

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCM2017/0061 (formerly entered as SVGHCV2016/0053)

**IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT (CAP. 136 OF THE REVISED LAW
OF SAINT VINCENT AND THE GRENADINES, REVISED EDITION 2009)**

AND

**IN THE MATTER OF AN APPLICATION FOR AN INJUNCTION RESTRAINING THE DISPOSITION OF
LAND DESCRIBED AS 19.05 ACRES IN EXTENT AS 19.05 ACRES OF LAND SITUATE AT CANE
GROVE REGISTERED AS NUMBER 1078/2009**

AND

**IN THE MATTER OF AN APPEAL AGAINST BELATED NOTICES OF DISALLOWANCES OF
SECURITY DATED 25th MARCH, 2019**

BETWEEN

- (1) ROBERT SUHRIE**
- (2) BRET LUTSKY**
- (3) STEPHANIE LUTSKY**
- (4) FRANK COX**
- (5) CARL E. PALERMO JR.**
- (6) JOAN A. PALERMO**
- (7) RAYMOND CALDWELL**
- (8) CHRITINE NEELY**

APPLICANTS/APPELLANTS

AND

**BRIAN GLASGOW OF KPMG EASTERN CARIBBEAN
The Trustee of the estate of Harlequin Properties (SVG)**

Limited, a bankrupt

RESPONDENT

Before: The Hon. Mde. Justice Esco L. Henry

High Court Judge

Appearances:

Mrs. Kay Bacchus-Baptiste for the applicants/appellants.
Mr. Garth Patterson Q.C., with him Ms. Taylor Laurayne and
Ms. Vynnette Frederick for the respondent.

2019: Nov. 01

2020: Jan. 23

Apr. 6

Written Submissions filed March 16th 2020

JUDGMENT

BACKGROUND

[1] **Henry, J.:** This case involves a group of persons that is aggrieved by the position taken by Mr. Brian Glasgow (Trustee in bankruptcy of the Estate of Harlequin Properties (SVG) Limited, a bankrupt) in relation to their claim that they are entitled to share in the bankrupt's property. Robert Suhrie, Bret Lutsky, Stephanie Lutsky, Frank Cox, Carl E. Palermo Jr., Joan A. Palermo, Raymond Caldwell and Christine Neely ('the appellants') are those persons. They seek an injunction¹ to prevent the Trustee from selling or concluding the sale of certain lands² owned by the bankrupt at Buccament Bay in the State of Saint Vincent and the Grenadines ('the subject property'). They have also filed an appeal against Notices of Disallowances issued by the Trustee against claims they made as 'creditors' of the bankrupt.

¹ By motion filed on April 10th 2019.

² Registered as Deed No. 1078 of 2009.

- [2] On or about 15th April 2013, the appellants obtained orders against Harlequin Management Services South East Ltd. ('HMSSE'), Buccament Bay Resort Limited. ('BBRL'), Merricks Resort Limited ('MRL') and Harlequin Properties (Caribbean) Limited ('HPCL') respectively³, for the payment of money. The judgments were entered on 26th April 2013. Mr. David Ames was joined as a defendant in those claims. The appellants contended that David Ames is or was the alter ego of those companies and also of the bankrupt. They have not secured any such or other judgments against the bankrupt, and it was not a defendant in the claims giving rise to the referenced orders.
- [3] The appellants purported to registered incumbrances⁴ against the subject property, based on those orders. They notified the Trustee that they intended to enforce their lien. He sent them forms to be completed to prove their claims. They filed notices with him pursuant to the Act, by which they sought to prove their claims. The Trustee disallowed those claims. The appellants have appealed by filing the instant Fixed Date Claim⁵, subsequently amended⁶, in which they seek a reversal of the Trustee's determination. They submitted that there is no real separation between the companies and their 'alter ego' and that the Court should make a finding that the various companies are just a sham and also lift the corporate veil.
- [4] The Trustee has vigorously resisted the appeal. He argued that the referenced court orders cannot create a secured interest in the subject property, without more, because they were not made against the bankrupt and are not protecting any pre-existing interest. They submitted that the contracts out of which the referenced orders arose, are not relevant to the claim and do not create a secured interest in the subject property. For the reasons set out in the judgment, the appeal is dismissed, and the requested injunctive relief is refused.

ISSUES

- [5] The issues are whether:

³ Referred to collectively as the 'judgment debtor companies'.

⁴ On 14th February 2014.

⁵ On April 10th 2019 by claim SVGHCV2016/0053, subsequently amended to 'SVGHCM2017/0061' by court order dated September 18th 2019..

⁶ On April 20th 2019.

1. The appellants have made out a case for allowing the appeal against one or more of the Notices of Disallowance? and
2. To what remedies, if any, are the appellants entitled?

ANALYSIS

Issue 1 – Have the appellants made out a case for allowing the appeal from one or more of the Notices of Disallowance?

