[2018] JMCC Comm 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

INSOLVENCY DIVISION

CLAIM NO. 2016I00002

BETWEEN	**OWEN GRANT**	**1ST CLAIMANT**
AND	**ISRAEL TRANSPORT &EQUIPMENT COMPANY LIMITED**	**2ND CLAIMANT**
AND	**HERBERT HARTWELL**	**1st DEFENDANT**
AND	**STEPHEN MOODIE**	**2ND DEFENDANT**

IN CHAMBERS

Mr. Lijyasu M. Kandekore Attorney-at-Law for the 1st Claimant

Mr Anwar Wright instructed by Taylor-Wright & Company for the 2nd Defendant

6th March and 26th April 2018

Insolvency - Procedure for application for receiving order - Whether previous failure to enforce judgment precludes application for receiving order – Whether stale dated judgment can ground application for receiving order - Whether failure to pay debt to single debtor can establish that debtor has ceased to meet liabilities generally as they become due. Conditions for appointment of Government Trustee - The Insolvency Act, 2014

LAING J,

[1] By fixed date claim form filed on 22nd November 2016, the 1st Claimant has applied for a receiving order against the 2nd Defendant pursuant to section 58 of The Insolvency Act, 2014 ("the Act"). The Act provides that where such an application is made the application must state:

(a) that the debt or debts owing to the applicant creditor or creditors, which shall amount in the aggregate to not less than the three hundred thousand dollars;

(b) that the debtor has committed an act of bankruptcy within six months immediately preceding the filing of the application for a receiving order ....

[2] Section 57(1)(a)-(j) of the Act lists a number of acts of bankruptcy. This Claim (alternatively referred to herein as "the Application"), is grounded on section 57(1)(j) of the Act, which specifies an act of bankruptcy, as including the situation where the debtor ceases to meet liabilities generally, as they become due. That assertion is founded on the failure of the 2nd Defendant to have satisfied an order of the Court made 25th September 2006 that "*The Judgment Debtor, Mr Steve Moodie pays to the Judgement Creditors the sum of One Million Five Hundred Ninety Three Thousand Four Hundred Sixty Eight Dollars Twenty Nine Cents ($1,593,468.29), less the sums already paid by monthly installments of Fifteen Thousand Dollars ($15,000.00) commencing June 30, 2006 thereafter at the end of each succeeding month until liquidation...*" ("the Judgment"). The Judgment was in turn based on a judgment in default of defence entered against the 2nd Defendant on 19th September 2000 in the sum $453,001.40 with interest.

[3] The Civil Procedure Rules ("CPR") rule 77.5 which is entitled *"Applications for Receiving Orders*" is clearly drafted and provides as follows:

77.5- (1) An application for a receiving order pursuant to Part V of the Act, must be commenced by a fixed date claim form in Forms 2-

(a) with prescribed notes in Form I.1; and

(b) Form 4.

(2) The application must name a trustee.

(3) The applicant must file an affidavit pursuant to section 58 of the Act.

(4) The application must be served –

(a) with the affidavit, prescribed notes (Form I.1) and a form of acknowledgment of service (Form 4);

> *(b) on the trustee named in the application and the Supervisor; and*
>
> *(c) not less than 14 days before the hearing date.*

[4] Rule 77.6-(1) provides that when an application under rule 77.5 is served, the application must be accompanied by a notice of dispute in Form I.2. Rule 77.6 (2) requires a debtor who wishes to dispute an application for a receiving order to file a notice of dispute in Form 1.2 and serve a copy of the notice on the applicant or the applicant's attorney-at-law, not less than 3 days prior to the date for hearing of the application.

[5] Rule 77.7-(1) provides that the applicant must file proof of service with the Court no less than 2 days prior to the hearing of the application. Rule 77.7 (2) states that:

> *"Where the debtor does not deliver a notice of dispute prior to the hearing date for the application or does not attend at the hearing of the application, the court may make a receiving order based on the allegations contained in the application and the supporting affidavit.*

[6] It is anticipated that most of the applications for receiving orders will be on the ground that the debtor has ceased to meet his liabilities generally, as they become due. A claimant who claims to be the creditor of a person in respect of whom he seeks a receivership order has the burden of proving to the Court, on a balance of probabilities that he is a creditor of that person, that the debt is due and payable, and that the person is unable to pay that debt. If there is evidence of a genuine and substantial dispute as to whether the debt is in fact due, then the Claimant would not have established that he is entitled to obtain the relief claimed.

[7] In this Claim, the 2nd Defendant did not file a notice of dispute, but chose instead to challenge the claim by a notice of application filed 13th February 2018 seeking to have the claim struck out as an abuse of the process of the Court. In support of this application for striking out, the 2nd Defendant submitted that the insolvency division of the Court was being invoked for an improper purpose. The gravamen of this submission was that the Claim was an attempt to enforce a stale dated judgment following previously failed attempts. The affidavit of the 2nd Defendant made

reference to the fact that he had successfully contested a judgment summons filed by the Claimant and the Court had refused the application for his committal to prison.

[8] The submissions of Counsel for the 2nd Defendant also placed considerable emphasis on his assertion that the judgment debt was stale dated, the Judgment having been obtained on 27th September 2006. Counsel referred to CPR rule 46.2 which requires a judgment creditor to seek permission to enforce a judgment debt which has not been enforced for 6 years. Counsel submitted that the Claimant was seeking to circumvent the statutory enforcement process which requires permission and that amounted to an abuse or misuse of the Court's insolvency jurisdiction.

[9] I do not accept these submissions, to the extent that they equate insolvency proceedings with enforcement proceeding and suggest the application of a similar test. Because of the availability of the insolvency jurisdiction of the Court governed by different rules, it is open to the 1st Claimant in these proceedings to seek to demonstrate their compliance with these rules and it cannot reasonably be asserted that recourse to the insolvency jurisdiction amounts to an abuse of that jurisdiction merely because the 1st Claimant previously may not have been able to enforce the relevant judgment. Furthermore, these allegations, without more, are incapable of establishing that the 1st Claimant is seeking to obtain some improper collateral advantage. However, the Court recognises that if the judgment creditor can collect the judgment without invoking the mechanism of the bankruptcy process, a petition ought not to be granted and this issue will be considered later in this judgment.

[10] The fact that the Act is relatively new has meant that we have not yet developed a significant body of local case law interpreting its provisions. However, thankfully, its drafting was heavily influences by the Canadian Bankruptcy and Insolvency legislation and as a consequence, the authorities from that jurisdiction offer considerable guidance. By way of example, Section 43 (1) of the Canadian Insolvency and Bankruptcy Act provides that one or more creditors may apply for a

bankruptcy order against a debtor if it is alleged that "*...(b) the debtor has committed an act of bankruptcy within six months preceding the filing of the application.*"

[11] In **Platt v Malmstrom** 53 O.R. (3d) 502, a case from the Court of Appeal for Ontario, Canada, as the headnote indicates, the Court had to consider whether:

> *"a judgment or order entered more than six months before the issuance of a petition for bankruptcy is sufficient evidence of an act of bankruptcy having been committed within the six months of the filing of the petition."*

The Court held that:

> *"..An express demand for payment by the judgment creditor within the six-month period is not necessary to establish the act of bankruptcy because a judgment is a continuing demand for payment by the judgment creditor."*

[12] In the Judgment of the Court delivered by Finlayson JA, he stated at paragraph 16 as follows:

> *[16] In Re Kaussen, supra, the bankruptcy judge, Gomery J., who was affirmed by the Quebec Court of Appeal, put it even more broadly at p. 119:*
>
> > *The reason for the six-month rule was to prevent a petitioning creditor from invoking a stale default as an act of bankruptcy. Where there is no purpose to be achieved in making fresh demands because it is apparent that the debtor cannot or will not pay, the creditor is entitled to consider that default, once clearly established, continues in effect. His recourse should not be excluded because he fails to perform the empty gesture of demanding payment from someone who has already demonstrated his inability to respond.*

[13] In the Claim herein, I do not find that the application fails by reason only of the judgment debt on which it is based, having been entered more than six months before the filing of the Application herein.

Has the 2nd Defendant committed an act of bankruptcy within six months immediately preceding the filing of the application for a receiving order

[14] As previously stated herein, the Application is grounded on section 57(1)(j) of the Act, which provides that the Court may grant such an order where a debtor commits

an act of bankruptcy. In this case the specific act of bankruptcy alleged is that the 2nd Defendant has ceased to meet liabilities generally, as they become due.

[15] Section 42(1)(J) of the Canadian Insolvency and Bankruptcy Act similarly provides that a debtor commits an act of bankruptcy "*if he ceases to meet his liabilities generally as they become due*".

[16] It has been settled in the Canadian cases that the word "generally" as used in the equivalent provision of their act does not mean "*entirely*" but rather it means "*in most cases*" or "*on the whole*" and whether this provision is satisfied is a matter to be decided on the facts of each case. Where there is only one debtor, as in this case, it may be difficult for him to prove that the claims of other creditors are unpaid. In the case of **Re Holmes and Sinclair** (1975) 34 C.B.R.(N.S.) 111, the Court held that a creditor cannot ask the Court to infer from the fact that he is not being paid that other creditors also are not being paid. It was recognised in cases such as **Valente v Fancsy Estate** 70 O.R. (3d) 31, that there is a long line of Canadian case law authorities which have made it settled law in that jurisdiction, that the failure to pay a single creditor can however constitute an act of bankruptcy where there are special circumstances.

[17] In the case of **Valente v Fancsy Estate** (supra), the Court of Appeal for Toronto, considered at paragraph 14 of the judgment :

> *"...whether the concept that a judgment constitutes a continuing demand will render every debt that has been pursued to judgment a special circumstance making that one debt evidence of an act of bankruptcy."*

[18] The Court clarified the decision in **Platt v Malmstrom** (supra) and confirmed that one judgment will not automatically constitute special circumstances and an act of bankruptcy, without the Court considering "*whether, in all of the circumstances, the petitioning creditor had proved that the debtor was not meeting his liabilities generally as they fell due."*

[19] The Court's analysis at paragraph 15 as well as its suggested approach to the issues to be examined in making this determination at paragraph 16 are worth reproducing as follows:

> *[15] Based on Platt, once a debt has been pursued to judgment, because that judgment constitutes a containing demand for payment, it can form the basis for a finding that it constitutes an act of bankruptcy based on special circumstances. However, one judgment debt will not necessarily constitute special circumstances in every case. Ultimately the issue for the bankruptcy court on a petition for a receiving order is whether the creditor has proved that the debtor committed the act of bankruptcy alleged in the petition.*
>
> *Section 43 (60 and (7) provide:*
>
> > *43 (6) At the hearing of the petition, the court shall require proof of the facts alleged in the petition and of the service of the petition, and, if satisfied with the proof, may make a receiving order.*
> >
> > *(7) Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay this debts, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.*
>
> *[16] Before the court can be satisfied that the failure to pay one judgment debt is tantamount to fail to meet liabilities generally [page 37] as they become due, the court must examine and consider all of the circumstances including:*
>
> *--The size of the judgment -- a small unpaid judgment is less likely to indicate an act of bankruptcy than a very large one;*
>
> *--How long the judgment has been outstanding -- there may be reasons why a recently obtained judgment has not been paid as yet, a potential appeal, the need to arrange for the marshalling of funds, the intent to make arrangements for payment over time or in the case of a default judgment, knowledge of the judgment;*
>
> *--If a judgment has been outstanding for a long time, it may be that the debtor believes that the creditor is willing to wait for payment, and is paying his or her other debts as they fall due;*
>
> *--Whether the judgment creditor has conducted a judgment debtor examination and the results of that examination*
>
> *--If the judgment creditor can collect without invoking the mechanism of the bankruptcy process, a petition ought not to be granted;*

> *--What steps the judgment creditor has taken to determine whether the debtor has other creditors and the results of those inquiries.*

[20] In the Claim herein, the Judgment in the sum of $1,593,468.29 (less the sums already paid) is not a small sum. In the Court's opinion it is capable of indicating an act of bankruptcy especially when viewed in the context of the evidence of the 1st Claimant in his affidavit filed 15th December 2015 (which I accept) that the 2nd Defendant started to pay the judgment over a period of time. The 1st Claimant said that he was informed and verily believe (and accordingly this evidence is of considerably less weight), that up to July 2017 the 2nd Defendant had paid $203,684.25 but suddenly [stopped] paying and asserted that he is not paying any more because he is not indebted to the 1st Claimant.

[21] The Judgment has not been appealed and the time for so doing has long expired. It cannot therefore be reasonably asserted that the 2nd Defendant is pursuing an appeal. There is also no evidence to support a finding that the 2nd Defendant has been or is in the process of arranging for the marshalling of funds, with the intent to make arrangements for payment over time.

[22] The Judgment has been outstanding for a long time, but there is no evidence to suggest that it may be that the 2nd defendant believes that the creditors are willing to wait for payment, and for that reason he is paying his other debts as they fall due. This conclusion is unsupportable, since the 1st Claimant has indicted his desire to have his money. Furthermore, the delay in paying him is inordinate by any measure.

[23] The Judgment includes the words "*upon the Order for Oral Examination coming on for hearing this day...*" and it seems reasonable to conclude that the judgment creditors have conducted a judgment debtor examination. However the results of that examination have not been disclosed on this application and are not known to this Court.

[24] Although the 1st Claimant is not required to conduct an exhaustive investigation of the affairs of the 2nd Defendant before filing this claim, the Court has not been provided with any evidence as to what steps the judgment creditors have taken to

determine whether the 2nd Defendant has other creditors and the results of those inquiries. However, in the circumstances I do not find that this deficiency is fatal. There is also no evidence before the Court to suggest that the judgment creditor can collect without invoking the mechanism of the bankruptcy process. There is of course evidence that the 1st Claimant has applied for a judgment summons and eh application was unsuccessful.

[25] The Court recognises that the burden of proof is on the 1st Claimant/Creditor in satisfying the Court on this Application. However, having regard to the factors considered herein, especially the inordinate delay in satisfying the Judgment, and in circumstances where the facts do not support a reasonable explanation for so doing, is the Court's finding that the 2nd Defendant has failed to satisfy a debt owed to the Claimants in excess of $300,000.00 and the Court has concluded that he has ceased to meet liabilities generally, as they become due. The Court finds that in the circumstances the 2nd Defendant has committed an act of bankruptcy within six months immediately preceding the filing of the claim herein as alleged by the 1st Claimant in this Application for a receiving order.

The appointment of the government trustee

[26] The identification and naming of a trustee as well as the service on him is a critical requirement of CPR 77.5. In some jurisdictions there is an added requirement that a "*consent to act*", duly signed by the named trustee, is also filed. The requirement for a signed consent avoids valuable judicial time being wasted by the Court having to address issues such as disputes relating to the retainer of a trustee at the first hearing of the fixed date claim form. However, in the absence of such a statutory requirement, it may be prudent for litigants and practitioners to obtain confirmation of a trustee's ability to act and to reach a firm agreement as to the terms of his acting before naming such an individual in the fixed date claim form which is filed.

[27] In this case, the 1st Claimant in recognition of his initial non-conformity with the rules, filed an amended fixed date claim form on 16th February 2017 to insert the name of

Ken Tomlinson as the insolvency practitioner he wished to have appointed. Subsequently the 1st Claimant explained that he had a difficulty obtaining his services and filed a further amended fixed date claim form seeking the appointment of the Government Trustee instead.

[28] Section 60 of the Act provides that on a receiving order being made the Court shall appoint a trustee of the property of the bankrupt, "*having regard, as far as the court deems just, to the wishes of the creditors"* and section 71 provides that only a person who is licensed under the Act may be appointed or act as a receiver.

[29] As it relates the Government Trustee, section 242 of the Act provides that the Court may appoint the Government Trustee to administer the estate of the debtor "*where no licensed trustee can be found who is willing to act as trustee*".

[30] The evidence of Mr Kandekore on behalf of 1st Claimant was that the 1st Claimant cannot afford to pay the charges of the commercial receiver and is therefore obliged to seek and obtain the services of the Government Trustee.

[31] It was submitted by Counsel for the 2nd Defendant that there was insufficient material before the Court on which an informed determination could be made as to whether: (a) an insolvency practitioner had been approached, (b) who had been approached, (c) the proposed range of fees, and (d) whether in light of the said fees, there is sufficient assets in the estate to appoint an insolvency practitioner or the Government trustee.

[32] In some jurisdictions the power of the Court to appoint the Government Trustee is not qualified as in the Act, (see for example section 159 of the British Virgin islands Insolvency Act, 2003 in respect of the equivalent position of Official Receiver). The obvious risk where there is no qualification is that the Government Trustee might be inundated with orders to act as trustee, which would undoubtedly compromise the efficiency of her office. In my view, in most cases "*where no licensed trustee can be found who is willing to act as trustee*", this will be as a result of the applicant being unable to afford the services of a private licensed trustee. It also appears to me that

in order to satisfy this qualification imposed by section 242 of the Act, an applicant is required to demonstrate to the Court that they have taken reasonable steps to secure the services of a licensed trustee. The evidence of Mr Kandekore on behalf of the 1st Claimant makes the assertion that the Claimant cannot afford the services of a private licensed trustee. The 1st Claimant in his affidavit filed 15th December 2017 also averred that he tried to secure a trustee "*but the fees are prohibitively high for me being in excess of $150,000.00 and unless I can obtain assistance from the Government Trustee I will be unable to collect the debt*". Ideally, this evidence ought to have contained greater detail. However, notwithstanding this weakness, the Court is prepared to accept the unchallenged evidence on this point and on that basis find that the 1st Claimant is unable to find a licensed trustee to act having regard to his financial position.

[33] There is no requirement in the Act for the Court to examine and or be satisfied as to the value of the assets in the debtor's estate before the appointment of the Government Trustee and the Court finds that the failure of the 1st Claimant to provide this information is immaterial.

[34] The Second Amended Fixed Date Claim Form filed 15th December 2017 seeks the Appointment of the Government Trustee to obtain payment of the judgment debt of $1,593,468.29. The Affidavit of Lijyasu M Kandekore filed November 22 2016 confirms the debt including interest as at 2015 to be in the sum of $1,720,945.60. As has been previously indicated in this judgment, the Court is therefore satisfied as to the existence of a debt in excess of the statutory minimum of $300,000.00.

[35] For the reasons stated herein the Court makes the following orders:

1. On the application of Owen Grant made on 22nd Day of November 2016, Stephen Moodie is declared bankrupt and Ms Nicola- Ann Brown Pinnock, the Government Trustee, is appointed as trustee of the bankruptcy estate of Stephen Moodie.

2. Costs are awarded to the 1st Claimant to be paid out of the estate of the bankrupt upon taxation thereof