

EASTERN CARIBBEAN SUPREME COURT

ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV2016/0053

IN THE MATTER of the Bankruptcy and Insolvency Act (Cap 136 of the laws of Saint Vincent,
Revised Edition 2009)

AND IN THE MATTER of the Intention to Make a Proposal of Harlequin Property (SVG) Limited
HARLEQUIN PROPERTY (SVG) LIMITED

Appearances:

Ms. Rene Baptiste, Mr. Bota McNamara and Ms. Jenell Gibson for Harlequin Property (SVG) Limited

Mr. Garth Patterson, QC, and Ms. Lalita Vaswani for Proposal Trustee

Mr. Joseph Delves and Ms. Heidi Badenock for FSCS and other Interested Parties

Mr. Grahame Ballers for Government of St Vincent and the Grenadines

2017: February 24

JUDGMENT

- [1] **ROBERTS, J. [Ag.]:** The applicant, Harlequin Property (SVG) Limited ("Harlequin"), is an insolvent person and debtor within the meaning of section 2 of the Bankruptcy and Insolvency Act, Cap 136 of the Laws of Saint Vincent and the Grenadines. Harlequin is seeking a further 45-day extension to file a proposal with the Supervisor of Insolvency, such that the new deadline would be 15th March 2017. Harlequin is also applying for an order "pursuant to section 21 (e) (iii) of the Bankruptcy and insolvency Act directing the Interim Receiver to make payments for valuation

services, accounting services and third party suppliers in order for the Company to make a proposal to its creditors".

[2] Harlequin filed a Notice of Intention (NOi) to make a proposal on 3rd October 2016. Pursuant to section 29 (8) of the Bankruptcy and Insolvency Act Cap 136, Harlequin was required to file a proposal within 30 days of filing the NOi on or before 2nd November 2016. The court granted an extension on December 8th 2016 following a hearing on 28th November 2016 to 16th December 2016. On 15th December the Harlequin made another application for extension which was heard on 27th January 2017 when another extension was granted to 30th January 2017. The applicant is now on its 3rd application for extension to file its proposal.

[3] I have perused the draft proposal of Harlequin and heard the submission of the counsel for Harlequin, counsel for the Proposal Trustee, counsel for the Government of St Vincent and the Grenadines, counsel for the United Kingdom Financial Services Compensation Scheme (FSCS). I considered affidavits of David Ames, sole shareholder and director of Harlequin, Brian Glasgow, Proposal Trustee, Martin Meredith on behalf of the FSCS and the reports of the Public Trustee.

[4] I came to the conclusion that Harlequin did not meet the conditions to be granted another extension of the period within which to file a proposal because I was not satisfied that -

(a) Harlequin had acted and was acting in good faith and with due diligence;

(b) Harlequin would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Is Harlequin likely be able to make a viable proposal if extension being applied for were granted?

[5] One of the planks on which the proposal rested for its viability was that the company would receive funds from the case it brought in the United Kingdom against its accountants. In the case,

Harlequin Property {SVG} Limited et al v Wilkins Kennedy, Harlequin won damages of £7,443,821.12 and costs of £2,000,000.00. However, it turns out that the barristers, solicitors, the funders, insurers and the interim receiver all made claims to the funds. It was pointed out to the court that the judge in the **Wilkins Kennedy** case indicated that the funds should be paid into court so that he could ensure that it did not get into the hands of Harlequin¹. The Proposal Trustee pointed out that "The combined value of claims received to date in relation to the WK Judgment debt is approximately £9.7 million against a total judgment sum paid into the UK Court {including interest and costs} of approximately £10.5 million. The Proposal Trustee therefore indicated that "there may not be sufficient funds to carry out the capital works required by operators in order to open the Resort"

[6] In **Wilkin Kennedy**, Mr Justice Coulson was moved to state in his judgment,

"The Harlequin business model might be said to bear the hallmarks of a serious and significant scam... It is important not to pull any punches when describing the Harlequin business model. There were elements of it which were similar to what might be called a Ponzi scheme, where the money paid by gullible investors was not spent as they thought it would be, but the scheme grew by word of mouth and those responsible for it became rich whilst the investors ended up with nothing."

The judge added that David Ames, "through an unhappy mixture of dishonesty, naivety a incompetence has caused irreparable loss to thousands of people". The upshot is that it is very unlikely that any of the funds on which the company was depending to fund the proposal will be available to Harlequin. At best obtaining funds from the **Wilkin Kennedy** case was no more than a hope that proved false. And Harlequin did not identify any alternative source of funding the proposal.

The debt to equity exchange

¹ Para 10 Public Trustee 3rd Supplemental Report

- [7] The second plank of the proposal was a debt to equity exchange. David Ames is the sole shareholder of Harlequin. The proposal is to transfer his shares in Harlequin to a new company, the shares of which would then be distributed to the investors (not other creditors) for the debts of Harlequin. I find The draft proposal to be opaque in that it does not make clear how the debt for equity swap will work. This is not a situation where Harlequin will be issuing shares to creditors in exchange for their debt. The plan does not explain the mechanics of the proposal. For instance, how will the debts of Harlequin be affected by the transfer of David Ames' shares to a new company? The only source of funds that Newco will have will be dividends, if any, from Harlequin.
- [8] In any event, a substantial² group of creditors represented by FSCS has indicated that "as a concept a debt to equity exchange is of little interest to our clients given its own role, function and statutory/regulatory duties". FSCS has called this "a significant and potentially unsurmountable hurdle"³.
- [9] The other failing in the proposal to swap equity for debt is that without a valuation or even forecast of Buccament Bay Resort, it is difficult to determine any equity value in the proposed shares on the current information. Further, the sole shareholder having been arrested in the United Kingdom by the Serious Fraud Office on 17th February 2017, I agree with Counsel for the Proposal Trustee that this must put into further question the value of the shares as there is a potential of the shares being subject to forfeiture as being the proceeds of crime; particularly where, as It was pointed out to the court, Justice Coulson in the **Wilkin Kennedy** case characterized the project as a Ponzi scheme. The proposal does not appear to benefit the creditors but rather it seems to be a scheme to let the sole shareholder off the hook as it is noted that on giving up his shares in Harlequin, David Ames and others closely associated will be released from any potential claim against them for losses incurred by the company's investors.
- (10) It also looms large that there is also silence as to stamp duty and fees on the transaction; and it must be borne in mind that, as I found, there is no sufficient, if any, funding from the **Wilkin Kennedy** case to finance this exercise. The proposal also failed to address those investors who

² Counsel for FSCS stated that it was the largest group of investors

³ Letter exhibited in First Affidavit of Martin Meredith

had paid Harlequin 100% for their property. Counsel for the Public Trustee submitted that these investors are in a special category of persons with a proprietary interest in real estate held by Harlequin. Counsel for Harlequin admitted that this group had not been mentioned in the draft proposal but indicated that Harlequin would be guided by the Proposal Trustee. He also stated that this group was not mentioned because Harlequin did not know what they wanted. The Proposal Trustee also mentioned a group of investors who had entered into contracts with Harlequin for the purchase of property not owned by Harlequin. Therefore, in these cases Harlequin held the debt but the assets were not brought into the mix (as Counsel for the Proposal Trustee put it). These add to the litany of inadequacies of the draft proposal and add to the unlikelihood that Harlequin will complete a viable proposal if granted the extension of time, or at all.

Lack of Financial data

[11] The proposal is not grounded in any financial data. Other than the Merricks land in Barbados, there are no formal valuations of any other Harlequin properties. I agree with the submission of the Proposal Trustee and the FSCS that there is no underpinning of financial data that would enable one to address the viability of the proposal. This is particularly so in the case of the main asset, the Buccament Bay Resort. There is insufficient information to enable creditors to make an informed view of their recovery prospects either under the draft proposal or the alternate, bankruptcy. The draft proposal suggests blanket figures but does not provide any verification. Harlequin has shown that it does not have the financial means to obtain the financial data necessary to complete the proposal. The other application before the court also highlighted the dire lack of funds by this insolvent company to pay even for the accounting services necessary to complete the proposal.

Proposed Hotel Management

[12] The Proposal Trustee pointed out to the court that there were no indicative terms for the proposed refurbishment and management of the main asset, the Buccament Bay Resort. What is presented is a vague limited disclosure of an expression of interest by Melia Hotels International with no definitive heads of terms or other assurance that arrangements are in place or are likely in the foreseeable future to progress to refurbishment, opening and operation of the resort.

[13] Further, a substantial group of investors⁴ has shown a lack of appetite for this aspect of the proposal. The FSCS stated, "It appears to be the intention that the current creditors run the resort. Our client certainly has no experience, expertise and available resources to carry out this task over a 5-year period and, as we have pointed out above, it is likely to be beyond our remit as a public body and scope of its statutory obligation." As it stands now, the proposed hotel management plan is half-baked and in my view could not be completed within the requested extension time. The draft proposal presented for the resort management is characterized by uncertainty. It fails to disclose contract details. One is left in the dark about key elements of the arrangement to manage the resort, such as management fees, responsibilities, access to distribution network, bookings.

Prejudice to Creditors

[14] Both the Proposal Trustee and the FSCS were of the view that the delay in filing a proposal resulted in the further costs being incurred for maintaining the estate. They gave as an example, keeping Buccament Bay Resort secure. These costs will inevitably form part of Harlequin estate and will continue to be incurred until conclusion of the proposal process, thereby potentially prejudicing the potential recoveries of all creditors. I agree with this submission. I am satisfied that the unsecured creditors of Harlequin would sustain material prejudice in the event the extension being applied for were granted.

Good Faith and Due Diligence

[15] I have distilled from the affidavits in this application that the preparation of the proposal has not reached much further than at the last extension. David Ames himself stated that he had limited staff to work on the draft proposal. Harlequin was applying to court for funds to pay the BCQS to do accounts that should have been done. In a letter written by a director of BCQS on 23rd February 2017, the day before the hearing of the application for the extension, it was stated -

⁴ First Affidavit of Martin Meredith, para 5, FSCS is a creditor of Harlequin for £21,253,943.24.

"Further to your recent instructions to value the above property, we are sorry to advise that due to the complexity of the valuations required, the fragmented ownership and uncertainty regarding the title to parts of the property, we have not been able to fully complete the preliminary report and would request that you please seek an extension from the Court until next week".

"We require further time to review the information provided internally in order that we can carry out a complete review of it and undertake further detailed analysis in order that we can provide robust and comprehensive opinions of value. Further, our quality assurance procedures require that all valuations be subject to review which unfortunately has not been possible within the set timescale"⁵.

[16] In David Ames' 6th Affidavit, he lists the financial information required by the Proposal Trustee on 17th January 2017. Of the eight items of information requested by the Proposal Trustee in his affidavit sworn on 23rd February 2017, only one had been completed within the time -

- (a) The audited accounts and management accounts for years ending December 31 2015 and December 31 2016 - to be provided by 10th February, 2017 - "The accounts are expected to be sent to the Proposal trustee imminently";
- (b) statement of affairs - by 15th February 2017 - can only be completed following delivery of accounts - direction sought;
- (c) financial accounts of intercompany debtors - by 10 February- accounts submitted to Baker Clarke;
- (d) independent valuations of Merricks - already delivered and Buccament to be provided by 15th February 2017 - full valuation expected on or before 23 March 2017;

⁵ Letter from BCQS to Harlequin dated 23rd February 2017

- (e) draft management contract with new operating company - by 15th February 2017 - delivered 22nd February 2017;
- (f) listing of connected companies waiving rights claims - to be provided by 27th January 2017 - "to be addressed in the Proposal";
- (g) estimated Outcome Statement for the Company - amended draft delivered by 27th January and completion to take place by 10th February - document in draft form - can only be completed once BCQS valuation is returned;
- (h) cash flow statement for the Proposal period - in final form and has been submitted to the Proposed Trustee;

David Ames in his affidavit sums up the performance of the company in providing data thus-

"In a nutshell, the Proposal is now supported by most of the information requested by the Proposal Trustee in its letter received by the Company on 18th January 2017 and where it is missing information that information is being finalized to be sent to the Proposal trustee as soon as it is available."

- [17] The Proposal Trustee does not agree with David Ames' description of where the proposal process has reached -

"In conclusion the Proposal Trustee does continue to have concern over the viability of the proposal due to the matters listed below:

- a. that there may not be sufficient funds to carry out the capital works required by operators in order to open the Resort;
- b. certain information requests remain outstanding and beyond their original delivery date; and
- c. earlier in the proposal process there was an expectation that there were due to be substantial recoveries from the **Wilkin Kennedy** Judgment Debt. This is now unlikely and when coupled with the increasing value of unsecured debt, even if the

proposal is accepted and successful there is a reasonable possibility that the return to creditors will be negligible".

[18] I note also that Harlequin embarked on a survey among investors seeking the views of investors on a range of issues connected with the proposal process and published the results of the survey. The applicant called the survey "Harlequin Property (SVG) Limited Investors Survey". However, the FSCS complained that their clients were neither made aware of the survey nor asked to respond to it. No explanation was forthcoming from Harlequin as to why the substantial group of investors represented by FSCS were not included in the survey.⁶ This seems to me as an instance of bad faith.

Conclusion

[19] For all the above reasons, I have come to the conclusion that Harlequin is not likely to be able to make a viable proposal if the extension being applied for were granted. In addition, I am not satisfied that the applicant is acting in good faith and with due diligence. Further, I am satisfied that the creditors are being materially prejudiced by the delay in that the estate is being further burdened with the cost of securing the resort. Harlequin's application for a further extension of time within which to make a viable proposal therefore fails as not meeting the statutory requirement governing such an extension.

Second application for release of funds

[20] Harlequin also made an application for an Order pursuant to section 21 (e) (iii) of the Bankruptcy and Insolvency Act directing the Interim Receiver to make payments for valuation services, accounting services and third party suppliers for services in order to enable the Company to make a proposal to its creditors". Section 21 of the Bankruptcy and Insolvency Act deals with applications for court directions but section 21 (e) (iii) deals with directions to "confirm any act of the receiver or receiver- manager". It is obvious that the reference is wrong.

⁶ Letter from Bevan Brittan to Daniel Abrams, Harlequin legal counsel, dated 22 February, 2017.

[21] The application for a further extension of time having failed, the need for application for directions that the Interim Receiver pay for valuation services, accounting services and third party suppliers in order for Harlequin to make a proposal to its creditors is rendered nugatory. In any event, I hold that the payments did not fall in line with the common law position of interim receiver in that I do not consider the items are required in the general business of the applicant. The basis of the application was stated clearly as being "in order for the Company to make a proposal to its creditors".

Order

[22] I therefore refuse both of the applications of Harlequin.



Sir Clare K. Roberts, QC

High Court Judge (Ag)