

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
SUIT NO. E372 OF 1993

(No. 2)

IN THE MATTER OF ADVANCED  
PRODUCTS LIMITED

AND

IN THE MATTER OF THE COMPANIES  
ACT

IN CHAMBERS

Mr. Gavin Goffe (March 28 and April 1) and Miss Corrine Henry (March 29)  
instructed by Myers Fletcher & Gordon for the applicant

Mr. Hugh Wildman, Trustee in Bankruptcy

March 28, 29 and April 1, 2011

SECTION 15 (5) OF THE BANKRUPTCY ACT - SECTION 242 (4), (5) OF THE  
COMPANIES ACT - APPLICATION TO RESTORE MONEY TO ESTATE AND  
PAY DIVIDEND

SYKES J.

1. DEG Deutsche Investitions Und Entwicklungsgesellschaft MBH ('DEG') is seeking the following orders as amended:

1. The Trustee in Bankruptcy is to restore to the trust for the benefit of the creditors of Advanced Products Limited (in Liquidation) the sum of JA\$458,423.46, or such other amount as this Court thinks fit.

2. The Trustee in Bankruptcy is to issue a further dividend to the creditors of Advanced Products Limited (in Liquidation) forthwith representing the balance of funds held in trust.

2. Paragraph one of the application originally had JA\$580,138.96 but that was amended to read the current figure of JA\$458,423.46.
3. The present application is in the context of the liquidation of Advanced Products Limited ('APL') which holds property in the parish of Hanover which is over 200 kilometres from Kingston where the Office of the Trustee in Bankruptcy is located. Mr. Hartley Cooper, the previous Trustee in Bankruptcy, has sworn an affidavit setting out the need for travel to Hanover because the arrangements he had made for securing the property were not working. The security and availability of the property to satisfy the debts of APL were under threat from persons who were entering the property illegally. He was of the view that frequent visits to the property were necessary to establish his presence and deter trespassers.
4. This application first came before me in June and September of 2009. A preliminary issue of the proper interpretation of section 15 (5) of the Bankruptcy Act was raised by the Trustee in Bankruptcy ('the Trustee'). On September 3, 2009, I delivered judgment on the preliminary issue. I had held that under that under section 15 (5), the Trustee in Bankruptcy must have the approval of the court before he can deduct expenses from the estate or trust. The matter went on appeal where the decision was unanimously affirmed but on different grounds (*Trustee in Bankruptcy and Liquidator of Advanced Products Limited* S.C.C.A. No. 117/09 (delivered February 5, 2010)). The reasoning of the Court of Appeal is central to the outcome of this particular application especially that of Harris J.A.
5. Section 15 (5) of the Bankruptcy Act reads:

*Such remuneration shall be for the time and responsibility of the Trustee in the general administration of the estate or trust, and the estate or*

*trust shall not be subject to any other charge in respect therefore, but any expenses in respect of any other matters, including traveling expenses relating to any estate or trust, may be charged against the estate or trust in such manner and to such extent as may be prescribed or specially sanctioned or allowed by the Court.* (my emphasis)

6. Focusing on the highlighted text of the subsection, I held that the phrase 'by the Court' governed the words 'prescribed or specially sanctioned or allowed.' Cooke J.A. (with whom Harris J.A. agreed), held that 'prescribed' was not controlled by the phrase 'by the Court.' His Lordship further held that 'prescribed' meant 'prescription by an authorized person or entity within the ambit of the Act' (para 8). Cooke J.A. also held 'that charges which are prescribed take affect independently of the supervision of the court' (para. 7). Finally, in the view of his Lordship, there was no distinction between 'sanctioned' or 'allowed' and whichever expression was used, the phrase 'by the Court' controlled those expressions.
7. Her Ladyship Harris J.A. held that the phrase 'as may be prescribed or specially sanctioned or allowed by the Court' should be understood thus: 'as may be prescribed *by rules of court*, or specially sanctioned by the court, or allowed by the court' (para. 35). Her Ladyship came to this position because 'prescribed' is defined in the section 2 of the Bankruptcy Act to mean 'prescribed by rules of court.'
8. For Harris J.A. in section 15, there were three methods of arriving at the expenses to be charged on the estate. The first was that expenses may be prescribed by the rules of court, the second was sanctioned by the court, and the third was allowed by the court. It will be recalled that Cooke J.A. indicated that he could not see the difference between the latter two. In this case, there were no rules of court prescribing the expenses thus the Trustee had to seek the sanction or permission of the Court (para. 26). Judicial control is therefore established where there are no rules of court.

#### **The submissions**

9. On behalf of the applicants, it was submitted by Mr. Goffe that there was no evidence from the Trustee detailing the expenses. He submitted that

simply to say that the expenses were incurred for traveling, accommodation and subsistence was insufficient. Learned counsel placed these submissions in the context that the Trustee, while not a trustee in the full sense of the term as used in equity, was nonetheless under a duty to manage the bankrupt's estate in such a manner so that as much of it as is possible is preserved for ultimate distribution to the creditors. This meant that the Trustee ought, firstly, to decide that such expenditures as he proposes to undertake in relation to the management of the estate are necessary, reasonable and prudent. Secondly, he must seek the sanction or approval of the court. Thirdly, he must set out in some detail the actual expenditures, meaning, if it was decided that traveling and staying overnight were necessary, the Trustee should set out the cost of staying at the particular hotel or guest house at which he may choose to stay. Fourthly, there must be figures from other places of accommodations or even modes of travel so that the court can properly carry out its supervisory function. Based on these premises, according to Mr. Goffe, prudent management of the estate means that the Trustee cannot choose an expensive hotel when a less expensive one would do. He cannot live and dine like King Croesus and then charge it to the bankrupt's estate but neither is he expected to feast like the poor church mouse.

10. Mr. Goffe further submitted that Mr. Keith Cooper's affidavit did not go far enough to meet the criteria set out by him (Goffe).
11. Mr. Wildman, for his part, submitted that section 242 (4) of the current Companies Act (section 225 (4) of the repealed Companies Act) which states that in managing the estate of a company and its distribution among creditors, the liquidator shall use his own discretion, gives him the latitude to use his discretion without giving a detailed breakdown of figures. He also submitted that this section taken along with section 15 (4), (5) of the Bankruptcy Act meant that as long as the Trustee acted reasonably in the Wednesbury sense, then he is immune from challenge.
12. As the court understood Mr. Wildman, the combined effect of the Companies Act and section 15 (5) of the Bankruptcy Act is to place a burden on those seeking to challenge the Trustee's decision to show that he acted unreasonably in the Wednesbury sense. The effect of this submission is that the Trustee need not detail his expenditures since prima facie they are

presumed to be reasonable unless it can be shown (not assumed) that he has breached the Wednesbury standard.

13. Learned counsel also submitted that there was evidence on which it could be said that the Trustee acted reasonably. He relied on the affidavit of Mr. Cooper. In that affidavit, Mr. Cooper outlined that property was in Hanover, some 240 - 250 kilometres from Kingston and despite the fact that arrangements were made for securing the property, those arrangements were not working because, persons had entered the property unlawfully and were stealing the equipment and other items. According to Mr. Cooper, the property was the major asset of the company and unless it was properly secured there was the risk that creditors would not have any hope of any recovery. It was expected, he continued, that frequent visits would be made in the initial stages which would reduce over time if proper arrangements for securing the property could be made. As it turned out, the person or persons engaged to secure the property proved to be less than reliable and this made his frequent visits a necessity. The affidavit went on to say that had he not done so there was the risk that he might have been accused of dereliction of duty. There is no challenge to these assertions and there is no reason to doubt them.

#### **Analysis and resolution**

14. This court accepts fully the propositions of Mr. Goffe. In light of the reasoning of the Court of Appeal, Mr. Wildman's submissions cannot be adopted. In the appeal, Harrison J.A. emphasised that 'the legislative intent [was] that the creditors of an estate or the beneficiaries under a trust be protected and that as a result, a Trustee's charges would be supervised and controlled by the intervention of the court' (para. 34). If the expenses are to be controlled by the court, then it must necessarily follow that the court must have some detail of the expenses accompanied by justification. The court is not to micro manage the Trustee but that does not mean that the Trustee is at liberty to keep to himself the sums of money expended and the reasons for each item of expenditure. In the absence of the details, it would be impossible for the court to supervise the Trustee. If Mr. Wildman's approach is adopted the court would have handed over its supervisory function to the Trustee and would be reduced to a rubber stamp. Of course, the views of the Trustee must be given great weight since he is the person on the ground doing the job required but that does not mean the court has a

passive role. The ultimate goal of any liquidation, especially a liquidation carried out by the Trustee, is to reduce expenditure from the estate as much as possible so as to maximize the amounts payable to the creditors.

15. Section 242 (4) of the Companies Act and its equivalent under the former Companies Act do not take the Trustee outside of the Bankruptcy Act. Despite the fact that section 242 (4) indicates that the liquidator is to use his discretion in the management of and disbursement of a company's estate, that provision does not confer on the Trustee the great latitude contended for by Mr. Wildman. The reason is that the Trustee in Bankruptcy is governed by the Bankruptcy Act and the power given to liquidators under the Companies Act does not derogate from section 15 (5).
16. The court had indicated that the judgment of her Ladyship Harris J.A. was of significant importance in resolving the instant application. Her Ladyship indicated at paragraph 34 that the 'legislative intent [is that] the creditors of an estate or the beneficiaries under a trust be protected and that as a result, a Trustee's charges would be supervised and controlled by the intervention of the court.' This intervention her Ladyship continued 'would either be in the form of a scale of fees as prescribed by rules of court, or by special sanction, or permission of the court, as authorised by section 15 (5).' The Trustee in Bankruptcy is a special liquidator. He is created by statute and must act within his statute. Other statutes that confer powers on the liquidator, so far as is possible, must be read in order that they and the Bankruptcy Act work harmoniously, or to put it another way, that the legislative intent of the Bankruptcy Act is upheld. This can be done in this case. What this court is saying is that the Trustee is a unique liquidator. He is subject to judicial control in the manner indicated by the Court of Appeal and section 242 (4) of the Companies Act should not be interpreted in a manner that would dilute judicial control otherwise the protection offered by the statute would be illusory.
17. If one reads section 242 (5) of the Companies Act, one sees that there is provision for any person aggrieved by the decision of the liquidator to apply to the court to have it reversed or modified. This is clear proof that even under the Companies Act, the liquidator is not entirely autonomous and cannot be called to account. The Bankruptcy Act establishes its own regime of judicial control by making it mandatory for the Trustee to get the

sanction of the court if he is going to charge expenses against the bankrupt's estate. The Trustee cannot avoid this accountability mechanism by relying on the Companies Act.

18. The affidavit of Mr. Cooper is not sufficiently detailed. The Trustee needed to have received the blessing of the court. In order to do so, he must make full disclosure in the manner suggested by Mr. Goffe and accepted by the court. Failure to do means that the court is not able to determine whether the actual expenditures as distinct from the need for the expenditures was reasonable. In this case there are two strikes against the Trustee. These are (a) failure to secure the approval of the court and (b) failure to detail the expenditure and the reasons for each expenditure.
19. There is a further problem with Mr. Wildman's position. In this particular case, the Trustee has simply stated a figure for his expenditure on travel and accommodation. He has provided no details. If Mr. Wildman is correct, how would the challenger establish that the expenditure was Wednesbury unreasonable or just unreasonable unless he has access to the details?

### **Conclusion**

20. The court wishes to make it clear that the decision of the court is not a reflection on the probity of the Trustee. The court accepts that he acted in good faith and was following what apparently was a long standing practice.
21. The application is granted in terms of paragraphs one (as amended) and two. Costs to DEG to be agreed or taxed.