Case No: A2/2015/2709

Neutral Citation Number: [2017] EWCA Civ 403

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Mrs Justice Proudman

Nos 2617 and 2618 of 2005

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 24 May 2017

**Before:**

THE MASTER OF THE ROLLS

LORD JUSTICE McCOMBE

and

LORD JUSTICE DAVID RICHARDS

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**Between:**

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| --- | --- | --- |
|  | 1. **SHEIDA ORAKI**
2. **ARDESHIR ORAKI**
 | Appellants |
|  | **- and -** |  |
|  | **(1) TIMOTHY BRAMSTON****(2) IAN DEFTY** | Respondent |

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**Leon Hines** (Solicitor, **Hines & Co**) for the **Second Appellant**

**The First Appellant** did not appear and was not represented

**John Briggs** (instructed by **DAC Beachcroft LLP**) for the **Respondents**

Hearing dates: 6, 7 and 8 December 2016

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Judgment

**Lord Justice David Richards:**

*Introduction*

1. The appellants, Dr Sheida Oraki and her husband Mr Ardeshir Oraki, brought an action for damages against the respondents as successive trustees in their respective bankruptcies. The respondents were alleged to have acted in breach of duty to the appellants in their conduct of the bankruptcies in a significant number of respects, but in particular it was said that they had prolonged the administration of the bankruptcy estates and had frustrated the appellants’ attempts to annul their bankruptcies. Following a seven-day trial, Proudman J dismissed the action. This appeal is brought with permission granted by the judge.
2. At the start of the hearing of the appeal, Mr Hines on behalf of the appellants sought an adjournment on two principal grounds. The first was the ill health of Dr Oraki. Mr Hines was instructed to appear on behalf of Mr Oraki but not on behalf of Dr Oraki, save for the purpose of seeking an adjournment. As between herself and her husband, Dr Oraki has taken the lead in all or most matters concerning their bankruptcies and the judgment on which they were based and Mr Hines stressed the desire of Dr Oraki to attend the appeal and make submissions. Mr Hines did however tell us that there was no difference between the cases and submissions that each of the appellants wished to make. The second ground was that an adjournment might enable the appellants to raise the funds needed to instruct counsel and that this was particularly important in view of some of the legal issues that arose on the appeal. However, Mr Hines has had a close involvement on behalf of the appellants in this case and more generally in their bankruptcies for some time, so he is very familiar with their cases. Although he does not have higher courts advocacy rights, he was able to demonstrate to us significant advocacy experience. As regards issues of law, Mr Hines and we had the advantage of the skeleton argument prepared for the trial by experienced counsel then instructed for the appellants. In these circumstances, and given that this is a very long-running case, we refused the adjournment. Mr Hines presented the appeal fluently and forcefully.
3. Mr Hines also applied to amend the grounds of appeal but, for the reasons given at the time by the Master of the Rolls, we refused the application.
4. There is a very disturbing background to the appellants’ bankruptcies. They were based on a judgment obtained against them by a firm of solicitors, Dean & Dean, in respect of apparently outstanding fees. Judgment was entered on 16 February 2004 for damages to be assessed, with an interim payment of £5,000 and costs of £3,858. Over eight years later, on 23 October 2012, it was ruled that the bankruptcies should be annulled and the judgment set aside, on the grounds that the judgment had been based on fraudulently charged fees. The judge, Mr Robert Ham QC (sitting as a Deputy High Court Judge), said that there had been a miscarriage of justice. His decision was made in the light of new evidence, that the solicitor employed by Dean & Dean who had handled the appellants’ matter had been admitted as a solicitor as a result of dishonest representations as to his legal qualifications and the dishonest non-disclosure of his criminal record in the United States, and that he had been struck off as a solicitor, on proof of these allegations (among many others), by the Solicitors Disciplinary Tribunal in June 2012.
5. On 21 January 2013, Mr Ham QC made an order for the annulment of the bankruptcies, conditional on (among other things) payment of the costs and expenses of the bankruptcies but also providing a time limit for any application by the appellants to challenge the respondents’ conduct as trustees in bankruptcy. The present proceedings were issued within that time limit.
6. The nature of the claims made in the present action was essentially one of professional negligence, as Proudman J said in her judgment. It was said that through their acts and omissions, the respondents failed to carry out their duties as trustees in bankruptcy to the standard required of an insolvency practitioner. The judge was right to express the duty in these terms, rather than, as pleaded, with the “same level of skill and care as a reasonable man of commerce would display in the management of his own affairs”, and there is no appeal against the standard as stated by the judge. Although the judge noted that claims of improper conduct were also made, they were not pleaded as such and the judge’s comment reflects, I think, the way in which the case was in part presented at trial. In any event, the judge found at [13] of her judgment that there had been no conscious wrongdoing by either of the respondents and there is no appeal against that finding.
7. So far as relevant to this appeal, the claims pursued by the appellants are for damages for loss said to have been caused to them personally for breach of duty owed by the respondents to the appellants personally. The claims are not for loss caused to their bankruptcy estates or for compensation to be paid to their estates.
8. This is an important distinction. Any claim for loss to the estate, for example by selling an asset at an undervalue, would be subject to the requirement under section 304(2) of the Insolvency Act 1986 (the Act) for the leave of the court where the claim is brought by the bankrupt. Because at all material times the estates were accepted to be solvent, in the sense that there would be a surplus, once sufficient assets had been realised to pay the provable debts and the costs of the bankruptcy, the appellants would have an obvious standing to make a claim in respect of loss to the estates. They did indeed make one claim for compensation to be paid to the estates in respect of an alleged failure to pursue debts and claims said to be owed or available to the estates and obtained permission under section 304(2) to do so. That claim was rejected by Proudman J and is not pursued on this appeal.
9. The personal claims made by the appellants raise some novel and difficult issues of law on, first, the duties, if any, owed by a trustee in bankruptcy to the bankrupt personally, as opposed to the bankruptcy estate of which he is trustee, and, second, if such duties exist, on the effect of a release under section 299 of the Act of a trustee who has ceased to hold office.
10. In my view, the right approach to this appeal is to consider first the factual bases of the relevant claims. The judge rejected the claims on the facts, before considering whether they were in any event maintainable at law.
11. The procedural history and the chronology of events are crucial to a consideration of the issues on this appeal. I will first set out first a brief chronology of the proceedings between Dean & Dean and the appellants.

*The proceedings between Dean & Dean and the appellants*

1. In and before 2002, Dean & Dean acted on behalf of the appellants and their matter was handled by Mr Shahrokh Mireskandari, who was then an employee of the firm. There was a dispute about fees and Dean & Dean issued proceedings and applied for summary judgment. On 16 February 2004, judgment was entered in the Brentford County Court against the appellants for damages to be assessed, with an interim payment of £5,000 and costs of £3,858 awarded against the appellants (the 2004 judgment). An appeal was dismissed by HH Judge Wakefield, who ordered the appellants to pay the costs of the appeal assessed at £11,193, and permission to appeal to the High Court was refused on the papers by Bean J (as he then was) and by Bell J following an oral hearing.
2. Dean & Dean threatened bankruptcy proceeding against the appellants, but refused to accept payment of the full amount of the judgment debt unless the appellants withdrew a complaint to the Law Society. The appellants refused to accept this wholly improper condition and Dean & Dean responded by petitioning for the bankruptcy of the appellants. Bankruptcy orders were made against Mr Oraki on 1 September 2005 and against Dr Oraki on 10 January 2006.
3. In June 2006, the appellants issued their first application in the Brentford County Court to set aside the 2004 judgment and to dismiss the claim. At a hearing on 24 July 2006, HH Judge Behar dismissed the application. Permission to appeal was refused on the papers in October 2006 by Butterfield J, who stated that it was “a hopeless appeal” with “not the remotest prospect that the appeal would succeed”. On a renewed oral application for permission to appeal on 13 December 2006, Keith J dismissed the application.
4. In 2008, allegations were published in the press that Mr Mireskandari had been convicted of a criminal offence in the United States, that his legal qualifications were bogus and that he had obtained admission as a solicitor by fraud. In December 2008, the Solicitors Regulation Authority intervened in his practice, which had the automatic effect of suspending his practising certificate.
5. The appellants had all along protested that the judgment against them was based on fraud on the part of Dean & Dean, and in particular on the part of Mr Mireskandari. The allegations published against him, together with the intervention in his practice, lent substance to their protests. They set about seeking to have the judgment against them set aside. Their attempts at first failed.
6. In March 2009, the appellants issued a second application in the Brentford County Court to set aside the judgment. The application was heard by HH Judge Oppenheimer on 9 November 2009, in the absence of Dean & Dean. The judge made an order setting aside the judgment, but on terms that gave any person with standing the opportunity to apply to set it aside by 23 November 2009. Such an application was made on behalf of Dean & Dean on 13 November 2009. On 11 January 2010, Judge Oppenheimer set aside his earlier order, with the result that the 2004 judgment remained in force. On 1 April 2010, Dr Oraki applied to the High Court (Queen’s Bench Division) for permission to appeal against the order made on 11 January 2010. The grounds included that Mr Mireskandari had obtained his practising certificate by fraud and so was not entitled to act as a solicitor or to charge as if he were a solicitor.
7. At this point the appellants’ attempts to challenge the 2004 judgment became so closely connected with applications in their bankruptcies that it is necessary to deal with them together.
8. On 18 November 2008, the appellants had issued an application in the High Court for the annulment of their bankruptcies under section 282(1)(a) on the grounds that the bankruptcy orders ought not to have been made. At the first hearing on 13 January 2009, Chief Registrar Baister adjourned the application generally, with liberty to restore it for hearing, to give the appellants the opportunity to apply to the Brentford County Court to set aside the 2004 judgment. It was restored for hearing on 9 April 2010 before Deputy Registrar Cheryl Jones. By then, of course, the attempt to set aside the judgment in the County Court had failed, but the appellants relied on the allegations by then being made against Mr Mireskandari in proceedings before the Solicitors Disciplinary Tribunal. The Deputy Registrar held that, until those allegations had been determined, the application was premature, and she dismissed it.
9. The appellants applied for permission to appeal against the order dismissing their annulment application. On 20 April 2011, having considered the application on the papers, Newey J refused permission, in view of the dismissal of the application to set aside the 2004 judgment in the Brentford County Court.
10. At the oral renewal of the application on 17 June 2011, Peter Smith J granted permission to appeal against the dismissal of the annulment application. He said: “The more I looked at this case the more I developed a great sense of unease about things that have happened”. He considered that “all of the appellants’ troubles flowed” from the 2004 judgment, but correctly observed that he had no jurisdiction to review that order, the appeal process having been exhausted in 2005. He referred to the allegations and disciplinary proceedings against Mr Mireskandari. He also identified serious procedural flaws in the 2004 judgment which had not previously been considered by any court concerned with the case. He considered that these matters arguably entitled the bankruptcy court to look behind the judgment. Subsequently, by an order dated 19 April 2012, Peter Smith J transferred the appellants’ application for permission to appeal against the order of Judge Oppenheimer dated 11 January 2010 from the Queen’s Bench Division to the Chancery Division and directed that it should be heard (with the appeal to follow, if permission were granted) at the same time as the appeal against the dismissal of the annulment application.
11. These applications came before Mr Robert Ham QC on 11 July 2012. By then, on 21 June 2012, the Solicitors Disciplinary Tribunal had given its decision in the proceedings against Mr Mireskandari, following a hearing of some five to six weeks. While evidence of the allegations against Mr Mireskandari had been put before Judge Oppenheimer in November 2009 and January 2010, the Tribunal’s decision meant that the case against Mr Mireskandari, and hence its significance to the 2004 judgment, was no longer a matter of assertion but had been established.
12. The Deputy Judge allowed the appeal against the dismissal of the annulment application, holding that the circumstances were such that there had been a miscarriage of justice and, in exercise of its bankruptcy powers, the court could go behind the 2004 judgment. He also set aside Judge Oppenheimer’s order dated 11 January 2010, thereby reviving the earlier order dated 9 November 2009 and setting aside the 2004 judgment.
13. The Deputy Judge allowed the appeals on terms requiring them to pay the costs and expenses of their bankruptcies, including those of the official receiver and their trustees in bankruptcy. The appellants appealed to this court against the imposition of those terms but their appeal was dismissed: see [2013] EWCA Civ 1629, [2014] BPIR 266.

