COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/COM/bnk/00004

BETWEEN

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

RE: COLIN WRIGHT

Ex Parte THE BAHAMAS COMMUNICATIONS AND PUBLIC OFFICERS UNION PENSION PLAN AND TRUST FUND

(By AVERIL CLARKE, ANDREA CULMER and STEVE HEPBURN in their capacity as Trustees)
(A Judgment Creditor)

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Maurice Glinton QC and Ms. Meryl Glinton for the Judgment Debtor
Mr. Kahlil D. Parker and Ms. Roberta Quant for the Judgment Creditor

Hearing Date: 12 February 2018

Bankruptcy Proceedings – Judgment Debtor absent at hearing although personally and properly served – Bankruptcy Order adjudicating Judgment Debtor a bankrupt made in his absence

***Ex Parte* Summons to restrain advertisement in Gazette – *Inter-Partes* hearing – Is there a serious issue to be tried – Damages as an adequate remedy - American Cyanamid Principles apply**

Is Writ of Summons and Statement of Claim in impugned action a nullity – Can Final Judgment made by consent in the presence of attorneys be struck out and/or vacated nineteen months after Order was made – Should Final Judgment have been appealed to the Court of Appeal – No reasonable prospects of success

Bankruptcy Act, Ch. 69 of the Statute Laws of The Bahamas – Bankruptcy Rules referred to – No substantial injustice –Judgment Debt in excess of $1.3 million still unsatisfied

The Judgment Debtor (JD) applied for an interim injunction to restrain the Judgment Creditor (JC) from publishing in the Gazette, the Bankruptcy Order dated 15 January 2018 adjudicating him a bankrupt, for all purposes of the Bankruptcy Act ("the Act").

The Order was made in the absence of the JD who was personally and properly served to attend Court. It is a fact that a date was not solicited from present Counsel on record as is required by Practice Directions No.1 of 2001.

The Bankruptcy Order of over $1.3 million has its genesis from a Final Judgment dated 15 October 2014 further to a Consent Order made by Barnett CJ (as he then was) on 7 October 2014. There was no appeal to the Court of Appeal of the Final Judgment. In the interim and nineteen months later, the JD applied to the Registrar to have the Final Judgment struck out or vacated on two legal grounds namely (i) the Writ of Summons which commenced the action is a nullity and (2) the impugned action was not brought as a mortgage action as required by the Rules of Court. To date, the Summons to strike out cannot be located either in the Registrar's Office and/or the Listing Office.

The JC strenuously opposed the application for an interim injunction asserting that this Court is *functus* and the JD should have directed his grievances to the Court of Appeal since the Final Judgment was derived from a Consent Order when the JD was represented by Counsel. Put differently, the JC asserted that a Judge of a court of concomitant jurisdiction cannot strike out and/or set aside the Final Judgment of another judge of the same Court.

HELD: refusing to grant the application for an interim injunction to restrain the advertisement of the Bankruptcy Order in the Gazette until the Summons to strike out is determined;

1. Where an application is made for an interlocutory injunction, in the exercise of the Court's discretion, an initial question falls for consideration, i.e. whether there is a serious issue to be tried. If the answer to that question is yes, then a further question arises: would damages be an adequate remedy for the party injured by the Court's grant of, or its failure to grant, an injunction? If there is doubt as to whether damages would not be adequate, the Court then has to determine where does the balance of convenience lie?: **American Cyanamid Co. v Ethicon Limited** [1975] A.C. 396 at 407; **Series 5 Software Ltd v Clarke and others** [1996] 1 All E.R. 853 at 865; **Grenada Co-operative Bank Limited v Valma Jessamy** –Claim No. GDAHCV2013/0313 (unreported) and **Cambridge Nutrition Ltd v BBC** [1990] 2 All ER 523 referred to.

2. Applying the principles derived from the landmark case of **American Cyanamid,** there is no issue to be tried, moreover, a serious one: **Tetrosyl Ltd v Silver Paint and Lacqueur Co. Ltd** [1980] FSR 68 relied upon.

3. Even if there is a serious issue to be tried, damages would be an adequate remedy. The JC is a Trust Fund and there is no evidence that it would be unable to pay damages; even substantial damages.

4. There is no reasonable prospect of success with respect to the legal grounds raised in the application namely that the Writ of Summons which commenced the impugned action is nullity and that the said action should have been brought as a mortgage action.

5. The Practice Direction No. 1 of 2001 makes provision for attorneys to confer with one another before securing hearing dates but the fact that Counsel for the JD was not consulted, while procedurally bad, is not fatal as the JD was personally and properly served as required by Rule 57 of the Bankruptcy Rules.

6. The Court finds that no substantial injustice was caused to the JD as the Judgment debt remains wholly unsatisfied pursuant to the Final Judgment which has not been appealed to the Court of Appeal.

7. The Supreme Court is *functus* and no judge of the Supreme Court may be able to strike out the Final Judgment of another Supreme Court Judge which Judgment was derived from a consent order made in the presence of Counsel especially since the Summons to strike out was made nineteen months after the Final Judgment.

