THE HIGH COURT

[2024] IEHC 650

[2014 No. 7820P]

BETWEEN

CHRISTOPHER LEHANE AS OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF SEAN DUNNE

PLAINTIFF

– AND –

GAYLE DUNNE

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 8th November 2024.

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SUMMARY

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In this judgment I explain why I will not dismiss the within proceedings, either on the basis that they are res judicata or by reference to the rule in Henderson v. Henderson [1843] 3 Hare 100.

1. By notice of motion of 19th April 2023, Ms Dunne (*née* Killilea)[1] comes seeking, among others, the following reliefs: (i) an order striking out these proceedings on the basis that they are barred by reason of *res judicata* and/or abuse of process, and (ii) an order dismissing the

[1] I understand that the defendant is often styled 'Ms Killilea' and she was also sometimes referred to by this name at the hearing of this application. As the defendant is named as 'Gayle Dunne' in these proceedings, it seems most appropriate (and hence I have elected) to refer to her generally in this judgment as 'Ms Dunne'.

proceedings pursuant to the rule in *Henderson v. Henderson*, or otherwise in accordance with the court's inherent jurisdiction.

2. As to relief (i), the within application must fail. It is of the essence of *res judicata* that what is before the court is a *res* ('thing') that has previously been adjudicated upon. As will be seen from the extensive summary chronology that follows, this application relates essentially to a matter which it is claimed could or should have been adjudicated upon in the United States, but – critically when it comes to the application of the concept of *res judicata* – was not.

3. It is also important to note from the outset what O'Donnell C.J. makes clear in his judgment *Munnelly v. Hassett & Ors* [2023] IESC 29, para.44, namely that 'the rule in *Henderson v. Henderson* is a species of abuse of process derived from and related to *res judicata*'. In the same paragraph O'Donnell C.J. refers with approval to the earlier observation of Murray C.J. in *Re Vantive Holdings* [2010] 2 I.R. 118, para.25, that '[u]nderlying the rule in *Henderson*...is the...need to protect the due and proper administration of justice from an abuse of process'. One will search long and hard to find any abuse of process by the plaintiff (or the chapter 7 trustee) in the extensive summary chronology that follows. This is because on the facts in evidence before me there is no such abuse of process.

4. The following extensive summary chronology seems to me to be the clearest and fairest way of relaying the evidence and submissions of both sides in as comprehensive a manner as possible:

10.07.2012	Action commenced by NALM before Connecticut Superior Court styled *NALM v. Sean Dunne et al*, FST-CV-12-5013922-S (the 'State Court Action') which asserted claims against the debtor, Ms Dunne and others to avoid fraudulent transfers, recover for unjust enrichment, and for an accounting to the US District Court for the District of Connecticut. In these proceedings, NALM sought to enforce a judgment against Mr Dunne and

to enjoin Ms Dunne from the dissipation of her assets.

12.02.2013 Ulster Bank commences an Irish bankruptcy petition against Mr Dunne (sometimes referred to hereafter as 'the debtor' or 'the bankrupt').

29.03.2013. Mr Dunne files for bankruptcy in the United States pursuant to chapter 7 of the US Bankruptcy Code in the US Bankruptcy Court. This case is titled *In re Sean Dunne, Bankruptcy Case 13-50484* and created Mr Dunne's bankruptcy estate.

12.06.2013. Shiff J. (of the US Bankruptcy Court) requires that nothing be done by the parties to deprive the US courts of jurisdiction over the debtor or the property of the bankruptcy estate. Before Shiff J., the chapter 7 trustee indicated that by reason of the US bankruptcy Mr Dunne no longer has any property that can be the corpus of an Irish bankruptcy estate.

29.07.2013. Mr Dunne is adjudicated a bankrupt in Ireland.

06.12.2013. High Court of Ireland dismisses Mr Dunne's application to show cause.

05.09.2014. Mr Lehane issues the plenary summons in these proceedings. These proceedings seek the reversal of the alleged fraudulent transfer of the Mavior assets, the principal of which is the Lagoon Beach Hotel. The action is grounded on s.10 of the Statute of Charles. The proceedings were first in time and so could not involve an abuse of process. They were authorised in the US context by Shiff J. His decision was subsequently followed in the High Court of Ireland by Costello and McGovern JJ.

01.12.2014. Official Assignee obtains order of recognition in South Africa.

12.12.2014. Statement of claim in Irish proceedings delivered.

12.01.2015 The chapter 7 trustee removes the action commenced on 10.07.2012.

25-27.03.2015. Mr Dunne's appeal against the dismissal of his application to show cause is heard by the Supreme Court of Ireland.

27.03.2015 The chapter 7 trustee commences adversary proceedings styled *Coan, Trustee v. Killilea* et al, Adversary Proceeding No 15-5019 (the 'Adversary Proceeding') in the Bankruptcy Court against Ms Dunne and other parties seeking to avoid transfers, pierce corporate veils, and for other related legal

and equitable relief. Counsel for Ms Dunne placed some emphasis before me on the fact that Claim 15019 had an 'umbrella' claim for all Irish transactions and 'subsequent dealings' referred to in the Irish statement of claim. A number of points might usefully be made in this regard. First, the 36 counts in Complaint 15-5019 contain no claim for relief in respect of a fraudulent transfer of the Mavior assets. Second, in cross-examination Mr Ostrow indicated that Complaint 15-5019 did not include the fraudulent transfer counts as regards the Mavior shares/loans. Third, as Mr Ostrow confirmed Shiff J. expressly held that the Irish proceedings were to proceed in Ireland.

The chapter 7 trustee also commences an adversary proceeding styled *Coan, Trustee v. Killilea,* et al (Proceeding No 15-5020) (the 'Mavior Adversary Proceeding'). These are mirror proceedings to the Irish proceedings. I understand from the evidence before me that they were issued as a protective step in case the Supreme Court of Ireland had ruled in favour of (in fact it ruled against) Mr Dunne as regards his application to show cause. (The effect of such a judgment had it issued, and it did not, would have been to leave the chapter 7 trustee as the only person entitled to take

such a claim.) Mr Ostrow (in his evidence on Day 2) indicated that the fraudulent transfer claim on Lagoon Beach was mirrored in Complaint 15-5020.

05.05.2015. Ms Dunne issues a motion to dismiss the Irish proceedings on the basis that they constituted an abuse of process and were before a *forum non conveniens*.

15.05.2015. Supreme Court of Ireland dismisses Mr Dunne's application to show cause and affirms his bankruptcy in Ireland.

19.05.2015. The chapter 7 trustee advises the US court that Mr Dunne's bankruptcy has been confirmed in Ireland and that the Irish proceedings will continue there.

14.07.2015. Ms Dunne seeks injunctive relief in the United States to terminate the Irish proceedings.

05.11.2015. The chapter 7 trustee motions to terminate Complaint 15-5020. I understand that the reason Complaint 15-5020 was withdrawn in the US by the chapter 7 trustee was because he was relying on the official assignee to continue the Irish proceedings. (Indeed, counsel for Ms Dunne confirmed to the US court that she had no objection to this course of action.) Mr Ostrow confirmed Complaint 15-2020 was withdrawn on

the basis that the Irish proceedings were being litigated in Ireland by the official assignee.

09.11.2015. The Supreme Court of Ireland confirms the Official Assignee's *ad colligenda bona* function in dual bankruptcies.

25.11.2015. Shiff J. allows the Irish proceedings to proceed, holding that the trustee had reasonably relied on the official assignee to pursue the official assignee litigation by not pursuing it himself. Mr Ostrow has acknowledged that Shiff J. had knowledge that litigation against Ms Dunne would take place in different jurisdictions.

19.02.2016. High Court of Ireland (Costello J.) dismisses motion to cross-examine.

12.04.2016. The chapter 7 trustee essentially pleads the entire case concerning the Lagoon Beach Hotel in the US First Amended Complaint filed on 12th April 2016.

01.07.2016. Subpoena issues requiring Mr Dunne to produce documents in the US proceedings, including documents concerning Mountbrook Ireland and the Lagoon Beach Hotel, and any documents evidencing the transfer of the property to Ms Dunne.

14.07.2016. Further evidence of the Lagoon Beach Hotel and Beara loans as being within the ambit of the US proceedings is evident from a request of this date by the chapter 7 trustee for the production of documents, including documents relating to the Mountbrook Ireland and Beara loans. (Although Ms Dunne has repeatedly sought in the course of the application before me to highlight that the Beara property was included in the cases, it was dealt with on the basis that it was worthless and essentially moot, as confirmed at that time by Ms Dunne when under cross-examination.)

27.07.2016. High Court of Ireland (Costello J.) dismisses *forum non conveniens* motion. (This judgment was subsequently vacated by the Court of Appeal on the basis that Messrs Miltenberger and Ostrow should be cross-examined.)

30.01.2018. Court of Appeal of Ireland allows defendant's appeal against dismissal of motion to cross-examine.

09.04.2018. The proceedings commenced in May 2015 are heard before McGovern J. During this case, Mr Miltenberger acknowledges during the hearing, the difficulties that would arise for the Official Assignee if the claims of unjust

enrichment were lost in the US proceedings.

22.06.2018. Following proceedings that involved cross examination of Mr Miltenberger and another US lawyer, Mr Ostrow, McGovern J. holds that the US bankruptcy vested all of Mr Dunne's estate in the chapter 7 trustee. However, he considered that this did not prevent the Official Assignee from pursuing claims in respect of the alleged fraudulent transfer.

11.09.2018. NALM proceedings and Complaint 15-5019 are consolidated.

03.10.2018. McGovern J. delivers a further judgment, indicating (among other matters) at para. 7:

> 'I have...held in the US law judgment at para.44 that the US court will be bound by any decision of this court in these proceedings either on the basis of res judicata or collateral estoppel. I accepted the evidence of Mr Miltenberger that it would be extremely difficult for the Chapter 7 trustee to re-activate the Mavior fraudulent transfer claims in the US having regard to the fact that they have been dismissed or discontinued in the US for the purpose of allowing the US court to

lift the automatic stay so as to enable the plaintiff in these proceedings to maintain an action against the defendant in Ireland.'

19.11.2018. Ms Dunne files an expedited appeal against the judgments of McGovern J.

20.11.2018 Official Assignee obtains order from Irish bankruptcy court allowing transfer of discovery from the Irish proceedings to the chapter 7 trustee.

05.12.2018. Chapter 7 trustee seeks discovery of a large number of documents relating to Lagoon Beach Hotel and Mountbrook Ireland. I understand that these documents were not ultimately produced.

13.02.2019. In a deposition for the US District Court the issue of the ownership of the Lagoon Beach Hotel and Mountbrook Ireland were put to Ms Dunne, as was the transfer of the said property from Mr Dunne to Ms Dunne.

18.02.2019. Chapter 7 trustee was deposed for the US Bankruptcy Court. During the deposition he stated that no claims were being pursued in respect of Mavior (Mountbrook Ireland). He further states his understanding that these claims were being pursued by the Official Assignee in Ireland.

01.03.2019. Deposition of Mr Dunne on this date contains further references by counsel for Mr Lehane in the US proceedings to Lagoon Beach Hotel and Mountbrook.

03.04.2019. Chapter 7 trustee issues motion in respect of alleged contempt by Ms Dunne in allegedly failing to comply with discovery and related orders. The motion alleged that Ms Dunne had failed to provide bank account statements in respect of Lagoon Beach.

Also on this date a deposition of Mr Ross Connolly, sometime finance director of Mr Dunne and also for a time a director of Mountbrook/Mavior, contains a notable number of questions from counsel for the chapter 7 trustee concerning Lagoon Beach Hotel and Mountbrook/Mavior, including as to the operation of Lagoon Beach and Ms Dunne's involvement in same.

15.04.2019. In the joint pre-trial memorandum of this date a number of the counts alleged against Ms Dunne refer to Mountbrook and Lagoon Beach Hotel.

The chapter 7 trustee's 'Contested Issues of Fact for Trial document' of this date identifies 405 contested issues of fact,

many of which relate to Mountbrook/Mavior/Lagoon Beach.

19.04.2019. Ms Dunne issues a motion *in limine* to preclude evidence in respect of Lagoon Beach. It is expressly acknowledged in the motion *in limine* that the fraudulent transfer of the Mavior assets does not form part of Complaint 5019 (or the first amended complaint). Counsel for Ms Dunne also indicated in his oral submissions to the court that everything related to the Mavior assets was being tried in Ireland. Before me, Mr Ostrow maintained that the unjust enrichment claims incorporated Lagoon Beach. However, this is contrary to what was stated to the US judge at the relevant time. So, at best, a lawyer for Ms Dunne indicated to the US court that everything related to the Mavior assets was being tried in Ireland. And Mr Ostrow is now stating that the unjust enrichment claims incorporated Lagoon Beach. Given the express acknowledgement in the motion *in limine*, I am inclined to believe what was said to the US court. Either way, however, I do not see that an applicant could conceivably cross the threshold for strike out on the basis of opposing evidence told by that applicant's own lawyers to different courts.

On the same date the chapter 7 trustee attempts to file a second amended complaint in the US proceedings to amend a fraudulent transfer claim from US$500k to €69+m (by identifying every deposit made into Ms Dunne's bank account from 2006-2016). This attempt was refused by Meyer J. on the basis that it was untimely. I should note that there was no proposed amendment which sought to include the Mavior shares/loans.

When this matter was before Meyer J. counsel on behalf of Ms Dunne indicated that the Lagoon Beach issue was being treated with by the Irish courts. However, the chapter 7 trustee made clear that in his view the Lagoon Beach issue had always been a part of the US proceedings. Meyer J. ruled that Lagoon Beach and Mountbrook Ireland were included as part of claim in the US proceedings.

29.04.2019. In a notice of compliance with an order of the court that issued on the 29th and was filed on the 30th, the chapter 7 trustee outlined a summary of the monetary transfers that were the subject of claims in the US proceedings. Listed therein were transfers from Lagoon Beach to Ms Dunne. On the same day the trial judge ruled in a pre-trial motion that Lagoon Beach was part of the claim for unjust enrichment.

30.04.2019. In a motion of this date issued against Ms Dunne in respect of the alleged contempt of court, counsel for the chapter 7 trustee expressly states as follows in relation to the alleged failure of Ms Dunne to provide certain bank statements:

> '[T]hey claim they don't have to produce these bank statements because it relates to a non-party Lagoon Beach Hotel, which is specifically one of our claims in this case is that non-party Lagoon Beach Hotel was fraudulently transferred or transferred under suspicious circumstances from Mr Dunne to Mrs Dunne and that she received all the benefits therefrom thereafter and he continued to control that asset.'

03.05.2019. Meyer J. holds that the chapter 7 trustee is not permitted to include the fraudulent transfer of the Mavior assets into Complaint 15-5019. I can see that the chapter 7 trustee might have pursued the €1.5m generated annually by the Lagoon Beach. I do not see that he could have pursued the statutory fraudulent transfer (which is the subject of the within proceedings).

24.05.2019. In reply to a motion seeking to remove Mr John Dunne as a party to the proceedings (on the basis that no substantive allegations had been made against him) the chapter 7 trustee disputed this on the basis that Mr Dunne was heavily affiliated with Lagoon Beach and Mountbrook USA.

06-24.05.2019. Case proceeds to trial in United States. Ms Dunne and other witnesses gave extensive evidence concerning Lagoon Beach and the 2005 and 2008 agreements. The jury was instructed on 18 counts involving alleged fraudulent transfers under US law, Irish law, and Connecticut law. Other reliefs that involved equitable claims were reserved to the trial judge. The US trustee failed on the unjust enrichment claim. The jury returned a split verdict. It found that Mr Dunne had engaged in some fraudulent transfers to Ms Dunne in breach of US law, Irish law, and Connecticut law. It also found that the chapter 7 trustee had not proven certain other claims, including fraudulent transfers with respect to certain assets and veil piercing claims, including the Beara loans. Following the jury trial, Meyer J. subsequently denied all of the US trustee's unjust enrichment claims, claim for an accounting, and attempted imposition of a constructive trust.

It may assist for me to make a number of points at this juncture. First, it is clear that counsel for Ms Dunne (Mr Nolin) understood that no claims, including unjust enrichment, relating to Lagoon Hotel, was part of Complaint 15-5019. He confirmed this in his opening speech to the jury. Second, the chapter 7 trustee confirmed this understanding when under cross-examination. Third, although Ms Dunne has repeatedly sought in the course of the application before me to highlight that the Beara property was included in the cases, it was dealt with on the basis that it was worthless and essentially moot (as confirmed at that time by Ms Dunne under cross-examination). There is no reference to Lagoon Beach in the jury verdict form. (So obviously the jury did not consider it was the subject of the trial.) And it was confirmed by the chapter 7 trustee that the unjust enrichment claims he was pursuing did not include Mavior or the Lagoon Beach Hotel. Against all this, Mr Ostrow's understanding that claims relating to Lagoon Beach formed part of the case in Complaint 15-2019 seem, with respect (and to put matters at their very mildest) unconvincing.

03.07.2019. In an analysis of damages, the chapter 7 trustee for the first time inserts the claims

in respect of Lagoon Beach under the heading of Irish claims.

15.07.2019. The chapter 7 trustee in a US court filing concerning the chapter 7 trustee's remaining equitable claims removes the unjust enrichment claim with regard to Lagoon Beach by way of footnote to a written submission.

05.10.2020. In a further filing (following on a reply to the chapter 7 trustee's motion for post-verdict, pre-judgment relief) Lagoon Beach is again omitted from what is sought by the chapter 7 trustee.

25.03.2021. In a response by the chapter 7 trustee to objections entered by the defendants to the chapter 7 trustee's motion for post-verdict, pre-judgment relief, the trustee indicates that the official assignee is seeking to recover assets not at issue in the US proceedings, such as Lagoon Beach.

07.07.2021. Meyer J. indicates that he will not depart from a jury verdict not to award an unjust enrichment claim where fraud is not proven. (This was in respect of the Beara loans counts.)

15.07.2021. Meyer J. rules on the remaining equitable claims. It is clear from this ruling that Meyer J. did not consider any unjust

	enrichment claim relating to Lagoon Beach. (Indeed, this was accepted by Mr Ostrow.) Meyer J.'s ruling makes no reference to Lagoon Beach or the Mavior assets.
19.07.2021.	Jury verdict entered as judgment.
11.01.2023.	Motion to re-enter Irish proceedings.
22.02.2023.	Motion for stay issues.
19.04.2023.	Present motion to dismiss issues.
07.05.2024.	Motion listed for hearing.
July 2024.	Closing written submissions furnished to me.
29.07.2028.	Mr Dunne due to be discharged from bankruptcy in Ireland.

5. A number of points that are cumulatively fatal to the *Henderson* claim now being made arise from the foregoing. First, the fact that there are two separate sets of proceedings in Ireland and in the United States has expressly been held by the Irish and the American courts *not* to constitute an abuse of process. Second, I do not see that the fraudulent transfer claim could have been brought in the United States after permission was sought of, and granted by, Shiff J. to the bringing of same in Ireland. I also do not see why it should have been brought in the United States. Third, the proposition that it should have been brought there seems a little unusual: why 'should' it have been brought in the United States when the shares involved were Irish and the issues presenting bore no relation to U.S. law?

6. I do not see that any of my conclusions in this regard are affected by the fact that, *e.g.,* counsel on his feet in the United States may have said something at a given time or engaged in

a particular line of questioning, or that discovery at some point was sought of a particular document or suite of documents, or that a particular line of interrogatories was engaged in. All of this seems to me to be part of the to-be-expected 'untidiness' that will necessarily arise when complicated dual bankruptcies are in play on both sides of the Atlantic. What I do not see (because it simply is not there) is an adjudication in the United States that would sustain a plea of *res judicata* in this jurisdiction *or* an abuse of process that would sustain a *Henderson* application.

7. I respectfully adopt as correct the following submissions made by counsel for the plaintiff in their closing written submissions:

> '50. In *Munnelly*, the case on which [Ms Dunne]...relies, O'Donnell C.J. held that in an application to strike out the "principal focus of a claim of *res judicata* or the rule in *Henderson*...is what was decided, not how it was decided". There is no reference to the statutory fraudulent transfer relief in respect of the Lagoon Beach Hotel/the Mavior shares in the pleadings in 5019/the First Amended Complaint, the Jury Form, or the Omnibus Ruling on Post Trial Issues [of] 15 July 2021. The fraudulent transfer of Lagoon Beach Hotel/the Mavior shares was not the subject of 5019/the First Amended Complaint, nor has it been the subject of judicial determination. Those claims formed part of 5020, which was withdrawn to allow the Irish proceedings [to] continue.
>
> 51. With regard to the unjust enrichment claim, which is separate, the Court is invited by [Ms Dunne]...to go behind the pleadings in 5019 and the final judgment of Meyer J. and engage in a trawl through the documentation, including categories of discovery and interrogatories, in order to determine whether or not it was dealt with by Meyer J. The official assignee's

position [with which I respectfully agree] is that it clearly was not....

52. ...[Ms Dunne] then asks this court to find that if the claim was not brought, which it was not, it could have been brought. Critically, the defendant in advancing this argument ignored the fact that the Irish proceedings continued with the approval of Judge Shiff of the US Bankruptcy Court. Mr Ostrow swore affidavits which made no references to the finding of Judge Shiff and which had to be put to him in cross examination notwithstanding that he appeared in various applications in the US and was aware of the position in the US. The Irish proceedings were then subject to review and approval of Judge Costello, which judgment...was vacated based on the cross-examination judgment, and Judge McGovern, in which he finds, as a fact, that the Irish proceedings are not an abuse of process.'

8. In *Munnelly v. Hassett* [2023] IESC 29 the Supreme Court held that the plaintiff's claim in that case was barred by *res judicata/Henderson* even though there was no substantive finding on the issues raised. In his judgment, O'Donnell C.J. observes as follows, at para.39:

> '[1] I consider that in the first place at least, issues of *res judicata* or *Henderson v. Henderson*, should be addressed by as forensic a scrutiny as possible, of what case had been pleaded, and what the court decided, and a subsequent court should be reluctant to accept an invitation to go behind what the documents show....[2] Whatever was encompassed in that claim could not be litigated as being *res judicata*, and anything which could and should have been raised but was not, is captured, at least in principle, by the rule in *Henderson v. Henderson*.'

9. As to [1], I do not see that I could have been seen by Ms Dunne and her legal team to have assessed fairly the case that they made before me had I *not* engaged in the detailed chronological analysis that I have engaged in above. I note too that if one steps back for a moment and confines oneself to (a) looking at what has been pleaded in terms of cause of action and reliefs, and (b) the subsequent judgments then there is nothing that would now sustain a claim of *res judicata* or a strike out by reference to *Henderson v. Henderson*.

10. As to [2], as I indicated at the outset of this judgment what O'Donnell C.J. makes clear in his judgment in *Munnelly v. Hassett*, at para.44, is that 'the rule in *Henderson v. Henderson* is a species of abuse of process derived from and related to *res judicata*'. Underlying the rule is the need to protect the due and proper administration of justice from an abuse of process. But as I have now repeatedly stated one will search long and hard to find any abuse of process by the plaintiff (or the chapter 7 trustee) in the extensive summary chronology that I have set out above.

11. I should perhaps add that even if I considered that this case was flawed when viewed from a *Henderson* perspective (and I do not see that it is), that would not be a 'slam dunk' for Ms Dunne in terms of having these proceedings struck out. In this regard, I recall the observation of Hogan J. in *Culkin v. Sligo County Council* [2017] 2 I.R. 326, para.15 that:

> 'The general approach of the courts to the issue of a multiplicity of proceedings has been, broadly speaking, to adopt a merits-based approach. In other words, doctrines designed to present a multiplicity of proceedings and thereby ensuring the administration of justice is not abused – such as the rule in *Henderson v. Henderson* – are applied flexibly and not by reference to some inexorable and unforgiving logic. The courts have generally fought shy of adopting an *ex ante*, automatic exclusion of any second set of proceedings and much will depend upon whether the second proceedings raise questions which might sensibly and reasonably have been raised in the first proceedings.'

12. Bringing such an approach to bear, and for all of the reasons stated above, I do not see that this is a case in which a strike out of the proceedings by reference to *Henderson* could now issue.

13. All the reliefs sought by Ms Dunne in this application are respectfully refused.