In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 315

BETWEEN:

IN THE MATTER OF THE BANKRUPTCY ACT 1989
AND IN THE MATTER OF HAROLD JOSEPH DARRELL
AND IN THE MATTER OF AN APPLICATION BY THE OFFICIAL RECEIVER UNDER s. 15 BANKRUPTCY ACT 1989

THE OFFICIAL RECEIVER

Applicant

-and-

HAROLD JOSEPH DARRELL

Respondent

Before: **Assistant Justice Kessaram**

Appearances: Ms. Leslie Basden, Office of the Official Receiver, for the Applicant
Mr. Gordon Woolridge, Phoenix Law Chambers, for the Respondent

Date/s of Hearing: **19 November 2018**

Date of Judgment: **18 December 2018**

RULING

Bankruptcy – Failure to Submit Statement of Affairs – Adjudication under s. 15 Bankruptcy Act 1989 – Recusal Application – Appearance of Bias

1. There are three applications before the Court:

a. an application by the Official Receiver ("the OR") for an order adjudicating the Respondent, Harold J. Darrell ("the Debtor"), bankrupt under the Bankruptcy Act 1989 ("the OR's Application");

b. an application by the Debtor for a stay of execution of the judgment obtained against the Debtor which underlies the Receiving Order made under the Bankruptcy Act 1989 ("the 1989 Act"); and

c. an application by the Debtor to stay further proceedings in the Bankruptcy Proceedings on the basis that the Debtor intends to appeal to the Court of Appeal against my decision not to recuse myself from hearing the OR's Application.

2. Before delving into the issues of the case, it is necessary to understand the history of the present proceedings in Bankruptcy.

History of the OR's Application

3. On 24th October 2017 Joseph Wakefield ("the Petitioner" or "the Petitioning Creditor") presented a petition to the Court (dated 4th October 2017) ("the Petition") for a receiving order to be made against the Debtor. The basis of the Petition was that the Debtor was adjudged by this Court on 24th September 2015 to owe Mr. Wakefield in his capacity as executor of the estate of the late Peter Willcocks the principal sum of $427,259.47 plus contractual interest to the date of judgment, plus taxed costs and interest on such costs (amounting to $597,611.49 as at the date of the Petition); and that the Debtor had failed to satisfy the judgment within 14 days of the service on him of a bankruptcy notice.

4. The Petition came on for hearing on 10th November 2017 when a receiving order was made against the Debtor ("the Receiving Order"). Mr. Darrell did not attend the hearing despite being personally served with the Petition on 1st November 2017[1].

[1] The Debtor stated in an affidavit that the reason he did not attend the hearing of the Petition was because of a "*mix-up*" with his lawyer: see his affidavit sworn on 17th November 2017.

5. By summons dated 21st November 2017, the Debtor filed an application for a stay of the Receiving Order on the basis that certain legal actions he had commenced would result in money becoming available to him in amounts sufficient to pay off the Petitioning Creditor. The summons was supported by an affidavit of the Debtor sworn on 17th November 2017.

6. The said affidavit was supplemented by a further affidavit sworn by the Debtor on 2nd October 2018 (described as being in support of his "*estoppel application*"). The second affidavit filled in some of the detail as to how the Petitioner's debt arose[2]; but does not otherwise shine any more light on the nature of the claims the Debtor claimed to have against others, which he says would enable him to discharge his debt to the Petitioner. The two actions are as follows;

The WQ Action

7. The Debtor's first affidavit states that he had filed a writ against the "*Relevant Partners of Wakefield Quin*" of which the Petitioner was one. The Debtor alleged that the claim against the Petitioner and other partners of Wakefield Quin ("WQ") related to WQ's representation of him in his claim against the Bank of Bermuda. The affidavit gives no other details of the claim; nor does it exhibit any claim documents. Notably, it does not state what amount was claimed or the legal basis of the claim.

8. For reasons unexplained, the Debtor insinuates in his affidavit that the Court is involved in some form of conspiracy against him. He claimed that his writ in the WQ Action was never returned but that legal suits brought <u>against</u> him were processed by the Court.

9. The affidavit carries on in this vein to infer some form of conflict of interest on the part of Mr. Wakefield's lawyer in the bankruptcy proceedings. He asserts that Mr. Wakefield's lawyer "*assisted Mr. Horseman* [a lawyer at WQ] *in* [his] *case against the bank*". The Debtor infers further some impropriety in the fact that Mr. Wakefield's lawyer in the bankruptcy proceedings is a co-director in a law practice

[2] The story told in the Debtor's second affidavit contains involves scandalous allegations, but does not throw any further light on the WQ Action.

with Mr. Horseman's wife but does not assert the significance of this fact. The Debtor says that these facts have caused the Debtor to feel "*as though the wagons are being circled around me to thwart off my quest for Justice*".

10. I have since the last hearing of the cross-applications in this matter on 19th November 2018 become aware that the WQ Action was dismissed on 8th March 2018: see Court Judgments 2018 at https://www.gov.bm/sites/default/files/Judgment-Harold-Darrell-Richard-Horseman.pdf. It is astonishing to me that counsel for the Debtor did not bring this fact to the attention of the Court.

11. The Debtor considers that there is some impropriety in the executor of a deceased person seeking repayment of a debt owed to the deceased's estate of approximately $600,000 which the Debtor admits he owes and which he has not repaid. The Debtor appears to think that the executor of the deceased creditor's estate (the Petitioner) is conducting some personal vendetta against him[3] in seeking to get in the assets of the estate for the benefit of those entitled. What he does not appear to realize is that it is the fundamental duty of an executor to gather in the assets of the deceased's estate (and then to pay the deceased's debts, funeral and testamentary expenses and distribute the remaining assets to those entitled under the deceased's will).

The HRC Claim

[3] The Debtor refers in his second affidavit to Mr. Wakefield conducting "*a campaign of vengeance*" against him: Para. 36.

The other claim the Debtor makes reference to as being the potential source of funds is his claim against the Human Rights Commission. This claim has since the swearing of the Debtor's affidavit (17th November 2017) been dismissed[4].

12. Given that the HRC Claim has been dismissed little more needs to be said about it save the following. The Debtor's affidavit suggests that the Ombudsman recommended that the Debtor be restored to the position that he would have been in but for the acts of maladministration found against the HRC. The Debtor has interpreted this to mean that he is entitled to recover "*all me* [sic] *legal fees and costs incurred as a result of the many resulting actions filed to unravel the conspiracy, concealment and deceit that was employed to dismiss my Tribunal hearing*": Para. 11 of the 17th November 2017 affidavit. (It is a matter of record in the various judgments rendered by this Court and the Court of Appeal that there have been a multiplicity of unsuccessful actions commenced by the Debtor arising out of the dismissal of his complaint of racial discrimination against the Bank of Bermuda). I find the Debtor's interpretation of what the Ombudsman recommended to be on its face inherently improbable. In his second affidavit the Debtor has exhibited the findings of the Ombudsman and only some of the recommendations. None of them support the Debtor in his view that they pave the way for the Debtor to recover all his legal costs in the various actions he has commenced in connection with his complaint against the Bank or its officers.

Bankruptcy Proceedings – Stay Application

13. The Debtor does not dispute that he owes the money due to the estate of the late Peter Willcocks. He did not appear at the hearing of the application for the Receiving Order, or seek to have it set aside, or a stay of further proceedings pursuant to the Receiving Order when he became aware of it. The amount due is a substantial amount. The fact that the Debtor now seeks a stay on the basis of

[4] At the time of the hearing of the Debtor's application for a stay of the Bankruptcy proceedings the Debtor's claim had not been dismissed. I sat as an assistant judge in hearing the application for the dismissal of the HRC Claim and dismissed the claim: see the Ruling of 6th November 2018 *Darrell v The Human Rights Commission* [2018] SC (Bda) 74 Civ. The same application of recusal was made by the Debtor to me in that case for the same reason. I rejected that application also.

achieving victory in certain pending legal actions suggests that he has no liquid assets with which to pay the Petitioner's debt. He is clearly insolvent in the sense that he cannot pay his debts as they fall due. The two actions on which he relies for the stay have been dismissed.

14. The Debtor could have avoided being put in the position that he now finds himself in had he complied with the simple requirement of filing a Statement of Affairs showing his assets and liabilities, etc. On 4th October 2018 when the OR's application first came before the Court, he was given a further 6 weeks to file a statement of affairs as a last chance to avoid being adjudged bankrupt. On the 19th November 2018 when the matter came back before the Court the statement of affairs had not been filed and no explanation was given. Instead, a further application was made for a stay of proceedings on the basis that the Debtor intended to appeal against my failure to recuse myself. Given that the two actions on which the Debtor relied for his stay application have been dismissed, summarily, there is now no basis at all for a stay of the bankruptcy proceedings. I, therefore, dismiss his application for a stay founded on the prospect of making substantial recoveries in legal actions. I now deal with the stay application based on the Debtor's appeal against the recusal order.

Recusal Appeal – Stay Application

15. As noted above, the OR's application for an adjudication of bankruptcy came before the Court on 4th October 2018. On that date Mr. Woolridge appeared for the Debtor and Ms. Basden appeared for the OR. Mr. Woolridge submitted that I could not hear the application and should recuse myself. There was no summons or affidavit filed by the Debtor in support of this application. The factual basis for the application was given by Mr. Woolridge from counsel's table. It was that the firm that I work for performs legal work for "*the bank*". No particulars were given. It is not clear what bank Mr. Woolridge was referring to; but with knowledge of the Debtor's differences with the Bank of Bermuda Limited (now HSBC Bank

Bermuda Limited) I assumed it was this bank that he was referring to[5]. I rejected the application for my recusal as being without substance.

16. On that occasion, I adjourned the OR's application for an adjudication to give the Debtor more time to comply with the requirements of the Bankruptcy Act 1989 in relation to the filing of a statement of affairs. The matter came back before this Court on 19th November 2018. The Debtor had still not filed a statement of affairs. Instead he applied for a stay of the Bankruptcy proceedings pending his appeal against my refusal to recuse myself.

17. The Debtor produced a Notice of Appeal dated and filed in the Court on 11th October 2018. The Notice of Appeal stated as the first ground of appeal that, "*The ground of this appeal is that counsel for the Appellant stated that it was the Respondent's position that the Learned Trial Judge was conflicted by virtue of the Firm, Namely Cox Hallett & Wilkinson Limited, formerly Cox Hallett & Wilkinson. It is the Appellant's position that after he was dropped as a client by Messrs Wakefield Quin, he went to CHW to seek alternative counsel. He was told by Mr. Kim White that the firm could not act for him as they were counsel for the bank (Bank of Bermuda) in similar actions*".

18. The statement in the Notice of Appeal of what the Debtor was told by Mr. Kim White, a lawyer in the firm of Cox Hallett Wilkinson ("CHW"), was not stated to the Court on 4th October 2018 when the recusal application was made and denied. The first time this Court became aware of the alleged conversation with Mr. White was when the Notice of Appeal was produced to the Court on the 19th November. The statement is not verified on oath and no particulars are given to show when the conversation took place. The statement that CHW could not act for the Debtor because the firm acted for the bank "*in similar actions*" suggests that CHW acted for the bank in defending allegations of discrimination against it; for that was the claim being pursued by the Debtor against the bank. On this basis, the Debtor submits that the matters alleged gave rise to an appearance of bias in my hearing

[5] This was subsequently confirmed in the Debtor's appeal against my decision to reject the application.

the OR's application (as a member of the same firm as Mr. White) to have the Debtor adjudged bankrupt for failing to file his statement of affairs.

19. In my judgment the stay pending appeal is without merit and ought to be dismissed for the simple reason that the appeal itself is so lacking in merit that it qualifies for the description of frivolous and vexatious and an abuse of the process of the Court. I say this for the following reasons. The Debtor made no proper application by summons for an order for recusal prior to the hearing. More importantly, it was not supported by an affidavit testifying to the relevant facts. The Debtor did not even notify the OR that he intended to make an application for recusal. The appearance given to the Court was one of a litigant flying by the seat of his pants.

20. The allegation was not of actual bias but of an appearance of bias. This is confirmed by the Notice of Appeal. The relevant legal test in relation to an appearance of bias is the test laid down in *Porter v Magill* [2001] UKHL 67, namely, whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The fair-minded and informed observer must be taken to be able to distinguish between what is relevant and what is irrelevant and decide what weight should be given to the facts that are relevant[6].

21. Leaving aside for the time being that there was no evidence (as such) of any facts supporting the allegation of bias (but simply the say-so of counsel for the Debtor), even if CHW did similar work for the bank (or any legal work for the bank[7]), it is inconceivable that a fair-minded and informed observer would consider that there was a real possibility of bias in a duly sworn[8] Assistant Justice employed by a firm that performed legal work for the bank hearing an application for an adjudication against a debtor for his failure to file a statement of affairs; in bankruptcy proceedings based on his failure to pay a debt to the executor of an estate of a

[6] *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, dictum of Lord Hope.
[7] At the hearing on 4th October 2018 at which the application for recusal was made the Debtor through counsel stated simply that I was conflicted because my firm performed legal work for the bank without specifying any particulars.
[8] The judicial oath of office is a relevant and important factor to be taken into account: *Davison v Scottish Ministers* [2014] UKHL 34.

deceased lender. Neither the judgment debt nor the failure to submit a statement of affairs has anything to do with the bank.

The OR's Application for an Adjudication of Bankruptcy

22. Section 15 of the Bankruptcy Act 1989 states as follows:

"***Debtor's statement of affairs***

15 (1) Where a receiving order is made against a debtor, he shall make out and submit to the Official Receiver a statement of and in relation to his affairs in the prescribed form, verified by affidavit, and showing the particulars of the debtor's assets, debts and liabilities, the names, residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the Official Receiver may require.

(2) The statement shall be so submitted within the following times, namely:

(a) if the order is made on the petition of the debtor, within three days from the date of the order;

(b) if the order is made on the petition of a creditor, within seven days from the date of the order;

but the Court may, in either case for special reasons, extend the time.

(3) If the debtor fails without reasonable excuse to comply with the requirements of this section, the Court may, on the application of the Official Receiver, or of any creditor, adjudge him bankrupt."

23. As noted, the basis of the OR's application is the failure of the Debtor to file a statement of affairs following the making of the Receivership Order on 10th November 2017. The OR's first report states that a letter with a blank statement of affairs was sent to the Debtor by post on 23rd November 2017. On the 30th November 2017, the 23rd November letter was sent to the Debtor again via his lawyer. The 23rd November letter advised the Debtor that he was required to provide the OR with a completed statement of affairs within 7 days of the Receiving Order, i.e., by 22nd November. The letter gave the Debtor until 5th December 2017 to file the statement of affairs. It also warned the Debtor that

failure to submit the statement of affairs would result in a public examination before the Court. The First Report goes on to state that on 30th May 2018 a letter was served on the Debtor personally and sent to his lawyer. The letter advised the Debtor that if he failed to submit a statement of affairs he would be adjudicated bankrupt.

24. These warnings were simply ignored. On the first return date of the OR's application, i.e., on 4th October 2017, the Court gave the Debtor an additional 6 weeks to submit his statement of affairs and adjourned the case to the 19th November 2018. As also noted, by the hearing date on 19th November 2017 the Debtor was still in default of submitting his statement of affairs. No explanation for his failure was given to the Court. Instead, the Debtor sought a stay of further proceedings on the two grounds mentioned above.

25. In the circumstances, having refused the Debtor's stay applications, I see no reason for not adjudicating the Debtor bankrupt for his persistent failure to submit a statement of affairs. The OR seeks to be appointed the Debtor's trustee in bankruptcy without a committee of inspection. This also seems appropriate and I so order.

26. The OR also seeks to have the Debtor held in contempt of court in failing to submit his statement of affairs under Rule 55 of the Bankruptcy Rules 1990[9]. It is not clear to me that Rule 55 permits the Court to find the Debtor in contempt in the circumstances pertaining. I read the rule as applying to the case where a debtor has been ordered to attend at a certain time and place for the purpose of producing a document. That is not the case I am dealing with. Accordingly, I decline to hold the Debtor in contempt.

27. I am minded however to order (as sought by the OR) that the OR's costs of the present applications be paid out of the assets of the Debtor's estate. Such costs are to be taxed on the standard basis rather than the indemnity basis.

[9] Rule 55 Bankruptcy Rules 1990 states "*Any person willfully disobeying any subpoena or order requiring his attendance for the purpose of . . . producing any document shall be deemed guilty of contempt of Court and may be dealt with accordingly*".

Dated the 18th of December 2018.

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Hon. David Kessaram
Assistant Justice