

THE HIGH COURT
JUDICIAL REVIEW

2008 928 JR

BETWEEN

JOHN HAND

APPLICANT

AND

BRENDAN LUDLOW

RESPONDENT

JUDGMENT delivered by Mr. Justice O’Keeffe on 18th day of December, 2009

Background

1. The Applicant is a Primary School Principal at St. Oliver Plunkett’s Primary School, Navan (“the School”). The Respondent is the appointed manager of the School.

2. This application for judicial review commenced on 30th July, 2008 and the Applicant sought an order of prohibition by way of application for judicial review prohibiting the Respondent from conducting a disciplinary hearing on 5th August, 2008 at Navan. An order of prohibition prohibiting the Respondent from pursuing any disciplinary procedure on foot of a purported investigation and the results of which were contained in a letter of 10th June, 2008 from the Respondent to the Applicant was also sought. The Applicant sought a declaration that the Respondent could not purport to cast himself as investigator, complainant, prosecutor, witness and adjudicator in a disciplinary context pursuant to the provisions of the Education Act 1998, (“the Act”) or otherwise. A declaration was sought that the Respondent was not empowered to investigate or pursue alleged breaches by the Applicant of the Rules for National Schools which were the exclusion preserve of the Minister for Education and Science. A declaration was also sought that the Respondent was acting *ultra vires* in that he cannot lawfully exercise all or any of the powers which he was purporting to exercise in circumstances where:-

- (a) He is acting under dictation;
- (b) The Act does not contemplate the appointment of a Single Manager for the stated purpose of investigation/disciplining of a School Principal and
- (c) Alternatively, there was no lawful basis for the appointment of the Respondent.

3. Without prejudice to the foregoing reliefs, a declaration was sought that an investigation by the former Board of Management of the School into alleged disciplinary infractions by the Applicant was:-

- (a) unlawfully terminated by the Respondent;
- (b) arrogated by the Respondent onto himself without lawful authority.

4. A declaration was also sought that the investigation disciplinary procedure conducted by the Respondent into allegations against the Applicant was carried out in breach of the Applicant’s constitutional rights including:-

- (b) the Applicant’s right to natural justice and fair procedures as guaranteed by Article 40.3 of the Constitution;
- (c) the Applicant’s right to work and earn a livelihood as guaranteed by Article 40.3 of the Constitution; and
- (d) the Applicant’s right to his good name as guaranteed by Article 40.3.2 of the Constitution

5. In the grounds upon which relief was sought, the Applicant stated he had been the subject of allegations of wrong doing which commenced with a visit by an inspector of the Department of Education and Science (“the Department”) to the School in October 2007. He claims that he fully co-operated with the school inspector of the Department in respect of her inquiries in relation to pupil enrolment and pupil transfers between the School and Kilmainham Wood National School, Co. Meath. He asserted that upon the expiry of the term of office of the Board of Management of the School on 30th November, 2007, that no new Board of Management was appointed by the Patron, Bishop Michael Smith, the Bishop of Meath, and instead that the Respondent, Fr. Brendan Ludlow was appointed Single Manager of the School. It was claimed that the appointment of the Respondent as manager was not made in accordance with the provisions of the Act. The staff and parents of pupils at the School were informed on 7th January, 2008, that serious matters that come to the attention of the Patron and for that reason a new Board of Management would not be appointed.

6. The Applicant was appointed Principal of the School in February 1997. He had been an Acting School Principal since

1980 and a School Principal since 1986.

7. In his grounding affidavit, the Applicant stated that the Bishop of Meath who was the Patron of the School, with the approval of the Minister for Education and Science ("the Minister") purported to appoint a manager to the School, namely the Respondent, purportedly pursuant to the provisions of Section 16 of the Act (the terms of office of the Board of Management of the School having expired on 30th November, 2007). He claimed further that the Act made no provision for the appointment of a manager upon the expiry of the term of office of a Board of Management and that the Respondent's appointment was made without lawful authority.

8. The School is a large Catholic Co-Educational Primary School. It had some 596 pupils on its role since 30th September, 2007. Teaching staff for the year 2007/2008 in addition of the Principal comprised 23 mainstream class teachers, 16 teachers who work in a support capacity and 17 special needs assistants.

9. Fr. Dwane Gavin was the Chairperson of the Board of Management, whose term of office expired on 30th November, 2007.

10. The Applicant describes a visit on 8th October, 2007 to the School by an inspector of the Department who asked him to provide all of the roll books which he stated he complied with. He said that the inspector checked in particular in relation to four children who had transferred to Kilmainham Wood National School in September 2007 where his wife was the then Principal. He said that in September 2007 four children had transferred from the School to Kilmainham Wood National School, two of whom were his own children and that these children were transferred in order to assist his wife who required pupil numbers sufficient to retain a teacher under the Developing School System. He said it was a matter which he had admitted and that the mother of the other two children involved consented to the temporary transfer.

11. Subsequently, he said the inspector informed him that the situation was very serious. He asked why, as he had done nothing wrong. He said she asked if there was anything he wished to tell to which he replied that there was nothing he wished to tell her and that the roll books were perfect. She asked if Fr. Gavin had any knowledge of this to which he replied no. There was a subsequent visit by the inspector on 10th October, 2007. The inspector took the roll books with her.

12. He met with Fr. Gavin on 24th October, 2007 who stated to him that the Patron, Bishop Smith considered the situation to be very serious and that the Department had got an anonymous phone call that had alerted them to the situation. Fr. Gavin stated that it was at that stage that he became involved. Fr. Gavin informed him that he had broken enrolment policy that he was "shipping" kids out to Kilmainham National School. The Applicant claimed that he had not broken any enrolment policy. He stated it was his wife who was in trouble because of this.

13. On 27th November, 2007, a letter was circulated to parents of pupils signed by Fr. Gavin stating that the election of parent representatives to the Board of Management of the School had been postponed, due to unforeseen circumstances.

14. He described that a meeting took place on 28th November, 2007 of the Board of Management attended by Fr. Gavin and himself and that Fr. Gavin referred to the movement of four children from the School to Kilmainham Woods National School from 1st September to 30th September, 2007. Fr. Gavin stated this breached the School's enrolment policy. The Applicant accepted that this had occurred and stated that all children were transferred properly and the forms were filled out and that it had taken place as his wife who was the Principal needed the numbers of pupils. He stated that he was sorry for what had happened, that he was responsible for it but he believed that no rule had been broken. Fr. Gavin informed the meeting that no Board of Management would be put in place until the issue was resolved and that he was in contact with the Minister. He told the Board that a Single Manager would be put in place when the current term of the Board of Management ended. He also claimed that Fr. Gavin informed the Board that the Patron was taking it "very seriously". He said he was astonished at the role played by the Patron from the outset where he could discharge the functions and duties of an objective appeal Board.

15. He describes a meeting on 1st December, 2007, with Bishop Smith, where again the matter was discussed and his explanation given, the Applicant adding that he regretted what he had done but he had broken no rules. He was informed, he stated, by the Bishop that he (the Bishop) regarded it as "a very serious matter" and that he was advised by the Department not to appoint a Board but to appoint a Single Manager because, the Applicant was being investigated. The Bishop stated that the complaint was against the Applicant and not his wife. The Applicant asked the Bishop that if a Single Manager were to be appointed to the School he was asking that an independent, fair minded and unbiased person should be appointed. He said the Bishop told him he should consider his position and save himself "a lot of hassle". The matter would end up on the Minister's desk the Bishop said and the Bishop advised him to get a solicitor.

16. The Applicant describes how there had been correspondences between the Patron, the Chairman of the Board of Management (Fr. Gavin) in relation to the issue of size of the pupil population in the School. He referred to correspondence which indicated that in November, 2006, the Board of Management members had expressed "outrage" that its policies in relation to enrolment had been ignored and that the Principal had shown no regard for the decisions made by the Board. He stated that on 13th December, 2006, Fr. Gavin had written to Bishop Smith stating that the Applicant had never shown any capacity or willingness to respect the management structures within which he has a duty to cooperate. If he was granted permission to expand the student enrolment numbers he would go over what the Department would sanction. This letter, the Applicant stated showed the hostility and antipathy which Fr. Gavin had harboured towards him. He also claimed that correspondence which was exhibited showed Bishop Smith had developed hostility towards him in relation to this matter.

17. The Applicant stated that Bishop Smith requested the approval of the Minister for the appointment of a Single Manager upon the expiry on 30th November, 2007 of the term of office of the Board of Management and that approval was given on 21st December, 2007. On 24th December, 2007 Bishop Smith confirmed the appointment of the Respondent as School Manager. The Applicant claimed that the appointment was not made in accordance with the provisions of the Act.

18. The Applicant took issue with a letter written by Fr. Gavin on 17th December, 2007 to the inspector who had visited the School on the basis that Fr. Gavin had no mandate to write such a letter (his tenure of office as Chairperson of the Board of Management having expired on 30th November, 2007) and that its contents comprised allegations which were an outrageous slur on his personal and professional reputation. This letter referred to the Applicant's failure to comply with

the Board of Management's enrolment policy. It also raised an issue about the rental of pre-fabs or their financing. This letter it was claimed demonstrated Fr. Gavin's bias and prejudice to him and had infected the entire process.

19. The Applicant stated that both the Respondent and Fr. Gavin resided at the parochial house in Navan.

20. The Applicant received a letter from the Respondent on 5th January, 2008 referring to the serious reservations which Bishop Smith had regarding the appointment of a new Board of Management for the School. The Applicant claimed that this was not a valid basis for the appointment of a Single Manager by the Patron. That letter also requested a letter to be sent to the parents of the pupils at the School informing them of the appointment of the Respondent as a Single Manager of the School. The letter which was written by the Respondent stated that the Patron, Bishop Smith deemed it impracticable to appoint a new Board of Management given the serious matters that had come to attention concerning the operation of the School.

21. On 16th January, 2008, the Assistant General Secretary of Irish National Teachers Organisation (INTO) wrote to the Respondent, *inter alia*, requesting the Respondent to outline the nature of the "serious matters" that are under consideration and the process of examining same and whether it was the intention of the Respondent as Sole Manager to investigate those matters or were they to be addressed by the Department.

22. On 21st January, 2008, the Respondent replied indicating that the serious matters under investigation had been discussed with the Applicant at the Board of Management meeting on 28th November, 2007 and that the Applicant had discussed the matters at the meeting with the Bishop and with the inspectors of the Department. The Respondent stated that his role going forward would depend on the outcome of current and future inquiries and investigations and any relevant information which came to hand. He said his role was to oversee the day to day management at the school during the interim period.

23. On 26th February, 2008, the Respondent wrote to the Applicant informing him that he had received a report from the inspector of the Department which raised a number of serious issues which were of great concern to the Respondent and that he would like to meet the Applicant to discuss the report and the issues arising. A copy of the report was enclosed to the Applicant. He also stated that he had appointed an accountant on the Department's instruction to carry out an audit of the School's finances. The accountant had some initial queries which had arisen in the course of the audit. He had tried to set up a meeting with the Applicant to discuss these queries but had received a message that he was not available and that he, the Respondent would be hearing from the INTO. He enclosed a copy of a letter from the accountant, Mr. Dylan and also a list of other issues and concerns arising from an examination of the files and records of the Board of Management.

24. The report of the inspector concluded:-

"There are irregularities in the enrolment policies of both Kilmainham Wood N.S. and St. Oliver's N.S., Navan. These figures have been manipulated by the Principals of both Schools in order to help Kilmainham Wood N.S. get sanction for the retention of an additional post under the terms of the Developing Schools Scheme. There are clear and evident breaches of the Rules for National Schools 64(4) and 64(5) and of the terms of Circular 0020/07 in the action taken by the school principals."

25. This letter also enclosed a list of issues arising from an examination of the files and records of the Board of Management which the Respondent wished to discuss with the Applicant.

26. The Applicant claims that the issue as to whether or not there has been a breach of the Rules for National Schools is one which can only be dealt with by the Minister in relation to school records.

27. A further letter was sent by the Respondent on 7th March, 2008 to the Applicant enclosing a document received from the Department in relation to a language support application for 2007/2008.

28. The meeting with the auditors was rescheduled for Tuesday, 11th March, 2008. On 11th March, 2008, the Applicant wrote to the Respondent seeking further information in order "to fully co-operate with" the Respondent's investigation. This included seeking roll books. He also wrote on 1st April, 2008 complaining that the inspector had removed all the roll books and registers of the School and as a result he could not carry out his duties to meet his responsibilities under the Education Welfare Act.

29. By undated letter received by the Respondent on 4th April, 2008, the Respondent in response to the Applicant's statement on 1st April, 2008, that he could not carry out his duties in relation to roll books, the Respondent said that he had been informed that replacement books were provided by the School and that these were to be regarded as the School's current roll books according to the Department's Inspector. The Respondent said that he was adding this matter to the other serious matters regarding enrolment which he had raised.

30. On 7th April, 2008, a further letter was received from a representative of the INTO seeking details in relation to the various documents that had been supplied. It also sought clarification as to whether the Department was investigating the matters or whether the Respondent as School Manager was conducting investigation or whether it was a joint investigation.

31. On 10th April, 2008, the Respondent replied to the letter of 7th April. It stated that since the Respondent's correspondence on 21st January, 2008, he stated that it was his role of overseeing day-to-day management of the School during the interim period that since that date, various communications and instructions accompanying the various reports were received by him from the Department. Bishop Smith, the Patron, had also given instructions and had clearly placed the responsibility of examination and investigation of various issues on his shoulders.

32. On 15th April, 2008, the Applicant wrote seeking the original school roll books, registers and daily report books.

33. In relation to the examination of Board of Management files it was undertaken in February 2008 on the instructions of the Department and also the Patron. Copies of the correspondence and Board Minutes were being sent to the Applicant.

34. On 30th April, 2008, the Respondent wrote to the Applicant stating that in the course of the audit, it had come to his attention that the Applicant had a prefab moved from the School premises to his own premises and he sought an explanation for the removal of the prefab from school property.

35. On 6th May, 2008, the INTO on behalf of the Applicant stated that the Applicant was prepared to respond fully to all the issues raised when a full and final report was issued to him. It stated that natural justice and due process was paramount to the situation and this could only be achieved when all investigations were concluded and the outcomes put to the Applicant. The letter claimed that all documentation had not been forthcoming. Correspondence between Fr. Gavin and Bishop Smith had been withheld. It stated that the Applicant would not be in a position to respond at a meeting to any report or messages until a full and final report was issued.

36. A further detailed letter was sent by the INTO on 20th May, 2008, which, *inter alia*, sought confirmation that the Applicant would be furnished with the draft of the auditor's proposed report for his comments prior to it being finalised.

37. The letter of 10th June, 2008 stated that following the various inquiries which had taken place that the Respondent and the Accountant, Mr. Dillon had serious concerns and that the Respondent believes that the only proper course of action to be followed to ensure that issues are properly addressed is that they be dealt with by way of a disciplinary procedure. He set out various disciplinary charges in the letter. He indicated that Mr. McKeever and Mr. Barry had both confirmed that they would be available to substantiate their respective accounts in the course of the disciplinary procedure and that he would be given an opportunity to question them, Mr. Dillon would also be available, if required. He would have an opportunity at the meeting to respond fully to the disciplinary charges. As the meeting would be a disciplinary meeting, he should understand that a sanction, up to and including dismissal may result. He was entitled to be represented at the meeting by a representative of his choice.

38. On 13th June, 2008, INTO wrote stating that the Respondent had purported to change his role. It sought clarification as to what the Respondent's role(s) were and complained about the short notice of the disciplinary hearing. The letter stated that a full rebuttal of the issues (or "charges") raised will be made at the appropriate time and in an appropriate context.

