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

ELSON AND DAWN TUITT — APPELLANTS

AND

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

Appearances:
Ms. Samantha Robertson and Mr. Joseph Delves for the Appellants
Mr. Garth Patterson Q.C. with him Ms. Taylor Laurayne and Ms. Vynnette A. Frederick for the Respondent

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2019: May 17

JUDGMENT ON WRITTEN SUBMISSIONS AND ORAL ARGUMENTS

2018 14 December
2019 16 January
2019 11 February
Oral Arguments
2019, 28 March

Byer,J.:

[1] On 3 March 2017, Harlequin Property (SVG) Limited (herein after referred to as "HPSVG") entered into bankruptcy in Saint Vincent and the Grenadines by virtue of a Certificate of Assignment issued by the Supervisor of Insolvency and Mr. Brian Glasgow assumed the role of trustee in bankruptcy of the estate of Harlequin SVG, a bankrupt (herein after referred to as the BT).

[2] Section 70 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**"**) provides that parties who have a claim to the estate of a bankrupt are entitled to file a claim for the same.

[3] In September 2017, pursuant to this section, Mrs. Dawn Tuitt filed an "Affidavit Seeking Reclamation of Property" (herein after referred to as the **"**Section 70 **Proof of Claim"**). The Section 70 Proof of Claim provided, *inter alia*:

> *"(3) That on the 3rd day of March, 2017,* Harlequin Property (SVG) Limited ("the Bankrupt") made an assignment;
>
> *(4) That, on that date, the property enumerated in the document(s) attached and marked was in the possession of the Bankrupt, and still remains in the possession of the Bankrupt and Mr. Brian Glasgow as the Bankruptcy Trustee ("the Bankruptcy Trustee");*
>
> *(5) That the claimant hereby claims that property, or interest or right in it, by virtue of the document(s) attached;"*

[4] The Section 70 Proof of Claim then provides a narrative on the Appellants' dealings with Mr. David Ames and other representatives of HPSVG in relation to contracts entered into for the purchase of the property referred to as "Property Number 206/61 or alternatively Cabana 3028" at the Buccament Bay Resort and appeared to have been extracted in part from pleadings of what appeared to be an unadjudicated claim filed on behalf of the Appellants.

[5] At paragraphs 37 and 38, the Section 70 Proof of Claim the Appellant, Mrs. Tuitt stated:

> *"37. That the claimant is entitled to demand from the trustee the return of the property enumerated in this document;*
>
> *38. That I hereby demand that the trustee return to me the property enumerated in the document(s) within the 15 days after the filing of this form, or within the 15 days after the first meeting of the creditors of the debtor, whichever is later."*

[6] Twenty-three (23) documents were exhibited to the Section 70 Proof of Claim. These included the preliminary contract for the sale of Property Number 206/61 or alternatively Cabana 3028, completion statements, e-mails, plot plans and a brochure. A note below the list of exhibits in the Section 70 Proof claim stated:

"43 and 206 were the original numbers given to the cabanas and entered on the original contract. In May 2008 an amendment was made to the numbering of the cabanas and they were changed from 43 to 56 and 206 to 61. However, when the hotel opened it used Spring Miller hotel Management software to manage the cabanas finance. This hotel software (called Spring Miller) used a different numbering system (56 in the Hotel management system became 3033 and 61 became 3028)".

[7] While there is, on its face, no "property" expressly and specifically enumerated within the Section 70 Proof of Claim, the BT did not dispute the Appellants' property claim on this basis. Instead, the BT relied on the narrative provided in the Section 70 Proof of Claim (including the note accompanying the exhibits identifying the most recent cabana numbers) and the documents exhibited to the Section 70 Proof of Claim in concluding that there were sufficient particulars to enable him to identify the property being claimed by the Appellants as the properties with Cabana Numbers 3028 and 3033.

