COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 111, 128, 157 & 158 of 2018

IN THE MATTER of The Bankruptcy Act, Chap. 69 of the Statute Laws of The Bahamas

Re: Colin Wright, Bernard Evans, Ray Nairn And Shawn Bowe

Ex parte The Bahamas Communications and Public Officers Union Plan & Trust Fund

B E T W E E N

Colin Wright
Bernard Evans
Ray Nairn
Shawn Bowe

Applicants

AND

The Bahamas Communications and Public Officers Union Plan & Trust Fund
(By Avril Clarke, Andrea Culmer, and Steve Hepburn in their capacities as trustees) (A Judgment Creditor)

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Roy Jones, JA

APPEARANCES: **Mr. Maurice Glinton, QC, with Ms. Meryl Glinton for the Appellants**
Mr. Kahlil Parker, with Ms. Roberta Quant, for the Respondent

DATES: **5 May June 2022; 15 June 2022; 28 July 2022**

****

Civil Appeal – Bankruptcy proceedings – Application for Clarification of the Court's decision (18 June 2020) - Order 59 rule 6(2) Rules of the Supreme Court

The applicants are all former trustees of the BCPOU Pension Plan & Trust Fund who were sued by the Fund's trustees for the recovery of the total amount of two unauthorized loans made to a construction company. The respondent initiated and succeeded in bankruptcy proceedings against all four applicants in the Supreme Court. On 18 June 2020, this Court dismissed the applicant's appeal against the judge's decision not to recuse herself as well as their appeals against adjudications of bankruptcy. The applicants now seek clarification of that decision relative to, inter alia, Order 59 rule 6(2) of the Rules of the Supreme Court. The Court heard the parties and reserved its decision.

Held: application dismissed. The costs of the application are the respondents; such costs to be taxed if not otherwise agreed.

The applicants allege that the application is necessary because the Court did not address an issue arising on the appeal, to wit, the precise terms of the consent orders and how such terms are to be treated. They seek clarification of the Courts' decision and attempt to create a controversy by reference to Order 59 rule 6(2) of the RSC.

Paragraph 1 of the judgment of Crane-Scott, JA (18 June 2020) makes it pellucidly clear, "**the appellants were sued in their capacity as former trustees**". Therefore, Order 59 rule 6(2) of the RSC has no relevance to the case; and in any event, as counsel for the respondent has submitted, if the appellants wished to rely on the indemnity which they believed was available to them they ought to have raised that at the time they consented to payment of the respondent's costs as contained in the orders to which they consented.

J U D G M E N T

Judgment delivered by The Honourable Mr. Justice Jon Isaacs, JA:

1. The applicants seek to move the Court by a Notice of Motion filed on 18 February 2022 ("the NOM"), for clarification of the Court's decision dated 18 June 2020 ("our decision") as it relates to, inter alia, Order 59 rule 6(2) of the Rules of the Supreme Court ("the RSC").

2. By way of providing a background to this application, I repeat paragraphs 1 through 13 of the decision of Crane-Scott, JA which was delivered on 18 June 2020.

> **"1. By way of a Supreme Court Writ action 2012/CLE/Gen/No. 0573 instituted by the Bahamas Communications and Public Officers Union Pension Plan and Trust Fund (acting by two of its trustees) and filed on 27 April, 2012, the appellants were sued in their capacity as former trustees for the recovery of the amount of two unauthorized loans made to the Kendal Williams Construction Company Limited (totalling $1,350,000.00) which the appellants were alleged to have negligently disbursed to the company in breach the Trust Fund's rules and in breach of the appellants' fiduciary and other duties owed to the Trust Fund.**
>
> **2. Subsequently, pursuant to a Consent Order made by Barnett CJ (as he then was) on 7 October, 2014, Final Judgment in the sum of $1,350,000.00 was entered against the appellants on 15 October, 2014 with interest and costs. When the Consent Order was made, the appellants were represented by their Counsel on record, Mr. Donovan L. Gibson. It is undisputed**

that following the entry of the Final Judgment, neither the Consent Order nor the Final Judgment has ever been appealed to this Court and accordingly, they remain in full force and effect to this day.

