Neutral Citation Number: [2019] EWHC 1663 (Ch)

Case No: CH-2018-00152

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM THE COUNTY COURT AT MILTON KEYNES

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 28/06/2019

Before:

THE HONOURABLE MR JUSTICE ROTH

- -

Between:

SURJIT SINGH ARDAWA	**Appellant**
- and -	
(1) RAJVINDER KAUR UPPAL **(2) ADAM JORDAN** **(as Trustee in Bankruptcy of the Appellant)**	**Respondents**

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- -

Alan Tunkel (instructed as direct access counsel) for the **Appellant**
Oberon Kwok (instructed by **Sydney Mitchell LLP**) for the **First Respondent**
Gavin McLeod (instructed by **Morgan Phelps Solicitors)** for the **Second Respondent**

Hearing date: 10 April 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ROTH: COSTS

Mr Justice Roth:

1. What approach may the Court take to the determination of costs following the hearing of an unsuccessful application to annul a bankruptcy order? That is the essential question raised in the argument on costs following handing down of judgment in this matter, as raised both by the First Respondent, the petitioning creditor (Ms Uppal), and the Second Respondent, the trustee in bankruptcy ("the Trustee"). Given the level of costs said to be incurred in this matter, in particular on behalf of the Trustee, the question is of some significance.

2. Mr Ardawa had appealed against the decision of District Judge Thorpe, dismissing his amended application to set aside the order authorising substituted service of the bankruptcy petition, annul the bankruptcy order and dismiss the bankruptcy petition. On 1 March 2019, I handed down judgment ("the Judgment"), allowing the appeal as regards the order for substituted service but otherwise dismissing the appeal: [2019] EWHC 456 (Ch). Both Ms Uppal, and the Trustee seek an order for their costs of the appeal to be paid as an expense of the bankruptcy, and contend that I have no power summarily to assess those costs. Mr Ardawa resists Ms Uppal's application, and in any event strongly challenges the level of costs being sought by both Respondents. The further hearing regarding these matters was delayed because of the unavailability of counsel.

The Relevant Rules

3. A preliminary question is whether this matter is governed by the Insolvency Rules 1986 ("IR 1986") or the current Insolvency (England and Wales) Rules 2016 ("IR 2016"). In fact, the relevant provisions of the two sets of rules are effectively the same, so the answer to this question makes no practical difference, but it is nonetheless necessary to consider which regime applies.

4. The transitional provisions in Schedule 2, para 14 of IR 2016 state:

> **"14 Applications before the court**
>
> 14(1) Where an application to court is filed or a petition is presented under the Act or under the 1986 Rules before the commencement date and the court remains seised of that application or petition on the commencement date, the 1986 rules continue to apply to that application or petition.
>
> 14(2) For the purpose of paragraphs (1), the court is no longer seised of an application when-
>
> (a) it makes an order having the effect of determining of the application; or

(b) in relation to a petition for bankruptcy or winding up when-

(i) the court makes a bankruptcy order or a winding up order.

(ii) the court dismisses the petition, or

(iii) the petition is withdrawn.

14(3) Any application to the court to review, rescind or appeal an order made under paragraph 14(2)(a) is to be made in accordance with Part 12 of these Rules."

5. The IR 2016 came into force on 6 April 2017. The relevant dates for these proceedings are as follows. The bankruptcy petition was presented on 20 January 2016 and the bankruptcy order was made on 6 April 2016. Mr Ardawa issued his application to annul the order on 30 June 2016. For reasons which it is here unnecessary to go into (see the Judgment at [18]), the substantive hearing of his application did not take place until 20 February 2018 and the order of the district judge dismissing the application was made on 19 April 2018. Mr Ardawa was granted permission to appeal to this court by order of Arnold J made on 24 July 2018.

