

Neutral Citation Number: [2021] EWHC 3140 (Ch)

Case No: CH-2021-LIV-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
INSOLVENCY AND COMPANIES LIST (ChD)

Liverpool Civil & Family Courts
35 Vernon Street
Liverpool
L2 2BX

Date: Thursday, 7th October 2021

Before:

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

Between:

(1) **THE OFFICE OF THE BANKRUPTCY
ADJUDICATOR**
(2) **THE SECRETARY OF STATE FOR BUSINESS,
ENERGY & INDUSTRIAL STRATEGY**
- and -

Appellants

MICHAEL JOHN SHAW

Respondent

MR JOHN WAITING (instructed by the **Government Legal Department**) for the **Appellants**
MR GRAHAM SELLERS (instructed by **KBL Solicitors LLP**, Blackburn) for the
Respondent

APPROVED JUDGMENT

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JUDGE HODGE QC:

1. This appeal to the High Court from a decision of a district judge exercising insolvency jurisdiction in the county court on appeal from a decision of the bankruptcy adjudicator raises two fundamental, and apparently novel, questions.
2. The first concerns the evidential burden, if any, resting on an applicant for a bankruptcy order to adduce evidence as to his inability to access his pension pots for the purposes of demonstrating, as required by section 263K(1)(b) of the Insolvency Act 1986 (as amended), that he is unable to pay his debts at the date of the adjudicator's determination of his bankruptcy application.
3. The second question concerns the potential liability of the Secretary of State to an order under section 51 of the Senior Courts Act 1981 to pay the costs incurred by an applicant for a bankruptcy order who successfully challenges the refusal of the bankruptcy adjudicator to make a bankruptcy order on his application.
4. The decision of the district judge was handed down in May 2020 and has been noted in several practitioners' works without - I am told - anyone suggesting that they have been troubled by the district judge's decision. By way of example, the commentary to section 263K of the Insolvency Act 1986 at page 410 of the current (2021) edition of Sealy & Milman's *Annotated Guide to the Insolvency Legislation* records that, in this case, the court indicated that a debtor's pension, which could not easily be realised, could be left out of the calculation when determining whether a debtor could pay their debts under subsection (1)(b).

5. This is my extemporary judgment on the appeal by the Office of the Bankruptcy Adjudicator and the Secretary of State for Business, Energy and Industrial Strategy, who are represented by Mr John Waiting (of counsel), from an order made by District Judge Johnson on 5 May 2020 allowing the appeal of the respondent, Mr Michael John Shaw, pursuant to section 263N(5) of the 1986 Act and Rule 10.44 of the 2016 Insolvency Rules against the refusal of the adjudicator to make a bankruptcy order following a bankruptcy application made by Mr Shaw.
6. The Secretary of State also appeals against a later order of the district judge, dated 11 January 2021, whereby, in an extemporary judgment, the district judge made a non-party costs order against the Secretary of State in favour of Mr Shaw. Although an interim payment on account of those costs was ordered to be paid, I am told that, by agreement with the official receiver acting in Mr Shaw's bankruptcy, satisfaction of that payment was effectively stayed pending the determination of this appeal.
7. The adjudicator had refused to make a bankruptcy order on Mr Shaw's bankruptcy application. Mr Shaw then appealed to a district judge sitting in the County Court at Liverpool. The conduct of such an appeal has been considered by Chief Registrar Baister in the case of *Budniok v The Adjudicator* [2017] EWHC 368 (Ch), [2017] BPIR 521.
8. Whilst the procedure is referred to as an appeal, it is clear that the hearing before the district judge is a first hearing, and this is therefore a first, rather than a second, appeal. The question on the appeal to the district judge was whether the requirements of section 263K(1)(b) were met, including whether the debtor

was unable to pay his debts at the date of the determination. In particular, the main issue was whether a number of pension pots held by Mr Shaw should be taken into account for that purpose.

