

09.9 (23)

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 38 of 1987

IN THE MATTER of a  
Sheriff's Sale

BETWEEN:

WAREFACT LIMITED  
(and Canadian Imperial Bank  
of Commerce) - Respondent/Appellant

and

VOICE BUILDINGS LIMITED  
MICHAEL GORDON  
LYNDELL GORDON  
(and The Sheriff of the High  
Court of Justice, St. Lucia) - Petitioners/Respondents

Before: The Honourable Sir Lascelles Robotham - Chief Justice  
The Honourable Mr. Justice Bishop  
The Honourable Mr. Justice Moe

Appearances: H. Deterville for appellant Warefact Limited  
A. Richilieu for Canadian Imperial Bank of Commerce  
W. Cenac, Q.C. and D. Theodore for respondent Voice  
Buildings Ltd. et. al.  
F. Nicholas for The Sheriff of The High Court of Justice

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1988: Jan. 28,  
May 9,  
Oct. 24.

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JUDGMENT

BISHOP, J.A.

On the 29th September, 1987, the solicitor for Voice Buildings Limited filed a petition praying that a Sheriff's sale of certain immovable property be annulled. The property belonged to the petitioner and the basis for the prayer, as set out in paragraph 4 of the petition was:-

"that at the time of the sale of the said property, there were not three persons present and bidding, so that the essential conditions and formalities prescribed by law for the sale were not observed."

On the 28th October, 1987, the solicitors for the petitioner filed a summons for leave to add the following paragraph to the petition:-

"5. Further or in the alternative artifice was employed with the knowledge of the purchaser Warefact Limited a respondent herein, to keep persons from bidding."

The Summons was supported by the affidavits of Lyndell A.G. Gordon, Chairman of Voice Buildings Limited and of Gerald St. Omer, a baliff of the First District Court, Castries. The latter was present at the judicial sale, and he stated on oath as follows:-

/"3.....towards....."

- "3. towards the latter part of the bidding I saw and overheard Lincoln St. Rose and Michael Chastanet conversing to the effect that if Michael Chastanet would stop bidding and allow Lincoln St. Rose to purchase the building, then Lincoln St. Rose would make available space in the building to Michael Chastanet.
4. Subsequently I saw Michael Chastanet write on a piece of paper, sign it and give it to Lincoln St. Rose who also signed it. The document was then passed to Miss Lorna Mynns who I heard was asked to witness it. Miss Lorna Mynns signed the document.
5. Immediately after the document was signed as above Michael Chastanet stopped bidding and the property was knocked down to Lincoln St. Rose.
6. Subsequently I discovered that Lincoln St. Rose was bidding for and on behalf of Warefact Limited. This I found out by reading the Minutes of Sale and Bidding of immovables."

There were two affidavits in reply, filed on the 2nd and 6th days of November, 1987. Lincoln St. Rose, Managing Director of Warefact Limited, referred to legal advice given him and asked that the application be dismissed. Hector Gerald, the Sheriff's Officer who conducted the Judicial Sale, stated on oath that he had no knowledge of the allegations contained in paragraphs 3,4 and 5 of the affidavit of Gerald St. Omer. Hector Gerald's choice of words was significant. He was careful not to deny on oath any of the facts specifically stated by St. Omer in the three paragraphs.

Mitchell J. heard the summons on the 9th November, 1987. He delivered his decision on the 12th November, 1987 and granted the petitioner leave to amend the petition as sought. He also stated:-

"leave is also hereby granted to the petitioner to file and serve the amended petition.....on the respondent on or before 26th November, 1987 and the matter is adjourned for compliance with this order, to the 2nd December, 1987."

On the 3rd December, 1987, the learned Judge heard an application on behalf of Warefact Limited and made a consent order that "(1) the plaintiff be and is hereby granted leave to issue an appeal against the order made herein on the 12th November, 1987, and (2) the Notice of Appeal be filed and served on or before the 16th December, 1987".

On the 7th December, 1987, a Notice of Appeal was filed; eight days later an amended Notice of Appeal was filed and served on the persons affected.

The appeal came before us on the 28th January, 1988. Counsel for the appellant requested an adjournment and gave an undertaking that the status quo would be maintained. Counsel for the respondent agreed to the adjournment and it was granted.

On the 9th May,, 1988, Counsel for the parties agreed that the argument in this appeal should be confined to answering the question whether or not the amendment was properly granted.

For the appellant Warefact Limited, Mr. Deterville pointed out that the petition sought to annul the Sheriff's sale alleging the lack of a quorum at the sale; and that the amendment to the petition though also seeking annulment of the sale, alleged other facts which were said to amount to artifice.

Learned Counsel submitted that the amendment ought not to have been granted since the effect of so doing was "to add or include a new factual situation at a time when the period of limitation for instituting a new proceeding had elapsed"; according to Counsel, the principles of law to be applied when considering amendment of any document after the period of limitation had passed were set out in Order 20 rule 5 of the Rules of Supreme Court 1970 which did not confer an unfettered discretion. In the instant matter Counsel submitted also that Article 560 of the Code of Civil Procedure set out the limitation period, while Article 34 of the same Code, (on which the application to amend was based) merely explained how the jurisdiction of the Court was exercised.

Counsel cited MARSHAL v. LONDON PASSENGER TRANSPORT BOARD (1936) 3 All E.R. 83 particularly the judgment of Lord Wright M.R. at pages 87 and 88, and YEW BON TEW v. KENDERAAN BAS MARA (1982) 3 All E.R. 833 at page 839.

Relying upon the definition of the term "cause of action" as it appears in Volume 37 of the 4th edition of Halsburys Laws of England at paragraph 20 on page 27, learned Counsel submitted that the annulment of the Sheriff's sale was not the cause of action; rather, it was the remedy available to the petitioner if he succeeded in proving "the subject matter of grievance founding the action", namely that there was not a quorum at the sale.

In the view of Mr. Deterville, the petition set out a cause of action and the application for an amendment sought to add a new cause of action. In addition the facts forming the basis for the particular amendment were not the same or substantially the same as those forming the basis for the petition.

Learned Counsel for Canadian Imperial Bank of Commerce did not wish to address the Court; nor indeed did learned Counsel for the Sheriff of the High Court of Justice.

/For the....

For the other respondents named, that is to say, for Voice Buildings Limited, Michael Gordon and Lyndell Gordon, learned Counsel pointed out that the object of the application for amendment was also that of the petition; and he submitted that (a) the allegations in the petition and those in the amendment were clearly linked and rested upon the same base; (b) it was wrong to regard a ground for applying to vacate the sale as a cause of action. There were statutory grounds available to a judgment debtor to set in motion the machinery by which the Sheriff's sale could be vacated and (c) Article 558 of the Code of Civil Procedure did not create causes of action. It designated who could go to Court to vacate an improper sale and it provided the reasons or grounds for doing so.

Learned Counsel contended that, assuming without agreeing that the term "cause of action" could be used when dealing with the question to be answered, then the cause of action here was the claim that the sale be vacated. Mr. Cenac explained why the term was inappropriate. He argued that having regard to the definition given by Diplock L.J. in LETANG v. COOPER (1964) 2 All E.R. 929 at page 934, the essence of the expression was that it entitled one person to obtain a remedy against another person. In the instant case what was being done amounted to an "attack" on a procedural step taken in the enforcement of a judgment; it was not an "attack" against a person. "The thrust of the petition was not against the Sheriff or any of the parties to the proceedings". It was not seeking a remedy for the Judgment Debtor itself against the purchaser of the property.

Mr. Cenac also emphasised that the application to amend was based especially upon Article 34 of the Code of Civil Procedure which, he contended, was not affected by periods of limitation. As Counsel put it; "the Court has power to grant an amendment under Article 34 even after a period of limitation has expired and whether or not based on same facts as the original cause of action, if the Court is satisfied that justice so requires". The discretion of the Court was wide and untrammelled, and in this case it was also necessary to answer the question whether or not the interest of justice would be served by allowing the amendment. This meant consideration of the facts disclosed.

Counsel referred to facts relied on in the petition as well as those given on oath in support of an answer to the application, and he submitted that the facts related to the application were substantially the same as those stated in the petition. Counsel emphasised that the fact that Chastanet stopped bidding coupled with the circumstances in which he did so were linked with and germane to the allegation that there were not three persons present and bidding at the material time. In addition, Counsel submitted that assuming that the grounds set out in

Article 558 of the Code of Civil Procedure could be regarded as causes of action - a view to which he did not subscribe - then the provisions of Order 20 rule 5 of the Rules of Supreme Court 1970 would be satisfied. Thus the application to amend might be granted under Article 34 and under Order 20 rule 5.

Mr. Cenac also contended that the appellant did not claim that injustice would result if the amendment was granted. He then submitted that justice would not be done if, on the hearing of the petition, Voice Buildings Limited were prevented from putting forward for consideration those facts alleging artifice.

