

Court of Appeal.
ROYAL COURT

14.

24th January, 1990

Before: J.M. Chadwick, Esq., Q.C., (President)
R.D. Harman, Esq., Q.C.,
A.C. Hamilton, Esq., Q.C.

Between:

Samuel Hunter Norris

Appellant

And:

Emprunt (Jersey) Limited

Respondent

Appeal against the Judgment of the
Royal Court (Samedi Division) of
the 2nd June, 1989, whereby the
appellant was refused leave to make
"cession" of his assets, pursuant
to the "Loi (1832) sur les Décrets".

Advocate P.C. Sinel for the Appellant,
Mr. B.N. Alexander, Managing Director
of the Respondent, on behalf of the
Respondent,
Advocate S.C. Nicolle, Amicus Curiae.

JUDGMENT

HAMILTON, J.A: On 12th May, 1989, the present appellant by a formal Act of the Royal Court declared his intention of making a cession générale of all his movable goods and heritages in accordance with Article 1 of the Loi (1832) sur les décrets.

The cession was proposed to be made on 26th May. At the time of this declaration the appellant was a prisoner for debt, having been incarcerated at the instance of Emprunt (Jersey) Limited, to whom I shall hereafter refer as Emprunt.

On 24th May, a written representation was prepared on his behalf to which was appended an affidavit setting forth his financial and other circumstances. That affidavit was formally sworn by the appellant when he appeared before the Royal Court on 26th May.

The substance of the evidence contained in that affidavit will be described later in this judgment. It may be noted in passing that this evidence was tendered by the appellant at this stage, although in terms of the law of 1832 it was necessary for a person in his situation simply to swear to his state of affairs after he had been admitted to cession if that had occurred. I refer in that context to Article 8 of the law.

The application came before the Court on 26th May when Emprunt as well as the appellant was legally represented. On Emprunt's behalf there was produced a file note bearing the date 3th November, 1987, partly prepared by a Mr. Ross. The note bore to be a record of a discussion on that date between the appellant and Mr. Ross, an agent of Emprunt, in relation to the appellant's affairs including his then outstanding debt to Emprunt. The note also bore to record certain other related matters.

The proceedings were then adjourned until 2nd June. In response to the production of this file note a supplementary affidavit was prepared for the appellant to which he swore before the Court on 2nd June. That supplementary affidavit made certain comments on the file note, accepting some but not all the features of the narrative therein contained.

When consideration of the application was resumed by the Court constituted by the Bailiff sitting alone, the appellant and Emprunt were again legally represented.

The appellant's advocate in moving the application took the Court through the affidavit and supplementary affidavit which were tendered in evidence in support of the application. Thereafter the advocate representing Emprunt addressed the Court. According to the statement of the appellant's advocate to this Court the address of Emprunt's advocate to the Royal Court left doubt as to whether Emprunt was actually opposing the application. However, Emprunt's advocate, we are told, read to the Court the terms of the file note of 3rd November, 1987 despite objection to that procedure being taken by the appellant's advocate upon the ground that inadmissible hearsay evidence was being tendered by Emprunt. Thereafter the appellant's advocate addressed the Court again contending, according to what we are told, that if the application were being opposed, or if the good faith of the appellant were, on the basis of the file note, being disputed, witnesses should be heard on the matter.

The Bailiff, without calling for further evidence and without, we are told, giving any prior indication of how he was disposed towards the application, pronounced an Order set out in the Act of Court in the following terms:

"Et aujourd'hui ledit jour 2 Juin, 1989, après que les parties ont été entendues par le moyen de leurs avocats, vu l'ensemble des circonstances, la Cour, sans admettre l'acteur à faire cession, l'a libéré de prison, et ce à condition que l'acteur fait paiement de la réclamation à raison de vingt-cinq livres sterling par semaine, le premier paiement devant être effectué à la fin du semaine qu'il commence à travailler".

No judgment was delivered by the Bailiff nor is there available to this Court any transcript of the proceedings. As Emprunt was not legally represented in the proceedings before us we are unable to obtain confirmation of the procedural narrative given to us by the appellant's advocate but we have no reason to doubt its accuracy.

In presenting this appeal the advocate for the appellant initially submitted that there were three factors of relevance to an application for cession: namely firstly whether the debtor was unable to pay his debts; secondly whether he was in good faith; and thirdly whether he had come to his present condition by financial misfortune described by Le Gros as "malheur".

He submitted that the Bailiff was bound to grant an application for cession if these three elements were satisfied.

In the course of the argument, however, he accepted that it was legitimate to take into account not only present capacity to pay debts but also prospective capacity to do so, including such capacity as might arise from any future employment. He also accepted that in determining the cession, which he described as a liberty, the Court was exercising a judicial discretion.

This Court has had the benefit of an address by Miss Nicolle, the Crown Advocate, on various aspects of the law of insolvency in this Island and information put by her before us has confirmed, by reference to one answer at least to a question put by the commissioners in 1861 when looking into various aspects of the laws of Jersey, that there was regarded as being a discretion in the Court in relation to whether or not cession should be granted. That is to say that notwithstanding that the three elements earlier identified could be said to have been satisfied the Court nonetheless was entitled to look at the matter in the exercise of judicial discretion. It would also appear that within the scope of that discretion it was legitimate to take into account the circumstance that the debtor might have the prospect of acquiring means in the future. As illustrative of that in the nineteenth century, when there were serious restrictions on the disposal of immovable property, such was the circumstance that an heir might reasonably be expected to come into the property of his father or other relative. That principle appears to us equally to be applicable in a situation in which in other circumstances a debtor might be expected to acquire property whether of a capital or revenue nature.

Applications for cession are, we are informed, in modern circumstances, very rare. In this case the Court had before it evidence from the appellant in the form of an affidavit sworn by him, supplemented by a supplementary affidavit in which he had had an opportunity, which he exercised, to deal with a fresh matter which had been introduced, namely the note of November, 1987.

In these circumstances in my view the proper approach is to consider whether the decision in fact arrived at by the Royal Court was one which a Court acting on the evidence properly admitted before it could reasonably have made. Or testing the matter slightly differently the issue is whether the decision is explicable only on the basis that inadmissible evidence or some other illegitimate consideration had been taken into account.

Applying these tests to the present circumstances I am satisfied that the decision of the Bailiff is not open to successful challenge. The evidence tendered on behalf of the appellant in affidavit form disclosed that when in employment he works as a foreman on a building site earning approximately £212 per week. Out of this he pays £43.10 per week in rent and there is deducted at source £55 per week in repayment of a debt due to the Income Tax Department. He thus when working has a disposable income of approximately £114 per week, viewing matters as at May, 1989. From this he has periodical household liabilities amounting on average to about £21 per week, leaving a net figure of about £93 per week. If the Bailiff's decision is upheld the appellant will require, on the assumption that after June, 1989, he recommenced work, to pay £25 per week to Emprunt leaving a balance of some £68 per week.

What precisely would happen after the Bailiff's decision could of course not be known to the Bailiff, though we understand from information put before us today that the Bailiff's anticipation that the appellant would be able to obtain employment was not without substance. The appellant's liabilities as disclosed in his affidavit amount to £12,935.19 of which £4,880.16 is due to Emprunt and some £2,518.60 to the Income Tax Department. The latter debt will, under the arrangements described, be wholly discharged after a further eleven months or so of working. The prospect of the appellant's resuming employment has to be assessed from the

evidence tendered as to his work record. His affidavit disclosed that although over the past two years his employment has been interrupted, not perhaps surprisingly in relation to a person engaged in the construction trade, he has had substantial periods of employment including employment between April and December, 1987, with Thatchers Limited and between May, 1988, and April, 1989, with Regal Construction Limited. His inability to obtain further employment thereafter was stated in his affidavit to be owing to his incarceration which commenced on 3rd May, 1989. The appellant was said to be a married man with a young family; although stated to have an epileptic condition and to have suffered from stress due to his financial predicament he had succeeded in being in employment for by far the largest part of the last two years preceding the determination of the cession application.

On that narrative a judge would have been entitled in my view to conclude that if released from prison the appellant would be capable of regaining remunerative employment.

In considering whether a cession should be granted the Court had in my view to consider the full circumstances disclosed by the appellant's affidavits including the legitimate interests of his creditors. An important consequence of the grant of cession is that in respect of the surrender of all the debtor's assets he is entitled to an absolute discharge of all debts incurred prior to the cession. Having regard to that legal consequence the Court properly in my view would be expected to proceed with caution before granting such an application.

The assets were valued in the appellant's affidavit at a few hundred pounds. As earlier stated his liabilities as at 2nd June approached £13,000. The grant of cession would accordingly have significantly prejudiced the appellant's creditors who would thenceforth be denied the possibility of having their debts paid in whole or in part by contributions from the appellant's future earnings.

Nor was cession the only insolvency proceedings open to the appellant. A declaration 'en désastre' could have been made on his own application. This would during its dependency have removed the possibility of further proceedings against him including proceedings giving rise to imprisonment for

debt. On the other hand désastre would not have resulted in his prior debts being immediately discharged.

In my view a judicial decision in the terms pronounced by the Bailiff would, if arrived at on the basis of the evidence adduced by the appellant himself, have been amply justified and is not open to successful challenge in this Court.

There is nothing in the material before us to warrant an inference in my view that the Bailiff proceeded upon any basis of disputed fact of an important character such as might require the hearing of oral testimony from witnesses to resolve. The appellant had in his supplementary affidavit commented on the file note of 3rd November, 1987, accepting parts at least of its narrative. Insofar as the file note raised the issue, apparently of importance at one stage, of property in Ireland which the appellant accepted he had mentioned as a possible inheritance, the appellant dealt with this matter in his supplementary affidavit, including providing search vouchers in support of the proposition that he had in fact inherited no property there. There are in my view no grounds for supposing that the Bailiff proceeded on the basis that the appellant was concealing the existence of any property rights in Ireland. In other respects the appellant's supplementary affidavit does not in my view materially dispute the factual narrative of the file note, albeit there may be differences of emphasis or of comment. In relation to the appellant's first affidavit the Bailiff was entitled, in my view, to accept the appellant's evidence of fact without necessarily accepting the inferences which the appellant sought to draw as to his future prospects of employment. He was also entitled to form an impression in relation to the appellant's general attitude towards his financial position and his responsibilities to his creditors including such inference as was appropriate from his failure to explain how his substantial borrowings had been dispersed.

If the Bailiff took the view that the factual narrative was itself a sufficient basis upon which to decide this application, a view which in my opinion he could reasonably have done, it was unnecessary and indeed inappropriate to require additional evidence to be read. That is of course not to say that there may not be circumstances in which further evidence is appropriate. That appears to have been the procedure followed in the case

of Schnitker -v- Inman and Lombank, Ltd (1963) 254 Ex 272, 289, in the reports of the Table des Décisions of the Royal Court. And in other circumstances it may also be appropriate to delay a determination until some further enquiry has been made as appears to have been the case in the application described as Hescott -v- Matthew; Pinney intervenant (1908) 225 Ex 443, reported in the fifth series of the Table des Décisions of the Royal Court.

We were referred to various authorities in the course of argument by the appellant's counsel. In this connection he relied upon four cases in the English courts: R. -v- Birkenhead Justices; ex parte Fisher (1962) 3 All ER 837, R. -v- Kingston-upon-Hull Rent Tribunal; ex parte Black (1949) 1 All ER 260, Blaise -v- Blaise (1969) 2 All ER 1032 and R. -v- Edmonton Justices; ex parte Brooks (1960) 2 All ER 475. We were also referred to Halsbury's Laws of England (4th Ed'n) (Vol. 1) para. 76, where these cases appear with others in the footnotes.

These cases in my view illustrate various situations in which irregularities have vitiated the proceedings but they are not, in my opinion, pertinent here. The Bailiff did not, as in Kingston, proceed without evidence. There was no procedural misunderstanding as occurred in the Birkenhead Justices case. There was no refusal to allow cross-examination of a witness who had given adverse evidence in chief as in Blaise. There was no refusal to allow evidence to be heard on a matter materially in issue as in the Edmonton case.

It was further argued that in circumstances where the Court was not simply adjudicating between parties, but was considering an application made to it for a discretionary remedy, the Court had an obligation before deciding to refuse any application to make clear to the applicant or his representative in what respect it was not satisfied that the application should be granted. It was said to be an obligation on the judge if minded to refuse the application to state what was in his mind so that the applicant might consider how to respond to that state of affairs. No authority was cited for that proposition. It is for the applicant to satisfy the judge in my view with the cogency of his evidence and his argument. Whatever the advantages in appropriate cases of exchanges between counsel and judge, there can be no

rule, in my view, that before reaching a decision a judge has to disclose his thought process.

In this connection one case was cited, the case of Skinner -v- Le Main (5th April, 1989) Jersey Unreported. That was a case in which, after evidence had been led on behalf of the plaintiffs and evidence had partially been led on behalf of the defendant, the Court at the beginning of resumed proceedings, intimated that it was in effect not going to hear the case further, the position intimated being that the court was satisfied that the application should be refused. That occurred without the applicant's counsel being given any opportunity to address the Court on the evidence which had been read on the applicant's behalf or as to the effect of that evidence. In my view it clearly has no bearing to the circumstances which occurred in the present case.

It is for these reasons that my motion would be that this appeal be dismissed.

THE PRESIDENT: I agree.

HARMAN, J.A: I agree.

ADVOCATE SINEL: Thank you, Sir. Is it the right time to ask for costs in this case?

HAMILTON, J.A: What was the ... the Order below was that Mr. Norris should pay your (indistinct) costs was it?

MR. ALEXANDER: We asked for costs in our submission. We did ask for costs.

HAMILTON, J.A: Thank you, Mr. Alexander. Mr Sinel do you wish to oppose that?

ADVOCATE SINEL: Sir, I understand, that costs are, in any event, added on to the (indistinct) of Mr. Norris.

HAMILTON, J.A: For what reason?

MR. ALEXANDER: Because that's in the contract.

HAMILTON, J.A: Well, to avoid doubt we'll make an Order that Mr. Norris should pay the costs of the opposing party, respondent, Emprunt. Yes, Mr. Alexander, you'll have your costs [of the appeal].

Authorities

- Rules of the Royal Court, 1982 (as amended): 6/18.
- Phipson on Evidence (13th ed'n): para. 16/01-16/06.
- Halsbury (4th ed'n) (Vo. 1): para 76.
- Board of Education -v- Rice (1911) A.C. 179.
- General Medical Council -v- Spackman (1943) A.C. 627.
- R. -v- Kingston-upon-Hull Rent Tribunal: ex parte Black (1949) 1 All ER 260.
- Chettiar -v- Chettiar (1962) 1 All ER 494.
- R. -v- Birkenhead Justices: ex parte Fisher (1962) 3 All ER 837.
- Vye -v- Vye (1969) 2 All ER 29.
- Mayes -v- Mayes (1971) 2 All ER 397.
- Blaise -v- Blaise (1969) 2 All ER 1032.
- R. -v- Edmonton Justices: ex parte Brooks (1960) 2 All ER 475.
- University of Ceylon -v- Fernando (1960) 1 All ER 631.
- Wilson -v- Equimalt Nanaimo Railway Company (1922) 1 A.C. 202.
- T.A. Miller, Ltd -v- Minister of Housing and Local Government (1968)
2 All ER 633.
- Rules of the Supreme Court: 0.38 r.1: p.588
0.38 r.20: p.612.
- Skinner -v- Le Main (5th April, 1989) Jersey Unreported.
- Loi (1832) sur les décrets.
- Report of the Commissioners, appointed to inquire into the Civil, Municipal,
and Ecclesiastical Laws of the Island of Jersey, 1861: p.p. lix, lx,
133-4, 236, 358-363, 646-649.
- Address by the Viscount of the Royal Court on Jersey Insolvency Law &
Practice to the Association Européenne des Praticiens en Procédures
Collectives, 1989.
- Schnitker -v- Inman and Lombank, Ltd (1963) 254 Ex 272, 289.
- Hescott -v- Matthew; Pinney intervenant (1908) 225 Ex 443.