[2023] JMCC Comm 38

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE INSOLVENCY DIVISION

CLAIM NO. SU2023IS00005

IN THE MATTER OF THE INSOLVENCY ACT, 2014

AND

IN THE MATTER OF AN APPEAL UNDER SECTION 201(5) OF THE INSOLVENCY ACT

BETWEEN	**SKY HIGH HOLDING LIMITED (As Agent JSCD TRUSTEE SERVICES LIMITED the Bondholder's Trustee)**	**APPELLANT**
AND	**DEBBIE-ANN GORDON Trustee of the Bankrupt Estate MYSTIC MOUNTAIN LIMITED (In Bankruptcy)**	**RESPONDENT**

Insolvency Act- Sections 185, 192, 193, 194 and, 201 – Secured creditor- Whether Proof of Claim and/or Proof of Security - Whether Trustee had authority to disallow – Whether Trustee had lawful reason to disallow - Appeal pursuant to section 201(5) - Whether a rehearing – Whether Trustee should bear costs.

Carlene Larmond KC, and Giselle Campbell instructed by Patterson Mair Hamilton for the Appellant.

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

HEARD: 11th May 2023, 12th May 2023 and 18th August 2023.

IN OPEN COURT

COR: BATTS J

[1] This appeal was brought by Sky-High Holdings Limited (hereinafter referred to as the Appellant), on the 28th day of April 2023, against a decision of Debbie-Ann Gordon the Trustee of the Bankrupt Estate of Mystic Mountain Ltd, (hereinafter referred to as the Trustee). The Appellant received a Notice of Disallowance of Claim, issued by the Trustee dated the 12th of April 2023, and appeals that decision pursuant to power contained in section 201(5) of the Insolvency Act. The precise relief being sought by the Appellant is, contained in its Further Amended Fixed Date Claim Form filed 5th May, 2023, as follows:

> *"1. The Notice of Disallowance of Claim issued by the Trustee of the Bankrupt Estate to Sky-High Holdings Limited and JCSD Trustee Services Limited dated the 12th day of April 2023 is set aside.*
>
> *2. Costs of this appeal to the Claimant to be taxed if not agreed."*

[2] The grounds on which relief is sought are:

> *"1. Without prejudice to its right to raise the matter of jurisdiction as contained in Ground 2 herein, the Claimant/ Appellant relies on the following grounds of appeal:*
>
> *1.1. the Defendant/ Respondent in the Bankrupt Estate had no jurisdiction to issue the Notice of Disallowance of Claim pursuant to Section 201*[of] *the Insolvency Act in that on a proper interpretation of Sections 2, 185(1), 188(1), 192 and 193, a secured debt and in particular the secured debt pursuant to Debenture dated 18 September 2018 in respect of which the JCSD Trustee Services Limited is a secured creditor does not constitute a provable claim under the Insolvency Act.*
>
> *1.2. the Defendant/Respondent failed to appreciate that the JCSD Trustee Services Limited as Secured Creditor made*

no claim and submitted no Proof of Claim in the bankruptcy to which any exercise of her powers could have properly extended.

1.3. the Defendant/ Respondent failed to identify in the Notice of Disallowance of Claim or at all, the Proof of Claim reviewed by her in the purported exercise of her powers under Section 201 (3) of the Insolvency Act;

1.4. the Defendant/ Respondent in any event misunderstood and misapplied the provisions of Section 201 (1) when she concluded that her powers to examine proof of claim and proof of security extended to any Proofs of Claim completed by the JCSD Trustee Services Limited as Secured Creditor, to wit:

i. Proof of Claim dated 2 February 2022 and submitted by JCSD Trustee Services Limited to the Proposal Trustee.

ii. Proof of Claim dated 9 February 2021 and submitted by JCSD Trustee Services Limited to the Proposal Trustee.

1.5. the Defendant/ Respondent acted ultra vires the Insolvency Act when she examined the Proofs of Claim particularized at Ground 1.4 above or any of them for the purposes of Section 201 (l) of the Insolvency Act and issued the Notice of Disallowance of Claim pursuant to Section 201 (3).

1.6. the Defendant/ Respondent abused the statutory process of the Insolvencv Act and the process of this Honourable Court when she issued the Notice of Disallowance of Claim purportedly in respect of proof of security dated 3 March 2022.

1.7 By issuing the Notice of Disallowance of Claim with full knowledge of the Supervisory Order dated 11 November 2022 in Claim No. 2022 SU IS 00009 expressly made on the basis of her concerns, the Defendant/ Respondent improperly

and/or unreasonably utilized the process of disallowance under the Insolvency Act as a collateral attack on the Supervisory Order thereby rendering the order and the sale process pursued under it nugatory.

2. *The Defendant/ Respondent had no jurisdiction to issue any notice pursuant to Section 201 of the Insolvency Act in that as at 28 March 2023 she ceased being the Trustee in the Bankrupt Estate.*
3. *Without prejudice to the Claimant's/Appellant's right to rely on Grounds 1 and 2 above, and further and/or in the alternative to those grounds, the Defendant/ Respondent erred in determining that "no substantiating or other evidence capable of being relied upon provided, received or seen in support of claim as a secured creditor in priority" in circumstances where information provided to her by the Claimant's/ Appellant's attorneys-at-law by letters dated 1 September 2022 and 3 November 2022, respectively, was sufficient to substantiate the Claimant's/ Appellant's claim as a secured creditor."*

[3] The appeal was heard by me on the 11th and 12th May 2023. It was heard at the same time as claim 2023IS00001 which involved other issues and additional parties. I reserved my decision in 2023IS00005 until completion of 2023IS00001 and delivered both decisions at the same time.

THE BACKGROUND

[4] The Trustee was appointed on the 8th day of August 2022, by the creditors of Mystic Mountain Limited. The Trustee's Certificate of Appointment was then issued by the Office of the Supervisor of Insolvency. The Appellant, Sky High Holdings Limited, is the bondholder of a debenture dated 28th September 2018 over the fixed and floating assets of Mystic Mountain Limited (In Receivership and Bankruptcy). Correspondence was exchanged between the Trustee and the Appellant's attorneys-at-law with reference to its bond and the debenture. The Appellant, in the correspondence sent to the Trustee, provided the notice of security interest dated 22nd January 2021; particulars of charge registered at the

Companies Office of Jamaica and the certificate of registration of charge (created on 27th January 2021); and a certified copy of the Debenture. The attorneys-at-law for the Appellant, by letter to the Office of the Supervisor of Insolvency dated 11th August 2022, took issue with the delay in recovery and the effect on its debenture. By way of letter dated 26th October 2022, the Trustee requested further information and documentation so as to obtain details on the debenture. On the 3rd November 2022, the Trustee sent another letter, requesting an urgent response to the letter of 26th October, 2022. The Appellant through its attorneys-at-Law, on 3rd November, 2022, responded to the Trustee's letter of request as follows:

> *"…*
>
> ***Re: Mystic Mountain Limited (In Bankruptcy) — Proof of Claim***
>
> *We refer to your letter of October 31, 2022 and November 3, 2022. As you know we act on behalf of Sky-High Holdings Limited. On September 28, 2018 Mystic Mountain Limited (MML) issued the Senior Secured Fixed Rate 7-year Bonds (the "Secured Bond"). Pursuant to the Secured Bond, MML borrowed (ONE BILLION, ONE HUNDRED MILLION JAMAICAN DOLLARS) at an interest rate of 7.125% per annum.*
>
> *Among the pertinent transaction documents that MML entered into were:*
>
> *(a) The Trust Deed;*
>
> *(b) The Global Bond;*
>
> *(c) The Debenture; and*
>
> *(d) The Debt Service Reserve Account Agreement, (referred to as the "Transaction Documents").*
>
> *The JCSD Trustee Services Limited C'JCSDT") was the counterparty to those agreements as trustee, for the benefit of bondholders. The Global Bond was later immobilized in the Jamaica Central Securities Depository Limited, so that future transfers of a bondholder's interest would be made*

by book entry credits and debits within the JCSD's depository,

The responsibility for registering the Notice of Security Interest was that of MML, see section 2.5(a) of the Trust Deed. However, prior to taking steps to enforce the security, a decision was made by the JCSDT to correct the default of MML as it could jeopardize the registration of the security.

