SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2012/0829

BETWEEN:

1. GERARD BEAUSOLIEL
2. MARY BEAUSOLEIL REPRESENTING THE SUCCESSION OF ANNE MARY CECILE BEAUSOLIEL

Claimant

AND

1. BARTHOLOMEW SYLVESTER
2. JULIEN SYLVESTER

Defendants

Appearances:

Petra Jeffery Nelson together with Antonia Auguste of Counsel for the Claimants
Huggins Nicholas of Counsel for the Defendants
Alvin St. Claire holding a watching brief.

2013: February 5th
2014: November 7th, 17th

DECISION

[1] TAYLOR-ALEXANDER M: This is a strike out application brought by the defendants pursuant to Part 13.3 of CPR 2000. The application alleges that the proceedings filed by the claimants is an abuse of process as it seeks to challenge the order of the High Court granting title by prescription on its merits. The defendants assert that the claim is res judicata.

The Relevant Facts

[2] The claim alleges that Anne Mary Cecile Beausoliel (deceased) who is herself a claimant, owned property located in Soufriere registered as 0029B 19 and 25 (the Property) They alleges that the defendants were awarded title to that property by 30 years prescription on the 25th March 2011. The claimants who are Gerald Beausoliel the paternal uncle of Anne Mary Cecile Beausoliel, and Anne Mary herself who appears by her succession, represented by Mary Beausoliel, alleges that the award of the Property by the court was made on fraudulent representation by the defendants of their entitlement to the property by long possession, when in fact, any occupation of the Property and any part of it, was with the knowledge and consent of the Anne Mary Beausoliel and was limited to an access over the Property, with the defendants paying for their use of the access.

[3] The claimants seek a declaration that the defendants acquisition of the Property was actuated by fraud and they seek a revocation and cancellation of the order of the court dated the 25th March 2011. The claimants also seek a declaration that Anne Mary Cecile Beausoliel is in fact and law the owner of the property.

[4] The Property was compulsorily acquired by the Crown by instrument No. 107/2010 for the purposes of tourism development and the Crown has offered a value for acquisition of $4,000,000.00. The claimants allege that the defendants hold the Property and any proceeds from the acquisition, on trust for the claimants.

The Application

[5] The distilled grounds from an extensively worded application are that:—

(1) The high court has in Claim SLUHCV2009/0728 declared the defendants owners by 30 year prescription of the Property.

(2) The present action is an abuse of process, it disclosing no recognisable cause of action, in that, the court has pronounced judgment in earlier proceedings relating to the title of the disputed property and is now functus officio.

(3) The current action is seeking circuitously to appeal the findings of the High Court, when the time for doing so has expired. This is in violation of the procedure laid down by the Supreme Court Act and the Civil Procedure Rules 2000. The decision of the High Court is inviolable.

(4) The claimants are abusing the process of improbation and invalidation used ordinarily for the invalidation and cancellation of Notarial Deeds.

(5) That in any event, in so far as the claimant's claim is one for fraud the High Court is not possessed of the jurisdiction to investigate allegations of fraud of its own order nor can it set aside its own order granted on merit.

(6) That in any event the claim is procedurally improper as it violates Article 1142 of the Civil Code and Article 174 of the Code of Civil Procedure, relating to the improbation of authentic writings.

[6] The application is being considered on the filed submissions of the parties.

The function of the court on a striking out action.

[7] CPR 2000 Rule 26.3 (1)(b) and (c) provides that a court may strike out the whole or any part of a statement of case if it does not disclose any reasonable ground for bringing a claim; or if it is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

[8] Our Court of Appeal has reasoned the application of CPR 2000, rule 26.3 in Julian Prevost v Rayburn Blackmore DOMHCV2005/0177.Rawlins J (as he then was) said this:—

> "The court has always had jurisdiction to strike out actions on this ground if having examined the claim it finds that the action will have no chance of success even if the pleading process were to continue and the matter goes to trial. This is a jurisdiction which the court exercises very sparingly and only in the most clear and obvious cases, for example when it is clear that the case has no legal basis. This is because the court errs on the side of having trials on the merit of cases."

In Baldwin Spencer v The Attorney General of Antigua and Barbuda, the court explained that the approach is not a factual investigation on the truth of the pleadings, but whether taken at its highest there is a disclosed cause of action. Bryon JA as he then was said this:—

> "This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court" The court is not concerned at this stage with the truth or otherwise of the pleadings".

[9] Consideration of the defendant's application will therefore be on the basis of the well-settled distilled principles, namely that a) The facts pleaded in the statement of claim are true; b) The cause of action must be so clearly untenable that it cannot possibly succeed; c) The jurisdiction to strike out is one to be used sparingly.

Res Judicata

[10] A useful staring point is the question of whether these current proceedings are res judicata. A finding of that would mean that the claim is untenable. Article 1171 of the Civil Code which states:—

> "The authority of a final judgment (*res judicata*) supplies a presumption incapable of contradiction in respect of that which has been the object of the judgment, when the demand is founded on the same cause, is between the same parties acting in the same qualities, and is for the same thing as in the action adjudged upon."