[8] On 5 January, 2018, the BT issued notices in writing to the Appellants advising them that their claims to Unit 3028 and Unit 3033, respectively, had been disputed. The reason provided for the dispute was the fact that Harlequin SVG was not a party to the contracts provided by the Appellants in support of their claims.

[9] However, on application by the Applicants/Appellants and without objection by the BT, on 18 May, 2018, this Honourable Court ordered that certain documents lodged by the Appellants with the BT after their claim was disputed be deemed properly filed and that the BT re-adjudicate theclaims on review of the new documentation.

[10] Thus in this appeal as filed, it was clear that there were in fact two different issues to deal with as the Appellants had made two different claims for two different properties and they in fact filed two different appeals.

[11] I will therefore deal with them separately with regard to the issues as raised.

[12] However before I embark upon that exercise, given the fact that counsel for the Appellants repeatedly submitted to the court during the supplemental oral submissions heard by this court on 28 March 2019, that this appeal was by way of rehearing, and not simply on the record but on all the matters raised by the Appellant. It is therefore necessary in this court's mind to address what is in fact the role and function of this court on this hearing.

[13] The BIA of this jurisdiction by Section 70 sets out the manner in which persons can make a claim to ownershipor interest in the estate of a bankrupt. This section in its entirety states as follows:

"70. Persons claiming ownership interest in property of the bankrupt

(1) Where a person claims any property, or interest in property, in the possession of a bankrupt at the time of the bankruptcy, that person shall file with the trustee a proof of

claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

(2) The trustee with whom a proof of claim is filed under subsection (I) shall within fifteen days after the filing of the claim or within fifteen days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or give notice in writing to the claimant that the claim is disputed with his reasons, and, unless the claimant appeals to the Court within fifteen days after the service of the notice of dispute, the claimant shall be deemed to have abandoned relinquished all his right to or interest in the property to the trustee, who may sell or dispose of the property free of any lien, right, title or interest of the claimant.

(3) The onus of establishing a claim to or interest in property under this section is on the claimant.

(4) The trustee may give notice in writing to any person to prove his claim to or interest in property under this section, and, unless that person files with the trustee a proof of claim in the prescribed form within fifteen days after the service of the notice, the trustee may with the leave of the Court sell or dispose of the property free of any lien, right, title or interest of that person.

(5) No proceedings shall be instituted to establish a claim to, or to recover any right or interest in, any property in the possession of a bankrupt at the time of the bankruptcy, except as provided in this section.

(6) Nothing in this section shall be construed as extending the rights of any person other than the trustee."

[14] This section does not state the manner in which the appeal is to be dealt with but it has been agreed by the parties and this court that Part 60 of the CPR 2000 applies to these appeals and as such Part 60.8(1) clearly states that the same is to be by way of rehearing.

[15] The procedure of how this rehearing is to be conducted has been considered several times by the courts in the Canadian jurisdiction from which this BIA emanates.

[16] In the text Bennett on Bankruptcy[1], the learned authorsmade an assessment of how the courts in various jurisdictions within Canadadealt with this issue. They identified that in British Columbia[2] the courts found that it was a true appeal and not a trial de novo, as to state otherwise would be to allow the "loss of efficiency in the bankruptcy process[3]. While in Alberta the courtsconcluded that there was no right to hear the matter de novo but where circumstances of the case were such that if it was "restricted to the record that it may result in injustice"[4] the parties were entitled to seek that it be a hearing de novo. The learned authors therefore in capturing what maybe considered the

[1] 13th Ed 2011 page 443
[2] **Re Galaxy Sports Inc.** (2004) 1 C.B.R. (5th) 20
[3] Bennett on Bankruptcy at page 443
[4] **Re San Juan Resources Inc.** (2009) 52 C.P.R. (5th) 97

middle ground opined that "unless a creditor can demonstrate that the appeal should be heard de novo in the interests of justice or some other principled basis the appeal will be on the record as before the trustee"[5].

