

THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0061

BETWEEN:

IN THE MATTER OF: The *Bankruptcy and Insolvency Act* (CAP. 136 of the Law of Saint Vincent and the Grenadines, Revised Edition 2009)

AND IN THE MATTER OF: The Bankruptcy of Harlequin Property (SVG) Limited

LINDSAY BRAMBLE

JAMES AND MAREA GERMAIN

APPELLANTS

AND

BRIAN GLASGOW (as Bankruptcy Trustee of the
Estate of Harlequin Property (SVG) Limited)

RESPONDENT

(GROUP 4)

Appearances:

Mr. Dustin Delany for the Appellants

Mr. Garth Patterson Q.C. with Ms. Taylor Laurayne and Ms. Vynnette A. Frederick for the Respondent

2019: April 12

JUDGMENT ON WRITTEN SUBMISSIONS

Judgment on Group 4 so entitled per agreement between the parties by letter dated 25 May 2018.

Byer, J.:

- [1] This claim has emanated from a plethora of litigation surrounding bankruptcy proceedings involving Harlequin Property (SVG) Limited (HPSVG)
- [2] On 3 March 2017, Harlequin Property (SVG) Limited (HPSVG) entered into bankruptcy in Saint Vincent and the Grenadines by virtue of a Certificate of Assignment issued by the Supervisor of Insolvency pursuant to section 29(8) (b) of the Bankruptcy and Insolvency Act, CAP136 of the Laws of Saint Vincent and the Grenadines (the “BIA”) and Mr. Brian Glasgow assumed the role of trustee in bankruptcy of the estate of Harlequin SVG, a bankrupt (BT).
- [3] Pursuant to copious and arduous case management, this Court in agreement with counsel for the Bankruptcy Trustee (BT) and the majority of Appellants filing appeals pursuant to Section 70 of the Bankruptcy and Insolvency Act (BIA) categorized the various appeals under headings for ease of reference.
- [4] This decision therefore refers to the grouping referred to as Group 4 of those appeals in which motions had been filed relating to claims where the Appellants agreements for sale for the purchase of the property is with an entity other than the bankrupt and there is therefore no express agreement for sale between the bankrupt and the Appellant and also that there is an agreement for sale for the purchase of the same property between the bankrupt and another purchaser that is dated later in time than that of the Appellant and whose claim has been accepted by the BT.
- [5] However in order to put these appeals into context, the background to the manner in which the Proof of Claims was dealt with by the BT must also be examined.
- [6] Pursuant to Section 216(1) of the BIA which states: “(1) A trustee may apply to the Court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the Court shall give in writing such directions, if any, as appears to it to be proper in the circumstances.”, the BT made an application to this court as it is presently constituted in October 2017 soliciting its assistance to manage and screen the hundreds of claims that had been made against HPSVG. Upon this court reading the affidavit in support of the Notice of Motion for such directions and being satisfied that the proposed manner in which the Proof of Claims were to be dealt with made commercial and legal sense, this court made an order on the 22 November 2018. This order has never been appealed and thus when these Group 4 Appellants made their claims the BT accordingly dealt with them as set out in the order. The following terms of the order were made in relation to those persons who filed claims where there did not exist an express agreement for sale. By the provisions of the order the BT was at liberty to dispute a claim where any of the following conditions were present:

“a. There is no evidence of a [written sale and purchase agreement for a Cabana or room at the Buccament Bay Property or the Merricks Property] for the sale of the [property to which the claim has been made];

b. The [written sale and purchase agreement for a Cabana or room at the Buccament Bay Property or the Merricks Property] is with a Non-Harlequin Vendor;

c. The [written sale and purchase agreement for a Cabana or room at the Buccament Bay Property or the Merricks Property] is not properly executed by [Harlequin SVG];”

[7] It is therefore the position of the BT having determined the claims that were provided to him pursuant to the terms of the order of November 2018 that the claims were accordingly dealt with appropriately and that the Group 4 Appellants having failed to meet the criteria as set out in the directions order, their claims were denied.

[8] In this regard I agree with Counsel for the Respondent BT that even though these Appellants were grouped for ease of reference into one grouping the individual Appellants must be dealt with according to the evidence that was provided in support of each appeal and whether on that evidence the BT was entitled to come to the decision that he did.

