IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE INSOLVENCY DIVISION

CLAIM NO. SU2023IS00002

IN THE MATTER OF MYSTIC MOUNTAIN LIMITED (In Receivership and Bankruptcy)

AND

IN THE MATTER of Section 202(1) of the INSOLVENCY ACT, 2014

BETWEEN	**MYSTIC MOUNTAIN LIMITED (In Receivership and Bankruptcy)**	**CLAIMANT**
AND	**WILFRED BAGHALOO (Receiver Manager [and former Bankruptcy Trustee] of Mystic Mountain Limited, in Receivership and Bankruptcy)**	**DEFENDANT**

Insolvency Act- Claim by Trustee for fees and related matters- Application by Creditors or Inspectors representing creditors to intervene- Preliminary Application to remove Trustee- Creditors' claims conditionally admitted- Whether Trustee obliged to follow directions of Committee of Inspectors- Whether Inspectors represent majority of Inspectors-Whether meeting of creditors lawfully constituted- Observations on the duty of the Trustee.

Dr. Christopher Malcolm, D 'Anne Toussaint instructed by Debbie-Ann Gordon and Associates for the Claimant.

Mr. John Vassell KC, Mrs. Julianne Mais-Cox and Mrs Trudy Ann Dixon-Frith instructed by DunnCox for the Defendant.

Mr Kwame Gordon and Chevant Hamilton instructed by Samuda & Johnson for the Interveners (being Inspectors Donna Howe and Kai Koberich).

Mrs Fayola Evans-Roberts for the Office of the Supervisor of Insolvency.

Ms Giselle Campbell instructed by Patterson Mair Hamilton watching proceedings for Sky High Holdings Ltd

Ms Maxine Johnson of the Tax Administration Division watching proceedings.

Miss Elise Campbell of the Office of the Government Trustee watching proceedings.

HEARD: 13th April and 4th, 5th and 8th May 2023.

IN OPEN COURT

COR: BATTS J

[1] This claim is brought by the Trustee in the name of Mystic Mountain Limited (an insolvent company in receivership and bankruptcy) against the Receiver (and former Trustee) of the same company for declarations and orders relative to the payment of fees and disclosure of information. On the first date hearing of the Fixed Date Claim Mr. Kwame Gordon indicated that he appeared for the majority of the appointed Inspectors. They wished to intervene in these proceedings in order to make certain applications. On that date Dr. Christopher Malcolm, it should be noted, asserted that Mr Gordon's clients were not majority Inspectors because the Tax Administration Division was the *"sole admitted creditor and is the Inspector*". I adjourned, the first date of the hearing of the Fixed Date Claim, to the 4th May 2023 and gave directions.

[2] On the 4th May 2023 Dr. Malcolm indicated that he no longer wished to cross-examine the intended interveners' affiant and formally withdrew a notice to cross-examine which had been served on the 3rd of May 2023. I therefore indicated that I would hear arguments on the application to intervene and allowed each party 30 minutes for oral submissions.

[3] In his submissions Mr. Gordon referenced section 277 of the Insolvency Act. The Inspectors, he said, sought leave to intervene in order to contend that the Trustee had been lawfully removed and, if not, that she ought to be removed as Trustee.

He urged that the Inspectors represented the interest of creditors and there was a wide power in the Insolvency Act for persons with an interest to approach the court. It was, he said, *"expedient and necessary*" to have his client before the court. Dr. Malcolm, on the other hand, submitted that the Inspectors do not have sufficient status to remove a Trustee. Section 241 of the Insolvency Act, he submitted, gives the court jurisdiction to remove a Trustee but gives no clear indication of who is an interested party.

[4] In the result I ruled that permission to intervene would be granted. Mr. Malcolm's urgings were more appropriate to the substance of the arguments the interveners wished to urge. There could be little doubt that Inspectors, having been appointed to represent the interest of creditors, had an interest however narrowly defined. I therefore admitted the interested parties to intervene as the "*purported majority Inspectors".*

[5] Mr. Gordon was therefore permitted to argue his clients' Notice of Application, filed on the 27th April 2023, as a preliminary point to the hearing of this Fixed Date Claim (2023 IS00002). These preliminary points, for the most part, relate to the status of the Trustee to bring this claim. I allowed each party 1.5 hours for oral submissions. All parties had by then filed written submissions. In the end the matter continued into the following day and each party was afforded in excess of 2 hours for oral submissions. I should indicate that the Defendant's counsel, Mr John Vassel KC, indicated that he would be making no submissions on the preliminary points made by the interveners. The Claimant in 2023 IS00005, who was represented by Ms Carlene Larmond KC, indicated that they were prepared in that claim to abide the decision on the preliminary point in this Claim (2023 IS00002).