Notices of Disallowance

- [6] There is little dispute between the parties regarding the chronology and background to the appeal. The Trustee's legal practitioners did not cross-examine the appellants' witnesses Robert Suhrie and Ms. Lynette Jameson. Cross-examination of Mr. Brian Glasgow spanned two days. The factual matrix can be distilled from the affidavits filed and oral testimony led in this matter.
- [7] They appellants alleged that the judgments they secured arose from contracts they had with the judgment debtor companies which had not been honoured. They contended that the judgment debtor companies and Mr. Ames had assigned their contracts and debts to the bankrupt even before they (the appellants) obtained their judgments. They also asserted that they relied on the judgments obtained against the judgment debtor companies to ground their claim to an interest in the subject property, through the liens. They alleged that after registering their liens⁷ against the subject property on September 23rd 2016, they notified the Trustee that they intended to enforce their 'security'; and they proceeded to lodge the Notices of Intention pursuant to section 12 of the Bankruptcy and Insolvency Act ('BIA').
- [8] Mr. Suhrie testified pleaded that the Trustee sent him and the other appellants, a notice pursuant to section 70 (4) of the BIA to which they responded by filing proof of their claims (by Form 53⁸) including judgments, deeds of assignment and copies of the registered liens. By this process, they claimed to have a secured claim to the Bankrupt's estate. Mr. Glasgow testified that after satisfying

⁷ By incumbrances numbered respectively 3812/2013, 1341/2014, 3817/2013, 276/2011, 428/2014, 427/2014, 430/2014, 426/2014, 429/2014, 431/2014, 422/2014 and 433/2014.

⁸ Prescribed by the BIA.

himself that the appellants had not demonstrated that they held a valid security over the bankrupt's property, he issued⁹ Notices of Disallowance of Security to each of them informing them that pursuant to section 125 (2) of the BIA he had disallowed their security on the property in whole.

[9] Mr. Suhrie asserted that the Trustee did not comply with section 70(2) of the Act and consequently he and fellow appellants wrote to the Trustee demanding that he honour their claims. The appellants averred that the Trustee then requested that they present legal submissions to support their claim, and that they did so. They indicated that the Trustee yet again failed to honour their claims and as a result they issued notices in the newspapers in Saint Vincent and the Grenadines and then filed this appeal.

[10] They expressly claimed two reliefs in their appeal; namely that:

‘The Trustee be restrained from selling or completing the sale of [the subject property]

‘AND ALSO, AN APPEAL against the Notices of Disallowances served belatedly on the Applicants on the 25th March 2019 and an order setting aside the said Notices of Disallowances and ordering the Trustee to take into account the registered Liens against the Bankrupt Harlequin Property SVG Ltd.’

[11] The Notices of Appeal are almost identical except for individual identifiers. The particulars state in part:

‘A.1 The property mentioned in the above Schedule are owned by Harlequin Property (SVG) Limited for the sole purpose of constructing Hotel facility at Buccament Bay, Pembroke in the State of Saint Vincent and the Grenadines and known as Buccament Bay Resort Limited.

A. 2 There is in existence several pending matters against Buccament Bay Resort Limited, Harlequin Management Services (south East) Limited and David Ames in respect of moneys advanced to them in respect of a contract for the purchase of property situate in the State of Saint Vincent and the Grenadines.

⁹ On March 25th 2019.

A.3 That [name of appellant] has instituted legal proceedings ... and registers his interest to protect any judgment which may be rendered therein.

A. 4 As a consequence, thereof the [name of appellant] has registered his interest in the hereditaments and premises described hereinbefore to the extent of the said judgment obtained in ...'

Grounds of appeal

[12] The appellants outlined 11 grounds of appeal. They basically highlighted certain factual and legal arising from the Notices of Disallowance. They did not specify any section in the BIA, the regulations or any other law on which the appeal is grounded.

[13] In their pleadings, they highlighted sections 120 and 75 of the BIA and rule 6(f) as the legal provisions under which they sought to prosecute the appeal. On November 1st 2019, prior to examination of witnesses, learned Queens Counsel Mr. Patterson asked learned counsel Mrs. Kay Bacchus-Baptiste, (through the court) to indicate under what specific provision of law was the appeal brought. Learned counsel Ms. Bacchus-Baptiste responded that the relevant provisions are as set out in the pleadings namely sections 120 and 75 and rule 6(f) of the BIA. She added that section 70 (2) of the Act was being invoked by paragraph 8 of the Amended Motion. I turn now to consider the merits of the appeal.

