

[1991–92 Gib LR 274]

**IN THE MATTER OF HARPER, ex parte ELTHAM and
ELTHAM**

SUPREME COURT (Kneller, C.J.): April 21st, 1992

Bankruptcy and Insolvency—stay of proceedings—court’s discretion—power to stay or adjourn proceedings for good reason under s.91 and s.87(2) of Bankruptcy Ordinance, or under s.7(4) and (5) if appeal against judgment on disputed debt pending—petitioner prima facie entitled to receiving order on debtor’s non-compliance with bankruptcy notice unless special circumstances justify stay

The petitioners applied for a receiving order against the respondent.

The petitioners brought proceedings against the respondent alleging that he had failed to exercise due care, skill and diligence when conducting a survey on a house in Spain which they had purchased, and which proved to have serious structural defects.

The respondent’s solicitors advised him to defend the claim on the basis that it should have been brought in Spain. They nevertheless allowed judgment in default of acknowledgement of service to be entered against him, and their application to set aside judgment was refused on the grounds of delay and the lack of an arguable defence. The respondent instructed other solicitors, who did not appeal against the refusal.

The Registrar awarded damages of the difference between the purchase price and the actual value of the property on the basis that they would have offered a much lower price had they known the likely cost of remedial works. The petitioners obtained a bankruptcy notice against the respondent requiring payment of the judgment within seven days. The respondent instructed further solicitors, who applied unsuccessfully for leave to appeal out of time against the court’s refusal of his application to set aside judgment in default.

The petitioners served a bankruptcy notice on the respondent in Spain. Their application for a receiving order was adjourned on condition that the respondent pay £60,000 into court within one month, which he failed to do. The petitioners refused to accept the respondent’s own property in Spain as security. The respondent issued proceedings against his earlier adviser for breach of duty of care, and requested a stay of the receivership proceedings.

He submitted that (a) the court had jurisdiction under s.7(4) of the Bankruptcy Ordinance to stay the proceedings on the ground of his appeal against the quantum of damages; (b) because of the incompetence

of his legal advisers and the consequent entry of judgment in default against him, his *bona fide* defences to the petitioners' claim had never been tried; (c) his appeal to the Court of Appeal would be unlikely to proceed if a receiver were appointed over his assets; (d) he had offered adequate security; (e) the petitioners had issued proceedings against their Spanish architects and builders alleging that they were at fault; and (f) accordingly, he had shown special circumstances justifying a stay.

The petitioners submitted in reply that (a) the respondent had not shown a sufficient reason for the stay of the proceedings under s.91 of the Bankruptcy Ordinance, or under s.7(4) and (5) of the Ordinance, which applied only where the respondent disputed the existence of the debt and required security to be given for its payment; (b) the Registrar had heard expert evidence from both sides when assessing damages; (c) the respondent's appeal against the assessment of damages lay to the Supreme Court, not the Court of Appeal, and therefore was bound to fail; (d) the respondent had refused to disclose information about his earnings and assets (including the property now offered as security) when requested for the purpose of execution of the judgment against him, and a receiver could investigate; (e) they were entitled to attempt to recover their loss from elsewhere, but there was no guarantee that their claim against the architects and builders would succeed; and (f) they were *prima facie* entitled to a receivership order on the ground of the respondent's failure to comply with the bankruptcy notice, and he had not shown special circumstances warranting a stay.

Held, making a receivership order:

(1) The court had power to stay proceedings under a bankruptcy petition under s.91 of the Bankruptcy Ordinance, or to adjourn them under s.87(2) of the Ordinance for a satisfactory reason. The power to stay proceedings under s.7 on the ground of a pending appeal from judgment on the debt applied only if the debt was disputed by the defendant. The petitioning creditor was *prima facie* entitled to a receiving order when the debtor had not complied with a bankruptcy notice unless the debtor showed special circumstances justifying a stay (paras. 19–22).

(2) Taking into account the circumstances in which the respondent's debt had been incurred, his action against his legal adviser and his appeal against quantum, the court was satisfied that there were no special circumstances justifying the stay of the proceedings. There was no appeal against the default judgment on liability, and the appeal against quantum was bound to fail, since it was in the wrong court. The respondent's prospects of success in suing his legal adviser could not be ascertained without knowing the defence, but he had commenced those proceedings at a late stage and they might not be heard for some time. There appeared to be no immediate prospect of the respondent paying the debt, and the petitioners were entitled to a receiving order (paras. 23–25).

Cases cited:

- (1) *Debtor (No. 452 of 1948), Re a, Ex p. Debtor v. Le Mee-Power*, [1949] 1 All E.R. 652; (1949), 118 L.J. Ch. 1123, referred to.
- (2) *Whitley (J.J.R.), Re, Ex p. Mirfield Comm. Co. Ltd.* (1891), 65 L.T. 351; 7 T.L.R. 508, referred to.
- (3) *Yeatman, Ex p., In re Yeatman* (1880), 16 Ch. D. 283; 44 L.T. 260, referred to.

Legislation construed:

Bankruptcy Ordinance (1984 Edition), s.7(4): The relevant terms of this sub-section are set out at para. 20.

s.7(5): The relevant terms of this sub-section are set out at para. 20.

s.91: The relevant terms of this section are set out at para. 19.

s.87(2): The relevant terms of this sub-section are set out at para. 21.

Supreme Court Ordinance (1984 Edition), s. 4(2):

“Any ruling or other decision of any kind whatsoever in any civil or criminal proceedings by the Registrar in exercise of the duties imposed upon him by subsection (1) shall be subject to appeal to the court.”

H.K. Budhrani for the petitioners;

C.A. Gomez for the respondent.

1 **KNELLER, C.J.:** Mr. and Mrs. Eltham of Sotogrande petition the court for a receiving order against the estate of Mr. Harper, also of Sotogrande, which he asks the court to stay until the results of (a) his appeal to the Court of Appeal against the damages awarded to the Elthams, and (b) his claim in the Supreme Court against Mr. Vaughan (one of his past legal advisers) for negligence, are determined, which, in turn, the Elthams resist.

2 Mr. Eltham is now the managing director of Credit Suisse Trustees in Gibraltar. He and his wife are the joint shareholders and directors of a Panamanian company called Serow International Ltd. They own and control it. They had bought and sold houses before and, in early 1987, they decided to move here from The Bahamas.

3 They made an oral contract on February 12th, 1987 with Mr. Harper, through PMS Estate Agents Ltd. acting for both parties, retaining and employing Mr. Harper for reward to act as their surveyor of “El Halcon” (“The Falcon”), a property at El Aguila, Jimena de la Frontera, and to prepare a report on it for them so that they could decide whether or not to buy it, and if so, at what price and on what terms. Mr. Harper knew this was so. He is a chartered quantity surveyor, project manager, claims consultant and a consultant to the building, civil engineering, mechanical and electrical industries.

4 Mr. Harper surveyed the property and submitted reports dated February 20th and March 1st, 1987. The Elthams relied on Mr. Harper and his reports and bought "El Halcon" for £112,000 and put it in the name of Serow International S.A. They moved into it in May 1987 but soon moved out into a Sotogrande villa. They found its external walls and the underside of the drawing-room ceiling were cracked and that these had been filled in previously but had re-opened. They had purchased a property which was worth far less than they had paid for it. It would cost them Pta. 5,428,000, plus professional fees, taxes and other expenses to put right. They could not borrow on "El Halcon," because it was falling down. They had been put to much trouble, inconvenience and discomfort so they issued a writ of summons against him for damages on November 16th, 1988.

5 Mr. Harper took the Elthams' letter before action to his solicitors, a branch of Glaisyers here in Gibraltar, who advised him the proceedings should have been brought in Spain because that was where the property was and where he had done the surveys, and they wrote to the Elthams' solicitor in the same vein.

6 On November 21st, 1988 Mr. Harper took the writ to Mr. Vaughan, a Gibraltar barrister to whom he had been referred by Glaisyers. Mr. Vaughan agreed with Glaisyers that the claim was one for the Spanish courts to decide. Nevertheless, Mr. Harper alleges that he instructed him to act for him and defend the claim, which Mr. Vaughan agreed to do.

7 The Elthams entered judgment in default of acknowledgement on December 6th, 1988. The amount of damages was to be assessed by the Registrar. Mr. Harper returned to Mr. Vaughan, who told him that the default judgment had been set aside, so Mr. Harper had not suffered in any way. This news was premature and incorrect. Mr. Vaughan applied on August 23rd, 1989 to set aside that judgment but Alcantara, A.J. refused to do so on October 9th or 13th, 1989 on the grounds of delay and because the application did not disclose any defence on the merits.

8 Mr. Harper terminated Mr. Vaughan's retainer and took it to Messrs. John Ross-Jones & Co., Solicitors, of Gibraltar, who did not advise him to appeal against Alcantara, A.J.'s decision. Their Mr. Bullock appeared for Mr. Harper before Mr. Registrar Balban for the assessment of damages and interest, which were ultimately fixed at £81,100.75 on April 5th, 1990.

9 Mr. and Mrs. Eltham caused the court's Registrar to issue a bankruptcy notice on June 27th, 1990, addressed to Mr. Harper, telling him that to avoid committing an act of bankruptcy on which bankruptcy proceedings might be taken against him he must, within seven days of its service on him, pay the judgment debt with interest or secure or compound for that sum to their satisfaction, or that of their agent, or the

court. Alternatively, he could apply to the court to have the notice set aside by filing with the Registrar an affidavit declaring he had a counterclaim, set-off or cross-demand which equalled or exceeded the amount they claimed and which he could not have set up in their action against him.

10 Mr. Harper went to another firm of local solicitors, Messrs. Brooke, North & Goodwin, who applied on his behalf on June 21st, 1991 for leave to appeal out of time against the decision of Alcantara, A.J. As an *ex officio* member of the Court of Appeal for Gibraltar, I dismissed the application. Messrs. Brooke, North & Goodwin advised him not to appeal against that result.

11 The time for serving the bankruptcy notice was extended by one month on March 22nd, 1991 and the Registrar was ordered to seal a further copy of it for service. It was further extended by one month on August 16th, 1991 and the Elthams were given leave to serve it on Mr. Harper in Spain. Mr. Eltham served it on him on August 22nd, 1991. The Elthams presented their petition for a receiving order on November 21st, 1991 and it came on for hearing on December 20th, 1991, when it was adjourned by Alcantara, A.J. on condition that Mr. Harper paid into court £60,000 within the next month. Mr. Harper declared that he wished to appeal against the Registrar's assessment of the damages. Mr. Harper could not raise that sum. His family offered a plot in Sotogrande worth not less than £42,000, but the Elthams rejected it.

12 Mr. Gomez was Mr. Harper's next choice of lawyer and some of the consequences were that, first, Mr. Harper issued proceedings against Mr. Vaughan on March 16th, 1992, for damages for breach of his duty of care to Mr. Harper and, secondly, Mr. Harper asked for a stay of the Elthams' petition.

13 The grounds of his application are a mixture of pleas *ad misericordiam* and points of law and of mixed law and fact. He is 66, has been a chartered surveyor since 1956 and practising in Gibraltar since 1989. He has never been accused of negligence. His "sole realistic source of income" is his profession, which he could not practice anywhere if he were declared a bankrupt. His defences to the Elthams' claim would have included these:

(a) They never owned "El Halcon."

(b) They never asked him to value it.

(c) His survey and report were full and correct.

(d) His findings and views were confirmed by the report which the Elthams had from some structural engineers called Messrs. Swinney, Stubbs, Spurgeon & Partners.

(e) The damages award is excessive and the subject of an appeal to the Court of Appeal for Gibraltar.

(f) The Elthams did not mitigate their loss by doing any works of repair on it and they let it stand empty for three years.

(g) Serow has issued proceedings for Pta. 15m. in Spain against the architect and builders, alleging that they are responsible for its condition.

14 None of these defences, Mr. Harper points out, has been adjudicated upon by any court, so the Elthams' petition is based on a judgment which is a default one, born of the incompetence of his legal advisers. Mr. Gomez added that in cross-examination, Mr. Eltham had admitted that Mr. Harper was never asked to advise the Elthams on the value of the property.

15 A receiver would probably not countenance Mr. Harper's proceeding with his appeal to the Court of Appeal for Gibraltar against the quantum of damages awarded by Mr. Registrar Balban or his claim against Mr. Vaughan, even though both the appeal and the claim were *bona fide* and had a chance of success.

16 The Harpers' Sotogrande plot had been offered as security. It was in the name of a Gibraltar company and its shares could be transferred to nominees willing to accept them. It was difficult to value precisely because the property market was so depressed. Mr. Budhrani declared that the property was unacceptable as security. Mr. Harper had not condescended to details as to its size, description or its whereabouts in Sotogrande. This was typical of Mr. Harper's manoeuvres to thwart the Elthams in their attempt to execute the judgment they had obtained lawfully 3½ years ago. He had not told the court what his average annual earnings were, whether or not he had any savings after 36 years as a chartered surveyor, and if so, how much and in what form, or if he had attempted to raise any sum to pay the judgment debt.

17 The Registrar had recorded evidence on the issue of damages over five days and taken into account reports on the building produced by experts for the Elthams and that of Mr. Harper. The appeal from his assessment did not lie to the Court of Appeal for Gibraltar but to the Supreme Court. The Elthams had pleaded from the outset that "El Halcon" was registered in the name of Serow but that they financed its purchase. Serow had no money and no account. They sued Mr. Harper for the loss they suffered. There was no guarantee that their claim against the architect and the builders in Spain would succeed after 3½ years.

18 The Elthams, Mr. Budhrani underlined, could not investigate Mr. Harper's resources, but a receiver could. That was one benefit they would obtain if their present petition were granted. Another would be finality.

19 That concludes a sufficient summary, in my view, of the facts and submissions of counsel in this petition. The relevant law begins with the court's power to stay proceedings, set out in s.91 of the Bankruptcy Ordinance, which reads as follows:

“The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just.”

20 The learned authors of *Williams on Bankruptcy*, 18th ed., at 525 (1968), believe the equivalent section in the UK Bankruptcy Act 1914 (c.59), which is s.113, is meant to stay proceedings after a receiving order, because similar provisions appear in its s.5(4) and (5) which apply to a stay of proceedings before a receiving order, and they are reflected in s.7(4) and (5) of the Ordinance in this way:

“(4) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, or sum ordered to be paid, the court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment or order.

(5) Where the debtor appears on the petition, and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security (if any) being given as the court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.”

These sub-sections, however, in my judgment, apply to circumstances where the alleged debtor disputes the petitioning creditor's claim or debt.

21 Counsel did not cite s.87(2) of the Ordinance which simply states: “The court may at any time adjourn any proceedings before it upon such terms (if any) as it may think fit to impose.” This is in the same terms as s.109(2) of the English Act. This confers a general power to adjourn any proceedings and is regulated by r.173 of the UK Bankruptcy Rules. Adjournments under that rule may only be for a reason satisfactory to the court, to be stated in the order. The court has the widest discretion in the matter but it must be exercised judicially.

22 The UK practice is for a receiving order to be made where a bankruptcy notice is not complied with because the petitioning creditor has a *prima facie* right to it unless the debtor establishes some very

special circumstances which justify the court's departing from it: see *In re a Debtor (No. 452 of 1948)*; *Ex p. Debtor v. Le Mee-Power* (1). Earlier decisions on the like provisions in earlier Acts established that the court has a discretion to exercise: see *Re J.J.R. Whitley, Ex p. Mirfield Comm. Co. Ltd.* (2); *Ex p. Yeatman, In re Yeatman* (3) (16 Ch. D. at 289).

23 In this matter before the court Mr. Harper has not complied with the bankruptcy notice so the Elthams have a *prima facie* right to a receiving order against him. I recall the circumstances in which the debt was incurred and underlined by Mr. Gomez. I take into account the action Mr. Harper has begun against Mr. Vaughan. I cannot say on what has been put before this court that it is frivolous or has no possible chance of success. Mr. Vaughan's defence, if any, is not in the documents, so equally it can be said that it is not plain that Mr. Harper is bound to succeed. Mr. Harper only issued his writ on March 16th, 1992 so he has not moved briskly in that cause. It may well not be heard for about another year. He has not appealed and cannot, I apprehend, appeal against the default judgment on which this petition in bankruptcy is based. His appeal against the quantum of damages is in the wrong court, so it is bound to fail (see s.4(2) of the Supreme Court Ordinance).

24 The upshot is that at the moment this court cannot say there will probably be a fund forthcoming which will be available to Mr. Harper to pay the debt claimed by the Elthams. Having regard to all the matters set out in this judgment this, in my view, is not a case in which the court should depart from the usual practice. There are no very special circumstances which justify it from departing from it. The court, in the exercise of its discretion, will make the receiving order.

25 The petition is granted and a receiving order is made in respect of the estate of Gordon Wilfred Harper. Leave to appeal (if necessary) is granted. A stay of the order is refused, with leave to the debtor to apply on notice with a supporting affidavit, including a full statement of affairs and suggested conditions for a stay. The petitioning creditors' costs are to be paid in any event.

Order accordingly.
