THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2016/0231

BETWEEN:

IN THE MATTER OF: The Petition of Marcus A. Wide, not personally but in his capacity as Liquidator of New Bank Limited (In **Liquidation) (the "Petitioner") for** an Order adjudging Thierry Dorian Nano Bankrupt

AND IN THE MATTER OF: The Bankruptcy and Insolvency Act, CAP. 136 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009

Appearances:

Mr. Graham Bollers for the Applicants

Mr. Duane Daniel with Ms. Jenelle Gibson for the Respondent

2018: June 21
2019: January 15

JUDGMENT ON SUBMISSIONS

Byer, J.:

[1] By Petition filed on the 21st December 2016 the Petitioner sought an order that the Respondent Thierry Nano be adjudged bankrupt and that a receiving order be made over the property of the Respondent/Debtor.

[2] The Petitioner based his petition on the following acts of bankruptcy as required by the Bankruptcy and Insolvency Act (BIA) namely:

*"**1.** The Debtor, in failing to honour judgment [obtained in Claim No. 118/2002] for over twelve (12) years nor satisfy the debts of others noted in supporting evidence, has ceased*

to meet his liabilities generally as they fall due, constituting an act of bankruptcy pursuant to Section 3(1)(j) of the Bankruptcy and Insolvency Act;

2. The Debtor, as a fugitive from criminal charges and arrest warrants, fled Saint Vincent and the Grenadines in 2001 and has refused ever since to return to face prosecuting authorities and meet the various liabilities he owes to his creditors. As such, and with intention to delay, defeat or hinder these creditors, the Debtor has absented himself from the jurisdiction and remained absent in service of the aforesaid creditor-evasive ends ***during the six (6) months next preceding this Petition's presentation,*** *constituting an act of bankruptcy pursuant to Section 3(1)(d) of the Bankruptcy and Insolvency Act; and*

3. The Debtor has, within the six (6) months next preceding this Petition presentation, taken steps to dispose of assets he legally or beneficially owns in the jurisdiction with the intention to hinder, delay or defeat his creditors and any attachable interest these creditors might assert within the jurisdiction of this Honourable Court. To wit, the Debtor has liquidated real property owned by a company of which he was 100% beneficial owner of, named Admiralty Estates Limited, on the eve of the prosecution of civil proceedings against the Debtor, thereby removing those assets from the reach of local creditors and the jurisdiction of this Honourable Court, constituting an act of bankruptcy pursuant to ***Section 3(1)(g) of the Bankruptcy and Insolvency Act."***

[3] The indebtedness upon which the Petitioner sought to rely related to 3 distinct debts. The first was the sum of USD $457,455.74 being a judgment obtained in the matter of *Re New Bank Limited*[1] in which the Respondent/Debtor was ordered to pay the above noted sum. This judgment was obtained on the 12th March 2004.

[4] The Petitioner also sought to rely on two other supporting creditors in the persons of Bronte Gregg and Ronald Marks. Ms. Gregg's claim was for the sum of XCD$25,635.15 for services she stated she rendered to the Respondent/Debtor personally as the former principal of the property owned by Sunny Caribbee Hotel Plantation Hotel. Ms. Gregg's contention was that when the hotel ceased

[1] SVGHCV118/2002

operations the Respondent/Debtor requested that she stay on and render services which she did from 2003 to 2015 when the property was sold. Mr. Ronald Marks on the other hand is a legal practitioner and his debt is said to be in relation to legal fees incurred in what appears from the face of the invoice in 2002. These fees amount to XCD$160,000.00.

[5] In relying on the existence of these outstanding sums together with reliance on other acts of bankruptcy under the provisions of the BIA, the Petitioner seeks the prayers as claimed.

[6] At the trial of the matter, no evidence was led. The parties agreed to allow the affidavits that were filed on behalf of both sides to enter as unopposed evidence. The parties determined and agreed with the court that the issues were mainly questions of law and not fact and wished to proceed based on written submissions.

[7] This decision is therefore rendered on the comprehensive and fulsome submissions of both sides.

[8] In looking at this matter, I am satisfied that there is really only one issue. The question must be asked: *has the Petitioner proven to the satisfaction of the court that he is entitled to the receiving order as sought and to have the Respondent/Debtor adjudged bankrupt.*

[9] In making that determination, it is clear in my mind that the basis upon which the order is being sought has to be carefully and painstakingly scrutinized.

The Basis of the Claim

[10] The Petitioner has sought to rely on 3 variant sums that he says are owed by the Respondent/Debtor. He submitted to this court that either in the aggregate or separately, they all are in excess of the statutory threshold of $5,000.00. Under Section 4(1)(a) of the BIA it is stated

clearly that a petition can be brought by one or more creditors for a receiving order where "*the debt owing to the petitioning creditor amounts to not less than five thousand dollars"*.

[11] So there is a specific sum and by the evidence that has been brought before the court and I so accept, the sum claimed to be owing by the three individuals does amount to a sum way in excess of the threshold. However, that being said, that does not mean that these sums can be considered "provable" within the context of the BIA and which could be "recoverable by legal process"[2] making them fall squarely within the type of debt upon which a petition can be filed. Therefore, the determination that there was a sum or sums upon which the Petitioner could file the Petition does not equate to a determination that the Petitioner is entitled to the order as prayed. That further determination would entail other considerations which I will undertake shortly.

[12] The second consideration set out in section 4 (1)(b) is that the creditor may file a petition if "*the debtor has committed an act of bankruptcy within six months immediately preceding the filing of the petition"*.

[13] Like the previous section, the Petitioner must rely on certain acts that would be considered "acts of bankruptcy". These acts of bankruptcy are also defined within the parameters of the BIA and it is these that the Petitioner must aver the Respondent/Debtor has done.

[14] In the case at bar the Petitioner alleges that the Respondent/Debtor has committed three specific acts captured by sections 3(1) (d), (g) and (j). By section 3(1)(d) the debtor commits an act of bankruptcy where "*with intent to defeat or delay his creditors, departs out of Saint Vincent and the Grenadines or being out of Saint Vincent and the Grenadines remains out of Saint Vincent and the Grenadines or departs from his dwelling house or otherwise absents himself*". (My emphasis added). In seeking to rely on this subsection the Petitioner drew the court's attention to the fact that the Respondent/Debtor had voluntarily left the state just previous to the execution of a warrant

[2]**Reference Re The Debt Adjustment Act 1937** [1943] 2 D.L.R. 1;**Farm Credit Corporation v Dunwoody Limited (Trustee) [1988] C.L.D. 1092**

issued by the United States authorities. They also submit it was as a means of escaping his liabilities and obligations that had accrued. On the face of it indeed, it would appear that this may have in fact been the ultimate intention of the Respondent/Debtor but again this bears scrutiny **especially in light of the contentions by the Defendant's in opposition that such departure was** undertaken by prearranged planning and not specifically in response to the perceived threat from the US authorities.

[15] Subsection 3(1)(g) states that the debtor commits an act of bankruptcy **when he** "*assigns removes secretes or disposes or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors* ***or any of them."*** (My emphasis added) .Once again, the allegation of the Petitioner is that actions taken by the Respondent/Debtor when he sold property in Bequia, he secreted and removed from the jurisdiction the funds of such a sale and as such these actions were captured by this subsection. The contentions of the Respondent/Debtor of the circumstances surrounding this transaction are however different. Therefore, like the other bases for the filing of the Petition. I accept that the Petitioner was entitled to rely on the same to file, the question whether he is however entitled to the prayers based on these actions is an entirely different question.

[16] The final act upon which the Petitioner relied as an act of bankruptcy is subsection 3(1) (j). A **debtor commits an act of bankruptcy if he** "*ceases to meet his liabilities generally as they become* ***due"***. The acts of the Respondent/Debtor in failing to pay the judgment of the Petitioner and the debts of the other two supporting debtors are what the Petitioner seeks to rely on in this regard.

[17] For this court, it is this reliance that goes to the heart of the application however and which must be determined in some detail.

Court's Considerations and Analysis of the grounds of the Petition

Section 4(1) (a)

[18] On the face of the claim as filed by the Petitioner it would appear that the Petitioner has satisfied the requirement that the sum owed is in excess of $5000.00. However, as I intimated earlier even though the sums claimed were in excess of this threshold that did not mean that the claims are either valid or enforceable to allow for the making of the order sought.

[19] The Petitioner's contention in this regard is that the sum due to him is by way of judgment obtained in a court in this jurisdiction. The Petitioner relied on authority that held that a bankruptcy court is entitled to accept and rely on a judgment either as a "foundation of a petition or offered as proof of unpaid creditors' claims generally".[3] Indeed "*there is no better or more conclusive evidence of a debt owing than a judgment of the court…in bankruptcy proceedings the bankruptcy court is entitled to accept and rely on such a judgment whether it is a foundation of a petition or offered as proof of unpaid creditors' claims generally. It will only be in the most unusual circumstances that the bankruptcy court will accept a challenge to such a judgment".*[4]

[20] However, that is just what counsel for the Respondent has done. They have challenged the right of the Petitioner to rely on this judgment and the ancillary debts as claimed. The submission of the Respondent/Debtor regarding this judgment is that the judgment having been obtained since 2004, that the Petitioner is barred from relying on the same by virtue of the provisions of the Limitation Act (the Act)[5]. Section 26(1) of the Act provides "*an action may not be brought upon any judgment after the expiration of six years from the date on which the judgment became* ***enforceable".*** The submission went on to state, that these bankruptcy proceedings being an "action" within the meaning of the Act, there was no provision to obtain permission to extend the time to rely on the same, completely unlike the circumstances where enforcement of a judgment is being sought against an individual under the provisions of the CPR 2000[6]. The Respondent/Debtor

[3] Paragraph 16 of the Applicant's submissions filed 7th September 2018
[4] **Pappy Good Eats Ltd** 189 D.L.R. (4th) 709
[5] Cap 129
[6] Part 46.1

therefore submitted that based on this, the Petitioner was not entitled to rely on the said judgment to get past the requirements of section 4(1)(a).

[21] This Act they also submitted applied to the debt claimed by the other debtors Mr. Marks and part (at least) of the debt said to be owed to Ms. Gregg.

[22] The answer to this submission by the Applicant was that these matters not having been raised on the Notice of Dispute or the affidavits in opposition that the Respondent/Debtor, that they could not now seek to raise the same.

[23] Before I deal with the substance of that response. I wish to go on record to indicate that upon the court receiving the submissions on the part of counsels for the parties, I recalled the matter and sought counsel for the Petitioner's assistance in responding to the main thrust of the submissions of the Respondent. Counsel who held for Mr. Bollers (as counsel on record) indicated that such a response could be filed by the 21st December 2018 on the basis that he would undertake to prepare the submissions and have them filed due to the medical condition of Mr. Bollers which seemed (without any formal notice to this court to that effect) to have resulted in Mr. Bollers' complete temporary removal from practice. Based on this undertaking, this court deferred making an order on the matter as stood before it. On the 9th January 2019 I received skeleton arguments from what appeared to be Counsel Mr. Bollers, some 19 days late with NO accompanying application seeking the same to be deemed properly filed. As far as this court is therefore concerned, these submissions are not properly before it. However, in making this determination I will address my mind to the submissions contained therein as a matter of completeness.

[24] In relation to the response to this issue as raised by the Petitioner on his original submissions in response, I can deal with the same in short order. It stuns the court that the Petitioner has sought to raise that argument as an answer to what this court sees as a legitimate and possibly insurmountable hurdle. I say so in the context of these proceedings.

[25] On the 14th May 2018 the Respondent/Debtor filed an application pursuant to the BIA, seeking to stay the proceedings on the petition to allow the court to determine before the hearing of the petition, issues surrounding the validity of the creditor's debts which raised "the possibility that certain alleged debts may be statute barred or may be unmeritorious"[7]. The court on the hearing of the application agreed with the contentions made by counsel for the Petitioner that the issues raised on that Notice of Motion could be dealt with in the substantive hearing and did not require the proceedings to be protracted by the granting of a stay of the same.

[26] This court never made an order barring the Respondent/Debtor from relying on this preliminary point and the Petitioner would have been on notice since then that this was being advanced. I therefore find it disingenuous of the Petitioner to take the point that it has raised regarding this argument. Additionally, when one peruses the Regulations[8] sought to be relied upon by the Petitioner, it is clear, that provision is made in those rules that where there are lapses of procedure, that the court is empowered to find that such lapses do not affect the proceedings. At Regulation 206 it says this "non-compliance with any of these Regulations or with any rule of practice for the time being in force shall not render any proceeding void unless the court shall so direct ..."

[27] This, in this court's mind, encapsulates the nub of doing justice as between the parties. I do not accept as indicated earlier that failure to include this point in the notice of objection is fatal to the Respondent especially when one reads the intention of the notice of objection is to show cause against the petition. As stated, the Petitioner clearly knew the objections on the part of the Respondent and there was no prejudice to him especially considering the submissions that were made by counsel and to which the court acceded as stated earlier in the judgment.

[28] That being said, the question must be asked, and which is highly relevant, can the Act apply to bankruptcy proceedings. From the learning found by this court the answer appears to be a resounding yes even having considered the later persuasive authorities provided by counsel for the Petitioner.

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[7] Ground 5 of the Respondent/ Debtor's application filed the 14th May 2018

[8] Bankruptcy and Insolvency Regulations 2015

[29] In the authority relied on by the Respondent/Debtor of Morrison Knudsen International Inc v The Consultant Ltd et al[9] Byron CJ as he then was accepted the following proposition:

"In the case of Re a Debtor (1997) 2 All E.R. 789 Paul Baker QC J ruled that bankruptcy proceedings, based on a statutory demand founded on a judgment debt, constituted an "action: in accordance with the provisions of the Limitation Act. At page 792(E) of his judgment he stated:

> *"It seems to me that bankruptcy proceedings are, first of all, a new proceeding so that it can be properly said that the proceedings are newly brought and are not in any way continuing some previous proceedings pursuant to the judgment or anything of that nature. But while they are not part of the proceedings which led to the judgment – they are not some continuation in any way of those proceedings – they are based on or related to the judgment. The bankruptcy proceedings in the Medway Court are brought on a judgment obtained in another court. I have stressed that because it is well settled that the limitation period in s.4 does not apply to a process of execution following a judgment.""*

[30] I accept that this must be the correct statement of the law. These proceedings are an "action" on the judgment and are not a process of execution as contemplated by the discretion that devolves on the court regarding permission on writs of execution. I am fortified in this view by the learning in <u>Halsbury's Laws of England</u>[10] which states that "a debt barred by the Limitation Act is not a ***provable debt"*** in the context of what is required in order to file the petition. Additionally,in the ancient case of Ex parte Dewdney, Ex parte Seaman[11] the court as long ago as the 19th century made it clear that it would be improper where there was a spent debt to allow it to be revived simply by the filing of a petition in the bankruptcy jurisdiction. As the Lord Chancellor stated, after examining the plethora of authorities that had arisen on the law up to that point, as to the applicability of the statute of limitations that "the objection upon the statute is competent to the creditors and may be sustained"[12].

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[9] Civil Appeal No 15 of 2002 (Grenada)
[10] Volume 3 (4th ed) at paragraph 723
[11] [1809] 15 Ves 836
[12] Op Cit at page 843

[31] So therefore, although I accept that a debt that has been reduced to a judgment which is entered more than six months before the issuance of a petition is sufficient evidence of an act of bankruptcy[13], I also accept that this must be within the confines of how that judgment is enforceable and indeed in fact whether it is in fact enforceable.

[32] It would seem a very incongruous state of affairs to this court, that if a stale judgment cannot be enforced (without permission being obtained) or an action cannot be brought on it in the ordinary course of matters before the court, that the Bankruptcy jurisdiction provides a way of getting around the same, without there being specific provision to that effect by that very bankruptcy legislation.

[33] This court takes this position even considering a judgment from the jurisdiction of the Supreme Court of Justice- Ontario in the case of Re Bankruptcy of Kenneth Temple[14] relied on in opposition to the contention of the Respondent/Defendant. As I indicated earlier in this judgment, I do not consider that the skeleton arguments are properly before this court given the state of play. However, for completeness, I have perused the same and in particular, the judgment mentioned above which was relied on heavily by the Petitioner.

[34] In that case, the contention was made in opposition to the proceeding that because the debt was statute barred it was incapable of supporting an application for a bankruptcy order. Newbould J the trial judge of the matter, rejected this proposition and declared at paragraph 28 that "in my view, in Ontario it cannot be said that a debt is extinguished if an action on the debt is not brought within two years of its being due. Rather the debt continues to be owed. Thus such a debt can be the basis on which an application for a bankruptcy order can be made. Such a debt can also be the basis for a provable claim by a creditor in a bankruptcy". Indeed, I agree with the Learned judge that in Ontario this may indeed be the position, but I do not agree that this can apply wholesale or at all to our jurisdiction.

[13] **Platt v Malmstrom et al** 53 O.R. (3d) 502

[14] 2012 ONSC 376

[35] I accept that as the bankruptcy jurisdiction in this jurisdiction evolves it is entirely appropriate to seek assistance from those jurisdictions that have had this legislation like ours a lot longer, to trace how the courts have dealt with these matters. However, it must be done not slavishly or without due consideration to other existing legislation. In St Vincent and the Grenadines, the Act and section 26(1) thereof **specifically speaks to "no action".** In Ontario legislation to which this judgment spoke, there was a bar to proceedings being brought on a Claim after 2 years and claim was specifically defined as *"claim to remedy an injury, loss or damage that occurred as a result of an act or omission"*. In that context I therefore do agree with the learned judge that the two year bar would not have applied to bankruptcy proceedings. They are simply not part of the legislative definition that was the subject of this Ontario legislation. The Court however went on to expound, and to which I disagree, that if the Limitations Act does not pre**vent a bankruptcy application** "what reason would there be to prevent an application because it is based on debt for which a law suit **was not brought to enforce it within two years of the bankruptcy application?".**[15]

[36] I believe that this takes the proposition too far. I accept that our legislation does not extinguish the debt, it simply forbids any action being taken on it. I also accept the statement[16] that "**although** a party is barred from enforcing its remedies once that time period has expired its legal right will survive … [however] in the absence of a remedy to enforce a right, such right in and of itself is of **little value".** Therefore, in the context of our Act, the right may not have been extinguished, however I do not accept that this debt is provable in the context of bankruptcy proceedings in its present state. I therefore maintain that the Act must bar the reliance on the 2004 judgment, the debt claimed by Mr. Marks and certainly a portion of the debt said to be owed to Ms. Gregg. That debt to Ms. Gregg was itemised for the period that would have been within as well as outside of the parameters of the Act and as such I am not in a position to sever any portion of it but simply must accept it as it is and find that the Petitioner is not entitled to rely on it to pass the threshold of $5,000.00. I therefore find that the Petitioner has not satisfied section 4(1)(a) of the Act.

[15] Op Cit paragraph 15

[16] Graeme Mew in The Law of Limitations (2nd Ed.)

[37] Even though section 4(1)(a) and 4(1)(b) are conjunctive provisions in that they must exist together to ground an application for a bankruptcy petition and having found that the Petitioner has not satisfied 4(1)(a) for the sake of completeness I will briefly examine the other grounds upon which the Petitioner sought to rely as acts of bankruptcy on the part of the Respondent, to ground this petition.

Section 4(1) (b)[17]

Section 3(1) (d)

[38] The intent of this sub section is clear. The Petitioner must show that the Respondent "with intent to defeat or delay his creditors departs out of Saint Vincent and the Grenadines…" Therefore the onus is on the Petitioner to show that there was NO other intention to be ascribed to the actions of the respondent other than that as stated by the Petitioner.

[39] In this case the allegation of the Petitioner as contained in the affidavit of Marcus Wide is that the Respondent being a fugitive from criminal charges and arrest warrants fled Saint Vincent and the Grenadines[18]. This is purportedly supported by the affidavit of Richard Rafuse filed on the 23/01/17 in which he also claims that "…Nano is a fugitive from Unites States justice given that in or around November 2001 a warrant for Nano's arrest on two charges of money laundering was issued by the US District Court …Nano fled the jurisdiction of Saint Vincent and the Grenadines (SVG) ahead of approaching US authorities seeking his extradition …"[19]

[40] In this court's mind this allegation is based on an inference based on the timing of the Respondent's departure from St Vincent. Indeed, I find that this may be a reasonable inference even in the face of the evidence of both the Respondent and his attorney that the Respondent had made prior arrangements to have left St Vincent before the execution of any warrant against the Respondent.

[17] Set out at paragraph 12 above
[18] Paragraph 14 .2 of the Affidavit of truth of Marcus Wide filed 21/2/16
[19] Paragraphs 4 and 5 of the said Affidavit

[41] However, it is clear that the onus must be on the Petitioner to prove to the court that the inference sought is one that can be accepted on the balance of probabilities. Bearing that in mind, I accept as a guiding principle that "…creditors who claim the benefit of these severe and almost criminal provisions of the law cannot have that benefit unless they strictly comply with the terms of the Act. The fact that the debtor having departed from his dwelling house in itself, announces nothing …"[20] Therefore it is for the Petitioner to ascribe to the act of the Respondent that his actions could have no other meaning. That is, more probable than not, that the Respondent/Debtor left the jurisdiction with that purpose in mind. In the case at bar, on the balance of probabilities based on what is before this court, I do not find that the actions of the Respondent/Debtor in leaving the jurisdiction can fall within the intention required under Section 3(1) (d) .Timing is not everything, there must be more and this court does not see that "more" having been produced on the evidence of the Petitioner. I am therefore satisfied that the Petitioner has not made out this act of bankruptcy.

Section 3(1)(g)

[42] This subsection speaks to the purported bankrupt disposing of assets within the jurisdiction with an "intent to defraud, defeat, or delay his creditors". So once again the onus is on the Petitioner to show that the complained of acts, on a balance of probabilities, amounts to the intention ascribed to it as required by the section.

[43] The Petitioner's contention is that the Respondent sold property in Bequia and transferred the proceeds of sale beyond the jurisdiction of the Court. That was the bald statement upon which this court was asked to consider that this amounted to an act of bankruptcy under the legislation.

[44] No evidence was brought by the Petitioner to show any banking transfers or tracing of any funds. In fact on the evidence "…the most probable inference is that the intent was simply to dispose of the property at a price and upon terms satisfactory to the debtor".[21] In fact when one looks at the evidence of the Respondent in this regard, he categorically stated that none of the actual financial

[20] **Re Skelton** [1877] 5 Ch D 979 per Bacon CJ
[21] Inland Projects Ltd [1980] O.J. 2954

settlements of that sale, were conducted with any banking institutions within the jurisdiction but rather were all conducted between accounts outside of St Vincent. The Respondent/Debtor himself did not produce evidence of this other than his statement but he does not have to prove anything. What was of interest however were the statements made in this regard, that in this transaction this Petitioner's counsel had been paid legal fees from the proceeds of this transaction. These allegations were never refuted by the Petitioner and the inference that this court can draw is that fees were received and those fees in fact came from banking institutions outside of the jurisdiction.

[45] The onus was on the Petitioner to prove to the court that the act of the Respondent/ Debtor disposing property within the jurisdiction was coupled with active steps to remove funds from the jurisdiction so as to defeat his creditors. I do not accept that the Petitioner has so satisfied me on a balance of probabilities that he has proven this ground to enable him to rely on the same.

Section 3(1)(j)

[46] The Petitioner's final ground was that the Respondent had ceased to generally meet his obligations as they became due. This failure under the BIA must occur within the 6 months prior to the filing of the application.

[47] The Petitioner's contention is that this 6 month period is however not a fixed period and relied on the case of Re Joyce[22] to submit that the provisions of this section are met once cessation and inability to pay, occurred at *some* point and continued for a period of 6 months. The Petitioner having relied on the failure of the Respondent to pay the debts of the judgment and the other purported creditors, Ms. Greggs and Mr. Marks, the stark and clear inference was that the Respondent's actions had satisfied this requirement.

[22] 1984 Carswell Ont 143, 51 C.B.R. (N.S.) 152

[48] The Respondents however submit that there was a need on the part of the Petitioner not just to say that the debts existed but that there had been a demand made on behalf of the purported creditors and that it had not been met. Having failed to do so, the Respondent submitted that the Petitioner had in fact failed to satisfy this requirement.

[49] I **accept that there is no requirement under this subsection for the creditor /applicant to make "an exhaustive investigation of the affairs of the debtor before filing an application".**[23] I also accept that there is no obligation to make a formal demand. Once there is an investigation that reveals *some* indebtedness, then there is no need to go any further.[24]

[50] The Respondent has answered these allegations based on the purported debts being statute barred and that they were in fact an invention on the part of the Petitioner**. In this court's mind,** this did nothing to assist the court in its determination. I do accept that on a balance of probabilities, there were debts of the Respondent that had not been paid, whether he was obligated to pay them is not, **in this court's** mind, a consideration under this sub section. All that the Petitioner had to show in this regard was whether there was a debt that had not been paid that existed in the 6 months period as a continuing debt, before the presentation of the application. I do accept that that existed here. The Petitioner, if he had been able to satisfy the first part of section 4 may have been in a position to rely on this act of the Respondent/ Debtor. However, it is clear that this ground is integrally a part of what needs to be proven under section 4(1)(a).This court therefore having found that there is no provable or recoverable debt to satisfy section 4(1)(a) effectively means that this petition cannot succeed in any event.

[51] I therefore find that the Petitioner is unable to rely on the debts to establish the bankruptcy of the respondent. The acts of bankruptcy[25] cannot be read or found in isolation of that primary fact and as such there is therefore nothing upon which this petition, as filed, can be sustained. I therefore

[23] The Annotated Bankruptcy and Insolvency Act 2015
[24] Re Joyce Op Cit at paragraph 5
[25] By section 4(1)(b)

dismiss the petition with costs to the Respondent to be assessed if not agreed within 21 days of today's date.

THE ORDER OF THE COURT IS THEREFORE AS FOLLOWS:

1. Petition filed on the 21st December 2016 is dismissed with costs to the Respondent to be assessed if not agreed within 21 days of today's date.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar