



**UNAPPROVED
THE COURT OF APPEAL**

Appeal Number: 2021/281

**Barnville J.
Donnelly J.
Faherty J.**

Neutral Citation Number [2022] IECA 224

BETWEEN/

MICHAEL IAN LARKIN

**PLAINTIFF/
RESPONDENT**

- AND -

JOHN GAYNOR

**DEFENDANT/
APPELLANT**

Judgment of Ms Justice Faherty dated the 13th day of October 2022

1. The defendant (hereinafter “Mr. Gaynor” or “the defendant”) appeals the Order of the High Court (Allen J.) of 15 October 2021 which, pending the trial of the action, restrains the defendant, his servants or agents or anyone acting in concert with him or having notice of the Order from:

1. trespassing on lands comprised in Land Registry Folios 10753F, 2538F and 7609F, County Westmeath;

2. interfering with or obstructing the plaintiff from exercising his lawful power to take possession of the lands;
3. preventing the plaintiff from exercising his lawful powers to sell the lands and deliver vacant possession to a purchaser;
4. contacting or interfering with purchasers or prospective purchasers of the lands and,
5. interfering with or obstructing the plaintiff from exercising his powers or functions as Official Assignee in the Estate of John Gaynor (the defendant).

2. The High Court Order was made following delivery by Allen J. of his *ex tempore* judgment on 15 October 2021 ([2021] IEHC 676).

3. The within proceedings were commenced by the plaintiff (hereinafter “the Official Assignee”) on 21 September 2021 by way of plenary summons. The notice of motion for injunctive relief issued on 22 September 2021 grounded on the Official Assignee’s affidavit sworn 21 September 2021. The interlocutory motion came on for hearing on 14 October 2021. It appears that Mr. Gaynor, who was (and remains) self-represented, was permitted to hand in a replying affidavit (sworn 12 October 2021) on that date and he made submissions to the court.

4. As deposed to by the Official Assignee at para. 1 of his grounding affidavit, Mr. Gaynor was adjudicated a bankrupt by Order of the High Court (Costello J.) on 7 December 2015 (“the Adjudication Order”) on foot of a petition by his former solicitors, Messrs. Noel Sheridan and Peter Quinn (hereinafter “Sheridan Quinn” or “the petitioning creditor”).

5. The adjudication of Mr. Gaynor as a bankrupt was in respect of the sum of €37,193.60 being the amount found on taxation to be due and owing pursuant to the Order of the High Court of 11 March 2013, by which it had been ordered that Mr. Gaynor was to

give up clear and vacant possession of lands over which a well-charging Order had been made by the High Court (Finlay Geoghegan J.) on 12 July 2004 which had been in turn made on foot of a judgment mortgage obtained by Sheridan Quinn. As noted by Costello J. in the course of her *ex tempore* judgment on 7 December 2015, on 11 March 2013 Finlay Geoghegan J. had directed that provided that possession of the lands in question was delivered up by Mr. Gaynor or payment of the sums due was made by him on or before 10 May 2013, there would be no order for costs. If, however, there was default in respect of the delivering up of possession or the alternative requirement on Mr. Gaynor to pay the sums due, Mr. Gaynor was liable for costs. As found by Costello J. on 7 December 2015, as neither possession was delivered nor payments of the sums due made, costs became payable by Mr. Gaynor to Sheridan Quinn pursuant to the 11 March 2013 Order. Costello J. also noted that neither the judgment and Order of Finlay Geoghegan J. nor the certificate of taxation that duly issued on 22 April 2015 were appealed. For the reasons she set out in her judgment, Costello J. was ultimately satisfied that the requirements of the relevant provisions of the Bankruptcy Act 1988 had been met, and Mr. Gaynor was duly adjudicated a bankrupt on 7 December 2015.

6. Mr. Gaynor brought an application to show cause against the adjudication. That application was dismissed by Order of the High Court (O'Connor J.) on 20 April 2016.

7. Mr. Gaynor appealed the Adjudication Order to the Court of Appeal. The appeal was out of time. It was dismissed on 10 October 2016.

8. On 25 November 2016, Mr. Gaynor brought an application for leave to appeal to the Supreme Court which was refused on 6 December 2017 ([2017] IESC DET 124). In its Determination the Supreme Court stated, *inter alia*, as follows:

“The application for leave to appeal arises from an appeal to the Court of Appeal from a decision of the High Court in bankruptcy proceedings brought against the

applicant by the respondents. In essence, the applicant has complained about the manner in which the bankruptcy proceedings were conducted in the High Court. This complaint related not only to the hearing before the High Court itself but also to the fact that he had been prevented from bringing an application to the High Court pursuant to the provisions of s. 8(5) of the Bankruptcy Act 1988.

It is important to bear in mind a number of points. The adjudication of the applicant as a bankrupt was in respect of the sum of €37,193.60 being the amount found on taxation to be due on foot of the order of the High Court of the 11th March, 2013, by which it had been ordered that the applicant was to give up clear and vacant possession of the lands over which a well charging order had been made on the 12th July, 2004 in turn made on foot of the judgment mortgage registered by the respondents. Neither the order for costs nor the certificate of taxation were the subject of an appeal or challenge. The applicant has referred to the order of the 8th December, 2003 as a fraud and has referred to forgery of the court order. If the original order was a "fraud" or a "forgery" as alleged by the applicant, it is difficult to understand why that order was not appealed or challenged within the time limited for seeking to appeal the order or to have the order set aside on the basis that it was a "fraud" or a "forgery". A judge in bankruptcy or indeed in other proceedings will not, in general, be in a position to go behind what appears on its face to be a valid judgment or court order. In circumstances where it appears that no steps were taken by the applicant to have the judgment set aside on the grounds of fraud, it is difficult to see any basis upon which the validity of the judgment could have been challenged in the course of the bankruptcy proceedings. It is not enough for an applicant for leave to this Court to simply make assertions or allegations of fraud in respect of what is on its face a valid Court order, without

more. The matters raised by the applicant in his Application for leave are not sufficient. However, it is important to bear in mind that what is in issue in this application is not the judgment of 2003 against the applicant but the decision of the Court of Appeal.