3. Following entry of Final Judgment, the respondent/judgment creditor applied pursuant to O. 48, RSC for examination of the appellants/judgment debtors; and by Order dated 1 March, 2016, they were required to appear before the Acting Assistant Registrar on 19 April, 2016 for examination.

4. Some 19 months after the entry of Final Judgment and some 4 days prior to the date fixed for their examination before the Acting Assistant Registrar, the four appellants/judgment debtors applied by Summons filed on 15 April, 2016 in Supreme Court Writ action 2012/CLE/Gen/No. 0573 ("the Impugned Action") to postpone the examination; and for further orders to strikeout the Writ of Summons and vacate the Final Judgment as it related to each of them.

5. We pause to observe that in practical terms, this essentially meant that rather than taking steps to appeal against the Consent Order and the Final Judgment, the four appellants/judgment debtors launched an attack by Summons on the validity of the Impugned Action itself, alleging it to have been a nullity ab initio. As appears on the face of the Summons, the strike-out application purported to be made pursuant to RSC, O. 18 r. 19 (1)(a) and (b) and under the inherent jurisdiction of the court on grounds, inter alia, that he Writ and Final Judgment were a nullity ab initio and further, constituted an abuse of process.

6. Nothing in any of the four Records of Appeal indicates what actually transpired on the date originally scheduled for the examination of the appellant/judgment debtors before the Acting Assistant Registrar. It appears that the examination may not have taken place on 19 April, 2016 as scheduled as there is in all four Records of Appeal, a copy of a Notice of Adjourned Hearing filed by counsel for the respondent which indicates that the examination of the Judgment Debtors was re-scheduled for hearing on 29 September, 2016 before one of the Registrars of the Supreme Court. What, however, is undeniable is that the

appellants' strike-out Summons of 15 April, 2016 has, for whatever reason, never been brought on for hearing in the court below.

7. Meanwhile, on 24 April 2017, the respondent/judgment creditor initiated bankruptcy proceedings against each of the appellant/judgment debtors. The four Bankruptcy Petitions were filed approximately 2 years and 6 months following entry of the Final Judgment and just over 1 year after the filing of the pending strike-out Summons which even at that date remained unheard.

8. Supreme Court Bankruptcy Petition 2017/COM/Bnk/No. 0004 ("the Wright proceedings") came on before Charles J., ahead of the other three. <u>On 15 January, 2018, the learned Judge made an Order of Adjudication against Mr. Wright</u> who had attended the hearing pro se. Following issuance of the Adjudication Order, Mr. Wright applied to the judge by Ex parte Summons filed on 12 February, 2018 for interim relief in the form of: (i) an injunction to restrain publication of the Gazette advertisement which was to issue in accordance with the Bankruptcy Act; and/or (ii) a stay of the bankruptcy proceedings pending the hearing and determination of the strike-out Summons of 15 April, 2016 filed in the Impugned Action.

9. Mr. Wright's Ex parte Summons was heard on 12 February, 2018; and in a written Judgment ("the Injunction Ruling") pronounced on 20 April, 2018, the learned judge refused the interim injunction and ancillary relief which he had sought.

10. On 14 May, 2018 Mr. Wright filed his Notice of Appeal Motion seeking, inter alia, an order from this Court setting aside the Injunction Ruling; granting him the interim and ancillary relief sought in his Summons; and a further order remitting the appellants' pending strike-out Summons to the Supreme Court for hearing. Charles J.'s Injunction Ruling located in Wright's Record of Appeal is the specific focus of Wright's appeal.

11. In the meantime, the remaining Bankruptcy Petitions against Evans, Nairn and Bowe and numbered: 2017/COM/Bnk/No. 0007; 2017/COM/Bnk/No. 0006 and

2017/COM/Bnk/No. 0005 respectively, came on for hearing before Charles J., on 17 April, 2018. Before substantive hearing of the Petitions commenced, counsel for appellants Evans, Nairn and Bowe, Mr. Glinton Q.C., made an oral application for the judge to recuse herself from hearing the Petitions. After hearing submissions on the matter, the learned judge handed down a written Ruling dated 24 May, 2018 ("the Recusal Ruling") dismissing the application with costs to the respondent.

12. Thereafter, the learned judge proceeded to hear the three Petitions; and <u>on 20 June, 2018 made Orders of Adjudication against appellants Evans, Nairn and Bowe</u> respectively.

