[2017] JMCC Comm 32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2015CD00137

BETWEEN	**NATIONAL EXPORT-IMPORT BANK OF JAMAICA**	**CLAIMANT**
AND	**WEST INDIES GYPSUM COMPANY LIMITED**	**FIRST DEFENDANT**
AND	**BRIAN WALKS**	**SECOND DEFENDANT**

IN OPEN COURT

Kashina Moore instructed by Nigel Jones and Company for the Claimant

Anthony Pearson for the First and Second Defendants

October 25 and November 3, 2017

INSOLVENCY ACT – WHETHER FILING NOTICE OF INTENTION TO MAKE PROPOSAL UNDER SECTION 11 OF INSOLVENCY ACT BARS QUESTIONING OF DEBTOR

SYKES J

The debt and the stay

[1] West Indies Gypsum Company Limited has defaulted on its debt obligations. Mr Brian Walks is the guarantor of the company's debts. He too has not paid. Exim Bank has successfully sued and has obtained judgment against both.

[2] On October 25, 2017, Mr Walks was to be examined on oath regarding his assets and on other matters connected to enforcing the security. He turns up with a notice of intention to file a proposal which he filed under section 11 (2) of the Insolvency Act ('IA').

[3] Once that notice is filed section 4 (1) bars the creditor (secured or unsecured) having any remedy against the insolvent person. [1] The creditor is also barred

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[1] Section 4 -

(1) Subject to subsection (2) and section 7, where a notice of intention has been filed under section 11 (2) in respect of an insolvent person•

(a) no creditor shall•

(i) have any remedy against the insolvent person or insolvent person's property;

(ii) commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy; and

(b) no provision of a security agreement between the insolvent person and a secured creditor has any force or effect that provides, in substance, that the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as the insolvent person would

otherwise have •

(i) the insolvent person's insolvency;

from commencing or continuing any action, execution or other proceedings for the recovery of the claim provable in bankruptcy. There are exceptions to this but those do not arise for consideration at the moment.

[4] The company and Mr Walks are persons within the meaning of persons as defined in section 2 (1). Both are insolvent persons under section 2 (1).

[5] The issue is whether Mr Walks can be questioned under the relevant provisions of the CPR where that is part of the execution process to enforce the debt.

[6] A similar issue arose on **Walchuck Estate v Houghton** 40 CBR (6th) 35, a decision of the Ontario Court of Appeal. In that case the creditor obtained a money judgment against the debtor. The debtor failed to attend an examination in aid of execution. The motion judge issued an order compelling the debtor to attend court to be examined and to bring specified documents. This he was to do on a named date. Between the date of the order and the date he was to appear with the documents, the debtor made an assignment in bankruptcy. The debtor turned up on the named date but had no documents. He was armed instead with a notice of a stay of proceedings under the Canadian Bankruptcy and Insolvency Act. The creditor was livid. He moved the judge to hold that the debtor was in contempt. The judge ruled that the motion for contempt should proceed in the face of the debtor's bankruptcy. The trial judge held that the matter raised questions of the ability of the court to enforce its judgments and that whether the debtor complied with the court's orders cannot be enmeshed in the timing of his filing for bankruptcy. The Court of Appeal reversed that decision.

(ii) the default by the insolvent person of an obligation under the security agreement; or

(iii) the filing by the insolvent person of a notice of intention under section 11 (2) in respect of the insolvent person, until a proposal is lodged or the insolvent person becomes bankrupt.

[7] In a single judgment of K. Feldman, Janet Simmons, P. Lauwers JJ.A. Their Honours held that the 'examination was clearly in aid of execution' and that the stay was designed to prevent examination of the kind that was proposed. The court held that the stay had the effect of staying the examination and consequently there could not be any contempt for failing to turn up with the documents. The court also observed that the bankruptcy process was designed to create a single forum for creditors.

[8] Although the issue arose in the context of a motion for contempt, the genesis of the matter in **Houghton** was a judgment which was to be followed by an enforcement process that involved an examination about his assets. In the present case, Mr Walks was to be examined on oath as a step in the enforcement process. This is the very thing that the IA was designed to stay because the examination would fall within 'execution or other proceedings for the recovery of a claim provable in bankruptcy.'

[9] Farley J in **In The Matter of the Bankruptcy of Arnold Saul Handelman** 48 CBR (3d) 29 stated in relation to the Canadian statute that:

> *The BIA must be given efficacy in the insolvency context. That is, the language of the Act must be given a reasonable interpretation which supports the framework of the legislation. Unless the language is unambiguous, an absurd result should be avoided.*

[10] This means that the language of the statute is not to be given an overly technical meaning. Therefore, even though the specific process of examination on oath is not mentioned in the IA it does not follow that it cannot be included in the word 'execution or other proceedings.'

[11] In **Brit Corp v Triumbari Containers Ltd** 13 CBR (5^{th}) 165 the court had to deal with a motion seeking to find Mr Triumbari in contempt of previous court orders requiring him to attend for examination in aid of execution of the plaintiff's judgment. Judgment was obtained against the company and at all material times Mr Triumbari was an officer of the company. The plaintiff sought execution of his

judgment and eventually obtained an order directing Mr Triumbari to attend court in order to be examined in aid of execution of judgment. On the specified date Mr Triumbari failed to attend for cross examination. The examination was postponed and on the new date Mr Triumbari turned up but without any document of the company. The plaintiff sought and obtained an order requiring Mr Triumbari to produced 'books, records, financial statements, banking records and tax returns; of the company. In addition, the order said that the contempt proceedings were to dealt with on a specified date. Before the hearing the company made an assignment in bankruptcy under the Canadian legislation.

[12] Eventually, in the Bankruptcy Court, Mr Triumbari's counsel sought a declaration that all enforcement proceedings including the contempt motion were stayed by section 69.3 of the Canadian Bankruptcy and Insolvency Act. [2] The Registrar responded to these submissions by adjourning the contempt motion and made the declaration sought but made it applicable on an interim basis that is to say, without prejudice to the contempt motion being heard on its merits. One possible effect of the Registrar's order was that the judge's order indicating that the contempt motion should be heard was stayed. That question was not decided by MacKenzie J since he was in fact hearing the contempt motion.

[13] Counsel for Mr Triumbari submitted that the motion for contempt was an enforcement proceeding within section 69.3 of the Canadian statute and therefore stayed. MacKenzie J, after a review of the authorities, concluded:

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[2] 69.3(1) Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged. (my emphasis)

> *Counsel for Mr. Triumbari submits that this dictum enforces the view that the examination in aid of execution of Mr. Triumbari in relation to the judgment debt against the bankrupt defendant being an integral part of the entire civil action, from its inception to its enforcement, is within the ambit of the terms "execution or other proceedings" in s.69.3(1) of the Act. I accept this submission.*

[14] Mr Triumbari was not the bankrupt. However, he was the human being required to answer for the company. The company made the assignment and that assignment generated a stay which meant that Mr Triumbari could not be proceeded against in the contempt proceedings because such proceedings arose out of effort to enforce the judgment and those efforts, including the contempt, fell within the phrase 'execution or other proceedings.'

[15] It should be noted that it appears that even if there is a court order that debtor should be subject to oral examination, once the notice of intention or an actual proposal is filed, then even the court order is of no effect. This was addressed by MacKenzie J when he heard these submissions:

> *10 As noted above, counsel for Mr. Triumbari submits that the contempt motion relating to Mr. Triumbari is an enforcement proceeding in an action in relation to a claim provable in bankruptcy and is thus within the ambit of the proper interpretation of the language utilized in s.69.3 of the Act. In this regard, counsel contends that the inherent jurisdiction of the court in relation to control its process permits the court on its own motion to exercise its powers of contempt only where the contempt is made "in the face of the court" or where, in a civil context, a motion for contempt is brought by the Attorney General on the court's behalf. Counsel points out that the subject contempt is a civil contempt brought by the plaintiff as a party to the action. Accordingly, despite the language used in paragraph 6 of Justice Dawson's order of March 25, 2005, namely, "to determine whether Domenic Triumbari should be held in contempt of any order of the court related to this matter", the contempt proceedings against Mr. Triumbari arise out of his examination in aid of execution of the bankrupt defendant and that the nature of those proceedings are enforcement proceedings in relation to the claim provable in bankruptcy. In sum, counsel*

> *submits that this court should not proceed with the contempt motion scheduled for July 6, 2005 in light of the interim order of Registrar Nettie and that the bankruptcy court in Toronto should make a final determination of the issue, it being acknowledged that the return date for the hearing in the Toronto bankruptcy court is in September of 2005.*

[16] Counsel for the judgment creditor responded in this way:

> *In response, the plaintiff submits that this court is not bound by an interim order of a registrar in bankruptcy and in any event, the contempt proceedings against Mr. Triumbari are not within the ambit of the stay provisions contained in s.69.3 of the Act. Counsel urges the court to proceed with the contempt motion, arguing that the timing of the defendant's bankruptcy is yet another egregious and transparent attempt by Mr. Triumbari to hinder, delay, if not thwart, the process available to the plaintiff to obtain compliance with various court orders that have been the subject of egregious and wilful disregard and disobedience by Mr. Triumbari.*

[17] MacKenzie J preferred the submission of Mr Triumbari's counsel. The reasoning in the case applies to this case. This means that on the filing of the notice of intention the claimant cannot proceed with the oral examination of Mr Walks whether in relation to the company or in his personal capacity because each defendant in this case filed separate notices of intention.

Disposition

[18] These proceedings are stayed and the matter it now to be dealt in accordance with the provisions of the IA.