*Chronology of the bankruptcies*

1. It will be necessary to look in some detail at some parts of the history of the bankruptcies when considering the issues on this appeal, but I set out the bare bones of the chronology in order to set the issues in context.
2. As earlier mentioned, the bankruptcy orders were made in the High Court against Mr Oraki on 1 September 2005 and against Dr Oraki on 10 January 2006. The official receiver became the trustee of their bankruptcy estates by virtue of section 293 of the Act. They were automatically discharged from bankruptcy one year after the orders made against them respectively, but of course the administration of their bankruptcy estates continued.
3. On 17 September 2005, Mr Oraki issued an application to annul his bankruptcy under section 282(1)(a) of the Act on the grounds that the order ought not to have been made. It was dismissed on 3 November 2005. Under cover of a letter dated 23 January 2006, Dr Oraki sent to the court an application to annul her bankruptcy under section 282(1)(b) on the grounds that all amounts due would be paid or secured to the satisfaction of the court. Although she maintained that the bankruptcy order ought not to have been made, she stated that she was content not to proceed on that basis in order to resolve the matter. At a hearing on 23 February 2006, Registrar Simmonds adjourned Dr Oraki’s application generally, with liberty to restore. In the following months (June – December 2006), the application to set aside the 2004 judgment was dealt with in the Brentford County Court and the High Court: see [14] above. Proceedings in the bankruptcies were stayed by an order made on 11 August 2006 pending the application for permission to appeal to the High Court. Following the final refusal of permission to appeal in December 2006, the stays were lifted, on the application of the official receiver, by an order made on 26 March 2007.
4. The first respondent, Mr Bramston, was nominated for appointment as trustee of both estates by Dean & Dean in a letter to the official receiver dated 27 March 2007. On the official receiver’s application under section 296 of the Act, Mr Bramston was appointed as trustee on 19 April 2007. I should pause here to say that the appellants have regarded this nomination as very suspicious and as showing that Mr Bramston was not independent. It is, however, often the case that the official receiver consults the petitioning creditor on the choice of trustee and it is not right to treat it as reflecting on a trustee’s independence, nor of course does it affect the trustee’s statutory obligations.
5. Throughout the rest of 2007 and during 2008, there was extensive communication between Mr Bramston and the appellants. It will be necessary to refer later in this judgment to some of these communications.
6. In the early months of 2008, the appellants again pursued the possibility of applying to annul their bankruptcies, under section 282(1)(b) on the basis of paying or securing the provable debts and the costs of the bankruptcies, but nothing came of this.
7. In June 2008, Mr Bramston issued applications for possession of four properties registered in the name of Dr Oraki, one jointly with her husband. On 20 October 2008, possession orders were made in respect of two of the properties, suspended until 20 November 2008.
8. Following the allegations about Mr Mireskandari appearing in the press in September 2008, the appellants issued their application on 18 November 2008 to annul their bankruptcies under section 282(1)(a) on the grounds that the bankruptcy orders ought not to have been made (see [19] above). The return date for the application was 13 January 2009. In light of this application, Mr Bramston did not enforce the possession orders and agreed to take no further steps in the bankruptcies pending its determination.
9. In about December 2008, Mr Bramston left his firm, having given notice to do so a year earlier. He retired from all current appointments as an insolvency office-holder and, by an order made by Mann J on 8 December 2008, he was replaced in those appointments by the second respondent, Mr Ian Defty, a partner in the same firm. Mr Defty therefore became the trustee of the bankruptcy estates of both appellants. He held office until April 2014, long after the period relevant to the present case, and was succeeded by the present trustee who is not involved in these proceedings.
10. At the first hearing of the annulment application on 13 January 2009, Chief Registrar Baister adjourned the application generally, with liberty to apply, to enable the appellants to make the application to the Brentford County Court to set aside the 2004 judgment (see [17] above). In the light of this application and at the request of the appellants, Mr Defty agreed to not to take any significant steps in the bankruptcies until it had been determined.
11. Following Judge Oppenheimer’s order on 11 January 2010 dismissing the application to set aside the 2004 judgment, Mr Defty requested the Bankruptcy Court to list the annulment application, together with other applications by the trustee that had effectively been stayed, for hearing. The annulment application was listed for hearing on 9 April 2010 when Deputy Registrar Cheryl Jones dismissed it, as premature while the allegations made in the disciplinary proceedings against Mr Mireskandari remained unresolved (see [19] above).
12. As detailed in [20] above, the appellants sought to appeal against the dismissal of the annulment application, and while they did so Mr Defty again did not take any significant steps in the bankruptcies, at the request of the appellants.

*The claim against the respondents*

1. The present proceedings were issued in February 2013, as a claim “for damages for breach of duty as a trustee, breach of fiduciary duty and negligence”.
2. A number of breaches of duty were alleged in the re-amended particulars of claim. First, it was said that the procedural defects in the 2004 judgment ought to have been apparent to the respondents’ solicitors and therefore to the respondents.
3. Second, it was alleged that the Respondents:

“failed to bring the Claimants’ bankruptcies to an end in an expeditious manner so as to minimise the fees and charges payable from the Claimant’s estates and/or the Defendants passively or actively obstructed the Claimant’s efforts to bring their bankruptcies to an end in an expeditious manner. In particular, the Defendants failed to cooperate with three insolvency practitioners appointed by the Claimants to liaise with them. This had the effect of precluding the possibility of the bankruptcies is [sic] being resolved under section 282(1)(b) of the Insolvency Act 1986 at an early stage.”

1. Third, it was alleged that the Respondents failed to use an available sum of just over £150,000 to settle the liabilities in the bankruptcies.
2. Fourth, it was said that the Respondents had sought exorbitant fees for themselves and their agents and advisors.
3. Fifth, it was said that the Respondents had wrongly accepted certain claims against the estates, making it more difficult for the appellants to seek annulments of their bankruptcies under section 282(1)(b) of the Act.
4. Sixth, the Respondents delayed in providing the appellants with an assignment of the right to challenge the 2004 judgment, thereby delaying their opportunity to set aside the judgment and apply with a good prospect of success for the annulment of their bankruptcies.
5. Seventh, the Respondents sought to oppose the appellants’ attempts to set aside the 2004 judgment and to annul their bankruptcies, instead of acting neutrally.
6. Eighth, the Respondents failed to enforce a judgment in favour of theappellants and failed to pursue negligence claims against Dean & Dean and another firm of solicitors.
7. Ninth, the Respondents unreasonably sought possession orders of the appellants’ properties, thereby incurring unnecessary costs, and wrongly placed restrictions on the titles of those properties and prevented them from re-mortgaging the properties on advantageous terms from 2008.
8. Although the particulars of claim challenged the quantum of the respondents’ costs in the bankruptcies, this challenge is being pursued in separate proceedings and the appellants accept that it cannot also be pursued in the present proceedings.
9. The relief sought by the appellants was pleaded as being partly for the benefit of their respective estates, to which section 304 of the Act applied, but principally for themselves personally. They claimed damages on their own account for (i) the loss of opportunity to carry on their property development business, because their capital remained in the possession of the respondents; (ii) the legal costs incurred by the appellants and the time spent by the appellants personally in dealing with their bankruptcies; (iii) the loss of the opportunity to obtain advantageous terms for re-mortgages of their properties; (iv) costs and lost rent in respect of their properties; and (v) mental distress.

*Proudman J’s judgment*

1. In a careful judgment, Proudman J dealt with each of the claims pursued at trial and dismissed them all. She expressed great sympathy for the predicament that the appellants found themselves in, describing it as Kafkaesque. But she was critical too of the appellants, particularly Dr Oraki who had “reported everyone in sight to everyone she can think of, accused the trustee of dishonesty and collusion with the firm, accused the trustee of taking the money in the Insolvency Services account illegally and alleged forgery of the block transfer order”.
2. As the focus of this appeal as advanced by Mr Hines at the hearing is narrower than at trial, it is unnecessary to summarise all the judge’s findings and conclusions. I will refer to those parts of her judgment relevant to the issues on this appeal as I deal with them.

*The issues on the appeal*

1. As regards the factual basis for the claims, two grounds of appeal were advanced by Mr Hines. First, the judge was wrong not to find that Mr Bramston and Mr Defty had unnecessarily prolonged the bankruptcies, by failing to use the liquid funds available to them to pay the debts, costs and expenses of the estates. Secondly, and more broadly, the judge was wrong not to find that Mr Bramston and Mr Defty had unnecessarily prolonged the bankruptcies, in particular by actively opposing the applications by the appellants for the annulment of their bankruptcies.

*Annulment of a bankruptcy: the law*

1. Before turning to consider the two broad grounds of appeal on the facts, I will outline the law governing the annulment of a bankruptcy, which is critical to an understanding of the factual issues.
2. Provision for the annulment of a bankruptcy is made by section 282 of the Act. There are two alternative bases on which a bankruptcy may be annulled, as set out in section 282(1):

“The court may annul a bankruptcy order if it at any time appears to the court-

(a) that, on any grounds existing at the time the order was made, the order ought not to have been made, or

(b) that, to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for the satisfaction of the court.”

1. Section 282(3) provides that the court may annul a bankruptcy whether or not the bankrupt has been discharged from the bankruptcy. As earlier noted, Mr Oraki and Dr Oraki were discharged on 1 September 2006 and 10 January 2007 respectively.
2. In the present case, the appellants have made or contemplated applications under both paragraphs of section 282(1). As is clear from the terms of those paragraphs, they are directed at two quite separate situations. Paragraph (a) requires it to be shown that the bankruptcy order should not have been made, while paragraph (b) assumes that the bankruptcy order was rightly made and the debtor proposes to pay or secure all costs and claims to the extent required by the Insolvency Rules.
3. The basis of the applications made by the appellants under section 282(1)(a) has been that the 2004 judgment should not have been entered against them and should be set aside. While there is debate as to the circumstances in which a bankruptcy should be annulled under section 282(1)(a) or rescinded under section 375 of the Act, all the proceedings to bring the bankruptcies to an end in the present case have been taken under section 282 without objection or question by the successive trustees or the court.
4. Further provision is made by the Insolvency Rules 1986 (the Rules). At all times relevant to this case, the relevant provisions were contained in Chapter 21 and references below are to the rules then in force.
5. Rule 6.206(4) provided that an application for annulment under section 282(1)(a) must be served on the trustee in sufficient time for him to be present at the hearing and an application under section 282(1)(b) must be served not less than 28 days before the hearing. An application under section 282(1)(a) must also be served on the petitioning creditor, reflecting his direct interest in the application.
6. Rule 6.207(2) provided that not less than 21 days before the hearing, the trustee (or the official receiver, if no trustee had been appointed) shall file in court a report with respect to the circumstances leading to the bankruptcy, the extent of the bankrupt’s assets and liabilities, details of any creditors known to him who had not proved and “such other matters as the person making the report considers to be, in the circumstances, necessary for the information of the court”. A trustee’s report must include a statement of his remuneration and expenses. The report must also include particulars of the extent to which, and the manner in which, the debts and expenses have been paid or secured and in respect of unpaid debts and expenses the trustee or official receiver must state “whether and to what extent he considers the security to be satisfactory”.
7. The purpose of section 282(1)(b) is to provide a relatively simple and inexpensive way out of bankruptcy. Costs are not incurred by the trustee in adjudicating claims. Where claims are disputed by the bankrupt, they will not be paid but instead secured to the satisfaction of the court. Following the annulment, the claimant and the former bankrupt can litigate or otherwise resolve the dispute.
8. Under rule 6.208, the court may grant an interim stay of any proceedings pending the hearing of the annulment application.
9. Rule 6.210 provided that “[t]he trustee shall attend the hearing of the application”. This requirement applies whether the application is made under paragraph (a) or (b) of section 282(1).
10. By requiring the trustee’s attendance at the hearing of any annulment application and a report in the case of any application under section 282(1)(b), the legislation clearly envisages an active role for the trustee. The duty of the trustee is to represent the interests of creditors generally. It is not for the trustee to fight the petitioning creditor’s corner on an application under section 282(1)(a) but he is under a duty, as representing the interests of creditors generally and as an officer of the court, to draw to the attention of the court any facts, points of law or other material factors known to him which are or may be relevant to the court’s consideration of the application.