JUDGMENT

Charles J:
Introduction

[1] By *Ex Parte* Summons filed on 12 February 2018, the Judgment Debtor, Colin Wright ("Mr. Wright") seeks the following relief namely:

1. An Order restraining the advertisement by the Judgment Creditor, the Bahamas Communications and Public Officers Union Pension Plan & Trust Fund ("the Trust Fund") whether by current trustees Averil Clarke, Andrea Culmer and Steve Hepburn (or any one or others of them) or its officers and directors or servants or agents or otherwise howsoever, of the Adjudication Order dated 15 January 2018 ("the Bankruptcy Order") made by this Court, by publishing a copy thereof in the Gazette in accordance with section 8 of the Bankruptcy Act, Ch. 69 of the Statute Laws of The Bahamas ("the Act") and;

2. An Order staying further proceedings under or in execution or furtherance of the said Bankruptcy Order, and other legal process against the Judgment Debtor under the Act, until after the determination of his pending application (made jointly with other former trustees of the Trust Fund Bernard R. Evans, Shawn Bowe, Mario Curry and Ray Nairn) to vacate the Final Judgment against them in Supreme Court Action 2012/CLE/gen/0573, entered by the Trust Fund, or further order.

[2] The *Ex Parte* Summons was made pursuant to Order 29 Rule 1 of the Rules of the Supreme Court, 1978 ("RSC") in accordance with section 19 of the Supreme Court Act, 1996, or otherwise under the inherent jurisdiction of the Court. It was supported by a detailed affidavit of Mr. Wright filed on 12 February 2018. Learned Counsel Mr. Glinton QC who appeared for Mr. Wright provided electronic as well as written submissions. Learned Counsel for the Trust Fund Mr. Parker did not. The reason was obvious. Mr. Parker was not aware of the application which was filed and heard on the same day at very short notice to him. That being said, he was given leave to provide written submissions by electronic means which he did on 16 February 2018. The Trust Fund also filed an affidavit of Roberta Quant on the said day which I have not considered since her affidavit was not tested in cross-examination. Reply submissions on behalf of Mr. Wright were filed on 19 February 2018.

[3] As I understand it, and it is evident at page 34 of the transcript of proceedings of 12 February 2018, the Court is only concerned with the first limb of the application which merely seeks an injunction to restrain the Trust Fund from advertising the Bankruptcy Order by publishing it in the Gazette.

[4] Briefly put, the Trust Fund opposed the application. Learned Counsel Mr. Parker argued that these proceedings concerned a wholly unsatisfied judgment debt pursuant to a Final Judgment entered by the Supreme Court further to a Consent Order made by Barnett CJ (as he then was) on 7 October 2014 and filed on 14 October 2014 in Supreme Court Action 2012/CLE/gen/00573 ("the impugned action"). According to him, neither the Consent Order nor the Final Judgment which was entered on 15 October 2014 has been appealed to the Court of Appeal. Therefore, the substance and efficacy of the judgment debt is incapable of substantive challenge before the Supreme Court. If I understand Counsel well, essentially, he is saying that no judge of the Supreme Court can set aside a Final Judgment made by a court of concomitant or concurrent jurisdiction, namely the Supreme Court. Such power only rests with the Court of Appeal.

Procedural history

[5] On 27 April 2012, the Trust Fund instituted the impugned action against Kendal Williams Construction Company Limited ("the 1st Defendant") and (1) Bernard Evans (2) Shawn Bowe (3) Mario Curry (4) **Colin Wright** (5) Ray Nairn (collectively "the 2nd Defendants") seeking damages for negligence and breach of fiduciary duty. It is alleged that, as trustees, the 2nd Defendants negligently entered into two contracts with the 1st Defendant and breached their fiduciary duties which they owed to the Trust Fund, which resulted in loss to the said Fund. The Trust Fund asserted that the 2nd Defendants had no authority or right to enter into the said reckless and imprudent transaction and thus, claimed a return to the Trust Fund of $1,350,000.00 with interest: see Exhibit CW1/4 of Wright affidavit.

[6] The 2nd Defendants, represented by the reputable law firm of Munroe & Associates, filed a Defence. Unfortunately, Mr. Wright did not provide the contents of the Defence: Exhibit CW1/1 of Wright affidavit.

[7] On 7 October 2014, Judgment by Consent was entered in favour of the Trust Fund against the 2nd Defendants (including Mr. Wright) in the impugned action before Barnett CJ. The Consent Order reads as follows:

> **"THIS COURT DOTH ORDER AND DECLARE BY CONSENT THAT:**
>
> **(1) Judgment be and is hereby granted to the Plaintiffs as against the 2nd Defendants in the amount of $1,350,000.00.**
>
> (2) **The 2nd Defendants are to pay the Plaintiff's costs of and occasioned by this action to be taxed if not agreed."**

[8] A final Judgment was entered on 15 October 2014. There has been no appeal to the Court of Appeal of the Final Judgment.

[9] On 16 December 2015, the Trust Fund filed an Order for Examination of Judgment Debtor which was slated to be heard on Tuesday, 1 March 2016 before Deputy Registrar, Camille Gomez: Exhibit CW2/1 of Wright affidavit.

[10] On 2 March 2016, a second Order for Examination of Judgment Debtor was filed. That examination was fixed to be heard before Assistant Registrar, Edmund Von Turner on Tuesday 19 April 2016: Exhibit CW3/1 of Wright affidavit.

[11] On 15 April 2016, that is exactly nineteen months after the Final Judgment was entered, Mr. Wright (and the other 2nd Defendants) filed a Summons: Exhibit CW4 of Wright affidavit for:

> **"…[A]ll parties concerned attend before the Registrar of the Supreme Court ...on an application by the Second Defendants herein, prior to hearing of the Plaintiffs' application for examination of each of the Second Defendants pursuant to the Order herein dated 1st March 2016 ("the Examination Order") for an ORDER pursuant to RSC Ord. 18 r. 19 (1)(a) and (b) and otherwise under the Court's inherent jurisdiction that the Writ of Summons herein be struck out and Final Judgment entered on 15 October 2014, be vacated as against the Second Defendants (and each of them) on grounds, inter alia, that the Writ and Final Judgment are a nullity *ab initio* (the capacity of the parties suing and sued being the same Pension Plan & Trust Fund) and constitutes abuse of process and for an ORDER that pending the hearing of the application of the Second Defendants all proceedings pursuant to the Examination Order be stayed until further Order…."** [Emphasis added]

[12] What is baffling is that the 2nd Defendants, ably represented by a learned Queen's Counsel, were comfortable to go before a Registrar seeking to strike out the Writ of Summons and to ask the Registrar to vacate a Final Judgment not only made by a Supreme Court Judge but a Chief Justice.

[13] But this is not the end of the saga. Two years later, this Summons to strike out cannot be located either in the Listing Office or in the Registry. As I understand it, in such a situation, Counsel who filed the Summons could merely reconstruct a file and ask the Listing Office to put it before a Judge of the Supreme Court. This is the most efficient and practical way if the 2nd Defendants wished for their Summons to be heard expeditiously.

Events subsequent to Summons to strike out Final Judgment

[14] On 24 January 2017, the Trust Fund filed a Request for the Issue of a Debtor's Summons dated 23 January 2017. This was supported by an affidavit of Averil

Clarke, Andrea Culmer and Steve Hepburn in their capacity as Trustees (A Judgment Creditor). Attached to their affidavit is Ex. 1 - Final Judgment dated 15 October 2014 which reads as follows:

> **"Pursuant to and in accordance with the Order of His Lordship Sir Michael Barnett Chief Justice made herein and dated 7th day of October A.D. 2014 and filed herein the 14th day of October A.D. 2014, IT IS THIS DAY ADJUDGED that, pursuant to and in accordance with the said Order, the 2nd Defendants do pay the Plaintiffs the sum of $1,350,000.00 with interest thereon at the statutory rate from the date of the said Order until payment in full, and that the 2nd Defendants do pay the Plaintiffs' costs of and occasioned by this action to be taxed if not agreed."**

[15] On 23 February 2017, the Trust Fund issued a Debtor's Summons to the Judgment Debtor, Mr. Wright. The Debtor's Summons was personally served upon Mr. Wright on Monday, 27 February 2017 at The Village Pub located on Balfour Avenue. Personal service was confirmed by the Affidavit of Service of R.Sgt. 562 George Symonette, filed on 9 March 2017.

[16] The Debtor's Summons commanded Mr. Wright, within twenty-one days after service of the Summons, to pay to the Trust Fund, the sum of $1,350,000.00 with interest. There is also an indorsement which states:

> **"…the consequences of not complying with the requisitions of this Summons are that you the said Colin Wright will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you...."**

[17] Mr. Wright failed before 21 March 2017 or at all to comply with the requirements of the Debtor's Summons which was duly served on him on 27 February, 2017. He has therefore committed an act of bankruptcy within the meaning of the Act.

[18] In the interim, on 14 March 2017, the Defendants filed a Summons before the Registrar of the Supreme Court for an Order to set aside the Summons *ex debito justiciae* dated 23 January 2017 on the ground that "*it is null and void ab initio and an abuse of the process of the Court on the ground that the said Colin Wright is not a trader as defined in section 2 of the Act, or alternatively, for an*

Order that all proceedings on the said Summons be stayed for such time as may be required for trial of the question relating to such debt on the Final Judgment entered into by the purported Judgment Creditor against the said Colin Wright (sued jointly with others in their capacities as trustees of the above intituled Pension Plan & Trust Fund in the substantive action which is also the subject of a pending application in that Action by the said Colin Wright and others (as to which the purported Judgment Creditor and its attorney appear not to have made full and frank disclosure at the time of the application for the grant of the said Summons), whichever is sooner, or until further Order."

[19] There is no indication on the Court's file whether the Defendants' Summons was ever heard by the Registrar.

[20] On 6 June 2017, the Trust Fund applied to the Listing Office seeking a date for the hearing of their Petition which was filed on 24 April 2017. Learned Queen's Counsel, Mr. Glinton who represented Mr. Wright, was not solicited to agree on suitable dates for the hearing of the Petition. Procedurally, this is bad but not fatal since Mr. Wright was personally and properly served to attend Court. Rule 57 of the Bankruptcy Rules requires personal service on the Judgment Debtor. I will expound on Rule 57 later on in the judgment.

[21] The Petition, endorsed by the Registrar with the hearing date of Monday, 15 January 2018 at 10:00 a.m., came before this Court. As I stated earlier, Mr. Wright was personally served with all of the requisite documents. Despite being personally served, Mr. Wright, for reasons best known to him, did not appear personally or with Counsel of his choice, at the hearing of the Petition on 15 January 2018 at 10:00 a.m.

