IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD #60 and #61 of 2013 (AJJ)

The Hon Mr Justice Andrew J. Jones QC
In Open Court, 29th May and 3rd June 2013

IN THE MATTER OF THE BANKRUPTCY LAW (Cap.7) (1997 REVISION)

AND IN THE MATTER OF PATRICIA H. MILLARD, A DEBTOR

AND IN THE MATTER OF WILLIAM H. MILLARD, A DEBTOR

Appearances:
Kyle Broadhurst and John Broadhurst of Broadhust LLC for the Debtors
James Corbett QC and James Stenning of Kobre & Kim for the Commonwealth of the Northern Mariana Islands

JUDGMENT

Introduction

1. Personal bankruptcy proceedings (as opposed to corporate liquidation proceedings) are rarely filed in this jurisdiction. It may be that no more than half a dozen bankruptcy petitions have been presented in the past 40 or 50 years. On 10 May 2013 Mr and Mrs William H. Millard (collectively "the Millards") presented petitions against themselves in which they state that they are unable to pay their debts and are desirous of being made bankrupt and having their estates administered pursuant to the Bankruptcy Law. This may well be the first time that a debtor's petition has ever been filed in this Court.

2. The Millards have filed sworn statements of affairs which list their assets and liabilities and explain the causes of their insolvency. The bulk of their assets consists of shares in wholly owned Cayman Islands incorporated investment holding companies. The assets of these companies mainly comprise real estate located in the Cayman Islands. One of these companies also owns a condominium in Florida and there are some assets in Belgium and Switzerland. The Millards' principal liability comprises judgment debts owing to the

Government of the Commonwealth of the North Mariana Islands ("the Marianas") in respect of unpaid taxes. Default judgments were entered against both of them 1994 for US$18,317,980.80. The total amount now owing, including interest accrued up to 1 July 2011, is about US$59 million. Their only other stated liabilities are legal fees owing to various law firms. The Millards are said to be insolvent in the sense that the realizable value of their worldwide assets is less that the amount of their total liabilities by a substantial margin.

3. In the case of a debtor's petition the Bankruptcy Rules contemplate that an absolute order for bankruptcy may be made summarily, without notice to the creditors, if the judge is satisfied that the debtor has filed a statement of affairs which appears on its face to comply with the rules. If it subsequently turns out that a bankruptcy order ought not to have been made for whatever reason, the Court has power under section 170 to revoke it. On 14 May 2013 the Millards made application for a summary order but Henderson J. adjourned the application and directed that the petitions, statements of affairs and verifying affidavits be served on all those creditors owed more than US$50,000. Apart from the Millards' own lawyers, the only creditor owed more than $50,000 is the Government of the Marianas. The matter then came on for hearing before me on 29 May 2013 when the Government of the Marianas appeared by counsel who argued that the petitions should be struck out or dismissed on three grounds. First, it is said that the Millards are not entitled to present petitions against themselves because they are not insolvent in the narrow sense that the realizable value of their assets (or at least those assets located in the Cayman Islands) is greater than the amount of the liabilities which are enforceable against them in the Cayman Islands. Second, it is said that the petitions are an abuse of the process because they have been presented for an improper purpose. Third, even if the Millards were properly entitled to present these petitions, it is said that I should nevertheless exercise my discretion by dismissing them because it would serve no useful purpose to make any order for bankruptcy in this jurisdiction and the Court should not make orders which are futile. The crucial point underlying all three of these arguments is that foreign judgments in respect of taxes are not enforceable in this jurisdiction.

4. It is well established that a foreign judgment in respect of taxes or other charges of a like nature will not be enforced either at common law or pursuant to the Foreign Judgments Reciprocal Enforcement Law (1996 Revision). Counsel referred me to the well known decision of the House of Lords in *Government of India v. Taylor* [1955] 401 which concerned an attempt by the Government of India to prove in the liquidation of an English company for taxes owing as a result of its trading activities in that country. It was held that the expression "liabilities" (as used in the applicable provisions of the

Companies Act) meant only such liabilities as are enforceable in an English court. Viscount Simonds said (at page 509) –

"I conceive that it is the duty of the liquidator to discharge out of the assets in his hands those claims which are legally enforceable, and to hand over any surplus to the contributories. I find no words which vest in him a discretion to meet claims which are not legally enforceable. It will be remembered that, so far as is relevant for this purpose, the law is the same whether the winding up is voluntary or by the court, whether the company is solvent or insolvent, and that an additional purpose of a winding up is to secure that creditors who have enforceable claims shall be treated equally, subject only to the priorities for which the statute provides."

It was held that the Government of India could not prove in the liquidation of an English company for unpaid taxes. That case concerned a corporate winding up proceeding under the English Companies Acts, but I agree with Counsel for the Marianas that the principle is equally applicable to personal bankruptcy proceedings under the Bankruptcy Law. It follows that "liabilities" as defined in section 121 means liabilities which are enforceable by this Court and that the amounts owing to the Government of the Marianas are not provable debts under section 119 of the Bankruptcy Law. I should perhaps emphasize that Cayman Islands law relating to insolvency, in the case of both corporate liquidation proceedings and personal bankruptcy proceedings, does not discriminate against foreign creditors. All creditors, both foreign and domestic, are treated equally. It is the nature of the debt, not the identity of the creditor, which renders the judgments in favour of the Marianas unenforceable in this jurisdiction.

5. On this narrow test, taking into account only assets located in the Cayman Islands and liabilities enforceable in the Cayman Islands, it may be said that the Millards are solvent. On a broader test, taking into account all their worldwide assets and liabilities, they are insolvent.

Are the Millards entitled to present bankruptcy petitions against themselves ?

6. It is not disputed that the Millards are persons in respect of whom this Court can properly exercise bankruptcy jurisdiction. For this purpose I have to be satisfied that they fall within the definition of "debtor" by reference to one or more of the criteria set out in section 1, which states as follows –

" 'debtor' includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him –
(a) was personally present in the Islands; or
(b) ordinarily resided or had a place of residence in the Islands; or
(c) was carrying on business in the Islands, personally or by means of an agent or manager; or
(d) was a member of a firm or partnership which carried on business in the Islands."

They have lived in this country for over 20 years and it is common ground that the first two of these criteria are met.

7. The argument is that the Millards have no standing to present bankruptcy petitions against themselves under section 15 unless it is proved that they are insolvent or, at the very least, there is some credible evidence tending to suggest that they may be insolvent, by reference to the narrow test (as I described it in paragraph 5 above). The Bankruptcy Law does not contain any definition of "insolvency", nor are the expressions "debtor" and "creditor" comprehensively defined. As a general proposition, I think that it can be said that the relationship of debtor and creditor exists when a legally enforceable liability is owed by one person to another. It may be said that a person is not a debtor unless he owes a payment obligation to someone who has a subsisting and exercisable right to maintain an action against him to compel its performance. As a matter of English law, I think that it has always been the case, at least since 1883, that a debtor may only present a bankruptcy petition against himself on the ground that he is unable to pay his debts. Section 8(1) of the English Bankruptcy Act 1883 stated that "A debtor's petition shall allege that the debtor is unable to pay his debts..." This provision is re-stated in slightly different language in the current legislation, namely the Insolvency Act 1986, section 272(1) of which states that "A debtor's petition may be presented to the court only on the grounds that the debtor is unable to pay his debts." These provisions have been interpreted by the English courts to mean that if a debtor is able to pay such of his debts as are legally enforceable against him, he is not eligible to present a bankruptcy against himself. See Ian Fletcher's *The Law of Insolvency* (4th Edition) paragraph 5-004. On this basis, it would follow as a matter of English law that the Millards are not entitled to present debtor's petitions (because they could not prove insolvency) and the Government of the Marianas is not entitled to present a creditor's petition (because its debt is unenforceable).

8. However, it seems to me that the Cayman Islands Bankruptcy Law, which has existed in its present form since 1880, is materially different from the English law.[1] Unlike the corresponding provisions of the English statutes, section 15 of our law states that "A debtor may present a bankruptcy petition against himself <u>without alleging any grounds.</u>" (Emphasis added). If a debtor is not required to allege insolvency, it seems to me that he should not be required to prove insolvency. However, there must be some criteria by which a person's right to declare himself bankrupt can be regulated in the interests of his creditors. It cannot be the law that a solvent debtor has an absolute right to a bankruptcy

[1] The legislative history of the Bankruptcy Law, Cap.7 is described in detail by Lord Walker in *Al Sabah v. Group Torras SA* [2004-05 CILR 373 at paragraphs 11 -22. In substance it is the Jamaican Bankruptcy Law, Cap.32 which has been in force in the Cayman Islands since 1st January 1880.

order, even though the Court would have power to revoke it for cause subsequently. It may be that the answer lies in section 17(1) which requires that a debtor's petition must be accompanied by a statement of affairs. This section provides as follows –

> "(1) Every petition presented by a debtor shall be accompanied by a statement verified in the prescribed manner of the debtor's property, and of his debts and liabilities, and of his creditors, and of the value and dates of the securities held by them, and of the dates when such securities were actually given, together with a general statement of the profits, losses and expenses of any business in which he may have been engaged during the twelve months preceding the presentation of the petition, and a memorandum explanatory of the causes of his insolvency."

The requirement that a debtor must file a memorandum explaining the causes of his insolvency assumes that a person will not present a bankruptcy petition against himself unless he believes that he is insolvent in some sense, but a requirement to explain the causes of his perceived insolvency is not the same thing as requiring that he must allege and prove that he is insolvent by reference to the narrow test (described in paragraph 5 above). The Bankruptcy Law certainly contemplates that orders for bankruptcy may be made against persons who are not insolvent or later turn out not to be insolvent. Section 170 provides for bankruptcy orders to be revoked or annulled. One of the reasons for revoking an order must be that the debtor is not in fact insolvent. Section 138 provides that the debtor shall be entitled to any surplus of assets after payment of his creditors and the costs of the proceedings. In this context, it should also be borne in mind that a creditor does not have to allege or prove that the debtor is insolvent (in an absolute sense) as a pre-condition to obtaining a bankruptcy order. A creditor is inherently unlikely to be able to adduce evidence of his debtor's assets and liabilities and prove that that he has a negative net worth. The creditor merely has to prove that his debtor has committed an "act of bankruptcy" which is some outward and visible act giving the appearance of insolvency.

9. I think that the combined effect of sections 15 and 17 is that a petitioning debtor must explain his financial position and show cause why a bankruptcy order should be made. I do not see any reason to interpret these provisions to mean that he must prove insolvency in the narrow sense that the realizable value of his Cayman assets is less than the amount of those liabilities which are enforceable against him in this jurisdiction. I therefore conclude that the Millards do have standing to present bankruptcy petitions against themselves. The question is whether they have established a sufficient reason why the Court should exercise its discretion in favour of making bankruptcy orders.

Have the Millards' bankruptcy petitions been presented for an improper purpose?

10. It seems to me that the sole purpose of presenting these petitions is that if an order for bankruptcy is made by this Court, the Trustee (or her agents) will be treated as a "foreign

representative" who can present an ancillary petition under Chapter 15 of the United States Bankruptcy Code, pursuant to which the United States Bankruptcy Court could then impose a stay in respect of the multiplicity of proceedings pending against the Millards in various courts in the United States. Counsel for the Millards did tentatively suggest that his clients are cash flow insolvent in the sense that they are presently unable to pay their lawyers' bills as they fall due but I concluded that I should disregard this argument. The question which I have to decide is whether it is legitimate, in the circumstances of this case, to invoke the bankruptcy jurisdiction of this Court for the sole or principal purpose of appointing agents for the Trustee who can then present an ancillary petition to the United States Bankruptcy Court.

11. The default judgments were entered against the Millards in 1994. The Government of the Marianas is said to have taken no steps to enforce these judgments for seventeen years. The Millards say that they did not become aware of them until 2011 when enforcement proceedings were commenced against them in New York. There are now seven separate enforcement proceedings pending in Florida and New York and the Millards commenced another proceeding in Florida by which they seek to set aside the default judgments. The Florida court has decided that this issue should be determined by the courts of the Marianas. The purpose of seeking bankruptcy orders from this Court is that the Trustee's Agents can present an ancillary petition to the United States Bankruptcy Court, which could then stay these enforcement proceedings pending a determination of the issues about the validity of the default judgments. In principle, it seems to me that this is a legitimate objective, assuming that the Millards are insolvent by reference to a broad worldwide test (which appears to be the case) and that there is an arguable basis for challenging the default judgments (about which I make no comment). For these reasons I concluded that the petitions have not been presented for an improper purpose and should not be struck out or dismissed on this ground.

Would it be futile for this Court to make bankruptcy orders?

12. Apart from appointing a trustee's agent who can present ancillary petitions under Chapter 15 of the United States Bankruptcy Code (or pursue the existing petitions), it is said that bankruptcy orders will serve no useful purpose in the circumstances of this case and that the administration of the Millards' estates under the Bankruptcy Law would be a futile exercise. For this reason it is said that the Court should exercise its discretion by dismissing these petitions. I think that there is some merit in this argument. If this Court makes absolute bankruptcy orders, the Millards assets will vest in the Trustee. The Trustee will delegate her functions to two professional insolvency practitioners who will perform all the duties and exercise all of the powers of the trustee in bankruptcy in respect of these estates, subject to the supervisory jurisdiction of this Court. Messrs Kenneth Krys and Margot MacInnis of KRyS Global have been nominated for

appointment as Trustee's Agents. They have also been appointed as joint voluntary liquidators of the Millards' investment holding companies in which capacity they have made applications for the liquidation proceedings to be brought under the supervision of the Court. In their capacity as official liquidators of the companies, Messrs Krys and MacInnis will realize some assets, pay a dividend up to the Trustee (in whom the shares will have vested by operation of law) and then declare and pay a dividend of 100 cents in the dollar to the ordinary creditors (because the Government of the Marianas will not submit any proof of debt in the knowledge that it is bound to be rejected). By itself, this is not a useful exercise. However, I do not regard it as futile to make bankruptcy orders because I think that it is useful to clothe Messrs Krys and MacInnis with the authority to pursue the existing Chapter 15 proceeding for the limited purpose of seeking a temporary stay of the various enforcement proceedings pending in the United States. What, if any, action should be taken in respect of any property of the Debtors located in the United States is a matter in respect of which I am not required to make any decision today.

Conclusions

13. For these reasons I will make absolute orders for bankruptcy on the Millards' petitions.

14. Because personal bankruptcy proceedings so rarely take place in this jurisdiction, the office of trustee in bankruptcy is held, *ex officio*, by the Clerk of the Court who does not in fact have the necessary professional qualifications and experience to be able to perform this role. For this reason, the Court must necessarily exercise its power under section 13 of the Bankruptcy Law to appoint a proper person to act as her agent in respect of these estates. Messrs Krys and MacInnis are qualified insolvency practitioners who have sworn affidavits stating that they meet the residency, independence and insurance requirements of the Insolvency Practitioners Regulations. In the absence of any objection by counsel for the Government of the Marianas, I am satisfied that they are proper persons who can be appointed as the Trustee's Agents in respect of these estates. The detailed terms of their appointments will be settled in chambers.

Orders accordingly.

Dated this 3rd day of June 2013

GRAND COURT - CAYMAN ISLANDS -

The Hon. Mr. Justice Andrew J. Jones QC
JUDGE OF THE GRAND COURT