THE HIGH COURT

BANKRUPTCY

[2024] IEHC 685

Bankruptcy No. 2478

IN THE MATTER OF SEAN DUNNE A BANKRUPT

BETWEEN

SEAN DUNNE (A BANKRUPT)

APPLICANT

AND

MICHAEL IAN LARKIN OFFICIAL ASSIGNEE

AND

CHRISTOPHER LEHANE FORMER OFFICIAL ASSIGNEE

AND

CLARK HILL SOLICITORS FOR THE OFFICE OF THE OFFICIAL ASSIGNEE

RESPONDENTS

JUDGMENT of Mr Justice Liam Kennedy delivered 3rd December 2024.

Introduction

1. In a series of motions, the Applicant seeks to probe and challenge the validity of the First and Second Respondent's respective appointments as Official Assignee in Bankruptcy. Notwithstanding the inflammatory language employed (describing them as "imposters") and the fact that his affidavits and submissions are not always clear as to the basis for his

allegations, the gist of his claim appears to be his assertion that the appointments were not validly effected, because, he says, such appointments were not duly made by the Minister for Justice ("the Minister") and because they were not evidenced by a formal warrant of appointment. The Applicant's position in this regard appears to be premised on differences in the procedures and documentation employed as between the appointments of the First and Second Respondents (and also as compared to the procedure employed on the appointment of their predecessor). The Applicant also appears to assert, on grounds that have not been fully articulated, that the procedures used, or legislation relied upon to effect such appointments were unconstitutional. The Respondents reject the Applicant's allegations on both factual and legal grounds, apparently contending that the appointments were duly effected and also that the necessary procedures changed over the years. The issue as to the requirements in respect of the appointment of the Official Assignee in Bankruptcy was touched upon in one High Court judgment (as appears at para. 49 below) but it does not appear to have been the subject of a binding judicial determination.

2. This judgment deals with the Respondents' application to strike out six motions issued by the Applicant and my earlier decision to reject a seventh, which called on me to recuse myself from dealing the matter. For the reasons set out below, I consider that the six motions must also be dismissed. The route which the Applicant has sought to pursue is procedurally flawed and contrary to the Rules of the Superior Courts. If the Applicant wishes to challenge the First and Second Respondents' respective appointments as Official Assignee, he should institute appropriate proceedings to that end, joining all relevant and necessary parties (and only those parties) and setting out the facts and matters relied upon as entitling him to the reliefs sought. He cannot proceed by way of motion in the proceedings concerning the administration of his personal bankruptcy estate.

The Seven Applications

3. The details of the Applicant's seven (plus) motions are as follows:

a. His original 26 July 2024 Motion, to which the others relate ("the Original Motion") seeks orders requiring the disclosure of the First and Second Respondents' *"appointment documents pursuant to statute and the Constitution"* and declarations that they were not validly appointed as Official Assignee in his bankruptcy. The solicitors representing the office of the Official Assignee have also been named as respondents to the matter.

b. His second and third motions both issued on 27 August 2024: In the second motion ("the Children's Motion") he applies as next friend, seeking to join his three minor children's as co-applicants; the third motion ("the Further Disclosure Motion") seeks orders directing: (i) access to the court/bankruptcy file in *Lehane v. Wymes* [2021] IEHC 427 (*"Wymes"*) relating to another bankrupt who queried the validity of the appointment of the Official Assignee; (ii) the production of a redacted copy of the First Respondent's contract of employment as Official Assignee; (iii) proof as to when certain documents allegedly evidencing the First and Second Respondents' respective appointments were generated.

c. The fourth and fifth motions, both issued on 4 October 2024, seek to compel; (i) the First Respondent's attendance for cross-examination ("the Cross-Examination Motion") (ii) Mr McNaughton to produce his appointment documents as sole Director of Insolvency Service of Ireland (and a declaration that he was not validly appointed in compliance with the applicable statutory appointment procedure ("the ISI Motion").

d. His sixth, 18 October 2024, motion seeks: (i) to join the Minister for Justice as a party to the Original Motion; (ii) to compel the Minister for Justice to produce

documents relating to the Respondents' purported appointments; (iii) a declaration that the Minister has breached her statutory and constitutional duties in failing to properly appoint the Respondents to the Office of Official Assignee;

e. His seventh, 23 October 2024, Notice of Motion sought an order that I recuse myself from the proceedings.

f. In addition, the Applicant has issued/intimated an intention to issue a further application seeking to join the Attorney General to the Original Motion/proceedings.

History of the Bankruptcy Proceedings

4. The Applicant was adjudicated a bankrupt in Ireland by the High Court on 29 July 2013 on foot of a creditor's petition issued in February 2013. In the meantime, the Applicant had himself filed for bankruptcy in the United States on 29 March 2013 (after the filing of the Irish petition but before its hearing). The Applicant's challenges to the Irish adjudication were dismissed by the Irish Supreme Court.

5. The High Court extended the Irish bankruptcy on 2 October 2018 for fourteen years and nine months due to the Applicant's non-cooperation. This was virtually the maximum possible extension (save for a modest deduction to take account of the Applicant's advanced years). The Respondents say that the imposition of the longest extension in the State's history reflected the Applicant's obstructive behaviour. He is due to be discharged on 29 April 2028.

6. The Applicant's bankruptcy proceedings were evidently vigorously litigated between 2013 and 2018. The order extending the bankruptcy illustrates the complexity of that litigation. It appears from the order that the motion was before the Court on circa 29 occasions between 20 June 2016 and April 2018, including being at hearing on 10 -13, 17 – 18, 25 and 27 April 2018, that circa 17 affidavits were filed; circa 7 notices for cross-examination were served. However, there is no suggestion that the Applicant previously raised the issue which underpins

the current motions - issued 11 years after adjudication - namely, the validity of the First and Second Respondents' appointments as Official Assignee.

7. In any event, these applications do not directly concern the Applicant's order for adjudication or the extension of his bankruptcy period. Nor do they directly concern the administration of his estate. As a matter of law, the estate vested in the Official Assignee on his adjudication in 2013 pursuant to s.44 of the Bankruptcy Act 1988.

The Correspondence Prior to the Motions

8. The Second Respondent wrote to the Applicant on 31 July 2013 noting that he had been adjudicated bankrupt by order of the High Court on 29 July 2013. The letter:

a. stated that

"under the Bankruptcy Act [1988] I am, by virtue of the Order, appointed Official Assignee of your estate. You are under a duty to fully cooperate with me in the administration of your estate which includes providing me with full contact details (i.e., address phone numbers and email address)."

b. asked the Applicant to complete a statement of affairs and statement of personal information and enclosed copies of the adjudication order and warrant of seizure.

c. enclosed an information booklet on bankruptcy and the Official Assignee and drew the Applicant's attention to s.19 of the Bankruptcy Act 1988

"which sets out your duties to the Official Assignee commencing on adjudication".

9. There is no suggestion that the Applicant queried the Second Respondent's appointment in 2013 - or, indeed, at any time over the decade the followed, including during the extension proceedings. However, on 3 July 2024 the Applicant emailed the First Respondent referencing an affidavit sworn by the latter **three years earlier**, on 6 October 2021 referencing his appointment as Official Assignee and requesting a copy of

"the Court Order appointing Mr Larkin to the role of Official Assignee in my bankruptcy estate by close of business, Friday, 5 July 2024".

10. The Applicant's email on 5 July 2024 referenced his earlier message and made a corresponding request in respect of the Second Respondent.

11. By a further letter dated 11 July 2024, the Applicant:

a. referenced his email of 3& 5 July 2024 and requested documentary evidence of the Respondents' appointments as Official Assignee *"as required under Irish statutory provisions"*.

b. criticised the Second Respondent's participation in a settlement involving funds which the Applicant had placed on trust for his children, alleging that such funds were transferred illegally to the Connecticut Bankruptcy Trustee and that the First Respondent had *"gifted himself €1.6m"* to settle a personal claim taken against him.

c. stated that the Applicant was putting the Official Assignee's solicitors

"formally on proof to exhibit now that Mr Lehane acted within his office's powers when he executed this unlawful agreement".

d. concluded that:

"I request an official response from you by close of business Tuesday 16 July 2024. If you do not respond I will take your silence as formal confirmation that no such statutory appointments exist".

12. The First Respondent's solicitors responded by letter dated 16 July 2024: (a) noting that the Applicant had not identified any specific statutory provision on which he based his assertions; (b) stating that his request for the court order/documentary evidence appointing the Respondents to the Applicant's bankruptcy estate were misconceived as no such order was required under the Bankruptcy Act 1988 (as amended); (c) Drawing the Applicant's attention to decisions of the Irish courts confirming that, on the retirement of the Official Assignee, all bankrupt estates vest in his successor.

13. The Applicant replied by email dated 17 July 2024 citing the Court Officer Act 1926, s.3 and the Courts Services Act 1998, s.29 and Schedule 2, insisting that the Respondents had failed to provide documentary evidence of valid appointments and requesting copies of letters

of appointment for both individuals showing when they were appointed and by whom. He asserted that, by the terms of his previous letter, the solicitor's response constituted a formal admission that no valid appointments exist and that the Bankruptcy Act 1988 has no relevance to the Official Assignee and concluded that if no letters of appointment existed:

> *"you as solicitors to a state body have a duty to me and the citizens of Ireland to say so and stop the equivocation and not be a party to a cover up and conspiracy.*
> *Should you continue to evade the answer and ignore my request, I will take action as necessary without further reference to you and exhibit the correspondence".*

14. The Applicant also wrote to Mr McNaughton, the Director of Insolvency Service of Ireland on 23 July 2024 on similar lines, requesting the latter, as the Official Assignee's superior, to provide the documentation by the following day, 24 July 2024.

The Affidavits

15. The original application was launched on the basis of the foregoing correspondence. The grounding affidavit:

a. referred to the correspondence and to legislation, asserting that

   "I cannot find and solicitors Clark Hill cannot provide proof of any other legislation governing the appointment of the Official Assignee under the Bankruptcy Act 1988 as amended. Clark Hill have failed to produce either of the appointments despite numerous requests and deadlines as set out below. I have been forced to bring this application because Clark Hill as solicitors to the Offices of the Official Assignee have failed to produce the official letters of appointment as set out under Statute and the Constitution."

b. invoked Articles 6, 37 and 40.3 of the Constitution *"which regulate and control the exercise of power over citizens by state officials"* and said that both Respondents had been swearing affidavits for years claiming that they were legally appointed as Official Assignees in his bankruptcy but had never provided any detail regarding the appointments or evidenced them.

c. stated that their solicitors had failed to provide the required documentation having been called upon to do so on 3 July 2024.

d. After summarising his understanding of the appropriate processes and legal principles, concluded that

> *"either (i) no valid appointment documentation exists as required by the Constitution, or (ii) the appointment documentation is fatally flawed and [the First Respondent] is not validly appointed as Official Assignee under the relevant statute as an officer of the Court nor, was [the Second Respondent] ever properly appointed".*

e. asserts that the issue has serious consequences for his bankruptcy and his rights given that the First Respondent currently purports to manage the bankruptcy estate without the powers granted to him under statutory appointment under the Constitution and in circumstances in which the Second Respondent as Official Assignee objected to his discharge from bankruptcy which was extended by the High Court until 2028, without

> *"legal powers under statute in line with the Constitution to make such an application extending my bankruptcy".*

16. The First Respondent's replying affidavit sworn 7 August 2024:

a. noted that the Applicant initially requested a copy of the *'Court Order'* appointing the Official Assignee to his bankruptcy estate but no such order exists as there has never been any requirement for such an order appointing the Official Assignee to individual bankruptcy estates. A bankrupt's estate automatically vests in the Official Assignee on adjudication pursuant to s.44 of the Bankruptcy Act, 1988.

b. observed that the Applicant's 17 July 2024 email was different, asserting for the first time that the First and Second Respondents were never appointed as Official Assignee in bankruptcy.

c. Stated that the Applicant had made baseless assertions against the Official Assignees or their solicitors and were erroneous in concluding that no valid appointment documentation existed or that the appointments were flawed and that his averments demonstrated a fundamental misunderstanding as to the appointment process and the legislative provisions.

d. explained the different processes and legislation which applied to the First and Second Respondents' respective appointments (the legislation having been amended between the two appointments), exhibiting documentation.

17. A supplemental affidavit sworn by the First Respondent 15 August 2024 explained why the Second Respondent's appointment had been advertised in *Iris Oifigúil* but there was no such advertising for the First Respondent's appointment.

18. On 19 August 2024, the Applicant swore a 36-page affidavit. A great deal of the affidavit is repetitive and it contained matters which were more properly matters of legal submission. It:

a. asserted that the Respondents had failed to provide the answer to a simple question raised on 3 July 2024, that the Respondents had failed to meet the burden of proof regarding the appointments, their solicitors had *"decided to stay silent"*.

b. Advanced lengthy assertions as to the legislative changes and their legal effect or validity and the documentation exhibited, asserting that

> *"it is now proven the required appointment documentation pursuant to statute and the Constitution does not exist."*

c. asserted that both statutory regimes under which the First and Second Respondents operated were unconstitutional. The basis for this claim is not clear.

d. refers at length, but selectively, to the decision of Mr. Justice Humphreys in *Wymes*.

e. complains that the First Respondent has not exhibited a redacted version of his employment contract.

f. accuses the Respondents of putting forward contradictory propositions as to the circumstances of their respective appointments.

g. makes highly contentious allegations against the Official Assignee, their solicitors, criticises their senior counsel and the Examiner of the High Court with whom the Applicant has also been engaged in correspondence (in respect of issues which appear unrelated to the appointments issue). Most of these allegations against various public servants or professionals are of no obvious relevance to the motions and seem to reflect the Applicant's angst at his original bankruptcy adjudication and its extension and his loss of control of his estate as a result of his personal insolvency.

h. accuses the First Respondent of being an imposter as Official Assignee and of seeking to delay matters.

i. seeks to revisit previous bankruptcy rulings. In particular, it criticises the exercise of the Official Assignee's powers and the conduct of the application to extend his bankruptcy by the then Official Assignee and the then bankruptcy judge.

j. describes the First Respondent as the

> *"self-appointed head of a rogue operation, carrying on as law onto himself within the Four Courts, accountable to no-one with no oversight".*

k. claims that

> *"it is vital to immediately rectify this anomaly at the earliest juncture and alter the statutes as required to ensure constitutionality. Indeed the respondents claim that I as a bankrupt have no locus standi to even ask if the Official Assignee is validly appointed to the office, and hence 'my bankruptcy estate', is a claim that the High Court has no jurisdiction to hear the matter without the Official Assignee's permission".* (para. 45)

l. exhibits correspondence to the Attorney General dated 15 August 2024 putting him on notice of the issue as to the appointments.

19. The First Respondent's two-page response sworn on 2 September 2024 deals with his ability to depose on behalf of all three respondents.

20. The Applicant's third affidavit ran to 18 pages and was sworn on 17 October 2024. It:

a. again recites the legislation which the Applicant relies upon, debating the impact of amending legislation on the basis of Oireachtas transcripts which are not generally legally admissible as an aid to interpretation.

b. in para. 3 describes the Respondents' appointments as being pursuant to a *"constitutionally flawed procedure".*

c. Continues to dispute the validity of the First Respondent's appointment based on the documents and averments advanced by the latter. The Applicant claims that only the Minister can appoint the Official Assignee under the Constitution and asserts that the necessary procedure was not followed.

d. asserts that

> *"similar to a High Court judge, the Official Assignee does require a warrant of appointment to prove his office to bankrupts and third parties when questioned as to how he exercises his rights in relation to bankrupt property in his own name."* (para. 18).

21. The third affidavit of Sean Dunne sworn 27 August 2024

a. explains the rationale of the joinder of his children by reference to the Respondent's asserting that he lacked standing.

b. identifies his minor children as Harrison, Ryan Emmet and Thomas Joseph "rising" 18, 15 and 11 respectively, saying that they reside with/depend upon him.

c. Asserts that the children continued to be gravely affected by the Applicant's bankruptcy status and the powers exercised over him as a bankrupt, including searching their home and attempting to imprison him:

> *"My role as caregiver has been impacted by my economic status and their knowledge that Lehane/Larkin are in a position to exercise vast powers over me*

at a moment's notice. The joining of my minor children is necessary as the respondents have threatened to strike out my motion by email of 9 August, 2024 on grounds of locus standi. They regularly ask me "Dad when are you going to be out of bankruptcy" (para. 7).

d. summarises his children's rights to join the motion, including alleging that there are

"serious Constitutional issues involved in [the] Motion. Not least of which [are that his] children need to be party in order to protect their many constitutional rights as Irish citizens but in particular their right to a peaceful family life and their father is in a position to care for them to the best of his ability both equally economically and emotionally"

e. refers to a loan due to repayment by a trust for his children and an injunction in respect of his former wife which

"gravely impacts and affects the economic rights of *[his] children".*

f. asserts that

"the courts since 2008 have 'made up a law' that when it came to my family law case in the bankruptcy court. My children deserve the right to know the law is applied equally to all citizens and is not applied in an illegal manner when the name 'Sean Dunne' appears" (para. 10).

22. The First Respondent's 2 September, 2024 affidavit:

a. refutes the Applicant's claims which he characterised as

"argumentative and charged with invective and hyperbole. Moreover, the purpose of a number of averments is either unclear or entirely unfounded. However, it is incumbent upon me to note that the arbitrary and derogatory criticisms and allegations, including an allegation of fraud, made against me, Christopher Lehane, and/or our legal teams, by the bankrupt, are scandalous and refuted in their entirety".

b. Argued that the application on behalf of the children was spurious, frivolous and vexatious and there was no evidence that their mother, the Applicant's ex-wife, supports it.

c. notes that the Courts Service would be the appropriate respondent for the application for discovery of the *Wymes* file but also that: (i) the Applicant had not stipulated what rules he relies upon as entitling him to such access; (ii) the file would be irrelevant to the validity of the Respondent's appointments and (iii) there may be public policy considerations in granting an individual access to a court file when they are not a party to the proceedings (para. 20).

23. By email dated 9 August 2024 the Official Assignees informed the Applicant that

"in circumstances where you are acting as a lay litigant with the assistance of a McKenzie friend, we wish to draw your attention in advance of the hearing of your motion dated 26 July 2024 ('the motion'), to the below preliminary points we will be raising to the court.

1. *You do not specify, and we are not aware of, any statutory provision under the Bankruptcy Act 1988, as amended that permits your bringing the motion.*
2. *At reliefs 3 and 4 of the Motion, you seek declaratory reliefs. In circumstances where you are adjudicated a bankrupt by Order of the High Court dated 29 July 2013, eleven years ago, the time for seeking such reliefs is well expired.*
3. *The declaratory reliefs which you seek concerning the appointments of [the Respondents] to the position of Official Assignee. It will be our submission that, without prejudice to 1. and 2. above, seeking such reliefs by way of notice of motion is not permissible in law and all off the relevant parties should be respondents to the appropriately constituted proceedings in order for the matter to be dealt with by the Court."*

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24. The Applicant's fourth affidavit was sworn on 27 August 2024 in support of the application for disclosure of the *Wymes* file and documents relating to the Respondents' employment and appointment. The affidavit takes issue with the documentation exhibited by the Respondents in respect of their respective appointments. It maintains that the Applicant is entitled to insist on the production of the documents sought by way of a notice to inspect.

25. The Respondents take issue with these averments in an affidavit sworn on 2 September 2024 in response to both the second and the third motion.

26. The Applicant's affidavit grounding the application to cross-examine said that cross-examination is necessary by virtue of the Official Assignee's unsubstantiated claims regarding his appointment process, inconsistencies regarding the appointment requirements, inadequate explanation of the statutory framework and the failure to provide adequate documentation. The affidavit also made assertions regarding costs and mismanagement on the part of the office of the Official Assignee which do not appear to be relevant to the current motions.

27. The Applicant's 23-page affidavit dated 17 October 2024 sets out the basis for the application to join the Minister to the motions, essentially rehashing the other motions. Again, there are lengthy but apparently inadmissible citations from Oireachtas debates and assertions concerning statutory powers and concern as to how they have been used. The Applicant asserts that the *"new vital information"* had emerged which meant that it was necessary to join the Minister as a party:

> *"It is incumbent upon the Minister to confirm her official position pursuant to statue and the Constitution and confirm whether she stands over the process of appointment, which rests solely in the power of the Minister for Justice. She cannot delegate and she must (a) now legally come into the proceedings (which she has been unofficially a part of from the outset) and provide evidence; (b) advise of the legal position pursuant to statute and the Constitution; and (c) explain is there an alternative legal framework hidden and unknown to the Oireachtas and the citizens of Ireland under which she is operating."*

Evolution of the Applicant's Case

28. As will be seen from the above, having not raised the issue between 2013 and 2023, the Applicant has sought to probe and dispute the validity of the First and Second Respondents appointments, but the basis on which he seeks to do so has evolved. His initial correspondence argued that the Official Assignee required an order of appointment in respect of the Applicant's

own bankruptcy. When the Respondents drew his attention to s.44 of the 1988 Act, the Applicant's focus changed to arguing that neither the appointments of the First and Second Respondents were valid. The evolution of the Applicant's case is also reflected in the proliferation of his additional "ancillary" motions, advancing further arguments, seeking to add further co-applicants and additional respondents. To paraphrase Lady Bracknell, to need to issue one motion is unfortunate, to require seven demands further explanation.

26 September 2024 Vacation sitting (before me)

29. At a remote hearing on 26 September 2024, the Applicant indicated that he believed I was conflicted and that the matter should be raised with the President of the High Court to endeavour to find a Judge to hear the case who was not conflicted. I told the Applicant I would reflect on his submissions and if I decided to recuse myself I would endeavour to find a judge who was not conflicted to hear the matter. The Applicant further indicated his intention to cross-examine the Official Assignee and that he was going to issue a motion in that regard, which, as noted above, he duly did, issuing the Fourth Motion.

14 October 2024 Remote hearing of the Bankruptcy List

30. When the matter was next before me on 14 October 2024, I informed the parties that the recusal issue should be dealt with on the basis of a formal application. Directions were agreed by the parties and approved by me for the case management of that motion along with the existing motions. I confirmed that; (a) the recusal motion would be the first issue dealt with at the hearing; (b) if I recused myself, then the other motions would need to be adjourned, in which case I would ensure that they would be listed for hearing as soon as possible (before a judge where no such issue was likely to arise); (c) if I did not consider that I should recuse myself then I would deal with the other motions. Counsel for the Respondents noted that they would be raising a preliminary objection which, in their submission, would dispose of the motions and result in a significant saving of Court time. I confirmed that if I retained seisin of

the proceedings I would deal with that point after the recusal issue. Having dealt with the recusal issue on 11 November 2024 (with reasons to follow), I invited submissions as to the Respondents' objection in that regard.

The Respondents' Objection to the Applicants' substantive applications

31. The Respondent's counsel's submissions:

a. focussed on an objection they had been raised in early August, noting that the same issues arose for Mr McNaughton as for Mr Larkin and Mr Lehane, and the structure of the ISI Motion essentially followed the Original Motion. The Applicant was seeking declarations and document production orders without pleading a cause of action. The production orders appeared ancillary to the applications for declarations that the three individuals had not been validly appointed and the Applicant's recusal submissions asserted that either the appointments procedures mandated by the legislation had not been implemented or followed or that those procedures were unconstitutional. However, the motions did not identify a statutory provision or Rule of Court pursuant to which such reliefs were sought. Such reliefs needed to be sought in plenary proceedings in accordance with Order 1 of the Rules of the Superior Courts ("RSC"). Under the Rules, a litigant seeking substantive relief by way of a Notice of Motion must identify a statutory provision or rule of court which entitled them to proceed other than by plenary proceedings. Order 1 RSC expressly stipulates that – with exceptions which are not applicable - civil High Court proceedings must be instituted by plenary summons. That is the default procedure unless, for example, the issue falls within the rubric of either special summons or summary summons provisions (but they do not apply here). The Oireachtas can and does also provide for certain proceedings to be brought by motion in certain

circumstances. Such exceptions are expressly provided for by legislation and rules of court. No such exceptions apply here.

b. There is no procedure enabling a bankrupt to apply by notice of motion in existing bankruptcy proceedings for declaratory relief such as that sought by the Applicant. Section 61(6) of the Bankruptcy Act 1988 (as amended) is inapplicable as it concerns applications by the Official Assignee. However, s.61(7) provides that:

> *"The exercise by the Official Assignee of the powers conferred by this section shall be subject to the control of the Court, and any creditor or other person who in the opinion of the Court has an interest may apply to the Court in relation to the exercise or proposed exercise of those powers."*

c. applications under subsection (7) must relate to the Official Assignee's exercise or proposed exercise of his powers. Section 61(7) allows motions challenging the Official Assignee's actions in the bankruptcy. An interested party can apply for directions, pursuing the summary route allowed for within the bankruptcy regime. It is then a matter for the bankruptcy judge, depending on the complexity of the matter, to determine whether the matter should proceed on affidavit or whether a plenary hearing is required.

d. Subsection (7) is inapplicable to the current applications because they do not concern the Official Assignee's exercise of his powers but rather concern the First and Second Respondents' appointments as Official Assignee and their entitlement to exercise the powers of that office at all. Accordingly, s.61(7) is inapplicable and proceedings should be issued in the normal way.

e. Section 60(1) also allows various parties to apply for directions in relation to the Official Assignee's exercise of his powers and Order 76 rule 168 RSC specifies certain motions which can be brought within bankruptcy

proceedings. However, those provisions do not encompass the current applications which do not concern the Official Assignee's exercise of his powers in the Applicant's extended bankruptcy, but rather whether the legislation has been properly complied with to appoint the Official Assignees at all, or, indeed, whether that legislation is itself constitutional.

f. Mr McNaughton's position was even more removed from the administration of the bankruptcy - he has no functions in relation to the particular bankruptcy estate and is not a party to the bankruptcy.

g. The Applicant's position is contradictory - on the one hand he seeks to rely upon an unidentified bankruptcy provision to seek non-bankruptcy reliefs by notice of motion which do not relate to the exercise of powers in the bankruptcy while at the same time submitting that no bankruptcy judge can hear his case and that they should recuse themselves.

h. the applications were essentially for declaratory relief in relation to compliance or non-compliance with legislation that led to the three appointments, or the constitutionality or otherwise of the associated legislation. Any such challenge must be by plenary proceedings. There is good reason why such proceedings are required. If you are challenging compliance with legislation or the constitutionality of legislation, you must plead your case properly and set out the grounds upon which either the appointments or the legislation are infirm. In other circumstances the proceedings could conceivably have been commenced by judicial review but in that case a detailed Statement of Grounds would still have been required, defining the basis upon which the public law illegality or wrong is alleged.

i. the Applicants' long and repetitive affidavits do not replace a properly

pleaded case. He has identified no provision entitling him to seek declaratory relief by motion within the bankruptcy. In any event, the rules don't allow him to proceed by motion. If the substantive motions fall then the joinder, cross-examination and document production applications must also fall.

32. In response to my enquiries, Counsel for the Respondent:

a. acknowledged the inherent jurisdiction to waive non-compliance with the rules but submitted that any such absolution would need to be on a basis which resulted in the defaulter remedying his default, effectively converting the applications to a proper plenary proceeding. However, the Applicant had been warned from the outset that he was proceeding the wrong way. He insisted on persisting with the wrong procedure and even issued a further motion (against Mr McNaughton) knowing the objection to the procedure.

b. Acknowledged the Applicant's right to challenge the validity of the appointments and to litigate that issue in an appropriate way if he had a basis to do so (and he reserved the his clients' defences, such as, for example, the Rule in *Henderson v Henderson* (1843) Hare 100 etc), but reiterated that he cannot do so by interlocutory motion in the bankruptcy list. Standalone proceedings were required. Subject to the Respondents' entitlements to take the points available to them, the Applicant was entitled to proceed by way of plenary summons or, if appropriate, judicial review, and should have done so from the outset.

33. The Applicant raised an initial point as to whether the Respondents' objection required a formal notice of motion. He suggested that the objection should only be dealt with after the substantive hearing of his motions because only then (once the validity of the Respondents' appointments had been confirmed) would the Court have determined

whether the Respondents had rights of audience. I should not entertain submissions on the Respondents' behalf until they had proven the validity of their appointment and established that the First Respondent is in fact the Official Assignee. His other submissions in response to the Respondents' objection were as follows: (a) Mr Justice Simons accepted the application as constituted, (ex parte) and on 30 July he rejected the Respondent's application to put it back to 14 October on the basis that it was a simple issue and that if the Respondents had the papers they could just produce them; (b) If the Respondents are correct then no bankrupt would ever be able to challenge the validity of the Official Assignee's appointment; (c) The Official Assignee's powers are draconian, and so was the way in which they were exercised in this bankruptcy. The First Respondent was not entitled to exercise those powers since he was not the Official Assignee; (d) The use of a notice of motion for the applications was in keeping with normal practice. Many issues are dealt with by motions for declaratory orders in bankruptcy proceedings including disputes over ownership and constitutional issues were constantly raised in relation to the bankrupt's rights, particularly in relation to bankruptcy extensions, raiding of houses, taking property, applications to jail individuals, seizing and freezing orders. That was how the bankruptcy court operates. (e) He referred to the experience of another individual who, he claimed, had probed the validity of the Respondents' appointment (but I have ignored these generalised anecdotal hearsay assertions which were not even on affidavit); (f) He noted that no discovery was required other than limited documentation identified in the application. It was a net point; (g) Acceding to the objection would mean kicking the can down the road, prolonging the impact on his "economic liberty" and was wasteful in terms of judicial economy.

Conclusion on Respondent's preliminary objection

34. I do not accept the Applicant's circular arguments that the Respondents' objection required a formal notice of motion, that it should only be dealt with after the substantive hearing of his motions or that I should not entertain submissions on the Respondents' behalf until they had proven the validity of their appointment and established that the First Respondent is in fact the Official Assignee. The Respondents have repeatedly flagged their objection on previous occasions on which the matter was before the Court from 12 August onwards. I also note that the Respondents' solicitors wrote to the Applicant as early as 9 August 2024 to notify him of their intention to pursue the objection. Such an objection does not require a formal motion. The issue is that the motions are not brought within the Rules of the Superior Courts. That point arises from the Applicant's own motions and does not require a separate motion.

35. Nor do the Respondents need to prove their standing or the validity of their appointment in order to make the case that the Applicant has adopted the wrong procedure to challenge their appointment. The Applicant's contentions would disregard normal and long established rules of procedure and reverse the onus of proof. I accept the Respondents' submission that the default procedure for a claim under the Rules of the Superior Courts is by plenary proceedings. None of the exceptions apply, with the possible exception of judicial review (and the Respondents would say that that course is time barred).

36. In reaching the foregoing conclusion, I have reflected on whether the motions could be saved by being brought within any provision of the Bankruptcy Act 1988 or of the Rules of the Superior Courts. The most promising provision from the Applicant's perspective seems to be s.61(7). I would give that provision an expansive an interpretation, to allow for applications challenging the Official Assignee's failure to exercise powers, or acts in purported exercise of such powers. I have accordingly reflected on whether the term *"Official Assignee"* in that provision could be interpreted broadly to facilitate the Applicant's challenge by interpreting

the rule as encompassing any person holding themselves out as such and unlawfully purporting to exercise the powers of that office (which is the Applicant's contention). However, in order to encompass the current applications it would be necessary to go far beyond the plain words of the legislation without any obvious basis to do so (particularly when there are alternative effective remedies available to any party wishing to agitate the appointments issue). It cannot plausibly be argued that s.61(7) was intended to permit the litigation of a constitutional challenge to the validity of legislation or the issues which the Applicant wishes to raise on behalf of his minor children. It is even harder to fit the challenge to Mr. McNaughton's appointment within the confines of s.61(7). The provision was intended to have a narrower effect, to deal summarily with points as to the disposal of assets etc which could appropriately and fairly be dealt with by motion. The raising of substantive and procedural issues in a succession of random notices of motion rather than on the basis of a properly pleaded case creates enormous practical difficulties, complicating and delaying matters rather than simplifying and expediting them.

37. The procedural chaos arising in the absence of properly constituted proceedings is demonstrated by the Applicant's successive attempts to join additional parties to the motions:

i. Having issued the Original Motion on his own behalf, the Applicant purported to issue the Children's Motion as next friend on behalf of his minor children. He sought leave to join his "children" – who were not parties to his bankruptcy proceedings – as parties to his current motions. Serious factual and legal issues may arise in respect of the Children's Motion including those identified by the Respondents' replying affidavit. Furthermore, it appears from the Applicant's averments that the joinder of the children may be primarily intended to reinforce his own standing. However, firstly, it is hard to see how the children could have any better standing than the Applicant and, secondly, this motivation may require the Court to consider whether there is a conflict

of interest in the Applicant seeking to represent his children to buttress his own position, or whether the children would need independent legal representation. A further and related issue arises as to whether the Applicant could advocate on his children's behalf notwithstanding that he is not a lawyer. The Applicant has rightly acknowledged that the Children's Application would need to be determined on the basis of the children's best interests rather than any other party's, including his own. The assessment of their best interests (rather than the Applicant's) could require an assessment as to whether the claim asserted on the children's behalf had a sufficient prospect of success to justify proceedings on their behalf. However, no independent legal assessment appears to have been undertaken on the children's behalf by a qualified and experienced lawyer currently authorised to practise in this jurisdiction, analysing the merits of the children's case from the perspective of their interests. The Applicant's personal opinions and assertions do not constitute evidence and are not admissible as such. There is scant material before the Court to support the Children's Motion. Accordingly, the determination of that motion, including the assessment of the children's best interests could itself be a complex and time consuming issue for the Courts to resolve before the Applicant's motions could proceed.

ii. Other motions have issued or been proposed to add at least three additional parties – Mr McNaughton, of Insolvency Service Ireland, the Minister for Justice, and, most recently, it is proposed to add the Attorney General. Presumably the State will be added to the fray in due course. The Applicant explained the basis of his application to join the Minister in his 14 October 2024 submissions:

> *"It should be dealt with in this motion legally and efficiently. We're not talking about bankruptcy or the Minister being a party to bankruptcy. We're talking clearly about the Minister who has sole responsibility for the appointment of Mr. McNaughton under Section 11. It's set out in black*

and white. It's a very small section. I have referenced it in my affidavit. It cannot be clearer. There is no ambiguity. There is no way around it. There is no delegation of authority by the Minister to anybody and therefore the Minister has to answer, firstly how she claims he was appointed on day one because there's no piece of paper available and the Minister has to answer how she reappoints somebody who was not appointed on day one and these are serious issues that is the job of a Minister who can answer and should answer and it goes to the core of my motion and it goes to the core of justice and it goes to the core of a fair unbiased hearing. And it's no load on the Minister who is surrounded by an army of legal teams to help her and assist her. And again, this is a motion I raised with her a month ago, so again it's not new".

iii. In terms of the proliferation of parties, the Applicant's bizarre action in purporting to name as a respondent the law firm representing the office of the Official Assignee appears particularly difficult to understand. In my view the gratuitous joinder of – or gratuitous allegations against - parties without any proper basis to do so could in an appropriate case, constitute an abuse of process (including on the basis of authorities such as *Ewing v Ireland* [2013] IESC 44 and *Riordan v Ireland* [2001] 4 IR 463, against the other party's lawyers) which on its own, might warrant an order for the dismissal of the entire proceedings (in this case the set of motions) and it is not obvious that there was any basis to name the solicitors as parties to the Original Motion. This issue was not canvassed in submissions, so I need not determine that issue here. However, it would have been open to the respondents to take a preliminary objection in that regard and the resolution of any such objection would clearly have the potential to further delay the resolution of the Original Motion,

iv. Of course, none of the foregoing parties are parties to the original bankruptcy proceedings. If reliefs are to be sought against parties, they should be named as defendants or respondents to properly constituted proceedings and the causes of

actions and claims alleged against each of them should be fully, separately and succinctly outlined in the appropriate pleadings.

38. The disclosure, document production and cross-examination sought orders sought by the first, third, fifth and sixth motions in support of the Original Motion are themselves extraordinary in their range as ancillary reliefs to another notice of motion, ancillary reliefs on top of ancillary reliefs. By definition, the range of factual and legal issues raised by the six motions illustrates the need for properly constituted proceedings. Furthermore, the applications for disclosure or document production do not, at first sight, appear to have been formulated in accordance with the applicable Rules of the Superior Courts. The Applicant maintains that he is not seeking discovery and is instead seeking to invoke the provisions of Order 31 Rules 14 and 15 RSC but the Respondents object that the orders which he seeks appear to go beyond the terms of rules 14 and 15 as those provision have traditionally been understood, interpreted and applied by the Irish Courts. I do not need to resolve the issue at this point but it appears likely that the Applicant would need to make a formal discovery application under Order 31 Rule 12 RSC for at least some of the documents sought. In that context, the necessity, relevance and proportionality of any discovery request would fall to be determined on the basis of a pleaded case, which is lacking as a result of the Applicant's choice to proceed by notice of motion. Furthermore, even leaving aside the novel issues which would arise as to the attempt to obtain discovery of the *Wymes* Court file, the relevance and necessity of such discovery has yet to be determined. However, I do not need to resolve the merits of the applicant's disclosure motions. The application for cross-examination would likewise need to be determined on the basis of the matters in dispute on the pleadings.

39. The delays and complications created by the Applicant's disregard for normal procedures are demonstrated by the fact that he has found it necessary to issue six plus motions and the number and volume of the filings generated on his seven motions:

	Affidavits	**Exhibits**	**Submissions**
Applicant	10 (119 pages)	28 (556 pages)	6 (122 pages)
Respondents	7 (37 pages)	10 (134 pages)	6 (80 pages)

These figures alone demonstrate that the Applicant has not raised a narrow issue amenable to resolution by an interlocutory hearing but a substantive issue which needs to be dealt with in properly constituted proceedings.

40. I am satisfied that the provisions of the Bankruptcy Act 1988 (as amended) and Order 76 RSC do not provide a vehicle for the Applicant to seek the current reliefs by notice of motion in the context of the Applicant's bankruptcy proceedings. Nor do any other provisions of the Rules allow him to pursue such a claim by notice of motion, special summons or summary summons. Accordingly, the Respondents' objection is well founded. The normal provisions of the Rules of the Superior Courts govern the claim which the Applicant seeks to agitate. It is not possible to obtain declaratory reliefs in relation to the validity of the Official Assignee's appointment (or that of his predecessor, or that of Mr McNaughton as a director of Insolvency Service Ireland) as interlocutory reliefs in the context of the Applicant's bankruptcy proceedings. Nor is it possible to obtain the disclosure or document production orders which are ancillary to such reliefs. Accordingly, the basis for the joinder motions also falls away. If the Applicant has a basis to challenge the appointments he must do so by independent proceedings (plenary proceedings or judicial review as appropriate).

41. Even if I considered that s.61(7) was potentially applicable, I would need to consider whether it was more appropriate to direct that an issue should be resolved by way of plenary

hearing. That would have appeared appropriate in any event since the Applicant himself has sought cross-examination of the Respondents' witnesses, has sought to join a proliferation of parties as either applicants or respondents and has sought a multitude of reliefs in his litany of motions including what amounts to discovery (although he seeks to avoid describing it as such). In that scenario, it would also be necessary to direct a formal exchange of pleadings setting out the precise cause of action alleged. The way the application has evolved demonstrates the need for proper pleadings and it would be wrong for the Court to determine issues such as the constitutionality of legislation without adequate pleadings and full legal argument. Issues of such weight and complexity do not lend themselves to summary resolution by notice of motion.

42. I have considered whether I can reduce the Applicant's procedural difficulties by invoking the inherent jurisdiction to waive non-compliance with the rules. However, it would not be appropriate to do so here. These are not just technicalities but fundamental safeguards mandated by the Rules of the Superior Courts. Continuing with the motions in their current form could unfairly impair the Respondents' ability to defend the claim. The absence of a case properly pleaded in accordance with the Rules of the Superior Courts would also make it more difficult for the Court to adjudicate the issues. The rules apply to all litigants, whether or not represented by lawyers and are designed to ensure the fair resolution of issues properly before the Court in an orderly and efficient manner. There is no basis for departing from them here.

43. I am satisfied that the provisions of the Bankruptcy Act 1988 (as amended) and Order 76 RSC do not provide a vehicle for the Applicant to seek the current reliefs by notice of motion in the context of the Applicant's bankruptcy proceedings. Nor do any other provisions of the Rules allow him to pursue such a claim by notice of motion, special summons or summary summons. Accordingly, the Respondents' objection is well founded. The normal provisions of the Rules of the Superior Courts govern the claim which the Applicant seeks to agitate. It is not possible to obtain declaratory reliefs in relation to the validity of the Official Assignee's

appointment (or that of his predecessor, or that of Mr McNaughton as a director of Insolvency Service Ireland) as interlocutory reliefs in the context of the Applicant's bankruptcy proceedings. Nor is it possible to obtain the document disclosure or production orders which are ancillary to such reliefs. Accordingly, the basis for the joinder motions also falls away. If the Applicant has a basis to challenge the appointments he must do so by independent proceedings (plenary proceedings or judicial review as appropriate).

44. For completeness, I will briefly explain my response to the Applicant's other main submissions. Firstly, I disagree with the contention that the Respondents' objection would prevent any challenge to the validity of the Official Assignee's appointment. The issue is simply how any such challenge must be brought. Any litigant can issue plenary proceedings or seek judicial review if they have a proper basis to do so. They cannot, however, litigate these wide ranging and complex legal and factual issues by means of a flurry of motions in the Applicant's bankruptcy proceedings, motions grounded on lengthy and repetitive affidavits but without proper pleadings identifying the legal basis for the challenge in accordance with the rules which apply to every litigant.

45. It would also be open to any bankrupt or other party who is subject to the exercise of the Official Assignee's powers – as the Applicant was following his adjudication in 2013 – to put the sender of the correspondence to the proof and insist on the production of evidence confirming their authority to exercise the powers of the office of Official Assignee; if the First Respondent was to bring an application as Official Assignee the party who was the respondent to any such motion could dispute his entitlement to exercise the powers of that office on the basis of the appointment issue. However, the Respondent failed to take that course in 2013. If he now wishes to attempt to agitate that issue, he must now seek to initiate his own proceedings. For completeness, and contrary to the Applicant's submissions, it is not obvious to me that the 31 July 2013 letter to the Applicant was in any way misleading and I have yet to be convinced

of the basis for the Applicant's delay in taking issue with the First and Second Respondents' appointments. However, I need not reach a concluded view on that issue or on the substantive issue as to the validity of the three appointments.

46. I accept the Applicant's submission that the Official Assignee's statutory powers may appear draconian. The legislation evidently reflects the public interest in the proper administration of a bankrupt's insolvent estate for the benefit of the creditors. Clearly, there would be an issue if any party seeking to invoke such powers had no legal basis to do so. The factual and legal merits of the Applicant's claims have yet to be determined. However, the effective legal remedies to allow the Applicant to pursue such issues, if appropriate, are laid down in the Rules of the Superior Courts but he has failed to avail of them.

47. The Applicant is correct in his observation that many issues in bankruptcy proceedings can be resolved on foot of notices of motion. These include, for example, applications for extensions (as in the Applicant's case) and orders in relation to the Bankrupt's principal private residence. It is also true that many of those motions will raise constitutional considerations as, indeed, do many issues which come before the Court. However, those are applications which are expressly permitted by the Bankruptcy Act 1988 (as amended) or by Order 76 RSC to be dealt with by notice of motion and the Court is concerned with ensuring that the powers associated with the administration of the bankrupt estate are exercised constitutionally (as opposed to the constitutionality of the powers themselves, which is a different issue). Even then, they are only dealt with on that basis when the nature of the issues and the evidence makes that the appropriate course.

48. Having regard to legal and constitutional rights in the context of orders relating to the family home is a narrower process, and one more relevant to the particular bankruptcy than would be the case with the Applicant's attempt to challenge the constitutionality of legislation. It would be remarkable if the constitutionality of long standing legislation could be resolved

by notice of motion. In my view, the use of notices of motion in bankruptcy proceedings is appropriate not only because of the far narrower nature of the issues resolved in that way but also because of the mandate to follow that course in those specified circumstances pursuant to the Bankruptcy Act 1988 (as amended) and the Rules of the Superior Courts. It is not appropriate to use them to resolve complicated factual and legal issues which fall outside the administration of a particular bankrupt's estate, such as the Applicant's current raft of motions.

49. Many of the Plaintiff's submissions focussed on the decision of Mr Justice Humphreys in *Wymes* and the Further Disclosure Motion essentially sought discovery of the *Wymes* Court file. Although he was not a party to those proceedings, the Applicant seeks to interrogate the factual basis for the Respondents' application to Mr Justice Humphreys in 2021 for an order substituting the First Respondent for the Second Respondent as a party to those proceedings. Because the Applicant repeatedly (but selectively) references that ruling, I should note that I do not accept that the Applicant is correctly summarising that decision. I do not think that the Order 17 rule 4 RSC ruling of Mr Justice Humphreys greatly assists either side in respect of the substantive issue in the Original Motion. Although the Applicant disputes the accuracy and completeness of the information before the Court in those proceedings (to which he was not party), it is important to note that the Court did not determine the validity of the appointment. As the ruling explains, the bankrupt, Mr Wymes (who, incidentally was a central protagonist in the *Bula* litigation which itself both led to his bankruptcy and also encompassed a seminal decision which I reference below in the context of the recusal application) unsuccessfully opposed an application to substitute the First Respondent's name for his predecessor's as Official Assignee under Order 17 rule 4 RSC. Mr Justice Humphreys noted that the court does not conduct a mini-trial to conclusively resolve such applications. The court will make the order if there is prima facie evidence to justify the issue. Such a ruling is to facilitate the orderly prosecution of the matter. However, any dispute about the factual or legal premises for the

substitution may be revisited once the proceedings had been reconstituted. Accordingly, the court noted - but did not determine - Mr Wymes' argument that the First Respondent's appointment was invalid because he was not appointed by the Minister and also noted the limitations of the evidence adduced by the Respondents on that occasion, but also accepted the First Respondent's own affidavit as prima facie proof of the validity of his appointment for the purposes of the substitution motion. Mr Justice Humphreys added that

> *"if the bankrupt thinks that Mr Larkin was not appointed by the Minister for Justice in accordance with the correct procedure, no doubt he can look into that by way of correspondence or under the Freedom of Information Act 2014 or in some other manner in due course. (Although it can be surprising to discover that not all appointments are reduced to writing by way of a formal warrant signed by the appointing Minister (which I think would be best practice) but omitting to do so, while slightly unsatisfying, doesn't mean that an appointee wasn't appointed). For present purposes, the bankrupt's beliefs about the appointment being procedurally questionable were not a reason not to make the order; doubly so since no plausible basis for those beliefs was apparent".* (emphasis added)

50. I do not accept the way the Applicant characterises what transpired on various occasions the motions were before the Court. The transcripts speak for themselves. When the Applicant originally brought the Original Motion before Mr Justice Simons on 26 July 2024 on an ex parte basis, he identified it as being part of his bankruptcy proceedings and did not demur when Mr Justice Simons observed that he thought that the Applicant's motion would need to be dealt with in the bankruptcy list. Mr Justice Simons offered to transfer the motion to the list for the following Monday but that did not suit the Applicant because of his personal overseas travel plans. To facilitate the Applicant, Mr Justice Simons gave leave for short service of the Original Motion returnable to 9 August 2024 before a vacation judge, but he expressly made clear that that was the only order he was making and that he was not making any substantive order. The proceedings subsequently unfolded as follows:

a. The Respondents appeared before Mr Justice Simons on 30 July 2024, seeking to adjourn the proceedings to the new term but Mr Justice Simons declined to do so in the Applicant's absence (the Applicant had apparently been notified of the listing but was still travelling), maintaining the requirement that the Respondents file a replying affidavit before a vacation hearing on 9 August 2024.

b. On 9 August 2024, Ms Justice Jackson recused herself, so the matter returned to Mr Justice Simons at a further vacation sitting on 12 August.

c. By 12 August Mr Justice Simons had identified the need to recuse himself, so he adjourned the motions for another vacation listing on 20 August 2024, making clear that he was not in a position to make any substantive ruling.

d. On 20 August 2024 Mr Justice Mulcahy gave directions and, without determining the issue, expressed doubts as to the entitlement to the *Wymes* file and warned the Applicant that some of his difficulties might be due to his proceeding by motion

> *"in circumstances where what [he is] actually seeking is substantive reliefs and, potentially, [he] should have proceeded by issuing a Plenary Summons rather than an originating Notice of Motion. [The Applicant is] not entitled to seek discovery, which is what [he is] suggesting in the context of a Notice of Motion. [He] put up what [he says] is the evidence, the Respondents reply with what they say is relevant and the motion proceeds on that basis. [The Court] can't order discovery in the context of [the Applicant] proceeding by way of motion."*

51. Mr Justice Mulcahy adjourned the motions to a further vacation sitting on 4 September 2024 before Mr Justice Holland. The latter questioned whether the matter required a vacation sitting, noting that the circumstances had changed since the initial application to Mr Justice Simons and that in any event that application was on an ex parte basis and such determinations are subject to review on later occasions. Mr Justice Holland added that:

> *"... perhaps more practically and importantly, since that determination of urgency was made, which would be based, one must imagine, on an intimation by Mr. Dunne that the matter was both urgent and in so far as he sought a date, ready to proceed. It is*

> *now apparent, in as much as he has brought these two further motions in respect of adding parties to the application by way of adding new Applicants to the application and also, what I will broadly call an application for discovery, it is perfectly clear that the matter is not ready to proceed and from recollection, I believe, an Order was made to the effect that these two motions should be determined before the substantive issue was dealt with."*

Accordingly, I do not accept the Applicant's account of what transpired on various occasions the motions were before the Court prior to their being listed before me. The transcripts tell a different story. Mr Justice Simons never made any determination in respect of the factual or legal merits of the application or as to the validity of the Applicant's procedural approach nor did he make any substantive direction. He simply gave leave for short service of the Original Motion. There would have been no basis to do it and any such conclusion would clearly have been premature and a breach of fair procedures since the Respondents had not filed their own affidavits and there had not been full legal argument. Indeed, the way Mr Justice Simons dealt with the matter on 12 August 2024 (and responded to the parties' submissions) undermines the Applicant's contention that he had purported to express any definite view on an earlier occasion. I also agree with Mr Justice Holland's observation that the case which the Applicant now seeks to advance is far more complex and expansive than the original application. The Applicant is now seeking to pursue his challenge on a multitude of grounds against an ever-growing cast of characters (including, most recently, the Director of Insolvency Service of Ireland, the Minister for Justice and the Attorney General) including challenges to the constitutionality of legislation on grounds which have not been fully pleaded. Accordingly, his invocation of preliminary ex parte directions by Mr Justice Simons on 26 July 2024 and the judge's reluctance to vary those directions on 30 July 2024 is fallacious.

52. The Applicant complains that acceding to the Respondents' objection will lead to delay. However, any such delay is entirely his responsibility for failing to follow the procedure laid

down by Order 1 RSC, for failing to mend his hand when the issue was raised at the outset and for issuing so many motions rather than marshalling his case properly at the outset. Having carefully reviewed the Applicant's prelitigation correspondence, I have to say that I do not consider the tenor or content of that correspondence to have been either reasonable or realistic, particularly in view of his acquiescence in the exercise of the Official Assignee's powers for more than a decade. His correspondence contained utterly unreasonable deadlines coupled with absurd and grandiose assertions as to the legal consequences of failing to meet such deadlines, in circumstances in which he had not established a legal right to the information – as Mr Justice Humphreys observed in *Wymes*

> *"The bankrupt argued there was no evidence that the Minister had appointed Mr. Larkin. But he is not entitled to demand such evidence for the purposes of an application of this kind, which is determined on a prima facie basis. In such a context, the averments of the moving party are generally sufficient".*

53. I also note that it does not appear that, prior to launching the proceedings, the Applicant exhausted the possibility of obtaining the information he sought under the Freedom of Information Act. It is not clear why the Applicant failed to exhaust that channel before launching proceedings and why he failed to offer the Respondents a more reasonable opportunity to respond to his correspondence so as to ensure that he was in possession of all the facts before launching proceedings I do not consider that the tone, content or deadlines in his pre-litigation correspondence with the various parties was either reasonable or appropriate in the circumstances, including in the light of the Applicant's own failure to raise the issue for a decade.

54. I should also note that there is no reason why it should delay matters if the Court requires the Applicant to properly constitute his proceedings. On the basis of the correspondence, affidavits, exhibits and submissions to date and the Freedom of Information documents belatedly obtained by him, the Applicant should be in a position to issue new –

fully and properly pleaded and particularised, proceedings setting out all facts and matters relied upon and all causes of actions alleged. In particular, he needs to explain whether he is claiming that the Respondents' appointment is invalid because: (i) existing provisions and procedures were not properly followed; or (ii) other mandatory legal requirements were not observed; or (iii) the legislation relied upon by the Respondents is repugnant to the Constitution.

55. The best way for the Applicant to progress his case is to comply with the rules and to focus on the issues requiring determination. Any further failure to do so is likely to lead, once again, to further delay as the Respondents - entirely legitimately - exercise their entitlements in that regard. Given the confidence repeatedly expressed by the Applicant in his legal position, I would expect him to be in a position to file a succinct Statement of Claim (or, in the event of a Judicial Review, a Statement of Grounds) without undue delay. I also expect that, if the claim is properly pleaded in accordance with the Rules of the Superior Courts, then the Respondents should be able to file their Defence within 2 or 3 weeks. They have already indicated some of the factual and legal issues that they will be raising in that regard. It appears from their various affidavits that these will include points in relation to locus standi, laches/delay, acquiescence, and, possibly, the Rule in *Henderson v Henderson*. I agree with the Applicant's submission that minimal - if any -discovery should be necessary in view of the documentation which has already been furnished either as exhibits to affidavits or in response to the Applicant's Freedom of Information request, although a hearing may be necessary to consider some of his disclosure requests, including the novel application for the Court file in proceedings to which the Applicant was not party and, as I have noted, discovery applications may be required in respect of at least some of the disclosure currently sought by the Applicant on the various motions.

56. In any event, the procedures laid down by the Rules of the Superior Courts should be as scrupulously followed as in any other case. I see no reason why case management should

not allow any pleading, discovery or other pretrial issues to be swiftly resolved, enabling the matter to be brought to trial without undue delay. However, this is very much in the Applicant's own hands in terms of properly pleading his case and following procedures like every other litigant. His decision to issue seven plus motions rather than a single set of properly pleaded proceedings is the sole cause of the procedural difficulties to date. Hopefully, putting the case on a sound procedural footing, anchored in precise pleadings in accordance with the rules will ultimately lead to a saving of judicial time and, most importantly, enhance the likelihood that all factual and legal issues will be fully explored and appropriately resolved. Indeed, a great deal of time and trouble would have been saved if the Applicant had launched such separate proceedings in the first place, seeking directions from the Court in relation to case management and following the same rules which apply to every other citizen in Ireland when seeking to obtain declaratory relief from the courts. Irrespective of how the proceedings are constituted, the plaintiff/applicant must set out the precise case that he is making. He has failed to do so to date and the prolixity and repetitiveness of his submissions and affidavits, coupled with their unnecessary introduction of irrelevant and often scandalous material must be avoided in future, as he will bog down and delay his own litigation and render any new proceedings vulnerable to dismissal if they fail to comply with the Rules. Whether he is saying that a public official has not been properly appointed in compliance with the legislation, or that the legislation is unconstitutional, he must properly plead that case from the outset and join all relevant parties (and only those parties) so that the other side know the case that it has to meet.

Additional Submissions

57. For completeness, I should mention that following the hearing of the preliminary objection to the motions and while judgment was pending, I received two further written submissions from the Applicant. The furnishing of such submissions at that stage is highly irregular. However, I was concerned to ensure that the Applicant, a litigant in person, was not

prejudiced by his apparent lack of understanding of the legal process, so I allowed both sides the chance to be heard in respect of the Applicant's additional submissions:

a. The first additional submission essentially proposed that if the Court was persuaded by the Respondents' submissions, the motions could essentially be converted into a plenary action and could progress on that basis. I have already dealt with this possibility above. If the issues were manageable, I would consider the possibility of allowing the motions to proceed to plenary hearing. However, I consider that the departure from the normal procedure is so great and there is such a proliferation of factual and legal issues that the only way that the Applicant's challenge can safely proceed is by way of fresh, properly constituted proceedings involving all necessary parties (and only those parties), grounded on proper pleadings in response to which the Respondents will have the opportunity to advance all factual and legal defences which may be available to them. In any event, the Applicant has been aware of the objection to the procedure he has adopted since at least 9 August 2024 but persisted with further motions, affidavits, allegations and submissions. It is too late for him to mend his hand in this way.

b. The second submission drew my attention to documents furnished under the Freedom of Information Act on 11 November 2024 in response to a request made on 24 October 2024 - three months after the Original Motion was issued - which the Applicant apparently relies upon as showing an inconsistency between the procedure adopted on the appointment of the First and Second Respondents as compared to their procedure. It does not seem to me that those documents are relevant to the immediate issue before me, the objection to the applications as presently constituted. However, the fact that the FOI request was only made on 24

October 2024 suggests that the Applicant had not exhausted such avenues before launching his various motions.

The Recusal Application

58. The basis for the recusal application has evolved since the Applicant raised the issue on 26 September 2024 as the Applicant has agitated a changing host of points, some evidently relating primarily to his adversarial view of the statutory bankruptcy regime in Ireland and others making factual assertions without any possible justification or attempt to confirm the objective facts. Because of the prolixity and repetitiveness of his submissions and averments and the sheer number of such assertions, I may not expressly respond to all passing comments as I focus on his principal themes, but I have considered every point raised.

59. As originally articulated, although the Applicant complained from the outset that the First Respondent had been and continued to be allowed to act as Official Assignee in the bankruptcy list without his being required to prove his credentials, when he first queried whether I should recuse myself, I understood that his concern primarily related to my roles in A&L Goodbody prior to my appointment as a judge in June 2023. This continued to be a focus of the application, coupled with related points concerning assumed connections with parties whose interests the Applicant deems adverse to his own. However, the thrust of the application broadened enormously, and bizarrely, to encompass; (a) the Applicant's perception of the relationship between the office of the Official Assignee and the Bankruptcy Court; (b) the background to the referral of the motions to the bankruptcy; (c) my case management of the various applications; (d) my continuing to allow the First Respondent to hold himself out as Official Assignee in proceedings in the bankruptcy list (not involving the Applicant).

60. I consider all points raised by the Applicant as grounds for recusal to be unsustainable. I propose to deal with the latter issues before addressing the original grounds of challenge (my former roles with A&L Goodbody and related issues). First, however, I will consider the

applicable legal principles (on which the parties seemed to agree) as to when a judge should recuse themselves for perceived bias. I also note that, notwithstanding the strident tenor of his submissions, the Applicant expressly disavowed any suggestion of actual bias, nor in my view, would there have been any basis for any such suggestion.

The Law – Recusal

61. The authorities cited, and which I have considered, included:

- *R. v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 ("*Sussex Justices*")
- *In Re Polites* (1991) 173 CLR 78 ("*Re Polites*")
- *R v Bow Street Metropolitan Stipendiary Magistrates ex p. Pinochet Ugarte (No.2)* [1998] UKHL 41 ("*Pinochet*")
- *Ebner v Official Trustee* [2000] HCA 63, (2000) 176 ALR 644 ("*Ebner*")
- *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451("*Locabail*")
- *Bula Limited v Tara Mines Limited* (No. 6) [2000] 4 IR 412 ("*Bula*")
- *Rooney v Minister for Agriculture & Ors* [2001] 2 ILRM 37 ("*Rooney*")
- R. *(Daly) v Secretary of State for the Home Department* [2001] UKHL 26 ("*Daly*")
- *Southwark LBC v Kofi-Adu* [2006] EWCA Civ 281 ("*Kofi-Adu*")
- *Ryanair Ltd. v Terravision London Finance Ltd* [2011] IEHC 244 ("*Ryanair*")
- *Goode Concrete v CRH plc* [2015] 3 IR 493 ("*Goode*")
- *O'Reilly v Garda Commissioner* [2018] IECA 34 ("*O'Reilly*")
- *Ulster Bank v McDonagh* [2022] IECA 180 ("*McDonagh*")
- *Secretary of State v MS* [2023] UKUT 00114 (IAC) ("*MS*")
- *Promontoria (Finn) Limited v Armstrong* [2024] IECA 73 ("*Armstrong*").

62. The well-known *Pinochet* case concerned whether a judge should have recused himself from proceedings concerning the legality of an attempt to arrest the former Chilean leader for human rights abuses. The Judge had been an unpaid director of a charity which was wholly

controlled by Amnesty International, an intervening party in the case. Lord Browne-Wilkinson, at p.133 of the judgment that:

> *"[o]nce it is shown that the judge is himself a party to the cause or has a relevant interest in its subject matter, he is disqualified without any investigation of whether there was a likelihood or suspicion of bias. [T]he rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties."*

63. In *Locobail,* Lord Bingham observed that:

> *"[A] real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of the individual could be significant in the decision of the case… or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind; or if, for any other reason there were real grounds for doubting the ability of the judge to ignore extraneous consideration, prejudices and predilections and bring an objective judgment to bear on the issues before him".*

64. *Locabail* dealt with several scenarios, in one of which the plaintiffs sought to enforce charges securing the repayment of advances to the ex-husband of a defendant, E. In the course of the hearing, it emerged that the judge's law firm was retained in debt enforcement and bankruptcy litigation against the ex-husband. To understand the decision, it is important to note that lawyers may serve as deputy judges in England, while still in private practice. The Deputy High Court judge dealing with the matter was the senior partner in a large solicitor's firm. He disclosed the connection to the parties, noting that he knew no more of the litigation than appeared from a newspaper cutting which had been produced. Neither party sought an adjournment, but E subsequently applied to the judge to disqualify himself. The court concluded that the judge's firm's engagement for clients involved in litigation against E's former husband had not created a conflict of interest such as to disqualify him from dealing

with the case. Leave to appeal was refused. The judge would have conducted a conflict search within his firm before the hearing (this observation clearly reflected the fact that he remained senior partner of the firm). However, any such search would have been confined to the parties themselves and would not have identified the ongoing litigation against the ex-husband. The fact that the Deputy Judge was a partner in a firm acting for clients who were litigating against a party's ex-husband (generating profit and goodwill for his firm) did not give him a sufficient interest in the outcome of the proceedings before him to attract the principle of automatic disqualification or to give rise to a real danger of bias. Even though the Deputy Judge might not have been able to act as a solicitor for E, he was not necessarily debarred from continuing with the hearing; given the large number of partners and size of the judge's firm, there was no real danger of bias (p.5 para. 5).

65. Another situation considered in *Locabail* concerned an applicant's complaint to an industrial tribunal against her former employers. The tribunal chair disclosed during the hearing that he had, many years previously, been employed for a short period by the same employer. The Court of Appeal concluded that the chairman's past employment by the respondent employer did not suggest any danger of bias.

66. Likewise in the seminal Irish decision in *Bula,* the Supreme Court rejected an application to set aside a judgment after it subsequently emerged that there were

> "*Links, relationships and connections between the defendants in the suit and two of the three members of [the Supreme] Court who determined the appeal, in the persons of Barrington J and Keane J (or Donal Barrington SC and Ronan Keane SC as they then were), and further that those links, relationships and connections were of such a character, strength, proximity and closeness, that the appeal hearing has not the appearance of detachment and impartiality but rather gives the impression, perception, reasonable suspicion/apprehension and appearance of unfairness and of possible bias, thereby constituting in law apparent or objective bias, contrary to constitutional justice*."

67. The Court on reviewing the professional links between the judges and the respondent found that the Chief Justice's involvement was limited. (Essentially, it involved legal advice on a technical planning point, and the respondents had also intended to instruct him to represent them for a planning hearing, but he became a judge prior to receiving those instructions). The Court accepted that Mr Justice Barrington's involvement was more extensive having acted both for and against the respondents. He had also advised the respondent on the mining regime at the boundary of the respondent's and applicant's respective mining operations. The Court's objective test has been followed in subsequent Irish decisions:

> "*whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues…".*

The Supreme Court determined that the test was not satisfied. It was well understood that barristers often find themselves appearing on the prosecution/plaintiff side one week and on the defence side the next. The fact that a judge previously acted for or against a party as a legal advisor or advocate is not enough to disqualify them, there must be an additional factor or factors. Denham J (as she then was) observed that:

> *"The circumstances must be considered to see if they establish a cogent and rational link so as to give rise to the reasonable apprehension test. The link must be relevant."*

68. In *Rooney,* a farmer was suing various parties including the Irish government and the Irish Farmers Association ("IFA") on the basis of an alleged constitutional entitlement to compensation for tuberculosis infected cattle. He sought to set aside a Supreme Court dismissal of his appeal after it emerged that, in the course of his former life at the Bar, one of the Supreme Court judges who had dealt with the appeal had advised and acted on behalf of the IFA, which was a party to the High Court litigation (although not, it appears, to the particular appeal). In particular he had advised as to farmers' constitutional rights (or lack of them) to compensation for cattle infected with tuberculosis. The Court noted that the professional relationship and the advice could be considered from two standpoints. First, it was suggested that the advice given as a barrister constituted a pre-judgment of an issue arising in the appeals. Secondly, it was suggested that his relationship with the client (described as 'standing counsel') amounted

to more than an isolated professional commitment. The Court did not consider that either standpoint would lead a reasonable person to a justifiable fear that such factors would prevent a completely fair and independent hearing on the issues arising on the appeal. Keane CJ noted that it was fundamental to the administration of justice that judges should be (and be seen to be) independent and impartial, citing *Sussex Justices* and observing that:

> "*Questions may arise as to whether external factors exist which could influence improperly the decision of a particular judge. The question is not confined to the intrusion, whether conscious or unconscious, of any such external factor. It has long been recognised that the appearance of bias is as damaging to the administration of justice as its operation".*

69. Keane CJ referenced the established and prudent practice that - ***if he had any reservations about the matter*** - the judge should disqualify himself where either party invites him to do so but also noted that:

> *"…a judge cannot permit a scrupulous approach by him to be used to permit the parties to engage in forum shopping under the guise of challenging the partiality of the court."*

Keane CJ also noted the appropriateness of judges disclosing the existence of any factor which either party might consider was capable of affecting the reality or the appearance of an impartial administration of justice but added that

> *"Every such disclosure, however, should not lead automatically to disqualification."*

70. The Supreme Court noted that: (i) parties to the substantive appeal had not been advised by the judge; (ii) the matter on which he had advised the IFA was not material to the Supreme Court judgment; and (iii) the appeal from the dismissal of the claim against the IFA did not involve any issue upon which the judge had advised. Applying *Bula*, the Supreme Court concluded that in the circumstances, no reasonable bystander would perceive

> *"any cogent and rational link between the involvement of Mr. Justice O'Flaherty with the Seventh Defendant and his judgment on either appeal".*

71. The Court also noted and approved Australian authorities which deal specifically with the position of the judge who had advised as a lawyer on an issue which subsequently comes before him for judicial interpretation. In *In Re Polites* (1991) 173 CLR 78, the Deputy President

of the Australian Industrial Relations Commission disqualified himself from continuing as a member of the commission hearing a dispute, when it emerged that the solicitor/client relationship had existed between him and a party to the dispute, in the course of which he had advised his clients on procedures to deal with a particular labour problem (not the issue under consideration). The former client secured an order from the High Court of Australia requiring Mr Polites to resume his participation in the hearing. Murphy J cited the Australian court's observation that:

> *"A prior relationship of legal adviser and client does not generally disqualify the former adviser on becoming a member of a tribunal (or of a court for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party.*
>
> *In a subsequent case decided in the Federal Court of Australia (AI v. Betty King [1996] 436 FCA 1) the proceedings involved a challenge to the validity of certain notices purported to be issued pursuant to the National Crime Authority Act 1984. The judge (Merkel J) informed counsel for the parties that he had given advices to the National Crimes Authority some six or seven years previously with regard to the validity of notices under the National Crime Authority Act in an unrelated matter. On that basis counsel for the respondent pressed the judge to disqualify himself but he refused to do so. Having considered the authorities (and ex p. Hoyts in particular) he concluded as follows:*
>
> *Even if a question of law arising for determination is the same question as that which is the subject of the advice, in my view a reasonable observer would apprehend that the legal question considered in 1990 would be fairly and impartially considered by me afresh in the light of the submissions put and the evidence adduced by the parties in this proceeding. Put more accurately, it has not been established, let alone firmly established, that the parties or the public might entertain a reasonable apprehension that I might not bring an impartial and unprejudiced mind to the resolution of each of the issues to be resolved in the present case. The expression of a view of the law by counsel, without more, whether to a party later coming before that erstwhile counsel as a judicial officer or otherwise, does not afford a basis for concluding that he or she*

might not bring an impartial and unprejudiced mind to the same question of law arising in a different factual context.

Merkel J amplified his views on the question of bias in Aussie Airlines Pty Ltd v. Australian Airlines (1996) 135 ALR 753 where he stated:

In my view, as with the cases considering personal, family and financial interests the decision in the cases dealing with professional association between adjudicator and litigant demonstrate that the courts do not take a hypothetical or unrealistic view of an association relied upon in a disqualification application. In particular they appear to accept that the reasonable bystander would expect that members of the judiciary will have had extensive associations with clients but that something more than the mere fact of association is required before concluding that the adjudicator might be influenced in his or her resolution of the particular case by reason of association. Although the test is one of appearance it is an appearance that requires a cogent and rational link between the association and its capacity to influence the decision to be made in the particular case.

These Australian cases and the passages quoted from them were cited with approval in judgments delivered by this Court in the Bula case".

72. *Kofi-Adu* demonstrates that excessive judicial interference in proceedings may evidence bias.

73. In *Ryanair* the test for recusal was not met but the Court pragmatically substituted another judge so that the litigation could proceed without delay.

74. In *Goode* the judge was found to have a pecuniary interest and was thus conflicted, by virtue of a shareholding that he had drawn the parties' attention initially but unbeknownst to him additional shares had been purchased on his behalf. Denham CJ applied the reasonable person test as in *Bula,* stressing at para. 54 that:

"As it is an objective test, it does not invoke the apprehension of a judge, or any party: it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts."

75. Denham CJ cited an Australian case with approval, *Ebner*:

"... in a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that would result of an appellate court were to take a

different view of the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."

Denham CJ added at paras. 47-48:

"[47] The tradition of recusal in the Irish Courts is reflected in the Bangalore Principles of Judicial Conduct 2002, at paragraph 2.5:—

'A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:

2.5.1 The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 The judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 The judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy;

provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.'

[48]In the Commentary on The Bangalore Principles of Judicial Conduct (United Nations Office on Drugs and Crime, September 2007), it was pointed out that a judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law

76. In *O'Reilly* Irvine J stated at para. 26 that:

"While individual judges, may choose to disclose any connections they may have with potential witnesses or parties they are not obliged to do so unless they consider that the reasonable, objective and informed person would, on being made aware of the relevant facts would reasonably apprehend that the judge would not be minded to adjudicate upon the case in a fair and impartial manner. That is the threshold at which a judge must recuse himself or herself from hearing from hearing the proceedings before them. However

> *casual relationships, such as here suggested by Ms. O'Reilly even if there was evidence in support would not reach this threshold. For example, in Talbot v Hermitage Gold Club[2009] IESC 26, Denham J. held that the test of objective bias was not satisfied by the attendance at the same school of judges and lawyers in the case before her."*

77. In *McDonagh,* the Court of Appeal dismissed an attempt to set aside its earlier judgment after it emerged that a member of the Court had acted on behalf of the Plaintiffs while practising as a barrister. Birmingham P. observed at p.16 that:

> *"The question that arises is really quite a narrow one. Would a reasonable observer, by which it must be meant a reasonable observer with a reasonable knowledge of the Irish legal system, apprehend that Mr. Justice Collins would have been unable to bring an open mind to bear, but rather would have been unconsciously biased towards the position of the plaintiffs because of acted -- having acted for either or both of them? In my view, the question only has to be posed in those terms to be -- for the answer to be apparent. It is the nature of the independent referral Bar that, in general, barristers do not have ongoing relationships with particular clients. Barristers practising on the civil side, and particularly in the commercial courts, as Mr. Maurice Collins did, with distinction for many years, will invariably find themselves acting for and against institutional clients."*

78. In *MS,* the UK Upper Tribunal determined that a decision was unsafe by virtue of apparent bias and lack of procedural fairness including the judge's conduct and handling of the proceedings in a manner which could unduly influence the fairness of the hearing and contribute to an appearance of bias. The Court concluded that the judge's actions and handling of the proceedings led to a situation where "*a fair-minded and informed observer"* might reasonably apprehend bias in the judge's conduct, particularly due to the lack of patience and failure to manage the court proceedings impartially.

79. Most recently, in *Armstrong*, the Court of Appeal dealt with facts similar to the present application, an appeal from a refusal by Ms Justice Roberts to recuse herself by virtue of her past roles in A&L Goodbody, which, it was said, had historically acted

against the Appellant in litigation. Ms Justice Roberts had dismissed the objection of objective bias in an extempore ruling stating that:

> *"Mr Armstrong has raised an issue of objective bias, seeking to impugn the interlocutory order that I made. Having heard his concerns, they relate to the fact that I was chair of A&L Goodbody and that another partner in my firm lists the plaintiff group as a corporate client. I'm fully satisfied in this case that my former firm, which has over one hundred partners, had no involvement whatsoever with this case at any time…Also, to be clear on the matter, at no time have I personally acted for the plaintiffs or either of them. I do not believe the concerns raised by Mr. Armstrong raise an issue of objective bias that would have required me to recuse myself from hearing the interlocutory hearing, or otherwise offend the Bangalore Principles".*

80. At p.15 of his judgment, Noonan J. endorsed Ms Justice Roberts' conclusions, observing that:

> *"... even were it the case that the High Court judge had acted in a professional capacity at some time in the past for the first respondent, that, without more, would be insufficient to raise a real apprehension of bias. However, as the Judge herself explained, the link here is even more tenuous. I am accordingly satisfied that there is no conceivable basis on which this could give rise to a real apprehension of bias and thus, the Appellant has demonstrated no arguable ground of appeal".*

Discussion

81. The competing considerations facing a Court in dealing with a recusal application were well summarised in the Australian decision, *Ebner,* which has been repeatedly cited and endorsed by the Irish Courts:

> *"Judges have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the court to which they belong. They do not select the cases they will hear, and they are not at liberty to decline to hear cases without good cause. Judges do not choose their cases; and litigants do not choose their judges. If one party to a case*

objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case".

82. While, from the outset of the recusal application, the Applicant has focused on my former roles in A&L Goodbody and associated assumed connections, his affidavit and oral and written submissions also seek recusal on very different grounds. These include: (i) his incorrect assumption of a professional relationship between the Respondents' counsel and myself; (ii) his object to the allocation of his various motions to the bankruptcy list (which I manage); (iii) his perception of the relationship between the Court and the office of the Official Assignee; (iv) his objection to my management of not only these proceedings but also, apparently, other bankruptcy proceedings; and (v) my conduct and comments at case management hearings in respect of the applications. The Applicant made entirely unjustified, claims in this regard.

(i) Professional Relationship with the Respondents' Senior Counsel

83. The Applicant wrongly claimed that I enjoyed a close relationship with the Respondents' Senior Counsel, Mr Lyndon MacCann from my time at A&L Goodbody. I do not believe that my having briefed counsel in the past would be a *"cogent ground"* for recusal, so this point was misconceived. However, there is no factual basis for the objection in any case. While at A&L Goodbody, I knew Mr MacCann only by repute. Many of my colleagues briefed him for their cases and he may have been briefed in cases in which I was involved for other parties. However, presumably reflecting our respective practice areas and client bases, I never had occasion to avail of his services. I do not recall meeting, speaking to or working with him and do not believe that I ever encountered him in person until he appeared before me as counsel.

(ii) The Referral of the Motions to the Bankruptcy List

84. The Applicant repeatedly made the extraordinary claim that the Respondents had *"handpicked"* me to deal with his applications, asserting at para. 13 of his submissions that:

"It is also most troubling to a lay litigant that the Respondents believe it is within their gift to pick the "referee" on their home pitch – The Four Courts".

85. The flimsy basis for this mischievous and fallacious assertion was the fact that, at a vacation sitting on 4 September 2024 (which the Applicant failed to attend), the Respondents' counsel submitted to Holland J. that the matter should be referred to the bankruptcy list at the start of the new term, the Michaelmas Term**.** While there was a disagreement between the parties as to whether the motions required a vacation sitting, it was scarcely controversial for the Respondents to submit that the bankruptcy list was their natural home. The Applicant himself effectively conceded that point by issuing the applications as part of his original bankruptcy proceedings, which have of course been managed within the bankruptcy list without objection for many years. The Respondent's reference to the bankruptcy list prompted Mr Justice Holland to ask *"Sorry, forgive me, but Mr. Justice Kennedy deals with bankruptcy list, isn't that correct?"* and counsel confirmed that: *"Mr. Justice Kennedy I understand deals with bankruptcy matters at the moment."* I should note that while I was correctly identified as managing the bankruptcy list *"at present"* both Mr Justice Holland and the Respondents' counsel would have appreciated that a different judge could well be assigned to manage the bankruptcy list for the start of the new legal year on 7 October 2024, that being the occasion on which judicial responsibilities are often reallocated by the President of the High Court. Indeed, the Applicant must surely have appreciated from his own experience of the bankruptcy list that different judges manage the list from time to time.

86. It is on the slender basis of this exchange that the Applicant asserts that the Respondents *"handpicked"* me as the judge to deal with the pending motions. It would be obvious to anyone with any experience or rudimentary knowledge of the operation of the High Court that Mr Justice Holland's reason for checking who was currently managing the bankruptcy list was because he would also have been aware that I was due to sit as a vacation judge. He therefore adjourned the motions to my 26 September vacation list. That was an obvious, appropriate and

sensible course in the circumstances. It is usual to adjourn matters to the appropriate list, which means that they are dealt with by the judge who happens to be managing that list at the time. It is nonsensical for the Applicant to portray such an uncontroversial proposal as forum shopping or judicial selection by the Respondent. The intention was to adjourn the matter to the list rather than to the individual judge who happened to be dealing with that list.

87. For completeness I should note that the Applicant's sinister interpretation of the discussion between Mr Justice Holland and counsel of the appropriateness of assigning the matter to the bankruptcy list and of the fact that I currently manage the list is difficult to credit as I note from the DAR that Mr Justice Simons made remarkably similar comments when the Applicant brought the Original Motion before him on an ex parte basis on 26 July 2024. It is surprising that the Applicant should take such exception to the discussion of the issue at the inter partes hearing before Mr Justice Holland without referencing the corresponding discussion on 26 July 2024 on his ex parte application during which Mr Justice Simons repeatedly suggested that the motions would normally be listed in the bankruptcy list before the judge dealing with that list (and noting that I was the Judge currently dealing with that list). The Applicant expressed no objection in principle to that course. However, he was anxious for an early return date for his motion, which required a vacation listing because, although Mr Justice Simons offered to list the Original Motion to my last July bankruptcy list the following Monday, the Applicant was travelling on that date and therefore unavailable. He therefore sought a vacation return date so as to avoid a protracted adjournment to the next bankruptcy list in October. In the light of this initial exchange with Mr Justice Simons, it is difficult to understand how the Applicant could have interpreted the routine exchange between Counsel for the Official Assignee and Mr Justice Holland as "forum shopping" – there is no reasonable basis for that characterisation of events.

88. In addition, in the Applicant's oral and written submissions, he suggested that because Mr Justice Simons and Ms Justice Jackson had recused themselves, I should do likewise. They were described as *"setting the standard"*. I have no doubt that both judges do indeed consistently *"set the standard"*, but it is fallacious to suggest that their determination as to whether they should recuse themselves given their particular factual circumstances (which were different to my own) should influence my answer to the same question in very different circumstances. Mr Justice Simon is a creditor in the bankruptcy, and Ms Justice Jackson advised the Applicant's wife in the bankruptcy. In those circumstances their recusal decisions were entirely appropriate. My circumstances are different, and their approach did not and could not inform my approach in different circumstances.

(iii) The assumed relationship between the Court and the Official Assignee's Office

89. In another unusual and unjustified submission, the Applicant effectively submitted that there was a perception of what I might describe as *"institutional bias"* although he did not use that term. Para. 13 of the grounding affidavit complains that

> *"the purported Official Assignee sits in the Bankruptcy Court on the bench regularly and would have reasons to meet and discuss matters privately and socially with Judge Kennedy"*.

90. I do not understand the basis for the assumption that I would have reasons to meet and discuss matters privately with the Official Assignee. I have only ever had one meeting or discussion with representatives of the office of the Official Assignee. That discussion did not concern the Applicant or any other individual bankruptcy proceedings or parties. It related to the Financial Statements for the office of the Official Assignee in Bankruptcy which were transmitted to me on 27 March 2024 pursuant to s.3(6) of SI464/2013 Bankruptcy Act 1988 (Official Assignee Accounts and Related Matters) Regulations 2013. Nor is it the practice for the Official Assignee or their staff to socialise formally or informally with the judge dealing with the bankruptcy list. I do not recall ever meeting him or his colleagues socially.

91. I also reject another obscure element of the objection, which concerns the seating position in court formerly occupied by the Official Assignee or his representative. In the past it was apparently the practice of the Official Assignee's representative to sit alongside the Registrar, rather than in the body of the court. The Applicant takes issue with this. In fact, since his appointment the First Respondent's representatives have not tended to occupy the bench which the Applicant regards as controversial (possibly finding other seating more convenient in terms of observing proceedings and communicating with counsel). In any event, the First Respondent's seating position in Court seems of limited relevance, since the bankruptcy list has generally been held remotely since the pandemic. Accordingly, the physical location of participants is academic. The hearing of these seven applications was the first physical bankruptcy hearing over which I have presided which involved the First Respondent and, in accordance with his current practice, he was not occupying the physical position to which the Applicant takes exception. Even if he had been, I would not have regarded his doing so as controversial. The Applicant's concern appears to have been due to his perception that such proximity to the Court could have facilitated inappropriate communications between the Court and the First Respondent. This is misconceived. On matters of substance, the Official Assignee is typically represented by counsel and submissions are made from the counsel's bench; in any event any submissions to the court are in open court and other parties to the proceedings have the opportunity to respond so the Applicant's concern is entirely misplaced.

92. Although I consider that the point has no substance, for completeness I note that the Applicant's 19 August, 2024 affidavit made scandalous but unsubstantiated assertions against various parties including at para. 25 where he suggested that the second respondent regularly conferred with the judge who dealt with the application to extend his bankruptcy and that he provided input and agreed on details concerning orders made by the judge.

The Applicant alleged that

> *"the closeness of the working relationship between the judge and the second respondent was visible to him during his attendance at various proceedings observing that "it always troubled me greatly that Lehane was effectively acting as judge and jury in relation to my bankruptcy and was sitting on the bench, in a quasi-judicial role."*

It seems to me that these and other allegations advanced by the Applicant are clearly a collateral attack on earlier decisions, including the order extending the bankruptcy six years ago. He has not adduced any evidence which would afford me a basis to conclude that any communications during those proceedings were other than entirely proper. However, if the Applicant had had any genuine concerns, he could and should have raised them at the time. I expect that he would have done so if there had been any legitimate grounds for him to do so on those occasions. At this remove, there is no basis for him to seek to raise such issues by means of vague, generalised and pejorative assertions six years later in entirely unrelated proceedings before another judge).

93. In his oral submissions the Applicant also expressed a concern that I, as the judge presiding over his applications, would have access to First Respondent's private files in relation to the Applicant but to which he would not have access. He was concerned that those files might have access to prejudicial material to which he would not have had the opportunity to respond. If such a concern was grounded in reality it would indeed be invidious. However, I have no such access to the First Respondent's files or those of the Official Assignee or of Insolvency Service Ireland. Any substantive material I receive in relation to these motions comes as evidence on affidavit or legal submissions in open court. There is no material which could influence me or other judges to which he would not have the opportunity to respond. There is no possible issue of "*institutional bias*" which could rise to a reasonable apprehension of any such issue.

(iv) The Court's management of these and other bankruptcy proceedings

94. The Applicant submitted that I could be perceived as having prejudged his central issue (the validity or otherwise of the appointments of the First and Second Respondent as Official Assignee) in two ways - by referring to the First Respondent as the Official Assignee at directions hearing in these proceedings and by continuing to allow him or his representatives to continue to participate as the Official Assignee in other bankruptcy proceedings before the Court (to which the Applicant is not a party and in which no issue had been raised as to the validity of the appointment). The Applicant submitted that, in view of the doubts raised in his motions as to the First Respondent's status, I was constitutionally obliged to refuse to allow the First Respondent or his representatives to participate in bankruptcy proceedings unless and until he satisfied me of his standing by demonstrating that he had been validly appointed. I should have suspended all bankruptcy proceedings, including those to which he was not party and where the parties had agreed the directions which I should make. For example, para. 14 of the grounding affidavit states that:

> *"Given the crystallisation of the evidence which Judge Kennedy has read I am perplexed that he continues to give orders on applications weekly, made by the Official Assignee in circumstances where Mr Larkin has no warrant of appointment to act. Suspension of the Bankruptcy Court is surely merited by now".*

95. Likewise, paras. 8 and 31 of the Applicant's submissions complained that:

> *"8. Having read the papers, Mr Justice Kennedy has also continued to accept Mr Larkin's locus standi as Official Assignee in other bankruptcy cases and grant him orders, such as the bankruptcy extension of Richard Harris which would lead the reasonable man to conclude that Mr Justice Kennedy has pre-determined the validity of Mr Larkin's appointment to Office of Official Assignee".*

"31. Mr Justice Kennedy has continued to hear Mr Larkin in other matters granting him locus standi qua Official Assignee having read the papers. Mr Justice Kennedy weekly grants Michael Ian Larkin orders without raising the issue of the legality of his appointment, powers to act where it is now established he is not an officer of the court. Mr Justice Kennedy did not refuse to hear Mr Larkin's motions on the basis that the matter of his locus standi is currently sub judice before him which at a minimum warranted assignment to another Court. He proceeded to hear and grant a motion to extend Mr Richard Harris's (14 October 2024) bankruptcy by Mr Larkin and raised no issues in that regard".

96. The Respondents rejected this submission, arguing that: (a) the Official Assignee has functions under the Bankruptcy Act and therefore comes before the Bankruptcy Court week in week out; (b) the fact that the Court therefore entertains applications by, or submissions on behalf of, the Official Assignee could not on any basis be said to give rise to even an objective bias such as to warrant my recusal; (c) On the face of it (and they say that this reflects the actuality) Mr Larkin is a legally appointed officer holding the office of Official Assignee and the Court is entitled to treat him as such unless or until there is any ruling to the contrary; (d) There will not be a ruling to the contrary because the legal grounds advanced for impugning his appointment are spurious and baseless but, in any event, the Court is entitled when the Official Assignee comes before it to treat him as validly appointed and, therefore, to entertain applications involving him and this could not be said to constitute actual or objective bias.

97. I cannot accept the Applicant's submissions with regard to the continued operation of the bankruptcy list. I do not consider that the Applicant's challenge – the merits of which has not yet been adjudicated upon - could have such remarkable effects on proceedings to which the Applicant is not a party and in which the actual parties are not raising any such objection. Between them, the First and Second Respondents have been recognised and accepted by the Court as Official Assignee for many years, including, until very recently, by the Applicant himself. While the Applicant is entitled to pursue any legal routes which may properly be available to him, his applications do not require or justify a decision by me to suspend the

bankruptcy court or to refuse to allow the First Respondent to continue to act as Official Assignee until the Applicant's proceedings are resolved or until the First Respondent has otherwise satisfied me of his appointment. Nor was such a submission made to me by the parties to those proceedings. At least some of those parties may presumably have been in Court on the various occasions on which he ventilated his objection to the validity of the Official Assignee's appointment but none of them appear disposed to adopt his objection.

98. While in these and entirely independent proceedings I have referred to the First Respondent as the Official Assignee, I was not thereby prejudging the outcome of his applications, nor was I constitutionally obliged to suspend the First Respondent's participation in these or other proceedings until he proved his appointment and standing. The two individuals have been acting as Official Assignee for many years (both in the Applicant's own extended bankruptcy and in many other proceedings). They have been consistently accepted as such by the parties and by the courts. The Applicant is entitled to challenge the validity of Respondents' respective appointments if he can demonstrate valid legal grounds. However, that does not mean that I should reverse the onus of proof on these motions to force the Respondents to prove the validity of the appointment or that, in the meantime, I should presume in other proceedings that the two individuals were not validly appointed. That would be a remarkable proposition. It would also be contrary to the approach adopted by Mr Justice Humphreys in *Wymes*, where the substitution of the new Official Assignee was permitted pending trial notwithstanding the dispute as to the validity of his appointment and I would rely on the entirety of his judgment in respect of that particular issue. As Mr Justice Humphreys observed

> *"substituting such a party cannot be intended to completely determine for all time all issues or defences that might be raised, but is based rather viewed as something to be done on a prima facie basis to allow the orderly prosecution of the matter."*

My directions for the management of the motion were to the same effect and must be seen in the same light. There was no need for a "mini-trial" of the appointments issue prior to

proceeding to give directions with regard to the motions (let alone in other proceedings in the bankruptcy list).

99. Furthermore, as far as these proceedings are concerned, it is the plaintiff himself who joined both individuals as respondents, so the question of their "standing" to participate in these proceedings does not arise. Indeed, the Applicant refers repeatedly to the First Respondent as the Official Assignee in his affidavits and submissions, so I don't understand the basis on which he criticises my doing likewise. I consider that the First Respondent is presumed to be validly appointed unless and until the contrary proposition has been established. At all times I have appreciated the Applicant's concern to challenge the appointments and I do not believe that the language I have used or the manner in which I have provided for the management of the motions has pre-empted that issue or that it was exceptional in any way. Nor do I consider that my references to the First Respondent in the context of these proceedings could reasonably be interpreted as suggesting that I had prejudged the issue.

(v) Conduct of proceedings

100. At hearings on 26 September and 14 and 21 October I gave directions with a view to progressing the Applicants' motions. Those directions concerned the timetable for exchange of affidavits and submissions - I invited the parties' proposals and approved directions agreeable to both sides. Those directions achieved their desired effect of progressing the matter to enable the 11 November 2024 hearing to proceed and I did not understand the Applicant to object to any directions (save that he considers that I should have recused myself and required the First Respondent to prove his credentials at the outset, which in my view would have pre-empted the issue the motions sought to probe). However, the Applicant expresses concern arising from my references to issues likely to arise at the substantive hearing of the motions. For example, his oral and written submissions criticise observations which I made at the directions hearings as to issues which would arise at the hearing of the motions. However, it was clear that I was

not expressing a concluded view but rather noting issues identified in the papers before the Court to be explored. Such references to issues for consideration are entirely appropriate in the context of a case management application hearing - they go to the issues to be canvassed in oral and written submissions and the time required for the hearing of the motions. It is helpful for the parties and the court to have a common expectation of the issues likely to be ventilated at the hearing so as to avoid surprises and delays and to focus the ultimate hearing. Such comments in no way anticipate the resolution of such issues nor could they be reasonably interpreted as such any more than a judge dealing with an injunction application would be prejudging the issue by noting that there would be an issue as to the existence of an arguable case, the balance of convenience and the adequacy of damages, whereas in other cases some of those issues would be less contentious.

101. Likewise, para. 25 of the Applicant's written submissions references a comment from me on 14 October that the Official Assignee might seek time to respond to a particular affidavit. The Applicant seems to assume that this was triggered by communications to which he was not privy, whereas my comments reflect my own experience of commercial litigation. My only knowledge of the case was and is based on the papers filed, including transcripts of previous hearings before other judges, and on my knowledge from the previous hearings before me. Accordingly, there is no basis for the suggestion at para. 14 of the grounding affidavit that my suggestion (that the Official Assignee might need time to respond to the Applicant's affidavit)

> *"confirms a close working relationship with the Official Assignee that may be perceived as overly cooperative, which raises my serious concerns about impartiality in the decision-making process".*

Virtually every week when I manage the bankruptcy list, the scenario arises that one party has delivered an affidavit and the other party – be it the Official Assignee, the Petitioning Creditor, the Debtor or the Bankrupt – requires time to respond and such time is usually afforded to them where there is a reasonable basis for any such request. The same pattern would repeat itself in

many other lists. I do not believe that any objective bystander could take that construction from these comments or the other case management comments to which the Applicant refers and which consisted of my noting some of the issues for resolution, rather than purporting to determine such points. This is entirely normal for such a directions hearing.

102. The Applicant also queried my using the word *"we"* at the 14 and 21 October directions hearing, which he apparently interpreted as suggesting that I was speaking on the Official Assignee's behalf as well as my own. Counsel for the |Respondent disagreed with that interpretation and submitted that I was clearly using the *"Royal We",* which, in itself I would regard as an alarming affectation for a recently appointed member of the judiciary. Having reviewed the transcript I am unable to agree with the Applicant's interpretation. It is my practice when case managing proceedings, to seek to give directions which are workable for both sides (providing such agreement can be secured and the terms are appropriate from the court's perspective). I adopted that course when these motions were before me on 26 September and 14 and 21 October 2024. I believe that my use of the term "we" was intended as an acknowledgment that the Applicant had complied with previous directions to which the parties had previously committed and which I had approved. As such it was wholly unexceptional. Such references certainly do not refer to communication between the First Respondent and his representatives and the Court in relation to the matter. There were no such communications save in open court.

(vi) Former A&L Goodbody Roles and Other relationships

103. What I had originally understood to be the primary potential concern related to my former roles in A&L Goodbody, solicitors, and my assumed involvement in litigation against the Applicant or in advising his two main creditors, Ulster Bank DAC and the National Asset Management Agency ("NAMA"). Dealing briefly with the Applicant's specific claims:

a. While I was an A&L Goodbody partner and the head of its litigation department, A&L Goodbody acted in respect of issues ("the 2009 Litigation") adverse to the Applicant or his companies. The Applicant has confirmed that the 2009 Litigation commenced in 2009, whereas his bankruptcies were in 2013. Either way they were concluded long ago.

b. The Applicant's affidavit does not detail the 2009 Litigation and I was not personally familiar with it (although I recall media coverage at the time). My enquiries confirmed that A&L Goodbody had indeed acted in matters involving the Applicant, principally a dispute in which A&L Goodbody represented CBRE in a claim against him. I was not personally involved in the 2009 Litigation nor did I ever act in respect of the Applicant in any way. The Applicant's assumption that I was involved (in any capacity) is wrong.

c. The affidavit also betrays an apparent misunderstanding of my roles in A&L Goodbody. There would have been no reason for me to be involved at any stage or for the team dealing with the 2009 Litigation to consult with me because that team comprised experienced litigators who were well used to dealing with such litigation (and there was a great deal of such litigation at the time). The team whose remit included, inter alia, the 2009 Litigation, included two of my predecessors as head of litigation, Peter Law and Eileen Roberts (now Ms Justice Roberts). They were available to provide any guidance or supervision which might have been required by the team dealing with the 2009 Litigation.

d. In view of the Applicant's detailed – but groundless speculation, I will confirm that I never had any role in the conduct of the 2009 Litigation or the relevant client relationships, whether in terms of:

    - dealing with the client contacts

- working on the relevant files
- supervising, managing, pricing, resourcing or allocating those files
- assigning resources to them in particular (as opposed to more general resource allocation within the firm)
- pitching or tendering to (or approving pricing or tenders for), or marketing to or entertaining or developing relationships with those clients.

104. Apart from media reports, my limited awareness of the 2009 Litigation was based on the conflict checks undertaken by A&L Goodbody on receipt of new instructions. These typically comprised short emails to all partners which identify the parties with minimal detail as to the substance or the merits, save that they would indicate if the particular matter was contentious. My concern as a recipient of such emails was to identify any issue with accepting the instructions. No such concern arose so that was the end of the matter as far as I was concerned. I would have scanned some of the media coverage of the 2009 Litigation over the years (along with coverage of other legal proceedings) without paying much attention as it did not involve me and I did not see the 2009 Litigation as particularly interesting, significant or remarkable. I do not recall ever discussing it with colleagues, clients or anyone else during my time at A&L Goodbody. There was no reason to do so.

105. The Applicant also says that concerns may arise due to my A&L Goodbody roles by virtue of possible connections with his two main creditors, who represent 98% of his debt. However, as the Applicant must have been well aware, A&L Goodbody did not act against him for those parties or in their roles as petitioning creditors in his US or Irish bankruptcies. The report of the Supreme Court's judgment dismissing the Applicant's appeal from his adjudication in bankruptcy ([2015] 2 ILRM 103) identifies the solicitors who actually represented the various parties. A&L Goodbody does not feature. A&L Goodbody has certainly

represented those two creditors in other matters over the years but I myself rarely, if ever, advised them, and certainly in nothing which concerned the Applicant.

106. The grounding affidavit also speculates about possible issues arising as a result of my involvement in marketing and business development activities, perhaps portraying a more glamorous image of the daily life of a solicitor than, sadly, was in fact the case (as least as far as I was concerned in my former life). My primary focus was on serving my existing clients and my marketing and business development activities (such as they were) were likewise directed to them and to other potential clients. CBRE, NAMA and Ulster Bank were never on my radar because other teams looked after them. Over the years I attended occasional events at which A&L Goodbody hosted for groups of clients and it may be that representatives of those three clients attended the same events on occasion. However, I cannot remember ever meeting them on any such occasions (or otherwise and am unlikely to have engaged with them to any great extent since I did not deal with them generally. At such events I would have focussed on my own guests. Other teams' clients would have been hosted by the lawyers with whom they were working. Fleeting encounters at isolated hospitality events, if, indeed, there were any, would not have referenced specific legal matters, let alone the 2009 Litigation. Such events would have been neither the time or place for such discussions and there would have been no point in referencing litigation in which I was not involved.

107. The Applicant criticises a press release issued by A&L Goodbody welcoming my appointment as a judge, but I do not believe that a reasonable person would interpret the release in the way in which he has asserted. Nor do I consider that any issue arises as a result of the fact that I remain friends with many former colleagues in A&L Goodbody (as well as with solicitors in other firms and with many barristers, irrespective of whether I had occasion to brief them over the years).

108. The grounding affidavit also references my *LinkedIn* account, stating that I am *"listed as having first degree connections with individuals who are close to (the Applicant)"* and expresses concern that such persons could use the *LinkedIn* messaging service to communicate with me inappropriately in relation to these proceedings. Such suggestions do not withstand scrutiny. I expect that if this had been a serious concern the Applicant would have identified the individuals and explained the basis for the concern. Since the Applicant has not done so, and has failed to even identify the individuals to whom he refers, I cannot comment on the contacts (if any) which I have had with the unidentified individuals. However, the fact of a *LinkedIn* connection, first degree or otherwise, cannot reasonably be taken to imply a significant relationship. In the current, tech dominated world, such connections are the equivalent of (and in a modern, international, professional context have to some degree replaced) the exchange of business cards, particularly when attending international conferences etc. They are as significant as a handshake in such contexts. The fact that I have somehow accumulated a surprising number of "connections" over the years (without really trying) is a testament to the ubiquity and superficiality of the medium (at least in my case) rather than to my popularity or relationships with such individuals. I have very limited recourse to *LinkedIn* in practice, even before I became a judge. In particular, I have rarely availed of the messaging facility. I have certainly never sent or received any message which could impinge on my discharge of my role as a judge. In any event, the *LinkedIn* account does not provide a basis for a reasonable apprehension of bias any more than the exchange of business or Christmas cards would have that effect. Nor is access to a messaging service a reason for concern. Judges, like everyone else, have access to a variety of forms of digital communication, such as texts, WhatsApp and other messages. Particular channels or media are not necessarily inherently an issue in themselves, whereas oral or written or electronic inappropriate communications

(irrespective of the media) would be. No objective basis for concern has been identified and there is no reasonable basis for concern.

109. The grounding affidavit also suggests that I may have benefitted financially from fees generated by the 2009 Litigation. It is trite to observe that fees generated by any partner or employee form part of the firm's revenues and thus ultimately contribute to its profits for the relevant years, in this case, it appears, 2009. The observation would have been equally true in *Armstrong* and a similar argument was given short shrift by the English Court of Appeal in an authority relied upon by the Applicant, *Locabail.* In any event, while the 2009 Litigation was substantial from the Applicant's perspective, it would have been only one of many legal matters which A&L Goodbody dealt with at the time. The firm is very large. Accordingly, my drawings were not and would not have been materially affected by the fees generated by the 2009 Litigation. In any event, it is the current position which is relevant in determining whether there is a real apprehension of bias. There is no conceivable basis to suggest that I have a pecuniary interest in the outcome of this litigation. It is impossible to see how a notional fractional share of fees possibly generated in private practice 15 years ago, before the Applicant's bankruptcy and in litigation entirely separate to it and long before my appointment to the bench, could give rise to a perceived risk of bias in my current approach to the issues which the Applicant has recently raised concerning the validity of the First and Second Respondents' appointments.

110. Accordingly, for the reasons outlined, none of the matters raised give rise to a reasonable apprehension of bias. The authorities show that even where a judge has acted for a party in unrelated matters in their past life that alone would not give rise to a reasonable apprehension of bias. In fact, I never advised in respect of the Applicant or acted against him and the involvement of past colleagues in my old firm in litigation against him many years ago would also be insufficient to give rise to such an apprehension. I agree with Mr MacCann's submission (which is reflected in the Irish and international authorities such as *O'Reilly* and

Ebner) that anybody who comes to the bench as a judge, whether they've been a solicitor or a barrister, will have had previous connections with the outside world. They will have had clients, but the fact that one (or, in this case, one's former colleague) may have simply represented a party in the past or acted against a party in the past doesn't in and of itself give rise to a conflict of interest.

111. It is clear in the light of the Irish and other legal authorities referenced above that there is no basis on which I should recuse myself. While in his oral submissions the Applicant repeatedly referred to his views and what he thought, the test for recusal is objective as *Bula* and subsequent decisions have consistently confirmed. In the light of the authorities, there is no reasonable basis for recusal in the circumstances. In particular:

- There is no suggestion of my having publicly expressed or associated myself with views as in *Pinochet.* Nor is there any factual basis for the suggestions of relationships with the Official Assignee or his counsel or his erstwhile creditors which would form a credible basis for the application.
- Decisions such as *Bula, Rooney* and *Armstrong* demonstrate that a judge need not recuse themselves simply because they have previously advised one of the parties (even where, as in *Rooney,* such advice appears to have extended to issues actually arising in the subsequent proceedings). In my case, the connection is far more remote. I had neither hand act nor part in the 2009 Litigation adverse to the Applicant nor have I ever advised any client in respect of issues adverse to his interest.
- The authorities consistently confirm that a judge is not precluded from presiding over a case merely by reason of having acted for or against one of the parties prior to their appointment, Some early authorities, including *Bula*, focussed on judges' previous roles as barristers and emphasised the role of the independent referral bar, but the ratio of those decisions seems equally applicable to both branches of the profession. The

reason for such terminology in the earlier decisions in particular may be historic – most Hiigh Court judges do in fact come from the bar – indeed, there were no High Court solicitor judges when *Bula* was decided (in fact, Mr Michael Peart, who advocated vigorously but unsuccessfully, without counsel, for recusal of two Supreme Court judges in *Bula* later became the first such solicitor appointed to the High Court and, subsequently, to the Court of Appeal, a fortunate appointment from the Applicant's perspective as he later delivered a judgment in favour of the Applicant in respect of the right to cross-examine in certain circumstances).

- In any event, the same rationale clearly applies to both solicitors and barristers. While barristers often have a more transient relationship with clients than might (depending on the client) be the case with solicitors, that is not always the case. Former Attorneys General who were appointed to the bench would recuse themselves if appropriate from dealing as judges with particular issues which they dealt with as Attorney General but they would scarcely be required to recuse themselves from all cases to which the state was a party notwithstanding their close engagement with the State during their service as the Government's legal advisor. Furthermore, the judgment of Mr Justice Murphy referred to a judge's past life as a party's *"advocate"* or *"legal adviser"*. While the former role might typically be undertaken by a barrister the latter would certainly be commonly undertaken by a solicitor, suggesting that there is no distinction in principle between the two branches of the profession – it will depend on the circumstances as to whether the Judge should recuse themselves. This conclusion is reinforced by the Australian cases such as *Polites* which were approved by the Supreme Court in *Bula* and *Rooney* and which apply the same principles in respect of judges who were solicitors on their past life. In any event, the applicability of the same principles in

respect of solicitor judges is confirmed by the recent Court of Appeal judgment in *Armstrong.*

- In the circumstances, my former roles in A&L Goodbody do not provide a reason to recuse myself in the factual circumstances. There are no cogent and rational circumstances which would lead a reasonable person to have a reasonable apprehension that the Applicant would not have a fair hearing from me or that I would not be an impartial judge when dealing with his applications.

Conclusion on Recusal Application

112. The Applicant's perceptions of a relationship or of "back channels" between the Bankruptcy Judges and the office of the Official Assignee are misconceived, as is his suggestion that I should have suspended the First Respondent's participation in bankruptcy proceedings until the Applicant's challenge had been determined. It was entirely appropriate to continue to allow the First Respondent to continue to hold himself out as Official Assignee in proceedings in the bankruptcy list pending the resolution of these proceedings. His criticism of the way the motions came to be referred to me is also entirely misplaced, as are his comments in respect of the case management of the various applications and the terminology which I have employed on the various occasions. In my view, for the reasons outlined, none of the matters raised give rise to a reasonable apprehension of bias. The authorities show that even where a judge has acted for a party in unrelated matters in their past life that alone would not give rise to a reasonable apprehension of bias. In fact, I never advised in respect of the Applicant or acted against him and the involvement of past colleagues in my old firm in litigation against him many years ago would also be insufficient to give rise to such an apprehension. I did of course consider whether, notwithstanding my conclusion in this regard, it would be to recuse myself. I have also considered whether, even if the individual points raised do not justify a reasonable apprehension of bias, they might in the aggregate, give rise to such a reasonable

apprehension. While that might well be the case in some circumstances, I do not believe that this is such a case. None of the points have sufficient credibility to justify a decision to recuse either individually or in the aggregate. The Irish Supreme Court has cited with approval the observations in an Australian judgment in *Ebner* :

> *"…if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."*

113. I am also mindful of the similar observation of Keane CJ in *Rooney* to the effect that:

> *"…a judge cannot permit a scrupulous approach by him to be used to permit the parties to engage in forum shopping under the guise of challenging the partiality of the court."*

I likewise concluded that, for the reasons which I have outlined, the grounds of the application which criticise the listing of the motions before me are entirely misconceived.

114. In summary, I do not believe that there are any circumstances which could give lead a reasonable bystander to have a reasonable apprehension of bias or which would render it appropriate for me to recuse myself.

Conclusion

115. For the reasons outlined above, it seems to me that all seven of the Applicant's motions must be dismissed. If he wishes to challenge the validity of the various appointments he must do so in properly constituted proceedings. For their part, the Respondents reject the Applicant's contentions. It is clear from the voluminous affidavits that complex legal and factual issues will need to be considered to resolve those issues. Further issues would arise as to the possible legal consequences if the Applicant's contentions were upheld. It is not necessary or appropriate for me to determine those issues in this judgment or in the existing bankruptcy proceedings as presently constituted and I do not propose to do so.

116. Although the issue may be academic in circumstances in which the Applicant is an undischarged bankrupt, it appears that the Respondents are presumptively entitled to their costs

on the basis that all motions were unsuccessful. Furthermore, significant costs have been occasioned by the manner in which the Applicant has chosen to proceed both before and after the issuing of the Original Motion, including his escalation of the motions when he was on notice of the Respondents' objections in that regard. Nevertheless, I will hear submissions before reaching a determination on the question of costs.