



# In The Supreme Court of Bermuda

## BANKRUPTCY JURISDICTION

**2017: No. 315**

**IN THE MATTER OF HAROLD J DARRELL (IN BANKRUPTCY)**

**AND**

**IN THE MATTER OF THE BANKRUPTCY ACT 1989**

**AND**

**IN THE MATTER OF AN APPLICATION FOR DIRECTIONS UNDER SECTION 18 (3) OF THE BANKRUPTCY ACT 1989**

## **RULING AND DIRECTIONS** **(In Chambers)**

*Application for directions under section 18 (3) of the Bankruptcy Act 1989 in respect of the admission of the claim in the bankrupt's estate as an unsecured claim and a declaration that certain property is not subject to an equitable charge purportedly created by the deposit of title deeds*

**Date of Hearing:** **28 May 2025**

**Date of Ruling and Directions:** **4 June 2025**

**Appearances:** *Rhys Williams* of Conyers Dill & Pearman Limited for the Trustee in Bankruptcy

Ms. Judith Chambers as estate representative of the Estate of Peter Willcocks (in respect of this application only) in person

*Victoria Greening* of Resolution Chambers Ltd for Mr. Darrell

## **RULING AND DIRECTIONS of Martin, J**

### **Introduction**

1. This application came on for hearing on the application of Mr. John Johnston and Ms Elizabeth Cava in their capacities as the Trustees in Bankruptcy of Mr. Harold Darrell (the “Trustees”) seeking directions under section 18 (3) of the Bankruptcy Act 1989 and a declaration that a property at 12 Cedar Avenue Hamilton Bermuda HM12 (the “Property”) is not subject to a purported equitable mortgage and that the property may be sold free and clear of all encumbrances purportedly created thereby.

### **Background facts**

2. The circumstances of the case are unusual. Mr. Joseph Wakefield was the executor of the estate of Mr. Peter Willcocks, who died in 2005. By the terms of his will, Mr. Peter Willcocks left the sum of BD\$480,000 on trust for the benefit of his son, Mr. Geoffrey Willcocks, on terms which it is not necessary to describe here.
3. During the course of the administration of the estate (the “Willcocks’ Estate”), on 22 October 2010 Mr. Wakefield lent the funds representing the remaining corpus of the Willcocks’ Estate’s funds (then standing at BD\$427,259.47) to Mr. Harold Darrell (the “Loan”). On 17 May 2011, some seven months later, Mr Darrell signed a document entitled Memorandum of Deposit of Deeds<sup>1</sup> (the “MODD”) whereby Mr. Darrell agreed that he “will deposit” the deeds to the Property with Mr. Wakefield in the future when he received those deeds back from the Bank of Bermuda Limited (the “Bank”), which held a first mortgage security interest in the Property.
4. Mr. Darrell defaulted on the terms of repayment of the Loan and has not made any payments since 2012. Subsequently, the Bank quite separately sought to enforce its rights under the first mortgage over the Property and obtained an Order to sell the Property. The Bank refused to deliver the Deeds to Mr. Darrell, and the obligation created by the MODD for Mr. Darrell to deposit the deeds was never in fact fulfilled.
5. Mr. Darrell was unable to repay the outstanding obligation to the Willcocks’ Estate. In 2015 Mr. Wakefield issued proceedings against Mr. Darrell to recover the debt and obtained a judgment by consent in the sum of BD\$427,259.47. In those proceedings Mr. Wakefield relied upon the MODD as “evidence” of the debt.

---

<sup>1</sup> At common law the deposit of title deeds creates an equitable mortgage. The *promise* to deposit deeds is commonly analysed as creating an equitable fixed charge enabling the lender to resort to that property to pay off the debt, but it does not by itself create a legal or beneficial interest in the property or confer a right to possession.

6. Mr. Darrell did not pay the judgment and in 2017 Mr. Wakefield (acting in his capacity as executor and trustee of the Willcocks' Estate) filed a bankruptcy petition against Mr. Darrell in relying upon the judgment debt.
7. The petition stated that the Willcocks' Estate was an unsecured creditor in the amount of BD\$597,611.49 made up of the unpaid Loan of BD\$427,259.47, unpaid contractual interest of BD\$72,000.02 and taxed legal costs of BD\$27,851.00 and statutory interest on those sums of BD\$64,501.00. The petition also declared that Mr. Wakefield did not hold any security in respect of the petition debt. Mr. Wakefield swore an affidavit verifying that the contents of the petition were true.
8. A Receiving Order was made on 10 November 2017. Mr. Darrell did not file a statement of affairs and appealed against the making of the Receiving Order, the details of which are not relevant to record here. Ultimately, on 18 December 2018 a Bankruptcy Order was made.
9. In 2021 Mr. Geoffrey Willcocks sued Mr. Wakefield and his law firm alleging breach of fiduciary duty, breach of trust, fraud and conspiracy to defraud in respect of the Loan to Mr. Darrell (Action 2021/417 (the "2021 Proceedings")), but those proceedings have not proceeded beyond the pleadings stage, and there is no prospect of them coming to trial any time in the foreseeable future.
10. However, in correspondence in relation to those proceedings in 2022, Mr. Wakefield's attorneys indicated that Mr. Darrell had created an equitable charge over the property under the MODD. The Trustees' attorneys queried this statement against the averment in the affidavit verifying the petition sworn by Mr. Wakefield in which he had confirmed that he held no security in relation to the petition debt. Mr. Wakefield's attorneys indicated that they would take instructions on making an amendment to the petition in this respect. When chased on this point, Mr. Wakefield's attorneys indicated that they had no instructions to pursue the application to amend the bankruptcy petition to allege that Mr. Wakefield held any security against the debt.
11. By operation of section 55 (2) of the Bankruptcy Act 1989, upon the making of a Bankruptcy Order all of Mr. Darrell's property vested in the Trustees in bankruptcy. The Trustees in bankruptcy are under a duty to realise the value of the property owned by Mr. Darrell in order to satisfy the debts owed to Mr. Darrell's creditors. The Trustees proceeded to obtain a Possession Order in respect of the Property so that they could take steps to realise its value. A Possession Order was perfected in January 2023. However, Mr. Darrell sought a stay pending appeal and appealed against the refusal of that application. The Court of Appeal refused the stay pending appeal and granted Mr. Darrell an extension to 21 July 2023 before the Possession Order took effect. A further application was made for a stay which was again refused by the Court of Appeal.

12. At about the same time Mr. Darrell's son expressed an interest in purchasing the Property. After some negotiations, a sale and purchase agreement was signed and there is now a binding contract for the sale of the Property to Mr. Darrell's son. The Trustees applied for an Order approving the sale, which was granted on 23 October 2023. In December 2023, the purchaser's attorneys indicated that they were unable to proceed with the sale due to the appearance of an equitable charge which had been registered at the Land Title Registry Office reflecting the terms of the MODD.
13. Mr. Wakefield died in December 2023. This is relevant because he cannot now (i) give instructions to amend the bankruptcy petition or (ii) confirm that he has surrendered his security under the MODD or (iii) give any explanation about the circumstances in which the Loan was given or the MODD was prepared.

### **The Issues before the Court**

14. The Trustees need to progress the administration of Mr Darrell's bankruptcy and realise the assets to pay the debts to creditors. In order to do so they need to be able to complete the sale of the Property which is Mr. Darrell's only known asset. Before they can do so, they need to resolve the question whether the MODD created a valid equitable mortgage so that the sale can proceed, or not.
15. There are three points that are central to resolving this question. First, was a valid equitable charge ever in fact created by the MODD? Second, even if it was a valid equitable charge, has Mr. Wakefield surrendered his right to rely upon that equitable charge by filing a petition in which he has declared that he holds no security interest? Third, if so, has Mr. Wakefield triggered the rules under the Bankruptcy Act 1989 that disallow a secured creditor from relying on his security when he has not declared the security and placed a value on it, but has claimed solely as an unsecured creditor?

### **The Trustees' application**

16. The Trustees start their analysis of the position from the basic notion that the Loan was made in October 2010, and the MODD was not executed by Mr Darrell until May 2011. They say that there was therefore no consideration given by Mr. Wakefield to Mr. Darrell for the MODD, and that therefore the MODD is invalid. The idea that the MODD was in consideration of the Loan fails because the normal rule is that past consideration (i.e. the Loan) is no consideration.
17. Although it might have been possible for Mr. Wakefield to provide evidence that this sequence of events had some other background explanation, he is now dead. The only evidence we have from him in sworn testimony is that the debt was unsecured. It is true that in the proceedings that he took to obtain judgment against Mr. Darrell, his pleaded case was that the MODD was "*evidence*" of the loan, but did not refer to it as being security for the loan. The Trustees say that it is curious that Mr. Wakefield, who was an experienced property lawyer, did not put the case in a more straightforward

way, and suggest that the inference is that he did not regard the MODD as a valid equitable security.

18. Further, when challenged on the status of the MODD by the Trustees' attorneys in relation to the 2021 Proceedings, Mr. Wakefield's attorneys did not pursue an application to amend the petition to clarify the position. No explanation was given. When chased, Mr. Wakefield's attorneys responded that the Trustees had "*misunderstood*" Mr. Wakefield's position and that "*should we be instructed to bring any application you will of course be properly advised of same.*"<sup>2</sup>
19. The Trustees point to the conduct of Mr. Wakefield in not (i) clarifying or explaining the position with respect to the MODD and (ii) not amending the petition when challenged as showing that Mr. Wakefield stood by his statement in the petition that the debt was unsecured.

### **The Court's assessment**

20. There is a clear argument that the MODD was given by Mr. Darrell without consideration, particularly in light of the passage of seven months between the receipt of the money and the execution of the MODD. The textbook explanation is that the giving of security in respect of an antecedent debt is not valid because there is no present consideration for it<sup>3</sup>, unless there is some act of forbearance on the part of the creditor, of which there was none in this case.
21. Although the textbook explanation also recognises that the court is not bound to apply a rigid chronological test, and will hold that consideration will exist where the two events (the Loan and the MODD) are in substance one transaction, normal practice would dictate that the giving of security would be contemporaneous with the receipt of the funds, otherwise the debt is wholly unsecured until the security is effected.
22. Mr. Wakefield did not explain what the intention was (or why it took seven months to prepare the MODD) when he had the opportunity to do so. He could have said that this was always the intention and that it was just an oversight, or the pressure of other business prevented him from arranging the documentation. His only unequivocal act was to swear that the Loan was unsecured, a position that he maintained even when pressed.
23. It seems to the Court therefore, that there is no evidence that assists the Court in overriding the general rule that past consideration is no consideration, and on that simple basis, the MODD is invalid and is of no effect. The Court so declares.

---

<sup>2</sup> Letter from Cox Hallett Wilkinson dated 28 February 2022.

<sup>3</sup> See e.g. *Chitty on Contract* (29 edition) paragraphs 3-026-7

24. However, in case this analysis is held to be wrong, I have also considered the alternative argument that even if the MODD was valid, Mr. Wakefield has surrendered that security in the bankruptcy by petitioning as an unsecured creditor for the full sum of the debt and the accrued interest and costs.
25. The Trustees rely on two provisions of the Bankruptcy Act 1989. The first is section 6 (2) which provides that a secured creditor must state in the petition either that he is willing to give up his security or give an estimate of the value of the security. The second is Schedule 2 to the Bankruptcy Act which states at paragraph 5 that the affidavit or claim in support of the proof of debt shall state whether he is or is not a secured creditor, and if at any time the creditor's affidavit has omitted to state that he is a secured creditor, he shall surrender his security for the general benefit of the creditors.
26. It is true that the affidavit that Mr. Wakefield swore was in support of his petition and was strictly not in support of a proof of debt in the administration of the bankruptcy. However, in the light of the fact that Mr. Wakefield is dead, the Trustee and the Court can only proceed on the basis that this is the fullest extent of the evidence there will ever be of Mr. Wakefield's position. Moreover, before he died Mr. Wakefield was offered the opportunity to amend the petition to clarify the position, but he chose not to do so.
27. The Court is therefore satisfied that the effect of the affidavit in support of the petition is to trigger the rule under paragraph 5 of Schedule 2, and that Mr. Wakefield is deemed to have surrendered his security for the benefit of the general body of creditors, and the Court so declares.
28. In the alternative, the Trustees submitted that in any event, in the course of the past seven years Mr. Wakefield has failed to take any steps to assert any claim that the MODD is a valid security, and that throughout the bankruptcy process the Trustees have acted on the basis that his claim is unsecured, and that any attempt now to value the security as at the date of the Receiving Order would be difficult, expensive and unrealistic to achieve.
29. The Court is satisfied that Mr. Wakefield has, by his conduct, waived his right to assert a security interest in the Property, and by taking the position over a period of seven years that he is an unsecured creditor of Mr. Darrell's bankrupt estate, it would now be inequitable to allow him or anyone claiming through him to assert to the contrary. The Court so declares.

### **Ms Chambers**

30. Ms Chambers was appointed to act as the estate representative of the Willcocks' Estate for the purposes of these proceedings. She informed the Court that she had no

objections to the application being made and took a neutral position in relation to its outcome.

### **Mr Darrell**

31. Mr. Darrell instructed counsel to attend the hearing and to seek an adjournment pending the outcome of the 2021 Proceedings. On a review of the issues to be determined in those proceedings the Court could not see that those proceedings will involve the question as to whether the MODD was a valid security, because the essence of those proceedings is that the giving of the Loan by Mr. Wakefield was in breach of duty, such that Mr. Wakefield or his firm is liable to account for the loss to the estate, or is liable in damages. The Court accordingly refused the application for an adjournment.
32. Mr. Darrell's counsel took instructions and confirmed that she was not instructed to make submissions in opposition to the application made by the Trustees but reserved the right to appeal or to apply to set aside any Order the Court made.

### **Other creditors**

33. The Trustees have notified all parties who may have an interest in these proceedings and have advertised the summons in the Royal Gazette to give any parties who might have an interest the opportunity to come to court to present their support or opposition. No parties have appeared.

### **Conclusions**

34. In the circumstances therefore the Court makes the following declarations and directions:
  - a. The MODD was executed without consideration and is therefore invalid and unenforceable.
  - b. The effect of filing a petition and verifying affidavit in support of an unsecured claim without declaring that there was any security in respect of the debt is that Mr. Wakefield is deemed to have surrendered his security interest (if any) in the Property.
  - c. The effect of Mr. Wakefield failing to make any claim to amend or assert any security interest in the Property either in the bankruptcy proceedings or otherwise, and his participation in the bankruptcy proceedings on the basis that he was and is an unsecured creditor, amounts to a waiver or acquiescence such that it would now be inequitable for Mr. Wakefield or anyone claiming through him as the executor of the estate of Peter Willcocks from hereafter asserting the contrary.

35. The Court therefore Orders:

- (1) The Property at 12 Cedar Avenue, Pembroke HM12 Bermuda (the “Property”) is not subject to any equitable mortgage, whether in favour of Mr. Joseph Wakefield (in his capacity as executor of Peter Willcocks) or otherwise.
- (2) The Property may be sold free and clear of any and all rights or interests of the estate of Peter Willcocks.

36. The Court orders that the costs of the application shall be payable out of the estate of Harold J Darrell as costs in the bankruptcy.

Dated this 4 June 2025



---

**THE HON. MR. ANDREW MARTIN**

**PUISNE JUDGE**