THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0061

BETWEEN:

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

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

GERALD PURDY (TITLE NUMBERS 5005 AND 5006)

COLLEN AND MICHAEL SHELSWELL

STEPHEN WESTHEAD

DOUBLE RED 359 LIMITED

ALISON KELLY

PETER AND JACQUELINE TILBE

MARTIN SHUTT AND ORS

DAVINDA JANDA APPELLANTS

AND

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

Appearances:

Mr. Satcha Kisson and Ms. Maya Carrington of Dentons Delany for the Appellants
Mr. Garth Patterson Q.C. with Ms. Taylor Laurayne of Lex Caribbean and Mr. Michael Wyllie of Fredericks Attorneys for the Respondent

---

2019: May 24

WRITTEN SUBMISSIONS

2018: 26 October
2018: 30 November
2019: 07 January

ORAL SUBMISSIONS
2019: 17 January

Decision on Group 6 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 (hereinafter referred to as HPSVG).

[2] On 3 March 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 (hereinafter referred to as the "BIA") and Mr. Brian Glasgow assumed the role of Trustee in bankruptcy of the estate of HPSVG (hereinafter referred to as the 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 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 6 or those appeals in which motions had been filed relating to claims where there had been a failure to pay outstanding monies claimed to be due on the purchase price of the property.

[5] This group unlike the others that were classed into groups for ease of reference were not disputed based on the failure of contractual relations as between HPSVG and the individual appellants, rather this group was concerned with the payment of the purchase monies by the individual appellants. In looking at this group, I agree with counsel for the respondent that this group could in fact be further subdivided into two. One sub-set are the appellants who provided an undertaking to pay the amounts that the respondent calculated were still due and owing and the second sub-set were the appellants who gave no such undertaking.

[6] On 5 January 2018, the BT issued correspondence to each of the Group 6 appellants indicating that their claim under Section 70(1) of the BIA had been accepted. In that correspondence and pursuant to the order of this court made on 22 November 2018 (the Directions Order) the respondent also informed these appellants of the sums that he had been able to confirm had been paid and that the claim's acceptance was based on the claimants giving an undertaking to pay the outstanding sums. Of the nine appellants, seven of the appellants gave the undertaking to pay the sum as noted by the respondent to be outstanding.

[7] It is to be noted that in the letter accepting the claim, the respondent had made it clear that if the appellant had failed to provide the undertaking within seven days of his letter he would take that as evidence that the appellants were no longer pursuing their claim.

[8] Subsequently, none of the appellants made any payments and the appellants Colleen and Michael Shelswell, gave no undertaking at all. Notices of Dispute were therefore issued to the appellants citing the reasons for disputing the claim and this court will examine those reasons when the individual appellants are dealt with subsequently in this judgment.

[9] The Group 6 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, (hereinafter referred to as the Appeal), each supported by an affidavit sworn to by Kimmesha L. Howell, a clerk employed with counsel for the appellants.

[10] However, even more so than the other groupings that emanated from this litigation, it is necessary to put these appeals into context and especially the basis upon which the BT disputed the proofs of claim of these appellants.

[11] Section 216(1) of the BIA 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."* Pursuant to this section, 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 the Directions order. This order has never been appealed and thus when these Group 6 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 and the respondent found that there were outstanding sums due and owing to HPSVG. The BT was as liberty 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 by the [Trustee]".*

[12] 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 Directions order, that, the claims were accordingly dealt with appropriately and that the Group 6 appellants having failed to meet the criteria as set out in the Directions order, their claims were ultimately denied.

[13] 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.

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

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

[15] This position was reiterated in the case of Roger (re)[2] where the British Colombia 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. …*

[1] [2004] B.C.J. No 1008
[2] [2018] B.C.J. No 174

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……"

[16] 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 and dealt with all the appellants together literally as a group. Thus it appeared to this court that 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 was indeed an unfortunate way in which these appeals were prosecuted before this court.

[17] That being said, there are two appeals which I wish to deal with separately from the majority of appeals filed. These are the appeals by Gerald Purdy regarding title 5006 and Colleen and Michael Shelswell. The second of these falls within the sub-set of those appellants who had not provided any undertaking at all to the BT.

GERALD PURDY "5006"

[18] By Notice of Motion filed on 18 May 2018 this appellant sought the following reliefs:

1. A declaration that the respondent incorrectly adjudicated the claim submitted and that the claim submitted by the applicant/appellant be re-adjudicated having regard to all the relevant facts.

2. A declaration that the respondent is not entitled to disclaim contracts entered into by the applicant/appellant and Harlequin Property (SVG) Limited.

3. A declaration that the respondent's belief that Harlequin Properties (SVG) Limited did not benefit from the funds transferred from the other properties in the Harlequin Group is without basis and without regard to the relevant facts; as all the monies were pooled together.

4. A declaration that the applicant/appellant is the beneficial owner of Cabana 39C with title number 5006 located at Buccament Bay development, Saint Vincent and the Grenadines, and as such the legal title should be transferred to him.

5. Further, that no distribution be made of Cabana 39C with title number 5006 until this Motion is disposed of.

6. The costs of this Motion be borne by the respondent.

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

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

[20] The affidavit sought to exhibit the documents which the appellant relied on in his Proof of Claim and upon which he was also seeking to rely on in this appeal as filed.

[21] These documents were as follows:

1. Proof of Claim on behalf of Profid PCC with respect to Profid Investment Fund Number 3 (Profid) with attachments including the contract for sale between HPSVG and Profid[3];

2. Letter of acceptance by respondent dated 5/1/18[4];

3. A document entitled Creditors Listing with an Inter-Company Loan agreement dated 23/9/2011 between Harlequin Management Services (South East) Limited and several other Harlequin entities including HPSVG[5];

4. Letter dated the 12/1/18 from counsel for Purdy Investment Management Ltd with the undertaking to pay the balance as found due and owing[6];

5. Email correspondence dated 28/2/18 to the BT with a cancellation agreement dated 9/5/14 between Harlequin Resorts (St Lucia) Ltd and Guardian Pension Trustees Limited and The Guardian SIPP with reference to Lot #5005[7];

6. Demand Letter dated the 22/3/18 from the respondent to Profid for the payment of £281,402.00[8];

7. Email from Harlequin Hotels and Resorts dated the 9/3/18 stating the figure to be paid for 5006 at £16,042.00[9];

[22] The Notice of Dispute that was issued on the claim on 4 May 2018[10] had as its reason that Profid had failed to pay the outstanding monies as provided in the Demand Notice of 22 March 2018.

[23] All of the contractual relations that were established and accepted by the respondent were in fact with Profid not Gerald Purdy. Therefore, I am in agreement with counsel for the respondents that this appeal is a non-starter in that the named appellant has no right to make such an appeal. This appellant that is presently before the court had no standing to make this application. Amazingly enough this was in fact accepted by counsel for the appellants who in their submissions of 7 January 2019 accepted that an application could be made and would be made for substitution[11].

---

[3] KH1 to the affidavit and documents #523 and 527 in the LOD filed by the Respondent on the 29/6/18
[4] KH2 to the affidavit
[5] KH3 to the affidavit
[6] KH4 to the affidavit
[7] KH5 to the affidavit
[8] KH6 to the affidavit
[9] KH7 to the affidavit
[10] Taken from the submissions of the Respondent as the Notice of dispute was not before the court
[11] Paragraph 21

[24] Up to the date of writing this judgment some 4 months after those submissions no such application was filed and therefore this appeal in its present form must be dismissed.

[25] The appeal for Gerald Purdy "5006" is therefore dismissed with costs to the BT of this appeal to be taxed if not agreed within 21 days of today's date.

COLLEN AND MICHAEL SHELSWELL

[26] This appeal was commenced by Notice of Motion filed on 9 April 2018. The relief sought was as follows:

1. A declaration that the respondent incorrectly adjudicated the claim submitted and that the claim submitted by the applicants/appellants be re-adjudicated having regard to all the relevant facts.

2. A declaration that the respondent's belief that Harlequin Properties (SVG) Limited did not benefit from the funds transferred from the other properties in the Harlequin Group is without basis and without regard to the relevant facts.

