NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURT ACT 1980.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA720/2022
[2024] NZCA 243

	BETWEEN	M Appellant
	AND	H Respondent

Hearing: 21 August 2023
Further submissions filed 19 February, 8 March, 22 March and 10 June 2024

Court: Wylie, Ellis and van Bohemen JJ

Counsel: E Telle and K A K Koo for Appellant
No appearance for Respondent
G A D Neil and R M G Hindriksen for Official Assignee

Judgment: 19 June 2024 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The order adjudicating H bankrupt is annulled, with effect from the date of adjudication, being 30 June 2021.

C The High Court order directing M to pay H's costs in the High Court is set aside, and the question of costs is to be reconsidered by the High Court in light of this decision.

D The respondent is to pay the appellant's costs on the appeal on a Band A basis for a standard appeal, together with usual disbursements.

E The Official Assignee's costs of administration are to be paid by the respondent and may be secured by way of charge over his interest in the Property.

REASONS OF THE COURT

(Given by Ellis and van Bohemen JJ)

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Introduction

[1] M appeals the decision of Associate Judge Gardiner dismissing her application to annul the adjudication in bankruptcy of her former partner, H,[1] under the Insolvency Act 2006 (IA 2006).[2] M says the Associate Judge applied the wrong test when considering whether H's application for voluntary bankruptcy was an abuse of process,[3] was in error in finding that H had legitimate reasons for applying for bankruptcy and was in error in holding that, in order for the bankruptcy to be annulled, M had to establish that H's sole purpose in seeking adjudication was to thwart M's claims under the Property (Relationships) Act 1976 (PRA).

[2] H played no part in the High Court hearing before Associate Judge Gardiner or in the hearing of this appeal. The Official Assignee (Assignee), however, was represented at both hearings and opposed both M's application and appeal.

[3] After the hearing of the appeal in August 2023, the Court invited counsel to file further submissions addressing specific questions about the operation of the annulment provisions in the IA 2006 in the context of debtor-initiated adjudications and in relation to the possibility of costs being awarded against the Assignee. And because of the possible wider significance of some of the matters raised by the appeal, the Court also invited counsels' views on whether we should refer the proceeding for consideration by a full court of this Court under s 47(4) of the Senior Courts Act 2016.

[4] In the submissions filed as a consequence of our request, counsel were largely agreed about the answer to the annulment questions and considered it was not

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1 We have anonymised the parties' names in this judgment to comply with the requirements as set out in ss 11B–11D of the Family Court Act 1980.

2 [*M*] *v* [*H*] [2022] NZHC 3060 [High Court decision].

3 The Official Assignee's position was that leave to advance this argument was required, because it was not raised in the notice of appeal. We address that issue later in this judgment.

necessary to have a further hearing before a differently constituted Court. We have determined that we should deliver this judgment, accordingly.

H's bankruptcy

The relationship breakdown

[5] In 2006, M and H entered into a de facto relationship. In 2008, they moved into a property owned by H's father (the Property). After H's father died in 2009, H inherited the Property and it vested solely in his name.

[6] M and H occupied the Property as their family home, together with their child, who was born in 2012.

[7] In February 2020, M and H separated. The same month, the Family Court granted M a temporary occupation order, and then, later, a final occupation order, which entitled M and their child to occupy the Property to the exclusion of H.[4] These orders have since lapsed but M and the child continued to occupy the Property.

[8] On 28 May 2020, the Family Court issued a final protection order against H.[5]

[9] In September 2020, M and H exchanged text messages, in which H proposed that M give him "[$400,000] and be done". M observed that he had not paid any child support and H suggested making a down payment of $50,000 for that.

[10] On 15 October 2020, M emailed H a draft separation agreement and a parenting agreement which had been prepared by her solicitors. The draft separation agreement acknowledged that the parties had been living in the Property as their family home, that the parties accepted that the current market value of the Property was approximately $830,000, that M wished to purchase H's half share in the Property, that H had agreed to sell his half share for $400,000, and that M was seeking to raise

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4 See [*M*] *v* [*H*] FC Waitākere FAM-2020-090-86, 30 June 2020. The Family Court also granted M a furniture order, which entitled her to the possession of all furniture, household appliances, and household effects in the Property: [*M*] *v* [*H*] FC Waitākere FAM-2020-090-86, 30 June 2020.

5 [*M*] *v* [*H*] FC Waitākere FAM-2020-090-86, 28 May 2020.

$350,000 to purchase the half share for that amount on the basis that H had agreed to pay $50,000 in settlement of his child support obligations.

[11] H did not respond directly to M's email. However, on 26 October 2020, solicitors engaged by H emailed M's solicitors stating that they were instructed that the Property was not relationship property but H's separate property. M's solicitors responded the following day, pointing out that the parties had been in a relationship for 14 years, had a child together, had lived in the Property from 2008 to February 2020 and had not signed a contracting out agreement.

[12] H's solicitors replied on 4 November 2020 saying that they were instructed that the Property was not relationship property because H had inherited it from his father, he had not expressly or impliedly consented to it being relationship property and because M had not made any contribution to it. Again, M's solicitors responded the following day, referring to s 8(1)(a) of the PRA and stating that the fact H had inherited the Property was of no relevance when it had been used as the family home. The email invited H to commence relationship property proceedings to determine the classification of the Property and its division, if he continued to maintain that the Property was separate property but observed that this would likely be a waste of time and resources.

[13] Despite follow-up messages from M to H, including messages resending the draft separation and parenting agreements at H's request, the agreements were not signed.

[14] From December 2020 and into the first half of 2021, H made several posts on Facebook about M alleging, among other things, that she had been unfaithful and violent towards him while they were in a relationship and that he was not the father of their child.

[15] In February 2021, H sent M a number of emails suggesting that he was prepared to sign the separation and parenting agreements if M paid him $500,000, amended the parenting agreement and delivered their child to him.

[16] On 2 March 2021, newly instructed solicitors for H wrote to M's solicitors advising that they had received preliminary instructions "to resolve a relationship property settlement" with M as soon as possible. The letter stated that H was, in principle, willing to negotiate a sale of his interest in the Property, which was described as the "Family Home", if there could be agreement on an appropriate market value and treatment of all other relationship property and debts.

[17] Two days later, on 4 March 2021, H's solicitors sent M's solicitors a further email confirming H's interest in selling the Property at full market value as assessed independently. The email said H's financial situation was dire and that resolution was needed without delay.

[18] A week later, on 10 March 2021, H provided his solicitors with an email from a case worker at the Salvation Army Epsom Lodge, where H had been living. The email said that H needed to find suitable accommodation, had not been able to move on with his life because of his financial struggles and that he feared being homeless and bankrupt. The email also said H was facing bankruptcy because of cash flow issues and that he could not obtain a loan because M had put a claim on the Property.

[19] Further correspondence was exchanged between the solicitors, including about obtaining valuations of the Property.

[20] On 20 April 2021, H's solicitors expressed concern to M's solicitors that they did not seem to be progressing the matter and asked where M had got to in terms of obtaining market appraisals of the Property. The email said H's financial and personal circumstances were precarious and the failure to resolve matters was causing him distress. The email advised that unless the solicitors had a clear understanding that settlement was achievable on appropriate terms, they would seek orders for the early sale of the "Family Home".

[21] On 23 April 2021, M's solicitor emailed H's solicitor a market appraisal of the Property, which advised that the Property was likely to sell for between $850,000 and $900,000. M's solicitors advised that M was willing to make an offer to purchase

H's interest based on a price of $850,000 less $28,000 for real estate commission and conveyancing fees.

The decision to apply for adjudication

[22] There was no direct response to M's proposal. However, on 27 April 2021, H sent M an email asking her to take him back. When M replied by sending H her solicitor's email of 23 April and asking for a response, H, on 7 May 2021, replied:

> I am instructing my attorney to stop work.
>
> If I go bankrupt and the house goes to creditor auction. So be it!
>
> I am not breaking up with you that easily.

[23] The following day, on 8 May 2021, H emailed M as follows:

> The way I see we have three options.
>
> 1. You take me back
> 2. You see a psychiatrist
> 3. We go to auction (*)
>
> If you agree with me, do nothing by Midnight or indicate reservation to the proposal tonight and I will instruct my solicitor first thing in the morning to sell the house at auction the consequence you will have 14 days to shift out and find your next estate, I can't help you because I am not welcome back.

[24] Just over a month later, on 10 June 2021, H sent M an email saying he had had surgery for cancer that day, that he could be "gone in six months" and that he was instructing his solicitor to sell the Property to leave a legacy for "you two". He said it was either that or he would leave everything to the Salvation Army. A week later, on 17 June 2021, H sent M an email saying he had given up, had no hope left and would be declaring bankruptcy the following day, triggering the sale of the Property. The email said that because his debts were too great, M would be left with nothing.

[25] On 23 June 2021, H filed an online application and statement of affairs to have himself adjudicated bankrupt. In his statement of affairs, H disclosed:

(a) debts of $58,000 to Government agencies, comprised principally of $50,000 said to be owed in child support arrears;

(b) $32,000 owed in total to Toyota Finance, Kiwibank and ASB Bank; and

(c) his ownership of the Property, which he valued at $890,000.

He also asserted that M owed him $500,000.

[26] On 30 June 2021, after H had provided further information in response to a request from the Assignee, the Assignee accepted H's application and H was adjudicated bankrupt accordingly.[6]

Post-bankruptcy events

[27] Following the adjudication, investigations by the Assignee revealed that the debt of $500,000 said to be owed by M was not an asset of H's estate. It was also ascertained that actual claims against the estate totalled only $33,706.75. The estate itself comprised the Property, valued at $1 million, with a forced sale price range of $900,000 to $950,000, and an antique clock. H valued the clock at $10,000 but the Assignee considered it to be of uncertain value and unnecessary to be sold, given that all debts and costs could be recovered from sale of the Property.

[28] There was also correspondence between the Assignee and M, including through their respective solicitors, about whether M might pay H's creditors and purchase the Property. No agreement was reached. The Assignee said H had to agree to any arrangement, and he had refused to do so. In addition, the Assignee advised that, in accordance with ss 20A, 20B and 53A of the PRA, the Property had passed to the Assignee and M's rights in the Property were restricted to her protected interest, being the specified sum of $103,000.

[29] On 15 September 2021, solicitors for the Assignee wrote to M's solicitors saying:

> It is not clear whether you are aware that [H] was adjudicated bankrupt on his own application. His debts are modest, and he has made it clear from the outset that he wants the [Assignee] to sell the property so that he can use the surplus, once his creditors and the [Assignee]'s costs have been paid, to purchase a new residence. It may well be that he will consent to your client

[6] We discuss the relevant statutory provisions later in this judgment.

> receiving half the proceeds of the sale, but this is something that will be explored once the property has been valued.
>
> It is not feasible for your client to make an interim payment to the [Assignee] in settlement of the creditors' claims and [Assignee]'s costs as the property will continue to vest in the [Assignee], who will remain under an obligation to deal with it. The first step remains to value the property, but this obviously cannot be accomplished whilst Auckland is at Level 4.

[30] In November 2021, the solicitors for the Assignee advised it was open to M to purchase the Property for full value ($1 million) less M's protected interest in the specified sum of $103,000 and sent M's solicitors an agreement for sale and purchase.

[31] M's solicitors replied saying:

> 3. The [Assignee] in his letter of 15 September 2021 admits the bankrupt's debts are modest and he adjudicate[d] bankruptcy on his own. The email goes on to say [H] wishes to use the surplus once his creditors and [Assignee]'s costs have been paid, to buy a new residence.
>
> 4. [M] takes the view that [H] deliberately made himself bankrupt to circumvent the [PRA]. He should not have made himself bankrupt in the first place because his assets far exceed his modest debts. Given [M] has offered to repay the debts but [H] has declined the offer, the only plausible explanation for [H] to remain in bankruptcy is his intention to use the office of the [Assignee] to gain an advantage which he would not otherwise have if he tried to pursue the claim for more than 50% share of the property himself. If the [Assignee] maintains that he has the right to sell the property without acknowledging [M] as having an equal share in the property, [M] considers the [Assignee]'s ongoing involvement in the relationship property dispute an abuse of process.

[32] M's solicitors then referred to s 309 of the IA 2006, saying M could apply to have the bankruptcy annulled because H's assets were sufficient to discharge his outstanding debts. They advised they would seek M's instructions about the offer to sell the Property for $1 million and that, if accepted, M would pay H $500,000 on the basis that the transaction would constitute a full and final settlement of any relationship property claim.

[33] On 24 November, the Assignee responded:

> 4 The Assignee is independent of and free of influence from the Bankrupt. The Bankrupt's property vested in the Assignee upon adjudication and the Assignee is statutorily obligated to realise

> the Bankrupt's property for the benefit of creditors. As we explain below, the Bankrupt's relationship property dispute with [M], and his personal motivations, are immaterial to the current position. Although, on the evidence we have reviewed, no improper motive is apparent.

[34] The Assignee rejected the propositions that the bankruptcy was motivated by H's desire to circumvent the application of the PRA and that, because his assets exceeded his debts, he should never have been adjudicated bankrupt. The Assignee advised that claims received in H's estate totalled $27,983.33, and that:

> 14 Apart from the Property, the only asset the Bankrupt had at the time of adjudication was an antique clock. This clock is currently being valued but the Bankrupt has advised it is worth $10,000. While it is true that the value of the Property far exceeds the value of the creditor claims, the value of that asset could only be realised by sale and the Bankrupt was unable to sell it while it was the subject of a dispute under the PRA.
>
> 15 In any case, we note that pursuant to s 45 of the [IA] 2006, the criteria for a debtor to file an application for adjudication (and be adjudicated pursuant to s 47) is simply that the debtor has combined debts of $1,000 or more. Section 45 of the Act does not require any further analysis of the debtor's assets. The Bankrupt had debts well in excess of $1,000 and he was unable to pay them without recourse to the Property. As a matter of law, his adjudication was entirely appropriate.

[35] The Assignee also denied that M was an "interested person" with standing under s 309 to challenge the adjudication.[7]

M's application

[36] In May 2022, M applied for an annulment of H's adjudication on the grounds that he "was not bankrupt" and/or that his bankruptcy amounted to an abuse of process. The application was served on the Assignee, in accordance with s 309(2) of the IA 2006.

[37] The Assignee then proposed that M pay the creditors' claims along with the Assignee's present and prospective costs so that the Court could be told that the creditors had been paid and the Assignee's costs met. M also rejected that proposal but did settle with all creditors, who then withdrew claims against H's estate.

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7 That position is, very properly, no longer maintained by the Assignee.

[38] By notice dated 7 July 2022, the Assignee notified M and the Court that the Assignee intended to appear at the hearing of the application and of their position that H's adjudication was not an abuse of process because it had not been established that he had sought adjudication for the sole, or even ancillary, purpose of suppressing M's relationship property claim.

[39] As at 28 October 2022, the Assignee's costs in relation to H's bankruptcy totalled approximately $90,500, of which almost $56,000 was attributable to legal fees.

Relevant legislation

[40] Before turning to consider the Associate Judge's decision and the issues raised by the appeal, it is useful to set out the relevant statutory landscape.

Insolvency Act 2006

[41] The IA 2006 sets out the process by which a person may be adjudicated bankrupt. Section 10 defines what adjudication means:

> **10 Adjudication**
>
> (1) Adjudication occurs when a debtor is adjudicated bankrupt.
>
> (2) A debtor is adjudicated bankrupt if either—
>
> (a) a creditor of the debtor applies to the court for an order of adjudication, and the court makes the order; or
>
> (b) the debtor files an application with the Assignee for adjudication.

[42] As s 10 suggests, the IA 2006 provides for two forms of adjudication:

(a) on an application by a creditor, in which case ss 11, 13 and 36–44 apply; and

(b) on an application by a debtor, in which cases ss 12 and 45–49 apply.

[43] Because it is only debtor-initiated adjudication that is relevant here, we address only the relevant parts of the second process:

(a) Section 12 provides that a debtor may be adjudicated bankrupt by filing an application for adjudication with the Assignee.

(b) Section 45 provides that a debtor may file an application with the Assignee to be adjudicated bankrupt if the debtor has combined debts of $1,000 or more.

(c) Section 46 provides:

> (1) A debtor may not file an application for adjudication unless the debtor has first filed with the Assignee a statement of the debtor's affairs in the prescribed form.
>
> (2) The Assignee may reject a statement of affairs that in the Assignee's opinion is incorrect or incomplete.

(d) Section 47 provides:

> (1) A debtor who files an application with the Assignee to have himself or herself adjudicated bankrupt is automatically adjudicated bankrupt when the application is filed.
>
> (2) That adjudication has the same consequences as if the debtor had been adjudicated bankrupt by the court.

[44] Later relevant provisions in the Act apply to both creditor and debtor-initiated adjudications.

[45] Section 101 provides that, on adjudication, a bankrupt's property vests in the Assignee, together with any powers the bankrupt could have exercised for his or her own benefit in respect of any property.

[46] Section 309 deals with annulment by the court, and states:

> (1) The court may, on the application of the Assignee or any person interested, annul the adjudication if—
>
> (a) the court considers that the bankrupt should not have been adjudicated bankrupt; or

…

(3) The adjudication is annulled—

(a) from the date of adjudication, in the case of an application on the ground specified in subsection (1)(a):

…

[47] Section 310 deals with annulment by the Assignee:

(1) The Assignee may annul an adjudication on any of the grounds specified in subsection (2) if the adjudication was made on a debtor's application.

(2) The grounds for annulment by the Assignee are—

(a) the Assignee considers that the bankrupt should not have been adjudicated bankrupt; or

…

(4) The adjudication is annulled—

(a) from the date of adjudication, in the case of an application on the ground specified in subsection (2)(a):

…

[48] It is useful to interpolate here that the provisions set out above incorporated two changes to the previous law that are of potential relevance in this case.

[49] The first is that debtor-initiated adjudication is now triggered by the debtor filing an application with the Assignee, rather than in the High Court.[8]

[50] The second is that there is no longer an express requirement that debtors seeking adjudication file a petition declaring that they are insolvent or unable to pay their debts.[9] Rather, the s 45 threshold is, as noted above, that the debtor has combined debts of $1,000 or more and has completed a statement of financial position to the satisfaction of the Assignee. Whether or not the phrase "combined debts of $1,000 or more" should, as a matter of purposive construction, be interpreted to mean *net* debts

---

8 As had previously been required by the Insolvency Act 1967 [IA 1967], s 21.

9 As was required by the Insolvency Rules 1970, r 44; and see Form 16. In earlier statutory iterations, debtors seeking their own adjudication were required to make a declaration that they were insolvent.

in that amount, is a point on which we heard no argument and about which we make no finding.

[51] There was no material change to the relevant ground of annulment: under the Insolvency Act 1967 (IA 1967), an adjudication was able to be annulled if the court considered "the order of adjudication should not have been made".[10]

[52] We return to the significance of these matters later in this judgment.

Property (Relationships) Act 1976

[53] Section 8(1)(a) of the PRA provides that the family home is relationship property whenever acquired. Section 2 defines the family home as "the dwellinghouse that either or both of the spouses or partners use habitually or from time to time as the only or principal family residence".

[54] Section 11(1) provides that, on the division of relationship property under the PRA, each of the spouses or partners is entitled to share equally in the family home, the family chattels and any other relationship property.

[55] Section 20A provides:

> (1) Secured and unsecured creditors of a spouse or partner have the same rights against that spouse or partner, and against property owned by the spouse or partner, as if this Act had not been passed.
>
> (2) If, had this Act not been passed, any property would have passed to the Official Assignee on or following the bankruptcy of a spouse or partner, then that property (and no other property) passes to the Official Assignee as if this Act had not been passed.
>
> (3) This section—
>
> (a) is subject to section 20B; and
>
> (b) applies except as otherwise expressly provided in this Act.

[10] IA 1967, s 119(1)(a). As noted above, under s 309(1) of the Insolvency Act 2006 [IA 2006], annulment can be ordered if "the court considers that the bankrupt should not have been adjudicated bankrupt".

[56] Section 20B(1) provides that each spouse or partner has a protected interest in the family home.

[57] Section 20B(3)(a) provides that, where s 11 applies, the value of the protected interest is the lesser of the specified sum or one-half of the equity of the spouses or partners in the family home.

[58] Under ss 20B(4) and 53A(2) and cl 3 of the Property (Relationships) Specified Sum Order 2002, the specified sum is presently $103,000. The specified sum has not increased for almost a quarter of a century.

[59] Under s 20C(1), if, on the bankruptcy of a spouse or partner, the family home passes to the Assignee, the Assignee must pay to the other spouse or partner, the lesser of:

> (a) the amount of the protected interest of the other spouse or partner; or
>
> (b) what remains of the protected interest once the Assignee has paid the debts specified in s 20C(2).

The Associate Judge's decision

[60] The Associate Judge stated the principles governing annulments as follows:[11]

> [21] Section 309(1)(a) … confers a discretion on the Court to annul an adjudication if "the Court considers that the bankrupt should not have been adjudicated bankrupt". It has been emphasised that the jurisdiction is narrow and the Court should exercise its discretion sparingly.
>
> [22] There are three broad categories of annulment applications that have succeeded under this subsection, identified in leading commentaries. These categories have been cited with approval by recent High Court authority. These are where:
>
> > (a) there was an abuse of process of the Court;
> >
> > (b) there was a defect in form or procedure;
> >
> > (c) as a result of human error, a material fact was not drawn to the Court's attention at the adjudication hearing.

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[11] High Court decision, above n 2 (footnotes omitted).

> [23] These categories are not exclusive, and the ultimate question is whether the Court considers that the bankrupt should not have been adjudicated bankrupt. Situations where the Court has annulled a bankruptcy on this ground include where someone not of age was adjudicated bankrupt, where the petition had not been properly presented, or where the adjudication was made while the debtor had a suit against the creditor that was still pending. In other words, s 309(1)(a) focuses on whether "there was some flaw that made the adjudication legally unsound". It is not a vehicle for relitigating the merits of an adjudication application.

[61] The Associate Judge was satisfied that, although M was not a creditor of H, she came within the term "any person interested" in s 309(1)(a), given her connection to and interest in the Property as their family home.[12] Accordingly, M was entitled to bring the application.

[62] The Associate Judge was also satisfied that the Court was not precluded from annulling a bankruptcy on abuse of process grounds just because the debtor had been automatically adjudicated bankrupt when the application was filed.[13] In reaching that view, however, she did not squarely focus on whether the IA 2006 had effected a material change to the earlier position by requiring that the application be filed with the Assignee rather than the Court.

[63] The Judge then noted that:

(a) the Assignee was satisfied that no material facts had been withheld from the Assignee that could have had any impact on the automatic adjudication of H as bankrupt;[14]

(b) H had filed a statement of affairs in the prescribed form at a time when he had combined debts of at least $1,000 and was therefore automatically adjudicated bankrupt by operation of s 47;[15] and

12 At [26]–[30].
13 At [31]–[34].
14 At [40].
15 At [42]; and IA 2006, s 47.

(c) although creditors had filed claims totalling only $33,706.85, meaning that H had overstated his debts in his statement of affairs, he met the statutory requirement of having debts exceeding $1,000.[16]

[64] The Associate Judge said that whether H's assets exceeded his liabilities had no bearing on his eligibility for bankruptcy; being "balance sheet [in]solvent" is not a requirement of bankruptcy.[17] Rather, the issue was:

> [45] … whether the bankruptcy [was] an abuse of process because it was designed to circumvent the PRA and prevent [M] from receiving her share of the residential property.

[65] The Associate Judge referred to three decisions in which an adjudication had been annulled on the grounds of abuse of process: *Re Ell*,[18] *Re Aekins, Ex parte Aekins* (*Re Aekins*)[19] and *Willis v Willis* (*Re Willis*).[20] Based on these and two other footnoted decisions (*Re Painter* and *Ireland v Ireland*),[21] she concluded that H's adjudication could be an abuse of process only if his sole reason for applying for adjudication had been to avoid M's relationship property claims.[22]

[66] The Associate Judge found that even if the avoidance of M's claims was one reason for H's application, it was not the only reason. She said the evidence demonstrated he was under genuine financial pressure: he owed Kiwibank $6,317.78 in credit card debt, and Toyota Finance $5,723.42 following the repossession of his car. His strained financial position was further illustrated by the fact he lived in Salvation Army housing for some months.[23] The Associate Judge concluded that H therefore had legitimate reasons for seeking adjudication and she was not satisfied an abuse of process had been established.[24]

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16 At [43].
17 At [44].
18 *Re Ell* (1885) 3 NZLR SC 433.
19 *Re Aekins, Ex parte Aekins* (1911) 30 NZLR 1021 (SC) [*Re Aekins*].
20 *Willis v Willis* [2017] NZHC 2586 [*Re Willis*].
21 *Ex parte Painter, Re Painter* [1895] 1 QB 85 [*Re Painter*]; and *Ireland v Ireland* (1911) 30 NZLR 1250 (SC).
22 High Court decision, above n 2, at [48].
23 At [49].
24 At [50].

[67] The Associate Judge considered M had prevented H's bankruptcy from running its normal course by refusing to allow the Property to be sold or to accept the other solutions the Assignee had proposed.[25] For these reasons, and because M's annulment application had been unsuccessful, she ordered M to pay costs to H on a 2B basis.[26]

Issues on appeal

[68] The central issue to be determined on appeal is whether the Associate Judge was right to reject M's contention that H should not have been adjudicated bankrupt. This question involves several sub-issues, namely:

(a) In what circumstances have the courts found that annulment should be ordered on the grounds that an adjudication should not have occurred and, more particularly, in what circumstances has a debtor-initiated adjudication been regarded as an abuse of process?

(b) Does abuse of process (in the sense it has historically been used in the cases) continue to be grounds for potential annulment of a debtor-initiated adjudication under the IA 2006, which provides that such applications are to be filed with the Assignee, not the court?

(c) If so, should M be granted leave to argue that abuse of process will be established where a debtor seeking to be adjudicated bankrupt had a predominant (rather than sole) improper or collateral purpose for doing so?

(d) If so, does establishing such a predominant purpose suffice?

(e) Do the facts establish that H had a potentially vitiating collateral purpose here?

(f) If so, should the Court exercise its discretion and annul the adjudication?

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25 At [54].
26 At [61].

[69] We address these in turn.

Circumstances in which the courts have found a bankruptcy should be annulled because adjudication should not have occurred

[70] For obvious reasons, our focus here is primarily (but not exclusively) on cases involving adjudications that were debtor-initiated. As well as considering the decisions referred to by the Associate Judge in the judgment under appeal, we also refer to several additional decisions from New Zealand and from England and Wales, that were referred to us by counsel, including more recent cases which specifically arose in a relationship property context.

[71] Our case review is chronological.

Re Ell (1885)

[72] *Re Ell*, a New Zealand case, did not concern a debtor-initiated adjudication: Mr Ell had been adjudicated bankrupt on a creditor's petition. He challenged the adjudication on the grounds that the sole purpose of the petitioner had been to avoid legal proceedings that Mr Ell was proposing to take against the petitioner over some land. The petitioner did not deny this was his purpose but said it was not his sole motive.[27]

[73] Johnston J accepted the creditor had petitioned for Mr Ell's bankruptcy because the creditor considered the land proceedings to be without foundation and to have been brought to vex and embarrass. He observed:[28]

> In the absence of authority upon the subject one might well have thought that the fact that the adjudication might have the effect of stopping an action ought not to prevent a creditor otherwise entitled to institute and carry on proceedings in Bankruptcy from doing so; but the decisions in the books seem to have established the proposition that where the sole object of the bankruptcy proceedings was to stop an action the bankruptcy cannot be supported.

[74] After distinguishing certain other cases, the Judge referred to the 1826 decision of *Re Bourne*:[29]

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27 *Re Ell*, above n 18, at 435.
28 At 436.
29 At 437, referring to *Ex parte Bourne, Re Bourne* (1826) 2 Glynn & J 137.

> … Lord Eldon in an elaborate judgment, held that a commission of bankruptcy taken out for the purpose of staying an action, and not for the purpose of working the commission for the benefit of the creditors, cannot be permitted to stand. This doctrine seems not to have been impugned by more recent authorities. It has indeed been held that an indirect object is not enough to vitiate the bankruptcy unless it be the sole object.

[75] So, although the legal pre-requisites for a valid adjudication existed, the Judge annulled the bankruptcy because he considered there was no evidence that the creditor had any other object than to put a stop to the land proceedings.[30] As noted, this was effectively admitted by the creditor. Importantly, there was nothing to suggest the adjudication had been sought to enable the creditor to take the benefit of the bankruptcy regime, because:[31]

> The petitioning creditor had got a charging order in the action on the bill before the adjudication, and does not seem to have anticipated that the bankruptcy would produce any dividend.

[76] Two points can be noted:

(a) the term "abuse of process" was not, itself, used in this judgment; and

(b) the Court was clear that any improper purpose by the creditor in seeking adjudication must be the creditor's *sole* purpose.

Re Painter (1895)

[77] In *Re Painter*, a United Kingdom decision, the debtor had petitioned for his own bankruptcy.[32] The debtor was a retired policeman, who was entitled to a weekly pension income. An adverse money judgment had been entered against him, which he had been ordered to pay by instalments. The order was backed up by the threat of imprisonment for non-compliance.

[78] By dint of statute, however, the debtor's entitlement to his pension income was inalienable; it did not pass to any trustee or other person acting on behalf of the creditors. The debtor therefore reasoned that, if he made himself bankrupt, he could

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30 *Re Ell*, above n 18, at 437.
31 At 437.
32 *Re Painter*, above n 21.

continue to receive the full fruits of his weekly pension income. In other words, on his bankruptcy, the adverse judgment would go but he would still receive the full fruits of his pension, unthreatened by committal. Because the judgment debt would go, he would not be required to forward on his pension income to the creditor. He duly petitioned and was adjudicated bankrupt.[33]

[79] The creditor applied for annulment on the basis that the order for adjudication ought not to have been made. At first instance, the order was annulled, but this was overturned on appeal.[34]

[80] Although Vaughan Williams J was in no doubt that the purpose of the adjudication was to obviate the pressure on the debtor to pay the debt out of his pension,[35] the decision on appeal turned on a finding that the Bankruptcy Act 1883 (UK) had left untrammelled a debtor's entitlement to petition for his own bankruptcy.[36] The relevant section read "a debtor's petition shall allege that the debtor is unable to pay his debts … and the Court shall thereupon make a receiving order".[37] When those words had first been enacted (in the Bankruptcy Act 1861 (UK)), they amounted to a "perfectly general power to any debtor to petition for adjudication of bankruptcy against himself".[38] Vaughan Williams J observed:[39]

> … from an early period the legislature recognised the interest that the State had in a debtor being relieved from the overwhelming pressure of his debts, and that it was undesirable that a citizen should be so weighed down by his debts as to be incapacitated from performing the ordinary duties of citizenship.

[81] And then:[40]

> … we are not entitled to annul an adjudication made on a debtor's own petition merely because the debtor has no assets, nor because he is possessed of an inalienable pension, nor because, having no assets and being in possession of such a pension, he has presented his petition for the express purpose of

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33 At 85–86.
34 At 92.
35 At 89.
36 At 88 and 91 per Vaughan Williams J. See also at 91–92 per Kennedy J.
37 Bankruptcy Act 1883 (UK) 46 & 47 Vict c 52, s 8(1).
38 *Re Painter*, above n 21, at 88 per Vaughan Williams J; and Bankruptcy Act 1861 (UK) 24 & 25 Vict c 134, s 86.
39 At 88.
40 At 91.

> preventing the application of the Debtors Act to compel him to pay this debt out of his pension.

[82] But Kennedy J, in a concurring judgment, left the door open, by saying:[41]

> There may be cases in which the debtor's object in presenting a petition is so distinctly foreign to the purposes of the Bankruptcy Act that it is a mere abuse of the process of the Court …

[83] The creditor's annulment application was, accordingly, unsuccessful. Although there were no assets to fall into the bankrupt estate, the bankruptcy order itself was not pointless because the bankrupt gained the utility, as was his wish, of being released from the overwhelming pressure of his debts. That identifiable, and bankruptcy related, benefit meant the bankruptcy order could not be impugned.

Re Aekins (1911)

[84] The New Zealand case *Re Aekins* also involved a debtor-initiated bankruptcy.[42] The bankrupt was a husband who had agreed to pay maintenance for his wife and children after he and his wife had separated but later refused to pay the agreed amount, despite an increase in salary and having the means to do so. Chief Justice Stout observed:[43]

> It is practically not denied that the whole object of his bankruptcy is to get the amount in his agreement for the maintenance of his wife reduced. In my opinion it is only necessary to state this to show that his conduct is *an abuse of the Bankruptcy Act*; and the only question is, whether there is power in this Court to annul the bankruptcy proceedings initiated by himself.

[85] The Chief Justice noted that the annulment provision in the Bankruptcy Act 1908 (s 136) was very similar to s 35 of the Bankruptcy Act 1883 (UK), under which "many applications" had been made.[44] He referred to *Re Painter*, but was satisfied that it was not on all fours with the facts of the case before him,

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41 At 92.

42 Bankruptcy Act 1908, s 31 provided for an automatic debtor-initiated process, not unlike s 47 of the IA 2006, although the (non-discretionary) adjudication order had to be made by the Court.

43 *Re Aekins*, above n 19, at 1023 (emphasis added).

44 At 1023. The Bankruptcy Act 1908, s 136(1) provided when the court may annul adjudication. Section 136(1)(a) relevantly provided that "[i]n any of the cases following the Court may by order, on the application of any person interested, annul the adjudication, and thereupon the adjudication shall be annulled from and after the date of the order annulling it, that is to say … where, in the opinion of the Court, an order of adjudication ought not to have been made".

because Mr Aekins was, by his adjudication, deliberately attempting to avoid his obligation to support his wife and family and had no genuine bankruptcy purpose.[45]

[86] It will be observed that the Chief Justice did not characterise this collateral purpose as an "abuse of process" but, rather, as "an abuse of the Bankruptcy Act".[46]

Ireland v Ireland (1911)

[87] Another New Zealand case, *Ireland v Ireland*, was decided very shortly after *Re Aekins*, by a different Supreme Court Judge (Williams J). It also involved a debtor-initiated adjudication in a divorce context.

[88] On separation from his wife in 1904, the debtor had covenanted by deed to pay her £2 12s a month for her support and 17s 4d maintenance for their child. He paid those amounts for about two years, but then stopped. About four years later, his wife obtained judgment for £262 8s. Mr Ireland said he was unable to pay because, as a result of ill health and being out of work, his weekly income from June 1906 to June 1911 had reduced to 16s 2d. The following month, his application for adjudication was granted. His only other debt was for £12. Mrs Ireland sought to have the adjudication annulled.

[89] Williams J plainly had doubts about the debtor's veracity, observing:[47]

> If the statement of the bankrupt be accepted as true, then, although he may have been unable to pay his wife in terms of the deed, it is perfectly clear that he made no attempt to pay her anything at any time. It is impossible to believe that during the whole five years he was never in a position to pay her a shilling.

[90] But the Judge went on to say:

> It does not, however, follow that because a bankrupt has failed in his duty to a creditor, and has filed only to escape further proceedings, that his so filing is an abuse of the process of the Court. As was held in *Ex parte Painter,* a

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45 At 1023–1024.
46 At 1023.
47 *Ireland v Ireland*, above n 21, at 1251 (footnote omitted).

> petition presented to escape proceedings by a creditor cannot be said to be presented for a purpose foreign to the bankruptcy laws.

[91] The case was thought distinguishable from *Re Aekins* because the debtor had not only filed for bankruptcy simply to avoid his weekly maintenance obligations. Rather, he had a significant judgment debt that he could not meet and, so, a bankruptcy purpose:[48]

> The bankruptcy will not, however, discharge the bankrupt from his obligation to maintain his wife and child, though it may do away with the past liability and the future liability under the deed. The existence of a heavy liability to his wife under a judgment would impair his capacity to provide for the future maintenance of his wife and child. It is plain that he filed in order to get rid of the judgment. Had there been no judgment it cannot be inferred that he would have filed merely to get rid of his liability to pay future instalments. If he had filed solely for that purpose, then probably the case would have been governed by the case of *In re Aekins* recently decided by the Chief Justice. If it appears that the bankrupt has been guilty of misconduct, that can be considered when he comes up for his discharge. Looking at all the authorities, I cannot say that the filing by the bankrupt was an abuse of the process of the Court, and it is only if it was such an abuse that there is jurisdiction to annul the adjudication.

Re Majory (1955)

[92] The United Kingdom case, *Re Majory*, involved a somewhat different situation.[49] There, a debtor who had a "receiving order" made against him appealed the order on the ground that, in obtaining the order (and threatening the debtor with bankruptcy), the creditor was guilty of "extortion".[50] The creditor had sought to persuade the debtor to settle his debt on terms less favourable than those sought in the proceeding brought for the recovery of the debt and had threatened to bankrupt him if he did not agree to this proposal. It was this threat that was said by the debtor to be extortionate and oppressive.

[93] On the facts of the case, the Court did not accept that the creditor had threatened bankruptcy to obtain a collateral advantage (payment of more than they

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[48] At 1252.

[49] *Re Majory* [1955] Ch 600 (CA).

[50] A receiving order is an order (now obsolete) for the protection of the estate when an act of bankruptcy has been established and making the official receiver the custodian of the bankrupt's property. Once an order is made the debtor may be adjudged bankrupt, unless a scheme is agreed or a composition accepted.

were owed) so there was no extortion.[51] However, Lord Evershed MR reviewed the relevant authorities and distilled a number of general propositions of some present relevance.

[94] First, Lord Evershed considered a number of decisions where bankruptcy had been used or threatened in order to gain a collateral advantage in which statements of general principle had been made, which he cited with approval. These included:

(a) In *Re A Debtor*,[52] where the threat of bankruptcy was used to try to recover solicitor and client costs from a debtor, Lord Hanworth MR said:[53]

> Those who are engaged in bringing bankruptcy proceedings must take care that their proceedings do not constitute an abuse of the process of the Court; and to make a demand of this nature was an attempt to extract from the debtor … costs of an amount in excess of his liability and further costs for which he was under no liability …

(b) In *Re A Judgment Summons, Ex parte Henlys Ltd*, where:

(i) Harman J, at first instance, said:[54]

> The principle exists … that the threat of the penal sanction of bankruptcy must not be used to obtain a collateral advantage of any kind.

(ii) Jenkins LJ, on appeal, said:[55]

> The object of proceedings in bankruptcy is to make the debtor's assets available for rateable distribution amongst his creditors. No creditor is entitled to have recourse to such proceedings for the purpose of obtaining some collateral advantage for himself.
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> …
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> It should be borne in mind that … there may be "extortionate" conduct in the bankruptcy sense, even though the collateral

[51] *Re Majory*, above n 49, at 625–626.
[52] *Re A Debtor* [1928] Ch 199 (CA).
[53] At 205 per Lord Hanworth MR.
[54] *Re A Judgment Summons, Ex parte Henlys Ltd* [1953] Ch 1 (Ch) at 5.
[55] *Re A Judgment Summons, Ex parte Henlys Ltd* [1953] Ch 195 (CA) at 212 and 214.

> benefit obtained is trifling in comparison with the amount of the debt …

[95] Secondly, Lord Evershed observed that there was no rule that extortion (abuse of process or improper purpose) had a special and artificial significance in bankruptcy law that was somehow different from ordinary usage.[56] He went on to state:[57]

> The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.

[96] This statement of the "general rule" has been considered and applied in a number of subsequent decisions, although not, as far as we are aware, in the context of a bankruptcy adjudication.[58]

Re Byron (1965)

[97] In the New Zealand case *Re Byron (a debtor), Ex parte Commissioner of Inland Revenue*,[59] Tompkins J described the ambit of the annulment power in s 136(1) of the Bankruptcy Act 1908:[60]

> This power has been used to annul the adjudication of an infant … to annul an adjudication where the petition was not properly presented … where an adjudication was made while a suit by the debtor against the petitioning creditor was pending … It is in my opinion the appropriate and only power to be invoked where an order of adjudication should not have been made for any reason.

Re Baker (1995)

[98] *Re Baker* was a New Zealand case arising under the IA 1967.[61] Despite the fact that the IA 1967 itself made no express reference to any insolvency threshold for

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56 *Re Majory*, above n 49, at 622–623.
57 At 623–624.
58 See for example *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 (CA); and *Williams v Spautz* (1992) 174 CLR 509.
59 *Re Byron (a debtor), Ex parte Commissioner of Inland Revenue* [1964] NZLR 508 (SC). The Court was here concerned with an application to annul a creditor-initiated adjudication.
60 At 510 (citations omitted).
61 *Re Baker* HC Wellington B506/94, 30 March 1995.

debtor-initiated bankruptcy, Master Thomson held it was fundamental to the administration of the Act that, at the time when a debtor signs and dates the debtor's petition (as required by r 44 of the Insolvency Rules 1970) and the petition is filed in the High Court, the debtor be unable to pay his or her debts and that the petition contain a declaration to that effect.[62]

Paulin v Paulin (2009)

[99] *Paulin v Paulin* involved an application for annulment in the context of a debtor-initiated bankruptcy where the debtor was involved in divorce proceedings.[63] Speaking for the English and Welsh Court of Appeal, Wilson LJ began by noting (very relevantly):

> [1] A tactic now occasionally adopted by a devious husband confronted with an application by his wife for financial relief ancillary to divorce proceedings is to issue proceedings for a bankruptcy order to be made against himself. Following the making of such an order and upon the appointment or other emergence of a trustee in bankruptcy, all the husband's assets vest in the trustee pursuant to s 306 of the Insolvency Act 1986 … with the result that the divorce court suddenly becomes disabled from ordering him to make capital provision for the wife. The wife's response to the tactic is often to apply in the bankruptcy proceedings for the bankruptcy order to be annulled; and a convenient practice has arisen for the bankruptcy proceedings thereupon to be transferred to the court which is conducting the divorce proceedings so that the same judge, at the same time, can determine the wife's application for annulment of the bankruptcy order and, in the light thereof, her application for ancillary relief.

[100] *Paulin* was decided under the Insolvency Act 1986 (UK), as it was at the relevant time.[64] Under the current version of the Insolvency Act 1986 (UK), s 263H(1) provides that a person may be adjudicated bankrupt on their own application without court intervention.[65] And s 263H(2) provides:

> An individual may make a bankruptcy application only on the ground that the individual is unable to pay his or her debts.

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62 At 6.

63 *Paulin v Paulin* [2009] EWCA Civ 221, [2010] 1 WLR 1057.

64 Insolvency Act 1986 (UK). Since its enactment, there have been amendments to some of the relevant provisions.

65 Section 263H of the Insolvency Act 1986 (UK) was inserted, on 25 April 2013, by s 103(1)(i) of the Enterprise and Regulatory Reform Act 2013.

[101] The predecessor to s 263H was s 272, which was in force at the time *Paulin* was decided. The wording of s 272(1) reflects that of s 263H, noted above.

[102] The relevant annulment power is contained in s 282(1)(a), which was in force at the time *Paulin* was determined. It provides that the court may annul a bankruptcy order if it at any time appears to the court "that, on any grounds existing at the time the order was made, the order ought not to have been made".[66]

[103] Wilson LJ said of those two provisions:[67]

> [40] A reading of [s 282(1) and s 272(1), the predecessor provision to s 263H] together yields the uncontroversial conclusion that a court may annul a bankruptcy order if it concludes that, on the date of that order, the bankrupt was able to pay his debts. But, even if it so concludes, the word "may" confers upon the court a discretion whether to annul the order.

[104] In *Paulin*, which had a complicated factual and procedural background, the Court was satisfied that the husband had been substantially dishonest in his statement of affairs and had assets that substantially exceeded his liabilities.[68] The Court considered the Family Court was therefore right to conclude that, on the date the husband petitioned for bankruptcy, he was able to pay his debts and, the fact he had procured his own bankruptcy to defeat his wife's claims strongly militated in favour of the Court exercising its discretion to annul the bankruptcy.[69] The Court observed that, in a case where the applicant for annulment of a bankruptcy order made on a debtor's petition established there was no balance sheet insolvency, the evidential onus shifts to the debtor to establish commercial insolvency, namely that he or she was, nevertheless, unable to pay his or her debts.[70]

[105] The Court upheld the annulment accordingly.

[106] The Court also considered whether there might be circumstances in which a petition for bankruptcy would be an abuse of process even if the debtor was unable to

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66 Insolvency Act 1986 (UK), s 282(1)(a).
67 *Paulin v Paulin*, above n 63.
68 At [50] per Wilson LJ.
69 At [52]–[53] per Wilson LJ.
70 At [49] per Wilson LJ.

pay their debts. Wilson LJ observed that, while there might be extreme cases such as where a debtor used bankruptcy serially to avoid debts:

> [48] … for practical purposes I regard it as safer to proceed on the assumption that, if the debtor was unable to pay his debts on the date of his petition, its presentation was not an abuse of the process of the court; and that accordingly the existence of abuse of process as an alternative ground for annulment is more apparent than real.

JSC Bank of Moscow v Kekhman (2015)

[107] *JSC Bank of Moscow v Kekhman* was also a debtor-initiated bankruptcy case from England and Wales.[71] Mr Kekhman was a Russian citizen who flew to England specifically to petition for his own bankruptcy and, on that petition, a bankruptcy order had been made. One of Mr Kekhman's creditors, JSC Bank of Moscow, then made an application to have the adjudication annulled.[72] That application failed before the Chief Registrar, and on appeal.[73]

[108] Although much of the judgment is concerned with cross-border bankruptcy issues, in terms of the power to annul more generally, the Judge considered the various grounds for annulment more generally, and relevantly said:[74]

> [67] The power to annul may, in principle, be exercised "at any time". As section 282(1)(a) expressly provides, when asked to annul a bankruptcy order, the court will consider "any grounds existing at the time that the order was made". This wording makes it clear that the court, when considering an annulment application, is not confined to the facts and matters which were drawn to the court's attention at the time when the bankruptcy order was made. It is open to the parties concerned in relation to an annulment application to put forward further evidence of fact, and to make further submissions, as to the grounds which existed at the time the bankruptcy order was made.
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> …
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> [71] Section 282(1)(a) requires the court to consider whether, on the grounds existing when the bankruptcy order was made, the order "ought not to have been made". There may be various reasons why the court hearing an annulment application is satisfied that the bankruptcy order "ought not to have been made". For example, it may emerge that the court had no jurisdiction to make the bankruptcy order … A court may annul a bankruptcy order where the debt on which the petition was founded did not exist … Further, a court may annul a bankruptcy order if the debtor was able to pay his debts when the

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[71] *JSC Bank of Moscow v Kekhman* [2015] EWHC 396 (Ch), [2015] 1 WLR 3737.

[72] Insolvency Act 1986 (UK), s 282.

[73] *JSC Bank of Moscow v Kekhman*, above n 71, at [1] and [142].

[74] Citations omitted.

> order was made (so that section 272 was not then satisfied): see *Paulin v Paulin* … at [40]; similarly, if the petition involved an abuse of process: see the discussion in *Paulin v Paulin* at … [43]–[48].

[109] The Judge went on to confirm that, even where grounds exist, the annulment power was discretionary:

> [74] The power to annul under section 282 is discretionary ("the court may annul"). Thus, even if the court is satisfied that on the grounds existing at the date of the bankruptcy order, the order ought not to have been made, the court can still decide not to annul the order. An obvious example would be where the annulment would be pointless, for example, where the circumstances were such that a new bankruptcy order would certainly be made. Another example would be where circumstances had changed following the bankruptcy order making it inappropriate to annul the order. It follows that when considering whether to exercise its discretion to annul an order which it has found ought not to have been made the court will take into account all relevant matters, including matters which have come about after the bankruptcy order was made.

[110] Another question raised by the annulment application in *Kekhman* was whether there was "a reasonable possibility of a benefit resulting from a bankruptcy order".[75] For that reason, the Judge set out at some length what the effect of a bankruptcy order is.[76] And later, addressing the question directly, the Judge said:

> [110] The next question is whether there was a reasonable possibility of benefit accruing from the making of a bankruptcy order. As explained earlier, it is natural first to ask whether the order would be of benefit to Mr Kekhman. However, it will also be relevant to ask whether an order would be of benefit to others.
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> [111] Prima facie, Mr Kekhman would benefit from the making of a bankruptcy order. In theory, his debts worldwide would be discharged. The discharge of the debts of an insolvent debtor is an important part of the policy of English bankruptcy law. The discharge of debt allows the debtor to start afresh, to be rehabilitated. In the ordinary case, the discharge of debt and the possibility of rehabilitation of the debtor is a clear benefit to the debtor and a sufficient reason to make a bankruptcy order on a debtor's petition. In the ordinary case, the creditors cannot complain about this. They are treated equally and there is an orderly administration of the bankrupt's estate rather than a free-for-all.

[111] The Judge went on:

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75 At [101]. This was a point that appears to have been of some moment in *Re Painter*, above n 21, where annulment as declined in part because the adjudication yielded a genuine bankruptcy-related benefit to the debtor.

76 At [77]–[83].

> [116] The chief registrar referred to the benefits of having an orderly realisation of the bankrupt's assets as distinct from a free-for-all. This point is relevant to a consideration of the position of creditors but I consider that this matter can also be of some benefit to the bankrupt. In relation to the bankrupt, this point is connected to the point I have already made as to the benefit of being relieved from pressure from creditors, even some only of the total number of creditors.
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> [117] The chief registrar thought that there was a further benefit to Mr Kekhman resulting from a bankruptcy order. He thought that the order would benefit Mr Kekhman as a result of a possible investigation by the trustees into his affairs. I doubt if this point is really available to Mr Kekhman. If it is suggested that third parties had harmed Mr Kekhman's business and that it would be a good thing for Mr Kekhman if a trustee could be appointed to carry out such an investigation and pursue those third parties, it was not established that Mr Kekhman would be better off by the trustee pursuing third parties as compared with Mr Kekhman pursuing them himself. One would expect that he would be a better person to investigate matters. So far as I can see, the only possibility of benefit to him in this respect as the result of the appointment of a trustee would be to do with the funding of such investigation. A question might arise whether it would be easier for the trustees to obtain funding to pursue the investigation as compared with Mr Kekhman obtaining funding to do so. I doubt if there was any reality in that possibility assessed as at 5 October 2012. Even if I took into account events after that date, all that I know is that it seems unlikely that the trustees will be funded to pursue such investigations whereas Mr Kekhman has been able to obtain funding from an unidentified source which has enabled him to oppose the application for annulment and to defend the claim to damages brought against him.
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> [118] I do not consider that this case is comparable to the position in *Shepherd v Legal Services Commission* … That was a case of a creditor's petition where the debtor contended that he had a substantial claim against the creditor. The court's assessment of that claim must have been that it was not sufficient to prevent the court making a bankruptcy order. The creditor accepted that the debtor had no assets so the creditor could not say that the bankruptcy would be beneficial to it, in that it would lead to the payment of a dividend to creditors. However, the creditor persuaded the court that it would be beneficial to it to have the question of the alleged claim against it investigated by an independent and objective officer of the court rather than by the debtor. There is no parallel in the present case.

[112] On the rather unusual facts of *Kekhman*, the question of benefit to the debtor as a matter of reality was, ultimately, rather finely balanced.[77] But the Judge concluded that because there was *some* legitimate benefit to Mr Kekhman flowing from the bankruptcy, "by a narrow margin … the order ought to have been made".[78]

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77 At [135]–[136].

78 At [136].

Re Willis (2017)

[113] In *Re Willis*, a New Zealand case, Mr Willis applied successfully for his former wife to be adjudicated bankrupt because she had not paid Court-ordered costs and disbursements of $12,263.50.[79] In considering his wife's application to annul the adjudication, Associate Judge Sargisson reviewed the history of the parties' relationship and the consequences of its acrimonious breakdown, the ensuing relationship property dispute in which the property of greatest value was held in trusts, at the end of which, as the Associate Judge described it:

> [32] … [Ms Willis] was left in a state of bankruptcy with an unenforceable settlement agreement and an adverse costs award. Some four years after proceedings commenced she still had no access to relationship property, and the negotiations were in many respects back to square one.

[114] The Associate Judge accepted that Ms Willis had the onus of establishing that the adjudication amounted to an abuse of process but found that Ms Willis had discharged the onus because, considered in its wider factual context, Mr Willis's adjudication application "smack[ed] of abuse and oppression".[80] In expanding on that finding, the Associate Judge held, among other things, that:

(a) Ms Willis had legal recourse under the PRA to trust property and might well have had a claim of over $400,000 for debts the trust owed to her;[81]

(b) to focus on Ms Willis's immediate inability to pay the comparatively trifling sum outstanding was an overly narrow and uncharitable perspective on the facts of the case;[82]

(c) Mr Willis's position that his actions were routine debt collection of a legitimate creditor was not credible;[83] and

(d) in circumstances where Ms Willis could have paid off the debts as soon as sufficient money had been released from the trust fund or otherwise

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79 *Re Willis*, above n 20, at [9].
80 At [43].
81 At [52].
82 At [53].
83 At [59].

made available by the trustees, the Associate Judge could not see that Mr Willis had anything to gain from applying to adjudicate his former partner bankrupt except her pain.[84]

[115] The Associate Judge drew the inference that Mr Willis had deliberately chosen bankruptcy as a weapon of oppression and found that the adjudication application was an abuse of process.[85] Accordingly, the Associate Judge annulled, from the date of the adjudication, the order adjudicating Ms Willis bankrupt.[86]

[116] Although the Associate Judge did not put it this way, it is apparent from her decision that she considered that Mr Willis's sole purpose in seeking the adjudication of his former partner as bankrupt was to cause her harm and distress.

Lin v Gundmundsson (2021)

[117] *Lin v Gundmundsson*, an England and Wales case, involved an application made by a bankrupt's spouse to annul a creditor-initiated adjudication on abuse of process grounds under s 282(1)(a) of the Insolvency Act 1986 (UK).[87] Despite the quite recent and substantive changes to the Act, the Judge held it remained open to the High Court to annul a debtor-initiated adjudication on that ground. The case contains a useful overview of *Paulin* and other similar decisions involved debtor-adjudicated bankruptcy in a divorce context. The Judge said:[88]

> 46. In the context of family proceedings Mr Howling points out that the court should be alive to one party seeking to circumvent a financial order by obtaining a bankruptcy order.
>
> 47. In this regard he refers to *F v F*... *Paulin v Paulin* … and *Arif v Zar and another* ... In the latter case, Patten L.J. advised … that the courts need to be alive to the real possibility that husbands (or wives) may attempt to use the protection of a bankruptcy order as a shield against the claims of their spouses for ancillary relief. The common feature in this case trilogy is the petitioner and the bankrupt are the same person. In a disputed ancillary relief context, there is generally more suspicion of abuse where one of the spouses petitions for their own bankruptcy in the course of financial relief proceedings. The remarks

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[84] At [60]–[61].
[85] At [65].
[86] At [68].
[87] *Lin v Gundmundsson* [2021] EWHC 820 (Ch), [2021] All ER (D) 29 (Apr) (Ch).
[88] Citations omitted.

provided by the Court of Appeal in *Arif* carried with them a warning that there need be "credible evidence" of abuse.

48. The husband had presented his own petition and obtained the bankruptcy order on the day when the wife had activated her claim for ancillary relief against him in *re Holliday (A Bankrupt); Ex p Trustee of the Property of the Bankrupt v Holliday* … Goff L.J (as he was) explained … that if the husband was not able to pay his debts when they fell due then "prima facie those orders were rightly made." Although *re Holliday (A Bankrupt)* is not recent it remains good law … The position is different if the statements supporting the petition are false, there were no debts or the bankrupt could pay the stated debts as they fell due: *F v F*; *Couvaras v Wolf* … .

49. Unlike the trilogy I have mentioned *Couvaras* concerned a creditor's petition and the court found collusion between the creditor and debtor. The court found that the bankruptcy petition had been a sham, and the proceedings an abuse of the process of the court. The husband had net resources amounting to much more than debts he claimed and was not insolvent.

50. In my judgment cases concerning a debtor's own petition for bankruptcy and a creditor's petition need to be distinguished. The warning that a party to financial relief proceedings may attempt to use the protection of a bankruptcy to avoid a spouse from receiving the benefit of an order, is not directed at cases where a genuine creditor petitions and the debtor cannot pay the debt. In this case Miss Lin has the burden of proving, that as at the date of the bankruptcy order, Mr Gudmundsson was able to pay his debts: *Paulin v Paulin*.

Summary of principles emerging

[118] The following propositions can be distilled from the authorities canvassed above:

(a) the courts *may* annul an adjudication on the grounds that it ought not to have been ordered where:

(i) there was no jurisdiction to make the order or some procedural error has occurred; or

(ii) the statute is explicit that a debtor-initiated adjudication is predicated on the debtor's insolvency/inability to pay his or her debts, and the debtor is not insolvent; or

(iii) the statute is not explicit that a debtor-initiated adjudication is predicated on the debtor's insolvency/inability to pay his or her debts, and the debtor is not insolvent; or

(iv) notwithstanding a debtor's insolvency, the application for adjudication was futile because no bankruptcy purpose could, as a matter of fact, be served by the adjudication; or

(v) the application for adjudication was an "abuse of process" in the sense that it was made for an improper purpose, namely a collateral purpose designed to advantage the applicant which is outside the scope of the bankruptcy regime;[89]

(b) annulment will not be ordered where grounds for annulment exist but it is likely (in the circumstances of the particular case) that a further application for adjudication would simply be made;

(c) where an applicant for annulment of an order made on a debtor's petition establishes there is no balance sheet insolvency, the evidential onus shifts to the debtor to establish that nevertheless he or she was unable to pay his or her debts; and

(d) even where relevant grounds are made out, the decision to annul remains a matter of discretion.

[119] As noted earlier, and despite [118] above, we heard no argument about whether the debtor-initiated adjudication threshold in s 45 of the IA 2006 (that the debtor has combined debts of $1,000 or more and, per s 46, has completed a statement of financial position to the satisfaction of the Assignee) means what it says.[90] It is arguably

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89 Although we have identified (at [118(a)]) five discrete grounds for annulment, in many cases, the existence of the second, third or fourth will simply be strong indicators of the existence of the fifth. As a matter of common sense, the making of a futile application for adjudication, or the making of such an application by a solvent debtor will often not be explicable absent some improper collateral purpose.

90 Nor have we been asked to consider whether the Assignee has either an obligation or a discretion, in debtor-initiated cases, to decline to accept an application for adjudication when, for example, the statement of affairs does not disclose a prima facie case of insolvency.

different, and lower than, the "unable to pay his debts" threshold at issue in *Paulin*, and while the New Zealand decision in *Re Baker* suggests that insolvency is implicit despite its omission from the statute, that decision is not binding on us. On the other hand, it seems arguable that the s 45 threshold (combined debts of $1,000 or more) might purposively be interpreted to mean "combined *net* debts". In the absence of argument, however, we make no firm finding on that issue.

[120] Regardless of that specific point, the underlying premise continues to be relevant. Irrespective of the statutory threshold, there is an obvious inference to be drawn that a solvent debtor who applies to be adjudicated does so for a collateral (and so improper) purpose, unrelated to the bankruptcy regime.

[121] Lastly, whether annulment can be ordered in a case where a debtor-initiated adjudication serves both a genuine bankruptcy purpose (for example, because the debtor is insolvent and the bankruptcy is not futile) and some *other* purpose is not addressed in the cases noted above, and we consider that separately, and later, below.

Has the enactment of the IA 2006 changed anything?

[122] It will be observed that a number of the cases just discussed are concerned with annulments sought or ordered on the grounds that the adjudication in question was an abuse of the court's process. That generally seems to reflect the underlying statutory position, whereby adjudication occurred by way of an order of the court.

[123] As already discussed, however, since the enactment of the IA 2006, the court has no explicit involvement in the debtor-initiated adjudication process: its role has been given to the Assignee. There is therefore a question whether the principles developed in the abuse of process cases continue to pertain where an adjudication is debtor-initiated under the IA 2006.

[124] We have little hesitation in agreeing with counsel that they should, for the reasons that follow.[91]

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91 See also *Ward v Official Assignee* [2020] NZHC 1991, where Associate Judge Bell took the same view.

