UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JOHN BURROUGHES GIBSON — CASE NO. 98-60690

Debtor — Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter initially came before the Court in the context of an objection filed on April 28, 1998, by Mark W. Swimelar, Esq., chapter 13 trustee ("Trustee") to the petition and plan filed by John Burroughes Gibson ("Debtor"). On June 5, 1998, an affidavit in support of the Trustee's objection was filed on behalf of the Society of Lloyd's ("Lloyd's"). On June 9, 1998, a hearing on confirmation of the Debtor's plan was held in Syracuse, New York. At that time, the Court determined that it would be necessary to conduct an evidentiary hearing before resolving that

portion of the Trustee's objection which alleged that the Debtor was ineligible to seek relief under the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code").

Following several adjournments, an evidentiary hearing ("Hearing) was conducted on February 5, 1999, in Utica, New York. At the Hearing, Debtor's counsel objected to Lloyd's cross- examination of the Debtor, arguing that Lloyd's had failed to file a proof of claim prior to the bar date of June 16, 1998, and therefore, was not a party-in-interest and had no standing to participate in the Hearing. The Court agreed to allow Lloyd's, appearing specially, to participate while indicating that if it should later conclude that Lloyd's had no standing as a party-in-interest, the Court would not consider "any and all of the issues of their participation in the hearing . . ." *See* Transcript of Hearing ("Tr.") at 16.

Following the Hearing, the Court allowed the participants to file memoranda of law, setting a submission date of March 5, 1999. On March 5, 1999, Lloyd's filed a motion to dismiss the case, alleging that the Debtor was ineligible to file a petition under the Bankruptcy Code. Lloyd's motion was scheduled to be heard on April 5, 1999; however, upon the consent of the Debtor, no oral argument was heard, and the motion was submitted to the Court for its consideration.

FACTS

The Debtor filed a voluntary petition ("Petition") pursuant to chapter 13 of the Code on February 9, 1998. In his Petition, the Debtor lists his address as 4780 Makyes Road, Syracuse, New York. However, at the Hearing the Debtor testified that he is a Canadian citizen and resides

in Penetang, Ontario, Canada. The address listed in the Petition is that of his daughter and son-in-law, who purchased the property shortly before the Debtor filed his Petition.

According to the Petition, Debtor has a checking account with Marine Midland Bank in Syracuse, New York. The Debtor testified that the joint account was first established in 1993 primarily for use by his daughter while she was attending Syracuse University. It was the Debtor's testimony that he used to deposit money into the account which his daughter was able to withdraw for her college expenses. He testified that on occasion he also withdrew money from the account when he was in the U.S. visiting his daughter. Allegedly, the account is still open although Debtor acknowledged that he had never written a check on the account and did not know what the available balance was in the account as of the date of the Hearing.

The Debtor testified that in 1988 he invested in Lloyd's syndicates,[1] becoming what is referred to as a "Name." According to the Debtor, the market suffered losses at some point which resulted in his losing a great deal of money. In connection with his investment, Debtor acknowledged that he entered into a "General Undertaking" which contained choice of forum (England) and choice of law (English) clauses. *See* Exhibit "A" of Declaration of Philip Holden, filed March 5, 1999, at ¶¶ 2.1-2.3.

In his Petition, the Debtor lists Lloyd's as having a contingent, unliquidated and disputed unsecured claim of $1.6 million.[2] *See* Schedule F filed with the Petition. Lloyd's did not file a

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[1] "Lloyd's is not a company; it is a market somewhat analogous to the New York Stock Exchange . . . There are over 300 syndicates within Lloyd's for underwriting business . . ." *Roby et al. v. Corp. of Lloyd's*, 996 F.2d 1353, 1357 (2d Cir. 1993).

