IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

INSOLVENCY DIVISION

CONSOLIDATED CLAIMS

CLAIM NO. SU2021 IS 00008

IN THE MATTER OF THE INSOLVENCY ACT 2014

IN THE MATTER OF SECTION 5 OF THE INSOLVENCY ACT

IN THE MATTER OF AN APPLICATION UNDER SECTION 7 OF THE INSOLVENCY ACT

IN THE MATTER OF AN APPLICATION UNDER SECTION 15 OF THE INSOLVENCY ACT

BETWEEN	**SKY–HIGH HOLDINGS LIMITED (acting on its own behalf as Bondholder and on behalf of the Bondholder's Trustee the JCSD Trustee Services Limited)**	**CLAIMANT**
AND	**MYSTIC MOUNTAIN LIMITED**	**DEFENDANT**

AND

CLAIM NO. SU2021 IS 00009

IN THE MATTER OF SECTIONS 18, 19, 22 AND 38 OF THE INSOLVENCY ACT

AND

IN THE MATTER OF A PROPOSAL TO THE SECURED CREDITORS OF MYSTIC MOUNTAIN LIMITED

AND

IN THE MATTER OF THE CREDITOR'S MEETING TO CONSIDER THE PROPOSAL

ON THE APPLICATION OF CAYDION CAMPBELL (TRUSTEE)

Insolvency - Proposal made to secured creditors only – Whether meeting of creditors to consider proposal properly constituted – Whether unsecured creditors have a right to vote –Insolvency Act – Sections 5, 7,15,18,19,22 and 38- Observations on role of the Supervisor of Insolvency-Preliminary point- Whether party who files written submission out of time, and in breach of an order of the court, ought to be permitted to make submissions.

Mr. Allan Wood QC Dane Patterson and Chad Wynter for Sky-High Holdings Ltd (the secured creditor) instructed by Patterson Mair Hamilton.

Mr. Maurice Manning QC and Tavia Dunn for Caydion Campbell (The Trustee) instructed by Nunes Scholefield Deleon and Co.

Mr. Gavin Goffe and Ms. Shaneil May instructed by Myers Fletcher and Gordon for Mystic Mountain Ltd (the debtor).

Mrs. Fiola Evans Roberts instructed by the Supervisor of Insolvency for the Supervisor of Insolvency.

Heard: 2nd and 3rd December 2021 and 18th January 2022.

IN OPEN COURT

Coram: Batts J.

[1] These matters were consolidated by an order made on the 21st October 2021. On that date also an order was made permitting the intervention of the Supervisor of Insolvency. It was also ordered that only the issues raised by paragraphs 2 and 3 of the Amended Fixed Date Claim in SU2021IS00008 would be determined on the 2nd December 2021. The Fixed Date Claim in SU2021IS00009 would also be heard on that date. The other aspects of the matter were fixed for determination on the 18th January 2022.

[2] Paragraphs 2 and 3, of the Amended Fixed Date Claim in SU2021IS00008, seek the following relief.

> *"2. A Declaration that the claimant being named as the affected creditor in a proposal filed and dated July 19,*

> *2021 (the "July 19 Proposal") was entitled to and did vote for the refusal of the July 19 Proposal at a duly convened meeting to consider and vote on the July 19, Proposal held on August 9, 2021 at 3:00 pm.*
>
> *3. A Declaration that the vote for refusal of the July 19 Proposal has the effect of lifting the stay imposed by Section 5(1) of the Insolvency Act."*

The Fixed Date Claim, in SU2021IS00009, seeks the following relief:

> *"1. Directions as to whether, where a proposal is made to secured creditors or a class of secured creditors, notice of the meeting to consider the proposal is to be given to all creditors known to the Trustees or may be restricted to only those creditors to whom the proposal was made.*
>
> *2. Directions, as to whether the meeting of creditors to consider a proposal on August 9, 2021 to which only the secured creditors to whom the proposal was made was a properly convened meeting.*
>
> *3. Directions as to the voting rights of unsecured creditors at the meeting to consider a proposal made solely to secured creditors.*
>
> *4. Directions as to whether at the meeting to consider the proposal which was made solely to secured creditors, consideration ought to be given to the votes of secured creditors.*
>
> *5. Alternatively, an order that the time for calling a meeting of creditors to consider the proposal be extended to twenty-one (21) days from the date of hearing this application and making of this order.*
>
> *6. The costs shall be the costs of the insolvent estate.*
>
> *7. Such further and other relief as this Honourable Court may deem fit."*

[3] These then are the issues for determination by this court at this time. Their resolution turns on a proper construction of the Insolvency Act. A statute which became law on the 31st day of October, 2014. It marked for Jamaica a new approach to the matter of bankruptcy and winding up. As Sykes J (now Chief

Justice of Jamaica) stated in **Development Bank of Jamaica v Proactive Financial Services [2017] JMCC Comm 31 (unreported judgment dated 31st October 2017):**

> *"5. The IA has definitely abandoned these ideas of insolvent persons being offenders and objects of disfigurement but the three core principles have remained. The IA has now has established a single regime for insolvency – the generic term preferred – having regard to the fact that the statute covers the whole run from natural persons to unincorporated bodies to companies. The IA operates in conjunction with the Companies Act in respect of companies. It has also introduced a new type of thinking to bankruptcy law in Jamaica, namely, rehabilitation and rescue. The idea is that the insolvent person, where possible, should, where possible (sic) emerge being able to 'restart' life after the previous debt has been satisfactorily dealt with under insolvency regime (**Markis v Soccio 33 CBR (3d) 89 (Quebec SC**) – speaking of the Bankruptcy Act, 1949 of Canada, **Re Newsome (1927) 8 CBR 270 (Ont SC); Re Neiman 33 CBR 230 (Ont SC).** All three cases emphasize that the bankruptcy law is for the honest debtor who has fallen on hard times. This seems to be the current thinking in Canadian bankruptcy law and that idea has been captured in the IA. Henry VIII would have been aghast and James I dismayed.*
>
> *[6] Since the statute is designed to give the insolvent person some breathing space to organize his, or her or its affairs in a manner that leads to the orderly meeting and satisfaction of lawful debts and liabilities it is not surprising then that the statute has introduced things such as automatic stays which can only be lifted by agreement between creditor and debtor or by judicial order. It permits the process to start not by any action by the creditor or even the court but by the insolvent taking the simple step of filing either a notice of intention to file a proposal or filing a proposal. Once that is done, as shall be shown, the insolvent is, generally speaking, immunised from individual action by a single creditor or group of creditors."*