The issues raised by the applicant for leave in this case do not give rise to any issue of general public importance or specify any basis as to why it is necessary in the interests of justice to allow the applicant leave to appeal the judgment of the Court of Appeal. The Court of Appeal gave consideration to the application to dismiss the notice of appeal pursuant to the provisions of the Rules of the Superior Courts on the basis that the same was made out of time. There is no suggestion that in making the order dismissing the notice of appeal the Court of Appeal did not have regard to well established principles in relation to such applications. It must be remembered that while the applicant has raised many issues relating to and surrounding the background to these bankruptcy proceedings which led to the making of the order by the Court of Appeal, the application for leave to appeal is rooted in the decision of the Court of Appeal to dismiss the notice of appeal in accordance with well established principles. The applicant has not engaged with the Constitutional threshold now required to apply for leave to this Court since the 33rd Amendment to the Constitution came into force. Quite simply, the applicant herein has not met the constitutional threshold for leave to appeal to this Court and therefore the application for leave to appeal is refused.”

9. As noted in the Supreme Court Determination, in 2015 Mr. Gaynor also brought judicial review proceedings against the Courts Service. His application for leave to apply for judicial review was dismissed by Order of the High Court dated 30 November 2015.

10. In November 2016, the Official Assignee brought an application seeking an Order extending Mr. Gaynor's bankruptcy pursuant to s.85A(1) of the Bankruptcy Act 1988 ("the 1988 Act") on the basis of Mr. Gaynor's failure to cooperate with the Official Assignee (as deposed to in the affidavit sworn by Mr. Christopher Lehane (the Official Assignee's predecessor in office) on 26 November 2016. By the judgment ([2017] IEHC 27) and Order of the High Court (Costello J.) of 23 January 2017, the bankruptcy period was extended for a period of five years. I should say at this juncture that Mr. Gaynor was discharged from bankruptcy on 7 December 2021.

11. By Order of 29 April 2019 (perfected 8 May 2019), the High Court (Pilkington J.) sanctioned the sale of Mr. Gaynor's home (Folio 11874F, County Westmeath) and granted the Official Assignee possession thereof with a stay on the execution of the Order for three months. Mr. Gaynor duly appealed this Order to the Court of Appeal (and in the process attempted to appeal the Adjudication Order). At the hearing of the appeal on 9 November 2020, both Mr. Gaynor's application to adduce additional evidence, and in the event that that application was refused, his application for an adjournment, were refused. As recorded in the Order of the Court of Appeal of 9 November 2020, following the refusal of his adjournment application, Mr. Gaynor indicated that he did not wish to progress his appeal. The appeal was duly dismissed.

12. On 17 December 2020, Mr. Gaynor made another application to the Supreme Court for leave to appeal the Adjudication Order of 7 December 2015, seeking *inter alia* an extension of time to make his leave application. In the event he was granted leave to appeal, his grounds of appeal included the following:

- His legal costs indebtedness had been fully discharged prior to his adjudication in bankruptcy by a series of payments (referred to later in this

judgment) to Sheridan Quinn, the petitioning creditor, and Ann Fitzgibbon and Company, Solicitors;

- In equity proceedings taken against him by a named third party, he had surrendered a life insurance policy to the value of €54,000, and a costs award in his favour of €50,000, to Robert Marren and Co Solicitors, the solicitors for the plaintiff in the equity proceedings;
- Certain motions, affidavits and orders intended to form part of his appeal to the Court of Appeal had been omitted by Clarke Hill Solicitors (the solicitors for the Official Assignee) from the Books of Appeal for the appeal hearing scheduled for 9 November 2020. The exclusion of some of those documents was contrary to the ruling of the Court of Appeal (Costello J.) of 23 July 2020;
- As Mr. Gaynor, by the payments he had made, had complied with all court orders, the court could not hold him responsible for the fate of those funds once payment had been made by him thus, “the matter rests with the lawyers and the courts”;
- Any subsequent claims “are based on fraud and no RIGHT can arise from such claims...The Court of Appeal at the hearing of 9th Nov last failed to have regard to the ruling on 23rd July 2020 and the order of 9th Nov 2020 paid [no] attention to the subsequent damaging consequences that are going to be unleashed by its decision”;
- Mr. Gaynor was appealing his farm assist repayment obligation on the ground that those payments had been sanctioned by named individuals within the Department of Social Protection.

13. The orders sought by Mr. Gaynor, should leave be granted, included an order pursuant to s. 85C of the 1988 Act annulling the Adjudication Order, an order for costs and damages, an order dismissing the farm assist repayment claim that had been made against him and an order for “an unreserved apology for malicious unfounded allegations...” Additionally, Mr. Gaynor sought a reference to the Court of Justice of the European Union.

