



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. CD 00023 of 2013

BETWEEN	MIGUEL SMITH	1st CLAIMANT
AND	TANYA SMITH	2nd CLAIMANT
AND	WILFRED NEMBARD	1st DEFENDANT
AND	ELWELL BROWN	2nd DEFENDANT

Ms. Carol Davis and Mr. Seyon Hanson instructed by Seyon T. Hanson & Co. for the 1st and 2nd Claimants.

Mr. Crafton Miller and Miss Khian Lamey instructed by Crafton S. Miller & Co. for the 1st Defendant.

Miss Celia Barclay, the Trustee in Bankruptcy

BANKRUPTCY- BANKRUPTCY ACT-SECTIONS 39, 84, 42- MEANING OF “DEBT PROVABLE IN BANKRUPTCY”- WHETHER BANKRUPT OR TRUSTEE IN BANKRUPTCY TO CONDUCT PROCEEDINGS-WHETHER AUTOMATIC STAY OF PROCEEDINGS

Heard: March 8th, April 12th 2013

Mangatal, J

[1] On the 15th February 2013, the Claimants applied for this matter to be transferred to the commercial list. After much discussion, the 1st Defendant and the Trustee in Bankruptcy ultimately indicated that they had no objection to the matter being transferred. It must be noted that on the 14th February 2013, the Claimants had filed a Notice of Discontinuance against the 2nd Defendant. Based on information

contained in certain affidavits filed in regard to the application for transfer, and in fixing the matter for case management for the 8th March 2013, I directed the Attorneys-at-law for the Claimants, the 1st Defendant, as well as the Trustee in Bankruptcy to address the following issues:

- a) The appropriate directions for the Court to make regarding representation and future conduct of the proceedings on behalf of the 1st Defendant Wilfred Nembhard, having regard to section 84 of the Bankruptcy Act.
- b) Whether these proceedings are governed by section 39 of the Bankruptcy Act.

BACKGROUND

[2] The circumstances giving rise to the present proceedings are of a complex nature and the matter has had a convoluted history. At the root of the dispute however is the performance of an agreement entered into between the parties. By an instrument of transfer by way of exchange, the Claimants agreed to exchange land owned by them, such land known as 2 and 2A Braemar in the parish of Saint Elizabeth and being registered at Volume 1323 Folio 639 of the Register Book of Titles (“ the Braemar lands”) for 9 lots, being lots 1-9, forming part of all that parcel of land part of Southfield called Seaview in the parish of Saint Elizabeth which is registered at Volume 1187 Folio 770 of the Register Book of Titles (“ the Seaview lots”). The Claimants filed suit on February 29 2012. There are disputes between the Claimants and the 1st Defendant as to the exact, original terms of the agreement to exchange. Originally the Claimants had claimed, amongst other things specific performance of the agreement of exchange, with the 1st Defendant also counter-claiming for specific performance of the agreement of exchange in terms set out by him in his Defence and Counter-claim. However, the Claimants filed an Amended Claim Form and Particulars of Claim on January 7, 2013 in which they are now seeking the following orders:

- i) A Declaration that the Claimants are entitled to terminate the instrument of transfer by way of exchange entered into on or about January 2008 between the 1st and 2nd Claimants and the 1st Defendant whereby the 1st and 2nd Claimant agreed to transfer to the 1st Defendant all that parcel of land called Braemar situate in the parish of Saint Elizabeth being the Lots numbered TWO and TWO A (2 and 2A) on the plan part of Braemar aforesaid deposited in the Office of Titles of the shape and dimensions butting as appears by the plan thereof and being part of the land registered in Volume 1323 folio 639 of the Register Book of Titles in exchange for All that parcel of land part of SOUTHFIELD called SEAVIEW in the parish of Saint Elizabeth being the Lots numbered ONE, TWO, THREE, FOUR, FIVE, SIX, SEVEN, EIGHT and NINE (1 to 9) inclusive on the plan part of Southfield called Seaview aforesaid deposited in the Office of Titles of the shape and dimensions butting as appears by the plan thereof and being part of the land registered in Volume 1187 Folio 770;
- ii) An order that the Claimants' Duplicate Certificate of Title for the Braemar Land registered at Volume 1323 Folio 639 of the Register Book of Titles be returned to the Claimants by the Defendant and/or Messrs. Crafton Miller and Co., Attorneys-at-law for the 1st Defendant.
- iii) An order that the Costs of the proceedings herein be paid by the 1st Defendant
- iv) Such further and/or other reliefs as this Honourable Court deems just;
- v) Costs to the 1st and 2nd Claimants.