Finally, Counsel pointed out in the decision where the learned Judge stated that he had exercised his judicial discretion in allowing the amendment to the petition, as requested.

Mr. Cenac referred to a number of cases including CHELMSFORD RURAL DISTRICT COUNCIL and ANOTHER v. POWELL (1963) 1 All E.R. 150 and EVANS v. BARTLAM (1937) A.C. 473.

In his reply Mr. Deterville urged that 'of its essence, attacking the Sheriff's sale involved a contest between parties'; and he invited us to be guided in deciding what justice requires, by the 1887 case of WELDON v NEAL Vol XIX QBD 394. Counsel also contended that the appellant had alleged there would be injustice done if the amendments were allowed outside of the time prescribed under Article 560 of the Code.

To answer the question agreed upon at the outset of the hearing, it is vital to appreciate how the matter developed.

In Suit No. 503 of 1986, brought by Canadian Imperial Bank of Commerce (C.I.B.C.) against Voice Buildings Limited, Michael Gordon and Lyndell Gordon, the plaintiff obtained judgment in default of defence, for \$39,785.20, with interest at 15½% per annum from 1st November 1986 until payment, and costs \$250.00. The judgment was dated 27th January, 1987.

A writ of execution returnable on the 2nd October, 1987 was issued to enforce the judgment, and by publication in the St. Lucia Gazette of 20th June, 1987, notice was given that by virtue of the said judgment and the writ of execution, there would be "put up for sale and adjudication by the Sheriff or her Officer to the highest bidder in the High Court House on Peynier Street in the City of Castries on Thursday the 17th day of September, 1987, at ten o'clock in the forenoon" immovable property which was fully described in a schedule to the said notice.

/There was.....

There was no opposition to the seizure or sale of the property as advertised and so the sale was conducted by Hector Gerald, Sheriff's Officer. The property was adjudged sold for \$952,300.00 to the last and highest bidder, namely Lincoln St. Rose, for Warefact Limited.

So then, C.I.B.C. had not only obtained judgment in its cause of action No. 503 of 1986, but it had taken steps towards enforcing that judgment according to law.

Within 12 days of the adjudication, Voice Buildings Limited, the judgment debtor in the said matter, acting under the law, and in the light of certain alleged facts, petitioned for an annulment of the said Sheriff's sale.

In my view it is clear that there had been only one cause of action. C.I.B.C. relying upon the existence of a factual situation had obtained a remedy from the High Court against Voice Buildings Limited and others. The petition filed in September, 1987 by the judgment debtor, Voice Buildings Limited, did not create or introduce another or a new cause of action. Indeed I venture to think that there may have been no such contention as was advanced on behalf of the appellant, if the heading of the petition had read: "IN THE MATTER OF SUIT 503 of 1986, Between Canadian Imperial Bank of Commerce, and Voice Buildings Limited and Michael Gordon and Lyndell Gordon, AND IN THE MATTER of the Annulment of the Sheriff's sale of 17th September 1987 AND IN THE MATTER OF Articles 558, 560 and 600 of the Code of Civil Procedure". Nevertheless, I hasten to say, that as headed the petition referred to suit 503 of 1986 - as indeed did the subsequent documents filed.

By the application for amendment, filed about 41 days after the adjudication, the same judgment debtor sought to add to its petition another allegation on which it claimed the sale should be annulled.

We are here concerned with the compulsory execution of a judgment and in particular with the seizure and sale of immovables of a judgment debtor. Bidding and sale of immovable property are governed by Articles 525 to 548 inclusive, while the vacating of the Sheriff's sale is governed particularly by the provisions of Articles 558 to 561 inclusive of the Code of Civil Procedure. Article 600 falls within the general provisions in respect of sales of "movables and immovables" and it states:-

"No sale can take place unless there be three persons present and bidding exclusive of the Sheriff and his officers."

/For the....

For the purposes of this appeal, Article 558 reads as follows:-

"Sheriff's sales may be annulled:-

1. At the instance of the judgment debtor.....:
  - If artifice was employed with the knowledge of the purchaser, to keep persons from bidding; if the essential conditions and formalities prescribed for the sale have not been observed....."

Clearly the petition was based upon the second of the above situations contained in Article 558 in which a judgment debtor might seek to have the Sheriff's sale annulled; and clearly too, the particular aspect of law that was allegedly not observed was that set out in Article 600.

Equally clearly, the Summons (by which application to amend the petition was made) was based upon the first of the above situations in Article 558. The facts alleged were that Warefact Limited, the purchaser, through its Managing Director Lincoln St. Rose, knew of facts and circumstances that revealed a contrivance to keep Michael Chastanet, the only other bidder at the material time, from bidding.

Neither of the reasons for which the Sheriff's sale might be annulled at the instance of the judgment debtor constitutes a cause of action between parties. As I see them they are not unlike statutory grounds on which an appellant might ask a Court of appeal to alter the decision of an inferior court; and indeed I am reminded of the numerous occasions on which Counsel apply - orally or in writing - long after the time fixed for appealing, to amend the reasons or grounds of appeal by adding another statutory ground to those already stated in the notice of appeal. In the case before us, the application to be allowed, to amend the petition, was a simple request by the judgment debtor, in a decided cause of action, to be allowed to add to a statutory reason or ground already relied on, another statutory ground or reason for vacating the Sheriff's sale.

Article 34 C.C.P. falls within the Chapter "General Provisions" in the First Part of the Code of Civil Procedure. It states:-

"The Court or Judge may allow any amendment of any writ, declaration, pleading or other document at any time and on such terms as justice requires".

In my view, this article empowers the Judge to exercise his discretion, in the interest of justice, at any time; and to allow any amendment of a writ, declaration, pleading or other document. No time limit is imposed. The Judge is left to consider all the material facts and circumstances including the period of and any reason given for the delay in applying for the amendment.

/The instant.....

The instant petition would properly come within the phrase "other document". It is a document filed during (and before the completion of) the enforcement of the remedy obtained in suit 503 of 1986. It is not a document by which issues were being formulated between persons for determination or remedy.

Nor does Article 560 C.C.P. impose a time limit on a party to a cause of action to file a pleading or seek an amendment to a pleading. It merely indicates the time within which an application on behalf of the judgment debtor ought to be made, following adjudication at the Sheriff's sale.

Learned Counsel for the appellant relied upon Order 20 rule 5 of the Rules of Supreme Court 1979, for the law to be applied when considering the amendment of any document. Order 20 is headed "Amendment" and rule 5 is headed "Amendment of writ or pleading with leave". Rule 4 of Order 1 deals with the definitions to be used in the various rules, unless the context otherwise requires. "Pleading" is therein defined as not including a petition, summons or writ; and paragraphs (2) and (5) of rule 5 of Order 20 reads as follows:-

"(2). Where an application to the Court for leave to make the amendment mentioned in paragraph..... (5) is made after any relevant period of limitation current at the date of the issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(5). An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

I have said enough to indicate that it is my view that Article 558 C.C.P. does not create a cause of action. It concerns neither a writ nor a pleading and therefore the two paragraphs of rule 5 of Order 20 do not truly assist us.

Assuming, but not admitting, that the two situations in which the Sheriff's sale may be annulled at the instance of the judgment debtor can be regarded as two causes of action, then on the facts revealed in the petition and in the affidavits filed in support of the application for amendment, I have no difficulty whatever in saying that "the new cause of action" arose out of substantially the same facts as "the cause of action in respect of which the annulment was claimed by the judgment debtor/petitioner. In which case, leave to make the amendment might be

/granted.....



granted if the justice of the matter merited it.

Here the Sheriff's sale was a step in the process of enforcing the judgment; and for such a sale to be properly controlled and not be "engineered", legal provisions exist in the Code of Civil Procedure for governing the conduct of the sale and for making it possible to annul a completed sale, at the instance of the judgment debtor or of the purchaser, if the conduct of the sale offends the law. Voice Buildings Limited, the judgment debtor in suit 503 of 1986, claimed in its petition that the conduct of the sale offended Article 600. The amendment also concerned the conduct of the sale, claiming artifice was employed with the knowledge of Lincoln St. Rose (acting for Warefact Limited) to keep persons from bidding.

The conduct of the sale in the sight of the law is vital; and in my view, it is in the interest of justice that allegations of improper conduct be investigated and decisions given. It would seem then, that the interest of justice would demand investigation into the situation alleged in the instant petition as well as that alleged in the proposed amendment. Each concerned the conduct of the sale and there was not an excessive delay between the dates of the said allegations. The learned trial Judge stated in his decision:-

"I consider it right, just and proper in the circumstances and in the exercise of my judicial discretion to grant the application.....and to permit the petitioner to add the particular paragraph... to the petition already filed....."

The appellant has not satisfied me that the learned Judge exercised his discretion wrongly when he allowed the amendment sought about a month after the petition was filed; and I am unable to find a good or sufficient reason to alter his decision.

Before I leave this appeal I wish to refer to the case MARSHALL v. LONDON PASSENGER TRANSPORT BOARD (supra) upon which Counsel for the appellant relied. In that case the plaintiff was injured on the 12th August, 1935 in a collision involving his bicycle and a tramcar. On 15th October, 1935 he issued a writ claiming damages for person injuries and consequential loss sustained by reason of the negligence of the defendants, their servants or agents. 15 days after the date of the writ, a Statement of Claim was delivered. Among other things, it set out under the heading 'Particulars of Negligence' a number of particulars each of which concerned the manner in which the defendant's servant was driving the tramcar at the time. In November 1935 application was made to amend the Statement of Claim by adding under

/'Particulars....

'Particulars of Negligence' an allegation to the effect that the defendants were under a statutory duty at all times to maintain and keep in good condition and repair the road and tramlines and that they had breached that duty. It was held by the Court of Appeal, that "the amendment introduced a new case which if set up in an action commenced at the date of the amendment would have been barred by lapse of time, and the amendment was disallowed". Lord Wright M.R. said this, at page 87:-

"The question is whether that involves a new cause of action within the meaning of the Public Authorities Protection Act 1893.... I think it does .....because it is well settled that an amendment will not be allowed if its introduction would deprive the defendant of a defence under the Statute of Limitations or under the Public Authorities Protection Act 1893 - in other words, if it is something which involves a new departure, a new head of claim or a new cause of action. That rule has been laid down in comparatively simple circumstances in WELDON v. NEAL. It is enough to read what Lord Esher M.R. says at p 395:

If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the Statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust.

In that case the original writ had been issued for slander, and the amendment asked for was an amendment setting out further claims "in respect of assault false imprisonment and other causes of action". That, as I say, was a comparatively simple case."

Then, after considering "a much more difficult case" (Lancaster v. Moss), Lord Wright M.R. pointed out that the claim as endorsed on the Writ was based on negligence while driving and negligence which was of a vicarious nature; but of the proposed amendment, he said this:-

"..... it is certainly an entirely different claim from a claim for negligent driving, and it is a claim which is not based on vicarious liability. It is a claim for a breach of statutory duty which is a liability personal to the corporation and not capable of being delegated; .....in addition.....it involves, as I read the proposed amendment, a quite different set of ideas, quite a different allegation of fact ..... the original claim of negligence had been because the defendant's tramcar was driven into and struck the plaintiff, whereas the proposed amendment seems to allege that the bad repair of the road and the tramlines

/caused.....

caused the plaintiff to collide with the defendant's tramcar..... In my view, therefore, the proposed amendment would, if allowed, have set up a new cause of action involving quite new considerations quite new sets of facts, and quite new causes of damage and injury."

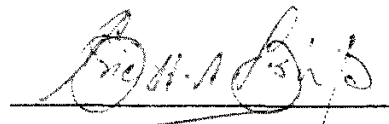
In agreeing Romer L.J. also referred to the rule laid down in WELDON v. NEAL and continued:-

"In the present case, if the plaintiff in his writ had claimed damages occasioned to him by reason of the negligent driving of the servant of the defendants, I do not see how it would be possible to say that the amendment now proposed to be introduced into the statement of claim was not an amendment introducing a new cause of action. It appears to me to be entirely a new cause of action. The first cause of action was owing to the breach of one duty on the part of the defendants. The alleged amendment proposed to charge the defendants with a breach of an entirely different kind of duty."

Clearly in Marshall's case the writ and pleadings which were not yet closed in the action, were under consideration. The parties or persons were involved in seeking to crystallise the issues in a factual situation the existence of which entitled one person to obtain from the Court a remedy against the other (see LETANG v. COOPER supra); and the plaintiff was then seeking to add neglect to repair a highway to negligent driving. On the other hand, the instant case had passed the stage of filing or settling the pleadings. The action had been heard. The remedy had been obtained; and the process of enforcing it had been almost complete. There was no question of a new cause of action.

The facts of the Yew Bon Tew case which was also mentioned by Mr. Deterville, indicate quite positively, in my view, that it may be easily distinguished from the instant case; and it is unnecessary to lengthen my judgment with an analysis of the case or with contrasting the cases.

I have said enough and I trust with clarity, to show why it is my considered view that this appeal must stand dismissed, with costs to be taxed.



E.H.A. BISHOP,  
Justice of Appeal

*L.L. Robotham*

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L.L. ROBOTHAM,  
Chief Justice

*G.C.R. MOE*

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G.C.R. MOE,  
Justice of Appeal.