CITATION: *In the Matter of the Proposal of Ruth Del Rocio Pacheco*, 2024 ONSC 1690
DISTRICT: Ontario
DISTRICT NO.: 09-TORONTO
COURT FILE NO.: BK-19-02218001-0031
ESTATE FILE NO.: 31-2218001
DATE: 20240313

ONTARIO - SUPERIOR COURT OF JUSTICE – IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PROPOSAL OF RUTH DEL ROCIO PACHECO (AKA RUTH D. PACHECO SERRANO, RUTH PACHECO, RUTH D. PACHECOOSERRANO) OF THE TOWN OF NEW TECUMSETH IN THE PROVINCE OF ONTARIO

RE: Ruth Del Rocio Pacheco, Debtor / Bankrupt

BEFORE: Peter J. Osborne J.

COUNSEL: *Philip Gertler*, for Ruth Del Rocio Pacheco, Debtor / Bankrupt

Jane Martin, Trustee in Bankruptcy

Jacob Blackwell, Office of the Superintendent in Bankruptcy

HEARD: June 1, 2023

ENDORSEMENT

[1] The Trustee in respect of the Amended Proposal of Ruth Del Rocio Pacheco (the "Debtor" or the "Bankrupt") seeks approval of the Amended Proposal dated August 23, 2022, which is an in-bankruptcy Division I Amended Proposal. The Debtor supports the relief sought.

[2] The Office of the Superintendent in Bankruptcy ("OSB") opposes the relief sought, and in particular objects to the proposed approval of the Amended Proposal given what it submits was a complete lack of disclosure of relevant information by the Debtor from the outset, contrary to the fundamental basis for the entire bankruptcy regime.

[3] The relevant provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, (the "*BIA*") relevant to the approval of proposals are ss. 59(2) and (3):

> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to

> approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.
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> (3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

[4] As observed by Morawetz, J. (now Chief Justice) in *Kitchener Frame Limited (Re)*, 2012 ONSC 234 ("*Kitchener Frame*") at paras. 19 – 22:

> [19] In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:
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> (a) the proposal is reasonable;
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> (b) the proposal is calculated to benefit the general body of creditors; and
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> (c) the proposal is made in good faith.
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> See *Mayer (Re)* (1994), 25 CBR (3d) 113; *Steeves (Re)*, 25 CBR (4th) 317; and *Magnus One Energy Corp. (Re)*, 53 CBR (5th) 243.
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> [20] The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See: *Farrell (Re)*, 2003, 40 CBR (4th) 53.
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> [21] The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors: see *Lofchik, Re*, [1998] O.J. No. 322 (Ont. Bkrptcy). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One, supra*.
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> [22] With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik, supra*, and *Farrell, supra*.

[5] The decision in *Re Mernick*, (1994) 24 C.B.R. (3d) 8 (Ont. S.C.) reflects the same principles as the above excerpt.

[6] As set out in the *2023 Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz and Sarra, Thomson Reuters Canada, Toronto, 2023 at §4:71 and §4.80:

> In deciding whether the proposal should be approved, the court must take the following interests into account: a) the interests of the debtor in making a settlement with creditors; b) the interests of creditors in procuring a settlement that is reasonable and that does not prejudice their rights; and c) the interests of the public in the fashioning of a settlement that preserves the integrity of the bankruptcy process and complies with the requirements of commercial morality: *Re Gardner* (1921), 1 C.B.R. 424 (Ont. S.C.); *Re Sumner Co. (1984) Ltd.* (1987), 64 C.B.R. (N.S.) 218 (N.B.Q.B.); *Re Stone* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); *Re National Fruit Exchange Inc*. (1948), 29 C.B.R. 125 (Que. S.C.); *Re Man With Axe Ltd. (No. 2)* (1961), 2 C.B.R. (N.S.) 12 (Man. Q.B.).
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> In order for the court to approve a proposal, it must be satisfied that the terms are reasonable: s. 59(2). To be reasonable, the proposal must have a reasonable possibility of being successfully completed in accordance with its terms: *McNamara v. McNamara* (1984), 53 C.B.R. (N.S.) 240 (Ont. S.C.); *Re Gareau* (1922), 2 C.B.R. 265 (Que. S.C.).

[7] The Trustee relies upon the Third Supplemental Report prepared for the hearing of June 1, 2023, the Report prepared for the hearing of December 7, 2022 and the Supplementary Report also prepared for the hearing dated December 7, 2022. Defined terms in this Endorsement have the meaning given to them in the Reports unless otherwise stated.

[8] This matter already has had a lengthy history in this Court, having been adjourned to the Commercial List by the Associate Justice upon becoming aware of the Intervention by the OSB.

[9] The Amended Proposal provides for payments totaling $97,200. Claims estimates by the Trustee of proven unsecured creditors total $351,577.04, meaning that unsecured creditors will receive a dividend of approximately 19.05% net of fees and expenses in respect of all Proven Claims of ordinary unsecured creditors on a *pro rata* basis.

[10] The Trustee recommends approval of the Amended Proposal on the basis that the projected recovery for unsecured creditors, if fully performed, would be superior to what they would receive in a bankruptcy (likely nil).

[11] At the creditors meeting of September 6, 2022, all six voting creditors holding a total of 18 claims (representing 100% in number and value) voted in favour of the Amended Proposal. It contemplates payment of the total amount of $97,200 as follows:

a. 60 monthly payments of $1300 for an aggregate of 78,000; and

b. one lump sum payment of $19,200 to be paid at the end of the process.

[12] Payments are to be made monthly but counted as a term of the Amended Proposal for default purposes as having been paid semi-annually in the amount of $7800. In other words, the proposal is in arrears only if there has been a default in payments of more than $7800 in a period of six months.

[13] As security for payment, the ex-spouse of the Debtor, Marino Rodriguez, agreed to permit the registration of a mortgage in favour of the Trustee against title to his property at 16 Casserley Crescent, Tecumseh, Ontario.

[14] The Debtor has contributed a total of $12,500 towards the requirements of the Amended Proposal as of May 2, 2023 and has been making monthly payments of $1200 based on the original Proposal terms.

[15] If the Amended Proposal is approved, the Debtor would exit bankruptcy and her non-exempt assets would reinvest with her (i.e., her Tax-free Savings Account).

[16] The issue before me is whether the Amended Proposal should be approved or not given the interests of the public in preserving the integrity of the bankruptcy process and compliance with the requirements of commercial morality as described in the case law above.

[17] There is no issue that the requisite majorities required by section 54(2) of the *BIA* were met here: a majority in number representing two-thirds in value of the unsecured creditors is required, and the Amended Proposal here was approved by 100% of the creditors in number representing 100% in value.

[18] The good faith concerns of the OSB are described in the Intervention Report which is part of the record before me where they are summarized this way: "[the] Bankrupt's conduct leading up to and during the bankruptcy process is fraught with a lack of disclosure and untruths."

[19] In particular, the Intervention Report states the following, in relevant part:

a. it is important to note that this is an in-bankruptcy Division I Proposal;

b. this is not the Debtor's first bankruptcy. She filed her first voluntary assignment in bankruptcy in the spring of 2001 (File No. 31 – 389157). According to the Statement of Affairs sworn by the Bankrupt, total declared assets were $5000, of which NIL was realized, as against liabilities of $112,980 (all of which were unsecured). The Bankrupt stated that she was separated from her spouse and employed as a housekeeper working for company called Hallmark Housekeeping Services Inc. She obtained her automatic discharge on February 17, 2022;

c. the Debtor filed her second voluntary assignment into bankruptcy on December 14, 2016. She was examined by the Official Receiver pursuant to section 161 of the *BIA* on April 16, 2018. The Official Receiver released her Report on May 3, 2018. It cited subsections 173(1)(e) and (j) as reasons to refuse a discharge based on the following, as set out in the Report:

i. proven liabilities as at April 9, 2018 of more $258,234.93;

ii. the Bankrupt reported on her Examination that she "lived separately" from her partner, Marino Rodriguez ("Rodriguez"), from 2001 to 2012. They had two children;

iii. however, in 2014, the Bankrupt and Rodriguez decided to reside at the same property located at 35 Cecil Crescent, Stouffville, Ontario. She stated that Rodriguez owned the property exclusively and that she paid him rent of $600 per month to live in a basement apartment at that location with their two children;

iv. to facilitate her move into the basement, she used creditor funds in the amount of $75,000 to construct a separate entrance to the basement of the property;

v. in her sworn Statement of Affairs, the Bankrupt stated that the causes of her financial difficulties were "accumulation of debt due to unemployment and financial mismanagement". However, on her Examination, she stated that her financial challenges whether result of the fact that her daughter suffered from a mental illness, her son had social anxiety, she had lost her job, and that she had used funds obtained on credit to gamble, which funds she estimated to be approximately $95,000;

vi. the Bankrupt used funds obtained by credit to fund travel expenses for her family, which occurred within five years of the filing of her second bankruptcy described above;

vii. the Bankrupt stated that she had also used funds obtained on credit to travel to treat her daughter's depression and to pay for her mother's open heart surgery in Ecuador; and

viii. the Bankrupt disclosed on the Examination (contrary to the Statement of Affairs) that she had sold a property located at 265 Glad Park Avenue, Stouffville, Ontario. That property was sold in 2014 at which time she received approximately $178,000 although, as of the date of the Report, that amount was still to be confirmed (I pause to observe

that there is no more accurate or updated information provided as of the date of the hearing).

[20] As a result of all of the above, the OSB opposed a discharge, citing subsections 173(1)(a), (e), (j) and (o) of the *BIA*. Following the issuance of a Notice of Hearing, the Official Receiver requested from the Trustee with respect to the Bankrupt:

a. CRA Notices of Assessments for 2010 to 2017;

b. closing documents relating to the sale of the property located at 265 Glad Park Avenue;

c. a detailed report with respect to the Bankrupt's banking records;

d. copies of Win/Loss Statements from the Ontario Lottery and Gaming Commission ("OLG");

e. all receipts relating to medical expenses said to have been incurred by the Bankrupt for her family; and

f. a fulsome report on the Bankrupt's use of credit relating to the proven unsecured claims to date.

[21] The OSB takes the position on this hearing that the conduct of the Bankrupt leading up to, and during, the bankruptcy process is "fraught with a lack of disclosure and untruths" including the following:

a. she was unemployed according to her sworn Statement of Affairs;

b. according to the Bankrupt she was in a common-law relationship;

c. on her Examination, the Bankrupt reported being employed as a housekeeper at a company called PCL Construction with a monthly net income of $3488.36 and an estimated yearly salary of $75,000;

d. according to the Bankrupt, she has worked for PCL Construction since 2012, although was unemployed for approximately 15 months from March 2016 to August 2017. In the last five years, her average annual income has been $75,000;

e. her Notices of Assessment for the period 2010 to 2015, and 2018 to 2020 (it appears that the 2017 Notice of Assessment was never produced) show an average income from 2018 to 2020 of $79,735.67 and further that the

> Bankrupt earned during the 2020 tax year an estimated $94,119. The Notices of Assessment also reflect that for 2011 and 2012, the Bankrupt received average support from her ex-partner of $7200;
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> f. her Notices of Assessment further reflect that she earned an average yearly income of $1,110 during the tax years 2011 to 2014 from interest and other investment income, although none of that was disclosed on her sworn Statement of Affairs (in fact no investment instruments or accounts were disclosed); and
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> g. the LinkedIn profile of the Bankrupt reflects that she is an interior designer and has been since April 2016, providing home and commercial staging services since that time and this was not disclosed on her Statement of Affairs.

[22] With respect to the property at 265 Glad Park Avenue, the sworn Statement of Affairs of the Bankrupt reflects that she sold the property in 2014 and converted the proceeds of CDN $178,000 into United States currency, yielding USD $150,000. The Bankrupt stated that she transferred those funds to her parents since they had supported her in the purchase of the house in 2007.

[23] However, on her Examination, the Bankrupt stated that the $178,000 in proceeds was used to pay her mother $150,000, an amount which included interest, while the remainder of the proceeds were transferred to her ex-partner Rodriguez, said to be in repayment of money he had loaned to her previously.

[24] As set out in the Intervention of the OSB, according to the Bankrupt, her mother had loaned her a total of CDN $100,000, of which $65,000 had been used as a down payment to purchase the Glad Park property, and CDN $35,000 was used to pay closing costs as well as to provide financial support to the Bankrupt as she was living alone with her children. (It is not clear from the record what period of time this support was said to cover, but that is not determinative since there are no records to support this in any event).

[25] The Bankrupt stated, however, that as against that advance from her mother of CDN $100,000, she "repaid" her mother the sum of USD $150,000 when the Glad Park property was sold. She explained the extra amount paid to her mother as applicable interest that had accumulated since 2007 as well as additional (unquantified) amounts to provide financial assistance to her mother since her mother was ill and separated from her spouse, the Bankrupt's father. The funds were paid to her mother by way of a USD $50,000 money order, which the Bankrupt took with her and delivered to her mother during a visit to Ecuador, and the balance was transferred to her mother via a Western Union wire transfer.

[26] Also during her Examination, the Bankrupt reported several events which she said led to her current financial predicament, including her daughter's mental illness, her son's social anxiety, loss of employment, use of credit to gamble, use of credit to cover travel expenses to treat her

daughter's depression, and use of credit to pay for her mother's open heart surgery in Ecuador. Virtually all of these amounts were paid through the use of various credit cards held by the Bankrupt and included the following specific items and corresponding amounts totaling in the aggregate $251,888.25:

a. basement renovations - $58,073.88;

b. "day-to-day expenses" (unspecified) - $13,614.67;

c. funeral costs for her sister's son - $23,113.70;

d. gambling at Niagara and Woodbine casinos - $102,418.51;

e. heart surgery for her mother - $12,970.88

f. travel to the Dominican Republic in 2015 (for her and her daughter, alleged to be undertaken to assist with her daughter's depression) and to Ecuador in 2016 (for her and her daughter, to visit her mother) in the aggregate amount of $41,696.61.

[27] During that same time period (2014-2015), the Bankrupt accumulated unsecured liabilities of $320,529.47 by utilizing her existing 15 credit card accounts and an additional newly obtained 12 credit card accounts.

[28] The Bankrupt stated that she and her ex-partner, Rodriguez, were separated from 2001 until 2012, and lived separately during that time.

[29] The parcel register for the Cecil property reflects that Rodriguez (exclusively) purchased the property in June 2013. The Bankrupt consented to the transaction as a spouse of the purchaser and was a guarantor on the mortgage debt.

[30] In 2014, the following year, the Bankrupt and Rodriguez decided that they would both reside together at the Cecil property as described above, with the Bankrupt and their two children (aged 16 and 22) living in the basement, and Rodriguez living on the main floor. The Bankrupt maintains that she and Rodriguez were and are still separated, and she pays him monthly rent of $600.

[31] The Cecil property was refinanced in November 2014, and the Bankrupt again consented to the transaction as a spouse. The same thing happened again in May 2018 when additional mortgage financing in the amount of $670,000 was obtained from the Bank of Montréal, and the Bankrupt again consented to the transaction as a spouse.

[32] Yet further still, in February 2020, the Bankrupt again consented as a spouse to additional refinancing with CIBC in the amount of $1 million.

[33] With respect to the gambling debts disclosed by the Bankrupt on her Examination (and, for greater certainty, not disclosed on her Statement of Affairs), the Bankrupt reported that 35% of her debts were due to gambling in which she had engaged for three years.

[34] However, she was unable to produce a Players Card, stating that she played slot machines at Woodbine Casino twice a week and at Niagara Casino twice per month. Her evidence was that the last time she gambled was in June 2016, and in the one year prior to her bankruptcy, she gambled an estimated amount of $65,000-$70,000.

[35] As noted above, the Trustee was requested on March 21, 2022 to obtain from the Bankrupt copies of the Win/Loss Statements from OLG. The Bankrupt was unable to produce copies of any of the requested Win/Loss Statements.

[36] With respect to the medical challenges said to be faced by her mother and daughter respectively, the Bankrupt stated on her Examination that she used a specifically identified CIBC account to cover the expenses of her mother's heart surgery, and used a specifically identified BMO account to fund treatment for her daughter's depression. A third specifically identified RBC Visa account was used, she testified, to cover the cost of the trip to the Dominican Republic in 2015 and to Ecuador in 2016.

[37] Not surprisingly, the OSB requested the Trustee to obtain receipts from the Bankrupt relating to the significant medical expenses said to be incurred. None were produced by the Bankrupt, who stated that her mother had moved a few times since the surgery, and that her daughter's medical treatments were paid in cash.

[38] Even if her daughter's medical treatments were in fact incurred, and even if they were paid in cash, there is no evidence in the record as to which, if any, clinical service providers delivered the services, and what those services were or when they were delivered.

[39] Indeed, it appears that it is the position of the Bankrupt that, for example, the 2015 trip to the Dominican Republic was a recreational trip perhaps to brighten the spirits of her daughter, but the funds were spent on the trip for the two of them, and not for the provision of any mental health clinical services whatsoever either in Canada or in the Dominican Republic. That is not even suggested, let alone corroborated.

[40] Moreover, the fact that the mother of the Bankrupt has moved since her open heart surgery does not in my view, even if true, constitute any explanation as to why no receipts or indeed any evidence of the surgery or the fact of it having been paid for by the Bankrupt (or even the fact that it occurred) were able to be produced at all.

[41] In argument, counsel for the Trustee was candid about many of the facts upon which the OSB relies in opposition to approval of the Amended Proposal including the previous bankruptcy, the debts incurred as a result of gambling and the fact that the sale of the property referred to above may represent a possible transfer at undervalue or a fraudulent conveyance.

[42] However, the Trustee maintains that approval of the Amended Proposal is appropriate given the fact that there has (at least now) been full disclosure of all facts, favourable or unfavourable, and in particular, the fact that 100% of the creditors in number (representing 100% of the value) have voted in favour of the Amended Proposal.

[43] In short, the Trustee submits that the Bankrupt is acting in good faith and that approval of the Amended Proposal is not inconsistent with the maintaining of public confidence in the integrity of the bankruptcy regime.

[44] Having considered all of the circumstances, I accept the position of the OSB. I am unable to conclude that the interests of the public at large in maintaining the integrity of the bankruptcy system are met by approval of the Amended Proposal in this case.

[45] To be clear, the issue is not the use of some of the funds by the Bankrupt for gambling activities, and nor is the issue the use of funds for healthcare related expenditures, if indeed that occurred.

[46] The challenges are those brought about by the Bankrupt herself. This is an individual who is in bankruptcy and not for the first time. She is well aware of her responsibilities as a bankrupt, and particularly the need for full disclosure and transparency.

[47] Simply put, the Bankrupt has not met those responsibilities here for the very reasons set out by the OSB, in circumstances where the Amended Proposal provides for recovery at less than twenty cents on the dollar for unsecured creditors.

[48] Of that, a proportion that is not insignificant is to be paid as one lump sum at the end of the process. The Amended Proposal contemplates what is effectively a built-in six-month cure period, in that, as noted above, defaults in the payments due monthly are not deemed to be defaults under the Amended Proposal for six months.

[49] Moreover, the mortgage security proposed by her ex-spouse, secures the payments proposed to be made pursuant to the terms of the Amended Proposal, but that security does not secure anything close to fifty cents on the dollar of unsecured liabilities. That mortgage is registered on the property in respect of which the relevant entries on the Parcel Register are reproduced above. There is a complete inconsistency between the evidence of the Bankrupt that she and Rodriguez were separated, and her repeated consent to encumbrances on the property as a spouse. The concerns of the OSB related to the possible transfer at undervalue or possible fraudulent conveyance are acknowledged by the Bankrupt but not answered.

[50] I am satisfied that the Bankrupt was not forthright in the disclosure she made in her Statement of Affairs for all of the reasons set out above. Yet, she seeks to terminate this bankruptcy proceeding, and thereby put an end to any further investigation of facts such as are contemplated in section 173 of the *BIA*, through approval of the Amended Proposal. This, in circumstances where the unsecured debts were accumulated in large part through the utilization of 15 existing credit card accounts to which the Bankrupt added 12 new credit card accounts.

[51] While I have significant sympathy for a person in the circumstances of the Bankrupt, I am unable to be satisfied that the court has an accurate picture of those circumstances as a result of her non-disclosure. For example, there is absolutely no objective evidence of any kind whatsoever about the material expenditures said to have been incurred as a result of the depression of the Bankrupt's daughter beyond her unsupported statements that this is what the credit card charges related to.

[52] To the extent that travel, for the Bankrupt herself and her daughter, to the Dominican Republic for a holiday (in the complete absence of any treatment) is said to fall into this category, in my view taking such a position does not assist the Bankrupt. It appears that the position of the Bankrupt is not that she travelled with her daughter to the Dominican Republic to obtain treatment (there is not even a suggestion of that let alone any corroborating evidence) but rather, the position seems to be that a holiday would improve her daughter's state of mind.

[53] Similarly, there is a complete absence of any evidence as to any healthcare related expenses incurred for the mother of the Bankrupt related to heart surgery or at all.

[54] The use of the proceeds from the sale of the property referred to above, and in particular the transfer to the mother of the Bankrupt, is similarly completely unsupported by any documents. Even the quantum of any debt owing to the mother of the Bankrupt is unsupported, and there is, even according to the Bankrupt's own evidence, a complete disconnect between the amount originally said to have been advanced by her mother, and the amounts subsequently transferred to her mother in purported repayment of the earlier advance.

[55] Nor is there any calculation to explain any of the debts. Further still, there is no calculation or supporting evidence to justify the additional payments to the mother of the Bankrupt said to be in respect of either or both of previous support by the mother for the Bankrupt, or current support by the Bankrupt of her mother. There is simply no documentation about the underlying debt or the repayment at all.

[56] Finally, and while I have no trouble accepting that gambling can be for some individuals an addiction, and aside entirely from the complete absence of any clinical evidence regarding the Bankrupt here, the debts said to be incurred by gambling represent almost 35% of the total debt, yet the Bankrupt has provided no disclosure or any supporting documentation whatsoever to support her statement about the use of funds.

[57] I find that the Bankrupt has failed (as contemplated in section 173(1)(d)) to account satisfactorily for any loss of assets or for any deficiency of assets to meet her liabilities. I also find that in addition to section 173(1)(d), on the evidence the facts set out in subsections 173(1)(e), (j) and (o) have been made out here.

[58] For all of these reasons, the Amended Proposal is not approved.

[59] Order to go in accordance with these reasons.

Osborne J.