3. A declaration that the applicants/appellants are the beneficial owner of Property 2109 located at Buccament Bay development, Saint Vincent and the Grenadines, and as such the legal title should be transferred to them.

4. Further, that no distribution be made of Property 2109 until this Motion is disposed of.

5. The costs of this Motion be borne by the respondent.

6. Any further orders that the Courts deem just.

[27] This notice was accompanied by an affidavit of Kimmesha Howell filed on the same date. The Motion as also supported by a supplemental affidavit of Kimmesha Howell filed on 4 May 2018. These affidavits 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.

[28] These documents were as follows:

1. Letter of Acceptance from the respondent dated 5/1/18[12];

2. Notice of Dispute dated 22/3/18 from the respondent[13];

3. Letter dated 2/3/18 from Harlequin Hotels and Resorts[14];

[12] KH1 of the affidavit of 9/4/18
[13] KH2 to the affidavit filed 09/4/18
[14] KH3 to the affidavit filed 09/4/18

4. Inter Company Loan Agreement dated 23/9/11[15];

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

> *"1. The claimant refused and/or failed to undertake to pay the outstanding monies owed in relation to the purchase price of the property at Buccament Bay described as 2109".*

[30] In addition to the documents referred to in the affidavits in support of the Notice of Motion the appellants by way of submissions identified three other documents upon which they also sought to rely. These were the cancellation agreement between the appellants and HPSVG dated 10 February 2013 (stated as 2014 in the submissions of the appellant)[16], the cancellation agreement with the appellants and Buccament Bay Resort dated 10 February 2013 (stated as 2014 in the submissions of the appellant)[17] and the contract between HPSVG and the appellants dated 19 January 2014[18].

[31] The nub of the submissions on behalf of these appellants was that the respondent was not entitled to place any condition on the acceptance of a claim. Counsel submitted that the only power in the BT under Section 70(2) was either to accept the claim or dispute the claim. The appellants also submitted that if the BT intended to accept the claim he could do so but not upon the condition of payment and that the BT only had the authority to issue one Notice of Dispute and that any second notice of adjudication which the BT purported to do was without authority. Additionally, the appellant submitted that the BT was not entitled to disclaim any contract entered into between HPSVG and the appellants. They relied on the case of Transmetro Corporation Ltd v Real Investments Property Ltd[19] which sets out the guidance for Trustees when they seek to disclaim a contract. Counsel identified five principles, namely that the contract is unprofitable and would impose ongoing financial obligations which would be regarded as detrimental to creditors; before the contract can be considered unprofitable under the Australian legislation it must be shown to have given rise to prospective liabilities; that the contract would delay the winding up of the company's affairs as they will have to be performed over a substantial period of time; it cannot be simply financially disadvantageous the Trustee must show the nature and cause of the disadvantage and finally it cannot simply be deemed unprofitable merely because the company could have made a better bargain. Therefore, the appellants submit that the BT cannot be in any better position than the bankrupt themselves. There is nothing they submitted which would allow the BT to impose further payments and disclaim the contracts to which he is bound. By failing to adhere to the terms of the contracts that HPSVG and the appellants entered, the BT is effectively seeking to disclaim the contracts. This is especially so when as they term it "an agent" of HPSVG categorically represented that the appellants owed no further sums. Finally, in relation to the

[15] KH2 to the affidavit filed 04/5/18
[16] Document #347 on LOD filed 29/6/18
[17] Document #348 on LOD filed 29/6/18
[18] Document #353 on LOD filed 29/6/18
[19] [1999]17 ACLC 1314 at paragraph 21

substantive appeal, the appellants submitted it was clearly stated that even though the correspondence that stated that all sums had been paid had been issued post-bankruptcy proceedings, it was sufficient to show that the bankrupt himself considered that there were no outstanding monies due.

[32] In response to this appeal, in addition to the general observations raised by the respondents to the appeals generally, that the appellants had failed to discharge the burden of proving their case, counsel for the respondent submitted to this court that the appellants had failed to discharge the burden that in fact all the purchase monies had been paid. The respondent submitted that in order to compel the BT to transfer property to them, the appellants must either show that they have paid the purchase price or that they will do so within a specified period of time. Additionally, this money must have not only been paid but paid to the true vendor, HPSVG. The respondent further submitted that it was clearly stated to the appellants in the letter of acceptance, that any monies that were paid to other developments which were then to be "transferred" to the purchase of the property at HPSVG, were not taken into consideration as there was no trail that could be followed to confirm that this was in fact done. In any event it was not for the BT to prove that the money had been paid or received but for the appellant to do so. The respondent submitted, that the appellants having failed to provide the evidence of these payments, that he was entitled working within the parameters of the Directions order to ultimately dispute the claims which did not amount to disclaiming the contract of the appellants.

Court's Consideration and Analysis

[33] This appeal has raised an interesting issue for the actions of the respondent. What I must however state from the beginning is that the relief sought by these appellants for a declaration that the BT wrongly adjudicated the claim is without merit.

[34] By the Directions order issued from this court, this court was satisfied that there needed to be some structure put into place that would determine how the BT was to decipher, collate, determine and adjudicate some 400 plus claims on the estate of the bankrupt. There is no doubt in this court's mind that the BT was entitled to seek such directions to ensure some uniformity in the handling of the same. This right of the BT is recognized as being essential so that the BT in applying for directions may "…have his position fortified in advance …which will justify his subsequent action taken pursuant to such directions"[20]. That is what this BT did, and this court is satisfied that he was entitled so to do. I am satisfied that the BT was entitled to make his investigations and to issue, if he saw from the evidence a discrepancy in the consideration paid, to seek the payment of that consideration and to determine that failure to do so, meant default on the part of the purchasers for which he could dispute. The question must however be, was he entitled to do so for these appellants and for each of the appellants in this group. I am therefore satisfied that the actions taken by the BT pursuant to the said Directions order must stand.

[20] **Re J. Stanley Wedlock Ltd**[1925] 2 D.L.R.566 at paragraph 36

[35] The further arguments of these appellants also surround issues of the executed agreement for sale between themselves and HPSVG as setting the purchase price for the parcel #2109[21]. The contract that was executed between the parties confirmed that the purchase price was £175,000.00. In the Notice of Dispute issued by the respondent he clearly stated that he accepted that £93,655.00 had been paid with a balance of £81,344.30 made up of a sum that was allegedly transferred from Buccament Bay Resort Limited but which could not be confirmed and the developer loan that was to take effect at the end of the project in which the appellants would have been repaying the same at a set rate of interest. This money was therefore never paid.

[36] In answer to this, the appellants rely on correspondence from two individuals who they claimed acted as agent for HPSVG. One is from someone called Carol Ames on 29 March 2007 in which she acknowledges receipt of £51,500.00. There is no indication on whose behalf this letter is written as there is no letter head and no actual signature. The second is from someone called Sarah Tricker offering a 100% finance agreement. Again, there is no indication on whose behalf this person acted. Finally, the appellant also relies on a letter dated 2 March 2018 (after the bankruptcy proceedings and the appointment of the BT) from an entity called Harlequin Hotels and Resorts that as far as HPSVG was concerned there was no outstanding monies owed. Thus the appellants say to the court that the BT is bound by the contract which states that the monies had been paid and that the mortgage that had been negotiated under the developer's loan ceased to have effect on the insolvency of HPSVG and therefore the BT was wrong in finding that monies were still outstanding.

[37] This is the essence of the argument for all the appellants in this group. That is, that once there is a document that was signed by HPSVG that stated that the monies had been paid the BT was bound by that document and could make no demands for "outstanding monies".

[38] In order to determine whether this argument holds any merit, an argument that I must quickly add was not raised before the BT upon the Proof of Claim being filed or even in response to the Letter of Acceptance issued by the BT, I must consider the legal grounding for this position.

[39] In seeking to assist the court the respondent provided the court with the Privy Council case of Creque v Penn[22] a case emanating out of the jurisdiction of the Territory of the Virgin Islands. The short facts of the case were that the appellant had sought to sell a parcel of land to the respondent. The sale was effected by two transfers (under the Registered Land system) and in which under the heading "in consideration for" the sums of $40,000.00 and $60,000.00 had been inserted. In fact, the appellant had not received any of this money and having received latterly a portion of the sum, she sued the respondent for the balance. The court at first instance held that the respondent was to pay the balance and the respondent appealed to the Court of Appeal. The Court of Appeal held that since the legislation that governed the transfer of land under the Registered Land system

[21] Document #353 LOD filed 29/6/18
[22] [2007] UKPC 44

contained a specific provision which stated that the instrument that was duly executed by the parties was to be considered as containing a true statement of the amount or value of the purchase price, the court found that they could not go behind the transfers and that the appellant was bound by the same. The Privy Council in considering whether this was so, agreeing with counsel for the appellants accepted that in equity[23], there is a settled rule that a vendor may as against his purchaser, give evidence to contradict a receipt clause even if it is contained in a deed. Thus, they relied on the dicta of Sir John Romily M R in Wilson v Keating[24] in which he stated:

"It is true the deed estop the parties at law, because at law you cannot contradict the deed, but it is settled by abundance of authority, that in this [Rolls] court you can contradict the statement of the payment of the purchase-money; nay more, though there is a receipt for the purchase-money endorsed and duly signed by the vendor, yet, even then, the vendor would have a lien on the estate for the unpaid purchase-money, and which would also be a debt due from the purchaser to the vendor."

[40] It is therefore clear to this court that there will always exist a right of the vendor personally against the purchaser for nonpayment, this exists as between the original parties to the transaction. Indeed the BT was not a party to the contract between the appellants and HPSVG but he is not the successor *in title*, he has simply stepped into the shoes of HPSVG and having done so, this court accepts that he is entitled to question and require proof of payment when the records of the very same HPSVG makes no reference to the same.

[41] The appellants seemed to have wholly misinterpreted the finding as contained in Creque. The cases on which they sought to rely in response, in this court's mind were fundamentally different to the case at bar. In Bickerton v Walker the court clearly stated that the plaintiff would have continued to have had a cause of action as against the original mortgager but because he had retained the original deed and transferred it to another person the plaintiff could take no action against that transferee. The transferee relied on the document which claimed that the monies had been paid under the mortgage when in fact none had been paid and the court found that he was able to rely on the receipt that indicated that monies had been paid. However, in this court's mind, this case does not assist the appellants as they were the original contracting party and the BT is also in his role the person who would be the original contracting party. I therefore find that he was entitled to seek clarification on the payments that could not have been found within the records of HPSVG, in essence, to go behind the sales agreement.

[42] For the sake of completeness, I also refer to the case of Prime Sight Ltd v Laverello (Official Trustee of Marrache, a bankrupt)[25] another decision of the Privy Council. The appellants sought to rely on this to show that the court there had found that the Trustee could not go behind the

[23] Op Cit at paragraph 10
[24] (1859) 27 Beav 121,54 ER 47
[25] [2013]UKPC 22

receipt clause to contradict the agreement between the parties; however a careful reading of this case in this court's mind does not support that proposition. The factual matrix again of that case is not similar to any of the facts in the case at bar save and except that it dealt with a bankrupt entity. In Prime Sight, the official Trustee had filed an application to send a company into bankruptcy based on a debt said to be owed to the bankrupt. The company disputed the debt and the decision of the court was based on the failure of the Trustee to show that the bankrupt was aware that there had been no payment due to several reasons and the debt was therefore properly disputed and unable to ground the petition for bankruptcy on the part of the company. The Board undertook a review of how estoppel would be activated in circumstances as applied in the case. The Board found that the Trustee sought to rely on the deed as an agreement for sale as between the parties but at the same time sought to disregard the part of the contract that said the monies had been paid. It was this attempt at manipulation that the Board said the Trustee could not do as he could not effectively have his cake and eat it.

[43] I therefore determine that the BT was entitled to seek clarification of the payments and that having not received the same was entitled to dispute the claim as made. In this court's mind this did not amount to disclaiming the contract as there is no evidence before this court that the BT in fact denied the existence of the contract, therefore there was no need for him or this court to consider the principles as to whether he could in fact disclaim the contract.

[44] I therefore find that the appellants have not proven their claim as contained in the Notice of Motion, and the same is dismissed in its entirety with costs to the respondent to be taxed if not agreed within 21 days of today's date.

STEPHEN JOHN WESTHEAD

[45] By Notice of Motion filed on 18 May 2018 this appellant sought the following reliefs:

1. A declaration that the respondent incorrectly adjudicated the claim submitted and that the claim submitted by the applicant/appellant be re-adjudicated having regard to all the relevant facts.

2. A declaration that the respondent is not entitled to disclaim contracts entered into by the applicant/appellant and Harlequin Property (SVG) Limited.

3. A declaration that the respondent's belief that Harlequin Properties (SVG) Limited did not benefit from the funds transferred from the other properties in the Harlequin Group is without basis and without regard to the relevant facts.

4. A declaration that the applicant/appellant is the beneficial owner of Cabana 17C with title number 2007 located at Buccament Bay development, Saint Vincent and the Grenadines, and as such the legal title should be transferred to him.

5. Further, that no distribution be made of Cabana 17C with title number 2007 until this Motion is disposed of.

6. The costs of this Motion be borne by the respondent.

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

[46] This notice was accompanied by an affidavit of Kimmesha Howell filed on 18 May 2018. This affidavit exhibited the documents which the appellant relied on in his Proof of Claim and upon which he was also seeking to rely on in this appeal as filed.

[47] These documents were as follows:

1. Proof of Claim and accompanying documents including the executed contract for sale of Cabana 17C dated 28 August 2014[26];

2. Letter from the respondent accepting the claim with the requirement for an undertaking dated 5/1/18[27];

3. Document entitled Creditor's Listing (not verified by Trustee) with Inter Company Loan agreement attached thereto dated 23/9/11[28];

4. Letter from Counsel for the appellants to the respondent 12/1/18 with the undertaking to pay the outstanding sums found to be due[29];

5. Email from KPMG to Counsel for the appellant with attachment of cancellation agreement of 2014 for property in St Lucia[30];

6. Demand letter for payment dated 22/3/18 from the respondent[31];

7. Email from Harlequin Hotels and Resorts dated 9/3/18 setting out that no further payments were due from the appellant[32].

[48] As with the other two appellants discussed above, the submissions made on behalf of this appellant were not particularized, as such, the overview of the submissions in the previous appeal therefore applies *mutatis mutandis*. Like the Shelswells, this appellant also relies on the evidence as contained in the contract as between HPSVG and the appellant. The respondent in answer to this claim, again stated that despite the existence of a signed Contract of Sale, the appellants had

[26] KH1 to affidavit and document #587 on LOD filed 29/6/18
[27] KH2 to affidavit
[28] KH3 to affidavit
[29] KH4 to affidavit
[30] KH5 to affidavit and document #584 on LOD filed 29/6/18
[31] KH6 to affidavit
[32] KH7 to affidavit

the onus to prove that not only had they paid the final purchase price but that it was paid to HPSVG.

[49] Therefore having failed to show that this had been done, the respondent submitted that the appellants had not discharged their burden on this appeal, and the appeal should therefore be dismissed.

Court's Considerations and Analysis

[50] In assessing this appeal first and foremost, I accept that the BT was entitled to go behind the executed sales agreement to determine whether payments had been made to HPSVG and the total of these payments. I therefore adopt the reasoning as given in the judgment previously[33].

[51] Indeed I go further to state that I accept that this was indeed a prudent approach by the BT given the nature of the fraudulent activity of the bankrupt and its principals which is not denied by either party to these proceedings. In this court's mind, to allow the appellant to rely on the contents of the contract evidencing payment received but with no other document that showed that the monies were in fact received by HPSVG would in this court's mind, continue to perpetrate the fraud to the detriment of the estate.

[52] That being said, I therefore accept that the BT did not wrongly adjudicate the claim.

