

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.15 OF 2002

BETWEEN:

MORRISON KNUDSEN INTERNATIONAL INC

Appellant

and

[1] THE CONSULTANT LIMITED
[2] BARCLAYS BANK PLC

First Respondent
Second Respondent

Before:

The Hon. Sir Dennis Byron
The Hon. Mr. Albert Redhead
The Hon. Mr. Ephraim Georges

Chief Justice
Justice of Appeal
Justice of Appeal Ag.]

Appearances:

Mrs. L. Grant for the Appellant
Mr. A. John and Ms. K. George for the First Respondent

2002: July 2;
2003: January 28.

JUDGMENT

The Background

[1] **BYRON, C.J.:** On 8th January 1990, the appellant obtained judgment against Denis Ross in the sum of \$97,207.49 and costs of \$123.09 in Suit No.424 of 1989. In 1996 he obtained an order for the said Ross to pay the judgment debt, quantified at \$155,424.71 inclusive of interest at 6% from the 8th January 1990, by monthly installments of \$750.00.

On the 4th day February 2000, Denis Ross sold and conveyed **two parcels of land** situated at Lance – Aux – Epines in Grenada to the first respondent without having satisfied the judgment debt. The first respondent then mortgaged the said land to the second respondent.

On the 19th of December, 2000, more than a decade after judgment had been entered, the appellant commenced proceedings to obtain an order for sale of the said for the purpose of collecting the sum due by virtue of the outstanding judgment , without applying for, or obtaining, permission from the court to do so. On 15th April 2002, Benjamin J dismissed the application on the ground that the proceedings were prohibited by CPR 2000 part 46.2

The Appeal

- [2] The appellant complains that the case was not governed by CPR 2000 Part 46.2 which relates to the issue of writs of execution but rather by the Limitation of Actions Act Cap. 173 which deals with the issue of fresh proceedings to enforce judgment debts. The appellant contends that these proceedings constitute a fresh action to enforce a statutory charge.

The Judgment as a Charge

- [3] It was conceded that the judgment debt did create a charge on the land owned by Denis Ross and his successors in title in accordance with the Civil Procedure Act Cap 55 section 23 which prescribes:

“A decree for the payment of money shall bind the land ... of the judgment debtor within Grenada to the extent of his beneficial interest therein, and the same shall be deemed to be attached by virtue of the decree, in satisfaction thereof, from the date of the judgment...”

- [4] The principles which could relieve a bona fide purchaser who did not have any notice of the charge could not apply to this case as the respondents must be

deemed to have had notice of this statutory charge in favour of the appellant. It was the duty of the purchaser's and the mortgagee's, conveyancing attorneys to search for outstanding judgments against Denis Ross, because judgments against a vendor attach to his entire beneficial interest in land by operation of the law. The appellant contends that the instant proceedings to enforce the statutory charge on land arising from the judgment and that the learned trial judge erred in categorizing the process as the issue of a writ of execution.

The Effect of Delay

- [5] The effect of delay in the enforcement of legal rights is a highly regulated feature of the law. In this case there are two relevant regimes. The first is under the Limitation Act Cap 173 and the other is under the Rules of Court. **(Civil Procedure Rules 2000)**
- [6] The limitation of actions legislation imposes time limits within which legal rights can be enforced. These rules are commonly applied to the use of land, and debts arising from contract. They also affect the enforcement of judgments and prescribe the time period within which it is permissible to bring an action to recover a judgment.
- [7] The Limitation of Actions Act Cap 173. Section 30 prescribes:
"No action or other proceeding shall be brought to recover any rent...judgment or lien....,but within twelve years next after a present right to receive it has accrued..."
- [8] If this is the provision that governs this proceeding, as the appellant contends, then the action is clearly permitted because it was commenced within 12 years next after the appellant's right to receive payment under the judgment accrued.
- [9] The Rules of court govern the period within which a writ of execution could be issued in accordance with the provisions of CPR 2000 part 46.2 which prescribes:

"A writ of execution may not be issued without permission if – (c) 6 years have elapsed since the judgment was entered;".

In this case, 6 years had elapsed since the judgment was entered and the appellant did not apply for or obtain permission to issue the proceedings. Therefore, a writ of execution could not be issued. It is significant that these rules do not exclude the possibility of granting permission to proceed after six years. They obviously envisage that, in appropriate cases, permission could be granted.

The Real Issue

[10] The solution to this case therefore depends on establishing the difference between the issue of writ of execution, and, the bringing of a fresh action, to enforce the collection of a judgment debt.

[11] Halsburys Laws of England Fourth Edition (reissue) vol 28 para 815 refers to the distinction between the issue of an execution to enforce a judgment and an action to enforce a judgment. It states:

"Actions. The Limitation Act 1980 applies to all actions of the classes for which a period of limitation is laid down by the Act, except actions for which a special period of limitation is provided by some other enactment. 'Action' includes any proceedings in a court of law, including an ecclesiastical court. This definition is wide enough to cover a set-off or counterclaim, any form of initiating process (including a creditor's petition to wind up a company), and an application in the course of a winding up for a declaration that a director of a company is to make a contribution to a company's assets. It also comprises some proceedings, for example an application for a distress warrant for arrears of rates, which are not actions in the ordinary sense of the word. It does not, however, cover the issue of an execution on a judgment, as distinct from an action to enforce a judgment, nor does it cover most criminal proceedings."

[12] This is emphasized and further clarified in footnote 1 to paragraph 916 of the Halsbury's Laws of England Fourth Edition (reissue) which states:

"Despite the wide definition of "action" contained in the limitation Act 1980 sec 38(1), an action upon a judgment applies only to the enforcement of judgments by suing on them and does not apply to the issue of executions

upon judgments for which the leave of the court is required, after six years have elapsed, by RSC Ord 46 r 2(1) (a); in matters of limitation the right to sue on a judgment has always been regarded as quite distinct from the right to issue execution under it, but the court will not give leave to issue execution when the right of action is barred see **National Westminster Plc v Powney** (1990) 2 All E.R 416 and **WT Lamb & Sons v Rider** [1948] 2 KB 331, 2 All ER 402 CA.”

- [13] In the leading case of **WT Lamb & Sons Ltd v Rider** (1948) 2 All E.R. 402 the court rejected the argument that the rule of court, which provided that where six years had elapsed after judgment a party intending to execute required leave to issue execution, was inconsistent with the provision of the Limitation Act, which provided for a twelve year limitation period for bringing actions on a judgment and was therefore invalid. The court was obliged to consider whether there was a distinction between the issue of execution and bringing an action on a judgment. In a scholarly dissertation which produced a historical review and explanation of the law Scott LJ revealed that at one time the law presumed a judgment to have been satisfied when a year and a day had elapsed without execution being issued on it and at common law the only remedy in such a case was by an action of debt on a judgment. The new judgment could then be executed. Another example of bringing an action on a judgment, not mentioned in the Lamb case, is the case of a foreign judgment, where in order to obtain a judgment which could be executed, it is necessary first to sue on the foreign judgment to obtain a judgment which could be executed. After his review, Scott LJ stated at page 407 (G) of the judgment:

“It follows from the above brief survey that the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it and that the two concepts have been the subject of different treatment. Execution is essentially a matter of procedure-machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders. A refusal by the court, whether before or after the passing of the Common Procedure Act, 1852, to place this machinery at a plaintiff’s disposal in no way affected his right to sue on the judgment at any time within the statutory limit of time – as indeed was expressly recognised by the proviso to s.130 of that Act.”

[14] In the case of **Re a Debtor** (1997) 2 All E.R. 789 Paul Baker QC J ruled that bankruptcy proceedings, based on a statutory demand founded on a judgment debt, constituted an "action" in accordance with the provisions of the Limitation Act. At page 792(E) of his judgment he stated:

"It seems to me that bankruptcy proceedings are, first of all, a new proceeding so that it can be properly said that the proceedings are newly brought and are not in any continuing some previous proceedings pursuant to the judgment or anything of that nature. But while they are not part of the proceedings which led to the judgment – they are not some continuation in any way of those proceedings – they are based on or related to the judgment. The bankruptcy proceedings in the Medway Court are brought on a judgment obtained in another court. I have stressed that because it is well settled that the limitation period in s.4 does not apply to a process of execution following a judgment."

[15] It would seem to me that there is a clear distinction between the two situations. A writ of execution is issued at the point where there is a judgment to be enforced and a proceeding is initiated to enforce it, for example by obtaining an order for sale of land charged with the judgment debt. On the other hand fresh proceedings are issued where the judgment is not being directly enforced, but the proceedings based on the judgment creates a new basis for enforcement.

[16] I would think that the matter is clarified by the rules of court which define the term "writ of execution" in clear and unambiguous terms. The relevant definition of a writ of execution is set out in the rules of court CPR 2000, Part 46.1:

"In these rules a "writ of execution" means any of the following – (a) an order for the sale of land'

[17] The form in which the order for sale of land is obtained is not limited by the rules. It is significant that the rules did not prescribe the method of obtaining an order for sale. This indicates to me that however the order is obtained it constitutes a writ of execution. Applying that reasoning to this case, an order for sale, that was obtained on an application to enforce a statutory charge by which the judgment debt was secured, is a writ of execution.

[18] In these proceedings the appellant did not require any new or fresh judgment. The appellant applied for an order for sale in order to enforce the existing judgment. The rules of court specifically required permission to be obtained where more than six years have elapsed. The obtaining of permission is regulated by part 46.3 which states:

“(1) An application for permission may be made without notice unless the court otherwise directs but must be supported by evidence on affidavit.

(2) On an application for leave the applicant must satisfy the court that it is entitled to proceed to enforce the judgment or order, and, in particular must satisfy the court-

- (a) if the judgment is a money judgment – as to the amount –
 - (i) originally due; and
 - (ii) due together with interest at the date of the application;
- (b) if rule 46.2(c) applies – as to the reason for the delay;
- ...(f) that the applicant is entitled to enforce the judgment; and
- (g) that the person against whom enforcement is sought is liable to satisfy the judgment.”

[19] The granting of leave is, therefore, a matter of the court’s discretion. It is clear from these provisions that is obtaining permission is not the automatic result of an application as the court is required to examine the circumstances including the reasons for the delay in enforcement.

[20] The appellant never applied to the court for permission. No evidence was adduced on the issue. There is therefore no material on which we can exercise a judicial discretion as to whether it is reasonable to enforce this judgment after the period of delay. It is clear that we cannot consider the issue of permission in these proceedings.

Conclusion

[21] My view, therefore, is that the learned trial judge was right when he ruled that the application for the order for sale was an application for the execution of the judgment entered against Denis Ross and was covered by the rules of court which mandated the obtaining of permission as a condition precedent to the issue of the

said order. This is not a purely procedural and technical matter. The granting of permission requires the exercise of a judicial discretion by the court, after considering evidence and the justice of the case. There is no alternative to dismissing the appeal with costs. The learned trial judge did not quantify the costs. In the court of appeal the second respondent did not appear and it was reported to us that the second respondent obtained an indemnity from the first respondent, the terms of which were not disclosed. Counsel agreed with costs and indicated that whether the outcome the unsuccessful party should pay \$3,100.00 in the first instance and \$5,000.00 for the appeal.

Order

[22] The appeal is dismissed with costs in the sum of \$5,000.00 to be paid by the appellant to the first respondent. The order of the trial judge is varied to include a quantified sum of \$3,500.00 for costs.

Sir Dennis Byron
Chief Justice

I concur

Albert Redhead
Justice of Appeal

I concur

Ephraim Georges
Justice of Appeal [Ag.]