



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE INSOLVENCY DIVISION

CLAIM NO. 2018 ID 00005

IN THE MATTER of section 267 of the  
Insolvency Act.

AND

IN THE MATTER of the Bankruptcy of  
COURJON INVESTMENTS LIMITED  
and CUDDY'Z FRANCHISE ONE  
LIMITED.

BETWEEN	THE TRUSTEE OF THE ESTATES OF CUDDY'Z FRANCHISE ONE LIMITED AND COURJON INVESTMENTS LIMITED, (Bankrupts)	CLAIMANT
AND	ACCESS FINANCIAL SERVICES LIMITED	1 <sup>ST</sup> RESPONDENT
AND	NATIONAL PEOPLES COOPERATIVE BANK JAMAICA LIMITED	2 <sup>ND</sup> RESPONDENT

Insolvency – Companies Act section 93 - Commencement date of Winding Up-  
Mortgages- Failure to register charges with Registrar of Companies- Whether  
mortgagees are secured creditors – Whether winding up commences with  
Certificate of Assignment under Insolvency Act –Whether category 3 or 4 creditors.

Michael Hylton Q.C. instructed by Hylton Powell for the Claimant

Dr. Lloyd Barnett and Weiden Daley instructed by Hart Muirhead Fatta for the 1<sup>st</sup> Respondent

Kemilee McLymont instructed by PeterMc & Associates for the 2<sup>nd</sup> Respondent

**HEARD: 27<sup>TH</sup> November and 21<sup>st</sup> December, 2018.**

**IN CHAMBERS**

**COR: BATTS J**

[1] On the 7<sup>th</sup> day of September 2018 the Claimant, a Trustee under the Insolvency Act of the affairs of Cuddy'z Franchise One Limited ("Cuddy'z") and Courjon Investments Limited ("Courjon"), by Fixed Date Claim applied for a declaration as to the status of mortgages no. 1874758 and 2062524. The mortgages are in respect of a property owned by Courjon. The property is registered at Volume 1342 Folio 707 of the Register Book of Titles (see exhibit CC3 to the affidavit of Caydion Campbell dated the 16<sup>th</sup> November 2018). Both mortgages are endorsed on the said Certificate of Title. However charges, in relation to the mortgages, were not registered at the Companies Office of Jamaica at the time of each loan. Mortgage no. 2062524 secured an amount of \$20 million loaned by the 1<sup>st</sup> Respondent to Cuddy'z. Mortgage no. 1874758 secured an amount of \$17 million loaned by the 2<sup>nd</sup> Respondent to Mr Courtney Walsh and Courjon. The mortgages are by way of guarantee.

[2] In December 2017 and January 2018 the Claimant filed with the Office of the Supervisor of Insolvency formal proposals, in respect of Cuddy'z and Courjon respectively, pursuant to section 11 of the Insolvency Act, (see affidavit of Caydion Campbell dated 7<sup>th</sup> September 2018: exhibit CC-1 page 4 for Cuddy'z and exhibit CC-1 page 23 for Courjon). The 1<sup>st</sup> Respondent was notified, on or about the 1<sup>st</sup> November 2017, of the intention to make a proposal with respect to Cuddy'z, see paragraph 4 of the affidavit of Carla Stephens dated 26<sup>th</sup> November 2018 and exhibit

AF 6. The 1<sup>st</sup> Respondent was advised of the proposal, with respect to Cuddy's and Courjon, by letter dated 21<sup>st</sup> August, 2018 (exhibit CC-1 page 41 to the affidavit of Caydion Campbell dated 7<sup>th</sup> September 2018). The 2<sup>nd</sup> Respondent was advised of the proposal by letter dated 20<sup>th</sup> August, 2018, (exhibit JL6 to the second affidavit of Janet Lamount dated 22<sup>nd</sup> November, 2018). The 2<sup>nd</sup> Respondent, however, had not been sent a Notice of Intention to make a proposal because it was not an affected creditor, see paragraph 13 of the affidavit of Caydion Campbell dated 7<sup>th</sup> September 2018. By letter dated the 3<sup>rd</sup> September, 2018 the 2<sup>nd</sup> Respondent was advised that, the nonregistration of the charge meant, they would be considered category 4 creditors, see exhibit JL6 to the second affidavit of Janet Lamount dated 22<sup>nd</sup> November 2018. The funding of both proposals contemplated the sale of the mortgaged property.

[3] The 1<sup>st</sup> and 2<sup>nd</sup> Respondents each refused to accept the proposal for compromise. The Trustee, in consequence of the refusal by the 1<sup>st</sup> Respondent (see paragraph 17 of the affidavit of Caydion Campbell dated 7<sup>th</sup> September 2018), filed a report with the Supervisor of Insolvency pursuant to section 40 (2) of the Insolvency Act. On the 3<sup>rd</sup> September, 2018 the Supervisor issued Certificates of Assignment to the Trustee. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents registered their charges, with the Registrar of Companies, on the 14<sup>th</sup> September 2018 and 22<sup>nd</sup> November 2018 respectively. Both registrations therefore postdate the Certificates of Assignment. The Trustee wishes to avoid a dispute, as to the status of these mortgagees when the meeting of creditors is called, and has therefore brought this claim pursuant to section 267 of the Insolvency Act.

[4] The Claimant contends that the mortgages are void, as against the Trustee and all other creditors, because they were not registered with the Companies Office of Jamaica prior to the commencement of winding up proceedings. It is alleged therefore that the Respondents are unsecured creditors and therefore part of category 4 in section 202 of the Insolvency Act. The Respondents say otherwise. The Respondents each filed a Notice of Application asserting that they are secured creditors and therefore fall within category 3 of section 202 of the Act. The Claimant

by Notice of Application filed on the 3<sup>rd</sup> October, 2018 also seeks an injunction to restrain the 1<sup>st</sup> Respondent from exercising a power of sale.

[5] The issue to be determined, under the Fixed Date Claim and the Respondents' applications, is the same. That is do the Respondents qualify as category 3 or category 4 creditors. Categorisation will determine whether they are paid in priority to other creditors. Section 202(1) of the Insolvency Act states:

*"Subject to the other provisions of this section and the rights of secured creditors, the proceeds realized from the property of a debtor which immediately before the commencement of bankruptcy or being placed in a receivership, the debtor was permitted to deal with and dispose of during the ordinary course of the debtor's business shall be applied in priority of payment in descending order in the following four categories*

*(a) Category 1, namely-*

- (i) the reasonable funeral and testamentary expenses incurred by the legal personal representative of a deceased debtor;*
  - (ii) the costs of administration, being –*
    - (A) the expenses and fees of any person acting under a direction made under section 240(1);*
    - (B) the expenses and fees of the trustee or receiver, as applicable; and*
    - (C) legal costs;*
  - (iii) the prescribed fees payable to the Supervisor; then*
- (b) Category 2, namely –*

*(i) contributions, payable by the debtor, as an employer, pursuant to-*

- (A) the National Housing Trust Act;*
- (B) the National Insurance Act; and*
- (C) an approved superannuation fund or approved retirement scheme under the Pensions (Superannuation Funds and Retirement Schemes) Act;*

*(ii) claims for wages and salaries, of any employee for services rendered during the six months immediately preceding the bankruptcy or appointment of the receiver, however, the sum to which priority is to be given under this paragraph shall not, in the case of any particular claimant, exceed five hundred thousand dollars or such other amount as the Minister may, by order subject to affirmative resolution, prescribe;*

*(iii) redundancy payments payable under the Employment (Termination and Redundancy Payments) Act, whether such payments fall due before or after the appointment of a receiver or a trustee;*

*(iv) all taxes (excluding penalties and interests) imposed under the provisions of any law and having become due and payable by the debtor within twelve months before the appointment of the receiver or the bankruptcy, not exceeding in total one year's assessment; then*

*(c) Category 3, namely, in payment of obligations owed to any secured creditor whose security includes that property, and if there is more than one secured creditor, the proceeds shall be applied in accordance with the priorities of their respective securities in that property, and thereafter;*

*(d) Category 4, namely, all other claims."*

[6] The resolution of this issue, of categorisation, will turn largely on the construction of section 93(1) of the Companies Act and its relationship to the provisions of the Insolvency Act. Section 93 of the Companies Act provides:

***"93 – (1) Every charge created after the appointed day by a company registered in the Island, being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the original or a copy certified in the prescribed manner of the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the Registrar for registration in the manner required by this Act prior to the commencement of the winding up of the company, but without prejudice to any contract or obligation for repayment of the money secured; and when a charge becomes void under this section, the money secured thereby shall immediately become payable."*[Emphasis Added]**

The Claimant contends that the charges were not registered prior to the commencement of the winding up. The Respondents say that winding up, within the meaning of the Companies Act, is yet to commence and they have now registered the charges. The Respondents contend that the Companies Act defines winding up for the purposes of section 93.