On February 8, 2022 Mr. Wilfred Baghaloo was appointed as Receiver under the Debenture and Sky-High has chosen not to participate in the bankruptcy process but instead to enforce and realize the security contemplated by the Debenture and as set out in the Notice of Enforcement of Security dated January 26, 2021.

As it is now expressly clear that the secured creditor is not participating in the bankruptcy process it is submitted that the requests made in your letter of October 26, 2022 have been answered or are not relevant to the secured creditor….." [Emphasis added]

[5] The Trustee thereafter issued to the Appellant a letter and a Notice of Disallowance of Claim, see exhibits IH 1 and IH 2 of the Affidavit of Ian Haynes filed on 28th April, 2023:

"…

12 April 2023

Sky- High Holdings Limited
3 Haughton Avenue
Kingston

JCSD Trustee Services Limited 40 Harbour Street
P.O. Box 1094 Kingston

Attention: Mr. Ian Haynes/Ms. Richelle Carney

Dear Sirs,

Re: Claim of JCSD Trustee Services Limited as Trustee for sole beneficial bondholder Sky-High Holdings Limited

Further to our correspondence regarding your Proof of Claim (Form 38) and despite my written communication since November 2022, to-date I have not received any substantiating evidence from either you, the Receiver, former Trustees or from any third party, to support your claim as a secured creditor in priority.

Accordingly, I hereby formally advise that pursuant to Section 201(3) of the Insolvency Act, I have determined that ***given the absence of substantiating evidence,*** *your claim against the bankrupt as a secured creditor in priority has been disallowed. Notice of Disallowance (Form 39) as required by the Insolvency Act, is attached. …"* [Emphasis added]

"FIRST SCHEDULE

Form 39

INSOLVENCY ACT

INSOLVENCY REGULATIONS, 2014

DISALLOWANCE OF CLAIM

TO: ***Sky- High Holdings Limited***
3 Haughton Avenue
Kingston

JCSD Trustee Services Limited
40 Harbour Street
P.O. Box 1094
Kingston

Attention: Mr. Ian Haynes/ Ms. Richelle Carney

> ***TAKE NOTICE THAT*** *as Trustee acting in the matter of the bankruptcy of* ***MYSTIC MOUNTAIN LIMITED****, I have disallowed your right to a priority in whole, pursuant to the Insolvency Act, for the following reason:*
>
> ***No substantiating or other evidence capable of being relied upon provided, received or seen in support of claim as a secured creditor in priority***
>
> ***AND FURTHER TAKE NOTICE*** *that if you are dissatisfied with my decision in disallowing your claim in whole, you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30- day period, allow.*
>
> ***…"*** [emphasis added]

APPELLANT'S SUBMISSIONS

[6] King's Counsel, for the Appellant, submitted that section 201(5) of the Insolvency Act does not expressly indicate whether the appeal, from the notice of disallowance, is a trial de novo or a true appeal. The Appellant relies on the decision of Registrar Balmanoukian, in **Re Huphman** 2019 NSSC 280, in support of the position that not all appeals pursuant to section 201 should automatically proceed de novo. It was for the court to consider the facts and circumstances of each case on appeal and to then decide how to proceed. It was submitted that in the case at bar the court has before it all that it would require to make a decision disposing of this appeal.

[7] Mrs Larmond KC submitted further that, where the Trustee's decision is a question of law or interpretation of the statue, the standard is one of correctness. However, where the decision is of a factual nature or involves a discretionary element, the standard of review is reasonableness, see **(Re) Huphman (Supra)**. Counsel contends that considering the grounds of appeal in these proceedings an application of both standards is required. She submitted that an examination

of the legislative framework, on proofs of claim by secured creditors, is critical to the disposal of this appeal.

[8] Mrs Larmond KC prayed in aid the decisions of **Martin v R** 2015 TCC 118 and **. (Re) Cutting Edge Foods Inc,** 2008 ABQB 340. In **Martin v R (Supra** D'Auray, J considered provisions of the BIA which are in pari materia to the IA of Jamaica, (121 of the BIA with section 185 of IA; 127 of the BIA with 192 and 193 of IA; 128 of the BIA with 194 of IA; and 201 of the BIA with 135 of the IA), and observed that a secured debt does not constitute a provable claim under the BIA as secured creditors are strangers to bankruptcy. Paragraph 25 of his judgment states:

> *"[25] In certain situations, a secured creditor may, however, wish to participate in the bankruptcy process. Secured debts are included as part of provable claims only in the following circumstances;*
>
> *-Where a secured creditor realizes his security, he may prove the balance due to him after deducting the net amount realized (subsection 127(1) BIA);*
>
> *-Where a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove his whole claim (subsection127(2) BIA);*
>
> *-Secured creditors may assess their security and prove the unsecured portion of their debt (subsection 128(2) BIA).*
>
> *[26] By not participating in the bankruptcy, a secured creditor will not be entitled, for the unsecured portion, to a distribution amongst the creditors if there is one. Furthermore, secured creditors cannot take personal action against bankrupts for the unrecovered* portion of their debt once the bankrupt is discharged."

It was submitted that in the instant case the secured debt pursuant to the debenture does not constitute a provable claim under the IA and that section 185 (1) is therefore inapplicable to it.

[9] The Appellant submits therefore that as it has not chosen to participate in the bankruptcy it has filed no proofs of claim, nor has the security been surrendered for the general benefit of creditors. In accordance with section 201(1) the Trustee is obliged to only examine proofs of claim and security, delivered to her in the bankruptcy, when exercising her authority whether or not to disallow a claim.

[10] King's counsel submitted that the proofs of claim submitted by the Appellant are not proofs of claim delivered in the bankruptcy. Counsel makes this contention relying on the fact that two of the proofs of claim submitted were made to the proposal trustee and the other to the Receiver. Counsel contends that, the Trustee acted ultra vires section 201(1) of the IA when she examined the proofs of claim that were not submitted by the appellant to her pursuant to section 192 and 193 of the IA. This is especially so she says, since the Trustee cannot disallow what does not exist and what, on a proper interpretation of the Act, could not have existed at the time she issued the Notice of Disallowance.

[11] Mrs Larmond KC, argued further that the effect of the Notice of Disallowance in light of the supervisory order of this Court on 11th November 2022, and the receiver's application for permission mandated by the supervisory order, is to bring a halt to the purpose of the court's supervisory order. Counsel submits that there is good ground supported by law for the court to invoke its inherent jurisdiction to protect its process from abuse such as this. She cited **Chaban v Chaban** 1999 CanLII 12238 (SK CA) and submitted that in the circumstances the court in its supervisory jurisdiction is properly positioned to treat the Notice of Disallowance as ineffective and inoperable. The Trustee surrendered her right to invoke the power, that was vested in her under section 201(3), when she attempted to render the court's order nugatory. Kings counsel argued that in the circumstances the appeal should be allowed.

TRUSTEE'S SUBMISSIONS

[12] Dr Malcolm for the Trustee submitted that, under section 201(5) of IA, the determination in respect of the proofs of claim by the Trustee is final and conclusive unless there is an appeal of the Trustee's determination to the court.

He relies on the case of**(Re) Galaxy Sports Inc.** 2004 BCCA 284 and avers that appeals, from the decision of the Trustee to disallow, are to be treated as true appeals and not as a hearing de novo. It is his submission that it is an exercise of discretion to allow fresh evidence to be tendered on an appeal. In considering whether to allow fresh evidence he says that the court should consider principles established in **Associated Gospel Assembled v Jamaica Cooperative Credit Union League Ltd** 2022 JMCA Civ 36 applying **Ladd v Marshall** [1954] 1 WLR 1489. In that regard:

a. The evidence the applicant seeks to adduce must not have been available at the hearing below and could not have been obtained with reasonable due diligence;
b. The evidence must be such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive; and,
c. Although the evidence itself need not be incontrovertible, it must be such as is presumably to be believed or apparently credible.

He submitted that the court must be satisfied all conditions are met but, the court is not bound strictly by them, with the court's primary consideration being that justice is done.

[13] Dr Malcolm submitted also that to the extent that the affidavits of Ian Haynes, tendered in this appeal, contain fresh evidence it should not be considered by the court. On the question of fresh evidence, the Appellant has not sought to seek leave nor have they submitted any basis on which the court should permit the consideration of fresh evidence on appeal. Dr Malcolm however acknowledged that the exhibits attached to Mr Haynes' affidavits may be considered by this court in conjunction with the exhibits attached to the Trustee's affidavit in this appeal (see paragraph 30 of written submissions filed on the 3rd May 2023.

[14] Counsel submitted further that section 201(1) gives the Trustee the authority to examine every proof of claim or security. Additionally, that the Trustee may require further evidence in support. Further that there is no question that the

trustee's jurisdiction and authority cover the secured claim. He contends that under section 201(3) the Trustee may disallow, in whole or in part, any security.

[15] Dr. Malcolm submitted that there is no 'opt-out' provision in the IA available to secured creditors. He avers that for a Trustee to protect the interest of unsecured creditors the Trustee must ensure that any creditor, purporting to have the right of priority of a secured creditor, has an enforceable security. The argument that the Appellant did not submit a proof of claim in bankruptcy must fail since the Appellant was aware that the Trustee relied on the proof of claim form filed and requested further information in relation thereto. At no time did the Appellant raise any issue with the Trustee's reliance or reference to the proof of claim. Counsel avers that to the contrary the Appellant's counsel reaffirmed their position as secured creditor and that they had provided evidence of its security.

[16] Dr. Malcolm notes that the Trustee has disallowed the Appellant's claim as it concerns the priority claimed and not in respect of the debt amount per se (paragraph 42 Written submissions filed 3rd May 2023). It was upon refusal of the Appellant, to provide additional information required, that the Trustee in furtherance of her statutory duty was obliged to disallow the security. It is counsel's contention that the documents provided by the Appellant which were copies of the debenture, the bond instrument, and the trust deed, permitted the Trustee to validate certain requirements of SIPPA. However, the Appellant failed to provide "*any evidence of value*" as required by paragraph 5(1)(a) of SIPPA (paragraphs 51 and 52 of written submissions filed 3rd May 2023).

[17] On the issue of abuse of process, Dr Malcolm states that the authority of **Chaban v Chaban (Supra)** relied on by the Appellant is distinguishable, inapplicable and does not stand as a general authority applicable to the case. He submits that on the face of the supervisory order of the court the court has yet to approve the sale and cannot be deemed to have made a final decision. He avers that the Trustee opposed neither the subject to approval order nor the sale. The affidavits of the Trustee he argues were filed in response to misrepresentations and omissions of the Receiver in keeping with her role and obligation. Counsel submitted that there was no issue concerning the validity of the security before

the court or a signed sale agreement at the time of the order. As such the Trustee's decision to disallow the proof of claim is not in conflict with the court's supervisory order. The court, he submitted, had granted leave to the Appellant to introduce fresh evidence on appeal which included evidence that the Trustee was in possession of the audited financial statements of the bankrupt. These financial statements the Trustee considered to be insufficient to determine whether value was given at the time of attachment to satisfy the requirement of SIPPA. Counsel ended his submission by asking that the appeal be adjourned to permit the Trustee to obtain the information required and obtain an independent legal opinion on the validity of the security. Upon determination that the security is valid the Trustee would amend its disallowance and issue either a notice of revision or of acceptance (see paragraph 26 supplementary submissions filed 11th May 2023).

RELEVANT STATUTORY PROVISIONS

[18] Section 185(1) and (2) of the Insolvency Act-

> *"185. (I) All debts and liabilities, present or future, to which-*
> *(a) the bankrupt is subject on the day on which the bankrupt becomes bankrupt; or*
> *(b) to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt,*
> *shall be deemed to be claims provable in proceedings under this Act.*
> *(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 201."*

[19] Section 192, 193 and 194 of the Insolvency Act

> *"192. Where a secured creditor realizes his security, he may prove the balance due to him, after deducting the net amount realized.*

193. Where a secured creditor surrenders his security to the trustee for the general benefit of the creditors, he may prove his whole claim.

194.-(1) Where the trustee has knowledge of property that may be subject to a security, the trustee may, by serving the prescribed notice, require any person to file, a proof of the security, in the prescribed form that gives full particulars of the security, including the date on which the security was given and the value at which that person assesses it.

(2) Where the trustee serves a notice pursuant to subsection (1), and the person on whom the notice is served does not file the proof of security within thirty days after the day of service of the notice, the trustee may, with leave of the Court, sell or dispose of any property that was subject to the security, free of that security."

[20] Section 199 of the Insolvency Act -

"199. Where a secured creditor does not comply with sections 194 to 198, he shall be excluded from any payment of dividend."

[21] Section 201(1), (2), (3), (4), (5) and (6) of the Insolvency Act

"201.

(1) The trustee shall examine every proof of claim or proof of security and the grounds for the proof and may require further evidence in support of the claim or security.

(2) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim and, if it is a provable claim, the trustee shall value it, and the claim is, subject to this section, deemed a proved claim to the amount of its valuation.

(3) The trustee may disallow, in whole or in part-

(a) any claim;

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

(4) Where the trustee makes a determination under subsection (2) or, pursuant to subsection (3), disallows, in whole or in part, any claim any right to a priority or any security, the trustee shall provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (2) or whose claim, right to a priority or security was disallowed under subsection (3) a written notice in the prescribed form setting out the reasons for the determination or disallowance.

(5) A determination under subsection (2) or a disallowance under subsection (3) is final and conclusive unless, no later than a thirty-day period after the service of the notice referred to in subsection (4) or such further time as the Court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the Court.

(6) The Court may expunge or reduce the proof of claim or the proof of security on the application of a creditor"

ANALYSIS

[22] I agree with counsel for the Appellant that where there is a true appeal, questioning the decision of the Trustee on an issue of law, the standard of review is correctness. Conversely, where the question is one based on facts in dispute the standard of review is one of reasonableness. By virtue of section 201(5), once the Trustee has made the decision to issue a disallowance, an appeal lies from that decision. The question before this court is whether the appeal is a true appeal or a hearing de novo, requiring and allowing new evidence for consideration. On this there are conflicting views. Dewar J at paragraph 26 of his judgment in ***Re 5274398 Manitoba Ltd o/a Cross Country Manufacturing (Bankrupt)*** 2019 MBQB 89 states:

> *"On the one hand, the BIA regime is intended to be relatively inexpensive and somewhat expeditious, and a hearing de novo has the potential of incurring significant cost and occasioning significant delay in the administration of a bankruptcy proceeding. On the other hand, some claims may involve millions of dollars, at least on a gross basis, and a claimant should not necessarily lose its ability to advance its position simply because it failed to anticipate the Trustee's response to its Proof of Claim before the Notice of Disallowance was issued. Nonetheless, there is some advantage to requiring claimants to provide substantial evidence of their claims when they file their Proof of Claim. A process in which a claimant is able to simply file a Proof of Claim in cursory form knowing with certainty that upon disallowance it may bolster its materials before the bankruptcy court, is not a satisfactory process."*

Dewar J went on to state that the hybrid line of cases demonstrates a compromise position and this is the approach that should be taken. He states that with this approach the default position is an appeal on record but it is flexible enough to prevent injustice. I agree.

[23] It seems to me that the Judge on appeal has a discretion whether the appeal should be treated as a true appeal or de novo. The discretionary element requires the Judge hearing the appeal to decide whether the circumstances of the case require further evidence for the court to decide (de novo). It may be that the Judge considering all the evidence makes the determination that there is no need for further evidence to be adduced and that what is before him is sufficient to arrive at a fair decision (true appeal). The decision whether to treat an appeal as de novo or a true appeal should be decided on a case-by-case basis. It would then be for the court to decide whether affidavits filed, advancing fresh evidence, should be allowed. That decision would be based on whether the information that

was available to the Trustee at the time of her decision was sufficient for her to have reached a reasonable determination. If it was not then a de novo approach may best suit this case.

[24] The material, admittedly before the Trustee at the time of her decision, were:

a. Debenture, as registered with the Companies Office of Jamaica.
b. NSIPP Registration, Notice of Security Interest with registration number 1030291065.
c. Particulars of Charge registered at the COJ.
d. Certificate of Registration of Charge issued by the COJ;
e. Trust Deed.
f. Secured Global Bond:
g. Debt Service Reserve Account Agreement
h. Notice of Enforcement of Security.
i. Deed of Appointment and Indemnity.
j. Bond Registry showing Sky-High Holdings Limited as the sole bondholder of the secured bond.

In accordance with section 194 of the Insolvency Act (IA) upon receipt of notice by the Trustee the secured creditor should file a proof of security. A finding by the Trustee that there was *"no substantiating or other evidence capable of being relied upon provided, received, or seen in support of claim as a secured creditor in priority*", was not a reasonable finding. I find that the material abovementioned was more than sufficient for the Trustee to substantiate proofs of security of debt of the appellant, as required by section 194 of the IA.

[25] The Trustee's duty when considering a claim is articulated as follows in **Re 5274398 Manitoba Ltd o/a Cross Country Manufacturing (Bankrupt) (Supra)**:

> *"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."* [emphasis added]

[26] Dewar J went on to elaborate on the pitfalls of a Trustee operating on the view that the onus of proving the claim is on the Appellant. He stated:

> *"31. …Rather than dealing with it primarily on the basis of the gaps in the materials attached to the Proof of Claim, it would have been prudent for the Trustee to raise its specific concerns with counsel for Bellhop before simply casting the claim aside. Relying too heavily on the proposition that a claimant has the onus of proving its claim upon its initial filing will many times result in an appeal in which the claimant is entitled to file additional material because it did not anticipate the concerns expressed in the Notice of Disallowance.*
>
> *32. In my respectful view, one of the ways that a Trustee might avoid the claimant's use of additional evidence in an appeal would be to telegraph its decision to the claimant in advance of the formal Notice of Disallowance and seek the claimant's comments, if any, before issuing its decision. If the claimant failed to respond, or respond appropriately, then it will have a more difficult task in obtaining leave to give further evidence if it launches an appeal to the court. Alternatively, the use of the examination sections under the BIA might assist the Trustee in cases in which the evidence provided*

with the Proof of Claim is deficient, since then, the Trustee might invite the claimant to fill in the gaps and avoid the argument at a subsequent time that the claimant was not given enough opportunity to advance its position. Neither of these two alternatives are mandated, and in many cases may not be appropriate. However, in some cases, taking advantage of them may save the Trustee (and the estate) additional time and expense in the long run."

[27] In ***Cutting Edge Foods Inc. (Re)(para 8.Supra)*** Topolniski, J had this to say regarding the secured creditor's standing in bankruptcy:

> *"[35] The BIA is a statute governed by business principles that puts day-to-day administration into the hands of business people (trustees in bankruptcy and often inspectors) and should not be interpreted in an overly narrow or legalistic fashion. Stated otherwise, BIA issues require consideration of the realities of commerce, practicality and business efficacy.*
>
> *[36] Subject to certain provisions of the BIA, ss. 79, 127 to 135 and 248(1) included, or unless the court orders otherwise, the bankruptcy of a debtor does not prevent secured creditors from realizing or otherwise dealing with their security as they would have but for the bankruptcy. While secured creditors often are described as strangers to the bankruptcy process, such characterization is not entirely accurate. As noted by the Supreme Court of Canada in Federal Business Development Bank v. Québec (Commission de Santé et de la Securité du Travail du Québec):*
>
> > *'The secured creditor did liquidate his security outside the bankruptcy proceeding. However, it must be kept in mind that it is the Bankruptcy Act itself which authorizes him to act in this way. Section 49(2) of the Act provides that "a*

secured creditor may realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it" if s. 49(1) had not had the effect of staying proceedings brought by creditors of the debtor. It is therefore wrong to suggest that the Bankruptcy Act does not apply to a creditor who chooses to realize his security outside the bankruptcy proceeding. Sections 49, 57, 98, 101 and 102 of the Act, which deal with secured creditors in this context, only reinforce this opinion'.

[37] Secured creditors may choose to participate in a bankruptcy by surrendering their security or proving the balance due them after realizing their security. Secured creditors affected by a proposal may choose to participate by voting on the proposal.

[38] There are two ways that a trustee can oblige a secured creditor to deliver a proof of security (as compared to a proof of claim, although both types of proof are provided by delivery of Form 31). The trustee can serve a notice under s. 149(1) or s. 128(1). In both cases, a creditor which fails to prove its claim within thirty days or such further time as the court allows, is excluded from receiving a dividend.

[39] Typically, notice under s. 149(1) is sent when the trustee is contemplating payment of a dividend and wants to ensure that a secured creditor will not be claiming a dividend as an unsecured creditor. Notice under s. 128(1), which is discussed below in the context of redemption, is intended to allow the trustee to determine whether it should redeem the security. It obliges the creditor to provide the trustee with a proof of security that gives particulars of the security, the

date the security was given, and the value at which the secured creditor assesses the security.

[40] In the context of a bankruptcy, if a secured creditor delivers a proof of claim or proof of security, s. 135 obliges the trustee to examine it and allows the trustee to require further evidence in support of the claim or security. However, partial or complete disallowance of the security by the trustee under s. 135 does not alter the value of the security as assessed by the secured creditor in the proof of security under s. 128 for redemption or realization purposes. If the trustee disagrees with the secured creditor's assessed value, s. 129 provides for a procedure whereby the trustee may force a sale of the security. Section 135 relates to the allowance or disallowance, in whole or in part, of the security itself for the purpose of distribution of dividends from the bankrupt estate".

[28] It is quite clear that the creditor bears the onus of establishing its claim. The creditor does so by providing to the Trustee sufficient evidence, to substantiate it, thereby affording the Trustee the opportunity to make an informed decision. The question before me is was the information supplied sufficient to enable the Trustee to make an informed decision. The Trustee on 3rd November 2022 requested a response to a letter dated 26th October, 2022. The Appellant responded to said letter on the 3rd November, 2022. In its response, by its attorneys-at-Law, the Appellant stated that they have chosen not to participate in the bankruptcy process but instead chose to enforce and realize the security contemplated by the Debenture. The Appellant informed the Trustee it was not participating in the bankruptcy process and considered the request for proof of claim in the Trustee's letter dated 26th October, 2023, either answered or not relevant to it as a secured creditor. There was no further correspondence from the Trustee to the appellant other than the Notice of Disallowance that was sent on the 12th April, 2023.

[29] For reasons, elaborated upon below, I find that the Trustee had no basis to disallow the Appellant's claim. Whereas I disagree with the submission, that a secured creditor who opts not to participate in the bankruptcy thereby immunises himself from the Trustee's jurisdiction to examine the validity of that claim, the Trustee must act reasonably. The evidence shows that the Trustee quite prematurely, and unnecessarily, denied the claim of the Appellant. The role of the Trustee is to be neutral and, rely upon evidence, not to act arbitrarily. There is also no need for a Trustee to go on a wide-ranging fact-finding exercise, which could cost the estate financially. That would defeat the purpose of the job of the Trustee and her duty to the creditors of the bankrupt.

[30] The Trustee disallowed the claim for lack of information supporting the Appellant's proofs of claim. That information allegedly being proof of consideration for the debenture. However, a debenture holder is a secured creditor and, it is apparent from sections 192, 193 and 194 of the IA that a secured debt does not constitute a provable claim. In this regard a proof of claim is not required. What is required is proof of security by the secured creditor to the Trustee. This had been provided to the Trustee. Sections 192 and 193 of the IA lists circumstances where a secured creditor would need to supply the Trustee with proofs of claim. None of those conditions or circumstances apply, at this stage, to the case at bar. I find therefore that section 194 is the provision applicable to the Appellant and not section 185 of the IA. Secured creditors are foreigners in the bankruptcy unless they wish and choose to participate in the bankruptcy process. In any event, and whether or not proof of claim was properly considered, in circumstances where the registered debenture is proved a request for proof of consideration for the debenture is difficult to understand. Particularly as there is no dispute, and little doubt, that the loan was granted, and a debt owed.

[31] The Appellant, a secured creditor, chose not to participate in the bankruptcy. It follows that the portion of the debt secured by the debenture is secure and remains so during bankruptcy proceedings. It is the unsecured portion with which the other creditors are concerned. The Appellant has chosen to realize its security outside the bankruptcy proceeding. The Trustee in this circumstance did

not have jurisdiction to disallow their claim. In all the circumstances of this case I do not believe the creditors of the estate should be asked to bear the costs of this wholly unnecessary litigation.

[32] The decision of the Trustee is therefore set aside. My orders are:

(1) Notice of Disallowance of Claim issued by the Trustee of the bankrupt estate to Sky-High Holdings Limited and JCSD Trustee Services Limited dated the 12th day of April 2023 is set aside.

(2) Costs of this appeal to the Appellant against the Trustee personally, such costs to be taxed if not agreed.

David Batts
Puisne Judge.