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 Laws of Saint Vincent and the Grenadines, Revised Edition 2009)

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

SARITA MAMAN APPELLANT

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

(GROUP 3)

Appearances:

Ms. Maya Carrington for the Appellant

Mr. Garth Patterson QC, Ms. Taylor Laurayne and Ms. Vynnette A. Frederick for the Respondent

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2019: February 22

JUDGMENT ON WRITTEN SUBMISSIONS

ORAL DECISION

Byer, J.:

[1] By Notice of Application dated the 17th December 2018 the Appellant sought to introduce fresh evidence, namely the executed contract between Harlequin Property SVG Limited and the Appellant dated 30th November 2012.

[2] By affidavit in support of the application the Appellant made four (4) statements contained in her affidavit filed 12th February 2019 being the same affidavit exhibited to the affidavit of Swinlon Hutchins filed the 17th December 2018.

[3] These statements were i) at the time of filing her appeal she was unable to locate her contract[1]; ii) that she had moved houses in 2013;[2] iii) that during November 2017 the Appellant contacted her financial advisor but he did not find it;[3] iv) that in June 2018 the advisor sent her the contract. [4]

[4] That was the extent of the evidence before this court that the Appellant sought to rely on to satisfy the uphill task as set out in the seminal case of Ladd v Marshall.[5]

[5] This case sets out three circumstances where the court would consider the introduction of fresh evidence. These are that the evidence:

a) could not have been obtained with reasonable diligence for use at the trial

b) such that if given it would probably have an important influence on the result of the case although it need not be decisive and;

c) such as is presumably to be believed or in other words it must be apparently credible although it need not be incontrovertible.

[6] Thus it is clear in this court's mind that the onus is on the Appellant to present evidence which would adequately address these requirements.

[7] In this present application, the court was not satisfied that this had in fact been done by the Appellant. What made this even more unfortunate was that on the last occasion that an application seeking similar relief had been made on behalf of this Appellant, this court had taken the time to identify to counsel for the Appellant that there was an uphill task to introduce fresh evidence. Therefore the evidence in support of any such application needed to be fulsome and adequate.

[8] It would appear that those indications fell on deaf ears.

[9] Indeed, although Counsel for the Appellant relied on the judgment of Neuberger J in the case of Charlesworth v Relay Roads Ltd, [6]funnily enough Counsel did not seem to think it useful to also refer to a further statement in the same judgment where the Learned Judge stated[7] "of course in

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[1] Paragraph 3 of the affidavit

[2] Paragraph 4 of the affidavit

[3] Paragraph 5 of the affidavit

[4] Paragraph 7 of the affidavit

[5][1954] 3 ALL ER 745

[6]See paragraph 8 of the submissions of the Appellant filed 29th January 2019

[7] 1 W.L.R. 230 at page 237 G

many ways, an applicant seeking to persuade the judge to receive fresh evidence and/or argument on a new point is in very similar position to an Appellant seeking similar relief from the Court of Appeal. *He has had a full opportunity to collect his evidence and to marshall his arguments and there must be a strong presumption against letting him have a second chance* ..." (my emphasis)

[10] So even though the court in that case seemed to suggest that there was no real need to "*proceed on the strict basis that each of these three conditions always has to be fully satisfied before fresh evidence can be admitted before judgment*"[8] this court is not so satisfied. In this court's mind the stronger principle seems to be, and I so accept, that in order to rely and introduce fresh evidence, both the arguments and more importantly the evidence to do so must be present.

[11] Therefore in assessing the case at bar, I find that the Appellant has failed to reach this threshold. The reasons for this are as follows:

1) The reason for the non-appearance/late appearance of the document in this court's mind still remains largely unexplained. There is little if any explanation as to the extent of efforts made to find the document.

2) That although indeed this court is somewhat satisfied that this document that is being sought to be introduced could possibly have had some impact on a result in normal circumstances, that that importance must be taken in the context of the appeal itself. This document purports to evidence the creation of legal relations between the parties; there is no further evidence upon which the Appellant could rely to suggest that there had in fact been a binding contract, as there were no payments shown or consideration of any kind. This document could therefore have done little to take it past the notice of dispute having been issued by the Bankruptcy Trustee (the Respondent). Without a proper marshalling of evidence or arguments on this issue, which may have been the strongest argument of the Appellant, this court is left to determine that the importance of the influence was minimal.

3) The evidence is presumably to be believed or apparently credible even if not incontrovertible. Again, this court was not assisted by the Appellant in this regard. There was no evidence to explain how and in what circumstances the Appellant's advisor had "found" this contract some 7 months after having been first contacted. This is especially so when by the Appellant's own admission, there was direct contact with the bankrupt's representative. So even if these circumstances may have appeared innocuous, this court was forced to consider those circumstances in the scheme of how this appeal was prosecuted by the Appellant. In March 2018 when the Appellant filed this appeal, there was absolutely no mention of the existence of an executed contract that could not be found but rather, the Appellant sought to rely on documents from other Harlequin entities to establish a contractual relationship. In this court's mind the inescapable inference that this court was left to draw was that the credibility or veracity of this document was severely wanting and there was no explanation to dispel the same.

[8] Op Cit at page 237 F

[12] On the totality of the application and having assessed the same, this court is therefore satisfied that the Appellant has not met the threshold required to allow fresh evidence.

Order:

1. The application is therefore dismissed with 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