[2022] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO 51/2018

BETWEEN	**STEVE MOODIE**	**APPELLANT**
AND	**OWEN GRANT**	**1ST RESPONDENT**
AND	**ISRAEL TRANSPORT & EQUIPMENT COMPANY LIMITED**	**2ND RESPONDENT**
AND	**HERBERT HARTWELL**	**3RD RESPONDENT**
AND	**THE GOVERNMENT TRUSTEE**	**4TH RESPONDENT**

Anwar Wright instructed by Wright Legal for the appellant

Lijyasu Kandekore for the 1st and 2nd respondents

3rd respondent not appearing or being represented

Miss Elece Campbell for the 4th respondent

5 October 2020 and 8 July 2022

BROOKS JA

[1] In this appeal, Mr Steve Moodie, who by order of a judge of the Supreme Court, should properly be referred to as Steven Moodie (but will be referred to herein as Mr Moodie), raises issues connected with the Insolvency Act ('the Act'). He challenges the

decision of a judge of the Supreme Court who, on 26 April 2018, declared him bankrupt and ordered the appointment of the Government Trustee as the trustee for his estate. The receiving order was made at the instance of Mr Owen Grant, to whom Mr Moodie owes a judgment debt.

[2] Among Mr Moodie's complaints against the learned judge's ruling are that the learned judge failed to appreciate that:

a. the judgment was too old to be enforced and therefore the application to appoint a trustee was an abuse of the process of the court; and

b. Mr Grant had failed to produce any evidence, as required by section 57(1)(j) of the Act, that Mr Moodie had ceased to meet his liabilities **generally** as they became due.

The issues raised by Mr Moodie's complaints involve interpretation of the Act.

Factual background

[3] On 19 September 2000, Mr Grant and his company, Israel Transport and Equipment Company Limited ('Israel Transport') (collectively referred to hereafter as 'the respondents'), obtained judgment in default of defence against Mr Moodie. The latter had guaranteed a debt which Mr Herbert Hartwell, the 3rd respondent, owed. Mr Hartwell had, apparently, defaulted on that debt. On 27 June 2006, the acting master in chambers at the Supreme Court ('the learned master'), after an oral examination, ordered Mr Moodie to satisfy the judgment by making monthly payments of $15,000.00. Mr Grant asserts that Mr Moodie made some payments against the debt, but later stopped, without satisfying the debt.

[4] The respondents, before seeking to have the trustee appointed, applied for a judgment summons against Mr Moodie, to commit him to prison for failing to satisfy the judgment debt. That application was refused in May 2016, by the same judge who granted the receiving order in this case.

[5] In his judgment on the fixed date claim to appoint a trustee, the learned judge recorded that it was on 22 November 2016 that Mr Grant filed the fixed date claim form against Mr Moodie. Mr Grant eventually filed the second amended fixed date claim form (filed 15 December 2017) that came before the learned judge. In an affidavit supporting that second amended fixed date claim form, Mr Grant deposed that Mr Moodie had made a number of payments in obedience to the learned master's order, and then, apparently in or about July 2017, suddenly stopped paying the instalments, claiming that he was not indebted to the respondents.

[6] Mr Moodie did not file a notice of dispute in response to the fixed date claim, as required by the Civil Procedure Rules 2002 ('CPR'), but instead filed an application to have the fixed date claim struck out as an abuse of the process of the court. He insisted that the Act was being invoked for an improper purpose.

The learned judge's decision

[7] The learned judge, in a closely reasoned judgment, found that Mr Moodie had committed an act of bankruptcy. He based his finding on the following factors:

a. that the procedure used by Mr Grant was not an abuse of the process of the court as a judgment creditor may be entitled to utilise the provisions of the Act even if he is unable to enforce the relevant judgment because insolvency proceedings are not enforcement proceedings;

b. previously decided cases, based on similar legislation, indicated that it was possible, in appropriate cases, to find, despite the existence of a single judgment debt, that the judgment debtor was not meeting his liabilities generally as they became due;

c. the following circumstances of the case indicated that Mr Grant had proved that Mr Moodie was not meeting his liabilities generally as they became due:

i. the sum involved ($1,593,468.29 less the sums which Mr Moodie paid), is not a small sum;

ii. the judgment has not been appealed and there is no evidence that Mr Moodie was seeking to marshal the funds to satisfy the debt;

iii. although the judgment has been outstanding for a long time there is no indication that Mr Grant was willing to wait for payment, so as to allow Mr Moodie to proceed to pay other debts as they fell due;

iv. the delay in making payment is inordinate;

v. the failure to demonstrate Mr Moodie's position with any other creditors was not fatal to Mr Grants' fixed date claim; and

d. Mr Grant had shown that he was unable to afford the services of a licensed trustee and therefore the appointment of the Government Trustee was warranted in the circumstances.

The grounds of appeal

[8] Mr Moodie filed six grounds of appeal:

"I. The learned [judge's] finding that the facts do not support a reasonable explanation for failing to satisfy the judgment was against the weight of the evidence that: -

a. the debt was disputed as it had been paid by [Mr Hartwell]; and

b. [Mr Moodie] did not regard himself as bound to honour a stale-dated judgment for which no permission to enforce had been obtained.

II. The learned [judge] erred in law in holding that [Mr Moodie] had committed an act of bankruptcy within six months preceding the filing of the Claim when [Mr Grant] had:

a. invoked a stale default as an act of bankruptcy

b. produced no evidence that [Mr Moodie] was not paying his debts generally as they became due

c. produced no evidence that [Mr Moodie] had paid on the judgment or the Order on examination within six (6) years of either; and

d. produced no evidence of his inability to collect the debt other than by bankruptcy

III. The learned [judge] erred in law when he took into consideration the fact that [Mr Moodie] did not file a Notice of Dispute of the debt since no form of Notice of Dispute accompanied, nor was served, with the Fixed Date Claim and since CPR 77.6(1) is inapplicable to insolvency proceedings.

IV. The learned [judge] misunderstood [Mr Moodie's] submissions as seeking to equate insolvency proceedings with enforcement proceedings when [Mr Moodie] was in fact seeking to establish the special nature of insolvency proceedings which are reserved only for proper purposes and the benefit of all [Mr Moodie's] creditors and not as disguised enforcement proceedings.

V. The learned [judge] erred in law when he treated the order on examination as a **judgment** which was capable of forming the basis of an insolvency order, since it was never made with [Mr Moodie's] consent.

VI. The learned [judge] erred in law when he failed to [recognise] that one only of two joint claimants had no standing to apply for, or obtain, an order for insolvency against a judgment debtor without the other claimant

being a joint applicant for the same judgment debt." (Emphasis as in original)

[9] Mr Wright, appearing for Mr Moodie, argued grounds I, IV and V together and grounds II, III and VI individually. For convenience, however, ground Ia will be discussed with ground II, while ground Ib will be considered along with grounds IV and V. Grounds III and VI will be considered individually. It will be more convenient to discuss grounds Ib, IV and V first since they address Mr Grant's right to utilise the processes of the Act against Mr Moodie.

The availability of a receiving order in these circumstances (Grounds Ib, IV and V)

[10] The learned judge ruled that Mr Grant was entitled to use the procedure set out in section 57 of the Act and in Part 77 of the CPR. He found that the recourse to that procedure did not equate to enforcement proceedings and was not an abuse of the process of the court.

The submissions

[11] Mr Wright argued that the learned judge was wrong in finding that Mr Grant was entitled to utilise the facilities of the Act against Mr Moodie. On Mr Wright's submissions, Mr Grant was not a legitimate creditor in that:

a. Mr Hartwell had paid the debt;

b. the judgment was unenforceable as it had been obtained in 2000 and was, therefore, time-barred, being subject to section 33 of the Limitation of Actions Act ('the LAA'), which barred the enforcement of judgment debts after 12 years; and

c. Mr Moodie did not regard himself as bound to honour a statute-barred judgment.

[12] Learned counsel argued that the order of the learned master in 2006 could not be considered a judgment and could not be considered as resetting the clock for the purposes of section 33 of the LAA.

[13] Mr Wright submitted that the learned judge misunderstood the submissions that were made before him on behalf of Mr Moodie. According to Mr Wright, the learned judge was wrong in interpreting the submissions before him to mean that Mr Moodie was equating bankruptcy proceedings with enforcement proceedings. Mr Wright argued that Mr Moodie, "was submitting that he was under no legal obligation to pay a debt which was either statute barred or not enforceable against him without permission of the court and the Insolvency Court was not the proper forum as it is the ordinary court which should pre-determine the status of [Mr Grant] as a legitimate creditor".

[14] Mr Kandekore, on behalf of Mr Grant, supported the learned judge's reasoning. Learned counsel submitted that Mr Moodie was improperly contending that the request for the bankruptcy order was an attempt to enforce a stale-dated judgment following previously failed attempts.

The analysis

[15] Section 58 of the Act is the first relevant statutory provision to be considered. It states in part:

> "(1) One or more creditors may file in Court, an application for a receiving order against a debtor.
>
> (2) The application filed under subsection (1), shall state–
>
> (a) the debt or debts owing to the applicant creditor or creditors, which shall amount in the aggregate to not less than the [sic] three hundred thousand dollars;
>
> (b) **that the debtor has committed an act of bankruptcy within six months immediately preceding the filing of the application for a receiving order**;

(c) …

(3) – (11) …" (Emphasis supplied)

[16] The second provision that is relevant to these grounds, is section 33 of the LAA. It states:

> "33. No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien … but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable … and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given."

[17] Thirdly, rule 46.2 of the CPR restricts a writ of execution of a judgment in a number of circumstances, including where "six years have elapsed since the judgment was entered". In such circumstances, the court's permission is required to proceed. Rule 46.1 of the CPR stipulates the methods of execution. They include orders for seizure and sale and for possession, but a receiving order or other bankruptcy proceedings are not included among the methods of execution.

[18] Finally, rule 77.5 of the CPR stipulates that an application for a receiving order must be commenced by a fixed date claim form and must be supported by an affidavit. Rule 77.6 of the CPR requires that the fixed date claim form, when served, must be accompanied by a notice of dispute. A debtor who wishes to dispute the application for the receiving order must file and serve, on the applicant or the applicant's attorney-at-law, a notice of his intention to dispute the claim at least three days before the date set for the hearing of the application. Where the debtor does not file a notice of dispute, rule 77.7(2) of the CPR allows the court to exercise its discretion to "make a receiving order based on the allegations contained in the application and the supporting affidavit".

[19] Two issues need to be assessed when applying those provisions to this case. The first is whether the LAA or rule 46.3 of the CPR operates to prevent Mr Grant from applying for a receiving order. The second is whether Mr Grant had proved that Mr Moodie had committed an act of bankruptcy within six months immediately preceding the application for the receiving order, so as to satisfy section 58(2)(b) of the Act.

[20] The issue of whether Mr Grant has been barred from applying for a receiving order, touches on ground V. Mr Moodie's complaint in this ground is that the learned judge improperly treated, as a judgment, the order on the judgment summons.

[21] In this regard, it is important to note that although the judgment debt was created in 2000, there was, on 27 June 2006, an order for oral examination. Contrary to Mr Moodie's assertion, the effect of that oral examination, especially as both Mr Grant and Mr Kandekore deposed that Mr Moodie paid some monies after that order was made, is to restart the clock for the purposes of section 33 of the LAA. The order is a judicial pronouncement of the existence of the judgment debt and the learned judge expressly accepted the evidence of payment up to July 2017 (see paragraph [20] of his judgment). As a result, the 2000 judgment would not become statute-barred until, at the earliest, 27 June 2018. Accordingly, the application for the receiving order, having been filed on 22 November 2016, would not have been barred by section 33 of the LAA.

[22] Similarly, rule 46.2 of the CPR does not bar Mr Grant from applying for the receiving order. This is because such an application, as the learned judge pointed out, does not constitute execution of a judgment. It has also been pointed out above, a receiving order is not included in the list of instruments that constitute a writ of execution.

[23] On the issue of whether Mr Grant had satisfied section 58(2)(b) of the Act, it is noted that proof of failure to comply with a demand for payment within the specified six-month period is one of the ways of proving an act of bankruptcy. It is not disputed, however, that in the six months prior to applying for the receiving order, Mr Grant made no demand of Mr Moodie for payment.

[24] There is authority for the principle that the existence of a judgment debt may obviate the need for such a demand. On that point, guidance may be taken from the judgment of the Court of Appeal of Ontario, in **Malmstrom v Platt** (2001) 53 OR (3d) 502, 198 DLR (4th) 285 (CA). In that case, Finlayson JA, who gave the judgment of the court, said at paragraphs 10 and 11:

> "10 It was the view of the bankruptcy judge that court judgments did not require a demand from the judgment creditor within six months of the petition in bankruptcy. As he put it in his reasons of February 7, 2000:
>
> . . . As I discussed before, court judgments and orders are sufficient in themselves. They're the ultimate demand. There is no necessity to keep on demanding on a periodic basis as to the payment under those directions of the Court.
>
> 11 I agree with the position taken by the bankruptcy judge."

[25] That court was treating with a similar legislative provision (section 43(6) of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3 ('the BIA')) requiring a demand within six months previous to an application for a receiving order. Finlayson JA reinforced his stance at paragraphs 18 and 19 of his judgment. He said:

> "18 … once a judgment or order has been entered against a debtor, no purpose would be served by forcing the creditor of that debtor to either file a petition immediately (and possibly prematurely), or to make repeated demands for payment once the petition is filed. It is inappropriate to require a creditor who has proceeded properly through legal channels and become a judgment creditor to make frequent demands for payment to the judgment debtor, only for the purpose of ensuring that the statutory time limitations are complied with. A judgment is a continuing demand for payment by the judgment creditor just as the failure to satisfy the judgment is a continuing refusal by the judgment debtor.
>
> 19 Once a judgment or an order has been entered against a debtor, that judicial decree, even if entered more than six months before the filing of the petition, constitutes sufficient evidence of an act of bankruptcy having been committed within six months of the filing date. There is nothing improper

> in allowing a petitioning creditor to rely, as proof of bankruptcy, on formal judgments awarded against the debtor before the six-month period. **Further, allowing petitioners to rely upon judicial pronouncements** in order to establish current acts of bankruptcy is not contrary to the objectives of the BIA." (Emphasis supplied)

[26] Although Mr Platt, in later litigation between those parties, succeeded, on appeal (**Platt v Malmstrom et al** (2004) CanLii 14073), in setting aside the receiving order, which was the subject of the judgment of Finlayson JA, that success was as a result of Mr Platt adducing fresh evidence, and there was no comment, on appeal, on the reasoning in the judgment of Finlayson JA, that has been set out above.

[27] Finlayson JA's judgment was, however, the subject of clarification in the judgment of the Court of Appeal of Ontario in **Valente v Courey, Executor of the Estate of Stephen Fancsy** (2004) 70 OR (3d) 31 [2004] OJ No 635 ('**Valente v Fancsy**'). In the latter case, Feldman JA identified the issue before the court:

> "[14] The question for this court is whether the concept that a judgment constitutes a continuing demand will render every debt that has been pursued to judgment a special circumstance making that one debt evidence of an act of bankruptcy."

[28] He answered that question in the negative, saying that the creditor had to prove more than just the existence of a judgment debt. He said at paragraph [16]:

> "Before the court can be satisfied that the failure to pay one judgment debt is tantamount to failing to meet liabilities generally [page 37] as they become due, the court must examine and consider all of the circumstances including:
>
> -- the size of the judgment -- a small unpaid judgment is less likely to indicate an act of bankruptcy than a very large one;
>
> -- how long the judgment has been outstanding -- there may be reasons why a recently obtained judgment has not been paid as yet, including a potential appeal, the need to arrange for the marshalling of funds, the intent to make

> arrangements for payment over time or in the case of a default judgment, knowledge of the judgment;
>
> -- if a judgment has been outstanding for a long time, it may be that the debtor believes that the creditor is willing to wait for payment, and is paying his or her other debts as they fall due;
>
> -- whether the judgment creditor has conducted a judgment debtor examination and the results of that examination -- if the judgment creditor can collect without invoking the mechanism of the bankruptcy process, a petition ought not to be granted;
>
> -- what steps the judgment creditor has taken to determine whether the debtor has other creditors and the results of those inquiries."

[29] In **Valente v Fancsy**, the court held that the bankruptcy judge had issued the receiving order solely on the existence of a judgment debt, without considering the factors above. The bankruptcy judge had erred in failing to conduct enquiries, such as those set out in the last paragraph.

[30] In that context, Mr Moodie's assertion (in ground Ib) that he was not bound to honour the judgment debt, is of no consequence. It was for the learned judge to decide whether Mr Grant had satisfied the requirements of section 58 of the Act.

[31] On the ground IV question of the learned judge asserting that Mr Moodie was seeking to equate insolvency proceedings with bankruptcy proceedings, it is first necessary to identify the learned judge's comments in this regard. These were made at paragraphs [7]-[9] of his judgment. Firstly, he said, in part, at paragraph [7]:

> "…In support of this application for striking out [Mr Grant's fixed date claim], [Mr Moodie] submitted that the insolvency division of the Court was being invoked for an improper purpose. The gravamen of this submission was that the Claim was an attempt to enforce a stale dated judgment following previously failed attempts. The affidavit of [Mr Moodie] made reference to the fact that he had successfully contested a

> judgment summons filed by [Mr Grant] and the Court had refused the application for his committal to prison.

At paragraph [8], the learned judge said:

> "The submissions of [Mr Wright, on behalf of Mr Moodie] also placed considerable emphasis on his assertion that the judgment debt was stale dated, the Judgment having been obtained on 27th September 2006 [sic]. Counsel referred to CPR rule 46.2 which requires a judgment creditor to seek permission to enforce a judgment debt which has not been enforced for 6 years. Counsel submitted that [Mr Grant] was seeking to circumvent the statutory enforcement process which requires permission and that amounted to an abuse or misuse of the Court's insolvency jurisdiction."

[32] It was in that context that the learned judge made the comment that Mr Moodie has impugned. That comment is made at paragraph [9] of the judgment:

> "I do not accept these submissions, to the extent that they equate insolvency proceedings with enforcement proceeding and suggest the application of a similar test. Because of the availability of the insolvency jurisdiction of the Court governed by different rules, **it is open to** [Mr Grant] **in these proceedings to seek to demonstrate their compliance with these rules and it cannot reasonably be asserted that recourse to the insolvency jurisdiction amounts to an abuse of that jurisdiction merely because** [Mr Grant] **previously may not have been able to enforce the relevant judgment.** Furthermore, these allegations, without more, are incapable of establishing that [Mr Grant] is seeking to obtain some improper collateral advantage. However, the Court recognises that if the judgment creditor can collect the judgment without invoking the mechanism of the bankruptcy process, a petition ought not to be granted and this issue will be considered later in this judgment." (Emphasis supplied)

[33] It may be said that Mr Moodie's affidavit in support of his application to strike out Mr Grant's fixed date claim, would have suggested that that was Mr Moodie's stance. He did suggest that because Mr Grant had failed in his judgment summons application, the application for a receiving order was an abuse of the process of the insolvency procedure.

However, even if that were not Mr Moodie's intent, the learned judge did not limit himself to that interpretation. He went on to explain that insolvency proceedings were open to a creditor who had failed in attempts at enforcement of a judgment. There is no flaw in that finding. In fact, a creditor who is able to successfully pursue enforcement proceedings should not ordinarily be granted a receiving order. As Feldman JA, in **Valente v Fancsy**, said in paragraph [16] of his judgment, quoted above, "if the judgment creditor can collect without invoking the mechanism of the bankruptcy process, a petition ought not to be granted".

[34] The learned judge in this case, not only referred to **Valente v Fancsy** in his judgment (see paragraphs [16]-[19] of his judgment), but he also sought to make the enquiries recommended by that case (see paragraphs [20]-[24]). It was after having done so he found that Mr Moodie had ceased to meet his liabilities generally, as they became due, and that Mr Grant had satisfied the requirements of section 58 of the Act. In this regard, the learned judge found that:

a. the judgment sum was not small;
b. Mr Moodie had made some payments but suddenly stopped;
c. there was no appeal from the judgment, but there was no evidence that Mr Moodie was seeking to settle it;
d. Mr Moodie had no basis to believe that Mr Grant was willing to wait for payment;
e. Mr Grant's failure to conduct enquiries to determine if Mr Moodie had other creditors, and the status of those creditors vis-à-vis Mr Moodie, was not fatal to the application for the receiving order; and
f. the delay in satisfying the judgment was inordinate.

[35] Based on that analysis, it cannot be said that the learned judge erred in finding that Mr Grant's application was not statute-barred and that he had satisfied the requirements to enable a grant of a receiving order.

[36] Mr Wright relied, in part, on the case of **Coilcolor Ltd v Camtrex** [2015] EWHC 3202 Ch as authority for the principle that where a defendant to an insolvency petition has a substantial defence, which shows that the debt is disputed, the insolvency court is not the proper forum and that the matter should be pursued by ordinary litigation. The case is not, however, reasoned in the context of a judgment debt. Where there is a judgment debt, there can be no dispute as to the legitimacy of the debt. It is therefore distinguishable on that basis.

Whether Mr Grant had demonstrated that Mr Moodie had committed an act of bankruptcy within six months preceding the filing of the claim (Grounds Ia and II)

[37] Ground 1a concerns Mr Moodie's complaint that the learned judge should have found that Mr Hartwell had paid the judgment debt. That complaint is without merit. There was no evidence to support Mr Moodie's assertion that Mr Hartwell had satisfied that debt.

[38] The previous analysis of the learned judge's finding that Mr Moodie had committed an act of bankruptcy in the face of an unpaid judgment debt is sufficient to determine that ground II, which stipulated that the learned trial judge erred in law in holding that Mr Moodie had committed an act of bankruptcy within six months preceding the filing of the claim, should also fail.

[39] Grounds I, II, IV and V must, therefore, fail.

The procedure that Mr Moodie used in response to the fixed date claim (Ground III)

The submissions

[40] Mr Wright somewhat modified his approach to this ground. He candidly accepted that rule 77.6(1) of the CPR did apply to this case. The concession was correctly made. Part 77 was brought into effect on 27 July 2016, which is before Mr Grant filed his fixed date claim on 22 November 2016.

[41] Learned counsel, nonetheless, asserted that it was Mr Grant who had failed to comply with rules 77.5, 77.6 and 77.7 of the CPR. He asserted that Mr Grant did not:

a. serve Mr Moodie with a copy of the affidavit which supported the fixed date claim form, as required by rule 77.5(4) of the CPR;

b. serve Mr Moodie with a copy of the Form I.2 notice of dispute as required by rule 77.6(1) of the CPR; and

c. file proof of service with the court, as required by rule 77.7(1) of the CPR.

[42] As a result of those omissions, learned counsel submitted, the fixed date claim was not properly commenced. In fact, he submitted, the omissions constituted a fatal procedural defect, which nullified the entire proceedings.

[43] Rules 77.5, 77.6 and 77.7, respectively state:

> "**Applications for Receiving Orders**
>
> 77.5 (1) An application for a receiving order pursuant to Part V of the Act must be commenced by a fixed date claim form in Form 2 -
>
> (a) with prescribed notes in Form I.1; and
>
> (b) Form 4.
>
> (2) The application must name a trustee.
>
> (3) The applicant must file an affidavit pursuant to section 58 of the Act.
>
> (4) The applicant **must** be served -

(a) with the affidavit, prescribed notes (Form I.1) and a form of acknowledgement of service (Form 4);
(b) on the trustee named in the application and the Supervisor; and
(c) not less than 14 days before the hearing date.

Notice of Dispute

77.6 (1) When an application under rule 77.5 is served, the application **must** be accompanied by a notice of dispute in Form I.2.

(2) A debtor who wishes to dispute an application for a receiving order must, not less than 3 days prior to the date for the hearing of the application -

(a) file a notice of dispute in Form I.2; and
(b) serve a copy of the notice on the applicant or the applicant's attorney-at-law.

Proof of Service

77.7 (1) The applicant **must** file proof of service with the court no less than 2 days prior to the hearing of the application.

(2) Where the debtor does not deliver a notice of dispute prior to the hearing date for the application or does not attend at the hearing of the application, the court may make a receiving order based on the allegations contained in the application and the supporting affidavit." (Emphasis supplied, except for headings)

[44] Mr Wright stressed that the word "must" as used in each of the relevant provisions, indicated that the requirement in each case was mandatory and therefore non-observance was not an option. He relied for support on the case of **Dorothy Vendryes v Richard Keane and Karene Keane** [2011] JMCA Civ 15.

The analysis

[45] Mr Wright's submissions cannot succeed because Mr Moodie's assertions have not been supported by any evidence. There was no affidavit from Mr Moodie before the

learned judge in respect of any failure to serve him with a copy of form I.2 and there was no application to adduce any such evidence before this court.

[46] Despite Mr Moodie's current complaints, it does not appear that they were brought to the attention of the learned judge. This is despite the fact that the rules quoted above, formed part of the learned judge's reasons for judgment, and must have been brought to his attention during the hearing of Mr Grant's application. As a prelude to his identification of Mr Moodie's failure to file a notice of dispute, the learned judge referred to the requirements of serving that form and filing proof of service.

[47] Mr Moodie cannot successfully rely on these complaints at this stage. Although the issue of jurisdiction may be raised at any stage of proceedings, these complaints do not go to the issue of jurisdiction, as Mr Wright has submitted; the issues raised are procedural. **Dorothy Vendryes v Richard Keane and Karene Keane** is authority for the principle that failure to serve prescribed documents along with a claim form invalidates the service. Paragraph [12] of the judgment states:

> "[12] Rule 8.16 (1) [of the CPR] expressly specifies that, at the time of service, the requisite forms must accompany the claim form. The language of the rule is plain and precise. The word 'must', as used in the context of the rule is absolute. It places on a claimant a strict and an unqualified duty to adhere to its conformity. Failure to comply with the rule as mandated, offends the rule and clearly amounts to an irregularity which demands that, in keeping with the dictates of rule 13.2 [of the CPR], the default judgment must be set aside. The learned judge was correct in so doing."

[48] Similar reasoning can be applied to non-compliance with rule 77.6(1). The notice of dispute is an important document. A person against whom a receiving order is claimed, ought to be given all relevant information to enable him to resist the claim if he can.

[49] In the absence of supporting evidence, however, the reasoning in **Dorothy Vendryes v Richard Keane and Karene Keane** cannot assist Mr Moodie.

[50] This ground cannot succeed.

The absence of Israel Transport from the claim for the receivership order (Ground VI)

[51] The basis of this ground is that although Mr Moodie owed the judgment debt to Mr Grant and Israel Transport jointly, it was Mr Grant alone who applied for the receiving order against Mr Moodie. The case, in this regard, is curiously framed. Israel Transport is named as a claimant in the heading of the case in the court below, but Mr Grant is named as the sole claimant in the body of the second amended fixed date claim form.

The submissions

[52] Although ground VI criticises the learned judge for failing to recognise that Mr Grant is the sole claimant, it does not appear that a complaint was made to him about the situation. Nonetheless, Mr Wright asserted that this court may properly consider the ground.

[53] Learned counsel submitted that the debt, being said to be jointly owed, there is no basis for treating with Mr Grant alone. All parties, Mr Wright submitted, should be involved in the claim. He relied, in part, on **Forbes and Forbes v Miller's Liquor Store (Dist) Limited** [2012] JMCA App 13.

[54] Mr Kandekore submitted that Israel Transport was Mr Grant's alter ego and since Mr Moodie's obligation was a single one, there was, therefore, nothing that turned on the joinder point. Learned counsel also pointed out that the issue was not raised in the court below.

The analysis

[55] Mr Wright is correct in his submissions on this point. It is essential in joint claims that all the relevant parties be parties to the claim. This point was made in **Forbes and Forbes v Miller's Liquor Store (Dist) Limited**. Although the circumstances of that case were different from this case, the principle stated there is applicable here. Paragraph [38] of the judgment in that case states:

> "Where, however, the right to claim is joint with the other persons, then practicality, as well as the interests of justice, would demand that all those persons who are jointly entitled to the remedy, should be parties to the claim. That principle should apply unless some other consideration renders that approach undesirable or impractical. Having all those parties in the same claim, and in the instant case, the same appeal, would ensure that all issues are dealt with at once. It would have the benefit of having all the relevant parties before the court at the same time, at least giving them an opportunity to be heard."

[56] Mr Kandekore's submission that Israel Transport is Mr Grant's alter ego cannot succeed in these circumstances. Israel Transport is still an independent legal entity. Curiously, however, Mr Grant in his affidavit in support of the second amended fixed date claim form stated that he is the "principal [shareholder] of [Israel Transport] and as such swear this affidavit". That assertion, however, is not sufficient to meet the point made in **Forbes and Forbes v Miller's Liquor Store (Dist) Limited**.

[57] This ground should, accordingly, succeed. The fixed date claim form, having been filed without the input of Israel Transport, and without Israel Transport being represented as a party, the claim is irregular and was irregular when it came before the learned judge. The defect, was not, however, brought to his attention and it was never corrected.

Conclusion

[58] Only one of the several grounds of appeal can succeed. It is the ground that the fixed date claim was irregular when it came before the learned judge. Mr Grant, being one of two joint creditors, could not properly, on his own, claim a receiving order against Mr Moodie. Israel Transport, the other joint creditor, should have been a party to the claim, either as a joint claimant or a defendant. The fact that it was named in the heading as a claimant is not sufficient to meet the complaint. The body of the fixed date claim identifies Mr Grant as the sole claimant.

[59] The appeal must therefore succeed and the judgment and orders of the learned judge set aside.

Costs

[60] In light of the fact that Mr Moodie has only succeeded on a point that was not raised before the learned judge in the court below, he should not have costs of the appeal but should have the costs in the court below.

SIMMONS JA

[61] I have read the judgment of my learned brother Brooks JA and I agree.

DUNBAR-GREEN JA (AG)

[62] I too have read the judgment of my learned brother Brooks JA and agree.

BROOKS JA

ORDER

1. The appeal is allowed.
2. The judgment and orders of the learned judge made on 26 April 2018 are set aside.
3. Each party should bear its own costs of the appeal.
4. Costs of the proceedings in the court below to the appellant.
5. The costs are to be taxed if not agreed.