Section 125 (5) of the BIA

[14] The appellants contended that they have come before the court pursuant to S 125 (5)¹⁰ 'as can be evidenced by the filings of exhibits "G" attached to the Motion, Form 53 and "J" the Notices of Disallowance of Security sent to the Applicants which triggered this appeal'. The references to S125 (5) did not identify what law or other authority was being referenced. The court is not in a position to supply any missing information. Moreover, those particulars were not pleaded in accordance with the rules of court¹¹. Accordingly, this court will give no consideration to any reference to S 125 (5) as a basis for the appeal.

¹⁰ Paragraph 5 of the submissions filed on 16th March 2020.

¹¹ Specifically, Civil Procedure Rule 2000, ('CPR') rule 60.2 (2) (b).

Section 70 (2) of BIA as basis of appeal

[15] Section 70 is referred to in paragraphs 7 and 8 of the Amended Motion. The relevant portions state:

‘7. The Respondent herein sent notices to the Applicants by virtue of S70(4) and the Applicants responded by filing with the trustee the proof of their claims including the judgments, Deeds of Assignments, and copies of the registered liens but the trustee did not comply with S 70 (2) ...

8. The Applicants/Claimants wrote the trustee requiring them to honor their claims the trustee asked for legal submissions to support their claim thereby waiving the application of S70 (2) of the Act. ...’ (underlining added)

[16] The Trustee submitted that the references to section 70 of the BIA in those paragraphs are passing ones and have not been relied on as enabling the Appeal to be made to the Court. In paragraph 7, the appellants’ only related assertion is that the Trustee did not comply with respect to their purported filing of notices ‘by virtue of section 70 (4)’. No averment is made as to what aspect of section 70 (4) he allegedly failed to comply with. In paragraph 8, the appellants asserted that by requesting legal submissions the Trustee waived compliance with section 70 (2) of the Act. They made no express or implicit complaint in relation to such alleged waiver.

[17] In both instances, the appellants have failed to properly plead a reliance on section 70 of the BIA. I agree with the Trustee that these are merely passing references which have not invoked the court’s jurisdiction under section 70 of the Act. They are accordingly not entertained as a basis of appeal.

[18] Section 70 (1) of the BIA stipulates that any person who claims any property or interest in property that is in a trustee’s possession at the time of the bankruptcy, must file a proof of claim with the trustee; which must be verified by affidavit giving identifying particulars of the property and stating the grounds on which the claim is based. The form prescribed by the Regulations for filing such proof of claims is Form 54. None of the appellants utilized that form when they filed their ‘claims’ with the trustee. Mr. Suhrie admitted this. Sub-section (2) obligates the trustee to either admit the claim and deliver the property to the claimant; or deny the claim and supply the claimant with his

the reasons for such denial.

[19] The trustee must make his decision and notify the claimant of it 15 days after the claim is filed or 15 days after a meeting with the creditors, whichever is later. The claimant may appeal the trustee's decision under this sub-section within 15 days after he is served with the notice of dispute. He is deemed to have abandoned or relinquished all right to or interest in the property if he files no appeal within that timeline.

[20] Referring to the claims filed by him and the other appellants, Mr. Robert Suhrie testified:

‘We filed a Form 53 Claim since we already had a lien against the property of the resort. I could not hold out a particular property from the bankruptcy, nor would I want to. Therefore Form 54 would be completely inappropriate and unnecessary because we were advised by the Defendant to claim only if we paid for a particular property in full...’ (underlining added)

[21] The appellants contended that even though they did not use form 54, they are ‘in fact claiming an ‘interest in property, in the possession of a bankrupt at the time of the bankruptcy’. They submitted that they did not file a form 54 ‘due mainly to the guidance and prompting of the Trustee in communications to the Applicants’. They argued that the decision to file a form 53 claim was based on early correspondence sent to them by the Trustee. They contended further that the Trustee prodded them not to make Form 54 claims, but instead to make Form 53 claims.

[22] They submitted that it appeared that he did so in order to deal with the ‘novel position’ presented by their applications, and their special position by virtue of:

- (a) their judgments and registered liens against the bankrupt property; and
- (b) an interest in the property in his possession during the bankruptcy.

They reasoned that he appeared to be devising a strategy to resolve the difficult issues, but not in their interests.

[23] The trustee argued that even if one were to ignore the appellants’ failure to use the prescribed form, their reliance on section 70 as a ground of appeal is still baseless, because their proofs did not refer to the property of the bankrupt or to a claim to or for its return, in accordance with section 70

or otherwise. He reasoned that it follows that no proofs of claim to an interest in the property verified by affidavit as stipulated, has been made and there was therefore no obligation on him to adjudicate any such claim or otherwise comply with section 70 (2) of the BIA. I agree. In fact, as noted earlier, Mr. Suhrie accepted that no claim was made by him or the other appellants by Form 54.

