

FortyTwo Talks:
Undoing Orders - Annulments (s 282) and rescission (s 375)
Michael Grant & Christopher McCarthy

Michael Grant: Hello and welcome to *FortyTwo Talks*. This is the fifth podcast in our latest mini-series on insolvency.

My name is Michael Grant, and I specialise in Property and Chancery, and I'm joined today by Chris McCarthy. He's one of our newest members to the Business & Property team, who I believe joined us, is it, February of this year, Chris?

Christopher McCarthy: That's right, Michael.

Michael Grant: Well, welcome to the 42 family.

Christopher McCarthy: Thank you very much.

Michael Grant: Well, it's important to note at the start of this podcast that the focus today is on personal insolvency with an emphasis on Section 282, which is annulment, and Section 375, which deals with rescission. It will not be focusing on corporate insolvency.

That would need to be covered within another podcast at another time.

However, I will say that whilst there's no ability to annul a winding-up order, there is an ability to review, rescind or vary a winding-up order under Rule 12.59 of the Insolvency Rules 2016. So that's just for any practitioners wanting to look into that in the meantime.

Right, Chris, I believe you'll be taking us through Section 282, so over to you.

Christopher McCarthy: Thanks, Michael. So 282, say a bankruptcy order has been made and someone later says that it should never have been made. This may be the bankrupt themselves or the wife of a bankrupt, for example. Section 282 is the court's statutory power to annul a bankruptcy order, and under 282, there are two principal routes: Section (1)(a), where the court asks whether a ground existed when the bankruptcy order was made, which meant that the order ought not to have been made.

And under 282(1)(b), the court may annul where the bankruptcy debts and expenses have since been paid or secured to the court's satisfaction.

So looking first at 1a, the first route asks a historical question, which is, "Was there already something wrong when the bankruptcy order was made?" And where the order followed a creditor's petition, for example, Section 267 provides an obvious starting point for checking if there is something wrong at the time the bankruptcy order was made.

The creditor needed a debt which met the bankruptcy level, which is currently £5,000. It was a liquidated debt, payable and unsecured, and which the debtor appeared unable to pay or had no reasonable prospect of paying. There could also be no outstanding application to set aside a statutory demand when the petition was presented.

So that means that if the debt was genuinely disputed, unliquidated, statute-barred, or below the bankruptcy level, and if the creditor held security or the debt was not payable or there was an outstanding set-aside application, then the bankruptcy order ought not to have been made. So the applicant must establish the defect which meant that the bankruptcy order ought not to have been made.

Merely raising the possibility of a defence would be insufficient.

Michael Grant: Were you able to put that into context for us perhaps, Chris?

Christopher McCarthy: Sure. So for example, say a creditor presents a petition claiming an unsecured debt of £100,000 and a bankruptcy order is then made - after the bankruptcy order is made, documents come to light showing the creditor actually held security for that debt.

Whilst the documents are new, the security existed at the time of the original bankruptcy, so that may support an application under Section 282(1)(a). Effectively, a later discovery of documents may reveal an original defect. That's in contrast to the position where a later event changes a position that was valid at the time that the bankruptcy order was made.

That falls outside of Section 282(1)(a), and we'll return to that distinction when we discuss *Hoare* and *Yang*.

So once establishing the original defect, that opens the statutory gateway, the court must then decide whether to exercise its discretion to annul, and that second stage is the subject of *Khan v Singh Sal*, which Michael, I think you're going to now take us through.

Michael Grant: That's correct, Chris, thanks. So *Khan v Singh Sal*, it's in 2023, Court of Appeal authority. I would probably suggest it's the leading modern authority on the exercise of the court's discretion under 282(1)(a).

The brief facts in this case are that *Mr. Khan* was made bankrupt on Habib Bank's petition. He applied to have the bankruptcy annulled, and the court found that the bankruptcy order ought not to have been made on two bases.

Firstly, the petition debt was genuinely disputed, and secondly, the petition incorrectly said the debt was unsecured when the bank did in

fact hold some security. However, and this is the crux, the annulment was still refused and the reason is *Mr. Khan* was clearly insolvent, and the court considered the wider circumstances, including the interests of creditors.

So the Court of Appeal confirmed that this was not a case where the court had lacked jurisdiction to make the bankruptcy order because it was an ordinary 282(1)(a) case, and the word 'may' in the statutory wording gave the court a discretion whether to annul.

