

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

DAVID LEE AND DAVID HANBY (regarding property No. 1008)

JOHN GAWNE AND ELEANOR GAWNE

NICHOLAS FEENEY et al

JAMES BUGDEN AND NICHOLA EINARSSON NEE BUGDEN

IAN LEWIN

SARITA MAMAN

APPELLANTS

AND

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

RESPONDENT

(GROUP 3)

Appearances:

Mr. Satcha Kisson and Ms. Maya Carrington for the Appellants

Mr. Garth Patterson Q.C. with Ms. Taylor Laurayne and Mr. Michael Wyllie for the Respondent

2019: January 17
April 12

Decision on Group 3 Appellants

(This group designation given as per agreement between the parties and the court)

Byer, J.:

- [1] This claim has emanated from a plethora of litigation surrounding bankruptcy proceedings involving Harlequin Property (SVG) Limited (HPSVG).
- [2] On March 3, 2017, 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, CAP 136 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 HPSVG (BT).**
- [3] Pursuant to copious and arduous case management this Court, in agreement with counsel for the BT and counsel for the majority of Appellants filing appeals pursuant to Section 70 of the Bankruptcy and Insolvency Act (BIA), a system was devised to categorize the various appeals under headings for ease of reference.
- [4] This decision therefore refers to the grouping referred to as Group 3 or those appeals in which motions had been filed relating to claims for property for which there was no express agreement for sale between the Appellants and HPSVG.
- [5] On 5 January 2018, the BT gave notice in writing to each of the Group 3 Appellants that their **claims were disputed and provided therein the reasons for same (the “Notice of Dispute”)**, in accordance with section 70(2) of the BIA.
- [6] The Group 3 Appellants each subsequently caused to be filed a Notice of Motion herein purporting to be an appeal against their respective Notices of Dispute, in accordance with section 70(2) of the BIA, (the Appeal), each supported by an affidavit sworn to by Kimmesha L. Howell, a clerk employed with counsel for the Appellants.
- [7] 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.
- [8] 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 3 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

“accept a claim when, inter alia, the following conditions were present:

a. there exists a written sale and purchase agreement for a cabana or room at the Buccament Bay Property or the Merricks Property (the “Contract”) in the name of Harlequin Property (SVG) Limited (“Harlequin”) which was validly executed by Harlequin.”¹

[9] Additionally, the same order of November 2017 also gave the BT the ability *“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 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];”²(my emphasis added)

[10] On the basis of this order it has therefore been the position of the BT that having determined the claims that were provided to him, pursuant to the terms of the order of November 2017, that the claims were accordingly dealt with appropriately and that the Group 3 Appellants having failed to meet the criteria as set out in the directions order, their claims were denied.

[11] In this regard I agree with Counsel for the 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.

[12] 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)³ 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

¹ Clause 4 of the order of the 22nd November 2017

² Clause 5 (a) to (c) of the order of the 22nd November 2017

³ [2004] B.C.J. No 1008

“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.”

- [13] This position was reiterated in the case of Roger (re)⁴ 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].

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.”

- [14] Thus it is clear in this court’s mind that it is necessary for me to assess each Appellant’s case in turn and the evidence relied upon together with the submissions that were advanced in support and against the appeal.

- [15] However, before I embark on this review, I wish to make a comment as to how these Appellants by their counsel placed their matters before the court. It appeared that the Appellants simply pulled all the authorities that they could find to support their claims, dealt with all the Appellants together literally as a group and made passing reference to the documents that they wished this court to consider in support of their appeals. At the supplemental oral hearing held in this matter on 17 January 2019, I asked counsel who appeared for the first time on behalf of these Appellants to provide a concise document referring to the documents they were relying on from the hundreds of documents that had been disclosed by the BT. Despite the date given at the oral hearing for the filing of this document, the Appellants as has been the manner in which they conducted this

⁴ [2018] B.C.J. No 174

litigation, filed the document late and then sought an extension of time. At the hearing of that application on 15 March 2019, this court intimated to counsel who appeared on behalf of the Appellants that the document was no longer needed as this court had taken the arduous task of determining from a list of documents of several hundreds to determine what documents were relevant to which Appellant. That being said, all in all, it seemed to have been lost to a certain extent that the onus of proof lay not on the BT to defend his decision but on the Appellants to prove that he was in fact wrong and that the appeals should be allowed. This court considers that this was a grave disservice done to the Appellants in this matter. However despite that, this court has taken the painstaking task of the required assessment on the materials provided to the court. Additionally, I wish to make it clear that this decision will not deal with Mr. Nicholas Feeney et al as his appeal was discontinued on 30 November 2018.

DAVID LEE AND DAVID HANBY

[16] By Notice of Motion filed on 7 March 2018 the Appellants sought the following relief:

1. A declaration that the Respondent incorrectly adjudicated the claim submitted.
2. 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 Property 1008 to the Applicants.
3. A declaration that the Applicant is the beneficial owner of Property 1008 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.
4. An Order allowing the Applicants to submit any other documents which provide evidence of a contract between the Applicants and Harlequin Property (SVG) Limited.
5. Further, that no distribution be made of Property 1008 until this Motion is disposed of.
6. The costs of this Motion to be paid by the Respondent.

[17] The evidence in support of this Motion was sworn to by Kimmesha Howell.

[18] The affidavit 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.

[19] These documents were as follows:

1. Letter dated 16/6/06 from Harlequin Property (stated as the trading name for Harlequin Management Services (South East) Ltd) stating to be an addendum to contract⁵;
2. Invoice from HPSVG dated 07/06/07⁶;
3. Stage Payment Statement from HPSVG dated 30/9/09⁷;
4. Quarterly Statement from HPSVG dated April, May and June 2011⁸;
5. Quarterly Statement January, February and March 2013⁹;
6. Bank Account Summary for 20 January 2006 to 20 February 2006 from Business Banking Centre, Abbey National House¹⁰;
7. Bank Account Summary for 20 June 2006 to 20 July 2006 from Business Banking Centre, Abbey National House¹¹;
8. Bank Account Summary for 20 January 2007 to 20 February 2007 Business Banking Centre, Abbey National House¹²;
9. Bank Account Summary for 20 November 2006 to 20 December 2007 Business Banking Centre, Abbey National House¹³;
10. Letter dated 22/8/2017 from KPMG (Barbados)¹⁴.

[20] 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 or a representative thereof*”.¹⁵

[21] 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 6 in the Notice of Motion. This court was therefore unsure whether the Appellants were still pursuing grounds 3 to 5 of the Notice of Motion. This was not made clear even on the reply submissions filed by these parties and at the

⁵ KH2 to the affidavit and document # 103 in the LOD filed by the Respondent on the 29/6/18

⁶ KH3 to the affidavit and document #105 in the LOD filed by the Respondent on the 29/6/18

⁷ KH4 to the affidavit and document # 106 in the LOD filed by the Respondent on the 29/6/18

⁸ KH5 to the affidavit

⁹ KH6 to the affidavit filed 7/3/18

¹⁰ KH7 to the affidavit filed 7/3/18

¹¹ KH8 to the affidavit filed 7/3/18

¹² KH9 to the affidavit filed 7/3/18

¹³ KH10 to the affidavit filed 7/3/18

¹⁴ KH11 to the affidavit filed 7/3/18

¹⁵ Notice of Dispute exhibited as KH1 to the affidavit

oral hearing which was only for the purpose of shoring up if required the substantial written submissions, this still was not clarified. Instead, this court was taken on an argument never before brought or pleaded by the parties that in fact the appeals were not limited to a claim for land but for the repayment of monies as well, a proposition that had never been canvassed throughout the entire process over the last year and a proposition that this court was not prepared to entertain in light of the pleadings and the confines of section 70 of the BIA.

- [22] The nub of the arguments for these Appellants was therefore that even though the Appellants had no contract signed by HPSVG, that the BT should have considered all the documents that were provided to him which proved in their mind the firm establishment of an agreement in writing which would have bound HPSVG. The submission on the part of the Appellants continued that, in light of the fact that the documents upon which they relied had in fact been signed by an “agent” of the party to be charged, the Appellants had fulfilled the provisions of the Statute of Frauds and there was a binding contract upon which they could rely. These Appellants relied on the documents that referred to the contract and agreement between the parties specifically, the unexecuted contract between the parties, the letter from an entity called Harlequin Property about the manner in which rentals were to be dealt with and a letter from the same Harlequin Property purporting to refer to clauses in the “contract” that were clarified.
- [23] The submission by the Appellants was that *“the mere existence of these documents suggests that there was a contract for the sale of property between the Appellants and HPSVG”*¹⁶. It is this that the Appellants therefore say is why the BT should be found as having incorrectly adjudicated the claim as submitted.
- [24] The Respondent on the other hand submitted that the documents relied upon before the BT were not signed by the party to be charged. In fact, they make it clear that the contract with HPSVG was unexecuted and the preliminary contract that was in fact executed only had the signatures of the Appellants and not HPSVG.
- [25] The Respondent submitted that the failure to produce documents that had the requisite signature by HPSVG resulted in the non-existence of any contract upon which the Appellants could rely and that on that basis alone, the finding of the BT was entirely correct.
- [26] Additionally, the Respondent made it clear by way of their submissions that the failure on the part of the Appellants in their submissions to this court, to identify the documents that could be read together to form the basis of any contract was detrimental to the case of these Appellants.
- [27] The submission made by the Respondent was that if the Appellants wished to rely on the ruling in the case of *Elias v George Sahely Co Barbados Ltd*¹⁷ they must show that there was a document that was signed by the party to be charged. In that document that is sought to be relied

¹⁶ Paragraph 19 Reply Submissions filed 7/1/19

¹⁷ [1982] 32 WIR 117

upon, it must contain some reference, express or implied to some other document or transaction. These Appellants they submitted had not proffered any document that had in fact been signed by HPSVG and as such the Respondents maintain that there was no enforceable contract which the BT was entitled to recognize.