[17] This was reiterated in later editions of this text and in The 2015 Annotated Bankruptcy and Insolvency Act text[6].Thus in this court's mind the operative manner in which this appeal must be dealt with is on the record as it appeared before the BT. It is indeed not lost on this court that this procedure isnot one of inflexibility, however it must be clear to the court that a hearing de novo must be "appropriate in the circumstances"[7].

[18] In the authorities perused by this court, what was clear was that in those circumstances in which the court found that the hearing should have been undertaken de novo, was where it was clear that the factual matrix of what took place with regard to the bankruptcies required such as assessment[8]. In fact, in the 2015 edition of Bennet on Bankruptcy[9], the author gave some insight into what factors the court may consider to determine that failure to undertake a de novo hearing would cause an injustice. The author identified the following, which was not to be considered an exhaustive list:

a) The trustee's experience and expertise in examining the Proof of Claim;

b) Whether the creditor submitted all its information and documents initially to the trustee;

c) Whether the trustee requires additional information to make a decision as to whether to allow or disallow the proof;

d) Whether the trustee releases an amended notice of disallowance without giving the creditor an opportunity to submit additional material.

[19] In the case at bar, theAppellants have not identified any one of the circumstances as those described above or as a matter of fact, any other circumstances that warrant this case being dealt with de novo as has been suggested by them. In fact, there were no additional documents that the Appellants sought to rely on before this court than what was before the BT. Their case simply is that upon those documents, the BT was entitled and should have come to a different decision. I therefore am not satisfied that this appeal should proceed as a de novo hearing.

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[5] Bennett on Bankruptcy at page 443.

[6] Sarra, Morawetz, Houlden

[7] Case comment on the **Re Galaxy** case by Carol Hunter in *The Lawyer's Weekly Vol 27 No 27* (16 November 2007) as quoted in the case of **Re San Juan Resources Inc**. at paragraph 24.

[8] **Re San Juan Resources Inc**.;**Able Automotive Ltd v Cameron- Okolita Inc** 2009 SKQB 476

[9] At page 482

Condominium #3028 **("3028")**

[20] By Amended Notice of Motionfiled on 8 October 2018, the Appellants sought the following relief:

i. That the Respondent's Notice of Dispute of the Appellants' Section 70 Claim dated 30 March 2018, disallowing the Applicants proprietary interest in Condominium #3028 on the ground that "the claimant refused and/or failed to pay the outstanding monies owed in relation to the purchase price of the property at Buccament Bay described as 3028" be quashed.

ii. On 19June, 2018 the Appellants were served with a letter and Notice of Dispute[d] dated 19 June 2018.

iii. That this Honourable Court make such orders and directions as it shall think fit to give effect to its decision.

iv. That the Respondent do pay the Appellants' costs of this appeal to be taxed if not agreed.

[21] The relief was supported by the grounds as at paragraphs 4 to 7 of the Amended Notice of Motion. These were:

"4. A claim filed under Section 70 of the BIA is a claim to a proprietary interest in property in the hands of a Bankruptcy Trustee. The Trustee takes the property of the Bankrupt subject to the same equities as affected the property when it was owned or possessed by the bankrupt. The Claim procedure under Section 70 of the BIA cannot be used as a means of demanding payment of alleged outstanding monies under an agreement for sale or for rejecting a valid claim based on an allegation that the purchase price remains unpaid.

5. The Appellants entitlement to a proprietary or equitable interest in Condominium #3028 is derived from an agreement for sale dated 6th December, 2006 and made between Harlequin (SVG) Limited as vendor and the Appellants as purchasers, the terms and conditions of which are binding on the Respondent under Section 65 of the BIA (the "Sale Contract").

6. The Respondent erred in law by imposing a payment condition for the recognition of the Appellants Section 70 Claim which was not a term of the Sale Contract. The BIA does not grant the trustee a greater legal or equitable right to the debtor's property than was vested in the debtor.

7. Under Clause 5 of the Sale Contract, the entire purchase price of £147,000 is represented as being paid in full. The Appellants contend that the Respondent is estopped from denying the debtor's representation that full payment was received as evidenced by the terms of the Sale Contract. Further and in the alternative, the Appellants contend that the issue of whether the full purchase price had been paid in full or not, is a matter that should be determined by a court of law by the filing of a claim for specific performance of the Sale Contract and not by the proprietary interest claim procedure under Section 70 of the BIA."

[22] In spite of the BIA making it clear that the onus lay on the claimant or in this case the Appellant to prove their claim[10], it was not lost on this court that the Appellant's only evidence was as contained in the affidavit of Andrea John filed on 14 June 2018, in support of the original Notice of Motion for 3028. The only document relied on was the acceptance of claim issued by the BT on 30 May 2018[11]. This document clearly stated (although exhibited as one document to the document issued for Condominium#3033) that the BT had accepted the claim for 3028 but that "*in accordance with the order of the high court of Saint Vincent and the Grenadines dated November 22nd 2017, you are required to provide us with an undertaking in writing stating that you are prepared to pay £346,500.00 within thirty (30) days of receipt of a demand notice issued…if you do not provide us with this undertaking within seven (7) days of the date of this letter we will presume that you are no longer pursuing this claim.*"

[23] Following this acceptance of claim, and the BT having not received the undertaking as requested, sent the Notice of Dispute to the Appellants on 19 June 2018 in which the BT stated for the *first* time that the claim was disputed for failure on the part of the Appellants to undertake to pay the outstanding monies owed in relation to the purchase price of the property described as 3028[12].

[24] The issuance of this Notice of Dispute, also formed the basis of one of the grounds in support of the Amended Notice of Motion, in that the BT having issued a letter in May 2018, was not entitled under the BIA to issue a "second" letter. The contention was that this "second notice" had no efficacy and should not be allowed to stand.

[25] It was unfortunate that the Appellants did not see it fit to set out the circumstances are to how this 'second notice' came about by way of evidence, however the BT did by his affidavit filed herein on 1 November 2018:

> *"9. Accordingly, on May 30, 2018, I issued correspondence to the Applicants/Appellants, a true copy of which is exhibited to the John Affidavit at "A5". In said correspondence, I informed the Applicants/Appellants that our records indicated that there was £346,500.00 remaining to be paid towards the purchase price of Unit 3028 and advised them that, in the circumstances, their claim to Unit 3028 was accepted, subject to their providing me with a written undertaking within seven (7) days to pay any outstanding monies owed within thirty (30) days of my issuing a demand notice.*
>
> *10. On June 19, 2018, nineteen (19) days after the abovementioned correspondence was issued, I still had not received the requested undertaking to pay the outstanding monies from the Applicants/Appellants. Accordingly, the Applicants/Appellants failed to satisfy paragraph 4(g) of the November 22 Order, as they had not undertaken to pay the outstanding monies.*

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[10] Section 70(3) BIA; **Re Adomako** 5 C.B.R. (4th) 158

[11] Exhibit AJ to the affidavit of Andrea John filed on the 30/5/18

[12] Notice of Dispute dated 19/6/18 attached to the Amended Notice of Motion filed on the 8/10/18

11. On this basis, I issued a formal notice of dispute to the Applicants/Appellants on the abovementioned date, June 19, 2018, in which I advised that their claim had been disputed due to their failure to undertake to pay outstanding monies owed. A true copy of the cover letter and Notice of Dispute is attached hereto and marked ***"BG-2"****.*

[26] It is therefore clear to the court that the letter that was issued in May was NOT a Notice of Dispute and that failure of the Appellants to pay the monies as requested, the BT was entitled to then dispute the claim as per the directions of 22 November 2017 order (November directions order) and issue the Notice of June 2018. Indeed, it is clear from the authorities that the "*initial acceptance of a claim may, however not be final and conclusive. The trustee has the right to review its initial decision and based upon further evidence to disallow the claim."*[13]

[27] Therefore in the instant case I do not accept that this ground of appeal relied on by the Appellants is with any merit.

[28] The main contentions however with regard to 3028 appeal surrounded the fact that the BT had sought to place conditions on the acceptance of the claim of the Appellants.

[29] However, even though that was the essence of the grounds in the Notice of Motionfiled, the submissions by counsel for the Appellant argued in a nutshell that the appeal should be allowed on the basis that the Appellants had established a constructive trust in their favour. Therefore, based on the payments, that the BT acknowledged had been received from the Appellants, it would amount to an unjust enrichment of the estate of the bankrupt for the BT to retain the money paidand the land claimed.

[30] Counsel for the Appellants argued that there having been undisputed fraudulent behaviour on the part of the bankrupt whereby the Appellants were defrauded of monies, that certainly the BT being in the position of the bankrupt must not be allowed to let the estate benefit. Counsel submitted that the Appellants had satisfied all the requirements identified in the Canadian authorities for the establishment of a constructive trust or remedial constructive trust as it is termed[14]. That is, that there was enrichment by the defendant, there was deprivation by the claimant and there is an absence of a juristic reason for the enrichment.

[31] On this basis the Appellants submitted by way of their counsel that the satisfaction of these elements together with the commercial immorality of the bankrupt meant that the BT held a constructive trust over the property. For the Appellants this 'property' to which they sought relief, they submitted, was the monies paid and that by the filing of this appeal they were not locked into only claiming for the land for which they had entered an agreement for sale with the bankrupt.

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[13] The 2015 -2016 Annotated Bankruptcy and Insolvency Act text at page 5-94; **Re Drummie** 2004 NBQB 035 at paragraph 25

[14] **Re Ascent Ltd** 18 C.B.R.(5th) 269

[32] The response of the Respondent's counsel was that this factual matrix did not lend itself to the imposition of the "extraordinary remedy"[15] of the finding of a constructive trust in favour of the Appellants.

[33] The Respondent's contention was simply, that the Appellants had never made any claim to money before the trustee in their Proof of Claim or affidavit for reclamation. The Appellants therefore, they submitted, could not now make that claim having filed appeals that "specifically referred to their claimed proprietary interests in the respective real property."[16] In any event, having been so bound to only claim property(that is the land that formed the subject matter of the agreement upon which they relied) the BT had acted appropriately based on the November directions order and further this was not a case where the a constructive trust could be properly implied whereby the BT would be in a position to convey the property since there was no evidence that the Appellants gave to the BT or this court that showed that the full purchase price had in fact been paid.

Court's Analysis and Considerations

[34] The starting point for this court must be to address the issue of the efficacy of the November directions order as this is the pivotal point upon which the BT acted in making the determination on 3028.

[35] It cannot be disputed that the BT was entitled to seek directions from the court to assist in his adjudications that would have emanated from the plethora of claims against HPSVG.

[36] Thus in November 2017, before the adjudication of claims began, the BT approached this court as presently constituted to seek direction and approval of the manner in which he considered would be the most efficient way to deal with claims that manifested themselves before him as BT.

[37] This was as a means, in this court's mind, to whittle away at the superfluous issues that would have arisen on claims and to deal with those that had merit but that had some missing requirement to allow him ultimately to act favorably towards the large pool of creditors as a whole.

[38] This right of the BT to apply for directions from the court,is recognized as being essential so that he may *"…have his position fortified in advance …which will justify his subsequent action taken pursuant to such directions."*[17]

[39] So in the instant case, this court sanctioned the BT to accept a claim where *"the purchase price has been paid in full or the claimant undertakes to pay the outstanding monies owed within thirty days of their notification of such option…"*[18]This is what the BT did. He issued a letter accepting the

[15] Paragraph 26 of the Respondent's submissions filed on 16/1/19
[16] Paragraph 23 of the Respondent's submissions filed 16/1/19
[17] **Re J .Stanley Wedlock Ltd**[1925] 2 D.L.R.566 at paragraph 36
[18] Paragraph 4(g) of the November directions order

claim and giving the Appellants the requisite period of time to give an undertaking to pay the balance as he had been able to confirm.

[40] By the affidavit of the BT the balance owed for 3028 was £346,500.00[19]. The Appellants gave no undertaking and made no further payments. The claim was therefore subsequently disallowed.

[41] The Appellants have pleaded that the BT was not permitted to place a condition on the acceptance of the claim and that further in any event they are not bound by the November directions order since it was obtained ex parte and was therefore in contravention of Regulation 20 of the Bankruptcy and Insolvency Regulations 2015 (the Regulations). Regulation 20 states this:

> *"20.(1) Subject to subregulation(2) where any party other than the applicant is affected by the motion referred to under regulation 19 no order shall be made unless*
>
> > *(a) proof of consent of the party is shown to the court or*
> >
> > *(b) proof of the intended motion and a copy of the affidavits in support of the motion have been duly served on the party.*
>
> *(2) Where the court is satisfied that serious mischief may result from delay caused by proceeding in the ordinary way, it may make an order ex parte upon such terms as to costs and other wise and subject to such undertaking, if any as the court thinks fit.*
>
> *(3) Any party affected by an order made ex parte may apply for it to be set aside."*

[42] At the time of the making of the November directions order, it is pertinent to note that there were no other *parties* to the proceedings. These were proceedings that were started by the BT to deal with the bankruptcy and for his appointment to be sanctioned by the court. There was therefore no other "party" to serve. Additionally, in spite of the Appellants becoming aware of the order and having their claim determined pursuant to that, they did not file an application to have the order set aside or varied but rather have sought to rely on a submission that the same cannot bind them as they were not served and not made a party.

[43] This court cannot accept this submission. Indeed, even in the authority[20] relied on by the Appellant to substantiate this argument, there was clearly a different factual matrix to the case at barin that there were opposing parties before the court on the hearing of that application as was being determined by the court. As indicated, this was not the case at bar. Therefore, in this court's mind this court was entitled to make the order that it did and until and unless an individual or otherwise applies to have it set aside, it remains binding on the actions of the BT.

[44] That being said, the issue must now be whether the decision of the BT should be quashed especially in the light of the argument of commercial immorality or unjust enrichment of the estate of the bankrupt.

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[19] Paragraph 26 of the affidavit of the BT filed 1/11/18

[20] **Re Armcorp 4-18** 32 B.L.R (2d) 138; 46 C.B.R. (3d) 81

[45] In making this determination I also wish to point out that even though I accept the submissions of counsel for the Appellant that an application under Section 70 does not lock the Appellants into making a claim for one type of property only[21] and that the outlook given to proofs of claim must be "liberal and free from technicalities"[22] this court accepts the submission by the Respondent that the Amended Notice of Motion filed made no mention of seeking a claim for monies paid but rather that the BT was not entitled to deny the claim based on the condition of further payment. Further I accept that the Appellants having claimed the basis of their entitlement to be the sales and purchase agreemententered into by the parties that these Appellants never made a claim for the monies that were held by the estate which both sides have admitted were in fact paid.

[46] In saying this, it is of course open to this court, if such an argument is raised, to look at the entirety of the matter and not just what was decided by the BT but to do so would be to treat this hearing as one de novo in the true sense of the words. To adopt this method has been pursued wholeheartedly by the Appellants. However as was stated earlier in this judgment, if this court is minded to do so, it must be satisfied that the factual matrix allows for that or that the Appellants have put forward compelling reasons to do so. Therefore, as with the appeal as a whole, the onus and burden lay with the Appellant to convince the court that it must proceed in that manner. It is with this in mind that the submissions made by the Appellant relying heavily on the claim that had been filed by these Appellants in civil suit 167/2014 in which they claimed against Buccament Bay Resort Limited, Harlequin Property (SVG) Limited (HPSVG) and David Ames damages for misrepresentation, fraud and breach of trust, bear some relevance.

[47] However, I am not satisfied that reliance on that extant proceeding providessufficient basis for this court to go outside the scope of a hearing on the record. Indeed, it has been said that a hearing restricted to the record may in some cases result in an injustice[23] but such a finding must be clear.

[48] In the case at bar, the Appellant has sought to rely on a claim that has never been to trial or determination. A claim is just that, a claim until the same is determined on its merits by a court of competent jurisdiction. Indeed, it is accepted that the claim did raise some points of concern as to how the defendants in that claim and by extension the bankrupt in these proceedings conducted itself, but I must bear in mind that the Section 70 appeal process is very limited. The BT has specific duties to perform under that section and once he is given the parameters to do so[24], then in this court's mind he has fulfilled his obligation.

[49] Indeed with regard to 3028, the BT was presented with a claim for an interest in property in the possession of the bankrupt at the time of the bankruptcy[25]. This claim clearly was based on the sales and purchase agreement and claimed an interest in the land which formed the subject of that sales and purchase agreement.The argument that the Appellant is entitled to the monies was in

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[21] **Craig Barry Andrew v Farmstart** 54 D.L.R. (4th Ed) 406; 1989 2 WWR 127

[22] **Re Burt Bankruptcy** 2009 NLTD 19

[23] **Re San Juan Resources Inc.** at paragraph 7

[24] November directions order

[25] Section 70(1) BIA

this court's mind an entirely new claim and not an amendment or an attempt at a liberal interpretation of the proof of claim[26]. That being said, that is not a claim which this court is now in a position to entertain.

[50] What this court therefore finds is that perhaps theAppellant does have a claim against the bankrupt for the monies paid and to which they seek restitution, however I am not satisfied that this is the correct forum for that claim and certainly was not one to be considered by the BT, it having not been specifically made clear to him. I find therefore that the BT was entitled to act within the parameters of the November directions order. Thus, taking into consideration the nature of the claim as was placed before him, he was entitled to find that the Appellants could not and did not prove full payment. The BT was therefore entitled to seek the undertaking and the Appellants not having given the undertaking the claim was denied.

[51] I therefore find that the decision of the BT should not be quashed. The appeal for 3028 is therefore dismissed with costs to the BT to be taxed if not agreed within 21 days of today's date.

Cabana 3033("3033")

[52] By Notice of Motion filed on 17 July 2018, the Appellants claimed the following:

i. That the Respondent's refusal of claim of the Appellants' Section 70 Claim by Notice of Dispute dated 29 June, 2015, disallowing the Appellants proprietary interest in Condominium #3033 on the ground/basis that the property to which your claim was made does not form part of the Estate of Harlequin Property (SVG) Limited, a bankrupt, and therefore the Bankruptcy Trustee does not have the legal capacity to convey said property that be quashed.

ii. That this Honourable Court makes such orders and directions as it shall think fit to give effect to its decision.

iii. That the Respondent do pay the Appellants' costs of this appeal to be taxed if not agreed.

[53] These prayers were supported by four grounds:

i. A claim filed under Section 70 of the BIA is a claim to proprietary interest in property in the hands of a Bankruptcy Trustee. The Trustee takes the property of the Bankrupt subject to the same equities as affected the property when it was owned or possessed by the bankrupt. The claim procedure under Section 70 of the BIA cannot be used as a means of refusing a claim as there is no legal capacity to transfer or convey title.

[26] **Re Pope and Talbot** 2009 BCSC 1738

ii. The Appellants entitlement to a proprietary or equitable interest in Condominium #3033 is derived from an agreement for sale dated 6 December, 2006 and made between Harlequin (SVG) Limited as vendor and the Appellants as purchasers, the terms and conditions of which are binding on the Respondent under Section 65 of the BIA (the "Sale Contract").

iii. Further the Appellants contend that they have paid the full purchase price and that the trustees hold their interest in equity.

iv. Alternatively, the Appellants claim that the Trustees hold in Trust for the Appellants all sums including purchase price, receipts from rental of Villa 3033 and interest thereon.

[54] The evidence in support of this motion was again contained in the affidavit of Andrea John which did nothing more than exhibit the Notice of Dispute that was issued by the Respondent on 29 June 2018 which clearly stated the reason for the disallowance as being "the property to which your claim was made does not form part of the Estate of Harlequin Property (SVG) Limited…"[27]

[55] Without differentiating between the two appeals, the Appellants also relied on the arguments in relation to the unjust enrichment of the bankrupt by not allowing the claim. In this appeal however, the arguments raised by the Appellants may have carried more weight if there was any evidence of actual payments received by HPSVG for this cabana.

[56] Indeed Section 70 of the BIA is clear; the trustee can only give what is in the possession of the bankrupt at the time of the bankruptcy. It is not denied by the Appellant that this indeed may have been the position but they, not in their claim to the BT but to this court, submit that the BT holds the monies paid to the bankrupt (if they are not entitled to the land) which is held on trust for them.

[57] The Respondent's short response is that they never made a claim for money and the property was not in the possession of the bankrupt at the time of bankruptcy so they are not entitled to their claim.

Court's Analysis and Considerations

[58] This court has already made its position clear as to the nature of these proceedings and what must be proven by the Appellant who seeks to have the court conduct a hearing de novo.

[59] In this court's mind it must be compelling that an injustice would be perpetrated if the Appellant is not in a position to ventilate their claim completely afresh. This court agrees that the case with regard to 3033 would have been a proper instance in which to consider doing so, if the Appellants had produced the requisite evidence to have the court examine.

[27] Exhibit AJ to the affidavit of Andrea John filed 17/7/18

[60] The affidavit in support of the appeal did nothing to assist and the document that was the affidavit of reclamation by the second named Appellant made no reference to the payments or any evidence regarding 3033 specifically.

[61] It could not have been within the consideration of these Appellants that this court was expected to do the heavy lifting for them without the required information.

[62] Indeed it would appear that on the authorities that establish that it is appropriate in a commercial law context to find a constructive trust for monies paid in instances of commercial immorality a court can only do so on some evidence.

[63] What have the Appellants said with regard to 3033?

i. That the interest of Appellant to a proprietary or equitable interest in 3033 is by way of a sale andpurchase agreement dated 6/12/06 but none was exhibited to the affidavit in support;

ii. That they had paid the full purchase price of 3033 yet no evidence was shown that this had been done. In fact, the Affidavit of reclamation under Section 70 which the BT exhibited to his affidavit of the 1/11/18 and referred to in the reply submissions of the Appellant filed 11/2/19 made no mention of payments for 3033 or 56 as it was previously called.

In fact, this court was not seised of any information relating to 3033.

iii. That the BT holds in trust all monies for 3033 including the purchase price, receipts from rentals and interest. Yet there was nothing before this court to make any such determination.

[64] This court therefore determines that the BT was entitled to disallow the claim of the Appellants in that similarly no such information was before him and the claim as it was framed before him sought the property not the money.

[65] This court may have been in the position to entertain a claim that the property being sought was for the possession of the land or in the alternative the repayment of sums paid, if such claims had been made and supported by the evidence before it. Indeed the inclusion of the prayer in the Notice of Motion without the evidentiary basis is of little assistance to the court and even less assistance in making a determination that the claim should have been dealt with on a de novo basis.

[66] In spite of the strong argument on behalf of the Appellants that this court should have entertained such, in the final analysis this court is of the opinion that there was simply not enough information of an evidentiary basis to do so.

[67] I therefore dismiss the appeal for 3033 with costs to the Respondent to be taxed if not agreed in 21 days.

[68] Having dismissed these appeals it may still be open to these Appellants to consider their remedies against the estate pursuant to other provisions of the BIA.

The order on this appeal is therefore as follows:

1. Appeal for 3028 is dismissed with costs to the Respondent to be taxed if not agreed within 21 days of today's date.

2. Appeal for 3033 is 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