14. Leave to appeal was refused by the Supreme Court on 17 February 2021 ([2021] IESCDET 19) on the basis that Mr. Gaynor was out of time for the leave application and on the basis that he had made no submissions establishing any new arguments to differentiate the leave application from the one he had made earlier and which the Supreme Court determined in 2017 ([2017] IESCDET 124). No new argument had been advanced by him. The Supreme Court opined, *inter alia*, as follows:

“13. The Court is satisfied that none of the matters raised by the Applicant give rise to any issue of general public importance and that it has not been established that it is in the interests of justice that there should be an appeal to this Court. Further insofar as the applicant has sought a reference to the Court of Justice of the European Union it is clear that no referable issue of European law arises. What is involved here are court actions, debts, enforcement and appeals therefrom which do not engage any issue of European law.

14. In the circumstances this Court will refuse the application for leave to appeal.”

15. Part of Mr. Gaynor’s real property at the date of the Adjudication Order included his interests in the lands comprised in Folio 10753F, Folio 2538F, Folio 7609F (the lands the subject of the within proceedings) as well as Folio 11874F comprising his family home. Mr. Gaynor was also the registered owner of lands in Folios 11873F, 5564F and 2299F, County Westmeath.

16. At this juncture it is perhaps apposite to set out the consequences of the Adjudication Order 7 of December 2015.

17. Section 44 of the 1988 Act provides:

“Where a person is adjudicated bankrupt, then, subject to the provisions of this Act, all property belonging to that person shall on the date of adjudication vest in the Official Assignee for the benefit of the creditors of the bankrupt.”

“Property” is defined in s.3 of the Act as including “money, goods, things in action, land and every description of property, whether real or personal”.

18. Thus, pursuant to the Adjudication Order, Mr. Gaynor’s lands as described heretofore vested in the Official Assignee as of 7 December 2015.

19. Albeit (as already referred to) Mr. Gaynor is now discharged from bankruptcy since 21 December 2021, the lands continue to be vested in the Official Assignee pursuant to s.85 of the 1988 Act which provides:

“Subject to (3)A, where a bankrupt is discharged in pursuance of this section the unrealised property of the bankrupt shall remain vested in the Official Assignee for the benefit of the creditors”.

20. A perusal of the Property Registration Authority documents that were before the Court in this appeal shows that Mr. Christopher Lehane (the Official Assignee’s predecessor in office) became the registered owner of the lands comprised in Folios 10753F, 2538F and 7609F (being the lands the subject of the within proceedings) on dates between 12 and 17 December 2017.

21. At para. 12 of his grounding affidavit, the Official Assignee deposes that he has entered into contracts for sale of Folios 2538F and 10753F and 7609F with different purchasers for a total consideration of €685,000 which, he avers, may be sufficient to conclude the bankruptcy without the necessity of selling Mr. Gaynor’s home.

22. At para. 7, the Official Assignee identifies the creditors of the Estate as comprising Sheridan Quinn (the petitioning creditor and Mr. Gaynor's former solicitors) (€168,911.24); Ms. E. G. (€222,931.72); and the Department of Social Protection (€73,593.87). The total debt of the Estate amounts to €465,436.83. At para. 8, the Official Assignee identifies the dividends paid to date and thereafter avers that the balance due to the creditors stands at €364,295.99.

23. At paras. 15 – 31 of his affidavit, the Official Assignee sets out the actions on the part of Mr. Gaynor which it is said constitute interference and obstruction with the sale of the lands.

24. At para. 28 he avers as follows:

“The Defendant has taken possession of lands, which are vested in me and required to be realised for the benefit of his creditors. This act interferes with the Official Assignee's statutory powers. It constitutes a usurpation of the court process and wilfully ignores determinations made by the Courts. The Defendant's adjudication in bankruptcy has been upheld and is no longer a matter which is before the Court”.

25. In his affidavit sworn 12 October 2021 Mr. Gaynor avers, *inter alia*, that in the bankruptcy proceedings the former Official Assignee, Mr. Christopher Lehane, had been misled as it was never disclosed to him by his lawyers that Mr. Gaynor had complied with all High Court orders in discharging his legal fees, both to Sheridan Quinn and also to Robert Marren and Co Solicitors (the solicitors for the named third party who had instituted equity proceedings against Mr. Gaynor). He further avers that while the Official Assignee in his affidavit of 21 September 2021 “reluctantly discloses a small percentage of the legal fees” paid to Sheridan Quinn, “there remains very substantial amounts discharged [to Sheridan Quinn] omitted and not accounted for”.

26. At para. 7, Mr. Gaynor lists the various sums which he says he discharged to Sheridan Quinn over the years, viz, a sum of €13, 529.67 on 16 December 2003, €50,000 on 2 March 2005 and €50,000 on 12 December 2011. He alludes to a further sum of €90,000 which he says was given to his then solicitors, Farrell Solicitors, on 25 January 2013 (when they were still “in legal practice”) by way of three bank drafts for €34, 000, €36,000 and €20,000 and which were for onward transmission to Sheridan Quinn (pursuant to an order of the High Court, as claimed by Mr. Gaynor). Mr. Gaynor claims that Mr. Peter Quinn of Sheridan Quinn refused to accept this money “by not disclosing his bank client account details”. Mr. Gaynor alleges that Ms. Stephanie Tierney, a solicitor in Sheridan Quinn’s office, had advised both him and the High Court (Kelly J.) of the refusal. Mr. Gaynor also avers that his proffering of the €90,000 sum was sufficient to satisfy the demand made by Sheridan Quinn in their letter of 15 October 2015 wherein they referred to an open offer they had made in court on 24 June 2015 that if €90,000 was paid into their office on or before 1 September 2015 they would not proceed to take possession of or sell lands comprised in Folio 2538 of the Register of Freeholders County Westmeath (in respect of which they had earlier obtained a well charging order and order for sale). Elsewhere in his affidavit, Mr. Gaynor refers to legal fees paid in 1999 to Tormey and Co Solicitors. By and large, the matters set out by Mr. Gaynor in paras. 7-16 echo the claims he made in his appeals to the Court of Appeal and his leave applications to the Supreme Court.

