THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
Date: 21 December 2015
Status: Immediate

*Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal*

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

An international businessman, Mr Sean Dunne, presently living in the USA, although Irish by descent, was declared bankrupt first in the USA and thereafter in Ireland. He had carried on business through a web of companies, holding companies and trusts and his affairs were complex. His Irish 'Official Assignee on Bankruptcy', Mr Lehane, acting with the support of the US trustee of Mr Dunne's estate identified the Lagoon Beach Hotel in Milnerton, Cape Town as an asset held by a company whose shareholding had been transferred by Mr Dunne to his wife Mrs Gayle Dunne pursuant to two handwritten contracts which Mr Lehane contends were not genuine and had been designed to frustrate Mr Dunne's creditors. Mr Lehane therefore instituted proceedings in Ireland to have the dispositors made under these agreements set aside and, in effect, to recover the Lagoon Beach Hotel as an asset in Mr Dunne's bankrupt estate. In the interim, Mr Lehane applied to the Western Cape High Court and obtained an order recognising him as the Official Assignee and interdicting the proposed sale of the hotel to a third party pending the outcome of his claim in Ireland. He succeeded, the judgment of Yekiso J having been reported as *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC). With leave of the court a quo Lagoon Beach Hotel (Pty) Ltd, the owner of the hotel, appealed to the Supreme Court of Appeal.

The appellant contended that Mr Lehane ought not to have been recognised as Official Assignee by reason of the US order having predated that of the Irish Court declaring Mr Dunne bankrupt, as the effect of the US order was to provide worldwide stay that vested all assets in the US trustee, so that an Irish official could not recover any of Mr Dunne's assets. The SCA however held that the US trustee and Mr Lehane were working hand in glove, and the US order had been modified to permit the Irish proceedings to take place. Furthermore, all that was sought in this country was an anti-dissipation order to protect the integrity of the legal process in both the US and Ireland.

It also found there to be a dispute as to whether in American law the assets in dispute fall within the estate of Mr Dunne. The SCA held that the principles of the US bankruptcy law were not so clear that it could take judicial notice thereof, nor what an Irish court would

decide the correct position to be and to what extent it would recognise the US worldwide provisions.

The issue has already been adjudicated in Ireland in dismissing an application by Mr Dunne to have the Irish proceedings set aside, and as an appeal in those proceedings was pending it would be inappropriate to the SCA to be seen to be interfering in that process. In addition, ordinarily a foreign trustee seeking recognition in South Africa must establish that the insolvent is documented within the jurisdiction of the foreign court that appointed him, and a prima facie case had been made out that Mr Dunne had retained his domicile of origin in Ireland. Moreover this rule is not set in stone and in exceptional circumstances proof of domicile will not be insisted upon. In the light of the uncertainty as to domicile, the fact that the US courts have invoked the Irish justice system to trace international assets, there are such exceptional incidents present. In all these circumstances Mr Lehane had correctly been recognised.

The appellant also objected to hearsay evidence relied upon by Mr Lehane and the fact that he had amplified his case in reply. The SCA however held that by the nature of things Mr Lehane had been obliged to rely on hearsay evidence, and that a practical and common sense approach was required. It approved the approach of Rabie J in *NDPP v Naidoo* 2006 (2) SACR 403 (T) at 427 in regard to the admissibility of hearsay in cases such as this, and drew attention to the fact that much of the hearsay had been admitted by the appellant. It also concluded that the appellant had not sought to challenge additional matter in the replying pages and that regard could therefore be had to such matter.

These are however certain unsatisfactory details of the court below's order which the respondents agreed to vary. The appellant raised no objection to these variations

In the result, the SCA upheld the appeal solely to the limited extent that there be minor variations of the order of the court below, but ordered the appellant to pay the first respondent's costs of appeal.

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