THE HIGH COURT
BANKRUPTCY

[2021] IEHC 291
[Bankruptcy No. 2478]

IN THE MATTER OF SEAN DUNNE (A BANKRUPT)

JUDGMENT of Humphreys J. delivered on Wednesday the 5th day of May, 2021

1. The bankrupt was born in 1954. His first marriage took place in 1979 and he was subsequently divorced in the State in 2001.

2. His second marriage took place in 2004.

3. The bankruptcy petition was presented on 12th February, 2013. Six weeks later, Mr. Dunne voluntarily filed for bankruptcy in the US on 29th March, 2013.

4. On 12th June, 2013, Judge Alan H. W. Shiff, US Bankruptcy Judge, of the US Bankruptcy Court, District of Connecticut, varied the automatic stay under US law to allow Irish bankruptcy proceedings [*Ulster Bank v. Dunne* 2013 No. 798P] to proceed [Order in *In re Dunne: Ulster Bank Ireland Ltd. v. Coan*, Case No. 13-50484 (AHWS)].

5. Mr. Dunne was adjudicated bankrupt in the State on 29th July, 2013.

6. On 6th December, 2013, a motion to show cause against the adjudication was dismissed: *In re Dunne (a bankrupt)* [2013] IEHC 583, [2013] 2 I.R. 796 (McGovern J.).

7. Separately, the bankrupt had brought a motion on 3rd December, 2013 to prevent the Official Assignee from accessing certain documentation seized from the K Club. On 6th March, 2014, an application to cross-examine the Official Assignee was not acceded to, but a further motion was permitted: *In re Dunne (a Bankrupt)* [2014] IEHC 113 (Unreported, High Court, McGovern J., 6th March, 2014). McGovern J. ultimately decided that the documentation could be accessed: *Ulster Bank Ireland Ltd. v. Dunne* [2014] IEHC 433 (Unreported, High Court, 13th August, 2014). Cross-examination of the Official Assignee was again refused: *In re Dunne (a Bankrupt)* [2014] IEHC 285 (Unreported, High Court, McGovern J., 10th April, 2014).

8. An appeal against the refusal of the show-cause motion was dismissed *(In re Dunne (a Bankrupt*) [2015] IESC 42, [2015] 2 I.L.R.M. 103), Laffoy J. noting at para. 1 that "Although it is disclosed in the Bankruptcy Law Committee Report, a report of a committee under the chairmanship of Budd J., which was established on 23rd August, 1962 and which reported in 1972, which will be referred to as 'the Budd Report', that legislation governing bankruptcy in Ireland has been on the statute books since as long ago as 1772, it is very surprising that there is no record of the principal issue addressed on this appeal having been raised and addressed before the courts in Ireland previously", that issue being jurisdiction in cases of concurrent bankruptcy in two states simultaneously.

9. The bankrupt says that his wife moved to the UK in 2013, that he was between the UK and the US for the following number of years, and that by 2017 he had moved residence to the UK.

10. In the meantime, on 25th November, 2015, Judge Shiff made an order in *In re Dunne,* Case No. 13-50484, Memorandum of Decision and Order on Trustee's Motion for Order (ECF No. 476), that the automatic stay did not prohibit the Official Assignee from prosecuting proceedings against the wife in the Irish bankruptcy. He noted at p. 17 that "Both this Court and the High Court of Ireland are cognizant of the principles of comity and have each proceeded in a manner which is respectful of that principle. The integrity of the US bankruptcy system, together with the respect for the High Court of Ireland and its interests in the efficient administration of the corresponding Irish Bankruptcy Proceedings, requires an order that will promote the efficient management of this case and hopefully provide assistance to the High Court of Ireland".

11. On 26th May, 2016, the Official Assignee brought a motion to extend the period of bankruptcy under s. 85A of the Bankruptcy Act 1988. Costello J. rejected an application to cross-examine the Official Assignee in that context: *In re Dunne, a Bankrupt* [2017] IEHC 66 (Unreported, High Court, 13th February, 2017). An appeal to the Court of Appeal against that refusal was allowed: *In re Dunne, a Bankrupt* [2017] IECA 304 (Unreported, Court of Appeal, Peart J. (Finlay Geoghegan and Hogan JJ. concurring), 27th November, 2017).

