



[2019] JMSC Civ 110

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. 2011 HCV 01059**

**BETWEEN SAGICOR BANK JAMAICA LIMITED APPLICANT/JUDGMENT  
(Formerly known as RBC ROYAL BANK CREDITOR  
(JAMAICA) LIMITED, formerly known as  
RBTT BANK JAMAICA LIMITED)**

**AND MARVALYN TAYLOR-WRIGHT RESPONDENT/JUDGMENT  
DEBTOR**

**AND THE SUPERVISOR OF INSOLVENCY INTERESTED PARTY**

**IN CHAMBERS**

**Mrs. Sandra Minott-Phillips Q.C. and Mr. Litrow Hickson instructed by Messrs. Myers, Fletcher & Gordon for the Applicant/Judgment Creditor**

**Mr. Christopher Dunkley instructed by Phillipson Partners for the Respondent/Judgment Debtor**

**Miss Ariel S. Von Cork instructed by the Office of the Supervisor of Insolvency for the Interested Party**

**Heard: March 11, April 10, May 1 and June 7, 2019**

**Civil Procedure – Whether the judgment creditor can seek to enforce the judgment debt owed to it by the judgment debtor by seeking to have the provisional charging order made final in light of the judgment debtor’s having been declared bankrupt – Whether an application for the annulment of a certificate of assignment can be made orally – Whether a certificate of**

**assignment can be annulled on the basis that the conduct on the part of the judgment debtor amounts to an abuse of process – Whether the conduct on the part of the judgment debtor amounts to an abuse of process – Whether the certificate of assignment ought to be annulled – Whether the provisional charging order ought to be made final - Insolvency Act, 2014, sections 2, 3, 82, 83, 84, 85 and 153, Civil Procedure Rules, 2002, rules 77.20(2), 77.28, 11.6 and Part 48**

**A. NEMBHARD, J**

**INTRODUCTION**

[1] By way of an Application for Charging Order, filed on 20 July 2018, the Applicant/Judgment Creditor, Sagicor Bank Jamaica Limited (formerly known as RBC Royal Bank (Jamaica) Limited, formerly known as RBTT Bank Jamaica Limited), sought Orders that: -

(a) Land, stock and other personal property (including money wherever situate) belonging to the Respondent/Judgment Debtor are provisionally charged with the balance judgment debt in the sum of J\$48,850,750.60 together with interest at the per diem rate of \$11,015.81 from May 14, 2018 to the date of payment together with costs of J\$21,067,046.61 and £35,681.49 (with interest on those amounts at the rate of 6% and 3%, per annum, respectively) incurred by the Applicant in this action and its related appeals in the Court of Appeal and to Her Majesty through the Judicial Committee of Her Privy Council, to protect and enforce its rights to recover the money owed to it by the Respondent, including:

- a. The lands comprised in Certificate of Title registered at Volume 1206 Folio 49 of the Register Book of Titles.
- b. Personal property as follows:
  - (a) 2004 Grey Nissan Sunny Motor Car bearing registration number 1571 FK;
  - (b) Mitsubishi Pajero bearing registration number 7227 EJ;
  - (c) 2014 Mitsubishi Pajero bearing registration number 1380 GP; and
  - (d) 2006 Mercedes Benz bearing registration number 2784 ES.
- (b) The Respondent/Judgment Debtor, Marvalyn Taylor-Wright (also known as Marvalyn Miles) or her successors and/or her servants or agents and each of them is hereby restrained from in any way disposing of, transferring, dealing with or diminishing the real and personal properties set out in paragraphs 1 above and 4 below and/or her interest in the value of the said real and personal properties and, should the real property be sold by the mortgagee, from dissipating any proceeds of sale representing her interest therein prior to this order being made final or discharged;
- (c) The Applicant/Judgment Creditor is permitted to sell the real and personal properties (save for monies in the bank accounts) upon this order being made final, and to apply

the net proceeds of sale against the Judgment Debtor's liability to it;

(d) The monies in the Respondent's bank accounts, wherever situate, be paid to the Applicant/Judgment Creditor by the relevant bank or financial institution to the limit of the amounts set out in 1 above in aggregate upon this order being made final.

### **BACKGROUND**

- [2] On 8 March 2011, the Applicant/Judgment Creditor, Sagicor Bank Jamaica Limited (formerly known as RBC Royal Bank (Jamaica) Limited, formerly known as RBTT Bank Jamaica Limited) ("Sagicor Bank"), filed a Claim Form against the Respondent/Judgment Debtor, Mrs. Marvalyn Taylor-Wright, claiming amounts due, together with interest, under a Demand Loan and two (2) credit card accounts. The debts due under the credit card accounts have been settled.
- [3] Particulars in tabular form alleged that the principal balance outstanding was Twenty Million Three Hundred and Thirty-Six Thousand Eight Hundred and Seventy-Eight Dollars and Ninety-Six Cents (\$20,336,878.96), that interest was outstanding as at 31 December 2009 in the sum of Six Million Two Hundred and Fourteen Thousand Three Hundred and Twenty-Nine Dollars and Nine Cents (\$6,214,329.09) and thereafter, until 7 March 2011, in the additional sum of Four Million Seven Hundred and Forty-Seven Thousand Eight Hundred and Thirteen Dollars and Eighty-Eight Cents (\$4,747,813.88). Claims were made for court fees and fixed attorney's costs on issue, of Two Thousand Dollars (\$2,000.00) and Ten Thousand Dollars (\$10,000.00), respectively. The aggregate amount claimed under the Demand Loan was therefore Thirty-One Million Three Hundred and Eleven Thousand and Twenty-One Dollars and Ninety-Three Cents (\$31,311,021.93).

- [4]** On 14 April 2014, Sagicor Bank obtained judgment in its favour against Mrs. Taylor-Wright, in the sum of Thirty-Nine Million Nine Hundred and Eighty-Eight Thousand Five Hundred and Eleven Dollars and Eighty-Eight cents (\$39,988,511.88), and interest thereon in the amount of Eleven Thousand and Fifteen Dollars and Eighty-One cents (\$11,015.81) per diem, from 18 February 2013, to the date of payment. A stay of execution was granted for a period of twenty-eight (28) days and leave to appeal was also granted. Costs of the Claim were awarded to Sagicor Bank, to be taxed if not agreed.
- [5]** On 1 July 2016, the Court of Appeal, on appeal by Mrs. Taylor-Wright, allowed the appeal and set aside the judgment that was entered on 14 April 2014.
- [6]** On 20 December 2016, the Court of Appeal refused Sagicor Bank's Motion for Conditional Leave to appeal to Her Majesty in Council, with costs to Mrs. Taylor-Wright, to be agreed or taxed.
- [7]** On 19 July 2017, the Judicial Committee of the Privy Council granted Sagicor Bank permission to appeal the judgment of the Court of Appeal, dated 1 July 2016.
- [8]** On 23 May 2018, the Privy Council allowed the appeal and ruled that the Order made by Sykes, J (as he then was), on 14 April 2014, be restored. The Privy Council also ruled that, subject to any submissions in writing to the contrary, Sagicor Bank should have its costs of the appeal before the Board and in the Court below.
- [9]** On 20 July 2018, Sagicor Bank filed an Application for a Charging Order over certain of Mrs. Taylor-Wright's properties, in an effort to enforce the judgment entered in its favour.
- [10]** On 24 July 2018, the Court granted a Provisional Charging Order and the final hearing of that Application was adjourned to 25 October 2018.

- [11] On 25 July 2018, a sealed, original Provisional Charging Order, which was granted on 24 July 2018; a copy of the Application for Charging Order, which was filed on 20 July 2018; as well as, a copy of the Affidavit of Andrew Foreman, which was filed on 20 July 2018, were served on Phillipson Partners, the Attorneys-at-Law representing Mrs. Taylor-Wright. (See – Affidavit of Service of Francis O’Sullivan, which was filed on 23 August 2018).
- [12] On 22 October 2018, Mrs. Taylor-Wright made an application for an Assignment, pursuant to the Insolvency Act, 2014 and on 23 October 2018, a Certificate of Assignment was issued by the Supervisor of Insolvency, declaring her to be bankrupt and appointing the Government Trustee as trustee of her bankrupt estate.
- [13] On 25 October 2018, the Supervisor of Insolvency was declared to be an ‘Interested Party’ in the instant matter and the Court ordered that the parties, as well as the interested party, file and serve Written Submissions and Authorities, in relation to whether the Judgment Creditor can enforce the Judgment debt, in light of the Judgment Debtor having been declared bankrupt.

### **ISSUES**

- [14] The following issues arise for the Court’s determination: -
- (a) Can Sagicor Bank seek to enforce the Judgment debt owed to it by Mrs. Taylor-Wright, by seeking to have the Provisional Charging Order made final, in light of the latter having been declared bankrupt?
  - (b) Can an application for the annulment of a Certificate of Assignment be made orally?
  - (c) Can a Certificate of Assignment be annulled on the basis that the conduct on the part of the Judgment Debtor amounts to an abuse of process?

- (d) Does the conduct on the part of Mrs. Taylor-Wright amount to an abuse of process?
- (e) Should the Certificate of Assignment be annulled?
- (f) Should the Provisional Charging Order be made final?

## **THE LAW**

### **The Mischief surrounding the Insolvency Act, 2014**

#### **The position before the Insolvency Act**

- [15] In **Development Bank of Jamaica Limited v Proactive Financial Services** [2017] JMCC COMM 31, Sykes, J explored the position of a bankrupt at common law. At paragraph [1] he describes the origin of the word bankrupt. He is quoted as follows: -

*“We have come a far way from the broken bench, that is to say, the time during which Italian merchants who did not pay their debts had the benches on which they sat in the market place quite literally broken. The Italian expression was ‘banca ruptura’ from which the term bankrupt came. The broken bench was notice to all that the particular merchant was barred from trading.”*

#### **Bankruptcy under the Companies Act**

- [16] Under the Companies Act, where the bankruptcy of a debtor arose, the interest of creditors took primacy over all other considerations, and there was little or no allowance made for the rehabilitation or reorganization of the business and affairs of the debtor. A receiver would be appointed - at the creditor's request - to pay the creditors and dissolve the company.
- [17] This position, although a move away from the position at common law, where a bankrupt person was treated as though he were a criminal, required that greater

consideration be had to the interest of the debtor. This led to the enactment of the Insolvency Act, 2014 (“the Act”).

- [18] The Act is, in large part, worded similarly to the Bankruptcy and Insolvency Act of Canada. There exists a body of case law from Canada in which the Courts have interpreted and applied the provisions of the Canadian legislation, in the Canadian context. For the purpose of this analysis, the Court has relied on the relevant and applicable principles distilled from that case law.

### **The current approach**

- [19] The Act abandoned the idea that insolvent persons were offenders and objects of public mutilation. It established a single regime for insolvency and treats with the entire gamut of categories of persons, from natural persons, unincorporated bodies to companies. It captures the three pillars of insolvency: the summary collection or realization of the assets of the debtor; the administration or distribution of those assets for the benefit of all creditors; and the *pari passu* principle.

- [20] Section 3 of the Act expresses the object and purpose of the statute. The section provides that the Act seeks to create an environment which aids in –

(a) the rehabilitation of debtors and the preservation of viable companies, having due regard to the protection of the rights of creditors and other stakeholders; and

(b) fair allocation of the costs of insolvencies with the overriding interest of strengthening and protecting Jamaica’s economic and financial system and the availability and flow of credit within the economy.

### **The relevant provisions of the Act**

- [21] Section 2(1) of the Act is the definition section. The relevant definitions, for the purpose of this analysis, are as follows: -

“bankrupt” means a person who has made an assignment under Part VI or against whom a receiving order has been made under Part V;

“debtor” means

(a) an insolvent person;

(b) any person who at the time an act of bankruptcy was committed by him, resided or carried on business in Jamaica;

(c) a bankrupt; and

(d) for the purpose of section 5 and Part III, a person facing imminent insolvency;

“insolvent person” –

(a) means a person who resides, carries on business or has property in Jamaica, whose liabilities to creditors provable as claims under this Act, amount to not less than three hundred thousand dollars or such other amount as the Minister may by order published in the Gazette prescribe as the threshold and –

(i) who for any reason is unable to meet his obligations as they generally become due;

(ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due;  
or

(iii) the aggregate of whose property is not at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations due and accruing;

(b) does not include a bankrupt;

“secured creditor” means a person –

(a) holding a –

- (i) security interest as defined under the *Security Interests in Personal Property Act*;
- (ii) mortgage;
- (iii) pledge;
- (iv) charge or lien,

on or against the property of the debtor or any part thereof, as security for a debt due or accruing, due to him from the debtor; or

(b) whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable;

“unsecured creditor” means any creditor that is not a secured creditor.’

**[22]** Section 82 of the Act reads as follows: -

*“(1) An insolvent person or, if the insolvent person is deceased, the insolvent person’s legal personal representative, may apply to the Supervisor for the assignment of all the insolvent person’s property for the general benefit of his creditors in the form and manner prescribed.*

*(2) ...*

*(3) An application for assignment made under subsection (1), shall be accompanied by a sworn statement in the form prescribed providing information as to –*

*(a) the property of the insolvent person available for distribution among his creditors;*

*(b) the names and addresses of all the insolvent person's creditors;*

*(c) the amounts of each claim; and*

*(d) the nature of each claim, whether secured pursuant to a fixed or floating charge, preferred or unsecured.*

*(4) ...*

*(5) Every assignment of property made by an insolvent person for the general benefit of his creditors, other than an assignment pursuant to this Act, is void."*

**[23]** Section 83 of the Act provides as follows: -

*"(1) A Supervisor may, subject to subsection (3), refuse an application made under section 82(1), only where the application is not in compliance with the procedure set out in section 82.*

*(2) Subject to subsection (5), where the Supervisor approves an application made under section 82(1), the Supervisor shall appoint the trustee so named in the application as the trustee of the estate, however, the creditors may, notwithstanding section 237, by ordinary resolution at any time appoint another trustee in lieu of that trustee so named.*

*(3) Where no trustee is named in the application submitted under subsection (1), the Supervisor shall, after giving the insolvent person fourteen days' notice in writing to notify the Supervisor of a trustee who has consented to act as a trustee –*

*(a) appoint a trustee identified by the Supervisor who has consented to act; or*

*(b) where the Supervisor is unable to find a trustee who is willing to consent to act, and act in accordance with prescribed criteria, either appoint the Government Trustee to act or reject the application,*

*however, the creditors may, notwithstanding section 237, by ordinary resolution at any time appoint another trustee in lieu of any trustee so identified.*

*(4) ...*

*(5) The Supervisor shall, on approving the application made under section 82, issue a certificate of assignment in the form prescribed and shall insert therein the name of the trustee appointed to act as such as under subsection (2) or (3).*

*(6) Within five days after the day the certificate of assignment is issued, the trustee shall send notice of the meeting of creditors in the manner specified in Part X.*

*(7) ...”*

**[24]** Section 84(1) of the Act states as follows: -

*“Every receiving order and assignment made in pursuance of this Act, takes precedence over all judicial and other attachments, garnishments, certificates of judgment, judgments operating as executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or his agent, and except the rights of a secured creditor.”*

**[25]** Section 85(1) of the Act provides as follows: -

*“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.”*

**[26]** Section 153 of the Act reads as follows: -

*“(1) Where in the opinion of the Court a receiving order ought not to have been made or an assignment ought not to have been filed, the Court may by order annul the bankruptcy.*

*(2) Where an order is made under subsection (1), all sales, dispositions of property, payments duly made and acts done theretofore by the trustee or other person acting under his authority, or by the Court, are valid, but the property of the bankrupt shall vest in such person as the Court may appoint or, in default of that appointment, without any conveyance or assignment whatever revert to and re-vest in the debtor for all his estate and interest in the property upon such terms and subject to such conditions, if any, as the Court may order.”*

### **ANALYSIS**

**Can Sagicor Bank seek to enforce the Judgment debt owed to it by Mrs. Taylor-Wright, by seeking to have the Provisional Charging Order made final, in light of the latter having been declared bankrupt?**

**[27]** The Court’s power to grant a Charging Order is conferred by section 28D of the Judicature (Supreme Court) Act, which provides that the Court may, on an application of the person prosecuting a judgment or order for the payment of money, make a Charging Order, in accordance with the Civil Procedure Rules, 2002 (“the CPR”), in relation to the enforcement of judgments.

[28] The relevant Part of the CPR relating to Charging Orders is Part 48. That Part provides that Charging Orders can be granted in respect of land, stock, securities and dividends, and other personal property. (See – Rule 48.1 of the CPR).

[29] The effect of a Charging Order was described by E. Brown, J in **Jennifer Messado and Company v North America Holdings Company Limited**, Claim No. 2011 HCV 04943 and Claim No. 2011 HCV 04669, judgment delivered on 20 June 2014, at paragraph [57]. He stated as follows: -

*“A charging order is granted by the Court to secure payment of money pursuant to a judgment or order...The charging order is therefore a security for a judgment debt and is imposed on property in which the judgment debtor is beneficially entitled (see **rule 48.3(2)(h)**). A charging order extends to cover the judgment debt, interest and costs even without being expressly so stated: **Ezekiel v Orakpo** [1971] 1 WLR 340.”*

[30] The application for a Charging Order is a two-step process, requiring that a Provisional Charging Order first be made, and further, that an inter partes hearing be had, to determine whether the Provisional Charging Order should be made final.

[31] A Final Charging Order falls within the definition of a ‘security interest’, pursuant to section 2 of the Security Interests in Personal Property Act. That section defines a ‘security interest’ as “an interest created contractually over one or more items of personal property (whether specifically or generically described, present or future) that secured the fulfilment of one or more present or future obligations.”

[32] Where the creditor of any person who is adjudged bankrupt has, before the commencement of bankruptcy, issued execution against any land of that person, that creditor is not entitled, as against the official receiver or trustee of the bankrupt’s estate, to retain the benefit of the execution, unless the execution was complete before the commencement of the bankruptcy. An execution against land is complete by seizure, by the appointment of a receiver or by the making of

a Charging Order. (See – Halsbury’s Laws of England, 4<sup>th</sup> edition, 2002 Reissue, 3(2) Bankruptcy and Individual Insolvency, page 381, at paragraph 678).

- [33] It therefore follows that a Provisional Charging Order does not give a creditor the status of a ‘secured creditor’ because it is an incomplete execution. Without an Absolute Charging Order or a Final Charging Order, such a creditor is described as an ‘unsecured creditor’.
- [34] The purpose of the further consideration of the Provisional Charging Order is to enable the Court to review the position inter partes. At the date of the Provisional Charging Order, the Court has made no irrevocable decision. If, therefore, the statutory scheme for dealing with the assets of a bankrupt has been irrevocably imposed on the bankrupt, before the Court has irrevocably determined to give the creditor the benefit of a Charging Order, the statutory scheme prevails.
- [35] The Court is strengthened in this position by the pronouncements made in **Roberts Petroleum Limited v Bernard Kenny Limited** [1983] 2 A.C. 192. The House of Lords discussed the considerations to which the Court should have regard, in deciding to make a Provisional Charging Order final, in circumstances where this may have an effect on other unsecured creditors.
- [36] The House noted that when a Court is asked to exercise its discretion to make a Provisional Charging Order final, in circumstances where a company is being wound up, the Court should exercise its discretion and refuse to make the order final. By so exercising its discretion, the property would fall within the statutory scheme for dealing with the judgment debtor’s assets, for the benefit of all creditors, and a judgment creditor with a Provisional Charging Order, at the time of winding up, has no more than a defeasible right to retain the asset.

**Can an application for the annulment of a Certificate of Assignment be made orally?**

- [37] The Court has, however, been urged to annul the Certificate of Assignment obtained by Mrs. Taylor-Wright, on the basis that that Assignment ought not to have been filed. It was submitted, on behalf of Sagicor Bank, that, in making the application for the Assignment, Mrs. Taylor-Wright acted with male fides and that, in the face of the Injunction that secures the Provisional Charging Order, her actions amount to an abuse of process.
- [38] In this regard, section 153 of the Act is instructive. The section provides that, where in the opinion of the court, a receiving order ought not to have been made or an assignment ought not to have been filed, the court may, by Order, annul the bankruptcy.
- [39] It is important to note that section 153 of the Act does not expressly state that the issue of the annulment of a receiving order, or an assignment, needs to be brought to the Court's attention by way of an application. In fact, the section gives the Court the authority to annul the receiving order or the assignment, where it is of the opinion that the former ought not to have been made and the latter ought not to have been filed. This suggests that no application needs to be made at all.
- [40] This is in direct contrast with other sections of the Act which expressly require that an application be made. (See - Sections 7, 15, 49, 55, 58, 65, 152, 241 and 267 of the Act). The maxim 'expressio unius est exclusio alterius' would therefore apply.
- [41] Should the Court be incorrect in its analysis of the proper interpretation to be applied to section 153 of the Act, it is guided by rules 77.20(2) and 77.28 of the CPR. Rule 77.20(2) of the CPR provides that all applications under the Act must be made by notice, with an affidavit in support, pursuant to Part 11. Rule 77.28 of the CPR states that the provisions of the CPR, with any necessary modifications,

apply to insolvency and winding up proceedings, with the exception of Parts 10, 12, 13-16 and 35-37.

- [42] Rule 11.6(1) of the CPR provides that the general rule is that an application must be in writing. An application may be made orally if permitted by a rule or practice direction; or the court dispenses with the requirement for the application to be made in writing.
- [43] This Court is of the view that section 153 of the Act does not require that an application be made, in writing, for the annulment of a Certificate of Assignment. Should the Court be incorrect in ascertaining the proper interpretation to be applied to the section, it will, in any event, dispense with the requirement that the application be made in writing, pursuant to rule 11.6(1) of the CPR.
- [44] In so doing, the Court has had regard to the fact that the pertinent and requisite affidavit evidence, on which Sagicor Bank is relying, has been disclosed in advance of the final hearing of the Application for Charging Order; that Mrs. Taylor-Wright has been put on notice that Sagicor Bank is applying for an annulment of the Certificate of Assignment and has been made aware of the bases for that application; and, finally, that natural justice requirements have been met, in that, the position of Sagicor Bank has been brought to the attention of Mrs. Taylor-Wright, who has had a fulsome opportunity to respond.

**Can a Certificate of Assignment be annulled on the basis that the conduct on the part of the Judgment Debtor amounts to an abuse of process?**

- [45] There is no simple or universal principle prescribed to decide when an assignment ought not to have been made. It is a wide-ranging and flexible test which necessitates an examination of the relevant facts, on a case-by-case basis. However, the power to annul a bankruptcy should only be exercised under very special circumstances and should take into account the conduct of the debtor. The case law confirms that the Court has a broad discretion as to when it may annul an assignment in bankruptcy. (See – **Re Regional Steel Works**

**(Ottawa – 1987) Inc** (1994) 25 C.B.R. (3<sup>rd</sup>) 135 (Ont. Gen. Div.), **Re Moss** 1999 CanLII 14182 (MB QB) and **Re Giesbrecht** (1998) 6 C.B.R. (4<sup>th</sup>) 239, 175, Sask R 229 (QB)).

- [46] There are a number of grounds on which the Courts have annulled an Assignment, including mistake, fraud, a clear sufficiency of assets to pay all creditors' claims and abuse of process. If an abuse of process exists, the Court may exercise its discretion to annul, even where the bankrupt meets the criteria of an 'insolvent person'.
- [47] In order to grant an annulment, the Court must be satisfied either that, (i) the debtor was not an insolvent person when he made the assignment, or (ii) the debtor abused the process of the Court. (See – **Wale, Re**, 1996 CanLII 8275 (ON SC) at paragraph 17).
- [48] In **Wale, Re**, 1996 CanLII 8275 (ON SC), Wale's assignment into bankruptcy was date stamped by the Official Receiver one and a half hours before the commencement of his family law trial. His former wife brought a motion, under section 181 of the Bankruptcy and Insolvency Act, to annul the bankruptcy and to vest his property in her, pending the outcome of the family law trial, or to exempt her claims from the usual stay of creditor proceedings, and other relief. She argued that Wale's filing was motivated solely by his desire to defeat her family law claims and was an abuse of the process of the Court. Wale's contention was that he had no such intention, that he was an 'insolvent person', as defined by the Bankruptcy and Insolvency Act, and that he was entitled to its protection.
- [49] At paragraph [16] Mann, J stated that the jurisdiction of the Court, sitting as a bankruptcy Court, is limited by the special rules and procedures set out in the Act. The Court has no authority, he stated, either on an interim or permanent basis, to stay an assignment. However, the Act does give the Court authority to annul a bankruptcy. (See – **Kalau v Dahl** (1985), 57 C.B.R. (N.S.) 296 (Alta. Q.B.).

- [50] Mann, J continued to state at paragraph [17], that, an annulment will be granted, only where it is shown that the debtor abused the process of the Court, or, committed fraud on his creditors.
- [51] In seeking to determine whether there had been an abuse of the process of the Court, Mann, J, at paragraph [24], stated that there are numerous cases that conclude that the debtor's motive in making an assignment is not generally relevant. There is nothing unlawful in declaring bankruptcy for the sole purpose of defeating the claims of one's creditors. (See – **Irving Oil Co. v Murphy** (1962), 5 C.B.R. (N.S.) 203 (P.E.I. S.C.).
- [52] One of the objectives of the bankruptcy legislation is to permit the debtor, in the words of Evershed M.R., 'to protect himself from the evils which he might otherwise suffer.' (See – **Re Dunn**, [1949] 2 All E.R. 388 (CA)). However, this general principle must always be tempered by the caveat that fraud or abuse of process will permit the Court to annul the assignment.
- [53] The learned authors of Bankruptcy and Insolvency Law of Canada, Holden and Morawetz, 3<sup>rd</sup> edition, Volume 2, at page 6-107, state as follows: -

*“The court must consider the rights not only of the debtor and of the creditors but also the rights of the public. A bankrupt should not be permitted to benefit from his own turpitude.”*

- [54] If the conduct, however, is tainted by bad motives, then the Court remains able to annul a bankruptcy. (See - **Blaxland v Fuller** (1990), 2 C.B.R. (3<sup>rd</sup>) 125 (B.C. S.C.), as per Donald, J).

### **Abuse of process**

- [55] The term 'abuse of process' is not easily susceptible to precise definition. In **Shaw v Trudel** (1988), 53 Man. R. (2<sup>nd</sup>) 10 (Man. Q.B.), Kennedy, J defines it in the following terms: -

*“...a term used to describe an improper use of the judicial proceedings and may arise if jurisdiction were exceeded. It arises when a legal process with some legitimacy is used for some ulterior motive, other than that for which it was intended. It is invoked to protect against harassment, or the perversion of the process to accomplish an improper result.”*

- [56] For example, in the authority of **Henfrey Samson Belair Ltd. v Sherrin Louise Manolescu and Donald Radu Manolescu** (1985), 58 C.B.R. (N.S.) 181 (B.C.C.A.), the abuse of process consisted of the bankrupt making an assignment in bankruptcy, in contravention of a Court order that one of the creditors should be given seven (7) days’ notice before any of the debtor’s assets were dealt with in any way.
- [57] Sherrin and Donald Manolescu were married on 8 October 1977. They separated on 26 January 1982. On 11 March 1983, Mrs. Manolescu filed a divorce petition and claimed, inter alia, a divorce and ancillary relief pursuant to the Family Relations Act.
- [58] On 16 March 1984, Locke, J pronounced an order, inter alia, restraining and enjoining Mr. Manolescu, “from transferring, disposing of and encumbering or otherwise dealing with any assets without first giving seven days’ written notice to the petitioner.” That order was entered on 22 January 1985.
- [59] Mr. Manolescu nevertheless dealt with the assets without giving notice to Mrs. Manolescu. Mr. Manolescu made an assignment for the benefit of his creditors, pursuant to section 31 of the Bankruptcy Act, and Messrs. Henfrey, Samson and Belair were appointed as trustees. Mrs. Manolescu, of course, did not hear of this until much later, in December 1984, and in that month Mackoff, J made an order that Henfrey, Samson and Belair be joined as a party to the divorce proceedings. Mackoff, J split the trial in two. The first part was to deal with access to the children. The second part was set for 9 May 1985.

[60] The first part came before Proudfoot, J, during which Mrs. Manolescu applied for an order annulling the assignment in bankruptcy. Proudfoot, J had to deal with the problem of whether or not the trustee, having been put in this position, obtained a legal assignment. The Court came to the conclusion that the assignment was “a dealing with or transferring or assigning of the assets without notice to Mrs. Manolescu and was in clear contravention of the injunction of Mr. Justice Locke.” The Court held that this was an abuse of the process of the Court and that where there is an abuse of the process of the Court, there is a discretion which may be exercised by the judge, as to whether the Court will annul the assignment. The decision of the judge at first instance, to annul the assignment, was upheld and the appeal was dismissed.

[61] In **Wale, Re** (supra), Mann, J stated that an exhaustive review of the circumstances surrounding the assignment should be made by the Court. The debtor’s motive is the primary consideration in determining whether the assignment was an abuse of process, and the following list of questions was developed to ascertain that motive: -

- (a) Is the debtor’s financial situation genuinely overwhelming or could it have been managed?
- (b) Was the timing of the assignment related to another agenda or was the bankruptcy inevitable in the near or relatively near future?
- (c) Was the debtor forthcoming in revealing his situation to his creditors or did he hide assets or prefer some creditors over others?
- (d) Did the debtor convert money or assets to himself, which would otherwise have been assets in the bankruptcy?

(e) What had been the debtor's relationship with his creditors, particularly his major ones? Was it such that they might have assisted him, had he approached them, by granting time or terms of repayment, or, had any goodwill been destroyed by past unfulfilled promises?

(f) Are there other relationships – business partnerships, shareholder arrangements, spousal, competitors for an asset, or simply personal associations - which could cast light on a possible bad faith motive for making an assignment?

**[62]** Mann, J concluded that Mr. Wale's motives and conduct compelled the Court to exercise its discretion to annul the assignment. The Court found that he barely met the definition of an insolvent person; that the timing of the assignment, the day of his family law trial, was not coincidental; nor was it motivated by a desire to assist the Court. Mann, J found that Mr. Wale's visceral antipathy toward his former wife, the holy war that had raged between them since separation, his egregious conduct in selling assets and pocketing the cash prior to the assignment, contrary to an Order of the Court, and his removing and hiding the contents of the matrimonial home, all overwhelmingly demonstrated male fides by him. The Court found that the assignment was an abuse of the process of the bankruptcy Court, and a fraud on at least one of his creditors, his wife. Consequently, the bankruptcy of Mr. Wale was annulled.

**[63]** Section 181(1) of the Bankruptcy and Insolvency Act of Canada reads similarly to section 153 of the Act. Section 181(1) of the Bankruptcy and Insolvency Act provides as follows: -

*“(1) If in the opinion of the Court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the Court may by order annul the bankruptcy.”*

- [64] The authorities clearly establish that an Assignment may be annulled where the Court is of the view that the bankrupt's conduct, in filing the Assignment, amounts to an abuse of process, or, a perversion of the process to accomplish an improper result.

**The motives of the judgment debtor**

- [65] A distinction must be made between the debtor who has acted for the purpose of finding a remedy to his insolvency and the one who, although insolvent, has acted primarily for the purpose of frustrating his creditors. This distinction may be perceived but is of delicate application. The Court must take into account the circumstances surrounding the assignment: the number of creditors; the nature and the date of the judgments against the judgment debtor; and the more or less appropriate character of the willingness of the debtor to execute his assignment. (See - **Re Tousignant** 2001 CanLII 7118 (QC CA)).

- [66] In **Development Bank of Jamaica Limited v Proactive Financial Services** (supra) Sykes, J, at paragraphs [51] to [54], reiterates the importance of dealing with good faith under the Act. He stated that the Act is not intended to be used for stalling, but honest, good faith effort at either paying the creditors or re-organizing the business to make it more viable, if possible.

**Does the conduct on the part of Mrs. Taylor-Wright amount to an abuse of process?**

- [67] The Court adopts the approach used in the case of **Wale, Re** (supra), that, a fulsome examination of the background surrounding the Assignment must be conducted, in order to determine whether an annulment should be granted.
- [68] In seeking to determine whether the Certificate of Assignment ought properly to be annulled, there are two considerations to which the Court must have regard. Firstly, whether the bankrupt was an insolvent person when the Assignment in Bankruptcy was made; and secondly, whether the bankrupt's conduct amounts to an abuse of process.

- [69]** In the instant matter, Sagicor Bank obtained a Provisional Charging Order on 24 July 2018, of which a sealed, original was served on Mrs. Taylor-Wright's Attorneys-at-Law, on 25 July 2018. The final hearing of the Application for Charging Order was adjourned to 25 October 2018. On 22 October 2018, Mrs. Taylor-Wright made an application for an Assignment, pursuant to section 82(1) of the Act, and on 23 October 2018, she obtained a Certificate of Assignment, issued by the Supervisor of Insolvency, declaring her to be bankrupt and appointing the Government Trustee as trustee of her bankrupt estate.
- [70]** It is instructive to note that the filing of Mrs. Taylor-Wright's application for an Assignment took place three (3) days before the scheduled final hearing of the Application for Charging Order. This, in the context of the unchallenged evidence that her Attorneys-at-Law had been served with a sealed, original of the Provisional Charging Order, from 25 July 2018.
- [71]** It is also instructive to note that Mrs. Taylor-Wright never sought to advise Sagicor Bank of her intention to apply for an Assignment under the Act, nor did she seek to advise the Office of the Supervisor of Insolvency of these Court proceedings, at the time of her application, or any at all.
- [72]** While there is no statutory requirement on Mrs. Taylor-Wright to advise Sagicor Bank of her intention to invoke the statutory regime and relief of the Act, or to advise the Office of the Supervisor of Insolvency of these Court proceedings, the failure to do so is a factor to which the Court can properly have regard, in its examination of Mrs. Taylor-Wright's motives in making the application for an Assignment.
- [73]** In the circumstances, there is no reason to accept that Mrs. Taylor-Wright genuinely intended to reach an acceptable resolution of this matter with Sagicor Bank. The Court finds that her conduct does not inspire confidence. It is unlikely that Mrs. Taylor-Wright's decision to make an application for an Assignment had been taken for the benefit of her creditors, or to relieve herself of the debt

burden. There is no evidence that Mrs. Taylor-Wright has any pressing creditors, other than Sagicor Bank. Furthermore, the unchallenged evidence is that, since 18 May 2018, Mrs. Taylor-Wright has made no effort to liquidate the debt she owes to Sagicor Bank. The Court finds that it is more likely that Mrs. Taylor-Wright's actions were designed to manipulate the situation and to frustrate the Provisional Charging Order.

**[74]** This Court is of the view that, on a preponderance of the evidence, the conduct of Mrs. Taylor-Wright amounts to an abuse of process. This conduct includes her failure to comply with the Order of Her Majesty that the judgment of the Privy Council, made on 23 May 2018, be punctually observed and obeyed; the date and timing of the filing of the application for an Assignment; the non-disclosure, at the time of the making of that application, or any at all, that there were enforcement proceedings continuing against her; the breach of the Injunctive Order that secures the Provisional Charging Order, her conduct during the litigation leading up to the Privy Council, and her visceral antipathy towards the judgment debt that she owes to Sagicor Bank, and her obligation to satisfy it, despite her evidence that she intends to use her best endeavours to honour the judgment debt from her own personal monies and assets. (See – Paragraph 8 of the Affidavit of Marvalyn Taylor-Wright in Response to the Application for Provisional Charging Order, filed on 23 October 2018).

#### **Should the Certificate of Assignment be annulled?**

**[75]** The Court therefore finds that the Certificate of Assignment issued by the Supervisor of Insolvency, on 23 October 2018, declaring Mrs. Taylor-Wright to be bankrupt, and appointing the Government Trustee as trustee of her bankrupt estate, ought properly to be annulled.

**[76]** Consequently, by virtue of the operation of section 153(2) of the Act, the properties of Mrs. Taylor-Wright revert to and revest in her.

**Jurisdiction to hear matter**

- [77] Before parting with this aspect of the instant case, the Court must also address an issue that was raised on Mrs. Taylor-Wright's behalf. An issue was raised as to whether the application for the annulment of the Certificate of Assignment, pursuant to section 153 of the Act, ought properly to be made in the Insolvency Division of the Court.
- [78] In this regard, the Court has had regard to section 2 of the Act, which defines the "Court" as the Supreme Court, and which includes a Judge sitting in chambers in matters of bankruptcy. Section 153 of the Act refers to the "Court". Section 4 of the Judicature (Supreme Court) Act consolidated the several Courts of the Island, including the Chief Court of Bankruptcy, and constitutes the Court as one, the Supreme Court of Judicature of Jamaica. Section 27 of the Judicature (Supreme Court) Act provides, further, that the Supreme Court shall have and exercise all the jurisdiction, power and authority vested in the Courts of the Island, including the Chief Court of Bankruptcy.
- [79] Section 276 of the Act supports this position. The section provides that the Court shall have and exercise jurisdiction in respect of bankrupts and matters of insolvency, and such jurisdiction shall be exercised under and subject to this Act and any other enactment relating to bankruptcy and insolvency.
- [80] Section 277 of the Act provides that, subject to this Act, the Court shall have full power to decide all questions of priorities in accordance with applicable law and all other questions whatsoever, whether of law or fact, that may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide, in furtherance of the objects of this Act. (See also – **Development Bank of Jamaica Limited v Proactive Financial Services** [2017] JMCC COMM 31 and **Henfrey Samson Belair Ltd. v Sherrin Louise Manolescu and Donald Radu Manolescu** (1985), 58 C.B.R. (N.S.) 181 (B.C.C.A.).

- [81] In light of the principles stated above, the Court finds that it does have the requisite jurisdiction to hear the application for the annulment of the Certificate of Assignment.

**Should the Provisional Charging Order be made final?**

- [82] Rule 48.3 of the CPR sets out the evidence that is required to support an application for a Charging Order. The rule provides that the affidavit evidence must state the name and address of the judgment debtor; identify the judgment or order to be enforced; state that the applicant is entitled to enforce the judgment; certify the amount remaining due under the judgment; where the application relates to land, identify that land; in the case of personal property, identify that property and state whether any person is believed to have any interest in the property; and state that, to the best of the deponent's information and belief, the debtor is beneficially entitled to all, or some part, of the land or personal property, as the case may be. (See – Rule 48.3(2) of the CPR).
- [83] Sagicor Bank has established that judgment was entered in its favour, on 14 April 2014, in the sum of Thirty-Nine Million Nine Hundred and Eighty-Eight Thousand Five Hundred and Eleven Dollars and Eighty-Eight Cents (\$39,988,511.88), with interest of Eleven Thousand and Fifteen Dollars and Eighty-One Cents (\$11,015.81) per diem, from 18 February 2013, to the date of payment. By that same Order, Sagicor Bank was also awarded costs, to be taxed if not agreed. Consequent on the judgment of the Privy Council, the sum of Twelve Million Two Hundred Thousand Dollars (\$12,200,000.00), which was being held in escrow by Sagicor Bank, was applied to the outstanding judgment debt, which then amounted to Sixty-One Million Ninety-Four Thousand Eight Hundred and Three Dollars and Eighty-Four Cents (\$61,094,803.84).
- [84] The evidence continues that, as at 14 May 2018, the sum of Forty-Eight Million Eight Hundred and Fifty Thousand Seven Hundred and Fifty Dollars and Sixty Cents (\$48,850,750.60) remained outstanding on the judgment debt. By way of

letter dated 18 May 2018, Sagicor Bank demanded payment of the outstanding sum. No payment has been made to liquidate the judgment debt since that demand. (See – Exhibit “AF-4” to the Affidavit of Andrew Foreman, filed on 20 July 2018).

**[85]** Sagicor Bank avers that costs in the amount of Twenty-One Million Sixty-Seven Thousand and Forty-Six Jamaican Dollars and Sixty-One Cents (J\$21,067,046.61) and Thirty-Five Thousand Six Hundred and Eighty-One Pounds and Forty-Nine Pence (£35,681.49), remain outstanding, with interest thereon at the rate of 6% and 3% per annum, respectively.

**[86]** In her Affidavit, filed on 23 October 2018, Mrs. Taylor-Wright has sought to address the named properties in the Provisional Charging Order.

**Mercedes Benz registered 2784 ES**

**[87]** Mrs. Taylor-Wright avers that the Mercedes Benz, registered 2784 ES, was jointly owned by herself and Dave White and that, since 2008, they have given it to Mr. Scott Wright. As such, she avers that she has no beneficial interest in same. She also asserts that this vehicle is disabled and is awaiting repairs. (See - Paragraph 4 of the Affidavit of Marvalyn Taylor-Wright in Response to the Application for Provisional Charging Order, filed on 23 October 2018). No documentary evidence has been provided to the Court, to support this assertion. The Court is therefore left with the bald assertion of Mrs. Taylor-Wright that this is so.

**2005 Mitsubishi Pajero registered 7227 EJ**

**[88]** Mrs. Taylor-Wright avers that the 2005 Mitsubishi Pajero, registered 7227 EJ, was transferred to a former employee, in or around 2014, who has neglected to complete the transfer in his name. She contends that she has no beneficial interest in same. (See - Paragraph 5 of the Affidavit of Marvalyn Taylor-Wright in Response to the Application for Provisional Charging Order, filed on 23 October

2018). Again, the Court has been provided with nothing but the bald assertion of Mrs. Taylor-Wright that this is so.

#### **Nissan Sunny registered 1571 FK**

[89] Mrs. Taylor-Wright avers that the Nissan Sunny motor car, registered 1571 FK, was that of her late mother, who had acquired it in her [Mrs. Taylor-Wright's name], and which now belongs to her mother's estate. She further contends that herself and her sister have surrendered their interest in same to their brother, Vaughn Parkes, and that he is now in possession of same, pending its transfer. (See - Paragraph 6 of the Affidavit of Marvalyn Taylor-Wright in Response to the Application for Provisional Charging Order, filed on 23 October 2018). Again, the Court has been provided with nothing but Mrs. Taylor-Wright's bald assertion that this is so.

[90] The Court also notes that Mrs. Taylor-Wright does not treat with the 2014 Mitsubishi Pajero, registered 1380 GP, in her affidavit evidence. The Court notes from the Affidavit of Corrine N. Henry, which was filed on 9 October 2018, that the National Commercial Bank Jamaica Limited asserts a right in respect of this vehicle. However, the existence of a lien on this vehicle is not a sufficient basis for the Court to decline to make a Final Charging Order. Upon a sale of the real and personal property covered in the Final Charging Order, Sagicor Bank would be obliged to apply the net proceeds of sale in accordance with the doctrine of priorities.

#### **Land registered at Volume 1206 Folio 49 of the Register Book of Titles**

[91] Mrs. Taylor-Wright avers that she holds this property on trust for her aunt, Luletta Fagan, and exhibits to her Affidavit, a Declaration of Trust dated 5 January 2009, in an effort to support this averment. The Court observes that, on the face of that document there is no evidence that it was ever stamped, pursuant to section 36 of the Stamp Duty Act. As an Attorney-at-Law herself, Mrs. Taylor-Wright should be aware of the legal requirements that an instrument of this nature be duly stamped. The Court also observes that, on the face of the document, there is no

evidence that it was witnessed by a Justice of the Peace or a Notary Public, but by one Janet Taylor.

- [92] Furthermore, there is no indication that the document was ever lodged with the Registrar of Titles. Although this is not an absolute requirement, the lodging of the instrument would be a clear indication that it represents a genuine transaction. The Court may draw an adverse inference from the absence of any evidence to that effect. (See- **Eriam and Ors v Rahman (A Bankrupt) and Others** [2016] EWHC 11 (Ch)).
- [93] Although Mrs. Taylor-Wright avers that she holds the property on trust for her aunt, it is instructive to note the fact of the mortgage of the said property, in favour of the Jamaica National Building Society. It is also instructive to note that the said property was transferred to Mrs. Taylor-Wright, on 6 February 2009, in consideration for the payment of Fifteen Million Dollars (\$15,000,000.00), representing the purchase price of the said property. This sum was paid to Luletta Fagan by Mrs. Taylor-Wright. (See – Exhibit “AF-6” to the Affidavit of Andrew Foreman, filed on 20 July 2018).
- [94] The Court notes that there is no documentary evidence to support Mrs. Taylor-Wright’s averments that she has no beneficial interest in any of these said properties. In any event, the Court can properly grant a Final Charging Order in respect of property that is jointly held. (See – Rule 48.6(2)(a) of the CPR and **First Global Bank Limited v D’Oyen Williams and Another** [2015] JMSC Civ 11).
- [95] Regrettably, the Court is unable to accept the evidence of Mrs. Taylor-Wright. The Court finds that Sagicor Bank has satisfied the requirements of rule 48.3(2) of the CPR and that consequently, the Provisional Charging Order ought properly to be made final.

**DISPOSITION**

**[96]** It is hereby ordered that: -

- (1) The Certificate of Assignment issued by the Supervisor of Insolvency to Marvalyn Taylor-Wright, on October 23, 2018, declaring her to be bankrupt and appointing the Government Trustee as trustee of her bankrupt estate, is annulled;
- (2) The Provisional Charging Order granted on July 24, 2018, is hereby made final;
- (3) Costs of the Application to the Applicant/Judgment Creditor to be taxed if not sooner agreed;
- (4) The Respondent/Judgment Debtor's application for a Stay of Execution is refused;
- (5) The Applicant/Judgment Creditor's Attorneys-at-Law are to prepare, file and serve the Orders made herein.