So the court was not restricted to refusing annulment only in exceptional circumstances. It could consider all the circumstances with the bankrupt's actual insolvency being highly relevant. So relevant matters, for instance, include the bankrupt's actual insolvency as seen in *Khan*, could be their conduct, could be delay in applying, it could be an impact on creditors, which we do see a lot, don't we, Chris?

Christopher McCarthy: Yes.

Michael Grant: That seems to be a quite a large factor in courts refusing to annul, or whether annulment would simply be followed by another petition and a fresh bankruptcy order.

So for instance, even if the order ought not to have been made, if it was likely to be followed by another petition and the inevitable granting of a bankruptcy order, what's the point in granting annulment right now?

Christopher McCarthy: Yes, exactly.

Michael Grant: You know, they may as well just keep the bankruptcy order in place. So insolvency will ordinarily be particularly important. The key distinction is between satisfying the statutory gateway and

obtaining relief. So establishing that the original order ought not to have been made is really the beginning of the analysis, it's not the end.

In other words, just because you can find that the order ought not to have been made, that's the starting point. It doesn't mean that the court will automatically grant the relief sought by way of the application. So for a recent illustration in this, and I hope I can pronounce this correctly, you can obviously correct me, Chris, if I'm not pronouncing it correctly, in *Sriram v HMRC*.

Is that correct?

Christopher McCarthy: I think so, yes.

Michael Grant: Oh, good. That was in 2024. I believe it was a High Court case. It found that the debtor lacked capacity during the bankruptcy proceedings, which is a fact which would ordinarily result in annulment. However, annulment was refused after the High Court considered delay, non-cooperation, and the prejudice to the creditors.

So even in that case, where the debtor lacked capacity, you would think in almost any circumstance, if an order is made when a party lacks capacity, you'd imagine for the order to be overturned.

Christopher McCarthy: Yes.

Michael Grant: But I think one of the major factors that we mentioned earlier is the impact on the creditors.

Now I'm going to give a little nod to the 1999 case of *Hope v Premierpace*. This concerned a case where a bankruptcy order was given in the debtor's absence, but such absence was down to the debtor and his solicitor having been wrongly told by the court staff that the petition had been adjourned, and so they didn't attend.

The court held that the making of the bankruptcy order in those circumstances was a breach of natural justice, but the important qualification is that procedural unfairness is not always enough.

The court said that if the debtor had no answer on the merits and the same bankruptcy order would inevitably be made on a rehearing, there could be no point in annulling it.

And I think that sort of makes sense, doesn't it, Chris?

Christopher McCarthy: It does make sense, yes.

Michael Grant: So again, just because the order should not seemingly have been made at the time of the hearing does not necessarily mean that annulment would be an automatic right. So we've seen a string of cases where the courts have refused to annul even in situations where the order ought not to have been made if, for instance, the result would just be inevitable upon a further petition and a rehearing.

Let's see how this compares with rescission.

You're going to talk us through Section 375, aren't you, Chris?

Christopher McCarthy: Yes, Michael. Section 375 gives the insolvency court power to review, rescind or vary an order made in the exercise of its insolvency jurisdiction. In effect, the section operates as a safety valve, but its practical focus is a material difference between the circumstances in which the original order was made and the circumstances now before the court.

That difference may consist of an important event occurring after the order. It may also consist of significant material which existed earlier but was absent from the original hearing. But in that case, the applicant must explain the material, its significance, and where it

could have been produced at the original hearing, the reason why it was absent.

And so the leading authority in relation to Section 375 is *Papanicola v Humphries*, which is a High Court case from 2005, and it establishes a broad but exceptional discretion to review, vary, or rescind. But the applicant bears the burden of persuading the court that the new circumstances justify reopening the order, and it's a fairly high bar, but there is the safety valve nonetheless.

So a simple example is that suppose a bankruptcy order rests upon liability orders which were valid at the time they were made, those liability orders are then later set aside. The bankruptcy order was made on a foundation which existed, and so Section 282(1)(a) doesn't fit because the bankruptcy order ought to have been made at that time the liability orders were valid.

So the subsequent removal of the foundation of the bankruptcy order may instead engage Section 375. So the jurisdiction also protects the finality of court decisions, and Section 375 requires material difference in the position before the court. It cannot, though, provide another hearing of an argument already determined without a good explanation.

So, *Papanicola* also addresses the common situation in which the insolvency order was made in a party's absence.

In that setting, the court applies the approach reflected in CPR 39.3. And Michael, I think you're going to explain to us about 39.3.

Michael Grant: I'll take us through it, just really briefly. And I imagine the majority of practitioners listening to this podcast will be familiar with 39.3.

Christopher McCarthy: I would have thought so, yes.

Michael Grant: But, you know, it doesn't hurt to quickly run through it. CPR 39.3 is relevant where the bankruptcy order was made in an applicant's absence, just like for instance, you know, a possession claim or any hearing - if someone doesn't attend a hearing and an order is made in their absence, they can make an application under 39.3 to set aside.

The applicant must show three things.

Firstly, that they acted promptly upon learning of the order. So we always see that as the first test. Was the application made promptly?

Number two, they had a good reason for not attending.

And three, they had a reasonable prospect of success at that hearing.

The third requirement, therefore, is particularly important in these cases.

It's not enough to explain simple absence, so the applicant must show that attendance could realistically have changed the outcome, not just simply that they were not informed of the hearing or didn't know that they were needed to go to the hearing.

As *Papanicola* explains, these are not freestanding statutory requirements for a Section 375 application, but they are an important guide to the exercise of the court's discretion when considering rescission in cases where the debtor was absent at that hearing.

Now, this leads us on to just discussing about the distinction between the 282 route and the 375 route.

Christopher McCarthy: Yes.

Michael Grant: Now, the distinction between annulment and rescission is well illustrated in two leading authorities.

You alluded to *Hoare* and *Yang* before. I'm going to properly set them out. So the first being the High Court decision in *Hoare v Inland Revenue Commissioners* in 2002 and the second being a Court of Appeal decision in *Yang v Official Receiver* in 2017.

Christopher McCarthy: Yes, and you might remember, Michael, in *Hoare*, this is the classic old defect case. The bankruptcy petition was defective when the bankruptcy order was made, but the defect was only identified after a change in legal advisors.

The court held that this remained an annulment case. It was a later discovery of an existing defect, so it doesn't turn it into an later event, which is more appropriate to 375.

Michael Grant: Oh, right. So what I'm taking from that, Chris, is that the question is therefore retrospective. In other words, would the bankruptcy order have been made if the relevant facts and submissions had been put before the petition court? Is that right?

Christopher McCarthy: Yes, that's right, Michael, and *Yang* is the contrasting later event case.

There, the liability orders supporting the bankruptcy were valid when the bankruptcy order was made but were then subsequently set aside. So the Court of Appeal held that this didn't amount to a ground existing at the date of the bankruptcy order, but the appropriate remedy was instead rescission under Section 375 and not annulment under 282.

Michael Grant: So I guess, Chris, the practicals test is simple. A defect which existed when the bankruptcy order was made, even if it's found later, I guess, points towards 282.

But a genuinely later development which removes a foundation that was valid at the time that the order was made points towards 375.

Christopher McCarthy: Yes, that's correct.

I think it might also be worth pointing out *IRC v Robinson*, a case from 1999, which supplies a qualification, though, that a Section 375 review jurisdiction cannot be used to circumvent the conditions required under 282 for annulment. So it's important to bear that in mind as well.

Michael Grant: Would you be able to wrap this up for us, Chris, then in a nice media soundbite?

Christopher McCarthy: Thanks, Michael. So I think the practical starting point is to identify when the matter relied upon arose. So 282(1)(a) is where the ground existed when the bankruptcy order was made. The applicant has to prove the ground that meant that the order ought not to have been made, and then the court goes on to exercise its discretion in light of the present circumstances, and importantly, as you highlighted, the collective interests of creditors.

Section 375 addresses material change or a new circumstance capable of justifying review, rescission or variation of the order. It preserves an exceptional power to prevent injustice while maintaining finality of decisions already made. And just for completeness, an appeal would address an error made in the original decision.

So correctly identifying the nature and timing of the complaint is therefore the essential first step, and that determines jurisdiction, and then you'll be able to then direct the evidence required towards the question that the court's going to ask at the hearing.

Michael Grant: Thanks, Chris. And just one final thing.

I do recall from my Celia Milman reading that rescission is not meant to be used as an alternative to appeal.

Christopher McCarthy: Indeed, yes.

Michael Grant: Well, thank you all for tuning in to this episode of *FortyTwo Talks*. We hope you enjoyed it.

To listen to all our podcasts, you can find us on Apple Podcasts, Spotify, the Chambers website, or wherever else you get your podcasts, and it's goodbye from me.

Christopher McCarthy: And it's goodbye from me.

Michael Grant: Thanks for listening.