9. There is no dispute as to the factual background. At the time of the adjudicator's decision, Mr Shaw was indebted to creditors in a sum of just under £170,000. He had four pension plans, the principal of which was a DHL Group plan, which was a workplace pension taken out over ten years earlier and valued in excess of £400,000. The question was whether that pension should be taken into account when determining whether Mr Shaw was able to pay his debts at the date of the adjudicator's determination. The adjudicator had held that it should.
10. In a carefully crafted judgment, to which I would pay tribute, the district judge held that the cash-flow test was the correct test in law to apply in determining whether Mr Shaw was unable to pay his debts at the date of the determination. There is no challenge to the correctness of that part of the district judge's decision. The challenge lies against the next part of her decision where she held that the pensions should not be taken into account because they did not satisfy the cash-flow test. On that basis, the district judge held that Mr Shaw was unable to pay his debts as they fell due and therefore a bankruptcy order should be made.
11. The district judge also considered the policy, and the authorities, relating to the position of pension pots after a bankruptcy order has been made. At paragraph 42 of her judgment, the district judge said that the anomalies, and the authorities which she had considered in that section of her judgment, lent support to her preliminary conclusion, which she had expressed at paragraph 24, that when

considering whether a person was unable to pay their debts, the court must consider whether that person was able to pay their debts as they became due, i.e. the cash-flow test. The balance sheet test was said to be of no relevance in the context of a bankruptcy application.

12. However, the district judge's reasons for declaring Mr Shaw bankrupt were set out at paragraph 43 of her judgment. Having referred to the level of Mr Shaw's debts, which included three unsatisfied county court judgments, and also tax debts, in respect of which HMRC had commenced enforcement proceedings, the district judge concluded that Mr Shaw had not had sufficient liquid assets with which to pay those debts when they had become due, and that he continued to be unable to pay his debts as they fell due.
13. For the appellant, Mr Waiting contends that the district judge fell into error in finding, on the evidence, at paragraph 31 of her judgment, that the DHL pension could not be said to be capable of prompt or instant conversion into cash, and that it did not comprise a means of visible support in the near future. The district judge's conclusion was that it could not be used to pay debts as they became due, and therefore that it should not be included when applying the cash-flow test.
14. Mr Waiting criticises the district judge on a number of grounds. First, he says that the district judge undertook her own research of facts which should have been proven by evidence. Secondly, it is said that counsel for the adjudicator had not been given the opportunity to respond to the matters discovered by that research. At paragraph 31, the district judge set out a number of conclusions

which she said were derived from information to be found in *Tolley's Pensions Law Service* and a letter from the DHL pension trustees.

15. I do not consider that there is any challenge to the matters summarised at sub-paragraphs 31(a) to (d). The matters identified at sub-paragraphs (e) and (f) may have been derived from the Tolley's publication; but they are certainly matters within my own knowledge, and they are matters of which I am satisfied that the district judge was entitled to take judicial notice:

(1) Sub-paragraph (e) noted that if Mr Shaw exercised his statutory entitlement to take his uncrystallised final pension lump sum, and withdrew more than 25%, DHL would need to undertake a tax calculation and deduct tax from the balance before payment to Mr Shaw.

(2) Sub-paragraph (f) noted that if there were an overpayment of tax at source under emergency tax provisions, Mr Shaw could later reclaim the tax from HMRC, suggesting that he would not have the full net amount in his hands at the point of draw-down.

(3) Sub-paragraph (g) is also a commentary upon the DHL letter. It is said to refer to the dates from which payment benefits would commence under the two options given in the estimate, but it did not make it clear how long it would take for a larger lump sum to be paid.

16. I do not consider that the district judge can be criticised for making those findings, or for not inviting counsel for the adjudicator to comment upon them. However, the district judge concluded, at paragraph 31, that the DHL pension could not be said to be capable of prompt or instant conversion into cash, and

that it did not comprise a means of visible support in the near future. It was on that basis that the district judge concluded that it could not be used to pay the debtor's debts as they became due and so should not be included when applying the cash-flow test.

17. Mr Waiting criticises that part of the district judge's decision. He says that she did not establish the time period for the conversion to cash and therefore could not compare this to the appropriate time within which the debts might be capable of being paid with the limited degree of flexibility appropriate to the commercial world.
18. Mr Waiting also says that if the district judge did take into account the policy, and the authorities, relating to the position post-bankruptcy, that was an error on her part. Mr Waiting submits that the value of pension rights should be taken into account in determining whether a debtor is insolvent on a cash-flow basis. In my judgment, that is correct, provided those pension rights are, in the particular case, sufficiently realisable within an appropriate time-scale.
19. At paragraph 30, the district judge had correctly formulated the appropriate legal test as being whether an asset was capable of promptly being converted into cash or, to put it in an alternative way, whether it was a means of visible support in the near future. The district judge, in that paragraph, referred to Mr Waiting's point that Mr Shaw had failed to produce evidence as to how long it would take for him to draw down his pensions. She agreed with Mr Waiting that it was the question of timing, or promptness, which was key to her consideration.

20. Mr Waiting submits that it was for Mr Shaw to establish how long it would take him to draw down his pension. He submits that the burden was on Mr Shaw of establishing that his pension pot would not be available within sufficient time to enable him to pay his debts within an appropriate timescale. In paragraph 51 of his judgment in the case of *Paulin v Paulin* [2009] EWCA Civ 221, [2010] 1 WLR 1057, Wilson LJ, delivering the judgment of the court (with the agreement of Lawrence Collins and Longmore LJJ), had referred to a time-frame which the debtor's creditors would have tolerated.
21. Mr Graham Sellers, counsel appearing for Mr Shaw, responding to this appeal, criticised the looseness of that formulation which, he submitted, would lead to chaos in terms of its application. But, in my judgment, the time-frame which a debtor's creditors would properly consider to be tolerable is a matter capable of objective determination by a court in the particular circumstances of the individual case.
22. At paragraph 42 of his judgment in that case, Wilson LJ had referred to a passage in the judgment of Sir Garfield Barwick CJ, in the High Court of Australia, in *Sandwell v Porter* (1966) 115 CLR 666 at 670, where the Chief Justice had made it clear that a debtor's own moneys were not limited to his cash resources immediately available but extended to moneys which he could procure by realisation, by sale or by mortgage or pledge of his assets within a relatively short time, relative to the nature and amount of the debts and to the circumstances, including the nature of the business of the debtor.
23. Mr Sellers points to the fact that Mr Shaw's tax-free lump sum of 25% of the pension pot would not have been sufficient to have discharged the amount of

Mr Shaw's indebtedness. Mr Waiting responds that, given that the DHL pension pot alone was worth in the order of £400,000, even applying emergency tax rates of 30% (or, indeed, 45%), there would appear to have been sufficient funds to pay out a sum of around £170,000. Thus the finding of the district judge, at paragraph 31 of her judgment, that the DHL pension could not be said to be capable of prompt or instant conversion into cash, and did not comprise a means of visible support in the near future, could not be supported.

24. The burden of proof was on Mr Shaw to establish that he was unable to pay his debts at the date of the adjudicator's determination. His evidence failed to establish any appropriate time-frame for the draw-down of his pension pot. In the course of his submissions, I asked Mr Sellers what evidence there was as to the time that would have been required for Mr Shaw to realise his pension; and Mr Sellers's answer was that there was little or no such evidence.
25. I have, over the short adjournment, again looked through the two witness statements submitted by Mr Shaw and there is no evidence that he had ever made any enquiry as to how long it might take to realise any of his pension pots. In my judgment, on the evidence that was before her, and bearing in mind the burden that was on Mr Shaw to establish that he was unable to pay his debts at the date of the adjudicator's determination, the district judge was not entitled, on the evidence, to come to the conclusion that the DHL pension was not capable of sufficiently speedy conversion into cash and, therefore, did not comprise a means of visible payment of his debts within an appropriate time-frame.

26. In short, the district judge correctly identified the appropriate law governing the question of the ability, or inability, of a debtor to pay their debts; but she did not correctly apply that law to the evidence that was before her.
27. Mr Sellers submits that there must, in the light of the observations of Mr David Oliver QC (sitting as a Deputy Judge of the High Court) in the leading case of *Re Coney* [1998] BPIR 333, be a “tangible and immediate prospect” of payment of the debtor’s debts: see page 336.
28. Mr Sellers at one point sought to draw an analogy with the test applied by Walton J in the case of *Bank of Baroda v Panessar* [1987] Ch 335 - an authority that was not placed before me - where that judge held that the question whether sufficient time had been given for compliance with a demand for payment was to be determined by reference to the time required for implementing the mechanics of payment, or of raising money out of illiquid assets. But, as Mr Sellers acknowledged, the background to those observations was that of a demand for moneys repayable on demand in the context of a question as to the validity of the appointment, by a bank, of a receiver. That is not necessarily the test which it is appropriate to apply when determining whether a debtor is unable to pay his debts for the purposes of a debtor’s bankruptcy application.
29. During the course of his submissions, I put to Mr Sellers the situation of a debtor who has a house which is worth in excess of his debts but which will take two or three months to sell. In such a case, would the debtor satisfy the test of being unable to pay his debts for the purposes of a bankruptcy application to the adjudicator? Mr Sellers was, I think, constrained to say that if a house were to take two or three months to sell, then, no, it would not be a sufficiently readily

available asset, and there would be no tangible or immediate prospect of repayment from the sale proceeds of the house. I cannot accept that submission.

30. Mr Sellers laid great stress on the various anomalies between the positions before, and after, bankruptcy, identified at paragraphs 33 and following of the district judge's decision. The first anomaly, addressed at paragraphs 34 to 36, flows from the terms of section 11 of the Welfare Reform and Pensions Act 1999 whereby the rights of a bankrupt under an approved pension arrangement are excluded from his estate where a bankruptcy order is made against a person.
31. The district judge pointed out that it would be anomalous that a debtor, aged 55 or more, who was able to take out the cash in their pension pot (albeit, above a 25% lump sum, with adverse tax consequences to themselves) should be in a worse position before the making of a bankruptcy order than after one had been made, when they would be entitled to the protection of section 11. The district judge said that flexibility had been brought in so that persons in, or heading towards, retirement could decide for themselves how to invest their accrued fund; and there was no suggestion that it was intended that individuals should be obliged to exercise their rights under the reformed pensions legislation in order to pay their creditors.
32. However, it was held by Mr Gabriel Moss QC in the case of *Blight v Brewster* [2012] EWHC 165 (Ch), [2012] BPIR 476 that the position before bankruptcy is very different from the position after bankruptcy. That difference was clearly endorsed by Gloster LJ in her judgment in the case of *Re Henry, Horton v Henry* [2016] EWCA Civ 989, [2017] 1 WLR 391, [2016] BPIR 1426. At paragraph

39, Gloster LJ, delivering the judgment of the Court of Appeal (with the agreement of McFarlane LJ and Sir Stanley Burnton), observed that:

“... the fact that, prior to bankruptcy, a judgment creditor may, by injunction, compel a judgment debtor to make an election to draw down his pension ... in order to satisfy [a judgment debt], does not support the argument that post-bankruptcy a trustee can require a bankrupt to make such an election”.

33. Notwithstanding the submissions of Mr Sellers, and his reliance upon the decision of Nugee J in the most recent case of *Wilson & Maloney (Joint Trustees in Bankruptcy of Michael McNamara) v McNamara & Others* [2020] EWHC 98 (Ch), [2020] 2 CMLR 27, I am satisfied that the bankruptcy adjudicator may have regard to pension assets in deciding whether to make a bankruptcy order. The exclusion of regard to those assets which applies after the onset of bankruptcy does not render it impermissible for such assets to be taken into account in deciding whether an individual should be made bankrupt in the first place. In determining whether a debtor can pay their debts, the bankruptcy adjudicator is entitled, applying (as she should) a cash-flow, rather than a balance sheet, test, to have regard to pension assets unless the applicant has established - the burden being upon them - that they are not readily realisable within a timescale which is objectively acceptable to reasonable creditors.
34. In the present case, there was no evidence that they were not. I fully accept Mr Sellers's submissions that the appropriate test is the cash-flow test and not the balance sheet test; but the question is whether, applying the cash-flow test, the applicant for a bankruptcy order has discharged the burden that rests upon him of adducing evidence that they are unable to pay their debts. Here, there was no satisfactory evidence that the applicant was not unable to pay his debts given:

(1) the existence of the pension pots, and (2) the absence of any evidence that the applicant could not have secured access to those pension pots within a time-frame which his creditors could properly have tolerated.

35. Mr Sellers submitted that if any evidential burden were to be placed upon an applicant for a bankruptcy order, they would have to obtain from their pension providers a likely timetable for the draw-down of their pension pots even though the debtor had no desire to make such a draw-down. The applicant would be required to provide evidence of something they did not want to do. That evidence would have to be provided by the third-party pension providers.
36. Mr Sellers submitted that it would be jolly difficult to see how any debtor could satisfy the evidential requirement in the context of the test of tangible and immediate prospect of payment. If there were ten or 20 pension policies requiring such evidence, that would raise a whole host of evidential issues. That would give rise to real practical problems if the adjudicator's analysis were to be accepted.
37. Mr Sellers submitted that a debtor needed to understand what the court required of an applicant for a bankruptcy order in order to enable them to discharge the burden upon them. What if a debtor wished, for good reason, to be made bankrupt quickly but he had multiple pension policies and was experiencing difficulties in getting information from the pension providers and there would be a host of knotty and difficult evidential problems?
38. Mr Sellers submitted that, if the applicant were right, there would be a positive obligation on any debtor, aged over 55, with access to a substantial pension pot, to either draw it down before seeking their own bankruptcy or adducing

evidence that such draw-down was not available within an acceptable timescale.

In such circumstances, a debtor might prefer to get a friendly creditor to present their own creditor's petition against them.

39. Mr Sellers also made the point that, in this case, those creditors who had opposed the bankruptcy order could have invoked the jurisdiction recognised by Mr Moss QC in *Blight v Brewster* of seeking an order requiring the judgment debtor to draw down his pension entitlement so as to satisfy the debt owed by him.

40. In my judgment, the fact that there may be such evidential difficulties does not alter the fact that the burden is on the debtor to satisfy the statutory test under section 263K(1)(b) of demonstrating that they are unable to pay their debts at the date of the adjudicator's determination. The fact that once a bankruptcy order has been made, the bankrupt has protection in relation to their pension pots does not mean that they can be disregarded in deciding whether a bankruptcy order should be made at all on a debtor's application.

41. The second anomaly identified by the district judge (at paragraph 37) was that the position might well be different on a creditor's petition. In my judgment, different considerations inevitably apply to debtors' and to creditors' petitions. In the case of a debtor's petition, it is the debtor, rather than their creditors, who are seeking to invoke the class remedy of bankruptcy. There is no reason why there should not be additional hurdles applied to a bankruptcy application by a debtor, as opposed to a bankruptcy petition by a creditor. If there is collusive action between a friendly creditor and a debtor, then the appropriate remedy is

an annulment application at the instance of another creditor or, if appropriate, the official receiver.

42. For all those reasons, I am satisfied that the district judge was wrong to allow the appeal and to make a bankruptcy order. The debtor, on whom the burden lay, had not discharged the evidential burden of showing that he was unable to pay his debts at the date of the adjudicator's determination. This case is no authority for the proposition that a debtor's pension, which cannot easily be realised, should not be left out of consideration when determining whether a debtor can pay their debts. All that I am deciding is that where a pension pot that is sufficient to discharge a debtor's debts clearly exists, and there is no satisfactory evidence that such a pension pot cannot be realised within an acceptable timescale, then in such a case the debtor has not discharged the evidential burden upon them of demonstrating that the debtor is unable to pay their debts. I would, therefore, allow the appeal against the district judge's substantive order, and I would discharge the bankruptcy order that she made.
43. I emphasise that I am in no way criticising the district judge's formulation of the applicable legal principles, which she set out very clearly in her carefully crafted reserved judgment. What I am doing is simply saying that, on the evidence that was before her, she failed correctly to apply those principles when she said that the DHL pension could not be said to be capable of prompt or instant conversion into cash, and did not comprise a means of visible support, by which I take her to have meant a means of discharging the debtor's debts in the near future. The evidence before the district judge simply did not support that conclusion.

44. Having allowed the substantive appeal, it is, I think, common ground that the district judge's costs decision cannot stand. Nevertheless, I should go on to consider that appeal on its merits.
45. Mr Sellers correctly emphasises that an appellant who seeks to appeal an exercise of a judge's discretion as to costs has a high hurdle to overcome. Such an appellant must demonstrate an error of principle of the part of the judge, or that the judge's decision was plainly wrong.
46. Mr Waiting, for the Secretary of State, submits that the district judge did, indeed, err in principle, and that she reached a decision outside the generous ambit of her discretion. It is said that she did not properly apply the principles set out by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807. It is said that the district judge erred in finding that this was a case which was unusual or out of the ordinary, and that exceptional circumstances existed. It is said that, to the extent that the district judge took into account the law in relation to vicarious liability, even by analogy, she fell into error. It is said that she also failed properly to address the issue of causation, in that she failed to address how the actions of the Secretary of State could be said to have caused Mr Shaw's costs. Mr Shaw had to appeal against the adjudicator's refusal to make a bankruptcy order on his application. There needed to be an appeal to the court.
47. Mr Waiting also submitted that the district judge had plainly wrongly exercised her discretion by placing too much emphasis upon the outcome of the appeal, and the effect of a costs order on Mr Shaw, particularly since such a costs order would enure for the benefit of the general body of his creditors, and the only