[2] According to the Debtor's chapter 13 plan, filed in conjunction with his Petition, the $1.6 million "is based on a proof of claim submitted by attorneys for Lloyd's in the *Schein* case [Chapter 7 Case No. 93B11124, E.D. La.]; the total amount of alleged debt may be different in

proof of claim in the Debtor's case prior to the bar date. With the exception of a law firm in New York City, all of the Debtor's creditors are located in either Canada or England. The only unsecured claim which is not listed as "contingent, unliquidated and disputed" is that of the Association of Canadian Names, which Debtor identifies as holding an unsecured claim of $4,200 in connection with "legal defense." *See id.*

ARGUMENTS

A. Debtor's Eligibility

Lloyd's asserts that the Debtor is not eligible to file his Petition in the United States. It is Lloyd's position that the checking account set up by the Debtor for his daughter in 1993 does not constitute "property" for purposes of Code § 109(a). The Trustee also takes issue with the Debtor's eligibility, pointing out that the Debtor failed to provide any proof of the existence of the account at the Hearing.

B. Lloyd's Standing

The Debtor asserts that because Lloyd's failed to file a proof of claim prior to the bar date, it is not a party-in-interest and has no standing to be heard by the Court. Lloyd's responds that because it may be affected by the bankruptcy case and by the Debtor's plan, it is a party-in-interest, even though it has elected not to file a proof of claim.

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this case, but accounting irregularities at Lloyd's make closer approximation impossible. These disputed claims result from underwriting losses at Lloyd's of London . . ." *See* Debtor's plan, filed Feb. 9, 1998, as Amended and filed February 5, 1999, at ¶2.

C. Dismissal of Petition

Lloyd's makes the argument that the Debtor's Petition should be dismissed for "cause" because the Debtor is a foreign citizen and has no creditors in the United States. Lloyd's contends that the Petition was filed as a means of addressing what is actually a two-party dispute. It is Lloyd's position that the Debtor is attempting to escape his contractual obligations and that he should not be allowed to obtain an advantage in bankruptcy court that has been denied other individuals that are United States citizens.[3]

The Trustee takes the position that the Petition should be dismissed based on assertions of bad faith. The Trustee contends that the Debtor "has consistently failed to disclose accurate information in the petition." *See* Trustee's Memorandum of Law, filed March 5, 1999, at 3. In addition to listing his residence inaccurately, the Debtor acknowledged at the Hearing that he owned a 1982 Porsche which he described as a "hobby car" (Tr. at 38) and which he failed to list as an asset. He also testified to having three accounts with the Canadian Imperial Bank of Commerce but listed only one of the three accounts in his Petition. The Trustee also alleges, based on the Debtor's testimony, that the Debtor misstated his income by approximately $11,000 per month. *See id.* at 4 and Trustee's Exhibits 4-8. The Trustee raises concerns regarding the Debtor's testimony that he spent approximately $15,000 in renovations to his residence postpetition and had no difficulty paying several large credit card bills of his and his common-

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[3] In addition to the Second Circuit's decision in *Roby*, six other circuits have addressed the issue of whether U.S. citizens who are Names may circumvent the choice-of-law and forum selection clauses found in the General Undertaking and concluded that they may not seek protection in the courts of the U.S. *See In re Head*, 223 B.R. 648, 650 n. 1 (Bankr. W.D.N.Y. 1998) (citations omitted); *see also Stamm v. Barclays Bank of New York*, 153 F.3d 30, 33 (2d Cir. 1998) (reaffirming the holding in *Roby*, "namely that the Choice Clauses are enforceable . . . .").

law wife in June and July 1998. *See* Tr. at 37 and Trustee's Exhibit 9.

The Debtor contends that he filed his Petition in good faith, wishing to reorganize his finances. He admitted, however, at the Hearing that but for Lloyd's claim, he would not have had to file a Petition as he was current on his other obligations.

Objection to Confirmation

The Trustee argues that confirmation of the Debtor's plan should be denied due to the Debtor's failure to report all his disposable income, as discussed above, and the Debtor's failure to satisfy the liquidation test set forth in Code § 1325(a)(4). The Trustee points out that the Debtor has equity in commercial property in Ontario and also has certain retirement accounts which are non-exempt, which if liquidated under chapter 7, would provide more monies to creditors than is currently proposed in the Debtor's plans.

DISCUSSION

Eligibility

Code § 109(a) provides that "only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor . . . ." In this case, the Debtor does not have a place of residence, domicile or business in the United States. He resides in Ontario, Canada where he practices dentistry. His eligibility rests solely on the joint checking account allegedly opened in 1993 for use by his daughter while she was attending college in Syracuse, New York.

In *In re Iglesias*, 226 B.R. 721 (Bankr. S.D.Fla. 1998), the Debtor was a permanent resident of Argentina and had $522 in an account at a bank located in the Southern District of Florida. The court, relying on *In re Berthoud*, 231 F. 529 (S.D.N.Y. 1916), concluded that the bank account was property located in the United States and that the Southern District of Florida was the proper venue for the case. *See Iglesias*, 226 at 723. This Court sees no reason to deviate from the reasoning by the courts in *Iglesias* and *Berthoud* and concludes that the Debtor is eligible to file a petition in this Court provided he is able to furnish the Court with documentary proof that the account was open at the time the Debtor's Petition was filed.

Lloyd's Standing

Having taken the position that the Debtor is not eligible for relief under the Bankruptcy Code and that the appropriate forum for addressing what Lloyd's argues is a two-party dispute is the English judicial system, Lloyd's has specially appeared in connection with the matters now before the Court and has not filed a proof of claim in the Debtor's case. An unsecured creditor is required to file a proof of claim in order for its claim to be allowed. *See* Rule 3002(a) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."). Because Lloyd's has elected not to timely file a proof of claim, it is not the holder of an allowed claim and is not entitled to receive payment through the Debtor's plan. *See In re Harris*, 64 B.R. 717, 719 (Bankr. D.Conn. 1986). Accordingly, it has no standing as a party-in-interest to object to the confirmation of the Debtor's plan under Code § 1324. However, this conclusion does not rule out the possibility that Lloyd's is a party-in-interest for purposes of its motion seeking dismissal of the Debtor's Petition pursuant to Code § 1307(c).

> "Party-in-interest" is not defined in Code § 101. It has been described as
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> "an expandable concept depending on the particular factual context in which it is applied." *In re River Bend-Oxford Associates*, 114 B.R. 111, 113 (Bankr. D.Md. 1990). In various contexts, a "party in interest" has been held to be one who has an actual pecuniary interest in the case, *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 706 (8th Cir. 1979); anyone who has a practical stake in the outcome of a case, *In re Amatex Corporation*, 755 F.2d 1034, 1041-44 (3d Cir. 1985); and those who will
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> be impacted in any significant way in the case. *In re Johns-Manville Corp.,* 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984)

In re Cowan, 235 B.R. 912, 915 (Bankr. W.D.Mo. 1999).

In *Cowan* AmeriCredit was found not to be a creditor in the chapter 13 proceeding because the debt it was owed had been discharged in the debtor's chapter 7 case. *See id.* at 914. The court concluded that it did not have standing to object to confirmation because it was not the holder of an allowed claim. *Id.* However, the court found that AmeriCredit did have standing to seek dismissal of the case under Code § 1307. *Id.* at 915.

Arguably, the present situation is one of Lloyd's own making in that it chose not to file a proof of claim. To have done so would have allowed the Debtor to object to the claim and to raise arguments on issues which other courts have found more appropriately addressed by the English courts (*see* Footnote 3). The Debtor has, on the advice of counsel,[4] by filing this chapter

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[4] The Debtor testified that the Association of Canadian Names, to which the Debtor pays dues, placed him in touch with Andrew Grossman, Esq. ("Grossman"), who advised him on filing bankruptcy in the U.S. See Tr. at 62. The Debtor testified that it was his understanding that "if Lloyd's filed a proof of claim and I listed them as a creditor, then under a Chapter 13 I would have the opportunity over three to five years to reorganize my finances so as to deal with my indebtedness with Lloyd's to either deal with them as being discharged at the end of that term, or that Lloyd's or any other creditor may choose not to file a proof of claim at which time at the end of that term -- three to five years -- I would be discharged from my indebtedness in the United States of America, and that at the end of that term anyone who hadn't filed a proof of claim could, and probably would, have recourse to introduce [a] proof of claim for that indebtedness to me in Canada." *See* Tr. at 51.

13 case placed Lloyd's between the proverbial "rock and a hard place". Lloyd's will certainly be impacted in a significant way if the Debtor is permitted to proceed with his bankruptcy case. Lloyd's debt will be discharged as long as it is provided for in the plan and the Debtor completes his plan. *See In re Ryan*, 78 B.R. 175, 178 (Bankr. E.D.Tenn. 1987). This is true despite the fact that the Debtor will have no obligation to make any payments to Lloyd's as a result of its failure to file a proof of claim. *See id.* Under those circumstances, the Court concludes that Lloyd's should be permitted, as a party-in-interest, to argue its position concerning dismissal of the Debtor's case.

Dismissal

The question which then presents itself is whether "cause" exists to dismiss the Debtor's Petition. Code § 1307(c) identifies several "causes" for dismissal. While bad faith is not specifically listed, the courts have determined that the absence of good faith is a basis for dismissal. *See In re Leavitt*, 171 F.3d 1219, 1224 (9th Cir. 1999)*; In re Letsche*, 234 B.R. 208, 213 (Bankr. D.Mass. 1999) (citations omitted); *In re Ladika*, 215 B.R. 720, 725 (8th Cir. BAP 1998). As one court notes, "[W]henever a Chapter 13 petition appears to be tainted with a questionable purpose it is incumbent upon the bankruptcy courts to examine and question the debtor's motives." *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1352 n.8 (8th Cir. 1990); *see also In re HBA East, Inc.*, 87 B.R. 248, 263 (Bankr E.D.N.Y. 1988) (stating that "[g]ood faith is the gatekeeper of the equity court. Bankruptcy courts are equity courts with powerful tools at their disposal to interfere with or disrupt traditional laws. Were there no good faith limits on the invocation of these powers, they could easily cause injustices and thwart useful

social policy."); *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992) (indicating that the inquiry should be whether the filing is "fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions.").

No where in the Code is "good faith" defined. It is a concept that requires the Court to examine the totality of the circumstances of the case. In this regard, the courts have considered a variety of factors in connection with the filing of a chapter 13 petition, including (1) the nature of the debt; (2) timing of the petition; (3) how the debt arose; (4) debtor's motive in filing the petition; (5) how the debtor's actions affected creditors; (6) debtor's treatment of creditors before and after the filing of the petition, and (7) whether the debtor was forthcoming with the bankruptcy court and the creditors. *See Letsche*, 234 B.R. at 213 (citations omitted)

Nature of the Debt

In this case the Debtor lists certain secured obligations with respect to two parcels of real property in Ontario, Canada, and a 1997 Buick Riviera automobile. *See* Schedules A and B, included with Debtor's Petition. According to the Debtor's proposed plan, the mortgages on the real property are to be paid outside of the plan. In addition, any obligations arising from the Debtor's dental practice are also to be paid outside the plan. The Debtor lists no outstanding unsecured obligations to anyone except certain entities involved in the dispute with Lloyd's. Of the unsecured claims listed in the Petition, only two are quantified, namely a claim of $4,200 owing to the Association of Canada Names for legal defense and a claim of Lloyd's of $1.6 million. All other claims are listed as contingent, unliquidated, disputed and unknown in amount. With the exception of a law firm located in New York City, none of the creditors are located in

the United States. Indeed, the Debtor admitted at the Hearing that but for the litigation with Lloyd's, he would not have found it necessary to seek bankruptcy protection. *See* Tr. at 22.

Timing of the Petition

Although Lloyd's suggests that the Debtor's Petition was filed "only two weeks after his defense to liability in the English action against him was rejected by the Queen's Bench Division Commercial Court" (*see* Lloyd's Memorandum of Law, filed March 5, 1999, at 53), the Debtor testified that he was uncertain of the timing of the ruling and whether it affected him. See Tr. at 64-65.

Motive in Filing the Petition

The Debtor testified that he was seeking to reorganize his debts. However, it is evident that the Debtor has no real need to reorganize his affairs. Debtor filed his Petition on the advice of Grossman as a means to address a two-party dispute.[5] Debtor is not financially distressed and has no real need for adjusting his debts other than the one allegedly due to Lloyd's. At the time he filed his Petition, he was current on all of his obligations except those relating to Lloyd's, which, with the exception of one creditor, he has identified as contingent, unliquidated and disputed. He continues to enjoy a life style which allows him to travel, to spend money on remodeling and landscaping of his home, and to incur credit card debt in excess of $1,000 on a

[5] According to the Declaration of Philip Holden ("Holden") Head of Lloyd's Financial Recovery Department, on March 11, 1998 judgments were internal against over 560 Names, but because of the Debtor's bankruptcy the proceeding in the High Court in London was "suspended" as to the Debtor. See ¶¶ 16-17 of Declaration of Holden, executed March 3, 1999.

monthly basis which he apparently is able to meet without difficulty.

Whether Debtor was forthcoming with the Bankruptcy Court and the Creditors

The Debtor failed to list his true residence on his Petition. He also admitted that he had three bank accounts with the Canadian Imperial Bank of Commerce even though he identified only one of the accounts in his Petition. He also failed to list a 1982 Porsche as an asset. Most importantly, the Debtor understated his income by between $8,500 to$10,500 per month in Canadian dollars. According to Schedule J, his projected monthly income is $13,467. However, according to his 1997 Taxpayer Summary (*see* Trustee's Exhibit 2), his total annual income was $434,520 or approximately $36,200 per month in Canadian dollars. Looking at his monthly income statements from February through June 1998, his net monthly income ranged from an approximate low of $30,000 to a high of $36,800 (*see* Trustee's Exhibits 4-8). Given the exchange rate of $.66 Canadian to $1.00 American, this calculates out to be between $22,000 to $24,000 per month in U.S. currency

In summary, other than the debt owed to Lloyd's, which the Debtor identifies as contingent and unliquidated, the Debtor has no need to reorganize under the jurisdiction of this Court. His filing appears to be a litigation tactic using his Petition as a sword, rather than a shiled, against Lloyd's. This approach is fundamentally unfair and certainly does not comply with the spirit of the Bankruptcy Code. Based on the totality of circumstances in this case, the Court concludes that the Debtor's Petition was not filed in good faith and should be dismissed. In reaching this conclusion, it is important to note that 'neither malice nor actual fraud is required

to find a lack of good faith. The [court] is not required to have evidence of debtor ill will directed at creditors, or that debtor affirmatively attempted to violate the law - malfeasance is not a prerequisite to bad faith." *Leavitt*, 171 F.3d at 1224-25 (citations omitted). The Court found the Debtor to be a very credible witness, and no one has asserted any malice or fraud on his part in filing his Petition. The Court understands the Debtor's frustration and his wish to resolve the dispute with Lloyd's. Unfortunately, the bankruptcy court is not the appropriate forum in which to address those matters.

Based on the foregoing, it is hereby

ORDERED that the Debtor's chapter 13 Petition is dismissed.[6]

Dated at Utica, New York

this 8th day of October

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[6] Having concluded that the Debtor's Petition should be dismissed, the Court need not address the Trustee's objections to the Debtor's plan.