

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN BANKRUPTCY
SUIT NO. 395A OF 2002

BETWEEN THE TRUSTEE IN BANKRUPTCY APPLICANT

AND FIVE C ENTERTAINMENT LIMITED RESPONDENT

Mr. Vaughan Bignall for the Applicant

Mr. Conrad George for the Respondent

Heard: September 23, November 13 2002

IN CHAMBERS

HARRISON J.

The Applicant filed this Originating Summons seeking inter alia:

- a) A Declaration that the Mortgage No. 1163028 registered on the 8th day of October 2001 to FIVE C'S ENTERTAINMENT LIMITED to secure the sum of One Hundred and Fifty Thousand Dollars United States Currency (US\$150,000.00) with interest in respect of ALL THAT parcel of land part of TRAFALGAR PARK now known as LOT ONE HUNDRED AND FORTY-SEVEN A TRAFALGAR PARK in the Parish of SAINT AQNDREW being the Strata Lot numbered FOUR on the Strata Plan numbered Three Hundred and Seven and Three Hundred and Twelve undivided 1/10,000th shares in the common property therein and being all of the land comprised in Certificate of Title registered at Volume 1038 Folio 502 but now registered at Volume 1188 Folio 163 of the Register Book of Titles is void.

....."

After hearing the evidence and submissions I reserved judgment since it was my considered view that I needed some time to consider the arguments. I must apologize however, for the delay in handing down the judgment.

The issues for consideration are:

1. Whether or not a bankrupt can deal with his assets after a Provisional Order of bankruptcy has been made against him.
2. Whether the registration of a mortgage in favour of a third party over property vested in the Trustee in Bankruptcy becomes indefeasible once it is noted by the Registrar of Titles on the registered certificate of title.

Keith Cooper (The Trustee in Bankruptcy) has deposed in an affidavit dated 24th July 2002 as follows:

"1. I am the Trustee for the Estate of Ronnie Chin Loy (hereinafter called the Debtor) by virtue of a Provisional Order in Bankruptcy made by the Supreme Court of Judicature of Jamaica dated the 3rd day of May 2000.

2 That the assets of the Debtor vest in me from the 3rd day of May 2000, the date of the Provisional Order.

3. That my investigations of the affairs of the Debtor have revealed that the Debtor is the owner of various assets.

4. That the Debtor is the registered proprietor of land registered at Volume 1188 Folio 163 of the Register Book of Titles.

5. That endorsed on the said duplicate Certificate of Title is Mortgage No. 1163028 registered on the 8th day of October 2001 to FIVE C'S ENTERTAINMENT LIMITED to secure the sum of One Hundred and Fifty Thousand Dollars United States Currency (US\$150,000.00) with interest.

6. That I have been advised and truly believe that enquiries made by officers of the Office of the Trustee in Bankruptcy have established that FIVE C'S ENTERTAINMENT LIMITED the registered mortgagee of mortgage No. 1163028 endorsed on the said Certificate of Title and the Respondent are one and the same Company.

7. That the Debtor is shown on the Memorandum of Association of the Respondent as a subscriber and shareholder of the Respondent.

8. That the Debtor is shown on the Articles of Association of the Respondent as a subscriber of the Respondent.

9....."

There is no dispute that a provisional order in bankruptcy was made against the Debtor on the 3rd day of May 2000. There is also no dispute that the Respondent and FIVE C'S ENTERTAINMENT LIMITED the registered mortgagee of the mortgage, is one and the same Company.

Now, how does the Bankruptcy Act deals with a provisional order in bankruptcy? Section 42 of the Act provides as follows:

"When a provisional order has been made against a debtor, the property of the debtor shall immediately pass to and vest in the Trustee, without any conveyance or assignment or transfer whatever to be by him in due course, either under an absolute order for bankruptcy, or under a deed of arrangement as hereinafter provided by this Act, realized, administered and distributed with as much dispatch as is reasonably practicable for the benefit of the creditors:

Provided, that until the provisional order is made absolute, it shall be the duty of the Trustee, as far as the nature of the property in such estate as to permit of its being returned to the debtor in the condition in which it was when it was seized, in the event of the revocation of the provisional order..."

What is clear from the above provision is that the property of the debtor and all rights attached thereto vests in the Trustee in Bankruptcy once a provisional order in bankruptcy is made. It means therefore that the Debtor no longer possesses the capacity to exercise any rights in relation to that property.

The question which arises now for consideration is whether or not a bankrupt can mortgage his property which has been vested in the Trustee.

Mr. Bignall who appeared on behalf of the Applicant referred also to sections 115 and 116 respectively of the Bankruptcy Act. He submitted that on or about the 8th day of October when Ronnie Chin Loy caused the property aforementioned to become encumbered with a mortgage of US\$150,000.00 plus interest, he was acting without the authority of the Trustee in Bankruptcy in whom the property was vested in. He further submitted that at the material time the Trustee in Bankruptcy was the only legal person capable of exercising any rights in relation to the said property hence, the charge that Ronnie Chin Loy caused to be registered on the title thereto was null and void as against the Trustee in Bankruptcy.

Mr. George submitted on the other hand, that in the absence of fraud the mortgage which has been registered is absolute and indefeasible. He referred to sections 68 70 and 71 of the Registration of Titles Act. Now, section 68 deals with the conclusiveness of a registered title. Section 70 provides as follows:

"70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or

interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:

Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement required by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument.

Section 71 states:

"71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or

consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud”.

Accordingly, Mr. George submitted that the sections he referred to establish that the registered proprietor can be taken by a third party as being the only person entitled to deal with the land in question and that such third party is protected absolutely if he does so unless there is fraud by the registered proprietor and the person dealing with him. He referred to and relied on the cases of **Assets Co. v Roihi and Others** [1905] AC 176 **Frazer v Walker** [1967] 1 AC 569.

Finally, he submitted that the evidence before the Court did not in any way support the application since there was no evidence that the mortgage was obtained fraudulently.

Section 138 of the Registration of Titles Act makes provision as to how the Registrar of Titles proceeds with the property of a bankrupt. The section states:

138. When upon the bankruptcy of the proprietor of any land, lease, mortgage or charge, the estate or interest of such proprietor in such land, lease, mortgage or charge, vests in the trustee in bankruptcy, such trustee shall be entitled to be registered in respect of the same; and the Registrar, upon the receipt of an office copy of the provisional or absolute order in bankruptcy against such proprietor, accompanied by an

application in writing under the hand of the trustee to be registered in respect of any land, lease, mortgage or charge, of such bankrupt therein described, shall enter in the Register Book, upon the folium constituted by the certificate of title of such land, a memorandum notifying such order in bankruptcy; and upon such entry being made the trustee shall become the transferee and be deemed to be the proprietor of such land, lease, mortgage or charge, estate or interest, and shall hold the same subject to the equities upon and subject to which the bankrupt held the same; but for the purpose of any dealings therewith under the provisions of this Act such trustee shall be deemed to be the absolute proprietor thereof. If the trustee shall omit or neglect to make the application aforesaid, or to lodge a caveat under the general provision relating to caveats hereinafter contained, within seven days after the Registrar shall have notified to him, by a letter delivered or registered, that application has been made for the registration of an instrument concerning property (to be in such notice described) standing in the Register Book in the name of the bankrupt, such instrument may be registered, and thereupon shall not be affected by the order of adjudication either at law or in equity..."

It was argued by Mr. Bignall that the above section required the Registrar of Titles to notify the Trustee in Bankruptcy of any dealings with the property of the Debtor. He further argued that this was not done in the instant case hence the Trustee's interest could not have been noted by the Registrar since the Debtor had failed to co-operate as required under the Bankruptcy Act, to assist the Trustee in tracing and recovering all his assets.

What is the objective of the Bankruptcy Act? Mr. Bignall argued and I do agree with him that the statutory objective was to safeguard the assets of the Debtor for the benefit of Creditors and to prevent the dissipation of such assets by the Debtor. He submitted that third parties whether innocent or not cannot and ought not to be allowed to have a superior claim to the assets of the debtor over that of the Trustee in Bankruptcy. He further submitted that to hold that this mortgage is valid as against the Trustee in Bankruptcy, would serve to defeat the Legislator's intent as a Debtor against whom a Provisional or Absolute Order in Bankruptcy has been made could opt to sell his property and that Third Party could then be protected because of lack of notice or the fact that it was a bona fide purchaser for value. He argued that this ought to be recognized as one of the exceptions to the principle of indefeasibility.

What is abundantly clear is that by virtue of section 42 of the Bankruptcy Act, the property of the debtor and all rights attached thereto vests in the Trustee in Bankruptcy once a provisional order in bankruptcy is made. It is also clear from section 138 of the Registration of Titles Act that once such property is vested in the Trustee he shall be entitled to be registered in respect of the same. In order to have this done the Trustee is obliged to serve the provisional or absolute order on the Registrar of Titles. The section goes on to lay down the procedure thereafter by stating:

".....If the trustee shall omit or neglect to make the application aforesaid, or to lodge a caveat under the general provision relating to caveats hereinafter contained, within seven days after

the Registrar shall have notified to him, by a letter delivered or registered, that application has been made for the registration of an instrument concerning property (to be in such notice described) standing in the Register Book in the name of the bankrupt, such instrument may be registered, and thereupon shall not be affected by the order of adjudication either at law or in equity " (section 138)

The facts do not reveal however, that the Trustee was notified about the mortgage hence the abovementioned procedure was not able to be implemented. What ought the Court to do in these circumstances? I hold that the Debtor had no right to have created a mortgage after the provisional order in bankruptcy was made since the Trustee would have had a prior right to have his interest registered in respect of the property. It is also my considered view that the Court ought not to overlook the statutory objective of the Bankruptcy Act. First and foremost, the Trustee must safeguard the assets of the debtor for the benefit of creditors. This may be done as soon as these assets are declared by the debtor or they are subsequently discovered by the Trustee. No debtor against whom a provisional order is made has the right of giving one creditor a preference over other creditors.

Accordingly, I find that the mortgage given by the Debtor over the land comprised in Certificate of Title registered at Volume 1038 Folio 502 but now registered at Volume 1188 Folio 163 of the Register Book of Titles is void as against the Trustee in Bankruptcy. In the circumstances, I hold that the mortgagee could not benefit from the protection of indefeasibility.

There shall be judgment for the Applicant in terms of paragraph (a) of the Summons with Costs to the Applicant to be taxed if not agreed.