



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case No: 235/2015

In the matter between:

LAGOON BEACH HOTEL (PTY) LTD

APPELLANT

and

**CHRISTOPHER D LEHANE NO
CASTORENA LTD
INVESTEC BANK LTD
DLA CLIFFE DEKKER HOFMEYR**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

Neutral citation: *Lagoon Beach Hotel v Lehane* (235/2015) [2015] ZASCA 210 (21 December 2015)

Coram: Navsa, Cachalia, Leach, Tshiqi and Willis JJA

Heard: 06 November 2015

Delivered: 21 December 2015

Summary: Cross-border insolvency — recognition of foreign trustee — interim interdict serving as preservation order — nature of evidence required to obtain such an order — practical common sense approach to the issue.

ORDER

On appeal from: Western Cape Division, Cape Town (Yekiso J sitting as court of first instance) reported as *Lehane NO v Lagoon Beach Hotel (Pty) Ltd & others* 2\2013 (4) SA 72 (WCC):

1 The appeal is upheld solely to the limited extent that the order of the court a quo is altered as follows:

(a) The reference to s 82 of the Insolvency Act 24 of 1936 is deleted from para 3.

(b) By the insertion of the following para 3A:

‘Notwithstanding paras 2 and 3 above, the applicant shall not be entitled to sell property belonging to Mr Sean Dunne (as contemplated in s 82 of the Insolvency Act 24 of 1936 or otherwise) without the leave of this Court.’

(c) Paragraph 10 is substituted with the following:

‘All questions of costs will stand over for later determination and the parties are given leave to approach this Court, on the same papers duly amplified as necessary, to determine the question of costs of this application after the finalisation of the proceedings referred to in paragraph 2.5 of the Notice.’

2 The appellant is to pay the first respondent’s cost of appeal, such costs to include the costs of two counsel where so employed.

JUDGMENT

Leach JA (Navsa, Cachalia, Tshiqi and Willis JJA concurring)

[1] The affairs of Mr Sean Dunne, an Irish businessman currently residing in Connecticut, United States of America, lies at the heart of this appeal. He conducted his business interests through an intricate web of holding and

subsidiary companies as well as trusts, registered in different parts of the world, including tax havens. Although he became a man of immense wealth, he also incurred considerable debt. On 9 March 2012, the National Asset Management Agency Limited obtained judgment against him in the High Court of Ireland for a sum of approximately €185.3 million. Subsequently, on 21 May 2012, the Ulster Bank Ireland Limited obtained judgment against him for more than €163 million. That Mr Dunne found himself in straitened financial difficulties is further borne out by him having been declared bankrupt in the United States by a court order obtained at his instance on 23 March 2013. Thereafter, on 29 July 2013, upon a petition by the Ulster Bank Ireland Limited, the Dublin High Court also granted an order that Mr Dunne be ‘adjudged bankrupt’. Pursuant to this order, the first respondent in this appeal, Mr Christopher D Lehane, was appointed as ‘the Official Assignee in Bankruptcy’ of Mr Dunne’s estate (for convenience, I intend to refer to him simply as Lehane).

[2] Amongst his many holdings, Mr Dunne had an interest in the appellant, Lagoon Beach Hotel (Pty) Ltd, a company which owns 205 sectional title units that comprise the hotel and conference facilities known as the Lagoon Beach Hotel in Milnerton, Western Cape. Until June 2012, the appellant’s entire shareholding was held by the company Mountbrook Homes Ltd, the name of which was changed to Mavior on 30 March 2012. For convenience I intend to refer to it simply as ‘Mavior’. On 29 June 2012 the second respondent, Castorena Ltd, a company registered in Mauritius, acquired the appellant’s entire shareholding from Mavior. A little over a year later, on 14 November 2013, the shares were transferred from Castorena to Volcren Management Ltd, a company wholly owned by Enia Investments Limited, which, in turn, is wholly owned by Mr Dunne’s wife, Gayle Dunne.

[3] She and Mr Dunne were married out of community of property in Italy on 11 July 2004. After he had been appointed as Official Assignee, Lehane

learned of two handwritten contracts Mr Dunne had signed with his wife some time before. The first, dated 23 March 2005, purported to have been concluded between them at Hua Hin, Thailand, the material part of which reads as follows:

‘Property transfer agreement between Sean and Gayle Dunne — 23 March 2005

I Sean Dunne, hereby undertake to give to my wife Gayle Dunne (née Killilea), whom I married on 11 July 2004, 70% of the profits accrued from the sale of my share of the following properties for the benefit of her and our son Bobby Luke and any future children born to us:

[There are then listed six properties, including the Lagoon Beach Hotel, Cape Town.]