*First ground: the claim that the Respondents unnecessarily prolonged the bankruptcies by failing to use the available cash resources*

1. The first ground of appeal focuses principally on the acts and omissions of Mr Bramston as trustee in bankruptcy of the two estates in 2007-2008. Mr Hines submitted that Mr Bramston had under his control sufficient cash to meet all the liabilities of the bankruptcy estates and to pay all the costs and expenses. The cash on which Mr Hines principally relied for this submission is a sum of £150,530.17 which was transferred from an account in the name of Dr Oraki to the Insolvency Services Account (the ISA) to the credit of Dr Oraki’s bankruptcy in December 2007. After payment of £25,458 by way of statutory charge on realisations, a sum of £125,071 was left standing to the credit of the estate in the ISA (the ISA funds). In addition, Mr Hines submitted that Mr Bramston had access to a sum of approximately £20,000 standing to the credit of a joint account in the names of Dr Oraki and her brother-in-law.
2. When Mr Bramston was appointed trustee of the appellants’ estates in April 2007, he received documents from the official receiver, detailing the assets and liabilities known to the official receiver. For Dr Oraki, the liabilities totalled £66,615 and the assets totalled £266,075, comprising principally four freehold properties. Dr Oraki was the joint registered proprietor with her husband of one property, to which a value of £210,000 for the entire equity in the property was given, and the sole registered proprietor of three others, including the matrimonial home at 68 Gladstone Avenue, Whitton, Twickenham (Gladstone Avenue). The value of these was stated to be uncertain. In addition, a sum of £19,000 was stated to be held in a joint account. This was the joint account with Dr Oraki’s brother-in-law, to which Mr Hines referred in his submissions. For Mr Oraki, his assets were shown as his interest in the jointly-held property and his liabilities as £21,976.
3. While, therefore, the estates were solvent, there appeared to be only very limited liquid funds, and certainly not sufficient to pay the listed liabilities.
4. Subsequent events confirmed that there were significant illiquid assets in the bankruptcy estates. In October 2007, Mr Bramston discovered three further properties held in the joint names of the appellants, thus on the face of it increasing the assets available in the bankruptcies, although issues were raised by the appellants about their beneficial ownership. The drive-by valuations obtained by Mr Bramston of four properties for which he sought possession orders in 2008 attributed a total value of some £726,000 to the equity in those properties.
5. On 21 January 2008 Mr Bramston, at the request of Dr and Mr Oraki**,** prepared estimated outcome statements for both estates as at 7 January 2008. Taking account of all costs, expenses, claims and interest (including in some cases estimates), these statements showed that the total amounts required to clear all debts and claims was £105,065 for the estate of Dr Oraki and £50,332 for the estate of Mr Oraki. These figures increased in subsequent estimated outcome statements, as a result of an increase in the amount allowed for Dean & Dean’s claims and increasing bankruptcy costs.
6. Mr Hines submits that, quite apart from there being sufficient cash available to meet all claims on the basis of the estimated outcome statements prepared in January 2008, there would have been very much more than was needed if Mr Bramston as trustee had properly investigated the claims of creditors and determined the amounts they could properly claim. Substituting for the figures for claims appearing in the estimated outcome statements as at 7 January 2008, the figures determined by Registrar Jones in a judgment given in October 2016 on an appeal by the appellants against the acceptance of proofs, the amount needed to pay all claims in the estates were £23,167 in the case of Mr Oraki and £46,876.25 in the case of Dr Oraki. If the same exercise is undertaken in respect of estimated outcome statements as at 3 March 2008, the amounts required increase only slightly to £23,476 in the case of Mr Oraki and £52,166 in the case of Dr Oraki. On either basis there was, Mr Hines submitted, more than sufficient cash available to meet all these debts and claims.
7. In failing to apply the available cash in meeting all the claims and debts in the estates, Mr Hines submits that Mr Bramston unnecessarily delayed the completion of the bankruptcies.
8. The decisive question on this first issue is the status and availability of the sum of the ISA funds. If they were available for distribution among creditors and in payment of the costs and expenses of the bankruptcies, they were sufficient or nearly sufficient for that purpose, at least in early 2008.
9. At [57]-[58] of her judgment, Proudman J made findings as to the circumstances in which this sum became known to Mr Bramston:

“57 On 27 September 2007 Mrs Wilson received a call from John Hynds of Barclays Bank plc saying that Dr Oraki had opened an account in August 2007 into which £156,369 had been deposited on 25 September 2007 and that Dr Oraki had tried to transfer £120,000 from the account. It transpired that the funds had come from the sale of a property, 22 Simpson Road, Hounslow, registered at the time of her bankruptcy in Dr Oraki’s sole name. This property had not been disclosed to the official receiver, even on the basis that Dr Oraki had no beneficial interest in it.

58 At the hearing seeking a private examination Dr Oraki sought unsuccessfully to adduce a witness statement which said that the property had come from Dr Oraki’s mother’s estate which belonged jointly to Dr Oraki, her brothers and her sister and that her brothers and sister would bring proceedings to reclaim the money. The trustee considered that he could not conclusively decide that the £156,369 was part of the bankruptcy estate because of Dr Oraki’s assertion that the funds were subject to a trust. On 18 October 2007 Salans wrote to Dr Oraki on behalf of the trustee again asking for an interview and saying that it was impossible for the trustee to be able to determine whether the moneys in the account belonged to the bankruptcy estate or not. The letter sets out in detail the kind of information needed by the trustee to make such a determination, such as a copy of Dr Oraki’s mother’s will. Such information has never been provided.”

Mrs Wilson, to whom the judge refers in [57] was an assistant to Mr Bramston working on the bankruptcies and Salans were the solicitors acting for Mr Bramston and then Mr Defty.

1. In the witness statement to which the judge refers in [58], Dr Oraki stated:

“I was discharged from the bankruptcy on 10 January 2007. On a visit to the UK I went to Barclays Bank and showed a letter of discharge and opened a new account. I have made some transactions on the new account, but on 20 September £157,000 came into the account from my mother’s estate, which belongs jointly to me, my brothers and sister. Now, Barclays Bank has told me SALANS have written to them to freeze the account. The trustee improperly and unlawfully intercepted funds in my account. The funds on my account are in trust for my brothers and sister and me, in equal shares, arising from my mother’s death last year. I expect my brothers and sister will apply to the court for a court order to secure and obtain these funds.”

1. Dr Oraki attended for an interview with Mr Bramston on 4 January 2008. She confirmed what she had previously said, that the sum of £150,369 paid into her account at Barclays Bank represented proceeds of sale of the property at 22 Simpson Road, Hounslow, that had formed part of her deceased mother’s estate. She and her five siblings were entitled to that sum in equal shares, meaning that her share of the £150,369, amounting to just over £25,000, would be insufficient to pay or provide for the liabilities in her bankruptcy. Mr Bramston reasonably required evidence of the beneficial interests of Dr Oraki’s siblings. Both at the interview and in a letter dated 17 January 2008, Dr Oraki agreed to provide documentary evidence of the trust but never in fact did so.
2. The question of the ownership of the ISA funds was raised at the hearing of the applications for possession orders on 19 August 2008. Shortly before the hearing, the solicitor then acting for the appellants told Mr Bramston’s solicitor, Mr Varley of Salans, that the other beneficiaries were willing to agree to the funds being used in the payment of bankruptcy debts and costs. At the hearing Mr Varley emphasised that there was no direct evidence of the other beneficiaries’ agreement and that Mr Bramston would need their consent in writing. If the funds were indeed held on trust, this was clearly a reasonable, indeed essential, requirement. The appellants’ solicitor stated that his instructions were that the other beneficiaries would be prepared to provide written authority for the funds to be used in the discharge of the sums owed. The applications were adjourned, in part to enable these authorities to be obtained.
3. In her evidence at the trial, Dr Oraki said that at the hearing on 19 August 2008 she produced an affidavit from one of her brothers which stated that he had the authority of the other siblings to give the necessary consent. The judge rejected this evidence, which finds no support in the transcript of the hearing. There is no appeal against this finding by the judge.
4. As the judge found at [78], notwithstanding what was said on behalf of the appellants at the hearing on 19 August 2008, no written authority has ever been produced, nor in fact any details of the alleged trust.
5. In conclusion on this point, the judge said at [80] – [81]:

“80. Were the Orakis obviously solvent so that cash assets could have been used to defray the bankruptcy debts without recourse to any of the real properties?

81. I do not accept Mr French’s contention that the money in the Insolvency Services account could have been used to defray the bankruptcy debts. Dr Oraki insisted that she only owned one-fifth of those moneys [this should be one-sixth]; she did not explain how the alleged trust came about; she did not prove the ownership of the moneys and she did not produce any proof that the true beneficial owners were willing to use the moneys to pay the Orakis’ bankruptcy debts. I do not therefore consider that the trustee could or should simply have assumed without more that 22 Simpson Road belonged beneficially to Dr Oraki, particularly as this is at odds with her oral evidence that it did not and that was why she did not disclose it to the official receiver. Nor do I consider that Dr Oraki can rely on a waiver from her siblings as there was none.”

1. In my judgment, that conclusion is unimpeachable for the reasons there given by the judge. It is not necessary to repeat or add to them.
2. In the light of the failure to produce the authority promised on 19 August 2008, Mr Bramston was concerned to establish the true status of the ISA funds. On 21 October 2008, he issued an application seeking a declaration as to the ownership of the funds. As he explained in his witness statement in support of the application, his position was, in the absence of evidence to the contrary, that there was no trust and the funds belonged to the bankruptcy estate.
3. In the light of the appellants’ application to annul their bankruptcies issued on 19 November 2008 (see [19] above), Mr Bramston and then Mr Defty agreed to an informal stay of proceedings in the bankruptcies. In a letter dated 20 January 2009, the appellants’ solicitors requested Mr Defty to adjourn the application in respect of the ISA funds until the annulment application had been dealt with. Mr Defty agreed and on 4 February 2009 Deputy Registrar Middleton adjourned the application generally with liberty to restore.
4. That remained the position until after Judge Oppenheimer’s order in January 2010, dismissing the application to set aside the 2004 judgment (see [17] above), whenMr Defty requested the court to list the application as regards the ISA funds for a hearing. A hearing took place on 30 April 2010 at which directions were given for Dr Oraki to file evidence in answer to the application and for Mr Defty to file evidence in reply. The application was adjourned to 29 September 2010. Dr Oraki did not file any evidence.
5. By a letter dated 17 September 2010, Dr Oraki requested agreement to an adjournment of the application, pending, first, determination of the appellants’ applications for permission to appeal against Judge Oppenheimer’s order of 11 January 2010 and against the dismissal of their annulment application (see [20] above) and, secondly, determination of the disciplinary proceedings against Mr Mireskandari. Mr Defty agreed the adjournment pending determination of the applications for permission to appeal. After Peter Smith J gave permission to appeal the dismissal of the annulment application in June 2011, Mr Defty agreed that the application be adjourned generally, with liberty to restore, pending determination of the appeal.
6. In my judgment, the overall conclusion in relation to the ISA funds is inescapable that they were not available at any relevant time for use in paying or providing for the bankruptcy debts and costs of either of the appellants. By maintaining (whether or not correctly) that the funds were beneficially owned by her five siblings and herself, but failing to provide any authority on which the respondents could rely that the funds could be used to pay the debts and costs, Dr Oraki precluded the use of the funds for this purpose. No criticism can be made of the respondents for agreeing to adjournments of the application as regards the ISA funds while the appellants sought to set aside the 2004 judgment and annul their bankruptcies, all the more so as these were at the request of the appellants. Nor can the appellants criticise the respondents for not earlier seeking to establish that Dr Oraki’s own case on the ownership of the funds was wrong. If it was wrong – and, as we were told, that has yet to be decided – it was always open to Dr Oraki to say so.
7. Without access to the ISA funds, it was not possible for Mr Bramston or Mr Defty to bring the bankruptcies to an end by the use of cash resources, even assuming the revised figures for debts and costs put forward by Mr Hines. Those figures are not themselves a reliable guide for these purposes. The estimated outcome statements provided by Mr Bramston in 2008 included a sum of £2,000 for future costs, but that was on the basis that the appellants would pay or secure all the alleged debts in accordance with section 282(1)(b). The figure would necessarily have been very significantly larger if all the claims of creditors were to be investigated and determined. It should also be noted that the respondents did not have liquid funds at their disposal to carry out such investigations.
8. Further, reliance cannot be placed on the sum of about £19,000 standing to the credit of the joint account of Dr Oraki and her brother-in-law. Dr Oraki told Mr Bramston in her letter dated 17 January 2008 that it was her brother-in-law’s account and she had no interest in it. In an email dated 16 May 2009 to Mr Defty, she confirmed that her name was on the account only as a UK contact and that she had no interest in it.
9. Accordingly, I would reject this first ground of appeal. It was not open to either Mr Bramston or Mr Defty at any time to bring the bankruptcies to an end by the use of cash resources.

*Ground 2: the claim that the respondents unnecessarily prolonged the bankruptcies by obstruction of the appellants’ applications to annul their bankruptcies*

1. The focus of Mr Hines’s submissions was the joint application by the appellants to annul their bankruptcies under section 282(1)(a) of the Insolvency Act after the publicity given in and after September 2008 to allegations of fraud against Mr Mireskandari (see [32] above). Some submissions were made in respect of earlier attempts to annul their bankruptcies and, in any event, it is appropriate to set the context for the later applications.
2. I propose to set out the narrative, which necessarily has to be detailed, before dealing with the acts and omissions on the respondents’ part that are said to give rise to claims for breach of duty against them. I set out and address the particular acts and omissions on which the appellants rely in [170] and following below.

*Chronology relevant to Ground 2*

1. Although bankruptcy orders were made against Mr Oraki in September 2005 and against Dr Oraki in January 2006 on the basis of the 2004 judgment and although an appeal against the judgment had been dismissed by a Circuit Judge and the High Court had twice refused permission for a second appeal, the appellants continued their efforts to set aside the original judgment. Earlier in this judgment, I have summarised the steps taken by the appellants in 2005 and 2006. The bankruptcies were stayed by an order made on 11 August 2006 pending applications to appeal against the dismissal of applications to the Brentford County Court to set aside the judgment entered in February 2004. Permission to appeal was refused by Keith J following an oral hearing on 13 December 2006, thus marking the end of the steps that could be taken to set aside the judgment (see [14] above). In January 2007, the official receiver applied for the stays on the bankruptcies to be lifted, and they were lifted on 26 March 2007.
2. In February 2007, the official receiver filed with the court a report which, among other things, set out particulars of the liabilities and assets of the bankruptcy estates of Mr and Dr Oraki. Four liabilities of Dr Oraki were listed, totalling £66,615.57 and including £20,052.38 due to Dean & Dean in respect of “unpaid legal fees and costs”. The report recorded that Dr Oraki disputed all these liabilities, except for a debt to the Inland Revenue which she partially disputed. The only liability of Mr Oraki stated in the report was the debt of £20,052.38 to Dean & Dean, which he was recorded as disputing.
3. By a letter dated 12 April 2007, Ellis Taylor, solicitors then acting for the appellants, asked the official receiver for the figures needed to pay the debts, costs and expenses in Mr Oraki’s bankruptcy. The official receiver replied on 13 April 2007, referring to the sum of £20,052.38 due to Dean & Dean and to £1,924 claimed by HMRC. He added that, in addition, Ellis Taylor would need to confirm with Dean & Dean their costs and expenses incurred in the presentation of the bankruptcy petition and that legal costs might be payable to the official receiver as well as a standard administration fee of £1,924.
4. Mr Bramston was appointed the trustee of both estates with effect from 19 April 2007 (see [28] above).
5. In accordance with usual practice for a trustee, Mr Bramston and, subsequently, his solicitors requested Dr and Mr Oraki to attend a meeting with him at a mutually convenient time and place. They declined to do so and also refused to answer a written questionnaire on the grounds that they had already answered the official receiver’s questionnaire. Mr Bramston was aware that they had done so, but he considered that he required more information. Dr Oraki had asked Mr Bramston to liaise with her insolvency advisor, Stephen Harfitt, which he did. Mr Harfitt stressed to her that she was obliged to attend for interview, as indeed was the case under section 333(1) of the Act.
6. The need for an interview was demonstrated by the discovery in the course of 2007 of further assets held by Dr Oraki that had not been disclosed to the official receiver. First, enquiries at the Land Registry disclosed that Dr Oraki and Mr Oraki were the joint registered proprietors of three properties in addition to those disclosed by them to the official receiver. Dr Oraki later said that two of the properties belonged to them and the third belonged to her father. Secondly, as earlier detailed, Mr Bramston was informed in September 2007 by Barclays Bank of the sum of over £150,000 paid into a new account in Dr Oraki’s name, representing the proceeds of sale of the property at 22 Simpson Road that had been registered in her name at the date of her bankruptcy. Even following the interview in January 2008, full disclosure was not made. In June 2008, Mr Bramston learned that Dr Oraki was the registered proprietor of two further properties.
7. On 19 July 2007, the trustee issued an application for orders that Dr and Mr Oraki attend for a private examination under section 366 of the Insolvency Act. They opposed the application on the grounds that Mr Bramston already had all the information he needed. The application was heard on 29 November 2007 when an order was made for their private examination at court on 18 January 2008 and for them to attend for an interview on a more informal basis on 4 January 2008. The appellants were ordered to pay the costs of the application. The purpose of the informal interview was to avoid the time and cost of a private examination if the trustee was given the information he needed.
8. During 2007, the appellants pursued the possibility of applying for the annulment of their bankruptcies under section 282(1)(b). For this purpose, they would need to know the full amount of the bankruptcy debts and the expenses of the bankruptcy. In the course of his submissions, Mr Hine referred us to a number of letters in the course of 2007 in which the appellants had requested this information.
9. The difficulty facing Mr Bramston was that until the appellants attended for interview he was not in a position to say whether there were likely to be debts or claims not previously disclosed or claimed. Mr Bramston explained this in a letter dated 10 December 2007 to The Institute of Chartered Accountants in England and Wales, his licensing body, to whom Dr Oraki had complained about his failure to deal with her correspondence.
10. Dr Oraki attended for an interview with Mr Bramston on 4 January 2008. I have earlier referred to what Dr Oraki said about the ISA funds. There was also discussion as to what the appellants would need to do in support of an annulment application under section 282(1)(b). Mr Bramston said (at page 51 of the transcript):

“You need to take renewed advice in your position what type of Applications you’re pursuing. My comments now are only on the basis of the payment in full. I will write to you setting out the sum you need to pay to discharge all the known liabilities and debts. That will include interest, it will include everything, it will be a large figure at the end of the day. For you to get annulment it will be necessary to you to pay that sum into court, then you can dispute any of the sums thereafter and they can be dealt with by you after that event. In the event that you pay the sum I require to be paid in, I won’t object to the annulment. I’m in a different position having met with you than I was before, and so we can now progress to the next step.

It’s important for you to do it as soon as possible because you don’t want my costs racking up further than they have done at the moment. I will tell you what my costs are, I’m not going to explain it now, but I will in the schedule I produce, I will show you what my costs are at that particular point in time.

I would suggest take your own advice, but I’d suggest to you that you make your disputes after the event not before the event. And your solicitor can deal with that aspect on how to deal with the arrangement post the annulment.”

1. Mr Bramston took immediate steps to ascertain claims, by publishing notices that creditors should lodge claims by 4 February 2008. Letters were sent on the same day to those persons who appeared to have a claim but had not submitted a formal claim, enclosing a copy of the notice.
2. By a letter dated 17 January 2008, Dr Oraki provided much, but not all, of the information that she had agreed to give. In particular, she did not give details of the family trust that she said had owned 22 Simpson Road and other properties but undertook to do so. She did not subsequently provide these details, despite protests in and after March 2008that she had given all the required information.
3. The position as regards proofs of debt lodged by creditors was as follows. HMRC lodged a proof for £1,907.04 in Mr Oraki’s bankruptcy in August 2007 and a proof for £10,213.29 in Dr Oraki’s bankruptcy on 14 January 2008. On 5 November 2007, Bathurst Brown Downie & Airey LLP lodged a proof for £10,223.50 in Dr Oraki’s bankruptcy in respect of a default judgment for unpaid fees. On 4 December 2007, Dean & Dean lodged proofs in both bankruptcies, to which I refer below. The evidence available to Mr Bramston showed that “Bulwant Singh Gill & P Gill/Pam.Com” were creditors in respect of a judgment for £19,165 against Dr Oraki. Solicitors acting for PAM.COM Limited (Pam.Com) provided evidence to Mr Bramston in August 2008 that it had taken an assignment of a judgment dated 20 February 2002 against both appellants for £18,169.77 in respect of arrears of rent and building insurance.
4. Under cover of a letter dated 21 January 2008, Mr Bramston sent to Dr Oraki estimated outcome statements for herself and Mr Oraki as at 7 January 2008, noting that Dean & Dean’s debt had been split in half between them. The figures for Dr Oraki showed creditors’ claims received of £51,064 and costs and expenses totalling £44,536. The creditors were Dean & Dean (£10,026 – half their judgment debt), Bathurst Brown (£11,843), “Bulwant Singh Gill & P Gill/Pam.Com” (£19,165) and HMRC (£10,030). The largest item in the costs and expenses was £17,861 for statutory fees (payable to public funds) and the next largest was an estimate of £7,714 for half of Dean & Dean’s costs as petitioning creditor. Mr Bramston’s fees to date were £7,608, with an estimate of further fees of £2,000 to finalise the administration of the estate, assuming the bankruptcy was annulled. The figures for Mr Oraki were debts of £13,857 and costs and expenses of £32,583. The creditors were Dean & Dean (£10,026 – half their judgment debt) and HMRC (£1,907 and a potential claim of £1,924). The costs and expenses included £8,556 for statutory fees and an estimate of £7,714 for half the costs of Dean & Dean as petitioning creditor. Mr Bramston’s fees were £5,354, with an estimate of further fees of £2,000 to complete the administration, again assuming a successful annulment application. Both estimates also included post-bankruptcy interest on creditors’ claims at the statutory rate of 8% pa from the date of bankruptcy. The total estimated amounts needed to clear the appellants’ bankruptcies were £105,065 for Dr Oraki and £50,332 for Mr Oraki.
5. As earlier mentioned, the estimates for further fees for Mr Bramston were on the basis that he would not be required to investigate creditors’ claims, but that any that were disputed by the appellants would be paid into court or secured by a bond to the extent required by the court. It was made clear on the face of the outcome statements that the figures were estimates and were subject to change.
6. In his letter dated 21 January 2008 to Dr Oraki, Mr Bramston strongly suggested that she should take legal advice, and gave her, as she had requested, details of three suitable firms.
7. By a letter dated 28 January 2008, Mr Bramston informed Dr Oraki that there might be an error in respect of Dean & Dean’s costs.
8. Because Mr Hines submitted before us that Mr Bramston behaved in breach of duty in respect of the claims of Dean & Dean, it is necessary to look at this in detail.
9. The figures for Dean & Dean’s costs, as provided to the appellants on 21 January 2008, were estimates, as the outcome statements made clear. Mr Bramston was in contact with Dean & Dean to obtain a clearer breakdown of the claims made by them. With a letter dated 4 February 2008, Dean & Dean provided an itemised schedule of their claims against each estate. The copies in evidence have Mr Bramston’s handwritten decisions on each item. He accepted their claims for:

(i) the petition debt of £20,052.38, comprising the sums payable pursuant to the 2004 judgment, that is: £5,000 on account of the claim for fees that was the subject-matter of the action, £3858.75 being the summarily assessed costs of the hearing at first instance, and £11,193.63 being the summarily assessed costs of the appeal dismissed by Judge Wakefield in October 2004;

(ii) the unassessed costs of £15,428.40 as petitioning creditors; and

(iii) £14,814.14 as the balance of their fees that were the subject-matter of the action.

1. It is important to understand what is meant by “accepting” these claims at this stage. He was not accepting any of them as proved debts for the purposes of distribution to creditors in the bankruptcy. While the petition debt would in practice almost certainly be accepted for that purpose, unless the underlying judgment were set aside, the same was not necessarily true of the other two “accepted” sums, neither of which had been the subject of full scrutiny either in the county court proceedings or in the bankruptcy. If they were disputed, as clearly they would be, at least by the appellants, they would be secured by a payment into court or a bond (if and to the extent the court thought fit) as a condition of a successful annulment application. They would then be the subject of proceedings between the appellants and Dean & Dean after the annulment, which would be no concern of Mr Bramston who would by then have ceased to be trustee. As mentioned above, it would not be the responsibility of Mr Bramston to examine or challenge these claims while a serious attempt to obtain an annulment was being made. By “accepting” them, Mr Bramston was doing no more than saying that, if established, these claims would rank either as provable debts (the 2004 judgment and the balance of the original fees for which the action was brought) or as expenses of the bankruptcy (Dean & Dean’s costs as petitioning creditors).
2. Mr Bramston rejected claims by Dean & Dean for pre-bankruptcy interest, none having been ordered, and for costs incurred in the proceedings brought by the appellants in the county court after the commencement of the bankruptcies in September 2005 and January 2006. Those costs were incurred too late to be provable in these bankruptcies and were not costs incurred by Dean & Dean in their capacity as petitioning creditors.
3. On 5 March 2008, Mr Bramston supplied a revised estimated outcome statement for each bankruptcy to the appellants. In the absence of any response from them, he supplied them again on 19 March 2008.
4. The amount required to clear Dr Oraki’s bankruptcy had increased by just under £23,000 to £128,029. The main reasons were increases in the trustee’s fees to date (from £7,608 to £11,226), the Secretary of State’s administration fee (from £17,861 to £21,765) and in the amounts claimed by Dean & Dean. The estimate of their costs as petitioning creditors had increased from £15,428 to £24,584, split equally between the two estates, and of their provable claim as creditors from £20,052 to £36,284. The amount required to clear Mr Oraki’s bankruptcy had increased from £50,332 to £68,628, on account of similar increases.
5. On the face of it, there were two errors in these later estimated outcome statements as regards Dean & Dean. Their total costs as petitioning creditors had increased to £24,584. There is no evidence in the papers before us to support this increase. The total for their provable claims against both estates was shown as £36,284. The schedule provided by Dean & Dean in February 2008 showed the petition debt of £20,052.38 and the balance of the fees for which they sued as £14,814.14, making a total of £34,866.52. To complete this part of the story, Mr Bramston wrote to Dean & Dean on 28 May 2008, accepting their claims for £15,428 for costs as petitioning creditors and provable claims for £20,052.38 for the 2004 judgment and £19,614.14 for the fees for which they had sued. These figures are in line with those supplied by Dean & Dean in February 2008, save that, unlike those figures, they do not give credit for the sum of £5,000 included in the 2004 judgment on account of the underlying fees. Mr Hines told us that Mr Bramston had agreed in cross examination that this involved erroneous double-counting.
6. The appellants in fact took no steps to progress applications to annul their bankruptcies under section 282(1)(b).
7. In or about April 2008, Mr Bramston concluded that in view of the lack of any steps by the appellants to seek the annulment of their bankruptcies, he would have to proceed with the administration of the bankruptcies.
8. In June 2008, Mr Bramston issued applications for possession orders in respect of four properties registered in the name of Dr Oraki, including one that she jointly held with Mr Oraki (see [31] above). One property was their matrimonial home at 68 Gladstone Avenue, Whitton, Twickenham (Gladstone Avenue). The applications were fixed for a hearing on 19 August 2008. Shortly before the hearing, the appellants instructed an insolvency practitioner and they were represented at the hearing.
9. The applications were heard by Registrar Nicholls on 19 August 2008. The Registrar was concerned that Mr Bramston was seeking possession orders in respect of four properties with a combined equity, on the evidence, of some £726,000 when the total costs and liabilities in the estates were far lower. Mr Varley, appearing for Mr Bramston, explained that he did not propose to sell all four properties at once but would proceed only to the extent necessary to raise sufficient funds to complete the administration of the estates. The solicitor appearing for the appellants proposed an adjournment on the basis that if Mr Bramston provided a final figure for the claims and costs in the bankruptcies, they could be met out of the ISA funds and the proceeds of sale of a tenanted property in Hounslow, Middlesex which was not the subject of any of the possession applications. Subject to the provision of the figure, he would be seeking an adjournment of 28 days before any possession order was made. If the funds were not then available to discharge the debts and costs, he did not think that he could at that point resist a possession order, although he would ask that it was not made in respect of Gladstone Avenue.
10. After a short break for further discussions, the parties agreed an adjournment of the applications to the first available date after 25 September 2008, which transpired to be 20 October 2008.
11. On 17 September 2008, Mr Bramston sent to the appellants’ solicitors updated estimated outcome schedules as at 31 August 2008. These showed the total amounts needed to clear the bankruptcies as £124,849 for Dr Oraki and £85,910 for Mr Oraki. They included the correct amounts for Dean & Dean, as per the figures accepted for these purposes by Mr Bramston, and did not involve any double-counting. The claim by Pam.com as assignee of the judgment in favour of Gill & Gill against both appellants was split between the two estates.
12. By a letter dated 26 September 2008, Mr Bramston was informed that the solicitors and insolvency practitioner previously acting for the appellants were no longer instructed.
13. A file note of a meeting between Mr Bramston and Mr Varley, his solicitor, on 15 October 2008 shows that he had lost patience with the appellants. He referred back to the meeting with Dr Oraki in January 2008 when he went through her options and “how she should pay the bankruptcy debts and expenses and pay monies into Court in order to satisfy the claims in the Bankruptcy estate and thereafter challenge the claims.” The note prepared by Mr Varley states: “Essentially, the time for being nice and holding back has now finished and Tim [Bramston] just wants me to proceed as normal now, rather than “pussy footing around” and pandering to the various statements of intent from the bankrupts which will never be seen through or acted on.”
14. In September 2008, the articles appeared in the press about Mr Mireskandari and his links with figures in public life. They accused him of being “a convicted fraudster with a suspect degree”. He had “obtained his law degree from a discredited ‘mail drop’ university in Hawaii”. It was reported that he was being investigated by the Solicitors Regulation Authority after doubts were raised over his legal qualifications and that he was the subject of a number of complaints from former clients about vastly inflated charges.
15. On 15 October 2008, the appellants wrote to the court, with copies to Mr Bramston and his solicitors, drawing attention to the press articles. They said that throughout the proceedings they had submitted that Mr Mireskandari was not a solicitor and that his invoices were a deception on them to obtain judgments and money. He had misled them and the courts that he was a solicitor. They denied any debt to him or Dean & Dean. They accused Mr Bramston of duress and harassment and of prolonging the bankruptcy to suppress any claims against Mr Mireskandari and his associates. They ended the letter by saying:

“It is an abuse of the process for the continuation of these proceedings against us which are not justified and in view of the above we are now requesting the Court to review/annul and set aside all judgments which have been obtained by Mr Mireskandari & his firm at the Courts own jurisdiction, the removal of the trustee and for the restitution of all our properties.”

1. At the adjourned hearing of the applications for possession orders on 20 October 2008, possession orders were made by Deputy Registrar Nicholas Briggs (as he then was) in respect of Gladstone Avenue and a property at 375 Bury New Road, Prestwich, with in each case vacant possession to be given by 20 November 2008. The applications in respect of the two other properties were adjourned to 2 February 2009.
2. Dr Oraki appeared in person at the hearing, while Mr Bramston was represented by Mr Varley. In his judgment, of which a contemporaneous note taken by Mr Varley is in evidence, the Deputy Registrar recorded that Dr Oraki opposed the applications on the grounds that the debt on which the bankruptcy order was made was not a valid debt, but based on false evidence. He further recorded that, in the course of the hearing, Dr Oraki produced an unissued application for an annulment that she intended to make, with a draft affidavit. She stated also that she wished to remove Mr Bramston as trustee “for prolonging the Bankruptcy and not cooperating with her to rid the Bankruptcy estate of the Bankruptcy Order”.
3. The note of the judgment continues:

“22. The Trustee has a duty to realise assets – he can apply at any stage for directions. He has had no notice of her application. He could seek directions. At the moment he says his duty is to get in and distribute the estate.

23. I have sympathy with her, but there is no live application and numerous applications before were unsuccessful and the position in relation to Dr. Oraki has not moved on. I need to apply Section 335A of the Insolvency Act 1986. There is no information before me to impede the Trustee’s application.

24. The presumption is in favour of the Trustee after one year. There are no exceptional circumstances before me. I therefore consider that the creditors’ needs outweigh all other considerations. The realisation of two properties rather than five [sic] could be proportionate.

25. Accordingly, I make the Order for possession in relation to 68 Gladstone Road and 375 Bury New Road,

26. In relation to Dr. Oraki’s application I have been told that she could pay £200,000 very quickly but does not want to as a matter of principal [sic]. She wants to fight to the end. She does not trust the Trustee and therefore is not going to pay him. That leaves her with very little room to manoeuvre. At this stage I am bound to make an order for possession. Should those Orders be suspended?

27. Her Application is based on facts not before this Court at the moment. I have asked the Trustee’s solicitors what to do and he says suspend the Order in order to allow her to make the application.”

1. The Deputy Registrar therefore suspended the possession orders for four weeks to 20 November 2008. He ordered the costs of the applications to be costs in the bankruptcy.
2. On 22 October 2008, Mr Bramston issued an application for a declaration that the ISA funds were part of Dr Oraki’s bankruptcy estate. It was supported by a witness statement made by him.
3. Dr Oraki had a meeting with Mr Bramston on 27 October 2008, and at the end of it left a letter with him. In it she referred to the disputes concerning the alleged debts against her and her husband and requested his confirmation that he would consent to them making annulment applications. She followed this up with a further letter dated 31 October 2008 requesting written confirmation that he would not oppose her application for an annulment under section 282(1)(a). On 4 November 2008, Salans replied on behalf of Mr Bramston that an application under section 282(1)(a) concerned only Dr Oraki and the petitioning creditor and “the Trustee takes no part in that application and must remain neutral”. Dr Oraki’s request that restrictions registered against properties be removed was refused, explaining that “the Trustee’s duty is to realise your assets for the benefit of your Bankruptcy estate and in the continued absence of the promised documentation and consents in respect of the monies held following the sale of 22 Simpson Road must proceed to realise other assets for the benefit of your Bankruptcy estate”.
4. On 18 November 2008, the appellants issued their joint application in the Bankruptcy Court for the annulment of their bankruptcy orders under section 282(1)(a) (see [19] above). It was given a hearing date of 13 January 2009. Dr Oraki made a witness statement in support of it, detailing three grounds for the application: first, the invoice on which the judgment in favour of Dean & Dean was based did not comply with the Solicitors Act 1974; second, she had issued proceedings for damages for negligence against Dean & Dean, which was not taken into account when the bankruptcy order was made; third, Mr Mireskandari, for whose services the appellants were charged by Dean & Dean, was not a properly qualified solicitor, having presented false documents and lied to the Law Society when he applied for enrolment, and therefore they were wrongly charged by Dean & Dean. Mr Oraki made a witness statement in similar terms, omitting any reference to his wife’s negligence claim.
5. On 19 November 2008, Ellis Taylor, solicitors instructed by the appellants, issued an application in the Bankruptcy Court for a stay of “the possession order” made on 20 October 2008. On the same day Ellis Taylor faxed a letter to Salans, enclosing a notice of acting for the appellants and informing them that they had issued an application for a stay and requesting an undertaking not to proceed with the possession order without three working days’ notice, failing which they would apply for an injunction. Later that day, Ellis Taylor faxed a further letter with a copy of the “application for the stay of the possession order and evidence in support”. The application for a stay was enclosed together with the appellants’ witness statements in support of the annulment application.
6. Ellis Taylor sent by fax and post a letter dated 20 November 2008 to Salans. It referred to the applications for a stay of the possession orders and annulments, and requested an undertaking not to enforce the possession order. They said that they would forward a sealed copy of the annulment application once it was returned by the court.
7. On 21 November 2008, Salans issued ex parte applications for leave to enforce the possession orders made on 20 October and suspended until 20 November 2008. Witness statements in support were made by Mr Varley, referring to the previous steps in the possession applications but making no reference to the appellants’ applications for annulment and for a stay of the possession orders.
8. On 24 November 2008, Ellis Taylor wrote to Salans, asking that, if Mr Bramston intended to enforce the possession order, they be given notice of the intended date of enforcement so that they could set an earlier date for their application for a stay.
9. On the same day, Salans wrote to Ellis Taylor to say that they had received a sealed copy of the annulment application and confirming that “the Court Enforcement Officer has not been instructed in relation to the Orders for possession and will not be so instructed pending receipt of instructions from our client whereupon we will confirm the position to you.” Salans followed this up with a letter dated 25 November 2008, confirming that provided the annulment application was “prosecuted timeously” the trustee would take no further steps in either bankruptcy, save as required by his regulatory body or statute, pending determination of the application but adding that he reserved the right to withdraw this voluntary stay on ten clear business days’ notice.
10. Under cover of a letter dated 27 November 2008, Ellis Taylor served a notice of intention to appeal the possession orders. Salans replied on 2 December 2008, expressing surprise, given that the annulment application had been issued. They stated that the trustee’s agreement to a stay was given at a time when it was not known that Dr Oraki intended to appeal the possession orders. They concluded that the voluntary stay was withdrawn, “the Trustee having no option but to defend the appeal.”
11. On 8 December 2008, Salans wrote to the Bankruptcy Court, without sending a copy to Ellis Taylor, referring to the possession orders and the applications to enforce them and continuing:

“We understand that on 26 November 2008 Mr Registrar Nicholls ordered that the applications for leave, rather than being dealt with by way of box work, be listed for hearing at the same time as the bankrupt’s application for a stay of those Possession Orders. We understand that the Registrar also ordered that the bankrupt file evidence in support of her application for a stay before the same would be listed for consideration by the Court, but that to date she has failed to do so.

In those circumstances we are somewhat concerned that the trustee applications for leave to enforce are accordingly held in limbo and could possibly remain so indefinitely if the bankrupt fails to submit evidence in support of her own applications as directed by the Court.

In these circumstances, and given the history of this matter and the fact that it is quite possible that the bankrupt will never submit evidence in support of her own application, we would ask that the trustee’s application for leave to enforce be dealt with as a totally separate issue, and no longer linked to the bankrupt’s own application. We would also ask if in those circumstances, as is the usual course, the trustee applications for leave to enforce could be dealt with as box work, rather than listed for hearing.”

1. On 10 December 2008, Ellis Taylor replied to Salans, saying that they were prepared to stay the application for permission to appeal against the possession orders until after the hearing of the annulment application, on the basis that the voluntary stay remained in place.
2. On 12 December 2008, Mr Bramston was succeeded as trustee of the appellants’ estates by Mr Defty (see [33] above).
3. The annulment application came before Chief Registrar Baister on 13 January 2009. The appellants were represented by counsel who said that directions had been agreed with the solicitors for Dean & Dean. The Chief Registrar observed that the best course from the appellants’ point of view would be to seek to set aside the judgment before seeking to annul the bankruptcy orders and he suggested that he should simply adjourn the application generally with liberty to restore. The parties agreed to this course.
4. Following the hearing, Ellis Taylor wrote to Salans on 16 January 2009, enquiring whether Mr Defty would either assign the claim to set aside the judgment or allow the appellants to make the application in the name of Mr Defty with an indemnity from the appellants. Salans replied on 22 January 2009 that the trustee had no objection to an assignment of the right subject to a full indemnity. By a further letter dated 29 January 2009, Salans requested a copy of an assignment, containing an indemnity, for their consideration. It is not clear from the documents before us when a draft assignment was provided to Mr Defty or Salans but it is apparent that some delay was caused in early March by the appellants seeking to include rights to challenge other judgments. The assignment was executed by the appellants and Mr Defty on 13 March 2009.
5. Ellis Taylor sought agreement to an adjournment of the application concerning the ISA funds and the applications for possession orders adjourned on 20 October 2008, fixed for 2 February and 4 February 2009 respectively, until the annulment application had been heard. The former was adjourned generally with liberty to restore, on the agreement of the appellants to issue an application to set aside the 2004 judgment no later than 2 March 2009 and to prosecute it expeditiously. The latter were adjourned to 15 April 2009.
6. On 5 March 2009, the appellants issued their application in the Brentford County Court for (i) permission to apply to set aside the 2004 judgment (needed because of a civil restraint order made in July 2006) and (ii) an order setting aside the 2004 judgment: see [17] above. It was supported by a witness statement made by Dr Oraki, detailing the alleged defects in the invoices on which the judgment was based and the allegations concerning Mr Mireskandari. Permission to make the application was given on 9 April 2009.
7. On 31 March 2009, Dr Oraki wrote to Mr Defty requesting a stay of the bankruptcy proceedings until the application to set aside the 2004 judgment had been heard. Mr Defty replied that he had yet to receive confirmation that such application had been made. Dr Oraki provided details of the issue of the application by a letter dated 12 April 2009 in which she repeated her request for a stay of the bankruptcy proceedings and for the hearing of the possession applications on 15 April 2009 to be vacated. The request was again repeated in a letter dated 14 April 2009 from Ronald Fletcher & Co, new solicitors instructed on behalf of the appellants.
8. On 15 April 2009, the applications for possession orders were adjourned to 31 July 2009.
9. The first hearing date of the appellants’ application in the Brentford County Court was fixed for 24 April 2009. On 15 April 2009 Mr Varleyemailed Mehrdad Jami-Tehrani, formerly the principal of Dean & Dean, as follows:

“Please could you confirm that you have been made aware that the Orakis’ applications to set aside the Brentford County Court judgments against them are due to be heard in that court on 24 April 2009 at 11.30am. You will appreciate that it is in your interests to defend those applications as if the Orakis are successful and then successfully apply for the bankruptcy orders against them to be annulled there is a strong possibility that the costs of the Trustee in both bankruptcies (now running at many tens of thousands of pounds) could be sought against your personally.”

1. It is necessary to explain Mr Tehrani’s involvement. According to a witness statement he made in the Brentford County Court proceedings in November 2009, he carried on a solicitor’s practice between 2002 and November 2005 as a sole practitioner under the name of Dean & Dean, employing Mr Mireskandari and a Ms Sokhal. It was during that period that the disputed fees were incurred and that judgment was entered against the appellants. In November 2005, Mr Tehrani went into partnership with Mr Mireskandari and they carried on practice together under the name of Dean & Dean. Mr Tehrani retired from the partnership in November 2006 and thereafter carried on practice on his own. The claim and the judgment against the appellants, said Mr Tehrani, therefore pre-dated the partnership and was an asset of his alone.
2. On 24 April 2009, the application in the Brentford County Court was adjourned.
3. Prior to the adjourned hearing of the applications for possession orders fixed for 31 July 2009, Ronald Fletcher & Co on behalf of the appellants requested that the hearing be vacated and the applications adjourned generally, with liberty to restore. With Mr Defty’s agreement, orders to that effect were made by the court on 29 July 2009.
4. Mr Tehrani made a witness statement dated 17 August 2009 in opposition to the appellants’ application in the Brentford County Court and appeared by counsel at the adjourned hearing on 2 September 2009. Deputy District Judge Amin-Mannion gave directions for further evidence and adjourned the application to be heard by a circuit judge on 9 November 2009. Although the appellants alleged that the adjournment occurred because Mr Defty or Salans had informed Mr Tehrani that he had not assigned the right to apply to set aside the judgment, it is clear from the transcript, as Proudman J held at [127] of her judgment, that this is not the case and that the application was adjourned because there was insufficient time to hear it and because further directions were needed.
5. Dean & Dean were not represented at the adjourned hearing of the appellants’ application on 9 November 2009. Mr Tehrani sent a letter to the court to explain that he had been made bankrupt on 5 November 2009 and therefore did not have standing to appear at the hearing.
6. At the hearing, HH Judge Oppenheimer prospectively set aside the 2004 judgment, expressly by way of sanction, the order stating “it appearing that the Claimant [Dean & Dean] has failed at any time to comply with paragraph 2 of the Order of 16th February 2004 made in this Court with the result that none of the further steps contemplated by that Order have been taken with the further result that the claim has not been quantified”. The order provided that “[u]nless any person having locus standi to act for the Claimant firm applies from [sic] relief from sanction by 4 pm on 23rd November 2009, the judgment of 16th February 2004 shall at 4 pm on 23rd November 2009 stand set aside.”
7. On 10 November 2009, Mr Tehrani was given permission by Peter Smith J to appeal against his bankruptcy order and the bankruptcy was stayed. He lodged an application dated 13 November 2009 in the Brentford County Court to set aside the order made on 9 November 2009. The court issued the application on 16 November 2009. The stated ground was that the terms of the order dated 16 February 2004 were superseded by orders dated 13 October 2004 and 17 June 2005 which confirmed that the action was at an end save for the purposes of enforcement (see [12] above). Mr Tehrani made a lengthy witness statement dated 13 November 2009 in support of his application, in which he said that the appellants had failed to draw these later orders and other material facts to the attention of Judge Oppenheimer.
8. In or about December 2009, the Solicitors Regulation Authority issued proceedings against Mr Mireskandari before the Solicitors Disciplinary Tribunal. It was certified as a case to answer in about March 2010.
9. Mr Tehrani’s application was heard by Judge Oppenheimer on 11 January 2010. Mr Tehrani and Dr Oraki appeared in person (see [17] above). The judge set aside his order of 9 November 2009 and dismissed the appellants’ application dated 6 March 2009, with the result that they remained subject to the 2004 judgment. On 1 February 2010, Dr Oraki issued an application to set aside Judge Oppenheimer’s order supported by a witness statement alleging that the judge had been misled by Mr Tehrani. This application was dismissed by HH Judge Powles on the court’s own initiative on 2 February 2010. On 16 February 2010, Dr Oraki wrote to Judge Powles, asking him to set aside his order.
10. Following the dismissal of the appellants’ application to set aside the 2004 judgment, Salans wrote to the Bankruptcy Court on 18 January 2010 requesting that the appellants’ annulment application, the trustee’s applications to enforce the possession orders made in October 2008 and his application for a declaration as regards the ISA funds be listed together for hearing as soon as possible. The court fixed the annulment application for 9 April 2010 and the trustee’s applications for 30 April 2010.
11. On 6 March 2010, Judge Oppenheimer set aside Judge Powles’ order and directed that if either of the appellants wanted to set aside or vary his order of 11 January 2010, they should proceed by way of an appeal. On 1 April 2010, Dr Oraki filed an appeal notice with the High Court, relying on grounds that included that Mr Mireskandari had obtained his practising certificate by fraud and so was not entitled to act as a solicitor (see [17] above).
12. On 6 April 2010, Dr Oraki asked Mr Defty whether he would agree to an adjournment of all applications, including the annulment application, until the case against Mr Mireskandari before the Solicitors Disciplinary Tribunal had been concluded. In reply to this and other communications, Mr Defty wrote to her on 7 April 2010, stating that the application under section 282(1)(a) was “purely between yourself and the Court, therefore I can have no involvement. I would be grateful if you could inform me of the outcome of the hearing.”
13. On 7 April 2010, Salans wrote to Dr Oraki, stating that “whilst the applications to be heard tomorrow afternoon are your applications and are a matter between you and the Court, the Trustee will be attending by Counsel in order to assist the Court if and where necessary.”
14. Counsel instructed for Mr Defty prepared a skeleton argument for the hearing on 9 April 2010 which, in contrast to the letters from Mr Defty and Salans, vigorously argued that the annulment application should be dismissed, on the grounds that (i) the bankruptcy was based on a judgment debt, (ii) the appellants had unsuccessfully applied to set aside the judgment, and (iii) they were trying to appeal the refusal to set aside the judgment “but any appeal will almost certainly fail”. The application was “wholly devoid of merit”.
15. At the hearing on 9 April 2010 before Deputy Registrar Cheryl Jones, the appellants sought an adjournment of the annulment application pending both the determination of their application for permission to appeal Judge Oppenheimer’s order of 11 January 2010 and the determination of the disciplinary proceedings against Mr Mireskandari.
16. The deputy registrar rejected the application for an adjournment and dismissed the annulment application. She focused in particular on the allegations concerning Mr Mireskandari and said in her judgment:

“8. I have considered whilst looking at this, the balance of justice. I think I have to in the exercise of my discretion. It is I think certainly the case that Mr and Dr Oraki feel very badly served by what has happened in terms of bankruptcy. They have said consistently that Dr Mireskandari is a fraudster. They feel that the action taken against him by The Law Society proves in effect that they are right. Unfortunately, it does nothing of the sort because this application is premature. It may well be the case that The Law Society will strip Mr Mireskandari down; I cannot pre-empt that. It may well be the case that this will have a retrospect effect on whether or not he can charge; again I cannot pre-determine that. It may well be that Dr Mireskandari will be exonerated.

9. From that point of view it seems to me that the application based on those facts is premature in the extreme. It may well have legs but at the moment I do not think I can make any determination based on mere allegations. I also do not think looking at it that the application and appeal to the Court of Appeal has any realistic chance of success as it stands. On that basis and notwithstanding what I accept is a genuine feeling by Dr Oraki and Mr Oraki that they have not been well served, I am not going to adjourn the matter until the hearing in the Court of Appeal for the reasons I have given and secondly having considered everything, I am going to dismiss the application to annul as it is premature.”

1. On 29 April 2010, the appellants filed an appeal notice seeking permission to appeal against the deputy registrar’s order.
2. The trustee’s applications for leave to enforce the possession orders made in October 2008 and for a declaration as to the ISA funds, together with the appellants’ application issued in November 2008 for a stay of the possession orders, came before Registrar Barber on 30 April 2010. She gave directions for the appellants to file evidence in support of their stay application and in answer to the application concerning the ISA funds, and for Mr Defty to file evidence in response and giving up to date details of the debts, costs and expenses in the bankruptcies, written valuations of the properties and up to date redemption statements in respect of any charges on the properties. The applications were adjourned to 29 September 2010.
3. The appellants did not file evidence in accordance with the order of 30 April 2010. Mr Defty filed evidence on 7 July 2010.
4. By a letter dated 17 September 2010 to Salans, Dr Oraki requested agreement to an adjournment of the hearing fixed for 29 September, pending determination of their applications for permission to appeal Judge Oppenheimer’s order and the dismissal of their annulment application and determination of the disciplinary proceedings against Mr Mireskandari. On 29 September 2010, Mr Defty agreed the adjournment pending determination of the applications for permission to appeal.
5. I have earlier set out a chronology of the proceedings thereafter. In June 2011, Peter Smith J granted permission to appeal against the dismissal of the annulment application (see [21] above).
6. The applications previously before the Bankruptcy Court had been adjourned to 27 October 2011. Salans acting for Mr Defty agreed that they should be further adjourned generally, with liberty to restore them, pending the determination of the appeal against the dismissal of the annulment application.
7. It is not necessary to give details of the chronology of events after this time.

*The appellants’ case on Ground 2*

1. The pleaded case was that the respondents had “failed to bring the Claimants’ bankruptcies to an end in an expeditious manner…and/or the Defendants passively or actively obstructed the Claimants’ efforts to bring their bankruptcies to an end in an expeditious manner” (para 9 of the re-amended particulars of claim). No particulars of this case are given in paragraph 9, except that the respondents had not cooperated with three insolvency practitioners engaged by the appellants, an allegation that was rejected by thejudge andhas not been pursued on this appeal.
2. Specific allegations that the respondents obstructed the appellants and prolonged the bankruptcies are given in some paragraphs of the re-amended particulars of claim. It is alleged that they delayed in assigning the right to challenge the 2004 judgment (para 21), that they subsequently denied giving an assignment which led to the adjournment of their application to set aside the 2004 judgment on 20 August 2009 (para 24: I have dealt with this allegation above), and that they acted in the interests of Dean & Dean, rather than independently, in opposing the adjournment of the appellants’ annulment application on 9 April 2010. Paragraph 26 contains an unparticularised allegation that the respondents continued to instruct their solicitors and counsel effectively to oppose the appellants’ efforts to set aside the 2004 judgment and to annul their bankruptcies “right up to the granting of the Order of Robert Ham QC on 21 January 2013.”
3. The judge dealt with these allegations in her judgment at [116]-[127] and [136]-[140]. I will refer to her conclusions on individual issues as I address those issues, but she made the general point at [119] that “the problem for the trustee is that while he was being constantly pressed by the creditors for payment, pressure was being applied by the Orakis to stall realisation of assets pending their constant applications to annul the bankruptcies under section 282(1)(a) of the 1986 Act.” While in the relevant period there was in fact only one application under section 282(1)(a), albeit it was before the court on a number of occasions, it is right to say that the appellants were pressing the respondents to stay their hand in the bankruptcies while they pursued their annulment application and that, for the most part, the respondents did so. The judge concluded at [121] that “it was the Orakis, not the trustee, who, in the circumstances understandably, did not want to deal with the bankruptcies expeditiously, except on their terms.”
4. In the course of his submissions, Mr Hines identified some nineacts or omissions on the part of the respondents which constituted breaches of their duties as trustees that had led or contributed to an unnecessary prolongation of their bankruptcies, causing losses to the appellants personally.
5. First, Mr Bramston miscalculated the sums due to Dean & Dean in the estimated outcome statements provided to the appellants in March 2008, even assuming that some amounts were due to them. I have earlier analysed as best I can the figures in those estimated outcome statements and explained that I am unable to reconcile the figures for the petitioning creditors’ costs and, to a smaller extent, the figures for Dean & Dean’s claim as a creditor. The total figure for the petitioning creditors’ costs, correctly split between the appellants in the statement provided in January 2008 and subsequently accepted by Mr Bramston in his letter dated 28 May 2008, was £15,428.40 (£7,714 each), whereas the total figure split between the appellants in the March statements was £24,584 (£12,292 each). The total provable debt was overstated by £1,418 (£709 each). Whatever the explanation, these figures were an error and were overstated by some £5,287 each.
6. It is, however, an error that had no effect. It did not affect the ability or willingness of the appellants to seek an annulment under section 282(1)(b), the route to annulment then under consideration. Without the ISA funds, which were not available for the reasons earlier given in this judgment, there is no evidence of any substantial funds available to the appellants to pay or secure the debts and costs and so obtain an annulment. Moreover, the appellants did not pursue the possibility of an annulment on this basis after receipt of the estimated outcome statements in March 2008 but there is no evidence to suggest that this error in the statements played any part in this, and there are no grounds for thinking that it might have done.
7. Second, it is said that Mr Bramston wrongly accepted Dean & Dean’s claims in his letter dated 28 May 2008. Dean & Dean had submitted proofs in the appellants’ bankruptcies under cover of a letter dated 4 December 2007. They were inadequately particularised and a schedule of claims was submitted under cover of a letter dated 4 February 2008. Mr Bramston’s notes appear on the schedule and they formed the basis of the partial acceptance set out in his letter dated 28 May 2008. Given that, at this time, the repeated attempts by the appellants to set aside the 2004 judgment had failed, it is difficult to see any basis on which Mr Bramston could then have refused to accept the claim of £20,052.38 for which there were outstanding court orders. The appellants had exhausted all routes of appeal, including consideration of their application for permission to appeal by four High Court Judges (see [12] and [14] above). It is unrealistic to expect a trustee in bankruptcy to second-guess these decisions. Proudman J rightly rejected the claim that a competent trustee would have identified the procedural errors in the 2004 judgment, and no appeal is pursued on that point.
8. The remaining part of Dean & Dean’s invoice had not been the subject of any assessment, nor had their costs as petitioning creditors, but the letter records that he had taken solicitors’ advice before accepting their claim to costs as petitioning creditors. It may fairly be said that Mr Bramston should take advice on the amount of fees claimed by Dean & Dean in their invoice before accepting the total figure for the purposes of a distribution, but the respondents have been adamant that no claim was accepted for the purpose of a distribution. Certainly Mr Bramston was not at this stage contemplating a distribution and could not do so until he had realised sufficient assets to pay the costs of the bankruptcies and make a distribution to creditors. Moreover, in a letter dated 17 February 2010, Mr Defty told Mr Tehrani that Dean & Dean’s claims had not yet been adjudicated.
9. The appellants complain that Mr Tehrani on behalf of Dean & Dean was able to use this acceptance of Dean & Dean’s claim in support of his successful application before Judge Oppenheimer in January 2010 to set aside his earlier order of 9 November 2009.
10. In considering this point, it is necessary to look first at the appellants’ application to set aside the 2004 judgment. They relied on two principal grounds, as set out in Dr Oraki’s witness statement dated 5 March 2009. First, the invoice rendered in 2002, on which the judgment was based, did not comply with the provisions of the Solicitors Act 1974 in a number of respects. These were grounds on which the appellants had previously relied. Second, they relied on the allegations concerning Mr Mireskandari and his suspension from practice. Dr Oraki referred to the allegations, “albeit yet to be proved”, that he had made false claims about his qualifications and that he had been convicted of fraud in the United States. The statement continued that “[i]t is arguable therefore that he is not a solicitor and as such could not charge my husband and I as a solicitor”, which “would invalidate” the 2004 judgment.
11. Neither of these were the grounds on which Judge Oppenheimer set aside the 2004 judgment by his order dated 9 November 2009. The order recites that the judgment was to be set aside by way of sanction for failure to comply with the requirement of the order made on 16 February 2004 that Dean & Dean file a fully itemised bill of costs by 15 March 2004.
12. Mr Tehrani applied to set aside the order dated 9 November 2009 on the grounds that the requirement of the February 2004 order had ceased to be applicable by virtue of further orders made by the Brentford County Court in 2004-2005.
13. Judge Oppenheimer accepted Mr Tehrani’s submissions and also, it is true, placed reliance on Mr Bramston’s acceptance of Dean & Dean’s proof. It is very doubtful that he was right to do so, given that the appellants had applied to set aside the judgment on which the bankruptcy order, and hence the trustee’s authority to accept proofs of debt, was based. The new ground on which the appellants had made their application was the publication of allegations against Mr Mireskandari and his suspension from practice. The judge referred to this as “so-called new evidence” that was “not in very choate form”. He dealt with it in his judgment at [14]:

“The so-called new evidence is as follows, in summary, and it is not in very choate form. It is alleged that Dr, or Mr Mireskandari was convicted of some form of crime, or fraud, concerning telesales in the United States of America prior to 1999 and that had Dr Oraki and Mr Oraki known this they would never have used him. Mr Mireskandari or Dr Mireskandari was a solicitor who was apparently qualified in 2000, having previously acted a trainee. His practising certificate was suspended on 2008. I am so informed by Mr Tehrani and I am going to assume, just for the purpose of the case today, that those facts are true. Furthermore, that the reasons for the suspension of his certificate in 2008 have to do with other alleged depredations, not seemingly the subject matter of the conviction.”

1. Not only could Mr Bramston not foresee in May 2008 that action would later be taken against Mr Mireskandari on the basis of allegations and investigations that had yet to be made, but his acceptance of the claim was irrelevant to the new evidence about Mr Mireskandari on which the appellants relied to set aside the 2004 judgment. In accepting Dean & Dean’s claim in May 2008, for whatever purposes, Mr Bramston could not have foreseen that it would be used (wrongly, in my view) in opposition to a later application to set aside the 2004 judgment.
2. Third, Mr Hines submitted in his skeleton argument for the appeal that the respondents should themselves have taken steps to investigate the allegations of dishonesty against Mr Mireskandari once made to them by the appellants and certainly after the press publicity in September 2008 and his suspension from practice in December 2008. I regard this as an unrealistic suggestion. The Solicitors Regulation Authority, and in due course the Solicitors Disciplinary Tribunal, were dealing with these allegations and had the resources to do so. The investigation into Mr Mireskandari proved to be very complex and expensive. The respondents had no resources to conduct the necessary investigations and, in my view rightly, left the matter to these professional bodies.
3. Fourth, it is said that Mr Bramston delayed the administration of the estates by unnecessarily applying for possession orders in 2008. Possession orders should not have been sought at all and, in particular, not in respect of a total of four properties nor in respect of the matrimonial home at Gladstone Avenue.
4. At the first hearing of the applications in August 2008, Registrar Nicholls was initially critical of the decision to apply for orders in respect of four properties when it appeared that the funds needed to complete the administration of the estates could be raised from a sale of one or two properties. The explanation given at the hearing by Mr Varley, and given also by Mr Bramston in his evidence at the trial, was that it was not intended to sell all the properties unless that became necessary but an application in respect of the four properties saved the costs of separate applications.
5. As regards Gladstone Avenue, Mr Bramston relied on section 283A of the Act, which provides that a bankrupt’s interest in a dwelling-house, which at the date of bankruptcy was the sole or principal residence of the bankrupt or his or her spouse, ceases to be comprised in the bankruptcy estate three years after the bankruptcy order, unless (among other things) the trustee had applied for a possession order for it. As Mr Oraki had been made bankrupt on 1 September 2005 and Dr Oraki on 10 January 2006, Mr Bramston considered that he could not delay in making an application for a possession order for Gladstone Avenue. Mr Hines submitted that Mr Bramston could instead have applied for a charging order under section 313 but that is possible only if “the trustee is, for any reason, unable for the time being to realise that property” (section 313(1)). No submissions were made to show that this requirement was satisfied in this case.
6. Although criticism is levelled at the possession applications, it must be noted that at the adjourned hearing in October 2008, possession orders were made in respect of two of the properties, including Gladstone Avenue.
7. The criticism of Mr Bramston in making the application loses its force once it is appreciated that the ISA funds were not available to discharge the debts and the costs of the bankruptcies. In the absence of either the availability of those funds or any serious move by the appellants to annul their bankruptcies, Mr Bramston had no choice but to proceed with steps to realise at least some funds.
8. In fact, of course, the two possession orders were not enforced nor were the applications for the two further possession orders brought to a full hearing. Following the publication of the allegations against Mr Mireskandari in September 2008 and the steps taken by the Solicitors Regulation Authority in December 2008, these and other steps in the bankruptcies were effectively stayed while the appellants pursued their application to annul the bankruptcies under section 282(1)(a). Although from time to time restored for hearing, they were usually adjourned at the request of the appellants to enable them to take further steps with a view to securing an annulment. In these circumstances, it cannot be said that the making of the possession applications prolonged the bankruptcies.
9. While Proudman J concluded that taking steps in relation to all four properties was a faulty strategy and that the respondents should have sought to realise the properties one at a time, she rightly rejected the case that the applications had in fact prolonged the bankruptcies.
10. Fifth, it is alleged that the respondents were in breach of duty in not first investigating and establishing conclusively the amounts, if any, owed to the persons claiming to be creditors. It is said that this is the course that the respondents should have taken, rather than taking steps to realise assets.
11. There are, in my judgment, several reasons why this allegation is misplaced. First, until about April or May 2008, Mr Bramston was seeking to cooperate with the appellants in their stated aim to seek annulment under section 282(1)(b) which would involve them in paying or securing all claims and costs. For the reasons already explained, it would not at this stage be appropriate for a trustee to increase costs by going through a full investigation and adjudication of creditors’ claims. Secondly, so far as concerns the 2004 judgment and associated costs orders including the costs of the petition (totalling about £35,000), there was no proper ground on which the respondents could reject it. This was the case until the appellants applied to set aside the 2004 judgment, at which point Mr Defty rightly awaited the outcome of that application. Thirdly, the respondents had no funds with which to undertake a process of assessing and, if appropriate, rejecting proofs of debt. It was precisely for this reason that Mr Bramston initiated the possession proceedings. The subsequent proceedings to determine the provable debts demonstrates that it was a far from straightforward process, involving a two-day hearing before Registrar Jones and a lengthy reserved judgment, and that was without any consideration of Dean & Dean’s claim which would have necessitated a full investigation into the claims of dishonesty against Mr Mireskandari.
12. Sixth, there is criticism of the steps taken by Salans on behalf of Mr Bramston in November and December 2008 to obtain leave to enforce the two possession orders that had been made on 20 October 2008 and suspended until 20 November 2008.
13. I have earlier set out in some detail the chronology of the relevant events. Two criticisms are made. First, in the evidence in support of the ex parte applications to enforce the possession orders issued on 21 November 2008, there was no reference to the appellants’ applications issued on 18 and 19 November 2008 for the annulment of their bankruptcies and for a stay of the possession orders. Second, Salans’ letter dated 8 December 2008 to the court, requesting that the applications to enforce the possession orders be separated from the stay application and dealt with as box work, was not copied to Ellis Taylor.
14. Neither of these criticisms was dealt with by the judge in her judgment, nor were either of them pleaded. It is not at all clear that either formed part of the appellants’ case at trial, and Mr Briggs said that the second had not even been mentioned. The letters faxed between Ellis Taylor and Salans on 19 and 20 November 2008 appear clearly to establish that Salans knew of the appellants’ applications before they issued the applications to enforce the possession orders, and Mr Varley made his witness statements, on 21 November 2008. On the face of it, as the trustee’s applications were ex parte (quite properly: see CPR 81.13, applicable in insolvency proceedings by reason of rule 7.51A of the Insolvency Rules) and therefore gave rise to a duty of frank disclosure, Mr Varley should have referred to the appellants’ applications in his witness statements. He should also have copied his letter of 8 December 2008 to Ellis Taylor. But we do not know whether these criticisms were put to Mr Bramston or Mr Varleyin cross examination or, if so, what evidence they gave.
15. What is, in my judgment, clear is that neither of these matters had any impact on the course of events. On 25 November 2008, Mr Bramston agreed to a stay of any steps in the bankruptcies, but this was withdrawn on 2 December 2008. Mr Defty did not however oppose an adjournment of the annulment application on 13 January 2009 to enable the appellants to apply to set aside the 2004 judgment, and shortly afterwards he agreed not to take any significant steps in the bankruptcies while that application was pursued. Neither of the criticised matters had the effect of prolonging the bankruptcies.
16. Seventh, it is said that Mr Defty delayed unreasonably, after the first hearing of the annulment application on 13 January 2009, in the assignment to the appellants of the right to apply to set aside the 2004 judgment. I have set out above the sequence of events. It was entirely reasonable for Salans to request Ellis Taylor to prepare the draft assignment for their consideration. We do not know the date on which the first draft was provided but we do know that in early March the finalisation of the draft was delayed by an attempt on the part of the appellants to include other judgments in the assignment. The assignment was executed on 13 March 2009. There are no grounds for suggesting that there was any unreasonable delay on the part of Mr Defty or Salans.
17. Eighth, it was suggested that Mr Defty and Salans had improperly encouraged Mr Tehrani to oppose the appellants’ application to set aside the 2004 judgment. I have earlier summarised the interest of Mr Tehrani, according to his evidence filed in the Brentford County Court in 2009; in 2004 he was the sole principal of Dean & Dean and the judgment was therefore in his favour, not in favour of Dean & Dean as subsequently constituted. On 24 April 2009, Mr Varley emailed Mr Tehrani in the terms quotedabove. We do not know whether the application to set aside the 2004 judgment had been served on Mr Tehrani or whether he knew about the application.
18. In my judgment, the email was neither improper nor unreasonable. It was right that Mr Tehrani should know about the application and it was right that he should be put on notice that if the judgment were set aside and the bankruptcies annulled, he might well be personally liable for the costs of the bankruptcies. The email did no more than give Mr Tehrani the opportunity, if he did not already know about it, to participate in the application. It cannot be a matter of criticism that an interested party – and, indeed, in this case the respondent – should be alerted to an application. Mr Tehrani did participate actively, filing evidence in August 2009 in advance of a hearing fixed for 2 September 2009 and appearing at the hearing. He would have appeared at the adjourned hearing on 9 November 2009 but for the bankruptcy order made on 5 November 2009, as his letter to the court made clear.
19. Once Mr Tehrani’s bankruptcy was stayed on 10 November 2009, he promptly applied on 13 November 2009 to set aside the order made by Judge Oppenheimer on 9 November 2009, in accordance with express terms of that order. It was a matter for Judge Oppenheimer to decide on the evidence and submissions put forward by the parties whether to set aside his order. Mr Defty did not participate in that process and he cannot be said in any sense to be responsible for the decision of Judge Oppenheimer in January 2010 to set aside his order of 9 November 2009, thereby restoring the 2004 judgment. That decision, it may be noted, was ultimately reversed by Robert Ham QC not on procedural grounds but by reason of the findings of the Solicitors Disciplinary Tribunal made against Mr Mireskandari in June 2012.
20. Ninth, the stance taken by Mr Defty at the hearing of the annulment application before Deputy Registrar Cheryl Jones on 9 April 2010 is criticised. I have earlier set out the approach to be adopted by a trustee on an application for annulment. In short, he is entitled and obliged to draw to the attention of the court all matters that are material to the application. These may well include matters that are contrary to the applicant bankrupt’s position and would tend to point to a refusal of the application. Mr Defty and Salans on his behalf on several occasions correctly informed the appellants that he could neither support nor oppose their application. For example, Salans wrote to Dr Oraki on 7 April 2010 that while the annulment application was “a matter between you and the Court, the Trustee will be attending by Counsel in order to assist the Court if and where necessary.” This was the correct approach. Counsel for Mr Defty before Mr Ham QC in July 2012 evidently adopted the correct stance, Mr Ham himself observing in his judgment that he had “very properly adopted a position of helpful neutrality” .
21. It is therefore surprising that counsel instructed to appear for Mr Defty at the hearing on 9 April 2010, who was also instructed at the hearing before Mr Ham QC, filed a skeleton argument that opposed the appellants’ application for an adjournment and argued strongly for the annulment application to be dismissed.This was clearly in my judgment not the right approach to be taken.
22. However, quite apart from whether it could be said to be a breach of a duty owed to the appellants for Mr Defty, through counsel, to have taken this stance at the hearing, it cannot be said to have prolonged the bankruptcies, for a number of reasons. First, many, if not all, the points made by counsel were points that it was entirely appropriate to be made on behalf of a trustee. It was the deployment of those points in favour of a strongly put argument against the appellants that was inappropriate. The points themselves could objectively justify the Deputy Registrar’s decision and it is quite possible, perhaps probable, that the Deputy Registrar would have reached the same decision without the active opposition of the trustee. Secondly, and more importantly, the appellants were not seeking annulment orders at the hearing. They applied for the adjournment of the application pending the determination of their application for permission to appeal Judge Oppenheimer’s order dated 11 January 2010 and the determination of the Solicitors Disciplinary Tribunal proceedings against Mr Mireskandari. The Tribunal gave its decision in June 2012, less than a month before the hearing before Mr Ham QC. Its findings of dishonest misrepresentation against Mr Mireskandari provided thebasis for Mr Ham QC’s order in favour of the appellants. If the annulment application had been adjourned on 9 April 2010, as the appellants requested, the bankruptcies would not have been annulled any earlier. Proudman J so held at [137] and in my judgment she was right to do so.
23. Standing back from the individual acts and omissions alleged by the appellants to have resulted in an unreasonable prolongation of the bankruptcies and looking at the whole chronology, it becomes clear that at most stages Mr Bramston and Mr Defty agreed not to take steps in the bankruptcies at the request of the appellants. They did so to enable the appellants to pursue their applications to annul the bankruptcies and to take steps to set aside the 2004 judgment. While there are a few instances of acts by one or other of the respondents that merit, or may merit, some criticism, they had no effect on the course of the bankruptcies and for the most part the respondents were accommodating to the appellants’ requests.
24. Ultimately the appellants’ position on the 2004 judgment was vindicated, or as their counsel put it in his skeleton argument for the trial “Dr Oraki’s contentions as regards Dean & Dean and Mr Mireskandari turned out to be correct”, as a result of the Solicitors Disciplinary Tribunal’s findings against Mr Mireskandari in June 2012. Those proceedings were vigorously defended by him. Although the allegations against him were published in the press in September 2008 and the disciplinary proceedings were commenced against him in or about 2009, the annulment application had in reality to await the outcome of those proceedings, as the appellants themselves recognised.

*Issues of law*

1. For the reasons given above, I have concluded that this appeal should fail on the facts, both as regards the breach of any duty on the part of the respondents and on whether the impugned acts and omissions caused any loss.
2. In those circumstances, it is not necessary to reach conclusions on the legal issues that would otherwise have arisen. As earlier stated, some of the issues raised novel questions which, in my view, would be better addressed by reference to the facts of a particular case requiring them to be decided.
3. It is however necessary to say something because the judge considered them and expressed her conclusions. As with this appeal, the judge had found on the facts that the claim was in any event not sustainable.
4. On behalf of the respondents, it was submitted to the judge, and she accepted, that (i) the duties of a trustee in bankruptcy to the bankrupt are governed exclusively by section 304 of the Act and that no duties are owed at common law, (ii) in any event, the effect of a release of the trustee under section 299 of the Act is to preclude any claim save under section 304, and (iii) again in any event damages were not recoverable for mental distress.
5. I will take first the question whether there are any duties at common law.
6. The judge referred to the historical background. The report of the Cork Committee on *Insolvency Law and Practice* (1982) (Cmnd 8558), many of whose recommendations were enacted in the 1986 Act, recognised that there was no remedy open to a bankrupt against his trustee before section 80 of the Bankruptcy Act 1914 and little practical remedy thereafter. The Committee did not regard this as satisfactory and recommended the imposition of a statutory duty of care but with protection for insolvency practitioners, given the antagonism that bankrupts not infrequently display to their trustees.
7. Parliament did not fully enact this recommendation but the Act contains section 304 which provides, so far as relevant:

“(1) Where on an application under this section the court is satisfied-

(a) that the trustee of a bankrupt’s estate has misapplied or retained, or became accountable for, any money or other property comprised in the bankrupt’s estate, or

(b) that a bankrupt’s estate has suffered any loss in consequence of any misfeasance or breach of fiduciary or other duty by a trustee in the carrying out of his functions the court may order the trustee, for the benefit of the estate, to repay, restore or account for money or other property (together with interest at such rate as the court thinks just) or, as the case may require, to pay such sum by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.

This is without prejudice to any liability arising apart from this section.”

(2) An application under this section may be made by the official receiver, the Secretary of State, a creditor of the bankrupt or (whether or not there is, or is likely to be, a surplus for the purpose of section 330(5) (final distribution)) the bankrupt himself.

But the leave of the court is required for the making of an application if it is to be made by the bankrupt or if it is to be made after the trustee has had his release under section 299.”

1. Section 304 in terms provides a framework for claims for the benefit of the bankruptcy estate. It is concerned with, and confined to, acts or omissions on the part of the trustee that have caused loss or damage to the estate. An application under the section may be brought by any creditor, who will clearly have an interest in the proper administration of the estate. The bankrupt may only apply under the section with the leave of the court. This is a requirement designed to provide protection to trustees, although it is to be noted that the bankrupt may be given leave even though there is not, or is not likely to be, a surplus available for him.
2. The judge held:

“33 I observe that it would be inconsistent with the requirement that the permission of the court must be given if the bankrupt had an unfettered right to take proceedings against his trustee. In any event there is no need for the bankrupt to have a general right of action based on a common law duty which would conflict with the statutory regime of rights, for example, sections 303, 304, 325(2), 326(3) and 363 of the 1986 Act.

34 I do not therefore consider that there is a common law duty in negligence apart from the statute.”

1. It is perfectly understandable that the bankrupt should need leave before he can apply under the section *for the benefit of the estate*. That does not, however, explain why in no circumstances can a trustee owe an enforceable duty to the bankrupt in respect of loss or damage caused not to the estate but to the bankrupt personally. Nor, importantly, does it explain why section 304(1) provides that the sub-section is “without prejudice to any liability arising apart from this section”. Those words are apt to extend to any claim for any common law or other duty not falling within the express terms of section 304. They wisely accommodate future legal developments, including developments in the common law, as well as providing for liabilities that could in 1986 have arisen.
2. In my judgment, section 304 cannot be read as excluding any liability on the part of a trustee to a bankrupt, save as expressly provided by the section, and I therefore respectfully disagree with the judge on this point. However, for the reasons given above, this is not the case to decide the circumstances in which a duty in respect of loss caused to the bankrupt personally may arise or the nature of that duty. I say only that section 304 does not exclude the possibility of such a duty.
3. Turning to the effect of section 299 of the Act, it provides, so far as relevant, that a person who has ceased to be a trustee “shall have his release” as from dates to be determined in accordance with the section. In the case of Mr Bramston and Mr Defty, these dates were 9 January 2009 and 17 October 2014 respectively. Section 299(5) provides that:

“Where the official receiver or the trustee has his release under this section, he shall, with effect from the time specified in the preceding provisions of this section, be discharged from all liability both in respect of acts or omissions of his in the administration of the estate and otherwise in relation to his conduct as trustee.

But nothing in this section prevents the exercise, in relation to a person who has had his release under this section, of the court’s powers under section 304.

1. The respondents submitted, and the judge held, that the effect of section 299(5) was that the appellants could not maintain their personal claims against the respondents. All the claims were “in respect of acts or omissions of his in the administration of the estate and otherwise in relation to his conduct as trustee”. She held that the saving for claims under section 304 did not assist the appellants because, apart from one or two claims for which they had permission, none of their claims involved the exercise of the court’s powers under section 304.
2. I agree with the judge as regards the inapplicability of the saving for claims under section 304 for the reason she gave, but I am unable to endorse her conclusion that therefore no other claim arising out of the trustee’s conduct as trustee can be brought. It gives rise to some difficult and as yet untested questions. Suppose that in the course of realising an asset a trustee makes a negligent or even fraudulent misstatement, is the third party who relied on it deprived of any remedy against the trustee? Mr Briggs submitted that he was. Mr Briggs further submitted that because Mr Defty had his release from 17 October 2014, the appellants’ personal claims could no longer been maintained against him, even though the action had been commenced some 20 months earlier. This seems a surprising result.
3. Again, I do not consider it valuable to express obiter views on what seem to me to be difficult questions on the effect of section 299 on claims such as these in this case but should await a case in which the answer will have an effect on the outcome.
4. The judge also held that, even if a bankrupt can bring a personal claim against his or her trustee, damages for mental distress are not recoverable. While I am inclined to think that may be right, I do not propose to express a concluded view on it.

*Conclusion*

1. For the reasons given in this judgment, I would dismiss the appeal. The appellants have justifiably strong views about their predicament flowing from the dishonest activities of Mr Mireskandari, but in my judgment there is no basis for their claims against the respondents who have had to perform their duties as trustees in very difficult circumstances.

**Lord Justice McCombe:**

1. I agree.

**The Master of the Rolls:**

1. I agree that the appeal should be dismissed for the reasons given by David Richards LJ. I express no views on the points of law briefly discussed at the end of the judgment of David Richards LJ since it is not necessary to decide them on this appeal and they are best considered in a case where they are required to be decided against particular facts.