

HISTORICAL SEMINAR MATERIAL

Trustee Costs

Annulment, rescission, appeal and related costs principles

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Trustee Costs

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Overarching Principles

▪ Insolvency Act 1986

- Section 305(2)
 - **The function of the trustee is to get in, realise and distribute the bankrupt's estate** in accordance with the following provisions of this Chapter; and in the carrying out of that function and in the management of the bankrupt's estate the trustee is entitled, subject to those provisions, to use his own discretion.
- Section 306(1)
 - **The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect** or, in the case of the official receiver, on his becoming trustee.

Overarching Principles

- The **common thread** through the authorities, whether there is an annulment or rescission, is that the Court has a **wide discretion** to dealing with the costs of the Joint Trustees in Bankruptcy.
- The **general principle** under the Insolvency (England and Wales) Rules 2016, r.18.16 (1) is that:
 - “[**Entitlement to remuneration**] An administrator, liquidator or trustee in bankruptcy is entitled to receive remuneration for services as office-holder.”

Overarching Principles

- There will in any application for annulment or rescission of a bankruptcy normally be **four items of costs** to be dealt with:
 - A. the cost of the original petition;
 - B. the costs of the annulment application;
 - C. the costs of the Official Receiver arising on or after the making of the original bankruptcy order; and
 - D. the costs and expenses of the trustee in bankruptcy in acting as such from the time of his appointment to the order for annulment.

(London Borough of Redbridge v Mustafa [2010] EWHC 1105 (Ch) at 25; Amin v London Borough of Redbridge [2018] EWHC 3100 (Ch) at 34)

London Borough of Redbridge v Mustafa [2010] EWHC 1105 (Ch)

- An appeal in the High Court brought by the London Borough of Redbridge against an order for costs made against it in the County Court.
- The District Judge ordered the annulment of the bankruptcy order made in respect of Mustafa.
- The order required the London Borough of Redbridge to pay the costs and expenses of the Trustee in Bankruptcy.

London Borough of Redbridge v Mustafa [2010] EWHC 1105 (Ch)

- The argument on appeal disclosed three points of principle requiring the Chancellor of the High Court's approval:
 1. What are **basic principles** to be applied in determining who should pay these costs?
 2. Whether a local authority which ascertains that the debt on which it has obtained a bankruptcy order should be reduced to nothing is under a **duty to do anything** and, if so, what?
 3. Whether when a bankruptcy order is **annulled under s282(1)(a)** Insolvency Act 1986 there is any **presumption** that the Petitioner should pay the costs of the petition, annulment and of the Official Receiver and Trustee in Bankruptcy.

London Borough of Redbridge v Mustafa [2010] EWHC 1105 (Ch)

- In respect of (A) the **cost of the original petition** and (B) the **costs of the annulment petition**, they were litigation costs covered by **r.12.41** Insolvency (England and Wales) Rules 2016.
- This rule has the **effect of applying CPR Part 44 to the costs of insolvency proceedings**, and it is therefore these costs that should be dealt with in accordance with the relevant parts of the CPR (at [35]).

London Borough of Redbridge v Mustafa [2010] EWHC 1105 (Ch)

- It is different in respect of (C) the **costs of the Official Receiver** arising on or after the making of the original bankruptcy order and (D) the **costs and expenses of the trustee in bankruptcy** in acting as such from the time of his appointment to the order for annulment.
- They are payable out of the bankrupt's estate in accordance with the **priority** laid down in what was **r.10.149** Insolvency (England and Wales) Rules 2016, but **on annulment provision has to be made for them** (at [36]).

Amin v London Borough of Redbridge [2018] EWHC 3100 (Ch)

- Mr Amin was made bankrupt on the petition of the London Borough of Redbridge.
- The petition was based on a statutory demand following liability orders being made against Mr Amin for unpaid Council Tax.
- Mr Amin succeeded in having the liability orders set aside and then applied to rescind the Bankruptcy Order.
- That application to **rescind** was not opposed, but there was substantial argument about costs.

Amin v London Borough of Redbridge [2018] EWHC 3100 (Ch)

- The District Judge **rescinded** the Bankruptcy Order pursuant to s375 Insolvency Act 1986 and dismissed the petition.
- But he ordered:
 1. that the **costs and expenses of the Trustee in Bankruptcy** be an expense in the bankruptcy and that the Trustee should retain and might realise any part of Mr Amin's estate until the costs and expenses of the bankruptcy had been discharged;
 2. that Mr Amin pay Redbridge's **costs of the petition**;
 3. that Mr Amin pay Redbridge's **costs of applications**; and
 4. that Mr Amin pay the **Official Receiver's costs and disbursements**.

Amin v London Borough of Redbridge [2018] EWHC 3100 (Ch)

- The appeal challenged the award of those **four items of costs**, with Mr Amin arguing that it was unfair that the entire impact of the bankruptcy should fall on him, it having been established that he was under no liability to pay the Council Tax on which the bankruptcy was based.
- It was once again recognised, as it was in *Mustafa*, that the **applicable regime is not the same in respect of all four items of costs**.

Amin v London Borough of Redbridge [2018] EWHC 3100 (Ch)

- Ultimately, Nugee J found that, in all the circumstances, it was a case where there was **justification for departing from the general rule**.
- Mr Amin being ordered to pay Redbridge's costs of the application would mean that Mr Amin, having successfully established that he did not have the underlying liability for Council Tax, would have to pay Redbridge the costs they incurred in putting forward evidence in support of a case that he did. This would **not** be fair or just.
- Also taking into account Mr Amin's delay, Nugee J directed that there be **no order as to the costs** of Mr Amin's applications as between Mr Amin and Redbridge.

Overarching Principles

- On an **annulment**, the Court has an **unfettered discretion** to determine who, if anybody, should pay the trustee's costs (Lord Neuberger in *Butterworth v Soutter* [2000] BPIR 582 at 586).
 - The **jurisdiction** to do so would either be under **s282(4) Insolvency Act 1986** or the **inherent** jurisdiction of the Court.
- If, on the other hand, the Court **rescinds** a bankruptcy order under s371(1) Insolvency Act 1986, then the Court has an **inherent power** to deal with the trustee's costs (*Appleyard v Wewelwala* [2012] EWHC 3302 (Ch))

Butterworth v Soutter [2000] BPIR 582

- Mrs Soutter served a statutory demand upon Mr Butterworth in respect of loans said to be outstanding and then presented a petition against Mr Butterworth who, belatedly, applied to set aside the statutory demand.
- The District Judge dismissed the application and also made a bankruptcy order. A trustee in bankruptcy was appointed.
- **Negotiations** took place between Mrs Soutter and Mr Butterworth resulting in an **agreement** which included provision for **annulment** of the bankruptcy order with **no order as to costs** between the parties.

Butterworth v Soutter [2000] BPIR 582

- **No provision was inserted relating to the trustee in bankruptcy's costs.**
- Mr Butterworth appealed against the bankruptcy order and prior to the hearing of the appeal, the settlement agreement was completed although there was an issue as to whether part of its terms had been authorised by Mrs Soutter.
- The judge **annulled** the bankruptcy but as there was a **dispute in respect of the liability for the trustee in bankruptcy's costs** such issue was adjourned for a further hearing.

Butterworth v Soutter [2000] BPIR 582

- Neuberger J made an order that Mrs Soutter and Mr Butterworth should be **equally responsible** for the **trustee in bankruptcy's costs**.
- Having regard to the **amount** of the costs, the **legally aided status** of the parties, and the **extent of the investigation** which would be required at a full hearing, Neuberger J held that it was **inappropriate to adjourn again** for a full hearing.
- Neuberger J determined that the issues should be dealt with forthwith and that **equal responsibility** was the **least unjust result**.

Appleyard v Wewelwala [2012] EWHC 3302 (Ch)

- Briggs J recognised that the application for directions by Mr Appleyard, the trustee in bankruptcy for Mrs Wewelwala, raised the following **“curious and surprising lacuna in bankruptcy law”**:
 - What can or should the court do to make provision for the payment of a trustee’s expenses where, some considerable time after his appointment, the bankruptcy order from which he derives his title to the bankrupt’s estate is successfully overturned on an appeal by the bankrupt, on an application of which he was not notified, at a hearing which he did not attend, and by an order which made no provision for his release from office?

Appleyard v Wewelwala [2012] EWHC 3302 (Ch)

- Briggs J considered, at 18, that dealing with the trustee in bankruptcy's expenses was a **necessary consequence** of the Bankruptcy Order, rather than a **reviewing** of it as it made no provision about expenses, and that the court has **inherent jurisdiction** to do so.
- Briggs J held, at 19, that the jurisdiction confers a **discretion** on the court as to the **twin questions**:
 - **whether** the Trustee should have his expenses paid; and
 - **by whom**, or out of what fund.

Appleyard v Wewelwala [2012] EWHC 3302 (Ch)

- Sealy and Milman note that *Appleyard* did not feature an annulment but rather a **successful appeal against the bankruptcy order** in circumstances where the trustee had **no notice** of such appeal.
- In such circumstances, the court should use its **discretion** to ensure that the trustee was not left out of pocket.
- The problem arose because there was **no provision in the legislation for the trustee to be notified of an appeal against the bankruptcy order** (as opposed to an application to annul).

Annulment

- Under **s282(1) Insolvency Act 1986**, the Court has **discretion**, on the **application** of a debtor, to **annul** a bankruptcy order, where the Court is satisfied that either:
 - 1) on any grounds existing at the time the order was made, **the order ought not to have been made**; or
 - 2) that the bankruptcy debts and expenses have, since making the order, been **paid or secured** to the satisfaction of the Court.
- The Court can annul a bankruptcy order if it should never have been made and annulment is **discretionary** (*Omokwe v HFC Bank* [2007] BPIR 1157 per Chief Registrar Baister).

Annulment

- Under **s282(4) Insolvency Act 1986**:

[Effect of annulment] Where the court annuls a bankruptcy order (whether under this section or under section 261 in Part VIII)-

- a) any sale or other disposition of property, payment made or other thing duly done, under any provision in this Group of Parts, by or under the authority of the official receiver or a trustee of the bankrupt's estate or by the court is **valid, but**
- b) if any of the bankrupt's estate is then vested, under any such provision, in such a trustee, **it shall vest in such person as the court may appoint or, in default of any such appointment, revert to the bankrupt on such terms (if any) as the court may direct**; and the court may include in its order such supplemental provisions as may be authorised by the rules."

Annulment

- The **accepted principle** on an annulment is that (absent any particular criticism of the trustee) **provision should be made for a trustee in bankruptcy costs** when a bankruptcy order is (to use a neutral expression) set aside.
- The Court's approach in the authorities has been that the **trustee will generally be treated as an innocent party** whose costs must be met (*Thornhill v Atherton* [2004] EWCA Civ 1858; *Oraki v Dean and Dean* [2013] EWCA Civ 1629).

Thornhill v Atherton [2004] EWCA Civ 1858

- Mr Atherton appealed against orders made following his application to review a previous refusal of the court to annul the bankruptcy order and, following such a review, for an order that the bankruptcy order indeed be annulled.
- The gist of the judge's order was that the bankruptcy order should be **annulled**, but **conditionally** on Mr Atherton **paying the proper costs incurred by his trustee in bankruptcy** during the bankruptcy.
- Mr Atherton contended that the order should be an unconditional annulment and that he ought not to have to pay the trustee's costs.

Thornhill v Atherton [2004] EWCA Civ 1858

- Lloyd J summarised that Mr Atherton grounded his appeal on the proposition that the judge could not properly have attached the condition as to the payment of costs by Mr Atherton, unless Mr Atherton was somehow at **fault**, and that there was no evidence that he was at fault.
- Mr Atherton contended that it was unfair and wrong to require him, an entirely **innocent party** and a victim of what has been held, in effect, to be an abuse of the process on the part of the petitioning creditor and his wife, to bear the costs of the trustee in bankruptcy.

Thornhill v Atherton [2004] EWCA Civ 1858

- Lloyd J recognised that the gap in Mr Atherton's abuse of process argument was that, although it dealt fairly with the position as between Mr Atherton and the other parties, it was **entirely irrelevant to the position of the trustee in bankruptcy** whose **costs were properly incurred** and who is **entitled to have security** for the discharge of his costs.

Oraki v Dean & Dean [2013] EWCA Civ 1629

- Dr and Mr Oraki appealed an order making the eventual annulment of their bankruptcies **conditional on payment by them of the costs of their trustee in bankruptcy**.
- The costs of the trustee were **very substantial** due to the length and complexity of the proceedings.
- **The Orakis tried on a number of occasions to annul their bankruptcies and were unsuccessful**, including on one occasion where they applied based on allegations of misconduct against their solicitor which were pending but had not yet reached a conclusion.

Oraki v Dean & Dean [2013] EWCA Civ 1629

- **Findings of serious misconduct** were eventually made against the Orakis solicitor, resulting in the **judge being prepared in principle to allow the Orakis appeal** against the decision to refuse to annul the bankruptcies.
- The judge did so essentially on the ground that the **fraud, collusion or miscarriage of justice** which had occurred **allowed the bankruptcy court to go behind the original judgment on which the bankruptcies were based.**

Oraki v Dean & Dean [2013] EWCA Civ 1629

- However, although the judge noted that there were several disputes between the Orakis and the trustee in relation to the trustee's conduct, he said:

“Those matters are not before me and I can decide nothing about them. In my judgment they are not relevant to the question of costs.”

- Accordingly the judge decided that the **costs of the trustee should be paid by the Orakis as it had not been established that the trustee had acted improperly.**

Oraki v Dean & Dean [2013] EWCA Civ 1629

- On appeal, Floyd LJ recognised that **confusion** occurs if one seeks to carry **considerations of innocence** across to the costs position between a trustee in bankruptcy and, in this case, the Orakis.
- Referring to Lloyd J's decision in *Thornhill*, Floyd LJ held that the decision **did not turn on the necessity of proving some fault against the bankrupt** in all cases. Rather, the fault of the bankrupt's solicitors in that case simply **reinforced the view that the trustee should not normally go unpaid.**

Annulment

- As a **general rule** (Neuberger J in *Butterworth v Soutter*):
 - if the annulment application was made under **s282(1)(a)** Insolvency Act 1986, the **starting point** in respect of liability for the trustee costs in bankruptcy would be that the **petitioning creditor should pay**, but
 - under **s282(1)(b)** Insolvency Act 1986, the **starting point** would be that the **debtor should pay**.
- However, the court has a **wide discretion**.

Annulment

- Arden LJ in *Oraki v Dean & Dean* at [63]:
 - The guiding principle, in my judgment, is that the proper expenses of the trustee should normally be paid or provided for before the assets are removed from him by an annulment order...
- If the bankruptcy order was made correctly or the bankrupt behaviour contributed to the making of the order, the applicant may be ordered to pay the costs incurred, which will be a post-bankruptcy debt, or may have their costs reduced.
- The costs of an annulment of a bankruptcy order will be paid depending on how it is annulled.

Review / Rescission / Variation

- **s375(1) Insolvency Act 1986:**
 - Every court having jurisdiction for the purposes of the Parts in this Group **may review, rescind or vary any order** made by it in the exercise of that jurisdiction.
- There is **no equivalent to s282(4)** Insolvency Act 1986 where there is a statutory power to deal with costs under s375 Insolvency Act 1986 (Briggs J in *Appleyard v Wewelwala* at 18 and 19).

Review / Rescission / Variation

- Sealy and Milman in its commentary on s375 Insolvency Act 1986:
 - *This confers a **general “safety valve” power** on the courts to review, rescind or vary orders on bankruptcy matters. The equivalent in corporate insolvency law is IR 2016 r.12.59 and broadly speaking similar principles should be applied: Midrome Ltd v Shaw [1993] BCC 659...*
 - HHJ Matthew’s repeated this well-known caution that s375 is not intended to offer further appeal rights; **it is only to be used exceptionally**.

Review / Rescission / Variation

- Briggs J in *Appleyard v Wewelwala* at 19:
 - I can envisage **no reason why jurisdiction to deal with the trustee's costs upon annulment should not extend equally to the case of an appeal**. Both processes have the effect of divesting the trustee of the property of the estate which vested in him upon his appointment, and which would, prima facie, be available to him for the purpose of discharging his proper expenses.
- Merritt C in *Amin v London Borough of Redbridge & Anor* quoted Briggs J with approval and went on, at 38, to say that:
 - **Exactly the same applies** when a bankruptcy order is set aside by being **rescinded** under s375 rather than on appeal, and the same jurisdiction must also be applicable.

Other Related Scenarios

- Megarry J in *Re Calgary and Edmonton Land Co Ltd* [1975] 1 WLR 355 at 360E:
 - A liquidator who loses control of the assets by reason of a stay ought normally to be safeguarded in relation to his expenses.
- Hart J in *Mellor v Mellor* [1992] 1 WLR 517 at 525C-D in discussing the costs of court appointed receivers:
 - **Absent any evidence that the receiver was in some way complicit** in the non-disclosure or other impropriety on behalf of the applicant in obtaining the order, **the receiver is entitled to act and be remunerated for acting on the footing that his appointment is valid.**

Public Interest Considerations

- A common thread throughout the authorities is that the **starting point** is that the trustees are an **innocent party** (assuming no misconduct) and that their **reasonable costs and expenses should be paid**, though this is subject to a wide discretion and is not a presumption.
- No doubt there are good public policy considerations for this approach as **it is in the public interest that bankrupt estates are properly and professionally managed and the interests of creditors are protected**.

Public Interest Considerations

- An additional point, which came up in *Drelle*, relates to trustees being **appointed by the Secretary of State**.
- In difficult cases such as *Drelle*, especially where the trustees take **no external funding** from the creditors and **bear the whole cost** themselves, **no trustee would want to take up such an appointment** where there is a considerable risk that the trustee will end up bearing the cost themselves.
- That would be **contrary to public interest** and not the usual 'cut and thrust' of **commercial risk** when taking an appointment.

Servis-Terminal LLC v Drelle [2025] EWCA Civ 62

- Servis-Terminal LLC (“the Company”), having been declared bankrupt (insolvent) by a Russian court brought proceedings against Valeriy Ernestovich Drelle (the former CEO of the Company) for breach of duty as a director.
- The Russian court gave judgment in favour of the Company, who served a statutory demand on Drelle (by now resident in London) and subsequently presented a bankruptcy petition against Drelle which came before ICC Judge Burton.

Servis-Terminal LLC v Drelle [2025] EWCA Civ 62

▪ **Second Appeal** – Court of Appeal

- “Not having been the subject of recognition proceedings, the Russian judgment was **not** capable of providing the basis for a bankruptcy petition and, accordingly, the bankruptcy order which ICC Judge Burton made should be **set aside** and the petition dismissed.” (*Newey LJ at para 56*)
- The Court of Appeal determined that the Russian judgment was not capable of providing the basis for a bankruptcy petition and granted the remedy sought, namely the setting aside of the bankruptcy order.

Servis-Terminal LLC v Drelle [2025] EWCA Civ 62

- The Matter of the Joint Trustees' Costs
 - The Insolvency Act provides mechanisms for the divestment of a bankrupt's estate.
 - However, beyond the more general powers of the Court in the context of the appeal or review of orders from courts exercising an insolvency jurisdiction, it does not provide automatic consequences from the perspective of a trustee in bankruptcy for what happened in *Drelle*.
 - In *Drelle*, the bankruptcy order was **set aside** as opposed to either being discharged or annulled.
 - Absent any directions to the contrary, therefore, the Joint Trustees remained in office and Mr Drelle's estate remained vested in them.

Trustee Costs

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