[4] The answers to the questions posed, in both Fixed Date Claims, are of great import to practitioners in this area of the law. However, before embarking on an examination of the issues, a preliminary point. This was raised by Mr. Wood QC by Notice of Preliminary Objection filed on the 1st December 2021. He urged the

court not to consider any submissions filed after the date ordered for the filing of submissions had passed. The Trustee (Mr Caydion Campbell) had filed his submissions on the 30th November 2021 being the day before this hearing commenced. This was contrary to the terms of the order of the 21st October 2021 which required the filing and exchange of submissions by the 29th November 2021. In a stirring address Mr. Wood bemoaned the flouting of the court's order and correctly indicated that it has become an all too pervasive practice of the profession to treat such orders casually. He urged this court to send a message that time stipulations ought to be obeyed at all times. In this regard he relied upon a judgment of the Judicial Committee of the Privy Council in two appeals being, ***Crick and another (Appellants) v Kurt Brown (Respondent) and, Phillip (Appellant) v Commissioner of Police and another (Respondents) (Trinidad and Tobago) [2020] UKPC 32, PC Appeal No. 0045 and 0050 of 2017 (judgment delivered on 30th November 2020)***. Mr. Wood urged that the court not permit any submission from the parties in breach.

[5] The Judicial Committee had for consideration, in the two appeals referenced, parties who had on the one hand failed to file written submissions and on the other filed submissions late. Both were in breach of orders of the court. The Board upheld the decision of the Court of Appeal of Trinidad and Tobago to refuse to hear submissions from, and to enter judgment against, the party who had failed to file written submissions. They however allowed the appeal of the party who was late in filing and remitted that matter for consideration by the Court of Appeal. Lord Sales who delivered the opinion of the Board stated,

> *"26. In giving conventional case management directions for the hearing of the appeals in these two cases, Mohammed JA was plainly entitled to consider that the situation in each case was not such as to call for the specification of any sanction in the Order which the court made. No one suggested that he should include any sanction in the directions Order. Judged at the time the directions were given, the circumstances in which there might be a failure to comply with them were many and various and it was not appropriate to specify a pre-determined sanction at that stage.*

> *27. This did not mean that there would be no consequences attaching to non-compliance with the directions. On the contrary aside from the obvious consequence that an extension of time would be required for the filing of any written submissions, the effect would be as stated in para 24 above. Any party who failed to comply with them would be at risk of suffering such detriment as the court might think it right to impose in the exercise of its discretion, having regard to the need to further the overriding objective. A party who has failed to comply with a stage directed by the court should seek an extension of time, and should understand that it might be refused".* [Emphasis Mine]

[6] In his response, to Mr. Wood's submission, Mr Manning QC was contrite and apologetic. He explained that the submissions were late partly because he had been out of the jurisdiction. He distinguished the cases on the basis that, on the one hand, he had filed submissions while in Crick none had been filed several months after the order was made. Queens Counsel also submitted, and in this he was joined by the Supervisor of Insolvency, that as this case was of general public import the court should be reluctant to deprive itself of the benefit of argument.

[7] After brief deliberation I stated my ruling orally. I repeat it here as I see no reason to resile from what I said then,

> *"The court considered the decision of the Privy Council and certainly shares the sentiments expressed there and in Queen's Counsel's submissions. However, I take Mr. Manning's point that his office's failure was a matter of being late and by a few days. These are distinguishing features which would ameliorate the position. I am also moved by the Supervisor's submission that as the matter is of some general public import, the court should not, if it can be avoided, deprive itself of any assistance. Therefore, I will not on this occasion adopt the extreme, and otherwise justifiable, sanction."*

[8] I proposed then to deprive Mr. Manning and his firm of the costs of the said submissions in any event. Mr. Wood at that juncture rose to indicate he was not seeking such a sanction. I acceded. However, on reflection, I do believe that a

message should be sent to the profession. In this regard I note that in **Crick** counsel on the other side did not seek the sanction ultimately imposed by the Court of Appeal. It was imposed at the court's own motion. So I will reverse myself and, whereas I allowed counsel to be heard and his late written submission to stand, I will deprive that party of the right to recover costs of written submissions filed late on the 1st December 2021. I so order.

[9] Finally, on this preliminary issue, although sending a firm message to the profession about the importance of time and of compliance with case management orders generally, it is right that I say something about the court's own processes. In this matter the various bundles and submissions (even those filed on time) did not come to my attention until the very morning of hearing. This really defeats the purpose of an order for submissions to be filed before the date of hearing. I am not sure why this occurred. It may be that, having seen my list, I ought to have made an enquiry in the registry so as to prompt action in that regard. It may be that there are staffing issues. Nevertheless, just as the court demands fastidious compliance so too should the court provide fastidious administration.

[10] Now to the merits of the matter. It concerns a meeting of creditors, called to consider a proposal put forward by an insolvent debtor, and whether the meeting was properly constituted. There are in the estate two categories of creditors being secured creditors and unsecured creditors. The debtor made the proposal in relation to the sole secured creditor who rejected the proposal. The Trustee, supported by the Supervisor of Insolvency, takes the position that all creditors both secured and unsecured had a right to attend the meeting and to participate in the discussions. This is so, they say, even if (which is not admitted) the unsecured creditors did not have a right to vote on the proposal. There are other aspects to the factual matrix, such as the fact that at the meeting the Supervisor of Insolvency participated and a counter proposal was raised. Mr. Wood QC contends that this was irregular and the Trustee had no power to suggest an amendment to the proposal let alone to actually amend it. This and other ancillary matters I will deal with in due course.

[11] A stay of proceedings is automatically imposed once a debtor files a notice of intent to make a proposal or a proposal, see sections 4 and 5 of the Insolvency Act. The stay prevents any claim being brought or if already brought being pursued. It also prevents any step being taken to liquidate securities such as by enforcement of mortgages. This interruption of contractual rights may be brought to an end by either, the creditors' rejection of the proposal or, by order of the court. It is to be understood that the import, of the rejection of the proposal made by the insolvent, is that the statutory stay will be lifted and the secured creditors will be at liberty to take steps to recover that which is due to them.

[12] The chronology of relevant events is as follows (I am grateful to Mr. Wood QC for the account given in his written submissions and which was not challenged):

a) Sky High Holdings Ltd (the secured creditor) owns 100% of Mystic Mountain Limited's Senior Secured Fixed Rate Bonds in the principal amount of one billion one hundred Million Jamaican dollars.

b) Mystic Mountain Limited (the debtor) failed to make principal and interest payments on those bonds resulting in the full amount becoming due on the 26th January 2021.

c) The debtor filed a Notice of Intention to file a proposal, pursuant to section 11 of the Insolvency Act, which was served on the 3rd February 2021.

d) The Notice of Intention imposed a stay of proceedings and prevented the secured creditor from enforcing its security.

e) The Trustee for the debtor is Mr. Caydion Campbell. He, by letter dated 4th February 2021, wrote to all the creditors and informed them that the proposal would only be made to one class as it was a secured creditor only proposal. Mr. Caydion Campbell oversaw and assisted in the formulation of two proposals both of which were secured creditors only proposals. Both were notified to the Companies Office of Jamaica and filed with the Office of the Supervisor of Insolvency.

f) Mr. Campbell pursuant to his duties under section 19 of the Insolvency Act, and after several extentions, convened a meeting for the 9th August 2021 to which only the secured creditor was invited.

g) At that meeting a proxy for the sole secured creditor, being JCSD Trustee Services Ltd (the Bondholders Trustee), voted to reject the proposal.

h) Mr. Caydion Campbell moved for an alternative proposal to be considered. He called it an "amended proposal"

i) The Supervisor of Insolvency intervened at this juncture and raised a query about the absence of unsecured creditors. The meeting was adjourned for the directions of the court to be obtained, see exhibit IH15 to the affidavit of Ian Hayles filed on the 28th September 2021.

[13] The legal submissions, on behalf of the secured creditor, may be summarised thus:

a) *Legal effect must be given to the plain and obvious meaning of words in a statute* ***Mamby – Alexander et al v Jamaica Public Service Company Ltd [2020] JMCA Civ 48 per Straw JA. @ para 54.***

b) *A statute should be considered as a whole so as to avoid inconsistency or absurdity,* ***para 808 Vol 96(2018) Halsbury's Laws of England 5th edition*** *was relied upon. Also cited were* ***Canada Sugar Refining Company Ltd v R (1898) AC 735 at 741*** *and* ***Attorney General v Prince Ernest Augustus of Hanover [1957] AC 436 at pages 460-461.*** *This latter case was also relied upon in this jurisdiction by Sykes J in* ***Dyoll Insurance Company Limited (In liquidation) [2005] HCV 1267 (unreported judgment dated 24th November 2005).*** *Mr Wood QC emphasized his Lordship's words at para 29 of that judgment:*

> *"29. At the risk of repetition, I say again that it is not the duty of the courts to become secret and unelected legislators by giving effect to its own notion of fairness under the guise of statutory interpretation. The judicial function is to glean the intention of Parliament from the whole Act and declare that intention……"*

c) *Although the Canadian Bankruptcy and Insolvency Act RSC 1985 is similar to the Insolvency Act of Jamaica, and our courts have frequently referenced Canadian cases, an examination of the respective provisions dealing with the making of proposals show a marked difference. The Canadian case law, in the matter to be considered, is therefore unhelpful.*

d) *Section 18 of the Insolvency Act which deals with the making of a proposal makes it clear that a proposal can be made to a particular class of creditors without being made to creditors generally. This is quite different from Section 50 (1.2) of the equivalent Canadian statute.*

e) *This is underscored by the way "Proposal" is defined in the Jamaican Act (Section 2(1).*

f) *Where however a proposal is made to one or more secured creditors it must be made to all secured creditors. This is because section 18(1)(a)(i) and (b) utilise the disjunctive "or" thereby allowing for the separate treatment of creditors as a group or separated into classes but where that is done all members of the group or class must be sent the proposal.*

g) *This interpretation of the law was clearly understood by the debtor who made the proposal to the secured creditors only, as well as by the Trustee Caydion Campbell who only summoned secured creditors to the meeting.*

h) *The omission of a provision equivalent to section 50(1.2) of the Canadian legislation, on which the Jamaican statute was patterned, is therefore of great significance. Taken with the insertion of sections 18(1) (a) and (b) and 18(4) it means the Jamaican legislature deliberately intended for the possibility of proposals being made only to secured creditors.*

i) *It therefore follows that section 22 (2) (filing proof of claims) and section 35 (right to vote on the proposal) must be read, consistently with section 18, as applicable only to the creditors to whom a proposal is made.*

j) *Therefore, in this case, where a proposal was made only to the secured creditors, it is the secured creditors*

who have the right to prove a claim, to attend a meeting and, to vote on the proposal.

k) Section 38(1) and (2) must be read against that background. Hence, as section 41 deals with where a proposal is accepted, the purpose is to bind the secured creditors.

l) Where the secured creditors vote to refuse a proposal they may proceed to realise their security (Section 5 (4)).

m) There is no scope to imply a term, that a proposal to secured creditors must be also made to unsecured creditors, because an implication cannot contradict an express term, see ***Halsbury Laws of England 5th ed. Vol. 96(2018) paras 211 n 1 and 817****;* ***Whiteman v Sadler [1910] AC 514*** *@* ***527****;and* ***Jamaica Public Service Company Ltd v Dennis Meadows et al [2015] JMCA Civ 1 at para 53-55.***

n) It follows that the meeting of secured creditors was properly convened.

o) In the alternative, and even if the meeting was irregularly convened, the meeting ought not to be set aside. Firstly, because Section 278 of the Insolvency Act provides that, provided there is no injustice, proceedings in bankruptcy ought not to be invalidated for irregularities. Secondly, because the secured creditors had rejected the proposal. There is no injustice consequent on any irregularity.

[14] The attorneys for Mr Caydion Campbell, whose official title is *"The Trustee acting in relation to the proposal of Mystic Mountain Limited",* see section 247, made the following case in rebuttal:

a) Section 19(2) of the Insolvency Act provides that notice of a meeting to consider a proposal must be served on "every creditor known to the Trustee." It is therefore immaterial that the proposal was made to secured creditors only.

b) It would be wrong to read into section 19(2) any qualifying words. Reliance was placed on dictum of Laing J in ***Re: Vernalyn Elizabeth Barnaby [2021]***

JMSC Civ 5 (unreported judgment dated 14th January 2021) *applying* ***Thompson v Goold & Co. [1910] AC 409 @420.***

c) *Section 24 of the Insolvency Act contemplates that creditors, other than those to whom the proposal was made, shall determine whether to accept or refuse the proposal. The question of acceptance or refusal is clearly, by section 38 (6), reserved for creditors of "all classes" voting.*

d) *On a true construction, of sections 38 and 41, for a proposal to be successful it must receive the majority in number and two thirds in value of the votes in each class of unsecured creditor. If the proposal receives the required support it may be submitted to the court for approval. When approved it binds unsecured creditors who were included in the proposal and who voted in like number and values. Accordingly, the vote of the secured creditor in respect of the proposal is only material in so far as the binding effect of the proposal on the class of secured creditors is concerned.*

e) *The stay may be lifted by application to the court if the court is satisfied that a creditor is "materially prejudiced," or that it is equitable on other grounds to lift it, section 7 of Insolvency Act and* ***On the Vine Meat and Produce BIA Proposal (Re) (2012) NBQB 086.***

f) *In this case the secured creditor has provided no evidence of how its security is threatened if the stay remains in place.*

g) *The court has a duty to consider, before lifting a stay, the interests of the estate and all parties involved,* ***Janodee Investments Ltd. v Pelligrini 25 CBR (4th) 47, [2001] Can LI 28455*** *and* ***Golden Griddle Corp. v Fort Erie Truck & Travel Plaza Inc 2004 Canill 81263 (ONSC)*** *and* ***Trustee of 9270-4378 Quebec Inc (2020) QCCS 400 (ConCII)***

h) *The meeting in this case was not properly convened as all creditors were not served. The Trustee should therefore convene a meeting of all creditors.*

[15] The submissions of the Supervisor of Insolvency I summarise thus:

a) *The idea behind the Insolvency Act of 2014 is that an insolvent person is provided every opportunity to survive the state of insolvency while having due regard to the interest of creditors.*

b) *The statute is modelled on the Canadian Bankruptcy and Insolvency Act. A Canadian court declared,*

> *"the BIA is not to be interpreted using a legalistic approach but rather with sensitivity to commercial realities and preserving commercial reality and integrity of the bankruptcy system.*
>
> ***Re Garritty (Proposal) (2006) ABQB 545 @ Para 20***

c) *The above stated position was endorsed by Sykes J (as he then was) in* ***Development Bank of Jamaica Limited v Proactive Financial Services [2017] JMCC Comm 31 (unreported judgment delivered 31st October 2017).***

d) *The effect of the automatic stay is that no creditor (secured or unsecured) can proceed with any action against any insolvent person or (in the case of secured creditors) seize or realise the insolvent's assets until the proposal is lodged or the person declared bankrupt. Only the court may lift the stay (section 7).*

e) *Sections 11 to 19 set out the procedure for making of a proposal. Section 18 states the persons to whom a proposal may be made.*

f) *Section 50(1.2) of the Canadian statute is the counterpart to Jamaica's section 18. Although Jamaica's section does not say, as does the Canadian, that a proposal "must be made to creditors generally" it is to be implied. This is so because of sections 12(1), 19, 38 and 41. A failure to imply that requirement would be to lack sensitivity to commercial realities, preservation of commercial morality and the integrity of the insolvency regime.*

g) *An insolvency event affects all creditors hence section 12 (1) requires notice to all creditors of the insolvent. The fundamental requirement is underscored by section 42(2) (b) which makes one criterion, by which a court*

may refuse to approve a proposal, if in the court's opinion the terms of the proposal are not calculated to benefit "the general body of creditors."

h) *Where a notice of intention to file a proposal is served the insolvent person must file a cash flow statement and a proposal within a prescribed period. A failure to do so results in automatic bankruptcy.*

i) *This potential detrimental effect on the rights of all creditors explains the requirement that notice be given to all known creditors from the inception that is on the filing of the Notice of Intention to Make a Proposal. It gives all creditors the opportunity to present a viable proposal and to participate in any plan to resuscitate the insolvent person.*

j) *Subsection 2(a) of section 19 makes it clear that all the insolvent person's known creditors must be notified of the meeting. This gives them the right to vote on the proposal. Substantial injustice results if a creditor is not served,* ***In re Gaucher (1961) Carswell Que 47, 4CBR(NS)33.***

k) *Section 35 provides for all creditors with proved claims to vote on a proposal. The section applies to all creditors whether secured or unsecured.*

l) *Section 38 states that when dealing with a vote to accept or refuse a proposal only the votes of unsecured creditors count. This applies even if the proposal was made to secured creditors only. Secured creditors have their security to rely on so they do not influence the acceptance or refusal of a proposal. Section 171 says a secured creditor may only vote the unsecured portion. The secured creditor may either, surrender his security (and become an unsecured creditor) or, value his security and vote for the unsecured portion of his debt only.*

m) *Sections 33 and 38 (7) are deeming provisions relative, in certain circumstances, to the votes of secured creditors.*

n) *Section 5(4) provides that the effect of a vote by secured creditors to refuse a proposal, whether directly at a meeting (section 5(4) or, indirectly by deeming*

provisions (sections 33 and 38(7)), is that the secured creditor is at liberty to deal with the security. The proposal only binds the secured creditors if they voted to accept it, see Section 41 (1) of the Insolvency Act.