13. All three appellants Evans, Nairn and Bowe then filed individual appeals each seeking to impugn the Recusal Ruling as well as the Adjudication Orders which had been made in relation to each of them. The judge's Recusal Ruling of 24 May, 2018 together with the Adjudication Orders of 20 June, 2018 located in their respective Records of Appeal provide the specific focus of their appeals." [Emphasis added]

3. At paragraphs 31 and 32 of the decision of Crane-Scott, JA, the following appears:

> **"31. Moreover, Mr. Glinton's fundamental contention that the Writ and Statement of Claim was a nullity is in our judgment flawed. On its face, the Impugned Action was instituted by the new trustees of the Trust Fund against the former trustees of the Trust Fund to recover monies due to the Fund negligently disbursed in breach the Trust Fund's rules and in breach of the appellants' fiduciary and other duties owed to the Trust Fund. It is certainly possible for a trustee to sue a former trustee to recover trust assets which have been squandered by the former trustees in breach of their fiduciary obligations. This point was made by Morrit V-C in Dalraida Trustees Ltd v. Woodward [2012] EWHC 21626 (Ch) in which he approved the following excerpt from Lewin on Trusts:**
>
>> **"The other trustees, including any judicial or other trustees, have locus standi to take proceedings against defaulting trustees. They can obtain replacement of lost assets even though they were themselves also guilty of the breach. Usually, where trustees take proceedings against former**

> **trustees to have a breach of trust redressed, no issues arise between one beneficiary and another, or as between a beneficiary and the current trustees. The object is to secure the return of the trust property for the benefit of all the beneficiaries according to their respective interests."**

> **32. The former trustees acknowledged their liability to make good the loss to the trust. A person cannot acknowledge an obligation, and consent to judgment against him, allow the judgment to remain unchallenged for months leading the judgment creditor to believe that issue of the obligation has been resolved and when the claimant seeks to enforce the judgment debt seek to challenge the existence or validity of the obligation. In the end there was no serious issue to be tried and the judge was correct to so find."**

4. The Court dismissed the appellants' appeals and at paragraphs 41-2 of her judgment Crane-Scott, JA said:

> **"41. For all the foregoing reasons Wright's appeal is dismissed. We affirm the learned judge's decision not to grant the injunction. The costs of Mr. Wright's appeal are awarded to the respondent to be taxed, if not agreed.**

> **42. The appeals of Evans, Nairn and Bowe are also dismissed. We affirm the learned judge's decision not to recuse herself from hearing bankruptcy Petitions numbered: 2017/COM/Bnk/No.0007; 2017/COM/Bnk/No.0006 and 2017/COM/Bnk/No.0005 respectively. The Adjudication Orders she made are consequently affirmed. Costs of the Evans, Nairn and Bowe appeals are awarded to the respondent to be taxed, if not agreed." [Emphasis added]**

5. The appellants applied to the Judicial Committee of the Privy Council for permission to appeal our decision, however, on 29 September 2021, their Lordships refused permission to appeal for the following reason:

> **"1. permission to appeal should be REFUSED because the applications do not raise a point of law of general public importance, there is no reasonable prospect of success and no infringement of the Bahamas Constitution. The stay applications should also be refused".**

> **2. Subject to any submissions (to be filed within 21 days of this Order) each Appellant should pay the Respondents' costs of the application and, where the Respondents apply for costs, the amount of those costs should be assessed if not agreed." [Emphasis added]**

6. We note paragraph 18 of the respondent's submissions that outlines grounds 6 and 8 found in the appellants' application for special leave before the Privy Council:

> **"18. On the 17th day of May A.D. 2021, the Appellants filed a special leave application to the JCPC with ten grounds of appeal. Ground 6 of the Appeal stated: "That the Court of Appeal erred in law by not considering whether the Consent Orders entered against KWC and the Former Trustees in relation to the same Principal Sum, doubly compensated and unjustly enriched the Fund, in respect of which the Applicant rightly contested the lawfulness thereof pursuant to s.7 of the Act (emphasis ours)". Ground 8 of the Appeal stated: "Whether the Court of Appeal erred in fact and in law by failing to consider (adequately or at all) the effect of the Former Trustees having been sued individually in their capacity as trustees, and there being no trial resulting in a finding that the Former Trustees acted negligently and/or in breach of trust and/or fiduciary duty, and their legal entitlement to indemnification in respect of legal actions against them, pursuant to Rules of the Supreme Court Ord. 59 r.6(2) and/or 5.36 of the Trustee Act (emphasis ours)""**

7. The Board concluded, inter alia, that both grounds 6 and 8 in the application for special leave had no reasonable prospect of success. The Board ordered that conditional on any submissions that may be made by the parties, each appellant was to pay the respondent's costs. We were advised by Counsel from the Bar table that the respondent took advantage of the Privy Council's decision and provided submissions on costs; but the appellants failed to do so.

8. For the sake of completeness, I set out paragraph 49 of Madam Justice Indra Charles' decision dated 30 April 2018, which related to:

> **"[49] The argument that the Writ of Summons and Statement of Claim in the impugned action is a legal nullity is, in my opinion, not only frivolous and nonsensical, to use Mr. Parker's vernacular, but it is illogical and inexplicable particularly since it is clear from Mr. Wright's own affidavit (paragraph 3) that**

he and the other Defendants were sued "as former trustees of the Trust Fund and named as Second Defendants in that Action". I agree with Mr. Parker that the fact that Mr. Wright and the other Defendants were identified in the heading of the substantive action as having been liable to the Trust Fund for their unlawful conduct while serving as its trustees, by no means, suggest that the Trust Fund was suing itself. The current trustees of the Trust Fund have sued former trustees (including Mr. Wright) for alleged breach of their fiduciary duties and other duty to the Trust Fund for, among other things, having "failed to have meaningful, or any, discussion about the prudence of the said loans to the 1st Defendant and to seek or secure expert, or any advice on the prudence of the said loan contracts prior to entering into the same and to investigate or otherwise properly determine whether the 1st Defendant (Kendal Williams Construction Company Limited) had the ability to repay the loan...."""

Present Application

9. The NOM states, inter alia that this is "an application by the Applicants for clarification of the Court's Decision dated18th June 2020 as relates to, inter alia, R.S.C. Ord. 59 r. 6(2)".

10. In their submissions the applicants allege that the application is necessary because the Court did not address an issue arising on the appeal, to wit, the precise terms of the consent orders and how such terms are to be treated.

Discussion

11. The present proceedings seek clarification of our decision and attempts to create a controversy by reference to Order 59 rule 6(2) of the RSC. That rule states as follows:

"(2) <u>Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee</u>, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative or the mortgaged property, as the case may be; and the Court may otherwise order only on the ground that the trustee, personal representative or mortgagee has acted unreasonably or, in the case of a trustee or personal representative, has in substance acted for his own benefit rather than for the benefit of the fund." [Emphasis added]

12. As paragraph 1 of the judgment of Crane-Scott, JA makes pellucidly clear, "**the appellants were sued in their capacity as former trustees**". Therefore, Order 59 rule 6(2) of the RSC has no relevance to the case; and in any event, as Mr. Parker has submitted, if the appellants wished to rely on the indemnity which they believed was available to them they ought to have raised that at the time they consented to payment of the respondent's costs as contained in the orders to which they consented.

13. In my view, Order 59 r. 6(2) appertains to cases where a trustee is involved qua trustee.

14. It is apparent that the present application is an unnecessary and futile attempt to steal a march on the judgment of the Court that has been delivered and determined adversely to them almost two years ago; and some seven months after the decision of the Privy Council.

15. Moreover, the appellants' Notice of Motion does not condescend to advert to any authority that would undergird their application for this Court to exercise the discretion they seek. Resort to the usual invocation of the "inherent jurisdiction of the Court" cannot avail the appellants inasmuch as the judgment of the Court and the order made by the Court for the payment of the costs is unambiguous, to wit, the appellants were sued in their capacity as former trustees and the costs are to be paid by the appellants.

Conclusion

16. There is nothing in the judgment of the Court that requires clarification. We are not persuaded that this application has any merit and the application is dismissed.

Costs of the Application

17. The costs of the application are the respondents; such costs to be taxed if not otherwise agreed.

The Honourable Mr. Justice Isaacs, JA

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Jones, JA