

Harlequin Property (SVG) Limited

- Property Information

I have been requested by numerous creditors to state my position on the question of completing outstanding sale contracts before the proposal process is concluded. There seems to be some confusion as to the role that I play in this regard, whether in my capacity as Proposal Trustee or in my capacity as Interim Receiver. In the interest of providing some clarity, I have chosen to respond by means of this general circular to all creditors, rather than by communicating directly with individual creditors to respond to the queries pertaining to their own particular circumstances.

I have consulted with counsel on this matter, and must stress that the information that follows is based on the advice that I have received, is given in very general terms, and is not meant to represent advice as to the legal position or standing of any particular creditor who is in the position of a purchaser of land under or pursuant to a contract for sale with Harlequin Property (SVG) Limited (“Harlequin SVG”). **My comments are meant to provide general information as to the potential rights of any such purchaser, and is not a substitute for each creditor/purchaser obtaining his own independent legal advice from a suitably qualified legal practitioner.**

Let me state from the outset that, as Proposal Trustee and as Interim Receiver, I have no authority or power to complete any sales contracts pertaining to the lands of Harlequin SVG. During the proposal process, the property remains vested in Harlequin SVG, and only Harlequin SVG can give good title to any purchaser. As Proposal Trustee, my role is to provide assistance to Harlequin SVG in formulating its proposal, and to provide creditors with such information as they may reasonably require, and which is in my possession, to enable them to make an informed decision on any proposal that may be advanced by Harlequin SVG. It is not my role, nor do I have the authority, to perform the obligations of Harlequin SVG under any contract that it may have entered into for the sale of the lands or property belonging to it.



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Similarly, as Interim Receiver, my role is to protect and preserve the property and assets of Harlequin SVG until such time as the proposal process comes to an end. I have no power or authority to perform the obligations of Harlequin SVG under any contract that it may have entered into for the sale of the lands or property belonging to it.

As to the position of Harlequin SVG, upon filing a Notice of Intention to Make a Proposal, the company has obtained the protection conferred by certain provisions of the Bankruptcy and Insolvency Act (the "BIA"). The effect of those provisions is to stay all proceedings against the company, and to suspend the enforcement of rights that are exercisable by any person who is a party to a contract with Harlequin SVG. The BIA makes provision for persons who are aggrieved by the imposition of the stay to make an application to the court to lift the stay, so as to enable them to enforce such rights as they may be entitled to pursue. This means that rights arising under the sales contracts may not be exercised by a purchaser unless either (i) the court grants an order lifting the stay or (ii) the proposal process fails, and Harlequin SVG is deemed to have made an assignment of all its assets for the benefit of its creditors (i.e. it enters into bankruptcy). If the proposal succeeds, in that it is accepted by the creditors and approved by the courts, then, subject to the remarks that follow, it is possible that the rights of purchasers may become subordinated to the terms of the proposal, which will be binding on all creditors.

Any creditor who is a purchaser of land under a contract for sale with Harlequin SVG must, when considering whether or not to accept a proposal, satisfy himself by taking appropriate legal advice as to whether or not he will be in a better position under the terms of the proposal or under a bankruptcy regime. As a general rule, a trustee in bankruptcy takes the property of the bankrupt subject to any equities or interests affecting it at the time of the bankruptcy. The interest of a purchaser under a contract for sale of land has been described as an equitable



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interest or a proprietary interest in the land itself, and the vendor of the land is sometimes treated as a trustee or constructive trustee of the land, holding it upon trust for the benefit of the purchaser. The position of each purchaser should therefore be carefully considered in light of the provisions of the BIA, which state that property that at the time of bankruptcy was held by the bankrupt in trust for any other person will not form part of the bankrupt's estate: section 51(a); and that any person claiming a proprietary or other interest in property that is in the possession of the bankrupt at the time of bankruptcy may prove a claim to have that property turned over to him: section 70. These provisions will have application only if Harlequin enters bankruptcy.

Section 65 of the BIA also provides that an agreement for sale of land in favour of a bona fide purchaser for valuable consideration is valid and effectual as if the bankruptcy never occurred. This provision has been construed as having the effect of compelling the trustee in bankruptcy to carry to completion the provisions of the agreement, that is, by conveying it to the purchaser, subject of course to the purchaser paying any outstanding purchase money. A trustee in bankruptcy may, in certain circumstances, e.g. where the performance of the contract will impose an onerous burden on the estate, where the cabana is not built or substantially incomplete, have the right to disclaim the contract for sale. If he does so, he may nevertheless be obliged to convey the property to the purchaser. **Not every purchaser will be in a position to insist on performance of his contract, and the position of any purchaser who has not already paid his purchase money in full is not by any means clear.** Also, the rights of the purchaser to enforce may depend on other factors, such as the ability of Harlequin SVG to convey title (in some instances, Harlequin SVG is not the owner of the subject land). Again, **each purchaser must take independent legal advice as to his own personal circumstances to determine whether he will be placed in a better position under the proposal or under a bankruptcy.**

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I stress, once more, that this memorandum is sent in the interest of providing clarity as to the position of the Proposal Trustee and Interim Receiver, and in response to the concerns raised. I have not attempted to stand in the way of any purchaser pursuing his rights, and in my capacity as Proposal Trustee, I am in no position to complete any of the sales contracts. This memorandum contains general information, and may not be relied on by any person to whom it is addressed for any purpose whatsoever. I accept no liability for any loss or damage sustained by any person as a result of his reliance on the contents of this memorandum, **and it is once more strongly advised that you obtain independent legal advice.**