This transfer of money and/or assets is to secure the financial independence of my wife and children for the future and to secure their independence from my own property investments. The 30% of the profits left over is estimated to cover all tax and associated costs in relation to these assets, any shortfall will be covered by me, and surplus is for my account.

Lagoon Beach: In relation to Lagoon Beach, which is owned by Mountbrook Homes Ltd, I have to date loaned Mountbrook Homes approximately €4 million. I hereby transfer this debt owing to me from Mountbrook Homes Ltd to my wife Gayle.

....

I further confirm that I renounce on behalf of my estate all claims over or against these properties or the amount of money derived from their sale should I die before this transfer is fully completed.

I reserve the right to retain ownership of all these properties and transfer and value as cash or alternatively properties at values to be agreed between us.

If no mutual agreement re values then this agreement must stand with no referral to arbitration or legal proceedings by either party, except from the enforcement of the agreement itself.’

[4] The second agreement, purportedly signed on 15 February 2008, the ostensible purpose of which was to deal with subsequent events and clarify the earlier one, reads:

‘Ref: Property Transfer Agreement between Sean Dunne and Gayle Dunne (Killilea) 23rd March 2005

I Sean Dunne, Ouragh Shrewsbury Road, Ballsbridge Dublin 4 confirm the following in reference to the above agreement.

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 on 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.

The open market value of the above as of today is circa €1.95 million.

I further confirm that I hereby renounce on behalf of my estate all present and/or for further claims over and against the assets the subject of this agreement or any monies derived from their sale, should I die before they are sold.

I furthermore hereby renounce all claims over any present or future income derived from the on-going trade or trade or sale of the assets the subject of this agreement.

This agreement hereby acknowledges that my obligations under the Property Transfer Agreement between my wife and in relation to Lagoon Beach Hotel and the Mountbrook Homes Ltd loans dated 23rd March 2005 is hereby fully satisfied and settled between us ie full and final settlement in relation to these assets.'

[5] After his appointment as Official Assignee, Lehane's investigations led him to believe that Mr Dunne had been insolvent both at the time he concluded these agreements and made the dispositions to which they refer to his wife. He also heard that a third party, later identified as Great Africa 999 Investment (Pty) Ltd (the fifth respondent in the court a quo), was in the process of acquiring the Lagoon Beach Hotel, by purchasing either the appellant's assets or its shareholding and loan account. On learning of this, Lehane did two things.

[6] First, he applied ex parte and as a matter of urgency to the Cape Town High Court for relief, including an order recognising him as the Official Assignee and interdicting the proposed transaction. He cited the appellant as the first respondent, Castorena, the entity then thought to be the appellant's sole shareholder, as second respondent, Investec Bank as the third respondent (it was

cited by virtue of its interest as a secured creditor of the appellant) and a law firm, DLA Cliffe Dekker Hofmeyr, as fourth respondent (in its case his information was that it might be holding the proceeds from any sale). When Great Africa 999 Investment then applied to intervene as a respondent on 16 September 2014, the first respondent learned for the first time that it was the proposed purchaser of the appellant's assets for a sum of approximately R260 million under an agreement concluded in July 2014.

[7] Second, Lehane instituted legal proceedings in the High Court of Ireland alleging, *inter alia*, that the natural and probable effect of both agreements and the dispositions made as a result, was to put assets (including of course the Lagoon Beach Hotel) beyond the reach of Mr Dunne's creditors, and had been concluded to 'delay, defer and hinder' such creditors. As a result, Lehane claimed, *inter alia*, the following relief:

1. A declaration that the transfer of all shares in Mavior, in the legal or beneficial ownership of Sean Dunne, date 28th October 2008 from Sean Dunne to Gayle Dunne and/or companies controlled by Gayle Dunne is void and of no effect by virtue of Section 59 of the Bankruptcy Act of 1988 and/or by reason of the provisions of Section 10 of the Irish Statute of Fraudulent Conveyances, 1634 (10CHAS. 1 SESS. 2, C.3);

2. A declaration that the purported transfer of Sean Dunne's interest in the Lagoon Beach Hotel, Cape Town, South Africa made pursuant to the Agreement of the 15th February 2008 between Sean Dunne and Gayle Dunne is void and of no effect by reason of the provisions of Section 10 of the Irish Statute of Fraudulent Conveyances, 1634 (10 CHAS. 1 SESS. 2, C.3);

3. A declaration that the purported transfer by Sean Dunne of the full book value as calculated as of the 15th February 2008 or otherwise of all loans made by him to Mavior and all of its related companies and subsidiaries made pursuant to the Agreement of the 15th February 2008 between Sean Dunne and Gayle Dunne is void and of no effect by reasons of the provisions of Section 10 of the Irish Statute of Fraudulent Conveyances, 1634 (10 CHS. 1 SESS. 2, C.3);

4. An injunction requiring Gayle Dunne, and her servants and agents, including any corporate entities of which she is a director or has control, to restore any assets purportedly transferred to her by reason of the Agreement of the 15th February 2008 and/or the share

transfer of the 28th October 2008 to the Estate of Sean Dunne in bankruptcy or damages in lieu of such injunction.’