27. At para. 17, Mr. Gaynor takes issue with the Order made by the Court of Appeal on 9 November 2020 and in this regard refers to an affidavit he swore on 4 November 2020 which he claims the Court refused to accept at the hearing on 9 November 2020.

28. He reiterates (at para. 18) that he is seeking an order pursuant to s.85C of the Bankruptcy Act 1988 for an annulment of the Adjudication Order. At para. 21, he avers

that the contents of his sworn affidavits and exhibits show that both he and his family have complied with all High Court orders in discharging his legal fees to all the legal teams and solicitors who acted for him. He thus avers that “the false and fraudulent claims on the family property are not correct and...is a deliberate attempt to go unnoticed before the Court for the purpose to gain financially”. (at para. 26)

29. In his affidavit, Mr. Gaynor traverses the background to proceedings he commenced against a named third party and he refers to certain dealings he has had with the Department of Social Protection in respect of farm assist payments.

30. Mr. Gaynor then goes on to refer to certain interactions he had with the purchaser of the lands in Folio 2538F and he avers that his sister, Ms Celia Gaynor, had advised the purchaser that she had discharged fifty percent of the purchase price of these lands and accordingly had a legal interest in these lands. Mr. Gaynor also states that it is misleading of Clark Hill Solicitors (the solicitors to the Official Assignee) to have advised the Official Assignee and the court that Mr. Gaynor had more than adequate lands (assets) to discharge his debts but that he had refused to do so. Mr. Gaynor says that those averments are misleading in circumstances where he alleges that the proceeds of any lands sold off “must be given to and legally registered in my sister Cecilia Gaynor[‘s] name and all other family members who I have borrowed very substantially from for the purpose of discharging legal fees”.

31. At para. 27, Mr. Gaynor refers to a hearing in the High Court on 28 September 2021 when he says the High Court (O’Hanlon J.) refused the Official Assignee’s application for an interim and/or interlocutory injunction for possession of the lands in question. At the within appeal hearing, Mr. Gaynor repeated his claim that the reliefs sought by the Official Assignee had been refused by O’Hanlon J. It is clear, however, from the face of the Order of 28 September 2021 that the reliefs sought at paras. 4 and 5 of the notice of motion were

granted by O’Hanlon J. on an interim basis with the matter then adjourned to 14 October 2021 before Allen J.

The hearing of the interlocutory application and the High Court judgment

32. As stated, the matter came on before Allen J. on 14 October 2021. Essentially, Allen J. predicated his consideration of the Official Assignee’s application for injunctive relief on the *dictum* of Keane J. in *Keating & Co. Limited v. Jervis Street Shopping Centre Limited* [1997] I IR 512. At p. 518 of that case, Keane J. stated:

“It is clear that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only. However, that principle is subject to the following qualification explained by Balcombe L.J. in the English Court of Appeal in Patel and Others -v- W. H. Smith (Eziot) Limited and Another [1987] 1W.L.R. 853 at p.859:

‘However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application of the principle set out in American Cyanamid Company -v- Ethicon Limited [1975] A.C. 396 in relation to the grant or refusal of an interlocutory injunction’”.

33. Allen J. went on the note that the “uncontradicted evidence” was that the Official Assignee has made two contracts for the sale of the lands – one for Folio 2538 and the other for Folios 10753F and 7609F – but that it was not possible to complete those sales because of Mr. Gaynor’s interference. As noted by the Judge, that interference comprised Mr. Gaynor putting up signs suggesting that the lands are not for sale, interfering with the advertisement for the sale of the lands, making various claims in respect of the lands and putting cattle on the lands to prevent the Official Assignee from giving vacant possession.

34. As there was no issue that Mr. Gaynor had done what the Official Assignee has sworn that he has done (a finding which Mr. Gaynor does not appeal), Allen J. considered that the first issue he had to decide was whether Mr. Gaynor had adduced evidence to seek to establish that he had a right to do what would otherwise be a trespass. If Mr. Gaynor had not done so, the Official Assignee was entitled to the orders he sought “*ex debito justitiae*”. If, on the other hand, Mr. Gaynor had put forward such evidence, in that event, the court would proceed to consider the balance of convenience and the balance of justice.

35. Allen J. noted that Mr. Gaynor was formerly the owner of the lands in question until his adjudication as a bankrupt on 7 December 2015 and that his application to show cause had been dismissed on 20 April 2016.

36. The Judge duly noted Mr. Gaynor’s appeals of the Adjudication Order and the outcome of those appeals and the applications he had made to the Supreme Court. As also noted by the Judge, Mr. Gaynor’s core argument in opposition to the injunction application was that he ought not to have been adjudicated a bankrupt, his specific argument being that the conclusion of Costello J. in December 2015 that there was debt owing to the petitioning creditor of more than €20,000 was in error.

37. Having set out the core of Mr. Gaynor’s argument, Allen J. opined:

“[T]hat conclusion and order is final and conclusive, and it is binding. Mr. Gaynor has exhausted his rights to challenge the adjudication by his application to show cause, his appeal to the Court of Appeal, and his applications to the Supreme Court for leave to appeal. As a matter of law he cannot now be heard to obliquely challenge the adjudication order”. (at para. 11)

38. While noting the case Mr. Gaynor sought to make, namely that the petitioning creditor’s debt had been paid before the bankruptcy petition was presented and that a sum of money which he had paid to his then solicitor at the time for onward transmission to the

petitioning creditor was not paid over to the petitioning creditor (claims which the Judge described as “obviously inconsistent”), Allen J. considered it important “not to be distracted by looking at the merits of an argument that Mr. Gaynor, as a matter of law, is not entitled to make”. (at para. 12) He further held that Mr. Gaynor was not entitled to make an argument that his sister, Ms. Cecelia Gaynor, had an interest in Folio 2538F, stating that Mr. Gaynor was not entitled to attempt to rely on a *jus tertii*. Moreover, he noted that Ms. Cecilia Gaynor’s claim had already been determined against her in a judgment of Feeney J. on 14 September 2009 ([2009] IEHC 421) following the trial of her alleged ownership as an issue in an action brought Mr. Gaynor’s former solicitors, Sheridan Quinn, against Mr. Gaynor. The Judge further stated that in any event, even if that claim had not been determined, any claim which Ms. Gaynor might have had against the land would not justify Mr. Gaynor trespassing on it.

39. Allen J. also rejected Mr. Gaynor’s plea that he would be homeless if the Orders sought by the Official Assignee were granted, noting that Mr. Gaynor’s home was not on the lands the subject of the injunction application and that the Official Assignee was hopeful that sale of the lands the subject of the within action would be sufficient to satisfy the creditors, and thus allow the bankruptcy to be concluded and the estate closed without the necessity for the sale of Mr. Gaynor’s home. The Judge also rejected Mr. Gaynor’s plea that if the lands were sold, he would have to transfer his remaining lands to family and friends from whom he had borrowed money from time to time. He noted that none of Mr. Gaynor’s family or friends had proved any debt in the bankruptcy. He went on to state that that fact apart, “the fundamental flaw in this suggestion and indeed the flaw in the very premise of the suggestion is that the lands are [Mr. Gaynor’s]. They are not. The lands were Mr. Gaynor’s until he was adjudicated bankrupt but, on his adjudication, by s.44 of the Bankruptcy Act, 1988 all of his property vested in the Official Assignee for the benefit

of his creditors. If Mr. Gaynor cooperates with the Official Assignee, he may get some property back, but for the moment he owns nothing.” (at para. 16)

40. The Judge was duly satisfied that whilst Mr. Gaynor’s affidavit traversed “a number of issues upon which it is not useful or necessary to dwell”, he had not pointed to any evidence that would establish that he had a right to do what would otherwise be a trespass.

The appeal

41. Mr. Gaynor’s notice of appeal asserts that he is appealing the Adjudication Order of 7 December 2015 and the Order of Allen J. of 15 October 2021. In summary, the principal grounds advanced are as follows:

- Unlawful interference by Senior Counsel for the Official Assignee with the court process;
- The Adjudication Order of 7 December 2015 should not have been made as all due legal fees had been discharged;
- The Order of the Court of Appeal of 9 November 2020 is of no effect as there was no actual hearing of Mr. Gaynor’s appeal;

42. In his respondent notice, the Official Assignee asserts as follows:

- The notice of appeal discloses no grounds of substance against the Order of Allen J.;
- Mr. Gaynor’s adjudication in bankruptcy has been the subject of an application before the High Court to show cause, appeals to the Court of Appeal and leave applications to the Supreme Court all determined adverse to Mr. Gaynor. In consequence, he has exhausted his right to appeal the Adjudication Order;
- The lands the subject matter of the Order of Allen J. vested in the Official Assignee;

- Contrary to Mr. Gaynor's assertions, Allen J. did not make a finding that the debt the subject of the Adjudication Order had been satisfied prior to the order of adjudication;
- Mr. Gaynor's arbitrary allegations against the solicitors and counsel for the Official Assignee are unfounded.

Discussion

43. In his written and oral submissions to this Court, Mr. Gaynor advances myriad matters said by him to be grounds upon which his appeal should succeed. Many of his grounds relate to the bankruptcy process and alleged procedural frailties in that process. Mr Gaynor reiterates that his appeal to this Court is not just against the Order of Allen J. of 15 October 2021 but, more fundamentally, against the Adjudication Order of 7 December 2015 and the Order of Pilkington J. of 29 April 2019. He asserts that on 17 December 2021 he was given liberty by Costello J. to include the Adjudication Order as a fundamental part of his appeal. I am satisfied, however, that that is not the case. Having listened to the D.A.R. of the proceedings before Costello J., at most, Mr. Gaynor was given liberty to include the Adjudication Order in his books of appeal.

44. Mr. Gaynor in his submissions describes the Adjudication Order and the Order of Pilkington J. of 29 April 2019 as "unlawful, unjust and immoral". This he says is because the petitioning creditor, Sheridan Quinn, when pursuing his bankruptcy, took no account of payments Mr Gaynor had made to Sheridan Quinn, payments which, Mr. Gaynor alleges, discharged any indebtedness he had to his former solicitors. In this regard, Mr. Gaynor again references a payment of a payment of €13,539 he says he paid over to Sheridan Quinn on 16 December 2003, €50,000 discharged in March 2005, €50,000 discharged in December 2011, all said by Mr. Gaynor to have been discharged by hand. He submits that his delivery of these sums by hand was required to be deemed proper discharge of his

indebtedness in circumstances where Sheridan Quinn themselves saw fit to deliver documents by leaving them at Mr. Gaynor's door notwithstanding the Order of Costello J. of 20 July 2015 that service was to be effected by pre-paid ordinary post. Mr Gaynor also alleges that in the bankruptcy petition, Sheridan Quinn made no mention of these payments (a total of €113,539).

45. Mr Gaynor also references a sum of €90,000 (comprised of three bank drafts for €34,000, €36,000 and €20,000) which, he says, he transmitted to the client account of his then solicitors, Farrell Solicitors, in 2013. He claims that the €90,000 was for onward transmission to Sheridan Quinn. He repeats his previous contention that when this sum was proffered by Farrell Solicitors, Sheridan Quinn refused to accept same, something, he says, which was confirmed both to the High Court and to him by a solicitor in Sheridan Quinn.

46. Mr. Gaynor further alleges that he was pursued in the bankruptcy proceedings by Sheridan Quinn without their ever having sought to recover costs which were awarded in Mr. Gaynor's favour in proceedings Mr. Gaynor had instituted against the named third party (the nature of which are set out in Mr. Gaynor's written submissions). He further asserts that the petitioning creditor failed to take any action to shield him or otherwise insulate him from the equity proceedings (again, described in Mr. Gaynor's written submissions) which were taken by the third party against Mr. Gaynor and which, he alleges, were commenced by the third party in contravention of certain statements of the trial judge in the proceedings which Mr. Gaynor had commenced against the third party. Mr. Gaynor asserts that, followings certain payments to be made by Mr. Gaynor to the third party, the trial judge in those proceedings had directed that no equity proceedings were to be commenced against Mr. Gaynor. He also asserts that he surrendered a life policy to the value of €54,000, together with costs to the value of to the value of €50,000 which had been awarded to him in his proceedings, to Robert Marren and Co Solicitors,

the solicitors for the third party. He alleges that Sheridan Quinn wrongfully prioritised their quest for their own legal costs ahead of Mr. Gaynor's interests in the litigation both brought by him against the third party and that which had been brought against him by the third party.

47. Mr. Gaynor submits that having brought the payments described above to the attention of the Allen J., and now to this Court, in the context of the present application, this Court must take the view that the Order of Pilkington J. and the underlying Adjudication Order of Costello J. "was fundamentally unfair and unlawful and ought to be struck out" and that Allen J. was wrong not to accede to his application in this regard.

48. He further asserts that by virtue of he, Mr. Gaynor, not having any indebtedness to the petitioning creditor, the registration of Mr. Lehane, the predecessor in office to the Official Assignee, as owner of Mr. Gaynor's lands was unlawful, premised as it was on an unlawful Adjudication Order of 7 December 2015.

49. As can be seen, Mr. Gaynor's fundamental submission is that as he had no indebtedness, whether by way of legal fees or otherwise, as of 7 December 2015 to the petitioning creditor, the Adjudication Order made on that date is flawed. He claims that as a consequence of that flawed order, the Official Assignee is not entitled to any title to or relief in respect of the lands in question and he submits that it is the Official Assignee who is in unlawful possession of the lands and who is the trespasser on the lands.

50. By reason of all of the foregoing, Mr. Gaynor now purports to seek an Order under s.85C of the 1988 Act for annulment of the adjudication in bankruptcy.

51. The first observation I would make is that Mr. Gaynor does not dispute the actions attributed to him by the Official Assignee and as described in the Official Assignee's affidavit of 21 September 2021. Nor does he, either in his replying affidavit or in submissions in the court below (or in this Court), refute the claim that he interfered with

the sale of the lands. Secondly, Mr. Gaynor does not argue that Allen J. made any error of law in granting the reliefs sought by the Official Assignee, other than to continue to maintain that he, Mr. Gaynor, should never have been adjudicated a bankrupt in the first place. Thus, the entire thrust of Mr. Gaynor's submissions is that he should not have been adjudicated a bankrupt on 7 December 2015. That, however, is not an argument Mr. Gaynor is entitled to make as he has exhausted all avenues in that regard by his application to show cause, his appeals to the Court of Appeal and his leave applications to the Supreme Court. The result of those failed appeals and applications for leave is that there is an extant Adjudication Order which neither the High Court nor this Court can go behind.

52. As is evident from his affidavit evidence and submissions, Mr. Gaynor also takes issue with the manner in which Court addressed the appeal he lodged against the Order of Pilkington J. of 29 April 2019 and which resulted in the Order made on 9 November 2020. Whilst, for the reasons I have already set out, the Order of 9 November 2020 is not a matter that Mr. Gaynor can now seek to revisit, I would observe, firstly, that his appeal was dismissed on that day in circumstances as outlined on the face of the Order of 9 November 2020. As is clear from the Order of 9 November, it was Mr. Gaynor himself who chose not to proceed with his appeal after certain rulings were made by the Court with respect to Mr. Gaynor's last-minute application to adduce additional evidence and his application for an adjournment. It is also clear from the Order that the appeal was dismissed not only upon Mr. Gaynor's statement that he did not wish to progress his appeal but also upon the Court having read the notice of appeal and respondent's notice, Mr. Gaynor's letter of 16 June 2020 (as lodged in the Court on 19 June 2020 and which was, upon the direction of the Court, accepted *in lieu* of the written submissions he had been given liberty to lodge up to the close of business on 19 June 2020), the submissions of the Official Assignee lodged on 13 August 2020, the Official Assignee's supplemental submissions lodged on 23 October

2020, the affidavit of Mr. Gaynor filed on 2 November 2020 *qua* written submissions, and the further documents contained in the books of appeal including the transcript of the proceedings before Pilkington J. on 29 April 2019. Hence, it is not the case, as Mr. Gaynor seeks to maintain, that his appeal was not adjudicated upon or that he was denied due process. Secondly, subsequent to the making of the Order of 9 November 2020, Mr. Gaynor sought and was refused leave by the Supreme Court to appeal the Order for the reasons set out by the Supreme Court in its Determination ([2021] IESCDET 19).

53. Insofar as the present appeal is concerned, I note that before granting the relief sought by the Official Assignee, the Judge took note of Mr. Gaynor's claim that he should not have been adjudicated a bankrupt on 7 December 2015 but found that that was an argument he was not permitted to make for the reasons set out in the judgment. The fact that Mr. Gaynor does not agree with or accept the conclusions of Costello J. in her judgment of 7 December 2015 that there was a debt owing by Mr. Gaynor to the petitioning creditor of more than €20,000 could not prevail before Allen J. since, as he correctly found, Costello J.'s conclusions and Order were final, conclusive and binding in circumstances where Mr. Gaynor had exhausted his rights to challenge the Adjudication Order by dint of his application to show cause, his appeal to the Court of Appeal and his leave applications to the Supreme Court. As said by Allen J., "as a matter of law [Mr. Gaynor] cannot now be heard to obliquely challenge the adjudication order". I agree entirely with the Judge's observation in this regard. Mr. Gaynor cannot now seek to revisit the matter having had the benefit of the appellate process and having availed twice (albeit unsuccessfully) of his entitlement to seek leave from the Supreme Court to appeal the relevant orders of the Court of Appeal.

54. Upon his adjudication as a bankrupt, all of Mr. Gaynor's assets vested in the Official Assignee pursuant to s.44 of the 1988 Act. Those assets include the three folios the subject

of the within proceedings. The sole issue before the High Court was whether the test for the granting of injunction relief in respect of trespass to lands was met in circumstances where the applicant for relief was the owner of the lands.

55. I am satisfied that in making the Order he did, the Judge applied the correct principle, as stated in *Keating*, namely that an owner of lands whose title is not in issue is entitled to injunctive relief subject to the defendant establishing that he had a right to do what would otherwise be a trespass. Nothing Mr. Gaynor has said persuades me that the Judge erred when he found that Mr. Gaynor had not pointed to evidence that established that he had a right to interfere with the lands in question.

56. Insofar as Mr. Gaynor asserts before this Court that it is Mr. Lehane (the Official Assignee's predecessor in office) who is the registered owner of the lands and, thus, the Official Assignee has no entitlement to the lands (or to seek relief in respect of the lands), that argument is misconceived. The fact that the lands are registered in the personal name of the holder of the office of the Official Assignee rather than being registered as in the ownership of "the Official Assignee" is explained by counsel for the Official Assignee as owing to the requirement of the Examiner's Office that the vesting certificate which issues from the Examiners Office upon an adjudication in bankruptcy issues in the name of the holder of the office of Official Assignee. Thus, when the application was made in 2017 by Mr. Lehane, *qua* Official Assignee, to become the registered owner of the lands, presumably that application involved his presenting the certificate which evidenced the vesting of the lands in him and which bore his name. In any event, the salient issue here is that pursuant to the 1988 Act, the property of the bankrupt vests in the holder of the office of Official Assignee. This has been put beyond doubt in *In re. Fitzpatrick* [1939] I.R. 252.

57. In *in re Fitzpatrick*, the Official Assignee (Mr. Hollinshead) had obtained liberty from the High Court to sell certain property of the bankrupt. After an abortive auction

process, the Official Assignee had engaged in negotiations with a purchaser. Ultimately, on 24 June 1938, the purchaser signed a proposal to purchase the property. However, before he could sign the proposal, the Official Assignee had retired from office on 25 December 1936. On 9 January 1937, the Minister for Justice appointed his successor (Mr. James Doyle) as Official Assignee “with effect from 25th December 1936”.

58. Among the purchaser’s requisitions on title was a requirement, *inter alia*, that Mr. Hollinshead join in the assurance of the property to the purchaser, or that it be shown that all Mr. Hollinshead’s estate in the property became vested in his successor, Mr. Doyle. The requisition was answered to the effect that Mr. Doyle had been appointed as successor to Mr. Hollinshead, as had been recorded in Iris Oifigiuil. This answer was not accepted by the purchaser as having cured the alleged defect in the title. Subsequently, the Official Assignee suggested that the purchaser file his objection in the office of the Court for adjudication. The matter then came before the High Court on the motion of the Official Assignee to have the purchaser’s objection discharged.

59. In the High Court, the purchaser’s objection was found to be untenable. It was held that when an Official Assignee in bankruptcy retires from office “*all the estate vested in him in the property of the bankrupt vests in his successor in office immediately on the appointment of such successor*”. Johnston J. explained the position thus:

“The nature of bankruptcy proceedings was carefully explained and placed on a proper basis by Dodd J. in the case of In re Bolton(1), and it is unnecessary to refer to that case in greater detail. The essential feature of a bankruptcy matter is the adjudication, and the moment when that happens the whole property of the bankrupt passes statutorily to the Assignees and becomes vested in them. This result is effected by virtue of ss. 267 and 268 of the Act of 1857. The former section provides that ‘When any person shall be adjudged a bankrupt . . . all the personal

estate and effects of such bankrupt . . . shall become absolutely vested in the Assignees for the time being for the benefit of the creditors of the bankrupt' and 'such Assignees shall have absolute power and remedy to recover the same in their own names.' Similarly, s. 268 provides that when an adjudication takes place 'all lands, tenements and hereditaments . . . to which any such bankrupt . . . is entitled . . . shall become absolutely vested in the Assignees for the time being for the benefit of the creditors of such bankrupt.' The matter is carried a little further by s. 277, which provides that 'the Assignees shall be subject to the orders of the Court in their conduct as Assignees.'

The Official Assignee is not, and, so far as my knowledge of the history of bankruptcy and insolvency goes, by whatever name he was called, never was a corporation sole, and it would certainly appear that if the matter rested alone upon ss. 267 and 268, the purchaser's requisition on title would have to be acceded to; but it seems to me that s. 60 of the Act of 1857 puts the matter at rest. That section (which is concerned solely with the Official Assignee as opposed to the Creditor's Assignee) provides further that 'the Official Assignees for the time being . . . shall be Assignees of each bankrupt's estate and effects and act with the Assignee (if any) chosen by the creditors; but the real and personal estate and effects of every bankrupt . . . and the income and proceeds thereof shall be possessed and received by the Official Assignee alone, save where it shall be otherwise directed by the Court.' That is to say, that while the property is vested in both Assignees, it shall be 'possessed and received by the Official Assignee alone.'

In quoting this section I have, however, omitted the words which, so far as the question involved here is concerned, are the salient words— 'and their successors when appointed.' The whole clause then reads thus: 'the Official Assignees for the

time being, and their successors when appointed, shall be Assignees of each bankrupt's estate and effects.' That is to say, Mr. Hollinshead, being the Official Assignee 'for the time being,' was to have the bankrupt's estate and effects vested in him, but when he ceased for any cause to be the Official Assignee, his successor (namely Mr. Doyle) was to be Assignee of the bankrupt's estate and effects, Mr. Doyle having been 'appointed' as Mr. Hollinshead's 'successor.' *In that way, the Legislature makes it quite clear that the bankrupt's estate and effects are, immediately upon the adjudication, to vest in the Official Assignee 'for the time being,' and when any change takes place, by reason of death, resignation, removal or otherwise, the new Official Assignee, 'when appointed,' immediately becomes the Assignee of the bankrupt's estate and effects.* Any other construction of s. 60 would bring about an absurdity and an impossible situation which cannot be attributed to the Legislature.

This interpretation of these three sections is consistent with and strengthened by the terms of s. 283, which provides that 'whenever an Assignee shall die or be removed, or a new Assignee shall be appointed, no suit shall be thereby abated, but the Court in which any suit is depending may, upon the suggestion of such death or removal and new appointment, allow the name of the new Assignee to be substituted.' Similarly my decision is not inconsistent with the decision of Sir Edward Sullivan M.R. in the case of *In re Frith and Hughes(1)*, who held that the annulment of a bankruptcy did not, *ipso facto*, re-vest the property of the bankrupt in him. That must be done separately and independently by an order of the Court.”
(emphasis added)

60. Whilst Johnston J. was considering the consequences of an adjudication in bankruptcy under a different legislative scheme, I am satisfied that his dictum is equally applicable to the bankruptcy scheme provided for in the 1988 Act.

61. In the later case of *In re. McGovern* [1971] IR 149, it was held by the Supreme Court that a deputy Official Assignee properly appointed under s. 28 of the Courts Officers Act 1926 could execute a deed of re-vesting of property in the bankrupt.

62. Here, the Official Assignee assumed Mr. Lehane's position in 2020. As in *In re. Fitzpatrick*, the consequence of the Official Assignee having succeeded Mr. Lehane in office that was that the estate of the bankrupt (Mr. Gaynor) became vested in the Official Assignee immediately upon his taking up his position. Moreover, the Official Assignee became possessed of the powers granted under the 1988 Act, including the power under s. 61(3)(a) to sell the property of the bankrupt. As the lands vested in him and he had the power of sale, it follows that the Official Assignee had the entitlement as owner of the lands to take such action as was required to ensure an effective sale of the property, including, if necessary, seeking injunctive relief against trespassers on the lands. Thus, for all of those reasons, the very fact that the property in issue here happens to be registered in Mr. Lehane's name cannot assist Mr. Gaynor in this appeal. His argument that the Official Assignee was not entitled to seek injunctive relief is rejected.

63. Another argument made by Mr. Gaynor in the court below (and in this Court) is that his sister, Ms. Cecilia Gaynor, is the beneficial owner (to the extent of fifty percent) of Folio 2538. However, as noted by the Judge, that claim was determined by Feeney J. in 2009 adverse to Ms. Gaynor. Moreover, as found by Allen J., Mr. Gaynor is not entitled to rely on a *jus tertii*. Thus, even if Ms. Gaynor's claim to Folio 2538 had not been determined, any claim she had would not justify Mr. Gaynor trespassing on the land in question.

64. Mr. Gaynor further alleges interference by the Official Assignee's legal team in the High Court process of 14/15 October 2021. Save this bare allegation, Mr. Gaynor has failed entirely to adduce any evidence of the alleged interference. This claim is entirely without merit and is dismissed *in limine*.

65. In the course of his appeal submissions, Mr. Gaynor also repeats the claim he made in the High Court that the granting of the relief sought by the Official Assignee would render him homeless. It is the case however that none of the lands or property the subject matter of the within proceedings comprise Mr. Gaynor's family home. Moreover, the Court was advised that the Official Assignee has not enforced the family home Order made by the High Court on 29 April 2019. There is therefore no merit in Mr. Gaynor's complaint.

66. For the reasons set out above, I would dismiss the appeal.

Costs

67. Mr. Gaynor has not succeeded on any of the grounds in the appeal. It follows that the Official Assignee should be awarded his costs. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

68. As this judgment is being delivered electronically, Donnelly J. and Barniville J. have indicated their agreement therewith and the orders I have proposed.