- [3] The 1st Defendant has not yet filed any defence in response to this amended claim, it having been agreed that the next step if any to be taken in the proceedings should await the outcome of this ruling.
- [4] Subsequent to the parties entering into the agreement to exchange land, bankruptcy proceedings were commenced against the 1st Defendant by an entity called Superlube Limited on the 26th August 2011. A Provisional Order for the 1st Defendant's estate to be wound up and his property administered under the law of bankruptcy was made on the 22nd September 2011. The Registrar granted a Triple Order on the 1st February 2012. An Absolute Order was later made on the 15th August, 2012. The 1st Defendant has filed an appeal in which he is seeking to have the Absolute Order made against him set aside. The appeal is pending.

CLAIMANTS' SUBMISSION

- [5] On the question of whether the Trustee in Bankruptcy should be substituted for the 1st Defendant, Counsel for the Claimants, Miss Davis argued in the affirmative. Miss Davis relied on the English Court of Appeal decision of **Jackson v North Eastern Railway Company (1877) 5 Ch. 844** to support this point. She argued that although this case relates to a "plaintiff", the same principle applies where the Bankrupt is a defendant. She also submitted that because the Defendant had filed a counter-claim in the matter, this further supports her point that the principles in **Jackson** are applicable to the present case. Miss Davis referred to a number of sections of the Bankruptcy Act ("the Act) to support her submission that it is the Trustee in Bankruptcy and not the debtor who must carry on proceedings in every action relating to the property of the debtor. She referred to Section 42 which reads:

42. When a provisional order has been made against a debtor, the property of the debtor shall immediately pass to and vest in the Trustee, without any conveyance or assignment or transfer whatever, to be by him in due course, either under an absolute order for bankruptcy, or under a deed of arrangement

as hereinafter provided by this Act, realized, administered and distributed with as much despatch as is reasonably practicable for the benefit of the creditors:

Provided, that until the provisional order is made absolute, it shall be the duty of the Trustee, as far as the nature of the property seized permits, to preserve all such property in such state as to permit of its being returned to the debtor in the condition in which it was when it was seized, in the event of the revocation of the provisional order.

[6] Reference was also made to Section 78 which states that “***The Trustee under the control of the Court shall administer the debtor's estate for the benefit of the creditors subject to the provisions of this Part.***” Miss Davis also referred to Section 84 which provides that “***The Trustee may bring, institute or defend, any action or other legal proceeding relating to the property of the debtor.***”

[7] Miss Davis further submitted that since the Trustee has to take a reasoned position as to whether to proceed in this matter, there should be a direction that the 1st Defendant hands over the documents to the Trustee. In my judgment, this is not a direction that can be given by the Court on the Claimants’ motion. This would have to be the subject of an application by the Trustee and there is no such application before me at this time.

[8] Section 39 of the Act states

39 (1) Where a provisional or an absolute order has been made against a debtor, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of such debt, except in manner directed by this Act.

(2) All proceedings to recover any such debt, shall if not already stayed, be stayed upon notice of such an order being given in the manner prescribed, but the Court may on an application by any creditor or person interested, allow any proceedings commenced to be continued upon such terms and conditions as it thinks just.

(3) The provisions of this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with the same if the section had not been passed.