active creditors had actually opposed the making of a bankruptcy order. I was taken to the principles in the *Dymocks* case, which are not seriously in any doubt.

48. I was also directed by Mr Sellers to the postscript to the leading judgment of Moore-Bick LJ in the case of *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, [2016] 4 WLR 17. At paragraphs 61 and 62 of his judgment, Moore-Bick LJ emphasised that the authorities provide no more than guidance, and do not lay down strict rules of application. Each case turns on its own facts. A third party costs order under section 51 is “exceptional” only in the sense that it is “outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense”. The only “immutable principle” is that “the discretion must be exercised justly”.
49. In the present case, as Mr Sellers explained, the nub of the district judge’s decision on costs is to be found at paragraph 30 of her judgment:

“So, in summary, we have a situation where the Bankruptcy Adjudicator has taken a particular approach to the treatment of a pension in the context of an application for bankruptcy and rejected the bankruptcy application. The court has disagreed with the approach of the Bankruptcy Adjudicator; I found that it was wrong, and I have made a different decision. Mr Shaw has been put to costs in pursuing his appeal. It is entirely appropriate that the Bankruptcy Adjudicator herself is not to be made personally liable for Mr Shaw’s costs but is it right and just in all the circumstances that the Secretary of State, as her employer, should pay? I do find that this is a case out of the ordinary. It falls to be treated as an exceptional case and, whilst I do not have any evidence that the Secretary of State has any direct control with regard to the conduct of this litigation or with regard to the decision-making of the Bankruptcy Adjudicator, I do think that in this particular case, in view of the history, it is appropriate for the Secretary of State to pay Mr Shaw the costs which he has incurred in relation to this litigation. So I am going to make the third party costs order against the Secretary of State”.

50. In my judgment, it was entirely, and clearly, wrong in principle for the district judge to have made an order for costs against the Secretary of State. Had there been no special provision relating to orders for costs in relation to appeals from decisions of the bankruptcy adjudicator, the incidence of costs would have been governed by Insolvency Rule 12.47. That provides that:

“... where an [insolvency] office-holder, the adjudicator or the official receiver ... is made a party to any proceedings on the application of another party to the proceedings ... [such person] is not to be personally liable for the costs unless the court otherwise directs”.

51. As Mr Waiting has pointed out, there is clear authority for the proposition that where Rule 12.47 is engaged, the court should not direct an office-holder to pay costs except in a special case, or where there is good reason to do so: see *Re The Burnden Group Ltd, Fielding v Hunt (No. 2)* [2017] EWHC 406 (Ch), [2017] BPIR 585, per HHJ Stephen Davies at paragraph 19.

52. So, absent special provision, an order for costs should only have been directed to the adjudicator in a special case, or where there was good reason to make such an order. But here there is special provision. Insolvency Rule 10.44(6) governs the liability for the costs of an appeal from a decision of the adjudicator, following a review of her refusal to make a bankruptcy order. It makes it clear that the adjudicator is not personally liable for costs incurred by any person in respect of an application under Rule 10.44.

53. In my judgment, it is a wholly inappropriate exercise of the jurisdiction under section 51 to make a non-party costs order, rendering the Secretary of State liable for costs, in circumstances where Parliament has directed that no order for costs should lie against the actual party to the appeal.

54. I have been taken to the statutory provisions governing the appointment of adjudicators and assistants in section 398A of the Insolvency Act 1986. In summary, the Secretary of State appoints the adjudicator, and is responsible for the payment and the removal from office of the adjudicator, and for directing the terms and conditions on which they hold office; but the Secretary of State has no direct control over the adjudicator's decisions.
55. Mr Sellers recognises that the adjudicator's role is, essentially, administrative and not judicial. That is the effect of section 263K of the 1986 Act. By subsection (2), if the adjudicator is satisfied that each of the requirements in subsection (1) are met, she must make a bankruptcy order against the debtor. By contrast, under subsection (3), if she is not so satisfied, she must refuse to make a bankruptcy order. There is no element of judicial discretion there. There is then an appeal to the county court, in relation to which no costs are to be awarded against the adjudicator, notwithstanding the part that she plays on the appeal, which should be one of neutrality, seeking to assist the court, and properly addressing the court as to the appropriate law.
56. In the present case, the district judge could not make an order against the adjudicator, as she rightly recognised. The earlier case of *Symphony Group Plc v Hodgson* [1994] QB 179 had made it clear that the court should be alert to the possibility that an application for costs against a non-party was motivated by resentment of an inability to obtain an effective order for costs against a legally-aided litigant. In the present case, the application for an order for third party costs against the Secretary of State was clearly motivated by the inability to

obtain any order for costs against the bankruptcy adjudicator, as a result of the provisions of the Insolvency Rules.

57. I can see no proper basis whatsoever for making an order against the Secretary of State in the circumstances of the present case. Mr Shaw may have incurred legal costs; but that was the consequence of: (1) his application for a bankruptcy order; (2) the adjudicator's refusal to be satisfied that the statutory test was satisfied; (3) Mr Shaw's decision to appeal that refusal; and (4) the court's inability, having allowed the appeal, to make any costs order against the adjudicator. That is no proper basis for joining the Secretary of State, who is responsible for the appointment of the adjudicator, in order to seek an order for costs against him.
58. At paragraph 12 of her judgment, the district judge had said that she thought that this was an exceptional case. She posed the question whether this was an exceptional case; and she concluded that it was an unusual situation. The court had a situation where the bankruptcy adjudicator had formed a view, had made a decision, had reported back to the debtor, and then the debtor had sought to bring an appeal before the court; and the court had formed a different view to that of the bankruptcy adjudicator. In the district judge's experience, there were not many of those cases.
59. Mr Waiting criticised the district judge for having conflated an unusual situation with an exceptional case. In my judgment, counsel was right to do so. Moreover, the test of exceptionality must be applied in the context of the particular form of litigation in question. "Exceptional" has been described as

being no more than “outside the ordinary run of cases where parties litigate for their own benefit and at their own expense”.

60. Here, there was no question of the Secretary of State, or the adjudicator, litigating for their own benefit and at their own expense. The adjudicator was simply the respondent to a statutory appeal, and she was discharging her duty of assisting the court. The case was a novel one. In giving her reasons for giving permission to appeal from the adjudicator’s decision, the district judge concluded that: (1) there was a real prospect of the bankruptcy adjudicator succeeding in showing that the decision to allow the appeal was wrong; (2) there was a real prospect of the Secretary of State showing that the decision to make a non-party costs order was wrong; but, also, (3) there was a compelling other reason for giving permission in that the appeal raised new questions of law upon which there was no previous direct authority at any level.
61. In those circumstances, I fail to see that this was an exceptional case justifying making an adverse costs order against the Secretary of State, who was not even a party to the appeal. In any event, and independently of that, however, I am satisfied that it was wholly wrong in principle to make an order against the Secretary of State simply because no order could be made against the proper respondent to the appeal, the bankruptcy adjudicator.
62. Mr Sellers submitted that this appeal was really hopeless. He submitted that it was without merit. I am satisfied that the district judge’s decision was wrong in principle for the reasons that I have given, and that it was plainly so. In the course of his submissions, Mr Sellers submitted that the Insolvency Service, the Secretary of State and the adjudicator were, effectively, one and the same and

that they were advancing structural interests in the outcome of the appeal - that is, the approach taken in the court below.

63. In my judgment, it was entirely appropriate for the adjudicator to be taking the points that she was, and it was wholly inappropriate for an order for costs to be made against the Secretary of State, who had appointed the adjudicator and could have removed her, in circumstances where no order for costs could be made against the adjudicator herself. So I would have allowed the appeal against the district judge's costs order even if I had dismissed the appeal against her substantive decision. As it is, however, her costs order cannot stand once I have allowed the appeal against her substantive decision and have discharged the bankruptcy order.

64. That concludes this extemporary judgment.
