

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

ANDREW MEECH

STEPHEN AND SANDRA SCRIEVENER

APPELLANTS

AND

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

RESPONDENT

Appearances:

Mr. Dustin Delany with Ms. Maya Carrington for the Appellants

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

2019: May 2

Judgment on Submissions on Group 2

Byer, J.:

- [1] The Group 2 Appellants each filed with the Bankruptcy Trustee (herein after referred to as the BT) a Proof of Claim verified by affidavit claiming property, or an interest in property, in the possession of the bankrupt at the time of the bankruptcy pursuant to section 70(1) of the Bankruptcy and Insolvency Act CAP. 136 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009 (herein after referred to as the “BIA”). Overall, the Bankruptcy Trustee received approximately 480 proofs of claim pursuant to section 70(1) of the BIA.
- [2] On 5 January, 2018, the Trustee gave notice in writing to the Group 2 Appellants that their claims were disputed in accordance with section 70(2) of the BIA (the “**Notices of Dispute**”) for the reason as stated below:
- “We have received proofs of claim which evidence that, at the time of your contract for the sale of land, Harlequin Property (SVG) Limited had already entered into an enforceable contract for the sale of the same property with another purchaser. As the other contract was entered into earlier in time, their interest ranks in priority to yours and their claim has been accepted.”*
- [3] On 2 March 2018 and 7 March 2018, Andrew Meech and Stephen and Sandra Scrivener, respectively, caused to be filed herein Notices of Motion purporting to appeal the Notices of Dispute (the “**Appeals**”), each supported by an affidavit sworn to by Kimmesha L. Howell.
- [4] On 4 May, 2018, the Group 2 Appellants each filed a Supplemental affidavit in Support of Kimmesha L. Howell.
- [5] On 22 October, 2008, in accordance with the case management orders issued herein, the Group 2 Appellants filed the Appellants’ Submissions.
- [6] On the same said date, the Group 2 Appellants filed Notices of Application seeking leave to amend the Appeals (the “Applications to Amend”). The Applications to Amend were subsequently amended on 8 November, 2018. On 13 November, 2018, the Applications to Amend, as amended, were dismissed and leave to amend the Appeals was, therefore, refused.
- [7] By Notice of Discontinuance filed on 30 November 2018, the Appellant Andrew Meech discontinued his appeal.
- [8] The Appellants Stephen and Sandra Scrivener continued their appeal and were therefore bound by the original Notice of Motion filed on 7 March 2018 which sought the following reliefs:
- i. A declaration that the Respondent incorrectly adjudicated the claim submitted.
 - ii. An Order that the Proof of Claim submitted by the other creditors be delivered to the Attorneys-at-Law acting on the behalf of the Applicants.

- iii. An Order that in the event a first in time approved creditor does not complete on Cabana 207 that the Applicants be entitled to complete.
- iv. Further, that no distribution be made of Cabana 207 with title number 2023 until this Application is disposed of.
- [9] This Notice of Motion was supported by two affidavits of Kimmesha Howell. The first one was filed 7 March 2018 and the second on 4 May 2018.
- [10] These affidavits exhibited the following evidence
- i) The Notice of Dispute sent by the Respondent on 5 January 2018¹.
 - ii) Correspondence from the representative of the Respondent in relation to the acceptance of claims that ranked in priority of time².
 - iii) Proof of claim submitted on behalf of the Appellants³.
 - iv) Affidavit seeking reclamation of property submitted on behalf of the Appellants⁴.
- [11] By the Notice of Dispute issued by the Respondent, the reason for the disallowance of the claim was that at the time of the Appellants' contract with Harlequin Property (SVG) Limited (herein after referred to as the "HPSVG"), HPSVG had already executed an enforceable contract with another party⁵.
- [12] This determination of the BT was based solely on the order of this court of 22 November 2017 (November directions order) in which this court was asked to issue directions for the categorization and determination of hundreds of claims made against HPSVG by the BT pursuant to section 216(1) of the BIA⁶.
- [13] It was on that hearing and upon the submissions made at that time that this court made the November directions order which stated at paragraph 5(f) that the BT was at liberty to dispute a claim where there had been multiple sales of the property and the claimant's contract is not enforceable, that is, it was not first in time.
- [14] This court was satisfied at the hearing that a party who had not completed the sale but who had a prima facie enforceable contract with HPSVG held only an equitable interest in the property and

¹ KH1 to the affidavit of the 7/3/18

² KH2 to the affidavit of the 7/3/18

³ KH1 to the affidavit of the 4/5/18

⁴ KH2 to the affidavit of 4/5/18

⁵ See paragraph 2 above

⁶ "A trustee may apply to the court for directions in relation to the any matter affecting the administration of the estate of a bankrupt and the Court shall give in writing such directions, if any, as appear to it to be proper in the circumstances"

that the party who held their interest first in time, (once all other aspects of the same were equal) must be given priority⁷.

- [15] In this court's mind this must be a proper proposition of the law and this court is satisfied that the directive given to the BT to consider and determine claims that fell within this category was required.
- [16] It is of course of great interest to this court that these Appellants did not see it fit to address this issue or that proposition of law but rather submitted on a ground that is of no relevance in that this court denied them the right to amend their Notice of Motion to plead repudiation of the earlier contract.
- [17] The Appellants have however persisted in this appeal and seek an order that the BT incorrectly adjudicated. Based on the foregoing, this court does not see how this can be argued and sustained. The actions of the BT based on the information that was before him and the November directions order were entirely appropriate. The BT was entitled to find that the claimants Francis and Patrina Bethell had an enforceable contract which was earlier in time than these Appellants and were therefore entitled to have their claim accepted.
- [18] What is however of note is that in the affidavit of the BT filed on 9 November 2018, after having accepted the claim of the Bethells, the BT discovered that they had assigned the benefit of their claim to a third party and the BT at that juncture then issued a Notice of Dispute to the Bethells based on that.
- [19] As it therefore stands, the claim of the Bethells is disputed and there having been no appeal of the same, the property Unit 2023 has not been assigned to any party.
- [20] By prayer 3 of the Notice of Motion the Appellants seek an opportunity to complete the contract upon the failure of the "first in time approved creditor ... to [complete]".
- [21] The evidence of the BT contained in his affidavit of 9 November 2018 and which has not been contradicted by the Appellants is that these Appellants owe an outstanding balance on Unit 2023 in the sum of £143,500.00⁸.
- [22] Indeed this court accepts the submission of the Respondent, (again receiving no real assistance from the Appellants on this issue) that at present the BT does not hold this property on trust for the Appellants. However, I am satisfied and by the evidence of the BT himself, that the Appellants have paid some money. There is no issue that they hold an enforceable contract with HPSVG and it was only because of the Bethells first in time claim, that their claim was not accepted.
- [23] Therefore this property still being within the possession of the BT for the purposes of section 70 of the BIA, I find that these Appellants are entitled to be given the opportunity to complete their

⁷Rice v Rice [1853] 2 Drew 73 per Kindersley V.C

⁸ Paragraphs 17 and 18 of the affidavit of the BT filed 9/11/18

purchase if the Bethells are not in a position to do so, by the payment of the outstanding balance as found by the BT.

- [24] For the sake of clarity, this court is not able to agree that more monies may have in fact been paid to HPSVG, as there is no documentary evidence to that effect and I find that the Appellants cannot rely on any monies that may have been paid to any entity other than HPSVG unless they can show clear and uncontroverted evidence that HPSVG received the same.
- [25] Certainly the evidence relied on and that is presently before this court does not so prove and as I have stated in other judgments of this nature the mere fact that two entities share the same name cannot in law establish the relationship of agent and principal. Indeed, there is documentation to show that monies had been paid by these Appellants but to an entity called Harlequin Hotels and Resorts⁹. Without more I am not prepared to find that this money had in fact been paid to and received by HPSVG.
- [26] That being said, the Notice of Motion filed on behalf of these Appellants is dismissed in part. I also state that there were no submissions made or evidence led in relation to prayers 2 and 4 with regard to seeing the other proofs of claim or the non-distribution of the unit 2023 until this motion was disposed of by this court. The onus being on the Appellants to prove their case was not met on these prayers and they stand dismissed. Additionally, based on the finding of this court that the BT was entitled to make the finding that he did, I also dismiss the prayer for a declaration that the Respondent incorrectly adjudicated the claim. The Appellants however will be given the chance to complete the sale upon the terms and conditions as to be given by the BT. Those indications are to be given to the Appellants within fourteen days of today's date.
- [27] In the round, the manner in which this appeal was prosecuted by the Appellants left the bulk of the burden on the Respondent to assist the court in coming to a determination. It was indeed unfortunate. Although the Appellants were partially successful, I do not find that the Appellants should be entitled to their costs in these circumstances. The Respondent was put to extended expense in having to answer claims that were not even properly before the court and to do their case and the Appellants case. I therefore find that costs are to be awarded to the Respondent to be taxed if not agreed within 21 days of today's date.

⁹ #96 on List of Documents filed on June 2018

The order of the court is therefore as follows:

1. The prayers 2 and 4 are dismissed.
2. The prayer at 1 is dismissed.
3. Prayer 3 is granted and the Bankruptcy Trustee is to give the terms and conditions to the Appellant within 14 days of today's date.
4. Costs to the Respondent to be taxed, if not agreed within 21 days of today's date.

**Nicola Byer
HIGH COURT JUDGE**

By the Court

Registrar