[9] In relation to the question of whether these proceedings fall within the ambit of Section 39, Miss Davis argued that what the Court will have to determine is whether what is being claimed by the Claimants constitutes a debt provable in bankruptcy. The cases of ***David Truex v Eugenie Romanovna Toll [2009] EWHC 396 (Ch)*** and ***Ezekiel v Orakpo [1977] Q.B. 260*** were cited by her in support of her submission that for a debt to be provable in bankruptcy it must be a liquidated amount. That is, it must be an amount that has been judicially assessed or proven. It was her submission that an unliquidated sum is not a debt provable in bankruptcy. Following on this premise, she argued that what is set out in the Amended Claim Form does not relate to a debt provable in bankruptcy, consequently, the present proceedings are not stayed pursuant to section 39 of the Act.

[10] Miss Davis argued that, in the alternative, even if I come to the view that this matter is not concerned with a debt provable in bankruptcy, the court has a discretion to permit the matter to continue. Counsel submitted that the more appropriate course would be to allow the proceedings to continue. This, she argued, would result in the issue being determined as early as possible in order for there to be certainty as to what is available to satisfy the creditors' debts.

1st DEFENDANT'S SUBMISSION

- [11] It was the 1st Defendant's contention that the Trustee in Bankruptcy should not be permitted to defend this claim. Both Senior Counsel Mr. Miller and Miss Lamey addressed the Court. Miss Lamey argued that under section 84 of the Act, the Trustee's decision to defend a claim is discretionary and must be exercised in light of the circumstances. She argued that this is not a case for the Trustee in Bankruptcy to be substituted to carry on this matter. At paragraphs 20-23 of the Written Submissions of the 1st Defendant, it was suggested that if the Trustee in Bankruptcy was to be allowed to defend the claim, this would result in apparent bias. This is based on the assertion that the Trustee, whilst employed in the chambers of the Attorneys-at-law on record for the 1st Defendant, had direct conduct of certain proceedings involving the 1st Defendant. The Court pointed out that it was inappropriate to address such a matter in written submissions without any application raising that as an issue, and with no affidavit or other evidence in support of such a serious assertion. As a result, I have not taken this argument into account.
- [12] It was also argued that the language of section 84 envisioned that there would be circumstances where a person subject to the laws of bankruptcy would need to conduct his own defence. This, according to Ms. Lamey, shows that the right of the Trustee to "bring, institute or defend" an action relating to the property of the debtor is not an absolute right, but a discretion. Counsel posited that since the Trustee has been appearing as *amicus* in previous proceedings involving the Defendant, she should continue to so appear.
- [13] As it relates to the question whether or not the matter should be stayed, it was argued on behalf of the 1st Defendant that by seeking an order that the Claimants' Duplicate Certificate of Title for the Braemar Lands be returned to the Claimants, the Claimants were alleging "that Mr. Nembhard owes them a non-monetary thing, therefore he owes a debt." Further, that this debt is one provable in bankruptcy. Consequently, it was submitted that the proceedings at hand are

captured by section 39 (1) of the Act and the Claimants are therefore restrained from seeking any remedy against the 1st Defendant's property or person.