[53] With regard to the claim that the BT disclaimed the contract of this appellant, like with the Shelswells, I do not accept that this is what the BT did. In order for a BT to disclaim the burden of a contract that may have been entered into by the bankrupt pre-bankruptcy proceedings, it is accepted that the BT would have to take into consideration certain matters and should seek the sanction of the court to do so, as disclaimer by necessity would mean that the other party to the contract would suffer some detriment for the loss of the bargain. Indeed, I am in agreement with the learning provided by counsel for the appellant on what has to be considered in order for the BT to disclaim a contract[34]. However, as I also found and said with regard to the appeal by the Shelswells I do not accept that the BT in this instance had undertaken any such action that could amount to disclaiming the contract between the appellant and HPSVG. Quite the contrary, the BT has accepted the existence of the contracts.

[54] In looking at the ambit of Section 70 appeals I am satisfied that they are very specific. Thus, if the appellant can in fact show that he is entitled to ownership having proven that he has paid all sums due and he had paid HPSVG then this court would have no difficulty in finding that the appellant has proven his claim. I am however not satisfied that this appellant has done so.

[33] Paragraphs 39-42 of this judgment
[34] **Transmetro Corporation** Op cit

[55] The final point I wish to make in this matter is that the appellant relied (as did the Shelswells) on documentation emanating not only from an entity that was not shown to have any relationship with HPSVG save and except its name but also on correspondence that post-dated the appointment of the BT to the estate of HPSVG. The appellant, by submissions, has stated that reliance on this correspondence was not to bind the BT but to show that HPSVG did not consider that there were any further monies due and owing. Although the respondent chose not to address the court on the same save as to draw it to the court's attention, I wish to make it clear that in this court's mind the reliance on the same was to do just that, to attempt to bind the BT as to the purported position of the bankrupt.

[56] Agency cannot be established based on the fact that one entity carries the same name as another especially when those entities are companies and have been established with the appropriate corporate personalities. This correspondence therefore was of no assistance to the appellant or the case as a whole. I wish to further add that when a closer inspection was had of the correspondence, and that which in particular emanated from Harlequin Hotels and Resorts dated 9 February 2018, it would appear that this correspondence did not specifically relate to this appellant.

[57] As a matter of fact when the correspondence is examined, it is clear that this letter was written on behalf of some "unknown" person making reference to sums that had nothing to do with this appeal or appellant and simply was an indication of the "general practice" that seemed to have existed within entities operated by the bankrupt's principal David Ames.

[58] This correspondence in this court's mind did nothing to assist the appellant and I deem it wholly irrelevant.

[59] I am therefore satisfied that the appellant has not discharged his duty to prove his claim and the Notice of Motion is dismissed with costs to the respondent to be taxed if not agreed within 21 days of today's date.

GERALD **PURDY "5005"**

[60] By Notice of Motion filed on 18 May 2018 this appellant sought the following reliefs:

1. A declaration that the respondent incorrectly adjudicated the claim submitted and that the claim submitted by the applicant/appellant be re-adjudicated having regard to all the relevant facts.

2. A declaration that the respondent is not entitled to disclaim contracts entered into by the applicant/appellant and Harlequin Property (SVG) Limited.

3. A declaration that the respondent's belief that Harlequin Properties (SVG) Limited did not benefit from the funds transferred from the other properties in the Harlequin Group is without basis and without regard to the relevant facts; as all the monies were pooled together.

4. A declaration that the applicant/appellant is the beneficial owner of Cabana 40C with title number 5005 located at Buccament Bay development, Saint Vincent and the Grenadines, and as such the legal title should be transferred to him.

5. Further, that no distribution be made of Cabana 40C with title number 5005 until this Motion is disposed of.

6. The costs of this Motion be borne by the respondent.

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

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

[62] 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.

[63] These documents were as follows:

1. Proof of Claim with attached documents including the Affidavit Seeking Reclamation of Property and other documents including the Contract for the Sale of Villa 40C (Now Title Number 5005) dated 9/5/2014, to Profid PCC for 83.5% of the property and Contract for the Sale of Villa 40C (Now Title Number 5005) to the Trustee of the Scheme and the appellant dated 9/5/2014 for 16.5% of the property[35];

2. Letter of acceptance by respondent dated 5/1/18 to the appellant and Profid PCC Ltd.[36];

3. A document entitled Creditors Listing (not verified by the BT) with an Inter Company Loan agreement dated 23/9/2011 between Harlequin Management Services (South East) Limited and several other Harlequin entities including HPSVG[37];

4. Letter dated the 12/1/18 from counsel for Purdy Investment Management Ltd with the undertaking to pay the balance as found due and owing[38];

5. Email correspondence dated 28/2/18 to the BT with an unexecuted cancellation agreement dated 9/5/14 between Harlequin Resorts (St Lucia) Ltd and Guardian Pension Trustees Limited and The Guardian SIPP with reference to Lot #5005[39];

6. Demand Letter dated the 22/3/18 from the respondent to Profid PCC Ltd and the appellant for the payment of £330,000.00[40];

[35] KH1 to the affidavit and documents #494 and #495 of the LOD filed on 29/6/18
[36] KH2 to the affidavit
[37] KH3 to the affidavit
[38] KH4 to the affidavit
[39] KH5 to the affidavit
[40] KH6 to the affidavit

7. Email from Harlequin Hotels and Resorts dated the 9/3/18 stating the figure to be paid for 5006 and 5005[41];

[64] The arguments proferred on behalf of this appellant were similar in all respects to the other appellants that were before the court with regard to the payments that had been made by this appellant to HPSVG. I therefore apply the same once again *mutatis mutandis*.

[65] This appellant also relied on the statement contained in the contract with HPSVG executed by all parties, that monies had been paid and that such payments having been made, the appellant was entitled to rely on the same. Therefore, as was previously argued, the BT was not in a position to dispute the payments and disclaim the property.

[66] In response, the respondent submitted that first and foremost, the appellant in this appeal was only a part owner of the property 5005. The other entity who contracted for the other (majority) interest in the property was not a party to the proceedings and on that alone the respondent submitted that this appellant inter alia was not entitled to the declaration of beneficial ownership as prayed.

[67] In fact the BT submitted that although this appellant and the other contracting party Profid PCC Ltd had filed separate claims, the BT had dealt with the claims and the demands to the parties as one entity as the claim dealt with one property. Thus, all communication directed in relation to 5005 was directed to all relevant parties including the sum outstanding.

[68] In the submissions of the respondent it was therefore conceded that the sum that would therefore be owed by *this* appellant based on his individual 16.5% share in the property would have been £54,500.00. Additionally, in spite of the contract containing the statement that this sum had been fully paid, it was clear that the sums had been "transferred" from other entities and the BT could find no evidence that the same had been received by HPSVG. The BT therefore disputed the claim of this appellant.

Court's Considerations and Analysis

[69] Having received the submissions from the respondent, the appellant conceded that indeed the other purchaser on the contract was Profid PCC Ltd. They accepted that it had not been joined as a party but that the appellant intended to make an application to do so.

[70] It is to be noted that as at the date of writing this judgment, this had not been done and as such the appeal must proceed in its present state and I therefore find that this appellant would have been entitled to 16.5% of the property.

[41] KH7 to the affidavit

[71] That being said, I repeat the findings made above[42] with regard to the BT being entitled to go behind the statement in the contract which purportedly evidenced the full payment by the appellant of his share of the purchase price

[72] It was clear from the documents that the BT was able to access (beyond those provided by the appellant) that the sums upon which this appellant relied had been purportedly paid by way of "transfers" from other developments, namely a development in St Lucia[43].

[73] As I stated, with regard to the appeal by the Shelswells above, I agree that the decision of the BT in these circumstances was to the ultimate benefit of the estate. I accept that the BT was entitled to ensure that HPSVG had in fact benefitted from the monies allegedly paid. In fact, in this court's mind to do otherwise, would have been to deprive the ultimate estate of the bankrupt of property without adequate confirmation. What would have resulted in the view of this court as a disservice to his responsibility to all the creditors of the estate as a whole?

[74] That being said, I also find that this appellant has not made out his entitlement to the reliefs claimed and in particular the claim regarding beneficial ownership based on the admission of the factual percentage owned. This appeal is therefore dismissed in its entirety with costs to the respondent to be taxed if not agreed within 21 days of today's date.