o) *Canadian cases underscore the importance of giving notice to all known creditors, see* ***Re Osztrovics (No. 1), 2014 ONSC 1567*** *and* ***Re Baker [1994] OJ No. 3016.***

p) *On a true construction of the Act a proposal should be made to all creditors even though directed at a class of secured creditors. A meeting called without serving all known creditors is not properly convened and any decisions taken are null and void.*

[16] Counsel for Mystic Mountain Limited (the debtor) made no submission on these issues. The positions articulated, however, result in diametrically opposed interpretations of the words in the statute. It is appropriate therefore that I set out in full the relevant provisions of the Insolvency Act.

> *"**Section 2(1)** … "proposal" means an arrangement for a composition, an extension of time or a scheme of arrangement made under section 17, or modified in accordance with section 38, with creditors either as a group or separated into classes or with secured creditors:"*
>
> *"**Section 5** (1) Subject to subsections (2)(3) and (4) and section 7, where a proposal has been filed in respect of a debtor -*
>
> *(a) no creditor to whom the proposal is made shall-*
>
> *(i) have any remedy against the debtor or the debtor's property;*
>
> *(ii) commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy; and*

(b) no provision of a security agreement between a debtor and the secured creditor to whom the proposal is made has any force or effect that provides, in substance, that the debtor ceases to have such rights to use or deal with assets secured under this agreement as the debtor would otherwise have on-

(i) the debtor's insolvency;

(ii) the default by the debtor of an obligation under the security agreement; or

(iii) the filing by the debtor of a proposal, until the trustee has been discharged or debtor becomes bankrupt.

(2) Subsection (1) shall not apply-

(a) to prevent a secured creditor who took possession of secured assets of such a debtor for the purpose of realisation before the proposal is filed under section 17 from dealing with those assets;

(b) unless the secured creditor otherwise agrees, to prevent a secured creditor who gave notice of intention to enforce security under section 72, from enforcing that creditor's security against such debtor more than ten days before –

i). a notice of intention was filed in respect of such debtor; or

ii). the proposal was filed, if no notice of intention was filed from enforcing that security; or

c). to prevent a secured creditor who gave notice of intention under section 72 from enforcing that creditor's security if such debtor has under section 72(2), consented to the enforcement action.

(3) Subject to sections 77,103 and 192 to 201, the filing of a proposal under section 17, shall not prevent a secured creditor to whom the proposal has not been made in respect of a particular security from realizing or otherwise dealing with that security in the same manner as the secured creditor would have been entitled to realise or deal with it if this section had not been passed.

(4) Where a proposal is made to a class of secured creditors and the secured creditors in that class vote for the refusal of the proposal, a secured creditor holding a secured claim of that class may henceforth realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed. "

*"**Section 7**. A creditor who is affected by the operation of section (sic) 4,5 or 6, may apply to the Court for a declaration that those sections no longer operate in respect of that creditor, and the Court may make such a declaration, subject to any qualifications that the Court considers proper, if it is satisfied-*

(a) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration."

*"**Section 11** (1) The following persons may make a proposal in accordance with this Part-*

(a) a person facing imminent insolvency;

(b) an insolvent person;

(c) a receiver, but only in relation to an insolvent person;

(d) a liquidator of an insolvent person's property;

(e) the trustee of the estate of a bankrupt;

(f) a bankrupt.

(2) Before lodging a copy of a proposal, an insolvent person may file a notice of intention, in the manner prescribed, with the Supervisor-

a) stating the debtor's intention to make a proposal within thirty days after the lodging of the notice of intention; and

b) including the name and address of the trustee who has consented in writing, to act as the trustee under the proposal.

(3) The notice of intention to file a proposal, shall be lodged in the prescribed form and in the case where the insolvent person is a company, notice shall be given to the Registrar of Companies of such intention to file a proposal."

*"**Section 12**- (1) Within five days after the filing of a notice of intention under section 11, the trustee named in such notice shall send to every known creditor, in the prescribed manner, a copy of the notice of intention so filed.*

2) The Supervisor may, on application made by the trustee or the insolvent person in the form prescribed, and after considering the prescribed criteria, exempt the trustee from the requirement to send the notice referred in subsection (1)."

*"**Section 16**. The trustee named under a notice of intention may advise on and participate in the preparation of the proposal, and any negotiations in relation thereto."*

*"**Section 18**- (1) A proposal under this Part may be made to -*

(a) the creditors either -

(i) as a group; or

(ii) separated into classes as provided in the proposal; or

(b) secured creditors in respect of any class of secured claim.

(2) All creditors having equity claims shall be in single class in relation to those claims.

(3) The Court may, on application made by any interested person at any time after a notice of intention or a proposal is filed, determine-

(a) the classes of secured claim appropriate to a proposal; and

(b) the class into which any particular secured claim falls.

(4) Where a proposal is made to one or more secured creditors in respect of secured claims of a particular class, that proposal shall be made to all secured creditors in respect of the secured claims for that class.

(5) Where a proposal is made to a secured creditor in respect of a secured claim the secured claim may be included in the same class where the interests of the creditors holding those claims are sufficiently similar to give them a commonality of interest, taking into account-

(a) the nature of the debts giving rise to the claims;

(b) the nature and priority of the security in respect of the claims;

(c) *the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies;*

(d) *the treatment of the claims under the proposal, and the extent to which the claims would be paid under the proposal; and*

(e) *such other criteria, consistent with those set out in paragraphs (a) to (d), as may be prescribed by the Minister.*

(6) Any person adversely affected by a determination under subsection (3) may appeal under section 49, that such determination is oppressive or unfairly prejudicial."

*"**Section 19**- (1) The trustee shall convene a meeting of creditors,to consider a proposal filed under section 17 in the manner provided under subsection (2) , no later than twenty-one days after the filing of the proposal.*

(2) The trustee shall convene the meeting referred to under subsection (1), by sending to the Supervisor and every creditor known to the trustee, at least ten days before the meeting-

(a) *a notice, electronically or otherwise of the date, time and place of the meeting;*

(b) *a statement summarising the assets and liabilities in the form prescribed;*

(c) *a list of the creditors with claims no less than the prescribed threshold and the amounts of their claims as known or shown by the books of the debtor;*

(d) a copy of the proposal filed under section 17;

(e) the following forms -

(i) proof of claim in the form prescribed; and

(ii) proxy in the form prescribed, if not already sent; and

(f) a report on the state of the business and financial affairs of the debtor, including any prescribed information."

*"**Section 21**. The trustee and in his absence his nominee, shall be the chairman of the meeting and shall decide any questions or disputes arising at the meeting."*

*"**Section 22-** (1) A trustee shall by notice in the form prescribed require the creditors to file proof of claim.*

(2) Subject to section 32, a creditor to whom a proposal is made may respond to the proposal made under section 17 by filing with the trustee proof of claim for secured and unsecured creditors, in accordance with the procedure set out under sections 188 to 191."

*"**Section 24**. Any question relating to a proposal lodged under section 17, except the question of whether to accept or refuse the proposal, shall be decided by ordinary resolution of the creditors to whom the proposal is made."*

*"**Section 32**- (1) Subject to sections (3), (4) and (5), a secured creditor to whom a proposal is made in respect of a particular secured claim may respond to the proposal, by filing with the trustee a proof of secured claim in the form prescribed, at or before the meeting referred to in section 19.*

(*2) A secured creditor who files a proof of secured claim in accordance with subsection (1), may, subject to the provision of this Act vote on all questions relating to the proposal in respect of the entire claim, and sections 188 to 191, shall apply in so far as they are applicable with such modifications as the circumstances require, to proofs of secured claim*."

*"**Section 35**. A creditor who has a proven claim, whether secured or unsecured, may vote on the proposal by -*

(a) mail;
(b) personal delivery; or
(c) printed electronic transmission, delivered to the trustee prior to the meeting referred to in section 19."

*"**Section 38**— (1) The creditors may resolve to accept or refuse the proposal filed under section 17, in its original or amended form.*

(2) For the purposes of subsection (1) -

(a) the following classes of creditors with proven claims are entitled to vote, that is to say-

(i) all unsecured creditors; and

(ii) secured creditors in respect of whose secured claims the proposal was made;

(b) creditors shall vote according to the class of their respective claims, and for that purpose-

(i) all unsecured claims constitute one class, unless the proposal provides for more than one class of unsecured claims; and

(ii) the classes of secured claims shall be determined as provided by section 18; and

(c) the votes of the secured creditors shall not count for the purpose of this section, but are relevant only for the purposes of section 41.

(3) Notwithstanding paragraphs (a) and (b) of subsection (2), creditors having equity claims are to be in a single class of creditors in relation to those claims and may not, as members of that class, vote at any meeting unless the Supervisor determines otherwise.

(4) A creditor who is a related person of the debtor may vote against the proposal but such creditor shall not vote for the acceptance of the proposal, and in determining the total votes in favour of the proposal, that creditor and the indebtedness owing to him shall not be taken into account.

(5) Where the trustee is a creditor, the trustee may not vote on the proposal.

(6) The proposal shall be deemed to be accepted by the creditors if, and only if-

(a) a majority in number of the creditors in all classes of unsecured creditors in attendance at the meeting either in person or by proxy vote for the acceptance of the proposal; and

(b) creditors in attendance at the meeting either in person or by proxy holding at least two-thirds of the proven claim in all classes of unsecured creditors vote for the acceptance of the proposal.

(7) Where there is no quorum of secured creditors in respect of a particular class of secured claims, the secured creditors having claims of that class, shall be deemed to have voted for the refusal of the proposal.

(8) For the purposes of voting on any question relating to a proposal in respect of an employer, no person has a claim for an amount referred to in section 202(1)(b)(i), (ii) or (iii).”

*“**Section 41** - (1) Where a proposal is accepted by the creditors and approved or deemed to be approved by the Court, such proposal shall be binding on the creditors in respect of -*

(a) all unsecured claims; and

(b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in

> *value of the secured creditors present, personally or by proxy, at the meeting and voting on the resolution to accept the proposal.*
>
> *(2) The acceptance or approval of a proposal by a creditor shall not be construed as releasing any person who would not be otherwise released under this Act by the discharge of the debtor."*

[17] These then are the provisions, the construction of, which will determine the main issue before me. A statute must however be read in its entirety. This I have done in relation to the Insolvency Act. I have also read the affidavits, all the written submissions and most of the cases cited. I have not found it necessary in this judgment to make a detailed analysis of them. I trust counsel will take no umbrage at this approach which is geared primarily towards keeping my judgment reasonably concise.

[18] I accept that in construing a statute it is the words used on which one should focus. They reveal Parliamentary intent. It is not generally appropriate to read words in or out in order to attain a more desirable policy goal. Exceptions of course can be found, to this general principle of construction, where a literal application of the words results in an absurdity. In this case there is no absurdity apparent on a reading of the provisions. Neither is there any inherent contradiction within or among the sections construed. The meaning is to me quite clear.

[19] The statutory design allows certain categories of persons, including a person who is either insolvent or about to become insolvent, to take steps to forestall bankruptcy, see sections 9 and 11. This involves the filing, with the Supervisor of Insolvency, of a "*Proposal*" or, as was done in this case, a "*Notice of Intent to File a Proposal".* Such a move precludes, for a time at any rate, creditors taking steps to recover their debt. This "stay" may be lifted by the Court on equitable grounds or for reasons having to do with material prejudice to any creditor, see section 7. The debtor has fixed time periods thereafter to do certain things. Primary among them is the appointment of a trustee. It is the trustee's duty to send to every known creditor a copy of the Notice of Intent to file a Proposal, see Section 12. The Trustee also assists with the preparation of the Proposal, any negotiations and,

the filing of certain things such as cash flow statements, see sections 13, 16 and 26. These documents are filed with the Supervisor of Insolvency. Then there is the matter, with which this case is concerned, of the convening of a meeting to consider the proposal.

[20] It is the Trustee who has the duty to convene a meeting of creditors, see section 19. Section 19 (2) is clear that he does so by sending to the Supervisor and *"every creditor known to the trustee"* a notice of the date, time and, place of the meeting among other things, see section 19 (2) (a) to (f). The clarity of intent of the legislator is emphasised by the fact that where necessary the statute references creditors "*to whom a proposal is made*", see for example sections 22 (2) and 24. Section 19 (2) has no such limiting phrase. All creditors, who have proven their claims, are entitled to vote on the proposal and may do so in their respective classes, sections 35 and 38 (1) (2)(a) (b) and (c), (6) and (7). Even where creditors generally vote to accept a proposal anyone adversely affected may oppose the subsequent application by the trustee to have the proposal approved, section 39 (2) and (3). Finally, section 24 is only explicable if all creditors have a right to vote on whether to accept or refuse a proposal. That section states that, in relation to a proposal, "*Any question … except the question of whether to accept or refuse the proposal, shall be decided by …the creditors to whom the proposal is made*". A fortiori other creditors decide, or play a role in deciding, whether or not to accept a proposal.

[21] The contention, that only creditors to whom a proposal is made need be invited to the meeting, stems primarily from two events. One being an act of commission the other of omission. The commission is the creation of provisions protective of secured creditors and which make it clear that a proposal with respect to secured creditors, even if voted for by all other creditors, only binds the secured creditors if they voted for it. This, it is argued, makes service of notice of a meeting unnecessary on creditors to whom a proposal is not directed. In that regard see, sections 18 (1) (b) and (4), 32 (1) and (2), 33, 38 (2) (b) and, 41 (1) (b). I do not agree. The policymakers have, by these and other provisions, endeavoured to

protect secured creditors from a greater erosion of their rights than is deemed necessary to achieve the statutory objects. Hence the ability of secured creditors as a class to determine whether a proposal is acceptable to them. Were it otherwise they may be forced to postpone realisation of their security because unsecured creditors, with other motivations, find it convenient so to do. Such a situation might severely erode the mortgage as an attractive instrument, for example, and fetter the willingness of institutions to lend. Be it noted that the process does not end with a "no vote" by a class of secured creditors, see sections 40 (deemed application for an assignment) and 42 (application to approve proposal). The rights of the secured creditor are protected even in the event of bankruptcy, receivership and, assignment of debts, see sections 84 and 100.

[22] The act of omission, which added grist to the contention that creditors other than those to whom a proposal was made need not be invited to the meeting, is the failure of the legislature to specifically so provide in section 18. The more so because the earlier Canadian legislation (which all parties agree is the one on which ours is patterned) has a specific clause. Section 50 (1.2) of the Bankruptcy and Insolvency Act (1985) of Canada states:

> *"A proposal must be made to the creditors generally, either as a mass or separated into classes as provided in the proposal, and may also be made to secured creditors in respect of any class or classes of secured claim, subject to subsection (1.3).* "

That section mandates the making of a proposal to all creditors. It seems rather odd that the section in Canada would at the same time say a proposal "*may also*" be to secured creditors "*as a class of creditors*". This is because a debtor may wish to enter arrangements with one or other secured creditors but not with creditors generally. It seems to me the Jamaican provisions, as I understand them, are more cohesive. They allow for a proposal to those creditors, or class of creditors, with which the insolvent is most concerned. However, at the same time, the statute

allows all creditors to be privy to the proposal and hence to attend and vote at the meeting called to consider said proposal, see sections 22, 29, 35 and 38. This is appropriate because the filing of the proposal affects the rights of all creditors to recover sums due to them, see sections 4 and 5. Be it noted that the court may be asked, at an early stage, to determine the class or classes of secured creditors, see section 18(3).

[23] It may be asked what is the purpose of giving notice of a meeting to persons to whom a proposal has not been made. Particularly because, in the case of secured creditors, an approved proposal which concerns their class, is not binding unless accepted by a majority of secured creditors, sections 5 (4) and 41 (1) (b). I posed the question to counsel for the Trustee. His response was that they will be able to comment, dialogue and, possibly persuade the secured creditors that there is good reason to approve the proposal. They may be able to demonstrate the effect, on their chance of recovery, if the secured creditors move to enforce and conversely if they do not. In short they may have a say and somehow influence in that way the content of a proposal and/or the decision on the proposal. It is an explanation for the statutory construct which is eminently reasonable. It bears repeating also that even a proposal which is accepted will not receive the court's approval if it "*is not calculated to benefit the general body of creditors,"* see section 42 (2) (b). The statutory construct is therefore transparent and fair.

[24] In the course of oral argument a few rather tangential issues emerged. I will address them shortly. Queen's Counsel, appearing for the secured creditors, queried the presence and role of the Supervisor of Insolvency at the meeting of creditors. I agree with counsel for the Supervisor that it is in order for the Supervisor to be there to ensure the meeting is conducted in accordance with the statute, see sections 9(3), 223 and 156 (2). Nor is there necessarily anything untoward about amendments to a proposal being made at the meeting, see sections 20 (b) and 38 (1). An amendment, mooted at a meeting, could of course not be voted on unless it had been first duly communicated to all parties. The statute allows for adjournments of the meeting presumably for this and other reasons, section 23.

[25] It was also urged upon me by Mr. Wood that even if the holding of the meeting was irregular this court has the power, pursuant to section 278 of the Act, to rectify matters. No harm he says has been done as his clients are clearly not interested in the proposal. It would be a waste of time and resources to merely hold a meeting for the "form" of compliance. I do not think this court has that power. Section 278 relates to "*proceedings in bankruptcy*." Bankruptcy has not yet commenced. "*Insolvent person*", in section 2 is defined so as not to include "*a bankrupt".* The statutory scheme is to have the possibility of a "proposal" which, if accepted and approved, will prevent bankruptcy. Therefore, the reference to proceedings in bankruptcy in section 278 does not include the stage prior to bankruptcy with which the case before me is concerned.

[26] Mr. Wood also urged that if the proposal was invalid, because it was not directed to all creditors, it is also void. Therefore, the time, after serving the notice, has long passed for the making of a proposal. A statutory assignment will already have occurred. Again I demur. There is, on my interpretation of the Act, no requirement that the proposal be directed to all creditors only that it be served on all creditors. So the proposal is valid because it may be directed at, in that it is made to, any creditor or any class of creditors. All however will be privy to it and will have a say. This is because regardless of to whom the proposal is directed it impacts all creditors' ability to institute, or proceed with, claims and execution, see sections 4 and 5. In this case the only time that needs extending is the time to call the meeting. This I will do pursuant to section 280.

[27] Finally, I reference supplemental submissions, filed after the close of arguments and, sent under cover of a letter dated 6th December, 2021. It was sent by the attorneys representing the secured creditor and copied to the other parties. The letter requested permission to rely on the submissions. By letter dated the 20th December 2021 the Trustee's attorneys-at-law opposed the application but stated that if granted they relied on submissions earlier made unless I needed to hear further from them. The Supervisor of Insolvency for its part stated that unless I required further submissions they were prepared to rest on submissions previously

made. I decided to consider the supplemental submissions and, having done so, did not require any further submission written or oral.

[28] The supplemental submission addresses a question I raised during the hearing. I had asked: What is the position if the proposal, made to the secured creditors, is accepted by them but rejected by the unsecured or general body of creditors. The submission is that the effect would be an application for an assignment, pursuant to section 40(1), and that this is an absurd result because it is contrary to the object of the statute which is to preserve a viable company. It is further submitted that if the unsecured creditors are entitled to vote the proposal is deemed accepted only if a majority of them vote to accept it. If they do not the company would be placed in bankruptcy contrary to the wish of the secured creditors who voted, in the hypothetical situation posited, to accept it. The absurdity is underscored, because the statute allows unsecured creditors to refuse a proposal by voting without attending the meeting or not voting to accept. Therefore, a company thought viable by secured creditors may be forced into bankruptcy by unsecured creditors contrary to the purpose of the statute. A construction which allows secured creditors only to vote on a proposal made only to them is more consistent with the statutory scheme. That is because the proposal will be accepted by secured creditors if the company is solvent and viable. Its acceptance will be to the benefit of all creditors and if refused would be neutral because the company would not be put in bankruptcy.

[29] The submission makes good business sense and is logical. However, I do not see that the statutory scheme as I understand it leads to an absurdity. There is merely a different mechanism for arriving at a just result. In the hypothetical situation, which I put forward to test the workability of the construction articulated by the Superintendent of Insolvency and the Trustee, there is no greater risk of prejudice or harm. This is because in the first place the secured creditors may, once the proposal is rejected, proceed to liquidate their securities and effect recovery of sums due to them. Secondly once there is a deemed assignment, and/or bankruptcy consequent on a rejection of a proposal, the matter is treated as a

voluntary assignment under Part VI of the statute, see section 40(1). This triggers the appointment of a trustee and a stay of all process except those related to secured creditors, see section 84. This will allow for the process of bankruptcy leading to automatic discharge after twelve months, see section 137 (subject of course to applications to extend). That process involves a continuation of the regime of rehabilitation and/or liquidation. In short if, in the hypothetical situation, the secured creditors who voted for the proposal were correct the bankrupt ought to be able to satisfy the trustee examining his affairs that he can be discharged after a year, see section 137 (2). Ultimately the question will be determined in court, see section 138 (5). In this regard the making of an assignment operates automatically as an application by the bankrupt for a discharge, section 140(1). In this process the earlier proposal process is evidentially relevant, see sections 142(1) (c), (3) (4) and (5), 144 and, 145 (n).In other words whether or not a viable proposal had been made becomes relevant when the Supervisor and/or the court has to determine whether the debtor elected bankruptcy. In the hypothetical situation under consideration the evidence, that there was a proposal supported by secured creditors but rejected by unsecured creditors, could certainly go a long way to prove that an automatic discharge is appropriate.

[30] Finally, on the hypothetical question I agree with the trustee's counsel that it would be a rare case in which unsecured creditors, in such circumstances, voted against a proposal which kept the debtor in business. This is because often the assets, providing the security for the secured creditors, are integral to the generation of income from which unsecured creditors expect to be satisfied. A rejection forcing bankruptcy, all other things being equal, may well see them in a worse or the same situation as if the proposal had been accepted. I have digressed considerably but necessarily to demonstrate that the statutory scheme is not absurd and on the contrary appears workable and consonant with the reality of industry and commerce.

[31] In the premises therefore my decision, orders and, declarations are as follows:

1. The relief claimed in Paragraphs 2 and 3 of the Amended Fixed Date Claim Form filed on the 30th September 2021 in Claim No. SU2021IS00008, is refused.

2. It is Declared that where a proposal is made to secured creditors or a class of secured creditors, notice of the meeting to consider the proposal is to be given to all creditors known to the Trustee.

3. It is further Declared that the meeting of creditors held in this matter to consider a proposal on the 9th August 2021 to which only the secured creditors to whom the proposal was made were invited was irregular and not a properly convened meeting.

4. The said meeting is to be and is hereby set aside.

5. It is further Declared that at a meeting to consider a proposal all proved creditors are entitled to attend in person or by proxy and to vote.

6. The Trustee is therefore directed, pursuant to sections 277 and 280 of the Insolvency Act, to convene a meeting of creditors to consider the proposal and any amendments within 21 days of the date of this judgment. The time for which is extended accordingly.

7. Question of costs deferred.

8. Costs of Trustees written submissions filed on the 1st December 2021 disallowed.

David Batts
Puisne Judge