[125] First, it is clear even from the decided cases that "abuse of process" is, in this context, effectively synonymous with "improper purpose", a vitiating concept that is not confined to judicial decisions. And since as early as 1911, some courts have expressly recognised that a debtor-initiated application made for an improper purpose is an abuse of *statutory* process:[92] namely, a purpose outside of the specific and limited objects of the bankruptcy regime established by Parliament.[93] That is hardly surprising because, for the 100 years prior to the enactment of the IA 2006, the debtor-initiated adjudication process both here and in the United Kingdom involved only *deemed* oversight by the Court; as a matter of practical reality the process has, for decades, effectively been an automatic function of statute, just as it is now.[94]

[126] Secondly, the literal words of the IA 2006 make it clear that the ability under s 309 to apply for an annulment on the ground that "the bankrupt should not have been adjudicated bankrupt" is not limited to creditor-initiated adjudications. Section 10(2) expressly states that adjudication can take two forms and s 309 itself suggests no differentiation between them. And to the extent it might nonetheless be argued that as a result of the Assignee's new responsibility, the scope of those grounds has become more limited in relation to debtor-initiated adjudications, the Parliamentary materials relating to the passage of the Insolvency Law Reform Bill 2005 make it clear no substantive change was intended. As Mr Neil for the Assignee submitted, the Explanatory Note to the Bill stated:[95]

> The Bill repeals the [IA 1967] and amends the Companies Act 1993. The changes proposed in the Bill in relation to personal insolvency can be broadly categorised as follows:
>
> - modernisation: the Bill proposes changes and additions that will take account of the fact that the main reason for personal insolvency has changed from business failure to consumer spending-related reasons. They also reflect changes in societal views of bankruptcy since the 1960s.

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92 See for example *Re Aekins*, above n 19.

93 The term "abuse of the processes of bankruptcy" has been used in other annulment cases: see for example *F v F* [1994] 1 FLR 359 at 366.

94 In New Zealand, ss 54–55 of the Bankruptcy Act 1867 required the court to adjudge a debtor bankrupt upon the presentation of a debtor's petition, subject only to certain procedural requirements. Under the Bankruptcy Acts of 1892 and 1908, and under the IA 1967, a debtor-initiated adjudication was simply deemed to occur upon the filing of the relevant application in Court.

95 Insolvency Law Reform Bill 2005 (14-1) (explanatory note) at 2.

- improvements in process: the Bill proposes a general streamlining of what are currently cumbersome and, in places, nonsensical processes. It also proposes transferring the responsibility for what are, in essence, administrative processes from the High Court to the Official Assignee.

[127] The clause-by-clause analysis of the Bill stated:[96]

> *Parts 1 to 7* replace the provisions of the [IA 1967]. In large part, the new provisions do no more than restate, reorganise, reorder, simplify, and modify those provisions without any intention of altering the substantive law. Accordingly, this part of the explanatory note highlights only those provisions that make significant substantive changes to the law.
>
> *Clauses 45 to 49* provide for the application by a debtor for his or her own adjudication. Previously, a debtor had to apply to the High Court for adjudication. Now the application is made to the Assignee. As before, adjudication is automatic on the application being made. The only procedural requirement is that the debtor must first have filed a statement of affairs with the Assignee.

[128] Similarly, during the Committee of the whole House debate of the Bill by the House of Representatives, Hon Lianne Dalziel, the then Minister of Commerce, explained what was intended by the proposed changes to the process for debtor-initiated bankruptcy as follows:[97]

> I will take just a brief call to explain this part. It provides for the application by a debtor for his or her own adjudication and bankruptcy. Previously a debtor had to apply to the High Court for adjudication. Now the application will be made to the official assignee. As was the case before, the adjudication is automatic on the application being made. The only procedural requirement is that the debtor must first file a statement of affairs with the official assignee, which allows the official assignee to advise debtors of alternatives to bankruptcy and of their best option. The reason I am spelling it out is that this part is a very technical restatement apart from the change to that one aspect of the existing law.

[129] Thirdly, the Assignee is, in any event, an officer of the court, subject to the High Court's supervisory jurisdiction.[98] So while on the face of it, it might seem that a debtor-initiated adjudication now involves a purely administrative process, the Court nonetheless retains an oversight role. The fact that applications for annulment can still be made to the Court under s 309, even in debtor-initiated adjudications, serves to underscore that role.

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96 At 6.
97 (12 October 2006) 634 NZPD 5741.
98 IA 2006, s 399.

[130] Fourthly, and in policy terms, it is precisely because debtor-initiated adjudication is, for all intents and purposes, automatic, that a safety net is required. An automatic statutory process, that nonetheless has a significant effect on third party rights, particularly the rights of creditors, might be said to be in particular need of curial protection from abuse.

[131] So whether, from a semantic point of view, it is right to call an application for a debtor-initiated adjudication made for an improper purpose an "abuse of process" in the orthodox sense, it is our clear view that the court continues to have the power under s 309(1)(a) to annul an adjudication that has resulted from such an application.

Sole or predominant improper purpose?

[132] The question next falling to be considered is whether the annulment power may be exercised where the improper purpose is not the debtor's *sole* purpose, but merely their predominant one.

The question of leave

[133] As noted earlier in this judgment, counsel for the Assignee submitted the "predominant purpose" argument was not raised in M's notice of appeal and so, under r 34 of the Court of Appeal (Civil) Rules 2005, leave was required to pursue it. M disputed this, saying it was implicit in the grounds one and three in her notice of appeal, which were expressed respectively as follows:[99]

> Ground One
>
> 1. Her Honour erred at paragraph [45] of her Judgment when stating "the issue … is whether the bankruptcy is an abuse of process because it was designed to circumvent the PRA and prevent [M] from receiving her share of the residential property".
>
> 2. This is an error because the abuse of process in this case is not whether it was designed to circumvent the [PRA] and prevent the appellant from receiving her share of the residential property but because it was designed to circumvent the PRA by preventing the appellant from purchasing the respondent's half share of [the Property] (the family home) from him and with a view to seeking to force the appellant to reconcile with him (the abuse).

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[99] Emphasis omitted.

…

Ground Three

8. At paragraph [50] Her Honour therefore erred by finding that the abuse was not the sole purpose of placing himself into voluntary bankruptcy.

9. The abuse was the sole reason or purpose and/or on balance the sole reason or purpose and/or the real or actual reason or purpose why the respondent placed himself into voluntary bankruptcy and therefore Her Honour erred by dismissing the appellant's application for annulment under s 309(1)(a) of the Act.

[134] We reject M's contention as far as ground three is concerned: ground three is plainly concerned with the contention that H's *sole* purpose in seeking adjudication was the "abuse", as defined in the notice of appeal. Her point is, however, more arguable when it comes to ground one, particularly when read in the context of the relevant part of the judgment under appeal. That judgment at [45] is, for example, immediately followed by a discussion of *Re Ell* and the sole purpose test.[100]

[135] Ultimately, however, we do not need to resolve whether the point is encompassed in the notice or not. We consider that, to the extent leave to pursue this ground of appeal is required, it should be granted. Whether the test in an application for annulment based on improper purpose requires the alleged purpose to be the sole or predominant one seems a matter of some general moment. Moreover, it was fully argued before us and no prejudice to the Assignee arises. It would be artificial and unhelpful to exclude consideration of the issue and, if necessary, we therefore grant leave, accordingly.

Which is the correct test?

[136] As noted by the Associate Judge, some of the older bankruptcy cases refer to the test being one of sole purpose.[101] *Re Ell* is the first of these that we have reviewed, but it is evident from the terms of that judgment that the sole purpose requirement had more ancient origins.[102] There is also the suggestion in some of the abuse of process

[100] It is not clear to us whether the Associate Judge heard argument on this point or not.
[101] High Court decision, above n 2, at [46]–[48].
[102] *Re Ell*, above n 18, at 437.

cases in a bankruptcy context, such as *Kekhman*, that even an incidental or minor bankruptcy purpose may save an adjudication from annulment.[103]

[137] On the other hand, the decision in *Re Majory* suggests that the use or threatened use of the bankruptcy process by a creditor as a means of extortion will be a vitiating abuse of process, even where grounds for bankruptcy exist.[104] And in other cases, in contexts other than bankruptcy, the abuse of (court) process threshold also seems lower. We refer, in particular, to the decisions of the High Court of Australia in *Williams v Spautz* and the English Court of Appeal in *Goldsmith v Sperrings*,[105] both of which referred to *Re Majory* and both of which have been followed (at least at High Court level) in this country.[106]

[138] The principles emerging from those cases are that, in determining whether the *court's* processes are being used for an improper and vitiating purpose:

(a) the improper purpose alleged to be the motivation for the relevant proceedings need not be the sole purpose, as long as it is the predominant purpose;

(b) qualifying abuse will not be found, and a litigant will not be barred from pursuing a genuine cause of action, if the cause of action would be pursued *despite* the collateral purpose, notwithstanding that the collateral purpose is a consciously desired by-product of the claim;

(c) the onus on the party alleging abuse of process is a heavy one, and the power to grant a remedy (such as a stay) is to be exercised only in exceptional circumstances; and

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103 See for example *JSC Bank of Moscow v Kekhman*, above n 71.
104 *Re Majory*, above n 49.
105 *Williams v Spautz*, above n 58; and *Goldsmith v Sperrings Ltd*, above n 58.
106 See for example *Air National Corporate Ltd v Aiveo Holdings Ltd* [2012] NZHC 602; *Walker v Forbes* [2015] NZHC 1730, [2015] 3 NZLR 831; and *Tomanovich Holdings Ltd v Gibbston Community Water Company 2014 Ltd* [2018] NZHC 990. See also *Shanghai Neuhof Trade Company Ltd v Zespri International Ltd* [2014] NZHC 2353 at [54]; *Cain v Mettrick* [2020] NZHC 2125 at [31]; and *Waterfall Park Developments Ltd v Hadley* [2022] NZHC 2221, [2023] NZRMA 11 at [190].

(d) it is unnecessary to prove the commission of an improper act to justify a remedy but, other than in the clearest of cases, it will be necessary to point to some separate manifestation of intent, in the form of an overt act (such as a demand) which is indicative of the true (collateral) purpose.

[139] For the reasons given earlier, and for the reasons articulated in *Re Majory*, we do not consider a meaningful distinction should be drawn between the rules governing abuse of process strictly so called (in other words, abuse of the *court's* process) and abuse of the statutory bankruptcy process. It follows that we consider that an application for adjudication made for an improper or collateral purpose may be annulled even where it is not the petitioner's *sole* purpose. As in the abuse of process cases discussed, we consider "substantial" purpose is the appropriate benchmark. Substantiality may well be established if, for example, the application for adjudication would not have been made "but for" the collateral purpose. That enquiry naturally invites consideration of the other questions highlighted in the bankruptcy cases, including whether the debtor is, in fact, insolvent and whether bankruptcy is, in the circumstances, futile. There must, of course, be evidence capable of establishing the existence of the collateral purpose.

[140] If, after considering these and any other relevant matters, the court concludes that any bankruptcy purpose that might be served by the adjudication was incidental to the applicant's principal and collateral purpose — and so that the statutory processes have been abused — then, the court may, in its discretion, annul the order.

Has M established that H had a potentially vitiating collateral or improper purpose when he applied for adjudication?

[141] As set out earlier, M's notice of appeal contends that H applied for adjudication to circumvent the PRA by preventing her from purchasing her half share in the family home (or making it more difficult for her to do so) and to force her to reconcile with him. It cannot, we think, be disputed that these are not purposes contemplated by the bankruptcy regime or, more generally, by the IA 2006.

[142] As noted earlier, H did not participate in these proceedings and did not file evidence in the High Court. But we think his purpose can nonetheless fairly be assessed from:

(a) the documentary record (and, in particular, written material authored by H) that was contained in the evidence filed by M and the Assignee;

(b) the undisputed fact that H was not insolvent at the time of his application and the absence of any obvious useful bankruptcy purpose underlying that application; and

(c) the effect of his adjudication on M.

[143] We elaborate below.

Documentary record

[144] We have set out the key parts of the documentary material earlier in this judgment. In our view, that material evidences the following relevant matters:

(a) From the time of separation, H almost certainly knew the Property was likely to be relationship property, but, in any event, can have been in no doubt that M was asserting that she was entitled to a 50 per cent share, and would do so in court if necessary.

(b) H displayed a developing (if fluctuating) animus towards M, expressed on social media and later in text messages.

(c) H was genuinely concerned about his day-to-day financial and living situation and his ability to meet his bills.

(d) But notwithstanding those concerns, he declined to respond or accede to M's formal proposal to buy him out — based on an independent valuation — which would have largely or wholly resolved those concerns.

(e) To the extent H did not consider M's offer was a fair one, he made no attempt to obtain a second valuation, make a counter proposal or to negotiate. Instead:

(i) he attempted to use the possible sale of the Property at auction as a bargaining chip to get M to reconcile with him; and

(ii) he resolved to apply for adjudication, motivated (expressly) in part by the fact that sale by the Assignee would likely require M to move out of the Property.

(f) H filed a statement of financial means that, while inaccurate as to both his debts and his assets, disclosed that his assets exceeded his liabilities, from which it can only be concluded that he knew he was not insolvent.

(g) H refused subsequently to agree to an arrangement with the Assignee whereby M would pay off his debts.

(h) In response to a question from the Assignee, H did not assert that he was insolvent, but that he did not have the "wherewithal" to sell the Property.

[145] Although we acknowledge that H's mental health issues may have contributed to what otherwise appears to be a wholly inexplicable stance on his part, we are unable to see this as militating against the conclusion that he was actuated by collateral purposes (causing harm and relationship property difficulty to M, and requiring her to move out of the family home), rather than a genuine bankruptcy purpose, when applying for adjudication.

H was not insolvent and had no bankruptcy purpose in seeking the adjudication

[146] There can be no question in this case that H was not, at the time of his adjudication, insolvent. Nor is it possible to suggest that he did not know his assets exceeded his liabilities by some considerable amount, although we acknowledge he may have had concerns about his ability to meet his day-to-day living expenses. As

we have said, however, M had offered him a way out of that which, on the evidence before us, he declined to consider. To the extent he thought the price offered by M for the Property was not a fair one, he took no steps to address that.

[147] The best that can be said in H's favour is that he wished a third party (the Assignee) to sell the house on his behalf, because he was worried about his debts and did not have the "wherewithal" to do so, or to deal with relationship property matters. But, particularly in circumstances where M was demonstrably willing and able to buy his share of the property, those things do not give rise to a proper bankruptcy purpose. His financial affairs were far from complex and required no expert or independent investigation.

[148] In the absence of consideration of the point referred to at [119], the fact of H's solvency cannot be determinative of the annulment application. But, in the absence of some other tenable explanation, it remains a strong indicator of such a collateral purpose. In the absence of such an explanation, there is a reasonable inference to be drawn that he had some other purpose. And on the facts before us, it is impossible to conceive of a proper bankruptcy purpose that might have underlain his application.

Effect of adjudication on M

[149] In terms of effect, the starting point is H's attempt to use the threat of adjudication as a means of obtaining emotional leverage over M in order to obtain her agreement to reconcile with him. That threat did not, however, bear fruit and so it remains more relevant not as an effect, but as a discrete indicator of collateral purpose.

[150] In terms of substantive effect however, M's default position under the PRA prior to H's bankruptcy was that she was entitled to 50 per cent of the relationship property, which for all present intents and purposes comprised the Property. Her share was valued at somewhere between $400,000 and $500,000. There would, of course also be a question of relationship debts, but the Assignee's conclusions on H's bankruptcy makes it clear that, even proceeding on the basis that all H's debts were relationship debts, they were in fact minimal. That is without taking any offsetting in relation to H's likely obligation to pay child support.

[151] Upon H's adjudication, however, M's position was expressed by the Assignee to be as follows:

> Any interest that [M] had in the Property by reason of it being a family home arises under the PRA. The effect of s 20A(2) of the PRA, however, is that upon the Bankrupt's adjudication, the Property passed to the Assignee as if the PRA did not exist. [M] can no longer claim a 50% interest in the family home on the basis it is or was the family home. The only claim that she has is to a protected interest, which is provided by s 20B of the PRA. In this case, that will amount to $103,000.

[152] As well, in the event of a sale of the Property by the Assignee:

(a) M had no guarantee of prevailing at auction and so maintaining ownership of the Property; and

(b) any proceeds received by H subsequently would be reduced by dint of the Assignee's administration costs and so any relationship property claim by M for half of those proceeds would, on the face of it, be similarly diminished.

Conclusion: improper purpose

[153] In light of all the matters just discussed, we have little hesitation in agreeing with M that H's substantial actuating purposes in seeking adjudication were to prevent or impede M from exercising her rights under the PRA to obtain a 50 per cent share in the family home, to make it more difficult (likely impossible) for M to continue living in the family home with their child and to diminish the relationship property pool readily available to her. These purposes are unrelated to the purposes of adjudication and the bankruptcy regime more generally and are therefore improper. The mere fact that H may have technically met the statutory threshold for debtor-initiated adjudication is no answer to any of that.

[154] Once that point is reached, whether to annul the adjudication becomes a matter for the court's discretion. No reasons were advanced as to why the discretion would not be exercised in M's favour, and we can think of none.

[155] We are satisfied, therefore, that H's application to be adjudicated bankrupt should be annulled. As s 309 makes clear, the annulment runs from the date of the adjudication, 30 June 2021.

Costs

[156] There are two costs issue for us to consider: who should bear the costs of this appeal and who should pay the Assignee's administration costs to date.

Costs on appeal

[157] M has succeeded on appeal and is entitled to the costs on a Band A basis for a standard appeal, together with usual disbursements. There remains a question, however, about who should pay them.

[158] Although H did not participate in the appeal (or in the hearing below), we have found that he initiated his adjudication for an improper purpose. It is this action that necessitated M's application, and we consider he should bear at least some responsibility for her costs.

[159] We have also considered whether the Assignee should bear some costs liability, given he acted as the effective contradictor to M's appeal. Counsel for M also submitted that the Assignee had, more generally, acted unreasonably in persisting with the bankruptcy and not initiating an annulment himself, under s 310 of the IA 2006. An appeal ground based on similar contentions was not, however, pursued before us.

[160] There is a presumption that the Assignee is not liable for costs in proceedings brought against the Assignee or where the Assignee is made a party to the proceedings. That presumption is reflected in r 24.53 of the High Court Rules 2016, which provides:

> Unless the court otherwise directs, the Official Assignee is not personally liable for costs if—
>
> (a) proceedings are brought against the Official Assignee representing the estate of the bankrupt; or
>
> (b) the Official Assignee is made a party to a proceeding on the application of another party.

[161] In *Rutherford v Official Assignee*, Winkelmann J set out the principles applicable to an award of costs against the Assignee, having regard the predecessor to r 24.53, which was drafted in almost identical terms:[107]

> (i) There is a presumption under [r 24.53] that the Official Assignee is not personally liable for costs.
>
> (ii) Situations in which costs will be awarded personally against the Official Assignee will be rare; exceptional circumstances would usually be required.
>
> (iii) Situations in which such an order may be granted include where the Official Assignee has acted outside the scope of his or her duties, where he or she has acted in bad faith, or where the Official Assignee has otherwise acted in a manner falling below the standard expected in the exercise of his or her function.

[162] While r 24.53 has no direct application in this Court, the underlying principles do.

[163] In the present case, the Assignee was required to be served with, and entitled to participate in, the proceeding as if the Assignee were a party to it, by dint of s 309(2) of the IA 2006. We consider that the principles referred to above apply.

[164] While we may not agree with the stance taken by the Assignee in relation to certain matters arising in this case, we are very far from a situation where he has acted outside his duties, below the expected standard or in bad faith. Given H's non-participation, we are grateful for the Assignee playing an active part in the appeal. We therefore decline to make an order for costs against the Assignee; that burden will fall on H alone.

Assignee's costs of administration

[165] In the event the bankruptcy was annulled, Mr Neil asked the Court to order that H pay the Assignee's fees and expenses and that the Assignee could secure H's obligation to do so by a charge over H's share in the Property. We were referred to another case in which such orders have been made.[108] We agree that is appropriate in this case and make an order accordingly.

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[107] *Rutherford v Official Assignee* HC Auckland CIV-2006-488-115, 8 September 2006 at [6].

[108] *Ella v Ella* [2008] EWHC 3258 (Ch) at [22].

Result

[166] The appeal is allowed.

[167] The order adjudicating H bankrupt is annulled, with effect from the date of adjudication, being 30 June 2021.

[168] The High Court order directing M to pay H's costs in the High Court is set aside, and the question of costs is to be reconsidered by the High Court in light of this decision.

[169] The respondent is to pay the appellant's costs on the appeal on a Band A basis for a standard appeal, together with usual disbursements.

[170] The Assignee's costs of administration are to be paid by the respondent and may be secured by way of charge over his interest in the Property.

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