DOUBLE RED 359 LIMITED

[75] By Notice of Motion filed on 18 May 2018 this appellant sought the following reliefs:

1. A declaration that the respondent incorrectly adjudicated the claim submitted and that the claim submitted by the applicants/appellants be re-adjudicated having regard to all the relevant facts.

2. A declaration that the respondent is not entitled to disclaim contracts entered into by the applicants/appellants and Harlequin Property (SVG) Limited.

3. A declaration that the respondent's belief that Harlequin Properties (SVG) Limited did not benefit from the funds transferred from the other properties in the Harlequin Group is without basis and without regard to the relevant facts; as all the monies were pooled together.

4. A declaration that the applicants/appellants is the beneficial owner of Unit 2410C with title number T2410 located at Buccament Bay development, Saint Vincent and the Grenadines, and as such the legal title should be transferred to him.

5. Further, that no distribution be made of Unit 2410C with title number T2410 until this Motion is disposed of.

[42] Appeal filed by the Shelswells; paragraphs 39-42 of this judgment
[43] Documents listed as #518-521 on LOD filed on 29/6/18

6. The costs of this Motion be borne by the respondent.

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

[76] This was supported by the affidavit of Kimmesha Howell filed on the same date.

[77] The documents relied on by this appellant were as follows:

1. Proof of Claim with attached documents including the Affidavit Seeking Reclamation of Property, Affidavit of David Morgan, Contract for the Sale of Off-Plan Property dated the 3/12/08 and Statement of Accounts[44];

2. Acceptance Letter from the respondent indicating the outstanding amount to be paid for completion dated 5/1/18[45];

3. Creditors Listing (not verified by the BT) and copy of an Inter Company Loan Agreement dated 23/09/11[46];

4. Letter from counsel for the appellant to the respondent dated 12/1/18 with the undertaking to pay the outstanding sums found due[47];

5. Email from KPMG to counsel for the appellant dated 27/2/18 in response to an email from counsel for the appellant dated 20/2/18attaching Cancellation Agreements dated 19/4/13 and Bank statements showing payments made to Harlequin Hotels on 25/4/13 and 29/4/13[48];

6. Demand Notice for Payment from the respondent dated 22/3/18 for the payment of £102,773.00[49];

7. Email to the counsel for the appellant from Harlequin Hotels and Resorts and completion statement indicating together with a letter from Harlequin Hotels and Resorts dated 9/2/18 with no known recipient[50].

[78] The submissions on behalf of this appellant mirrored the arguments that were put forward on behalf of the other appellants encapsulated in this group.

[79] The submissions on behalf of the respondent were also fundamentally the same. The respondent BT in this instance had satisfied himself that the bankrupt had received £132,227.00 resulting in an

[44] KH1 to the affidavit
[45] KH2 to the affidavit
[46] KH3 to the affidavit
[47] KH4 to the affidavit
[48] KH5 to the affidavit
[49] KH6 to the affidavit
[50] KH7 to the affidavit

outstanding balance of £102,773.00 on the agreed purchase price. Like other appellants in this group, this appellant relied on the purported transfer of payments made to other developments apparently run by the principal David Ames. This appellant had specifically made payments to the Merricks development in Barbados.

[80] The BT having satisfied himself that HPSVG had in fact only received a portion of the purchase price from what one could surmise were legitimate and traceable origins, gave the appellant an opportunity to pay the balance. This was not done.

[81] Instead the appellant has relied on the contractual documents before the court which purportedly support these transferred payments to HPSVG.

Court's Considerations and Analysis

[82] When this court considers the submissions for this appellant, which are no different from the ones that were made on behalf of the other appellants, this court is constrained to find that the appellant has also fallen short of his obligation of proof.

[83] When one examines the contract that was exhibited to the affidavit of Kimmesha Howell in support of this motion, it was clear that this contract unlike some others that were before the court, did not even establish on a prima facie basis that payments had been received by HPSVG. The cancellation agreement that was also relied on which purportedly showed payments made to Merricks development simply stated that "the sums stated in paragraph B above shall be moved to unit 2410a Buccament Bay St Vincent and the Grenadines". Therefore in this court's mind, on their case at a cursory level showed no payments even purportedly being made to HPSVG but to an entity called Harlequin Hotels.

[84] In this court's mind this did not even advance the appellant's case off the starting blocks. There was no attempt by the appellant show any nexus between HPSVG and Harlequin Hotels or how Harlequin Hotels could have been considered an agent of HPSVG save and except the use of a similar same name.

[85] Throughout this judgment, and these bankruptcy proceedings as a whole, this court has made it clear that the use of a similar name does not and cannot establish the legal standard of agency without more. I therefore have consistently found and do so here again that the appellant has failed to establish any such relationship. It was much to the concern of this court that it was the BT's efforts that in fact established that any payments had been made at all. It is those payments that he accepted and it was on that basis he made demand for the balance of the purchase price. Having failed to pay the same, the proof of claim was disputed for nonpayment of the balance.

[86] Once again I am not satisfied that this appellant has proven his appeal.

[87] The appeal is therefore dismissed with costs to the respondent to be taxed if not agreed within 21 days of today's date.

ALISON KELLY

[88] By Notice of Motion filed on 18 May 2018 this appellant sought the following reliefs:

1. A declaration that the respondent incorrectly adjudicated the claim submitted and that the claim submitted by the applicant/appellant be re-adjudicated having regard to all the relevant facts.

2. A declaration that the respondent is not entitled to disclaim contracts entered into by the applicant/appellant and Harlequin Property (SVG) Limited.

3. A declaration that the respondent's belief that Harlequin Properties (SVG) Limited did not benefit from the funds transferred from the other properties in the Harlequin Group is without basis and without regard to the relevant facts as all the monies were pooled together.

4. A declaration that the applicant/appellant is the beneficial owner of Cabana 43C with title number 5002 located at Buccament Bay development, Saint Vincent and the Grenadines, and as such the legal title should be transferred to him.

5. Further, that no distribution be made of Cabana 43C with title number 5002 until this Motion is disposed of.

6. The costs of this Motion be borne by the respondent.

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

[89] This was supported by the affidavit of Kimmesha Howell filed on the same date.

[90] The documents relied on by this appellant were as follows:

1. Proof of Claim with attached documents including the Affidavit Seeking Reclamation of Property, Affidavit of Alison Kelly and Contract for the Sale of Off-Plan Property dated 3/2/14[51];

2. Acceptance Letter from the respondent indicating the outstanding amount to be paid for completion dated 5/1/18[52];

3. Creditors Listing (not verified by the BT) and copy of an Inter Company Loan Agreement dated 23/09/11[53];

[51] KH1 to the affidavit and document #443 on LOD filed on 29/6/18
[52] KH2 to the affidavit
[53] KH3 to the affidavit

4. Letter from counsel for the appellant to the respondent dated 12/1/18 with the undertaking to pay the outstanding sums found due[54];

5. Email from KPMG to counsel for the appellant dated 27/2/18 responding to an email from counsel for the appellant dated 20/2/18 exhibiting Cancellation Agreement dated 3/2/14[55];

6. Demand Notice for Payment from the respondent dated 22/3/18 for the payment of £341,000.22[56];

7. Email to the counsel for the appellant from Harlequin Hotels and Resorts and completion statement indicating a payment due by the appellants of £14,000.00 together with a letter from Harlequin Hotels and Resorts dated 9/2/18 addressed to one Mr. and Mrs. Christopher and Bridget Eyre indicating that no further payments were owed.[57]

[91] The submissions that were made on behalf of the other appellants apply to this appellant as well.

[92] The appellant maintained that the BT was bound by the terms of the contract for sale which stated that monies had been paid and the cancellation agreement that indicated that monies had been transferred from a David Ames connected development to HPSVG.

[93] The submission of the appellant was that once the contract was in keeping with the requirements of a valid contract and that HPSVG had signed the same accepting the monies it was not open to the BT to go behind those terms.

[94] The respondent submitted, as he had continuously in this appeal, that he was entitled to go behind the terms of the contract. Once the sums stated to be paid could not be verified he was obliged, it was submitted, as a means to protect the estate of the bankrupt to approach the method of payment in a conservative manner. As such he was therefore entitled to undertake independent verification of payments. Having done so and not having found the payments as identified by the appellants coupled with the appellants refusing to make the requisite payments on the balance, the BT submitted that he was entitled to dispute the proof of claim as presented.

Court's Consideration and Analysis

[95] This appeal has not raised any new considerations for the court.

[96] This court has made it clear that the onus or burden of proof of these appeals must by necessity lie with the appellant.

[54] KH4 to the affidavit
[55] KH5 to the affidavit and document #472 to LOD filed on 29/6/18
[56] KH6 to the affidavit
[57] KH7 to the affidavit

[97] This court accepts that although on the face of the documentary evidence there are payments that HPSVG states they are in receipt of, it was, in this court's mind, still incumbent upon the BT to ensure that the payments were in fact within the "coffers" of the bankrupt.

[98] In this court's mind for the BT to have failed to have acted in that manner would have resulted in the BT running afoul of his obligations as a whole to the estate and the creditors of the estate.

[99] I am fortified in this regard when one considers the authorities that speak to the obligation of a trustee in bankruptcy. Thus, in the case of Re Sangha[58] the court there made it clear that the obligation of the trustee is to administer the bankrupt's estate and preserve the assets for the benefit of the general body of creditors[59].

[100] In this court's mind this obligation must translate to the BT adopting a conservative approach to the claims that are made. In order to "preserve and liquidate the bankrupt's property"[60] it must be imperative that the BT undertake their own assessment and investigation of claims and ensure that "only valid claims to the assets under distribution are recognized"[61].

[101] I therefore determine that the BT was entitled to do as he did. I accept that is was in fact within his mandate to address his mind to whether the payments stated to have been made were in fact made. Having done with regard to this appellant he was therefore entitled to dispute the claim and there is nothing before this court to suggest that this approach was incorrect warranting the granting of the prayers sought.

[104] As a further note, which is applicable to all the appeals as filed, the appellant sought a prayer that the BT was not entitled to find that HPSVG did not benefit from the funds "transferred" from other Harlequin entities as all the monies were "pooled together".

[102] The short answer to this is that the appellants have brought no evidence to substantiate this prayer. By the inclusion of this relief it appeared to this court that the appellant sought to take this court on a journey on the road to Oz to see the Wizard of Oz. This is an invitation that is profoundly refused by this court. This prayer is therefore also dismissed.

[103] The appeal is therefore dismissed in its entirety with costs to the respondent to be taxed if not agreed within 21 days of today's date.

---

[58] [2018] BCSC 1049
[59] Op cit at para 44
[60] **Re LeFebvre** [2004] SCC 63
[61] Kingsway General Insurance Company v Residential Warranty Co of Canada Inc [2006]ABCA 293 at para 36

PETER TILBE AND JACQUALINE TILBE

[104] By Notice of Motion filed on 18 May 2018 this appellant sought the following reliefs:

1. A declaration that the respondent incorrectly adjudicated the claim submitted and that the claim submitted by the applicants/appellants be re-adjudicated having regard to all the relevant facts.

2. A declaration that the respondent is not entitled to disclaim contracts entered into by the applicants/appellants and Harlequin Property (SVG) Limited.

3. A declaration that the respondent's belief that Harlequin Properties (SVG) Limited did not benefit from the funds transferred from the other properties in the Harlequin Group is without basis and without regard to the relevant facts.

4. A declaration that the applicants/appellants is the beneficial owner of Studio 2506C with title number T2506 located at Buccament Bay development, Saint Vincent and the Grenadines, and as such the legal title should be transferred to him.

5. Further, that no distribution be made of Studio 2506C with title number T2506 until this Motion is disposed of.

6. The costs of this Motion be borne by the respondent.

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

[105] This was supported by the affidavit of Kimmesha Howell filed on the same date.

[106] The documents relied on by this appellant were as follows:

1. Proof of Claim with attached documents including the executed contract of sale between HPSVG and the appellants dated the 17/6/15. Included was also transfer activity of funds to Harlequin Hotels and Resorts[62];

2. Acceptance Letter from the respondent indicating the outstanding amount to be paid for completion dated 5/1/18[63];

3. Creditors Listing (not verified by the BT) and copy of an Inter Company Loan Agreement dated 23/11/11[64];

4. Letter from counsel for the appellant to the respondent dated 12/1/18 with the undertaking to pay the outstanding sums found due[65];

[62] KH1 to the affidavit and documents #559, #556 and #557 on the LOD filed on the 29/6/18
[63] KH2 to the affidavit
[64] KH3 to the affidavit
[65] KH4 to the affidavit

5. Email from KPMG to counsel for the appellant dated 27/2/18 with a letter from Harlequin Hotels and Resorts dated 30/1/14 together with cancellation agreements[66];

6. Demand notice for payment from the respondent dated 22/3/18 for the payment of £160,500.00[67];

7. Email to the counsel for the appellant from Harlequin Hotels and Resorts and completion statement indicating an overpayment by the appellants of £47,855.00 together with a letter from Harlequin Hotels and Resorts dated 9/2/18 with no known recipient[68].

[107] Like the above determined appeals the appellant's case was based on the submission that the BT was bound by the documents that were signed by the HPSVG evidencing payments that had been "transferred" from other Harlequin entities.

[108] As with the other appellants this court has not been privy to any documentary evidence that supported this contention. These appellants in fact had a letter dated 30 January 2014 from Harlequin Hotels and Resorts (a company registered in the Cayman Islands) evidencing a payment of £46,365.00 but which made no reference as to who the recipient was or that they were receiving the same on behalf of HPSVG.

[109] However the appellants have somehow submitted that this payment together with payments evidenced by bank transfer at the instance of the appellants to Harlequin Hotels and Resorts in the sum of £1490.00 and the "transfer" of £147,145.00 from another entity which were purportedly acknowledged as having been received by HPSVG as an "agent" thereof, bound the BT. The appellants therefore contend that the BT's decision to dispute the claim was therefore erroneous.

[110] As with the other appellants, the respondents denied that this was in fact the position and that he by his own investigation has not been able to independently verify that these sums had in fact been received by the bankrupt. The BT therefore in accepting the claim made it clear that further payments in order to effect completion.

Court's Analysis and Considerations

[111] In this court's mind, this appeal unfortunately does not have any merit with which to detain this court for any length of time.

[112] Like the appellants before[69], this appellant seeks to base his claim on a fictional position that all Harlequin entities, regardless of the comprehensive principle of company law recognizing

[66] KH5 to the affidavit
[67] KH6 to the affidavit
[68] KH7 to the affidavit and document #554 on LOD filed on 29/6/18
[69] Double Red, Gerald Purdy, Alison Kelly et al

corporate identities and personalities which cannot be pierced save in specific circumstances, were interrelated, linked and acted on behalf of each other.

[113] This court accepts that the purchase price for these appellants was as stated in the contract made between themselves and HPSVG. That purchase price was £195,000.00.

[114] This court also accepts that some payments were made by the appellants. These payments having been independently verified were as by and large contained in the same contract of sale. This court therefore determines that this was an action that the BT was entitled to do. This was even more imperative in these circumstances when payments were in fact[70] not paid to HPSVG but another entity who acknowledged receipt. There is in fact no indication on those documents as produced that payment of these monies were made to or received on behalf of HPSVG.

[115] Agency can only be established in specific ways. The onus was on the appellant to show that the relationship of agent and principal had been established between the two entities that carried the same names. It is well established that agency can be established in one of four ways:

i) by express or implied appointment giving actual authority to act to the agent;

ii) by subsequent ratification by the principal of a contract entered into by the agent without the principal's authority;

iii) by ostensible authority conferred on the agent by the principal although no authority was actually given or;

iv) by authority given by implication of law in cases of necessity[71].

The onus was therefore on the appellants to show that some act of the entity they called the agent, had been conducted either under the direct authority of the entity that they considered the principal (who they made out to be HPSVG) or that the principal had in some way ratified the acts of the "agent". No such submission was made on the part of the appellants nor was any evidence led to that effect. However, these appellants have asked this court to make that deduction.

[116] Without more, this court is not in a position to accede to this request. There is nothing before this court that can lead to the conclusion that monies paid were paid to an agent of HPSVG or that the entity accepting the payment was doing so in any manner as agent for HPSVG.

[117] Further, as was stated earlier in this judgment, this BT acted within the scope of his power as directed by this court[72] in making the demand for the payment of outstanding sums.

---

[70] From documentary evidence

[71] Commonwealth Caribbean Contract Law Gilbert Kodilyne page 223

[72] The Directions Order

[118] I therefore find that in looking at this appeal holistically and relying on the findings that have been made by this court earlier in this judgment, that the BT was entitled to take the action that he did in regard to these appellants. The appellants have also failed to satisfy this court that they are entitled to the prayers as sought.

[119] The Notice of Motion is therefore dismissed in its entirety with costs to the respondent to be taxed if not agreed within 21 days of today's date.

MARTIN SHUTT, DANIEL OLDROYD, LISA OLDROYD, JOANNE BERRY, PARKER STAG LTD

[120] By Notice of Motion filed 18 May 2018 this appellant sought the following reliefs:

1. A declaration that the respondent incorrectly adjudicated the claim submitted and that the claim submitted by the applicants/appellants be re-adjudicated having regard to all the relevant facts.

2. A declaration that the respondent is not entitled to disclaim contracts entered into by the applicants/appellants and Harlequin Property (SVG) Limited.

3. A declaration that the respondent's belief that Harlequin Properties (SVG) Limited did not benefit from the funds transferred from the other properties in the Harlequin Group is without basis and without regard to the relevant facts.

4. A declaration that the applicants/appellants is the beneficial owner of Unit 2410C with title number T2410 located at Buccament Bay development, Saint Vincent and the Grenadines, and as such the legal title should be transferred to him.

5. Further, that no distribution be made of Unit 2410C with title number T2410 until this Motion is disposed of.

6. The costs of this Motion be borne by the respondent.

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

[121] This Motion was supported by affidavit by Kimmesha Howell of the 18 May 2018. 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.

[122] These documents were:

1. Proof of Claim with supporting documentation including the contract for sale dated 15/7/14 with HPSVG and the appellants[73];

[73] KH1 to the affidavit and document #565 on the LOD filed on 29/6/18

2. Letter from the respondent accepting the claim with the proviso for the undertaking to pay the balance on the purchase price dated 5/1/18[74];

3. Creditors listing (not verified by the BT) and the Inter Company Loan agreement dated the 23/9/11[75];

4. Letter from counsel for the appellants to the respondent dated 12/1/18 with the undertaking to pay the outstanding sums found due[76];

5. Email from KPMG to counsel for the appellants in response to the indication from counsel for the appellants as to the amount paid by the appellants with completion statement[77];

6. Demand letter from the respondent for payment of £135,750.00 dated 22/3/18[78];

7. Email from a Sarah Tricker dated March 2018 with no indication as to company that she represents stating that the appellants are due to pay £9750.00. Also included in the exhibit are unexecuted cancellation agreements and a letter dated 9/2/18 on the letter head of Harlequin Hotels and Resorts to an unknown recipient[79].

[123] The submissions of the appellants on this appeal were substantially as those advanced for the other appellants and did not raise any new legal issues that the court has not already dealt with in the earlier appeals. The respondent maintained his position with regard to his legal right to determine the appeals as he had. The respondent also made it clear to the court that these appellants as constituted before the court were in fact not entitled to 100% of the property the subject of the contract of sale but rather were only entitled to 64.6% share of the property. The respondent there submitted that these appellants would therefore not be entitled to a declaration of ownership if the court was minded to grant their appeal Additionally, the respondents submitted that the Notice of Motion had an error in that it sought relief in relation to Unit #2410C when in fact the Unit the subject matter of the contract with these appellants was 2507C, a flaw the respondents submitted gave this court sufficient rationale to dismiss the appeal without more.

[124] The appellants in response made it clear that all the documentation presented referred to Unit 2507C and as such there was no prejudice to the respondent with regard to what was simply a typographical error. As to the submission as to the appellants as they were before the court on this appeal, the appellants conceded that they were only in fact entitled to a 64.6% interest in the said Unit and that the remaining 35.4% interest had been contracted with the appellants Shutt and Berry

[74] KH2 to the affidavit
[75] KH3 to the affidavit
[76] KH4 to the affidavit
[77] KH5 to the affidavit
[78] KH6 to the affidavit
[79] KH7 to the affidavit

together with one Ian Kirkbridge, Jamie Husband and Parker Stag Ltd (the Trustee of the Scheme). The submission therefore was that even though Parker Stag Ltd had joined this appeal when these appellants were concerned with 64.6%, that they was not barred from joining in this claim in his own right for the 35.4% that he and others had contracted for with HPSVG.

Court's Consideration and Analysis

[125] At the very outset I must agree with counsel for the appellants that it is clear from all the documents submitted that the appellants were seeking relief in relation to Unit 2507C and that it was nothing more than a superficial error where the Notice of Motion refers to Unit 2410C. Under the provisions of Rule 4 of the Bankruptcy and Insolvency Regulations 2015 the court is empowered to find that "*no proceeding in bankruptcy shall be invalidated by any formal defect or any irregularity unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court."* In relying on this provision, I accept that this defect will not cause any injustice to the parties participating in these proceedings. Additionally, it was clear that the respondent was well aware of the correct unit number when he responded to the appeal[80]. I therefore find that these appellants are entitled to proceed on the Notice of Motion as filed amended to read Unit 2507C as opposed to 2410C.

[126] That being said, this appeal did not raise any new issues of law that were separate from the other appeals dealt with in this judgment. However, what was of concern to this court was that there appeared to be some discrepancy as to who should have been the proper parties before the court and therefore what was in fact being claimed. In order to determine this some examination needs to be undertaken of the contracts of sale for Unit 2507C.

[127] Before I address my mind to that I wish to make mention of the documentary evidence that was before this court. These appellants, like all of the appellants in this group save and except the Shelswells, did not exhibit to this court the actual Notice of Dispute that triggered the appeal.

[128] Indeed it would appear that these appellants, like their counterparts treated the *Demand Letter* issued by the BT as amounting to the Notice of Dispute which was required to found the appeal under Section 70 of the BIA.

[129] However, it is clear to this court that this Demand letter was not and could not amount to the Notice of Dispute. The Demand letters that were issued by the respondent were to those appellants whose claim had been accepted pending outstanding payments and for whom an undertaking had been issued on their behalf[81]. It was only upon the failure to adhere to the undertaking given that the respondent then issued a finite *Notice of Dispute*. It was that Notice of Dispute that would have triggered the procedure for the filing of these appeals. Indeed, this court accepts that the BT was entitled upon the failure of the appellants to adhere to their undertaking to pay, to then review his

[80] Paragraph 77 of the Respondent's submissions filed on the 30/11/18
[81] As an example paragraph 2 of the letter of 22/3/18 in KH6 of the affidavit

initial acceptance and issue his Notice of Dispute for such failure[82]. It was therefore unfortunate that those properly issued (in this court's mind) Notices of Dispute were not produced to this court for analysis. This missing evidentiary documentation has resulted in those appellants who fell afoul of this production to ask this court to speculate on the contents of the said document.

[130] Having said this I now wish to revisit the issue of the parties before the court. By contract for sale dated the 15 July 2014, HPSVG agreed to sell 35.4% of Unit 2507C to The Trustee of the scheme (Parker Stag Ltd) and Martin Shutt, Joanne Berry, Ian Kirkbright and Jamie Husband. It appears that the purchase price for this share was stated to be £69,000.00. Upon HPSVG becoming bankrupt these parties through Martin Shutt submitted a Proof of Claim that was not allowed.

[131] By contract of sale dated 15 July 2014, HPSVG contracted to sell 64.6% of Unit 2507C to the first four appellants that appear in this Notice of Motion. Parker Stag Ltd was not a party to the contract for the 64.6% interest. The purchase price for the 64.6% was £126,000.00. This meant that arithmetically the total purchase price for Unit 2507C was £195,000.00.

[132] The Demand Letter that was issued by the respondent dated the 22 March 2018, stated clearly that it was in relation to all of the parties who contracted for the purchase of Unit 2507, that is to the four appellants before the court on this Notice of Motion and to Jamie Husband and Ian Kirkbright for the balance on the entire purchase price and not as to the respective shares of the purchase price owed by the parties. It does not appear from the documents that were disclosed by the appellants that any documents were in fact issued to Parker Stag Ltd but rather to the parties themselves. Indeed, the letter that emanated from counsel for the appellants[83] disputing the amount that was outstanding made no mention of the Parker Stag Ltd despite it being a party to this contract with HPSVG.

[133] This court is therefore at a loss to grapple with how the present appellants wish this court to proceed. Either all the parties who signed the contract with HPSVG are to be before the court or there is to be a differentiation as to the relative parties and the interests that they would have been entitled to in the said Unit.

[134] So as it presently stands, if this court had been minded to grant the reliefs as claimed, it would certainly only have been in relation to the appellants that are before the court who are the parties that purchased 64.6%. So where does Parker Stag Ltd find itself? Can it on its own seek to enforce the contract for 35.4%? These were issues that were not in this court's mind adequately canvassed by counsel for the appellants. This court therefore has no option in its mind but to strike the appellants Parker Stag Ltd from this action as having no standing on the motion.

[135] In any event the court is not persuaded on the arguments that would now only be relevant to the four appellants. These appellants like their cohorts in this Grouping have not satisfied this court

[82] **Re Drummie** [2004] NBQB 35
[83] KH5 to the affidavit

that they are entitled to the relief claimed and I adopt the findings made previously in this judgment, as all the legal arguments remain the same.

[136] This Notice of Motion is therefore dismissed with costs to the respondents to be assessed if not agreed within 21 days of today's date.

DAVINDA JANDA

[137] By Notice of Motion filed 22 May 2018 the appellant sought the following reliefs:

1. A declaration that the respondent incorrectly adjudicated the claim submitted and that the claim submitted by the applicant/appellant be re-adjudicated having regard to all the relevant facts.

2. A declaration that the respondent is not entitled to disclaim contracts entered into by the applicant/appellant and Harlequin Property (SVG) Limited.

3. A declaration that the respondent's belief that Harlequin Properties (SVG) Limited did not benefit from the funds transferred from the other properties in the Harlequin Group is without basis and without regard to the relevant facts; as all the monies were pooled together.

4. A declaration that the applicant/appellant is the beneficial owner of Cabana 62 with title number 3027 located at Buccament Bay development, Saint Vincent and the Grenadines, and as such the legal title should be transferred to him.

5. Further, that no distribution be made of Cabana 62 with title number 3027 until this Motion is disposed of.

6. The costs of this Motion be borne by the respondent.

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

[138] This motion was supported by the affidavit of Kimmesha Howell filed on the same date exhibited certain documents upon which they had relied on before the BT and which they sought to proffer in support of this appeal. These documents were as follows:

1. Proof of Claim[84];

2. Letter of acceptance from the respondent dated the 5/1/18 and the contract for sale between HPSVG and the appellant[85];

3. Creditors Listing (not certified by the BT) and an Inter Company agreement dated 23/11/11[86];

4. Letter from counsel for the appellant giving the undertaking to pay the balance dated 12/1/18[87];

[84] KH1 to the affidavit
[85] KH2 to the affidavit and document #597 on the LOD filed on 29/6/18
[86] KH3 to the affidavit

5. Email from KPMG to counsel for the appellant dated 27/2/18 with attachments of cancellation agreement dated 1/3/15 for property in the Dominican Republic[88];

6. Demand Letter from the respondent to the appellant dated 22/3/18 for the payment of the monies pursuant to the undertaking given[89];

7. Email from accounts manager of Harlequin Hotels and Resorts purporting to state the outstanding sums due to HPSVG together with a letter from Harlequin Hotels and Resorts dated 9/2/18 with no known recipient[90].

[139] Like the previous appeals filed, this appellant also relied on the information contained within the contract for sale that monies had been "transferred" from another development. There was also on the documentation evidence of a mortgage agreement that had been agreed between the parties which was to cover a substantial portion of the purchase price. Counsel for the appellant submitted to this court, that because this mortgage agreement was no longer in existence upon the bankruptcy of HPSVG, that the monies that were to be paid by the bankrupt and then by the appellant would no longer be due and owing. This submission was also raised on other appeals where similar documents had been executed and despite this submission; the appellant did not proffer any authority to substantiate this proposition.

[140] In response, the respondent submitted that having not established that the sums "transferred" had in fact been received by HPSVG, it was for the appellant to prove their case that the monies had in fact been paid to HPSVG. The BT was entitled to go behind the receipt clause in the contract where there was no evidence of payment and that he had done so with an intention to protect the estate as a whole. Additionally, the respondent submitted that the developer loan that the appellant sought to rely on was of little assistance to the appellant to refuse payment of the purchase price, as the obligation to pay by the appellant under the agreement would not have arisen until completion. Since this was never reached, the monies would still have remained due and owing by the appellant personally and the BT was entitled to consider that there had in fact been outstanding monies due and owing.

Court's Consideration and Analysis

[141] This appeal did not raise any new issues from those appeals previously dealt with in this judgment.

[142] In this appeal, in this court's mind, the evidence of payments that this appellant sought to rely on were even less compelling than her fellow appellants.

---

[87] KH4 to the affidavit
[88] KH5 to the affidavit
[89] KH6 to the affidavit
[90] KH7 to the affidavit

[143] It was clear from the contract that had been entered into by the appellant with HPSVG, that the bulk of the purchase price was to be covered by a developer loan that was due upon completion. That loan accounted for 70.9% of the purchase price. It was therefore of concern to this court that the appellant submitted that this was money that the bankrupt had already benefitted from and as such the appellant was not now required to pay it.

[144] It would appear, that this reasoning required some mental gymnastics on the part of this court.

[145] What the appellant asked this court to do seemed to have been this – "*I entered into a contract with HPSVG, that they would carry the burden of completing the construction and that once it was finished I would then repay that money at an interest rate of 3% per annum. HPSVG is no longer functioning but the estate is to finish the project at its expense, accept what they have found I have paid to stand as full satisfaction of the purchase price and convey the property to me."* It stuns this court that this could on any interpretation of the facts be legally or even logically acceptable.

[146] When a lender goes bankrupt, the mortgage that that lender had entered into would not cease to exist. The loan that is owed to the bankrupt lender is a valuable asset that can be assigned or sold to another solvent lender. In fact, the provisions of BIA are intended to ensure that the bankrupt's estate is protected and maintained for proper and effective distribution to those parties who can adequately prove their claim[91]. The essence of the BIA is fairness and it therefore startlingly to this court that the result, that the appellant seeks to advance is far from that tenet. In the opinion of this court, this submission as advanced by the appellant seeks to undermine the very basis of the BIA.

[147] I therefore find as I did previously that in the acts of the BT ensuring the protection of the estate that he was then entitled to go behind the receipt clause in the contract and as such he did not adjudicate the claim of this appellant incorrectly.

[148] The appellant has not in this court's mind proven her appeal and this appeal stands dismissed with costs to the respondent to be taxed if not agreed within 21 days of today's date.

The order of the court is therefore as follows:

1. The Notice of Motion filed on behalf of Collen and Michael Shelswell stands dismissed with costs to the respondent.

2. The Notice of Motion filed on behalf of Gerard Purdy (5006) stands dismissed with costs to the respondent.

3. The Notice of Motion filed on behalf of Peter and Jacqueline Tilbe stands dismissed with costs to the respondent.

[91] **The Bankruptcy of Residential Warranty Company of Canada Inc** [2006] ABQB 236 at paragraphs 25 et seq.

4. The Notice of Motion filed on behalf of Martin Shutt and others stands dismissed with costs to the respondent.

5. The Notice of Motion filed on behalf of Stephen Westhead stands dismissed with costs to the respondent.

6. The Notice of Motion filed on behalf of Davinda Janda stands dismissed with costs to the respondent.

7. The costs to the respondent on all the appeals are to be taxed if not agreed within 21 days of today's date.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar