

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.4 OF 2007

BETWEEN:

LABORIE COOPERATIVE CREDIT UNION

Applicant

and

PETER EMMANUEL

Respondent

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

On written submissions:

Messrs. Caribbean Law Offices for the Appellant
The Attorney General as a friend of the court

2007: July 20.

JUDGMENT

[1] **BARROW, J.A.:** This appeal raises the question whether the High Court can oblige a judgment creditor who has sued out a writ of seizure and sale to apply to the court to fix a reserve price before the sheriff can proceed with a sale of the judgement debtor's land.

Proceedings prior to the judge's order

[2] By an order of the High Court made on 3rd June 2005, it was ordered among other things that the defendant, Peter Emmanuel, pay the claimant, Laborie Credit Union, the sum of \$60,373.84 with interest thereon. At that point the claimant became a judgement creditor and the defendant became a judgement debtor. The

order of 3rd June 2005 was registered in the Registry of Deeds and Mortgages on the 10th June 2005 in volume 158A as instrument 191764.

- [3] On 10th March 2006, the appellant as judgement creditor, still not having been paid the judgement sum, filed the following documents at the High Court Registry, namely: a writ of seizure and sale of property, a praecipe for a writ of seizure and sale, instructions to levy and a list of exhibits. The writ of seizure and sale and the supporting documents were in respect of the judgement debtor's parcel of land at Laborie. In fact the said parcel of land had been used by the judgement debtor as security for the loan from the appellant. Thereafter the appellant's attorneys forwarded the appropriate fees to the sheriff and the judicial sale of the parcel of land was advertised as required by law.

Liability of a debtor's land to satisfy a judgment

- [4] Article 1875 of the **Civil Code**¹ renders the judgement debtor's property liable to satisfy debts owed by the judgement debtor. That Article reads as follows:

"1875. Whoever incurs a personal obligation, renders liable for its fulfilment all his property, moveable and immovable, present and future, except such as is specifically exempt from seizure".

George C. Marler in **The Law of Real Property of Quebec**², describes this obligation as "the almost unlimited liability of the debtor's property for the fulfilment of his obligation".³ Under the rubric, "The right of the judgement creditor", the author stated:

" As soon as a creditor has established before the proper tribunal that his debtor has really incurred and is liable for the obligation which the creditor alleges his debtor has incurred towards him and that it is exigible, and the court by its judgement has condemned the debtor to pay the amount proved to be due upon the obligation, or the damages incurred by the creditor by reason of its inexecution, the law authorises the creditor to take in execution and so put under the power of the law, and caused to be sold

¹ Civil Code of Saint Lucia 1957

² George C. Marler B.C.L. (1932)

³ 341

in satisfaction of the judgement, the property movable or immovable of his debtor, except only the articles specially exempted by law ..."⁴

The judge's order

[5] On or about the 30th of November 2006, the Deputy Registrar of the High Court circulated a memorandum to all attorneys at law on the subject of writs of seizure and sale. The memorandum stated that the Deputy Registrar had been directed to inform attorneys at law of the following:

- "1. When a Writ of Seizure and Sale is filed an application should be made to the Court pursuant to Part 55.2 and 55.5 (a) of the CPR 2000 for the fixing of a reserve or minimum price for the sale of the property.
- "2. Pursuant to Article 499 of the Code of Civil Procedure, the Writ of Seizure and Sale is an order of the Court.
- "3. It is obvious therefore that Article 499 of the Code of Civil Procedure is an enactment, which authorizes the Court to order the Seizure and Sale.
- "4. Interestingly enough Part 46.1 of the CPR 2000 equates an Order for the Seizure and Sale of Immovable Property in St. Lucia.
- "5. Pursuant to Article 37 of the Code of Civil Procedure, the CPR supersedes the Code of Civil Procedure.
- "6. Finally section 119 of the Land Registration Act Cp 5.01 states that "any matter not provided for in the Act or in any other written law in relation to land and interests therein shall be decided in accordance with the principles of justice, equity and good conscience."
- "7. Therefore the above mentioned law requires justice to be done in accordance with Part 55 of the CPR 2000 for future Judicial Sales."

⁴ 292

[6] The general direction appearing in Paragraph 1 of the judges' memorandum, that when a writ of seizure and sale is filed an application should be made to the court for the fixing of a reserve price, was given judicial force in this case by an order made on 11th December 2006. The judge made the order on her own initiative and without the assistance of either the judgment creditor or judgment debtor, neither of whom responded to the judge's summon. The order reads as follows:

- "1. The property/properties that is/are the subject of the Writ of Seizure and Sale/Writ of Execution filed on the 10th day of March 2006 is/are to be valued by a qualified land valuer or Surveyor pursuant to PART 55.2 (a) of the CPR 2000.
- "2. An application for the fixing of a reserve price or minimum price or an upset price relating to the said property/properties to be made by Claimant's Counsel, and the persons having an interest in the properties are to be stated in the Application along with the nature and extent of each such interest.
- "3. This Application is to be served on all persons who to the knowledge or belief of the Claimant have an interest in the said property/properties.
- "4. Adjourned to the 31st day of January 2007 for hearing of the Application pursuant to PART 55 of the CPR 2000.
- "5. A copy of this Draft Order is to be served personally on Counsel for the Claimant by the 15th December 2006 and Affidavit of Service filed."

[7] The attorneys at law for the appellant submitted that there is nothing that obliges a judgment creditor to make an application for an order of the court fixing a reserve price.

The nature of a writ of execution

[8] The Registrar of the High Court issues a writ of seizure and sale. The form appears as Form 68 of the former **Rules of the Supreme Court 1970 (RSC 1970)**. The present rule 46.1 of the **Civil Procedure Rules 2000 (CPR 2000)** expressly recognizes that a writ of seizure and sale is a writ of execution. That rule reads as follows

“46.1 In these rules a “**writ of execution**” means any of the following –
(a) an order for the sale of land (or in St.Lucia a writ for the seizure and sale of immovable property);
(b) ...”

Interestingly, while CPR 2000 thus recognizes that such a writ exists, CPR 2000 does not include such a writ among the prescribed forms that are appended to the Rules. It follows that the writ has an existence apart from CPR 2000.

[9] Rule 46.2 of CPR 2000 states that a writ of execution may not be issued in certain cases. It identifies seven instances where a writ of execution may not be issued without permission, namely, if – any party against whom a judgement or order was liable to enforce is no longer liable to have it enforced against it; any statutory provision requires the permission of the court to be obtained before judgement is enforced; 6 years have elapsed since the judgement was entered; the goods against which it is wished to enforce the judgment are in the hands of a receiver or confiscator appointed by the court; the judgement creditor is no longer entitled to enforce the order; the judgement debtor has died and the judgement creditor wishes to enforce against assets of the deceased person which have passed to that person's personal representatives since the date of the order; or the judgement was made subject to conditions.

[10] It seems inescapable that the absence of a writ of seizure and sale from the listing of those cases where a writ of execution can only be issued with permission means that this writ of execution does not need permission to be issued. To my mind that leaves no doubt that a writ of seizure and sale may be issued without

permission. A judgment creditor does not need to obtain an order of the court for that writ to issue.

- [11] The Canadian Supreme Court in **Lefeuntun v Veronneau**⁵ reached a similar conclusion on the similar basis that the authority to issue a writ of execution was specifically given by the Code of Civil Procedure. Therefore, the Supreme Court ruled, the issue of a writ of execution was subject to no intervention by the court. It drew a distinction between a writ of venditioni exponas that was being challenged in that case, on the one hand, and a writ of summons and a writ of execution, on the other hand. Under the scheme of the Code, the court decided, a writ of venditioni exponas can only be issued by order of the court, because no power was given for any other authority to issue it. In contrast, the Code provided that a writ of summons, and similarly, a writ of execution were to be issued by the named authority, the prothonotary. Thus, the Supreme Court held, these latter writs did not need an order of the court for them to issue.

Sale out of court

- [12] If a writ of execution may be and is issued without an order of the court, should a judgment creditor who seeks a sale pursuant to that writ nonetheless be obliged to obtain directions from the court for the conduct of that sale? Part 55 of CPR 2000, which regulates sales of land by order of the court, provides for the orders that the court may make when an application is made. It nowhere provides that an application must be made. Even, however, on the hypothesis that a judgment creditor must apply to the court for an order for sale, a judgement creditor is completely at liberty to apply to the court for an order for sale that does not include the court fixing a reserve price, which is the specific object of the judge's order.

⁵ [1893] S.C.J. No. 22

[13] Rule 55.4 specifies that there are two orders that the court may make on an application for an order for sale. It states:

“55.4 On making an order for sale, the court may
“(a) direct the manner in which the land is to be sold; or
“(b) permit the person having conduct of the sale to sell the land in such manner as that person thinks fit”.

A sale out of court, as the latter provision is called, is a concept that has had a fertile existence since before RSC 1970.

[14] The comparable provision in the old rules was O. 31, r. 2 which stated:

“ 2-(1) Where an order is made, whether in Court or in chambers, directing any land to be sold, the Court may permit the party or person having the conduct of the sale to sell the land in such manner as he thinks fit, or may direct that the land is sold in such manner as the court may either by the order or under paragraphs (4) direct for the best price that can be obtained, and all proper parties shall join in the sale and conveyance as the court shall direct. ”

[15] In the English **Annual Practice 1965** the particular value of the identically worded English O. 31, r. 2 (1) was stated in the following note to that rule:

“Form of order. – This rule has undoubtedly proved a success and full advantage has been taken of the flexibility it gives. The court now usually orders a sale completely out of court with liberty to apply for any necessary directions which cannot be agreed. In view of the state of the property market at the moment an auction is often dispensed with, if a reserve price can be agreed between the parties ...”

[16] It will therefore be seen that the premise of the memorandum and consequent High Court order, that there should in all cases be an application to the court so that the court can fix a reserve price, goes counter to the clear provision of the rules and the history of the rule. In some instances there will be good reason why a judgement creditor will not need to get a court order for a reserve price, including cases in which he can agree with the judgement debtor on a reserve price. In other cases the judgment creditor may be confident that the upset price that he fixes on such advice as he obtains will withstand any challenge by the judgement debtor that the judgement creditor has sold the property at an undervalue. Rule

55.4 of CPR 2000, therefore, permits a judgment creditor to apply to the court for the order for sale that he considers appropriate.

- [17] Because CPR 2000 permits the judgement creditor to apply for an order for sale out of court, the essence of which is that the court does not fix a reserve price, it was not competent for the judge to establish any general rule that a judgement creditor must apply to the court to fix a reserve price. In relation to this particular case no basis was given for the judge to make the order that has been appealed. But beyond that, it seems to me, there is no obligation on a judgement creditor to apply at all to the court for any order for sale; not even an order for sale altogether out of court.

Sale pursuant to the Code

- [18] In some jurisdictions there is no writ of seizure and sale and a debtor's land can only be sold by applying for a court order. Thus, in England rule 40.16 of their CPR provides:

"In any proceedings relating to land, the court may order the land, or part of it, to be –

- (a) sold;
- (b) mortgaged;
- (c) exchanged; or
- (d) partitioned."

- [19] In contrast, in St.Lucia as noted, the power to sell a judgment debtor's land exists under the Code of Civil Procedure in article 499. That article reads:

"499. The seizure of immovables can only be made in virtue of a writ, clothed with the same formalities as writs of execution against movables, ordering the Sheriff to seize the immovables of the defendant and sell them in satisfaction of the judgement pronounced against him for principal, interest and cost."

- [20] Article 500 specifies that the writ is addressed to the Sheriff and is executed by the Sheriff himself or by one of his officers. A number of following articles detail the procedure the Sheriff must follow and the rights of the judgment debtor and the

judgment creditor after seizure. Then comes Article 511 which provides that the advertisement of a sale of immovables must contain “the upset price if one has been fixed in accordance with the following articles”. (Emphasis added.) The ‘following articles’ are article 511(a) to article 511(e) which deal with fixing, agreeing and appealing against the fixing by the Registrar of an upset price. The leading provision is article 511(a) which states:

“The Judge or the Registrar may on an application made by the judgement creditor, notice of which shall be served on the judgement debtor, fix an upset price for the sale of immovables seized by the Sheriff by virtue of a writ of execution.”

[21] The appellant submitted that it is clear from the wording of those articles that the filing of an application to fix a reserve price is not an obligation but rather an option for a judgement creditor. Therefore, the appellant submitted, a sale can go forward without there having been fixed any reserve price and without there having been made any application to fix one.

[22] The power to sell a judgment debtor's land pursuant to article 499 has existed from the time the CCP was promulgated in 1882. The CCP, it can be seen, established a procedure for such sales to be conducted long before RSC 1970 or CPR 2000. That procedure did not require a judgment creditor to apply for an order for sale from the court. That is where the law in St. Lucia, which permitted a sale of land pursuant to a writ of execution, differed from the law in England, which required a judgment creditor to obtain an order for sale of land from the court. In St. Lucia the judgment creditor was able, because of article 499 of the Code of Civil Procedure, to file a praecipe (or request) for a writ of seizure and sale. The Registrar issued that writ as an administrative act in the same way that the Registrar issued a writ of fieri facias. By amendment to the CCP provision was made for judgment creditors to apply to the court for directions and such recourse is obviously very helpful. It provides certainty in the conduct of sales of land and averts challenges by having the judicial imprimatur. This is similar to the option in O. 31, r. 2 of RSC 1970 (and now CPR 55.4) that enabled a judgment creditor to obtain an order for sale under the direction of the court. But in the same way that

those rules did not (and do not) require that a sale must be under the direction of the court, the procedure in article 499 and the following articles in the CCP do not require that a sale of land must be under the direction of the court. The one major difference, as noted, is that because the power to sell land pursuant to a writ of execution is conferred by the CCP, a judgment creditor needs no order for sale from the court, at all.

[23] When RSC 1970 was enacted⁶ the rule making authority varied the provisions of the Code of Civil Procedure by repealing a number of articles. However, the authority did not repeal article 499 which conferred the power to sell land. Neither did it repeal the procedure for the exercise of that power contained in article 499 and those following. In fact the whole of Section V of the CCP, which contains those provisions, was left intact. This is in contrast with the repeal of a whole column of articles of the CCP, listed in schedule 2 to the statutory instrument that promulgated RSC 1970.⁷ The implication is ineluctable. The former procedure for the sale of a judgment debtor's land under the Code of Civil Procedure was preserved. CPR 2000 likewise did not repeal those provisions of that code. They are alive and well.

Abuse?

[24] The fact that the judge's order sought to impose a requirement that a judgement creditor should obtain an order of the court fixing a reserved price must mean that all along judgement creditors have been acting pursuant to the provision of the Code of Civil Procedure. It has not been suggested that by doing so they have been acting unlawfully. But there must have been some factors that moved the judge to seek to bring sales of land under the direction of the court in all instances. If there have been abuses the court and the profession must move quickly to curb

⁶ Pursuant to the provision in article 37 of the Code of Civil Procedure and in section 19 (1) of the Eastern Caribbean Supreme Court (Saint Lucia) Act, Chapter 2.01 of the Revised Laws of St. Lucia 2001

⁷ Statutory Instruments 1970, No. 2

them. However, I do not think that the judge's order in this case can provide the solution. I would accordingly allow the appeal and set aside the judge's order.

Assistance to the court

[25] It remains to express my considerable appreciation for the invaluable assistance provided by the Attorney General's chambers to which I had the registrar write to seek assistance in this matter. The judgement debtor has taken no interest in these proceedings and therefore the appeal was unopposed. Because of the importance of the subject matter to the practice in St. Lucia, it was appropriate to get the benefit of a disinterested view. The Attorney General's chambers duly responded and conducted extensive research and made full, focused and helpful submissions. The references in this judgment to material on the Quebec code are entirely the result of that research. That and other material that the chambers provided confirmed the soundness of the submission of the attorneys at law for the appellant, for whose assistance I am also grateful.

Denys Barrow, SC
Justice of Appeal