SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 1991/0218

BETWEEN:

DENNIS LOUISY

Claimant

AND

DOLPHIUS DOXAY ET AL

Defendant

Appearances:

Peter Foster and Renee St Rose for Claimant
Dexter Theodore for Defendant

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2005: May 31
June 10

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JUDGMENT

Introduction

[1] SHANKS J: In 1989 Adelina Louisy was registered as owner of a 12 acre parcel of land which had formed part of the Duchon Estate in the Quarter of Micoud. In 1991 she brought a claim for possession against the Defendants who were in occupation of a four acre section of the land and obtained judgment in default of Defence. The Defendants have never given possession and the judgment has never been enforced. The Claimant, who is her son and administrator of her succession, applies for permission to enforce the judgment by a writ of possession. The Defendants resist the application and themselves apply for compensation for improvements they have carried out under Art 372 of the Civil Code.

[2] There was evidence before the court in the form of an affidavit from the Claimant and witness statements from him and his brothers Elias and Francois and, on the Defendants' side, from the Third, Fifth and Tenth Defendants and from Epiphane Bapiste and Francis Duplessis. There was also a helpful valuation report dated June 2001 from Tedburt Theobalds. The parties very sensibly chose not to cross-examine the witnesses and both accepted Mr Theobalds's report so that I am able to take the facts from those documents. I was greatly assisted by the characteristically moderate and sensible submissions of Mr Foster for the Claimant and Mr Theodore for the Defendants.

Factual background

[3] There have been members of the Defendants' family living on the land and cultivating it since the 1930s or 1940s. The Tenth Defendant (who is now 77) was born on the land. She has four children (including the Third and Fifth Defendants) who were also born on the land and have never left it. The Third Defendant (who is now 55) built the house he still lives in when he was 19 in 1969. The Fifth Defendant (who is now 58) has a house on the land. Three of her children were born on the land and all four live there now. When Mr Duplessis surveyed the land in 1976 there were four or five McFarlane family houses on it. It is accepted that in 1990 there were two concrete structures there owned by the Third and Fourth Defendants respectively. When Mr Theobalds carried out his inspection of the land in May and June 2001 there were 16 structures there (some wooden, some concrete) owned by the Defendants and various other family members and a large amount of cultivation.

[4] The dispute over the land between the Claimant's and Defendants' respective families arose in the late 1970s or early 1980s. Adelina Louisy was registered as owner of the land on 28 August 1989. The default judgment for possession was entered on 4 September 1991. The judgment was set aside by Matthew J on 9 October 1991. Mrs Louisy appealed to the Court of Appeal and the appeal was allowed by consent on 29 January 1992. Save that the attorneys for the parties were Henry Giraudy and Velon John respectively nothing is known about what led to that consent order.

[5] Between January 1992 and September 1995 the Louisy family kept asking the Defendants to leave the land and stop building on it and also offered to sell the land to them for $3.00 per square foot (see Elias Louisy statement para 5), but nothing was done to enforce the default judgment until a summons was issued on 4 September 1995 for leave to issue a writ of possession (this was a necessary step before enforcement under Order 66 rule 3(2) of the old rules of procedure). On 17 January 1996 there was a hearing of the summons at which the Government stated through counsel that it proposed to acquire the land compulsorily for the Defendants and compensate Mrs Louisy. There were advertisements of the Government's intention placed in the Gazette for 23 and 30 March 1996. Mr Foster for Mrs Louisy wrote to the Attorney General on 18 April 1996 indicating her general agreement to the proposal but also pointing out that there were parts of the whole parcel on which members of the Louisy family were living and also stating that she did not wish to sell to the Third or Fourth Defendant but would consider compensating them. There was some further correspondence ending with a letter from the Attorney General dated 16 September 1996. In 1997 there was an election, a new government came to power and the idea was dropped.

[6] On 8 May 1998 an injunction was obtained to prevent the Defendants (or some of them) interfering with a survey and on 19 February 1999 an injunction was obtained to prevent the Defendants from continuing to construct buildings or plant crops on the Claimant's land but nothing further was done about the summons dated 4 September 1995 for leave to issue the writ of possession until 3 March 2000 when the original summons was restored by the Claimant's attorney. In the meantime Mrs Louisy had died on 11 September 1999. Her death led to litigation between the Claimant and his brother Francois against their brother Elias over her will and succession which started in December 2000; that litigation was not settled until 25 October 2002. The summons dated 4 September 1995 finally had an effective hearing on 11 April 2001. On that occasion Mr Theobalds was appointed to value the individual portions of land occupied by the Defendants (including improvements) and the summons was adjourned to 27 July 2001 for a report on progress to be made.

