IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN BANKRUPTCY

IN THE MATTER of the indebtedness of Courtney Eric John Morgan of Holiday Village, Rose Hall, Montego Bay, in the parish of Saint James, to Citizens Bank Limited of 17 Dominica Drive, Kingston 5, in the parish of Saint Andrew, Bankers.

A N D

IN THE MATTER of the Bankruptcy Act.

SUIT NO. 1997/B-002

BETWEEN	**CITIZEN'S BANK LIMITED**	**PETITIONER**
A N D	**COURTNEY ERIC JOHN MORGAN**	**RESPONDENT**

Mr. Ransford Braham for the Respondent/Applicant, instructed by Messrs Livingston, Alexander & Levy.
Mr. David Johnson for the Petitioner/Respondent, instructed by Messrs Piper & Samuda.
Mr. K. Gordon for the Trustee in Bankruptcy.

HEARD: MARCH 30 AND 31 ,
APRIL 3 AND 4 ,
AND MAY 19, 2000.

N. E. McINTOSH, J

In his affidavit sworn to on the 26th of May, 1999, the Respondent, Courtney Eric John Morgan, describes himself as a businessman with a postal address of Providence Drive, Ironshore, in the parish of Saint James. He operated several accounts at a branch of Citizen's Bank Limited, the Petitioner herein, including two chequing accounts which

were opened in or about 1990 or 1991 and which were numbered numbered 3109002650 and 3109002618, respectively. Some time in 1993, cheques totalling approximately US $75,000, or JA $2,988,265.00 and cheques totaling approximately + 70,000 pounds sterling, or JA $1,879,127.00, were deposited into these two chequing accounts. It is the operation of these two accounts after the deposit of the aforementioned cheques which has resulted in this matter coming before the Court, first by way of a Bankruptcy Petition and now by way of a Notice of Motion on the application of the Respondent (hereinafter referred to as the Applicant).

Before dealing with the Notice of Motion which embodies the application before the court, however, it is necessary to look at the sequence of events which gave rise to it.

It is common ground that these cheques were subsequently dishonoured and that the applicant had drawn cheques against these accounts. The Applicant's cheques were honoured by the Petitioner Bank (hereinafter referred to as the Petitioner) with the result that the accounts became overdrawn.

It is also common ground that the Petitioner made demands for the payment of the overdrawn sums and in a letter dated February 17, 1994, informed the Applicant that the sum then due totalled $8,296,894.31 with interest at the rate of 117% per annum or $6,779.42 per diem and $41,973.12 per diem, on the two accounts , respectively, compounded monthly. In that letter the Petitioner also advised the Applicant that the applicable **penal rates** of interest was 117%.

When the sums remained unpaid the petitioner resorted to the Courts and, when the Applicant failed to file a Defence in the suit, the Petitioner obtained a judgment in default of Defence, on the 29th of April, 1994, to recover the sum of $8,694,552.49. The Applicant did seek to have this judgment set aside by summons dated 15th May, 1995, but that application was refused.

Having been unsuccessful in efforts to recover the debt by way of writ of seizure and sale the Petitioner next resorted to Bankruptcy Proceedings.

The Bankruptcy Notice bears the date 30th January, 1997 as the date of preparation, stamping and filing and, on the non-compliance of the Applicant, the Petitioner proceeded to the next step, the filing of a Bankruptcy Petition on the 25th of September, 1998.

Paragraph 3 and 4 of the Petition allege as follows:

> 3. That the said Courtney Eric John Morgan has committed an act of Bankruptcy within 6 months before the presentation of this Petition.
>
> 4. That the act of bankruptcy committed by him was that he failed on or before the 20th of February, 1997, to comply with the requirements of a bankruptcy notice duly served on him on the 13th day of February, 1997.....

and the Petition ends with the prayer:

> "Your Petitioner therefore prays that on proof of the requisites in that behalf, on

> the hearing of this Petition, the said Courtney Eric Morgan may be adjudicated as Bankrupt."

On December 7th, 1998 the Petition was heard and upon proof of the debt and the act of bankruptcy to the satisfaction of the court, a Provisional Order was made for the winding up of the applicant's property:

> "unless cause be shown to the contrary on the 3rd day March 1999.... why the said order should be revoked."

The Order continues:

> "If you intend to show cause against the Order you are required to file a notice with the Registrar indicating the statements in the Petition which you intend to deny or dispute and to serve on the Petitioning creditor a copy of such last mentioned notice three days before the hearing."

A copy of the Provisional Order was served on the applicant on the 7th of January, 1999 and the matter went before the Bankruptcy Court on the 3rd of March, 1999. Those proceedings were adjourned to the 5th of May, 1999. The court was then informed that discussions were going on with a view to a settlement. On the 5th May the court was advised that the discussions had bourne no fruits but the Applicant's attorneys still had some hope of settlement and sought a further adjournment indicating that if the application was not successful and the matter was to proceed the Applicant wished to challenge the Petition and the Provisional Order. Time was requested to file an affidavit as none had been filed in view of the negotiations. The basis of the challenge was given and the opportunity was sought to put the relevant evidence before the court. The

application was resisted and the court was requested to make the Triple Order in favour of the Petitioner. However, the court in the exercise of its discretion granted the adjournment to the 2nd of June, 1999.

In the interim, the applicant filed a Notice of Intention to show cause. It bore the filing date 20th May, 1999 and was served on the Petitioner on the 28th May, 1999. On the 2nd of June it was the Petitioner's turn to seek an adjournment as time was needed to take "full instructions" consequent upon the service of the Notice and supporting affidavits. The matter was then "adjourned to a date to be set by the Registrar in consultation with Attorneys".

On the 25th of June, 1999, the Applicant then filed this Notice of Motion seeking to move the court to grant the following Orders:

"1. That the Bankruptcy Petition dated 25th September, 1998 be dismissed.

2. The Provisional Order dated 7th December, 1998 be revoked.

3. The Bankruptcy Notice dated 30th January, 1997 be set aside.

4. Costs of this application and this proceedings to the Respondent.

5. .....".

In dealing with the arguments advanced at the hearing of this Motion it is necessary to commence with a submission by Counsel for the Petitioner as it related to the jurisdiction of this court to hear this matter. It was argued that these proceedings are misconceived as the applicant ought properly to have proceeded by way of appeal to the Court of Appeal –

that having failed to comply with the provisions of Rule 18 of the Bankruptcy Rules he may no longer proceed under the provisions of the Bankruptcy Act but must instead take his grievance to the Court of Appeal.

In Counsel's view the provisions of Section 175 of the Act are not available to the Applicant inasmuch as those provisions relate to action taken by the court of its own volition.

I do not agree that there has been a failure on the part of the Applicant to comply with the provisions of Rule 18 of the Bankruptcy Rules. Dealing with the debtor's right to show cause against the Provisional Order, Rule 18 states as follows:-

> "18. Where a debtor intends to show cause against the Order, he shall file a notice with the Registrar indicating the statements in the petition which he intends to deny or dispute and serve on the petitioning creditor a copy of such last-mentioned notice three days before the hearing.

In my view, the language of the Rule is of much significance. It gives no time within which the notice should be filed and it speaks to the hearing and not the date set for hearing. Furthermore, Rule 18a refers to the date in the Provisional Order as a 'return day' which is an indication that the hearing may not take place on that date and for one reason or another, subsequent dates may be set. Rule 18a provides as follows:-

> "it shall not be necessary on the return day mentioned in the provisional order, for the petitioning creditor to furnish evidence that the debtor has made default

under Rule 18 of the above-mentioned Rules, but the production by the Registrar of his certificate in the Form No. 9a in the schedule hereto shall be sufficient...."

In the instant case, there was no hearing on the return day mentioned in the Provisional Order. No notice had been filed because the parties were negotiating. It seems clear that because of those negotiations no point was taken by the Petitioner about non-compliance and certainly, no certificate to that effect was produced by the Registrar. It was when those negotiations broke down that the Applicant gave verbal notice of his intentions on the 5th May, 1999 and sought time from the court to take the necessary steps for the hearing of his challenge of the Provisional Order. It was only then that the Petitioner sought to resist the application and to request the granting to the Triple Order.

In not hearing the matter then and setting a hearing date of the 2nd of June, 1999, the court thereby made way for the Applicant to comply with the requirements of Rule 18 which was what was done when notice was filed on the 20th of May, 1999 and served on the petitioner on the 28th of May, 1999. In any event, the hearing did not commence until the 30th of March, 2000 and, as it is my view that a distinction is to be made between 'the hearing ' and ' hearing date' service was therefore well in excess of the required three days. Rule 28 speaks of affidavits supporting motions being filed two days before 'the day appointed for the hearing', clearly showing that the Rules recognize a distinction between the two positions.

Even it that proposition is incorrect, the provisions of Section 175 is available to the applicant as in my view the restriction placed on it by Counsel for the Petitioner is unwarranted. The whole scheme of the Bankruptcy Act makes it clear that this is an avenue open to the debtor even after the triple order and distribution of the assets. Section 175 provides as follows:-

> '175. --- (1) The Court may at any time, for sufficient reason, revoke a provisional order for bankruptcy, or annul an adjudication;.....'

so that a debtor may, for instance, move the Court to revoke a provisional order, by virtue of the provisions of this section. I hold however that the notice was not out of time but that, in either event, this court has jurisdiction to hear this matter.

I turn now to the submissions on the effect of Section 19 of the Act and Provisos (i) and (ii), thereunder. Section 19 of the Bankruptcy Act sets out the requirements as to who may present a petition and the grounds on which the petition may be presented in the following terms as is relevant to these proceedings:-

> 19. A single creditor or two or more creditors, if the debt owing to such single creditor or the aggregate amount of debts owing to such several creditors from any debtor amounts to a sum of not less than three thousand dollars, may present a bankruptcy petition to the Court against a debtor, alleging as the grounds of the petition any one or more of the following acts or defaults, in this Act deemed to be and included under the expression 'acts of bankruptcy' –

(a) to (g).....

(h) that the creditor presenting the petition has obtained final judgment or final order against the debtor in an action in the Supreme Court, or in a Resident Magistrate's Court for a sum not less than three thousand dollars and has served on the debtor in Jamaica a bankruptcy notice in writing, in the prescribed manner and form, requiring him to pay the amount for which such judgment or order has been obtained and the debtor has not within seven days after the service of such notice paid such amount, or secured or compounded for the same to the satisfaction of the creditor;

.....

Provided --------

(i) that the alleged act of bankruptcy must have occurred within six months before the presentation of the petition

(ii) that the debt of the petitioning creditor must be a liquidated sum due or growing due at law or in equity and must not be a secured debt .....

The language of the Provisos and the authorities make it clear that these requirements are mandatory and not merely procedural. The requirement in Proviso (i) is a condition which grounds the Petition and, on the authority of **In re A Debtor, (No. 10 of 1953), ex parte The Debtor v. Ampthill Rural District Council, (1953) 1 W.L.R.** a petition is held to be presented on the date of filing. It was argued on behalf of the Respondent/Applicant that the date of presentation of a Petition is to be equated with the date of service. In this case, filing and service of the Petition occurred on the same day, namely, the 25th of September, 1998.

In **re Noble. (No. 10 of 1953),** (supra), it was held that a petition was presented out of time having been filed after the stipulated period and must therefore be dismissed. So strict is this provision that in **Re Noble (a bankrupt), Ex Parte The Bankrupt v. The Official Receiver and Another, (1964), 2 All E.R. page 522,** it was held that a debt could not be added to a petition after the time allowed had expired. Here the creditor had presented a bankruptcy petition based on the non-payment of a certain debt which was said to constitute the act of bankruptcy. When it became clear that that debt was not to be relied upon for the purpose, the creditor sought to add another debt to the petition but the Court of Appeal held that no debt could be added to a petition when more than three months had elapsed after the act of bankruptcy, for to add it would be inconsistent with the relevant legislation. At page 528 of the judgment Lord Justice Russell had this to say:

> "An available debt is an essential of a valid petition: to allow an available debt to be introduced into the petition for the first time more than three months after the act of bankruptcy relied on, would,

> I consider, be the equivalent of allowing the presentation of a Petition more than three months after the act of bankruptcy, contrary to s.4 (1) (c) of the Bankruptcy Act, 1914."

This requirement cannot be waived by the conduct of the parties and is not covered by the provisions of section 172 of the Bankruptcy Act which states as follows:

> 172. Proceedings under this Act shall not be invalidated by any irregularity, unless the Court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity and that such injustice cannot be remedied by any order of such Court.

Failing to comply with a mandatory requirement is not a mere irregularity and as demonstrated by Re Noble (supra), results in the dismissal of the petition.

It was submitted on behalf of the Petitioner that the debt was a continuing one and was therefore not stale – that it was therefore within the statutory time frame. I find no basis for this submission. The petition stated the act of bankruptcy relied on by the creditor and that act was clearly outside of the period. No evidence was presented of any continuing act and in any event the legislation makes no provision for that position.

Similarly Proviso (ii) is a condition which must be strictly complied with as the petition would otherwise be improperly conceived. The requirement that the debt be a liquidated

sum is one of considerable significance and non-compliance cannot be regarded as a mere irregularity. Counsel for the Petitioner clearly recognizes this as it was sought to establish that the sum was liquidated at the point of the judgment debt and that it had no penal component.

The authorities make it clear that the debt must be a liquidated sum owing at the time when the act of bankruptcy was committed. In **Re A Debtor ex parte Berkshire Finance Co. Ltd. v. The Debtor, [reported on June 8, 1962, in the Solicitor's Journal, (Volume 106), Chancery Division],** it was held that despite the claim having been the subject of a judgment, if it contains a penal element – if it is not for a liquidated sum – it could not stand as a good Petitioning creditor's debt for bankruptcy purposes. Per Cross, J.,

> "the creditors were not entitled to recover judgment for ..... as a liquidated sum, because that sum included an interest element which resulted in the creditors recovering more than any possible damage they could have suffered."

The decisive hallmark of a liquidated claim is that the process of quantification is already complete and there is an absence of any penalty to be imposed over and above the actual loss sustained. In the instant case there is an admitted penal element as clearly stated in the letter from the petitioner's Attorney-at-Law, dated February 17, 1994. In the penultimate paragraph it states:

> "Please be further guided that the applicable penal rate of interest with regards to the overdrafts has moved from 91% to 117% and, as you can well imagine, monumental havoc is being wreaked on the daily accrual factor."

In **Dunlap Pneumatic Tyre Co. Ltd. vs. New Garage and Motor Co. Ltd. (1914 - 15) All E. R. page 740**, it was held that a sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from a breach of the contract or if the breach consists only in not paying a sum of money and the sum stipulated is greater that the sum which ought to have been paid. In the instant case the sum is extravagant and unconscionable. This petition was therefore improperly conceived since the debt on which it was based was not a liquidated debt.

At the hearing of the petition proof of the relevant matters is vital. In the text, **Bankruptcy Law and Practice,** by G. H. L. Fridman, I. Hicks and E. C. Johnson, to which Counsel for the Petitioner referred, it is stated thus:

> "at the hearing the court must require proof of the petitioning creditor's debt, the service of the petition and the act of bankruptcy."

Further, "it is the duty of the court to see that the requirements of the law of bankruptcy are complied with, irrespective of the consent of the parties,

> for example, relating to waiver of proof of any material fact, since bankruptcy is a matter of interest to the public generally, not merely to the parties."

On the authority of this text, it was submitted that this refers, in particular, to proof of a valid sufficient creditor's debt without which, among other things, no provisional order may be made. The prayer in the petition clearly speaks to the requirement for such proof but what proof of the relevant matters was presented in this case where the petition is out of time and the debt upon which it is based is for an unliquidated sum?

The above findings are sufficient to dispose of this matter without more but before parting with it I wish to add that the submission of Counsel for the applicant concerning the Court's ability to look behind the judgment and enquire into the validity of the debt is well founded being based upon the Rules and the authorities, with particular reference to Rule 19 of the **Bankruptcy Rules and Forms, 1879,** referred to above; **Ex Parte Lennox. In Re Lennox (1885) 16 Q.B.D. 315 and Re Fraser (1892) 2 Q.B. 633. Ex Parte Lennox,** Lord Esher explained that the mere fact that there was a judgment for the debt did not prevent the registrar in bankruptcy from saying that there was no good petitioning creditor's debt. The court of bankruptcy can go behind the judgment and can enquire whether, notwithstanding the judgment, there was a good debt. In **Re Fraser**, it was held that the court of bankruptcy has power at the instance of the debtor to go behind the judgment and enquire into the validity of the debt even though the debtor had

previously applied in the action to set aside the judgment and his application had been refused, as in this case.

An enquiry into this debt reveals that there was no agreement between the parties as deponed in the affidavit of Glendon Gordon. I accept that it was represented to the applicant that the cheques had cleared and that the applicant had been of the view that the funds he was utilizing were his own funds. There was therefore no question of his agreeing to any credit facilities. Clearly the agents of the Petitioner took it upon themselves to encash cheques drawn against the accounts before receiving clearance on the foreign cheques. The so-called overdraft came into being after the fact when it was discovered that the cheques were dishonoured. There was therefore no agreement between the parties for any compounding of interest on the accounts and no loan agreement. In the circumstances the attitude of the Petitioner was certainly unconscionable especially in the face of the applicant's willingness to repay the sums when it was brought to his attention that the foreign cheques had been dishonoured.

Accordingly, the Bankruptcy petition is dismissed with the consequential revocation of the provisional order and the setting aside of the bankruptcy notice.

Costs of this application and of the proceedings are the applicant's to be taxed if not agreed.