In The Supreme Court of Bermuda

CIVIL JURISDICTION
2020: No. 31

BETWEEN:

RACHELLE FRISBY AND JOHN JOHNSTON
(As Trustees of the Property of Harold Joseph Darrell, in Bankruptcy)

Plaintiffs

-and-

HAROLD JOSEPH DARRELL

Defendant

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Mr. Rhys Williams, Conyers Dill & Pearman Ltd. for the Plaintiffs
Mr. Jaymo Durham, Amicus Law Chambers Ltd. for the Defendant

Date(s) of Hearing: 29th August 2022
Date of Ruling: 30th December 2022

RULING

Application by trustees in bankruptcy for an order for possession of property – Stay of the application for possession – Duties of debtor pursuant to section 26 of the Bankruptcy Act 1989

WOLFFE, J:

1. By way of an Originating Summons dated 24th January 2020 the Plaintiffs, in their capacities as trustees in bankruptcy of the Defendant ("Trustees"), seek possession of the Defendant's property located at #12 Cedar Avenue in the City of Hamilton in Bermuda (the "Property")[1].

2. The Property to which the Plaintiffs' application refers is not insubstantial as it comprises five (5) residential apartments. However, despite letters being sent to the separate addresses by the Plaintiffs it is unclear what the value of the Property is, how many of the apartments are lawfully rented, and if the apartments are rent then what rental income the Defendant is receiving from them. It is understood that the Defendant resides in one of the apartments and that the other apartments are occupied by the Defendant's family members (which apparently they have done so for a number of years prior to the bankruptcy proceedings).

3. The Defendant resists the Plaintiffs' application and in tandem seeks a stay of the entire bankruptcy proceedings (*The Official Receiver and Harold Darrell No. 315 of 2017*)(the "bankruptcy proceedings"), and hence the Plaintiffs' possession application, until such time that the Court determines an application by the Defendant to set aside a consent judgment which was agreed to by a Mr. Joseph Wakefield and the Defendant on the 24th September 2015 in the matter of *Joseph Wakefield (as Executor of the Willcocks Trust) v. Harold Joseph Darrell No. 160 of 2015* (the *"Wakefield"* matter). The outstanding judgment debt of $427,259.47 (plus interest) from this consent judgment is what precipitated a Bankruptcy Petition being instituted under the Bankruptcy Act 1989 (the "Act") by Mr. Wakefield against Mr. Darrell, and which led to a Receiving Order being made against the Defendant.

---

[1] The Plaintiffs were provided with the Deeds to the Property by the Official Receiver and the deeds confirm that the Defendant is the owner of the Property.

4. The Defendant also adds to the mix the case of *Brian Willcocks v. Joseph Wakefield & Wakefield Quinn, Case No. 417 of 2021* (the "*Brian Willcocks*" matter) which he says should be resolved by the Courts before any further progression of the bankruptcy proceedings. I will say more about the *Brian Willcocks* matter later.

Decision

5. Context of course is important and so it would be helpful to first set out what appears to be the undisputed background of this matter which, as I see it, is as follows:

22nd April 2015	The *Wakefield* matter is instituted by Mr. Wakefield as executor of the Willcocks Trust. At the time his lawyers were Canterbury Law Ltd.
24th September 2015	Mr. Wakefield and the Defendant agreed to the consent judgment in the *Wakefield* matter (the Order was signed by then Justice Stephen Hellman).
29th September 2016	A Writ of Fieri Facias is issued against the Property in respect of the payment of the judgment debt of $427,259.47 plus interest which at the time amounted to $62,978.03.
5th September 2017	The Writ of Fieri Facias is extended for a further twelve (12) months.
4th October 2017	The Bankruptcy Petition is presented by Mr. Wakefield.
10th November 2017	A Receiving Order is made against the Defendant and the Official Receiver is appointed.

18th December 2018 The Defendant is declared bankrupt by Assistant Justice David Kessaram after, *inter alia*, having failed to file a statement of affairs pursuant to section 15 of the Act.[2]

14th February 2019 The Plaintiffs are appointed trustees in bankruptcy in place of the Official Receiver (under section 55(1) of the Act).

31st March 2019 The Defendant attends the first meeting with the Plaintiffs.[3]

24th June 2019 The Plaintiffs write to the Defendant inviting him to meet with them. In the same letter the Plaintiffs remind the Defendant that he should provide a statement of his affairs as well as the deeds to any other property in his name and any documents relating to his assets and liabilities.[4]

The Plaintiffs also write to each of the five (5) apartments of the Property advising whomever may occupy them that the Property had been vested in them as trustees in bankruptcy and that they would be grateful if their respective leases would be provided. However, no response from any possible tenants of the Property have as yet been received.[5]

Mr. Jaymo Durham (Counsel for the Defendant) informs the Court during this hearing that there are no formal leasehold agreements in place and that each tenant, who are family members (one of whom is the Defendant's ninety (90) year

---

2 Assistant Justice Kessaram rendered full written reasons for his decision.

3 The Defendant was invited to this first meeting by way of a letter dated 21st February 2019 which can be found on page 1 of Exhibit RF-1 of Ms. Rachelle Frisby's First Affidavit sworn on the 13th January 2020.

4 Page 13 of Exhibit RF-1 of Ms. Frisby's First Affidavit.

5 Pages 16 to 23 of Exhibit RF-1 of Ms. Frisby's First Affidavit show the letters to the five (5) apartments along with courier returns showing that the letters were undelivered.

	old mother), are charged with the responsibility of maintaining the Property.
26th June 2019	The Plaintiffs are informed that Mr. Durham represents the Defendant.[6]
26th September 2019	A meeting is scheduled with Mr. Durham and the Defendant but the Defendant did not attend. The meeting was rescheduled to the 30th September 2019.
30th September 2019	The Defendant nor Mr. Durham attend the scheduled meeting.
24th January 2020	The Plaintiffs file the Originating Summons seeking possession of the Property.
30th May 2022	The Defendant files into Court an application to stay the bankruptcy proceedings.
16th August 2022	The Defendant files into Court an application to set aside the consent judgment in the *Wakefield* matter.

6. I should also say upfront that there is no dispute, or at least there did not appear to be any, that:

   (i) Pursuant to section 55(2) of the Act that upon the appointment of the Official Receiver on the 10th November 2017 that the Property[7] passed to and vested in the Official Receiver. Further, that the Property then became vested in the

---

6 Page 24 of Exhibit RF-1 of Ms. Frisby's First Affidavit.

7 There was no dispute that the Property constituted "property" as defined by section 2 of the Act or that as residential property the Property does not fall within the excluded categories.

Plaintiffs on the 14th February 2019 when they were apppointed trustees in bankruptcy.

Therefore, as it currently stands, the Defendant nor his tenants (if there are any) have any right to occupy the Property (*Anthony John Charles Holtham v. John Kelmanson [2006] EWHC 2588 (Ch)*).

(ii) Pursuant to section 15 of the Act the Defendant was obliged to make out and submit a statement of and in relation to his affairs showing the particulars of his assets, debts and liabilities, and the names, residences, and occupations of his creditors, etc.

(iii) Pursuant to section 26 of the Act the Defendant was obliged to attend a first meeting of his creditors and submit to such examination and give information as the meeting may require. Further, that he was obliged to give an inventory of his creditors and debtors and to the utmost of his power assist in the realization of the Property (and any other property which he may have) and in the distribution of the proceeds among his creditors.

(iv) Pursuant to sections 57 and 64 of the Act respectively the Plaintiffs have the power to sell the Property, or any part thereof, and with "all convenient speed" to distribute the dividends amongst the creditors of the Defendant upon proof of their debts.

(v) Pursuant to section 52 of the Act the Court may, on the application of the Plaintiffs, enforce the acquisition or retention of the Property.

Defendant's Stay Application

7. The Defendant's application to stay the bankruptcy proceedings and therefore these possession proceedings is partly predicated on an application to set aside the consent

judgment in the *Wakefield* matter (Mr. Durham points to the case of *Sands (as Trustee in bankruptcy of the estate of Carlos Layne (a bankrupt) v. Layne and Anr. [2016] EWCA Civ 1159* in this regard). From what can be gleaned from the contents of an affidavit sworn by the Defendant on the 12th May 2022 (filed in the *Wakefield* matter) and a letter from Mr. Durham's law firm Amicus Law Chambers Ltd. dated 5th August 2022, it would appear that the crux of the Defendant's application to have the *Wakefield* consent judgment set aside is the allegation that Mr. Wakefield misled and deceived the Court in obtaining the consent judgment. In particular, that he fraudulently misrepresented that he was a trustee of the Willcocks Trust and that he had the authority to give a Mr. Terry Eve, a friend of the Defendant, a second mortgage to finish a building project that Mr. Eve was carrying out at Mr. Wakefield's home. This second mortgage was supposedly contingent upon the Willcocks estate having the first mortgage and also the Willcocks estate taking out a mortgage on the Property to guarantee the loan to Mr. Eve. The allegation of Mr. Wakefield not being a trustee of the Willcocks estate and therefore not having the authority to transact on behalf of the Willcocks estates appears to have been a revelation made to the Defendant by another in or around mid-April 2022 and the Defendant filed his application to stay the bankruptcy proceedings approximately one (1) month later on 20th May 2022. I should add that in a second affidavit of Ms. Rachelle Frisby (one of the Plaintiffs) sworn on the 25th August 2022 that she exhibits a Grant of Probate dated 30th June 2006 purportedly authorizing Mr. Wakefield to act on behalf of the Willcock estate pursuant to the Administration of Estate Act 1974.

8. Mr. Durham further asserts that in the *Brian Willcocks* matter it is claimed that a Memorandum of Deposit of Deeds Agreement dated 17th May 2011 (the "MODD") which encapsulated the agreement between the Defendant and Mr. Wakefield was "potentially fraudulent" in that (a) Mr. Wakefield well knew that he was never going to hold the deeds to the Property due to a lien on Property by HSBC, and (b) Mr. Wakefield gave the wrong impression to all other creditors that he had a priority charge over the Property. Further, that the MODD lacked "authenticity" in that it was signed some seven (7) months after the purported date of the agreement.

9. To all of this, Mr. Durham argues that the transaction between the Defendant and Mr. Wakefield is fraudulent and therefore void or voidable, and *ergo* so is the consent judgment which underpins the bankruptcy proceedings against the Defendant (Mr. Durham relies on the authority of *Patricia Madge Pitt et al v. David Langford Holt et al., and Mark Stephen Futter et al. and Elizabeth Gaye Futter et al. [2011] EWCA Civ 197*).

10. In the words of Mr. Durham, there are too many serious questions "looming" about the agreement between the Defendant and Mr. Wakefield and therefore the Court has an overriding duty to stay these bankruptcy proceedings until such time that these questions are answered. In this regard, Mr. Durham also invites the Court to heed the general powers of the Court under section 98 of the Act and accordingly conclude that it would be *"expedient or necessary to decide for the purpose of doing complete justice"* to stay these bankruptcy proceedings. I will say more about this later but it would seem to me that under section 98 of the Act that the Court is called upon to consider all of the circumstances of a bankruptcy and that this may involve the balancing of interests from the perspectives of both the creditor and the bankrupt person.

11. It is not for me to address the merits of the Defendant's application to set aside the *Wakefield* consent judgment or whether he has *locus standi* to make such an application, and nor is it for me to address the merits of the *Brian Willcocks* matter. The legal and factual issues of those matters will be ventilated in the fullness of time and possibly before someone else (I have therefore not considered the authorities cited by Mr. Williams and Mr. Durham in this regard). I am however minded of the principle enunciated by Hoffman L.J. in *Heath v. Tang and Another, Stevens v. Peacock [1993] 1 W.L.R 1421* that the Court *"acts as a screen which both prevents the bankrupts substance from being wasted in hopeless appeals and protects the creditors from vexatious challenges to their claims"*.

12. Having reviewed the factual and procedural trajectory of this matter, or the lack thereof, I see no reason why the bankruptcy proceedings or these possession proceedings should be stayed until such time that a decision is made on the Defendant's application to set aside the *Wakefield* consent judgment or on the validity of the *Brian Willcocks* matter. Whatever

may be the decisions in the *Wakefield* or *Brian Willcocks* matters the Defendant will likely remain a bankrupt if he has indebtedness to other creditors. In her Second Affidavit Ms. Frisby exhibits an email from the late Justin Williams to Mr. Rhys Williams (the Plaintiffs' current lawyer) dated 27th March 2019 stating that he [Justin Williams] was the lawyer for Clarien Bank Limited ("Clarien") and that they had four (4) judgments against the Defendant to the tune of over three (3) million dollars ($3,000,000). Further, that Clarien had issued Writs of Execution against the Defendant. Mr. Durham is correct to highlight that the Plaintiffs did not put before me any Court documents evidencing any judgments obtained by Clarien against the Defendant. However, Mr. Durham did not outright say that those judgments do not exist. He was only prepared to say that the Willcocks Trust is the only "identified" creditor and that he has not received any instructions from the Defendant as to whether Clarien is a creditor. Although, in paragraph 4 of his affidavit sworn on the 22nd August 2022, in seeking to establish that the MODD was fraudulent and inauthentic, Mr. Durham alluded to the fact that the Defendant had "other creditors".

13. I also direct my attention to the contents of an affidavit of Paul Andrew Harshaw, then lawyer for Mr. Wakefield in the *Wakefield* matter, which was sworn on the 31st August 2017 for the purposes of making an application to have the writ of *fieri facias* extended. In that affidavit Mr. Harshaw lists other known judgment creditors of the Defendant, such as: Steede Holdings Limited, the Bank of Bermuda, The Human Rights Commission, Winston Leroy Joaquin, Michael Edward Smith and Capital G Limited (now Clarien). Mr. Durham did not specifically speak to these judgment debts purportedly owed by the Defendant but he did submit that even if the Clarien judgments and those listed by Mr. Harshaw exist then the Defendant would have to write to the Court to address the validity of those judgments, and he adds that no steps have been taken by any other creditors to join in with Mr. Wakefield in the bankruptcy proceedings.

14. Taking all of the circumstances into consideration I accept the evidence of Ms. Frisby, coupled with the contents of Mr. Harshaw's affidavit, and find that the Defendant has creditors other than Mr. Wakefield and that the amounts owed to them are linked to Court judgments. Therefore, even if the consent judgment in the *Wakefield* matter is set aside

and even if the *Brian Willcocks* matter is decided in favour of Brian Willcocks (it should be noted that the Defendant is not a party in the *Brian Willcocks* matter) the Property will likely still remain vested in the Plaintiffs and the Plaintiffs will still be obligated by statute to sell the Property and distribute the proceeds amongst the Defendant's remaining creditors. Unless of course the Defendant makes an application under section 35 of the Act to annul his adjudication as a bankrupt and is of course successful in that application. It is accepted that no such annulment application has been made by the Defendant over the past five (5) years.

15. But even if Clarien is not a creditor of the Defendant and even if it is argued that the judgment debts of the creditors listed by Mr. Harshaw are not as yet proved, I would still be slow to stay the bankruptcy proceedings or these possession proceedings. It is incumbent on the Court to not only protect known creditors of a bankrupt who have proven their debts but to also protect those creditors who the bankrupt himself/herself has identified, whether or not their debts are as yet proved. Since the date that the Defendant was declared a bankrupt he has failed or refused to provide a statement of affairs or a list of his creditors and debtors to the Official Receiver or to the Plaintiffs as required by section 26 of the Act. I agree with Mr. Williams that it is the Defendant who is in the best position to conclusively inform the Plaintiffs, and the Court, as to whether Clarien is a creditor or whether there are other creditors waiting in the wings. The Defendant has not done so over the past five (5) years nor in these proceedings currently before me. It may therefore be that the Defendant has other creditors who are as yet unknown to the Plaintiffs but are well known to the Defendant. It would be monumentally unfair to those creditors if the bankruptcy proceedings or these possession proceedings are stayed.

16. More specific to section 98 of the Act, the interests of the creditors of the Defendant far outweigh those of the Defendant. To stay the bankruptcy proceedings and these possession proceedings would be doing a "complete injustice" as I would be disproportionately apportioning less weight to the interests of legitimate creditors than to the interests of the Defendant who is a declared bankrupt and who has deliberately not complied with his statutory obligations. I therefore disagree with Mr. Durham that any injustice to the

Defendant outweighs any prejudice which may be caused to the Defendant's creditors. Effectively, by issuing a stay of the bankruptcy proceedings I would be rewarding the Defendant for non-compliant conduct by keeping his creditors at bay for an indefinite period of time when, or if, the Defendant's set aside application in the *Wakefield* matter is heard or until determination of the *Brian Willcocks* matter. No doubt this would be to the understandable frustration of the Defendant's creditors who have patiently waited for five (5) years for a resolution (whether for or against the Defendant).

17. I therefore dismiss the Defendant's application to stay the bankruptcy proceedings and the Plaintiffs' application for possession of the Property.

Plaintiffs' Application for an Order for Possession of the Property

18. In her supporting First Affidavit sworn on the 13th January 2020, and with reference to the above background, Ms. Rachelle Frisby (one of the Plaintiffs and trustees in bankruptcy), states the following:

- Since the appointment of the Plaintiffs as trustees in bankruptcy on the 14th February 2019 the Defendant has not engaged with the Plaintiffs in good faith and that he has failed to meet his obligations under section 26[8] of the Act. In particular, the Defendant has failed or refused: to attend meetings of the creditors[9] (the Defendant did attend the first meeting with the Plaintiffs on the 31st March 2019 but thereafter failed to attend scheduled meetings); to submit to examination and give such information as required; to give an inventory of his property; to give a list of creditors and debtor; to assist in the realization of his property and distribution of the proceeds among his creditors; or of course, to deliver up the Property.

---

8 In her First Affidavit Ms. Frisby references section 25 of the Act which speaks to the power of the creditors to accept a proposal for a composition in satisfaction of the debts or for a scheme of arrangement. This may have been a typographical error as it is section 26 which covers the duties of debtors.

9 Pages 13 to 15 of Exhibit RF-1 shows a letter and notice to the Defendant to attend a meeting with the Plaintiffs.

- The Defendant has failed to provide a statement of affairs or provide any further information regarding his other assets and liabilities despite repeated requests to do so.

19. Ms. Frisby punctuates the contents of her affidavit by expressing that the creditors are desirous of having the Property sold as soon as possible as currently there is no prospect of the Defendant ever satisfying his debts. Further, Ms. Frisby says, the dilatory and uncooperative conduct of the Defendant increasingly closes the door to any opportunity to maximize the value of the Property so that the creditors may be fully paid that which is owed to them by the Defendant.

20. In response to the Plaintiffs' application for possession of his property the Defendant chose not to file an affidavit contesting any of the contents of Ms. Frisby's First Affidavit. This may be a well thought out strategy on the part of the Defendant to keep his cards close to his chest or it may be a deliberate attempt to not capitulate to the mandated directions of the Plaintiffs. Whatever may be the Defendant's intention, the end result is that the Defendant provides no or little answer as to why he has not met with the Plaintiffs, or provided a list of all his assets and liabilities, or provided an inventory of his property, or given a list of all his creditors and debtors, or assisted the Plaintiffs in realizing and distributing the proceeds of his property, or not delivered up the Property. All of which he is obligated to do under section 26 of the Act and which is necessary for the Plaintiffs to fulfil their duties to the creditors under the Act.

21. In the absence of the Defendant providing the Court with sustainable and legitimate reasons as to why he did not fulfil his section 26 obligations, or even make an application under section 35 of the Act to annul his adjudication as a bankrupt, I am compelled to accept the evidence of Ms. Frisby and find that the Defendant has failed or refused to comply with section 26 of the Act in the manner stated by Ms. Frisby in her First Affidavit. I accordingly find that the Defendant has exhibited an unexplained stubborn reluctance to cooperate with his statutory obligations. The question now for me to determine is whether I should grant the Plaintiffs' application for possession of the Property.

22. Taking into consideration the uncooperative stance adopted by the Defendant from the 10th November 2017 when the Receiving Order was made (a period of over five (5) years), as well as the financial plight surely endured by the Defendant's creditors over that period of time, I cannot reach any other conclusion but to grant possession of the Property to the Plaintiffs so that they may comply with their statutory duty to sell the Property and distribute the proceeds in satisfaction of the Defendant's debts (this may involve the termination of any leasehold agreements held in respect of the Property – *In re Sharpe (A Bankrupt), Ex parte Trustee of the Bankrupt's Property v. The Bankrupt and Another 1 WLR 219*).

23. Had the Defendant taken some definitive steps to meet with the Plaintiffs and fulfill his section 26 obligations there may have been an alternative plan executed by him and the Plaintiffs to satisfy the creditors, and this plan may not have involved the selling of the Property. Or, if the Defendant has family members still residing in the Property, then it may have been possible for one or all of them to purchase the Property thereby leaving the family members in occupation (as was suggested to be a possible solution in *Louise Brittain (The Trustee of the Property of the Bankrupt) and Hamid Dehdashti Haghighat and another [2009] EWHC 90 (Ch)*). Unfortunately, it would appear that given the conduct of the Defendant over the past five (5) years that any prospects of the Plaintiffs and the Defendant reaching an amicable agreement to satisfy the Defendant's debts without resorting to the Property being sold seems to be irretrievably bleak. However, hope springs eternal and if what Mr. Durham says is correct i.e. that the Defendant may have other assets from which his creditors may be paid, then maybe the Property may not have to be sold.

24. For the avoidance of doubt, I do not accept as viable excuses that the Defendant did not submit his statement of affairs because (i) he was extremely concerned to learn on the 31st March 2019 that the Plaintiffs were represented by Mr. Williams who is a lawyer with Conyers Ltd. ("Conyers") which has represented HSBC in proceedings brought against and by him; or (ii) that he has been embroiled in litigation against the Government of Bermuda. Firstly, from at least 10th November 2017 when the Receiving Order was made

and certainly from the 18th December 2018 when Assistant Justice Kesseram strongly commented on the Defendant's failure or refusal to provide a statement of affairs, it would have been clear to the Defendant that he must provide his statement of affairs. So the Defendant's obligation to provide his statement of affairs would have predated him discovering that Conyers represented the Plaintiffs.

25. Secondly, it is difficult for me to see how any other litigation which the Defendant had with the Bermuda Government or HSBC would to any degree have justifiably stalled the Defendant's obligations under section 26 of the Act. Whether or not the Bermuda Government interfered with the Defendant's complaint to the Human Rights Commission would not have affected any insolvency which the Defendant may have had and it would have unlikely affected the Defendant being declared a bankrupt. Therefore, the Defendant was, and still is, compelled to produce his statement of affairs and his "knee jerk reaction" (Mr. Durham's terminology) to not comply with section 26 of the Act may have been ill-advised.

26. Mr. Williams invites me to hold the Defendant in contempt of court pursuant to section 26(4) of the Act for his failure to comply with section 26 of the Act. I decline to do so at this time as I will give the Defendant a final opportunity to comply with his section 26 obligations in a reasonable time frame set by the Plaintiffs. Should the Defendant continue to be obstinate then holding him in contempt of court will most likely be an inescapable decision for me to arrive at. Having said this, I am in no way whatsoever suggesting that the delivering up or selling of the Property should await the Defendant providing his statement of affairs. The Plaintiffs should proceed with fulfilling their statutory obligations with convenient speed so that the Defendant's creditors may be paid from the proceeds of the sale of the Property. One would think that with the prospects of the Property being sold hovering over the Defendant's head that this would spur the Defendant into action of not only providing his statement of affairs but to also do all that is required to ensure that his debts are satisfied without the Property being sold.

Conclusion

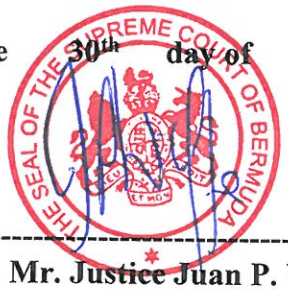
27. In consideration of the above paragraphs I order the following:

(i) That the Defendant's applications to stay the bankruptcy proceedings and the possession proceedings are dismissed.

(ii) That the Plaintiffs' application for possession of the Property is hereby granted.

28. Unless either party files a Form 31TC within seven (7) days of the date of this Ruling to be heard on the issue of costs, I hereby order that costs shall follow the event in favour of the Plaintiffs on a standard basis and that such costs shall be taxed by the Registrar if not agreed.

Dated the 30th day of December , 2022



The Hon. Mr. Justice Juan P. Wolffe, JP