IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2021IS00001

In The Matter of Patrick Emmanuel Mason (a bankrupt)

and

In The Matter of Sections 6 & 7 of the Insolvency Act 2014.

BETWEEN	**S & C Financial Limited**	**CLAIMANT**
AND	**The Trustee in the Estate of Patrick Emmanuel Mason (A Bankrupt)**	**DEFENDANT**

Bankruptcy – Application by creditor to lift automatic stay- Whether false statement as to solvency in loan application- Whether a sufficient basis to lift stay- Whether public interest served- Whether policy of statute relevant consideration.

Yakum Fitz-Henley instructed by Ramsay Smith for the Claimant

Elece Campbell for the Government Trustee

Heard: 16th July and 16th September, 2021.

In Open Court

Cor: BATTS J.

[1] By Fixed Date Claim filed on the 18th January 2021 the Claimant seeks to have the automatic stay, of proceedings against the bankrupt, lifted. The complaint is that, by filing for his own bankruptcy, the Defendant is abusing the process and acting to the Claimant's prejudice. The Trustee opposed the application maintaining, that

the bankrupt exercised a statutory right and, that a lifting of the stay would be to the prejudice of the other creditors.

[2] The facts are contained in the affidavit in support of Fixed Date Claim sworn to by Sade-Lee James. It is undated but was filed on the 18th January, 2021. There was no affidavit filed in opposition but, in the course of the hearing, permission was granted for the Government Trustee to file and serve an affidavit setting out the amounts collected, the proved creditors and, the amount to be paid in the dollar. That affidavit sworn to by Gleninsha Drummond-Campbell was filed on the 29th July 2021. An affidavit of service, filed and dated 31st May 2021, proved service on the other creditors. It is to be noted that the bankrupt was present at the hearing of the matter. None of the other creditors answered when called.

[3] The Claimant, a microfinance institution, is exempt from the Moneylending Act, see Exhibit SJ1. The bankrupt is employed to the National Water Commission. On the 9th September, 2020, prior to his bankruptcy, the bankrupt had been granted what is described as *"the last in a series of loans"* by the Claimant, exhibit SJ4. The bankrupt at that time signed a Solvency Declaration, exhibit SJ5. On the 20th October 2020 the Claimant received notice of bankruptcy and an invitation to lodge a claim, exhibit SJ2. The relevant Certificate of Assignment reveals that the bankrupt made a voluntary application for assignment on the 12th October, 2020, exhibit SJ3. This was approximately one month after he had made the declaration of solvency and obtained a loan from the Claimant.

[4] The Claimant states, in the affidavit in support, that the bankrupt owns a motor car which was not disclosed as part of his assets. This was revealed at the last creditors meeting held on the 4th December, 2020. The bankrupt owed $511,688.04 to the Claimant at the time the affidavit was executed. As the affidavit is undated we can only assume this was the amount due when the claim was filed. It is asserted that the bankrupt did not act in good faith when he made the application for the loan and when he applied for voluntary bankruptcy.

[5] It is appropriate to quote in full the solvency declaration, signed by the bankrupt, on the 9th September 2020, when the loan was applied for:

> *"THIS FORM is important PLEASE READ THIS CAREFULLY BEFORE SIGNING –*
>
> *Note that your loan is conditional upon the following declarations and warranties concerning your financial status. In the event that your loan is approved you will be in default if the following declarations no longer apply. By initialling and signing the form, you agree to permit S and C Financial Limited, their employees, agents, or assigns, to disclose your responses and this form in the Office of Trustee in Bankruptcy, the Office of the Supervisor of Insolvency, the courts of Jamaica, or any other relevant body including investigations with regard to your solvency. You also accept that your warranties and undertakings will be used to determine whether you are insolvent or eligible for bankruptcy or insolvency protection under the Insolvency Act 2014.*
>
> *I [Patrick Mason] [name] hereby warrant and declare the following to be true and accurate:*

Initial here to show your agreement	*Warranty/Declaration*
P.M.	*I have been informed of and have obtained independent information on the Insolvency Act.*

P.M.	*I am not insolvent because I can meet my obligations when they became due, I have not ceased paying my obligations as they became due, and my property at fair value and sale would be sufficient to meet all my obligations*
P.M.	*I do not reasonably believe that I will become insolvent before the maturity date for my loan, or at least within the next 12 months*
P.M.	*I have not and do not plan to borrow any further monies the instalment payment of which could significantly affect my solvency without prior written consent of the company.*
P.M.	*The financial information I have provided, including my income and expenditure statement as attached, and payslip, are accurate and complete and I have no other material expenditure.*
P.M.	*I have not withheld any information that is relevant to the determination of my solvency.*
[The form is signed by the borrower]	

[6] The Claimant has not exhibited the form of application for the loan. It is not alleged that the bankrupt when applying for the loan had misrepresented to the Claimant any information of a financial nature either as to his means or his obligations.

[7] In written submissions filed on the 12th July, 2021, the complaint is that the bankrupt made fraudulent declarations. This being that he could pay his debts and did not expect to be insolvent within 12 months. In the absence of evidence to explain, the voluntary application for bankruptcy one month later, fraud should be presumed (paragraph 12 of written submissions). It is submitted that this has caused the Claimant material prejudice as it was by that false declaration induced to grant the loan. It is submitted further that it would be inconsistent with the scheme of the Insolvency Act to allow debtors to make such declarations falsely, (Paragraph 14 written submissions). The bankrupt has breached the "good faith" requirement of the Act and should therefore not be allowed its benefits. This continued when he failed to disclose the motor car he owned to the Trustee, (Paragraphs 17 and 18 of written submissions). The Claimant relies on various authorities in support of its application for:

1. A declaration that Section 6 of the Insolvency Act no longer operates in favour of the bankrupt.

2. Any judgment obtained against the bankrupt in respect of debt owed to the Claimant may be satisfied by any assets held on his behalf by the Government Trustee

3. Costs.

[8] In written submissions, filed on 12th July 2021 and also supported by several authorities, the Government Trustee argued that the totality of the circumstances, and relative prejudice to creditor and bankrupt, must be considered when deciding whether a stay is to be lifted. It was submitted that the threatened litigation would disrupt orderly and fair distribution as contemplated by the Act. Further that the cost of the defence of the action will further reduce the bankrupt's estate. The stay

also facilities rehabilitation of the bankrupt as all creditors participate in one collective proceeding for recovery. The bankrupt exercised his statutory right when applying for a Certificate of Assignment and it is not sufficient to rely on the fact that he had signed the declaration one month before. Further, other than the indebtedness, no material prejudice to the Claimant is alleged. The court is urged to consider the interests of the creditors as a whole. It is submitted that if the stay of proceedings is lifted then any judgment obtained against the bankrupt ought not to be binding on the Trustee as to do so would render the Claimant's debt recoverable in priority to other creditors. This is contrary to the purpose of the Act which seeks to rank unsecured creditors equally.

[9] Having considered the submissions, both written and oral, as well as the authorities cited I have decided to dismiss this application. My reasons can be shortly stated.

[10] The Insolvency Act, which became law on the 31st October 2014, introduced to Jamaica a modern approach to bankruptcy and winding up. Its purpose is stated in Section 3:

> *"3. 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."*

[11] Sykes J, as he then was, ably summarised the purpose and effect of the new legislation thus:

> *"5….. The IA has now has [sic] established a single regime for bankruptcy – 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……."*

Justice Sykes continued, in the following paragraph of that judgment being ***Development Bank of Jamaica Limited v Proactive Financial Services [2017] JMCC Comm 31*** **(unreported judgment delivered 31 October 2017),** as follows:

> *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 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."

[12] In the case at bar the bankrupt, or perhaps in keeping with the new regime I should use the term "the insolvent person", applied for voluntary bankruptcy by way of assignment. The Certificate of Assignment (exhibit SJ3) was therefore issued pursuant to Section 83 (5) of the Insolvency Act. The issue of the certificate is sufficient to effect an automatic stay of all proceedings against the insolvent person. This occurs pursuant to Section 6 of the Insolvency Act which provides:

"6. 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.

Subsections (2) and (3) relate to secured creditors which the Claimant is not. Section 7 provides an avenue for a creditor's escape from the operation of the stay. That is by way of an application to the court which the Claimant in this case has adopted.

Section 7 provides:

"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 qualification 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."*

[13] In the ***Development Bank of Jamaica Ltd. case*** (cited at paragraph 11 above) the Honourable Mr. Justice Sykes (now Lord Chief Justice) considered an application to lift the automatic stay. After reviewing several authorities from Canada, which has a similar statutory scheme, the learned judge decided it was equitable to do so because the insolvent entity had been a trustee of public funds which were to be applied as part of a programme to develop the market for lending to small and medium sized businesses (Para 9 of the judgment). The evidence revealed that the insolvent entity:

> "46. *… failed to meet its debt obligations, failed to permit accountability inspections, failed to provide information and [had] a Chief Executive officer who was off island and telling the staff not to cooperate with DBJ*."

Justice Sykes formed the view that there was no real desire to reach an acceptable resolution with the creditor bank. The learned judge's concluding paragraphs are instructive:

> "*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*

these 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 reorganising the business to make it more viable if possible. Regrettably, this court has formed the view that the IA is being misused as the 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."

[14] It is manifest that no such circumstances arise in this case. The insolvent person has not used the Insolvency Act for any dishonest purpose. In making his application he exercised a right, given by statute, if he found himself unable to meet his lawful debts. It is a way the law gives him to treat with his creditors equitably. He had several creditors. The Claimants would wish the court to find that by asserting, one month earlier, that he was not insolvent he has acted dishonestly. That seems a rather difficult inference to draw depending, as it must, ultimately on his own state of mind and opinion as to his ability to master the situation. In all probability he anticipated that the loan of the Claimant would provide sufficient cover to avoid insolvency. But even if I am wrong the inequity, of which the statute speaks, is not I think the dishonesty to which the Claimant points. If, in order to get the loan, the borrower makes a misrepresentation how does that affect the matter of insolvency and the equity to other creditors. The claim is still one of a simple debt owed and is not one for fraud. Neither is it so complex as to make proof of the debt in bankruptcy particularly difficult.

[15] The Claimant argues that the court should lift the stay so as to discourage future borrowers from falsely stating that they are solvent at the time the loan is given. I rather doubt that lifting the stay, in this case, will have such a momentous impact. Furthermore, persons, in need of loans funds, will likely sign any declaration put before them. It is an unwise lender who decides to give a loan solely on the faith of such a declaration. The Claimant would have been well advised to conduct its own due diligence which, given the other rather prominent creditors concerned, would likely have better informed the decision to lend. Then there is the public interest and the purpose of the legislation. These must weigh in the balance against any possible benefit to lenders of the discouraging impact a lifting of the stay will have. In this regard to lift the stay will be to give the Claimant priority over other creditors. It will interrupt or interfere with the smooth operation of the insolvent's estate. The affidavit of Gleninsha Drummond-Campbell (referenced at paragraph 2 above) demonstrates that this is well underway. Frankly I do not see that the public interest in rehabilitation of debtors and recompense of creditors is better served, or ought to be subjugated to or by the "punishment" of the borrower, even if he falsely declared he was solvent in order to obtain the loan.

[16] I am fortified in the view I take because none of the other cases cited before me, in which a stay was lifted, remotely approximate to the facts of this case. In ***Derek Da Silva et al v River Run Vistas Corporation et al (2016) ABQB 433*** the directors, officers and shareholders were alleged to have made fraudulent representations and performed false appraisals to induce investments of millions of dollars. These investments were it seemed misapplied in other corporate ventures. The court concluded that as the corporate veil could be pierced, where the directors /shareholders were the operating mind in the case of fraud, the Claimants would be materially prejudiced by a stay which prevented them proceeding against the Defendants. The court decided,

> *"the claims … involved a degree of complexity that makes the summary procedure prescribed by the B/A inappropriate for their determination."*

[17] In the matter of the **Bankruptcy of Great North Data Ltd. (2020) NLSC 105 (27th July 2020)** the stay was lifted in circumstances of a complex case which was already well advanced in court. The material prejudice to the Claimant was unique and self-evident. The case involved a claim between companies dealing in crypto currency (bitcoin). After several interlocutory proceedings the 25 day trial was on the 29th November 2018 listed to commence on the 23rd March 2020. Assignments in bankruptcy were filed by the Defendants on the 22nd November 2019 and 9th December 2019. The learned judged found that the claims involved credible allegations of fraud the investigation of which was too complex to be dealt with without a full trial. There was therefore likely to be material prejudice if the stay was not lifted and it would be unfair and inequitable to allow it to remain. The case is again distinguishable from the one before me.

[18] In his judgment in the ***Great North Data Limited case*** (cited above) Handrigan J, referenced **Re: *Advocate Mines Limited [1984] OJ No. 2330 (OSC in Bankruptcy).*** That case listed circumstances in which it might be appropriate to lift a stay. These were:

> *"1. Actions against the bankrupt for a debt to which a discharge would not be a defence*
>
> *2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation, has that degree of complexity which makes the summary procedure prescribed by S95 (2) of the Bankruptcy Act inappropriate.*
>
> *3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.*
>
> *4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract*

of insurance or indemnity or under compensatory legislation.

5 Actions in Ontario which, at the date of the bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment. "

The learned judge (in paragraph 8 of his judgment) stated,

"8. While Registrar Ferron's "list" is comprehensive and is frequently cited, it is generally recognised as a beginning and not the endpoint for discussing the issue. I note, for example, Adam J's comments in ***Re Francisco [1999] OJ NO. 917 (OCJ General Division in Bankruptcy):***

"it should be understood that ***Re Advocate Mines Ltd****, supra, is not an exhaustive codification of the policy underlying the Bankruptcy and Insolvency Act. It is but one thoughtful decision attempting to articulate the type of grounds which may provoke the exercise of a judicial discretion. To view* ***Advocate Mines*** *as a limiting or exhaustive instrument is an error in principle*."

Handrigan J then summarised the principles applicable when considering the lifting of a stay, principles I see no good reason from which to depart, thus:

"11. From my view of Section 69.4 of the BIA [materially similar to Section 7 of the 1A in Jamaica] *these are some of the principles that are relevant to its application:*

- *A creditor applying under Section 69.4 of the BIA must meet at least one of the two criteria stated in the section, not both.*

- *A creditor applying under Section 69.4 of the BIA does not have to show it has a prima facie case in its action against the bankrupt* ***Re Ma***

- *The bankruptcy court need only consider the merits of the proposed action to see whether there are sound reasons for lifting the stay:* ***Re Ma***

- *A bankruptcy court on a leave application must ensure that sound reasons exist for relieving against the automatic stay of proceedings:* ***Re Francisco***

- *It is an error of law to accept the five circumstances enumerated in* ***Re Advocate Mines Limited*** *as "a limiting or exhaustive instrument"* ***Re Francisco***

- *If the creditor satisfies the court that one or more of the grounds referred to in* ***Re Advocate Mines Limited*** *is present and that the creditor is likely to be materially prejudiced or that it is equitable on other grounds to make such a declaration then a court will lift the stay of proceedings;* ***Re Panorama Parkview Homes Ltd. (2017) BCSC 2071 (BCSC)*** *and,*

- *Fraud alleged by a creditor to have been committed by the bankrupt is a complex matter which should not ordinarily be dealt with on a summary basis and without a full hearing* ***Re Taylor Ventures Ltd., 2002 BCSC 82 (BCSC)****"*

[19] The 'fraud" referred to in the final bullet point is the cause of action against the debtor. It is that which needs to be proved to establish the debt. In the matter before me the debt is the loan provable in the usual and summary way by the

documentation established. The Claimant before me references fraud to the extent that he wishes an inference drawn that the insolvent person was dishonest by not disclosing his pending (or actual) insolvency. It has no applicability to Justice Handrigan's final bullet point.

[20] Another case, cited before me, in which the stay was lifted is in ***Re Casimiro Almeida Francisco's Estate No. 31-292784 (Ontario).*** In that case Adams J lifted the stay and allowed the action to continue in circumstances where the trial had commenced. After three days of hearing it was adjourned to permit further discovery of documents which the insolvent had not earlier produced. He used the opportunity to obtain an assignment of bankruptcy. The claim involved fraud, embezzlement and, breach of fiduciary duty. The matter was therefore complex and the claim already well advanced. The prejudice to the Claimant obvious and the equity clear.

[21] It should be noted that in at least one case, ***Bowles v Barber (1985) Carswell Man 33(Manitoba Court of Appeal) [1985] MJ No 102***, the view is expressed that even when the claim is in fraud it may be appropriate to stay proceedings. As per Hubbard J. A:

> ***"11. The fundamental idea of the legislation is that all claims against the bankrupt be dealt with within the context of the bankruptcy proceedings. The bankrupt himself is presumably bereft of assets with which to engage in continuing or new litigation contemporaneous with his bankruptcy. If the claimant has a claim which sounds in fraud, unless there is some compelling reason why it should proceed (such as an approaching limitation date for example), the action can wait until the bankrupt is discharged***."

There is no relevant claim in fraud applicable on the facts before me and, therefore, I need not decide that question. Suffice it to say the question is whether there is material prejudice, or circumstances of inequity, which should provoke a lifting of the stay.

[22] As indicated at paragraph 9 above, and for the reasons stated in this judgment, the application to lift the stay is refused. Costs will go to the Defendant Trustee. Such costs to be taxed if not agreed.

David Batts
Puisne Judge