In The Supreme Court of Bermuda

BANKRUPTCY JURISDICTION

1998: No. 21 & 1998: No. 423

IN THE MATTER OF THE BANKRUPTCY ACT 1989

AND IN THE MATTER OF JULIAN ERNEST SINCLAIR PHILLIPS HALL

Dates of Hearing: 19 May 2008
Date of Judgment: 23 May 2008

Kulandra Ratneser for the Official Receiver
Saul Froomkin QC for the Petitioning Creditor
The bankrupt in person

RULING

INTRODUCTION

1. This ruling is given on the application of the bankrupt that I recuse myself from further involvement in this matter, and that I also set aside my judgment of 18th April, and allow the matter to be referred to another judge for fresh consideration. For the reasons given below I allow this application, set aside my earlier decision and refer the matter to another judge of the Supreme Court to be allocated by the Registrar in the normal way.

2. The judgment of 18th April was given on the Official Receiver's application for a review of Mr. Hall's bankruptcy, in the course of which Mr. Hall sought his absolute and unconditional discharge. I refused that, and gave directions for the future conduct of the matter. Mr. Hall submits that I have power to review and rescind that decision, pursuant to section 101 of the Bankruptcy Act[1] ('the Act'), and I accept that submission. My

[1] "**Review and appeal**

earlier order would also be susceptible to an appeal, but I consider that it would not be appropriate to put the parties to the time, trouble and expense of an appeal if the matter were clear, which I think that it is.

3. The principle ground of Mr. Hall's application is that, in my capacity as Chief Justice, I have been required by law to preside over the Mental Health Act ('the MHA') receivership of Mrs. Betty McMahon. Mr. Hall owes Mrs. McMahon a considerable sum of money. Her MHA receivers were the petitioning creditor in Mr. Hall's bankruptcy[2] and they now oppose his application for a discharge.

4. The functions of the Supreme Court under the MHA are conferred solely upon the Chief Justice, at least while he is present in the country[3]. Mr. Hall submits that at law receivers appointed to manage the property of a patient under the MHA are in fact operating on behalf of the Chief Justice, and that I therefore have a direct interest in the bankruptcy proceedings. I think that that probably overstates the point. Nevertheless, the Chief Justice does at law have control of the MHA receivers, and in the ordinary course of the subsequent administration of Mrs. McMahon's affairs I have, from time to time, had to hold private chambers hearings with the receivers and/or their legal representatives, and I have given directions as to actions to be taken by them, including a direction permitting the assignment of Mr. Hall's debt into a protective trust. While I have never been asked to consider the question of what stance they should take in respect of Mr. Hall's bankruptcy, and have given no directions in respect of that, I have obviously considered it appropriate to authorize them to place his debt in a protective trust to protect it against the day when he becomes executor of the estate.

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101 (1) The Court may review, rescind or vary any order made by it under its bankruptcy jurisdiction."

[2] See paragraphs 7 and 8 of my earlier judgment.

[3] See section 49 of the MHA:

> "49 (1) The Chief Justice and, in his absence, a Puisne Judge, are hereby appointed to act for the purposes of this Part, and each such judge is hereinafter in this Part referred to as the judge.
>
> (2) The judge shall be the judicial authority for the protection and management, as provided by this Part, of the property of persons under disability."

5. The relevance of this was not immediately apparent at the outset of the bankruptcy hearing, but as it proceeded I felt it necessary to confirm in open court with counsel for the petitioning creditors whether the debt had in fact been placed into a protective trust, because the Official Receiver had advanced, as a ground for objecting to Mr. Hall's discharge, the possibility that he could waive the debt upon becoming executor. As it was, I resolved that issue in Mr. Hall's favour[4], but the fact that all this only came out as the hearing progressed meant that he was not afforded an opportunity at the outset to consider the impact of my supervision of the receivership on the question of whether I was an appropriate person to hear the bankruptcy proceedings.

6. The modern test for bias is that set out by Lord Hope in Porter v Magill [2002] 2 AC 357 at 494 H:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The test is framed in that way partly to avoid the difficult task of ascertaining whether the judge was in fact biased, and partly because appearances can matter as much as substance, and justice must not only be done but must be seen to be done. As a result, it does not avail that the court was not in fact biased, or otherwise approached the matter in a fair and balanced way. It does not advance the question, therefore, for the petitioning creditor to argue that my judgment was such that any reasonable tribunal must have come to it. Obviously I think that, or I would not have made it in the first place, but the question is what an objective observer would think of all the circumstances when viewed in the round. The recent case of T. Smith v The Queen[5] [2007] CA (Bda) 15 Crim (29 November 2007) demonstrates just how rigorously the test will be applied.

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[4] See paragraph 60 of my judgment.

[5] http://www.gov.bm/portal/server.pt/gateway/PTARGS_0_2_10809_204_226633_43/http%3B/ptpublisher.gov.bm%3B7087/publishedcontent/publish/non_ministerial/judiciary/appeals_judgments_final/app_15f.pdf

7. In applying the test I do not think that the court is likely to be much helped by a consideration of its evolution or the facts of earlier cases. The court's function is to take the test as propounded by the House of Lords and apply it to the circumstances of the particular case which it has to consider.

8. Applying the test, I consider that the objective by-stander would consider that my involvement with the MHA receivers in the administration of the estate of Mrs. McMahon could give rise to a real possibility of bias against someone with Mr. Hall's history in relation to the affairs of Mrs. McMahon. I think therefore that it is better for the administration of justice that another judge bring a fresh mind to bear, and consider the matter anew. I therefore rescind my ruling of 18th April and step aside from further consideration of this case, save only to direct that it be listed before another Judge. Any further applications, such as that for cross-examination of the Official Receiver should be made to that Judge.

9. If there are any matters which properly arise before me, I will adjourn them to Chambers as I understand that leading counsel may not be available when I hand down this judgment.

Dated the 23rd day of May 2008

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Richard W. Ground
Chief Justice