

## **Insolvency Reform in the OECS**

Justice David Hayton, Caribbean Court of Justice

The courts have some capacity to modernise insolvency law but it is very limited.

Take three CCJ cases. (1) LOP Investments Ltd Demerara Bank Ltd [2009] CCJ 10. This was concerned with whether a company's secured debentures ranked as "conventional mortgages" under Guyanese Roman-Dutch law so that only a judicial sale was possible even if the receiver was expressly given a private power of sale? No, so the receiver could proceed with a private sale.

(2) Atlantic Corporation Ltd v Development Finance Ltd [2012] CCJ 6. Every "transfer of property" made by a debtor to prejudice or defraud creditors is liable to be set aside by creditors. Were only transfers covered? What about creation of long leases or mortgages? Yes, included

(3) Canadian Imperial Bank of Commerce v Gypsy International Ltd and Beepat [2015] CCJ 16. The Bank had a secured debenture over Gypsy's property, which was then damaged by fire, erroneously thought at first to be caused by a director's arson. Thus the insurer cancelled the fire policy, the lack of insurance then triggering a breach of covenant in the debenture deed. The wording of this covenant enabled the Bank immediately to appoint a receiver and manager and it did so without making any demand for payment of the money due to it, which if paid would have avoided such an appointment, alleged to have had a calamitous impact on the company's business. The receiver sold what he could to recover the money, putting the company out of business. The company alleged the appointment was void because as a matter of law it could not be made without making a demand for payment of money due and allowing a reasonable but short period for the money to be paid as under Canadian law. The latter, however, depended upon the constitutional protection against unreasonable seizures of property by anyone under Art 8 of the Canadian Charter of Rights and Freedoms. No such constitutional protection existing in Barbados, the CCJ held commercial parties to the terms of their agreement designed to enable a lender to take immediate steps if it considered this was needed to protect its legitimate interests.

The Barbados Bankruptcy and Insolvency Act now provides greater flexibility. By s 10B a secured creditor must give a prescribed notice of intent to enforce a security by appointing a receiver and cannot do so until 10 days after the notice unless the debtor consents. However, in that period the creditor can seek the appointment by the Court of an interim receiver if necessary for the protection of its interests.

Insolvency reform needs to come from legislation and is necessary for a thriving economy

For a country's wealth to develop it needs to encourage business enterprises which inevitably have to take on some risk of failure. Businesses need capital, and the provision of credit to them at a reasonable price is vital to them for their development. Those with capital are keen to lend their capital to acquire interest for the use of their money over time. Businesses, hopefully, will generate capital and income profits, while providing work

for their own workers and other workers involved in supplying materials or services for businesses. Such workers with money to spend will help drive the economy forward. The Government benefits greatly from all these matters and so should be keen to encourage lenders and borrowers work together in their mutual self-interest and enact insolvency legislation that will help to achieve this. Studies have shown that insolvency legislation that balances the interests of creditors and debtors produces a higher level of credit available to help businesses develop, provides credit at a lower cost and, if things go wrong, produces an increased return for creditors.

A problem, however, has arisen from the imbalance of the interests of lenders and borrowers. Traditionally, the law has preferred the interests of lenders over those of borrowers, giving effect to written instruments devised by the best lawyers that lenders can afford and to legislation influenced by a weighty group of lenders. The voices of persons involved in small and medium enterprises were hardly heard until economists began speaking up for them and made lenders and Governments realise that everyone would benefit if the interests of lenders and creditors were more evenly balanced.

Plenty of lenders existed, especially secured lenders, but the harsh treatment of borrowers whose enterprises resulted in their bankruptcy was leading to too few persons being prepared to build businesses based upon credit and so to less economic growth than desired by Governments. So what can be done?

In this hemisphere the Canadian insolvency legislation has shown the way to ameliorate insolvency law in favour of borrowers and remove the historical distinction between individual and corporate insolvency. Thus Trinidad & Tobago, Barbados and Jamaica have enacted new insolvency legislation based upon Canadian law and in the OECS consideration is being given towards some harmonisation of recently developed insolvency laws.

A major focus is upon moving towards a universal system for taking security of all types of security and for perfecting it by registration or otherwise. It seems that there is already sufficient protection for the interests of creditors against wily debtors who make dispositions of property within a relatively short period before becoming bankrupt or who make dispositions made with intent to defraud creditors or to unduly prefer particular creditors.

#### *The possible rehabilitation of debtors*

Following the Canadian example, the interests of debtors, however, are furthered by making available a rehabilitation process which may well result in more being made available to satisfy creditors' claims than if there were no such process.

Why not try to help '**insolvent**' persons who have not yet been made '**bankrupt**' whether by a court order made at the behest of creditors or by a voluntary assignment of all property to a trustee generally for the benefit of creditors? Why not have such an insolvent person retain possession of its property, work with an experienced insolvency practitioner, to be known as a 'licensed trustee', who will set out the position, put forward a proposal to satisfy creditors and file it with the insolvency Supervisor to call and chair a meeting of creditors.

Meanwhile all proceedings are stayed. If the creditors of the class of unsecured creditors and the class of secured creditors agree by a majority in number and two thirds in value then the proposal, if approved by the court, is carried out under meetings chaired by the licensed trustee. He or she will provide a certificate that the proposal has been fully performed when this has occurred. In the absence of agreement or if the proposal is subsequently annulled for some special reason, the insolvent becomes treated as a bankrupt who had assigned all property to the licensed trustee.

Might there not be a possibility to assist the two classes of bankrupt, those who have assigned all property to a licensed trustee appointed by the Supervisor (after receiving an assignment with a space to insert the trustee's name) and those who have had a licensed trustee appointed receiver of their assets by the court at the behest of any creditors? Yes, a proposal may be put forward by the licensed trustee if a committee of inspectors appointed by the bankrupt's creditors has approved it. The Supervisor and the court then become involved as for insolvents' proposals, but the court's approval annuls the bankruptcy.

It is to be hoped that there will be sufficient good licensed trustees and experienced judges to help the rehabilitation process work well.

#### *Automatic discharge of bankrupts*

While a bankrupt corporation may not apply for discharge unless it has satisfied its creditors in full, why not have financial counselling prescribed for individual bankrupts and why not have automatic discharge available for individual bankrupts, who had not before been made bankrupt? The licensed trustee can within say, eight months of the bankruptcy, file a report on what has happened, copying it to the bankrupt, the Supervisor and the creditors. If no objection is made by any of them the bankrupt is automatically granted a discharge, say nine months after the bankruptcy. In the case of objections the Court determines what is to happen and can impose conditions. It can, for example, refuse a discharge if the bankrupt's assets were not of a value equal to 33 and a third cents on the dollar in respect of the unsecured liabilities or if he had acted recklessly or improperly.

Any statutory disqualification on account of bankruptcy will cease when the individual is discharged and obtains from the court a certificate to the effect that his or her bankruptcy was caused by misfortune not misconduct.

After such misfortune the bankrupt can walk tall in the community and, having learned from misfortune, can seek to make a fortune next time with the help of credit provided at not too high a price.

All this is designed to create a win-win situation for lenders, creditors, their employees and the country. The situation will be further improved by easier access to credit when the Eastern Caribbean Guarantee Corporation is established to encourage lenders by guaranteeing repayment of their loan to businesspeople.

The OECS, CARICOM and insolvencies covering several States

In a small grouping of States like the OECS it makes obvious sense to strive for as much harmonisation of insolvency laws as possible, indeed covering cross-border insolvencies. Of course, this is a wider issue for CARICOM countries which can obtain much assistance from the well-established UNCITRAL framework for a Model Law on Cross-Border Insolvency based on the work of INSOL International supported by the World Bank. We do, after all, want to encourage foreign investment in the OECS.

#### The way ahead

It seems to me that the various stakeholders in the OECS States need to work with them via their Commission to produce a harmonised insolvency law that will enable the OECS States' economies go further together. This conference shows that we are pulling together in the right direction.