Court's Analysis and Considerations

- [28] The starting point for this court on this and all of the appeals filed is: what is the position of the court in undertaking this appeal?
- [29] I am satisfied that Part 60 of the CPR would inform the manner in which this appeal is dealt with and in particular Part 60.8(1) CPR which states that the appeal is by way of a re-hearing. This position conforms to the learning that has been laid down by the Canadian authorities which all confirmed that the nature of an appeal from a trustee in bankruptcy does not amount to a hearing *de novo*.¹⁸
- [30] That being said, it must be incumbent upon this court to examine what was in fact before the BT on the Proof of Claim and determine whether he was entitled to find that these Appellants had not satisfied him as to their entitlement as claimed.
- [31] When one looks at the documents that were given to the BT by the Appellants and the documents that he considered (even if we include those that were gleaned from the records of HPSVG itself) one thing was clear, there was no document that was signed by HPSVG that amounted to an agreement for purchase by the Appellants. Indeed, it would appear that the Appellants, based on certain representations by individuals and entities that *appeared* to be associated with HPSVG, purported to act to their detriment on those representations.
- [32] However, what was of note and a document not expressly relied on by the Appellants but which was in fact disclosed by the BT, were two documents dated 14 March 2011¹⁹ and 24 March 2011²⁰ in which the entity known as Harlequin Property (which was specifically stated as a trading name for another entity called Harlequin Management Services (South East) Ltd) advised the Appellants that there was in fact no subsisting contract. It also appeared from the documentary evidence that this position was in fact acknowledged by the Appellants. What appears to have transpired is that there having been no contract, the entity called Harlequin Property forwarded a contract to the Appellants sometime in 2009²¹ which contained provisions that the Appellants took issue with due to the intimation that the contract as presented was so different to any other terms that they had agreed to previously. However, despite this correspondence on the execution of the sales and purchase agreement, what is of note was that none of this correspondence flowed from HPSVG

¹⁸**Roger (Re)** [2018] BCSC 169

¹⁹ Document #DL I 119 on LOD filed 22/6/18

²⁰ Document #DL I 118 on LOD filed 22/6/18

²¹ Document #DL123 on LOD filed 22/6/18

but from an entirely different vehicle. It is on this basis that the Appellants have asked this court to find that this entity without more was in fact acting on behalf of HPSVG and was therefore its agent.

[33] So what was before the BT? No documents that bound HPSVG. No documents that were otherwise signed by HPSVG that evidenced the terms of any agreement. No documents upon which it could even be inferred that there was an agreement between these two parties.

[34] In the ancient case of *Boys v Ayerst*²² the fundamentals of what was required to satisfy the Statute of Frauds were identified:

“It has long since been the settled rule of a Court of Equity to decree specific performance of an agreement which has been signed by the party sought to be charged with it, although it be not signed by the Plaintiff in the suit and he be not equally bound by it. It may be matter of surprise that it should have been so settled, because, although such an agreement may satisfy the words of the Statute of Frauds (29 Ch. 2, c.3), yet a Court of Equity does not generally lend its assistance to enforce agreements which are not mutual. It is now, however, too late to question this doctrine. The language of the Statute of Frauds is, that the agreement or some memorandum or note thereof must be in writing and signed by the party sought to be charged, or some other person by him duly authorized. It is immaterial therefore what the form of the writing is which expresses the agreement, and a letter is as effectual for the purpose as a deed. It is immaterial too what the form of the language is. It is necessary only that the writing should evidence all the terms of the engagement by which the defendant consents to be bound, and which the Court is called upon to execute.”

[35] Thus it is clear, that there is a need that not only must there be some form of writing but that additionally, it must satisfy all the terms of the **parties’** agreement and must be signed by the party to be charged.

[36] Although I do not think that it can be disputed that indeed there were documents submitted that showed there was some interaction between the Appellants and some other entity, this court is not **satisfied that this entity in fact was the agent or “some other person thereunto by him lawfully authorized”**.²³

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

²² [1822] 56 ER 1112

²³ Statute of Frauds Section 4

- [38] Although there is in fact no statutory definition of “**lawfully authorized**” it is perfectly sensible to accept as suggested by the learned author J. T. Farrand in his book²⁴ that an interpretation of that phrase must be dictated by the ordinary principles of agency. In so saying, an agency is recognized as being created in one of four ways: i) by express or implied appointment giving A actual authority to act for P; ii) by subsequent ratification by P of a contract entered into by A without P’s authority; iii) by ostensible authority conferred on A by P although no authority was actually given and iv) by authority given by implication of law in cases of necessity.²⁵
- [39] At no point in the submissions made to this court did the Appellants seek to point to any act that could have amounted to the creation of an agency between HPSVG and the entity called Harlequin Property. Not one of the ways in which agency could have been created was relied upon or shown to exist as a matter of fact. Thus, it is clear to this court, that if the Appellants are unable to get past this stage, it mattered not whether there could be any document that could have amounted to a sufficient memorandum in writing.
- [40] This court does not dispute the law that was set out in the Elias case²⁶ that “*in order to justify the reading of documents together for this purpose, ... there should be a document signed by the party to be charged which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read **together.***” However, what must be undertaken as a prerequisite before there can even be an examination of the documents to see if they amount to such evidence as is sought, there must be first a determination as to “**whether the document[s] [were] signed by or on behalf of the person to be charged...**”
- [41] In this **court’s** mind the Appellants cannot get over this hurdle and even though there may have been some relationship it was not up to the BT and certainly not this court to simply assume one and accept the existence of any such relationship without some proof of the creation of the agent/principal relationship.
- [42] Finally, the Appellants by their submissions sought, as a further ground, to rely on the payment of sums to evidence part performance sufficient to establish a contractual obligation as between the parties.

²⁴Contract and Conveyance 4th Ed

²⁵Commonwealth Caribbean Contract Law Gilbert and Maria Kodilyne at page 223

²⁶ Op Cit

- [43] It is not doubted that indeed part performance of a contract for a sale of land can create legal relations once all the other requirements necessitated by the Statute of Frauds are present. The Appellants relied on the case of *Steadman v Steadman*²⁷ to underlie this proposition. However, this court is not of the opinion that this case which emanated out of the matrimonial jurisdiction in which the husband having made a payment on the basis of an agreement that included maintenance and conveyance of property can have such a wide application as given it by the Appellants. Indeed, there was no assistance given by the Appellants as to how this authority in fact was of relevance to the Appellants.
- [44] From the evidence relied on by the Appellants, it was clear that monies had been paid but the question must again arise, paid to whom? If indeed monies were paid to an entity which bore no relationship as agent to HPSVG, can such a payment amount to **“some contract” between HPSVG and the Appellants?** This court is of the opinion that it cannot. As Roskill LJ stated in *Steadman* the **payment must be “unequivocally referable to some contract between the parties”**²⁸.
- [45] For the BT to have enforced or relied on any such payment it must have been between relevant parties to the purported transaction.
- [46] From all the evidence this was not established as this court has previously determined.
- [47] I therefore do not accept that the BT incorrectly adjudicated this appeal and I find that the Appellants are not entitled to the prayers as claimed.
- [48] The appeal for David Lee and David Hanby is therefore dismissed and they are to pay the BT the **costs of this appeal to be taxed if not agreed within 21 days of today’s date.**

JOHN AND ELEANOR GAWNE

- [49] This appeal was commenced by Notice of Motion filed on 11 May 2018. The relief sought was as follows:
1. A declaration that the Respondent incorrectly adjudicated the claim submitted.
 2. 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 Apartment 2308 to the Applicants.

²⁷ [1976] AC 536

²⁸ Op Cit page 184

3. A declaration that notwithstanding the Respondent's **belief of the invalidity of the Deed of Assignment**; there is evidence of a contract or evidence of a contractual intention to transfer property between Harlequin Property (SVG) Limited and the Applicants.
4. An Order allowing the Applicants to submit any other documents which show that there is contract for the sale of Apartment 2308 from Harlequin Property (SVG) Limited.
5. A declaration that the property to which the Applicants lay claim, that being Apartment 2308 is **readily identifiable on a surveyor's plan**.
6. A declaration that Apartment 2308 has had the requisite subdivision approval and can be legally conveyed to the Applicants.
7. A declaration that the Applicants are the beneficial owners of Apartment 2308 located at Buccament Bay Development located at Buccament Bay, Saint Vincent and the Grenadines, and as such the legal title should be transferred to them.
8. Further, that no distribution be made of Apartment 2308 until this Motion is disposed of.
9. The costs of this Motion to be paid by the Respondent.

[50] This notice was accompanied by an affidavit of Kimmesha Howell filed on the same date. The affidavit exhibited 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. The Proof of Claim which included a letter from HPSVG dated the 12/6/15 purporting to be the assignment of a contract from Buccament Bay Resort Limited to HPSVG²⁹;
2. Letter dated 5/1/2018 from KPMG to Mr. John Alan Gawne and Mrs. Eleanor Wilma Gawne³⁰;
3. Deed of Indemnity – Harlequin Property (SVG) Limited and Mr. John Alan Gawne & Mrs. Eleanor Wilma Gawne³¹;
4. Letter from Ms. Kattian Barnwell Cabinet Secretary, Office of the Prime Minister to Mr. Dustin D. P. Delaney, Delaney Law for Mr. John Alan Gawne & Mrs. Eleanor Wilma Gawne granting approval **for Alien's Land-Holding Licence**³²;
5. Copy of Aliens Land-Holding Licence³³;

²⁹ KH1 of the affidavit and letter is #220 on the LOD filed by the Respondent on 29/6/18

³⁰ KH2 to the affidavit filed 11/5/18

³¹ KH3 to the affidavit filed 11/5/18

³² KH4 to the affidavit filed 11/5/18

³³ KH5 to the affidavit filed 11/5/18

6. Letter dated 5/9/2017 from KPMG (Barbados)³⁴.

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

“1. The contract provided in support of your claim is 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 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.

3. The property subject to your claim is not readily identifiable by the contract on a surveyors plan.

4. The property to which your claim was made is on land which has not received the requisite approval for subdivision and is therefore legally not capable of being conveyed.”

[53] However by affidavit filed 1 June 2018 the BT stated that in relation to the reasons advanced on the Notice of Dispute that the 3rd and 4th reasons provided for disputing the claim were erroneous.

[54] As stated in relation to the Hanby/Lee appeal, the submissions made on behalf of these Appellants were not particularized as to the individual Appellants and the comments made in relation thereto apply *mutatis mutandis* to this appeal. However, it must be noted that in this appeal HPSVG appeared by way of letter dated 12 June 2015 to assign a contract made between Buccament Bay Resort Limited³⁵ and the Appellants to HPSVG. This was an entirely different position than that which applied to the Hanby/Lee appeal. However, it was of note to this court that counsel for the Appellants made no such differentiation nor did they attempt to submit on the relevance of this document and its efficacy if any on this appeal.

[55] In response to this appeal, in addition to the general observations raised by the Respondents to the appeals generally, counsel for the Respondent submitted to this court that this document upon which the Appellants sought to rely was of no moment in that once again the party with whom this agreement had been signed was not HPSVG but an entirely different entity. Additionally, counsel for the Respondents submitted that the letter of 12 June 2015 which purported to act as an assignment from Buccament Bay Resort Limited to HPSVG was unsigned. In any event they further submitted that if the same had been executed its efficacy in law to amount to an assignment would have been nil given that it was ineffective to do so.

³⁴ KH6 to the affidavit filed 11/5/18

³⁵ Document #220 on LOD filed by the Respondent on the 29/6/18

[56] Counsel for the Respondent **in fact drew the court's attention to the reason given by the BT in the Notice of Dispute** with regard to this purported letter of assignment. The BT made it clear that this assignment was ineffective for its failure to include a novation.

[57] Additionally, the Respondent in their submissions asked this court to consider that the Appellants have produced documents for this appeal that were in fact not before the BT. On this basis, the Respondents submitted that even if this court considered that the appeal should succeed, it was still inappropriate to find that the BT was in error based on what was before him. In any event, they submitted to this court, none of the documents that were before the BT or what has been produced to this court, establish any relationship with HPSVG and these Appellants and as such the appeal should fail.

Court's Consideration and Analysis

[58] From the outset this court is of the opinion that no reliance can be placed on the unsigned letter of 12 June 2015. This letter was wholly ineffective in this **court's mind to create any assignment of the contract** from Buccament Bay Limited to HPSVG.

[59] This court is in agreement with the reasoning attached to the BT's finding that this letter could not have acted as an effective assignment, the requirement of a novation not having been met. A **novation has been defined as** "*the rescission of one contract and the substitution of a new one in which the same acts are to be performed by different parties*"³⁶. As the authors of Commonwealth Caribbean Contract Law³⁷ state, "*novation unlike assignment requires the consent of the new party as well as that of the outgoing party and the existing party. This is because it involves entry into a whole new contract which replaces (and annuls) the contract already in place. In this way novation allows for the transfer of both rights and liabilities*". (My emphasis added)

[60] It appears to this court that at no time was such a document prepared and further, the very letter that the Appellants seek to rely on remains unsigned, making it additionally unhelpful to their case. I therefore find that the BT was entitled to dispute the claim of these Appellants on the basis of the evidence that was before him.

[61] However, the question now arises if this position still applies given the new documents that were presented to this court.

[62] Under Section 60, if I accept that this is the rule that guides these appeals, and I have so accepted, there is provision for the admittance/receipt of further evidence of fact.³⁸

³⁶Commonwealth Caribbean Contract Law Op Cit at page 221

³⁷ Op Cit page 221

³⁸ CPR 60.8(2)

[63] Indeed, this court may have been minded to do so, if the Appellants had made the appropriate application to adduce this fresh evidence as opposed to simply exhibiting it to the appeal as if this was a document that was before the BT to which he did not treat.

[64] In any event, even if this court were to consider this “new” document given the fact that it does in fact exist, this court is of the opinion that the interpretation given to it by the Appellants cannot be substantiated.

[65] This “new” document that the Appellants brought to this court on this appeal was a Deed of Indemnity.³⁹ The parties to this document are the Appellants and HPSVG. However, in the submissions of the Appellants in relying on this document this is what they say:

“22. The document referenced as KH3 is a Deed of Indemnity between HPSVG and the Appellants. This deed refers to the existence of a contract and is signed by the party to be charged, HPSVG.

*23. Having established there is a written document signed by the party to be charged which refers to existence of a contract, it is submitted that the Contract referenced as document 219 between the Appellants and Buccament Bay Resort Limited contains all the terms of the agreement between HPSVG and the Appellants, and when documents KH3 and 219 are read together, they satisfy the requirements of the Statute of **Frauds**.”⁴⁰*

[66] The submission is therefore that the Deed of Indemnity read with the contract that the Appellants executed with Buccament Bay Resort Limited are sufficient to bind the BT and thus HPSVG. However, when one scours the two page document that is the Deed of Indemnity, it clearly stated that it was being made in relation to property at Buccament **Bay which was** “*the subject to a contract between Harlequin and the Buyers*”⁴¹ (my emphasis added). No such document exists. The only contract is with an entity called Buccament Bay Resort Limited.

[67] Therefore in these circumstances although it may be agreed that the parameters of the Statute of Frauds have been partially met, in so far as there does exist a document in writing that is signed by the person to be charged (HPSVG) that requirement goes beyond merely the signature being attached. The Statute clearly requires that any such writing must also contain some reference to some other document or transaction. That is the stage at which parol evidence would then be allowed to speak to that other document that was referred, at which point all the evidence must be taken in its totality.⁴²

³⁹ KH3 to the affidavit of the 11/5/18

⁴⁰ Appellants Reply submissions filed on the 7/1/19

⁴¹ Clause 1.1 Unit of the Deed of Indemnity

⁴² Elias case at page 124

- [68] **In this court's mind**, this stringent threshold cannot be met by simply producing a document that is signed by someone to be charged which then makes reference to another document and that other document does not even exist. The mischief which the Statute of Frauds was intended to cure, was the reliance on parol evidence to bind an individual on a debt or other obligation. The signing by the person to be bound or someone who he lawfully authorized, meant that the writing spoke for itself and unless was brought about fraudulently, then it would stand as good evidence of the transaction. Thus, the expansion of this stringent rule to allow parol evidence⁴³ to explain what is in **writing must be in this court's mind strictly construed and applied.**
- [69] The Appellants have made no attempt to apply any parol evidence as to the circumstances of these two documents by way of affidavit or seeking to bring actual oral evidence. Therefore, I do not accept that the Appellants are entitled to rely on this rule by giving what appears to be a wide interpretation to rely on these documents in the manner they have submitted. I am fortified in this view when it is clear that there is in fact no document in existence to which the deed of indemnity refers.
- [70] As a matter of completeness since the Appellants made the general submissions with regard to part payment without differentiating to which Appellants it may in fact be relevant, I adopt the considerations I made in this judgment above in relation to the application of the principle of part payment.
- [71] I therefore find that the Appellants have not proven this appeal and are 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 BUDGEN AND NICHOLA EINARSSON NEE BUDGEN

- [72] By Amended Notice of Motion filed on 4 May 2018 these Appellants sought the following relief:

1. A declaration that the Respondent incorrectly adjudicated the claim submitted.
2. A declaration that notwithstanding the Respondent's **belief of the invalidity of the Deed of Assignment** there is evidence of a contract or evidence of a contractual intention to transfer property between Harlequin Property (SVG) Limited and the Appellants.
3. A declaration that the applicant is the beneficial owner of Cabana 76 located at Buccament Bay Development located at Buccament Bay, Saint Vincent and the Grenadines, and as such the legal title show be transferred to him.

⁴³Elias case Op cit

4. Further, that no distribution be made of Cabana 76 until this Motion is disposed of.

5. The costs of this Motion to be paid by the Respondent.

6. Any such Orders that the Courts deem just.

[73] This notice was accompanied by an affidavit of Kimmesha Howell filed on 7 March 2018 and a supplemental affidavit filed on 4 May 2018. These affidavits 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.

[74] These documents were as follows:

1. Notice of Dispute dated 5/1/18⁴⁴;

2. Letter from Harlequin Property acknowledging receipt of monies dated 17/12/07⁴⁵;

3. Letter from Harlequin Property acknowledging receipt of monies dated 4/1/08⁴⁶;

4. Email to Appellants indicating that there were no further monies owed on the purchase price dated 6/8/15⁴⁷;

5. Letter from the Respondent with instructions for making a claim⁴⁸;

6. Proof of Claim including executed contract with Buccament Bay Resort Limited⁴⁹ and

7. Affidavit by the Respondent filed 12/4/18⁵⁰.

[75] As stated in relation to the Gawnes and the Hanby/Lee appeal, the submissions made on behalf of these Appellants were not particularized as to the individual Appellants and as such, the overview of the submissions in the previous appeal applies *mutatis mutandis*. However, it must be noted that in this appeal these Appellants like the Gawnes, have sought to rely on a contract made between Buccament Bay Resort Limited and the Appellant but unlike the Gawnes there was no letter produced that showed that HPSVG had in fact taken any purported assignment of this contract. What the Appellants submitted was that all the documents when read together were signed by the party to be charged and referred to the existence of a contract (even though it was with an entirely

⁴⁴ KH 1 to affidavit of 7/3/18

⁴⁵ KH2 to affidavit of 7/3/18 and # 289 of LOD filed 29/6/18

⁴⁶ KH3 to affidavit of 7/3/18 and # 290 of LOD filed 29/6/18

⁴⁷ KH4 to affidavit of 7/3/18 and # 293 of LOD filed 29/6/18

⁴⁸ KH5 to affidavit of 7/3/18

⁴⁹ KH1 to affidavit of 4/5/18 and # 285

⁵⁰ KH2 to affidavit of 4/5/18

different entity) and as such the submission was that the Appellants could rely on the same, the Statute of Frauds having been satisfied.

- [76] The Respondent's **very short submission was that there was no contract for sale between HPSVG** and the Appellants; therefore the BT was entitled to dispute the claim. They additionally submitted that even if the documents that were sought to be relied upon were examined, not one of them was signed by HPSVG or anyone who acted as agent on behalf of HPSVG. Harlequin Property, the entity that issued the receipts and the letters acknowledging payment, and the individual who sent an email indicating there were no outstanding payments, were not linked by the Appellants to be an agent of HPSVG.
- [77] The Respondents therefore submitted that there was no evidence upon which the Appellants could rely for this court to make a finding that there existed a memorandum in writing signed by the person to be charged and the appeal should by necessity fail.

Court's Considerations and Analysis

- [78] **It is clear in this court's mind that the** Appellants are not in a position to rely on the documents referred to, to establish any written memorandum on the part of the party to be charged, that is HPSVG.
- [79] **In this court's mind, it would have taken a quantum leap** of logic to have accepted them as having established that they were generated by an entity that could be considered an agent of HPSVG.
- [80] As determined earlier in this judgment with regard to the appeal filed by Hanby and Lee, agency cannot be created on the mere supposition of a party.⁵¹ There was no authority relied on or any actual act done, that was drawn to the attention of this court to support this claim. As such this court is not in a position, without **more, on the mere basis that the entities all have "Harlequin"** affixed to their names that a relationship of agent/principal was created.
- [81] I also once again adopt the findings with regard to the part payment of monies. In fact I say that this is even more glaringly inapplicable when there was not one document that evidenced any transaction having in fact been made with HPSVG or that they accepted or acknowledged payment of monies on the part of the Appellants.
- [82] As a result of my findings itemized above, I do not find that the Appellants have proven their case as required and this appeal also fails with costs to the Respondent to be agreed within 21 days of **today's date, failing which they are to** be taxed.

⁵¹ Paragraph 36 above

IAN LEWIN

[83] By Notice of Motion filed on 2 March 2018 this Appellant sought the following relief:

1. A declaration that the Respondent incorrectly adjudicated the claim submitted.
2. A declaration that notwithstanding the Respondent's **belief that the claim submitted by the applicant** does not prove the existence of a written contract between the applicant and Harlequin Property (SVG) Limited, there is evidence of a contract between Harlequin Property (SVG) Limited and the applicant for the sale of Apartment 2205A situate at Buccament Bay Resort, Saint Vincent and the Grenadines.
3. A declaration that the applicant is the beneficial owner of Apartment 2205A situate at Buccament Bay Resort, Saint Vincent and the Grenadines, and as such the legal title show be transferred to him.
4. Further, that no distribution be made of Apartment 2205A until this Application is disposed of.
5. The costs of the application be costs in the intended application.

[84] This was supported by the affidavit of Kimmesha Howell filed on the same date and an affidavit filed the 5 May 2018.

[85] The documents relied on by this Appellant were as follows:

1. Notice of Dispute dated 5/1/18⁵²;
2. Letter from Harlequin Hotels and Resorts dated 1/7/13 confirming receipt of monies for a unit at Buccament Bay Resort⁵³ and
3. Proof of Claim of the Appellant.⁵⁴

[86] Like the above determined appeals the Appellant's case was based on the documents produced and the authorities relied upon for the arguments that these Appellants had "*fulfill[ed] the requirements of the Statute of Frauds and the principles enunciated in Elias v Sahely*"⁵⁵.

[87] The Respondent's short response was as stated in the Notice of Dispute, that is, that there was no contract evidencing any relationship between the Appellant and HPSVG. They further submitted

⁵² KH1 to the affidavit of 2/3/18

⁵³ KH 2 to the affidavit of 2/3/18 and # 299 of the LOD filed 29/6/18

⁵⁴ KH1 to affidavit of 4/5/18

⁵⁵ Paragraph 28 of Reply submissions filed 7/1/19

that when one looked in fact at the one document that was submitted on behalf of the Appellant, it was issued by a company called Harlequin Hotels and Resorts a company that had been incorporated in the Cayman Islands. The submission on the part of the Respondent therefore was that there was no evidence to state that this company was acting as agent for HPSVG and as such this letter was not in fact signed by a party to be charged or an agent thereof.⁵⁶

Court's Considerations and Analysis

- [88] In this **court's mind**, this appeal does not have any merit with which to detain this court for any length of time.
- [89] This Appellant is even in a worse position than those of his fellow Appellants in this group, in that he does not even have a contract of any kind with any party to show that he had in fact entered legal relations with anyone at all.
- [90] The letter upon which he seeks to rely again purports to issue from a company that had made no indication expressly or impliedly that they had any relationship with HPSVG. It is this company that acknowledged receipt of monies. Indeed it also made reference to property at Buccament Bay, but this court cannot accept that without more an agency was created.
- [91] As stated earlier in this judgment, the mere fact that two entities may share the same name does not mean without more, that there exists a relationship of agent and principal.
- [92] There is no evidence of even a course of conduct that may have facilitated such an interpretation. It is one letter, with one indication. This court even fails to see the imputation given to this letter by the Appellant's **counsel** that the letter refers to the property that the Appellant sought to purchase and as such by virtue of that one line, the requirement of the law is satisfied.
- [93] It seemed to have been lost on this Appellant as it was with his Co-Appellants⁵⁷ that the provisions of section 70 of the BIA place the onus on the Appellant to prove their case.
- [94] It generally appeared to this court, magnified in this appeal of Mr. Lewin that the Appellants just threw information at the court and without assistance, asked the court to make determinations in their favour. This could not have possibly been the intention of the legislature and certainly it is not how litigation should be conducted, especially on the scale and magnitude of this litigation in particular.
- [95] This court therefore finds that this appeal must also be refused and is dismissed with costs to the Respondent to be agreed within 21 days of today's date failing which the same are to be taxed.

⁵⁶ Paragraph 85 of the Respondent's submissions filed 30/11/18

⁵⁷ Group 3 Appellants only

SARITA MAMAN

[96] By Notice of Motion filed 7 March 2018 this Appellant sought the following relief:

1. A declaration that the Respondent incorrectly adjudicated the claim submitted.
2. That notwithstanding the Respondent's **belief that the claim submitted by the applicant does not** prove the existence of a written contract between the Applicant and Harlequin Property (SVG) limited, there is evidence of a contact between Harlequin Property (SVG) Limited and the Applicant for the sale of T2306A situate at Buccament Bay Resort, Saint Vincent and the Grenadines.
3. A declaration that the applicant is the beneficial owner of T2306A located at Buccament Bay Development located at Buccament Bay, Saint Vincent and the Grenadines, and as such the legal tide should be transferred to her.
4. Further, that no distribution be made of T2306A until this application is disposed of.
5. The costs of this Motion be paid by the Respondent.

[97] This Motion was supported by affidavit by Kimmesha Howell. This affidavit exhibited 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.

[98] These documents were:

1. Notice of Dispute 5/1/18⁵⁸
2. Letter from Harlequin Hotels and Resorts dated 17/5/13⁵⁹
3. Affidavit seeking reclamation⁶⁰

[99] The Appellant on 26 October 2018 purported to file an Amended Notice of Motion in which they sought to fundamentally change their relief and instead seek leave to submit the contract between HPSVG and the Appellant.⁶¹

[100] This Motion was however filed without leave and when the actual application to amend the Motion was heard this court made it clear that the amendment could not be made without first making an application to have the fresh evidence of this contract properly before the court.

[101] It was on the subsequent application filed on 17 December 2018 for leave to adduce fresh evidence that the court issued an oral decision on 22 February 2019 in which the application was refused.

⁵⁸ KH1 to the affidavit of the 7/3/18

⁵⁹ Document #308 on the LOD filed on the 22/6/18 and KH2 to the affidavit filed on the 7/3/18

⁶⁰ KH1 to the affidavit of the 4/5/18

⁶¹ Amended Notice of Motion filed on the 26/10/18

- [102] It was therefore only the original Notice of Motion filed in March 2018 that was before the court for determination.
- [103] That being said, the Notice of Dispute that was issued to the Appellant clearly stated that the claim **was disputed because** *“your claim does not provide any evidence of a written contract for the sale of the property to which your claim is made.”*⁶²
- [104] Like the appeal that was filed on behalf of Ian Lewin above, this Appellant relied on the letter from the entity Harlequin Hotels and Resorts as evidence of satisfaction of the Statute of Frauds.
- [105] Counsel for the Appellant in fact submitted that Harlequin Hotels and Resorts having **acknowledged the sum of £150,000.00 must now be “deemed” to have acted as agent of HPSVG.**⁶³
- [106] The Respondents in short order repeated the submissions made in relation to the appeal of Ian Lewin as set out above in paragraph 86. I therefore will not repeat them here.

Court’s Considerations and Analysis

- [107] It appears to this court that this Appellant sought to **hinge her appeal on the “automatic” granting of the application to adduce fresh evidence.**
- [108] That evidence was not accepted and therefore is not before the court and in the oral decision of this court this court made it clear why it felt that the Appellant had not reached the necessary threshold to admit the fresh evidence, the purported executed contract between HPSVG and the Appellant.
- [109] That being said, this Appellant was therefore only left with this letter from an entity that only had the name Harlequin attached to it but with no evidence to substantiate that it was in fact acting as agent for HPSVG.
- [110] As I have stated elsewhere in this judgment and which bears repeating, the mere fact that two entities carry similar names, does not make it in law that one may be acting as agent for the other.
- [111] At no time does Harlequin Hotels and Resorts in the letter of 17 May 2013, state that they are acting for HPSVG or that the acknowledgment of the payment is on behalf of HPSVG, a very simple addition to the letter that would have removed all doubt. I therefore also find that the submission by counsel for the Appellants that the acceptance of the monies established part performance sufficient to find a contractual relationship.
- [112] I therefore do not find that this Appellant has proven her claim and the appeal is therefore dismissed.

⁶² KH1 of the affidavit of the 7/3/18

⁶³ Paragraph 12 of the submissions of the appellant filed 21/2/19

[113] The appeal therefore stands dismissed with costs to the Respondent to be taxed if not agreed **within 21 days of today's date.**

[114] The court having found that there exist no enforceable contracts on behalf of these Appellants, refrains from making any determination on the other issues raised by counsel for the Respondent as to the position regarding the legal position of individuals on the payment of purchase monies.

The order of the court is therefore as follows:

1. The Notice of Motion filed on behalf of David Lee and David Hanby stands dismissed with costs to the Respondent.
2. The Notice of Motion filed on behalf of John and Eleanor Gawne stands dismissed with costs to the Respondent.
3. The Notice of Motion filed on behalf of James Budgen and Nichola Einarsson nee Budgen stands dismissed with costs to the Respondent.
4. The Notice of Motion filed on behalf of Ian Lewin stands dismissed with costs to the Respondent.
5. The Notice of Motion filed on behalf of Sarita Maman stands dismissed with costs to the Respondent.
6. The costs to the Respondent are to be taxed if not **agreed within 21 days of today's date.**

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar