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Case Number BR-2019-000895

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY LIST (Ch D)
IN THE MATTER OF MANUELA RAYKOVA RADEVA (IN BANKRUPTCY)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

22 March 2023

Before:

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO KC

Between:

MARCELLUS ADRIANUS ANTONIUS KOOTER
Applicant

- and –

(1) THE OFFICIAL RECEIVER
(2) MANUELA RAYKOVA RADEVA (A BANKRUPT)
(3) SIMON JAMES UNDERWOOD AND LAURENCE PAGDEN (as trustees in bankruptcy)

Respondents

- -

Mr Kamen Shoylev (Direct Access) for the Applicant
Ms Lauren Kreamer (instructed by Julian Dobson solicitors) for the third Respondents

Hearing date: 6 December 2022

- -

JUDGMENT

Introduction

1. On 24 October 2022, I handed down judgment annulling the bankruptcy adjudication dated 27 March 2019 which had been made the adjudicator, on the application of the bankrupt herself, the Second Respondent, Ms Radeva ('the debtor'). Shortly thereafter, on 23 July 2019, Mr Kooter made his application seeking to have the bankruptcy order annulled. The grounds for the annulment

relied on were, pursuant to section 282(1)(a) of the Insolvency Act 1986, that the order ought not to have been made. Principally, Mr Kooter's application asserted that the debtor's COMI was not in England and Wales at the relevant time and therefore there was no jurisdiction to make the bankruptcy order. According to the evidence before me at the hearing, Mr Kooter is by far the largest creditor of the debtor. He has a substantial judgment against her entered in his favour just days before the debtor's application for the bankruptcy adjudication. A direction for cross examination had been made in relation to the final hearing. The debtor failed to attend after seeking and failing to obtain an adjournment of the hearing itself. As can be seen from the annulment judgment, I did grant her an adjournment over to the start of the second hearing day. She failed to attend. On the basis of the evidence which had been presented to the court as well as the evidence relied upon my Mr Kooter, I was satisfied that the debtor's COMI was not in England and Wales but remained in Bulgaria, her place of birth and where she had lived prior to her alleged change of COMI. A jurisdictional challenge, if successful, results in the bankruptcy order (and its petition or application) being annulled/set aside as of right (see paragraph 3 of the 24 October 2022 annulment judgment and the authorities cited therein). In this judgment reference is made to a bankruptcy order rather than using the term bankruptcy adjudication. Nothing turns upon the difference in language. In this judgment references to statutory provisions are to the Insolvency Act 1986 unless otherwise specified.

2. At the hearing on 24 October 2022, I made the annulment order but also directed that a subsequent hearing be listed before me to enable the Trustees in Bankruptcy, who had been appointed shortly before the issue of the annulment application, to make such application in relation to costs and or remuneration and expenses as advised. I did not direct that the remuneration application, seeking to fix the remuneration of the Trustees which had subsequently been issued by the Trustees, be listed and heard at the same time. It seemed to me that such an application should be heard, at a later date after the determination of the issue as to whether the Trustees were entitled to an order for all or part of their costs, remuneration and expenses from Mr Kooter. If I made such an order making Mr Kooter liable in general terms for the remuneration and costs and expenses, then

Mr Kooter may well have objections to the level of remuneration and expenses. A separate hearing of the Trustees' application for fixing the remuneration seemed therefore sensible and this is reflected in the 24 October 2022 order.

3. On 24 October 2022, I granted Mr Kooter an order for costs against the debtor. It also follows, in my judgment, that an order for the Trustees' costs of and occasioned by the annulment application should also be made against the debtor. Likewise, it seems to me that the debtor should also be liable for the Trustees' remuneration, costs and expenses of the bankruptcy. That also follows from the annulment application. The debtor clearly, in my judgment, mispresented where her COMI was located. There was no jurisdiction to make the bankruptcy order. The Trustees are therefore entitled to costs orders against her as well as orders that she is liable to pay their remuneration, costs and expenses of the bankruptcy.

Background

4. On 7 February 2019, judgment was entered in favour of Mr Kooter against the debtor in the sum of approximately £206,000. This judgment related to the debtor inducing Mr Kooter to invest the sum of £192,000 but thereafter using those sums for her own benefit or otherwise than investing the same for Mr Kooter. On 23 December 2017 and on 5 January 2018, freezing orders were made against the debtor in favour of Mr Kooter. These covered certain assets of the debtor. Shortly after the judgment was handed down, on 4 March 2019, the debtor applied for a bankruptcy adjudication. In her application, she stated that her COMI was in England. The bankruptcy order was made on 27 March 2019. Mr Kooter also obtained third party debt orders against the debtor on 25 April 2019. These orders were finalised on that day, according to Mr Shoylev, Counsel acting on behalf of Mr Kooter, with the Master on notice of the bankruptcy order having been made. As the bankruptcy order has been annulled, these orders, in my judgment, remain effective against any of the relevant assets of the debtor. Ms Kreamer relies on the fact that these orders place Mr Kooter in a much improved position as compared to the Trustees in seeking to enforce any costs order as against the debtor.

5. The annulment application was made, in my judgment, promptly, on 23 July 2019, being three months after Mr Kooter was notified of the existence of the order. According to Mr Kooter, he had discussions with the Official Receiver and notified the Official Receiver that he would be applying to annul the bankruptcy order. The Trustee were appointed on 2 July 2019. This is clearly very shortly before the annulment application. At the first hearing of the application, the Trustees were represented and had served a witness statement dated 2 October 2019. Directions were given to allow for the service by Ms Radeva of evidence and for Mr Kooter to serve any evidence in reply. The Trustees were also provided with permission to file any further evidence. The matter was eventually listed for trial, with a direction for cross examination.

6. On 16 November 2020, ICC Judge Barber considered a very late application by the debtor to adjourn the annulment application hearing before her. The Judge granted the application and the hearing of the annulment application was adjourned. Further directions were thereafter made by ICC Judge Burton on 21 June 2021 and the application was listed for one and half days starting on 30 March 2022. On that day a further application was made by the debtor, who was, on that occasion, represented, for an adjournment and for her to be granted permission to file further evidence. That adjournment application was granted by me and the application was relisted and came on before me on 21 and 22 June 2022. I have set out this brief chronology in order to explain that despite the application being made promptly by Mr Kooter, the matter has taken considerable time to come on for final hearing. None of that delay can, in my judgment, be laid at Mr Kooter's door. Obviously, none of this delay was either something where any blame can be placed upon the Trustees. Ms Kreamer does rely on the fact that at one hearing, her solicitors had to prepare the bundle as Mr Kooter had failed to do so. Mr Kooter was for a large part of the time acting as a litigant in person. After judgment was handed down by me on 24 October 2022, the hearing of the issue of costs and other ancillary orders and relief was listed.

The Trustees' costs of the annulment application and costs incurred in the bankruptcy

7. The main contested issue before me was whether I should order that Mr Kooter be liable for the costs, or part of the costs, of the Trustees. This encompasses both the legal costs or and occasioned by the annulment application and also the Trustees' remuneration, costs and expenses of the bankruptcy itself (see below for the categories of costs set out in the case law). Ms Kreamer relied on the schedule of costs in relation to the costs of the annulment application and also the sums which had been set out in the witness statements relating to the Trustees' remuneration and expenses. She explained that the Trustees had done work that was necessary and that in fact their remuneration costs were higher than envisaged but they were prepared to restrict them to £25,000. She pointed out that their time costs were approximately £52,000. In my judgment, remuneration is not an issue of simply dealing with time costs. Reference should be made to the Practice Statement on the fixing and approval of the remuneration of office holders as well as the judgement in *Brook v Reed [2011] EWCA Civ 331*. For current purposes, I note the figures and make no further comment at this stage. Ms Kreamer pointed out the bankruptcy went on for many years and that the Trustees had statutory obligations to comply with.

8. Generally, a trustee in bankruptcy is not involved in any meaningful sense in a section 282(1)(a) application with the known proviso that the trustee will seek that one or both of the parties before the court will be made liable for the costs of the trustee. The Trustees in this case attended the first hearing of the annulment application and had prepared, filed and served a witness statement which declared that the Trustees' position was one of neutrality. Whilst the Trustees do of course have a statutory obligation, pursuant to Insolvency Rule 10.137, to attend the annulment application hearing, the Court almost invariably dispenses with the attendance of the trustee in section 282(1)(a) cases. No such application was made by the Trustees at the first directions hearing. This was, in my judgment, precisely the type of case on its facts, where office holders should seek at the earliest possible moment to have their attendance at the hearings dispensed with

and for their attendance and any representations to be confined to when the case has terminated and the issue of costs becomes live.

9. The Trustees did eventually seek such a direction, but at a later date rather than at the first hearing. In the meantime, the Trustees had sought and obtained an entitlement to file further evidence if so advised. There is a clear distinction, in my judgment, between the role of a trustee in bankruptcy in section 282(1)(a) and section 282(1) (b) annulment applications. In relation to section 282(1)(a) cases, as recognised early on in this case by the Trustees in asserting that their role was neutral, there is in general, no role or necessity for the trustee to be involved. In this particular case, the Trustees' involvement was even more limited because effectively this was a jurisdiction challenge. There is effectively in jurisdiction cases, no real discretion to be exercised by the Court which will, if satisfied on the issue, annul the bankruptcy order and dismiss the petition/application

10. I will come back to the evidence filed by the Trustees which consisted of two lengthy witness statements, in so far as necessary. The first statement provided details of the work caried out by the Trustees, the financial position of the debtor as relayed by the Official Receiver and also made the express request for their costs whatever the outcome of the annulment application against parties including Mr Kooter. The costs and remuneration claimed as set out in the first witness statement of Mr Underwood appears to have caused some serious concerns to Mr Kooter. According to his evidence, he was concerned about the level of fees and expenses including legal costs which were being incurred by the Trustees. On 6 November 2020, Mr Kooter wrote to the Trustees requestioning a creditors' decision procedure pursuant to section 298(1) to consider the removal of the Trustees and their replacement. This resolution was approved by the application of the decision procedure, but as no substitute trustee had been identified who had provided consent to act, the Trustees remained in office. Ms Kreamer relied on this application by Mr Kooter as in some way displaying conduct which was such that an order for costs should be made against Mr Kooter. She also relied upon

correspondence with Mr Kooter during the bankruptcy which she asserted increased the costs. I will deal with this below.

Legal principles

11. The issue of costs before me fall into four categories. In *London Borough of Redbridge v. Mustafa [2010] EWHC 1105 (Ch)*, the Chancellor, Sir Andrew Morritt, at paragraph 25, held that there were four components of costs incidental to an annulment:
    a. The costs 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

12. There is no dispute in relation to an order being made against the debtor in relation to the first limb. I have already dealt above with these costs. As for the costs of the Official Receiver, I have already dealt with these in part under the order of 24 October 2022. Mr Shoylev sought a clarification in relation to the Official Receiver's costs, being that the Official Receiver's costs be limited to what it recovered by way of the deposit. The letter dated 21 October 2022 from the Official Receiver also stated that the Official Receiver did not seek any other order and therefore I granted the amendment to the order as sought.

13. The issue remaining is therefore the costs of the Trustees, under limbs b and d (referred to as limbs 2 and 4). In her skeleton, Ms Kreamer set out that what she was seeking on behalf of the Trustees was an order that the debtor and Mr Kooter be jointly and severally liable for the Trustees' costs. I will deal with both limbs at this stage together in order to set out the legal principles.

14. Ms Kreamer referred me to the well known case of *Butterworth v Soutter [2000] BPIR 582*, a decision of Mr Justice Neuberger (as he then was) where he stated as

follows, *"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."* As recognised by Ms Kramer, that statement itself does not provide the trustees with an entitlement to seek their costs from Mr Kooter. The discretion which I have to exercise is unfettered, but that case reminds me that, *"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*."

15. The words, ' *in an individual case'* make it clear, in my judgment, that the facts of each case are relevant. In *Butterworth v Souter*, a creditor had presented a statutory demand against the debtor which thereafter culminated in a bankruptcy petition and bankruptcy order. After negotiations took place between the debtor and the creditors, they reached an agreement which included approving an order for the annulment of the bankruptcy, being 'order to be annulled with no order for costs'. No provision had been made for the costs and remuneration and expenses of the trustee. After considering the facts of the case, the Judge directed that the costs of the trustee be borne by both the debtor and the creditors. The Judge held that that they were both equally responsible for those costs and that this was the least unjust result. The starting principle in annulment cases, according to the Judge, is in relation to a section 282(1)(a) application, the starting point is that liability for the trustee's costs would be with the petitioning creditor. In the case of a section 282(1)(b) application, the starting point would be liability for those costs on the debtor. In the case before me, the bankruptcy order was made on the application of Ms Radeva, the debtor. She was the person who applied for her own bankruptcy. Accordingly, in my judgment, she is in the position of the petitioning creditor. I do not accept that Mr Kooter is in the position of a petitioning creditor. Whilst he is a creditor, it is clear that as a creditor he applied for the annulment.

That does not mean that his position is akin to a petitioning creditor or a debtor's application for a bankruptcy order.

16. It is worth quoting a bit more from the judgment in *Butterworth v Soutter*. At page 587, the Judge considered that in reality he did not have sufficient details of the facts before him. He stated,

'Faced with these various contentions what is the right approach on costs? To my mind, unless I reach a conclusion irrespective of how contentious issues of fact between the parties are resolved, either I have to take a very broad brush view and make a decision now or I have to adjourn the matter for facts to be investigated further. So the first question is can I take a clear view now? Having heard the arguments, the longer they went on the more satisfied I am that I could not form a clear view at the moment.'

Further down on the same page, the Judge stated ,

'In my judgment the least unjust result is to say, as I believe to be the case, that Mrs Soutter and Mr Butterworth are both in part responsible for the trustee's costs and to hold them equally responsible. As Mr Dodge said in his parting shot in argument, that lies very happily with the agreement between the Soutters and the Butterworths that there be no order for costs; I suspect that if they had been forced to consider, as they should have been, how to determine the one outstanding issue, namely how the trustee's costs should have been borne, they would (albeit in each case protesting) have been prepared to agree that they would share those costs.'

17. In my judgment, the way the Judge dealt with that case demonstrates the width of the discretion, but also the relevance of the facts in each case. In many respects the Judge made the order he did partly because he was not prepared to adjourn and embark on a more extensive fact finding exercise. The issue for the Judge was whether the petitioning creditor or the debtor should be liable. Here, the issue for me is whether the successful creditor on the annulment application of a debtor's bankruptcy order should be liable. That is different.

18. Ms Kreamer also referred me to the later case of *Oraki v Dean and Dean (A firm) [2013] EWCA Civ 1629*. In that case, the appellants had succeeded in their appeal to have the bankruptcy orders made against them annulled on the grounds that the judgment in favour of the petitioning creditor was tainted by fraud, collusion or miscarriage of justice. The Deputy Judge then considered the issue as to the trustee's costs and ordered that the appellants be liable to pay those costs.

The appellants' appeal on the issue of costs was dismissed. The Court of Appeal stated that the issue as to whether the appellants should be liable for the trustee's costs was an issue over which the court had an unfettered discretion. The Court of Appeal also held that there was no rule that the trustee's costs could not be ordered to be paid by a party who had successfully applied for an annulment when that party was entirely innocent vis-a-vis the petitioning creditor. Additionally, the Court of Appeal held that the Deputy Judge was entitled to take into account the fact that the petitioning creditor would be unlikely to pay any costs order in favour of the trustees.

19. The Court of Appeal repeated what it stated was the guiding principle, namely that the proper expenses of the trustee should normally be paid or provided for before the assets were removed from the trustee by an annulment order. In the case before me, I have already made the annulment order and dismissed the petition. I did not make any direction relating to the Trustees being entitled to retain such sums as are necessary in order to pay the expenses of the bankruptcy. It seemed to me that having reached the conclusion that there was no jurisdiction to make the order, it did not follow that the Trustees should be able to retain any sums from the estate in bankruptcy. This of course does not weaken or alter the application being made before me by the Trustees. It merely means that in so far as I make an order in their favour against Mr Kooter, they will need to seek to enforce that order as against Mr Kooter.

20. In *Oraki v Dean and Dean*, the Deputy Judge , Mr Robert Ham QC stated as follows, '*So far as the Official Receiver and the trustee are concerned, the bankruptcy orders were regularly made, they have on the face of it no personal interest in the matter and there is no ground to mulct them of their costs unless and until the Orakis have established that they have acted improperly'.* In *Oraki*, the Deputy Judge admitted fresh evidence which satisfied him that he was entitled to go behind the judgment against the Orakis and annul the bankruptcy orders upon which they were based. Until that evidence was before the Court, the bankruptcy orders were not capable of being annulled. In those circumstances, it is understandable that the Deputy Judge considered that, as far as the Official

Receiver and the Trustee were concerned, the bankruptcy order was regular on its face. It was based on a judgment. The Deputy Judge exercised his discretion to annul the bankruptcy order pursuant to section 282(1)(a), but required the Orakis to pay the Official Receiver's and Trustee's costs subject to the Orakis being entitled to challenge the level of the remuneration and expenses claimed at a subsequent hearing.

21. *Oraki* also clarifies that there is no presumption in favour of awarding costs to the trustee. At paragraphs 30 and 31, Lord Justice Floyd stated,

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] Thus in Mellor v Mellor [1992] 1 WLR 517 the issue concerned the application of the former RSC Ord 30 r 3 to the remuneration of a court appointed receiver. The receivership was later discharged because of non-disclosure on the part of the applicant for the order. There are obvious analogies with the position of a trustee where the bankruptcy is annulled. Michael Hart QC (later Hart J) said at 524G:
'A professional receiver cannot be expected to accept office except on the understanding that he is to be entitled, in principle, to remuneration.'

[33] Later, at 525C-D he said: 'I am myself unable to understand the basis on which it is said that the receiver's rights to remuneration in respect of services actually rendered by him during the currency of his appointment can depend in any way on whether the order appointing him would not have been made if the party applying for it made fuller disclosure to the court than it in fact did. 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.'

[34] On the other hand, there may be circumstances where the trustee's conduct outweighs considerations such as this. In Ella v Ella [2008] EWHC 3258 (Ch),

[2009] BPIR 441 a bankruptcy order had been made on the application of a wife in acrimonious divorce proceedings to enforce costs orders against her wealthy husband. Sir Edward Evans-Lombe (sitting as a judge of the High Court) considered that the bankruptcy proceedings were an abuse of the process of the court and annulled the bankruptcy under the provisions of s 282(1)(a). Although he allowed the costs of the Official Receiver to be taken from the estate he declined to make similar provision for the costs of the joint trustees. It is clear from the report that Sir Edward Evans-Lombe thought that the trustees might have other ways of obtaining their remuneration. He also said this at [26]: 'It seems to me that the trustees are not wholly blameless for their own position. They should have realised that this was highly likely to be the sort of bankruptcy proceedings which constitute an abuse of process.'

22. Accordingly, Oraki provides confirmation of the unfettered nature of the discretion which I am exercising. It also, in my judgment, demonstrates the importance of the facts and circumstances in each case. There are also the important points that the trustee is fulling a function for the court and that the fact that trustees could not be prevailed to act if their remuneration was contingent on the bankruptcy not being annulled are said to be factors , 'which may weigh heavily in the exercise of the discretion in an individual case'.

23. Oraki also confirms that the innocence of the bankrupt does not prevent the bankrupt being made to pay the costs of his or her trustee. In Oraki, it was clear that the petitioning creditor, being the firm Dean and Dean, were apparently guilty as compared to the innocence of the Orakis. However, as observed by Lord Justice Floyd, (paragraph 37) *'The confusion occurs if one seeks to carry those considerations across to the costs position as between the trustee and the Orakis. There is no clear disparity, at least at this stage, between the 'innocence' of the two parties. As the judge was aware, untested allegations in this case are made by both sides that the conduct of the other within the bankruptcy has been other than reasonable'.*

24. In my judgement, the last extract from the Oraki judgment is particularly pertinent in the case before me. Both parties before me tried to rely upon what they saw as a culpability of the other side. I have highlighted some of those relied upon by Ms Kreamer which include relying on the fact that the Trustees' legal team had to prepare the court bundle for a hearing and that Mr Kooter had caused more

expense for the Trustees legally by seeking to have them removed. Mr Shoylev relied upon the level of remuneration, costs and expenses, including the legal costs, to argue that this demonstrated that the Trustees were guarding their own personal interest and effectively charging far too much for the job which had to be carried out. He relied especially on the special position of the Trustees as office holders and only being entitled to be paid for work they have properly carried out. He asserted that the Trustees had to be effective and efficient in their work and that they were not. He referred me to the principles set out in *Brook v Reed* and submitted that on the figures and the claims being made by the Trustees, it was clear that they had not complied with those principles. This, he submitted, meant that the Trustees should not be entitled to any costs. In my judgment, none of these points on either side really enable me to place culpability more on one side than the other so as to make the order sought by the Trustees or to refuse to make that order. In my judgment, the exercise of discretion must take into account the particular facts and circumstances of the case itself rather than just seeking to place culpability on one side or the other. It should not always be a case of trying to see who is culpable. In so far as the Trustees are seeking excessive remuneration and costs, then either this can be resolved by an order that they be entitled to their costs, but also enabling Mr Kooter to make such objections as he thinks fit at a subsequent hearing. Alternatively, it is also, in my judgment, well within my discretion to order that Mr Kooter be liable for only a proportion of the Trustees' costs.

25. The case before me is, in my judgment, quite different from the facts in both *Butterworth v Soutter* and *Oraki*. Neither Counsel referred me to a case relating to a successful annulment application on jurisdictional grounds made by a creditor in relation to a bankruptcy order made on the application of the debtor. In my judgment, the discretion remains as wide and unfettered in debtor bankruptcy cases, but the facts and circumstances are important.

Submissions relating to discretion

26. Ms Kreamer submits that the Trustees have acted entirely properly and that an order should be made that both the debtor and Mr Kooter should be jointly and

severally liable to pay the costs of the Trustees. The schedule of costs before me totals £32,508.96. I have already set out above in summary the remuneration sought by the Trustees to which needs to be added expenses and disbursements. As I observed to Ms Kreamer, I found the costs schedule extremely high in circumstances where the Trustees asserted from the start that they were adopting a neutral stance. It seems to me that in so far as I determine that the costs being sought by the Trustees are effectively too high and disproportionate to the role and their proper and proportionate participation in the annulment application, then I can, in the exercise of my discretion, direct that they are entitled to a proportion of the costs. Equally the discretion is in my judgment wide enough for me to make an order which only provides for Mr Kooter to be liable for a percentage or specific sum in relation to costs. In relation to the Trustees' limb 4 costs, I appreciate, as submitted by Ms Kreamer, that the Trustees had certain statutory obligations to discharge. I also appreciate that the Trustees were in office for a considerable period of time. However even taking these points into account, those costs look high. I do not have the actual remuneration application before me, but the Trustees have sensibly restricted what they seek in that application. Even that looks on the high side, but in any event, the assessment is not before me today.

27. Ms Kreamer relied upon the evidence before me which she submitted made it clear that the debtor would be unlikely to meet any costs order made against her. Having considered the evidence which was before me in relation to the annulment application hearing, I have considerable sympathy with this submission. However, the difficulty is that it is simply not possible to know what assets the debtor has in Bulgaria or elsewhere. I found the debtor'sher evidence unreliable and in many respects, untruthful when it came to asserting she had a Master's degree. I do accept that enforcement by the Trustees of any costs order they have against the debtor will not be straightforward. I also accept the point made by Ms Kreamer that within this jurisdiction, Mr Kooter has the benefit of a freezing order over certain assets of the debtor as well as third party debt orders. So, to this extent, as submitted by Ms Kreamer, Mr Kooter is in a better position in relation to being able to purse the debtor for costs than the Trustees. Mr Kooter is also further down

the line in Bulgaria in seeking to ascertain what assets the debtor has there. I have taken into account these factors.

28. As I have indicated already above, I am not persuaded by assertions that Mr Kooter is in some way, not an innocent party. I accept that the Trustees had to prepare a bundle for the court because Mr Kooter failed to do so when he was acting in person. I also accept that the Trustees needed to deal with Mr Kooter's removal resolution, but this to my mind is simply part of the insolvency process. A creditor in Mr Kooter's position is entitled to ask for a meeting in order to remove and replace the Trustees. It is hard for there to be culpability on Mr Kooter for exercising an entitlement he has under the insolvency legislation. He is by far the largest creditor. Although the removal of the Trustees did not take place ultimately, I am not prepared to consider Mr Kooter culpable in the sense that in some way this entitles me to make an order against him. I have also taken into account the position of the Trustees in general and in particular the points raised in Oraki about their position.

29. Mr Shoylev relied heavily on the fact that Mr Kooter was successful in his annulment application and that effectively, Mr Kooter was an innocent party. He also relied upon the general rules as to litigation costs being that the successful party should have an order for costs in its favour and not be liable therefore for the costs of other parties. As explained in *Oraki*, being the innocent party does not in itself prevent an order for costs or even remuneration being made. Mr Shoylev also set out criticism relating to the conduct of the Trustees, mainly on the basis that the costs being claimed are too high and that as far as Mr Kooter is concerned, the Trustees were not carrying out their functions in a proportionate way and in particular not taking into account the limited role of the trustees in the annulment application based on its jurisdictional grounds. He sought to persuade me that the conduct of the Trustees was such that no order should be made against Mr Kooter. Without carrying out a detailed investigation into what the Trustees did and whether they were entitled to do the work they did, it is not possible to reach a view on these rather broad assertions made by Mr Shoylev. In addition, it seems to me that even taking into account some of the criticism made, there would

remain a certain amount for which the Trustees could rightfully assert they were entitled to be paid by way of remuneration, costs and expenses, subject to who should be ordered to pay. So taking on board all these factors, I have to determine what has been called, 'the least unjust result'. I say that because, as submitted by Ms Kreamer, there is really in these types of cases between two effectively innocent parties, no really just result bearing in mind that the real culprit is not before the Court and also it is uncertain whether costs orders against her could be enforced.

Determination

30. Having considered the submission made by both parties, I set out my determination. The annulment application made in this case was a jurisdictional challenge. This means that once the Court was satisfied that the debtor's COMI was not in England and Wales, the annulment of the bankruptcy order would be granted as of right. The Trustees were served with the annulment application and the evidence in support. They took advice on it. It was a section 282(1)(a) challenge based on jurisdiction. They would have been advised that a jurisdictional challenge meant that, if successful, the bankruptcy order would be annulled as of right. Equally, it seems to me that the Trustees ought to have been, on the facts of this case, very alert to the merits of the application. The timing of the annulment application also meant that it was launched very shortly after their appointment. Unlike in cases where the Trustees have been in office for some considerable time prior to the annulment application, this particular application meant that the Trustees were, in my judgment, well aware that their costs, remuneration and expenses may well not be met. They were almost immediately faced with a jurisdictional annulment application.

31. Whilst I do not have details as to why the Official Receiver decided to appoint the Trustees when he did, the timing of the annulment application as well as its grounds and contents should have made the Trustees alert to there being, in my judgment, good merits in the annulment application on the grounds of COMI succeeding. I pause to note that the schedule of costs shows use by the Trustees of both experienced insolvency counsel and experienced insolvency solicitors. With

that background, it is difficult to understand why the Trustees filed two lengthy witness statements which included assessments as to the investigations which the Trustees would seek to carry out. A simple statement setting out the fees incurred to date was all that was needed, if that. Equally, the overall sums being claimed bear little resemblance to a case of a neutral trustee. The evidence filed in the annulment application demonstrated, in my judgment, the uphill struggle which the debtor faced in seeking to establish that her COMI was in England and Wales. So the Trustees were, in my judgement, on the facts of this case in a somewhat different position than in section 282(1)(a) cases where (1) the bankruptcy has been going on for a long time before the annulment application is made, and/or (2) the annulment application is made by a debtor and directly relates to the conduct of the petitioning creditor, or (3) the annulment is made on the basis of fresh evidence admitted by the Court (Oraki). The differing factors I have set out here are by no means exclusive, but merely enable me to place the facts of this particular case into context.

32. It seems to me that the fact of this case are such that the Trustees should have been very careful in what investigations or other work they carried out. This is not to say that the Trustees should ignore their statutory obligations, but in this particular case, Mr Kooter was the main creditor with over 90% in value. The Trustees could therefore have consulted him and ensured that they kept their fees as small as possible. It is not an answer, in my judgment, for Ms Kreamer to assert that Mr Kooter could have applied on the grounds that the fees and expenses of the Trustees were excessive. That approach merely demonstrates a failure of the Trustees to take into account the facts and background in this case.

33. The Trustees knew that this was a jurisdictional challenge. That meant that if Mr Kooter succeeded , then there was no entitlement to any costs unless ordered by the Court. Additionally, unlike in other annulment cases, if the COMI argument was made out, the Court would annul as a matter of right. This is therefore different from annulment cases, such as Oraki and Butterworth where the exercise of the Court's discretion relating to annulment can in certain cases result in conditional orders.

34. As for Mr Kooter, I accept to an extent he caused some additional expense for the Trustees, but I do not regard that as being substantial. In exercising my discretion, I have taken into account that Trustees expect to be paid for carrying out a role and that they are fulfilling a function. That does not lead to a presumption that an order will be made. I have taken into account what I consider to be important factors relating to the facts and circumstances of this case. I do not consider even taking into account all the matters I have raised relating to the facts that overall the Trustees should be deprived of any order at all against Mr Kooter. It seems that the most just outcome is to make a limited order against Mr Kooter. On the basis of the facts and matters which I have set out above, it seems to me that Mr Kooter should pay a contribution towards the Trustees' costs. I do not consider that I should make an order that Mr Kooter should be liable for all the costs. An order that Mr Kooter be liable for a specific sum towards the Trustees' costs and remuneration seems to be to be a fair and just outcome on the basis of the facts and matters set out above. From my consideration of both the schedule of costs as well as the sums claimed by the Trustees as their remuneration and costs and expenses, it seems that insufficient consideration was given to the facts of the case. Both sets of costs including remuneration are far higher than I would have expected even without carrying out an assessment or fixing the remuneration sought. However, even without my concerns as to the levels of costs and remuneration being sought, it seems to me, in any event, that any order against Mr Kooter should only be for a portion of the Trustees costs.

35. This reflects the facts and circumstances of the case. I do consider that in a case where the annulment application is made so soon after the appointment of the trustees in a case where the merits of the jurisdictional challenge are high, it is not fair to Mr Kooter to make him pay all of the costs, even if the subject of an assessment by me. Equally, this is not a case where I consider that the Trustees should be deprived of any order in their favour in relation to Mr Kooter. Accordingly, I direct that Mr Kooter should be liable to pay the sum of £7,500 plus VAT by way of a proportion of the overall costs of the Trustees under limbs 2 and 4. Mr Kooter will be granted whatever indemnity he invites me to make in

order for him to seek to recover that sum for the debtor. Equally I will hear the parties when this judgment is handed down as to the correct period of time to pay, but currently I do not anticipate a short period to be ordered by me. The parties are encouraged to agree a form of order.

Dated 22 March 2023