[7] I am not told but deduce that this order was made so that the court could consider the question of compensation under Art 372 of the Civil Code. Mr Theobalds carried out a

thorough inspection of the land and produced a comprehensive report in June 2001 though for some reason it was not lodged with the court until November 2001. As I have said, he found 16 structures and substantial crops on the land occupied by the Defendants. Some of the structures were put up after the judgment had been obtained in 1991 and some were pre-existing. He ascribed values to the structures and the crops which amounted in total to over $1.1 million.

[8] Nothing further seems to have happened until the matter came before me on 28 May 2003. I ordered that if the Claimant wished to enforce the judgment he would have to make an application under CPR 46.2(c) for permission to issue a writ of execution notwithstanding the lapse of six years since the judgement and file suitable evidence and that if the Defendants wished to claim compensation under Art 372 they too would need to make an application and file evidence and that the two matters should be heard together. For some reason those applications were not filed until 17 August and 15 September 2004 respectively. Master Cottle gave directions in November 2004 fixing the date for this hearing and it finally came on for hearing on 31 May 2005.

Principles to be applied

[9] Notwithstanding the order I made in May 2003 it seems to me that the old rules of procedure must apply in this case: although CPR 73 does not refer expressly to cases started before the new rules came into force in which judgment is also obtained without a trial before that date, the clear implication of CPR 73.3(1) must be that they are to be dealt with under the old rules. In any event, Order 67 rule 2(1)(a) is in similar terms to CPR 46.2(c) and I have no doubt the principles to be applied are the same under both procedural regimes.

[10] I should note here that Order 67 rule 2(1)(b) also required permission in a case where there had been a change by reason of death in the party entitled to enforce a judgment and Order 66 rule 3(2) and (3) also provided that every writ of possession required leave, which would not be granted unless everyone in actual possession of the relevant land had received such notice as would enable them to apply for any relief to which they may be entitled. In this case the Claimant would require leave under these two provisions as well as under Order 67 rule 2(1)(a). However, since the latter two

are procedural matters that could no doubt be satisfactorily dealt with by the Claimant in due course if necessary, I shall concentrate on the provision requiring leave after the lapse of six years from the judgment since, if the Claimant fails on this, it will effectively bring an end to his claim.

[11] There was no dispute as to the principles the court should apply in determining an application under Order 67 rule 2(1)(a) or CPR 46.2(c). When exercising its discretion to permit the issue of execution after the expiry of six years the court will not generally give permission unless it is demonstrably just to do so; and the burden of demonstrating that it is just rests on the judgment creditor: see *Duer v Frazer* [2001] 1 All ER 249. The most important factors for the court to consider are the length of and reasons for the delay in enforcement and any prejudice caused to the defendants.

Delay

[12] The delay in enforcing this judgment is very substantial: over 13 years have passed since Mrs Louisy's appeal was allowed by consent.

[13] There was no evidence about the reason for the initial delay between the appeal being allowed by consent (January 1992) and the summons for leave to issue a writ of possession under Order 66 rule 3(2) (September 1995) except that the Defendants were asked to leave and invited to buy the land. Mr Foster also told me that Mrs Louisy's lawyer Mr Giraudy died in 1992. In the absence of any indication as to the Defendants' response to the offer to sell I do not think any of these points provides a good reason for the delay of over 3 ½ years.

[14] Between September 1995 and the election of the new government in 1997 it was reasonable for Mrs Louisy not to proceed with enforcement since the Government were suggesting they would compulsorily purchase the land so that the Defendants would not have had to leave and she would have been compensated (an idea to which she agreed in general terms). However, no good reason has been given as to why no attempt was made to enforce the judgment by a writ of possession between 1997 and March 2000 when the summons for leave to issue the writ was restored, notwithstanding that there was a certain amount of activity in court.

[15] After the summons was restored Mr Theobalds report had been lodged with the court by November 2001 but nothing substantive happened until the matter came before me in May 2003. The litigation between the Louisy brothers may explain some of the delay between November 2001 and May 2003 but I do not regard it as a good reason *vis a vis* the Defendants. There is no explanation for the delay between my order in May 2003 and the issuing of the application in August 2004 which led to Master Cottle giving directions in November 2004. In view of the whole background I find it extraordinary that an application was not issued within a few days of my order.

[16] The only periods of delay for which there is a satisfactory reason are therefore September 1995 to mid 1997, March 2000 to November 2001 and August 2004 to date. Overall there is therefore no satisfactory reason for about 8 ½ years of the total delay, of which nearly five years come more than six years after the date of the judgment which the Claimant now seeks to enforce.

Prejudice

[17] Some of the Defendants have undoubtedly put up buildings on the land since the judgment was obtained in 1991 (and indeed since the six years expired) which is a substantial change of position. Mr Foster says that it is not open to them to say they will suffer prejudice as a result if the judgment is enforced because they must have been aware of the judgment and that they had no right to remain on the land at the time they put up the buildings. I am satisfied however that the extreme delay in enforcement, combined with the attitude shown by Mrs Louisy and the Claimant in being prepared to co-operate with the Government's plans and maintaining to this day that they are willing to transfer the land to the Defendants if a price can be agreed, would have led the Defendants to the legitimate belief that they were not going to be evicted from the land and that it was safe to build, at least during large parts of the period of delay.

[18] Furthermore I cannot ignore the fact that if the judgment is enforced it will lead to the removal of a substantial community from lands which it has been occupying for many years. Mr Foster says with some force that if the Defendants had any rights to remain

those rights should have been raised in 1991 but I confess to sharing Mr Theodore's unease at the unexplained way in which judgment was allowed to go by default and the appeal was allowed by consent and the fact that the Defendants appear never to have had an opportunity to put their case. In any event, I think that having obtained the judgment in such circumstances against people who had been in occupation so long it behoved Mrs Louisy to get on and enforce it promptly so as not to raise hopes that it would not after all be enforced.

[19] On the other hand, the Claimant and the heirs of Mrs Louisy stand to lose only financially since they are not occupying the four acres which are occupied by the Defendants and the Claimant has made it quite clear that he will sell the land for the right price. Mr Foster says that Mrs Louisy's sons are not getting younger and are suffering stress as a result of the fact that the matter has been outstanding for so many years. I can understand that they may be suffering some stress as a result of continuing with these legal proceedings but in a sense that is their own choice since they are on the side of the Claimant and choose to pursue the matter; I imagine the Defendants are suffering at least equal stress at the thought of being thrown off the land they occupy. Mr Foster also says that the matter needs to be resolved in his client's favour because the Defendants and members of the family keep putting up new houses and cultivating new land and expanding their occupation and it must be brought to an end. It seems to me it would be open to the Claimant and his family to "draw a line on the ground", possibly physically (indeed, there may already be a road separating the Defendants' four acres from the balance of the 12 acres) and/or by partitioning the parcel at the Land Register, and to take appropriate action hereafter if the Defendants or anyone else encroach onto the eight acres not currently occupied by them.

[20] There is another consideration. Those Defendants who put up buildings or planted crops before 1991 are *prima facie* entitled to compensation under Art 372 and to maintain a lien over the land until that compensation is paid under Art 374. But the Claimant has made it clear that his side is not in a position to pay any compensation so that it is possible that the Claimant is not going to be entitled to enforce any writ of possession against some of the Defendants for the time being in any event. Mr Foster submitted that the claims under Art 372 are hopeless because they should have been

raised by way of counterclaim at the outset and are therefore an abuse of the process, because the Defendants did not improve the land in good faith and because it was open to his clients to rely on the right to force the Defendants to purchase under Art 373. All these points raise interesting arguments but for present purposes it is sufficient to say that having considered the points I remain of the view that at least some of the Defendants have arguable claims under Art 372 which could not be met by the Claimant. This seems to me a relevant factor to be taken into account in deciding whether to allow enforcement to take place at this stage, albeit one of limited weight.

Result

[21] Taking account of the delay, the reasons for it, the relative prejudice and the other relevant factor I mention, I am of the clear view that the Claimant has not satisfied the burden of demonstrating that justice requires that he should be allowed to enforce this judgment. Indeed, I think it would be quite unjust to allow him to do so. I therefore refuse the Claimant's application for permission to enforce the judgment obtained in 1991. In the circumstances I need not consider the Defendants' application for compensation under Art 372 and I make no order on that application. I will hear counsel on costs.

Murray Shanks
High Court Judge (Ag)