IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES

SUIT NO.: 39/1994

BETWEEN:	**CHESTER CLARKE**	-	**PLAINTIFF**
	V.		
	THE BANK OF NOVA SCOTIA		
	JULIAN COMPTON	-	**DEFENDANTS**

APPEARANCES: **Mr S Commissiong for the Plaintiff.**
Mrs A Cato and Mr St A Cato with her for the 1st Defendant.
Mr E Robertson for the 2nd Defendant.

21st and 29th October 1999

DECISION

Mitchell J.

This is a ruling on a number of interlocutory applications by the 1st Defendant and 2nd Defendant in Chambers.

This case began by way of a Writ endorsed with a Statement of Claim issued on 28th January 1994. Essentially, the Plaintiff claimed that he attended an auction sale conducted by the 1st Defendant under a mortgage given to it by the 2nd Defendant. The Plaintiff bid for the two properties being sold by the 1st Defendant and was successful. The 1st Defendant, he claimed, refused to convey both properties to him, but would only convey one of them. The 1st Defendant, the Plaintiff claims, wrongfully re-conveyed the second property to the 2nd Defendant. The reliefs sought are either specific performance of the contract or damages for breach of contract. The Defence of the 1st Defendant is that the Plaintiff's bid was for only one parcel of land. The Plaintiff had his solicitor prepare the conveyance, which was duly executed by the 1st Defendant. The Reply claims that the Plaintiff had originally prepared the conveyance of the 2 parcels, but that the 2nd Defendant had refused to execute it. The Plaintiff had executed the deed for only one parcel under protest. The Defence of the 2nd Defendant, filed late with leave as will subsequently appear, is that the sale of the first property realized a sufficient amount to satisfy the 1st Defendant, and the 1st Defendant therefore properly re-conveyed the second property to him. The Request for Hearing has been filed since 2nd August 1994.

The original Plaintiff died. His son, the present Plaintiff on record, applied before Baptiste J under O.15, r.7 to be substituted as the Plaintiff on the ground that he was directly affected by the action and was the proper person to be substituted. In his Affidavit in support of his application he claimed that his father had been acting on his behalf as he was residing in Canada. The deed of conveyance had been made in his father's name, but his father had subsequently transferred the legal and beneficial interest in the land to him. On 28th November 1997, Baptiste J dealt with the matter ex parte, and made the order substituting the present Plaintiff. The Order was settled by the Registrar and entered on 4th December 1997. It was served on the Defendants. There has been no appeal from that order.

On 12th January 1998, the 1st Defendant filed the first of 4 Summonses supported by various Affidavits for the various reliefs. The main thrust of the application was that (1) the Order should be set aside on the ground that the endorsement of the parties to the action infringed the Rules of the Supreme Court O.6, r.3 whereby the Plaintiff was required to disclose the capacity in which he sued; (2) this failure to disclose misled the Defendant as to the identity of the Plaintiff; (3) that the substituted Plaintiff could not at one and the same time be asking to be substituted as Plaintiff by reason of the death of the original Plaintiff when according to his Affidavit the original Plaintiff was really acting as his agent. The argument was that where a Plaintiff sues in a representative capacity the Writ should be so endorsed before it is issued. The writ was defective from its inception because it was filed in violation of O.6, r.3. Baptiste J should not have substituted the present Plaintiff under O.15, r.7(1) because that Rule deals with the situation where there has been a Grant of Probate or Letters of Administration. There was no evidence of the appointment of the substituted Plaintiff as Executor or Administrator. Alternatively, if the original Plaintiff had been lawfully appointed Attorney on Record for the substituted Plaintiff the Defendants had a right to know. There was deception on the part of the substituted Plaintiff between 1989 and 1997 as to who was the true purchaser of the land.

On 29th January 1998, the 1st Defendant filed the second Summons. It applied for leave to apply to the Court to set aside the Order of 27th November 1997 notwithstanding the time limited by the Rules had expired, and that the Summons of 12th January 1998 do stand as an application filed in such extended period with the sanction of the Court. That application was opposed and, on 13th March 1998 Baptiste J refused leave. That order of Baptiste J was not appealed against.

On 10th March 1998, the 1st Defendant applied by a third Summons to amend the Summons of 12th January 1998 to add the O.15,r.7(4) ground. The gist of the complaint was that the Registrar had not caused the Cause Book to show that the Plaintiff was substituted as ordered by Baptiste J. since 28th November 1997. The

Affidavit in Support urged that this noting is a condition precedent before an order granting leave for the substitution can be served. This ground was the one pressed hardest by the 1st Defendant. The argument was that the Rule makes it a prerequisite for service of the substitution order that the person obtaining the order must "procure" the order to be noted up in the Cause Book, and that a search of the Registry after service of the order had revealed that the Cause Book had not been so noted up. The effect of this failure was to nullify the service of the order. Compliance with the Rule is a condition precedent for the order to be served. Neither had the requisite Amended Writ been served. The change of the party had substantially changed the nature of the action. The pleadings would have to be amended.

On 14th October 1999, the 1st Defendant filed a fourth Summons to the same effect as the Summonses of 12th and 29th January 1998. The Summons asks that notwithstanding the time limited by the Rules of Court for his so doing has expired, the 1st Defendant be at liberty to apply to set aside the Order of 27th November 1997, and that the summons of 12th January 1998 do stand as an application filed in such extended period with the sanction of the Court together with the Summons filed on 10th March for an amendment to that Summons.

On 19th October 1999, the 2nd Defendant applied by Summons supported by Affidavit for leave to file his Defence out of time. The proposed draft Defence was exhibited. The stage of Summons for Directions has long passed, and the Request for Hearing has been filed. Nevertheless, the Plaintiff did not seriously argue that the Plaintiff was in any way prejudiced by allowing the application.

The Court permitted the applications to be all argued together. The Court is grateful to both counsel for the Plaintiff and the 1st Defendant who submitted carefully prepared and argued submissions on behalf of their clients, with copies of the authorities on which they relied. This greatly assisted the Court in coming to a determination on the various matters raised.

The Court makes the following observations and comes to the following decisions on the various applications before it.

1. The 2nd Defendant is given leave to serve and file his Defence within 7 days of this date. The Plaintiff has not applied for Judgement against him, nor does it appear that the late service of the proposed Defence catches the Plaintiff by surprise or otherwise prejudices him. Costs of the application to be costs in the cause.

2. The High Court is not an appropriate forum to appeal a decision of the High Court. Once an order has been perfected, the High Court is functus. Only the Court of Appeal can thereafter overturn that earlier decision. The decisions of the Court of Appeal on this point are numerous, and not necessary to refer to. This Court has no authority to set aside the Order made by Baptiste J on 28th November 1997 on the grounds submitted or on any other grounds.

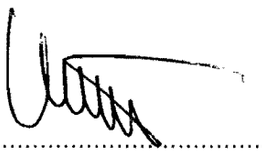
3. Even if the Court was not now functus and had the appropriate authority to set aside Baptiste J's order of 28th November 1997, the Court would not hold that in this case the failure of the Registrar to amend the Cause Book as required by O.15 before the service of the order was fatal. This was a minor administrative slip, outside of the control of the Plaintiff in spite of the use of the word "procure" in the rule. The failure to amend the Cause Book could be corrected at any time by the Registrar, as indeed it subsequently was. The Plaintiff having made the original application for substitution before the Judge in the presence of the Registrar or the Registrar's representative, and the Registrar having under O.42, r.1(1) made a minute of the order, and the order having been subsequently settled by the Registrar and indeed subsequently signed, sealed and filed by the Registrar under O.42, r.5, there is very little further that the Plaintiff could do to bring the order further to the attention of the Registrar. The Plaintiff could hardly force the Registrar to comply with O.15, r.7 and 8. This Rule may be significant in the UK from whose Rules it is taken. There, the application is made to a Judge or Master who has only the application before him at the time of the application. No one from the Central Registry works with the Judge. The Registry is located in a separate building, perhaps in a separate part of the country, from that in which the order might be made by the Judge. It is necessary there in the UK for the Plaintiff to take the order to the Central Registry, and to procure that all the necessary amendments are made to ensure that the Court file properly reflects the order made substituting the party. In the OECS Courts by contrast, the Court House is in the same building as the Registry; the Registrar sits in Chambers with the Judge and is aware of the orders of the Judge; the Judge works on each application with the Registry case file on which are all the pleadings, applications, Affidavits and orders, in front of him; he has the court clerk note the order he has made on the back of the file. Unlike in the UK, there is no likelihood that the Court or any of the parties will be uncertain as to any order made by the Judge in a particular matter.

4. Baptiste J has previously in dealing with the Summons filed on 29th January 1998, on 13th March 1998 refused leave to hear this application. That order was not appealed against. It is true that the minute on the back of the file (there was no order filed, as O.42, r.5 does not require any order to be drawn up and filed in applications of this sort) only indicates that the application of 29th January 1998 was refused. But, the inevitable consequence of that order refusing the application of 29th January 1998, was that the application of 12th January 1998 was not susceptible to argument, as it was out of time. The filing of a new

Summons on 14th October 1999 was an attempt to have the matter re-litigated. This Court has no authority to overrule Baptiste J and to grant the application sought by the 1st Defendant.

5. For all these reasons, the applications of the 1st Defendant are dismissed.

6. There being no further interlocutory applications pending, the matter is fixed to resume in Chambers on 17th November 1999 at 11 am to see if the pleadings are in order and the suit is ready for trial with a view to setting a trial date



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Ian Donaldson Mitchell, QC
High Court Judge.