[22] The Court proceeded to hear the Petition in the absence of Mr. Wright. Mr. Wright, despite having neither paid, secured, nor compounded the judgment debt pursuant to which he has been adjudicated a bankrupt, has now approached this

Court by way of *Ex Parte* Summons filed on 12 February 2018 seeking to avoid the lawful consequences of the Bankruptcy Order.

[23] At paragraph 6 of his Summons, Mr. Wright averred that although his attorney filed a Defence in the substantive action, he and the other Defendants discovered that Final Judgment was entered on 15 October 2014 against them leaving him and the other Defendants to speculate as to the circumstances in which the Final Judgment was obtained and entered. Notably, Mr. Wright did not allude to the fact that his attorney was present and consented to the Order.

[24] Mr. Wright then premised his application for relief on the fact that he has issued a Summons in the impugned action to have the said Final Judgment and the said action struck out. He also averred that the Trust Fund has failed to adequately explain why his application in the impugned action has neither been prosecuted with any alacrity nor otherwise been heard on its merits, such as they might be. At paragraph 12 of his affidavit, he stated that if Counsel for the Trust Fund had given the procedural history of the impugned action to the Court, the Court would have declined to make the Bankruptcy Order since it is palpable from his skeleton arguments, that the Summons to strike out/set aside the Final Judgment, is likely to succeed.

Applicable legal principles

[25] The procedure to be adopted by the Court in hearing applications for interlocutory injunctions and the tests to be applied, were laid down by Lord Diplock in the landmark case of **American Cyanamid Co. v Ethicon Limited** [1975] A.C 396 H.L. At page 407, Lord Diplock had this to say:

> **"The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are questions to be dealt with at the trial…So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a**

permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction relief that is sought." [Emphasis added]

[26] According to **American Cyanamid**, when an application is made for an interlocutory injunction, in the exercise of the Court's discretion, an initial question falls for consideration, i.e. whether there is a serious issue to be tried. If the answer to that question is yes, then a further question arises: would damages be an adequate remedy for the party injured by the Court's grant of, or its failure to grant, an injunction? If there is doubt as to whether damages would not be adequate, the Court then has to determine where does the balance of convenience lie?

[27] Some of the key principles derived from the speech of Lord Diplock in the **American Cyanamid** (at pages 406- 409) may be listed as follows:

1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.

2. There are no fixed rules as to when an interlocutory injunction should or should not be granted. The relief must be kept flexible.

3. The evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.

4. It is no part of the Court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend **nor to decide difficult questions of law which call for detailed and mature considerations.** These are matters to be dealt with at the trial. [Emphasis added]

5. The object of the interlocutory injunction is to protect the claimant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial; but the claimant's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.

6. **Some additional factors that the Court needs to bear in mind are:** (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other to pay; (b) the balance of convenience; (c) maintenance of the status quo, and **(d) any clear view the court may reach as to the relative strength of the parties' cases.** [Emphasis added]

7. Unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the claimant has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

8. The Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious issue to be tried.

[28] These key principles were adopted and re-stated in **Series 5 Software Ltd v Clarke and others** [1996] 1 All E.R. 853 at 865; **Grenada Co-operative Bank Limited v Valma Jessamy** –Claim No. GDAHCV2013/0313 (unreported) and **Cambridge Nutrition Ltd v BBC** [1990] 2 All ER 523; authorities referred to by Mr. Glinton QC. Interestingly though, none of these cases has diminished the key principles derived from the House of Lords decision in **American Cyanamid** which, to date, remain the *locus classicus* on interlocutory injunctions.

Is there a serious issue to be tried?

[29] This question is the threshold requirement. Lord Diplock in **American Cyanamid** said that it is sufficient if the Court asks itself: is the applicant's action "not frivolous or vexatious?"; is there "a serious question to be tried"?; is there "a real prospect that he will succeed in his claim for a permanent injunction at the trial"? These may appear to be three subtly different questions but they are intended to state the same test: **Smith v Inner London Education Authority** [1978] 1 All E.R. 411 at 419, C.A. per Browne L.J. See also **Seaconsar v Bank Markazi** [1994] A.C. 438, H.L.and **Canada Trust v Stolzenberg** (No. 2) [1998] 1 WLR 547.

[30] Learned Counsel Mr. Glinton QC submitted that the evidence adduced in Mr. Wright's affidavit, particularly at paragraphs 13 to 15 shows *prima facie*, in addition to there being an issue to be tried,' that the *status quo ante* should be

restored to await the outcome of his Summons to strike out the Final Judgment in the impugned action pursuant to RSC O.18 r. 19 (1)(a) and (b) and/or the inherent jurisdiction of the Court, **which raises strictly points of law**, which, it is contended, are dispositive of the action if any of the grounds is sustained by the Court, redound to a principle of pleading of general application embodied in the basic common law rule recognized by Best CJ in **Neale v. Turton** 4 Bing 149 at 151: "**There is no principle by which a man can be at the same time plaintiff and defendant.**" The rule that a person cannot sue himself at common law is the same in Equity: **Boyce v. Edbrooke** [1903] 1 Ch 836.

[31] According to learned Queen's Counsel, the Trust Fund being a trust, is not a natural person, and therefore lacks legal personality. So it cannot sue or be sued except by its trustees who are juridical persons. Thus, in the impugned action, the Trust Fund, "**by Tyrone Cunningham and Anthony Moss in their capacity as Trustees**"; sued **Former** Trustees "**in their capacities as Trustees of the BCPOU Pension Plan & Trust Fund**" which, in legal reality, is the Trust itself. Mr. Glinton QC submitted that this is a clear case of a Trust having sued itself and not a case in which the Court allows one of the other trustees to bring an action and make the other trustees of a Trust, defendants so that they may be bound by the Order.

[32] Mr. Glinton QC next submitted that the Final Judgment that the Trust Fund obtained in the impugned action is against itself and the legal costs of proceedings in that action are to be governed by O.59 r.6 (2) which provides:

> "**Where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, 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 trustees 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.**"

[33] According to him, the Applicant and other **Former** Trustees of the Trust Fund, in the absence of it been held by the Court on a trial that he or they acted unreasonably or in substance for his or their benefit rather than for the benefit of the Trust Fund are entitled to the costs of the proceedings in the impugned action. Also, they are entitled to the benefit of section 36 of the Trustee Act, 1998, in particular section 36(3) and (4), which prescribe, respectively:

> "**(3) A trustee may upon resignation, retirement, removal or otherwise ceasing to be trustee of a trust, whether created before, on or after the commencement of this Act** –
>
> **(a) require from any continuing or new trustee or continuing and new trustee (in the event of the trustee's resignation, retirement or removal), from the settlor (in the event of the trust's revocation) or any beneficiary** (in **the event of a final distribution to such beneficiary) a release and indemnity holding harmless the outgoing trustee, and the servants and agents of the outgoing trustee and (if it is a corporation) its directors and officers from and against any and all claims, demands, proceedings, damages, costs, charges and expenses whatsoever for, or arising out of or in relation to, any act or omission of the outgoing trustee or of any such directors, officers, servants or agents in respect of the administration of the trust by the outgoing trustee; and**
>
> **(**b**) withhold such trust property as the outgoing trustee in good faith considers necessary to pay outstanding liabilities, whether present, future, contingent or otherwise or to satisfy the aforesaid indemnity.**
>
> **(4) The indemnity and right to withhold trust property referred to in subsection (3) shall not extend to any liabilities for breach of trust or in respect of which the outgoing trustee would otherwise ant have been entitled to an indemnity out of the trust property had the outgoing trustee remained a trustee; and the indemnity given by any continuing or new trustees shall be limited to the trust property in their possession or under their control from time to time**."

[34] Thus, O 59, r. 6(2) as to entitlement to costs of proceedings of persons in the capacity of trustees, taken together with section 36 of the Trustee Act as to indemnification of former trustees of trusts, means that in practical terms, the Trust Fund in this case, would have recovered Final Judgment against itself *in vacuo*.

[35] Learned Queen's Counsel insisted that given the Writ commencing the action is itself a legal nullity, anything built upon it is nullified: **MacFoy v. United Africa Co. Ltd.** [1962] A C 152, pp. 159-160 (*per* Lord Denning). It follows that there was improper use (abuse) of the legal process; the logical consequence of which is that the Writ must be struck out and the Final Judgment vacated.

[36] Learned Queen's Counsel next submitted that it is not for the Court, at this stage, to anticipate what evidence the Trust Fund will adduce opposing the application to vacate the Final Judgment or otherwise defend the propriety of the proceedings that resulted in the making of the Bankruptcy Order, it ought nevertheless be satisfied *prima facie* of the likely success of Mr. Wright establishing that the said Order must be annulled.

[37] According to him, the Court must, upon applying established principles evaluate the propriety of Mr. Wright's application but without entering upon a determination of the Final Judgment's propriety.

[38] Mr. Glinton QC submitted that, in all the circumstances, assuming sufficiency of evidence given in support of the application (albeit from one side only at this stage), Mr. Wright exhorts the Court to be guided by what was said by Sir John Donaldson, MR, in the context of an *inter partes* hearing of an interim injunction application, but consistent with the principle, in **Francome v. Mirror Group Newspapers** [1984] 1 W L R 892, at 898:

> "…**I stress, once again, that we are not at this stage concerned to determine the final rights of the parties. Our duty is to make such orders, if any, as are appropriate pending the trial of the action. It is sometimes said that this involves a weighing of the balance of convenience. This is an unfortunate expression. Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs <u>pending the trial</u> which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience**."[Emphasis added]

[39] Mr. Glinton QC submitted that the Court should grant the interim injunction restraining the Trust Fund from advertising the Bankruptcy Order since no injustice will be caused to the Trust Fund whereas, on the other hand, the Bankruptcy Order has already paralyzed Mr. Wright.

[40] Learned Counsel Mr. Parker submitted that the wholly unsatisfied judgment debt stemmed from a Final Judgment further to a Consent Order made on 7 October 2014 and filed on 14 October 2014. That Order was made by Barnett CJ (as he then was) and signed by Counsel on behalf of Mr. Wright and Counsel for the Trust Fund. Mr. Parker emphasized that neither the Consent Order nor the Final Judgment has been appealed. Therefore, the substance and efficacy of the judgment debt is beyond dispute and incapable of substantive challenge before the Supreme Court. According to him, it is in respect of the judgment debt, that the Bankruptcy Order was made on 15 January 2018. Learned Counsel maintained that the Supreme Court is *functus.*

[41] Mr. Parker next submitted that Mr. Wright grounded his entire application for relief, by his *Ex Parte* Summons filed on 12 February 2018, upon the fact that he has issued a Summons to strike out the impugned action on 15 April 2016, seeking, among other things, that "*the Writ and Statement of Claim* [therein] *be struck out and Final Judgment entered on 15 October 2014, be vacated as against the Second Defendants (and each of them) on grounds, inter alia, that the Writ and Final Judgment are a nullity ab initio (the capacity of the parties suing and being sued being the same Pension Plan & Trust Fund) and constitutes abuse of process*…."

[42] According to Mr. Parker, despite the frivolity and nonsense of the proposition raised in the Summons, it is clear that the Supreme Court cannot make any determination upon it. Furthermore, even Mr. Wright at paragraph 3 of his Affidavit of 12 February 2018, recognized that he and the other Defendants were sued and represented "*as former trustees of the Trust Fund and named as Second Defendants in that Action*". 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 does not mean, or reasonably suggest, that the Trust Fund was suing itself.

[43] Learned Counsel Mr. Parker referred to the Ruling in **Palms of Love Beach Building B Management Company (In Administration) et al v. Love Beach Properties Ltd. et al** 2010/CLE/gen/001673 [unreported]. In the Ruling delivered on 20 December 2013, Barnett CJ stated, at paragraph 19, the following:

> **"In my judgment, as the Second Defendant has not appealed that Order it cannot be heard on applications which in effect seek to negate that Order made. That, in my judgment, is what the applications of the 29th July, 2013 and 29th November, 2013 seek to do. I had indicated in my Ruling of the 4th July, 2013 I might have been minded to reopen the matter if I was satisfied that there was a bona fide Defence. Upon further reflection, I do not think I was able to do that although I could have granted injunctive relief pending an application for leave to appeal to the Court of Appeal. Nevertheless, the Second Defendant has not appealed to the Court of Appeal."** [Emphasis added]

[44] His Lordship went on, at paragraph 21 in **Palms of Love Beach**, to state that:

> "…**The condominium fees have not been paid (and this is not disputed) and the management company is entitled to enforce its rights against the Units given to it by the Declarations."**

[45] Learned Counsel Mr. Parker submitted that Mr. Wright's Summons in the impugned action is bound to suffer the same fate as the **Palms of Love Beach** case. He maintained that Mr. Wright, having not appealed the Final Judgment entered against him in the impugned action and being bound by the Consent Order, cannot be heard "*on applications which in effect seek to negate*" the Final Judgment and Consent Order, which is what both his Summons in the impugned action and his *Ex Parte* Summons for injunctive relief seek to do.

Discussion

Is there a serious issue to be tried?

[46] In **Mothercare Ltd. v Robson Books Ltd** [1979] FSR 466 at 474, Sir Robert Megarry VC examined how serious is "serious" of the issue to be tried. He stated:

> **"The prospects of the Plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the Plaintiff has prospects of success which, in substance and reality, exist. Odds against success no longer defeat the Plaintiff, unless they are so long that the Plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the Plaintiff fails, for he can point to no question to be tried which can be called "serious" and no prospect of success which can be called "real."**

[47] In his Ex Parte Summons, Mr. Wright seeks an interim injunction restraining the Trust Fund from advertising the Bankruptcy Order in the Gazette. Pursuant to O. 18 r. 6 of the RSC and/or the inherent jurisdiction of the Court, Mr. Wright applies to strike out the Final Judgment as a legal nullity on points of law going directly to jurisdiction. The Summons (which cannot be located) has been pending for over two years now from the date of its filing.

[48] The gravamen of Mr. Wright's grievance is that the Trust Fund being a trust, is not a natural person, and therefore, lacks legal personality. Therefore, it cannot sue or be sued except by its trustees who are juridical persons. It follows that the Writ of Summons commencing the impugned action is a legal nullity in that the Trust Fund as Plaintiff had sued itself as the 2nd Defendants. In addition, Mr. Wright asserted that the impugned action was not brought as a mortgage action as required by the rules of court.

[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…."*

[50] The other point that Mr. Wright alluded to is that the impugned action was not brought as a mortgage action as required by the rules of court. To suggest that the impugned action is a "mortgage action" is surprising especially since the Writ of Summons and Statement of Claim show that it is a claim in damages for negligence and/or breach of fiduciary duties.

[51] In any event, formidable though Learned Queen's Counsel's arguments are, they should have been canvassed before the Court of Appeal. In addition, at paragraph 6 of his affidavit, Mr. Wright seems baffled about the Final Judgment which was entered against him. As he stated, it left him "*to speculate as to the circumstances in which the Final Judgment was obtained and entered*". Such speculation may have been easily unraveled by simply finding out from his attorney what took place at that hearing. If no instruction(s) was/were given to his Counsel, he would, no doubt, be properly advised as to what action (if any) to take.

[52] In my opinion, Mr. Wright should have appealed to the Court of Appeal if he was/is unhappy with the Final Judgment. That being said, I am in agreement with learned Counsel Mr. Parker that the Supreme Court is *functus.*

[53] In the event that I am wrong to come to this conclusion, it is an established principle of law that the onus is on the Applicant (Mr. Wright) to show that there is

a serious issue to be tried. I remind myself that it is no part of the Court's function at this stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor **to decide difficult questions of law which call for detailed and mature considerations as these are matters to be dealt with at the trial**. That being said, prima facie, Mr. Wright has to satisfy the Court of his prospects of success on the issue that the Writ commencing the impugned action is a nullity. His evidence that the Trust Fund sued itself is without merit. His own affidavit reveals otherwise: paragraph 3. In addition, the Statement of Claim illustrates that this is not a mortgage action. It seems to me that neither of the issues involves difficult questions of law which cannot be resolved here. A judge hearing such application for injunctive relief is obliged to consider reasonable prospects of success at the trial. In my considered opinion, there are no such prospects of success in this case. That being said, Mr. Wright faces other hurdles with respect to the Final Judgment and its setting aside.

[54] All things considered, Mr. Wright has not satisfied this Court that there is any issue to be tried, moreover, a serious one. As Lawton LJ said in **Tetrosyl Ltd v Silver Paint and Lacqueur Co. Ltd.** [1980] FSR 68, "*a serious question …can only arise if there is evidential backing of it.*"

[55] Even if I were wrong to come to these prima facie findings, I would move on to consider whether damages would be an adequate remedy.

Damages as an adequate remedy

[56] In **American Cyanamid,** Lord Diplock said at page 408:

> **"If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."**

[57] Neither Counsel has addressed me on the adequacy of damages. One of the major factors to be borne in mind is the extent to which damages are likely to be

an adequate remedy for each party and the ability of the other party to pay. There is no evidence before me to suggest that the Trust Fund would be unable to pay damages for any personal injury to Mr. Wright's reputation caused by the advertisement of the Bankruptcy Order in the Gazette.

The Bankruptcy Order made on 15 January 2018

[58] Learned Queen's Counsel Mr. Glinton submitted that the necessity for the urgent grant of injunctive relief arises out of the hearing that took place in the absence of Mr. Wright and without notice to his attorneys on record, in which the Bankruptcy Order was made adjudging Mr. Wright a bankrupt for all purposes of the Act.

[59] Mr. Glinton QC submitted that since Mr. Wright was not at the hearing on 15 January 2018 when the Bankruptcy Order was made, he is uncertain whether it was made known to the Court that there was a pending Summons to strike out the Final Judgment filed on 15 April 2016. Learned Queen's Counsel submitted that since the Bankruptcy Order was made *ex parte*, it remains open to an application to set aside simply on that basis.

[60] Mr. Glinton QC next submitted that, in any event, no hearing date should have been obtained and fixed without canvassing opposing counsel for agreement of such date or dates, in accordance with *Practice Direction No. 1* of 2001. I already alluded to this and opined that, by not seeking a date from opposing Counsel, though bad, is not fatal because Mr. Wright (the Judgment Debtor) was personally and properly served.

[61] Rule 57 of the Bankruptcy Rules only requires that: "***A bankruptcy petition shall be personally served seven days before the day of its hearing*** *by delivering to the debtor a sealed copy of the filed petition*." The Trust Fund effected personal service of the Petition on Mr. Wright over three (3) months before the date of its hearing. The rules require that the **Judgment Debtor be personally served**. The Trust Fund was therefore in compliance with the requisite rules.

[62] Mr. Glinton QC also submitted that both the Trust Fund and Counsel had a particular duty of candour to discharge, which both appeared to have breached. Having failed to disclose the existence of pending applications in particular the Summons to strike out the Final Judgment upon which making of the Bankruptcy Order is justified, it must follow in this regard that any other evidence adduced was immaterial and at best unreliable. Therefore, the Court's exercise of its discretionary jurisdiction to make the Bankruptcy Order was miscarried.

[63] Learned Queen's Counsel submitted that the requirement of the duty to make full and frank disclosure is said to be deceptively simple. He quoted John Carrington QC of the British Virgin Islands Bar during a presentation to the Belize Bar Association on 24 January 2014 in which the learned Queen's Counsel said:

> **"The duty extends beyond merely stating material facts on paper. In Memory Corporation Plc. v. Sidhu (No. 2) [2000] 1 W L R 1443 Mummery LJ listed in detail the requirements of Judges in relation to *ex parte* hearings. Judges require that their attention be drawn specifically to significant factual, legal and procedural aspects of the case, and that counsel use the correct legal procedures and forms, provide a written skeleton and properly drafted Order that are lodged in advance with the court. At the hearing, counsel must draw the court's attention specifically to any unusual features of the evidence, to the applicable law and to the formalities and procedure to be observed. The advocate should not commence the application unless he has provided the judge in advance with a draft Order and the advocate has a special responsibility to settle personally the draft Order and to ensure that he is personally familiar with it and in the best position to respond to the concerns of the court. The court is entitled to scrupulous and meticulous assistance of the advocate and these cases should never be treated as routine. The list of requirements as to this duty is obviously a comprehensive one."**

[64] Next, learned Queen's Counsel asserted that the Trust Fund and its Counsel failed to discharge their duty to the Court. Therefore, the Court was misled into making the Bankruptcy Order. He submitted that the duty to make full and frank disclosure is a continuing obligation on both the Trust Fund and its Counsel: see **Addari v Addari** (BVIHCV2003/009) – unreported.

Discussion

[65] As Mr. Parker correctly pointed out, this Court was very much aware of the Summons to strike out the Final Judgment of Barnett CJ in the impugned action brought by the 2nd Defendants (including Mr. Wright). Action 2014/CLE/gen/00872 between **The Bahamas Communications and Public Officers Union Pension Plan & Trust Fund (By Averil Clarke and Barry Wilmott in their capacity as Trustees) v The Bahamas Communications and Public Officers Union (BCPOU) (By Sharazard Pickstock, Martin Clark and Hilbert Collie as Trustees)**, ("the 2014 action") came before this Court on 9 November 2016. The dispute in the 2014 action focused primarily on the enforceability of an undertaking given by the defendant therein "*not to interfere with the operation and management of* [the Petitioner] *until the conclusion of the impugned action."* On 24 November 2016, I delivered a written judgment. The judgment in the 2014 action turned to a great degree upon whether proceedings in the impugned action had reached a "*conclusion*" when Final Judgment was entered. Reference was made to the impugned action at paragraphs 15, 16 and 39. I found, under the sub-head, **Findings on the 2012 action (i.e. the impugned action)** at, paragraph 39, that:

> **"On 7 October 2014, judgment by consent was entered in favour of the Plaintiff against Mr. Evans and four other defendants in the amount of $1,350,000.00 with costs in the 2012 action. The Plaintiff conceded that this is a Final Judgment. Entry of the Final Judgment in the 2012 action effectively concluded the 2014 action. Any Summons, particularly the Summons to set aside the judgment by consent filed almost two years later seems to be nothing more than a delaying tactic. Enforcement of the judgment in that action is an entirely different matter that involves considerations that are extraneous to the pleadings in the 2014 action."** [Emphasis added]

[66] Mr. Parker correctly submitted that, consistent with the decision of Sir Michael Barnett CJ (as he then was) in **Palms of Love Beach** [supra], "*any summons*" before the Supreme Court issued after final judgment has been entered in a matter seeking to challenge the said final judgment would have no reasonable

prospect of success. The chances of Mr. Wright's Summons in the impugned action are even weaker in light of the Consent Order.

[67] Contrary to the submissions of learned Queen's Counsel Mr. Glinton, this Court was not misled. At all material times, this Court was fully aware of the existence of the Summons to strike out. In fact, at the hearing of this application, the Court handed a copy of the judgment delivered on 24 November 2016 to Mr. Glinton QC. Also, at paragraph 39 of the judgment in the 2014 action, this Court intimated that "**Any Summons, particularly the Summons to set aside the judgment by consent filed almost two years later seems to be nothing more than a delaying tactic."**

The Bankruptcy Act and Rules

[68] Section 5 of the Bankruptcy Act provides as follows:

> **"…Any debtor served with a debtor's summons may apply to the court in the prescribed manner, and within the prescribed time, to dismiss such summons, on the ground that he is not indebted to the creditor serving such summons, or that he is not indebted in such amount as will justify such creditor in presenting a bankruptcy petition against him; and the court may dismiss the summons, with or without costs, if satisfied with the allegations made by the debtor, or it may, upon such security (if any) being given as the court may require for payment to the creditor of the debt alleged by him to be due, and the costs of establishing such debt, stay all proceedings on the summons for such time as will be required for the trial of the question relating to such debt."** (Emphasis added)

[69] The Judgment Debtor (Mr. Wright), having been personally served with the Debtor's Summons on 27 February 2017, has waited until 12 February 2018, nearly a year later, to seek to challenge the judgment debt. There is no good reason for this Court to accede to his late application.

[70] In addition, section 64 of the Bankruptcy Act provides that:

> **"No proceedings in bankruptcy shall be invalidated by any formal defect or by any irregularity unless the court before which an objection is made to such proceedings is of the 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."**

[71] As learned Counsel Mr. Parker correctly submitted, in the face of uncontroverted evidence that Mr. Wright was personally served with both the Debtor's Summons and the Petition, it cannot reasonably be suggested that substantial injustice has been caused or that there was in fact any irregularity of which Mr. Wright could reasonably complain. Even when the Judgment Debtor's summons issued in this action is considered in light of the "*substantial injustice*" test, it cannot be reasonably suggested that the Bankruptcy Order ought to be stayed or that Mr. Wright is entitled to the relief for an interim injunction. The judgment debt was entered by consent and there is no appeal before the Court of Appeal. As I see it, this Court is bound to enforce a Final Judgment properly issued by the Supreme Court.

Conclusion

[72] For all of these reasons, I find that the Bankruptcy Order which I made on 15 January 2018 is sound and unassailable.

[73] In the premises and in the exercise of my discretion, I will refuse to grant the interim injunction sought in the *Ex parte* Summons filed on 12 February 2018 to restrain the Trust Fund from advertising the Bankruptcy Order by publication in the Gazette. I will also award costs to the Trust Fund against Mr. Wright to be taxed if not agreed.

Dated this 30th day of April, A.D. 2018

Indra H. Charles

Justice