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"Not Broken, Just Bent" Facilitating Financial Rehabilitation via the Bankruptcy and Insolvency Act 2007

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On 23rd May 2014, the Bankruptcy and Insolvency Act 2007 (BIA) was proclaimed and all Parts except Part XI (dealing with International Insolvencies) were brought into effect on 26th May, 2014. The BIA's primary aim is said to be the rehabilitation of corporate and individual debtors who find themselves in financial straits. The BIA seeks to introduce a framework within which persons who fall into financial hardship can re-group, re-organize and recover as opposed to becoming insolvent and (in the case of a corporate debtor) no longer existent. In the first of this two-part Article, we summarize the purpose and intent behind the legislation as well as the implementation and management of a corporate reorganisation under the BIA.

At a stakeholder workshop hosted by the Ministry of Trade, Industry, Investment and Communications, the BIA and its provisions for financial reform was said to be aimed at private sector growth. According to the Honourable Minister of Finance and the Economy, such is needed if Trinidad and Tobago (T&T) is to lower its dependency on the energy sector. The Minister emphasized the need to lower the cost of doing business in T&T, at least from an administrative perspective, by loosening the constraints on lending as well as by increasing the availability of credit.

Debt re-arrangement followed by improved creditor recovery, while minimising risks, stood out as the key performance indicators on which the success or failure of the BIA would be judged.

The Need for Insolvency Reform

According to the World Bank Group's 2014 data, while Trinidad and Tobago is ranked 67th of 189 countries in terms of ease of starting a business, its insolvency recovery ranking stands at 114. This weak ranking is linked to increased difficulty in getting credit and a near impossibility of enforcing business contracts.

Under the old law relating to bankruptcy, a weak framework existed for securing credit which left lenders uncertain about borrowers, and borrowers concerned about a lack of flexibility among lenders. To this end, real estate has been heavily relied on as security, and banks have implemented clear rules to enforce their rights. To overcome this hurdle the BIA has as its main driver the recovery rate by creditors.

An insolvency application takes approximately two and a half years in T&T, and in many cases there is no room for rehabilitation or recovery. The BIA seeks to address this issue through the following:

- Introducing a stay of bankruptcy proceedings which is time sensitive;
- Regulating insolvency practitioners;
- Creating tools to reorganize viable businesses with short term cash flow problems;
- Developing a commercial law bench in the High Court; and
- Promoting more alternative dispute resolution mechanisms.

All of the above are aimed at putting T&T on a path to achieving greater recovery for creditors.

Corporate Reorganisation under the BIA

The BIA introduces a court-supervised debtor-driven process directed at maintaining the status quo of a company while a restructuring plan is devised, negotiated and voted upon by creditors. The benefit of this process for creditors is that it helps the debtor avoid immediate bankruptcy and allows it to carry on business. The process has a number of strict timelines with an end result that would either see the company successfully restructured or having to file for bankruptcy.

Filing a Proposal

Under the BIA, a proposal for recovery can be made by an insolvent company itself or a receiver or liquidator in relation to the insolvent company. Insolvency refers to an inability to pay one's debts compared to bankruptcy which speaks to the legal status of a debtor due to insolvency. In order to qualify as an insolvent person under the BIA, certain criteria must be satisfied. Companies that are deemed or declared bankrupt can also file a proposal for recovery. The process of recovery for an insolvent or bankrupt person begins either with the filing of a Notice of

(cont'd on page 2)

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Intention (Notice) in the prescribed form, to make a proposal with the Supervisor of Insolvency (Supervisor), or by consulting and lodging a copy of a proposal with a licensed trustee who is then responsible for filing the proposal with the Supervisor. A copy of all documents filed with the Supervisor must at the same time be filed with the Court.

The BIA provides the information that must be included in the proposal for it to be approved by the Court which includes, but is not limited to, provisions for the payment of preferred claims, trustee fees, as well as unpaid wages. Generally, the proposal is sent to all unsecured creditors, but the insolvent person may also wish to involve its secured creditors. Where both secured and unsecured creditors are involved, they must be treated equally in their classes. Claims of the State will be considered unsecured unless they are properly registered in the same manner as any other secured claim.

Within five (5) days of filing the Notice to the Supervisor, the trustee is required to send a copy of the Notice to every known creditor. Within ten (10) days of filing the Notice, the insolvent person or bankrupt company, in conjunction with the trustee, must file with the Supervisor a financial cash flow statement showing how the company will be run. Where a Notice is not filed with the Supervisor, this cash flow statement must be filed by the trustee at the time of filing the proposal. Creditors may respond to the proposal by filing a proof of claim. A meeting of the creditors should then be held within twenty-one (21) days of filing the proposal with the Supervisor.

Effect of Filing a Proposal

The filing of the Notice or proposal results in an automatic stay of proceedings against the person. It prevents any creditor from commencing or continuing any action against that person, subject to a lifting of the stay by the Court on application by an aggrieved creditor. There are, however, certain financial contracts which have so called "safe harbour" provisions to which a stay of proceedings would not apply.

The initial stay of proceedings after filing the Notice lasts for thirty (30) days. Service providers to the company or any person with whom the insolvent person had an agreement are prevented from terminating or interrupting the agreement with the company. Service providers can request immediate payment for goods and/or services which are provided post filing.

Extensions of a stay of proceedings are available in increments of forty-five (45) days up to a maximum of six (6) months. In seeking an extension of the stay, the applicant must prove to the court:

(i) that it is acting in good faith and with due diligence;
(ii) that it will likely be able to make a viable proposal if the extension is granted; and
(iii) that no creditor would be materially prejudiced if an extension is granted.

After the Proposal is filed

Once a proposal has been filed, all unsecured creditors and any secured creditors to whom the proposal has been made can vote on the proposal provided that their claims have been proven prior to the scheduled voting meeting. A proposal may be annulled if there is any default in performance of the steps or obligations set out in the proposal.

All questions relating to the proposal (other than questions of accepting or refusing the proposal), are decided by an ordinary resolution of the creditors to whom the proposal was made. Creditors may also recommend terms or provisions to be included in the proposal with respect to the supervision of the affairs of the debtor. To be accepted, the proposal must be passed by a double majority, that is, a majority in number and two-thirds in value of all proven claims present in person or by proxy at the meeting. If the proposal is passed by the double majority, it must be approved by the Court to become binding.

If the proposal is approved, the insolvent company would escape bankruptcy and can continue operations. It should be noted that where a proposal is filed by a company already bankrupt (as opposed to insolvent), acceptance of a proposal has the effect of annulling the bankruptcy and all right, title and interest of the trustee in the property of the debtor may be revested in the debtor. The Company must, however, carry out all obligations set out in the proposal until such time as the company is no longer deemed insolvent. Failure to do so may result in the proposal being annulled (as mentioned earlier) and a certificate of assignment being issued against the company. If the proposal is rejected or refused by the Court, then the Supervisor will issue a certificate of assignment against the company and the company would be deemed bankrupt.

Conclusion

The advantages of this new procedure are the transparent and full disclosure of the proceedings, the fact that it is court-supervised, and that relief is available to creditors who may have been prejudiced. The potential length of time needed to develop a proposal, as well as the costs involved in a corporate reorganisation are some of the challenges of the proposal process. Stakeholders may also be prejudiced if the proposal is done solely to delay the inevitable demise of the debtor's business and the public nature of the process may prove to be disruptive.

In Part II, we will consider the licensing and regulation of the Trustee in Insolvency Reform and The Office of the Supervisor of Insolvency.

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Proving Passing Off

Fanta Punch

Although, the tort of passing off is largely systemized by statute such as the Protection Against Competition Act Chapter 82:36, it continues to be used as a parallel cause of action in trademark infringement especially for protecting unregistered trademarks.

Passing off seeks to prevent the unfair use of a trademark owner's reputation by an infringer who represents to the purchasing public that its goods or services are those of the trademark owner. Passing off focuses on the protection of goodwill and business reputation, and can lend more flexibility than may be available under the statutory provisions for trademark infringement.

In March 2015 the House of Lords, in the United Kingdom heard the matter of *Starbucks (HK) Ltd (no relation to the US coffee franchise) ["Starbucks"] v British Sky Broadcasting Group plc and others ["BSkyB"]*. Starbucks had appealed an earlier dismissal of its claim for trademark infringement and passing off against BskyB.

Starbucks claimed that BskyB's use of its online broadcast service 'Now TV' traded on goodwill it attained though its internet streaming services called 'Now'. It argued that although the source of its goodwill was attained from its own customers in Hong Kong, this goodwill had extended beyond its jurisdiction to include Chinese language programmes on its website which were accessible though videos on UK-based BskyB's Internet protocol TV service.

The case was dismissed previously at the UK Court of Appeal on the basis that Starbucks failed to prove that it gained sufficient goodwill in the UK to satisfy a passing off claim. While yet to be decided, the Starbucks case highlights some of the challenges faced by a Claimant in meeting its burden of proof in a passing off action. The three elements of passing off include:

- Goodwill or reputation;
- Misrepresentation; and
- Damage

Goodwill or reputation

Goodwill can be defined as the reputation generated by a product (including its packaging) over a period of time. Products gain distinctiveness through association with a point of origin, for example a distinguishing feature of the product or its packaging which, over time, becomes synonymous with quality and significant value. Where there is evidence of considerable confusion amongst customers as to whether a product is the original version or one that has been '*passed off*' as genuine is integral to proving the existence of goodwill. Sales figures over a significant period of time, evidence of continuity of goodwill, amounts spent on advertising and promotions, witness evidence and survey evidence can all aid in showing reputation and goodwill in a product.

Misrepresentation

Secondly, there must be evidence of misrepresentation to the purchasing that the infringed goods or services actually belong to the Claimant. Without this, a Claimant is unlikely to be able to show that any confusion occurred and would make it difficult for a passing off claim to succeed. It can take the form of:

- Deliberately fooling customers into believing that the infringed product is the same as the Claimant's original product.
- An innocent misrepresentation where the infringing party has no knowledge of the Claimant's products by innocent misrepresentation.

Passing off is still actionable, regardless of whether it is deliberate or innocent, as it is not necessary to prove intention.

Providing compelling evidence that a misrepresentation has taken place can be a challenge for a Claimant. Where there has been actual confusion, witness evidence or survey evidence can be persuasive. A Claimant may be required to conduct independent investigations, market research or maintain detailed records to build a case. Where survey evidence is used, it can raise questions for a court in terms of reliability of statistical data and speculation as to whether the survey itself may be an invitation to encourage participants to provide sought after responses.

Damage

Where the first two elements of passing off are proven, damage or the likelihood of damage is likely to be inferred by a court. A successful Claimant may be entitled to damages where there has been:

- Loss of profits resulting from the sale of infringed products as opposed to those of the Claimant;
- Reputational loss where customers have been led into believing that the Claimant was involved in the sale of goods of an inferior quality in the market where this was not the case; or
- Where infringed products in a market have brought a Claimant into disrepute.

In support of a claim for damages, proof of technical data or other relevant evidence on the effect of the infringed goods or services on a Claimant's sales can be helpful. Passing off remains a useful tool in the arsenal of a Claimant seeking to protect its trademark or brand, and prevent unauthorised use, though careful consideration is needed to do that effectively.

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