39. On 18th June, 2008, the Respondent wrote to INTO referring to his appointment as Single Manager by Bishop Smith, the fact that he had initiated an examination and investigation of various issues and that some of these issues had been investigated by himself and others by the accountant engaged by him. He said that it was not until early June (prior to 10th June, 2008) that he decided that a disciplinary process should be commenced. He said it was not possible to delegate the decision making function of manager/employer to a third party. He stated that whilst in larger organisations it may be possible to arrange for a third party to investigate and/or prosecute disciplinary charges in the case of the School, it was not practical to engage some outside third party to carry out the earlier inquiries nor indeed, was it practical to engage some outside third party to "prosecute" the disciplinary charges. He said that he could assure the Applicant that the process would be conducted fairly.

40. On 20th June, 2008, a further detailed letter was written by INTO. It demanded separation of the investigative and disciplinary roles, that an independent person conduct the investigation, that the disciplinary process should only proceed when the investigation is conducted and adverse findings made. Matters in relation to school records could be determined by the Minister only it stated.

41. On 30th June, 2008, the Respondent wrote raising a further serious matter which had come to his attention in giving details in relation to it. He confirmed that the investigation was completed and that the Applicant was being called to the disciplinary meeting. In relation to Rule 108 of the Rules for National Schools, the letter stated that Rule 108 provides that a teacher may be "dealt with as the Minister may determine" and that the Minister had given very clear instructions that the issue in relation to the records should be addressed by Management of the School. The letter stated that the Respondent could not delegate the decision making function of Manager/Employee to a Third Party. The letter stated that no findings had been made against the Applicant.

42. On 25th July, 2008, the solicitors to the Applicant wrote a lengthy letter to the Respondent. It stated, *inter alia*, that it was not proper for the Respondent to don both the mantle of investigator/prosecutor and adjudicator. They asked for his immediate withdrawal as the Respondent had immersed himself in all aspects of the process. He could reasonably be regarded as both complainant, prosecutor and possibly witness and also arbitrator. They stated that the solicitors had serious reservations concerning his purported appointment as Single Manager which did not appear to be made in accordance with the provisions of the Education Act 1998. They stated that in the event of proceedings being necessary, they would be seeking a declaration that there was no lawful basis for his appointment and that he was acting *ultra vires*. The letter claimed that it was clear from the solicitor's instructions that the Respondent had evinced bias and prejudice towards the Applicant in the conduct of his investigation and in the circumstances they were objecting to his continued involvement in matters relating to the Applicant and his position as Principal Teacher.

43. On 29th July, 2008, the solicitors for the Respondent replied to this letter. It stated, *inter alia*, that contrary to what was suggested on behalf of the Applicant that the Respondent was not a witness in relation to the disciplinary charges and an examination of the charges made that clear. It stated that the Respondent had not evinced bias and prejudice towards the Applicant in the conduct of his investigation.

44. The foregoing correspondence comprised correspondence exhibited in relation to the application to the High Court on 30th July, 2008.

45. In the course of the hearing of this application in December 2008, the Applicant exhibited a letter from the Minister to the Minister for Transport dated 19th November, 2009 which stated that a new Board of Management was due to be appointed in December 2007 to the School. In accordance with section 16 of the Act, the Patron of the School requested approval to appoint a Single Manager. The question of dissolving the Board did not present itself at that time as the Board had not been appointed and the Minister's approval was given to appoint a Single Manager for a six month period. It also stated that following an application from the Patron that the Single Manager appointment had been continued for a further six month period to 9th December, 2008. The Minister in his letter stated he was satisfied that the appointment had been made in accordance with the requirement of the Act.

46. On 17th December, 2008, the Applicant produced, in court, a letter received by him pursuant to a request for

information under the terms of the Freedom of Information Act which had been sent to him on 16th December, 2008. This letter included what purported to be minutes of a meeting of the Department of Education and Science and Patrons and Management of Kilmainhamwood National School and St. Oliver Plunkett, National School, Meath. It related to a meeting on 30th January, 2008 attended by Bishop Smith, Bishop O'Reilly, Patron, Kilmainhamwood NS, the Respondent, the Single Manager of Kilmainhamwood NS, the outgoing chairpersons (including Fr. Gavin) of Kilmainhamwood NS and St. Oliver Plunkett NS, Boards of Management, the Assistant Secretary General of the Department and three other officials of the Department. The document had been prepared by one of the officials of the Department. The document as prepared stated, *inter alia*:-

"Discussions centred around the following concerns which were shared by all in attendance:

Schools Issue Comments Agreed Action Points

St. Oliver` Allocation of Concerns that pupils don't Single Manager to
Plunkett NS Language exist and that pupils who address this issue in
(Navan) Support don't need resources are an overall examination
included in applications /audit of the school
for resources from Dept. funding, enrolments
and applications for
resources and report the
outcome to the Patron/
Department to provide
Assistance where
necessary

St. Oliver Deis Funding Concerns that DEIS Single Manager to
Plunkett NS Funding was being address this issue in an
used inappropriately overall examination/
and questions raised by audit of the school
the authorities whether funding, enrolment and
the school was in fact applications for
eligible for DEIS status/ resources particularly in
disadvantages status. The context of needy/
disadvantaged pupils and
report outcome to
Patron/Dept. Dept. to
provide assistance where
necessary.

St. Oliver General School Concerns that general Single Manager to
Plunkett NS Funding school funding/grants address this issue in an
are being spent on items overall examination/
which subsequently end audit of the school
up being removed from funding, enrolments and
the school for applications for
Principal's personal resources and report
use, e.g. caretakers outcome to Patron/
equipment purchased for Dept. Dept. to provide
school unaccounted for. Assistance where necessary

Monies sought by the

Principal from a local

Developer for school funding

Has not come through school

accounts as yet.

School authorities are of the

View that a lot of resources may

have transferred to

Kilmainhamwood NS.

St. Oliver Temporary Concerns that monies owed Single Manager to

Plunkett NS Accommodation to Cabinpac which the Dept. address this issue in an

(School Prefabs has funded through the overall examination/

school board of management audit of the school

(possibly as far back as 1999) funding, enrolment and have not been paid to applications for

Cabinpac for rental of the resources and inform

temporary accommodation. Patron/Dept. of outcome It is estimated by the school

authorities that the amount of

unaccounted monies could be in

the region of €23,000.

In addition there were six other matters set out in similar terms including enrolment irregularities and overcrowding in St. Oliver Plunkett NS and Kilmainhamwood NS.

47. The document continued:-

"Following lengthy discussion on the issues above, it was agreed that the most appropriate course of action at this point would be for the Patron and Single Managers to carry out a full investigation and audit of school accounts, addressing all of the issues of concerns in consultation with Ian O'Herlihy, Solicitors and to reach a decision, as employers of these teachers on a course of action which now needed to be taken. The Department agreed to follow up on the allocation of funding and resources."

48. When the Applicant applied to have this document admitted as evidence, this application was opposed by the Respondent's advisors. The court directed that the Applicant should set out in an affidavit the provenance of this document more fully, what its importance was and what inferences might be drawn by the court from it.

49. In a further affidavit sworn by the Applicant, in relation to this issue, the Applicant complained that he found it extraordinary that Fr. Gavin who had displayed extraordinary animus against him should attend a meeting with the Respondent who would ultimately purport to sit in independent judgment of him in relation to allegations of wrongdoing. He said that he had real and deep apprehension that the Respondent was biased against him and was influenced by those who were hostile towards him to such an extent it was impossible for him to be an independent or objective in coming to judgment from the allegations against him. He also objected to the presence of the Patron at the meeting. The Bishop's involvement in the investigation and at the meeting was inappropriate and antithetical to his role of the Ultimate Appeals Board in the disciplinary process to which he was being subjected.

50. In his replying affidavit sworn on 27th January, 2009, the Respondent says he was advised by his legal advisors that the Bishop of Meath had, by virtue of his appointment of the Respondent as Sole Manager (with the consent of the Minister) effected a dissolution of the Board of Management. He instanced the many and varied duties which a Sole Manager of a national school must undertake and which were undertaken by him. In relation to the Applicant, he stated that as his employer he intended to deal with him with meticulous fairness and bears him no animus. He said that he saw nothing untoward in consultation with those other parties interested in education and the welfare of the School. They were all intimately connected with the welfare and education of the children not alone in the school but also in Kilmainhamwood NS where a Sole Manager had been appointed by Bishop O'Reilly. He said that the document in relation to the meeting was in no sense an agreed minute. The document was not comprehensive and he did not accept some of the interpretations put on the comments contained therein by the Applicant.

51. Far from the meeting addressing "*findings*" as claimed by the Applicant, the meeting he said amounted to no more than a discussion of ongoing mutual concerns and how they might be dealt with. No copies of the reports of the Inspector dated 12th October, 2007 were circulated at the meeting. He first saw those reports around 9th February, 2008. The meeting discussed the fact there were concerns about a significant number of issues relating to both schools. He rejected the suggestion as the newly appointed Sole Manager of the School, that he should not be discussing issues which had arisen with the School Patron or with the outgoing chairman of the Board of Management or with an Assistant Secretary General or a senior inspector of the Department. He rejected the suggestion that in some way the purpose or object or

business of the meeting was to discuss "*findings*" in respect of the Applicant which had already been made (he said the Applicant had by that stage made some admissions from he has never sought to resile).

52. He said that he was advised that it was entirely appropriate for the Patron of a National School to hold such a meeting as held on 30th January, 2008 and to invite to such a meeting, any party whom he believed might be able to assist in discerning the needs and requirements of a National School under his Patronage and what steps should be taken to enhance the educational welfare of the relevant student body. He said that he was briefed by Fr. Gavin at the time when he was being appointed Sole Manager regarding the issues with which he could expected to be faced. He said that the meeting assisted him on his "learning curve" and did not prejudice him in anyway against the Applicant. His attendance at the meeting was only one element of his coming to grips with the situation. At the date of the meeting he had not received the report from the Department's Inspector.

The Respondent's Statement of Opposition

53. The Respondent resisted the application on grounds, *inter alia*:-

- (i) The issues arising in the proceedings arise from the individual contract of employment of the Applicant with the Respondent and in the circumstances did not attract nor warrant the application of the public law remedy of judicial review.
- (ii) The Applicant has been guilty of unreasonable delay in making his application to the court and did not apply promptly for leave to seek judicial review nor prior to the date of the proposed hearing of the disciplinary matters the subject of the proceedings.
- (iii) The Respondent was lawfully appointed as Sole Manager of the School in accordance with the provisions of the Education Act 1998.
- (iv) The Respondent was lawfully appointed as the Sole Manager of the School and as the Applicant's employer was entitled to and obliged to conduct appropriate inquiries into allegations of misconduct on the part of the Applicant.
- (v) The Respondent conducted an investigation in circumstances where the Applicant was aware that the Respondent had serious concerns following his appointment as Sole Manager of the School. As Sole Manager and in his capacity as the Applicant's employer, he instigated an initial investigation of various issues which were of grave concern to him. At all material times, the Applicant was aware of the inquiries being conducted by the Respondent. Following the completion of the inquiries the Respondent determined that a number of issues ought to be addressed by way as of a disciplinary hearing.
- (vi) Following the conclusion of the investigation, the Applicant was advised that the disciplinary matters which fell to be considered and they were enumerated at paragraph 6 in the Statement of Opposition.
- (vii) The Respondent had undertaken to conduct the disciplinary inquiry involving the Applicant in full conformity with the Applicant's rights in natural and constitutional justice.
- (viii) It was denied that the appointment of the Respondent as Sole Manager was not in accordance with the Act.
- (ix) The Respondent is entitled to conduct a disciplinary hearing in circumstances where he has conducted inquiries and gathered evidence. In such circumstances where the Respondent is the sole management of the School, properly appointed, there is no provision, either pursuant to statute or arising from the Applicant's contract of employment or otherwise for the appointment of any person other than the Sole Manager to conduct a disciplinary inquiry. The Respondent was neither obliged (nor entitled) to have any disciplinary inquiry conducted by any person or body external to the School.

54. It was denied that the Respondent was tainted with bias. The fact that the Respondent shared accommodation with the Chairman of the former Board of Management and/or that he was appointed by the same Patron as appointed the Chairman of the former Board of Management did not and could not raise a reasonable apprehension of bias. There is no requirement in law or otherwise for the Applicant to be furnished with an "investigation report" following the investigation into allegations against the Applicant. The Respondent will conduct the disciplinary process in accordance with natural and constitutional justice and in accordance with best practice and consistent with the recommended methodology provided for in Statutory Instruction 146/2000.

55. There is no requirement on the part of the Respondent to separate the investigative and disciplinary roles and the Respondent asserted that where he is Sole Manager of a School, properly appointed pursuant to the provisions of the Act, the investigatory and disciplinary roles properly fell within his remit and authority.

56. The gathering of evidence by the Respondent during the course of an investigation did not preclude him from conducting a disciplinary procedure and same was not in breach of natural justice or fair procedures.

57. The Respondent was not tainted by bias and would conduct a fair and objective disciplinary hearing in relation to the allegations made against the Applicant.

58. The Respondent's appointment and his continuance and in office is in accordance with the provision of the Act and the Respondent has full statutory authority to act as a Single Manager of the School and to conduct the investigation and disciplinary procedure.

Relevant Legislation

59. Establishment and membership of boards of management as follows:-

"14(1) It shall be the duty of a patron, for the purposes of ensuring that a recognised school is managed in a spirit

of partnership, to appoint where practicable a board of management the composition of which is agreed between patrons of schools, national associations of parents, recognised school management organisations, recognised trade unions and staff associations representing teachers and the Minister.

(2) A board established in accordance with subsection (1) shall fulfil in respect of the school the functions assigned to that school by this Act, and, except in the case of a school established or maintained by a vocational education committee, each board shall be a body corporate with perpetual succession and power to sue and may be sued in its corporate name.

(3) Pending the establishment of a board as provided for by subsection (1) the persons who have responsibilities under the structures and systems in place in a school for the management of that school at the commencement of this Part, including boards of governors, shall, as appropriate, discharge the functions of a board under this Act.

(4) The members of a board shall, except where articles of management otherwise provide, be appointed by the patron of the school.

(5) When making appointments to a board established in accordance with subsection (1) the patron shall comply with directions given by the Minister in respect of an appropriate gender balance and the Minister, before giving any such directions, shall consult with patrons, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers.

(6) The Minister, with the agreement of the patron, national associations of parents, recognised school management organisations and recognised trade unions and staff associations representing teachers, shall prescribe matters relating to the appointment of a board.

(7) Except as provided by this Act, no action shall lie against a member of a board in respect of anything done by that member in good faith and in pursuance of this Act or any regulations made by the Minister under this Act.

(8) Where a patron determines that the appointment of a board in accordance with subsection (1) is not practicable, the patron shall inform the parents of students, the teachers and other staff of the school and the Minister of that fact and the reasons therefor at the time of such determination and, thereafter, if a board is not so appointed, the patron shall, from time to time or as requested by the Minister, inform the parents, teachers and other staff and the Minister of the reasons therefor."

60. Section 15 sets out the functions of a Board as follows:-

"(1) It shall be the duty of a board to manage the school on behalf of the patron and for the benefit of the students and their parents and to provide or cause to be provided an appropriate education for each student at the school for which that board has responsibility.

(2) A board shall perform the functions conferred on it and on a school by this Act and in carrying out its functions the board shall –

(a) do so in accordance with the policies determined by the Minister from time to time,

(b) uphold, and be accountable to the patron for so upholding, the characteristic spirit of the school as determined by the cultural, educational, moral, religious, social, linguistic and spiritual values and traditions which inform and are characteristic of the objectives and conduct of the school, and at all times act in accordance with any Act of the Oireachtas or instrument made thereunder, deed, charter, articles of management or other such instrument relating to the establishment or operation of the school,

(c) consult with and keep the patron informed of decisions and proposals of the board,

(d) publish, in such manner as the board with the agreement of the patron considers appropriate, the policy of the school concerning admission to and participation in the school, including the policy of the school relating to the expulsion and suspension of students and admission to and participation by students with disabilities or who have other special educational needs, and ensure that as regards that policy principles of equality and the right of parents to send their children to a school of the parents' choice are respected and such directions as may be made from time to time by the Minister, having regard to the characteristic spirit of the school and the constitutional rights of all persons concerned, are complied with,

(e) have regard to the principles and requirements of a democratic society and have respect and promote respect for the diversity of values, beliefs, traditions, languages and ways of life in society,

(f) have regard to the efficient use of resources (and, in particular, the efficient use of grants provided under section 12), the public interest in the affairs of the school and accountability to students, their parents, the patron, staff and the community served by the school, and

(g) use the resources provided to the school from monies provided by the Oireachtas to make reasonable provision and accommodation for students with a disability or other special educational needs, including, where necessary, alteration of buildings and provision of appropriate equipment.

(3) For the avoidance of doubt, nothing in this Act shall confer or be deemed to confer on the board any right over or interest in the land and buildings of the school for which that board is responsible."

61. Section 16 provides for dissolution by a Patron as follows:-

- "(1) Subject to this section and to the consent of the Minister, the patron may –
- (a) for good and valid reasons stated in writing to a member of a board of management remove that member from that office, or
 - (b) if satisfied that the functions of a board are not being effectively discharged, dissolve that board.
- (2) Where a patron proposes to remove a member of a board from that office or to dissolve a board, the patron shall inform that member or board by notice in writing of his or her intention and the reasons therefor.
- (3) If, at the end of a period of one month after the date of the notice provided for in subsection (2), the patron, having considered any representations made to him or her by or on behalf of the member or the board, remains of the view that the member should be removed from office or that the board should be dissolved then the patron may, subject to the approval of the Minister, by notice in writing and stating the opinion of the patron and the reasons therefor, remove the member from office or dissolve the board as appropriate.
- (4) A copy of every notice issued under this section and any representations made to the patron shall be delivered to the Minister as soon as may be after it has been made.
- (5) Whenever the patron dissolves a board, the patron may, subject to the approval of the Minister, appoint any person or body of persons as the patron thinks fit to perform the functions of the board.
- (6) Where a patron removes a member of a board the resulting vacancy shall be filled in accordance with regulations made under section 14 (6).
- (7) The patron shall provide, in accordance with section 14, for the re-establishment of a board dissolved under subsection (1) not later than six months following the dissolution or such longer period as the patron, with the consent of the Minister, considers appropriate and when the new board has been established the functions of the dissolved board shall be re-vested in the new board and shall cease to be functions of the person or body of persons, if any, appointed under subsection (5)."

62. Section 17 provides:-

- "(1) Where –
- (a) the Minister is satisfied that the functions of a board are not being effectively discharged, or
 - (b) a board willfully neglects to comply with any order, direction or regulation of the Minister given or made under this Act, or
 - (c) a board fails to comply with any judgment or order of any court of competent jurisdiction,
- the Minister may, by notice in writing, require the patron to dissolve the board for reasons stated in such notice and the patron shall dissolve the board accordingly as soon as may be after the date of such notice.
- (2) Before the Minister serves a notice as provided for in subsection (1), he or she shall inform the board and the patron of his or her intention to do so and shall consider any representations made to him or her by or on behalf of the board or the patron within one month of informing the board and the patron.
- (3) Whenever the patron dissolves a board under this section, subsections (5) and (7) of section 16 shall apply.

63. Section 22 sets out the functions of Principals and teachers as follows:-

- "(1) The Principal of a recognised school and the teachers in a recognised school, under the direction of the Principal, shall have responsibility, in accordance with this Act, for the instruction provided to students in the school and shall contribute, generally, to the education and personal development of students in that school.
- (2) Without prejudice to subsection (1), the Principal and teachers shall—
- (a) encourage and foster learning in students,
 - (b) regularly evaluate students and periodically report the results of the evaluation to the students and their parents,
 - (c) collectively promote co-operation between the school and the community which it serves, and
 - (d) subject to the terms of any applicable collective agreement and their contract of employment, carry out those duties that—
 - (i) in the case of teachers, are assigned to them by or at the direction of the Principal, and
 - (ii) in the case of the Principal, are assigned to him or her by the board."

64. Section 23(1) provides:-

- "(1) A board shall, in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union or staff association representing teachers, appoint to the school in a whole-time capacity a person to be Principal of that school subject to such terms and conditions as may be determined from time to time by the Minister with the consent of the Minister for

Finance.”

65. Section 24 deals with provisions relating to staff as follows:-

“(1) Subject to this section, a board may appoint such and so many persons as teachers and other staff of a school as the board from time to time thinks necessary for the performance of its powers and functions under this Act.

(2) The numbers and qualifications of teachers and other staff of a school, who are to be paid from monies provided by the Oireachtas, shall be subject to the approval of the Minister, with the concurrence of the Minister for Finance.

(3) A board shall appoint teachers and other staff, who are to be paid from monies provided by the Oireachtas, and may suspend or dismiss such teachers and staff, in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union and staff association representing teachers or other staff as appropriate.

(4) Pending the agreement of procedures provided for in subsection (3), the procedures applied in the appointment, suspension and dismissal of teachers or other staff immediately before the commencement of this section shall, after such commencement, continue to be applied.

(5) The terms and conditions of employment of teachers and other staff of a school appointed by a board and who are to be paid from monies provided by the Oireachtas shall be determined by the Minister, with the concurrence of the Minister for Finance.

(6) Where all or part of the remuneration and superannuation of teachers and other staff of a school is paid or is to be paid from monies provided by the Oireachtas, such remuneration or superannuation shall be determined from time to time by the Minister, with the concurrence of the Minister for Finance.”

66. Section 2 of the Act defines “teacher” as including a Principal.

Public/Private Law Remedy

67. The issue as to whether or not the Applicant is correctly seeking a public law remedy is one of the matters that was extensively debated both in the written and oral submissions. I was particularly referred to two cases which considered this issue under the Education Act 1998. Firstly, there was the decision of Peart J. in *Becker v. Board of Management, St. Dominic's Secondary School, Cabra* [2005] IEHC 169. The case concerned an inter teacher dispute in the School. The Board of Management had following an investigation, issued a warning to the Applicant that she should not harass any other member of the staff and that should she do so, that disciplinary action, up to and including dismissal might result. The Applicant sought to challenge the decision and sought an order of certiorari. The court considered the decision of *Rafferty v. Bus Éireann* [1997] 2 I.R. 424, *Geoghegan v. Institute of Chartered Accountants in Ireland* [1995] 3 I.R. 86, (and in particular the decision of Denham J. which set out the facts which might be considered relevant in determining whether judicial review might lie), *Murphy v. Turf Club* [1989] I.R. 171, *Rajah v. Royal College of Surgeons of Ireland* [1994] 1 I.R. 384, *Murtagh v. Board of Governors of St. Emer's School* [1991] 1 I.R. 482 and *O'Neill v. Beaumont Hospital* [1990] ILRM 419. In his conclusion, Peart J. referred to the Preamble of the Education Act 1998, and section 6 of the Act which sets out the “objects” with which every person concerned in the implementation of the Act should have regard. He referred to section 7 which imposes on the Minister for Education and Science obligations so as to insure that each person has the necessary support services appropriate to the needs and abilities of that person, Part II of the Act which dealt with the functions of recognised schools and the annual funding of such schools, Part III which makes provision for the appointment by the Minister of a Chief Inspector and other inspectors and its functions, Part IV which dealt with the establishment and membership of Boards of Management as well as its functions. He also referred to Part V which dealt with the functions of the Principal and teachers in the School and in particular section 23(2). Peart J. stated:-

“I have set out these matters in some detail in order to highlight the extensive public nature of education. However, it is not sufficient for the Applicant simply to show that the nature of the job she performs is of such importance to the advancement and development of society as a whole in order to bring her present claim within the reach of judicial review. There is a distinction to be drawn between the wider aspects of education, and the statutory provisions, such as those to which I have referred, and the narrower aspects of this particular case, such as the employer/employee relationship between her and the Respondent which is based, as has been pointed out, solely on a contract of employment entered into between the parties. The decision sought to be impugned in this case, namely one to give her a written warning, is one made by her employer as part of a disciplinary procedure applicable in the school. The Applicant has a grievance in relation to that decision to issue a warning letter. The merits of that dispute are not in issue in this case at this stage. What is at issue is simply whether the Applicant is confined to a purely private law remedy, rather than a remedy by way of judicial review. Let us suppose that she had been dismissed, and not simply warned in writing. In such a situation, would the decision to dismiss her be amenable to judicial review or must she rely on her private law remedy? The answer must be that the dispute is not amenable to judicial review, as lacking that public law element which is essential to judicial review relief.

I draw an important distinction between the various public functions of the school which are involved in the provision of education to the public, and what I might describe as the private functions of that body, such as the hiring and firing of a teacher. One could think of other private functions of a school, such as entering into a contract for the supply of food, or school books, or the building of an extension to the school, which have a similar private law element to the hiring and firing of a teacher. Disputes arising in such private contracts are to be dealt with under private law remedies, such as breach of contract, unless there is some particular public law element to the dispute.

Simply because a school may be established, and its functions and obligations set forth, in an Act of the Oireachtas, is not of itself sufficient to bring every dispute emanating from the school's activities within the reach of judicial review. Simply because s.15(2) is couched as it is, does not mean that everything which the Board, or the Principal duly appointed, does in relation to the management of the school is amenable to judicial review. There

would be a range of functions or obligations on a Board of Management, which to a greater or lesser degree come within the public law domain – for example one could immediately foresee that some of the requirements of s. 9 of the Act would be clearly within the public domain, as would aspects of s. 22 and s.23. The fact that under s. 24 of the Act, a Board of Management is empowered to appoint, suspend or dismiss a teacher 'in accordance with procedures agreed from time to time between the Minister, the patron, recognised school management organisations and any recognised trade union and staff association representing teachers or other staff as appropriate', does not take any dispute arising out of the invoking of such a disciplinary procedure, out of the private law domain applicable to such disputes in other areas of life."

68. In that judgment, Peart J. also referred to the decision of Finlay C.J. in *O'Neill v. Beaumont Hospital* [1990] ILRM 419 at p. 437 where the Chief Justice questioned whether an issue arising from a contract of employment, which had been conceded as appropriate to be considered under a judicial review application, was in fact, the appropriate jurisdiction for adjudicating on the matter.

69. In the other case, *Brown v. Board of Management of Rathfarnham Parish National School & Ors* [2006] IEHC 178, Quirke J. decided that the Board of Management is required in the appointment of a Principal teacher to apply the procedures set out in section 23 of the Act. He considered that the Applicant had a right to question by way of judicial review, the manner in which the rules in relation to the statutory provisions in relation to the appointment of a principal were exercised by the Board of Management. In relation to the *Becker* decision of Peart J. (referred to above) he stated that the facts were readily distinguishable from what he had to consider and concerned the application of rules and procedures which had a statutory derivation and which had been imposed pursuant to a public policy sanctioned by the Oireachtas.

70. I have carefully considered both decisions and the cases referred to in each of these decisions. I adopt the decision of Peart J. in *Becker's* case as being appropriate to the facts and circumstances of this case. It is clear that each of the judges stated that there are issues that arise under the Act which are appropriate for an application by way of judicial review. I conclude that the present dispute should be governed by a private law remedy and that it is not amenable to judicial review.

71. I have, however, considered some of the other issues that were raised in the proceedings.

Delay

72. Order 84, rule 21 of the Rules of the Superior Courts provides:-

"(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

73. This application commenced on 30th July, 2008. The Applicant was informed by the Respondent by letter dated 5th January, 2008 that he had been appointed Single Manager to the School that the Minister had approved this measure on 21st December, 2007. In the statement grounding the application for judicial review, the Applicant has put in issue the legality of the appointment of the Respondent as manager (see para. E4 and 22 and 23). These issues are also raised in the grounding affidavit of the Applicant (paragraphs 5 and 19). Furthermore declaratory relief is sought at D(v) in relation to the Respondents' appointment as Manager. In his affidavit, the Applicant says Bishop Smith confirmed the appointment of the Respondent as Manager on 24th December, 2007

74. It must be remembered that on 29th November, 2007 the Applicant had a meeting with Bishop Smith at his (the Applicant's) request and they discussed the transfer of four children between schools. He told the Bishop it was an unprecedented step in not appointing a Board of Management. He stated that if a Single Manager were to be appointed to the School, at least he could for an independent, fair minded and unbiased person. I have already referred to the conversation in which the Bishop informed him that he regarded the issue as a "very serious matter". The Bishop informed him that he should consider his position. He stated that it would "end up on the Minister's desk". The Bishop advised him to get a solicitor. He was thus on notice that the Bishop regarded the issue as a "very serious matter". In relation to the letter issued by the Respondent on 7th January, 2008 to Staff, Parents and Guardians, the INTO by letter of 16th January said that they were at a loss to understand why the School Patron deemed it "impracticable to appoint a new Board of Management" to the School. The letter also complained that it was grossly unfair and potentially damaging to the reputation (of the Applicant) that such issues have been put into the public domain and at a time when no matters had been raised with the Applicant by the Board of Management/School Manager or the Department. The issues that were put into the public domain was the determination by Bishop Smith that it was impracticable to appoint a new Board of Management, given the serious matters that had come to attention concerning the operation of the School. There is also a reference to section 14(8) of the Act in the letter of 7th January, 2008. The letter of 16th January also requested the Respondent to outline the nature of the "serious matters" that were under consideration and the process of examining same. In my opinion, the grounds for challenging the appointment of the Respondent as Manager first arose in January 2008. The Applicant was in possession of the necessary facts in relation to the appointment of the Respondent as Manager by Bishop Smith from that date. The role of the Patron in the appointment of the Respondent as manager and the Patron's powers under the Act were known to the Applicant as from receipt of the Respondent's letter of 21st January, 2008. If the Applicant had concerns as to the lawfulness of the appointment of the Respondent as Manager by Bishop Smith or that there was non-compliance with the Act, he should have taken action as from this time. In my opinion, the time runs from the end of January 2008. Having regard to the nature of the appointment by the Patron of the Manager and the many issues and decisions which a Manager has to take, he/she having been appointed by the Patron, it is my opinion, incumbent upon persons seeking judicial review to challenge the appointment of the Manager by the Patron to act promptly, in other words, with dispatch and certainty and not to wait until the end of July when six further months had elapsed. The Applicant in this regard did not act promptly.

75. If I am incorrect in this conclusion, it appears to me that the next process which is called into question is the investigation process conducted by the Respondent. It is referred to in the correspondence from the Respondent of 26th February, 2008, with enclosures including the letter from Mr. Dillon, Accountant, on 22nd February, 2008 and the letter of 7th March, 2008. On 11th March, 2008, the Respondent sought additional information. In the relief sought, the Applicant

is seeking a declaration, *inter alia*, that the Education Act does not contemplate the appointment of a Single Manager for the stated purpose of investigation/disciplining a School Principal. It also seeks a declaration that the investigation by the former Board of Management of the School into alleged disciplinary infractions by the Applicant was arrogated by the Respondent onto himself without lawful authority and a declaration that the investigation was carried out in breach of the Applicant's constitutional rights. In my opinion, the grounds for making an application challenging his investigative role were known by mid March 2008 and once again I would have expected the Applicant to move promptly if a challenge by way of judicial review were to be made. I find the Applicant did not act promptly. On the contrary the Applicant engaged in lengthy correspondence with the Respondent either personally or through INTO. The Respondent's duties and responsibilities were not static and impacted on many others in addition to the Applicant.

76. Furthermore, the grounds upon which relief is sought at paragraph 18 refer to the hostility that has been evinced by Fr. Gavin towards the Applicant for a number of years and that the Patron, Bishop Smith has likewise engaged in correspondence that is highly critical of the Applicant and the fact that both the Respondent and Fr. Gavin served Bishop Smith at the School. It is claimed that these facts constitute a breach of the Applicant's right to basic fairness of procedures and natural and constitutional justice and to an objective hearing free of bias and prejudice. Again, these allegations against Bishop Smith and Fr. Gavin and their impact on the Respondent in causing bias and prejudice were known to the Applicant by early March and even before that date. There was delay in seeking relief under this heading.

77. In paragraph 23, of the Statement of Grounds it is claimed that the Respondent has purported to act as Single Manager when he had no lawful authority to so act and/or to conduct an investigation. In paragraph 24, it is claimed that the Respondent failed to ensure a fair, objective and independent investigation of the allegations made against the Applicant.

78. In my opinion, these grounds and the factual matters in relation to them were known by the Applicant by the end of March, 2008 and the Applicant should have acted promptly in commencing an application for judicial review as from that time. I do not think it is sufficient that the application commenced on 30th July, 2008.

79. On 1st April, 2008, the Applicant wrote to the Respondent requesting him as Manager to return the school roll books with immediate effect. This letter is either an acknowledgment of the role of the Respondent as Manager or not. If a challenge were to be made to the Respondent's appointment or role as Manager, it should have been made at this time. Instead of that the Applicant or his representatives continued to correspond with the Respondent and acknowledged his position as Manager.

80. Furthermore, the Applicant in his submissions submitted that there was no lawful basis for the appointment of the Respondent since the Board of Management was never dissolved and the appropriate circumstances set out in section 16 of the Act could not have arisen. In my opinion, it is not sufficient for the Applicant to say that time will not run until such time as the disciplinary process was invoked by the Respondent. All the grounds sufficient to make the application to the court in respect of the appointment of the Respondent were known by the end of the January 2008.

81. No application has been brought to extend the time for bringing this application.

82. Following over a period of seven months, the Applicant or his representatives communicated extensively with the Respondent and no objection to the appointment by the Patron of the Respondent as Manager was taken, nor was the process adopted under the act for his appointment by the Patron challenged until these proceedings were commenced. These proceedings have challenged each of the roles in which the Respondent has been involved have been over the seven month period.

83. I conclude that the Applicant has not moved promptly for judicial relief as envisaged by the Rule in the many instances which I have set out above. I therefore dismiss this application on this particular ground.

The Manager's Appointment

84. The appointment of the Respondent as manager has been put in issue. It was the Bishop of Meath, the Patron who with the approval of the Minister appointed the Respondent as a Single Manager of the School which took effect from 24th December, 2007. It was submitted that the Applicant's argument could be shortly stated in that there was no lawful basis for the appointment of the Respondent since the Board of Management was never dissolved. It was submitted that this was a pure question of law that arose in circumstances where the statutory pre-requisites for the appointment of a Sole Manager did not exist. It was submitted by the Applicant that the invocation of the power of dissolution by the Patron must be in conformity with section 16 of the Act in that:-

- (a) The view has to be formed that the Board's functions are not being effectively discharged;
- (b) Notice has to be given to the Board in writing of the intention to dissolve it and the reasons;
- (c) One month after the date of such notice, the Patron then considers any representations made to him and with the approval of the Minister proceeds to dissolve the Board of Management;
- (d) The Patron must forward a copy of every notice issued under section 16 and any representations to the Minister;
- (e) Whenever a Patron dissolves a Board he can, subject the approval of the Minister, appoint any person or body of persons to perform the functions of the Board; and
- (f) The tenure of a Sole Manager or other body or persons is limited by section 16(7) to six months following a dissolution or such longer period as the Patron with the Minister's consent considers appropriate.

It was submitted that there was no evidence that any of the foregoing steps were taken by the Respondent in his affidavit.

85. The Respondent submitted that if any issue arose concerning the lawfulness of the appointment of an individual

pursuant to statute, it was the responsibility of the Applicant to join the appropriate Respondents in the proceedings. It was submitted that Bishop Smith was the only person who was in a position to deal with suggestions that he had failed to have within his contemplation appropriate grounds for the appointment of a Manager in lieu of appointing members to a Board of Management. It was submitted that in the absence of the Bishop Smith, the Patron being properly before the court, the Applicant could not obtain any relief such as would impinge or impugn the validity of the Patron's decision in that regard.

86. I agree with the submissions of the Respondent. It is clear from the ambit of the submissions of the Applicant that the presence of the Patron as a party before the court is essential. Whilst, the Respondent made certain submissions in relation to the interpretation of section 16, it is for the Patron to make the submissions he considers proper. Since the approval of the Minister also has to be obtained and was obtained by the Patron, consideration would have to be given as to whether or not the Minister should be involved in the construction of the statutory provisions or in the exercise of his powers.

87. Having regard to my conclusions on this issue, no issue in relation to the legality of the appointment of the Respondent as Manager can be raised.

Bias and Prejudgment

88. The bias alleged against the Respondent is that he lived in the same house as Fr. Gavin who had evinced hostility towards the Applicant over a number of years, that he served Dr. Smith in his role as Manager and that Dr. Smith had expressed concerns about the manner in which the Principal had discharged his duties and functions in the past. Bias consisting of prejudice is also alleged.

89. I have been referred to the various principles of law and I set out the following which I regard as relevant.

90. In *O'Neill v. Beaumont Hospital Board* [1990] ILRM 419, Finlay C.J. stated at p. 437:-

"I am firstly satisfied that the requirements for the carrying out of certain functions which arise in various aspects of the law in accordance with natural or constitutional justice apply to the function which was undertaken by the board of the hospital in this case under the terms of the contract. They do not apply coextensively and identically with the requirements of natural justice which may apply to certain forms of independent tribunals or courts. To take an example of the differences without purporting to set them out in detail, the fact that members of the board of the hospital are in a sense one of the two parties in relation to the question as to whether the consultants term of appointment should be continued or not and the fact that of necessity members of the board of the hospital may well have had information prior to the discharge by them of their function to make a decision with regard to a certificate in relation to the affairs of the hospital, including that the conduct of the consultant involved, would not disqualify them of itself from taking part in the decision making process as it would disqualify members of an independent or outside tribunal created by statute or even under contract."

91. In dealing with the question of prejudice, Finlay C.J. stated at p. 438 – 439

"I am satisfied that the proper standard to be applied by this Court which does not appear to be wholly different, although it may be subtly different from the standard which was applied in the High Court, is the question as to whether a person in the position of the plaintiff, Mr. O'Neill, in this case who was a reasonable man, should apprehend that his chance of a fair and independent hearing of the question as to whether his services should be continued or terminated does not exist by reason of the prejudice of the issues which are involved in that by the members of the Board...

In those circumstances, I take the view that applying the test which I have outlined in short terms and which I believe to be the appropriate test in this case, that a person in the position of the plaintiff who is a reasonable man and not either oversensitive or careless of his own position, would have good grounds for a fear that he would not get in respect of the issues involved, from a body which included the chairman, an independent hearing...The test is an objective test as to whether a person in the position of the plaintiff who is a reasonable man might reasonably fear that the prejudice expressed by the chairman would prevent a completely fair and independent hearing of the issues which arise."

92. In relation to the doctrine of necessity, Finlay C.J. stated at 440:-

"I think that in relation to this last point regard must be had to the doctrine of necessity. It is not a dominant doctrine, it could never defeat a real fear and a real reasonable fear of bias or injustice but it is a consideration in relation to the question of the entire board being prohibited, for if that were to be done, there can be no other machinery by which something which is of great importance both to the board of the hospital and to the plaintiff and I might add, to the public who will attend the hospital, namely, the continuance or non-continuance of the plaintiff's services in the hospital, can be determined in accordance with the terms of the probationary agreement."

The Applicant relied on the decision of the High Court in *Heneghan v. Western Regional Fisheries Board* [1986] ILRM 225. In that case plaintiff claimed that his dismissal from the post of Fisheries Inspector was null and void on the grounds, *inter alia*, that prosecutor had gathered evidence and had acted as a judge in relation to allegations which he himself formulated in relation to the behaviour of Mr. Heneghan to him personally.

93. At p. 225, Carroll J. stated:-

"Quite apart from the contractual point, I am also of opinion that there was a lack of natural justice in the way the dismissal was carried out. Mr. Kennedy was the prosecutor in the dismissal. It was at his instance, related to the behaviour of Mr. Heneghan to him personally that he sought to dismiss him. He was also himself in the position of gathering evidence. He heard representations and then acted as judge on the allegations which he himself made and he then decided to dismiss...In my opinion, it was highly objectionable that Mr. Kennedy, who was the prime mover in the dismissal process, one of the main reasons for which was the element of personal antagonism and whose version of facts was challenged by Mr. Heneghan, should decide the whole question. Assuming for the

purpose of deciding this point, that Mr. Kennedy had been delegated power to dismiss (which is doubtful) he should have disqualified himself and referred the matter back to the Board to decide in another way. In a much milder case, *O'Donoghue v. Veterinary Council* [1975] I.R. 398, where a member of the Council who voted to suspend a veterinary surgeon, had allowed his name to be used as prosecutor in the inquiry preceding the resolution to suspend, but otherwise took no part, it was held that the decision was void because the principle *nemo iudex in causa sua* was not observed. This case is much stronger. Here, Mr. Kennedy was witness, prosecutor, judge, jury and appeal court."

94. The Applicant also relied on the decision of Murphy J. in *O'Neill v. Irish Hereford Breed Society Limited* [1992] 1 I.R. 341. In that case, the plaintiff claimed that a decision to expel him from the defendant's society was *ultra vires* on the grounds of bias. He claimed that the fact that some of the members of the Council who took the decision to expel him had sat on another subcommittee which had recommended his expulsion. It gave rise to a real likelihood or reasonable suspicion of bias as to the involvement of the chairman of the committee and of the Society at an earlier stage in the proceedings. Murphy J. concluded that the purported decision to expel the plaintiff was void insofar as some members of the editing committee who had recommended the plaintiff's expulsion then sat on the Council which took the decision to expel him and also the involvement of the chairman at an earlier stage constituted bias amounting to prejudgment.

95. In my opinion, the facts in *Heneghan* are entirely distinguishable from the facts in the instant case. The Respondent will not be a witness as in the *Heneghan* case. There is no evidence the Respondent has personal antagonism towards the Applicant or reasonable grounds for so concluding. The Respondent proposes to have available witnesses including Mr. Dillon who conducted an audit of the school finances, Mr. McKeever, Mr. Barry and Mr. Podgorniak will also be available to be questioned. Having regard to all the matters which have been stated in the correspondence it was inevitable that the Respondent would have extensive documentation in relation to the school and in relation to the Applicant (and indeed to all staff) coming into his possession upon his appointment as Manager. The fact that he elicited information from such documentation upon which he prepared the various charges which are set out in the letter of 10th June, 2008 and that he engaged in correspondence does not, in my opinion, affect him with prejudgment or bias.

96. I propose to comment on a few of the documents which were specifically referred to. In relation to the letter of 30th April, 2008 written by the Respondent to the Applicant. I do not regard this letter as one where the Respondent forms a view adverse to the Applicant. This letter is seeking information arising out of matters which had been communicated to him by Cabinpac.

97. Furthermore, I do not regard the manner in which Charge No. 7 is expressed as evincing prejudgment on the part of the Respondent.

98. Objection is taken in relation to the reference to "false records" on p. 2 of the letter of 30th June, 2008. It is clear that, in my opinion, that this is a reference to what the Minister considers are false records and that these are to be addressed by management. There is no prejudgment or conclusion by the Respondent in this matter.

99. Objection is taken to the use of the word "fraud" in the letter of 21st April, 2008 from the Respondent to Vividale Limited in connection with the School's account with Cabinpac. This letter was written as the auditor felt that a number of issues referred to in a previous letter had been unanswered and unresolved. The Respondent wrote the letter having spoken with the auditor who determined that further clarification was necessary in order to resolve the issues which had arisen. In response to that, a letter was written. It is not a prejudgment, in my opinion. There was no determination by the Respondent that fraud was involved but questions were raised by the Auditor which required to be answered.

100. Further concern is expressed in relation to a letter written by Fr. Gavin in November 2006. It appears this letter was directed to the Department and objection was taken to the statement by Fr. Gavin that the members expressed their outrage that once again its policies had been ignored and that the principle were shown to have no regard for the decisions made by the Board. This letter does not prove anything. Should it arise at the hearing, the Applicant will have the opportunity of dealing with it. It does not impair the Respondent's competence to carry out the disciplinary hearing.

101. Furthermore, I do not consider that the use of the words "would appear" in the "Preliminary Examination" document indicates prejudgment on the part of the Respondent.

Conclusions

102. I have referred in considerable depth to the extensive correspondence in the exchange of documentation between the Applicant and/or his advisors and the Respondent. I have also considered the document entitled "minutes of meeting" of 30th January, 2008 referred to above. I accept the Respondent's statement that the document is in no sense an agreed minute. The Respondent says he attended this meeting for the purpose of gathering information and familiarising himself with his assignment as Manager of the School. The fact that the meeting was attended by others including representatives of the Department and Fr. Gavin (and the outgoing chairperson of Kilmainhamwood N.S.) does not, in my opinion, constitute impropriety on the part of the Respondent as Sole Manager of the School. It is inevitable that in the course of his duties as Manager that the Manager will come across or be the recipient of information relevant to the discharge of his duties as arose in this case in the investigation of issues in relation to the Applicant.

103. I revert to the test set out by Finlay C.J. in *O'Neill v. Beaumont Hospital Board* referred to above which I propose to apply. The test is an objective test as to whether a person in the position of the Plaintiff who is a reasonable man might reasonably fear that prejudgment expressed by the chairman (in that case) would prevent a completely fair and independent hearing of the issues which arise. The Respondent in this case over the six month period of correspondence sought to emphasise that he was free of bias, had made no findings nor had he come to, as the Chief Justice described in the *O'Neill* case at p. 439 as "a firm judgment on the actual facts". The Respondent having been engaged in lengthy correspondence with the Applicant and/or his advisors was required to deal with all the issues that arose. I conclude that neither his attendance at the meeting of 30th January, 2008 nor his discharge of his duties between January 2008 and July 2008 are such that applying the objective test that a reasonable man might reasonably fear that there was prejudgment expressed by the Respondent which would prevent a fair and independent hearing of the issues which arise. Likewise, I do not think that any reasonable apprehension of bias or animus against the Applicant has been made out so as to disqualify the Respondent. In particular, I find that residing in the same house as Fr. Gavin or attending the meeting of 30th January, 2008, with him and others did not debar the Respondent from dealing with the matter or continuing to deal with the disciplinary process. No real reasonable fear of bias or injustice in relation to the proposed hearing has been established in my opinion.

104. I dismiss this application.

105. This judgment does not deal with the manner in which the disciplinary hearing should be conducted or the manner in which evidence should be adduced and/or the witnesses and/or the Applicant being given an opportunity to cross examine. Neither does it decide that it is in order for the respondent to conduct the investigation under Rule 108 of the Rules for National Schools in relation to school attendance records. It does not impact upon the Patron in his role as alleged Appeals person.