**THE EASTERN CARIBBEAN SUPREME COURT**

**SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. SLUHCV 2006/0056**

**BETWEEN:**

**RAYMOND FLOOD**

Petitioner

v

**FIRST CARIBBEAN INT'L (BARBADOS) BANK LIMITED**

Respondent

**Appearances:**

**Petra Nelson for Petitioner**
**Cheryl Goddard-Dorville for Respondnet**

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**2011 July 8**
**2011 July 12**
**2013 September 19**

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[1] **Belle J:** Section 31 (2) of the Land Registration Act Cap 5.01 of The Laws of Saint Lucia states that the Certificate of Title is only prima facie evidence of what appears on it. The parties to this action appear to agree that the Respondents to the Opposition herein are trustees for sale as is stated on their extract from the Land Register exhibited in the action.

[2] This assumption is also based on section 62(2) of the Land registration Act (LRA) Cap 5.01 of the Revised Laws of Saint Lucia which provides:

*"When any land is conveyed, transferred, devised or devolves to 4 or more persons the first 4 named shall hold the property on trust for sale."*

[3] Section 2 of the LRA defines trust for sale as: "trust for sale has the same meaning as in Article 2141 of the Civil Code."

[4] Article 2141 of the Civil Code states:

*"Trust for sale in relation to land means an immediate binding trust for sale whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale; "trustees for sale "means the persons (including a personal representative) holding land on trust for sale."*

[5] On the 9th day of August 1996 Sarah Flood-Beaubrun, Beatrice Flood, John Fred Flood, and Frank Francis Flood executed a Hypothecary Obligation ("hypothec") in which they entered into certain covenants with the First Caribbean International Bank. On 13th January 1997 the same Respondents executed another hypothec with the said Bank (the Bank) and on 9th October 2000 the said parties executed a third hypothec with the Bank again entering into certain covenants with the Bank in doing so.

[6] One of the Covenants under the said Hypothec executed by the Respondents on 9th August 2006 numbered "4" states:

*"The Principal Debtor and / or The Surety hereby agrees and accepts that by virtue of these presents The Principal Debtor is indebted to The Mortgagee to the sum of the Debts."*

[7] The Covenant numbered "5" states:

*"As security for the repayment of the Debts with interest thereon and at Agreed Rate the Principal Debtor and /or The Surety hereby mortgages and hypothecates unto The Mortgagee thereof accepting the Mortgaged Premises."*

[8] Each subsequent hypothec contained covenants in similar terms, leaving it beyond doubt that the Respondents became indebted to the Bank pursuant to all three hypothecs and to the extent stated in the three hypothecs which as the Bank's statement of claim states, is the sum of $232,425.75.

[9] At all material times the Bank relied on the Certificate of Title disclosed and exhibited in the Claim to which this Petition relates. The description of the land hypothecated was:

*"All that piece or parcel of land dismembered from the Vigie Estate situate in the quarter of Micoud measuring 5.43 acres or 2.20 hectares and registered in the*

*Land Registry as Block Numbered 1423B Parcel 23. The said portion of land is also shown on the Land Registry Map to be bounded as follows:*

NORTH: Partly by Parcels 5 and 6
SOUTH: Partly by Parcels 24 and 26
EAST: Partly by Parcels 2 and 3
WEST: Partly by Parcels 22 and 26

Together with all appurtenances and dependencies thereof."

[10] Sarah Flood Beaubrun et al. failed to pay the money due to the Bank under the said hypothec and became subject to the Bank's right to enforce payment pursuant to the hypothec.

[11] The Bank obtained judgment against Sarah Flood–Beaubrun on 10th November 2006. Judgement was also obtained against the Third and Fourth Defendants on 10th November 2006. It is evident that the Bank never bothered to obtain judgment against the 2nd Defendant Beatrice Flood who had passed away on 21st September 2005 according to an affidavit filed by Sarah Lucy Flood–Beaubrun on 17th February 2006 exhibiting a death certificate of the said Beatrice Flood.

[12] The Bank did obtain an order against the 4 Defendants to pay by instalments. This order was dated 26th April 2006.

[13] Pursuant to the aforesaid judgments the Bank started the process of judicial sale of the land which is subject to the hypothec.

**The Opposition Article 381**

[14] The action herein is an Opposition pursuant to Article 381 and Article 517 of the Code of Civil Procedure. These Articles permit the Opposant/Petitioner to file a Petition in opposition to any order or judgement of the court in which the Opposant has interest. In proceeding in this manner Counsel for the Opposant argues that Mr Flood relies on the Privy Council Decision **Noellina Maria Propsere (Madore) v Frederick Prospere et al** # 18 / 2005. That decision does not go beyond establishing the right to take advantage of Article 381 of the Code of Civil

Procedure (Cap. 243 of the Revised Laws of Saint Lucia). The authority does not go into the right to file an Opposition pursuant to Article 517 of the Code.

[15] However, there are certain constraints to the right to file a Petition pursuant to Article 381 and indeed the ordinary requirements of pleading do apply.

[16] Article 382 of the Code states as follows:

*"The opposition is formed by means of a petition to the Court, which must contain the grounds of opposition, and proper conclusions, and must be served upon the parties in the cause, or upon the solicitors who represented them, if it is made within a year and a day after judgment. The truth of the allegations contained in the opposition must be sworn to, as in the case of an opposition to annul."*

[17] We can glean from Article 382 that the Opposition must be brought by Petition to the Court which must contain the grounds of opposition etc. These words establish the form of pleadings which are required for the Opposition to be properly placed before the court.

[18] Secondly, apart from form, there is a time constraint for the Article 381 Opposition. It must be brought within a year and a day after judgment. In this case Judgment was entered on 10th November 2006. This far exceeds a year and a day from the date of filing the Opposition which is 15th April 2011. However, even if it were found that the Opposition does not have to be brought within a year and a day after the judgment it must be understood that the Opposition has to be against the judgment itself. Section 382 speaks about "after judgment."

[19] In this case the Opposant opposes both the judgment and the enforcement of the judgment. Opposant Petitioner's counsel in her arguments stated that both the judgments and the Writ of Seizure and Sale are opposed.

[20] This double barrelled attack however does not save the Opposant / Petitioner from the time restrictions in relation to the opposition to the judgments pursuant to Article 381 of the Code.

[21] The Opposant/Petitioner's stated grounds for opposing the orders of the courts are apparently that the Opposant has an interest in the matter in that he is a beneficiary of the estate of the second Named Defendant Beatrice Flood who died on 21st day of September 2005 prior to judgment being entered against her and he is also a co-owner and entitled to one ninth undivided share in and to the parcels 'A' land against whom the judgment has been wrongly registered.

[22] Secondly, he opposes the judgments and the Seizure and sale of the property described as Block 1423B Parcel No.23 on the following grounds:

(i) That your petitioner's sister Sarah Flood Beaubrun as Principal Debtor took three loans for her sole benefit with the second, third and fourth defendants acting as surety.

(ii) The loans were secured by the following instrument: - (being the instruments mentioned earlier in this Judgment).

[23] It is clearly not the law that anyone with an interest can file a Petition in Opposition in all or any circumstances. The Petitioner would have to plead a right to have been present and to make representation at the time when consideration was being given to entering the judgments which were entered. But he has not pleaded that he had any such right to participate in the litigation in relation to the payment of the debt by the defendants 1, 3 and 4 not including Beatrice Flood. Indeed what he has pleaded is that he was not bound by the hypothecs which were executed by the Defendants. He has also pleaded that the order on the application to pay by instalments was made contrary to the court's rules because the Claimant/ Respondent to this Opposition failed to have a representative of Beatrice Flood's estate appointed before having the court make the order.

[24] The Petitioner has not pleaded that he had no knowledge of the application for entry of judgment against the Defendants. Neither has he claimed that there was no one capable of representing him and his 1/9th share at a hearing where any entry of judgment could have been opposed. Indeed it can be presumed that

there was such a person involved in the proceedings, namely the three defendants against whom judgement was entered, but they failed to make any case to protect his interest.

[25] These are serious failures in terms of establishing grounds of opposition to the Judgements entered. Part of the problem understanding the pleadings is that the Petition represents two oppositions of different kinds. In that regard counsel for the respondent argues that the Petitioner should also be penalised for failing to swear the truth of the allegations. The latter is standard procedure in support of a petition and should have been part of the pleadings. It is specifically required under Article 382 of the Civil Code. Its absence renders the Petition irregular to say the least.

[26] The enforcement of a judgment follows a judgment and cannot be prevented unless the judgment is set aside, stayed or varied in some way. This explains the role of the second opposition.

[27] Part 43.5 of the CPR 2000 speaks to the effect of setting aside a judgment or order of the court in the following terms:

> (1) The general rule is that if the court sets aside a judgment or order, any order made for the purpose of enforcing it ceases to have effect.
>
> (2) The court may however direct that an order remains in force.

**The Opposition under Article 517**

[28] Counsel for the Petitioner cites in his support Articles 517 - where the Code of Civil Procedure provides for oppositions to Seizure and Sale to be permitted by the judge. This wording implies that there is a discretion on the part of the judge and this is governed by considerations of justice. See Article 514 of the Code.

[29] Indeed the opposition at this stage can be either on "substantive or procedural grounds." See Article 519 of the Code.

**The Trust for Sale**

[30] This aspect of the matter turns largely on the rights of the beneficiary of a trust for sale and the obligations of the trustee for sale. But the only submission of counsel on the rights of the trustee for sale is that of the Petitioner where he argues that the trustee for sale has the right to sell and nothing more. But this is not supported by any reference to Saint Lucian law or jurisprudence.

[31] In the circumstances based on section 11 of the Supreme Court Act I refer to the law in England. **Megarry Law of Real Property**, Sixth Edition states that the law in England prior to the 1925 Law of Property Act was that the trustee for sale is a trustee to sell the property. However, the beneficiary's right is that of a right to personalty not land. This was the consequence of the doctrine of conversion. The effect of creating a trust for sale was that even before sale the rights of beneficiaries were for certain purposes deemed to be rights in personalty. Equity treated as done that which ought to be done, see example **Lechmere v Earl of Carlisle** (1733) 3 P. Wins 211 at 215. As soon as there was a binding obligation to sell, the interests of the beneficiaries were notionally converted into the money into which the land was destined to be converted.

[32] However, this rule was never considered an absolute rule. To mitigate some of the difficulties of the old law of trustees for sale Statute law in England has changed the definitions of the law such as obtains in the Trust of Land and Appointment of Trustees Act (T.L.A.T.A) which provides that the Trust for Sale takes effect as a trust of land.

[33] The said law also abolished the doctrine of conversion which is addressed above. The question then arises what is the law in Saint Lucia? Some assistance may be obtained from Articles 2141 to 2170 of the Civil Code. But neither counsel in this matter has attempted to explain the relevant provisions.

[34] Based on the references to the law made above and in the absence of a specific statutory provision I refer to the description of the law of England subsequent to the Law of Property Act of 1925.

[35] **At Article 42 of Underhill's Law of Trust and Trustees, Eleventh Edition** page 245 it is stated:

> (1) A trust for sale of land falling within the provisions of the Law of Property Act, 1925, is defined as "an immediate binding trust for sale whether or not exercisable at the request or with the consent of any person, and with or without power at discretion to postpone the sale". This definition embraces not only express trusts for sale in settlements and wills, but also the "statutory trusts," where sales are directed to be made in various cases by the Law of Property Act, 1925.

[36] The said author also states at paragraph (3) of Article 42 that every trust for sale of land includes a power to postpone the sale unless a contrary intention appears and no trustee is liable for loss caused by such postponement; nor is a purchaser to be concerned with any directions respecting postponement. And, so far as regards the protection of a purchaser, the trust is to be deemed subsisting until the land has been conveyed to or under the direction of the persons interested in the proceeds.

[37] On page 246 the learned author of Underhill Law of Trust and Trustees at paragraph 7 states:

*"A trustee for sale must, so far as is practicable, give effect to the wishes of the persons of full age for the time being beneficially interested in possession, or the majority of them; but a purchaser is not concerned with this. Persons beneficially interested may include annuitants."*

[38] Finally at paragraph (11) page 247 the learned author states:

*"Where the proceeds of the sale have become absolutely vested in persons of full age in undivided shares, the trustees may , instead of selling with the consent of persons interested (other than annuitants) of full age , partition the land between them, raising money for equality by means of a mortgage."*

[39] Explaining paragraph (4) page 246 of the same treatise at page 249 the author states:

*"The provisions in paragraph (3) which appear in section 28, subsection (1) of the Law of Property Act, 1925 (k), and which are intended to facilitate dealings with land and not to encourage dealings in land, give to trustees for sale (so long as any land remains subject to the trusts of the settlement) all the powers, administrative or otherwise, of Settled Land Act trustees and tenants for life under real property settlements, thus dispensing with the necessity of inserting any powers of leasing etc. in the deed which vests the property in the trustees for sale, and enabling them to manage the estate as well as a tenant for life could do. The court of Appeal had the subsection under consideration in* ***Re Wellsted' Will Trust, Wellsted v Hanson****, where Lord Greene, M.R., said:*

*"It is to be observed that the powers given are 'all the powers of a tenant for life' I do not think it is an exaggeration to say that the word 'all' in a statute is extremely recalcitrant, and if the meaning is to be cut down so as to exclude certain things which might otherwise be included in it that must be done in the clearest possible language."*

[40] Explaining paragraph (7) the author of Underhill states at page 251:

*"The duty of the trustees for consult the beneficiaries extends not only to the exercise of the trust for sale but also to the exercise of all other trusts and powers arising under the Settled Land Act, 1925 and Law of Property Act, 1925, and the additional powers (if any) conferred the settlement. It would seem that, before selling or exercising any other statutory or additional power, trustees of land should send round notices to persons interested in possession in the income and take account of their wishes."*

[41] Based on the foregoing position of the English Law which is referred to because there is apparently no clear explanation of the functions of the trust for sale in Saint Lucia, I hold that the beneficiary in the circumstances of this case would not have the right to bring an action against the Bank which was only interested in the ability of the Defendants to sell the land based on the extract from the Land Register.

[42] The Bank also appears to be protected by Article 2156 of the Civil Code which states that no mortgagee advancing money on a mortgage purported to be made under any trust or power vested in trustees shall be concerned to see that such

money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.

[43] In relation to other interpretations of the law there is no evidence that the four defendants who contracted with the Bank did not represent a majority of the trustees for sale even if they did not consult with the beneficiaries before entering into the agreements for the hypothecs.

[44] Section 62(2) of the LRA which creates the trust for sale does not spell out any obligation to consult. However, such consultation would seem just in the circumstances. But having failed to consult I do not see the basis for opposing the Bank's rights to recover the proceeds of the loans. The Opposant/ Petitioner would have to show that the Bank was in some way complicit in depriving him of his beneficial rights. This he is unable to show.

In this case the Opposant/ Petitioner therefore has an uphill battle. His answer is that the order was not made against him. However Part 43.8 of the CPR 2000 states that:

> (1) A judgment or order in favour of a person who is not a party may be enforced in the same way as a judgment or order in favour of a party.
>
> (2) A judgment or order against a person who is not a party may be enforced in the same way as a judgment or order against a party.

[45] I therefore hold that the judgements can be enforced against the Opposant / Petitioner as a 1/9th part owner of the land which was mortgaged unless he has the judgement set aside pursuant to Part 13 of the CPR 2000 or the oppositions filed.

[46] The Opposant argues that the respondents who are the defendants in the claim No SLUHCV2006/0056 are trustees for sale and only have the power to sell and distribute the proceeds. But the Respondents counsel argues that the defendants

had the right to hypothecate the property. I have shown that the known law does not say that the Defendants did not have the right to hypothecate the land.

[47] However, we do not have an action to improbate the hypothec before the court as there was in one leg of the **Prospere v Prospere** actions. What we have before the court is an attempt to overturn the Judgements and order which were obtained pursuant to the hypothec and the contractual arrangement entered into pursuant thereto. I have already explained why the opposition will not succeed procedurally pursuant to Article 382.

[48] Yet another reason why the Opposition would not suffice against the judgments is because the contractual arrangement between the Claimant and the Defendant has been breached and the remedy for the said breach is the sale of the land which stands as surety for the debt. The contract included the hypothec which hypothecated the entire parcel of land.

[49] The fact is that the persons who represented the Opposant/Petitioner's interest in the Claim did not oppose the entry of judgement and the Opposant/Petitioner cannot claim that they were not present and in a position to do so.

[50] In this regard this case can be distinguished from **Prospere v Prospere** discussed above. Indeed Lord Bingham in that decision noted that the Appellant Mrs Prospere was not a party to the relevant proceedings in which a deed of sale against which Mrs Prospere objected was reinstated by the Court of Appeal and her husband who was a party to the proceedings was not acting on her behalf or with her authority. But Mrs Prospere had an interest in the subject matter of the decision.

[51] In this case the Petitioner is a beneficiary and it must be assumed that the trustees for sale acted on his behalf even if not with his express authority since the law permitted four of the trustees for sale to sell the property. These four were the defendants in the suit. I agree with counsel for the Respondent Bank that the Defendants acted as Trustees for Sale and not in their individual capacities.

[52] The Opposant/ Petitoner has not been ordered to pay the debt. But he complains that his 1/9th entitlement has been subject to a Writ of Seizure and Sale along with his 1/3 entitlement to the estate of Beatrice Flood.

[53] Counsel for the Petitioner enters into an elaborate argument in which she relies on various Articles of the Code of Civil Procedure including Article 417 to establish that the hypothec is not valid in that it purported to encumber property which the Defendants had no title to and could not hypothecate. Hence the judgement could not be against that property. The Petitioner argues that the hypothec is null and void and of no effect and opposes any claim by the claimant to enforce same.

[54] However, I have concluded above that this argument cannot be properly presented as the basis for setting aside the orders on which the Sale and Seizure of the relevant property is based. The Defendants/Respondents obviously accepted that they had contracted with the First Caribbean Bank for a loan and that they were obliged to repay the loan. That is the basis of the orders made.

[55] **Whether the Writ of Seizure can be opposed**

The law permits a Petition in Opposition pursuant to Article 517 of the Civil Code and issues such as the value of the aggregate amount claimed in the hypothecs far exceeding the value of the land now being claimed may be raised. However ,the basis on which the issue of value arises is the upset price for sale. The fact is that there is no date set for sale. The initial application for Seizure and Sale was filed on 16th September 2008. A new application to fix the upset price would therefore have to be scheduled for any future sale if the sale is to proceed on any reasonable basis.

[56] Indeed the issues raised by counsel in relation to the Writ of Seizure and Sale would become more relevant if a sale was being pursued at this time. Although the process was commenced there is no on-going process for sale and it is clear that the Article 517 contemplates an opposition being made in time to stop a sale from going forward, ie. at least 7 days before the date set for the sale. In my view

if there is no sale on the cards there is no basis for the opposition to be permitted by the court as an academic exercise.

[57] The issue raised in relation to the Article 382 procedure have all been answered above. The Petitioner is restricted to directly challenging the judgment (see **Propere v Prospere** at paragraph 19 of Lord Bingham's decision). The Petitioner cannot succeed in opposing the Judgements. Indeed his Petition is irregular for failure to attest to the truth of the allegations made in the Petition and should have to be rectified before it can properly proceed. The Article 381 petition is also out of time.

[58] In the circumstances I dismiss the Petition in Opposition and award costs to the respondents to be assessed if not agreed.

**Francis H V Belle**
**High Court Judge**