[7] Dr Barnett, in his submissions for the 1<sup>st</sup> Respondent, points to the fact that the Insolvency Act expressly preserves sections 214 to 220, 272 (a) (b) and 273 of the Companies Act. It is submitted that a Company can only be wound up if section 220 is complied with and the Court makes an order to that effect. The Respondents each submit that neither the failure of a proposal nor the delivery of a Certificate of Assignment by the Supervisor of Insolvency effects commencement of a winding up. Reliance is also placed on section 86 of the Insolvency Act which states:

*"The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute that are not in conflict with this Act, and the trustee shall be entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act."*

[8] Dr. Barnett submits, with reference to amendments to section 205A of the Companies Act, that it is *"a clear objective of the Insolvency Act to avoid as far as possible bankruptcy of individuals and the dissolution of Companies and to facilitate compromises and arrangements between debtors and creditors"*. Dr Barnett referenced Section 82(2) of the Insolvency Act and submitted that, as no resolution was passed for an assignment, the issue of the Certificates of Assignment was premature and void. The 1<sup>st</sup> Respondent's counsel further submitted that the Certificate of Assignment, having been made pursuant to section 85 of the Insolvency Act, is not applicable to Companies but only to individuals. Therefore, as no winding up proceedings have been initiated, the property subject to a mortgage ought not to vest in the Trustee.

[9] By way of further written submissions the 1<sup>st</sup> Respondent alleges that the Trustee failed to complete procedural requirements in the Insolvency Act and Regulations. Therefore, the deeming provision in Section 40 cannot take effect. The procedural errors are alleged to be:

- 1) Failure to provide a comprehensive report to the 1<sup>st</sup> Respondent which would have allowed it to make an informed decision on the proposal.

- 2) The Trustee switched from treating the 1<sup>st</sup> Respondent as a secure creditor to treating it as unsecured.
- 3) The Trustee by applying for an extension of time to hold a meeting of creditors demonstrated that the proposal stage had not yet passed.
- 4) The Supervisor had not informed the Respondents of their class 4 ranking up to the time the Certificate of Assignments were issued.
- 5) The Trustee failed to serve Notices of Intention to make a proposal in respect of Courjon Limited.

[10] The 2<sup>nd</sup> Respondent's submissions are much to the same effect. Ms McLymont, at paragraphs 30 and 31 of her written submissions, summarises the contention quite nicely, paragraph 30 *"We also submit that the commencement of a winding up as set out in the Companies Act suggests that some definitive and purposive action must be taken with a view to wind up a company, namely a resolution passed by members or creditors or the filing of Court proceedings. The mere failure to accept a proposal ought not to trigger winding up in the absence of a definitive action by members to either accept or oppose such action. In short the decision to wind up is by an overt act and not a "deemed decision".* Paragraph 31 *"It is therefore submitted that the act of issuing a Certificate of Assignment by the Supervisor of Insolvency can in no way equate to the commencement of a winding up of a company."*

[11] Queen's Counsel, appearing for the Claimant Trustee, submitted firstly that winding up did not mean dissolution. The latter occurred at the end of the process of winding up. The mortgages, in order to be valid against the Trustee and other creditors, had to have been registered at the Companies Office prior to commencement of the process of winding up. Queen's Counsel further submitted that the Insolvency Act introduced additional modes of winding up to those contained in the Companies Act. These were an assignment process and the appointment of a receiver. He submitted that the Insolvency Act now deals with the winding up of

insolvent Companies whilst the Companies Act deals with the winding up of solvent Companies, or rather, with winding up on grounds other than insolvency. Mr Hylton demonstrated this by reference to the fact that the Insolvency Act amended section 220 of the Companies Act by deleting subparagraph (d) as a basis of winding up under the Companies Act. Subparagraph (d) reads, *"the Company is unable to pay its debts"*. Deleting that subparagraph removed insolvency from the list of reasons for winding up pursuant to section 220 of the Companies Act. Therefore, he submitted, winding up of insolvent companies is now effected under the Insolvency Act. In this case it commenced with the issue of a Certificate of Assignment.

[12] I agree with the Claimant's counsel that the winding up of a Company is a process and not an event, see *Re Crust "N" Crumb Bakers (Wholesale) PTY Ltd (1992) 2 Qd. R 76* at page 78, per McPherson S.P.J:

*"Winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for cost and expenses, to the persons entitled"*.

I agree also that the Insolvency Act has created other modes of winding up a company. It is clear, from the schedule to that Act and the amendments made to the Companies Act, that the Insolvency Act intends to treat with the winding up of insolvent companies. The Insolvency Act intends that inability to pay debts, as a basis for commencing winding up, is not to be dealt with by the Companies Act. It can now only be dealt with under the Insolvency Act.

[13] The question therefore is when did the winding up commence, within the meaning of section 93 of the Companies Act. The mode of winding up relevant to this case was by way of "assignment". The Insolvency Act gives the Supervisor of Insolvency the power to issue certificates of assignment. Section 85(1) states:

*"85. -(1) On a receiving order being made or a certificate of assignment being issued by the Supervisor, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors*



*(a) pass to and vest in the trustee named in the receiving order or assignment; and (b) in any case of change of trustee, the property, shall pass from trustee to trustee without any conveyance, assignment or transfer."*

**[14]** Section 82(1), which is located in Part VI of the Insolvency Act, allows an insolvent person to apply for an assignment of property for the benefit of all creditors. The method, or process, of such an application is set out in sections 82(2), (3) and (4) of the Insolvency Act. Section 82(2) provides that:

*"82.-(2) An insolvent person that is a corporation may only apply for such an assignment, where the members thereof have passed a resolution to that effect, or that, in the case of a company, it be wound up, in accordance with the corporation's constitution and the Companies Act or any other applicable law."*

The Supervisor of Insolvency will, after all relevant steps are taken, issue the Certificate of Assignment.

**[15]** The Insolvency Act, in section 40, deems an insolvent person to have applied for an assignment where creditors refuse a proposal issued under the Act. Section 40 (1) and (2) states:

*"40.-(1) Subject to subsection (3), where the creditors refuse to accept a proposal, the debtor concerned shall be deemed to have made an application for an assignment under Part VI, at the time of the refusal of the proposal.*

*(2) Where a proposal is refused under section 38, the trustee shall forthwith—*

*(a) file a report in respect of the refusal of the proposal in the form prescribed with the Supervisor, who shall thereupon issue a certificate of assignment in the form prescribed, which has the same effect for the purposes of this Act as an assignment made pursuant to Part VI; and*

*(b) in the case where the debtor is a company, files a notice of the assignment with the Registrar of Companies;*

*(c) call a meeting of creditors —*

*(i) present at that time; and,*

*(ii) if no quorum exists for the purpose of subparagraph (i), send notice, within five days after the day the certificate mentioned in paragraph (a) is issued, of the meeting of creditors and approve the remuneration of the trustee,*

*and at either meeting the creditors may by ordinary resolution, notwithstanding section 237, approve the appointment of the trustee or appoint another trustee in lieu of that trustee.”*

[The subsection (3) exception does not arise on the facts before me].

I agree with Mr Hylton that a deemed application for an assignment must, of necessity, mean that the formalities have been dispensed with or that they are deemed to have been complied with. Any other construction would mean that there is no effective application for an assignment. Therefore the Supervisor of Insolvency could never act on a deemed application. Such a construction would defeat the purpose of the provision.

[16] In the case before me proposals were put to the Respondents as follows:

**Letter 1 - To the 2<sup>nd</sup> Respondent.**

*“20 August 2018*

*Ms. Janet Lamount  
Branch Manager, Stony Hill Branch  
National People's Co-operative Bank of Jamaica Limited  
Lot 19, Nashville, Mandeville P.O. Manchester*

*Dear Ms. Lamount,*

***Re: Courjon Investments Limited-Duplicate Certificate of Title  
registered at Volume 1342 Folio 707 of the Registered Book of  
Titles and Courtney Walsh a/cv# 63-060613-6***

*Reference is made to recent correspondence between the National People's Co-Operative Bank of Jamaica Limited(NPCB) and our attorneys-at-law Debbie-Ann Gordon & Associates with respect to the captioned matters.*

*Please be advised that Ambassador Courtney Walsh, the beneficial owner of Courjon Investments Limited and Cuddy's Franchise One Limited (Cuddy's Restaurant and Sports Bar) is in the process of liquidating some assets to settle the liabilities of himself and these entities, including that due to the NPCB.*

*Unfortunately, there will not (sic) sufficient funds to pay out the creditors in full and many creditors stand to receive less (sic) twenty percent (20%) of their outstanding balance, if anything at all. We are therefore requesting a compromise from NPCB in the form of your acceptance of the amount of Five Million, Five Hundred Thousand Dollars (\$5,500,000) as full and final settlement of the indebtedness on the Courtney Walsh loan account# 63-060613-6. Please note that this compromise would facilitate us making in particular the severance payments and statutory remittances related to the former employees of the Cuddy's.*

*We wish to advise that we would be in a position to make the payment by Friday, 24 August 2018 and look forward to your favourable consideration of this request.*

*Yours very truly,*

*Caydion E.O. Campbell  
Trustee acting in relation to the Proposal of Courjon Investment Limited  
c/o Pheonix Restructuring, Advisory & Insolvency Services Enterprise (PRAISE)"*

**Letter 2 – To Legal representatives of 1<sup>st</sup> Respondent.**

*"21 August 2018*

*Hart Muirhead Fatta  
Attorney at Law  
2<sup>nd</sup> Floor  
The Victoria Mutual Building  
53 Knutsford Boulevard  
Kingston 5.*

**Attention: Mrs. Shelley-Anne Forte-Sykes**

*Dear Sirs,*

***Re: Courjon Investments Limited-Duplicate Certificate of Title registered at Volume 1342 Folio 707 of the Registered Book of Titles and Cuddy's Franchise One Limited loan account***

*I write as Trustee and in reference to your letter dated 14 August 2018 to our Attorneys regarding the captioned matters.*

*Please be advised that Ambassador Courtney Walsh, the beneficial owner of Courjon Investments Limited and Cuddy's Franchise One limited (Cuddy's) is in the process of liquidating some assets to settle the liabilities of these entities, including that due to Access Financial Services Limited (Access).*

*This indebtedness is approximately \$121.8 million as shown below:*

<b>Category of Creditors</b>	<b>\$,m</b>	<b>Comments</b>
<i>Class 2 preferred</i>	13.0	<i>Employee taxes and statutory remittances</i>
<i>Class 3 preferred</i>	26.3	<i>Access \$19.6 M others \$6.7 M</i>
<i>Class 4 unsecured creditors</i>	82.5	<i>Trade Creditors and Suppliers</i>
<i>Total</i>	121.8	

*As you are aware, 2 properties were previously liquidated with the net proceeds of \$3,500,000 and \$7,957,775 being paid over to your firm on behalf of Access.*

*There is a final property being sold from which approximately \$50 million will be realised. Unfortunately, these funds are insufficient to payout the creditors in full and many creditors stand to receive less than fifteen percent (15%) of their outstanding balance, if anything at all.*

*In light of foregoing and the significant losses suffered by Cuddy's both from operations and the collapse of the project for which the \$20 million was originally borrowed, we are requesting a compromise from Access in the form of your acceptance of the amount of Seventeen Million, Five Hundred Thousand Dollars (\$17,500,000) plus Attorney's fees of \$100,000 plus GCT in full and final settlement of the indebtedness on the Cuddy's loan.*

*I should point out that with this \$17.5 million, Access would be paid in total \$31,312,120 on the \$20 million loan that was advanced in June 2016. Access would therefore be receiving full principal repayment plus \$11,312,120 in interest which equates to approximately 57% of the principal balance over 26 months.*

*I should also point out that by my calculations, based on the original repayment terms as of August 2018 Access should have received \$16,883,352 being 6 payments of \$416,666.67 and 20 payments of \$719,167.60. My estimate of the balance that would have been due as of August 2018 is \$12,416,189. This means that had the loan performed according to terms and was being paid out in August 2018, the total that would have been paid to Access is estimated at \$29,299,541 which is approximately \$2 million less than under the compromise proposal.*

*This compromise payment will facilitate other creditors receiving some nominal amounts and while I appreciate that this may be of no concern of Access, I hope that the fact that they would receive full principal repayment and the majority of the interest, including significant default interest, will lead to a favourable consideration of this request.*

*I wish to advise that I would be in a position to authorise the payment by Friday, 24 August 2018 and look forward to your favourable consideration of this request.*

*Yours very truly,*

*Caydion E.O. Campbell  
Trustee acting in relation to the Proposals of Courjon Investments Limited  
Trustee acting in relation to the Proposals of Cuddy'z Franchise One Limited  
c/o Phoenix Restructuring, Advisory & Insolvency Services Enterprise (PRAISE)"*

[17] Each responded as follows:

**Letter of Refusal by 2<sup>nd</sup> Respondent**

"2018 August 31

*Mr. Caydion E.O Campbell  
Acting Trustee (Proposal Courjon Investments Limited)  
C/o Phoenix Restructuring, Advisory & Insolvency Services Enterprise (PRAISE)  
22b Old Hope Road,  
KINGSTON 5, JAMAICA*

*Dear Mr. Campbell,*

**Re: Courjon Investments Limited-Duplicate Certificate of Title registered at Volume 1342 Folio 707 of the Registered Book of Titles and Courtney Walsh a/cv# 63-060613-6**

We refer to your recent correspondence regarding the captioned account and advise that we are unable to grant your request of a compromise in the acceptance of Five Million Five Hundred Thousand Dollars (\$5,500,000) as in full and final settlement of the indebtedness on the Courtney Walsh loan account #63-60613-6.

It is of importance to note that based on the valuation of the property at the time of our agreement with the above client and the fact that we are first mortgagees on the property this is not an acceptable loss that the National People's Cooperative Bank can accommodate at this time.

Kindly note that the total amount outstanding as at 2018 August 31 is as follows: -

Principal Outstanding: \$6,360,197.69  
Interest Outstanding: \$ 326,199.73

**\$6, 686,397.42**

Interest accrues daily at Two Thousand and Ninety-One Dollars and Two cents \$2,091.02

We await your letter of undertaking based on the full amount to complete your attorney's requests and ask that you note the associated charges totalling **Nine Thousand Seven Hundred Dollars (\$9,700.00)**

Yours truly,  
**NATIONAL PEOPLE'S CO-OPERATIVE BANK OF JAMAICA LIMITED"**

### **Letter of Refusal by 1<sup>st</sup> Respondent**

"August 30, 2018

Mr. Caydion E.O. Campbell  
c/o Phoenix Restructuring, Advisory & Insolvency Services  
Enterprise  
22b Old Hope Road  
Kingston 5

Dear Sir:

**Re: Indebtedness to Access Financial Services Limited-  
Courjon Investments Limited**

*We refer to your letter dated August 21, 2018.*

*Our client has instructed us to advise that it is unable to accept your proposal for settlement of the mortgage debt due to it.*

*We therefore anticipate receiving an acceptable undertaking for payment of the sum due to our client to the date of payment, inclusive of interest and costs.*

*Yours faithfully,  
HART MUIRHEAD FATTA"*

**[18]** The Supervisor of Insolvency recognised the rejection of the proposals as triggering a deemed assignment and issued certificates in the following terms:

**First Certificate**

*"On the 12<sup>th</sup> day of DECEMBER, 2017, **CUDDY'Z FRANCHISE ONE LIMITED (CUDDY'Z)**, lodged a proposal to creditors pursuant to the Act naming **CAYDION CAMPBELL** as trustee under the proposal. On the 19<sup>th</sup> day of DECEMBER, 2017, **CUDDY'Z FRANCHISE ONE LIMITED (CUDDY'Z)** lodged a Revised Proposal.*

*The Class 3 (Secured) Creditor has refused the Proposal (and proposed amendments).*

*The debtor is deemed by the Act, to have made an application for an assignment for the general benefit of creditors as of 31<sup>st</sup> day of August, 2018 and the undersigned is required to issue a Certificate of Assignment.*

***CAYDION CAMPBELL** as trustee is hereby appointed as trustee of the debtor's bankruptcy estate.*

*Dated the 3<sup>RD</sup> day of SEPTEMBER, 2018"*

**Second Certificate**

*"On the 12<sup>th</sup> day of JANUARY, 2018, **COURJON INVESTMENTS LIMITED**, lodged a proposal to creditors pursuant to the Act naming **CAYDION CAMPBELL** as trustee under the proposal.*

*The Class 3 (Secured) Creditor has refused the Proposal (and proposed amendments).*

*The debtor is deemed by the Act, to have made an application for an assignment for the general benefit of creditors as of 31<sup>st</sup> day of August, 2018 and the undersigned is required to issue a Certificate of Assignment.*

***CAYDION CAMPBELL** as trustee is hereby appointed as trustee of the debtor's bankruptcy estate.*

*Dated the 3<sup>RD</sup> day of **SEPTEMBER**, 2018"*

[19] I am satisfied that, on the evidence before me, winding up proceedings commenced with the issuing of Certificates of Assignment by the Supervisor of Insolvency. This began the process of collecting assets for liquidation and distribution. The certificates were lawfully issued given the deemed request in consequence of the creditor's rejection of the proposal.

[20] The Respondents both complain of what they allege to be irregularities. Complaints are made about the details contained in the proposals and, in the failure to serve a Notice of Intention to file a proposal. The Claimant says that the 1<sup>st</sup> Respondent was regarded as the sole member of a class of creditors. It was therefore the only one served with the proposal, see exhibit "A.F.6" to the Affidavit of Carla Stephens dated 26<sup>th</sup> November, 2018. Section 18(1) of the Insolvency Act allows for this:

*"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."*

[21] In respect of the failure to file or serve a Notice of Intention to make a proposal the Act does not make this mandatory. This conclusion is supported by the decision of Justice Sykes (as he then was) in ***Development Bank of Jamaica Limited v Proactive Financial Services [2017] JMCC Comm 31*** where he stated at paragraph 34:

*"The notice of intention referred to in section 4 (1) is a notice that the insolvent person intends to file a proposal (section 11 (2)). Under section 11 (1), the insolvent person may file a proposal. The*



*IA permits the debtor to file either a notice of intention to file a proposal or the proposal itself. Regardless of which one is filed, the automatic stay comes into operation without any judicial intervention and thereafter the matter proceeds according to the regime set out in the IA."*

[22] As regards the Trustee's decision, to change the category of creditor from 3 to 4, this is easily explained. It is clear that, as the mortgages were registered on the title, the creditors were prima facie secured. However when it became apparent that there was no registration pursuant to the Companies Act, then as against the Trustee and creditors, they would be unsecured. Certainly, the Trustee should be entitled to treat with them accordingly.

[23] I am troubled by the fact that Certificates of Assignment were issued for both Cuddy's and Courjon although, on the evidence, the report from the Trustee of a refusal was only made in respect of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent you will recall loaned money to Cuddy's not Courjon. I will not refuse the Claimant's application on this ground for two reasons. First, because Courjon is a mortgagor (who secured the loan to Cuddy's). The 1<sup>st</sup> Respondent therefore knowingly refused the proposal. On the face of it, I see no substantial injustice, which is a prerequisite, if a proceeding in bankruptcy is to be invalidated (section 273 of the Insolvency Act). Secondly, because the Supervisor of Insolvency has not been made a party to these proceedings. That ought to be the appropriate course if his decision to issue the Certificates of Assignment, is to be impugned, whether by judicial review or otherwise.

[24] The onus is on persons, who treat with registered companies, to register their charges at the Registrar of Companies. This serves inter alia to alert persons, who may be doing business with the company, of other creditors and interests. Section 93 of the Companies Act ensures that those who fail to register their interest rank equally, in a winding up, to those who may not have been aware of that interest when treating with the company. The new procedure, to implement winding up proceedings, does not change that purpose. This decision therefore is consistent with the policy and intent of the Companies Act. Finally, I observe that section 238(1) of

the Insolvency Act provides that the Supervisor of Insolvency may investigate decisions of a Trustee. It is a point to consider whether that avenue ought to be first explored by persons who take issue with the Trustee's acts or omissions.

**[25]** In the result I grant the relief prayed for by the Claimant and dismiss the applications filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

It is declared:

- 1) Mortgages No. 1874758 and 2062524, registered on Certificate of Title registered at Volume 1342 Folio 707 of the Register Book of Titles being property owned by Courjon's Investments Ltd. (a bankrupt), are void as against the Claimant and Courjon's other creditors.
- 2) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are category 4 creditors pursuant to Section 202 (1) (d) of the Insolvency Act.

**[26]** These declarations having been granted I did not consider it necessary to grant injunctive relief. I will however hear submissions on costs.

**David Batts  
Puisne Judge**