SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.27 OF 2005

BETWEEN:

DENNIS LOUISY qua Administrator of the Estate
of the late Adelina Louisy as appears by Probate No.51 of 2000

Appellant

and

[1] DOLPHIUS DOXAY
[2] LIAS COFFIN
[3] LENNARDS MC FARLANE
[4] BABY PINNEL
[5] INEZ MC FARLANE
[6] FAFA COFFIN
[7] CLAUDIA MC FARLANE
[8] CLAUDIUS MC FARLANE
[9] MERITA COFFIN
[10] IRIS MC FARLANE
[11] OLIVER MC FARLANE
[12] ARNOLD AMOS
[13] JOSEPH (alias Andess) MC FARLANE
[14] ALBERT BLANCHARD

Respondents

Before:

The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances:

Mr. Peter Foster with Ms. Renee St. Rose for the Appellant
Mr. Dexter Theodore for the Respondents

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2006: February 8;
May 8.

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JUDGMENT

[1] GORDON, J.A.: In June 1991 the appellant, or rather Adelina Louisy whose estate the present appellant administers, (both the present appellant and the original plaintiff will be hereafter referred to collectively as "the appellant") filed a writ of summons claiming, inter alia, possession of part of a parcel of land, the total area of which was some 12 acres which was part of the Duchon estate in the Quarter of Micoud. The allegation was that the defendants, the respondents in this appeal, occupied some 4 acres of the 12 acre portion. The portion occupied by the respondent will hereafter be referred to as the occupied portion. In September 1991 the appellant obtained judgment by default of defence. In October 1991 Mathew J set aside the judgment in default and gave leave to the respondents to file a defence and counter-claim. The appellant was granted leave to appeal the decision of Mathew J. Without any explanation, is available to this Court or the Court below the appeal was allowed by consent in January 1992.

[2] In September 1995 the appellant filed a Summons supported by an affidavit for leave to issue a writ of possession to the occupied property pursuant to Order 66 Rule 3 of the 1970 Rules of the Supreme Court (RSC). The summons was served on all of the respondents. However, prior to that latter summons the appellant caused letters to be sent to 10 of the respondents offering to sell to them the property they occupied.

[3] The Summons first came on for hearing on January 17, 1996 and was adjourned to June of that year with costs to the appellant.

[4] In March 1996 the Government published in the St. Lucia Gazette a Notice of Intended Acquisition under the Compulsory Acquisition Ordinance in respect of all of the appellant's lands, that is the 12 acres referred to at paragraph 1 above. Between March 1996 and April 1997 there seems to have been considerable communication between the appellant and the Government of St. Lucia on the subject of the acquisition of the occupied portion. In 1997 there was a general election in St. Lucia and the Government changed. From that time there seems to

have been no further interest by the Government in the acquisition of the occupied portion.

[5] In February 1998 a Summons was filed on behalf of the appellant seeking an injunction restraining respondents 5, 10 and 11 from entering on the appellant's lands. An injunction was granted in May 1998 to restrain the respondents from interfering with any survey of lands comprised in Land Register Certificate Block 1625B Parcel 33 "save and except that area shown on exhibit JA 3 and marked off by iron pegs on the ground separating the houses of the defendants from the rest of the land."

[6] A study of the February 1998 Summons and the Affidavits associated therewith would indicate that the appellant hired a surveyor to dismember a portion of land from the 12 acre piece in her ownership. The dismemberment would appear to be that portion of land on which there were a number of houses or structures presumably occupied by the respondents[1].

[7] In January 1999 a Summons was filed by the appellant for an injunction to restrain all of the respondents from constructing or continuing to construct buildings or from planting or cultivating or continuing to cultivate the lands of the appellant. The requested injunction was granted initially on February 19, 1999 with a return date of March 5, 1999. The Summons for the injunction came on for hearing on April 23, 1999, September 22, 1999, February 23, 2000, April 12, 2000 and July 26, 2000. On each occasion the injunction granted on February 19, 1999 was continued in force until further order of the court.

[8] On April 14, 2000 a Notice of Hearing of the application for leave to issue a Writ of Possession filed on September 4, 1995 was filed advising that a hearing would take place on July 26, 2000. On that day it would appear that the court only

[1] I deduce this from plan exhibited at page 42 of Bundle 2 of Record

continued the injunction rather than considered the application for leave to issue the Writ of Possession.

[9] Another Notice of Hearing of the application of September 4, 1995 was filed on August 11, 2000 setting February 15, 2001 as the date for hearing. In fact the matter came on for hearing on April 11, 2001, at which time the court made an Order that Mr. T. Theobalds "is to value the individual portions of land which the defendants occupy. Improvements made to be taken into account." Mr. Theobalds filed his valuation on November 20, 2001. On November 13, 2001 the respondents applied to have the Application for leave to issue a Writ of Possession restored to the hearing list.

[10] The application for leave to issue a Writ of Possession was finally heard on May 31, 2005 and judgment given on June 10, 2005. At paragraph 21 of his judgment the learned trial judge said the following:

> "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."

[11] The appellant being dissatisfied with that judgment has filed this appeal.

[12] In the course of his judgment the trial judge recalled that he had "ordered that if the claimant [appellant] wished to enforce the judgment he would have to make an application under CPR 46.2[2] for permission to issue a writ of execution notwithstanding the lapse of six years since the judgment and file suitable evidence …"[3] That order was dated May 28, 2003. It is completely unclear to me why the appellant needed to file another application under Part 46.2 of CPR while there was on file a live application made under Order 66 of the Rules of the Supreme Court, albeit that application was made in 1995. Further, though this is

[2] Civil Procedure Rules 2000 (hereafter CPR)
[3] Judgment paragraph 8

more of academic interest, I do not believe that CPR Part 73 (Transition provisions) would have the effect of allowing someone in the position of the appellant to file under Part 46.

[13] In my view which application the learned trial judge heard was of vital importance as establishing the contextual environment in which his discretion had to be exercised. I am further of the view that the learned trial judge recognized his error in ordering that an application be made under Part 46.2 of CPR when during the course of the proceedings the following exchange took place between the trial judge and learned Counsel for the appellant:

> "THE COURT: The rules are very unclear actually about enforcement –
> MR. FOSTER: What ought to have happened, My Lord, is just for us to have continued the application that we made in nineteen ninety-five.
> THE COURT: Yes quite. So that's my fault, is it? Yes its under the old rules, these rules do not apply to proceedings commenced before the commencement date in which a trial date has been fixed. Well, there wasn't ever a trial, but it must, I think it followed"[4]

[14] After the May 28 2003 order, a case management conference took place on November 17 2004 and the matter was set down for trial on 31st May 2005.

[15] I have taken the trouble to set out at some length, though by no means comprehensively, the chronology of events that took place between the judgment in 1991 and the hearing of the application for leave to enforce the judgment by way of a writ of possession because I believe that it is important to be aware of the efforts made by the appellant to enforce rights given by the judgment of 1991[5].

[16] Both sides referred to the case of Duer v Frazer[6], Counsel for the appellant in order to distinguish it and Counsel for the respondents to support the judgment. The learned trial judge undoubtedly relied on the learning in that case. In Duer a claimant obtained judgment against the defendant in proceedings in Germany in

[4] Record Vol 1 page 49
[5] Also see paragraph 21 hereunder
[6] [2001] 1 WLR 919

1984 and in 2000 sought permission of the court to enforce that judgment, which was for a sum of money. It is unnecessary to recount the whole circumstances giving rise to the passage of time between the judgment and the attempt to enforce it. Suffice it to say that the defendant had moved from England to Nevis and, according to the claimant, his whereabouts were unknown to her.

[17] The *ratio* of Duer as expressed in the head note is as follows:

> "*Held*, dismissing the appeal, that the court would only extend time beyond the six-year period provided for by RSC Ord 46, r 2 where it was demonstrably just so to do; that the burden of proof to establish that it was just to do so rested on the judgment creditor; that, whilst every application turned on its own facts, the court would have regard to the reasons given for not issuing judgment during the initial six-year period and to any prejudice suffered by the judgment debtor as a result of the delay, including in particular any change of position by him; that for the purposes of RSC Ord 46, r 2 there was no reason to treat the judgment of a foreign court which had been registered in England any differently from that of an English court; and that since the claimant had failed to satisfy the court that the interests of justice required it to exercise its discretion to extend time the master's order would be affirmed (see post, pp 925B-F, 926G).

[18] I hasten to say that I have no quarrel with that statement of the law. However, the learned trial judge in this case misled himself when he assumed that he was adjudicating the application filed in response to his May 2003 order rather than the one filed in 1995. If, as the trial judge thought, he was dealing with a fresh application for leave to issue a Writ of Possession, then rather complex issues of prescription would properly have had to have been considered in the exercise of his discretion. As he was dealing with the original application, no such considerations were relevant. It is quite likely that the trial judge was influenced by the statement in BP Properties Ltd v Buckler[7] by Slade LJ to the following effect:

> "The true position, in my judgment, under the 1939 Act was that after a judgment for possession had been obtained in an action for the recovery of land begun in due time, the successful plaintiff had 12 years from the date of the judgment to enforce the judgment before any question of limitation could arise. This result may follow from the view expressed by Scott LJ in *Lougher v Donovan* [1948] 2 All E. R. 11 that an application to

[7] [1987] 2 EGLR 168, 171

issue or extend a warrant for possession is itself an 'action brought upon a judgment' for which there was a prescribed limitation period of 12 years under section 2(4) of the 1939 Act. Alternatively, it may be based on the view expressed by the editors of the C*ounty Court Practice* in their notes to the present Order 26 r 5 that, although the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it which is essentially a matter of procedure, nevertheless leave to issue a warrant of execution will not be granted, nor will a warrant issued be renewed, at a time when the limitation period appropriate to an action on the judgment has expired."

[19] Order 66 rule 3, (which is in pari materia with the English Order 45 rule 3) to the extent relevant reads as follows:

> "3.- (1) Subject to the provisions of these rules, a judgment or order for the giving of possession of land may be enforced by one or more of the following means, that is to say –
> (a) writ of possession;
> (b) …
> (c) …
>
> (2) A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action to which Order 58 applies.
>
> (3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled."

[20] Reading the very language of Order 66 rule 3 it is apparent that the purpose of the rule is to ensure that every person in actual possession has received notice of the proceedings. Once the court is satisfied that service has been effected on each of the persons entitled to it, the court, of its own motion has no further discretion as to whether to allow the writ to issue or not. Clearly rule 3 anticipates that the writ may not issue, or may issue subject to conditions, given the last 20 or so words of rule 3 (3).

[21] If I am wrong, however, and there is a wider discretion to be exercised by the court then I would exercise that discretion by using as a starting point the statement of Slade LJ in Narional Westminister Bank PLC v Powney et al[8]:

> "It is in our judgment a cardinal principle of procedural law that no party should suffer unnecessarily from delay which is not his fault but rather a fault in the administration of justice…We have described this as a cardinal principle. But in matters of discretion it cannot always override other considerations. It is a factor to be taken into account."

[22] The chronology recited in the first 14 paragraphs of this judgment leave me in no doubt that the respondents were never in any doubt as to the intentions of the appellant. Any complaint by the respondents that they worsened their position vis a vis the appellant and their occupation as a result of the belief that the appellant would be accommodating of their claims is risible.

[23] The appellant obtained his judgment in 1991. He attempted to reach an accommodation with the respondents prior to 1995. In 1995 he applied for permission to issue a writ of possession and since that time his attendance at court to promote his interests as against those of the respondents has been constant, and no doubt not without cost. In the circumstances I would allow this appeal and order that a writ of possession may issue pursuant to Order 66 Rule 3 of the Rules of the Supreme Court 1971.

[24] The matter does not end there, however. Given the decision of the learned trial judge, he did not consider it necessary to consider the application of the respondents for compensation. This must now, in the context of my decision, be considered and adjudicated upon.

[25] In the result my order is as follows:

1. The appeal is allowed. Leave to issue a writ of possession is granted, such writ not to be issued before the expiry of 6 months from today's date with liberty to apply.

[8] [1991] Ch 339

2. The determination of the liability to and quantum of compensation pursuant to Article 372 et seq of the Civil Code of Saint Lucia shall be remitted to the High Court for determination as a matter of urgency.

3. A Case Management Conference of the trial of the issue of compensation shall be scheduled with the least possible delay.

4. The costs of this appeal shall be the appellant's in any event, costs to be agreed or assessed.

Michael Gordon, QC
Justice of Appeal

I concur.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal