

**THE EASTERN CARIBBEAN SUPREME COURT
THE HIGH COURT OF JUSTICE SAINT VINCENT AND THE GRENADINES
(IN THE BANKRUPTCY AND INSOLVENCY)
CLAIM NO. 2016/0053**

16/11/2016

**IN THE MATTER OF: The Bankruptcy and Insolvency Act (Cap. 136 of the Law of
Saint Vincent and the Grenadines, Revised Edition 2009)**

**AND IN THE MATTER OF: The intention to Make a Proposal of Harlequin Property
(SVG) Limited**

Appearances:

Mr. Joseph Delves and Ms. Heidi Badnock for the Petitioners;
Mr. B. McNamara and Ms. J. Gibson for Harlequin;
Mr. G. Patterson Q.C. and Ms. L. Vaswani for the Proposal Trustee.

2016: Nov. 11
2016: Nov. 16

JUDGMENT

- [1] **Cottle, J.:** The Petitioners brought a petition under Section 4 of the Bankruptcy and Insolvency Act Cap 136 of the Laws of ST Vincent and the Grenadines, Revised Edition 2009 to have a receiving order made against Harlequin Properties (SVG) Ltd (the Company). One day before the scheduled hearing of the petition, the Company filed a Notice of Intention to make a proposal to its creditors under Section 54 of the Act (NOI). Under the act, the effect of filing a NOI is the immediate staying of the proceedings by the Petitioners for 30 days in the first instance with a possibility of an extension for up to a maximum of 5 additional months.
- [2] Section 29(2) of the Act requires the Company to file with the Supervisor of Insolvency, within 10 days of filing the NOI, three things. These are a cash flow statement prepared by the Company, a report on the reasonableness of the cash flow statement in the prescribed form, prepared and signed by the Proposal Trustee, and a report prepared and signed by the company containing the prescribed representations regarding the preparation of the cash flow statement.

- [3] On the 10th day after filing the NOI, the company filed with the Supervisor of Insolvency a cash flow statement and a report containing the prescribed representations regarding the preparation of the cash flow statement. The Proposal Trustee also appended a letter. It was not in the prescribed form but stated in part, "... the Trustee is required to prepare a report on the reasonableness of the cash flow statement provided by the Company. This letter serves as to report on the reasonableness of the cash flow statement." The Trustee went on to explain that he had been provided documents by the Company but was "unable to assess the reasonableness of the cash flow within the required time of filing this report." The Trustee undertook to continue working with the Company and provide another report and the prescribed form within a further fortnight.
- [4] Before the expiry of the additional two weeks the Petitioner applied to the court for an order declaring that the failure of the Proposal Trustee to file his report on the reasonableness of the Cash flow projections of the Company within the mandated 10 day limit amounted to a breach of Section 29(2) of the Act. By Operation of Section 29(8) of the Act this was said to constitute a deemed assignment, rendering the Company immediately bankrupt at the expiry of the 10 day period after filing the NOI. The Petitioners also sought relief consequent upon the declaration prayed for.

THE LAW

- [5] Section 29 (8) of the Act reads....

"Where an insolvent person fails to comply with subsection (2), or where the trustees fails to file a proposal with the Supervisor under section 43(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9) -

- (a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have made an assignment;
- (b) the trustee shall forthwith file a report thereof in the prescribed form with the Official Receiver, who shall issue a certificate of assignment in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed pursuant to section 24; and

- (c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b) is issued, send notice of the meeting of creditors under section 92, at which meeting the creditors may by ordinary resolution, notwithstanding section 185, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

[6] There is no dispute that no report on the reasonableness of the Cash flow statement in the prescribed form had been provided by the Proposal Trustee. The Company has since applied for an extension of time within which to provide the statement in the prescribed form and has in fact done so before the present application came on for hearing. That application is yet to be heard.

SUBMISSIONS

[7] Mr. Delves for the Petitioners urged the following authorities upon the court.

[8] The Canadian Encyclopedic Digest, Bankruptcy and Insolvency at Paragraph 740 concerning the equivalent Canadian legislation, says

"Within 10 days after filing notice of Intention the debtor must file a cash flow statement with the official receiver. The court cannot extend the ten-day period, and if the cash flow statement is not filed in that time period the debtor is deemed to have made an assignment in bankruptcy."

[9] Several Canadian cases were cited in support of the proposition that the failure to file the cash flow statement within the statutory deadline results in an automatic assignment in bankruptcy. For example, in Re IDG Environmental Solutions Inc. 16 CBR (3d) 317, Carswell Ont 181 (Ont. Gen. Div.) the Court concluded that it had no power to extend the deadline to file the cash flow statement. In the words of Registrar Ferron the section allowing a court to extend time "... is applicable only in those cases where there is no intervening statutory event consequent upon default. Here, as a consequence of the default a very significant event occurs; bankruptcy intervenes." This reasoning was followed in In the matter of Proposal of Le Groupe Reso-Terre Inc. Insolvent person and H&M Diamond & associates Inc. Trustee- Petitioner where the court concluded that it had "no power to extend the time to file the cash flow statement."

- [10] On the other hand, Mr. Delves also pointed out that in Re Zabel 2013 BCSC 1738 the court did extend the time for filing the cash flow statements where the debtor and his Trustee had submitted the required documents in electronic form but for some unknown reason the filing had not been received. The debtor was not notified of the failure within the deadline period. The court thought it appropriate in the circumstances to exercise its jurisdiction to extend time. The court also extended the period in Re Birchshade Farms Ltd. In that case the insolvent person had failed to sign the documents as required by the statute. The filings were made in time though unsigned. The court found that the non compliance was of a very technical nature and distinguished the IDG Environmental Solutions Inc case. The irregularity was found not to have caused any injustice and was therefore curable. The court opined that it should give ongoing bankruptcy proceedings under that Act a wide berth with a broad and flexible interpretation of the procedural sections relating to such proceedings.
- [11] In Re proposal of Casa Verde Health Centre Inc. 1993 CarswellOnt 238 22 C.B.R (3d) 24 Ground J of the Ontario Court of Justice heard an ex parte motion for extension of time to file a cash flow statement. He granted the application and made an order, nunc pro tunc, extending the time for filing and setting aside the deemed assignment in bankruptcy. The judge gave no reasons.
- [12] The court was also referred to the case of The Banque Nationale du Canada, requiring creditor c. Nilus Inc., Les Planchers Leclerc Inc., Industries Leclerc Inc., respondent debtors 1997 CarswellQue,606 23 C.B.R (4th) 13. The original of the decision is in the French language and the court was provided an inelegant translation without the benefit of the original. Still the facts seem to indicate that insolvent company had filed a notice of intention to present a proposal under the equivalent Canadian legislation to the Act. Within 10 days of filing the notice, the debtor company filed a cash flow statement and a report of the insolvent person. The Proposal Trustee also filed a report indicating that he had examined the cash flow statement but could not declare that he was satisfied that it was reasonable because he had not seen certain sales orders and the factories were not in operation. The court held that the report did not conform to the required statutory format but was of the view that it was not necessary to adhere strictly to the prescribed forms in

matters of bankruptcy as the time for formalism was outdated. What was required was a confirmation by the Trustee that serious investigation had been done, the relevant proposals carefully analyzed and an opinion issued concerning the Trustees view of the reasonableness of the proposals. The court concluded that the Notice of Intention was ineffective.

ANALYSIS

[13] It appears that the authorities are conflicted as to whether there is power in the court to extend time to file a cash flow statement after the 10 day statutory period has passed. At the very least it seems that in exceptional circumstances the court may extend the time for such a filing. In the present case the cash flow statement was filed. It was the statement of reasonableness by the Trustee in the prescribed form that was absent. I find that the Trustee, by his letter of 13th Oct which I reproduce in full below did provide a statement as to the reasonableness of the Company's Cash flow statement.

[14] "Mrs. Sandra Bollers
Supervisors of Insolvency
c/o Financial Services Authority
2nd Floor, Reigate Building
Bank of St. Vincent and the Grenadines
Granby Street
Kingstown
St. Vincent

October 13, 2016

Dear Madam,

Harlequin Property (SVG) Limited (the "Company")

On October 3, 2016, I, Brian Glasgow, Partner of KPMG in St. Vincent and the Grenadines, was appointed Trustee in respect to the Intention to make a Proposal of Harlequin Property (SVG) Limited under section 29(1) of the Bankruptcy and Insolvency Act under the Laws of Saint Vincent and the Grenadines.

Under Section 25 (14)(b) of the Bankruptcy and Insolvency Act, the Trustee is required to prepare a report on the reasonableness of the cash flow statement provided by the Company. This letter serves as to report on the reasonableness of the cash flow statement.

The documents contained in Appendix A were provided by the Company to support the cash flow statement provided. Based on our review and further discussions with Management of the Company, I was unable to assess the reasonableness of the cash flow within the required time of filing this report.

The Company has been forthcoming with the information requested however given the complexities of the corporate structure and funds flow around the entities I am unable at this time to provide further comment. I will continue to work with the Company to assess the reasonableness of the cash flow and its financial position and will provide another report and the prescribed Form 35 on or before October 28, 2016.

Should you have any questions or further information, please contact me at (784) 562 2669 or via email at brianglasgow@kpmg.vc.

Yours truly

Signed

Brian Glasgow
Trustee

[15] By his report, the Trustee was saying that given the short period of time and his request for further information which the Company was supplying he was not yet in a position to speak to the reasonableness of the projected cash flow statement.


[16] Section 227 of the Act states;

"Proceeding not invalidated by defect or irregularity

No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of an opinion that substantial injustice has been caused by defect or irregularity and that the injustice cannot be remedied by an order of that court."

[17] In the present case where the report of the Proposal Trustee has been filed though not in the prescribed form I think it appropriate to refuse the application of the petitioners. I distinguish the Banque Nationale du Canada case as it turned on quite peculiar facts. The court was there concerned that the creditors had applied for and been granted an order appointing an interim receiver. The interim receiver had applied for and been granted an order extending the period within which the cash flow statement could be filed. The court concluded that it was in the interests of the creditors that the 30 day period to make a proposal should be terminated prematurely and the interim receiver be allowed to continue to apply the measures he had already put in place.

[18] I do not yet go on to consider the pending application for extension of time to file the report as to the reasonableness of the cash flow statement. I also note that there is pending an application for an extension of time within which to make a proposal. As no arguments have been advanced to the Court on these applications, no order concerning them is yet made.


.....
JUSTICE BRIAN. COTTLE
HIGH COURT JUDGE