[2017] JMCC COMM 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2017CD00276

BETWEEN DEVELOPMENT BANK OF JAMAICA LIMITED CLAIMANT

AND PROACTIVE FINANCIAL SERVICES DEFENDANT

IN OPEN COURT

Tana'ania Small Davis and Adam Jones instructed by Livingston Alexander and Levy for the Claimant

Kwame Gordon and Christopher Henry instructed by Samuda and Johnson for the Defendant

July 13, July 31, 2017 and October 31, 2017

INSOLVENCY – SECTIONS 2 (1), 4, 5, 6, 7, 9, 10, 11, OF THE INSOLVENCY ACT – WHETHER AUTOMATIC STAY UNDER SECTION 4 (1) SHOULD BE LIFTED – TEST FOR LIFTING STAY UNDER SECTION 7

SYKES J

Insolvency

[1] An oral judgment was delivered on July 31, 2017. These are the written reasons. Bankruptcy and insolvency law in Jamaica has been changed dramatically by the new Insolvency Act ('IA'). We have come a far way from the broken bench, that is to say, the time during which Italian merchants who did not pay their debts had the benches on

which they sat in the market place quite literally broken. The Italian expression was ‘banca ruptura’ from which the term bankrupt came. The broken bench was notice to all that the particular merchant was barred from trading.

[2] We have moved away from the English idea that suggested that a bankrupt was a person of not so wonderful character and to be treated as if he were a criminal. The preamble of the 1542 statute commonly regarded as the first English statute on bankruptcy spoke volumes. The statute - **Statute of Bankrupts** or **An Acte againste suche persones as doo make Bankrupte** – had this preamble: [1]

> *Where divers and sundry persons craftily obtaining into their hands great substance of other men’s goods do suddenly flee to parts unknown or keep their houses, not minding to pay or restore to any their creditors their debts and duties, but at their own will and pleasure consume the substance obtained by credit of other men, for their own pleasure and delicate living, against all reason, equity and good conscience: Be it therefore enacted by the authority of this present parliament, That the Lord Chancellor of England, or Keeper of the Great Seal, the Lord Treasurer, the Lord President, Lord Privy Seal, and other of the King’s most honourable Privy Council, the Chief Justices of either Bench for the time being, or three of them at the least, whereof, the Lord Chancellor or Keeper of the Great Seal, Lord Treasurer, Lord President, or the Lord Privy Seal, to be one, upon every complaint made to them by any parties grieved, concerning the premises, shall have power and authority by virtue of this Act to take by their wisdoms and discretions, such order and directions, as well with bodies of such offenders aforesaid, wheresoever they may be had, or otherwise, as also with their lands, tenements, fees, annuities, and offices, which they have in fee-simple, fee-tail, term of life, term of years, or in the right of their wives, as much as the interest, right, and title of the same offender shall extend to or be, and may then lawfully be departed*

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[1] Act 34 & 35 Henry VIII c 4 (1542) is commonly regarded as the first English statute on the subject but as the preamble shows, bankrupts were thought of persons not far removed from criminals.

> *with, by the said offender, and also with their money, goods, chattels, wares, merchandizes, and debts, to be searched, viewed, rented, and appraised, and to make sale of the said lands, tenements, fees, annuities, and offices, as much as the same offender may then lawfully give, grant, or depart with, or otherwise to order the same, for true satisfaction and payment of the said creditors: that it to say, to every of the said creditors, a portion, rate and rate like, according to the quantity of their debts. And that every direction, order, bargain, sale, and other things done by the said lords, authorized as is aforesaid, in writing signed with their hands, by authority of this act, shall be good and effectual in the law to all intents, constructions, and purposes against the said offenders, their heirs and executors for ever, as though the same order, direction, bargain and sale had been made by the said offender or offenders, at his or their own free will and liberty, by writing indented, inrolled in any the King's courts of record.*

[3] If this statute did nothing else it captured the three pillars of insolvency law that are still present today even in the new IA. They are '[1] summary collection or realisation of the assets and [2] then an administration or distribution for the benefit of all creditors'[2] [3] the pari passu principle which was introduced to English law and later to Jamaican law by the words 'a portion, rate and rate like, according to the quantity of their debts.' This 1542 statute continued in force until 1825. If Henry VIII took a jaundiced view of insolvents, James 1 made clear his distaste for them when in 1 Jac 1 c 15 (1604) it was stated that should the offender '[commit] any wilful or corrupt perjury … and being lawfully convicted thereof, shall stand upon the pillory in some public place by the space of two hours, and have one of his ears nailed to the pillory, and cut off.' Apparently, not even such stringency deterred bankrupts for in 1623, the preamble to 21 Jac 1 c 19 lamented that 'daily experience sheweth, that the number and multitude of bankrupts do increase more and more, and also the frauds and deceits invented and practised for the avoiding and eluding the penalties of the good laws in that behalf already made, and the

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[2] Levinthal, Louis Edward, *The Early History of English Bankruptcy*. 67 Univ of Pa. L Rev 1, 14 (January 1919).

remedy by them provided.' The 1623 statute also provided that 'that pillory and the loss of an ear should be the penalty imposed upon a debtor who failed to show that bankruptcy was due solely to his misfortune.' [3]

[4] If one notes the language of the 1542 statute it clear that insolvent individuals were regarded as 'offenders' and by 1623, regarded as worthy subjects for mutilation. Insolvency to tends arise when there are (a) multiple creditors and (b) insufficient assets to meet the liability. In those circumstances it is therefore necessary to have an orderly system of collecting the insolvent's assets, totting up the debt owed and then distributing it pari passu.

[5] The IA has definitely abandoned these ideas of insolvent persons being offenders and objects of disfigurement but the three core principles have remained. The IA has now has established a single regime for insolvency – the generic term preferred – having regard to the fact that the statute covers the whole run from natural persons to unincorporated bodies to companies. The IA operates in conjunction with the Companies Act in respect of companies. It has also introduced a new type of thinking to bankruptcy law in Jamaica, namely, rehabilitation and rescue. The idea is that the insolvent person, where possible, should, where possible, emerge being able to 'restart' life after the previous debt has been satisfactorily dealt with under insolvency regime (**Markis v Soccio** 33 CBR (3d) 89 (Quebec SC)– speaking of the Bankruptcy Act, 1949 of Canada; **Re Newsome** (1927) 8 CBR 279 (Ont SC); **Re Neiman** 33 CBR 230 (Ont SC). All three cases emphasise that the bankruptcy law is for the honest debtor who has fallen on hard times. This seems to be the current thinking in Canadian bankruptcy law and that idea has been captured in the IA. Henry VIII would have been aghast and James I dismayed.

[6] Since the statute is designed to give the insolvent person some breathing space to organise his, her or its affairs in a manner that leads to the orderly meeting and

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[3] Id, at p 17.

satisfaction of lawful debts and liabilities it is not surprising then that the statute has introduced things such as automatic stays which can only be lifted by agreement between creditor and debtor or by judicial order. It permits the process to start not by any action by the creditor or even the court but by the insolvent taking the simple step of filing either a notice of intention to file a proposal or filing a proposal. Once that is done, as shall be shown, the insolvent is, generally speaking, immunised from individual action by a single creditor or group of creditors.

[7] Section 3 tells what the statute is about:

> *This Act seeks to create an environment which aids in-*
>
> *(a) the rehabilitation of debtors and the preservation of viable companies, having due regard to the protection of the rights of creditors and other stakeholders; and*
>
> *(b) fair allocation of the costs of insolvencies with the overriding interest of strengthening and protecting Jamaica's economic and financial system and the availability and flow of credit within the economy.*

The unhappy saga of Proactive Financial Service Limited

[8] This is one of the earliest cases under IA. It is an application by Proactive Financial Services Limited ('PFSL') for an order that the Development Bank of Jamaica Limited ('DBJ') not be allowed to enforce its right to recover money under the terms of a loan agreement.

[9] How did PFSL come to this sorry state of affairs? Part of the answer lies in the fact that the Government of Jamaica wanted to develop the market for lending to small and medium size businesses by borrowing money from international lenders and then permitting retail lending of those funds through non-traditional financial institutions ('ntfs'). PFSL is an ntfs. It is a company incorporated in Jamaica and by an agreement between itself and the DBJ money was lend to PFS which in turn would on lend to

borrowers for what has been described as ‘eligible projects.’ The expression, eligible projects, was defined in the agreement between PFSL and DBJ.

[10] As expected, the lender had, in the agreement, a number of monitoring mechanisms which were designed to deter, detect and prevent serious difficulties from developing within PFSL.

[11] Between March 2014 and November 2015 PFSL received over JA$100,000,000.00 from DBJ by way of loan. By March 2016 PFSL began defaulting on its repayment obligations to DBJ. Some payments were made between January 2016 and December 2016 but it is common ground that PFSL was not serving the loan in accordance with the terms of the loan agreement. Therefore, there is no question that DBJ is and was fully entitled to enforce its security and seek to recover the loan. As of May 2017, PFSL owed JA$139,560,692.72 in principal and JA$10,486,594.62 in interest payments.

[12] It is undeniable that not only was PFS in default on the loan but it was also in breach of its other contractual obligations. For example, PFS failed to

(1) submit audited financial statement as required;

(2) provide monthly reports on arrears of loans it made;

(3) provide quarterly income statements and balance sheets by the 15th day of the month following the quarter;

(4) provide in house financial statements by 30 days after the end of each financial year.

[13] The loan agreement permitted DBJ to inspect the books and accounting records and papers connected to the loan. All this was designed to see if PFSL was performing properly.

[14] In March 2016 it was determined that PFSL was in breach of the loan agreement by not making the loan repayments. This non-payment was followed by other non-

payments in June, September and December 2016 and also March 2017. During this time sporadic payments were made but at no time since March 2016 was PFSL current with its loan payments. In April 2017 DBJ decided to send in its audit team to inspect the books of PFSL. This action, it will be recalled, was expressly permitted under the loan agreement.

[15] The audit team met with officials of PFSL. This meeting confirmed DB's worst fears. It was found that:

(1) PFSL has severe liquidity problems;

(2) 80% of the loans made were at risk;

(3) average monthly collection was JA$400,000.00;

(4) monthly overhead expenses were JA$382,000.00 – JA$400,000.00.

[16] The audit team naturally sought to examine records regarding the borrowers from PFSL, bank statements, audited financial statements and the like. The officials of PFSL were about to provide that information when they were told, via telephone, by a Mr McLeod, Chief Executive Officer of PFSL, that they were not to supply the information. The audit team made heroic efforts to secure the needed information but the officials of PFSL declined to do so ostensibly on the instructions of Mr McLeod.

[17] Added to this was the information that PFSL, in the midst of this debt crisis, was acquiring property at 13 Old Hope Road. It is not clear what was the source of funds for this purchase.

[18] It is against that background that DBJ first approached the court for interim relief which included a freezing order accompanied by a disclosure order. The orders were granted on May 15, 2017. Up to the date of hearing the present application PFSL has not complied with the disclosure order.

[19] The relief sought by DBJ was in the context of a claim filed to recover JA$139,560,629.72 in principal with interest at JA$10,480,594.62. The debt continues

to accrue interest at the daily rate of JA$38,235.79. There was also a claim for late payment penalty of JA$1,572,859.92.

[20] DBJ has placed before the court several promises by Mr McLeod to take steps to meet PFS's indebtedness but none of those has produced the promised repayments.

[21] On July 7, 2017, PFSL filed a notice of intention under section 11 (2) of the Insolvency Act. The consequence of this under section 4 is that 'no creditor shall have any remedy against the insolvent person or insolvent person's property' or 'commence or continue any action, execution or other proceedings for the recovery of a claim in bankruptcy.' The issue in this case is whether this statutory automatic stay should be lifted. The court now turns to the statutory provisions

The statutory provisions

[22] Section 9 reads:

> *(1) This Part shall apply to a debtor that*
>
> *(a) is experiencing financial difficulties; and*
>
> *(b) intends to restructure its financial affairs.*
>
> *(2) The provisions of this Part shall be applied together with and not in substitutions for, sections 203 to 208 of the Companies Act, however, any compromise or arrangement between a company and its creditors (from any class) shall be effected in accordance with this Part.*
>
> *(3) Nothing in this Part precludes the application of other provisions of this Act with such modifications as the circumstances may require to proposals made under this Part.*

Section 10 states

> *For the purposes of this Part and subject to section 11 (2) unless the context otherwise requires, a person facing imminent*

insolvency, shall be treated in a similar manner as an insolvent person

Section 11 is as follows:

(1) The following persons may make a proposal in accordance with this Part –

(a) a person facing imminent insolvency;

(b) an insolvent person;

(c) a receiver, but only in relation to an insolvent person;

(d) a liquidator of an insolvent person's property;

(e) the trustee of the estate of a bankrupt;

(f) a bankrupt

(2) Before lodging a copy of a proposal, an insolvent person may file a notice of intention, in the manner prescribed, with the Supervisor-

(a) Stating the debtor's intention to make a proposal within thirty days after the lodging of the notice of intention; and

(b) Including the name and address of the trustee who has consented in writing, to act as the trustee under the proposal.

(3) The notice of intention to file a proposal shall be lodged in the prescribed form and in the case where the insolvent person is a company, notice shall be given to the Registrar of Companies of such intention to file a proposal

[23] The other important sections are sections 4, 5 and 7.

Section 4 reads:

(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 any such rights to use or deal with assets secured under the agreement as the insolvent person would otherwise have on-

(i) the insolvent person's insolvency;

(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.

(2) Subsection (1) shall not apply

(a) To prevent a secured creditor who took possession of secured assets of the insolvent person for the purpose of realization before the notice of intention from dealing with those assets;

(b) Unless the secured creditor otherwise agrees, to prevent a secured creditor who have notice of intention to enforce security under section 72, in the form prescribed from enforcing that creditor's security against the insolvent person more than ten days before a notice of intention was filed in respect of the insolvent person; or

(c) To prevent a secured creditor who gave notice of intention under section 72 to enforce that creditor's security, from enforcing the security, if the insolvent person has under section 72 (2), consented to the enforcement action.

Section 5 states*:*

(1) Subject to subsections (2), (3) and (4) and section 7, where a proposal has been filed in respect of a debtor-

(a) No creditor to whom the proposal is made shall-

(i) Have any remedy against the debtor or the debtor'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 a debtor and the secured creditor to whom the proposal is made has any force or effect that provides, in substance, that the debtor ceases to have such rights to use or deal with assets secured under the agreement as the debtor would otherwise have on

(i) The debtor's insolvency;

(ii) The default by the debtor of an obligation under the security agreement; or

(iii) The filing by the debtor of a proposal

Until the trustee has been discharged or debtor becomes bankrupt.

(2) Subsection (1) shall not apply –

(a) To prevent a secured creditor who took possession of secured assets of such debtor for the purpose of realization before the proposal is filed under section 17 from dealing with those assets;

(b) Unless the secured creditor otherwise agrees, to prevent a secured creditor who have notice of intention to enforce security under section 72, from enforcing that creditor's security against such debtor more than ten days before –

(i) A notice of intention was filed in respect of such debtor; or

(ii) The proposal was filed, if no notice of intention was filed from enforcing that security or

(c) To prevent the secured creditor who have notice of intention under section 72 from enforcing that creditor's security if such debtor has under section 72 (2), consented to the enforcement action.

(3) Subject to sections 77, 103 and 192 to 201, the filing of a proposal under section 17, shall not prevent a secured creditor to whom the proposal has not been made in respect of a particular security from realizing or otherwise dealing with that security in the same manner as the secured creditor would have been entitled to realise or deal with it if this section had not been passed.

(4) Where a proposal is made to a class of secured creditors and the secured creditors in that class vote for the refusal of the proposal, a secured creditor holding a secured claim of that class may henceforth realize or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section has not been passed.

Section 6

(1) Subject to subsections (2) and (3) and section 7, on the bankruptcy of any debtor, no creditor shall have any remedy against the bankrupt or the bankrupt'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 in respect of the bankrupt is discharged.

(2) …

Section 7

A creditor who is affected by the operation of section 4, 5 or 6, may apply to the Court for a declaration that those sections no longer operate in respect of that creditor, and the Court may make such a

declaration, subject to any qualifications that the Court considers proper, if it is satisfied-

(a) That the creditor is likely to be materially prejudiced by the continued operation of those sections; or

(b) That it is equitable on other grounds to make such a declaration.

[24] It is important to note that section 4 (1) uses the phrase 'insolvent person.' Section 5 (1) speaks of a 'debtor' and section 6 refers to a 'bankrupt.' The different words suggest that the meanings are different. Section 2 (1) is the definition section and it is there important definitions are found. These are the relevant definitions.

Bankrupt 'means a person who has made an assignment under Part VI or against whom a receiving order has been made under Part V.

Debtor means

(a) an insolvent person;

(b) any person who at the time of an act of bankruptcy was committed by him, resided or carried on business in Jamaica;

(c) a bankrupt; and

(d) for the purpose of section 5 and Part 111, a person facing imminent insolvency.

Insolvent person -

(a) means a person who resides, carries on business or has property in Jamaica, whose liabilities to creditors provable as claims under this Act, amount to not less than three hundred thousand dollars or such other amount as the Minister may by order published in the Gazette prescribe as the threshold and –

(i) who for any reason is unable to meet his obligations as they generally become due;

(ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or

(iii) the aggregate of whose property is not at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations due and accruing due;

(b) does not include a bankrupt.

Person includes

A partnership, an unincorporated association, a corporation, a co-operative society or an organisation, the successors of a partnership, association, corporation, society or organisation, and the heirs, executors, liquidators of the successions, administrators or other legal representatives of an individual.

Proposal means

an arrangement for a composition, an extension of time or a scheme of arrangement made under section 17, or modified in accordance with section 38 with creditors either as a group or separated into classes or with secured creditors.

The meaning and effect of the provisions

[25] The principles relating to interpreting a statute are no longer in doubt. The starting point is always the word of the statute. The words are to be read and understood in their immediate context and within the broader context of the statute. The intention of the statute is gathered from the words used which means that the entire statute must be read. This methodology excludes ministerial statements and other

sources of pontification. The reason for this is that the promoter of the statute, usually a member of the executive branch of government, will introduce the Bill which as its objects and reasons for it stated. Experience has shown however, that during the debate the Bill is amended and redrafted to such an extent that when the Bill becomes an Act the text used in the Act is quite different from that which was in the Bill. The final version may not quite reflect what the promoter of the Bill announced at the commencement of the debate. Sometimes the promoter of the Bill, for strategic reasons, adopts some amendments proposed even though those amendments go against what the Bill was expected to reflect. At time the executive branch is operating against a tight legislative time scale and so in order to get the Bill passed have to accommodate amendments that hardly fit the promoter's intention. This is why we speak of the intention of Parliament and not the minister's or the promoter's intention. The intention of Parliament is to be gleaned from the actual text of the statute and not the utterances of the legislators. Even the expression – the intention of Parliament – is misleading because the intention of individual members is irrelevant and no one tries to find that out. What matters is the text voted on by the majority. All this means that we do not divine an intention in the ether and then seek to apply it to the statute.

[26] An examination of the Act reveals that it is a statute that is expected to be operated by the trustees, the creditors and the insolvent persons. The Supervisor is largely a regulator. The role of the court is limited. This has led to jurisprudence from the Supreme Court of Canada that suggests that the statute should not be interpreted in 'overly narrow, legalistic' manner. [4] Since the statute is going to be operated by the

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[4] **A Marquette & Fils Inc v Mercure** 65 DLR (3d) 136 (De Grandpré J: Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it. It seems to me that appellant is urging the Court to so interpret it).

persons already identified then its administration should be practical not legalistic. [5] Finally, it has been said that the statute is to be given 'a reasonable interpretation.' [6]

[27] Sections 4, 5 and 6 grants an automatic stay to the insolvent person, debtor or bankrupt. Section 4 grants the stay to an insolvent person. Section 5 grants an automatic stay to a debtor and section 6 grants an automatic stay to a bankrupt.

[28] These sections were taken from the Federal Canadian Bankruptcy and Insolvency Act. This means that decisions from Canada may be helpful in interpreting the IA. In **3031085 Nova Scotia Ltd v Classic Freight Systems Ltd** 34 CBR (4th) 313, McDougal J speaking of the Canadian section 69.3 (1) [7]stated:

> *The purpose of this section of the* Act *is to prevent proceedings by a creditor that would give the creditor an advantage over other creditors. The stay of proceedings occurs upon filing. It does not require a court order.*

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[5] **Re Rassell** 12 CBR (4th) 316, 71 Alta LR (3d) 85 (CA) (Côté JA: First, the *Bankruptcy and Insolvency Act* puts day-to-day administration into the hands of business people (trustees in bankruptcy and often inspectors). Of course the court has overriding control, and the Superintendent has some oversight, and now a power to issue directives. The point is that the administration is to be practical, not legalistic.)

[6] **In The Matter of the Bankruptcy of Arnold Saul Handelman, Handelman Re** 48 CBR (3d) 29 (Farley J: 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.)

[7] 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.

[29] This provision is similar to section 6 of the IA. Having regard to the similarity of wording of sections 4 (1), 5 (1) and (6 (1), his Honour's comments apply equally to Jamaica's IA. The stay is by operation of law and no judicial order or act is necessary.

[30] Having examined Jamaica's IA and in particular Part 111, there is no requirement that the notice of intention must be brought to the attention of the creditor before the stay has effect. This means that once the relevant documents are filed, then the stay takes effect from that moment and it matters not when the creditors get notice of the filing. The consequence of this is that a creditor who cashed a cheque from the insolvent person or debtor after the notice of intention has been filed must return the money. This was held in **Startek Computer Inc (Trustee of) v Samtack Computer Inc** (2000) 20 CBR (4th) 166. The judgment is very short and will be set out in full so that the impact of the new law in Jamaica can be begun to be appreciated. Harvey J's judgment is this:

> *1 The plaintiff applies for judgment pursuant to Rule 18A against the defendant Samtack Computer Inc. ("Samtack") in the amount of $20,098.88 plus interest and costs.*
>
> *2 Startek Computer Inc. ("Startek") paid the defendant for certain goods, computer equipment, sold by it to Startek with a cheque. That cheque was returned to the defendant for non-sufficient funds.*
>
> *3 Startek provided the defendant with a replacement cheque for the goods. The defendant negotiated the replacement cheque.*
>
> *4 On June 17 two events occurred. Startek filed a Notice of Intention to Make a Proposal pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 and pursuant to s. 69(2) of the said statute a stay of proceedings was in effect as of June 17, 1999.*
>
> *5 On or about June 21, 1999 without the knowledge or consent of Startek or the trustee, the defendant renegotiated the original cheque which was cleared by Startek's bank.*
>
> *6 The matter has a history.*

7 On July 6, 2000 the matter came on for hearing before Pitfield J. At that time Samtack claimed that the first cheque and the replacement cheque were not issued to pay for the same three invoices. Samtack claimed it had evidence that supported its position but that evidence was not before the court. As a result, Pitfield J. ordered Samtack to produce this evidence and the application was adjourned accordingly.

8 In due course Samtack forwarded copies of the invoices it claims were paid by the first cheque and the replacement cheque.

9 The issue is framed in counsel for the plaintiff's outline of argument as follows:

> *Is Samtack liable to the trustee in the amount of $20,098.88 for cashing both the first cheque and the replacement cheque on the basis that renegotiating the first cheque was a remedy prohibited as a result of the stay of proceedings imposed by section 69 (1) of the BIA.*

10 The answer to this question is yes.

11 The short answer to this application is that Samtack by renegotiating what has been referred to as the First Cheque on or about June 21, 1999, without the knowledge or consent of Startek or the trustee, exercised a remedy and violated the existing stay of proceedings. Further, upon a comparison of the invoices and particularly the further material ordered to be produced by Pitfield J. it is apparent the cheques were issued to pay for the same three invoices and not as alleged by Samtack invoices in relation to additional goods sold to Startek. In this perspective Samtack was paid twice for the same goods and the same invoices.

12 I do not accept Samtack's assertion that it has some form of defence based upon the fact it was not aware of the filing and the stay of proceedings referred to supra. In this regard in Re Gene Moses Construction Ltd. (1999), 9 C.B.R. (4th) 275 (B.C. Master) the Court of Appeal confirms that knowledge of the filing of the Notice of Intention to make a proposal is not necessary for the stay to be effective. It follows that in this case pursuant to the relevant provision of the BIA a stay of

> ***proceedings was in effect as of June 17, 1999 and no creditor, including Samtack, had any remedy against it for a claim provable in bankruptcy.***
>
> *13 I grant the application for summary judgment in the amount as claimed together with interest and costs on Scale 3.* (emphasis added)

[31] The point to note is that the lack of knowledge of the creditor of the filing of the notice of intention does not prevent the stay from taking effect. On the facts, the notice of intention was filed on July 7, 2017. PFSL therefore has the benefit of section 4 (1).

[32] PFSL is within the definition of person and it also within the definition of insolvent person since it has clearly failed to meet its obligation as they generally become due. In this case the obligation is to repay the debt to DBJ. All this means that PFSL is an insolvent person under section 4 (1) which means that where it files a notice of intention then there is an automatic stay unless section 4 (2) applies or there is an application under section 7.

[33] From what has been said the IA on the face of it has made very significant changes to Jamaica's insolvency law. The insolvent person is now able, once he, she or it files the necessary documentation, to take benefit from an automatic stay of any action or proceedings the creditor may wish to take or is currently taking.

[34] The notice of intention referred to in section 4 (1) is a notice that the insolvent person intends to file a proposal (section 11 (2)). Under section 11 (1), the insolvent person may file a proposal. The IA permits the debtor to file either a notice of intention to file a proposal or the proposal itself. Regardless of which one is filed, the automatic stay comes into operation without any judicial intervention and thereafter the matter proceeds according to the regime set out in the IA.

[35] Prima facie, it does not seem to matter whether any action is taken or proposed to be taken. Once the insolvent person files the intention under section 11 then a shield is erected and quite a formidable one at that. The escape from this impediment to enforcement by a secured creditor who is owed money is to take possession of the

secured assets ‘for the purpose of realisation before the notice of intention’ (section 4 (2)). Where the secured creditor has not taken possession he can escape section 4 (1) if he gave notice of an intention to enforce security under section 72 ‘in the form prescribed’ more than ten days before a notice of intention was filed in respect of the insolvent (section 4 (2) (a)). Also the automatic stay does not apply if the insolvent consented to the secured creditor enforcing his security (section 4 (2) (a)).

[36] The stay is effective even if the creditor does not yet have proof of the filing of the notice.

The application

[37] The court must give more procedural history in this matter. After the court had granted the injunction and made consequential orders to DBJ, PFSL, on July 12, 2017, filed an application seeking a stay of execution of proceedings and in the alternative a variation of this court’s previous order and failing any of these two, an extension of time for PFSL to comply with the previous order. The notice had been filed on July 7, 2017.

[38] When PFSL applied for a stay of execution of the proceeding taken by DBJ, that need not have been done if it had filed a notice of intention under section 11 (2). Under sections 4, 5 and 6 the court is given any power to grant a stay. PFSL’s application was for an order that the court has no power to make under the IA. The application was filed July 12, 2017 supported by an affidavit of the same date which had exhibited to it the notice of intention to file a proposal which was filed at the Supervisor of Insolvency on July 7, 2017. The consequence of this is that an automatic stay took effect under section 4 (1) and thereafter if the DBJ wanted to continue taking steps to recover its money then the stay had to be lifted by a court order.

[39] Once the automatic stay takes effect power is given to the court to lift the stay. Mrs Tana’ania Small Davis did not make a written application under section 7. Section 7 does not mandate a written application. There is nothing in the IA to say that an oral application cannot be made. In this court’s view it is desirable that a written application should be made supported by an affidavit but it does not follow that an oral application

is out of place. In this case the court decided to treat Mrs Small Davis' oral response as an application under section 7 for the following reasons. First, all the affidavits being relied on by DBJ were before the court and many were served on PFSL when the earlier application for the freezing order was made. The additional affidavits filed by DBJ were also served on PFSL before this present hearing. Second, PFSL had applied for a stay (albeit that it was unnecessary in light of section 4 (1)) and the opposition to that application was a de facto application for a lifting of the automatic stay. Third, the object and purpose of permitting a creditor to apply for lifting of the stay is to (a) put the insolvent person or debtor on notice that a particular creditor is not in agreement with the stay and (b) to let the insolvent person/debtor to know the basis on which the lifting of the stay is sought. This was met in this case. Fourth, natural justice requirements were met in that PFSL knew what DBJ's position was and has full opportunity to make full answer. PFSL filed its own affidavit.

[40] In the end the court lifted the stay and permitted DBJ to enforce its rights under the loan agreement. The rest of this judgment is dedicated to explaining why this decision was made.

The legal position regarding lifting stays

[41] The court may lift the stay if satisfied that the creditor is likely to be materially prejudiced by the continued operation of sections 4 to 6, or 'it is equitable on other grounds to make such a declaration.' This is what the Ontario Court of Appeal had to say about lifting a stay in **In the Matter of the Bankruptcy of James Hoi-Pang Ma, of the City of Mississauga, in the Regional Municipality of Peel, in the Province of Ontario** 24 CBR (4th) 68 where it was stated by the joint judgment of Abella, Charron and Sharpe JJA:

> *1 The appellant argues that when considering an application to lift a stay under s. 69.4 of the* Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, the applicant is required to establish a* prima facie *case for the proposed action.* Bowles v. Barber *(1985), 60 C.B.R. (N.S.) 311 (Man. C.A.) is cited in support of this proposition. It is argued that to the extent Ontario cases such as* Arrojo Investments

v. Cardamone *(1995), 33 C.B.R. (3d) 46 (Ont. Gen. Div.) apply a more lenient standard, they are inconsistent with decisions from other provinces.*

2 In our view there is no requirement to establish a prima facie case and no inconsistency in the case law. We do not agree that Bowles v. Barber imposes a prima facie case requirement. More importantly, that requirement is not imposed by the statute. Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in Re Francisco (1995), 32 C.B.R. (3d) 29 (Ont. Bktcy.), at 29-30, a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):

> *In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, exist for relieving against the otherwise automatic stay of proceedings.*

3 As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in Re Francisco, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act" to relieve against the automatic stay. While the test is not whether there is a prima facie case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

[42] This case was applied as recently as 2016 by J Strekaf J in **Da Silva v River Run Vista Corp** [2016] AWLD 3853, 39 CBR (6th) 109. The observations there are applicable to section 7.

[43] The judge's discretion under section 7 of the IA can be exercised under either ground set out in the section. The question ultimately is whether there are sound reasons for lifting the stay.

The analysis

[44] The court has indicated PFSL's behaviour regarding the attempt by DBJ to monitor the loan and collect reliable information from PFSL in accordance with the term of the contract. In the affidavit filed on behalf of PFSL the deponent stated, in response to the allegation that DBJ's team did site visit to procure information, PFSL was 'not in a position to provide the requested information as that was too short notice for the preparation of the requested document.' This explanation is at odds with DBJ's assertion that DBJ's team met with Ms Nordia Wauchope, the Human Resources Manager, and Mrs Barnes-Carr, the accounting officer who provided the information on the severe liquidity problems, 80% of the loan portfolio was at risk, JA$28,000,000.00 loan portfolio with 35 active loans and average monthly collections was JA$400,000.00. The ladies told DBJ's team that Mrs Barnes-Carr prepared the accounts from bank statements but the payments to DBJ were handled exclusively by Mr McLeod the Chief Executive Officer.

[45] The team requested supporting documents for the loan, including the sub-borrowers loan account listing and statements, bank statements, audited financial statements, organisational charts. At that moment Mrs Wauchope took a telephone call and returned saying that Mr McLeod had told her not to comply with the request and to say also that 'they cannot accommodate us at this time until a mutually agreed time for the commencement of the audit.' It was also said that Mr McLeod was abroad and no date was set for his return to Jamaica. DBJ's team persisted in its efforts to secure the information but the PSFL's staff refused to provide the information. None of this behaviour by Mr McLeod is consistent with a good faith effort by his company to meet its obligations and if there is difficulty to work out a solution. It is more consistent with a solution on PFSL's terms.

[46] What we have at this stage is a company that has failed to meet its debt obligations, failed to permit accountability inspections, failed to provide information and a Chief Executive Officer who was off island and telling the staff not to cooperate with DBJ. A clear red flag is that Mr McLeod did not permit the accounting officer to handle the payments to DBJ. It is clear that DBJ was not being repaid when ostensibly Mr McLeod was responsible for those payments. DBJ had no idea whether the sub-borrowers were making payments to PFSL.

[47] The freezing order that was granted on May 15, 2017 was served on the company in Jamaica and sent to Mr McLeod by email. Both occurred on May 16, 2017. In all this, PFSL had not sought to take advantage of sections 4 or 5 of IA.

[48] PFSL's affidavit provoked another detailed response from DBJ. PFSL sought to give the impression that it was making genuine effort to settle the indebtedness but DBJ was being recalcitrant. Mr McLeod sought to convince DBJ that he had property in the United Kingdom which were available to meet the debt obligations. The problem with this was that (a) the properties were not in the name of PFSL and (b) they were in the name of Mr Lennox McLeod and a Ms Jacqueline McLeod. Details of the equitable ownership were not provided by Mr McLeod and he did not provide any original documents or certified copies to prove the truth of what he asserted regarding the properties. DBJ's position, sensibly so, was that more specific and verifiable details should be provided. Again this conduct by Mr McLeod does not lead a conclusion of good faith.

[49] The email correspondence between Mr McLeod and counsel for DBJ shows that at some point Mr McLeod was offering an undertaking from his solicitors to pay unstated sums to DBJ. DBJ's attorneys responded by saying that this latest promise was no different from a previous promise to pay £425,000.00 which was supposed to be proceeds of sale of property in England. He also proposed or promised to sell property. DBJ's attorneys asked for copies of the sale agreement and title to the property that was to be sold. None of this was forth coming. DBJ's attorneys also suggested that he 'should also direct [his] staff to accommodate the bank's audit team to conduct the

inspection which [on his] instructions was aborted.' None of these suggestions was acted upon. The simplest one of providing the information to DBJ through PFSL's staff was not acted on.

[50] On PFSL's behalf it was asserted that 'some of the information requested by the order has already been given to [DBJ].' This is an incomplete statement according to DBJ. What, it is said, PFSL provided was financial statements for the year ended March 31, 2016. This was delivered to DBJ on June 17, 2017 at 5:44pm. Since the order, no other information has been provided.

[51] The IA can only operate properly if the person seeking to take advantage of the provisions acts in good faith. As it presently stands, there is no reason to accept that Mr McLeod was desirous of reaching some acceptable resolution with DBJ. His conduct did not inspire confidence. In his dealings with DBJ he has proven to be less that forthright and he obstructed good faith efforts of DBJ to secure information about the company. In dealing with the lawyers for DBJ, when asked important questions concerning the property he claimed that he could use to pay off the debt he declined to answer or answer in a manner that would reassure reasonable persons. He presented documents that showed a third party may have interest in the properties he claimed he could use to meet the debt obligations and did not explain the nature and extent of the possible third party interest.

[52] He has failed to comply substantially with the court order made on May 15, 2017. Such attempts at compliance came only in July 2012, some two months after the order was made. The excuse is that he could not secure legal representation. However, the company is located in Jamaica and as far as the court knows was still operating even after the May 15 order. Had he been interested in complying with the order, he could have instructed the PFSL staff to collect the necessary information. There is no evidence that this was done.

[53] An important dimension to this case is that ultimately the money involved came from the Government of Jamaica through DBJ via a loan from international agencies. In the midst of the non-servicing of the loans and not providing timely or any information

about the loans made and repayments of those loans PFSL has acquired property at 13 Old Hope Road. There is no evidence of the source of funds for this purchase. PFSL in its affidavit has not explained this purchase or indeed properly addressed the concerns raised by DBJ.

[54] PFSL has been stalling every step of the way. The IA is not intended to be used for stalling but honest, good faith effort at either paying of the creditors or re-organising the business to make it more viable if possible. Regrettably, this court has formed the view that the IA is being misused as this notice of intention does not appear to be bourne out of a genuine good faith desire to come to terms with the creditors under the IA regime.

Disposition

[55] Application for stay by PFSL refused on the ground that the court has no power to make such an order. The automatic stay imposed by section 4 (1) is lifted on the ground that it is equitable to so. DBJ is now free to enforce its security and all the provisions under the contract with PFSL. Costs of this hearing to DBJ to be agreed or taxed.