TRUSTEE IN BANKRUPTCY'S SUBMISSION

- [14] Miss Celia Barclay, the Trustee in Bankruptcy, maintained that it is the Trustee who ought to have conduct of these proceedings concerning Mr. Nembhard. She too, like Ms. Davis, referred to a number of sections of the Bankruptcy Act, particularly, Sections 84 and 42, to support her argument. Further, at paragraph 29 of her written submissions, it was stated that the Trustee is in a neutral position, one in which the Trustee has a duty both to the debtor and his creditors. The Trustee must preserve the debtor's assets and distribute only to creditors who have satisfactorily proved their debts and must account to the Court for all actions with respect to the estate if and when required. On this basis, it was argued that the Trustee was in the best position to have conduct of all future hearings in these proceedings. Additionally, Miss Barclay pointed out that as a debtor, the 1st Defendant is not permitted to take on or amass additional debt. Whilst therefore the debtor may choose to have a legal representative to ensure that his rights are protected, in so far as the Trustee acts in the realization, administration and distribution of the debtor's estate; in such a circumstance, the 1st Defendant risks incurring additional legal costs to the estate.
- [15] Regarding the issue of the applicability of section 39 to the present proceedings, Miss Barclay pointed out that the critical issue is whether the subject matter is a debt. If it is a debt, the Court will further have to look at whether it is a debt provable in bankruptcy. She argued that a debt need not be for a liquidated sum. Once the debt is quantifiable by the trustee, it can be a debt provable in bankruptcy. She submitted that an interest in land is one which is quantifiable, and consequently, what is being claimed is a debt provable in bankruptcy. Miss Barclay submitted that since these proceedings were commenced at a time when the provisional order for bankruptcy had already been made, the instant proceedings are automatically stayed pursuant to section 39. Consequently,

these proceedings should be stayed unless the Court grants permission for the proceedings to continue.

RESOLUTION OF THE ISSUES

Whether Proceedings should be stayed pursuant to Section 39

[16] The preliminary issues which arise are interesting, especially given that there is an apparent dearth of local learning on the subject. The parties through their submissions have greatly assisted the Court in resolving the points raised.

[17] The critical issue to be determined is whether what is being claimed by the Claimants in the Amended Statement of Case can be regarded as a “debt provable in bankruptcy” within the meaning of section 39 (1) of the Bankruptcy Act .

[18] In my judgment, Section 39, albeit not drafted in the clearest of language, means and has as its true purport the following :

(a) When a provisional or absolute order has been made, no person who is an unsecured creditor of the bankrupt in respect of **a debt provable in bankruptcy** ;

(i) has any remedy against the property or person of the debtor in respect of the debt.

(ii) ought to commence thereafter any action or other legal proceedings against the bankrupt without first seeking the permission of the court. However, see **Halsbury’s Laws of England**, 4th Edition, Reissue, Volume 3(2), paragraph 731, and the useful case of **In re Saunders, (a Bankrupt), Re Bearman, (a Bankrupt)**, [1997] Ch 60, [1997] 3 All E.R. 992, [1996] 3 W.L.R.473, there cited, where it is stated that the practice of the English courts from 1893 and for a period of more than 100 years, has been to treat proceedings commenced against a bankrupt after

the making of a bankruptcy order without the permission of the court as not null and void ipso facto and as being capable of validation by retrospective permission being granted by the court. The permission is not to commence the proceedings, but to continue them “to overcome the logical difficulty inherent in giving leave to commence after proceedings had already begun without that leave”. See in particular page 480 of the Weekly Law Reports.

(b) Where proceedings to recover any **debt provable in bankruptcy** have already commenced and there was no order made in the bankruptcy proceedings staying all such matters already commenced, upon notice of a Provisional or an Absolute order being given in the proceedings before the court, the proceedings are automatically stayed.

(c) However, if proceedings to recover any **debt provable in bankruptcy** have already commenced, any creditor or person interested may apply to the Court and the Court may in the exercise of its discretion allow any proceedings already so commenced to be continued upon such terms and conditions as it thinks just.

(d) The provisions of section 39 do not affect the power of secured creditors to realize or otherwise deal with their security.

(e) The section only applies to restrict legal proceedings in relation to **debts provable in bankruptcy** against the debtor.

[19] Sections 39 (1) and (2) are aimed at restricting certain kinds of proceedings and remedies which may be brought and sought by creditors, more so unsecured creditors, against the property or person of the bankrupt. As observed at paragraph 490 of the **Hal s bur y’s Law s of England** 4th Edition, Reissue, Volume 3(2), the reason for this restriction is based on the fact that, when a person has been adjudged a bankrupt, the rights which his creditors enjoyed of enforcing their claims against him and his property cease to be enforceable, and what the creditor acquires is the right to share proportionally in the distribution by the

trustee in bankruptcy of the assets of the bankrupt which become vested in the trustee. This is to ensure that no one creditor is given an advantage over other creditors.

- [20] The Claimants rely on the decision of ***David Truex v Eugenie Romanovna Toll [2009] EWHC 396 (Ch)*** for the proposition that for a debt to be provable, it must be for a liquidated amount. In that case a solicitor had filed a petition for bankruptcy under section 267 of the English Insolvency Act 1986 in respect of his costs and charges. One of the requirements under that Act was that the debt being owed must be for a liquidated sum. It was held in that case that for a sum to be considered liquidated so as to be the subject of a bankruptcy petition under section 267, it must have been judicially assessed or determined. By parity of reason, the Claimants argue that a debt provable in bankruptcy must be one that has been judicially assessed or proven. This particular case does not assist much in the determination of the matter. It merely explains what is meant by “liquidated sum”. Section 19 (ii) of Jamaica’s Bankruptcy statute also requires that as a condition to filing a bankruptcy petition, the debt owing must be a “liquidated sum”. This case as cited and relied upon by the Claimants is better suited to deal with that issue and does not explain what is meant by a debt or more specifically, what is a debt provable in bankruptcy.

(My emphasis)

- [21] Miss Davis had also cited the case of ***Ezekiel v Orakpo [1977] Q.B. 260*** to help determine the essence of a debt provable in bankruptcy. This case was more apposite to the present circumstances. In that case, the plaintiff had commenced an action in the County Court, claiming possession of shop premises which had been let to the defendant, on the ground that the defendant’s lease was forfeited for non-payment of rent. A receiving order in bankruptcy was made against the Defendant prior to the commencement of the proceedings and when the matter came up for consideration, the Defendant argued that the proceedings issued by the Plaintiff should be stayed under the provisions of section 7 and section 9 of the United Kingdom (“UK”) Bankruptcy Act 1914.

Section 7 of that Act states:

- (1) ***On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.***
- (2) *But this section shall not affect the power of any secured creditor to realise 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 had not been passed.*

Section 9 of that Act deals with the courts power to stay such proceedings and states:

“The Court may at any time after the presentation of a bankruptcy petition stay an action, execution or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against a debtor, either stay the proceedings or allow them to continue on such terms as it may think just”

[22] This case is particularly useful because sections 7 and 9 of that Act although not identical, bears some similarity to Section 39 of our local bankruptcy statute. The analysis of the learned Judge in ***Ezekiel*** in interpreting the section is therefore of great assistance to this Court.

[23] SHAW L.J. in delivering the judgment of the Court in ***Ezekiel*** opined that section 7 (1) was intended to *“inhibit any form of remedy or action which is directly designed to enforce payment of the debt which is owed.”* He reasoned that the nature of the plaintiff’s action, that is an action for possession, is not a remedy against the property of the debtor for any enforcement of payment of any debt.

He suggested that if the plaintiff was seeking to enforce payment of rent due, that would have fallen within the ambit of section 7 (1) of the UK statute.

[24] The decision in *Ezekiel* suggests that a debt provable in bankruptcy is one which is capable of resulting in some kind of enforcement of payment against the property of the bankrupt. It generally appears to be of a monetary nature, and must be capable of proof and being proved.

[25] I do not agree with the Claimant's submission that the debt must be a liquidated sum. I agree with Miss Lamey's submission that the debt in question need not only be for a liquidated sum. Support for this argument can be found in section 123 (1) of the Act. Section 123 reads as follows:

"123.- (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable under a bankruptcy petition, and no person having notice of any act of bankruptcy available for adjudication against the debtor shall prove for any debt or liability contracted by the debtor subsequently to the date of his so having notice, unless the Court is of opinion that the property of the debtor has been benefited or increased, or that his debts or liabilities have been diminished, by the payment of the money or execution of the contract upon which the debt or liability sought to be proved has arisen.

(2) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the provisional order, or to which he may become subject by reason of any obligation incurred previously to the date of the order, shall be deemed to be debts provable under a bankruptcy petition in pursuance of this Act.

The section signifies that all debts and liabilities of the description set out in subsection 2 of section 123 will be characterized as being debts provable in bankruptcy. This would encompass both liquidated and unliquidated sums. However not all unliquidated sums will be regarded as debts provable in bankruptcy. Only unliquidated damages arising out of a contract or promise will be so considered.

[26] In determining whether the instant case falls within the ambit of section 39, the nature of what is being claimed for by the Claimants has to be scrutinized. It is not necessarily the property in question that is to be looked at, but more the nature of what is being claimed in respect of the property.

[27] In the Amended Statement of Case, the Claimants are seemingly asking the court to certify that they are entitled to terminate the contract based upon the 1st Defendant's repudiatory breach. Further or in the alternative, they are saying that the contract for exchange is frustrated and/or impossible of performance. They are asking the Court for such declarations and for the return of their Title to the Braemar Lands. If the Court were minded to grant those orders, or any of them, this would not result in any judgment for payment of any sum. In this case, as it was in **Ezekiel**, the remedies sought are not remedies against the property of the debtor in respect of a debt. The conclusion would be different if the Claimants were seeking damages for breach of contract or some other monetary remedy. I therefore agree with the Claimant's submission that what is being sought is not a debt provable in bankruptcy and therefore these proceedings are not caught by section 39 of the Bankruptcy Act. There was therefore no necessity to seek the Court's leave under section 39(2) in order to commence this action. Further, these proceedings are not automatically stayed. Furthermore, the Court cannot grant a stay based upon any inherent jurisdiction as argued on behalf of the 1st Defendant, (almost as an afterthought). This is because there is no formal application seeking such relief, supported by evidence providing a basis upon which the Court could exercise such a discretion.

Whether Trustee in Bankruptcy should be substituted as a party to the suit

[28] Whenever a person is adjudged a bankrupt, his interest is made subordinate to the interests of his creditors. It therefore means that the interests of the creditors become paramount and every step must be taken to protect the estate of the debtor. This is to ensure that creditors can have their debts realized. In ensuring that the creditor's interests are guarded, section 14 (1) (a) of the Act provides for the appointment of a Trustee in Bankruptcy, whose mandate it is to administer the estate of the debtor in bankruptcy, subject of course to the provisions of the Act.

[29] Section 41 of the Act points to the main objective of bankruptcy provisions, that is; such provisions are designed to ensure that all the property of a debtor is realized by the trustee and divided among creditors. The section reads thus:

41. When a provisional order has been made against a debtor, his property shall become divisible amongst his creditors in proportion to the debts proved by them.

[30] To ensure that this objective is carried out, section 42 vests the property of the debtors in the Trustee.

42. When a provisional order has been made against a debtor, the property of the debtor shall immediately pass to and vest in the Trustee, *without any conveyance or assignment or transfer whatever, to be by him in due course, either under an absolute order for bankruptcy, or under a deed of arrangement as hereinafter provided by this Act, realized, administered and distributed with as much despatch as is reasonably practicable for the benefit of the creditors:*

Provided, that until the provisional order is made absolute, it shall be the duty of the Trustee, as far as the nature of the property

seized permits, to preserve all such property in such state as to permit of its being returned to the debtor in the condition in which it was when it was seized, in the event of the revocation of the provisional

[31] Section 2 provides that:

*“property” includes money, goods, **things in action, land,** and every description of property real or personal, also obligations, easements, **and every description of estate, interest** and profit, present or future, **vested or contingent,** arising out of or incident to property as above defined*

[32] Section 104 further provides:

“The property of the debtor divisible amongst his creditors and **vesting in the Trustee,** and in this Act **referred to as the property of the debtor;**

Shall comprise:

(a) ***All such property as may belong to or be vested in the debtor at the commencement of the bankruptcy, or may be acquired by or devolve on him at any time previously to his discharge;*** and

(b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the debtor for his own benefit at the commencement of the bankruptcy, or at any time previously to his discharge

(c)

[33] Having set out those provisions, it is to be determined whether the property, the subject of this dispute, is one in which the debtor would have acquired an interest which would have consequently passed to the Trustee.

- [34] At paragraph 4 of the 1st Defendant's Affidavit dated February 14, 2013 he stated that he was put into possession of the Braemar lands. It was not indicated when he was put into possession, but it seems that this would have been before the Provisional Order was made. Until the interest of the 1st Defendant is registered on the title making him the registered owner, he may at most have acquired an equitable interest in the said property. When the Provisional Order was made, the equitable interest or any interest that the 1st Defendant had in that property would have passed to the Trustee in Bankruptcy.
- [35] Section 84 of the Act provides that "***the Trustee may bring, institute or defend, any action or other legal proceeding relating to the property of the debtor.***" Consequent upon the interest of the debtor in respect of any property owned by him being vested in the Trustee, it is the Trustee in exercising its discretion who may choose whether to exercise its powers under section 84. Also, a literal interpretation of that section suggests that the Trustee can be a Claimant or a Defendant in any suit which involves the property of the debtor.
- [36] In the course of the Claimants' argument reliance was placed on the case of **Jackson v North Eastern Railway Company** for the proposition that the Trustee in Bankruptcy should be the one who is allowed to take conduct of these proceedings. I think that the principles in that case are specific to cases dealing with plaintiffs/claimants since the case was concerned with the right to commence proceedings. The same can be said of ***Index Communication Network Limited v Capital Solutions Limited et. al. Claim No. 2011 H.C.V. 00739 Tudor Grange Holdings Limited and others v. Citibank NA and Another [1991] 4 All E.R. 1***). The real point in the instant case is as to who should conduct or defend this claim on behalf of the 1st Defendant and not whether there is a right to commence proceedings.

[37] Further the Claimants and the Trustee in Bankruptcy have also referred the Court to section 78 of the Act. Among the things provided in that section, is a mandate that the Trustee under the control of the Court shall administer **the debtor's estate for the benefit of the creditors.** Surely, any proceedings involving the property of the debtor would be best suited to be conducted by an impartial person. It is clear from the statutory scheme set out under the Act, that the Trustee is the person who must have conduct of such proceedings. Additionally, if the 1st Defendant was to be allowed to carry on these proceedings, I agree with the Trustee in Bankruptcy that he risked racking up additional legal costs which may add to the burden of his estate.

[38] Rule 19.3 (1) of the Civil Procedure Rules 2002 ("the CPR") allows the Court to add, substitute or remove a party on or without an application. Rule 19. 2(5) provides that the Court may order that a party be substituted for an existing one if

—

(a) ***The existing party's interest or liability has passed to the new party;*** or

(b) The Court can resolve the matters in dispute more effectively by substituting the new party for the existing party.

(My emphasis)

[39] I am satisfied that by virtue of section 42 of the Act, the interest in any property owned by the 1st Defendant would have been vested in the Trustee in Bankruptcy. Having regard to the circumstances of this case, I accept the Claimants' and the Trustee's argument that the Trustee in Bankruptcy be substituted for the 1st Defendant in these proceedings. In fact, since the Claimants have filed a Notice of Discontinuance against the 2nd Defendant, there is really now only one defendant in this matter and that is Wilfred Nembhard. I therefore order that the **"Trustee in Bankruptcy, Trustee of the Estate of Wilfred Nembhard, a Bankrupt"** be substituted for Wilfred Nembhard as the Defendant and that the proceedings are to be conducted henceforth on behalf of the Defendant by the Trustee in Bankruptcy.