Those proceedings have not yet run their course.

[8] Reverting to the proceedings in this country, on 2 September 2014 Steyn J granted a rule nisi returnable on 13 October 2014, operating as an interim interdict pending the return day and restraining the transaction from proceeding to its conclusion. The appellant thereafter gave notice of its intention to anticipate the return day and to seek a reconsideration of the order under Uniform rule 6(12)(c). On 22 September 2014, the matter came before Yekiso J who, on 17 October 2014, confirmed the rule substantially in the form sought by Lehane. His reasons for doing so were handed down on 23 January 2015, and the judgment since reported as *Lehane NO v Lagoon Beach Hotel (Pty) Ltd & others* 2015 (4) SA 72 (WCC). However, on 24 March 2015, the court a quo granted the appellant leave to appeal to this court, with costs of the application for leave to appeal being costs in the appeal. The only parties who actively participated in the appeal were the appellant, on the one hand, and Lehane on the other. The third respondent, Investec Bank Ltd, employed counsel with a watching brief to protect its interest insofar as any order might affect its rights.

[9] The debate in this court initially turned on whether the order of Yekiso J was appealable in the light of it being interim in nature, pending the decision of the Irish High Court. The appellant argued that not merely the form of the order was of importance but also its effect. Consequently, so the argument went, as the issues between the appellant and Lehane will not be revisited either by the court a quo or the Irish court, and the confirmed rule relates to pending litigation between parties in a foreign jurisdiction and is to endure for a period of at least six months after those proceedings have been finalised, whenever that uncertain date in the future might be, the matter should in effect be considered as being an application for a final interdict – thereby bringing the rules applicable to proceedings of that nature into play.

[10] This argument largely overlooks that almost invariably interim interdicts seek relief different from that claimed in the pending litigation and may involve, in effect, the rights of parties who are not parties to main proceedings - none of which renders an interim order as being final in effect. Moreover, as has been pointed out, inter alia by this court in *Knox D'Arcy*, whilst the refusal of an interim interdict may be final in that it cannot be reversed on the same facts, it may be open to an unsuccessful respondent against whom it is passed to approach the court for its amelioration or to have it set it aside 'even if the only new circumstance is the practical rule experience of its operation.'¹ Certainly, in the present case, should the Irish proceedings be unduly delayed or should there arise some other material change in circumstances likely to have a bearing on its continued enforcement, the appellant can apply to have the interim interdict either varied or even set aside.

[11] In any event, no more really need be said about this issue as, during argument, counsel for the appellants accepted that for purposes of this appeal, save for certain paragraphs of the order which should be regarded as final (and therefore appealable), such as the recognition of Lehane as the Official Assignee, the remaining interdictory provisions of the order should be treated as not being final in effect. It is trite that in respect of such a case a court has the discretion to grant interim relief to an applicant who establishes a prima facie right even if open to some doubt, where there is a well-grounded apprehension of irreparable injury and the absence of another ordinary remedy.

[12] It is necessary at this stage to mention the appellant's strident criticism of Lehane's papers, and its complaint that the court a quo took into account evidence that it alleged was hearsay in nature or which conflicted with the so-called rule in *Hollington v Hewthorn*² which has been adopted by this court in

¹ *Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (A) at 359I-360B.

² *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 (CA).

*Hassim*³ and cited with approval by the Constitutional Court in *Prophet*.⁴ The rule is that, generally speaking, the fact that a person may have been convicted in criminal proceedings is not admissible in subsequent civil proceedings as proof of his guilt. Essentially, under the rule, a previous conviction amounts to no more than an opinion which has been expressed in regard to certain facts, and does not determine them.

[13] It was argued by the appellant that the court a quo, in having regard to the various allegations and documents, that amounted to hearsay, impermissibly elected to allow this into evidence on the basis of the interests of justice without having due regard to the law as to their admissibility, to the prejudice of the appellant who had to answer to largely incomplete and unsubstantiated allegations. This was all the more so when the source of information was not disclosed, rendering it impossible for the appellant to make independent investigations to verify the accuracy of the information. In support of this argument the appellant invoked the following dictum in *Southern Pride Foods (Pty) Ltd v Mohidien* 1982 (3) SA 1068 (C) at 1071H-1072B:

‘The source of information must be disclosed to enable a respondent, confronted by an allegation normally inadmissible as hearsay, to check its accuracy. And when the Courts prescribed the disclosure of the source of information, they mean, in my view, a disclosure with a degree of particularity sufficient to enable the opposing party to make independent investigations of his own, including, if necessary, verification of the statement from the source itself.’

[14] That there is a great deal of hearsay in the first respondent’s papers is clear enough. In the circumstances of the matter, that is understandable. As Lehane says, he ‘came to Mr Dunne’s affairs as a stranger’, and during the course of carrying out his duties as Official Assignee, he came into possession of documents and records relevant to Mr Dunne’s affairs which, in turn, led him to conclude, inter alia, that Mr Dunne had retained the true ownership of the

³ *Hassim (also known as Essack) v Incorporated Law of Society of Natal* 1977 (2) SA 575 (A) at 764E-765E.

⁴ *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC).

shares in Mavior and that his disposition of such shares and his loan accounts to Mrs Dunne constituted an invalid stratagem to place assets beyond the reach of creditors. In his approach to court, Lehane made documents in his possession available to support certain statements made by him. Some of them included judgments of the Irish courts, which relate to certain of the facts established in those proceedings, as well as financial statements of companies, correspondence and statements made by others and official records of government bodies and the like. In a case such as this, in which the first respondent is in a position akin to that of a trustee in an insolvency in this country, the comment in *Registrar of Insurance v Johannesburg Insurance Co Ltd* (1) 1962 (4) SA 546 (W) at 547E-F that ‘[i]f all the people who know about every small fact which makes up this complex case should have to make affidavits, the matter would become quite impracticable. In a case like that a court will relax its rules for the sake of facilitating litigation and in the interests of justice,’ becomes pertinent. It is also necessary to state that Lehane could not swear positively to the facts, but was only called on to justify his suspicions.

[15] That a practical and common sense approach is required in cases of this nature is also reflected in the decision in *Naidoo*.⁵ In that matter, the NDPP had applied for a confiscation order under the Prevention of Organised Crime Act 121 of 1988. Twenty-two defendants were cited as persons or entities who stood to be prosecuted, with another twenty-three respondents being cited as persons or entities who allegedly held an interest in, or were in possession of, realisable property. The NDPP sought to restrain them from disposing of or dealing in any manner with such property. In the course of seeking relief, the NDPP relied upon documents and allegations which were hearsay, and in respect of which Rabie J said the following:⁶

‘Without detracting from the *caveat* regarding “wild and unsupported hearsay allegations”, and without proposing an absolute rule in this regard, I am of the view that it would be

⁵ *National Director of Public Prosecutions v Naidoo & others* 2006 (2) SACR 403 (T).

⁶ At 427d-i.

unnecessary to consider the relevance of hearsay evidence in a matter such as the present on the basis of a strict application of the provisions of s 3 of the Law of Evidence Amendment Act 45 of 1988 in respect of every piece of hearsay evidence in the applicant's papers (as it was submitted on behalf of the defendants the approach should be). In considering hearsay evidence in a matter such as the present, the court will necessarily have regard to factors such as the nature and purpose of the evidence, the probative value and reliability thereof, the reason why direct evidence was not submitted, the possible prejudice to the other party and all the other facts, of the case. These are, *inter alia*, the factors which, according to s 3 of (the Law of Evidence Amendment Act 45 of 1988), the court should take into account, but as the veracity of the evidence is at this stage of the process not the primary question but only whether there is evidence that might reasonably be believed and which might reasonably support a future conviction and a consequent confiscation order, a formal ruling in terms of Act 45 of 1988 as to the admissibility of every piece of hearsay evidence is not required.

Furthermore, in an application for a restraint order, especially one involving alleged criminal activities of the magnitude alleged in the present case, reliance upon hearsay evidence is virtually indispensable and even more so where the restraint is applied for before an indictment is served. This is so because the application for a restraint will usually precede the completion of the criminal investigation, and disclosure of evidence before completion of the investigation might well prejudice the capacity of the prosecution to effectively prosecute in the ensuing trial and may also, as I have indicated above, endanger the safety of potential witnesses.'

Although these comments were made in regard to criminal proceedings, in a case such as this in which averments of fraudulent conduct on the part of Mr Dunne are made to justify an interim preservation order, they encapsulate the correct approach.

[16] Then there is the fact that a voluminous replying affidavit containing a great deal of evidential material relevant to the issues at hand had been filed. Relying upon authorities such as *Sooliman*,⁷ the appellant argued that it was 'axiomatic . . . that a reply is not a place to amplify the applicant's case' and that the new matter had been impermissibly raised by Lehane in reply, that it was evidential material to which the appellant had not been able to respond, and

⁷ *Industrial Development Corporation of South Africa v Sooliman* 2013 (5) SA 603 (GSI) para 9.

that it fell to be ignored. However, again, practical, common sense must be used, and it is not without significance that many of the hearsay allegations complained of were admitted by the appellant in its answering affidavit. And although Lehane had been appointed the Official Assignee to Dunne's estate some thirteen months before the application was launched in the court a quo, and the information set out in reply could therefore have been contained in the founding affidavits, sight must not be lost of the fact that the application was initially launched by Lehane's deputy official, Mr D Ryan, in the absence of Lehane who was abroad at the time and unable to depose to an affidavit. The detailed allegations made by Lehane speak of he, and not Mr Ryan, having been more au fait with the facts and circumstances of the matter. Moreover, the initial application was moved as a matter of urgency, and the courts are commonly sympathetic to an applicant in those circumstances, and often allow papers to be amplified in reply as a result, subject of course to the right of a respondent to file further answering papers. Regard should also be had to the intricacy of Mr Dunne's dealings that required intensive and on-going investigations. Furthermore, the appellant, as respondent a quo, did not seek to avail itself of the opportunity to deal with the additional matter Lehane set out in reply, and I see no reason why these allegations should therefore be ignored.

[17] In the light of these general observations, I turn to deal with the more specific contentions of the appellant. I have already mentioned that an applicant seeking interim relief must show a right, albeit one that might be attended by some doubt. The appellant's argument was that no right at all had been established and therefore Lehane had not only failed to establish this essential part of his case, but had failed to show that he had locus standi and that the court ought not to have granted an order recognising him.

[18] It was the appellant's contention that Mr Dunne's bankruptcy fell to be dealt with by the trustee appointed in the United States and in accordance with the bankruptcy laws of that country, rather than pursuant to the laws of Ireland,

the standard position being that the insolvent estate will fall into the jurisdiction of the first court which grants a sequestration order.⁸ Accordingly, so it was argued, Lehane who was appointed pursuant to the proceedings in Ireland, had no right to take the steps he had done in this court. The basis of this argument is set out in an expert opinion provided by a practising counsel in Cape Town, Mr Osborne, who holds himself out as an expert in the law of the United States. He expressed the view that the effect that the original bankruptcy order issued in the United States was to bring about a worldwide stay which the courts of the United States have held applies extra-territorially. This worldwide stay operates to bar any other person from obtaining possession of or commencing action to obtain control over property falling with the bankrupt estate of Mr Dunne. Thus, so it was argued, Lehane has no right to obtain any restraint over the Lagoon Beach Hotel, even if it is an asset in Dunne's estate.

[19] There is a dispute in the papers as to the precise effect of this worldwide stay. Lehane filed an expert report of Joshua W Cohen, an attorney admitted to practice in the United States of America, who expressed the opinion that although the automatic stay in bankruptcy applies extra-territorially, it only applies to actions against property of the bankruptcy estate and that the relevant assets do not fall within the bankruptcy estate of Mr Dunne.

[20] This gave rise to considerable debate as to whether the views of Advocate Osborne or Attorney Cohen should be accepted. Relying on the judgment of Wallis JA in this court in *Imperial Marine Company v Deiulemar Compagnia di Navigazione SPA* 2012 (1) SA 58 (SCA) para 27, the appellant argued that we could have regard to the United States law without further reference to any expert opinion as the law on the issue could be ascertained with sufficient certainty. There are in my view a number of answers to this. First, I do not think the principles of the law in the United States of America are

⁸ Richard Sheldon QC *Cross-Border Insolvency (4ed)* paras 28-9.

so clear that this court should attempt to take judicial notice either of what it perceives that country's law to be nor, for that matter, what an Irish court would regard as being the correct position and to what extent it would recognise the United States worldwide stay provisions. This it seems to me, is an issue far more conveniently dealt with in the Irish Courts rather than ours. Significantly the Irish High Court has given judgment dismissing an application by Mr Dunne to set aside the Irish bankruptcy order, inter alia on the ground of an objection similar to the argument advanced by Advocate Osborne – an appeal was pending when the replying affidavits were filed in the court a quo – and it would be inappropriate for this court in any way to be seen as interfering in that process.

[21] Furthermore, and most importantly, sight cannot be lost of the fact that the American and Irish bankruptcy officials are working hand in glove to attempt to recover assets for the benefit of Mr Dunne's creditors. Indeed the American trustee of Mr Dunne's estate, Mr Coan, states in his letter of 12 September 2014 that he is working 'in collaboration' with Lehane and that, after reviewing the order of the court a quo, he concurs that 'the interdict is appropriate to protect the Irish and American bankruptcy estates.' This goes to the very nub of the matter. All that is being sought is an anti-dissipation order that seeks to protect Mr Dunne's creditors and ensures the integrity of the legal process, both in the United States and in Ireland.

[22] In any event, it is clear that the effect of the worldwide stay can be lifted. Significantly, on 12 June 2013, Judge Shiff of the United States Bankruptcy Court granted an order at the request of the Ulster Bank of Ireland Limited to modify the automatic stay to permit the bank to take all actions necessary under Irish law to effect service upon Mr Dunne and to permit the continuation of bankruptcy proceedings against Mr Dunne in Ireland. In this way, the proceedings in Ireland were authorised. As just mentioned, there has been close contact between Lehane and his counter-part in the United States in regard to

the proceedings taken, not only in Ireland but in this country as well. In these circumstances, where the official representatives of both jurisdictions in effect support each other in the bringing of this relief in the interest of Mr Dunn's creditors, there seems to be no reason to refuse to recognise Mr Lehane's efforts to seek a preservation of assets order, the effect of which will ensure the integrity of the legal process of both courts.

[23] Turning to another issue, as already mentioned, the proceedings were initially launched on the strength of a founding affidavit made by Mr D Ryan, the deputy to the official assignee in the absence of Lehane. It was deposed on 2 September 2014, the day after Cross J in the Irish High Court, Bankruptcy had issued an order requesting 'the High Court of South Africa, Western Cape Division and the Offices of said Court to recognise the Irish High Court and the Official Assignee' as trustee of the estate of Mr Dunne, and authorising the Official Assignee to 'have liberty if recognised by the High Court of South Africa' to apply in this country for 'an anti-dissipation order in respect of the proceeds of sale of the Lagoon Beach Hotel . . . and/or of the shares in (the appellant).' The appellant contends that this order was fundamental to the granting of the relief sought against it, and drew attention to the allegation in the founding papers that a copy of the order would be made available 'at the hearing of this matter'. It contended further that as a copy was not attached to the founding affidavit, it had been impermissibly attached to Lehane's replying papers and should be ignored; and that an essential allegation that Lehane was obliged to establish, was therefore missing.

[24] There is no merit in this. I have already dealt with it being necessary to approach urgent applications with a degree of flexibility and common sense. On the papers as they stand, the allegations made in regard to the deputy's appointment stand both unchallenged and supported by a court order. And for the reasons already mentioned, I have no difficulty with that order only being made available in reply. The appellant made no effort to challenge the

allegations made in that respect, as it could easily have done had it had any doubt as to their correctness. Its argument in this regard amounts to no more than a clutch at a technical straw.

[25] I turn more specifically to the recognition order granted by the court a quo. Of course the question of *locus standi* is relevant to the issue of recognition of the first respondent in this country as Official Assignee, to be empowered to administer the estate of the bankrupt in this country and, in particular, to conduct an enquiry into the bankrupt's affairs in South Africa. The argument of the appellant is that as this is final relief, the first respondent had to establish a clear right thereto, and as Lehane had failed to establish a case for recognition on that basis, the order of the court a quo should be dismissed.

[26] Pertinent to this issue is the question of Mr Dunne's domicile. In *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C), Berman J dealt exhaustively with the authorities relevant to the recognition of foreign trustees. The learned judge pointed out⁹ that it is now well established that a foreign representative such a trustee (or in this case, the Official Assignee), who seeks to deal with assets present in this country, must first obtain the 'active assistance' of a South African court by obtaining recognition of the foreign order. Without such recognition, he or she will be precluded from exercising authority and power, for example to convene a statutory meeting in order to interrogate the respondent.

[27] It is unnecessary for present purposes to unduly scrutinise previous decisions relating to requirements of recognition in this country. Suffice it to say that they were summarised as follows by Berman J in *Ex Parte Palmer*:

'Certainly, insofar as the movable property found in this country belonging to a person whose estate was sequestrated by order of a foreign Court within whose jurisdiction that

⁹ At 361G-I.

person was domiciled is concerned, that property vests in his trustee appointed pursuant to that order, for our Courts.

....

Indeed where movable property is concerned, a formal application for the recognition of the foreign trustee is not strictly necessary. . . . As a matter of practice, however, such an application is invariably made and the need for formal recognition has been elevated into a principle . . . The position in regard to immovable property is, however, different. To deal with the insolvent's immovable property situate in this country, formal recognition is required by a foreign trustee. And its grant is no formality: the South African Courts may grant or refuse to accord recognition of a foreign trustee in their discretion, and they will only exercise such discretion in favour of the foreign trustee in special circumstances.

The basis for the apparent difference between the manner in which movable property of an insolvent and his immovable property is dealt with in South Africa is that, in the former case, such property is governed by the *lex domicilii* and it is a matter of convenience that a single *concursum creditorum* be established; in the case of immovable property it is the *lex situs* which governs the position. Thus the foreign trustee appointed in the foreign State where the insolvent was domiciled as at the date of the sequestration of his estate by a Court of that State has the power and authority, strictly speaking, to deal with the insolvent's movable property in South Africa without the need to obtain recognition here, but that trustee must first be granted judicial recognition in South Africa before he can deal with any immovable property of the insolvent situate in this country.

As pointed out above, the grant of recognition to a foreign trustee to deal with an insolvent's immovable property in South Africa is a matter for the local Court's discretion. The discretion is absolute. It is exercised on the basis of comity and convenience.

....

The foregoing applies not only where an insolvent's property is situate in South Africa and the power and authority of a foreign trustee to deal therewith is concerned. It is applicable also in all matters relating to the administration of the insolvent estate, including the authority of the foreign trustee to convene a meeting in South Africa in terms of the Insolvency Act 24 of 1936 in order to interrogate the insolvent living here. In such a case, too, the foreign trustee requires formal recognition and here again the grant of recognition is a matter for the local Court's discretion, to be exercised on the basis of comity and convenience.

The right, power and authority of a foreign trustee to deal with the movable property of an insolvent in South Africa exists only, and the grant of recognition to him by a local Court to deal with that insolvent's immovable property situate in this country is permissible only

(subject to what is set out below with regard to the question of exceptions to the proposition here being stated), where the insolvent was domiciled in the foreign State, the Court of which sequestrated his estate and the trustee was appointed pursuant to the sequestration order. “Comity and convenience” is a factor which plays a part in influencing the local Court to exercise its discretion in favour of recognising a foreign trustee; it is not a separate ground for granting such trustee recognition.’

[28] In the light of this, and returning to the issue of Mr Dunn’s domicile, Mr D Ryan the Deputy Official Assignee, expressed his understanding that although Mr Dunne was then resident in Connecticut in the United State of America, he is domiciled in Ireland. In support of this, he referred to what purports to be a letter signed by Mr Dunne on 14 May 2010 which formed part of an application he had made for a visa in order to travel to the United States, and in which he had stated:

‘I am an Irish National who resides in Ireland. I am intending to go to the United States to develop and manage my United States’ company pending an approved visa.

Upon termination of the investor visa status, I have every intention of departing the United States and returning home to Ireland.’

This is a clear indication that Mr Dunne regarded Ireland as being his place of domicile at that time. Although one can accept that he has since resided in the United States, there is nothing that clearly shows that he thereafter settled permanently in that country with a fixed and deliberate intention to abandon his domicile in Ireland (compare *Eilon v Eilon* 1965 (1) SA 703 (A) at 722A).

[29] Relying upon certain later statements of Mr Dunne, the appellant argued that the visa application was out of date, unreliable and ought not to be taken into account in assessing Mr Dunne’s domicile. In this regard, reference was made to documents in judicial separation proceedings that had taken place between Mr Dunne and his wife in Geneva in which it is stated that they had both been domiciled in Geneva ‘since August 2008’. Also mentioned was an affidavit filed in the Irish High Court in 2013 in proceedings relating to his bankruptcy, wherein Mr Dunne stated that he was resident and domiciled in the

United States and that, although he had travelled to Ireland frequently to visit family and to assist in the winding-up of his business interests, he had not resided there since early 2007. All of these allegations to some extent conflict with each other. Importantly, Mrs Dunne in her papers does not attempt to explain away any of these conflicts. In particular, she fails to explain how it came about that the judicial separation proceedings took place in Geneva on the strength of an allegation that she and her husband were domiciled there.

[30] What Mrs Dunne does say, however, is that she, and not Mr Dunne, was the person who had invested in the United States and that he had done no more than work in that country for her company. Bearing in mind that it would require a fixed intention on Mr Dunne's part to permanently reside in the United States for him to acquire a domicile of choice in that country, as he was residing there under a visa granted on the supposition that he would return to Ireland, it seems improbable that he has since 2010 lawfully acquired a domicile in the United States. In the light of this, and the unexplained allegations in regard to his domicile in Geneva, I am of the view that a prima facie case has been made out that Mr Dunne has retained his domicile of origin in Ireland.