[6] I am grateful to all parties for the written and oral submissions made. For reasons of economy I will not restate them all and I reference only such areas of the evidence and cases as are necessary to explain my decision. In this regard there has been no cross- examination of affiants. I therefore accept as fact the matters stated in each affidavit. Where inferences are drawn from primary facts I reserve the right to reject them and to substitute my own. So too with conclusions of law where they appear. There is a plethora of documentation, much of it contemporary,

and which speak for themselves. Insofar as the facts are concerned this made my task easier. Finally, Dr. Malcolm's candid admission that there had been no new development or change since the 3rd November 2022, insofar as the status of the intervenors were concerned, helped to narrow the issue.

[7] The interveners' contention is two-fold. Firstly, that the majority of unsecured creditors in a meeting held on the 24th and 28th March 2023 removed. Mrs Debbie Ann Gordon as Trustee and substituted someone else. This was done pursuant to a power in section 237 of the Insolvency Act. Secondly, and alternatively, that this Court ought to remove the Trustee due to her conduct and the resultant deterioration in relations between herself and the majority of creditors. The power to do so is contained in section 241 of the Insolvency Act.

[8] As regards the purported removal I find, and did so indicate in the course of argument, that the meeting of creditors which endeavoured to remove the Trustee had not been properly called or constituted. The evidence is clear that she had not been notified of the time of the meeting or even that it was being held. Briefly, the facts are that, exchanges occurred by email and otherwise between the Inspectors represented by Mr Gordon, and the Trustee. They repeatedly called upon the Trustee to call a meeting of creditors. They also stated that if one was not called they would do so. The Trustee instead proceeded to call a meeting of Inspector's on the 24th March 2023. At that meeting the Trustee presented a document called a report to creditors, see exhibit DAG-4 to the Second Affidavit of Debbie Ann Gordon filed on the 13th April 2023. On the same date that the meeting of Inspectors was held, but at 5pm after it concluded, the creditors (or some of them) met and voted to remove the Trustee, see paragraph 26 of the Affidavit of Kai Koberich filed on the 27th April 2023. The Trustee was given no notice of that meeting.

[9] I hold that a general threat to call a meeting, without providing information as to its date and time was not notice of a meeting. Furthermore, as the meeting was virtual there ought to have been provision of the meeting credentials. In that regard it is no answer to say that the same credentials were used as had been used for the earlier Inspectors meeting (held at 2pm that day) because the Trustee could not

know they were to be used for that purpose unless she was told. I therefore, without calling on Mr Malcolm to reply, decided that the Trustee had not been validly removed. It seems to me trite that, absent exceptional circumstances, a meeting to remove a Trustee could not be validly convened unless notice of the meeting was given to the Trustee. The principles of natural justice require no less. If authority is required I pray in aid a passage, in the judgment of the Honourable Mr. Justice Walker, in ***Re Jaswant Singh Sangha et al 2022 BCSC 286*** (the Supreme Court of British Columbia) at paragraphs 39-40:

> **"*39. The inspectors do not have the power to remove the Trustee and appoint a new one. Only the creditors may do so by special resolution or the court in bankruptcy on application by an interested person: BIA, ss. 14, 14.04; Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada, 4th ed., … No such special resolution of the creditors was ever passed. No application to discharge the Trustee has been brought by those who have standing, i.e., the bankrupt estates' creditors.***
>
> ***40. It is not clear whether the inspectors did, in fact, meet (if they did, it is also not clear whether they, in fact, passed any such resolution). In any event, if a meeting was held, it was not called with proper notice to the Trustee and would have been held in its absence. As a result, it would not have been convened in compliance with the BIA. Any resolution that may have been passed is thus of no legal and binding effect: Guertin (Re) (1933), 14 C.B.R. 347, 1933 Carswell Que 5 (S.C.); Wedlock Ltd. (Re), [1925] 2 D.L.R. 566, 1925 Carswell PEI 1(S.C.); Chretien (Re), [1962] C.S. 116, 1958 Carswell Que 56 (S.C.); Ultimo Boutique Ltd. (Re) (1986), 58 C.B.R. (N.S.) 63, 1986***

Carswell Ont 164 (S.C.); Houlden & Morawetz, ss. 116–120."

[10] There is also the further point that, as the Insolvency Act mandates that the Trustee is to chair all meetings of creditors, it follows that the Trustee must have notice of the meeting, see section 161 of the Insolvency Act. The creditors once the meeting is convened may appoint another person to chair it and, by special resolution, may remove the Trustee. In the case at bar the Trustee was not told either the date or time of the meeting nor was she given notice of any special resolution to be tabled.

[11] Most of the time, on the preliminary application, was therefore taken with the intervenors' application for an order to remove the Trustee. The order is sought pursuant to section 241 of the Insolvency Act which reads:

> *" 241. Notwithstanding section 238, the Court on the application of any interested person, may for cause remove a trustee and appoint another trustee in the trustee's place."*

[12] The conduct of the Trustee, of which complaint is made, may be summarised as follows:

a) She retained her own firm as attorneys to act without consulting the committee of Inspectors
b) She has commenced legal action and retained experts and incurred expense without consulting the Committee of Inspectors or the creditors
c) She has refused or failed to call a meeting of creditors
d) She has failed to consult and/or act in accordance with the wish of the creditors or the majority of Inspectors and in particular has failed to call a meeting of creditors.
e) She has not acted in good faith and has acted in a manner which impedes rather than advances the wish of the majority of creditors to proceed with the sale of assets
f) There is in consequence such disharmony between the Trustee and the creditors that she ought to be removed.

g) Even if the meeting of creditors was not properly convened the vote taken is evidence of the disharmony and the wish of the majority of creditors.

[13] The Trustee's response is to say that she has acted lawfully. Furthermore, that the Inspectors do not represent the majority of creditors. It was submitted that the Trustee is only obliged to "*have regard*" to creditors' and/or Inspectors wishes but is not to be dictated to by them. This is because the Trustee has to consider other interests such as that of the bankrupt. It was also submitted that as the creditors' claim, represented by these Inspectors, were only conditionally admitted the Inspectors had no authority and were unable to act. In this latter submission the Trustee was supported by the Supervisor of Insolvency.

[14] Mrs Evans-Roberts, who appeared for the Supervisor of Insolvency, urged that there is a distinction to be made between an entitlement to be appointed Inspector and an entitlement to act as an Inspector. In other words, given the restrictions contained in the Insolvency Act and Regulations, it is possible that although appointed an Inspector a person may not be eligible to act as such. Regulation 40 prescribes the criteria referable to a section 175(2) appointment as Inspector and provides:

> *"40 (1) A person shall be eligible for appointment, under section 175 of the Act, as inspector, if that person-*
>
> *(a) is a creditor; or*
>
> *(b) is authorized by the creditor or creditors, to act for the creditor or creditors in relation to the bankruptcy.*
>
> *(2) For the avoidance of doubt, a creditor or a person authorized by the creditor to act as an inspector shall not be eligible to act as an inspector, unless-*
>
> *(a) in the case of a creditor; or*
>
> *(b) in the case of a person authorized by the creditor,*
>
> *the creditor's proof of claim is admitted."*

The submission is that Regulation 40(1) addresses eligibility for appointment but not eligibility to act as an Inspector. Thus, according to the Supervisor of Insolvency, a Trustee may admit claims for voting purposes, see section 166(1) of the Insolvency Act. Therefore, Inspectors and creditors may also be permitted to vote subject to later validation of claims. The Supervisor of Insolvency submitted in paragraph 39 of written submissions filed on the 2nd May 2023,

> *"…..In practice, admitting claims for the purpose of voting generally occurs at the First MOC or very early in an administration before the Trustee is able to review books and records to determine whether the claims are provable in bankruptcy or may be admitted for payment that is proved".*

[15] This submission by the Supervisor of Insolvency supported a challenge to the validity of the meeting of creditors. It was argued that the creditors and/or their Inspectors had no authority to act because their claims were only conditionally, not finally, admitted. The submission also supported a ruling or determination made by the Supervisor of Insolvency with respect to the validity of the said meeting. I have already determined, on other grounds, that the meeting in question was not properly convened and therefore its decisions were ineffective. The validity of the determination, directive or, ruling of the Supervisor of Insolvency did not therefore arise for my decision. I did however hear argument on the question whether the Supervisor of Insolvency had the power to issue such a directive. Let me say, without deciding, that as at presently advised I see no statutory basis for the Supervisor of Insolvency to issue a determination, ruling or directive as to the validity of a meeting. The Supervisor's counsel invited me to imply such a power since it is inherent in the duties of the Supervisor of Insolvency. The Insolvency Act where necessary confers specific power on the Supervisor of Insolvency to give directives, see for example section 240. In that regard the Act provides for a challenge to such a directive by an appeal to this court. I do not think it adds to the efficacy of the statute to imply a power to give directions or to make determinations. On the contrary, given that an express power to direct is given with respect to some things, it seems to follow that there is no such power where it is not so expressed. The point is compounded by the Supervisor's submission that the

appropriate way to challenge the directive or decision, given in this case, is by an application for judicial review. In the context of the statute, which otherwise expressly provides for appeals to this court, that is a further reason not to imply the power to give directives. There is of course nothing to prevent the Supervisor issuing guidance in the form of opinions or advice. The Supervisor is also always at liberty to articulate on issues which may arise in this court.

[16] Be that as it may be, the Trustee relied on the Supervisor's ruling, determination or, opinion, (that although appointed the creditors and their Inspectors could not act) in support of a submission that the intervenors had no locus standi to urge this court to remove the Trustee. It was also submitted that, for similar reasons, they had no power to advise the Trustee and the Trustee had no duty to follow or consider that advice. It was Mr Malcolm's submission that as only one creditor had been verified, that being the Tax Administration Department, and because that creditor had not voted for the Trustee's removal, there was no evidence to support her removal.

[17] In dealing with, what I will refer to as, the opinion of the Supervisor of Insolvency I must say it does seem rather artificial and gives a strained interpretation to the provisions. I say so most respectfully as I have the highest regard for the office holder and the professionals in the offices of the Supervisor. The Insolvency Act does not expressly distinguish between a person who is "*eligible for appointment"* and one who is "*eligible to act*" contrary to the Supervisor's submission, see paragraph 38 of the written submissions filed by the Supervisor on the 2nd May 2023. What the Act provides, and the Regulations make clear "*for the avoidance of doubt*", is that no one should be appointed as an Inspector until and unless a proof of claim is admitted. In this regard no reference is made in the statute or regulations to a conditional as against a final admission of the proof of claim. In other words whenever a proof of claim is admitted, whether final or conditional, that creditor or a person authorised by the creditor is eligible for appointment as an Inspector. Once appointed the person is eligible to act as an Inspector.

[18] The provisions of the Insolvency Act and Regulations are therefore clear. A literal construction permits of no other interpretation and is practical and workable. I say

that because the other interpretation would mean that Inspectors appointed by creditors whose claim was only conditionally admitted, would not be eligible to provide the oversight, guidance and, instruction to the Trustee that the Act contemplates. They would be precluded because, for example, the quantum of the creditor's claim had not been determined. In this case, for example, the Trustee on more than one occasion, and in particular on the 3rd November 2022, wrote to the creditor Josef Wiegand GMBH & Co KG as follows:

> *"I write to advise that having reviewed your Proof of Claim dated 15 February 2022 I see no basis to object to your Claim. Consequently, your claim will be admitted to quantum (following verification of the books and records of the bankrupt).*
> *For the record, the office of the Supervisor of Insolvency has indicated that the date of bankruptcy is 9th February 2022.*
> *At present, two other creditors' Claims from the Committee of Inspectors have been admitted. We will now move to convene a Committee meeting soonest."*

The consequence of the conditional nature of that admission of the claim (which is as to quantum), if the submission is correct, is that the Inspectors cannot "*act"* although eligible to be appointed. In effect therefore the Trustee would be enabled, by making only "*conditional*" admissions, to deprive herself of the oversight by Inspectors which is a cardinal feature of the statutorily scheme, see for example section 263 which sets out several areas in which the approval of the Inspectors is required. It may also lead to undesirable uncertainty as Inspectors, and by extension creditors, would never be sure which, if any, of the statutory powers granted to them could be exercised.

[19] I hold therefore that once the claim was admitted the creditors and/or their Inspectors were eligible for appointment and hence entitled to act. This applies whether the admission of the claim is final or conditional. In the case at bar I hold that the Inspectors represented by Mr. Gordon were entitled to act as they were

validly appointed because the creditor's Proof of Claim had been conditionally admitted.

[20] It seems to me that the practice outlined by the Supervisor of Insolvency, of the conditional admission of claims, is consistent with the statutory scheme and conducive to good and efficient administration of the estate. When bankruptcy occurs the Trustee has to consider the creditor's Proof of Claim. The proof quite often cannot be verified unless or until the books and accounts of the bankrupt are reviewed. A final resolution and accounting can therefore take time. Until that is done however the business of calling in assets, of deciding whether the insolvent business may be salvaged and, of liquidating assets must go on. The statutory scheme contemplates that when carrying out these functions the Trustee will be guided by creditors and/or a Committee of Inspectors appointed by the creditors. There is a benefit therefore in creditors' Proofs of Claim being admitted at the earliest possible time so that a Committee of Inspectors may be appointed. In this regard therefore, and given the often preliminary information contained in the Proof of Claim submitted by creditors, there is practical value to conditional admission of claims. There is little prospect of creditors or conditionally approved creditors, impeding the Trustee's duties as all are motivated to recover the debt due. What is important, however, is that the admission of the claim is no longer conditional by the time final disbursements or payments out are made. It should by then be either finally admitted or denied. Nothing I have said therefore is to be taken to reflect dissatisfaction with the practice, as outlined by the Supervisor of Insolvency, of conditional admission of creditors' claims.

[21] In returning to the facts and circumstances of the case at bar my conclusions can now be stated. It was conceded that the Inspectors represented by Mr Gordon were appointed by creditors whose proof of claim had been conditionally admitted. It was also common ground that no new facts or circumstances, which might affect that conditional status, had come to the attention of the Trustee between the 2nd November 2022 and the date of this hearing. The 2nd November 2022 is the last date on which the Trustee communicated to the creditor about the admission of its claim, see paragraph 18 above. The Trustee, in her report to creditors dated 23rd March 2023, stated at paragraph V:

> *"My findings have been communicated to the named Inspectors since October 2022. As of current date, the findings are in summary as follows:*
>
> *(i) Only 1 of the named Inspectors has been admitted as an unsecured creditor. This admission has been made on the basis and to the extent that the company's own pre-bankruptcy Returns accord with the creditor's Proof of Claim.*
>
> *(ii) 2 of the named Inspector claims have been determined provable but subject to admission upon verification that the company's books and records substantiate the claims and their volumes*
>
> *(iii) 2 of the named Inspectors claim have been determined to be unprovable."*

It is common ground, and clear from the evidence, that neither of the two unprovable claims relate to Mr Gordon's clients. It is therefore apparent, and I so find, that there were at all material times three Inspectors duly appointed on behalf of creditors admitted (unconditionally and/or conditionally) and that Mr Gordon therefore represents the majority of Inspectors. I am fortified in my view of the evidence because of the plethora of correspondence in which the Trustee treated with the Inspectors as Inspectors and even, as we have seen, called a meeting of Inspectors to which they were invited.

[22] It is also apparent that the dispute between the Trustee and the majority Inspectors flow from her misunderstanding of the law. Her report in paragraph V states: *"To be eligible as an Inspector, the Insolvency law requires that the Proofs of Claim of Inspectors be admitted Claims, that is, proven and final for purposes of dividend distribution…*". In her third affidavit, filed on the 28th April 2023, the Trustee describes the creditors (at whose behest Mr Gordon's client were appointed Inspectors) as having claims which were "*neither admitted nor denied*" pending verification of the bankrupt's books and records, see paragraphs 15 and 18 of the third affidavit of Debbie-Ann Gordon filed on the 28th April 2023. At paragraph 34 of that affidavit the Trustee states that any meeting of creditors should consist only

of proven creditors. She in that affidavit referenced Mr Gordon's clients as "*purported inspectors*". At paragraph 55 the Trustee states:

> *"55. I refer to paragraph 21 of the said affidavit and deny that I stated in the meeting that JBM and Weigand were "no longer" admitted creditors. As a matter of fact, in all my communication with JBM and Weigand, I maintained that their admission was "subject to verification" and therefore, conditional upon an examination of the books and records of the Bankrupt."*

This is also consistent with her reference to and reliance on a letter dated 21st March 2023, in paragraph 67 of her affidavit under reference.

[23] The above referenced evidence suggests that the Trustee is of the view that until a "final" verification of claims the Inspectors are not Inspectors but are only "*purported Inspectors*." This I suppose flows from the argument that notwithstanding their appointment they are not entitled to act as such. In keeping with my decision on the law, that there is no distinction between "*eligibility for appointment*" and "*eligibility to act*", the Trustee was wrong. The Trustee having acceded to a conditional admission of the claims it follows that the Inspectors, consequently appointed, were entitled to act. They were and are not "*purported Inspectors".* I bear in mind that the Trustee was encouraged in that erroneous point of view by the opinion of the Superintendent of Insolvency.

[24] It should be made clear that, although section 166 permits admission (or rejection) of a proof of claim "*for the purpose of voting*", it is not necessarily connected to the appointment of Inspectors. The section 166 power is in the context of a meeting of creditors and the tally of votes and deciding who may or may not vote. Section 175 addresses the appointment of a Committee of Inspectors. The Inspectors are appointed by creditors however, to be appointed, they must satisfy certain criteria one of which is that the creditor making the appointment should have a claim which has been admitted. There is no mention, and hence no distinction made, in section 175 or rule 40 of final or conditional admission of a claim. Therefore, any admission of a claim, whether final or conditional, suffices to satisfy that criterion under Rule 40 and section 175. The Trustee is to be guided accordingly. The Trustee is to be further cautioned that once appointed the Inspector's appointment

may only be revoked by either the creditors at any meeting or the court on the Trustee's or creditor's application.

[25] The law provides expressly that the Trustee *"…shall have regard to any directions that may be given by resolution of the creditors at any general meeting or by the inspectors, and any directions so given by the creditors shall in case of conflict be deemed to override any directions given by the inspectors",* see section 181(1) of the Insolvency Act. Mr. Malcolm submitted that "*have regard to*" did not mean obey. I beg to disagree. It is the clear intent of the statute that the Inspectors and creditors in general meeting are entitled to give "*directions"* to the Trustee. When carrying out her duties the section is saying she must have regard to, that is, pay attention to or, go along with any such directions. If it were otherwise there would be no need to give the Trustee an expressed power to apply to the Court to review any such decision or direction, see section 181(2). In other words, the Trustee must abide decisions of the creditors in general meeting and/or of the Committee of Inspectors and, if she is unwilling to do so, may apply to the court to have the decision changed or reconsidered.

[26] I am fortified in this view of the statutory intent by the words of Justice of Appeal Blair, sitting in the Court of Appeal of Ontario, **In the matter of Impact Tool & Mould Inc of the City of Windsor, BDO Dunwoody Limited (Trustee of the Estate of Impact Tool & Mould Inc., A Bankrupt) v Doyle Salewski Inc., (in its capacity as Court appointed Interim Receiver of Impact Tool & Mould Inc et al) [2006] 7498 CanLII 7498 (ON CA)** decided on the 9th November 2005**.** In that case the duty to provide information and documentation to Inspectors was under consideration. In holding that the information ought to be provided the learned judge of appeal said in part:

> *"27. Apart from the rehabilitative goals with respect to personal bankrupts, the purpose of a bankruptcy is to gather in and realise upon the assets of the bankrupt and to distribute those assets amongst the creditors on an equitable basis, subject to their priorities. In that sense, bankruptcy is a creditor driven process with the creditors pursuing their*

claims by collective action through the trustee in bankruptcy, see Dartmouth (City) v Barclays Bank of Canada (1996) 40 CBR (3d) 1 (NSCA). The inspectors-appointed by the creditors under S.116 of the BIA- are the creditors' representatives in this exercise.

28. The inspector's role is integral to the operation of the bankruptcy regime. As the creditors' representatives in the administration of the bankrupt estate they owe a fiduciary duty to the general body of creditors, collectively.... They have an obligation to be proactive and to keep watch on the trustee to ensure that assets are realised to the best advantage of the estate…. In Re Fishman (1985) 56 CBR (NS) (Ont SC in Bankruptcy at 317, Henry J said,

"The inspectors are the supervisors of the trustee and it is their function to instruct the trustee to take whatever steps they consider appropriate in order to protect the estate and the creditors"."

[27] For completeness let me say that any creditor may prove his claim pursuant to section 188. Section 201 provides for the examination of the claims by the Trustee and the power to allow it in whole or in part. I commend to the Trustee the following extracts, from the authorities cited,

a) "**Bankruptcy and Insolvency Law of Canada" by L.W. Houlden, G.B. Morawetz and Janis Sarra, Publishers Note Released 4th April 2023**

"*The Trustee may at any time call a meeting of creditors, s. 103(1) [Insolvency Act Jamaica s. 15 (1)(c). Meetings of creditors other than the first meeting are rare and are only called when the trustee and inspectors are faced with some extraordinary problem. The trustee must call a meeting when (a) directed to do so by the court (b) requested in writing by a majority of*

inspectors; or (c) requested by 25% of the creditors holding 25% in values of the proved claim; s. 103(1)"

[Insolvency Act section 158 (b) (i) and (ii) being creditors with 1/6th in value of unsecured creditors holding 1/6th in number of proved unsecured claims].

b) **Farber v Goldfinger [2011] ONSC 2044** heard 28th March 2011, per Mesbur J at paragraph 34,

"*Trustees, as the court's officers, operate under these obligations. In addition, they are subject to the provisions of the Bankruptcy and Insolvency Act, including following the prescribed Code of Ethics referred to in s. 13.5 of the Act. In looking at a Trustee's obligations, it is important to look at the entire scheme of the BIA in relation to a Trustee's duties and continued representation of an estate. For example, section 14 gives the creditors the right to substitute one Trustee for another. Most importantly, the Superintendent has broad powers to deal with a Trustee who has acted improperly. These include revoking the Trustee's licence, requiring the Trustee to make restitution, limiting the Trustee's ability to practice, or doing anything else the Superintendent considers appropriate and the Trustee agrees to. Thus, unlike a Receiver, whose role derives solely from the court order appointing it, the Trustee is subject to the additional duties imposed by the Bankruptcy and Insolvency Act itself, and the additional supervision of the Office of the Superintendent.*

c) In **Re 5274398 Manitoba Ltd. o/a Cross Country Manufacturing (Bankrupt) [2019] MBQB 89** judgement delivered 18th June 2019 per Dewar J paragraph 13*:*

> *"In performing the task of assessing Proofs of Claims, the trustee must maintain an even hand between the various stakeholders, including the claimant whose claim is then under consideration. In practical terms, this will require a trustee to objectively assess the information contained within the Proof of Claim, to investigate other sources of information which might shed some light on the claim, when appropriate to request further information from the claimant, to consider the legal position upon which the claim is based, and to render a decision as to whether the claim is allowed or disallowed. It is not unusual in the course of this process for a trustee to engage in negotiation with a claimant with a view to finding a compromise. The amount of work done by the Trustee in assessing a claim should be performed with a view to the practicalities of the situation. The trustee represents creditors of an entity which is financially strapped and there is no requirement for the trustee to look under every stone in order to satisfy itself to a degree of certainty. Were that the case, the estate would be eroded by the trustee's efforts to achieve that overwhelming standard. It is reasonableness that governs, both as to the nature of the investigation and the decision that is made. This is even the case where the trustee is faced with the assessment of a claim that is contingent or unliquidated."*

[28] In considering the conduct of the Trustee, and whether she ought to be removed pursuant to section 241 of the Insolvency Act, I bear in mind the approach of Farley J at first instance on the 12th December 1995 in ***Re Bankruptcy of Confederation Treasury Services Limited [1995] CanLII 7386 (ON SC)*** at paragraphs 13 and 14:

> *"13. Houlden J.A. for the court in Re Reed (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.) said at p. 86:*

'…Unless this inquiry is carried out, the credit union may be dealt with unfairly. A trustee in bankruptcy should act equitably and so far as possible hold an even hand between the competing interests of various classes of creditors'. As James L.J. said in Re Condon; Ex parte James (1874), 9 Ch. App. 609 at 614 (L.JJ.):

"I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors."

See also my view in Re Rizzo Shoes (1989) Ltd. (1995), 1995 CanLII 7361 (ON SC), 29 C.B.R. (3d) 270 (Ont. Gen. Div. [Commercial List]) at pp. 277-8 including my observation:

'I think it also fair to observe that in deciding whether or not the trustee has acted properly the court must be careful to judge the trustee's conduct in light of the circumstances as they existed at the time the trustee performed the act or made the decision: see Cocks v. Chapman, [1896] 2 Ch. 763 at 777 (C.A.)'.

[14] A trustee may be removed for cause: see Houlden and Morawetz, supra, at p. 1-52 where the authors observe:

"Cause" means misconduct, fraud, dishonesty, becoming bankrupt or otherwise incapable of acting as a trustee: Re Herman (1930), 1930 CanLII 379 (ON CA), 11 C.B.R. 239 at 246. Cause is not, however, restricted to dishonest conduct; misconduct short of dishonesty is sufficient: Re Bryant Isard (1923), 4 C.B.R. 41, 24 O.W.N. 597 (S.C.).

> *Cause exists: (a) if there is conduct showing that it is no longer fit that a person should continue as trustee; (b) if there is a danger to the estate property; (c) if there is a want of reasonable fidelity; (d) if circumstances prevent the creditors from working in harmony with the trustee; (e) if the trustee cannot act impartially; (f) if there has been an excess of power by the trustee; (g) if there has been a lack of bona fides by the trustee; or (h) if there has been unreasonable conduct by the trustee in relation to the bankrupt estate. The main principle upon which the jurisdiction of the court is exercised in ordering the removal of the trustee, is the welfare of the creditors and of the bankrupt estate. The trustee must not undertake a duty and put himself in a position that is in conflict with his duty as trustee, or act in a manner that is inconsistent with that duty. If the trustee has placed himself in a position of conflict, he cannot continue as trustee; he must resign or be removed by the court; Re Commonwealth Investors Syndicate Ltd. (1986), 1985 CanLII 333 (BC SC), 61 C.B.R. (N.S.) 147, 69 B.C.L.R. 346 (S.C.)', additional reasons at (1986), 1986 CanLII 1139 (BC SC), 62 C.B.R. (N.S.) 308 (B.C.S.C.). In the Commonwealth case, the trustee was removed because he had improperly delayed the winding up of the bankrupt estate for several years.*
>
> …
>
> *Even if a trustee is not dishonest, the court, if it is of the opinion that he has not acted in the best interests of creditors and that he cannot act in concord with the inspectors, may remove him and appoint a new trustee: Re Gauthier Lumber Ltd.; Vanasse Tire Ltd. v. Tardif '(1960), 1 C.B.R. (N.S.) 127 (Que. S.C.)."*

[29] I respectfully adopt that approach to the question of whether this Trustee is to be removed. Although perhaps not exhaustive it is a comprehensive statement of the circumstances which may give rise to removal. Applying these considerations, I do not find that in all the circumstances I should order her removal. In the first place although her law firm is on the record the Trustee has

retained counsel Dr Malcolm to act in this matter. There is no evidence that she has in this way profited from the trust. I do not find that placing her own legal firm on record is necessarily dishonest or not in the best interest of creditors. Secondly, I have found that her attitude to the Inspectors, in failing to consult or have regard to their instructions, was reinforced even if not precipitated by the erroneous opinion of the Supervisor of Insolvency. Thirdly, as regards the reticence about calling a general meeting her third affidavit explains that there were costs and logistical difficulties with which she was concerned. In the absence of cross-examination, I cannot find these concerns did not exist nor indeed do I think them necessarily unreasonable. I bear in mind also that there was not an absolute refusal, on the Trustee's part, to call a creditor's meeting. The letter from her office of the 10th March 2023, actually proposed dates in April 2023, for such a meeting. Fourthly, the only claim the Trustee has filed is this one seeking disclosure and provision for fees and outgoings. I cannot say whether it is unreasonable to seek such relief unless and until I have heard the matter. At this preliminary stage therefore commencement of this claim cannot be a basis for her removal. Finally, although it does appear that relationships are strained, and this is clear from the correspondence exhibited, relations can be improved. I do hope my decision, as to the role and duty of the Trustee vis a vis the creditors and their Committee of Inspectors and as to their capacity to act, will result in better relations going forward.

[30] In the result, and for all the reasons stated above, my declarations orders and directions are as follows:

a) The Intervenors' application for a declaration that as of the 28th March 2023 Miss Debbie- Ann Gordon ceased being the Trustee for the claimant is refused.
b) The Intervenors' application for an order for the removal of Miss Debbie-Ann Gordon as the Trustee for the claimant is refused.
c) It is Declared that there is no legal distinction express or implied in the Insolvency Act between eligibility for

appointment and eligibility to act and that every inspector who has been validly appointed is entitled to act.

d) It is Declared that a proof of claim which is admitted, whether that admission is final or conditional, suffices to make the relevant person eligible to be appointed within the meaning of section 175 of the Insolvency Act.

e) The question of the costs, of this preliminary application, is reserved until the determination of this claim.

f) The court will now consider directions and the date to be fixed for the trial of this matter.

David Batts
Puisne Judge.