

**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

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: Jul. 22
Sept. 18

DECISION

BACKGROUND

[1] **Henry, J.:** Mr. Brian Glasgow of KPMG Eastern Caribbean is the Trustee of Harlequin Properties (SVG) Ltd., a bankrupt ('the bankrupt'). He was deemed to have been so constituted when the bankrupt failed to make a timely proposal to its creditors after filing a Notice of Intention to do so. His appointment as Trustee was formalized on March 3rd, 2017 when the Supervisor of Insolvency issued a Certificate of Assignment. It is in that capacity that he appears before the court¹ in these proceedings.

[2] Robert Suhrie, Bret Lutsky, Stephanie Lutsky, Frank Cox, Carl E. Palermo Jr., Joan A. Palermo, Raymond Caldwell and Christine Neely (referred to collectively either as 'the applicants' or as 'the appellants'²) have filed a Motion³ seeking an injunction to prevent the Trustee from selling or

¹ An Amended Motion filed on 30th April 2019 included reference to his trustee status.

² Depending on the context.

³ On April 10th 2019.

concluding the sale of 19.05 acres of land at Buccament Bay in the State of Saint Vincent and the Grenadines and registered as Deed No. 1078 of 2009 ('the subject property'). It is registered in the bankrupt's name. The applicants have also filed an appeal against Notices of Disallowances which they alleged that the Trustee issued regarding certain claims they made to him as 'creditors' of the bankrupt.

- [3] The Trustee filed a Notice of Opposition to the Motion and has applied for summary judgment. He submitted that there are a number of procedural irregularities which are fatal to the applicants' claim that should result in the application and appeal being struck out. The applicants have rejoined that the court may invoke section 227 or 228 of the Bankruptcy and Insolvency Act⁴ ('BIA') to cure any defects in their case.

ISSUES

- [4] The issues are whether:

1. To allow the appeal against one or more of the Notices of disallowance?
2. To grant the injunction restraining the Trustee from selling the subject property?
3. To make an order for summary judgment on the Trustee's cross-application? and,
4. The Notice of Application and/or appeal can survive any procedural irregularities in the applicants' pleaded case?

ANALYSIS

Issue 1 - Should the appeal against one or more of the Notices of Disallowance be allowed?

Preliminary observations

- [5] The proceedings initiated by claim number SVHHCV2016/0053 were commenced in 2016. They related to the bankruptcy proceedings involving the bankrupt. The matter has generated several voluminous bundles of documents. It has been presided over at different times by three other judges, two of whom had exercised exclusive management and control of those proceedings for an extended period. This is reflected on the Orders endorsed on the file and rehearsed in a series of letters written to the letter by learned Queens Counsel Mr. Garth Patterson.

⁴ Cap. 136 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

- [6] Learned Queens Counsel had brought these background facts to the attention of the learned Registrar when he sought unsuccessfully to have the instant proceedings continued before one of the judges who would have become quite familiar with the background to the case and the factual and legal issues. He observed that the switching of the case from one judicial officer to another in the past had necessitated adjournments to afford a new judicial officer to familiarize himself with the issues. Learned Queens Counsel quite correctly indicated that the usual practice in matters of such complexity is to seek as far as possible to have all related proceedings handled by the same judicial officer. He explained that this serves to avoid unnecessary expense, delay and frustration.
- [7] Those representations were considered by the learned Registrar along with opposing ones made by learned counsel Mrs. Kay Bacchus-Baptiste on behalf of the applicants. A decision was taken to assign the instant proceedings to me. Suffice it to say that Learned Queens Counsel's observations regarding the desirability of saving time and expense in the manner recommended accords with best practices. Unfortunately, there are times when this approach is not followed due to the exigencies of the administration of justice. On behalf of the administration of justice system, I apologize for any inconvenience occasioned to the parties by the introduction of yet another judicial officer at this stage of the proceedings.
- [8] As it turned out, while this decision was being prepared, it was discovered that a number of documents appeared to have been removed from the case file. These include the original Motion (with attachments) and supporting affidavit filed by the applicants/appellants on April 10th 2019; the Notice of Motion and affidavit of Brian Glasgow filed by the Trustee on April 26th 2019 and the affidavit of Robert Suhrie filed on May 10, 2019. The Trustee had graciously provided electronic copies of his filings to the court in accordance with the relevant court order⁵.
- [9] Attempts to retrieve copies of the applicants' filings from their legal practitioner were largely unsuccessful until September 16th 2019 when electronic copies of the affidavits sworn to by Mr. Suhrie and Lynette Jameson, a Notice of Application⁶ and other exhibits, and their written

⁵ Dated 22nd July 2019.

⁶ Filed in 2015.

submissions were forwarded to the court by email. At the Court's request, the Trustee had previously supplied the court office with photocopies of the applicants' written submissions, their original motion and some of the exhibits – the liens. It remains a mystery how and under what circumstances important pleadings and documentation have disappeared and remained missing from July 22nd 2019 when the hearing was concluded up to present. The learned Registrar is invited to conduct an investigation to ascertain how this happened.

Notices of Disallowance and appeal

- [10] Robert Suhrie, Bret Lutsky, Stephanie Lutsky, Frank Cox, Carl E. Palermo Jr., Joan A. Palermo, Raymond Caldwell and Chritine Neely have filed a two-pronged Motion. For purposes of the appeal element of their motion, they are appellants and will be addressed as such.
- [11] The appellants claimed that they obtained court orders against Harlequin Management Services ('HMS'), Dave Ames, Buccament Bay Resort Ltd ('BBRL') and Merricks Resort Ltd. ('MRL'). The Trustee pleaded that the bankrupt was not a party to those proceedings. The appellants pleaded that relying on those judgments they registered liens⁷ against the subject property on 14th February 2014, and on September 23rd 2016 gave notice to the Trustee of their intention to enforce the security. They averred that the Notices of Intention were submitted pursuant to section 12 of the Bankruptcy and Insolvency Act ('BIA'). They alleged that HMS, Mr. Ames, BBRL and MRL had assigned their contracts and debts to the bankrupt even before they obtained their judgments.
- [12] The appellants pleaded that the Trustee sent each of them a notice pursuant to section 70 (4) of the BIA to which they responded by filing proof of their claims including judgments, deeds of assignment and copies of the registered liens. They claimed that the Trustee failed to comply with section 70(2) of the Act and as a result they wrote to him demanding that he honour their claims. They contended that the Trustee thereupon requested that they present legal submissions to support their claim which they did.

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.

- [13] The appellants pleaded further that the Trustee once again failed to honour their claims as a result of which they issued notices in the newspapers in Saint Vincent and the Grenadines and proceeded to file this appeal.
- [14] They pleaded that they apply to the court for an order that:
‘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.**’ (Bold added)
- [15] The Trustee contended that ‘an appeal’ cannot be construed as a valid relief. He argued further that the appellants have not identified the relevant section or legislation under which such relief is being sought. He submitted that this would assist the Court and him in understanding the underlying basis of the claim. He argued that the appellants claim for relief in the form of ‘an appeal’ is puzzling, and does not constitute relief recognizable by a court of law.
- [16] The Trustee submitted that the bankrupt was not named as a defendant in any of the judgments and none of them were made against the bankrupt in favour of any of the appellants. He submitted further that no judgment been entered against the bankrupt in favour of the appellants or any of them. He pleaded and contended that he disallowed the appellants’ claims and issued them Notices of Disallowance after satisfying himself that they failed to demonstrate that they held any valid security over the subject property. He confirmed that he proposes to sell it.
- [17] The appellants purported to initiate their appeal by Motion. They pleaded that their application (which includes the appeal) is made pursuant to section 120 and 75 of the BIA and rule 6(f)⁸. Neither they nor the Trustee made submissions regarding those legal provisions. The appellants did not advance any legal argument which support their reliance on section 120 and 75 of the BIA and ‘rule 6(f)’.

⁸ Presumably regulation 6 (f) of the BIA.

- [18] Section 75 of the BIA provides that properties sold by a trustee operate to vest in the purchaser all of the bankrupt's legal and equitable estate in the property. Section 120 authorises a secured creditor to place a trustee on election regarding whether he will exercise the power of redeeming a security or require that it be realized. In accordance with that provision, if a trustee fails to signify his election to exercise the power within the requisite time, he may not do so subsequently. Thereafter the property becomes vested in the creditor.
- [19] Regulation 6 (f) stipulates that all trials of issues of fact must be held in open court. The hearing of the instant Motion was held in chambers. Neither section 75 or 120 nor regulation 6 (f) of the BIA deals with the originating process for appealing a trustee's determination. They do not assist the court in arriving at a determination on the issue of the appeal.
- [20] Regulation 199 of the BIA Regulations provides that appeals are to be regulated by the CPR. Part 60 of the CPR is applicable. Rule 60.2 of the CPR stipulates that an appeal to the Court must be made in the prescribed form by fixed date claim. The claim must outline the grounds of appeal and state the decision appealed against; identify the enactment enabling the appeal and the person whose decision is being appealed; the facts found by the tribunal; and any factual or legal findings being challenged.
- [21] The appellants did not utilize a fixed date claim form in lodging their appeal. However, section 227 and regulation 4 of the BIA regulations provide that no bankruptcy proceeding is invalidated by any formal defect or irregularity unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.
- [22] The Trustee has not claimed that he has been prejudiced or has suffered injustice by the appellants' failure to utilize the fixed date form. However, he submitted that section 125(5) of the BIA provides that a person who has received a notice of disallowance pursuant to section 125 of the BIA has the option of appealing the Trustee's decision to the Court. He argued that to the extent that the appellant intended the Motion to constitute such an appeal, this has not been made evident by its contents or form. He submitted that the appellants have not sought appellate relief, or provided substantive grounds on which they are appealing his decision, or referred to the reasons for the disallowance outlined in the Notice of Disallowance.

- [23] The Trustee contended that he is not in a position to properly respond to any purported appeal because the appellants have not properly pleaded their case. He argued that the irregularities contained in the Motion are not mere procedural irregularities, that they have caused substantial injustice to him because it constitutes a claim to which, on its face, he is unable to respond. He submitted further that any such proposed appeal has no reasonable prospect of succeeding.
- [24] The stated 'relief' articulated by the appellants in their Motion signaled that they are dissatisfied with the Trustee's determination of their 'Notices of intention to enforce a security'. By the pleading, they also seek an order setting aside the Trustee's determination. They set out 11 grounds of appeal. In those grounds they purport to highlight certain factual and legal findings by reference to the Notices of Disallowance. However, they did not specify any provision of the BIA or other law pursuant to which the appeal was purportedly made. In this regard, they did not comply with the CPR. Notwithstanding, the parties have purported to prosecute and argue the merits of the appeal based on the contents of the documents filed. They filed written submissions on those matters.
- [25] The guidance outlined in the CPR regarding how such an appeal should proceed, is applicable to the present proceedings. The appellants have identified section 120 and 75 of the BIA and rule 6(f) as the enactment under which the appeal is brought. They have complied with each aspect of CPR 60.2 except that they did not use a Fixed Date Claim Form. Their failure to use the fixed date claim form although irregular will not hamper the progress of the appeal in the court. I make no finding that any of the parties were prejudiced or suffered any injustice thereby.
- [26] I make the observation that all parties were all represented by very senior counsel who undoubtedly were aware of or had the opportunity to apprise themselves of the procedural requirements and took no objection to the non-use of the fixed date claim form. The parties appeared content to accept and act on the statements outlined in the affidavits filed in this matter. This suggests that they have completed filings in respect of the appeal. However, CPR 60.8 stipulates that the appeal is to be way of re-hearing unless an enactment otherwise provides. The BIA makes no contrary stipulation for appeals. It follows that the court must re-hear the appellants' claim. It may do so at