12. In the meantime, the bankrupt's wife had sought and been refused an order for cross-examination in a related application (*Lehane v. Dunne* [2016] IEHC 96 (Unreported, High Court, Costello J., 19th February, 2016)). Costello J. also rejected arguments regarding *forum non conveniens* and abuse of process, and directed discovery (*Lehane v. Dunne* [2016] IEHC 690 (Unreported, High Court, 27th July, 2016) and *Lehane v. Dunne* [2016] IEHC 679) (Unreported, High Court, 25th November, 2016).

13. On 30th January, 2018, an appeal from the *forum non conveniens* and abuse of process decision was allowed by the Court of Appeal in *Lehane v. Dunne* [2018] IECA 7 (Unreported, Court of Appeal, Hogan J. (Peart and Whelan JJ. concurring), 30th January, 2018). Hogan J. commented: "I cannot conclude this judgment without making two observations. First, events in the last two and a half years or so have entirely confirmed the anxieties which Laffoy J. expressed in Dunne regarding the complex questions which were likely to emerge arising from the inter-action of any dual bankruptcy regime in both the United States and Ireland. While I appreciate that the Official Assignee and the Chapter 7 Trustee are determined to work together co-operatively (and have done so to date), the potential for overlapping jurisdiction, inconsistent judgments, dual recovery, additional costs and even opportunistic legal stratagems are all the inevitable by-products of parallel bankruptcy proceedings in two separate jurisdictions. If it can at all be done, the case for centralizing all these claims in one single jurisdiction is, I should think, a pressing one." (para. 44). "Second, this litigation has highlighted the urgent necessity for legal measures to be taken by this State to address the implications for domestic

bankruptcy proceedings of foreign non-EU bankruptcy proceedings falling outside the scope of the (recast) Insolvency Regulation No. 2015/848 EU, whether by the making of the appropriate order under s. 142(1) of the Bankruptcy Act 1988 or otherwise" (para. 45).

14. McGovern J. re-heard the *forum non conveniens* motion and dismissed it: *Lehane v. Dunne* [2018] IEHC 367 (Unreported, High Court, 22nd June, 2018) and *Lehane v. Dunne* [2018] IEHC 536 (Unreported, High Court, 3rd October, 2018).

15. There were also separate proceedings [2016 No. 10991 P] involving Yesreb Holdings Ltd. which was a corporate owner of a property known as Walford, Shrewsbury Road that Mr. Dunne had contracted to buy in 2005 and then sold (as trustee for his wife) to Yesreb in 2013. The property was then sold on to Celtic Trustees Ltd. In *Lehane v. Yesreb Holdings Ltd.* [2017] IEHC 512 (Unreported, High Court, 24th July, 2017), Costello J. dealt with an application for payment out of escrow funds arising from this transaction. Haughton J. dealt with a privilege issue in those proceedings and in related proceedings (*Celtic Trustees Ltd. v. Lehane* [2017 No. 2146P]) in *Lehane v. Yesreb Holdings Ltd.* [2019] IEHC 4 (Unreported, High Court, 15th January, 2019).

16. Returning to the situation directly affecting the bankrupt, Costello J. allowed an extension of the period of bankruptcy under s. 85A of the 1988 Act on 2nd October, 2018. She also granted a bankruptcy payment order (BPO), which is the main issue with which we are concerned in the present judgment: *In re Dunne (a bankrupt)* [2018] IEHC 813 (Unreported, High Court, 2nd October, 2018). The formal order was made on 22nd October, 2018 and reflects that judgment with a slight change in terms of the dates of the order. That order required under s. 85D(1) of the Bankruptcy Act 1988 that the bankrupt pay €7,000 per month from 25th November, 2018 to 25th July, 2021. The 12-year extension is, I am told, under appeal [Court of Appeal record no. 2018 No. 442].

17. The bankrupt says that he was divorced in 2019 in the UK although he has not produced an order or any further details. Also in 2019, he says that enforcement proceedings were taken by the US trustee through the English courts in order to obtain information from him.

Applications before the court

18. Three motions were before the court at the outset of dealing with the matter and two more were added during the currency of proceedings. Those motions were as follows:

    (i). a motion dated 6th March, 2019 by the Official Assignee under ss. 19(a) and 21(3) of the Bankruptcy Act 1988 seeking production of various documents - that was determined on 19th November, 2019 by Pilkington J. in an *ex tempore* judgment, a transcript of which I have been given, but the motion was re-entered for consequential matters (in particular, costs);

    (ii). a motion dated 16th July, 2019 by the bankrupt under s. 85D(5) of the 1988 Act seeking an order varying or setting aside the BPO;

(iii). a motion dated 4th March, 2020 by the Official Assignee under O. 44, rr. 1 and 2 RSC seeking contempt remedies for failure to comply with the BPO;

(iv). a motion dated 17th December, 2020 seeking an order striking out paras. 2-84 of the bankrupt's affidavit; and

(v). a motion issued on 22nd February, 2021 seeking third-party discovery against James Ryan.

19. There have been 16 adjournments in total of the application to vary the BPO, between the date of filing of that motion, 16th July, 2019, and judgment being reserved on 26th April, 2021. Seven of those listings were before Pilkington J. (including one listing which was cancelled due to the Covid-19 pandemic). I was assigned to the list with effect from Michaelmas, 2020, and can perhaps focus more particularly on the procedural history thereafter.

Listing of 5th October, 2020

20. When this matter first came before me on 5th October, 2020, for physical mention, the bankrupt was not in attendance (being outside the jurisdiction). Remote hearings had yet to get going in the bankruptcy context, and in fact the present application was the first such case in this list and paved the way for remote bankruptcy hearings to be mainstreamed, as they now are. In the bankrupt's absence I adjourned the matter, but requested the Official Assignee to write to the bankrupt specifying what financial information was being sought from him.

Listing of 26th November, 2020

21. On 26th November, 2020, this matter achieved that modest record of being the first remote bankruptcy listing. I fixed a date for hearing of the motion regarding variation of the BPO and adjourned the contempt motion generally with liberty to re-enter on the grounds that the Official Assignee accepted that the question of variation should be dealt with first.

22. As regards the balance of the motion of 6th March, 2019, Mr. Dunne argued that he should be given the costs of third-party discovery in separate proceedings, *Lehane v. Yesreb Holdings Ltd.* [2016 No. 10991 P], which were settled at hearing on 12th February, 2020.

23. However, that is a separate matter. The motion of 6th March, 2019 and the order made thereunder arose under s. 19(a) of the 1988 Act which concerns Mr. Dunne's own bankruptcy, so an entitlement to the costs of third party discovery in the Yesreb proceedings did not properly arise. Thus, I made no further order on the motion of 6th March, 2019 other than that the Official Assignee's costs would be costs in the bankruptcy.

Listing of 10th December, 2020

24. The bankrupt put in an affidavit on 9th December, 2020 raising various issues which related to previous family law matters. Counsel for the Official Assignee then sought to

have the present matter heard *in camera* because of the overlap with the family law proceedings and I granted that application pending further order. Counsel then sought liberty to bring a motion to strike out what he said were scandalous and irrelevant allegations at paras. 2-84 of the new affidavit. I permitted that motion to be brought and adjourned the matter to 13th January, 2021 also taking the opportunity to encourage Mr. Dunne to furnish all relevant information to the Official Assignee by the end of term.

Listing of 13th January, 2021

25. In the run up to this hearing date, the bankrupt sought further time which was consented to, so the matter was adjourned for two weeks.

Listing of 27th January, 2021

26. The matter was then heard, but it was clear that some information of relevance remained outstanding so at the end of the hearing on 27th January, 2021, I allowed what I hoped was a final opportunity for post-hearing clarifications by additional affidavits and submissions. That turned out to be a somewhat more involved process than I anticipated at that time.

Listing of 22nd February, 2021

27. Mr. Dunne then took the opportunity to put in a further affidavit disclosing additional financial information, which was welcome insofar as it went. The Official Assignee filed a replying affidavit and submissions and the matter was listed for mention on 22nd February, 2021.

28. On the listing date, the Official Assignee agreed to prepare a summary of the income and expenditure from the statements disclosed.

29. Separately, Mr. Dunne sought and was granted leave to bring a motion for third-party discovery against Mr. James Ryan, accountant and adviser to his former wife and a former adviser to Mr. Dunne himself.

30. I allowed a further week's adjournment to allow Mr. Dunne to get a clarifying affidavit as to his pension entitlements and to allow the Official Assignee to prepare a summary of Mr. Dunne's disclosed accounts.

Listing of 1st March, 2021

31. The Official Assignee then filed an affidavit providing an analysis of Mr. Dunne's disclosed financial material.

32. Mr. Dunne had not obtained an affidavit from his pension manager because he stated that the individual concerned was out of contact during the previous week, but said an affidavit would now be prepared.

33. Mr. Dunne had in the meantime issued the motion for third party discovery in relation to papers in the possession of Mr. James Ryan. The parties agreed that the motion need not be held *in camera* subject to not referencing any family law proceedings.

Listing of 8th March, 2021

34. The Official Assignee filed a further affidavit providing an analysis of Mr. Dunne's disclosed financial material and providing precise figures for a possible BPO if the court was satisfied with disclosure (although certain questions were still being raised about that at that point) and with the non-availability of the pension.

35. Mr. Dunne provided an affidavit of his pensions manager indicating that he could not draw down the pension until age 70 and because it was uncrystallised. On the Official Assignee's application I adjourned the matter for a further 2 weeks to allow this to be considered.

Listing of 15th March, 2021

36. In the meantime Mr. Ryan did provide Mr. Dunne with a link to documents relevant to the pension issue although there was some argument as to problems in accessing it. I adjourned the matter for a week to allow Mr. Dunne to access the documents and to allow Mr. Dunne to exhibit papers regarding the US bankruptcy which he said were relevant to the third-party discovery application.

Listing of 22nd March, 2021

37. When the matter resumed, Mr. Dunne had filed an affidavit setting out some matters currently before the US courts as well as delivering a further written submission. The matter was then adjourned to 25th March, 2021.

Listing of 25th March, 2021

38. When the matter resumed, the parties had delivered further materials for the court's consideration. An issue arose as to whether and to what extent the matter should remain *in camera.* As there is a clear overlap between the proceedings and the earlier family law proceedings, which as noted above have involved two divorces and which have been referred to by both sides, it was appropriate in all the circumstances to continue the order that the hearing of the motion to vary be *in camera* pursuant to s. 134 of the 1988 Act, insofar as it touches on the family law matter.

39. However, the parties agreed that the matter should not remain *in camera* insofar as it did not deal with the family law issues and also insofar as relates to this judgment subject to not identifying the specific family law judgments already delivered (as to do so would obviously undermine the redaction in those judgments). But there is no pressing need for the applicant's name to be redacted from the present judgment; nor is there a need for hypothetical future applications not relevant to the family law matters to be *in camera.*

40. Mr. Dunne also argued that the Official Assignee wasn't acting independently in that there was allegedly some undisclosed funding arrangement with the creditors, and he asked for some disclosure of additional information. I didn't consider that this was something that properly arose procedurally or that it was something the determination of which was necessary for disposal of the present motions.

Listing of 19th April, 2021

41. Mr. Dunne then sought a further week to prepare a summary of his accounts due to recent personal unavailability of his accountant, which was not opposed.

Listing of 26th April, 2021

42. Following a further and final opportunity to provide an affidavit, the matter was listed on 26th April, 2021 at which point Mr. Dunne produced an affidavit breaking down €269,536.61 of expenditure for the period 1st November 2018 to 4th December, 2020 (the Official Assignee's figures were somewhat less, but for a period ending in October, 2020). This showed a net figure of €34,292.22 for personal expenditure, the balance being for the children or for the costs and expenses of dealing with the bankruptcy itself.

43. With that somewhat more complex than normal procedural history outlined, I now turn to the various issues that fell for consideration.

The application to strike out certain paragraphs of the bankrupt's affidavit

44. Order 40, r. 4 RSC precludes inappropriate hearsay or argumentative averments in an affidavit (although hearsay is admissible in interlocutory application, with means of knowledge stated). Order 40, r. 12 RSC allows the court to strike out a matter that is scandalous. There is also an inherent jurisdiction to strike out a matter that is irrelevant: see *e.g. per* Charlton J. in *Condron v. ACC Bank* [2012] IEHC 395, [2013] 1 I.L.R.M. 113, *per* Laffoy J. in *Dublin City Council v. Marble and Granite Tiles Ltd.* [2009] IEHC 455 (Unreported, High Court, 16th October, 2009).

45. The essence of the impugned averments related to complaints about previous judges that dealt with Mr. Dunne's matters. However, I do not think that those complaints are relevant to the matter that the court has to deal with now. If an irregularity in some proceeding is alleged, that is a matter to be raised in that other application (either by an application to re-open the matter where the law so permits, an appeal if the law so permits, or, if one might say so, a recourse to Strasbourg if it does not). The fact that there is a further application in the same or related proceedings does not create an open-season jurisdiction vested in a first-instance judge dealing with the subsequent application to revisit any or all previous orders made by earlier courts including appellate courts. That being said, there is a jurisdiction to revisit most orders in bankruptcy (which is invoked in the present application), but that doesn't depend on showing some irregularity in the previous application, rather on there being a case on the merits to come to a different conclusion. Accordingly, I ordered that the impugned averments be struck out on the grounds that they are not relevant.

Whether third-party discovery should be granted

46. The papers Mr. Dunne was looking for by way of third-party discovery were not specified in the motion but, as developed in oral submissions, were primarily as follows:

    (i) all documents held on Mr. Dunne's behalf during the period for which Mr. Ryan acted for him between 2010 and early 2013;

    (ii) all documents between 2013 to 2019 evidencing Mr. Dunne's entitlements or potential entitlements under his pension, Mr. Ryan being a trustee during that period; and

(iii) all documents relating directly or indirectly to the assets held beneficially in favour of his minor children or any of them from 2011 to date.

47. Mr. Dunne had written some letters in advance seeking documents without reply, albeit not headed under O. 31, r. 29 RSC (no point was being taken on that), on various dates including 14th June 2019, 13th July, 2019, 8th October, 2019 and 13th October, 2020. Mr. Dunne said he was being "blanked" and that Mr. Ryan had "reneged" on an agreement to provide necessary documents.

48. Order 31, r. 29 provides as follows: "Any person not a party to the cause or matter before the Court who appears to the Court to be likely to have or to have had in his possession custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter or is or is likely to be in a position to give evidence relevant to any such issue may by leave of the Court upon the application of any party to the said cause or matter be directed by order of the Court to answer such interrogatories or to make discovery of such documents or to permit inspection of such documents. The provisions of this Order shall apply mutatis mutandis as if the said order of the Court had been directed to a party to the said cause or matter provided always that the party seeking such order shall indemnify such person in respect of all costs thereby reasonably incurred by such person and such costs borne by the said party shall be deemed to be costs of that party for the purposes of Order 99."

49. Mr. Ryan's counsel submitted that the application should be refused on numerous grounds specifically a lack of jurisdiction; that the documents aren't necessary for the variation motion; and that Mr. Dunne hasn't said that he can't get them elsewhere or through the Official Assignee in particular.

50. Following some argument, some pensions documents (under category (ii) referred to above) were produced by way of link. It was accepted that these were previously given to Mr. Dunne in 2019 by way of link, but the link expired before he endeavoured to access them on that occasion.

51. Mr. Dunne argued that he needed further information for:

(i). his appeal to the Court of Appeal regarding the duration of the bankruptcy;

(ii). the contempt motion that is currently adjourned generally;

(iii). a possible motion to revisit the duration of the bankruptcy;

(iv). the present motion regarding the BPO;

(v). the UK proceedings; or

(vi). the US proceedings regarding Yesreb funds.

52. Somewhat unnervingly given the amount of time that had to be devoted to it, he said the variation of the BPO was a "minor" aspect of the issues.

53. As far as the Irish matters are concerned, I don't think that, leaving aside the pension documents which have now been provided, the materials sought are relevant or necessary for anything that is currently live. If some future matter arises that makes such documents relevant or necessary then that can be reconsidered. It may be that some of the documents could be obtained under GDPR either on behalf of Mr. Dunne or his minor children, but that is a separate procedure.

54. As far as the foreign matters are concerned, I don't think that a stand-alone motion for third-party discovery is the correct procedure. The way to get documents relevant to a foreign proceeding is either to apply in that proceeding in a foreign court or alternatively to bring an originating application under some procedure for international cooperation regarding the taking of evidence. I suppose for completeness I might add that if there is no such procedure then there might be a potential public law challenge to the lack of a procedure on constitutional or ECHR grounds; but we haven't got to that point or anywhere near it.

Date on which the application to vary the BPO is operative

55. Turning then to the application to vary or set aside the BPO, while one might be inclined to start from the presumption that any motion to vary an existing order would backdate to when it is filed, the court has jurisdiction under s. 135 of the 1988 Act to backdate a variation to the date the order is originally made, and that seems to be the appropriate approach here.

Whether the application to vary the BPO should be granted

56. The bankrupt initially confronted three difficulties in the application to vary or discharge the BPO:

    (i). the question of whether he had disclosed all of his financial affairs; fortunately it was ultimately accepted by counsel for the Official Assignee that disclosure of his means has now occurred;

    (ii). the question of whether he had demonstrated that he cannot access the pension in terms of drawing down an income, and in that regard there are two basic questions: whether the pension should be considered as a source of income in principle, and, if so, whether on the evidence before me it should be accepted as a current source of income for the purposes of s. 85D; and

    (iii). the fact that he is clearly receiving a significant amount of money, mainly from his former wife, which he says is primarily for the four children of the marriage.

Pension-related means - inclusion in principle

57. Without doing undue violence to Mr. Dunne's objection in principle to considering the pension as an asset, it seemed to be predicated on three broad arguments:

    (i). having regard to the pension was precluded by US law;

(ii). having regard to the pension was precluded by UK law; and

(iii). he can't access it anyway at the moment so it is to be disregarded for Irish law purposes.

58. I will deal with the first two points as objections in principle to considering the pension. The third point is more an objection dependent on the evidence, which I will address later in this judgment.

59. The pension existed in at least two incarnations in Ireland, and latterly under a trust deed dated 11th April, 2014 which said that the scheme which was replaced by that deed was to provide relevant benefits for certain employees of a company called Amrakbo, which Mr. Dunne says is his former wife's company.

60. The pension was then transferred to the UK and a new pension was set up, referred to as the Hartley Pension.

61. On the US law point, Mr. Dunne says that the US trustee has excluded his pension from the US bankruptcy. That may well be so, but if there can be a simultaneous Irish bankruptcy (which has already been decided long before the present motions came before me), what happens in the US is not automatically determinative for the purposes of Irish law. The fact that the bankrupt has also been subject to bankruptcy proceedings in another jurisdiction prior to the Irish adjudication does not prevent the court from dealing with the assets in accordance with Irish legislation in the absence of an appearance before the court by the foreign trustee in bankruptcy: see *A.A. v. B.A*. [2015] IESC 102, [2017] 3 I.R. 498. Having said that, of course the court would not wish to create a situation of conflict with another jurisdiction, but in the particular circumstances here, the making of orders directed to the pension does not seem to create a difficulty for the US trustee in bankruptcy.

62. On the UK law point, reliance was placed on *Horton v. Henry* [2016] EWCA Civ 989 to the effect that an entitlement to draw down a pension as opposed to actually drawing it down doesn't constitute income for purposes of the English equivalent of a BPO. That may be so, but such an entitlement *does* constitute income under Irish law. While the pension as an asset is not automatically vested in the Official Assignee under s. 44A of the 1988 Act, income or potential income under a pension can be the subject of a BPO: see *Lehane v. Coady* [2017] IEHC 653 (Unreported, High Court, Costello J., 25th October, 2017).

63. Consequently, I must reject the submission that the pension is excluded in principle from consideration as part of Mr. Dunne's means. If the evidence shows that any given bankrupt has a right to draw down a pension, then that constitutes income for BPO purposes.

Pension-related means - inclusion on the specific evidence here

64. We now turn to the purely evidential and fact-specific question as to whether Mr. Dunne has a current right to draw down the pension.

65. Mr. Dunne produced a letter from O'Mahony Actuarial dated 12th March, 2013 indicating that the normal pension age for the former Amrakbo pension was 70.

66. A letter from Denis McHugh of Hartley Pensions, who administer the current pension, dated 3rd February, 2021, was exhibited, although it was not altogether clear, in that it states that Mr. Dunne is only entitled to pension income once his fund has crystallised and that there is currently no entitlement; but it also says that he has a right to elect to have benefits at the normal or even at an early retirement age. A reference to the drawdown age of 70 was not spelled out in that letter.

67. However, Mr. McHugh then swore a formal affidavit on 8th March, 2021, setting out these matters and positively averring that Mr. Dunne does not have a right of drawdown until age 70 or crystallisation neither of which have happened.

68. Given such direct evidence by the manager of the pension scheme itself, a court would normally accept their position unless it was properly challenged. Such an averment would provide a basis to conclude that there is no notional income from a draw down right that should be included in the calculation for BPO purposes.

69. The Official Assignee has only indirectly challenged that evidence by exhibiting a number of documents:

    (i). the Hartley scheme itself is exhibited, Amrakbo is not a party, and the scheme draw-down age is stated to be 55 (para. 9.1);

    (ii). it is stated that the Amrakbo scheme has been wound up and the assets transferred; in effect this is to a different type of pension – it is submitted that the Amrakbo scheme was an occupational pension, but the Hartley scheme is an Self Invested Personal Pension Scheme; and

    (iii). a letter from Blick Rothenberg Ltd. is exhibited indicating that draw down was possible from age 55.

70. There are two problems with the Official Assignee's response. Firstly, for some reason not apparent to me, Blick Rothenberg weren't shown and didn't refer to Mr. McHugh's affidavit. Secondly and more importantly, Mr. McHugh's affidavit is not hearsay whereas the letter exhibited by the Official Assignee's is (for clarification, I am not saying that this makes it inadmissible in principle, but rather that it is of significantly lesser evidential status). Mr. Dunne expressly raises an objection that this letter is hearsay in his affidavit of 23rd April, 2021 at para. 2. The question then arises as to whether hearsay material has properly joined issue such as to put the onus back on to Mr. Dunne. I think the answer to that has to be "No". The main reason is that if I were to hold that issue had been fully joined, the next step for Mr. Dunne to advance his point would be to seek cross-examination on the affidavits, but cross-examination on an affidavit that exhibits the view of an expert adviser wouldn't get us very far - not much further than something along the lines of "I suggest that that advice is mistaken"/"That's the advice we got". So

I am going to have to hold that because the non-hearsay evidence favours his contention that he doesn't have a current entitlement to draw down the pension, and because this hasn't been challenged by evidence of equal evidential weight so as to put the onus back on him, I think he has established on the balance of the evidence for present purposes that the pension should be excluded from the calculation of his means for BPO purposes.

Non-pension means - inclusion in principle

71. Moving then to Mr. Dunne's non-pension means, again there are issues of general principle and issues on the particular evidence here. I'll start with the issues of principle.

72. While it's accepted that Mr. Dunne had access to some funds from his ex-wife and brother, he says that these funds aren't taxable income. He also says that all property is vested in the US trustee anyway.

73. On the first objection, the fact that spousal maintenance is not taxable doesn't mean it must be disregarded for the purposes of a BPO, assuming that it is for maintenance of the bankrupt as distinct from maintenance of children which raises a separate question.

74. As regards the claim that recovery is precluded by the US bankruptcy, I might have given more mileage to that argument in the absence of any authority, but the caselaw supports the notion that the Irish courts should apply Irish legislation despite foreign proceedings unless there is at least something to indicate that difficulty is thereby caused to the foreign court or its officers.

75. We now return to the more substantial issue of principle here which is whether monies received by a bankrupt for the benefit of his or her children are "income" for the purposes of s. 85D.

76. Section 85D(4) states: "In making an order under subsection (1) the Court shall have regard to the reasonable living expenses of the bankrupt and his or her dependants and the Court may also have regard to any guidelines on reasonable living expenses issued by the Insolvency Service under the Personal Insolvency Act 2012 or by the Official Assignee."

77. The guidelines issued by the ISI are dated August 2020 and are exhibited at JF6 to Ms Fay's affidavit of 3rd December, 2020. In particular, the Official Assignee majors on the fact that the Personal Insolvency Act 2012 (Prescribed Financial Statement) Regulations 2014 (S.I. No. 259 of 2014) refer to "child or" spousal maintenance as included in the list of income for which the debtor has to account. That, however, is readily explained - it is so that the debtor doesn't get credit for expenses for the benefit of the children without account being taken of income for the children as well. It is absolutely not an implication that the income for the children is to be treated as income of the debtor. If it had that meaning, it would not come within the terms of the enabling statute, s. 136 of the Personal Insolvency Act 2012 which relates to the income or assets of "such persons" being persons making applications under the Act. That doesn't include treating the income of their children as being the income of the persons applying.

78. The 2014 regulations, in any event, don't (and can't) change the requirement in s. 85D(1) that it is *the bankrupt's* income we are talking about, not that of his or her children.

79. Section 85D(1) provides as follows: "The Court may, on application being made to it by the Official Assignee or the trustee in bankruptcy, make an order requiring a bankrupt to make payments to the Official Assignee or the trustee in bankruptcy from his income or other assets for the benefit of his creditors (a 'bankruptcy payment order')."

80. What's crucial is that the payments are "from his income or other assets" - not from the income or assets of his or her dependants, or income and assets given to him or in trust for children for example. Thus, monies given to a bankrupt for the benefit of his or her children do not constitute income or assets of the bankrupt for the purposes of s. 85D.

Non-pension means - inclusion on the specific evidence here

81. On the basis of my conclusion on the balance of the evidence that the pension is not available to Mr. Dunne, and having regard to the acceptance by the Official Assignee that enough information and disclosure has been provided to enable an estimate of his means, I have considered the analysis of his financial information as provided by the Official Assignee, in particular as set out in the Affidavit of Jennifer Fay of 26th February, 2021.

82. On that basis, the Official Assignee has categorised his incoming monies during the period December 2018 to October 2020 inclusive (23 months) as STG £225,027.93 which should give a monthly average income of €11,251.40. Allowing for prescribed outgoings as a sole carer of children of €2,373.74 per month that leaves an excess of €8,877.66 per month which is in excess of the amount of the existing BPO. On that basis the Official Assignee asks for the motion to vary to be dismissed.

83. The fatal flaw in these calculations is that the Official Assignee has not engaged with the accounts on the basis of accepting the relevance of a distinction between monies provided for the children and monies for Mr. Dunne himself. By contrast, Mr. Dunne has put in detailed figures, which weren't contested on the merits other than as to the legal points which I have dealt with above, indicating a net personal income of €34,292.22 for a period of 25 months which equates to €1,371.69 per month. I don't think that such an income level on these facts warrants being the subject of a BPO. That is for four main reasons:

    (i). the Official Assignee didn't in fact suggest that such an income level would warrant a BPO;

    (ii). indeed this is so far below the monthly amount of €2,373.74 that the Official Assignee was prepared to recognise as permissible, even factoring in that that amount itself included provision for children, that a BPO would be unfair in the circumstances;

    (iii). significant payments for the children impose some obligation on their custodial parent to accompany them and participate in activities thus funded, thereby imposing a requirement for a somewhat more elevated level of personal

expenditure than might apply to a person living on their own (for example, having to accompany children when the latter are travelling);

(iv). finally, the application for the BPO involves significant costs, which aren't really warranted given the modest sums of net income we are talking about here (despite the very high gross figure – but appearances can be deceptive).

84. Accordingly the appropriate order is simply to set aside the BPO in full from the date of its making.

Order

85. For the reasons set out above, the order will be as follows:

(i). the motion for third party discovery is dismissed, without prejudice to the applicant seeking any such discovery in future in any application to which that information is relevant and necessary;

(ii). under ss. 85D(5) and 135 of the 1988 Act I will set aside the BPO in full with effect from the date of its making;

(iii). it follows that the order under the court's inherent jurisdiction enjoining dealing with the pension should be discharged;

(iv). it also follows that the contempt motion should be formally dismissed; and

(v). it is confirmed that the *in camera* order will not apply to the present judgment and will only apply to past, present and future pleadings, affidavits and proceedings insofar as they reference the family law proceedings.