

Re ADAMS (Deceased);

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EX PARTE MUNRO AND OTHERS

[SUPREME COURT, 1964 (Hammett P.J.), 31st July, 7th August]

In Bankruptcy

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Bankruptcy—non-compliance with Bankruptcy Rules—discretion of court whether to direct proceeding rendered void—application for administration of estate in bankruptcy—necessity for verifying affidavit—Bankruptcy Ordinance (Cap. 37) ss.7(1), 8, 117(1) (8) (10), 147(1)—Bankruptcy Rules 1915 (Imperial) rr.5(1), 299, 319, 321, 385, Appendix Form 12—Bankruptcy Act 1914 (Imperial) (4 & 5 Geo.5, c.59) s.130.

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By virtue of rule 385 of the Bankruptcy Rules, 1915, which, as amended to 1945 are in force in Fiji, the Supreme Court has a discretion whether to order that any particular non-compliance with the Bankruptcy Rules, as opposed to non-compliance with a provision of the Bankruptcy Ordinance, shall render any proceeding void. Application to set aside an order of a Judge in Chambers that an estate be administered in bankruptcy, on the ground that the application upon which the order was based was not verified by affidavit, refused on the merits.

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Cases referred to: *Re Sanders; Ex parte Sanders* (1894) 71 T.L.R. 236; 63 L.J.Q.B. 734; *In re Nicol* (1903) 22 N.Z.L.R. 129; *In re McGregor* (a debtor) (1914) 33 N.Z.L.R. 801; *Woolfenden v. Woolfenden* [1948] P. 27; [1947] 2 All E.R. 653.

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Application in chambers to set aside order that an estate be administered in bankruptcy; reported by direction.

B. A. Palmer for the Official Receiver.

A. D. Leys and C. D. Singh for the executors.

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HAMMETT P.J.: [7th August, 1964]—

This is an application to a Judge in Chambers for an order setting aside the previous order of a Judge in Chambers that the estate of Clarence Angleson Adams (deceased) be administered in Bankruptcy as an insolvent estate and that the Official Receiver in Bankruptcy of this Court be the Trustee, on the ground that the said order is a nullity.

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The facts leading up to this application as set out on the affidavits before me appear to be as follows:

The late Mr. C. A. Adams died in Fiji on 10th May, 1962. By the terms of his will he appointed Robert Lindsay Munro, Donald John Warren and Ronald Graham Quayle Kermode to be the executors of his estate. His executors were granted probate of the deceased's

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estate by this Court in the exercise of its Probate Jurisdiction on 25th February, 1963 (No. 7544).

A On 15th February, 1964, these executors presented a petition to this Court in its Bankruptcy Jurisdiction stating that the estate was insufficient to pay the debts of the deceased and praying that an order be made for the administration of the estate in Bankruptcy. This petition was not verified by an affidavit.

B On 18th February, 1964, an ex parte order was made, by a Judge in Chambers, that the deceased's estate be administered in Bankruptcy and that the Official Receiver in Bankruptcy of this Court be made the Trustee.

C In these proceedings Crown Counsel applies to a Judge in Chambers on behalf of the Official Receiver for an order that this earlier order be set aside as a nullity on the ground that when it was presented it was not verified by an affidavit.

The provisions of the Bankruptcy Ordinance (Cap. 37) relating to the administration in bankruptcy of an insolvent estate are contained in Section 117 of which subsections (1) and (8) read:

D "117.(1) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against the debtor, had he been alive, may present to the court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy.

E (8) A petition for the administration of the estate of a deceased debtor under this section may be presented by the legal personal representative of the debtor, and, where a petition is so presented by such a representative, this section shall apply subject to such modifications as may be prescribed by general rules made under subsection (10) of this section."

F I note further that whereas the Bankruptcy Ordinance by Section 7(1) requires that a creditor's petition in bankruptcy shall be verified by affidavit, no such requirement is necessary in respect of a debtor's petition under Section 8 of the Ordinance.

G On this analogy it would appear that whilst the Ordinance itself might have intended a petition by a creditor of a deceased debtor to be verified by affidavit, it did not apparently intend to require a petition by the deceased's personal representatives, who for all practical purposes stand in the shoes of the deceased debtor, to be verified by affidavit.

H No specific rules have been made under the provisions of Section 117(10) in respect of the administration in bankruptcy of the estates of persons dying insolvent, other than those contained in the English Bankruptcy Rules, 1915, which, as amended up to 1945, are in force in Fiji by virtue of Section 147(1) of the Bankruptcy Ordinance (Fiji) (Cap. 37).

Rule 299 of the Bankruptcy Rules, 1915, reads:

"A creditor's petition and a petition by the legal personal representative of the deceased under section 130 of the Act shall be verified by affidavit." A

Section 130 of the Bankruptcy Act, 1914, (Imperial) is in identical terms with Section 117 of the Bankruptcy Ordinance (Fiji), Cap. 37.

It is clear that the petition of the executors in this case should, therefore, have been verified by affidavit in compliance with Rule 299. The point now in issue is whether the failure to verify the petition in this case by affidavit was such a fundamental non-compliance with the rules as to make the order a nullity, notwithstanding the express provisions of Rule 385 which reads as follows: B

"385. Non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceeding void unless the Court shall so direct, but such proceeding may be set aside either wholly or in part, as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court may think fit." C

My attention has been drawn to three decisions: D

The first of these is the case of *Re Sanders; Ex Parte Sanders*, 71 T.L.R. 236. This was a case of a creditor's petition in Bankruptcy in which an affidavit verifying the petition had been filed. This decision did not deal with the same issue as is raised in the case I am now considering, and I do not feel able to apply it to this case, which concerns a petition by personal representatives of a deceased person who did not verify their petition by affidavit. E

The next two cases are in *Re Nicol* (1903) 22 N.Z.L.R. 129 and *In Re McGregor* (a debtor) (1914) 33 N.Z.L.R. 801. Each of these cases concerned contested creditors' petitions in Bankruptcy, in which, following the dicta of Vaughan Williams J. in *Re Sanders* (supra) it was held that the Bankruptcy Acts made it a condition precedent to the issue of a creditor's petition in Bankruptcy that the petition must be verified by an affidavit. I do not feel able to derive any help from these decisions because nowhere in either the English Bankruptcy Acts nor in the corresponding Bankruptcy Ordinance in Fiji is there any requirement that a petition in Bankruptcy by the personal representative of a deceased person whose estate is insolvent must be verified by an affidavit. This latter requirement is not prescribed by the Acts of the Legislature but by the Rules of Court made thereunder. F

It is abundantly clear from the provisions of Rule 385 of the Bankruptcy Rules that non-compliance with any of these Rules which might otherwise render proceedings void, shall not do so unless the Court shall so direct. "The Court" in this connection means "The Supreme Court of Fiji". G

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A In my opinion, therefore, it is a matter entirely within the discretion of this Court whether to order that any particular non-compliance with the Bankruptcy Rules, as opposed to non-compliance with the provision of the Bankruptcy Ordinance, renders any proceeding void.

B In the exercise of this discretion it is necessary to examine what the non-compliance in question has amounted to and whether this has resulted in prejudice to anyone. The form of the affidavit required to verify the petition in this case is authorised by Rule 5 (1) and the Appendix of the Bankruptcy Rules, and is as set out in Form No. 12.

Form 12 reads as follows:

"I, the petitioner named in the Petition hereunto annexed make oath and say :—

C That the several statements in the said petition are within my own knowledge true.

Sworn at etc."

D This affidavit is, therefore, a purely formal document which does not give any additional information to that already contained in the petition. I am invited on this application to rule that the order made on the original petition by the deceased's personal representatives is void and to put this apparently insolvent estate to the additional expense of the presentation of another petition merely to have it verified by a formal affidavit, which will in fact be of no practical help to anyone. I do not think that so to order would be a proper use of my judicial discretion but rather the contrary and would be to make an order against the obvious words, spirit and intention of Rule 385.

E In my view the order made in this case following this failure to comply with the provisions of Bankruptcy Rules was not thereby rendered a nullity as might well have been the case had the failure been to comply with the provisions of the Statute—see *Woolfenden v. Woolfenden* [1948] P. 27.

F It would appear that this matter might well have been brought before me in a somewhat different form having regard to the express provisions not only of Rule 385 but also of Rules 319 and 321 of the Bankruptcy Rules which read:

G "319. Applications by the Official Receiver to the Court may be made personally, and without notice or other formality; but the Court may in any case order that an application be renewed in a formal manner, and that such notice thereof be given to any person likely to be affected thereby as the Court may direct.

H 321. In any case of doubt or difficulty or in any matter not provided for by the Act or these Rules relating to any proceeding in Court the Official Receiver may apply to the Court for directions."

I have, therefore, considered treating this application as an application for directions in this case. It appears to me, however, that the papers now on the file are sufficient to enable the Official Receiver

to proceed to the winding up of the estate and that no further directions are necessary at this stage.

For these reasons this application is dismissed.

Application dismissed.