[9] Thus it is important to note that in reviewing the BT’s decision the standard of review is one of correctness. In the case of **Galaxy Sports Inc (Re)**¹ the court there had this to say:

“39. On a consideration of all the “Contextual” factors mandated by the “pragmatic and functional” approach, I see no reason to disagree with the long-standing principle enunciated in Re McCoubrey, supra, which requires the application of a “correctness” standard where compliance with a “mandatory” provision (which I would equate to a question of law or statutory compliance) is involved, and the application of a “reasonableness” standard where the determination of a factual matter or an exercise of true discretion is called for. In the former category, I would place the chair’s decision under s.108 rejecting a Proof of Claim under ss.124 and 135 (2). In the latter category, I would place the trustee’s role in valuing contingent and unliquidated claims under s. 135 (1.1). This general approach conforms with the objective, which I see as implicit in the BIA, of enabling debtors to have their proposals voted upon expeditiously and permitting creditors to have their rights and claims determined in a business-like manner, while at the same time providing a meaningful appeal to a court of law on questions that clearly affect legal rights, engage the relative expertise of judges, and set precedents for other cases.”

[10] This position was reiterated in the case of **Roger (re)**² where the British Columbia Supreme Court set out the following brief principles governing the nature of an appeal hearing under the Canadian equivalent of section 70 theirs being, section 81:

“Nature of the Hearing

13. This appeal is brought under s. 81 (2) of the Bankruptcy and Insolvency Act, R. S. C. 1985, c. B-3 [BIA].

¹ [2004] B.C.J. No 1008

² [2018] B.C.J. No 174

14. It is a true appeal; not a hearing de novo. As such there is no room for fresh evidence to be adduced unless the Appellant satisfies some preconditions. ...

15. When assessing the Trustee's decision, the standard of review this Court must employ is correctness: Galaxy Sports Inc. (re), 2004 BCCA 284 at para. 39; Campen v. Campbell Saunders Ltd., 2008 BCSC 1524 at para. 13.....

18. Following the principles above, the issue on this appeal is whether the Trustee was correct in finding that the Appellant's Affidavit was not sufficient to prove that Ms. Roger's estate holds its half interest in the subject property in trust for his benefit.”

[11] I will therefore take each Appellant in turn and the evidence relied upon and the submissions that were advanced in support and against the appeal. Like the Respondents this court was also concerned that there was no mention of the Appellants James and Marea Germain in the submissions filed on behalf of the Appellants on the 26 October 2018. However, by the Reply submissions filed by the Appellants on the 7 January 2019 the Germaines were referred to therein and this court will proceed to deal with their appeal accordingly.

[12] I also pause to state here that the comments I made in the judgment of this court with regard to the submissions filed by Counsel for the Appellants in the appeals that dealt with the group labeled Group 3 and delivered by this court previously also apply here. Although I will not repeat those observations verbatim, what I do wish to make clear is that it is the obligation of counsel to assist the court in the presentation of their matters³. Failure to do so, in this court's mind amounts to a failure ultimately to the client that is being represented by counsel. In the case at bar, counsel for these Appellants in their presentation provided little or no analysis of the authorities relied on or the relevance to the cases of the Appellants and certainly failed to address their minds, in this court's opinion to the nuances of the individual Appellants and sought to rely on the groupings that had been agreed upon as a reference point as a firm indication of sameness. This, in this court's mind gave little assistance to the court or to the cases of the Appellants themselves.

LINDSAY BRAMBLE

[13] By Amended Notice of Motion filed on 4 May 2018 the Appellant sought the following relief:

- i. A declaration that the Respondent incorrectly adjudicated the claim submitted.
- ii. A declaration that notwithstanding the Respondent's belief of the invalidity of the Deed of Assignment there is evidence of a contract between Harlequin Property (SVG) Limited and the Applicant, and an intention of Harlequin Property (SVG) Limited to contractually transfer Cabana77, #3049.

³ Copeland v. Smith [2000] 1WLR1371

iii. A declaration that the Applicant is the beneficial owner of Cabana 77, #3049 located at Buccament Bay Development located at Buccament Bay, Saint Vincent and the Grenadines, and as such the legal title should be transferred to her.

iv. Further, that no distribution be made of Cabana 77, #3049 until this Application is disposed of.

v. The costs of this Motion be borne by the Respondent.

vi. That the Applicant have sight of the Proof of Claim submitted by Kay Banning;

vii. That there be no transfer of Cabana 77, #3409 to Kay Banning until this Motion is disposed of; and

viii. Any such further orders as the Courts deem just.

[14] The evidence in support of this motion was sworn to by Kimmesha Howell the legal secretary of Counsel for the Appellant.

[15] There were two affidavits which sought to exhibit the documents which the Appellant relied on in her proof of claim and upon which she was also seeking to rely on in this appeal as filed.

[16] These documents were as follows:

1. Finance Agreement dated 5 April 2007 between HSPVG and the Appellant and her then partner Alexander Hopper⁴;

2. Receipt for £81,500 dated 27/3/07 from Harlequin Property to Appellant and Hopper and a receipt dated 19/2/07 for £1000.00 from Harlequin Property to the Appellant and Hopper⁵;

3. Proof of Claim dated 19/5/17⁶ and affidavit in support of the proof of claim of 11/5/17 with attachments being the Preliminary contract with Buccament Bay Resort Limited,⁷

4. A letter from Harlequin Property dated 8/4/06⁸ and Deed of Separation between the Appellant and her then partner Alexander Hopper.⁹

[17] The Notice of Dispute that was issued on the claim had as its reason that the *“contract provided in support of your claim was not executed by Harlequin Property (SVG) Limited. The deed of assignment between the vendor named in the sale contract and Harlequin Property (SVG) Limited that was provided is ineffective to transfer the obligation to convey the property from the named*

⁴ KH2 to affidavit filed 7/3/18 and document # 316 in the LOD filed by the Respondent on the 29/6/18

⁵ KH3 to affidavit filed 7/3/18 and document #315 in the LOD filed by the Respondent on the 29/6/18

⁶ KH1 to affidavit of 4/5/18

⁷ KH2 to the affidavit of 4/5/18; contract is document # 312 in LOD filed by the Respondent on the 29/6/18

⁸ Document # 317 in LOD filed 29/6/18

⁹ Document 318 in LOD filed 29/6/18

vendor to Harlequin Property (SVG) Limited as it is not possible in law to assign the burden of a contract without a novation agreement".¹⁰

- [18] Additionally the BT by affidavit filed 12 April 2018 stated that in addition to this reason as stated above, the BT also had received a valid separate claim from another claimant which claim he has already accepted.
- [19] In support of the appeal the parties were invited to make submissions and the Appellants for this group made such submissions generally to the group as a whole and not to individual Appellants. In particular the submissions only spoke to grounds 1, 2 and 5 (although stated as Ground 3 in the submissions) in the Amended Notice of Motion. This court was therefore unsure whether the Appellants were still pursuing grounds 3, 4, 6, 7 and 8 of the Amended Notice of Motion. This was not made clear even on the reply submissions filed by these parties and at the oral hearing which was only for the purpose of shoring up if required the substantial written submissions, this still was not clarified.
- [20] The nub of the arguments for this Appellant was therefore that even though the Appellant had no contract signed by HPSVG that the BT should have considered all the documents that were provided to him which in their mind established a written contract between the parties and evidence of an agreement. The argument was that the documents signed were signed by the bankrupt and that these documents so signed in fact made reference to the existence of another document that set out all the terms of a contractual arrangement. Having shown that this document existed and was signed by the party to be charged, the Appellants submitted that the provisions of the Statute of Frauds had therefore been met and fulfilled. This Appellant relied on the Finance Agreement which was made in reference to the purchase of Cabana 77 Buccament and which referenced a sales and purchase agreement dated 19 February 2007. Together with the receipts of payments received by Harlequin Property and an executed contract with Buccament Bay Resort Limited, the Appellants submitted that there was sufficient evidence for the BT to have found that this Appellant had a valid claim to the property.
- [21] The Respondent on the other hand submitted that none of the documents relied upon by the Appellant and presented to the BT were signed by the party to be charged. In fact, the Respondent submitted that the Appellant had failed to identify the documents that they sought to rely on as containing the relevant information as a pre requisite to satisfying the provisions espoused in **Elias v George Sahely Co. Barbados Ltd**¹¹. However, the court must take this submission in the context of the original submissions filed by the Appellants which indeed did not make any such indication but which was addressed to some degree in the reply submissions.
- [22] The Respondent further submitted that the Appellant had also not satisfied the court as to her ability to rely on the principle of part performance as the Appellant had sought to submit. Indeed, the Respondent made it clear that the Appellant had failed to present evidence or submissions on

¹⁰ Paragraph 15 of Affidavit of the BT filed on 12/4/18

¹¹ [1982]32 WIR 117

the actions that supported any such finding. She was therefore as far as the Respondent saw, unable to rely on this principle of law.

- [23] Finally the Respondent submitted that the documents that had been submitted to the BT had been the executed sales agreement with Buccament Bay Resort Limited. This entity had no legal entitlement to the land they purported to sell and as such they were unable to execute any such contract in favour of the Appellant. Additionally, there had been a further claim by an unrelated individual who presented a contract executed by HPSVG for the same property which was accepted. However, that individual who had been required to make certain payments failed to do so and as such they also received a notice of dispute disallowing their claim. There has been no appeal and as such the Respondent indicated that the existence of the second claim would now not impact the appeal of this Appellant.

Court's Analysis and Considerations

- [24] The starting point for this court to make a determination first and foremost as to whether the BT had incorrectly adjudicated the claim is for the court to consider what in fact was before the BT at the time he made his finding.
- [25] When one examines the affidavit of reclamation that was submitted in support of the proof of claim, the Appellant relied on the documents that were referred herein at paragraph 15 above. These were the contract from Buccament Bay Resort, a Finance Agreement with HPSVG, a receipt from Harlequin Property, a letter from Harlequin Property making reference to amendments to a contract and the deed of separation as between the original purchasing parties.
- [26] It is on the basis of these documents, that the BT came to the conclusion that there was no enforceable contract upon which the BT could rely to bind HPSVG.
- [27] However, it is these very same documents that the Appellant relies on to say that read together, they provided enough evidence of a binding contract between the parties.
- [28] It is of some note for this court as to the existence of the Finance Agreement between the Appellant and HPSVG, the party to be charged. Therefore, this document bears some scrutiny to decipher whether the reliance placed on it by the Appellant can in fact be supported.
- [29] By the very first recital the Finance Agreement states clearly "the purchaser (the Appellant) and HP have entered into a sale and purchase agreement dated 19 February 2007 attached hereto as Schedule 1 pursuant to which the Purchaser has agreed to purchase and HP has agreed to sell the property (the Sale Agreement)". (My emphasis added)
- [30] So for this court the obvious inference was that at the date of execution of the Finance Agreement, there was already in existence a sales and purchase agreement between these parties dated some two months prior that had set out the parameters of the sale.

- [31] However, there was no such agreement attached to the Finance Agreement and no such agreement ever materialized before this court or the BT.
- [32] This position was not assisted when once again within the text of the Finance Agreement it spoke to a payment being made “pursuant to the sale agreement” for which the purchaser paid “HP £1000.00 as an initial deposit for the property”.
- [33] This payment is then acknowledged (from the documents presented) not by HPSVG but by an entity called Harlequin Property. The Appellants however were unable or unwilling to establish any relationship or nexus between Harlequin Property and HPSVG other than the shared name. That receipt was dated 19 February 2007.
- [34] The Finance Agreement then included a recital purporting to identify the property by the use of these words that the property “means the property identified in the sales agreement”.
- [35] So in a nutshell, the evidence was clear. This Appellant had no sales and purchase agreement with HPSVG. The Appellant and HPSVG signed a Finance Agreement for the financing of a purported purchase making express reference to a nonexistent contract. However, the Appellant submits to this court in essence, forget the **terms** of the Finance Agreement upon which I say I am relying, but still look to the fact that it was signed by HPSVG and together with the contract that was not executed by HPSVG, there is enough upon which I am entitled to rely to allow my claim.
- [36] In this court’s mind this is a most untenable proposition.
- [37] Indeed in this court’s mind the extrapolation that the Appellant seeks to take from the case of **Elias**¹² to substantiate this position is unsupported by the very case.
- [38] In **Elias**, the Privy Council made it clear that in those circumstances where there was the existence of a document signed by a party to be charged and that document referred to another document which contained the particulars of the transaction, the Statute of Frauds could still be satisfied with the allowance of parol evidence on that further document.
- [39] Indeed, the Judicial Board found that in order to do so “*the first inquiry must therefore be whether the document signed by or on behalf of the person to be charged on the contract contains some reference to some other document or transaction*”.¹³
- [40] In fact, the Board said clearly that in that case where the receipt referred to some other transaction namely an agreement to sell the property, that parol evidence can therefore be given to explain the transaction and identify any document relating to it.
- [41] It would appear to this court that the use of the words “any document” has been interpreted by the Appellant to literally mean **any** document and thus the reliance on the contract made with Buccament Bay Resort Limited.

¹² Op cit [1982] WIR

¹³ Op Cit at page 124

- [42] However, in this court's mind it could not have been this wide unlimited interpretation that the Board envisioned when it made this pronouncement.
- [43] For a party to rely on this rule as enunciated, it is pellucid to this court that there must be some relationship between the reference in the document signed by the party to be charged and the document seeking to be relied upon. Thus, although in the **Elias** case the letter that was relied upon on behalf of the purchaser was in fact signed by the attorney at law, it was completely conceivable that the attorney, who had forwarded the deposit, had some nexus to the transaction even though the letter was not answered by or on behalf of the vendor. What the court found was that the letter had set out the terms of the understanding or fundamentals of the sale and the basis for forwarding the deposit in any event.
- [44] In the case at bar, the Finance Agreement made reference to a nonexistent document and to a nonexistent agreement made between HPSVG and the Appellant. In this court's mind if perhaps there had been an unexecuted agreement even exhibited by the Appellant this court may have considered that the requisite hurdle had been met. Additionally, this court was at a loss as to how there could have been any reliance on receipts from an entity that had no correlation to the bankrupt. Or at least no established correlation to the bankrupt. Or on a document that purported to be a sales agreement with an entirely different entity.
- [45] I therefore do not agree that the Appellant can widen the learning of **Elias** and seek to rely on the Preliminary contract between herself and Buccament Bay Resort Limited and the Finance Agreement together with the receipts from a third entity to justify that the Statute of Frauds has been satisfied.
- [46] I therefore agree with the findings of the BT that there was no enforceable contract in the name of this Appellant and dismiss the appeal.
- [47] I therefore find that the Appellant has not proven this appeal and is not entitled to the reliefs as prayed. The Notice of Motion is therefore dismissed with costs to the BT to be taxed if not agreed within 21 days of today's date.

JAMES AND MAREA GERMAIN

- [48] By Amended Notice of Motion filed on 4 May 2018 the Appellants sought the following relief:
- i. A declaration that the Respondent incorrectly adjudicated the claim submitted.
 - ii. A declaration that there is evidence of a contract between Harlequin Property (SVG) Limited and the Applicants and/or the existence of a contractual relationship between Harlequin Property (SVG) Limited and the Applicants which demonstrates an intention of Harlequin Property (SVG) Limited to contractually transfer Cabana 145 with title number 7011 to the Applicants.

iii. A declaration that notwithstanding the Respondent's belief of the invalidity of the Deed of Assignment and there is evidence of a contract or evidence of a contractual intention to transfer property between Harlequin Property (SVG) Limited and the Applicants.

iv. A declaration that the Applicant is the beneficial owner of Cabana 145 with title number 7011 located at Buccament Bay Development located at Buccament Bay, Saint Vincent and the Grenadines, and as such the legal title should be transferred to him.

v. Further, that no distribution be made of Cabana 145 with title number 7011 until this Motion is disposed of.

vi. That the Applicant have sight of the Proof of Claim submitted by Graham Swain;

vii. That there be no transfer of Cabana 145, with title number 7011 to Graham Swain until this motion is disposed of;

viii. The costs of this Motion to be paid by the Respondent; and

ix. Any such further costs orders as the Courts deem just.

[49] The evidence in support of this motion was sworn to by Kimmesha Howell the legal secretary of Counsel for the Appellants.

[50] There were two affidavits which sought to exhibit the documents which the Appellants relied on in their proof of claim and upon which they were also seeking to rely on in this appeal as filed.

[51] These documents were as follows:

1. Letter from HPSVG to the Appellants dated the 22/5/15;¹⁴

2. Unexecuted conveyance between the Appellants and HPSVG's predecessor in title MAM Investments Limited;¹⁵

3. Affidavit in support of the Proof of Claim and documents attached including an unexecuted contract for sale with Buccament Bay Resort Limited¹⁶ and

4. Affidavit in support of the Proof of Claim of 11/5/17 with attachments including the Preliminary contract with Buccament Bay Resort Limited.¹⁷

[52] The Notice of Dispute that was issued on the claim had as its reasons that the:

1. *"...contract provided in support of your claim was not with Harlequin Property (SVG) Limited. The Deed of Assignment between the vendor named in the sale contract and Harlequin Property (SVG) Limited that was provided is ineffective to transfer the obligation to convey the property from*

¹⁴ KH2 to affidavit filed 7/3/18 and document # 327 in the LOD filed by the Respondent on 29/6/18

¹⁵ KH3 to the affidavit filed 7/3/18 and document # 324 in the LOD filed by the Respondent 29/6/18

¹⁶ Document #326 in the LOD filed by the Respondent 29/6/18

¹⁷ KH2 to the affidavit of 4/5/18; contract is document # 312 in LOD filed by the Respondent on the 29/6/18

the named vendor to Harlequin Property (SVG) Limited as it is not possible in law to assign the burden of a contract without a novation agreement.

2. The contract provided in support of your claim was not executed by Harlequin Property (SVG) Limited or a representative thereof".¹⁸

- [53] Additionally, the BT stated by affidavit filed 12 April 2018 that in addition to these reasons as stated above, the BT also had received a valid separate claim from another claimant which claim he has already accepted.
- [54] In support of the appeal the parties were invited to make submissions and the Appellants for this group made such submissions as they did throughout these proceedings, generally to the group as a whole and not to individual Appellants. In particular the submissions only spoke to grounds 1, 2 and 10 (although stated as Ground 3 in the submissions) in the Amended Notice of Motion. This court was therefore unsure whether the Appellants were still pursuing the other grounds contained in the amended notice of motion 3, 4, 6, 7, 8 and 9 of the Amended Notice of Motion. This was not made clear even on the reply submissions filed by these parties and at the oral hearing which was only for the purpose of shoring up if required the substantial written submissions, this still was not clarified.
- [55] Be that as it may, the Appellants submitted on this appeal as they had in the previous one that there was a requirement to read all the documents together to satisfy the Statute of Frauds and in particular they relied on the letter from HPSVG which made reference to the terms of a contract, but again a contract made with Buccament Bay Resort Limited and sought to rely on the terms of that agreement and that there had been an assignment of the benefit from Buccament Bay to HPSVG. The Appellants additionally asked this court to consider the letter and the terms of the unexecuted contract as to have been made with HPSVG.
- [56] The submission was that these two documents when read together satisfy the requirements of the Statute of Frauds and substantiate the claim of the Appellants.
- [57] The Respondents however submitted that the submission of the unexecuted contract with Buccament Bay did not establish any legal relations with the Appellants. Not only was it unexecuted it was also with an entity that had no legal right to convey any interest in the property to the Appellants. Additionally, the unexecuted draft conveyance with HPSVG did not assist the Appellants either as the party who was required to be charged had not signed it. Of interest no mention was made of the letter sent by HPSVG to these Appellants and what would have been the impact of such a letter.

¹⁸ Affidavit of the BT filed on the 12/4/18 paragraph 22

Court's Analysis and Considerations

- [58] Although the situation with regard to the Germaines was indeed similar to that of the Appellant Bramble, this court finds that the significant difference was the existence of the letter from HPSVG which made reference to an agreement with Buccament Bay Resort and then to another agreement with HPSVG and the existence of an unexecuted conveyance with HPSVG. In fact, the correspondence dated 22 May 2015 from HPSVG stated clearly "Harlequin is and will remain ready, willing and able to complete the contract on or before the date. Please find enclosed a copy of the draft deed of conveyance for the transfer of the freehold property."
- [59] In this court's mind although the correctness of the BT's decision to refuse this claim in these circumstances may not be one which can be disputed, the real issue then becomes whether this claim should now be allowed.
- [60] Indeed the arguments put forward by the Appellants as to the law relating to the reading of the documents to provide a sufficient memorandum would not have been made to the BT and he was faced with unexecuted documents. Thus having been bound by the directions order of November 2018 in which he was directed to be at liberty to dispute the claim where there was no written sale and purchase agreement for a Cabana or room at the Buccament Bay Property or the Merricks property is not properly executed by Harlequin SVG¹⁹ it does not appear to this court that the BT had any discretion or latitude in the matter of the acceptance of the claim.
- [61] Having been given those directions it was well within the terms of the order for the BT to have disputed the claim of these Appellants and I therefore do not make the declaration that he wrongly adjudicated the claim. The correctness of his decision given the parameters in which he worked was justified. The Appellants on the proof of claim had the onus of proving that they were entitled to the claim as filed. This was not done.
- [62] However this court having looked at this appeal finds that the evidence and the arguments proffered require that this claim be revisited.
- [63] I am satisfied upon my review of the documents relied upon and my interpretation of the Board's findings in the **Elias** case, that the Appellants may in fact be in a position to rely on the draft conveyance together with the letter from HPSVG that makes specific reference to the draft conveyance.
- [64] Although indeed that letter makes reference to another unexecuted document from Buccament Bay Resort Limited, I am satisfied that there is sufficient reference in the letter of 22 May 2015 to the purchase of property, where that property was to be located and even to purchase price of the property. I find that this letter together with the proposed draft conveyance amount to satisfaction of the Statute of Frauds and the declaration as sought pursuant to ground number 2 of the amended notice of motion is granted. Therefore, it is declared that there is evidence of a contractual

¹⁹ Paragraph 5 (c) of the Order of November 22 2018

relationship between HPSVG and the Appellants which demonstrates an intention of HPSVG to contractually transfer Cabana 145 with title number 7011.

- [65] In light of that declaration the relief sought at paragraph 3 is denied.
- [66] In the submissions of the BT, counsel for the BT asked this court to consider that the BT had already accepted the claim of one Graham Swain who is not before this court. It was indeed unfortunate that this was done, however the BT was entitled to do so on the basis of the documentation that appeared before him.
- [67] In light of the finding of this court, it would however not be appropriate for this court to allow the BT to transfer the disputed property to the said Mr. Swain and the relief sought at paragraph 7 that there be no transfer to him be made until this motion is disposed of is granted. There was no further order sought in relation to the transfer to Mr. Swain and this court makes no further order on the same.
- [68] The difficulty however that the court now finds itself in, is whether it is in a position to declare that the Appellants are the owners of the property and make an order directing that the property be conveyed to them.
- [69] Although, I have found that there was in fact a contractual relationship that was intended to be created between the Appellants and HPSVG, there is certainly no evidence before this court that the Appellants have acted on or carried out any obligations under those contractual intentions.
- [70] There is no evidence of payment of the purchase price to HPSVG nor that had any constructive trust relationship arisen due to any action taken on the part of the Appellants.
- [71] Even if the court was to accept that the doctrine is not activated only in the instances when the full purchase price has been paid, a position that I make no determination on, this court certainly has no evidence of even a substantial deposit having been made. There is indeed reference in the letter of 22 May 2015 to the loss of the benefit of the sum of £76,000.00 if the Appellants failed to complete. There is however no evidence that this money was received by HPSVG. In fact, in the affidavit of one of the Appellants for the reclamation of property the Appellant James Germain said this:

"I entered into an agreement to purchase off plan property on 4 January 2007 with Buccament Bay Resort Limited which has by a deed of assignment been transferred to Harlequin Property (SVG) Limited ("HPSVG") for the amount of £76,000.00. A copy of the deed of assignment is exhibited as JG1 [the letter of the 22nd May 2015]. I transferred this amount to Harlequin Management Services South East Limited who acted as sales agent for HPSVG. This amount was remitted on to HPSVG for the purpose of developing my property."²⁰

²⁰ Exhibit KH 1 to affidavit of Kimmesha Howell filed 4/5/18

[72] That was the extent of the evidence upon which these Appellants submitted they were entitled to ownership. In this court's mind this is woefully inadequate to make any such submission or seek any such relief.

