Neutral Citation Number: [2023] CA (Bda) 31 Civ

Civil Appeal No. 98 of 2022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2020: No. 031

Date: 23 January 2024

Before:

PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

Between:

HAROLD JOSEPH DARRELL

Appellant

- and -

(1) RACHELLE FRISBY
(2) JOHN JOHNSTON

Respondents

Mr. Harold Darrell, Appellant in Person
Mr. Jonathan O'Mahony of Conyers, Dill and Pearman, for the Respondent

Hearing dates: 22, 23 June and 9 August 2023
Date of Judgment: 23 January 2024

APPROVED JUDGMENT

GLOSTER, J.A.:

Introduction

1. By his Notice of Appeal dated 19 January 2023 Mr Harold Joseph Darrell ("Mr Darrell" or "the Appellant") sought to appeal the ruling of Wolffe J dated 30 December 2022 in which the judge (i) dismissed the Appellant's application to stay his bankruptcy; (ii) dismissed his application to stay the possession proceedings brought in the bankruptcy until the Court determined an application by him to set aside a consent judgment dated 24 September 2015 in the matter of *Joseph Wakefield (as the Executor of the Willcocks Trust) v Harold Joseph Darrell - No 106 of 2-15*; and (iii) granted the Respondents, the Trustees in bankruptcy of the Appellant ("the Trustees" or "the Respondents"), an order for possession of 12 Cedar Avenue Hamilton Bermuda ("the Property"). On 27 January 2023 the Supreme Court issued its actual order for possession of the Property dated 27 January 2023 ("the Possession Order") and refused the Appellant' s application for a stay. Subsequently, on 31 March 2023, the Supreme Court refused a second application for a stay of the Possession Order.

2. Pursuant to Rule 2/37 of the Rules of the Court of Appeal of Bermuda, and by an application made by Amended Notice of Motion dated 16 May 2023 ("the First Stay Application"), Mr Darrell renewed his application for a stay before the Court of Appeal. He applied to this Court for a stay of execution pending the Appeal of: (i) the Possession Order, and (ii) the Supreme Court's subsequent order for possession of the Property dated 31 March 2023, which stayed the order for possession of the Property for three months until 15 June 2023, with a direction that the Applicant vacate the Property by 5 PM on 15 June 2023, with possession of the property to take place on 16 June 2023.

3. That application came on for hearing before the Court of Appeal on 22 June 2023. The Court heard submissions from the Appellant as a litigant in person, who was assisted by his McKenzie Friend, Mr. Jaymo Durham, and from Counsel for the Trustees, Mr. Jonathan O'Mahony, of Conyers Dill & Pearman ("Conyers"), attorneys. By its order for directions dated 23 June 2023 ("the 23 June 2023 Order"), this Court refused the First Stay Application. In addition, the Court ordered:

> "2. There is to be a final stay of the order for possession for a further 28 days, until 5 PM on 21st July 2023 to afford the Applicant a final opportunity to move himself, his mother, his siblings and any other occupants of the Property out of the Property.
>
> 3. The Applicant is hereby ordered to vacate the property by 5 PM on 21st July 2023.
>
> 4. The Writ of Possession shall be executed on 22nd July 2023.
>
> 5. As directed during the hearing of the application on 22nd June 2023, the Applicant is to file with the Court within seven days of today a copy of his affidavit dated March 2023 originally filed in support of his application to the Supreme Court made on 31st March 2023 for a stay of execution, which this Court was informed reflected some, or all, of the facts and matters stated by or on behalf of the Applicant to this Court on 22nd June 2023.
>
> 6. The Respondents' costs shall be costs in the bankruptcy."

4. Subsequently, by summons dated 21 July 2023 ("the Second Stay Application") Mr Darrell applied for a further stay of execution of the Possession Order which was due to be executed on 22 July 2023 pursuant to the 23 June 2023 Order. That application came on for hearing before this Court (sitting remotely) on 9 August 2023, when Mr Darrell, with the permission of the Court, was assisted by Mr Gordon Ricky Woolridge Jr. as Mr Darrell's McKenzie Friend and Mr. O'Mahony again appeared on behalf of the Trustees.

5. Having heard the parties, this Court dismissed the Second Stay Application and, in addition, by a directions order dated 9 August 2023 ("the 9 August 2023 Order"), ordered as follows:

> "2. The Applicant [i.e. the Appellant] is hereby required to vacate the Property by 5pm on 23 August 2023.
>
> 3. The Writ of Possession dated 1 March 2023 shall be executed on 24 August 2023.
>
> 4. The Respondents' costs shall be costs in the bankruptcy.
>
> 5. The Applicant is precluded from making any further application for a stay of execution of the Possession Order unless all the following pre-conditions are met:

(i) there has been a change of circumstances from those prevailing as at the date of this order;

(ii) the Applicant has, prior to making any such further application, made an application in writing to the Court of Appeal for Bermuda ex parte on notice to the Respondents for permission to make such an application in sufficient time to enable the 3rd condition below to be satisfied; and

(iii) the application for permission has been granted by the Court of Appeal on the papers not less than 5 days before the date of execution of the Possession Order."

6. This judgment, which is the judgment of the Court, sets out the reasons why this Court made the 23 June 2023 Order and the 9 August 2023 Order, thereby refusing the Appellant's application for a stay of possession pending appeal.

Summary of the relevant factual background

7. The following summary is to a certain extent taken from the Trustees' skeleton argument dated 21 June 2023, as supplemented by further information received by the Court in the form of comments/submissions by Mr Darrell and/or Mr Durham and other documents produced by the respective parties.

8. On 10 November 2017 a receiving order was made against Mr. Darrell on a bankruptcy petition presented by Mr. Joseph Wakefield, a judgment creditor, who had obtained judgment against Mr. Darrell on 24 September 2015 ("the Wakefield Judgment"). Mr. Darrell did not file his statement of affairs as required by section 15 of the Bankruptcy Act 1989, and, on 18 December 2018, he was declared bankrupt ("the Bankruptcy Order").

9. The Official Receiver was initially appointed trustee in bankruptcy. On 14 February 2019 the Trustees were appointed in place of the Official Receiver. On the commencement of the bankruptcy the Property vested initially in the Official Receiver and, subsequently, in the Trustees on their appointment. As a result of the Bankruptcy Order, Mr. Darrell had no legal right to occupy the Property enforceable against the Trustees. As against Mr. Darrell, the Trustees had a clear right to possession and the right to sell the property.

10. On 24 June 2019, the Trustees wrote to each of the units at the Property asking for information as to any tenant and the details of any tenancy. The Trustees did not receive any response to their letters. More recently, Mr. Darrell has asserted that the units at the Property are all occupied by his family members. Not one of them responded to the Trustees' letter. Accordingly, on 24 January 2020 the Trustees filed possession proceedings in relation to the Property.

11. The Trustees wrote to Mr. Darrell on numerous occasions requesting information about his assets and liabilities. They sought to meet with Mr. Darrell. Until January 2023, Mr Darrell refused to comply with the Trustees' demand for him to provide a statement of affairs or to comply with his statutory obligations to provide information to the Trustees. In the Ruling Wolffe J accepted the Trustees' evidence that Mr. Darrell had also failed to comply with his statutory obligations under section 26 of the Bankruptcy Act 1989.

12. Mr. Darrell's asserted basis for refusing to provide his statement of affairs was that Conyers, the attorneys advising the Trustees, were conflicted. The reality was that Mr. Darrell had refused to provide his statement of affairs long before Conyers were engaged, and this had led to the making of the Bankruptcy Order. In any event, in August 2022 the Supreme Court dismissed Mr. Darrell's application to enjoin Conyers from being engaged by the Trustees. However, Mr. Darrell still did not provide a statement of affairs until 25 January 2023. The Trustees contend that the statement was deficient at best and, at worst, wilfully misleading.

13. By his Notice of Appeal dated 23 January 2023 Mr Darrell sought the following relief:

> "i. That the Order of the Court below be discharged; and
>
> ii. That all of the Bankruptcy Proceedings be stayed pending
> - The production of the Statement of Affairs;
> - The outcome of the Willcocks case; and
> - The determination of the Appellant's Application to set aside the judgment that gave rise to this bankruptcy.
>
> iii. That the costs of this Appeal and of the application in the Court below be provided for."

14. By his Amended Notice of Motion dated 16 May 2023 applying for a stay of execution of the order for possession, Mr Darrell stated that the grounds of his application were:

> "1. That the Applicant has an Appeal to this Honourable Court that is pending to be heard before the full court. The Appeal is said to be likely to be heard in the November session but the Supreme Court has given this Applicant until 15 June 2023 to advance his appeal that he filed on 19 January 2023.
>
> 2. That the only known creditor's judgment that has led to the bankruptcy of this Appellant has the inherent risk of being set aside on the basis that the judgment was obtained by dishonesty against the Appellant.
>
> 3. That the matter that shall determine the validity of the judgment is being heard in or about May 2023 before the Hon. Chief Justice *GEOFFREY LYNN WILLCOCKS -v- (1) JOSEPH E. WAKWEFIELD* [sic] *AND (2) WAKEFIELD QUIN LIMITED.*
>
> 4. That this Appellant is making an Application to join the above-named matter as an interested Party.
>
> 5. That should the judgment be set aside, there are no other claims in the bankruptcy and the said bankruptcy shall be dismissed.
>
> 6. That should the judgment be set aside, there shall be a claim for significant damages owed to this Appellant who is a leading businessman in this community."

15. In Mr Darrell's submissions in support of a stay dated 16 March 2023 ("Mr Darrell's 16 March Submissions"), which apparently were not before Wolffe J in March 2023, and in his affidavit sworn on 16 June 2023 ("Mr Darrell's 16 June Affidavit"), Mr Darrell relied on two further grounds to support the First Stay Application to this Court, namely:

    i. "the grave medical circumstances relating to Mr Darrell's mother, who is an occupant of the Property", which Mr Darrell submitted amounted to an exceptional circumstance with reference to the case of *Grant v Baker* [2016] EWHC 1782 (Ch); and informed the Court in its exercise of its powers under section 98 of the Bankruptcy Act (see Mr Darrell's 16 March submissions, paragraph 5);

    ii. the fact that no creditors had come forward, that none has been identified by the Trustees and if the Trustees had identified other creditors the Trustees would have had to call a meeting under section 14(2) of the Act; it was therefore

impossible to ascertain what was in the interests of the purported creditors (see Mr Darrell's 16 March submissions, paragraph 6).

16. In addition to Mr Darrell's 16 June affidavit and Mr Darrell's 16 March submissions, in relation to the First Stay Application the Court was referred to and read:

    i. Mr Darrell's affidavit dated 27 March 2023 in support of his application for a stay of execution ("Mr Darrell's 27 March Affidavit");

    ii. the affidavit of John Johnston, one of the Trustees, dated 20 June 2023 ("Mr Johnston's First Affidavit");

    iii. the Trustees' skeleton argument dated 21 June 2023.

17. In addition to the above evidence, in relation to the Second Stay Application the Court was referred to and read:

    i. Mr Darrell's affidavit dated 21 July 2023 ("Mr Darrell's 21 July Affidavit");

    ii. Mr Darrell's affidavit dated 7 August 2023 ("Mr Darrell's 7 August Affidavit");

    iii. Mr Johnston's affidavit dated 7 August 2023 ("Mr Johnston's Second Affidavit");

    iv. a skeleton argument filed on behalf of Mr Darrell dated 9 August 2023.

The correct legal approach to the granting of a stay of execution of an order pending appeal

18. The correct legal approach to the granting of a stay of execution of an order pending appeal is set out in the President's judgment in the recent Court of Appeal of Bermuda case of *Hong Kong and Shanghai Banking v Newocean Energy* [2021] CA (Bda) 214 Civ at [26] as follows:

> "In *Aabar Block SARL v Maud* [2016] EWHC 1319 (Ch) Snowden J (as he then was) set out the law on stays of judgments and orders in the following terms:
>
> *22. The principles applicable on an application for a stay pending appeal were helpfully summarised by Mr Justice Eder in Otkritie*

International Investment Management Ltd & Ors v Urumov & Ors [2014] EWHC 755 (Comm) at paragraph 22. Mr Justice Eder stated:

"As summarised by the claimants, the applicable principles are as follows:

"1. First, unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court: CPR r 52.7.

2. Second, the correct starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending: Winchester Cigarette Machinery Ltd v Payne, CA Unrep, 10 December 1993, per Ralph Gibson LJ.

3. Third, as stated in DEFRA v Downs [2009] EWCA Civ 257 at [8]-[9], per Sullivan LJ (emphasis supplied):

> *'...A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.*
>
> *It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal. So what is the basis on which a stay is sought in the present case?'*

4. Fourth, the sorts of questions to be asked when undertaking the 'balancing exercise' are set out in Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065 at §22, per Clarke LJ (emphasis supplied):

> *'By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the*

> *lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?'*
>
> 5. *Finally, the normal rule is for no stay to be granted, but where the justice of that approach is in doubt, the answer may depend on the perceived strength of the appeal: Leicester Circuits Ltd v Coates Brothers pie [2002] EWCA Civ 474 at§ 13, per Potter LJ."*

19. This approach was followed by Hargun CJ in *Ivanishvili v Credit Suisse* [2022] SC (Bda) 56 Civ5. In his judgment at [48 – 50], the Chief Justice emphasised that the assessment as to whether a stay is to be granted involves a two-stage process. First the appellant must establish solid grounds. Then, if it does so, the Court will undertake a balancing exercise weighing the risk to each side. Reference should also be made to the Chief Justice's comments at [49] where he said:

> "In *Contract Facilities v Rees* [2003] EWCA Civ 465 at [10], the Court of Appeal quoted from the *Hammond Suddards v Agrichem* judgment referred to by Eder J (above) as follows: "*On the question as to whether there might be a stifling of the appeal, again a further paragraph of Agrichem is material. That is paragraph 18. All I need to quote from that paragraph is that the court made it clear that where somebody seeks to stay orders what they need to do is: '... produce cogent evidence that there is a real risk of injustice if enforcement is allowed to take place pending appeal.*' "[My emphasis.]

20. This Court adopts the approach set out in these authorities.

The Ruling

21. The Ruling was published in December 2022 (giving the Trustees possession) and was formally handed down in January 2023.

22. The reasons which Wolffe J gave in allowing the Trustees' application for an order for possession of the Property and rejecting Mr Darrell's application for a stay of possession were as follows:

> "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 of the Act. In particular, the Defendant has failed or refused: to attend meetings of the creditors (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.
>
> - 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* 1WLR 219).

23. Had the Defendant taken some definitive steps to meet with the Plaintiffs and fulfil 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* (20091 EWHC 90 (Ch)). Unfortunately, it would appear that given the conduct of the Defendant over the past five (5) years that any prospect 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."

23. It is relevant to note that no argument was put forward before Wolffe J in the Supreme Court in August 2022 that there should be no order for possession of the Property because of the circumstances relating to Mr Darrell's mother. Accordingly, Wolffe J did not address any such reasons in the Ruling.

24. The Provost Marshall gave a date for the enforcement of the Writ of Possession of 4 April 2023. On 30 March 2023 Mr Darrell filed a last minute application for a stay of execution of the Writ. At the hearing Mr Darrell also applied for recusal of the Judge. Both the recusal application and the application for a stay were dismissed.

25. It is also relevant to note that, in support of his application for a stay of the Writ of Possession before Wolffe J, Mr Darrell filed a 41 page affidavit (namely, Mr Darrell's 27 March Affidavit as defined above) with over 100 pages of exhibits. None of that evidence referred to the situation of Mr Darrell's mother. It appears that, at the hearing of the stay application on 31 March 2023, Mr Woolridge, on behalf of Mr Darrell, without reference to any evidence, informed the Court that Mr Darrell needed more time to find accommodation for his elderly and infirm mother. Notwithstanding the absence of any evidence in the evidence filed in support of the application, Wolffe J stayed the possession order until 15 June 2023 but directed that the possession order was to be enforced on 16 June 2023, thereby giving Mr Darrell almost a further three months to find his mother alternative accommodation.

Discussion and determination

Absence of solid grounds supported by cogent evidence that there is a real risk of injustice if enforcement is allowed to take place pending appeal

26. Having heard from Mr Durham on behalf of Mr Darrell, and from Mr Darrell himself, we were not satisfied either at the hearing on 23 June 2023, or at the subsequent hearing on 9 August 2023, that Mr Darrell had established solid grounds supported by cogent evidence that there was a real, or indeed any, risk of injustice if enforcement were allowed to take place pending appeal. Our reasons may be summarised as follows.

The circumstances surrounding Mr Darrell's elderly mother's occupation of the Property

27. We assume, without deciding, that this Court has power, whether under section 81 of the Bankruptcy Act 1989, in the exercise of its discretion whether to grant a stay of execution of an order, or otherwise, to take into account the circumstances surrounding Mr Darrell's elderly mother's occupation of the Property in deciding whether to grant a stay of the order for possession. The Court is prepared to assume, without deciding, that the type of considerations identified in the English case of *Grant v Baker* [2016] EWHC 1782 (Ch) by Henderson J in relation to the postponement of a sale of a property in a bankrupt estate might be applicable in the present case. However, it rejects Mr Darrell's reliance upon a "priority" argument by reference to section 98 of the Bermuda Bankruptcy Act 1989. Section 98 is concerned with priority of debts payable in the bankruptcy and is not concerned with the Court's discretion to allow occupants of a bankrupt's property an extension of time before execution.

28. In Mr Darrell's affidavit dated 16 June 2023 he stated as follows in relation to the circumstances of his mother's occupation of the Property:

> "Exceptional Circumstances Point:
>
> 55. As previously mentioned in these proceedings, the court should consider that my mother, who is in her 96-year of age, continues to reside on the property in the lower south apartment.
>
> 56. Currently, my mother suffers from cardiac and liver-related diseases, which have recently impaired her mobility and quality of life. This year she has been taken to the hospital on at least six occasions and has been hospitalised for the better of three months.
>
> 57. As a result of her ailments, she has around-the-clock caregiver requirements. From 9 a.m. to 5 p.m., a caregiver attends to her at home. From 5 p.m. until the following morning, my two brothers and I take turns looking out for her.
>
> 58. I have installed a remote lighting system next to my mother's bed so that she can contact any of us in an emergency. As such, her apartment has been renovated to meet her needs, and the family environment of the homestead adequately compensates for her needs between 5 p.m. and 9 a.m. In contrast, a caregiver employed for the same period would be excessively expensive.
>
> 59. My mother has resided in the homestead for the past 40 years, and her familiar surroundings and family provide great comfort and have sustained a good quality of life for her. In this regard,

> the court should exercise its discretion to stay the possession order and eviction until my mother's death, particularly given that Mr Wakefield is before the Court answering fraud charges initiated by the Wilcocks estate."

29. We heard reiterated in oral submission that Mr Darrell's mother is very frail and requires carers; that she lives in a separate unit at the Property; and that Mr Darrell, and his two brothers, both of whom are aged 65 and above, and live in other units in the Property, apparently share with Mr Darrell the care, and expenses relating to the care, of their mother. But we did not receive any medical evidence on either occasion to support the asserted medical condition of Mr Darrell's mother. Nonetheless, we are prepared to accept that her circumstances are indeed as set out in Mr Darrell's affidavit.

30. We did not consider that the circumstances surrounding the mother's age, health and care justified any further suspension of the order for possession of the Property in the context of Mr Darrell's bankruptcy. The reality is that Mr Darrell has known for many months, if not years, that he faced an order for possession of the Property. Despite this, as the Ruling made clear, he has failed to cooperate in any way with the Trustees or to discharge his obligations in the bankruptcy. Nor, it seems, has he attempted to make any suitable alternative provisions for his mother, whether with the assistance of his brothers, or otherwise. A summary of the chronology is as follows:

    a. The Trustees were provided with the title deeds to the Property by the Official Receiver shortly after their appointment.

    b. On 24 June 2019 the Trustees wrote to each of the (5) units at the Property requesting that the occupants provide details of any tenancy; but there was no response. Mr Darrell refused at that stage to provide any details about the occupants and, if so, whether there was any rental income. It appears that there was no such income.

    c. The Trustees were therefore realistically left with no choice but to seek a possession order; proceedings were issued on 24 January 2020. Mr Darrell has therefore known that the Trustees were attempting to gain possession of the Property for some 3.5 years.

d. The Ruling was published in December 2022 (giving the Trustees possession) and was formally handed down in January 2023. The Provost Marshall gave a date for the enforcement of the Writ of Possession of 4 April 2023. At the last moment, on 30 March 2023, Mr Darrell filed an application for a stay of execution of the Writ. At the hearing Mr Darrell also applied for recusal of the Judge. Both the recusal application and the application for a stay were dismissed.

e. In support of his application for a stay of the Writ, Mr Darrell filed a 41 page affidavit with over 100 pages of exhibits. At the hearing of the stay application on 31 March 2023 Mr Woolridge, without reference to any evidence, informed the Court that Mr Darrell needed more time to find accommodation for his elderly and infirm mother. Despite the absence of any evidence in the extensive evidence filed in support, Wolffe J stayed the possession order until 15 June 2023 but directed that the possession order was to be enforced on 16 June 2023, thereby giving Mr Darrell almost a further 3 months (on top of the 3 already given) to find his mother alternative accommodation.

31. As Mr O'Mahony for the Trustees submitted:

a. Mr Darrell has known of the possession proceedings for 3.5 years and (if he is to be believed) has failed to find suitable accommodation for his mother in that time.

b. The possession order was made in December 2022 and Mr Darrell has had 6 months since then to find suitable accommodation for his mother in that time.

c. The Supreme Court had no evidence before it in March 2023 of Mr Darrell's mother's medical condition, despite his having filed a 41 page affidavit with over 100 pages of exhibits. That remained the case at the hearing before the Court of Appeal in June 2023; Mr Darrell's 16 June 2023 affidavit in support of his application for a stay pending appeal contained no evidence of his mother's condition.

d. That remained the position in August 2023 when this Court heard Mr Darrell's further application for a stay.

e. In anticipation that Mr. Darrell would attempt to further delay execution of the possession order, on 8 June 2023 the Trustees wrote to Mr. Darrell (copying his former attorneys, Amicus Law), requesting certain information about Mr. Darrell's mother. This letter was not answered.

32. In addition, this Court received no, or no adequate, evidence from Mr Darrell:

a. as to who exactly lives in the property;

b. what are the rental contribution arrangements to meet the outgoings on the property;

c. the income or capital means which are available to Mr Darrell's mother to provide for her care and accommodation; in particular, as to Mr Darrell's brothers' resources or those of other members of the family to assist with her care and accommodation;

d. the availability of alternative accommodation for his mother, or as to steps that had been taken to identify or secure such accommodation;

e. the availability of any state facilities to provide for her care in accommodation.

33. Accordingly, this Court concluded that there was no sufficient, let alone cogent, evidence to support Mr Darrell's application for a stay on the grounds of his mother's circumstances. Her circumstances, given the context and chronology of the present case, do not amount to exceptional circumstances such as to justify either any further, let alone a lengthy or permanent, stay of the possession order. The type of considerations identified by Henderson J in *Grant v Baker supra* simply do not apply.

34. Even if it were relevant to consider the balance of injustice, we consider that the risk of injustice to Mr Darrell's creditors, in the circumstances far exceeds the risk of injustice to Mr Darrell, or indeed his mother.

No realistic grounds to support any entitlement to set aside the judgment underlying the bankruptcy

35. Mr Darrell and/or Mr Durham on his behalf contended before us that the only known creditor's judgment that had led to the bankruptcy, namely the Wakefield Judgment,

was likely to be set aside as the judgment had been obtained by dishonesty. Mr Darrell and Mr Durham submitted that Mr Darrell was making an application to join the case entitled *Geoffrey Willcocks v Joseph Wakefield and Wakefield Quin* (Claim No.417 of 2021) ("the Willcocks Proceedings") and that, given the facts arising in that case, the Wakefield Judgment and consequently his bankruptcy will in due course be set aside. In fact, in or about October 2022, Hargun CJ refused Mr Darrell's application to join the Willcocks Proceedings as a party. Notwithstanding this, Mr Darrell contends that the facts relating to the Willcocks proceedings support his submission that the Wakefield Judgment will in due course be set aside.

36. In the Court's judgment, the evidence shows no realistic likelihood that the Wakefield Judgment will be set aside.

37. In summary the facts underlying the Wakefield Judgment are that Mr Joseph Wakefield filed proceedings against Mr Darrell in 2015 (Claim No.160 of 2015) arising from Mr Darrell's failure to repay a loan made by Mr Wakefield, as executor of the estate of a Mr Peter Willcocks, to Mr Darrell for $427,259.47 in October 2010. On 24 September 2015 Mr Wakefield and Mr Darrell agreed a consent order by which Mr Wakefield was given judgment for this sum and the order was signed by Hellman J. The consent order was signed when Mr Darrell was represented by counsel and following a hearing when Mr Darrell admitted that the debt was due and owing as claimed; this was recorded in the recital to the order. It was this judgment that led ultimately to Mr Darrell's bankruptcy.

38. Mr Darrell now claims that this judgment will be set aside in the Willcocks Proceedings, which is a claim by Geoffrey Willcocks against Joseph Wakefield, as first defendant, and Wakefield Quin as second defendant.

39. Mr Darrell's initial case was that the Wakefield Judgment as against him was liable to be set aside because Mr. Wakefield was not the executor of the Willcocks Estate and so did not have standing to bring the proceedings against Mr Darrell. However, the Trustees gave evidence on the appeal to the effect that they had been provided with a copy of the grant of probate dated 30 June 2006 showing that Mr Wakefield had been properly appointed as executor. Moreover, the judgment of Chief Justice Hargun dated 11 October 2022 on a strike out application in the Willcocks Proceedings - *Willcocks v*

(1) Wakefield and (2) Wakefield Quinn [2022] SC (Bda) 76 at [2] ("the Willcocks Judgment") demonstrates that that is indeed the case.

40. Mr Darrell then sought to claim that the Wakefield Judgment was fraudulent as Mr Wakefield ceased to be executor and trustee of the will of Mr Willcocks' late father when he retired as senior partner of Wakefield Quin. Mr Darrell claimed that this meant that Mr Wakefield did not have the authority to lend him the money at the relevant time.

41. Again, that argument has no realistic chance of success. On the First Defendant's application in the Willcocks Proceedings to strike out the claim, Hargun CJ rejected the argument that Mr Wakefield ceased to be an executor and trustee when he retired as a senior partner of Wakefield Quin. He held that Mr Wakefield had never been formally removed as executor and had never renounced his position as executor; see [61] – [64] of the Willcocks Judgment.

42. In addition, Mr Darrell claimed that the Memorandum of Deposit of Deeds form ("MOOD") signed by Mr Darrell in 2011 to secure the loan from Mr Wakefield was fraudulent. This was the form that was submitted to the Registrar General to register the Memorandum of Deposit executed by Mr Darrell in May 2011. As Hargun CJ makes clear at [25] – [27] of the Willcocks Judgment, the latter was nothing more than an agreement by Mr Darrell (with Mr Wakefield) to enter into a future mortgage once he received the title deeds to the Property from the bank. The fact that, taken at their highest, Mr Darrell's allegations about the MOOD might make the mortgage (as opposed to the underlying loan) unenforceable, is absolutely no basis for assuming that the Wakefield Judgment is liable to be set aside.

43. Furthermore, Hargun CJ's judgment makes clear that Mr Willcocks' claim will not determine the validity of the consent judgment against Mr Darrell. Rather the claim is for damages for breach of fiduciary duty by Mr Wakefield (as trustee and executor of the will of Mr Willcocks' late father).

44. Further and in any event once the bankruptcy order was granted, Mr Darrell no longer has *locus standi* to attack the Wakefield Judgment: he can only do so through his trustees either by consent or as a result of an order of the Court: *Heath v Tang* [1993] 1 WLR 1421. In *Royal Bank of Scotland v Farley* [1996] BPIR 638 CA the English Court of Appeal held that a bankrupt had no standing to set aside a judgment obtained in

default and therefore could not apply to annul the bankruptcy order. Had we considered that there was any *prima facie* merit in Mr Darrell's submissions in relation to the Wakefield Judgment, we might have disregarded this procedural point since any procedural defect arising out of the status of a bankrupt could, technically at least, in appropriate circumstances have been cured by an order of the Court. However, since we do not regard the point as having any merit, the lack of standing is another hurdle to Mr Darrell's claim.

45. Accordingly, this Court concluded that there was no sufficient, let alone cogent, evidence to support Mr Darrell's First Application for a stay on the basis that the underlying judgment upon which the bankruptcy was based was liable to be set aside.

46. Even if it were relevant to consider the balance of injustice, we consider that the risk of injustice to Mr Darrell's creditors, in the circumstances far exceeds the risk of injustice to Mr Darrell, or indeed his mother.

The alleged absence of creditors other than the Willcocks Trust in respect of the Wakefield Judgment and Mr Darrell's alleged claims against the Human Rights Commission and others

47. Mr Darrell alleged that the fact that no other creditors had come forward and that none had been identified by the Trustees provided another reason in support of his application for a stay of the Possession Order. He submitted that if the Trustees had identified other creditors the Trustees would have had to call a meeting under section 14(2) of the Bankruptcy Act and accordingly it was impossible to ascertain what was in the interests of the purported creditors in the sale of the Property.

48. The evidence belied this allegation. Not only did Mr Darrell's own statement of affairs set out a number of other creditors apart from the Willcocks Trust, but in addition there was extensive evidence from the Trustees to the effect that Clarien Bank was indeed owed in excess of $3 million by Mr Darrell in respect of a judgment debt (the veracity of which we do not need to decide for present purposes and so do not decide). Mr Darrell's allegations that he had various unformulated and speculative claims against the Human Rights Commission, the Bank of Bermuda, the Office of the Ombudsman and others arising out of alleged discriminatory conduct over many years went nowhere near to supporting his further argument that this Court should perform some sort of

notional set off against the Clarien Bank debt and the Wakefield Judgment and regard Mr Darrell as a solvent individual for the purposes of the two stay applications.

49. In any event these allegations were of little relevance, if any, to the exercise of this Court's discretion to grant a stay of execution. Apart from the absence of any cogent evidence on Mr Darrell's part to support these allegations - and his 7 August Affidavit was inadequate in this respect – the allegations provided no support for an argument that the balance of injustice weighed in his favour.

Conclusion in relation to the First Stay Application and the Second Stay Application in relation to the above grounds

50. Accordingly, this Court concluded that there was no sufficient, let alone cogent, evidence to support Mr Darrell's First Stay Application or his Second Stay Application on any of the grounds discussed above, whether taken singly or cumulatively. Nor did such evidence as there was go any way to support a conclusion that the risk of injustice to Mr Darrell exceeded the risk of potential injustice to Mr Darrell's creditors, if a stay of the Possession Order were not granted.

Additional ground relied upon in relation to the Second Stay Application

51. In his 21 July Affidavit, entitled "Affidavit to support the urgent application for leave to file an action for breach of fiduciary duty against the trustees in bankruptcy under section 81 of the Bankruptcy Act 1989", Mr Darrell sought leave of the Bankruptcy Court to file an action for breach of fiduciary duty against the Trustees. This affidavit was also deployed as part of Mr Darrell's Second Stay Application (see paragraph 10 ibid). In that affidavit, Mr Darrell complained on various grounds about the Trustees' conduct of the sale of the Property, which he informed the Court that his son, Michael Darrell ("MJ"), was attempting to purchase. Mr Darrell complained *inter alia* that the Trustees:

    a. were demanding too high a price for the Property which at $800,000 (with $80,000 non-returnable deposit) was well over the valuation which MJ had received by way of an informal appraisal;

b. had required acceptance of the offer to sell at such price in an unreasonably short timeframe;

c. had imposed unreasonable stipulations on the purchase by way of anti-money-laundering (AML) and know your customer (KYC) requirements;

d. had imposed unreasonable requirements in relation to the demonstration of the availability of finance to fund the purchase;

e. had failed to obtain, and to provide to MJ as buyer, a structural assessment and valuation of the Property despite alleged issues with the roof and termite infestation.

52. In his second affidavit, Mr Johnston addressed these complaints and exhibited the relevant correspondence. He stated that on 28 June 2023 Ms Angelita Dill of AAA wrote to Conyers indicating that MJ wished to buy the Property. In addition, the Trustees were contacted by Marshall Diel & Myers ("MDM") who said that they were acting for an anonymous lender who claimed to be willing to lend MJ the funds necessary to buy the Property. Following this, between 28 June 2023 and 21 July 2023, the Trustees entered into correspondence with AAA and MDM to see whether a sale might be effected. Mr Johnston further stated that no sale came about due to the refusal by the anonymous lender to provide adequate KYC/AML information and details of its source of funding, and the refusal by MJ to accept the Trustees' offer for sale of the Property at the market price.

53. It was only on 7 August 2023 that Mr Darrell duly filed in this Court the exhibits to his 21 July Affidavit which identified the name and the terms of the offer of the proposed funder.

54. Having considered the correspondence and heard the respective submissions of counsel for the Trustees, Mr Darrell and Mr Woolridge, the Court concluded that it had no reason to suppose that the Trustees were acting unreasonably and/or in breach of their fiduciary duties by failing to consider, or accept, an offer for purchase which would be in the interests of the bankrupt and the creditors. The Court concluded that, on the basis of the valuation advice which they had received, the Trustees were entitled to take the view that they could achieve a better price than that which was being offered by MJ.

They were also entitled, given the history of their dealings with Mr Darrell, to require satisfactory information about the terms of financing so as to reassure themselves that the funds would indeed be available, not merely to meet payment of the deposit but also the balance of the purchase price. They were not obliged to provide a valuation or a structural survey to a proposed purchaser. It was for them as professionals to decide how to conduct the negotiations for the sale of the property. It would not, in the Court's view, have been surprising for the Trustees to have regarded the email exchanges as indicating stalling and prevarication on the part of the proposed purchaser.

55. In the Court's judgment, the negotiations as evidenced in the relevant email exchanges provide no basis for the Court's intervention in the conduct of the sale of the Property by the Trustees, by means of a stay of execution of the Possession Order or otherwise.

Disposition

56. For the above reasons this Court refused Mr Darrell's First and Second Stay Applications and made the 23 June 2023 Order and the 9 August 2023 Order.

CLARKE, P:

SMELLIE, JA: