

**Case:** Andrew Appleyard (in his capacity as the Trustee in Bankruptcy of Chithra Melani Wewelwala) v Chithra Melani Wewelwala [2012] EWHC 3302 (Ch); Briggs J, 23 November 2012

**Synopsis:** A TiB's remuneration should be charged on the bankruptcy estate even if the bankruptcy order is later set aside, at least for the period until he finds out about the setting aside, providing the TiB acts properly and innocently of wrongdoing. Such position is not affected by liability as between the petitioner and the former bankrupt.

**Topics covered:** Bankruptcy; Appeal; Trustee in Bankruptcy's Remuneration

## The Facts

Mrs W was made bankrupt on 20 April 2011 on the petition of Davenham Trust Ltd (Davenham) notwithstanding opposition on the basis of an unreasonable refusal to accept payment by instalments. A written application for permission to appeal was refused on 8 July 2011 and on learning of this Mr A was appointed TiB with effect from 20 July 2011. Mrs W renewed her application for permission to appeal orally on 20 October 2011 having informed Mr A of the date of the same. This was adjourned and Davenham ordered to attend. The order did not direct Mrs W to inform Mr A and she did not do so. When the application came before the Court again – on 14 December 2011 – the appeal was allowed and the bankruptcy order was set aside on the basis that Mrs W undertook to make instalment payments of £500 per month for six months with the balance payable by 14 December 2011 and liberty to restore the bankruptcy order in the event of non-payment. Mr A did not know anything about the setting aside of the bankruptcy order until he was told by Mrs W in January 2012. The order made no provision as to release and payment of expenses. Mr A issued an application for directions on 30 May 2012 joining Mrs W. Case management directions were given on 6 August 2012 including a direction that Mrs W and Davenham be notified. By August 2012 Davenham was in administration.

## The Decision

The Court had an inherent jurisdiction to deal with Mr A's expenses which word the Judge uses to cover remuneration and disbursements – see paras 4 and 8 of the judgment. The Court needed to consider two questions (1) whether the TiB should have his expenses paid and (2) by whom or out of what fund.

A TiB who acts properly and innocently of any wrongdoing can expect payment of his reasonable expenses and is not expected to act gratuitously or discharge expenses out of his own pocket and his remedy is not limited to the exercise of a lien or equitable charge over the assets in his name or under his control but extends to all the former bankrupt's property which had vested in the TiB. The cases proceed on the basis that there was no jurisdiction to make a personal order against defendants in respect of a receiver's costs

but the position as to such a remedy was not clear in relation to a TiB although the absence of such a remedy reflected the general perception amongst IPs.

Further on the subject of the source of payment the attribution of fault as between Davenham and Mrs W was irrelevant to the position as between Mr A and Mrs W.

The effect of the above analysis was that Mr A's right to recover expenses having acted properly at least until January 2012 prevailed over Mrs W so that her property stood charged with payment of Mr A's reasonable expenses until January 2012. As to the position after such date no order was made, as before undertaking further expense Mr A should have applied for directions. The quantum of the expenses was not decided.

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## Comment

The importance of this decision is that those acting on appeals against bankruptcy orders need to address the issue of a TiB's expenses or presumably the position of the OR just as they would do on an application for rescission or annulment. As the IR 1986 do not address this explicitly the lacuna will need to be filled by amendment or a Practice Direction. In the meantime and bearing in mind that a number of appeals will be brought by litigants in person those acting for IPs will need to ensure that his/her position is dealt with at the hearing of an appeal if the bankruptcy order is set aside.

It should also be noted that work performed by IPs after finding out about the setting aside will generally need a direction from the Court in order to be chargeable.

More generally, the approach of the judge is consistent with the principles applied on annulment applications and, in that respect, is line by analogy with the following cases: *Butterworth v Soutter* [2000] BPIR 582

*Tetteh v Lambeth Borough Council* [2008] BPIR 241

*Thornhill v Atherton* [2004] EWCA Civ 1858, [2005] BPIR 437 *London Borough of Redbridge v Mustafa* [2010] EWHC 1105 (Ch) [2010] BPIR 893

*Re Ruiz (A Bankrupt)*; *Mekarska v (1) Ruiz (2) Boyden* [2011] EWCA Civ 1646. [See our bulletin 381](#).

Members might also wish to consider the position of a TiB who spends substantial time and expenses despite knowledge of a potential setting aside of the bankruptcy order: *Ella v Ella* [2008] EWHC 3258 (Ch) [2009] BPIR 441.



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