[73] I therefore am in agreement with the Respondents on this issue that:

"74. Regardless of the existence of an executed contract for sale, before the property can be conveyed and legal title can be transferred to an Appellant, the Appellant must be proven to have fully paid for the property or must be required [to] pay the balance of the purchase money. Failing which, no constructive trust would have ever existed and the Appellant's claim to the property under section 70 of the BIA must, by necessary implication, fail.

75. The evidence submitted by the Appellants must, therefore, demonstrate that they have paid for the property claimed. In reviewing the Appellants' evidence for these purposes, it is submitted that the documentation provided must evidence not merely that monies were paid, but that the monies were received by Harlequin SVG, the vendor of the property."

[74] I do not accept that the Appellants are entitled to the declaration as sought at paragraph 6 of the Amended Notice of Motion and I make no order in relation to the transfer of property to them.

[75] If indeed monies were paid these Appellants are of course at liberty to seek to recover those monies from the entity to whom they paid the same.

[76] Additionally, in light of the accepted claim of Mr. Swain, the Appellants in fact have no better claim to the property at this time but are of course at liberty to seek to take whatever legal action that they may feel entitled outside the parameters of the section 70 appeal in that regard.

[77] The Appellants having been only partially successful on their appeal and none of the results can be in fact laid at the feet of the BT, I am minded to follow the learning contained in the case of **Re Major – Way Trailers Ltd Exp Nelson Harvey Ltd**²¹. In that case, Aikens J in dealing with a similar set of circumstances where the arguments before the court were not placed before the trustee had this to say, *"I now turn to the question of costs. The position is that the Appellant has succeeded on an argument put before me which was not put before the trustee. On the argument which was put before the trustee, in my respectful opinion the trustee was right in the conclusion which he reached. If the Appellant's claim had been put to the trustee supported by the argument that the Appellant was indebted to the Crown with the bankrupt for the amount of the duties which the Appellant in fact paid, and that this was the basis upon which the Appellant sought to be surrogated to the preferential position of the Crown, I have no doubt that the trustees would not have disallowed the claim. I have a discretion as to costs under s.155 of the Act. In the special circumstances, which I have just mentioned, I think it just that the Appellant be denied costs and be directed to pay the trustee's costs of this appeal."*

²¹ [1964] B.C.J. No 186

[78] Although the arguments of the Respondent are indeed persuasive in this regard²² and that the Appellants should in fact bear the costs of this appeal, it is still in my discretion to make a determination of such costs and in this instant case I make no order as to costs.

The order on this appeal is therefore as follows:

LINDSAY BRAMBLE

1. The appeal is dismissed with costs to the trustee to be agreed within 21 days of today's date failing which the same are to be taxed.

JAMES AND MAREA GERMAIN

1. The declaration that the trustee wrongly adjudicated the claim is refused.
2. It is declared that there was evidence of the existence of a contractual relationship between HPSVG and the Appellants which demonstrated an intention of HPSVG to contractually transfer Cabana 145 with title 7011 to the Appellants.
3. The declaration that there is evidence of a contractual intention to transfer property between HPSVG and the Appellants is granted.
4. The declaration that the Appellants are the beneficial owners of Cabana 145 is refused.
5. The relief sought that there is to be no distribution of Cabana 145 until the motion is disposed of is granted
6. The relief that the proof of claim of Graham Swain be submitted to the Appellants is refused.
7. The relief sought that there be no distribution of Cabana 145 to Graham Swain until this motion is disposed of is granted
8. No order as to costs.

**Nicola Byer
HIGH COURT JUDGE**

By the Court

Registrar

²² Paragraph 97 of the Respondent's submissions filed 30/11/18