[24] The Trustee contended further that he did not issue a notice in writing to any of the appellants under section 70 (2) of the BIA, disputing their claims. The appellants have not averred that they made any such claims. The evidence is to the contrary. The Trustee concluded that no such notice of dispute exists from which an appeal may arise under section 70 (2) of the BIA; and accordingly no basis for an appeal under that provision. This is so. The Trustee's reasoning is impeccable. I find therefore that the appellants are unable to and have advanced no factual or legal basis for invoking section 70 (2) of the BIA as a ground of appeal. Their appeal must fail on this limb of their arguments.

[25] Their suggestion that the Trustee failed to advise them is baseless. There is no requirement for him to do so, precisely because it would create a conflict where he would be purporting to advise them and advise himself. This is contrary to the timeless natural justice principles which precludes an adjudicator from being a judge in his own cause.

Sections 75, 120 and rule 6 (f) of the BIA

[26] In relation to sections 75, 120 and rule 6 (f) presumably of the BIA¹², the appellants pleaded:

'9. ...the Applicants/Claimants then ... filed this application under S69 of the Act and for an injunction under S120 and 75 and Rule 6 (f). The Court has jurisdiction by virtue of S226 of the Act.'

[27] The appellants provided no submissions to explain the implied rational connection between sections 75, 120 and rule 6 (f) and their appeal. The Trustee argued that none of those provisions contemplate an appeal 'or provide for the originating process for appealing a trustee's

¹² Defended as such by the Trustee in his pleadings and submissions.

determination 'as noted by the court at paragraph 19 of ...' its earlier decision dated September 18th 2019. He set out the relevant provisions which are self-explanatory.

[28] Sections 75 and 120 of the BIA state respectively:

'All sales of property made by a trustee vest in the purchaser all the legal and equitable estate of the bankrupt in the property.'

'Notwithstanding section 118 (3) and section 119, the creditor may, by notice in writing, require the trustee to elect whether he will exercise the power of redeeming the security or requiring it to be realized, and if the trustee does not, within one month after receiving the notice or such further time or times as the Court may allow, signify in writing to the creditor his election to exercise the power, the trustee is not entitled to exercise that power, and the equity of redemption or any other interest in the property comprised in the security that is vested in the trustee shall vest in the creditor, and the amount of the claim of the trustee shall be reduced by the amount at which the security has been valued.'

[29] Section 75 makes clear that a purchaser of property from the trustee owns all legal and equitable interests in it that were formerly vested in the bankrupt. Section 120 imposes an obligation on the trustee to elect at the instance of the creditor, whether he will redeem a security or require it to be realized. It also precludes him from exercising the power of redemption if he fails to notify the creditor of his election within the stipulated timeframe. Neither of these provisions creates an avenue for an appeal.

[30] The appellants referred to rule 6 (f). The appropriate reference is to 'regulations' and not 'rules'. That regulation provides that all trials of issues of fact must be conducted in open court. It is self-evident that this is not relevant to grounding an appeal. As submitted by the Trustee, the appellants' reliance on sections 75 and 120 and regulation 6 (f) to anchor their appeal is misplaced. I find that those provisions afford no legal or other basis for an appeal as pleaded and alleged.

[31] The Trustee submitted further that none of the appellants issued any notice to him pursuant to

sections 120 of the BIA, requiring him to make an election under that provision. I agree that there is no evidence of this. The Trustee argued that for this reason section 120 is irrelevant to these proceedings. The appellants did not address this in their submissions. It is an unassailable submission. The Trustee contended further that the appellants did not specify in their pleadings, any provision of the BIA or any other law by virtue of which the appeal was brought. They argued that this failure is fatal to the appeal. I agree that it is on both scores.

Sections 69 and 226 of the BIA

[32] Paragraph 9 of the Amended Motion mentioned sections 69 and 226 of the BIA. The appellants made no submissions regarding those provisions. Neither did the Trustee. For the sake of completeness they are now addressed.

[33] Those sections state respectively:

‘Where the trustee has seized or disposed of property in the possession or on the premises of a bankrupt without notice of any claim in respect of the property and it is made to appear that the property was not at the date of the bankruptcy the property of the bankrupt or was subject to an unregistered lien, a right of retention, a pledge or a charge, the trustee is not personally liable for any loss or damage arising from the seizure or disposal sustained by any person claiming the property or an interest in the property or for the costs of proceedings taken to establish a claim to the property, unless the Court is of the opinion that the trustee has been guilty of negligence with respect to the duties of the trustee in relation to the property.

‘Subject to this Act, the Court shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, that may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.’

[34] Neither of these provisions offers a route to an appeal. In the case of section 69, it exempts the

trustee from personal liability for loss or damage in respect of his dealings with any of the bankrupt's property that he might seize or dispose of in his capacity as trustee. Unless he was negligent in his dealings, if he had no notice of any unregistered lien (or other encumbrance over) or claim to any such property found on the bankrupt's property or in its possession, the Court may not make a finding that he is liable. Section 226 summarizes the Court's jurisdictional remit with respect to issues of priorities and all legal issues in relation to the distribution of property in insolvency proceedings. The referenced provisions are not applicable to the appeals in this matter. They do not assist the appellants.

Piercing the corporate veil

[35] The appellants argued that the Trustee admitted to them in his correspondences that he was aware of sufficient commingling of assets of 'all David Aims companies'¹³. They added and all the circumstances set out in the **Bertrand Burke v Mildred Kirwan et al**¹⁴ case, as articulated in their July 2019 submissions. They led evidence that the judgment debtor companies are controlled and directed by David Ames. They submitted that the Trustee has a duty to lift the corporate veil if necessary to give effect to their claims. They argued that his communication with them steered them towards form 53 claims. They pointed out that his letter of March 10th 2017 did not include a form 54. They contended that consequently all proofs of claims were filed; on:

1. March 13th 2017 for Suhrie;
2. 20th May 2017 for Lutsky;
3. 20th March 2017 for Cox; and
4. 24th March 2017 for Caldwell.

[36] They submitted that they sent a Notice of Intention to Enforce Security to the Trustee pursuant to section 12 of the BIA. They submitted further that by letter of August 22 2017 (which introduced section 70 claims) that they had all already filed their Form 53 claims. They argued that that letter excluded them from making section 70 claims, as they had no units or phase 1A claims. They contended that no account was taken of their special claim. They argued further that this event was

¹³ Presumably 'David Ames' was intended.

¹⁴ Claim number MNIHCV2014/0028.

followed by the letter of December 3rd 2017 which 'clearly excluded them in the circumstances indentified (sic) therein'. They noted that section 13 of the BIA imposes a duty on a receiver to act in good faith. They reasoned that the Trustee must comply with the duties of a Trustee to all interested parties. They argued that the Trustee offered no evidence that he considered the law in relation to lifting the corporate veil. Implicit in the foregoing is the notion that he was bound by statute to do so. I make no finding that he was.

[37] The appellants contended that they 'were vigilant enough to do all they could to extract their money' from the Trustee and David Ames. They pointed out that they brought proceedings against David Ames and all 'his' companies and served Notices of Intention to Enforce a Security on them. They argued further that the bankrupt brought an action by its principal owner David Ames to have the liens removed from all his companies including Harlequin Property (SVG) Ltd. ('HPSVG'). They submitted that Robert Suhrie's entire affidavit clearly outlines the direct link between David Ames and all his companies especially HPSVG.

[38] They rehearsed that their application to the Court to join HPSVG to all judgments and to have a receiver appointed in respect of the real estate assets and personal assets of David Ames and his companies was adjourned by Master Moise to 15th January, 2019¹⁵. The appellants submitted that they are in a unique combination of circumstances akin to the appellants in **Octavius John v CLICO**¹⁶ as described in paragraph 47.

[39] There the Court set out what it considered to be the procedure for judicial management of insurance companies, as follows:

'The statutory regime for judicial management of insurance companies

[37] We endorse the view of Goodridge JA above at [31]-[33] as to the purpose of judicial management. It should also be noted that s 61(1) of the Insurance Act states as follows.

"The judicial manager shall conduct the management of the insurance company with the greatest economy compatible with efficiency and shall, as soon as practicable,

¹⁵ By order dated 31st October, 2018.

¹⁶ [2019] CCJ 05 (AJ).

file with the court a report stating which of the following courses is in the circumstances, in his opinion, most advantageous to the general interest of the policy holders of the company and seeking an order accordingly (a) the transfer of all or any part of the insurance business of the company to some other insurance company in pursuance of a scheme prepared by the judicial manager and annexed to his report; (b) the carrying on of its business either unconditionally or subject to such conditions as the judicial manager may suggest; (c) the winding up of the company; or (d) such other course as he considers advisable.”¹⁷

[40] This court observes that the foregoing excerpt addresses and explains the specific legal provision governing judicial management of insurance companies in Barbados. This court is not currently engaged in such an exercise. The appellants did not identify any parallels between that statutory regime and:

1. the regime in this jurisdiction governing how a trustee of a bankrupt should treat with issues related to liens:
 - (a) founded on judgments involving entities other than the bankrupt;
 - (b) over the bankrupt’s property; and
2. Form 53 claims by persons asserting a right to or interest in such property by virtue of such judgments; and
3. alleged ‘implicit Form 54 claims’ purportedly arising through breach of duty by a trustee to advise a claimant to pursue a Form 54 claim.

[41] I fail to see any direct or indirect connection between the excerpt from the **Octavius John** decision and the circumstances in the present case. It does not assist this court in resolving the issues which arise for consideration in this appeal. It is therefore disregarded.

[42] The appellants contended that the learned Master did not remove the liens and they are therefore preserved to this day. They argued that the Trustee chose to go behind the law outlined in Section 5 (3) of the **Registration of Documents Act** and declare that the liens are worthless. They contended that the Trustee is aware that they have matters before the Court to lift HPSVG’s

¹⁷ [2019] CCJ 05 (AJ), at para. 37.

corporate veil 'to declare their judgments against David Ames and his companies'. They submitted that after they joined David Ames to all their judgments, he applied to the High Court to have his name removed and was unsuccessful. They argued that all of the judgments and liens are also against David Ames.

[43] The appellants submitted further that in the circumstances, the stay of their application to join HPSVG to their claim before the Court has caused 'exceptional prejudice to them' or in the words of section 56 of the BIA 'the Creditor is likely to be materially (sic) prejudiced by the continued operation of the stay'. They argued that it is therefore equitable to grant the injunction prayed for or to order that the liens are valid and that the Trustee's disallowance of their security is not equitable or just in all the circumstances. They contended that 'despite the alacrity (sic) with which they had sought to look after their interests ... the test here is likely to be materially prejudiced!'.

[44] They argued that paragraph 15 of Robert Suhrie's affidavit details the extreme cost to them and that they stand to lose everything. They relied also on the decision of the Court in the case of **Bertrand Burke v Mildred Kirwan**. They submitted that the Court in that case held:

'The circumstances in which a court may be prepared to lift or pierce the corporate veil include;

- (1) where the company was being used for a deliberately dishonest purpose.
- (2) to recognize the receipt of the company as that of the individuals in control of it if the company was used as a device or façade to conceal the true facts there by avoiding or concealing any liability of those individuals.
- (3) in family matters (sic) where assets are vested in a one man company and the company is considered an alter ego of a party.
- (4) in cases of impropriety linked to the use of the company structure to avoid or conceal liability.
- (5) when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evade or whose enforcement he deliberately frustrates by interposing a company under his control'.

[45] The appellants reasoned that in circumstances where there is no real separation between

companies and the alter ego David Ames the Court is being asked to consider the alleged mixing of accounts and that the reckless use of their monies was not in accordance with their contracts.

They submitted that factors the courts usually consider are:

1. Whether the company engaged in fraudulent or improper behavior.
2. Whether the companies failed to follow corporate formalities.
3. Was the company inadequately capitalized and not a corporate entity to stand on its own?
4. The sole ownership of the companies by David Ames.
5. Did these companies hold annual meetings; keep accurate and detailed records? Did they commingle assets?

- [46] They contended that as Mr. Suhrie testified, the checks made to Harlequin Property are evidence shared and commingling – presumably assets. They argued that guidelines for purchase are clear as attested by Mr. Suhrie. The appellants submitted: ‘ “encumbrance” under the RDA includes “other Liens” in any event S 23 of our Civil Procedure Code will create the necessary security interest once the veil of the company is lifted and our application to join HPSVG is heard. They submitted that HSPVG is genuinely a third party, which we say it is not.’
- [47] The Trustee submitted that the **Burke** case exemplifies the great evidential burden placed on an applicant seeking to lift the corporate veil. He noted that the learned Master denied the application, having remarked¹⁸ that the statement of case established no basis for doing so.
- [48] The appellants contended that the referenced stayed Application is for the very purpose of exposing the sham between the companies and HPSVG. They contended further that their liens give them a secured claim against the bankrupt and that if the bankrupt’s property is sold they will lose all.
- [49] The Trustee submitted that the appellants’ suggestion that the referenced orders should be treated as if they were made against the bankrupt, solely because of its relationship to the judgment debtor companies, ignores the universally accepted legal principle of separate corporate personality. He submitted that the English Court of Appeal decision of **Adams v Cape Industries plc**¹⁹ re-affirmed

¹⁸ At paragraph 23 of the **Bertrand Burke v Mildred Kirwan et al** case.

¹⁹ [1990] Ch 433 Eng CA.

that the principle (of a company's separate legal personality) applies equally to companies within a 'corporate group', akin to the corporate grouping that the appellants contend exists between the bankrupt and the judgment debtor companies against whom they obtained the referenced orders.

- [50] The Trustee highlighted the pronouncement by Slade LJ in that case²⁰, where he adopted an articulation of the principle as enunciated by Roskill L.J. in **The Albazero** that:

'There is no general principle that all companies in a group are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities.'²¹

- [51] The Trustee submitted further that the High Court in Saint Vincent and the Grenadines has already addressed that argument in the decision by my learned sister Byer J. in the case of **Lee et al v Glasgow (as trustee of the estate of Harlequin Property (SVG) Limited (in the matter of the Bankruptcy of Harlequin Property (SVG) Limited** where she opined:

'[37] The submission of the Appellants seems to suggest, that the mere fact that the entity and HPSVG had the same names (Harlequin) that without more, the entity that signed all the documents upon which the Appellant relied, could only mean that the entity was the agent of HPSVG. In this court's mind this is a wrong proposition of law.'²²

- [52] The appellants rejoined: 'the judgments of Justice Byer did not consider the position of the Applicants/Appellants and therefore do not bind them.' The Trustee submitted that in the case at bar, the evidential and legal basis for the Appellants' attempts to treat debts of the other judgment debtor companies as the bankrupt's debts is not too far from that relied on in **Lee et al**. This latter submission invites the court to review the decision in the **Lee case** to appreciate whether the appellants in the instant claim are making the same factual and legal assertions as the claimants in

²⁰ At page 476.

²¹ [1977] A.C. 774 at p. 807.

²² SVGHCV2017/0061, at para. 37.

Lee et al. I do not consider that to be necessary. In my opinion, it would not be an efficient and effective use of the court's time.

[53] The appellants submitted that they are not merely relying on the same or similar names of the companies. They remarked that they are not that trite. They maintained that the principles enunciated in the **Bertrand Burke case** are applicable.

[54] In any event, I do not interpret the appellants' submission to be as simplistic as inviting the court to find that the similarities between the bankrupt's name and the judgment debtor companies' names, translate to a conclusion that the entity signing the documents on which the appellants relied, was the bankrupt's agent. Rather, the appellants contended that the dealings between David Ames, the judgment debtor companies and the bankrupt were so closely connected that the court should rule that this is an appropriate case to pierce the corporate veil to permit them, to pursue the bankrupt and attach their liens to its property, for enforcement purposes. I hasten to point out that the Trustee's submissions regarding the effect of an order lifting the corporate veil are legally sound and demonstrate that the principle is not applicable to the facts of this case and cannot benefit the appellants in the way they intended to invoke it. This is dealt with later in the judgment.

[55] The appellants submitted that the issue turns on whether the referenced liens and judgments can be regarded as judgments against HPSVG, which would enable them to bind the bankrupts land and create a security or interest in it. The Trustee submitted that the appellants appear to suggest in their supporting affidavits that the mere fact that the judgment debtor companies and the bankrupt have the same beneficial owner means that they may unilaterally impose an incumbrance on the bankrupt's property by filing a notice to that effect. He argued that piercing the corporate veil of a limited liability company is not such a simple undertaking.

[56] He contended that a challenge based on the doctrine of piercing the corporate veil must be clearly and convincingly pleaded and include the subject company as a party. He argued that no company is a party to the present proceedings; the bankrupt is not a party and further no proceedings have been taken to pierce the judgment debtor companies' corporate veil or to treat them and the bankrupt as one. The Trustee reasoned that since neither the judgment debtor companies nor the

bankrupt are party to the instant proceedings, the court has no jurisdiction make an order for piercing their corporate veil. That is so.

[57] The Trustee submitted correctly that the doctrine of piercing the corporate veil refers to a situation 'in which a court of law may disregard the principle of separate corporate personality' consider who are the persons directing and controlling the company's activities and hold its shareholders or directors personally liable for its actions or debts. He cited learning from the practitioner's encyclopaedia of law, **Halsbury's Laws of England**²³. He argued further that the appellants have not produced any evidence to establish that the bankrupt company was a director or shareholder of or the person controlling the judgment debtor companies. He submitted that to the contrary the appellants have provided testimony that the judgment debtor companies are controlled and directed by David Ames.

[58] The Trustee argued that while the appellants may obtain recourse against the judgment debtor companies' beneficial owners or controllers by an order to pierce the corporate veil of one of the judgment debtor companies, it would not provide them with a remedy against the bankrupt or its estate. He submitted that while piercing the corporate veil is not sustainable in this case, it would not result in a security over the bankrupt's property, even if it was an available route for the appellants. The Trustee's submissions on this issue of piercing the corporate veil are fulsome and accurately capture the salient aspects of the applicable law. His analysis of the appellants' case for piercing the corporate veil is just as comprehensive and flawless in every respect. I adopt them for present purposes. I find therefore that the appellants by their pleadings, have made no application to pierce the corporate veil and further that such an order could not be made in any case, on the factual matrix before this court. I make no order granting them such relief.

Civil Procedure Act

[59] The appellants argued that the referenced judgments ought to be deemed valid

²³ (2016) Vol. 14, para. 116.

judgments against the bankrupt and in such case would be caught by section 23 of the **Civil Procedure Act** ('CPC')²⁴. They submitted that they have pending applications to join the bankrupt as a party to the referenced judgments; and to appoint a receiver over the bankrupt; and that both have been stayed, pursuant to the Trustee's appointment.

- [60] The Trustee submitted that pursuant to section 23 of the CPC, a judgment for the payment of money will bind the judgment debtor's lands, and no one else's. He argued that the bankrupt was never a party to those proceedings and is therefore not bound by the referenced orders. He submitted that the referenced orders cannot therefore bind the bankrupt's lands, tenements or hereditaments, because he is a stranger to the proceedings in which they were made.
- [61] He contended further that the Notices of Incumbrances filed by the appellants pursuant to section 3 of the Registration of Documents Act²⁵, create no security in themselves but merely provide notice to the world that the person filing them claims to be entitled to a security interest in the subject land (described in the notice). He contended that to create an incumbrance, it must be effected by act of the parties, by statute or operation of law. That indeed is a correct statement of the law.
- [62] The Trustee submitted that to the extent that the appellants are relying on section 23 of the CPC to establish the existence of such an incumbrance, the orders do not constitute a binding security interest over the bankrupt's property because it (the bankrupt) is not a judgment debtor. He concluded that the Notices of Incumbrance are therefore ineffective. The Trustee's submissions on this point are accurate. Applying those correct statements of the law to the appellants' averments, it is this court's determination that section 23 of the CPC does not assist the appellants in persisting in their misguided posture that the referenced judgments are to be ruled validly obtained or enforceable against the bankrupt. I find that they have not. Section 23 of the CPC has no such effect. Those assertions are factually and legally baseless.

²⁴ Cap. 120 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

²⁵ Cap. 132 of the Revised Laws of Saint Vincent and the Grenadines, 2009, section 5.

Curing irregularities in the appellants' case

[63] The appellants submitted that they rely on sections 227 and 228 and Rule 19²⁶ Form 3 of the BIA to cure any perceived or other defects in their case. Sections 227 and 228 provide respectively:

'No Proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

- (1) The Court may review, rescind or vary any order made by it under jurisdiction in insolvency.
- (2) The Court may at any time adjourn any proceedings before it upon such terms, if any, as it may think or to impose.
- (3) The Court may at any time amend any written process or proceeding under this Act, upon such terms, if any, as it may think for to impose.'

[64] Regulation 19 provides that every application to the court shall be by motion in Form 3. The Court had reason to address this issue partially in a decision rendered on September 18th 2019. The matter proceeded on the basis of rulings made at that time. Any further irregularities which have arisen since then have been discussed and dealt with by rulings elsewhere in this judgment. Suffice it to say that sections 227 and 228 of the BIA enable the court to make orders correcting procedural or other defects or irregularities in pleadings and other filings the effect of which would not amount to substantial injustice to an opposing party. Those considerations have been engaged throughout and applied in arriving at the determinations made in this judgment.

The Stay

[65] The appellants contended that based on *dicta* in the **Octavius John case** they are prejudiced or are likely to be materially prejudiced by the continued stay of their application to appoint Stanley Defreitas as 'Receiver to Defendant's companies including HPSVG'. They contended that the stay prevents the determination of the very matter identified by the Trustee as the 'issues in this claim'.

²⁶ Presumably regulation 19.

[66] The proceedings before me did not relate to the stay imposed by the learned Master. That application is still pending, apparently. The pleadings did not raise the issue of the stay as a live one in this forum. I therefore make no order lifting or otherwise addressing the stay.

[67] The appellants have been unsuccessful in establishing either a factual or legal basis for disturbing the Trustee's determination in relation to their claims and the Notices of Disallowances. Their appeal is therefore dismissed.

Issue 2 - To what remedies, if any, are the appellants entitled?

[68] The appellants submitted that they are seeking injunctive relief to restrain the sale of the subject property if their appeal is successful. Having found that they have not made out their case to disturb the Trustee's decisions, they have failed to establish a basis to grant the remedy they seek. I make no order granting the injunction claimed.

COSTS

[69] The Trustee was the successful party. He is entitled to recover his costs in accordance with established principles and rules of court.

ORDERS

[70] It is accordingly declared and ordered:

1. The appeal is dismissed.
2. The appellants shall pay to the Trustee prescribed costs of \$7500.00 pursuant to CPR 65.5 (2) (b).

Postscript

[71] After the hearing on January 23rd 2020, learned counsel Ms. Kay Bacchus-Baptiste requested an extended period of time to prepare and file her written submissions. She represented that she expected to be out of the State for a prolonged period and would have difficulty in finalizing her submissions before mid-March. Both parties represented that they wished to be given a further opportunity to file written submissions in response to closing written submissions filed by the other side. Those applications were granted in the exceptional circumstances.

[72] By order of court made on that date, the due dates for closing written submissions and responses to the same were scheduled respectively for March 16th and 23rd 2020. All parties filed written submissions but no responses to written submissions were filed. The parties were also directed to transmit electronic copies of their pleadings, affidavits, written submissions and list of authorities to the court office in MS Word format. This was to facilitate preparation of the judgment in a timely manner. None of the parties complied with that part of the order and no explanations or apologies were extended. Counsel provided written submissions which were helpful to the court. The court is appreciative.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar