OFFICIAL RECEIVER'S OFFICE
破產管理署
10TH-12TH FLOORS, HIGH BLOCK,
QUEENSWAY GOVERNMENT OFFICES,
66 QUEENSWAY, HONG KONG.
香港金鐘道六十六號金鐘道政府合署高座十樓至十二樓

FAX (852) 2536 9963 (Case Management)
(852) 2501 0698 (Case Management)
(852) 2104 7151 (Case Management)
(852) 2104 7150 (Finance)
(852) 3105 1814 (Admin.)
(852) 3105 0435 (Legal Services)
(852) 3106 0347 (Personnel)

圖文傳真 (852) 2536 9963 (個案處理)
(852) 2501 0698 (個案處理)
(852) 2104 7151 (個案處理)
(852) 2104 7150 (財務)
(852) 3105 1814 (行政)
(852) 3105 0435 (法律事務)
(852) 3106 0347 (人事)

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中國深圳市鹽田區
沙頭角恩上路
20 小區 1 棟 C-207
林哲民先生

傅真（8169 2860）
及郵遞

林先生：

關於： 破產案2010年第7360
宗
林哲民

隨函夾附下列文件之副本各一份，以供參閱：

1. 破產管理署署長之陳詞綱要
2. 破產管理署署長之典據列表

破產管理署~~署長~~暫行受託人
（薛漢儀 代行）

2011 年 8 月 25 日

連附件

高等法院破產案件 2010 年第 7360 宗
有關林哲民(債務人)的事宜

破產管理署署長之陳詞綱要

(一) 背景

1. 本案呈請人駱韋希在 2010 年 10 月 13 日對債務人林哲民作出本破產呈請。

2. 本案之破產呈請於 2010 年 5 月 5 日於高院原訟法庭法官區慶祥席前正式公開聆訊。區法官於 2011 年 7 月 20 日頒下判案書向債務人頒下破產命令。

3. 依據破產條例第 12(1)條，在破產令作出後，破產管理署署長成為本案破產人財產的暫行受託人。

4. 債務人在 2011 年 8 月 8 日提出傳票申請依據破產條例第 98 條要求覆核破產令及要求作廢或暫緩破產命令直至民事上訴案件 2011 年第 146 宗有結果為止（"該覆核申請"）。在該傳票當中，破產人夾附附件 1 至 3（"該新証據"）以支持其覆核理由。

5. 該覆核申請在 2011 年 8 月 12 日在區法官席前處理。在該聆訊中，區法官連同其他事宜作出指令，要求呈請人及破產管理署署長於 14 天內存檔及送達有關在覆核申請中採納或接納新証據的法律原則之陳詞。

(二) 署長之陳詞

1. 有關在一般覆核申請中是否接納新證據的適用法律原則在英國一案例中列出：Re a debtor [1993] 2 All ER 991。在覆核、撤銷或更改法院命令的聆訊中，可採納新證據，無論所述的新證據是否在最初的聆訊中可憑應盡的努力所獲得，因為原審法院對接納新證據事宜享有酌情權（見 991 e-f 段及 995 f-h 段）。新證據應是可靠或可使人信服的，它無須是無可爭議但須可作為推翻或更改最初命令的理據（見 991 f-g 段及 996 h-j 段）。〔見典據列表文件 1〕

2. Zhang Sabine Soi Fan v. The Official Receiver（HCB 472/1989，判案日期：1999 年 5 月 21 日，無彙報的案例）一案中亦提及 Re a debtor 有關新證據的原則（見第 3 頁）。〔見典據列表文件 2〕

3. Fletcher on the Law of Insolvency （見第 388 頁 12-014 段）及 Muir Hunter on Personal Insolvency（見 3-2614 段第 3289 頁）這兩本常用參考典籍中亦有提及 Re a debtor 有關新證據的原則。〔見典據列表文件 3 及 4〕

4. 署長認為 Re a debtor 案例中有關接納新證據的原則可應用於本案的覆核申請中，法官有酌情權決定是否接納破產人的新證據。為使其新證據被接納，破產人須證明其新證據是可靠或可使人信服的而可作為推翻或更改最初命令的理據。

破產管理署署長暨暫行受託人

（律師 林晶 林晶 代行）

2011 年 8 月 24 日

高等法院破產案件 2010 年第 7360 宗
有關林哲民(債務人)的事宜

破產管理署署長之典據列表

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1. Re a debtor (No. 32/SD/91) [1993] 2 All ER 991

2. Zhang Sabine Soi Fan v. The Official Receiver（HCB 472/1989，判案日期：1999 年 5 月 21 日，無彙報的案例）

3. Fletcher on the Law of Insolvency (Sweet & Maxwell, 2009)（第 388-390 頁）

4. Muir Hunter on Personal Insolvency (Sweet & Maxwell)（第 3288-3291 頁）

2011 年 8 月 24 日

Re a debtor (No 32/SD/91)

CHANCERY DIVISION
MILLETT J
16 OCTOBER 1992

Insolvency – Statutory demand – Setting aside statutory demand – Dismissal of application to set aside statutory demand – Jurisdiction to review, rescind or vary order dismissing application to set aside statutory demand – Nature and extent of court's jurisdiction – Admissibility of fresh evidence – Whether court having jurisdiction to review, rescind or vary order dismissing application to set aside statutory demand – Whether fresh evidence admissible on application – Nature of fresh evidence which is admissible – Insolvency Act 1986, ss 267(2), 375(1).

The court has jurisdiction under s 375(1)[a] of the Insolvency Act 1986 to review, rescind or vary an order dismissing an application made under r 6.5 of the Insolvency Rules 1986 to set aside a statutory demand which thereby removes the statutory stay under s 267(2)[b] on the presentation of a bankruptcy petition. The jurisdiction to review, rescind or vary an order dismissing an application to set aside a statutory demand ought however to be rarely exercised and the applicant for the review, rescission or variation must put forward cogent evidence to show either that there was no debt or that for some other reason the statutory demand ought to have been set aside, eg because the debt is proved to have been paid or to be no longer owing, or never to have arisen or is bona fide disputed on substantial grounds. Fresh evidence is admissible on the hearing of the application to review, rescind or vary an order dismissing an application to set aside a statutory demand whether or not such evidence could with due diligence have been obtained in time for the original hearing, since, unlike an appeal, the admission of fresh evidence on an application to the original tribunal is a matter of discretion. However, in the rare case where the court will entertain an application to review, rescind or vary an order dismissing an application to set aside a statutory demand any fresh evidence must be cogent evidence that the debt is bona fide disputed. Where credible, it need not be incontrovertible but it must be such that if unanswered it would undoubtedly lead to the setting aside of the statutory demand if made at the appropriate time (see p 995 *b* to *d f* to *h* and p 996 *g* to *j*, post).

Ladd v Marshall [1954] 3 All ER 745 and *Re a debtor (No 12 of 1970), ex p Official Receiver v The debtor* [1971] 2 All ER 1494 distinguished.

Notes

For appeals and reviews of court orders in bankruptcy proceedings, see 3(2) *Halsbury's Laws* (4th edn reissue) paras 723–734, and for cases on the subject, see 5(2) *Digest* (2nd reissue) 363–381, 15749–15960.

For the Insolvency Act 1986, ss 267, 375, see 4 *Halsbury's Statutes* (4th edn) (1987 reissue) 910, 1007.

For the Insolvency Rules 1986, r 6.5, see 3 Halsbury's Statutory Instruments (1991 reissue) 376.

Cases referred to in judgment

Blunt v Blunt [1943] 2 All ER 76, [1943] AC 517, HL.
Cohen (a bankrupt), Re, ex p the bankrupt v IRC [1950] 2 All ER 36, CA.

a Section 375(1) is set out at p 994 *j*, post
b Section 267(2), so far as material, is set out at p 995 *a*, post

Debtor, Re a (No 12 of 1970), ex p Official Receiver v The debtor [1971] 2 All ER 1494, [1971] 1 WLR 1212, CA; *affg* [1971] 1 All ER 504, [1971] 1 WLR 261, DC. *a*
Ladd v Marshall [1954] 3 All ER 745, [1954] 1 WLR 1489, CA.

Appeal

The debtor appealed from the decision of the district judge sitting in the Hertford County Court on 3 June 1992 dismissing his application seeking a review, rescission or variation of the district judge's decision of 12 March 1992 dismissing his application made on 26 September 1991 to set aside the statutory demand issued by the petitioning creditor on 9 September 1991 for payment of £30,552. The facts are set out in the judgment. *b*

Thomas Graham (instructed by *Wright-Morris & Co*) for the debtor. *c*
David Holland (instructed by *Beveridge Ross & Prevezers*) for the respondent creditor.

MILLETT J. This case raises questions concerning the nature and extent of the bankruptcy court's jurisdiction to review, rescind or vary any order made by it in the exercise of its bankruptcy jurisdiction. It is an appeal by the debtor from the dismissal by the district judge in the Hertford County Court of his application to rescind or vary a previous decision of her own to dismiss his application to set aside a statutory demand. *d*

The debtor is a trader in a small way of business. He engaged the petitioning creditor, a firm of accountants, in early 1989 to investigate his affairs, to prepare accounts, to report to the Inland Revenue inquiry branch, and to negotiate with the Inland Revenue the extent of his tax liabilities for a number of past years. There was no agreement as to the rate to be charged, rate for the work, or as to the amount of work which needed to be done. In due course the petitioning creditor submitted three invoices, each for £2,000 or a little under. These were all paid in full by the debtor during 1989 or early 1990. In August 1990 the petitioning creditor submitted a further substantial bill for just under £24,000. The debtor immediately challenged the amount of the bill and paid a sum of £8,000 on account in October 1990. In March 1991 the petitioning creditor submitted a further bill for over £19,000. Once again the debtor challenged the amount of the bill and paid a further £8,000 on account. In May 1991 the petitioning creditor wrote to the debtor estimating his outstanding tax liability, excluding penalties, at approximately £102,000 and stating that he could not estimate what further tax charges he might be exposed to but pointing out that he might be liable to penalties at the rate of 100% as well as interest. The total sum, he reported, could come to more than £220,000. *e f g*

In July 1991, not having been paid the amount of the outstanding invoices the petitioning creditor ceased to act for the debtor. On 9 September he issued a statutory demand. It was served on 16 September. It demanded payment of a sum of £30,552, being the total of the outstanding invoices, after giving credit for amounts paid, together with interest of £1,800-odd. On 26 September, well within time, the debtor applied to set aside the statutory demand. *h*

The hearing of the debtor's application took place on 12 March 1992, that is to say almost six months after the service of the statutory demand. At the hearing before the district judge there was one affidavit from the petitioning creditor and three affidavits sworn by the debtor's solicitors. These affidavits disputed the amount of the petitioning creditor's charges and claimed that the advice given by *j*

the petitioning creditor was negligent. They deposed to the fact that the debtor had negotiated in person with the Inland Revenue after the petitioning creditor had ceased to act, and that he had reached an agreement with the Inland Revenue as to the amount outstanding. He had succeeded in avoiding any substantial claim for penalties and had settled for much less tax liability than the petitioning creditor had advised. He had paid the Revenue a sum of £30,000, although at the hearing it was not clear whether that was the full amount agreed with the Inland Revenue as the amount of liability or a payment on account.

The debtor's application to set aside the statutory demand was dismissed. An appeal was lodged but was withdrawn and instead application was made to the county court to review the order dismissing the application. That came before the district judge on 2 June. The application was accompanied by an affidavit sworn by a Mr Mulfakis. It was sworn only on 2 June and the petitioning creditor had no opportunity to deal with the allegations which it contained. Mr Mulfakis, a partner in a firm of accountants, had been instructed by the debtor's solicitors to review the petitioning creditor's charges. He had not had an opportunity to examine the petitioning creditor's working papers and accordingly had to make a number of assumptions. However, his conclusion, after making a number of assumptions in favour of the petitioning creditor—some of them according to him, very generous assumptions—was that the amount charged by the petitioning creditor was grossly excessive. He deposed, for example:

> 'It would appear to me from the petitioning creditor's evidence that a total of 477 hours have been spent on simply the tax enquiry work, excluding the account preparation work. In my view this is out of all proportion to the size of the case or the amount of work that could possibly have been required. I cannot see on any interpretation that this work, if properly done, could justify the time and cost being claimed . . . I would also consider whether the advice given to the debtor was correct. The petitioning creditor advised the debtor by letter dated 31 May 1991, by which time his firm had spent 977 hours on the matter, that the debtor's tax liability was likely to be in the region of £102,200. He further advised that there could be a penalty of up to £75,000 plus specific penalties for late submissions of returns. Interest was advised at £44,200. The total liability therefore as advised by the petitioning creditor could be as much as £222,200 plus specific penalties. I consider this advice to be questionable in view of the fact that the debtor eventually settled the case himself by paying £51,580·80 tax and National Insurance contributions plus £24,443·53 by way of interest and penalties. [I interpose to say that the debtor had paid the Inland Revenue moneys on account and that the figure of £51,000 was the total sum paid inclusive of earlier payments.] This covers the seven tax years ending 1987/88 and is less than one third of the liability advised by the petitioning creditor. [I interpose to say that even if penalties and interest are excluded the amount of the total tax liability appears to be something of the order of half that advised by the petitioning creditor.] The petitioning creditor has charged a total of £48,902·36 for his services. The debtor has paid £20,159. It would be my professional view that the debtor has paid enough and should not pay any more without first a full investigation into the petitioning creditor's assertions and full disclosure of his working papers. It is further my professional view, based on the information I have seen, that the debtor is being substantially overcharged and should not be liable to pay the balance of these claims without the reasonableness of those charges being tested.'

That affidavit was submitted only on the day of the hearing and the petitioning creditor had no opportunity to deal with it. It is possible that the assumptions made by Mr Mulfakis, in the absence of any opportunity to see the petitioning creditor's working papers, were misconceived. Clearly the district judge would not have acceded to the application without allowing the petitioning creditor an adjournment. However, the hearing on 3 June lasted only five minutes or so. Counsel have agreed a note of the hearing, which the learned district judge has not approved. She has appended a note of her own. In order to give the flavour of what occurred I propose to read both notes in full. The note agreed by counsel is as follows:

> '(1) The learned district judge told counsel for the debtor prior to the making of any submission that she was not prepared to review her order of 12 March 1992. (2) The learned district judge was asked by counsel for the debtor whether she had read the affidavit evidence of Mr Mulfakis filed since the hearing of 12 March 1992. The learned district judge said that she had flipped through it. The learned district judge further stated that there had been a plethora of affidavits filed on behalf of the debtor for the hearing on 12 March 1992 and that the affidavit of Mr Mulfakis could have been adduced then. (3) The learned district judge stated that simply because the debtor was aggrieved by the order of 12 March 1992 that was not a ground for a review of that order and that the debtor could appeal such order if he so wished. (4) The learned district judge did not give a reasoned judgment.'

The district judge has commented:

> 'I do not agree that I did not give a ruling on the reasons for refusing a review. I do not approve this note. From memory I said that the reasons for refusing a review were that the application had been fully argued with affidavit evidence from both parties, both of whom were represented by counsel. There were full submissions by counsel and a judgment given. Thus the proper way forward was appeal.'

Although there is a discrepancy between those two accounts I do not think that there is much doubt as to what happened or what the views of the learned district judge were. She clearly considered that there was no ground for seeking a review of the order, that Mr Mulfakis's evidence should have been obtained in time for the hearing on 12 March, and that accordingly it was not material upon which an application for review could be founded. She does not seem to have recognised the distinction between a review and an appeal or that the affidavit evidence of Mr Mulfakis could not be admitted on appeal because of the doctrine laid down in the well-known case of *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489.

The first question I have to decide is whether the court has jurisdiction to review, rescind or vary an order dismissing an application to set aside a statutory demand. Section 375(1) of the Insolvency Act 1986 is in these terms: 'Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction.' The order dismissing the application to set aside the statutory demand was made under r 6.5 of the Insolvency Rules 1986, SI 1986/1925, and the effect of making the order was to remove the statutory stay on the presentation of a bankruptcy petition which follows from s 267(2)(*d*) of the Insolvency Act 1986. That subsection provides:

'Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented . . . (*d*) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts.'

It follows, in my judgment, that there is jurisdiction in the court to review and rescind or vary an order dismissing an application to set aside a statutory demand, and the contrary was not contended before me. As a matter of discretion I have no doubt that the jurisdiction ought to be rarely exercised, since the effect of doing so would be to allow what would amount to a renewed application to set aside a statutory demand after the period limited for making the application. It is clear from the time limit for making the application that Parliament envisaged that such applications should be made speedily, and any attack upon the validity of the debt on which the petitioning creditor intends to proceed should either be made within 18 days by the adoption of the statutory procedure or should be raised at the hearing of the bankruptcy petition. Counsel submitted that great caution must be exercised in dealing with applications of the present kind, since the result would be to lead to an absence of finality, and he drew an alarming picture of the floodgates which would be opened if I were to allow this appeal. I will deal with the floodgates argument in a moment.

The second question is whether fresh evidence is admissible upon an application under s 375, that is to say evidence which could with due diligence have been obtained in time for the original hearing. In my judgment there is a significant distinction between an application under s 375 of the Insolvency Act 1986 and an appeal. When an appeal is brought from the making of an order the appellant must persuade the appellate court that the original order should not have been made on the material then before it or upon fresh material adduced in the appellate court in accordance with the rule in *Ladd v Marshall* [1954] 3 All ER 745, [1954] 1 WLR 1489. Where an application is made to the original tribunal to review, rescind or vary an order of its own, however, the question is not whether the original order ought to have been made upon the material then before it but whether that order ought to remain in force in the light either of changed circumstances or in the light of fresh evidence, whether or not it might have been obtained at the time of the original hearing. The matter is one of discretion, and where the evidence might and should have been obtained at the original hearing that will be a factor for the court to take into account; but the rationale for the rule in *Ladd v Marshall* that there should be an end to litigation and that a litigant is not to be deprived of the fruits of a judgment except on substantial grounds has no bearing in the bankruptcy jurisdiction. The very existence of s 375 is inconsistent with such a rationale. Fresh evidence of this kind was admitted by the registrar in *Re Cohen (a bankrupt), ex p the bankrupt v IRC* [1950] 2 All ER 36 and the Court of Appeal acted upon the evidence which was admitted below notwithstanding that it could easily have been tendered at the original hearing. There was a concession in that case that the court, in arriving at its decision, was not bound exclusively by the material which was before the court at the original hearing, but Asquith LJ who gave a concurring judgment, expressed the view that it was open to the registrar in deciding whether or not to rescind his earlier order to take into account the additional evidence which had been tendered after the date of the original hearing. In that case the fresh evidence was tendered by the petitioning creditor in order to support the making of the original order and not in order to support the application to rescind it. In my judgment, however, that is a distinction without a difference.

The next question, which has been argued at some length before me, is whether exceptional circumstances must be shown before the court's jurisdiction under s 375 can be invoked. Counsel for the petitioning creditor relied very strongly on the decision of the Court of Appeal in *Re a debtor (No 12 of 1970), ex p Official Receiver v The debtor* [1971] 2 All ER 1494, [1971] 1 WLR 1212. In that case there was an application to rescind a receiving order. The Court of Appeal held that exceptional circumstances which justified the exercise of a power to rescind a receiving order must be closely analogous to a scheme of arrangement or to circumstances which enabled an adjudication to be annulled. No such circumstances existed in that case.

Section 375(1) re-enacts in almost identical terms the wording of s 108(1) of the Bankruptcy Act 1914, which was the section considered by the Court of Appeal in *Re a debtor*. The reason for the Court of Appeal's decision appears clearly where Russell LJ, giving the judgment of the court (see [1971] 2 All ER 1494 at 1495, [1971] 1 WLR 1212 at 1214), approved as correct in law the statement by Stamp J in the Divisional Court below in the same case ([1971] 1 All ER 504 at 508, [1971] 1 WLR 261 at 266):

> 'A scheme of arrangement or composition and annulment of the adjudication being two of the ways of getting rid of the consequences of bankruptcy singled out by the legislature, the court in exercising its discretion to rescind a receiving order has adopted a similar approach. In my judgment the single result of all the cases is that the court does not, except in very exceptional circumstances, exercise its discretion to rescind a receiving order, except where it would have annulled an adjudication on an application for annulment under s 29(1).'

Accordingly, that case was authority for proposition that the court would not rescind a receiving order except where the debtor could show that the order should not have been made or that since the date of the receiving order all his debts had been paid or compounded for. But, as Stamp J pointed out below ([1971] 1 All ER 504 at 507, [1971] 1 WLR 261 at 265):

> 'Extending, as it does, over a wide field, different considerations must apply to the exercise of the discretion thereby conferred on the court according to the character of the order sought to be rescinded or varied.'

In my judgment, the decision in *Re a debtor* has no bearing on the present case, which raises the question: what grounds should exist to invoke the jurisdiction to rescind or vary an order dismissing an application to set aside a statutory demand? In my judgment, what is needed is evidence to show either that there was no debt or for some other reason the statutory demand ought to have been set aside. The statutory demand ought to have been set aside either where the debt is proved to have been paid or to be no longer owing, or never to have arisen or where the debt is bona fide disputed on substantial grounds. It follows that in the rare case where the court would entertain an application to rescind an order dismissing an application to set aside a statutory demand any fresh evidence must be cogent evidence that the debt is bona fide disputed. Where credible, it obviously need not be incontrovertible; it must be such that if unanswered it would undoubtedly lead to the setting aside of the statutory demand if made at the appropriate time.

I turn to deal with the floodgates argument. It seems to me that problem can safely be left to the discretion of the district judges who have great experience of debtors who make excuses for non-payment and take every advantage of the rules to delay the day of judgment. I do not believe that by confirming the existence

of this jurisdiction and the admissibility of fresh evidence upon an application under s 375, notwithstanding that it could have been made available at the initial hearing, will lead to chaos in the county court.

I turn then to the question whether the district judge exercised her discretion, for if she did it would not be right for an appellate court to interfere with it unless satisfied that the exercise of her discretion was plainly wrong. In my judgment, she did not exercise her discretion at all or, if she did, she exercised it on the wrong basis. She did not consider whether the fresh evidence was admissible. She gave no consideration to its cogency or whether it was sufficient, if unanswered, to show that any outstanding liability was disputed. She does not appear to have recognised the difference between the appeal and review procedures and she seems to have considered that because the case had been previously investigated the only proper course now was to appeal it.

In *Blunt v Blunt* [1943] 2 All ER 76 at 79, [1943] AC 517 at 526 it was held that it is the duty of an appellate court to substitute its own discretion or to remit the case where it is satisfied that the court below has not exercised its discretion on the proper basis.

I will allow the appeal and remit the case to a district judge in order to consider whether or not to review the order dismissing the debtor's application to set aside the statutory demand and to vary it by substituting an order setting it aside. It will be for the petitioning creditor to consider whether to adduce evidence in answer to that of Mr Mulfakis and, if so, no doubt the district judge who hears the application will consider it. I express the view that the application ought to be heard by a different district judge.

Appeal allowed. Case remitted to county court.

Jacqueline Metcalfe Barrister.

HCB472/89

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
BANKRUPTCY PROCEEDING NO.472 OF 1989

Re: Wan Soi Fan Sabina — Bankrupt
Ex Parte : The Official Receiver

BETWEEN

Zhang Sabine Soi Fan — Applicant

and

The Official Receiver — Respondent

Coram : The Hon Mrs Justice Le Pichon in Chambers
Date of Hearing : 21 May 1999
Date of Decision : 21 May 1999
Reasons Handed Down : 25 May 1999

REASONS

On 31 March 1999, discovery orders were made against Messrs Sit Fung Kwong & Shum and the Liu Chong Hing Bank Limited based on the finding of fact by the court that Zhang Sabine Soi Fan ("the Applicant") and the person adjudged bankrupt ("the Bankrupt") on 14 March 1990 are one and the same person. On 21 May 1999, the Applicant applied for review pursuant to section 98(1) of the *Bankruptcy Ordinance* which provides as follows :

> " (1) The court or the Registrar may review, rescind or vary any order made by it or him, as the case may be, under its or his bankruptcy jurisdiction."

The application was refused. The reasons appear below.

Counsel for the Applicant explained that the application was issued as a result of a meeting held at the Official Receiver's Office on 16 April 1999. Apparently on that occasion, the Applicant together with her legal advisers and a lady by the name of Wan Soi Fan ("Miss Wan") attended the meeting. Miss Wan claimed to be the Bankrupt. The Applicant therefore believed that the identity issue had been "rectified" and envisaged the hearing to be a formal one. The Applicant's understanding proved to be incorrect. The Official Receiver has filed evidence making it clear that far from resolving the matter, the appearance of both the Applicant and Miss Wan together at the Official Receiver's Office raised more questions than it answered. As far as the Official Receiver is concerned, the matter is still highly controversial : he is not prepared to accept that Miss Wan is the Bankrupt.

It should be mentioned that at that meeting, an appointment for fingerprint tests was made for 19 April 1999 and arrangements put in hand. However, Miss Wan failed to keep the appointment. The present summons was then taken out, a notice of appeal having been filed on 16 April 1999 which was within the time limit of 21 days for appeal under section 98(2).

In what circumstances would the court exercise its jurisdiction to review?

In the context of a similar English provision under the *Insolvency Act*, the law is stated to be as follows :

> "In practice the courts are cautious in exercising the jurisdiction to review their own decisions, since the effect of so doing is to allow what may amount to a second application for the order or relief which is being sought, possibly beyond the time limited for making the original application. The cases in which the court will exercise its discretion to entertain such an application will therefore be somewhat rare, and will normally involve the operation of exceptional

> circumstances, such as fresh and cogent evidence such as would, if unanswered, furnish grounds for reversing or varying the original order of that court."

See *Fletcher on the Law of Insolvency* at 314. In **Re A Debtor** [1993] 2 All ER 991 Millet J (as he then was) observed that "the jurisdiction ought to be rarely exercised" (at 995B) and that "any fresh evidence must be cogent evidence... where credible, it obviously need not be incontrovertible..." (at 996I).

In the present case, there is simply no new evidence, much less any "cogent" evidence. For reasons best known to the Applicant and Miss Wan, the appointment for fingerprint tests was not kept. Nor has any fresh evidence been filed to explain the many matters that the court considered required explanation as set out in my judgment of 31 March 1999 and which ultimately led to the finding of fact made. In those circumstances, the only appropriate order to make on the summons was to dismiss it.

As the Applicant has filed a notice of appeal and her appeal is due to be heard at the end of June, she will have every opportunity to challenge the correctness of the orders made.

(Doreen Le Pichon)
Judge of the Court of First Instance
High Court

Mr B.K. Ho, inst'd by M/s Liu, Chan & Lam, for the Applicant

Ms Phyllis McKenna, for the Official Receiver

Mr Peter Wong, inst'd by M/s Tony Kan & Co., for Miss Wan

The Law of Insolvency

FOURTH EDITION

By

Ian F. Fletcher
M.A., LL.M., M.C.L., PH.D., LL.D.
Bencher of Lincoln's Inn
Professor of International Commercial Law
University College London

With a chapter on Company Receivership
contributed by Letitia Crabb, LL.B., LL.M.,
Solicitor, formerly Senior Lecturer in Property Law,
University of Reading

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4. APPEALS (INCLUDING APPELLATE JURISDICTION IN GENERAL)

12–014 Appeal against an order made by a court exercising jurisdiction in bankruptcy matters lies in the way provided by s.375, which has general application to all aspects of insolvency of individuals and bankruptcy. Section 375(1) provides that every court having jurisdiction in individual insolvency matters may review, rescind or vary any order which it has made in the exercise of that jurisdiction. Hence a possible first avenue of recourse is one in which an application is made to the court concerned, requesting it to reconsider and alter its own original decision in the light of new arguments or fresh information. Thereafter, an appeal properly so-called may take place. Strictly speaking, the jurisdiction conferred by s.375(1) does not constitute an appellate procedure, which involves an exercise of jurisdiction by a hierarchically superior court to that whose original decision is being challenged. In practice the courts are cautious in exercising the jurisdiction to review their own decisions, since the effect of so doing is to allow what may amount to a second application for the order or relief which is being sought, possibly beyond the time limited for making the original application. The cases in which the court will exercise its discretion to entertain such an application will therefore be somewhat rare, and will normally involve the operation of exceptional circumstances, for example the discovery of fresh and cogent evidence such as would, if unanswered, furnish grounds for reversing or varying the original order of that court.[40] While not unmindful of the "floodgates" argument, the courts are aware that the costs of a full-scale appeal may be averted by appropriate use of the facility provided by s.375(1).[41]

12–015 Appeal from a decision by a county court or by a registrar in bankruptcy of the High Court lies to a single judge of the High Court, and an appeal from a decision of that judge on such an appeal lies to the Court of Appeal.[42] It may be noted that there is the further possibility (subject to leave being granted) of a final appeal to the House of Lords in bankruptcy matters where a point of law of general public interest arises. An appeal within the terms of s.375(2) of the Act may arise either as a challenge to the original decision taken by the lower court, or as a challenge to the refusal by that court to exercise its discretion under s.375(1) to review its own original decision.

[40] *A Debtor (No.32–SD–91), Re* [1993] 2 All E.R. 991 (involving application to set aside a statutory demand). For instructive illustrations of the proper function of this jurisdiction, see *Fitch v Official Receiver* [1996] 1 W.L.R. 242 (CA); *Papanicola v Humphreys* [2005] EWHC 335 (Ch); [2005] 2 All E.R. 418 (Laddie J.).

[41] *Debtors (No.VA7 and VA8), Re, Ex p. Stevens* [1996] B.P.I.R. 101; *Brillouet v Hachette Magazines* [1996] B.P.I.R. 518. cf. the comparable power, in relation to the winding-up of companies, provided by IR r.7.47(1). The Court of Appeal have confirmed that s.375 of the Act and r.7.47 of the Rules are intended to establish a uniform system of appeals in personal and corporate insolvency actions, so that it is permissible to draw analogies between their respective provisions: *Midrome Ltd v Shaw* [1993] B.C.C. 659 at 660–661, per Bingham M.R. and Hoffmann L.J.

[42] Insolvency Act 1986 s.375(2), as amended. See Practice Direction (Insolvency Proceedings) [2007] B.C.C. 842, Pt Four—Appeals.

12–016 Where the grounds of an appeal to the Court of Appeal include a challenge to the refusal by the judge below to grant an extension of time for bringing an appeal at that level, difficult questions of statutory construction and procedure arise. This is because the terms of s.375(2) refer to an appeal from "a decision of that judge on such an appeal", whereas the essence of the appellant's complaint is that the precise effect of the decision of the judge has been to prevent any appeal from taking place. Although the drafting of the Insolvency Act appears to preclude the bringing of an appeal under s.375(2) in such cases, the Court of Appeal have held that the provisions of s.16 of the Supreme Court Act 1981, which empower the court to hear and determine appeals from "any judgment or order of the High Court" are sufficiently wide in their scope to confer a jurisdiction to entertain an appeal in these circumstances.[43]

12–017 Special provision is made by r.7.48 of the Insolvency Rules to enable an appeal to be preferred at the instance of the Secretary of State from any order of the court made on an application for the rescission or annulment of a bankruptcy order, or (where this can still take place on an order of the court)[44] for a bankrupt's discharge. Other persons with the requisite interest and standing to appeal against the granting of an order of discharge are the official receiver or the trustee, and any creditor whose debt remains unpaid.[45] The basis of a creditor's appeal may be the undue leniency of the terms upon which the discharge has been granted, or the fact that the terms inflict some particular injustice upon the appellant personally so as to violate the principle that all equally-ranked creditors must be treated alike. In the latter instance, however, it would seem to be essential that the creditor should first have established his precise status in the bankruptcy by proving his debt, before he can properly claim to exercise a right of appeal.[46]

12–018 The standing of the bankrupt to initiate an appeal is necessarily limited to those matters in which the law regards him as retaining a personal interest in the outcome of the proceedings in question. This is manifestly the case where the decision appealed against concerned the bankrupt's own discharge, or the possible annulment of the bankruptcy.[47] The same is true of the limited range of personal rights of action which do not vest in the

[43] *Lawrence v European Credit Co Ltd* [1992] B.C.C. 792. The decision confirms the correctness of the interpretative approach followed in *Podberry v Peak* [1981] Ch. 344 (CA) in construing the effects of s.108(2) of the Bankruptcy Act 1914, whose material provisions are echoed by those currently contained in s.375(2) of the Act of 1986. The point concerning the separate jurisdiction arising under s.16 of the Supreme Court Act 1981 was not considered in the earlier case. For further comment on each decision see, respectively, Fletcher, "Appeals and reviews in insolvency proceedings" [1994] J.B.L. 279 and "Jurisdiction to appeal in bankruptcy" [1981] J.B.L. 387.

[44] As explained in Ch.11 above at para.11–008, discharge by order of the court is now limited to cases involving a criminal bankruptcy order.

[45] *Payne, Re* (1886) 18 Q.B.D. 154.

[46] *Chesters, Re* (1877) 6 Ch.D. 57; cf. observations as to the principle of equal treatment in *Caribbean Products (Yam Importers) Ltd, Re* [1966] 1 Ch. 331; [1966] 2 W.L.R. 153 (a company liquidation case).

[47] See Ch.11 above at para.11–033.

trustee in bankruptcy, and which the bankrupt is allowed to pursue on his own behalf despite undergoing adjudication.[48] But otherwise, according to long-established principle, a bankrupt cannot in his own name appeal from a judgment against him which is enforceable only against the estate vested in his trustee.[49]

12–019 In general, the procedure and practice of the Supreme Court is to be followed in relation to appeals in insolvency proceedings.[50] The notion attaching to the power of review now contained in s.375(1) is that it is perpetual and hence may be exercised at any time, notwithstanding the general maxim: *interest reipublicae ut sit finis litium*.[51] Hence there remains the possibility that at a later stage the court may form the view that the bankrupt has been punished enough by the provisions of its original order, which may consequently undergo alteration in a way favourable to the bankrupt. The court will be assisted to make such an amendment by any evidence that the bankrupt has been of good conduct since the previous hearing.[52]

[48] See Ch.8, above, paras 8–011 et seq. Note also the possibility of assignment by the trustee bank to the bankrupt of rights of action of a proprietary character: paras 8–015 et seq.

[49] *Heath v Tang* [1993] 4 All E.R. 694 (CA), reviewing the previous case law; *Hunt v Peasegood* [2001] B.P.I.R. 76 (CA).

[50] Insolvency Rules 1986 r.7.49 (as substituted by SI 1999/1022, with effect from April 26, 1999); see Sch.1 to the Civil Procedure Rules 1998 (re-enacting the former RSC, Ord.59).

[51] *Tobias & Co, Re* [1891] 1 Q.B. 463. The Latin maxim may be translated as follows: "It is in the interest of the State that there should be finality to litigation."

[52] *Tobias & Co, Re* (above, fn.51); *Shields, Re* (1912) 106 L.T. 345.

Muir Hunter
on
PERSONAL INSOLVENCY
Volume 1

AUTHORS

JOHN BRIGGS, LL.B.
of Gray's Inn, Barrister.
A Deputy Bankruptcy Registrar of the High Court

CHRISTOPHER BROUGHAM, Q.C., B.A.
of Inner Temple, Barrister.
A Deputy Bankruptcy Registrar of the High Court
Bencher of the Inner Temple

CONTRIBUTOR

STEPHEN BAISTER, M.A., PH.D.
Chief Bankruptcy Registrar of the High Court

THE DEVELOPMENT OF ENGLISH BANKRUPTCY LAW

DAVID GRAHAM, Q.C., M.A., BCL,
of Middle Temple, Barrister
Visiting Professor of Law, Faculty of Business, Kingston University

FOREWORD BY

THE LATE RT. HON. LORD JUSTICE DILLON, P.C.

LONDON
SWEET & MAXWELL

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district which, at the present time, comprises the courts referred to below, and the bankruptcy district of a county court having bankruptcy jurisdiction became its insolvency district.

County Courts included in London insolvency district

3–2610

Barnet
Bloomsbury
Bow
Brentford
Central London
Clerkenwell
Edmonton
Lambeth
Mayor's & City of London
Shoreditch
Wandsworth
West London
Willesden

See also the *County Court Practice*, Appendix and Supplement, and the *County Courts Directory*, published by HMSO.

Alternative courts for debtors' petitions

3–2611 By virtue of IR r.6.40A(5), a debtor (not within the London insolvency district) who wishes to present his own petition may, with a view to expediting it, present it to an "alternative county court", being the nearest "full-time court" to the debtor's own court: see the IR 1986, Sch.2, in Part VII of this Work, below. Note in any event the provisions of s.373(4) to the effect that initiation of proceedings in the wrong court does not invalidate such proceedings.

Deceased insolvents' estates: application of section

3–2612 See note to section 365, above.

Appeals, etc. from courts exercising insolvency jurisdiction

3–2613 **375.**—(1) Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction.

(2) An appeal from a decision made in the exercise of jurisdiction for the purposes of those Parts by a county court or by a registrar in bankruptcy of the High Court lies to a single judge of the High Court; and an appeal from a decision of that judge on such an appeal lies to the Court of Appeal.

(3) A county court is not, in the exercise of its jurisdiction for the purposes of those Parts, to be subject to be restrained by the order of any other court, and no appeal lies from its decision in the exercise of that jurisdiction except as provided by this section.

Subsections (1) and (2)

Reviewing, rescinding and varying orders

3–2614 This subsection reproduces a power contained in successive bankruptcy statutes: see s.71 of the 1869 Act; s.104(1) of the 1883 Act; and s.108(1) of the 1914 Act. The jurisdiction under that subsection was held to be, in a proper case, almost without limit, and the fact that an appeal against the order in question was pending did not prevent the court from rehearing the matter and reviewing the order: see *Ex p. Keighley* (1874) L.R. 9 Ch. App. 667. The exercise of the jurisdiction was however linked with the provisions as to the time for appeal (initially 21 days, but subsequently four weeks); the expiry of that period might lead the court to refuse the application to rehear, unless it would have been minded to extend the time for appealing, had an appeal been brought: see *Re Cohen* [1950] 2 All E.R. 36, CA, and *Re Noble* [1965] Ch. 129, CA.

In *Re RS&M Engineering Co Ltd* [2000] Ch. 40; CA, Chadwick L.J. noted that the jurisdiction to re-hear in s.375 is (likewise) unlimited, but that where a decision has been arrived at by a judge after full argument, another judge of co-ordinate jurisdiction presented with the same material on an application for review should not substitute his own decision "save in the most exceptional circumstances". "The power to review is not to be used in order to hear an appeal against a judge of co-ordinate jurisdiction. The exercise of the power should be confined, as a matter of discretion, to cases in which there has been some change in circumstances (which may, perhaps, include the consideration of material which was not previously before the court) since the original order was made" (p.493A–C). See further *Re A Debtor (No.32/SD/1991)* [1993] 1 W.L.R. 314 (Millett J.) for an application to rescind an order dismissing an application to set aside a statutory demand. The Judge acknowledged that the circumstances in which the court would exercise such jurisdiction would be rare but that on

such an application fresh evidence would be admissible whether or not it was obtainable at the time of the original hearing but that the matter was one of discretion. However, the very existence of the jurisdiction under s.375 is inconsistent with the rationale of an end to litigation.

As to the tribunal to which an application for review should be made and the interrelation of the power to review (subs.(1)) and the right of appeal (subs.(2)), compare *Re SN Group Plc* [1994] 1 B.C.L.C. 319;*Re Piccadilly Property Management Ltd* [1999] 2 B.C.L.C. 145; *O'Brien v Inland Revenue Commissioners* [2000] B.P.I.R. 306.

Power to rescind bankruptcy order, instead of annulling it **3–2615**

In *Fitch v Official Receiver* [1996] 1 W.L.R. 242, CA, the Court of Appeal applied the power to review and rescind to the rescission of a bankruptcy order, on the application of bankrupts, a large number of whose creditors, including the petitioning creditor, had changed their mind about the making of the bankruptcy order, which was likely to prejudice the recovery of a substantial asset for the estate, and on the ground of a significant change of circumstances, the order was rescinded; the power to rescind was, in theory at least, virtually unlimited, and was not to be confined to cases closely resembling a scheme of arrangement (as had been held in *Re Izod Ex p. O.R.* [1898] 1 Q.B. 241, and *Re A Debtor (12 of 1970)* [1971] 1 W.L.R. 1212, CA; the Court observed that there was no "Rule in *Re Izod*", either under the Act of 1914 or under the IA 1986. See also notes to s.282(1), above. See C. Brougham, Q.C., "A New Way to Kill a Bankruptcy" (1996) 9 *Insolvency Intelligence*, No.5, p.36.

On further consideration of jurisdiction under s.375 (and the above case law), Laddie J. formulated the following propositions in *Papanicola (as trustee in bankruptcy for Mak) v Humphreys and others* [2005] EWHC 335 (Ch); [2005] 2 All E.R. 418:

(1) The section gives the Court a wide discretion to review vary or rescind any order made in the exercise of the bankruptcy jurisdiction.

(2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour.

(3) Those circumstances must be exceptional.

(4) The circumstances relied on must involve a material difference to what was before the court which made the original order. In other words there must be something new to justify the overturning of the original order.

(5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time.

(6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any explanation by the applicant given for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion.

In his judgment Laddie J. developed the second and fourth propositions (at para.26). He said that inherent in s.375 is the concept that something has changed so that it is appropriate for the court to reconsider its own earlier order. If there is no change in circumstances, the only way to challenge the order is by appeal. The court is not to review its order simply on the basis that the applicant wants to present essentially the same facts and the same arguments but more forcefully or attractively.

In exercising its discretion to rescind a bankruptcy order the court will bear in mind the same sort of considerations as would be relevant to an application to annul a bankruptcy order under s.282. In *HMRC v Cassells* [2007] EWHC 3180 (Ch.); [2009] B.P.I.R. 284 the Chancellor, in allowing the petitioner's appeal against the rescission of a bankruptcy order which had been made nearly five years prior to the application to rescind it, said:

> "[A]n order for rescission would, without more, prejudice all the other creditors who proved in the bankruptcy. There is no evidence that Mr Cassells could or would pay them with interest in full. Nor is he able to pay or provide for the costs incurred by the Trustee in Bankruptcy. An order for rescission would unjustly prejudice the creditors if their debts thereby became statute barred. Further, it would be a waste of time and money if, as seems inevitable, it were to be followed by a further bankruptcy order obtained by a substituted creditor on the same petition. Finally, it was the failure of Mr Cassells to cooperate with his Trustee. This was sufficiently serious and prolonged as to justify an order for the indefinite suspension of his discharge. If a court is to make an order under s.375 it must be satisfied that it is in possession of all material facts. If a bankrupt fails to cooperate with his Trustee then the court cannot have that confidence ... [T]he court should not exercise its discretion under s.375 in such circumstances unless it is satisfied by evidence that it is appropriate for the bankrupt to be discharged. There is no such evidence before me" (*ibid.*, at paras [32], [33]).

Although it is well established that a debtor who wishes to resist a bankruptcy petition on the grounds of no assets has a very heavy burden to surmount, Evans-Lombe J. in *Amihyia v the Official Receiver* [2005] B.P.I.R.264 rescinded the bankruptcy, on appeal, on being satisfied, among other

things, that after investigation by the official receiver the debtor had no assets and that his previous occupation was no longer open to him because of the bankruptcy, despite the opposition of a majority of the creditors. The Judge described the case as very special.

Rules on appeals in bankruptcy

3–2616 As from May 2, 2000, new and comprehensive rules in relation to the procedure, nature and listing of "first appeals" and "second appeals" in insolvency proceedings came into force. These are printed in Part IX of this Work, and are contained in para.17 of the *PDIP*.

In relation to "first appeals" (from a decision of a County Court or of a Registrar of the High Court in insolvency proceedings) the practice and procedure of appeals to the Court of Appeal (now governed by CPR, Pt 52 and its Practice Direction) are followed to some extent, but paras 17.8 to 17.23 set out detailed rules in relation to the practice, procedure and powers of the Court in relation to these appeals. Paragraph 8.13 of the Practice Direction supplementing CPR, Pt 52, has no application to insolvency appeals: the words "a single judge of the High Court" contained in subs.(2) include a judge authorised under the Senior Courts Act 1981, s.9(1), to sit as a judge of the High Court (*Bailey v Dargue* [2008] EWHC 2903 (Ch); [2009] B.P.I.R. 1).

Since October 2, 2006, permission to appeal has been required in relation to "first appeals" in insolvency proceedings (see the 42nd Update to the CPR) and the time limit for appealing has been increased (from 14 days) to 21 days. An appeal is limited to a review of the decision of the lower court and will only be allowed where the decision of the court below was wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court. It has been held that where the issue on appeal is whether a debt claimed in a statutory demand is disputed on substantial grounds, while appropriate respect is to be given to the judge at first instance, the appellate court is not limited to interfering only if it is satisfied that the judge took into account immaterial factors, omitted to take into account material factors, erred in principle or came to a decision that was impermissible or plainly wrong (*Feldman v Nissim* [2010] EWHC 1353 (Ch); [2010] B.P.I.R. 815 at [5]–[8]). An application for leave to appeal out of time must have regard to the check-list in CPR r.3.9 (see the decision of the Court of Appeal in *Sayers v Clarke-Walker (a firm)* [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095 and CPR, r.42.6 (variation of time)).

Section 55 of the Access to Justice Act 1999 has amended s.375(2) of the IA 1986 (s.106, Sch.15, Pt III) and implicitly IR 7.47(2) and 7.48(2) so that an appeal from a decision of a judge of the High Court made on a first appeal lies, with the permission of the Court of Appeal, to the Court of Appeal. In this case, the Court of Appeal will not give permission unless it considers that (a) the appeal would raise an important point of principle or practice, or (b) there is some other compelling reason for the Court of Appeal to hear it (CPR, Pt 52, r.52.13). An appeal from a judge of the High Court in insolvency proceedings which is not a decision on a first appeal lies, on the other hand, with the permission of the judge or of the Court of Appeal, to the Court of Appeal (see CPR, Pt 52, r.3). The procedure and practice for appeals from a decision of a judge of the High Court in insolvency proceedings (whether made on a first appeal or not) are also governed by IR, r.7.49 which imports the procedure and practice of the Court of Appeal as stated in para.17.2(2) of the *PDIP*.

[THE NEXT PARAGRAPH IS 3–2646.]

The admission of fresh evidence on appeal

3–2646 The practice relating to the admission of fresh evidence on appeal is governed by para.17.18(2) of the PDIP, which is in terms identical to CPR, r.52.11(2).

In *Hertfordshire Investments Ltd v Bubb* [2000] 1 W.L.R. 2318, CA, the Court of Appeal held that, while under CPR, r.52.11(2) it was no longer necessary to show special grounds for the admission of fresh evidence, nevertheless the principles in *Ladd v Marshall* [1954] 1 W.L.R. 1489, CA, remain relevant: see in particular the judgment of Hale L.J. at 2325.

In *Heavy Duty Parts Ltd v Anelay* [2004] EWHC 960 (Ch); [2004] B.P.I.R. 729, Lewison J. held that the principles in *Ladd v Marshall* had no relevance to an application to admit fresh evidence in support of the judgment below.

Security for costs: appeals by bankrupts and others

3–2647 Under the old law, and more recently under the B.R. 1952, r.129, the giving of security for any bankruptcy appeal was mandatory, but was fixed in the sum of £20; special circumstances had to be shown to justify the increase of that sum. In the case of *Re Phillips* [1896] 2 Q.B. 122, Vaughan Williams J. emphasised that it was not usual to increase the amount of the deposit, in cases where the debtor was appealing from a receiving order made against him, because a receiving order entirely changed the status of a debtor, and the tendency of the courts was to afford him every facility in prosecuting an appeal from the order. To increase the deposit, except on very special grounds, might considerably increase his difficulties.

A bankrupt appealing against a bankruptcy order, against whom the petitioning creditor applies for an order for security for costs, is now presumably to be treated in the same way as any other impecunious appellant; security should be ordered, unless the bankrupt can show that it would stifle an arguable appeal and deny him justice. He must show not only that he himself does not have the necessary resources, but also that he does not have other sources of funds: see *Hocking v Walker*

[1997] B.P.I.R. 93, CA, where the Court of Appeal held that the state of bankruptcy was a "special circumstance", within the meaning of RSC, Ord.59, r.10(5), justifying the making of an order for security for costs; the court applied the dicta in *MV Yorke Motors v Edwards* [1982] 1 W.L.R. 444, HL, and *Kloeckner & Co AG v Gatoil Overseas Inc* [1990] 1 Lloyd's Rep. 177, CA; it held that although the bankrupt had no funds of his own, he plainly had available sources of funds from elsewhere, including those of his wife, as evidenced in part by the standing of the counsel who had represented him: his appeal was however not hopeless, and although substantial security should be given, allowance would be made for his prospects of possible success, by fixing a lower sum than was sought. CPR, Pt 25, r.25.15 now governs security for costs of an appeal.

Under the IR 1986, security for costs can be applied for against any person "assuming the position of plaintiff, one who has invoked the jurisdiction of the Court", including a petitioner: see *Re Unisoft Group (No.2)* [1993] B.C.L.C. 532, V.-C. A solicitor's undertaking may be accepted by way of security for costs, in lieu of a bond: see *A. Ltd v B. Ltd* [1996] 1 W.L.R. 665.

Stay of Proceedings/Stay of Advertisement pending Appeal against Bankruptcy Order

3–2647.1 Paragraph 17.25 of the PDIP regulates the practice regarding a stay of proceedings pending appeal where a Judge of the High Court has made a bankruptcy order (or a winding up order). The Judge will not normally grant a stay of proceedings, but will confine himself to a stay of advertisement of proceedings and where the Judge has granted permission to appeal, any stay of advertisement will normally be until the hearing of the appeal, but on the terms that the stay will determine without further order if an appellant's notice is not filed within the period prescribed by the rules. Where the Judge refuses permission to appeal, any stay of advertisement will normally be for a period not exceeding 28 days. Application for any further stay of advertisement should be made to the Court of Appeal. The relevant paragraph is set out in Part IX of this Work.

This Practice Direction follows the practice and procedure under the former law where in only the rarest kind of circumstance would a stay of proceedings be justified. See in *Re A Debtor (No 644 of 1969)* under the old law regarding a stay of proceedings pending an appeal against a receiving order, reported in [2001] B.P.I.R. 901. It is furthermore submitted that the practice would be the same for an appeal against a bankruptcy order made by a Registrar of the High Court, or a District Judge of the County Court. Even if a stay of proceedings were in a rare case to be regarded as meritorious, since the appeal could be seen to have a very good prospect of success, it is submitted that the stay of proceedings could only be granted on undertakings as to disclosure of assets and liabilities to the official receiver and on compliance with such undertakings and where the official receiver could be happy that there would be no likelihood of prejudice to the bankrupt's estate. For an example of a case in which the appeal court ordered a stay of a bankruptcy order made in the county court, subject to undertakings given by the bankrupt, see *Emap Active Ltd v Hill* [2007] EWHC 1592 (Ch); [2007] B.P.I.R.1228.

[THE NEXT PARAGRAPH IS 3–2648.]

Subsection (3)

Unfettered jurisdiction of the county court in insolvency

3–2648 The text of this subsection reproduces that of s.105(2) of the Act of 1914, which applied to all bankruptcy courts.

Other appeals

Appeals by or against the Secretary of State and the Department of Trade and Industry and the official receiver

3–2649 Under the Act of 1914 provision was made by s.108(3), for appeals against decisions of the Department of Trade and Industry and the official receiver. Such appeals generally related to the release or removal of the trustee by the Department, and as to undistributed dividends, and as to the decisions of the official receiver, as chairman of the first meeting of creditors, as to creditors' rights to vote. The functions of release and removal are no longer to be performed by the Department, but either by the creditors or by the court (s.298(1) and IR r.6.132), or by the Secretary of State, in the case where he appointed the trustee (s.298(5) and IR r.6.133). In the case of a removal by the court, there is an "order", which can be appealed against, or reviewed, rescinded or varied; in the case of a removal by the creditors, however, or by the Secretary of State, there is no such "order"; but an appeal lies, under IR