the first or a subsequent hearing.⁹

[27] The CPR outlines the general rule regarding the taking of evidence at trial. The combined effect of CPR 27.2 and 29.2 requires that a trial be conducted and unless an order is made otherwise that evidence be received in open court. This corresponds to the dictates of Regulation 6 (f) of the BIA Regulations. The Court of Appeal has made pronouncements on the requirement for a trial, even if only summarily in appropriate cases. Their judgments in the cases of **Richard Frederick et al v. The Comptroller of Customs et al**¹⁰ and **Agnes Danzie et al v Cecile Anthony**¹¹ are apt and binding. It is imperative and just that evidence be received in open court and the parties permitted to cross-examine witnesses if they so wish. It would be premature to make any order on the appeal at this stage without hearing the evidence and allowing the parties to test the evidence of the opposing party.

[28] In light of the foregoing, it is clear that the appellants intended by their motion to appeal the Trustee's decision to disallow their claims. Their failure to use the prescribed Fixed Date Claim Form does not obscure this intention. Having found that this irregularity is procedural in nature and does no injustice to the Trustee, I find that the appeal is not thereby invalidated. The court of its own volition may by order rectify this procedural defect. This is desirable on the interests of justice.

[29] The Trustee and the appellants have filed substantive legal submissions which address the central issues. Although afforded the opportunity to file further submissions following the July 2019 hearing the appellants declined to do so. This suggests that they have considered all written and oral submissions advanced by the Trustee and considered it unnecessary to respond. In the circumstances, hearing of the appeal can be completed without further delay.

⁹ CPR 60.7.

¹⁰ SLUHCVP2008/0037 (delivered 6th July 2009, unreported).

¹¹ SLUHCVP2015/0009 (delivered 4th December 2015, unreported).

[30] It is accordingly ordered that the Amended Motion¹² is deemed to be a Fixed Date Claim Form; the affidavit filed by the Trustee on 26th April 2019 is deemed to be his Defence and evidence in reply; and the affidavits of Lynette Jameson and Robert Suhrie are deemed respectively to be the evidence for the appellants and Mr. Suhrie. The hearing of the Appeal is scheduled to a date to be fixed in the month of October 2019. No order is made regarding the appellants' claim for an order setting aside the Notices of Disallowance.

Issue 2 - Should an injunction be granted to restrain the Trustee from selling the subject property?

[31] Relying on the factual background outlined in their pleadings and affidavits, the applicants submitted that as a relief arising from their appeal, they seek an injunction to restrain the sale of the subject property. This suggests that they are claiming a permanent injunction and not interim injunctive relief.

[32] The Trustee submitted that the applicants' Motion does not seek to provide any grounds to support the granting of an injunction and that no affidavit evidence has been supplied that would justify the granting of such relief. He contended that the granting of an injunction is an exceptional, equitable remedy that should only be granted where it appears to the Court to be just and fair to do so. He argued that the applicants have advanced no legal or evidential arguments in support of the granting of an injunction.

[33] The Trustee submitted further that the granting of an injunction would be severely prejudicial to him because any delay of the proposed sale of the subject property could cause irreparable damage to the bankrupt's estate and would be inappropriate in the circumstances.

[34] The court may grant an interim injunction pursuant to the Civil Procedure Rules 2000 ('CPR')¹³. It exercises this authority on discretionary principles¹⁴ as enunciated in the *locus classicus* **American Cyanamid Co. v Ethicon Ltd.**¹⁵ In exercising any discretion the court must have regard to the

¹² Filed by the appellants on 30th April 2019.

¹³ CPR 17.1 (1) (b).

¹⁴ Bean on Injunctions, 9th Ed. para. 1.20.

¹⁵ [1975] A.C. 396.

overriding objective of the CPR.¹⁶ The Court would be required to consider and apply those principles if the applicants were seeking interim relief. They have not made a case for such redress. Significantly, they submitted that this was one of the desired outcomes of their appeal. In the circumstances, this issue is reserved for consideration at the hearing of the appeal. Consideration of that part of their claim is deferred until then.

Issue 3 – Can the Notice of Application and/or appeal survive any procedural irregularities in the applicants' pleaded case?

[35] The proceedings in the instant claim number SVGHCV2016/0053 was commenced in 2016. The Trustee asserted that it was originally entitled 'In the Matter of the Intention to Make a Proposal of Harlequin Property (SVG) Limited', and contained only pleadings related to the matter of the intention to make a proposal and, subsequently, the matter of the appointment of an interim receiver over the Bankrupt. He submitted that since the appointment of the Trustee and the Bankrupt's entering into bankruptcy, all proceedings under this Claim No. are spent, and the claim number has not been utilized in connection with any subsequent proceedings. He contended that all subsequent proceedings related to the bankruptcy of the Bankrupt have been filed in Claim No. SVG2017/0061. The court's record bears this out. The applicants do not dispute this.

[36] It appears from the face of the record that the claim number SVGHCV2016/0053 was inscribed on the instant Motion and Amended Motion by the applicants or their legal practitioner before they lodged the Motion and supporting documentation at the court office. It seems also that the court office made no inquiries but simply incorporated the Motion and subsequent filings into the case file¹⁷ for claim No. SVGHCV2016/0053 and issued them for service in the usual manner.

[37] The case file contains a copy of a letter dated May 13, 2019 per Mr. Garth Patterson Q.C. in which learned Queens Counsel wrote to the learned Registrar alerting her to the incorrect numbering of the Motion and requested that the necessary corrections be done by the Court Office to replace 'SVGHCV2016/0053' with 'SVGHCV2017/0061'. The letter was copied to learned counsel Mrs. Kay

¹⁶ CPR 1.2.

¹⁷ And the court's JEMS electronic record system.

Bacchus-Baptiste who signified by letter dated 15th May 2019 that she had no difficulty with the proposal to correct the numbering. By letter dated May 16th 2019 learned Queens Counsel reiterated his observations and again requested that the errors be corrected. This was not done. The Trustee had already filed his Motion in opposition and for summary judgment and Affidavit using the incorrect case file number. All other filings were similarly intituled.

[38] The Trustee argued that Regulation 12(7) of the BIA Regulations provides:

‘The first proceeding in every matter shall have a distinctive number assigned to it by the Registrar, and all subsequent proceedings in the same matter shall bear the same number.’

He submitted that in accordance with Regulation 12(7), this distinctive number is reserved for all proceedings in the same matter; and accordingly, the alphanumeric ‘SVGHCV2016/0053’ is reserved for proceedings in the case dealing with the bankrupt’s proposal.

[39] He reasoned that since the bankrupt’s proposal failed over three years ago, the bankrupt was on March 3, 2017 deemed to have made an assignment pursuant to section 16 of the BIA. He argued that consequently, any proceedings to be filed in relation to the bankrupt after March 3, 2017 were no longer capable of being filed in the defunct suit numbered SVGHCV2016/0053. He submitted that this matter is now defunct, and the Court is *functus officio*. The applicants made no substantive submissions in response.

[40] Learned Queens Counsel Mr. Patterson quite correctly and properly drew the court’s attention to the administrative errors in assigning a filing number in this case. It is regrettable that the earliest representations made by him and learned counsel Mrs. Bacchus-Baptiste to the learned Registrar regarding correcting the filing number were not addressed prior to the hearing of this Motion. That was the appropriate approach to give certainty to the parties and to maintain procedural integrity in the administrative aspects of the proceedings.

[41] In determining whether those errors are fatal to the applicants’ Motion, the Court must consider who contributed to the *faux pas*; whether the Trustee has been irremediably prejudiced thereby and

whether it is just to strike out the Motion in the circumstances. It seems to me that the Trustee took the proper steps in bringing the irregularity to the Registrar's and the Applicants' attention. He did this roughly 3 weeks after filing his Notice of Motion in Opposition¹⁸. It is clear that he was not immediately alive to the error when he was served with the applicants' Motion. He addressed the issues raised in the Motion fulsomely in his counter motion and Affidavit, before flagging the irregularity. In those circumstances, it does not appear that he was unduly prejudiced by the referenced administrative error.

[42] The applicants chose to file their Motion in these defunct proceedings. They are represented by senior legal counsel who would be expected to address her mind to the proper procedure for lodging the claim. The applicants have given no explanation regarding why they elected to insert their claim in these proceedings by affixing the incorrect claim number to their filings. They could have elected to omit the claim number and rely on the Registry staff to insert the appropriate particulars. By failing to do so they erred, and this contributed to an avoidable aberration. The registry staff and the Registrar did not undo this at the earliest opportunity as they should have. They are therefore not blameless.

[43] The Trustee's written submissions have addressed every conceivable issue and side-issue which appears from the pleadings and affidavits filed by the applicants. They were filed in June 2019, sometime after the exchange of letters with the learned Registrar. The Trustee thereby demonstrated that by then he fully appreciated the claim which the applicants have brought by this Motion. In the premises, any prejudice occasioned to him is seemingly minor.

[44] Section 227 of the BIA provides:

'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.'

¹⁸ Filed on April 26th 2019.

I make no finding that the Trustee has suffered a substantial injustice by the incorrect assignment of numbering on the Motion and associated documentation. Both parties used that claim number in their filings.

[45] I am of the considered opinion that it is just to address this irregularity by re-assigning the appropriate claim number of SVGHCV2017/0061 to the instant Motion and Motion in Opposition. I hasten to add that in view that the proceedings are commercial in nature, the letter component of the claim assignment should be 'SVGHCM'. It is therefore ordered that the Motion, Motion in Opposition and all associated filings in the referenced claim be and are hereby re-assigned the claim number 'SVGHCM2017/0061'. The Registrar is directed to make the necessary adjustments to the entries on the hard copy and electronic versions.

[46] For the sake of completeness and proper record keeping, the heading in this decision carries the new claim number and a parenthetical reference to the previous claim number. The Court acknowledges that the Trustee is very likely inconvenienced by this turn of events. It behooves me to apologize for such inconvenience and the role played by the court staff in contributing to it.

[47] The Trustee highlighted other 'procedural irregularities' which relate directly to the prayer for injunctive relief and the appeal. They have already been addressed. In light of the conclusions reached in respect of each, I hold that those 'irregularities' are not fatal to the claim.

Issue 3 - Should the Trustee's cross-motion for summary judgment be granted?

[48] In his motion in opposition, the Trustee claimed summary judgment under Part 15 of the CPR. He advanced 4 principal grounds, namely:

1. The applicants have no real prospect of succeeding on the claim.
2. The Motion is procedurally flawed and without legal merit. (He identified 25 irregularities which are set out below.)
3. If claim results in prolonged litigation, the consequential delay and expense would cause irreparable harm and damage to the bankrupt's estate.

4. He knows of no other reason why disposal of the claim should await trial.

[49] The Trustee submitted that neither the BIA nor the Regulations provide the applicable procedure, where an appeal by way of motion under the BIA has no reasonable prospect of succeeding. He argued that in accordance with regulation 3 of the BIA regulations the ordinary procedure pursuant to the CPR should apply. He submitted that rule 15.2 of the CPR clothes the Court with authority to give summary judgment against a party on the whole of a claim or on a particular issue. Regulation 3 provides that in cases not provided for in the BIA or the Regulations, the Court shall apply its ordinary procedure pursuant to the CPR if such procedure is not inconsistent with the BIA or Regulations.

[50] CPR rule 15.2 provides:

‘15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the –

- (a) claimant has no real prospect of succeeding on the claim or the issue; or
- (b) defendant has no real prospect of successfully defending the claim or the issue.’

[51] The Trustee contended that the United Kingdom Court of Appeal decision in **Swain v Hillman**¹⁹ is illustrative. He quoted Lord Woolf who said of the grant of summary judgment:

‘It is important that judges in appropriate cases should make use of the power contained in CPR Part 24 [to grant summary judgment]. In doing so, they will give effect to the overriding objective ... It saves expense, achieves expedition, avoids the court's resources being used up on cases where that serves no purpose and is in the interest of justice. If a claimant has a case which is bound to fail, it is in his interest to know as soon as possible that that is the position. ... The proper disposal of an issue under Part 24 ... *is to enable cases, where there is no real prospect of success, either way, to be disposed of summarily.*’

[52] The Trustee also cited the judgments in **Saint Lucia Motor and General Insurance Co. Ltd v Modeste**²⁰, the Barbados case of **Goodman v Venture Kendal International et al**²¹, and the

¹⁹ [2001] 1 All ER 91

²⁰ LC 2010 CA 1.

Jamaican case of **Adola Manufacturing Co. Ltd. et al v McDonald et al**²². Delivering the decision in **Saint Lucia Motor and General Insurance Co. Ltd v Modeste**, Justice of Appeal George Creque referred to **Swain v Hillman** and summarized the applicable principles as follows:

“Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in **Swain v. Hillman** is that the claim or the defence has no “real” (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment.’²³

- [53] The Trustee submitted that if the applicants’ Motion constitutes either an application for injunctive relief or an appeal pursuant to section 125(5) of the BIA or both, that they both depend wholly on the Court deciding the singular issue of whether the applicants hold a secured interest in or incumbrance over the subject property. The Trustee contended that the Motion does not constitute an appeal under section 125 (5) of the Act. The applicants submitted that it was an appeal against ‘the wrongful disallowance’ of their claim, and that the injunction is the relief they seek.
- [54] The Trustee submitted further that on the applicants’ case, the incumbrances allegedly held by them over the subject property form the sole basis for their claims to be entitled to restrain the sale; and to constitute them secured creditors of the bankrupt’s estate. He reasoned that it follows that the existence, validity and enforceability of any such incumbrance is at the foundation of the applicants’

²¹ CV No. 116 of 2013. Decision dated February 2, 2017

²² JM 2009 SC 33

²³ At para. [21].

claim and the key issue to be examined in determining the prospects of success. The Trustee argued that the application for an injunction and the appeal have no real prospect of success because the applicants have no real prospect of establishing that they have any valid incumbrance over the subject property.

[55] The court is not permitted to grant summary judgment in respect of matters which are initiated by Fixed Date Claim Form²⁴ or required to be so commenced. Having regard to the nature of appeals and indeed the present claim, it does not lend itself to the grant of summary judgment. I therefore dismiss the Trustee's application for summary judgment.

COSTS

[56] The parties have had mixed success at this stage of the proceedings. Accordingly, I make no order as to costs. They are each required to pay his or her own costs.

ORDERS

[57] It is accordingly declared and ordered:

1. The claim number in respect of the instant Motion and Motion in Opposition be and is hereby changed from 'SVGHCV2016/0053' to 'SVGHCM2017/0061' and is to be used in all future filings. The Registrar is directed to cause the corrections to be made on the hard copies and electronic versions of all related filings.
2. The Motion and Amended Motion filed by the applicants/appellants is deemed be a Fixed Date Claim Form filed pursuant to Part 60 of the CPR.
3. Hearing of the appeal against the Notices of Disallowance and the associated application for an injunction is adjourned to a date to be fixed in the month of October 2019.
4. The Trustee's application for summary judgment is dismissed.
5. Each party shall pay his or her own costs.

²⁴ CPR 15.3.

[58] I wish to acknowledge and thank counsel for their comprehensive and helpful written submissions. Legal practitioner Ms. Vynette Frederick was very responsive to the court office's requests for photocopies of the pleadings and submissions filed by the applicants. Without this assistance, completion and delivery of this decision would have had to be delayed for some time. The court wishes to record its gratitude to learned counsel Ms. Frederick for her responsiveness and aid in this regard.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar