



[2019] JMCC Comm 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018I00007

**IN THE MATTER OF the
BANKRUPTCY ESTATE OF BRIAN
WALKS**

AND

**IN THE MATTER OF ALL THAT
PARCEL OF LAND Registered at
Volume 1170 Folio 228 of the Register
Book of Titles**

AND

**IN THE MATTER OF Sections 85, 89,
and 98 of the Insolvency Act &
Sections. 3 & 8 of the Partition Act**

BETWEEN DALMA JAMES CLAIMANT

(Trustee of the bankruptcy estate of Brian Walks)

AND BRIAN WALKS DEFENDANT

AND SHERYLL ELAINE WALKS INTERESTED PARTY

IN CHAMBERS

Mr Glenroy Mellish, Attorney-at-Law for the Claimant

Mr Charles Piper QC, Ms Petal Brown and Mr D'Angelo Foster instructed by Charles

E Piper & Associates, Attorneys-at-Law for Mr Brian Walks

Ms Nicola Earle instructed by Blacklaw and Associates Attorneys-at-Law for Mrs Sheryll Elaine Walks an Interested Party

Ms Judith Brown instructed by Nigel Jones & Co for Exim Bank an Interested Creditor

Ms Ariel Von Corke of the Office of the Supervisor of Insolvency watching proceedings

Heard: 14th February and 18th March 2019

Insolvency-Whether Trustee disqualified- Application for sale of property jointly owned by bankrupt - Whether bankrupt can challenge decision of trustee

Real Property - Application pursuant to Partitions Act for sale of jointly owned property - Principles to be applied

LAING, J

The Claim

[1] The Applicant, Mr Dalma James (“the Trustee”), on 12th February 2018, was appointed as the Trustee of the bankruptcy estate of Mr Brian Walks.

[2] By a fixed date claim form filed on 20th September 2018, the Trustee has sought, *inter alia*, an order that all that parcel of land situated at Old Golden Spring Road part of Constant Spring Estate and registered at Volume 1170 Folio 228 of the Register Book of Titles (“the Property”) be sold and that the interest of Mr Walks in the net proceeds thereof be used to satisfy the creditors of Mr Walks’ estate, in accordance with the priority set out in the Insolvency Act.

[3] Mr Walks has filed a Statement of Affairs in which he disclosed that the Property is jointly owned with his ex-wife Mrs Sheryll Elaine Walks and the Trustee also sought an enquiry as to whether Mrs Sheryll Elaine Walks (whose name appears on the Registered Title for the Property), is entitled to any portion of the Property.

Additionally, the Trustee also prayed for a number of other consequential orders which he asserted would be necessary in order to effect the sale of the Property.

[4] Although there are no specific provisions in the Insolvency Act to this effect, it is generally recognised in the law of insolvency that for the purposes of effecting the objectives of the Insolvency Act, the Court in exercising its bankruptcy jurisdiction has the power to authorise and sanction acts required to be done by the Trustee in carrying out his functions.

[5] It is important to place the application before the Court in its proper context and in that regard it is worth noting at the outset that this is not an application by which the Trustee is asking the Court to sanction his decision to dispose of Mr Walks' interest in the Property, which is jointly owned by himself and Mrs Sheryll Elaine Walks. The Trustee's application is in fact for a sale of the Property pursuant to the Partition Act. The point was well made by Mr Mellish that, but for the fact that Mrs Walks has an interest in the Property, this application to the Court would have been unnecessary since the Trustee by virtue of his statutory remit would have the authority to dispose of the Property.

The bankruptcy process

[6] The main objectives of the Insolvency Act are stated in section 3, which is 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.”

[7] Pursuant to Part III of the Insolvency Act, the opportunity is afforded to a debtor (which includes a bankrupt or a person facing imminent insolvency), who is experiencing financial difficulties and who intends to restructure his financial affairs, to make a proposal.

[8] Under the Insolvency Act, the Government Trustee as well as any licenced trustee may act as trustee for a bankrupt person. On the 27th November 2017 Mr Walks lodged a proposal to creditors pursuant to the Act naming Dalma P James as trustee under the proposal and the proposal was refused by the creditors.

[9] The relevant portion of section 40 of the Act provides as follows:

“40.(1) Subject to section (3), where the creditors refuse to accept a proposal, the debtor concerned shall be deemed to have made an application for an assignment under Part VI, at the time of the refusal of the proposal.

(2) Where a proposal is refused under section 38, the trustee shall forthwith-

(a) file a report in respect of the refusal of the proposal in the form prescribed with the Supervisor, who shall thereupon issue a certificate of assignment in the form prescribed, which has the same effect for the purposes of this Act as an assignment made pursuant to Part VI ; ...”

[10] The proposal of Mr Walks having been refused, the Supervisor of Insolvency issued a Certificate of Assignment dated 12th February 2018 which indicated that Mr Walks is deemed by the Insolvency Act to have made an assignment for the general benefit of creditors as of the 31st January 2018.

[11] The effect of the Supervisor of Insolvency issuing the Certificate of Assignment in this case was that the Property became vested in the Trustee. This is patently clear from section 85 of the Act which I set out hereunder:

“85.— (1) On a receiving order being made or a certificate of assignment being issued by the Supervisor, a bankrupt ceases to have any capacity to

dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors—

(a) pass to and vest in the trustee named in the receiving order or assignment; and

(b) in any case of change of trustee, the property, shall pass from trustee to trustee without any conveyance, assignment or transfer.

(2) Subject to section 263, the trustee may exercise the right to transfer the property of the bankrupt to the same extent as the bankrupt might have exercised that right if he had not become bankrupt.

(3) The trustee shall file within fifteen days under the Security Interests in Personal Property Act, a notice of his appointment.

(4) If the trustee does file within fifteen days any imperfect security interest as at the date of bankruptcy such interest will be treated as unsecured debt.

(5) If the trustee does not file in fifteen days any security interest perfected prior to filing will be treated as perfected as at the date of the bankruptcy.”

[12] Section 89 of the Act is also material to the extent that it provides as follows

“89.— (1) Every copy of—

*(a) a receiving order certified by the Registrar or other officer of the Court;
and*

(b) an assignment certified by the Supervisor,

shall be registered by or on behalf of the trustee against the bankrupt or the whole or any part of real property or personal property that the bankrupt owns or in which he has any interest or estate in the appropriate registry in accordance with laws regarding same.

(2) Where the bankrupt is the registered owner of any land or charge or other property, the trustee, named in a receiving order or assignment referred to in subsection (1), shall be entitled to be registered as owner of the land, charge or other property free of all encumbrances or charges mentioned in section 84(1).”

[13] The Court notes that the Certificate of Assignment dated 12th February 2018 issued by the Supervisor of Insolvency to which reference has been made herein, is duly noted on the Certificate of Title in respect of the Title.

The case presented by the Claimant/Trustee

[14] The grounds filed in support of the Trustee's application (in which Mr Walks is referred to as the debtor), accurately and concisely summarised the Trustee's position and I reproduce them hereunder as follows:

“(a) The debtor made a proposal to his creditors for settlement of his debt which the creditors refused. Upon the refusal of the proposal by the creditors, the debtor was deemed to have assigned all his assets for the general benefit of his creditors.

(b) The debtor operates a manufacturing business and has requested and up to now obtained the forbearance of the creditors by placing before the Trustee a number of prospects for financing to be provided by equity investors out of which funds his debts would be satisfied. Nothing tangible has as yet come from these promises of capital injections.

(c) The debtor's landlord for the premises at which the business is conducted has re-entered and forcibly repossessed the premises due to non-payment of rent. This has foreclosed any prospect of the business being in a position to earn funds to reduce his indebtedness.”

(d) That the debtor's interest in the lands the subject of this application appears to be the only means by which a portion of the debt can be satisfied.”

[15] In my view, grounds (b) and (c) although they provide an explanation as to the reason for the Trustee making the application, (which explanation was amplified by the evidence of the Trustee), are not relevant considerations in the Court's determination as to whether an order for the sale of the Property ought to be granted. The reason for this has been indicated earlier, which is, that this is not an application in which the Court is being asked to assess, with a view to sanctioning, the decision of the Trustee to seek the sale of Mr Walks' interest in the Property.

The challenge to the conduct of the Trustee

[16] Mr Walks produced a gypsum-based rock veneer plaster product, named “Tuff Rock”, used primarily to smooth concrete walls. It was manufactured at a factory in Bull Bay St Andrew, owned by Factories Corporation of Jamaica.

[17] A considerable portion of the cross examination of the Trustee was devoted to an enquiry into the Trustee's conduct for example, his efforts to obtain an investor or investors in Mr Walks' business. Mr Walks also complained that the Trustee has attended on one or more persons interested in the Tuff Rock product without seeking Mr Walks' assistance to either effect a sale of the product or of the intellectual property rights in the Tuff Rock product.

The challenge based on an alleged disqualification of the Trustee

[18] During cross examination, there was no challenge to the integrity of the process which led to the appointment of the Trustee, nor was there any challenge to the submission of the Proposal and its rejection by the creditors. However, the issue of whether the Trustee was disqualified from acting was raised, based on the prior relationship between the Trustee and West Indies Gypsum Co Ltd., a company in which Mr Walks had an interest.

[19] During the amplification of his evidence, the Trustee admitted that he was the Auditor/Accountant for West Indies Gypsum Co Ltd. and that in 2012 he prepared the financial statements for the company in respect of the year 2009. The Trustee admitted during cross examination that in 2017 Mr Walks approached him to provide services as an Auditor. The Trustee also admitted that at the relevant time he had recommended to Mr Walks that West Indies Gypsum Co Ltd. go into liquidation. Mr Piper submitted that by this advice the Trustee did as follows:

“diverted his client from the very thing he was consulted for (the provision of accounting services) to insolvency”. Counsel submitted that the Trustee was disqualified from acting as trustee for both estates from the moment of the bankruptcy and insolvency of Mr Walks and West Indies Gypsum Co. Ltd.”

Whether the sale of the Property advances the objectives of the Insolvency Act?

[20] Mr Piper also submitted that an order for the sale of the Property at this time does not advance the purpose and objects of the Insolvency Act. Counsel submitted that:

“In fact, it potentially deprives the insolvent estates of the benefit of Mr Walks’ support in an environment in which he is critical to the continued existence of the company which may ultimately be determined to be viable, if properly managed. Mr Walks will no longer have a home and as a bankrupt, he is unlikely to be able to secure rented accommodation. In the meantime, given that the trustee is endorsed as a proprietor of the land, there is no prejudice to the creditors except to the extent that interest continues to accrue on the debt.”

Protection of the Intellectual Property

[21] Mr Piper also submitted that in this case the Court has the power to make appropriate orders which arises from its inherent jurisdiction and relied on the case of **Vadim Schmidt v Rosewood Trust Limited** [2003] UKPC 26. Counsel submitted that there is a need for the Court to intervene because the Trustee is seeking the disclosure of obviously confidential information and there is the need to protect the intellectual property rights that exist.

The Court’s ruling on the intellectual property issue

[22] The Trustee explained that the formula for the production of the Tuff Rock product is critical to the business. He explained that without the formula in a documentary form, it was impossible to realise a reasonable return on the sale of the business or to raise capital in order to keep the business running. This is because investors would view the business as risky having regard to the fact that its operations would be entirely independent on the actions of Mr Walks as the only person who knows the formula.

[23] Mr Walks in his evidence stated that he understood that withholding the formula from the Trustee was an act of non-cooperation but explained that he had agreed to disclose it under certain conditions.

[24] This is not an issue which is material to the Court’s decision as to whether the sale should be permitted. However, since it has been raised, I find that the formula would constitute intellectual property which would pass to and vest in the Trustee

named in the Certificate of Assignment pursuant to section 85 in the same way that Mr Walks' interest in the Property passed. I am therefore unable to appreciate any basis on which there needed to be any conditions imposed by Mr Walks subject to which the formula should be disclosed to the Trustee. Accordingly, I have not found that there was any good reason for Mr Walks not to have disclosed the formula to the Trustee, a neglect and/or refusal which is in clear breach of the Act.

[25] Having regard to the statutory regime of the Insolvency Act and the nature of the application by the Trustee, I do not find that it is necessary for this Court to seek recourse to its express statutory or inherent jurisdiction for the making of any orders other than those applied for by the Trustee. In particular, I am not convinced that there is any justification for any order or direction by me as to the means by which the formula should be entrusted to an independent person under appropriate undertakings as to confidentiality.

The Court's ruling on the Trustee's Conduct

[26] Mr Walks complained of aspects of the Trustee's management such as his failure to explore other methods of settling the debts and his failure to aggressively pursue various customers' expressions of interest in purchasing the product. For purposes of this judgment and for the reasons I have already expressed, I do not find an examination of the Trustee's management decisions and his commercial decisions to be properly within the scope of the application before the Court. Accordingly, it is not the Court's function on this application to seek to determine whether the objectives of the Act as far as rehabilitation were met or whether the Trustee ought to have made greater efforts to resuscitate the Bankrupt's business.

[27] Accordingly, the Court is not required to analyse the bases on which the Trustee reached the decision that he wished to liquidate Mr Walks' interest in the Property. Where an aggrieved bankrupt wishes to challenge a decision of a Trustee then he ought to avail himself of the provisions of section 270 of the Act which provides as follows:

“270. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, the aggrieved person may apply to the Court and the Court may confirm, reverse or modify the act or decision complained of and make such other order as it thinks just.”

- [28] This provision or a variation thereof, is present in most insolvency legislation. In the British Virgin Islands (“BVI”) for example, (a Caribbean neighbour with as robust insolvency regime), the relevant provision is section 273 of BVI Insolvency Act which provides as follows;

“273. A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder.”

- [29] It is worth noting, if only in passing, that as it relates to challenges to the commercial decision liquidator there is a threshold which is deliberately fixed very high, to be reached, because the courts recognize that in making commercial decisions the Trustee is often faced with a number of reasonable decisions. In **Re Edenote Ltd: Tottenham Hotspur PLC and Others v Ryman and Another** [1996] 2 BCLC 389 at 394 the test was expressed as follows:

“The Court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it.”

This test has often been referred to as the “*perversity test*” and in my view, it applies equally to an assessment by the Court of the decision of the Trustee in this matter as to the realization of Mr Walks’ interest in the Property for the benefit of the general body of creditors.

- [30] This is not a section 270 application where there is a formal challenge to this decision and the Court is being asked to pronounce on it. Instead of making a section 270 application, Mr Walks has challenged the bases for the Trustee’s decision that the Property be sold. This amounts to collateral attack on his conduct as trustee and in my view is an impermissible mode of challenging this decision of

the Trustee. For this reason, I am of the view that I am not strictly required to determine this issue.

- [31] However, if I am incorrect in this regard and Mr Walks is permitted to mount such a challenge in this forum and by the method he has sought to employ, it would not make a difference. This is because, if I were required to assess the Trustee's decision to sell the Property, I would be unable to find that the decision of the Trustee is one which is "perverse" or unreasonable in the circumstances. The creditors are out of pocket and their interest ought not to be subject to Mr Walks' need to retain his home for his use. The fact that the Property will only cover a small fraction of the debt owed to creditors is not a consideration of much significance. I am also unconvinced that Mr Walks will be unable to contribute to the insolvent estates simply because he is no longer residing at the Property and has to seek alternative accommodation.

The Court's ruling on whether the Trustee is disqualified

- [32] Section 234(1) (a)(iv) of the Insolvency Act provides that:

"except with the permission of the Supervisor and on such conditions as the supervisor may impose, no trustee shall act as trustee in relation to the estate of a debtor where the trustee is, or at any time during the two preceding years was the auditor or accountant of the debtor".

The Trustee admitted that Mr Walks had approached him in late 2017 for his services as an Auditor. The Trustee explained that M Walks needed financial statements for the company for presentation to the Court within two weeks and he explained to Mr walks that there was no way that this could be done since no audit had been done for so many years. The Trustee vehemently denied that Mr Walks had presented him with a letter dated 18 October 2017 with attachments. I accept the evidence of the Trustee in this regards and I do not find as Mr Piper submitted that he was acting as the Auditor or Accountant of West Indies Gypsum Co Ltd.in 2017 so as to disqualify him from acting as trustee for either or both the estates of

Mr Walks and West Indies Gypsum Co. Ltd pursuant to Section 234(1) (a)(iv) of the Insolvency Act.

- [33] This submission on behalf of Mr Walks is rather odd, having regard to the fact that he was the person who proposed the Trustee. I note the evidence that he complained about the conduct of the Trustee but the complaint was taken no further than that. Pursuant to section 241 of the Insolvency Act, on the application of any interested person, the Court may remove a trustee and appoint another in his place. If Mr Walks was satisfied that the Trustee was disqualified by virtue of having acted for West Indies Gypsum Co Ltd. and was uncomfortable with him continuing to act in that capacity, then he ought to have taken steps to remove and replace him. In a similar vein, if Mr Walks had proper grounds to be dissatisfied with the conduct of the Trustee in general, including his efforts to maintain or revive the business, he ought to have sought to remove the Trustee. No such application has been made by Mr Walks.

The Court's analysis of the partitioning and sale issue

- [34] Mr Walks and Mrs Walks each hold an equal interest in the Property as joint tenants. The Trustee's application purports to be in the matter of section 3 and 8 of the Partition Act. Section 3 provides as follows.

"3. In a suit of partition, where, if this Act had not been passed, a decree of partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions."

[35] However, the more appropriate section appears to be Section 4. Counsel for the Trustee in his closing skeleton submissions made specific reference to section 4 which provides as follows:

“4. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.”

[36] The Approach of the Courts to this section can be seen in **Porter v Lopes** [1877] Ch. D 356 at page 363 where Jessel M.R in commenting on the English equivalent of section 4 of our Partition act, said as follows.

“Now therefore, there is an absolute right in the owner of a moiety to require sale subject to this, unless it sees good reason to the contrary, the Court shall direct a sale ...

Contrary to what? As I read it. It is contrary to a sale. It can mean nothing else. The Court must see good reason why there should not be a sale. I do not say there may not be some other good reason from the peculiar nature of the property, but it must be a good reason against the sale.”

[37] Counsel for the Trustee commended the Case of **Stevens v Stevens** [2012] JMSC Civil 134 for the Court’s consideration. In that case Justice Paulette Williams (as she then was), accepted that **Porter v Lopes** remained instructive. The learned Judge agreed that section 4 of the Partition Act is regarded as making it imperative for the Court to order a sale when there is an application by a party interested in a sale unless there is some good reason to the contrary shown by an opposing party

[38] Mr Walks’ evidence was that although he and Mrs Walks are divorced she still lives at the Property and spends “*a couple of months*” there each year but he does not know where she lives for the other portion of the year. This evidence, in and of itself, is not of significance in the court’s determination.

Conclusion and disposition

[39] I am satisfied on the evidence of the Certificate of Title in respect of the Property that Mrs Walks is a joint owner of the Property and is entitled to a half interests on a partition. Although Mrs Walks was represented by Counsel at the hearing, Counsel was restricted in her ability to participate on account of the inadequacy of her instructions. The effect of this is that there was no real opposition to the application by Mrs Walks and no evidence was filed on her behalf.

[40] The only objection to the sale of the Property is therefore Mr Walks' opposition which for reasons I have given earlier in this judgment is a challenge grounded in the Insolvency Act. I find that the bases of the opposition are not appropriate in these proceedings and in any event do not provide a sufficient reason or sufficient reasons for the Court not to order that the Property be sold.

[41] For the reasons herein I make the following orders:

1. That all that parcel of land situated at Old Golden Spring Road part of Constant Spring Estate and registered at Volume 1170 Folio 228 of the Register Book of Titles (the "Property") be sold and the interest of the bankrupt in the net proceeds thereof be used to satisfy the creditors of the bankrupt's estate, in accordance with the priority set out in the Insolvency Act.
2. That the sale of the said Property may proceed by private treaty or public auction.
3. The rates and taxes owed and the reasonable costs of valuation of the Property, advertisement for sale, auctioneer's fees and commission payable to real estate agents (if any) are allowable deductions from the proceeds of sale.
4. That the attorneys-at-law for the Trustee of the bankrupt's estate shall have carriage-of sale.

5. That the Registrar of the Supreme Court is empowered to sign the transfer and any other document on behalf of Sheryll Elaine Walks, the joint owner of the Property, in the event that the said Sheryll Elaine Walks is unwilling or unavailable to sign the said documents.
6. That any portion of the net proceeds belonging to Sheryll Elaine Walks shall be made payable to Sheryll Elaine Walks or alternatively paid into court for her benefit.
7. Liberty to apply
8. No order as to costs