IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 15678/2014

In the matter between:

CHRISTOPHER D LEHANE N.O.	Applicant
And	
LAGOON BEACH HOTEL (PTY) LIMITED	1st Respondent
CASTORENA LIMITED	2nd Respondent
INVESTEC BANK LIMITED	3rd Respondent
DLA CLIFFE DEKKER HOFMEYR	4th Respondent
GREAT AFRICA 999 INVESTMENT (PTY) LTD	5th Respondent

Dates of Hearing:	22, 23, 26, 29, 30 September and 1 October 2014
Date of Order:	17 October 2014
Delivered:	23 January 2015

JUDGMENT

(INCORPORATING REASONS FOR ORDER GRANTED ON 17 OCTOBER 2014)

YEKISO, J

[1] On 29 July 2013, Christopher D Lehane ("the applicant"), an adult male person whose place of business is situate at Block 2, Phoenix House, Conyngham Road, Dublin, in the Republic of Ireland was appointed as the Official Assignee of the bankrupt

estate of Sean Dunne by the Dublin High Court, Bankruptcy, at the instance of one of his creditors, Ulster Bank Ireland Limited. At the time Mr Dunne was declared bankrupt by the Dublin High Court he was resident in the state of Connecticut, USA. Mr Dunne had earlier, and this was on 23 March 2013, filed for Chapter 7 Bankruptcy in the United States. He was declared bankrupt by the United States Bankruptcy Court of Connecticut, Bridgeport Division on 12 June 2013. His declaration for bankruptcy in the United States had been at his instance, and not that of his creditors. A Mr Richard Coan was appointed his trustee. His trustee in the US supports these proceedings. The Official Assignee in Ireland is the equivalent of a trustee of an insolvent estate in terms of the South African Law of Insolvency.

[2] Once appointed the Official Assignee of Mr Dunne's bankrupt estate, the applicant conducted its investigations and in the course of such investigations ascertained that Mr Dunne structured his affairs through a web of companies and trusts situated in multi jurisdictions and tax havens. It was in the course of such investigations that the applicant ascertained that, prior to 2008, Mr Dunne was a shareholder of a company registered in Ireland called Mount Brook Homes Limited which later changed its name to Mavior. Mavior, in turn, held the entire shareholding in Lagoon Beach Hotel (Pty) Limited, the first respondent in these proceedings.

[3] The investigation further revealed that Mr Dunne had also funded the first respondent (Lagoon Beach Hotel (Pty) Ltd) through loans which had been made to Mavior. Mavior, in turn, had lent funds to the first respondent. The investigation ultimately revealed that Mr Dunne had a personal interest in, and had indeed funded,

the first respondent through the inter position of the corporate entity in the form of Mavior.

[4] It was in the course of the investigation of the affairs of Mr Dunne that the applicant ascertained that the first respondent, Lagoon Beach Hotel (Pty) Ltd, was in the process of disposing of its immovable property, or that its shareholder was in the process of disposing of its shares and, possibly, its loan account therein. The purchase consideration in respect of the disposition of its immovable property and shares in the first respondent was said to be in an amount of R260m. The implementation of the transaction was said to be imminent hence the launch of these proceedings, *ex parte,* and on the basis of urgency.

[5] On 1 September 2014 the High Court, Bankruptcy, in Ireland, issued letters of request at the instance of the applicant, asking the High Court of South Africa, Western Cape Division, to act in its aid. This Court was requested by the Irish Court to recognise the applicant as the trustee of Mr Dunne's bankrupt estate. The High Court in Ireland further authorised the applicant, in the event of recognition being accorded to him by the South African High Court, to apply for an Anti-dissipation Order in respect of the sale of the Lagoon Beach Hotel and to pursue any related proceedings in South Africa.

[6] On 2 September 2014, the applicant applied, on *ex parte* basis, for an order, amongst other things:

[6.1.] to obtain recognition of the applicant as Mr Dunne's foreign trustee;

[6.2.] restraining the first respondent, Lagoon Beach Hotel (Pty) Ltd, from disposing of the proceeds of the sale of its assets, a hotel business, and the assets comprising same pending the outcome of legal proceedings then contemplated to be instituted in the Republic of Ireland. Those proceedings were subsequently instituted in the High Court in Ireland on 5 September 2014.

[7] The application served before Steyn J. Steyn J granted the order sought, in the form of a Rule *Nisi,* returnable on 13 October 2014, together with interim interdicts pending that return date. In terms of the Order of 2 September 2014, the applicant was empowered, after providing security to the satisfaction of the Master:

[7.1.] to administer the estate of Mr Dunne in respect of all his assets which are or may be found or are situated within the Republic of South Africa; and

[7.2.] granting him all rights under the Insolvency Act, 24 of 1936 ("the Insolvency Act") including sections 64, 65, 66, 69 and 82; and

[7.3.] entitling him to administer the estate of Mr Dunne as if a sequestration order had been granted against him by a South African Court on 29 July 2013.

[8] On 17 September 2014 the first respondent filed a notice in terms of rule 6(8) of the Uniform Rules of Court advising that it intended anticipating the return day on Monday, 22 September 2014. The same notice informed the applicant of the first respondent's intention to seek re-consideration of the application in terms of rule 6(12)(c) of the Uniform Rules of Court.

[9] Apart from seeking re-consideration of the matter, the first respondent opposes the relief sought on several grounds and these relate to admission of inadmissible hearsay evidence; introduction of new matter under reply; urgency; authority; *locus standi*; jurisdiction; authentication; non-joinder; and material non-disclosure. It is contended on behalf of the first respondent that once these issues are reconsidered, or that the matter is reconsidered based on those issues, it may well be concluded that the rule *nisi* should not have been issued or, at best, that the rule *nisi* be discharged.

[10] The matter was argued before me on 22, 23, 26, 29, 30 September 2014 and 1 October 2014. After hearing argument I reserved judgment. On Friday, 17 October 2014, and this was after I had formed a view of the matter, I handed down the order which is annexed to this judgment as Annexure "A" and which, in turn, was handed to all parties having an interest in the matter. In handing down the order I gave, I indicated to the parties that the reasons for that order would be furnished in due course. In the paragraphs which follow are reasons for the order I gave.

THE RESPONDENTS

[11] The first respondent is Lagoon Beach Hotel (Pty) Limited, a limited liability company incorporated in terms of the company laws of the Republic of South Africa, and bearing registration number 2003/003/011/07 and has its registered office at Lagoon Beach Hotel, Lagoongate Drive, Milnerton, Cape Town. The first respondent is the owner of at least 205 sectional title units comprising the Lagoon Beach Hotel. It appears that the aforesaid units are its principal asset.

[12] The second respondent is Castorena Limited ("Castorena"), same being a company limited by shares incorporated in accordance with the laws of Mauritius and bears registration number C11063. It has its registered office at International Proximity, 608 St James Court, St Denis Street, Port Louis, Mauritius. On the basis of the securities register of the first respondent, Lagoon Beach Hotel (Pty) Ltd, Castorena, the second respondent, is the first respondent's sole shareholder. Efforts by the applicant to ascertain whether Castorena, during the period immediately preceding the institution of these proceedings, was still its shareholder did not yield any result. This resulted in proceedings being instituted in this Court under case number 13180/2014 to compel a response. That application was opposed by the first respondent and was due to be heard in this Court on 22 October 2014.

[13] The third respondent is Investec Bank Limited, it being a registered bank and a limited liability company incorporated in accordance with the laws of the Republic of South Africa and carrying on business at 36 Hans Strijdom Avenue, Foreshore, Cape Town. As at the time of the institution of these proceedings the third respondent had mortgage bonds registered over the sectional title units in the first respondent, Lagoon Beach Hotel (Pty) Ltd, as security for the indebtedness of the first respondent to it.

[14] The fourth respondent, DLA Cliffe Dekker Hofmeyr, ("DLA") is a firm of attorneys which carries on business as such at 11 Buitengracht Street, Cape Town. It is cited in these proceedings in its capacity of having been retained as the first respondent's attorneys in the past and in anticipation of having been instructed in respect of the sale of the first respondent's assets.

CHRONOLOGY OF MATERIAL FACTS & EVENTS

[15] On 11 July 2004 and at Santa Margherita, Italy, Mr Dunne and Gayle Allison Reyna Killilea were married to each other out of community of property. On 23 March 2005 and in Hua Hin, Thailand, Mr Dunne dissipated a portion of his interest in the first respondent by way of a written undertaking to Mrs Dunne to give her 70% of the profits that would accrue from sale of his share of Lagoon Beach Hotel, Cape Town. Mr Dunne also transferred to Mrs Dunne a debt of €4m owed to him by Mount Brook Homes Limited.

[16] Ongoing investigations into the affairs of Mr Dunne revealed that as at 15 February 2008, Mr Dunne's liabilities exceeded his assets by €66,6m and by 28 October 2008 that excess of liabilities over assets had increased to €240,8m.

[17] On 15 February 2008, Mr & Mrs Dunne signed a further document in terms of which the 2005 agreement was clarified and in which the following recordals and undertakings appeared:

> "As the sale of item 3, Lagoon Bay 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.
>
> I also hereby transfer with immediate effect the full book value as calculated as of today's date all loans made by me to Mount Brook Homes Limited [Mavior], and all of its associated companies and subsidiaries."

[18] On 28 October 2008, the shareholding in Mavior was transferred to Isle of Man companies controlled by Mrs Dunne, these companies being Zabingo and Zintkala. Evidence tends to suggest that Mrs Dunne held 100% interest in the first respondent through these corporate entities located in the Isle of Man and Cyprus. A total of 499 shares was transferred from Mavior to Zabingo whilst 1 share was transferred to Zintkala..

[19] On 14 May 2010 Mr Dunne addressed a letter to the US Embassy in Ireland which formed part of a visa application for his travel to the USA in which he 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."

[20] On 23 June 2010 Mr & Mrs Dunne concluded a separation agreement in which it is stated that Mrs Dunne does not have a personal income; that Mr Dunne owns the Shrewbury home; and that the parties are domiciled in Geneva. In the separation agreement there is a reference to the 2005 agreement but no reference is made to the 2008 agreement.

[21] In early 2010, Mr & Mrs Dunne were involved in family law proceedings in Switzerland which culminated in an order by agreement on 31 August 2010. The Order was granted by a Court of first instance in Geneva, Switzerland.

[22] On 30 March 2011 Mount Brook Homes changed its name to that of Mavior. On 9 March 2012 the Irish High Court, per Kelly J, granted default judgment against Mr Dunne at the instance of the National Asset Loan Management Limited in an amount of €185,299,627.78. Shortly thereafter, and specifically on 21 May 2012, similarly the Irish High Court per Kelly J, granted default judgment against Mr Dunne at the instance of Ulster Bank Limited in an amount of €164,586,493.05. On 29 June 2012 Mount Brook Homes Limited transferred its entire shareholding in Lagoon Beach Hotel (Pty) Limited to Castorena, the second respondent in these proceedings. Castorena was, at that time, owned by Mrs Dunne.

[23] On 12 February 2013 bankruptcy proceedings were initiated in the High Court, Ireland when leave was given to serve proceedings outside that court's jurisdiction.

[24] On 29 March 2013 Mr Dunne filed for bankruptcy in terms of Chapter 7 in the United States. On 29 July 2013, Mr Dunne was declared bankrupt in the Dublin High Court at the instance of the petitioning creditor, Ulster Bank Ireland Limited. On 31 October 2013 Castorena Limited sold its shares in Lagoon Beach Hotel to Volcren Management Limited. This company is indirectly owned by Mrs Dunne through Enia Investments Limited. Volcren Management, based in Cyprus, has claims against another company called Cotton Developments Limited and other entities. These other entities also assert loan claims against Lagoon Beach Hotel.

[25] On 6 December 2013 Mr Dunne applied to the High Court, Bankruptcy in Dublin to set aside a declaration of bankruptcy granted against him on 29 July 2013. The

application was dismissed and in the course of determining that application, McGovern J determined that Dunne was domiciled in Ireland. As at the date of the hearing of this matter an appeal against that judgment was still pending.

[26] On 31 March 2014 Mrs Dunne purchased property in the UK for £5m and for which she paid a non-refundable deposit in an amount of £1m. The closing date of that transaction was recorded as having been 30 September 2014.

[27] What becomes evident from a chronology of these facts and events is that before October 2008 Mr Dunne, by way of several corporate entities, had a 100% interest in the first respondent; that subsequent to the 2005 and 2008 agreements the 100% interest in the first respondent had migrated to Mrs Dunne through Mavior, which subsequently transferred its entire shareholding to Zabingo and Zintkala based in the Isle of Man and both corporate entities being owned by Mrs Dunne; and that after the Volcren transfer during October 2013, Mrs Dunne held a 100% interest in Lagoon Beach Hotel through Volcren Management which is based in Cyprus and, ultimately, through Enia Investments Limited.

[28] It is on the basis of these transactions that the applicant contends that Mr Dunne has sought to defeat the right of his creditors by structuring his affairs through a web of companies and, in doing so, engineered the fraudulent disposal of his interest in the first respondent, Lagoon Beach Hotel, to Mrs Dunne at the time when his estate was insolvent. The applicant contends that those transactions pertinent to the disposal of Mr Dunne's interest in the first respondent are impeachable dispositions with a potential to

be set aside and be re-instated in his bankrupt estate. The proceedings instituted in the High Court, Dublin, Ireland, are intended to recover these interests for the benefit of Mr Dunne's creditors.

[29] I now turn to determine those issues set out in paragraph [9] of this judgment on the basis of which the first respondent opposes the relief sought. I am thankful to both counsel for the comprehensive submissions filed and the elaborate argument before me to flesh out those issues.

URGENCY

[30] In the affidavit deposed to on behalf of the applicant on 2 September 2014 the deponent of that affidavit states that he had reliably been informed that Lagoon Beach Hotel was in the process of selling its assets or its shareholder was in the process of selling its shares and/or loan claims against it for an amount of R260m. It is further stated in that affidavit that the implementation of the transaction was imminent and that the conclusion of that transaction would enable Mrs Dunne, who it appeared was the holder of the interest in Lagoon Beach, would realise that interest and to pay it away to whomever she pleases.

[31] The first respondent contends that the grounds of urgency the applicant relies upon are self-created in as much as the applicant had known about the anticipated sale of the first respondent's assets since January 2014, a reference in this regard being made to what Mr Dunne stated at a section 341 Enquiry held in the United States. However, the transcript of the section 341 Enquiry relied upon makes no mention of any

anticipated disposal by the first respondent of its assets. The agreement in terms of which the first respondent would dispose of those assets was only signed on 16 July 2014. This evidence has since been confirmed by the intervening party which confirmed that the sale had indeed taken place and that the concluding date of the transaction was 30 September 2014. In the light of the imminent conclusion of that transaction, the launching of these proceedings, on an urgent basis, was, in my view, justified.

INADMISSIBLE HEARSAY EVIDENCE

[32] The evidence on the basis of which the applicant relies in seeking the relief sought is based on several documents. By virtue of his office the applicant is in possession of books, records, correspondence and other documents of a contemporaneous nature relating to Mr Dunne's bankrupt estate and the applicant relies on the evidence based on those documents in support of the relief it seeks.

[33] The first respondent objects to the admission of evidence based on the documents the applicant relies upon on the basis that such documents constitute inadmissible hearsay evidence in as much as the applicant does not, both in its founding affidavit and its affidavit in reply, identify the sources of such hearsay evidence. The first respondent has set out in its submissions several paragraphs in the applicant's founding and replying affidavits where such inadmissible hearsay evidence is contained. Indeed, the first respondent has adopted the position that anything stated by the applicant, based on those documents, that the applicant does not have personal

knowledge of should, on the basis of the exclusion of hearsay evidence rule, be ignored.

[34] In adopting this stance, the first respondent seeks to exclude from the evidence any documents relied upon in the applicant's affidavit. The first respondent has pleaded over in the event of its objection as to the admissibility of hearsay evidence is rejected. *Gore v Amalgamated Mining Holdings (Pty) Ltd* 1985 (1) SA 294 (C) is authority for the proposition that a respondent seeking to object to inadmissible hearsay evidence is obliged to plead over, for a litigant who elects not to deal with evidence against it, which such litigant considers inadmissible, runs the risk that such evidence will remain unanswered if its objection fails.

[35] In paragraph [31] of this judgment I concluded that the launching of these proceedings, on an urgency basis, was justified. *Southern Pride Foods (Pty) Ltd v Mohidin* 1982 (3) SA 1068 (C) is authority for the proposition that hearsay evidence will be admitted into evidence in instances where interdictory proceedings are brought on an urgent basis. Such hearsay evidence will be admitted into the body of evidence on the basis of a statement by the deponent thereof that he or she believes in the truth of such evidence, simultaneously identifying the source of such hearsay evidence relied upon.

[36] In the instance of this matter, the deponents of both the founding and the replying affidavit make it plain that their knowledge of the facts is based on the documents annexed to their respective affidavits. The purpose of the requirements to

disclose the source of hearsay evidence is to enable the party who has to deal with such evidence to be able to interrogate the source of the document in question. Having regard to the documents the applicant relies upon the first respondent would have been able, on the basis of such documents, to identify the source of the hearsay evidence relied upon thus satisfying the requirement relating to the identification of the source of such hearsay facts.

[37] In any event, the approach to hearsay evidence was altered by the introduction of the Law of Evidence Amendment Act, 45 of 1988. Section 3(1) of the Law of Evidence Amendment Act provides that hearsay evidence shall not be admitted unless a court, having regard to various factors stated therein, is of the opinion that such evidence should be admitted in the interest of justice. In *Registrar of Insurance v Johannesburg Insurance Company Limited* (1) 1962 (4) SA 546 (W) at 547 E-F the court made the following observation:

> "It is true that the report contains statements by the accountants that they were informed of certain facts. Any investigation into books drawn up by others who do not testify to the entries is, very strictly speaking, hearsay. But books are admissible against a party. If all the people who know about every small fact which makes up this complex case would have to make affidavits, the matter would have become quite impracticable. In a case like that a court will relax its rules for the sake of facilitating litigation and in the interest of justice."

[38] I am perfectly in agreement with the submission that this is a matter of an extremely complex nature concerning, as it does, significant sums of money and involves multiple jurisdictions. Proceedings have already been instituted in the Irish

Courts in an effort to set aside those dispositions which the applicant believes were of a fraudulent nature in order that the proceeds arising from those dispositions be restored to Mr Dunne's bankrupt estate. Principles of international comity would, in the instance of this matter, lean towards the evidence complained of being admitted into the body of evidence for, in my view, it is in the interest of justice to do so.

[39] Although the authority referred to in paragraph [37] above precedes the introduction of the Law of Evidence Amendment Act, the position is currently different in that the advent of the Law of Evidence Amendment Act unshackles the court from such restraint. I accordingly hold the view that Steyn J was correct in issuing the rule *nisi* in the manner she did and that there is no basis, on the basis of the evidence on record, to conclude that such an order should not have been issued.

NEW MATTER

[40] Ancillary to the objection of admission of the evidence on the basis of the hearsay rule is the argument that numerous allegations in the applicant's replying affidavit constitute new matter and, for that reason alone, that such evidence should be ignored or, otherwise be excluded in the determination of the issues in dispute. Amongst other evidence that the first respondent seeks to have excluded, and accordingly ignored, is the evidence relating to the family law proceedings in Ireland in respect of which Mrs Dunne stated that she was exonerated from any wrongdoing. In an attempt to rebut this evidence the applicant annexed to his replying affidavit the judgment in those proceedings which reveal that Mrs Dunne was joined in those

proceedings merely as an interested party. In those proceedings, it was found that Mr Dunne had concealed assets from his former wife.

[41] In another instance, the first respondent alleges that Mr Dunne had intimated that a sale of the first respondent's assets was likely as long ago as December 2013 and that this fact was known to the applicant as early as January 2014. In reply, the applicant attached a transcript to his replying affidavit revealing that assertions to this effect, in the course of a section 341 enquiry, had been made in the vaguest of terms. I have carefully considered the first respondent's submissions with regards to the admission of new matter in reply and I am of the view that whatever evidence that there could be, contained in the applicant's replying affidavit, not specifically set out in the founding affidavit, was included in the replying affidavit in reply to allegations contained in the first respondent's answering affidavit. My view is that whatever other matter contained in the replying affidavit which the first respondent considers objectionable on the basis that it is new matter or otherwise inadmissible, its admission at this stage of the proceedings does not create any prejudice to the first respondent.

WORLDWIDE STAY OF PROCEEDINGS

[42] It is contended on behalf of the first respondent that when Mr Dunne applied for voluntary bankruptcy in the US on 29 March 2013, and once Mr Richard Coan was appointed as his US trustee, his estate and assets vested in his US trustee and that fact had an effect of staying all proceedings against his estate and barred any future proceedings against his bankrupt estate save with the leave of the US Court of Bankruptcy.

[43] In terms of section 362 of the United States Bankruptcy Code an automatic stay is placed on anyone, other than the US Trustee in Bankruptcy, in instituting, amongst others, a fraudulent transfer action for the recovery of assets transferred pursuant to a fraudulent transaction. A fraudulent transfer action would be an action similar to the one based on the right of a creditor of a bankrupt person to have a fraudulent disposition made by that bankrupt person to a third party set aside. According to the US domestic law the aforesaid stay of proceedings applies extra territorially.

[44] In this regard, it is submitted on behalf of the first respondent that the proceedings before me are subject to the automatic stay as provided in section 362 of the United States Bankruptcy Code and that, on that basis alone, this application ought to be dismissed with costs *de bonis proprius* as the applicant was aware of automatic stay placed on Mr Dunne's estate and the vesting of his assets in the US trustee.

[45] The proceedings before me are, in no doubt, ancillary to the proceedings instituted in the Dublin High Court, Ireland for the recovery of Mr Dunne's assets, arising from the alleged fraudulent transfer thereof. The proceedings before me are intended to preserve assets allegedly belonging to Mr Dunne pending the outcome of a fraudulent transfer action instituted in the High Court, Dublin, Ireland. The case put up by the first respondent in these proceedings is that the automatic stay in terms of the US domestic legislation prevents the applicant from prosecuting any claim against Mr Dunne that the applicant may have. As has already been pointed out, the proceedings before me are not intended to recover assets as a consequence of a fraudulent transfer but for the

preservation of such assets pending the determination of a fraudulent transfer action instituted in the High Court, Dublin.

[46] Even if I were to accept that the ambit of the proceedings contemplated by the United States Bankruptcy Code includes the kind of application before me, that does not of itself, in my view, mean that the worldwide stay has any binding force in South Africa. In the Republic the legislative authority in the national sphere of government is vested in parliament; that of the provincial sphere of government is vested in the provincial legislatures; and that of local sphere of government is vested in municipal councils.

[47] The source of law in the Republic is the Constitution of the Republic of South Africa, 1996 and legislation enacted by the national parliament, provincial legislatures and municipal councils. That is the only legislation that has a binding force in South Africa. Declaration of insolvency by a court in a foreign state is no bar to a domestic court in South Africa from adjudicating an issue pertaining to a person declared insolvent by a court in a foreign state.

[48] As Henochsberg J observed in *Hymore Agencies Durban v Gin Hih Weaving Factory* 1959 (1) SA 180 (D):

> "It has been held that a bankruptcy statute is only of force in a state where it is enacted, nevertheless, by comity of nations, assignments in bankruptcy in one state are sometimes recognised as effective in another. It is for this reason that the sequestration of a debtor by a foreign court does not preclude a creditor in this country instituting or proceeding with an action against the debtor in the ordinary way."

[49] The US Bankruptcy Code is a US domestic piece of legislation. It is not customary international law. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an act of Parliament. No matter what the US Bankruptcy Code provides as regards its extra-territorial application, that in itself is no basis for a conclusion that it has a binding force in the Republic. To conclude otherwise would countenance the violation of the territorial sovereignty of the Republic of South Africa. The principle of sovereignty has consistently been recognised by our courts in the context of insolvency matters.

[50] In any event, even if it were to be accepted that the provisions of section 362 of the US Bankruptcy Code do apply extra territorially and are thus of force in the Republic of South Africa, the worldwide stay contemplated in the US domestic legislation is intended to prevent the institution of a fraudulent transfer action against the estate of a bankrupt person. Since the proceedings before me do not constitute a fraudulent transfer action, it therefore follows that these would not be hit by the automatic stay contemplated in the US Bankruptcy Code.

[51] Michael Francis Osborne, an advocate of this Court and a member of the New York Bar and Joshua W Cohen, an attorney admitted to practise law in the United States of America, furnished opinions on behalf of the first respondent and the applicant, respectively, about the effect the US Bankruptcy Code worldwide stay has in these proceedings. In the light of my conclusion and the approach I have adopted in the determination of this issue, it is not necessary for me to express a view on the opinions expressed by these pratctitioners.

LOCUS STANDI

[52] The first respondent challenges the applicant's *locus standi* on the basis that, until such time as the applicant has been recognised by this Court as Mr Dunne's official assignee, the applicant does not have *locus standi* to institute these proceedings; that a foreign trustee of an insolvent estate will only be recognised by this court only in those instances where the bankrupt is domiciled in the state where the declaration of bankruptcy was issued; the declaration of bankruptcy is issued at the time the bankrupt is domiciled in the state in which the declaration of bankruptcy is issued; and that, in the instance of the matter before me, the applicant has not established that Mr Dunne was domiciled in Ireland at the time he was declared bankrupt by the High Court, Dublin.

[53] In contending that Mr Dunne was domiciled in Ireland the applicant relies on a letter signed by Mr Dunne on 14 May 2010 addressed to the US embassy in which Mr Dunne indicated that he had intended to pursue a property development business in the United States and once that business project would have been completed, he would thereafter return home to Ireland. The first respondent refutes this assertion on the basis that more than four years had elapsed since the writing of the letter relied upon; that Mr Dunne is still resident in the US; and that he was so resident on 29 March 2013 when he was declared bankrupt by the US court.

[54] In a settlement agreement concluded in Geneva, Switzerland on 23 June 2010, Mr & Mrs Dunne stated that they had been domiciled in Geneva since 2008. On 30 November 2013 Mr Dunne deposed an affidavit in which he stated that he was

resident and domiciled in the US and had not been resident in Ireland since early 2007. It is on the basis of these facts that the first respondent contends that the applicant has not established that Mr Dunne was domiciled in Ireland at the time he was declared bankrupt by the High Court, Dublin. Absent proof that Mr Dunne was domiciled in Ireland as at the time of his declaration of bankruptcy, the applicant does not have *locus standi* to institute these proceedings, so the first respondent contends.

[55] The applicant's response to this assertion is that the Irish Bankruptcy Court had, in the proceedings before it, determined that Mr Dunne was domiciled in Ireland at the time of his declaration of bankruptcy and that such determination was made after a comprehensive analysis of the competing contentions on the point between Mr Dunne and the applicant. In support of this assertion the applicant annexed a copy of the judgment of the Irish Court wherein, in paragraph 46 thereof, the court stated that it was not satisfied that the bankrupt (Mr Dunne) had discharged the onus upon him to show cause for the declaration of his bankruptcy to be set aside on the basis of his domicile. Furthermore, and in response to this assertion, the applicant contends that domicile is not an absolute requirement for his recognition relying on *ex parte Pama N.O.: In re Kahn* 1993 (3) SA 359 (C) at 364I – 365B in support of this contention.

[56] In that authority this Court, per Berman J, and citing the cautious and guarded language of Innes CJ *Re Estate Morris* 1907 TS 657 at 666 observed that recognition could be granted to a trustee appointed by a Court within whose jurisdiction the insolvent was not domiciled under exceptional circumstances and by reason of exceptional consideration of convenience.

[57] In the instance of this matter, I therefore conclude that the applicant has established that Mr Dunne was domiciled in Ireland when he was declared bankrupt by the High Court, Dublin and that, in a subsequent application by Mr Dunne to have his declaration of bankruptcy set aside, the High Court, Dublin, determined that Mr Dunne was domiciled in Ireland at the time of the declaration of his bankruptcy.

NON-DISCLOSURE

[58] The first respondent complains of various non-disclosures or misrepresentations in the founding papers. Those complained of are set out in paragraphs 12.1 upto 12.8 of the first respondent's submissions and these are: the existence of the worldwide stay under the US Bankruptcy Code; the necessity of a modification to the worldwide stay in order for the Irish bankruptcy proceedings to get off the ground; the order varying the worldwide stay; the judicial separation of Mr & Mrs Dunne during August 2010; that Mrs Dunne has not resided with Mr Dunne in Connecticut since at least September 2013; that the applicant has had access to all documentation relating to the family court proceedings between Mr Dunne and Jennifer Coyle in Ireland; that Mr & Mrs Dunne have separate attorneys/solicitors in the US and Ireland, respectively, and that the applicant has the particulars of those attorneys; and that the Irish Statute of Fraudulent Conveyancers 1634 was repealed with effect from 1 December 2009.

[59] The applicant complains that such non-disclosures and/or misrepresentations are capable of being characterised as material because they are such that had Steyn J

been apprised of the true and full facts, she might well have refused the application, or granted relief in differently formulated terms.

[60] It is trite that an *ex parte* applicant must disclose all material facts that might influence the court in deciding the application. In deciding whether a fact is material to the application, such fact must have direct relevance and bearing on the merits of the *ex parte* application and, therefore, the utmost good faith must be observed by litigants in *ex parte* applications.

[61] If the applicant fails in this regard and the application is nevertheless granted in provisional form, the court hearing the matter on the return day has a discretion and, given the full facts, to set aside the provisional order or grant confirmation of the provisional order.

[62] In exercising that discretion the court, on the return date, will have regard to the extent of the non-disclosure; the question as to whether the court granting the order on an *ex parte* basis might have been influenced by proper disclosure; the reason for non-disclosure; and the consequences of setting the provisional order aside.

[63] The first three non-disclosures set out in the first respondent's submissions have already been dealt with in this judgment under the heading "Worldwide Stay of Proceedings". In paragraph [47] of this judgment I concluded that the declaration of insolvency by a court in a foreign state does not bar a domestic court in South Africa from adjudicating an issue pertaining to a person declared insolvent by a court in a

foreign state. Thus, the first three non-disclosures complained of are, in my view, immaterial and did not need to be disclosed.

[64] The fourth to the seventh non-disclosures appear to border around the relationship between Mr & Mrs Dunne. The relationship between Mr & Mrs Dunne, subsequent to the dispositions forming the subject matter of the Irish family law proceedings is, in my view, immaterial to the substantive relief sought in these proceedings. It is trite that in seeking interim relief, all that the applicant needs to establish is a *prima facie* case based on prospects of success in those proceedings.

[65] The alleged non-disclosure of the repeal of the Irish Statute of Fraudulent Conveyancers 1634 with effect from 1 December 2009, is similarly not material to the relief sought in these proceedings. The dispositions complained of occurred during 2005 and 2008, long before the repeal of the Irish Statute of Fraudulent Conveyancers. It was repealed by the Land & Conveyancing Reform Act of 2009 which came into effect on 1 December 2009. I had an opportunity of considering this piece of legislation which was handed in during argument. There is no indication that this piece of legislation was intended to apply retrospectively. It therefore follows, in my view, that its non-disclosure, similarly, has no bearing to the relief sought in these proceedings.

MISCELLANEOUS COMPLAINTS

[66] Apart from the complaints based on the alleged non-disclosure, the first respondent complains about the issue of jurisdiction; authentication; and non-joinder.

[67] As to the issue of authentication, the first respondent objects to the founding affidavit being utilised as evidence on the basis that it was not properly authenticated. I have considered the basis of this complaint and, in doing so, I have found that, *ex facie* the founding affidavit, the individual who commissioned same was a notary in the Republic of Ireland and duly authenticated the affidavit in the manner contemplated in Government Notice R.1872 in Government Gazette 15 of 12 September 1980 which contains a schedule setting out a list of officers outside the Republic of South Africa entitled to act as Commissioners of Oaths as contemplated in the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963.

[68] As regards the issue of non-joinder, it would appear that this is based on the objection by the first respondent and Mrs Dunne to the effect that Mrs Dunne has not been joined as a party to these proceedings. As is evident from the notice of motion, no substantive relief is sought against Mrs Dunne. Her interest in the proceedings are merely financial and, in any event, indirect. In any event, this court would not have jurisdiction over her as she is not only resident outside the jurisdiction of this court, but is in fact resident outside the country and, in her own admission, in the state of Connecticut, USA.

[69] As to the complaint based on jurisdiction, it would appear that this relates to Castorena Limited, the second respondent in these proceedings. As has already been pointed out in paragraph [12] of this judgment, the second respondent is the first respondent's sole shareholder. While it is so that the second respondent is situated outside the area of jurisdiction of this court, the shares in the first respondent are not.

As such, such shares are situated at the first respondent's registered office, which, in turn, is situated within the jurisdiction of this court. The disposal which prompted this application is a sale of the first respondent's business and, as such, the relief sought against the second respondent, effectively becomes redundant.

THE APPLICANT'S RIGHT TO THE INTERDICTORY RELIEF

[70] The purpose of these proceedings is to enable the applicant to recover the purchase price of R260m or, if not, a substantial part thereof from the first respondent through Mount Brook Homes which later changed its name to Mavior. Effectively, what the applicant seeks to recover is Mr Dunne's indirect claims against the first respondent.

[71] By way of recap of the chronology of events it will be recalled that the applicant states in the founding affidavit that Mr Dunne had, by way of various stratagems, sought to put his assets in the form of his loan claims and shares beyond the reach of his creditors. Mr Dunne initially owned the shares in Lagoon Beach and had loan claims against it through the interposition of Mount Brook Homes which later changed its name to Mavior. These interests were alienated during 2008 by way of donations to Mrs Dunne. On 29 June 2012 the shares and loan claims in Mavior were transferred to a company registered in Mauritius called Castorena Limited, cited as the second respondent in these proceedings. On 14 November 2013 these shares were transferred from Castorena Limited to a company registered in Cyprus called Volcren Management Limited. This company is controlled by Mrs Dunne through yet another company called Enia Investments.

[72] It is clear on the basis of the affidavit of Mrs Dunne that the purchase price of R260m received by the second respondent for the sale of its assets or a substantial portion thereof, once received, would have been be paid to Mrs Dunne personally. Thus, the second respondent had intended to pay these funds out of jurisdiction of this court and thus putting them beyond the reach of the applicant and, ultimately, Mr Dunne's creditors. The interim interdict was sought in order to preserve in South Africa the funds which would have been derived from such sale. A preservation order had been sought pending the finalisation of legal proceedings in Ireland. Those proceedings have since been instituted for the recovery of those claims for the benefit of Mr Dunne's bankrupt estate and, ultimately, his creditors.

[73] A Trustee or creditor may apply to the court to prevent the disposal of property, including money separately identifiable as a particular fund, which is in possession, or under the control of the proposed defendant or respondent pending the determination of proceedings for the recovery of such property. On the basis of the authority *Enyati Resources Limited v Glaum N.O. & Another* 1989 (2) SA 314 (C) it is not necessary in such an application to show an intention on the part of the respondent to dissipate the relevant property. It is also not necessary for the applicant to prove that irreparable harm will be suffered if the interdict sought were to be refused. All that the applicant is required to establish for purposes of the interdictory relief sought is a *prima facie* right even if open to some doubt. This approach is in line with authorities such as *Spur Steak Ranches Limited v Saddles Steak Ranch* 1996 (3) SA 706 (C) at 714C-D where this Court observed:

> "In determining whether or not the applicants crossed the threshold, the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough if it is *prima facie* established although open to some doubt.
>
> The proper approach is to take the facts set out by the applicants, together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, obtain final relief at trial."

A *PRIMA FACIE* CASE

[74] The proceedings which the applicant had intended to institute in Ireland, which proceedings I was informed when the matter was argued before me that they have since been instituted, are intended to set aside Mr Dunne's disposal of his indirect interests in the first respondent to Mrs Dunne pursuant to two agreements concluded on 23 March 2005 and 15 February 2008. The applicant states it in so many words in the founding affidavit that it does not accept that the two agreements I have just referred to are genuine agreements.

[75] In terms of the agreement concluded on 23 March 2005 Mr Dunne undertook to give Mrs Dunne 70% of the profits that would accrue to him from the sale of the first respondent. In the same agreement Mr Dunne transferred the loan claim he had against Mavior, stated to be in an amount of about €4m, to Mrs Dunne. Mavior, in turn, had advanced loans to the first respondent in the same amount. In the same agreement Mr Dunne reserved the right to retain ownership of the first respondent and to transfer the value thereof as cash or, alternatively, properties and values to be

agreed between him and Mrs Dunne ostensibly as and when circumstances would have been conducive for him to do so.

[76] In the 2008 agreement Mr Dunne recorded that the sale of Lagoon Beach Hotel (the first respondent) as contemplated in the 2005 agreement had not been possible. In view thereof, and on the basis of 2008 agreement, Mr Dunne transferred, with immediate effect, his full Interest in that property (Lagoon Beach Hotel or the first respondent), the full book value of all loans made by him to Mavior and all of its associated companies and subsidiaries to Mrs Dunne.

[77] The applicant states in his founding affidavit that he considers the true motivation behind the 2005 and 2008 agreement was to formally dissipate Mr Dunne's indirect interest in the first respondent to Mrs Dunne with a view to delaying, hindering or defrauding his creditors. The first respondent disputes this assertion and, in doing so, relies on the affidavit of Mrs Dunne who contends that the motivation behind the two agreements was an attempt by Mr Dunne to secure her financial independence as well as that of her child and future children. The applicant, on the other hand, states in his affidavit that the issue of disposal of Mr Dunne's interests is relevant because, if decided in his favour, the dispositions effected under the 2005 and 2008 agreements may be set aside under Irish law. The legislation on the basis of which the disposal may be set aside is section 59(1)(b) of the Bankruptcy Act, 1988 and section 10 of the Irish Statute of Fraudulent Conveyancers 1634.

[78] Finally, as regard the issue of disposal of his interests by Mr Dunne, it is submitted on behalf of the applicant that the 2005 and 2008 agreements constitute donations between spouses and, as such, such transactions are by their very nature suspicious and cannot be said to be truly at arm's length. The applicant has, furthermore, produced a letter from a Mr Mark Sanfey SC in which letter Sanfey states that there are reasonable prospects of the proceedings instituted in Ireland being decided in favour of the applicant.

[79] It is not disputed in the papers that if the interdict is refused or the rule *nisi* is otherwise discharged, the first respondent will pay the proceeds of the sales transaction to Mrs Dunne. Indeed, Mrs Dunne candidly states that the proceeds she anticipated to receive arising from the transaction had already been earmarked for utilisation by her for the purchase of a certain property and for an investment into a property development venture in the US.

BALANCE OF CONVENIENCE

[80] As regards the balance of convenience the first respondent sets out in its submissions the poor prospects of success, ostensibly in litigation then contemplated in Ireland; the first respondent's inability to perform its obligations in terms of the sale of its immovable property; Mrs Dunne's inability to access funds available to the first respondent of which she is the ultimate sole owner which, in turn, will result in her being in breach of the agreement of sale in respect of the immovable property which she purchased in the UK for an amount of £5m; the fact that she stands to forfeit an amount of £1m paid as a deposit; and a further amount of £250,000 spent on renovations in

respect of the property she was then in the process of acquiring if the order granted by Steyn J stands or not appropriately altered.

[81] In order to ameliorate the potential prejudice that the first respondent would suffer, the applicant could have furnished an undertaking to pay any damages which the first respondent could prove it had suffered should an interim interdict be granted against it and the final relief ultimately refused. It is thus contended on behalf of the first respondent that the fact that no such undertaking had been given, tilts the balance of convenience in the first respondent's favour.

[82] On the other hand, it is submitted on behalf of the applicant that, as is clearly apparent from paragraph 2.5.1 of the notice of motion, the applicant merely seeks to interdict the proceeds the first respondent is said to receive upon completion of the transaction concerning the sale of its business and that the applicant did not want to interfere with the completion of the transactions as such. The interdict sought, so the submission goes, will not prevent the transfer of the first respondent's immovable property. What the notice of motion contemplates is that certain proceeds may be paid away with the leave of the applicant, failing that, with the leave of the court.

[83] It is further submitted on behalf of the applicant that there can be no prejudice to the first respondent's trade creditors. In terms of the agreement of sale those trade creditors are to be transferred to the purchaser. It is plain on the basis of the evidence that the first respondent would immediately pay away the proceeds of the sale to Mrs Dunne upon receipt thereof. That it is obliged to retain those funds cannot cause it any

prejudice. The fifth respondent, the purchaser under the relevant agreement of sale, has joined these proceedings but does not oppose the relief sought.

[84] The sale agreement Mrs Dunne relies upon concerning the immovable property she intends to purchase in the UK was concluded in March 2014, several months before the first respondent concluded the sale of business agreement on 17 July 2014 with the fifth respondent. Thus, at the time Mrs Dunne concluded the property transfer agreement, the balance of the purchase price was to be sourced from sources other than from the proceeds of the transaction between the first and the fifth respondent.

[85] Mrs Dunne does not state in her affidavit that she is unable to raise the balance of the purchase price from other sources. That she has other sources of capital is overwhelmingly probable from her own affidavit in which it is revealed that Mr Dunne gifted her a company valued at €58m in June 2005; she has business interests in the US which concerns the building of two developments; she has been able to afford renovations of some £250 000 in the UK property since concluding the immovable property transaction in March 2014; and that she was able to raise a deposit of £1m for the purchase of the UK property.

[86] The prejudice to the applicant, if the interdict is not granted, is significant. It is clear that the intention of the first respondent is to immediately dissipate the proceeds it will receive from the fifth respondent solely on instructions of Mrs Dunne. Once that occurs, the relief sought in the Irish proceedings to set aside the dispositions Mr Dunne made under the 2005 and 2008 agreements will lose their purpose. The restoration of

Mr Dunne's indirect loan and shareholding in the first respondent will be valueless given the disposal by Lagoon Beach of its assets. Efforts to trace the flow of the proceeds from the first respondent's disposition of its assets will be nigh impossible given the ease with which funds can be transferred internationally, privacy of banking transactions, and the fact that Mrs Dunne controls a network of companies registered in multiple jurisdictions around the world. It therefore follows, in my view, that in the circumstances of this matter, the balance of convenience clearly favours the applicant.

CONCLUSION

[87] In reconsidering the order granted by Steyn J I have had the benefit of the facts contained in affidavits filed by all parties having an interest in the matter as well as argument on behalf of the first respondent who was absent during the granting of the original order. Based on the evaluation of the evidence and the conclusion arising from such evaluation I am not persuaded that Steyn J acted inappropriately in granting the order in the manner she did. The reasons for the order I gave on 17 October 2014 are contained in this judgment. Furthermore, I could not find any facts or circumstances which would warrant the discharge of the rule *nisi,* which stands to be confirmed.

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N J Yekiso
Judge of the High Court