6. It is clear that the hearing before the district judge, and the order which she made, were governed by IR 1986, since Mr Ardawa's application to annul was filed before the commencement date of IR 2016. However, both Respondents submitted that the appeal against that order is governed by IR 2016. They contended that the order of the district judge had the effect of "determining the application" within para 14(2)(a), so that the court was no longer seised of the matter. Mr Ardawa's appeal was started after the commencement date and accordingly was governed by the 2016 Rules. Mr Kwok, for Ms Uppal, indeed said that if the appeal had been decided the other way, so that the district judge's order had been set aside and the bankruptcy annulled, then IR 1986 would have applied to the question of costs, since in those circumstances this court would have remained seised of Mr Ardawa's original application. Mr Tunkel, for Mr Ardawa, made no submission on this matter since it made no difference to his client.

7. It would be very strange if a different set of procedural rules were to apply to the question of costs of an appeal according to the way in which the appeal is decided, and I do not think that para 14 IR 2016 should be interpreted to that effect. Although I do not find the position very clear, I think that the better views is that the order of the district judge indeed had the effect of determining Mr Ardawa's application, and so comes within para 14(2)(a). The appeal to this court against that order falls within para 14(3). That requires the appeal to be made in accordance with IR 2016, and I consider that it is those rules which therefore governed the appeal, irrespective of the outcome.

8. However, as I have observed, in practical terms the question is immaterial and I shall accordingly give references to IR 1986 in brackets following citation of the provisions of IR 2016.

Ms Uppal's Costs

9. As stated above, Ms Uppal asks for her costs on the basis that, overall, she was the successful party. Mr Tunkel submitted that there should be no order for costs, having regard to the facts that Mr Ardawa succeeded on the issue of substituted service and the comments of the court on the conduct of Ms Uppal in obtaining the order for substituted service.

10. Mr Kwok took a preliminary point on behalf of Ms Uppal, contending that as the bankruptcy estate is now vested in the Trustee, Mr Ardawa "has no real standing" to object to a costs order in favour of Ms Uppal. I do not accept that submission. The costs at issue relate to an appeal brought by Mr Ardawa, and he is therefore in the best position to present arguments opposing the costs sought by the respondents to his appeal. And where, as in the present case, it appears that subject only to the question of costs there will be a surplus in the estate after creditors are paid, that surplus would pass to the bankrupt on discharge of the bankruptcy. It seems to me that this gives Mr Ardawa a clear interest in the potential for a costs order against the estate. I consider that this combination of ability and interest means that he is entitled to be heard on an application for such an order, irrespective of the position adopted by the Trustee.

11. Costs are governed by Chapter 8 IR 2016 [Chapter 6 IR 1986]. Rule 12.41 [r. 7.33A] states:

> **12.41 Application of Chapter and interpretation**
>
> **12.41(1) [Application]** This Chapter applies to costs of and in connection with insolvency proceedings.
>
> **12.41(2) ["Costs"]** In this Chapter "costs" includes charges and expenses.
>
> **12.41(3) [Application of CPR Pts 44, 47]** CPR Parts 44 and 47] CPR Parts 44 and 47 (which relate to costs) apply to such costs.

12. CPR rule 44.2(1) sets out the general discretion of the court as regards costs, including as to the amount of those costs, and rule 44.2(2) and (4)-(5) provide, insofar as is relevant:

> "(2) If the court decides to make an order about costs –
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful;

…

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings ….”

13. Here, I consider that on any sensible view of the appeal, Ms Uppal was the overall the ‘winner’, in that Mr Ardawa failed to have the bankruptcy order annulled. The starting point is therefore that she should have her costs. However, Mr Ardawa, as a distinct ground of his appeal, sought to challenge the order for substituted service of the bankruptcy petition, made by District Judge Hickman on 17 February 2016. That was strongly resisted, on various bases, by Ms Uppal, and none of those arguments succeeded: see the Judgment at [47]-[61].

14. Mr Kwok reminded me of the well-known observations of Gloster J (as she then was) in *HLN Kidsons v Lloyds Underwriters* [2007] EWHC 2699 (Comm) at [11], that there is no automatic rule requiring the costs of a successful party to be reduced because it has failed on certain issues, and that: “[i]n any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case.” The appropriate approach therefore very much depends on the circumstances of the particular case. The present appeal cannot be described as complex litigation and the challenge to, and argument about, the order for substituted service took up a discrete and not insignificant part of the hearing, as reflected in the Judgment. Indeed, some of the grounds unsuccessfully relied on were specifically raised by a Respondent’s Notice for the appeal. On that part of the case, Mr Ardawa succeeded. In my view, it accords with the justice of the case for this to be recognised in the order for costs. Not only should Ms Uppal be disentitled to a part of her costs as a result but in principle Mr Ardawa would be entitled to some costs in his favour. Instead of making such cross-orders, the better approach is for Ms Uppal to have a reduction from her costs to reflect the overall position.

15. However, the matter does not end there. Not only was the order for substituted service made without jurisdiction, but I found that the court making the order was significantly misled by the evidence adduced on behalf of Ms Uppal: Judgment at [54]. I regard that as both serious and inexcusable, and I have no doubt that it should be reflected in the order for costs in accordance with CPR r. 44.2(5)(a).

16. Mr Kwok said that in the light of the Judgment, Ms Uppal would not seek to recover any costs of the application for the order of substituted service. I think that is somewhat obvious, but it is distinct from the question of Ms Uppal’s costs of the appeal. As regards those costs, taking into account both of the matters discussed above, I consider that the appropriate discount here from Ms Uppal’s costs is 40 per cent. Accordingly, she will recover 60 per cent of her costs from the estate of Mr Ardawa, subject to assessment.

17. Ms Uppal’s solicitors have served a schedule of her costs amounting to £19,923.84, inclusive of VAT (excluding the costs of the costs hearing itself). The hearing of the appeal lasted a little over 1½ days and in the ordinary way this would be an

appropriate case for summary assessment. However, both Respondents submitted that the court has no jurisdiction to make a summary assessment of these costs.

18. Mr Kwok made brief written submissions on this issue but the more extensive oral argument was largely presented by Mr McLeod, appearing on behalf of the Trustee.

19. Central to the argument are the provisions of rule 12.42 IR 2016 [r. 7.34A IR 1986, as substituted for r. 7.34 by the Insolvency (Amendment) Rules 2010]. This states, so far as relevant:

> **12.42 Requirement to assess costs by the detailed procedure**
>
> **12.42(1) [Where costs payable as insolvency expense]** Where the costs of any person are payable as an expense out of the insolvent estate, the amount payable must be decided by detailed assessment unless agreed between the office-holder and the person entitled to payment.
>
> **12.42(2) [Service by office-holder]** In the absence of agreement, the office-holder—
>
> (a) may serve notice requiring the person entitled to payment to commence detailed assessment proceedings in accordance with CPR Part 47; and
>
> (b) must serve such notice (except in an administrative receivership) where a liquidation or creditors' committee formed in relation to the insolvency proceedings resolves that the amount of the costs must be decided by detailed assessment.
>
> ….
>
> **12.42(4) [Payments on account of person employed by office-holder]** Where the costs of any person employed by an office-holder in insolvency proceedings are required to be decided by detailed assessment or fixed by order of the court, the office holder may make payments on account to such person in respect of those costs if that person undertakes in writing ……
>
> **12.42(5) [Detailed assessment in any proceedings]** In any proceedings before the court (including proceedings on a petition), the court may order costs to be decided by detailed assessment.
>
> **12.42(6) [Costs of trustee in bankruptcy or liquidator on standard basis]** Unless otherwise directed or authorised, the costs of a trustee in bankruptcy or a liquidator are to be allowed on the standard basis for which provision is made in—
>
> (a) CPR rule 44.3 (basis of assessment); and

(b) CPR rule 44.4 (factors to be taken into account when deciding the amount of costs).

20. Mr McLeod, supported by Mr Kwok, submitted that since Ms Uppal's costs are to be paid out of the estate, rule 12.42(1) is engaged and, unless agreed by the Trustee, they must be determined by detailed assessment. Moreover, in the present case, the Trustee was not disputing Ms Uppal's costs. In that regard, they relied on the judgment of Mr Jeremy Cousins QC (sitting as a Deputy High Court Judge) in *Cooke v Dunbar Assets plc* [2016] EWHC 1888 (Ch), [2016] Bus LR 960. That case, which was decided under IR 1986, concerned the costs of an unsuccessful appeal by the bankrupt against a bankruptcy order. The judgment is essentially devoted to the question whether the court could make an order for costs against the bankrupt personally or whether the costs could only be an expense of the bankruptcy. The deputy judge held that a costs order could be made in the alternative, but in the penultimate paragraph of his judgment, he said this (at [60]):

> "Mr Curl [counsel for the petitioning creditor] invited me to assess costs summarily, but in her latest submission Miss McErlean [counsel for the bankrupt] has helpfully drawn my attention to rule 7.34A of the 1986 Rules which provides that where costs are payable as an insolvency expense out of the insolvency estate, the amount payable must be decided by detailed assessment unless agreed between the office-holder and the person entitled to payment. In these circumstances, it seems to me that I cannot summarily assess costs in so far as they may be payable from the bankrupt estate."

21. However, with due respect to Mr Cousins, I consider that this view fails to have regard to the terms of the relevant rule (now r. 12.42 IR 2016) as a whole and to give any weight to r. 12.42(5). As r. 12.41 [7.33A] makes clear, these provisions apply to charges and expenses as well as litigation costs. The costs of proceedings before the court are expressly addressed in r. 12.42(5) [7.34A(5)], which provides that the court may order such costs to be decided by detailed assessment. That language shows that detailed assessment is not mandatory when the court is making a costs order in proceedings before it, and contrasts with the wording of r. 12.42(1). In my view, r. 12.42(1), which significantly refers to the costs "of any person", is accordingly addressing a different form of costs, i.e. a charge or expense which is a liability of the estate outside the scope of court proceedings.

22. I note that the view to which I have come is consistent with that adopted by HH Judge David Cooke, upholding the views of Mr Registrar Jones, in *Hosking and Bonney v Slaughter and May (a firm)* [2014] EWHC 1390 (Ch) at [28]-[32], with regard to IR 1986. Judge Cooke said that what was then r. 7.34(4) was referring to "a costs order made in those proceedings (whether in relation to a party or otherwise) by the court seized of the proceedings in question." Moreover, Judge Cooke added, at [32]:

> "If the order is to be made by the court seized of the proceedings, there can in my judgment be no ground for holding that the power of that court is limited to cases where the costs are not agreed. It is true that in very many cases the order made in respect of costs of litigation is that costs are "to

> be assessed if not agreed", and if an order is made in those terms the "agreement" would be that of the responsible insolvency practitioner as the person with the power to conduct the proceedings on behalf of the insolvent estate. But I do not think the rule intends to exclude the possibility that the court in particular proceedings before it might conclude that assessment of costs was required and so order without leaving the matter to the discretion of the insolvency practitioner. An obvious example might be if the court making a winding up or administration order considered that the costs of the petitioner or applicant were apparently excessive."

23. If the court therefore may order a detailed assessment, it seems to me that it can, where it considers a detailed assessment is unnecessary, conduct a summary assessment. Moreover, this makes obvious good sense. If there is to be an assessment of costs, then after a relatively short hearing the person best placed to conduct that assessment will often be the judge who heard the case. In more complex or longer matters, summary assessment may be inappropriate, but where it can be achieved without difficulty the whole thrust of modern procedural rules is that it should be done. To send Ms Uppal's costs of this appeal off to detailed assessment is only going to cause delay and more costs, which is in nobody's interests.

24. Turning to the level of costs claimed, Mr Tunkel made some detailed criticisms of the amount of time spent on documents and under some of the other heads of solicitors' costs. However, save only for the question of work on documents, I did not find that there was anything in those criticisms. Most of those items concerned work done by a Grade C solicitor at £180 per hour, and the overall sums are reasonable and proportionate. As regards the work done on documents, it is necessary to bear in mind that this was an appeal, not a first instance hearing. Mr Kwok realistically accepted that two small items, which total a mere £90 (before VAT), could be disallowed as unreasonable. I also regard it as disproportionate and unreasonable on an appeal where the client is represented by counsel for the solicitor to bill for 3.3 hours of "preparation for hearing.". Further, I think it was disproportionate that most of this work was done by a Grade A solicitor, with very little delegated to the Grade C lawyer working on the case. I consider that about half of the time so spent by the Grade A lawyer could reasonably have been left to the more junior solicitor, and so I would reduce the amount for work on documents overall to £1600.

25. That reduces the total amount of the fees, inclusive of VAT, to £18,020.64. Standing back, that seems to be a reasonable and proportionate sum for an appeal of this nature. Ms Uppal will accordingly recover 60 per cent of that figure, i.e. £10,812.38.

The Trustee's Costs

26. The Trustee was properly named as Second Respondent to the original application and the appeal. However, the short skeleton argument filed before the appeal by counsel then acting on behalf of the Trustee made clear that the Trustee was neutral on the substantive issues as between Mr Ardawa and Ms Uppal and was concerned only that provision should be made for his costs in the event that the bankruptcy order was set aside: Judgment at [2]. Under IR 2016, the Trustee is required to attend the hearing, unless the court otherwise directs: r. 10.137(1) [6.210(1)]. On the first day of

the hearing, I made clear that the Trustee was not required to attend thereafter, and he accordingly was not represented on the second day.

27. Pursuant to my direction, and without prejudice to his contention that this court has no jurisdiction to assess his costs, the Trustee filed a statement of his costs relating to the appeal. That statement set out his costs at £19,176 (inclusive of VAT), of which the Trustee's solicitors' costs amount to £13,716. Those are remarkable figures, when compared to Ms Uppal's total costs of £19,923 and bearing in mind that it was Ms Uppal through her solicitors and counsel who contested the appeal whereas the Trustee remained entirely neutral and was not represented on the second day of the hearing. The significance of this level of Trustee's legal costs, which he seeks to have paid out of the bankrupt estate, is underlined by the fact that the entire bankruptcy debt amounts to £9,215.17 plus statutory interest, comprising the debt of £8,834.80 owed to Ms Uppal and one small additional debt of £380.37. The total indebtedness set out by the Trustee's solicitors in a Payment in Full calculation sent to Mr Ardawa on 26 March 2019 was £11,409.54. The legal costs which the Trustee seeks to recover for adopting a wholly neutral stance on this short appeal are accordingly over 60% more than the bankrupt's indebtedness.

28. The core submission of Mr McLeod, who appeared for the Trustee at the costs hearing, is that the Trustee's legal costs of the appeal fall outside r. 12.42 and are to be treated as an expense of the bankruptcy, recoverable pursuant to r. 10.149(1) [6.224(1)]. Rule 10.148 states:

> "All fees, costs, charges and other expenses incurred in the course of the bankruptcy are to be treated as an expense of the bankruptcy."

Rule 10.149 then sets out the general rule as to priority of such expenses, and the relevant part of the rule is as follows:

> "The expenses of the bankruptcy are payable out of the bankrupt's estate in the following order of priority –
>
> (a) expenses or costs which –
>
> > (i) are properly chargeable or incurred by … the trustee in preserving, realising or getting in any of the assets of the bankrupt or otherwise relating to the conduct of any legal proceedings which … the trustee has power to bring … or defend."

29. Mr McLeod submitted that the manner in which any challenge by Mr Ardawa to the level of the Trustee's costs had to be pursued was exclusively governed by rule 18.35, of which the material provisions provide:

> "**18.35(1) [Application to court for permission to apply]** A bankrupt may, with the permission of the court, make an application on the grounds that—

(a) the remuneration charged by the office-holder is in all the circumstances excessive;

(b) the expenses incurred by the office-holder are in all the circumstances excessive.

…

18.35(4) [Surplus of assets required] The court must not give the bankrupt permission to make an application unless the bankrupt shows that—

(a) there is (or would be but for the remuneration or expenses in question); or

(b) it is likely that there will be (or would be but for the remuneration or expenses in question),

a surplus of assets to which the bankrupt would be entitled."

30. Both Mr Tunkel and Mr McLeod referred to the Court of Appeal decision in *Oraki v Dean & Dean (a firm)* [2013] EWCA Civ 1629, which concerned the costs of a trustee in bankruptcy of an application by the bankrupt to annul the bankruptcy under (as in the present case) s. 282(1)(a) of the Insolvency Act 1986 ("IA"). In that case, the application, on an appeal from a deputy registrar, was successful, but the deputy judge made his order annulling the bankruptcy conditional on payment by the bankrupt of the costs of the trustee. The costs covered by the order therefore concerned the entirety of the trustee's costs arising in the bankruptcy (including his remuneration), not simply the costs of the appeal in which the annulment was ordered. The bankrupt challenged this condition on appeal to the Court of Appeal.

31. Giving the leading judgment, Floyd LJ (with whom Davies LJ agreed), explained the position as follows:

"26. By Rule 7.33 of the Insolvency Rules 1986 (now replaced by Rule 7.51A which is to the same effect), CPR Part 44 (dealing with costs) applies to insolvency proceedings except insofar as inconsistent with the provisions of Chapter 6 of Part 7 of those Rules. The provisions of CPR Part 44 are well known. They provide that the court has discretion as to whether costs are payable by one party to another and as to the amount of those costs. The general rule is that the unsuccessful party will pay the successful party's costs, but the court may make a different order. The conduct of the parties is relevant, as is the question of whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue.

27. In *London Borough of Redbridge v Mustafa* (supra), Sir Andrew Morritt Ch. concluded that the trustee's costs of the original petition and the annulment application were governed by the relevant costs provisions of the CPR, save insofar as

they were inconsistent with the Insolvency Rules. He went on to say at [25]:

> "No doubt the application of those parts of the Civil Procedure Rules to insolvency proceedings requires some moulding to make them fit the different nature of insolvency proceedings. For example it may not always be obvious who is the successful and unsuccessful party for the purposes of CPR Rule 44.3(2). In annulment proceedings under s.282, conduct may assume a greater importance than may normally be the case."

28. So far as the costs and expenses of the trustee are concerned, absent an annulment these are payable out of the estate in accordance with the priority laid down in the Insolvency Rules: see rules 6.138 and 6.224. On an annulment of a bankruptcy, provision may still be made for them. The court has an unfettered discretion as to whether the trustee should have his expenses paid and who is to pay them. There are many dicta to this effect in the cases. Thus in *Butterworth v Soutter* [2000] BPIR 582 at 585, an annulment case, Neuberger J (as he then was) said:

> "The parties' arguments have all proceeded on the basis that I have unfettered discretion to decide who, if anybody, should pay the trustee's costs. To my mind that must be right. The bankruptcy is pursuant to a court order and the court is still seised of the matter. In my judgement the question of whether the trustee should have his costs, and the question as to who should pay the costs, are at large when the court makes an order annulling the bankruptcy."

Similar conclusions were reached by this court in *Thornhill v Atherton* [2004] EWCA Civ 1858 at [39], albeit in a case where the judge had directed that the perfection of the annulment order should be deferred. At [41] it was indicated by Lloyd J (with whom Jonathan Parker and Waller LJ agreed) that in the circumstances of that case to order the bankrupt to pay the costs of the trustee was "logical and sensible".

29. The basis of the jurisdiction to provide for the payment of the trustee's costs on an immediate annulment of a bankruptcy has been said to be either the inherent jurisdiction of the court or section 282(4) of the Insolvency Act 1986: see *London Borough of Redbridge v Mustafa* at [27]. The imposition of a condition as to payment of the trustee's costs upon making an annulment order falls plainly within the words of section 282(4)(b). The bankrupt's estate is vested in the trustee. On an annulment it is open to the court to order the return of the estate on condition that the bankrupt pay the trustee's costs. There is also no difficulty about jurisdiction to provide for such costs

where the court, as here and in *Thornhill v Atherton*, defers the making of the annulment order until the costs are paid. Whether in any given case the court should impose such a condition is another matter.

30. Immediately after the passage from Neuberger J's judgment in *Butterworth v Soutter* which I have cited, he went on:

> "Prima facie it cannot be envisaged that a trustee in bankruptcy will work for nothing, and normally, when a bankruptcy order has been properly made, subject to questions of reasonableness and subject to special facts, the trustee will be paid out of the estate."

31. In *London Borough of Redbridge v Mustafa* that passage was argued to create a presumption in favour of awarding the trustee his costs. Sir Andrew Morritt pointed out at [33] that there was no presumption. I respectfully agree. A presumption is the antithesis of an unfettered discretion. However the fact that the trustee is fulfilling a function for the court, and that trustees could not be prevailed upon to act if their remuneration was contingent on the bankruptcy not being annulled, are both factors which may weigh heavily in the exercise of the discretion in an individual case.

32. Arden LJ, concurring, said in her judgment:

> "66. Usually, when the court makes an annulment order on the ground that the bankruptcy order ought never to have been made, it will go on to order that the petitioning creditor should pay the costs of the trustee. Assuming that the petitioning creditor can pay these costs, this order will have the effect that the burden of the expenses is transferred from the innocent estate to the culpable party.
>
> 67. In the present case, however:
>
> i) the petitioning creditor could not pay those costs;
>
> ii) the trustee had not (on the evidence before the judge) done anything that would deprive him of any right to his costs;
>
> iii) the costs could if disputed be quantified on a separate application to the court before payment; and
>
> iv) if the trustee did not obtain an order against the Orakis, and their estates turned out to be insufficient to pay his expenses, the burden of non-payment of those expenses would fall on the trustee since those expenses would not be paid."

33. Mr McLeod submitted that *Oraki* was addressing the particular situation where a bankruptcy order is annulled. In those circumstances, the trustee cannot recover his costs under the priorities rule from the bankrupt's estate, since the bankruptcy has been set aside, and the court therefore can fill this 'lacuna' and make provision for the trustee's costs, either through its inherent jurisdiction or by the imposition of a condition under s. 282(4) IA. I think that is correct, and I accept that the situation is different when the annulment application fails and the bankruptcy continues. Mr McLeod said that where the annulment application fails, the Trustee's legal costs of the application (and therefore of this appeal) are payable out of the estate. And he further submitted that those costs are governed exclusively by rules 10.148-10.149, with the bankrupt's right of challenge determined by rule 18.35. Mr McLeod said in terms that "however excessive or exorbitant the court may think the costs are," the court has no jurisdiction in the present proceedings over the level of those costs.

34. I do not accept the latter submission. The fact that the Trustee's costs of legal proceedings are payable out of the estate determines the source from which the funds will come. It does not, in my judgment, remove the normal role of the court as regards the costs of legal proceedings conducted before it. Although the circumstances there were different, some assistance can nonetheless be derived from the observations in *Oraki.* As Neuberger J (as he then was) said in the passage in *Butterworth v Souter* quoted by Floyd LJ at [30], the trustee will get his costs out of the bankrupt estate "subject to questions of reasonableness." And Arden LJ noted at [67(iii)], that the costs being claimed by the Orakis' trustee "could if disputed be quantified on a separate application to the court before payment." Moreover, rule 10.149 prescribes that costs "properly chargeable or incurred" by the trustee are payable out of the estate. I reject the suggestion that this means only that the subject-matter of the costs is to be justified and precludes consideration of the amount of costs incurred.

35. Of course, in most circumstances the means for the bankrupt to challenge the amount of costs which the trustee seeks to charge will be by the route prescribed by rule 18.35. But where the costs are legal costs incurred in proceedings before the court, and the court is asked to make an order for those costs by directing that they be paid out of the estate, I see no reason why the normal provisions of CPR Part 44 concerning costs of court proceedings should be displaced in their entirety when they can readily be applied with, as Sir Andrew Morritt stated in *Mustafa*, any appropriate modification. To hold otherwise would be to imply a carve-out in the Insolvency Rules from a particular application of the CPR, which is not expressed and for which I can see no justification.

36. Mr McLeod recognised that if a trustee had conducted himself improperly, the court could deprive him of all or part of his costs: see per Arden LJ in *Oraki* at [69]. I accept that there was no such improper conduct here. But if the court can by its costs order control the trustee's right to claim costs in those extreme circumstances, it seems to me that it similarly has jurisdiction to determine the amount of costs that are properly incurred for the work involved; more particularly, the court can consider whether it is just for the trustee to recoup his full legal costs from the estate when the amount claimed is said to be excessive. Relegating argument about the amount of costs to a subsequent application by the bankrupt under rule 18.35, to be heard by a different judge on a later occasion, may be grossly inefficient and serve only to give

rise to greater costs. I reject the argument that the modern insolvency regime, as set out in the IR 2016, compels such a course.

37. I should add that s. 363(1) IA, which was not referred to in argument before me, provides a power in the court to exercise general control over a bankruptcy, including (subject to the provisions in the Second Group of Parts concerning personal insolvency and bankruptcy) full power to decide all questions of law or fact arising in any bankruptcy. It would be curious if notwithstanding such a general statutory power, the court was unable to determine the amount of legal costs that a trustee could properly recover for legal proceedings before the court itself, unless those were challenged by the bankrupt under rule 18.35.

38. Accordingly, I hold that the court which heard and determined the appeal has jurisdiction to address the amount of costs which the trustee seeks to recover for his costs of that appeal. The court can do so either by directing a detailed assessment or, where appropriate, by a summary assessment. The present case is clearly one for summary assessment, as in the case of Ms Uppal's costs.

39. Turning therefore to the amount of costs claimed, I regard them as wholly unreasonable and disproportionate. To repeat, the Trustee, very properly, played no part whatever in this appeal, other than to instruct junior counsel (i) to put in a brief skeleton argument explaining how the Trustee's position on costs overall (i.e. his costs and expenses incurred in the bankruptcy, not simply in the appeal) should be protected in the event that the bankruptcy should be annulled, relying on *Oraki;* and (ii) to attend on the first day of the hearing on, in effect, a noting brief. In my view, that cannot remotely justify fees of £15,980 plus VAT, including solicitors' fees of £11,430. My concern at the level of fees is reinforced by the fact that the total costs up to 26 March 2019 of dealing with this estate, where the total indebtedness as I have observed comprises just two debts amounting to £11,409.54, is stated by the Trustee to be £110,104 (inclusive of these legal costs and VAT).

40. Mr McLeod said that the reason all solicitors' fees for this appeal were billed by a partner at the rate of £300 per hour is that the Worcestershire solicitors instructed are a small firm where only the one partner deals with insolvency work, so that everything was done at partner level at the rate of £300 per hour. The Trustee is of course free to instruct whichever firm he wishes to represent him and to agree to any fee arrangement he chooses. But that does not make those fees reasonable and proportionate. As Leggatt J observed in *Kazakhstan Kagazy PLC v Zhunus* [2015] EWHC 404 (Comm) at [13], the question must be approached objectively:

> "The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party."

41. Taking a broad brush approach, I summarily assess the Trustee's reasonable and proportionate costs of the appeal at £6000. In reaching that figure, I have regard to the fact that there was apparently significant discussion post-judgment between the

Trustee's solicitors and Mr Tunkel about the possibility of the bankruptcy debts being discharged. Insofar as such time may be included in the statement of costs, it seems to me that those are not costs of the appeal. I express no view as to whether they may be separately recoverable as costs of the bankruptcy. There has been some correspondence since the hearing regarding the VAT position. On the basis that VAT paid on the legal fees is not recoverable by Mr Adam Jordan's firm on account of his acting as trustee, the chargeable costs will therefore be £7200.

42. Finally, there is the question of the costs of the further submissions and hearing regarding costs. As between Mr Ardawa and Ms Uppal, neither achieved the more extreme position for which each was contending. In my judgment, neither should therefore recover from the other as regards the costs submissions and hearing. As between Mr Ardawa and the Trustee, the Trustee's arguments have been rejected. Mr Ardawa had by his counsel's skeleton argument submitted that the costs awarded should be £5000 (excluding VAT) and I have awarded costs close to that figure. I therefore consider that the Trustee should be liable for Mr Ardawa's costs of the costs argument, and since Mr Tunkel was instructed by direct access I summarily assess those costs at £1250. Those costs should be set off as against the liability of Mr Ardawa for the Trustee's costs. I therefore direct that the Trustee is entitled to costs of £4750 plus VAT, i.e. £5,700, to be paid out of the estate.