[31] But in any event, while I accept that ordinarily a foreign trustee seeking recognition in South Africa must establish that the insolvent party was domiciled within the jurisdiction of the foreign court that appointed him, this is not a law set in stone. It has been accepted that in exceptional circumstances the requirement of domicile will not be insisted upon. As pointed out by Berman J in *Ex parte Palmer*¹⁰ South African courts have recognised a foreign trustee at times where the order pursuant to which the trustee was appointed was issued by a court other than that of domicile, but added the proviso that those cases 'are certainly not authority for the contention that a South African court may,

¹⁰ At 364I-365B

simply on the basis of comity and convenience, grant recognition to a foreign trustee, regardless of any consideration given to the insolvent's domicile'.

[32] In the present case, even though there appears to be a prima facie case that Mr Dunne must be domiciled in Ireland, the other allegations mentioned are such that there is a degree of uncertainty about the issue. But because of that uncertainty, and the fact that the American Courts have invoked the justice system of Ireland to assist in tracing assets and administering bankruptcy proceedings, there are in any event exceptional circumstances present that justify a South African court also rendering assistance by taking the necessary steps to recognise the Irish Official Assignee in order to protect the interests of Mr Dunne's creditors. But it is not simply a matter of comity and convenience to do so. It is also intimately bound up with the prima facie case made out against Mr Dunne for his being domiciled in Ireland.

[33] In the light of these considerations, I see no reason to interfere with the court a quo's recognition of Mr Lehane. It had the discretion to exercise whether or not to do so, and in my view such discretion was properly exercised. It also properly exercised its discretion to grant an interim interdict to preserve assets in respect of which Lehane had established a prima facie right. In broad terms, then, the appeal must fail.

[34] There are however, two issues arising from the order of the court a quo that do need to be addressed. In para 3 thereof, specific reference is made to s 82 of the Insolvency Act 24 of 1936 which, so it is stated, are to 'exist in relation to the administration of Mr Dunne's estate as if the said Act applied thereto pursuant to a sequestration order granted by the Irish Court on 29 July 2013. Section 82 provides for the sale of property after a second meeting between creditors, and it seems to be wholly inappropriate in a case such as this where an order is sought to prevent property being dissipated prior to finalisation of proceedings in another court that will determine whether or not

the property falls into the estate of the insolvent, for that section to be invoked. This was raised with counsel for Lehane who proposed a varied order deleting reference to s 82. This was placed before the appellant's legal representatives to consider the appropriateness of the variation. No objection was made and the variation, will be reflected in the order granted.

[35] Similarly, in para 10 of the order of the court a quo, the appellant was ordered to pay the costs of the application. This, too, appears to be premature. In the event of the litigation in Ireland being resolved in the appellant's favour, its opposition to the proceedings in the court a quo would be justified. It is more appropriate for the costs to be reserved, as was also suggested by Lehane's counsel in the order he proposed in this court. This too will be reflected in the order.

[36] This limited success on the part of the appellant is insufficient to deprive the first respondent of his costs of appeal. The appellant's primary objective in appealing was to have the restraint imposed by the preservation order set aside and in that it has failed. The first respondent, on the other hand, has successfully defended the interim relief granted by the court a quo.

[37] It is therefore ordered as follows:

1 The appeal is upheld solely to the limited extent that the order of the court a quo is altered as follows:

(a) The reference to s 82 of the Insolvency Act 24 of 1936 is deleted from para 3.

(b) By the insertion of the following para 3A:

‘Notwithstanding paras 2 and 3 above, the applicant shall not be entitled to sell property belonging to Mr Sean Dunne (as contemplated in s 82 of the Insolvency Act 24 of 1936 or otherwise) without the leave of this Court.’

(c) Paragraph 10 is substituted with the following:

‘All questions of costs will stand over for later determination and the parties are given leave to approach this Court, on the same papers duly amplified as necessary, to determine the question of costs of this application after the finalisation of the proceedings referred to in paragraph 2.5 of the Notice.’

2 The appellant is to pay the first respondent’s cost of appeal, such costs to include the costs of two counsel where so employed.

L E Leach
Judge of Appeal

Appearances:

For the Appellant: P B Hodes SC (with him T A Dicker SC
and M A McChesney)

Instructed by: Barnaschone Attorneys, Sea Point
McIntyre & vd Post, Bloemfontein

For the 1st Respondent: G W Woodland SC (with him AHA Morrissey)

Instructed by: Alexander Cox Attorneys, Kloof
Symington & de Kok, Bloemfontein

For the 3rd Respondent: J Muller SC

Instructed by: Edward Nathan Sonnenbergs
Matsepes In c, Bloemfontein