The Privy Council in Prospere v Prospere and Remy PC 18 of 2005 approved the reasoning of the Supreme Court of Canada of Roberge v Bolduc [1991] 1SCR 374 and the decision of L Heureux-Dubé J, that to constitute Res Judicata a subsequent proceeding must conform to the following conditions:— (1) the first court must have had jurisdiction; (2)the first proceedings must have culminated in a definitive judgment; (3) the earlier decision must have been given in a contentious matter; (4) the principle only prevents re-litigation of an issue by those who were parties to or represented in and so bound by the first judgment, and who act in the same capacity in the second proceedings; (5) the object and purpose of the second proceedings must have been the same as those in the first; (6) there must be identity of cause in the two actions.

[11] I gather that the parties are in agreement as to the presence of the first two conditions. I adopt the definition of contentious given in Black's Law Dictionary of something that can be contested or is argumentative. Proceedings for 30 years prescription are for possession adverse to the rights of the registered owned or anyone else. It is no doubt contentious in nature, and its character does not change because it was uncontested. In my view, it is beyond question that the decision made in the earlier case was in fact contentious.

Were the parties represented in and so bound by the decision in the first judgment, and act in the same capacity in the second case.

[12] The claimants assert that Ann Mary Cecile Beausoliel, as the former registered owner of the property was deceased and her successors in title and representatives

were unaware of the Petition for prescription, neither were they named as parties to the proceedings. The case of Roberge v Bolduc confirms that it is juridical identity of the parties that is required. Hence a successor in title to the property is a "party" to any proceedings.

[13] In any event I pause to note that an order of the court in the earlier proceedings dated the 1st of March 2010 had directed that the application be advertised in two consecutive issues of two local newspapers as well as in the St. Lucia Gazette, and by service on the adjoining land owners, of which Anne Mary Beausoliel is also an owner. Although on my perusal of the first claim, I can only find that that order of March 2010, was only partially complied with in that there had been two publication in one local newspaper, and in my view it was not a paper with widest circulation. I also have yet to find any proof of service on the adjoining land owners.

[14] Despite these anomalies, I have to assume that the court had been aware of these deficiencies, but had nevertheless satisfied itself that the application had met the threshold criteria, including as to service, or that there was proper service and it is the court file that is deficient. This court is not seized of the complete file, including the representations made in the proceedings. I can only conclude therefore, that all procedural requirements including as to service were met. In any event such a challenge ought to be brought in the proceedings in which the order was granted and not by collateral proceedings.

The object and purpose of the second proceedings must have been the same as those in the first.

[15] To determine, then, what is the "object" of an action, it is necessary to look both at the nature of the right sought and at the remedy or the purpose for which it is sought. There need not be an identical remedy sought or object pursued.

[16] It is useful at this point to refer to the dicta in Roberge v Bolduc so as to gather an appreciation of what the object and purpose of the second proceedings are. The court refered to the work of Mignault, in Le Droit Civil Canadien (1902), at p. 105, which offers the following translated illustration:

> *"But what is the object of an action at law? Clearly it is the immediate legal benefit sought in bringing it, namely the right whose implementation is desired. Thus, A claims house C from B. The object of the claim is that A should be declared owner of the house. If this claim is rejected, A can no longer claim house C from B, but this judgment will not prevent him from claiming house D from the defendant. Similarly, A can claim the usufruct of house C from B, despite the dismissal of his action to claim ownership, because the object of the two actions is not the same."*
>
> *". . . to complete the rule it must be said that it is not necessary for the two actions to seek precisely the same order: there will be res judicata once the object of the second action is implicitly included in the object of the first."*

[17] The leading case on the identity of object is Pesant v. Langevin (1926), 41 Que. K.B. 412, referred to in Roberge, where it was explained by Rivard J.A. at p. 421:

> The object of an action is the benefit to be obtained in bringing it. Material identity, that is identity of the same physical thing, is not necessarily

> required. This perhaps forces the meaning of "object" somewhat, but an abstract identity of right is taken to be sufficient. "This identity of right exists not only when it is exactly the same right that is claimed over the same thing or over one of its parts, but also when the right which is the subject of the new action or the new exception, though not absolutely identical to that which was the subject of the first judgment, nevertheless forms a necessary part of it, is essentially included in it, as by being a subdivision or a necessary sequel or consequence". In other words, if two objects are so related that the two arguments carried on about them raise the same question regarding performance of the same obligation between the same parties, there is *res judicata*. [References omitted.]

[18] In order, therefore, to decide whether there is identity of object, the substance of the claim must be examined.

Examination of the two claims.

[19] The earlier proceeding commenced by the defendants, was for title by prescription, and was supported by third party affidavit evidence attesting to the applicants' claims that they had possessed the subject property for in excess of thirty years and were presumed to be the owners in the circumstances.

[20] The second proceedings according to the claimants, is for misuses of fraud and to challenge the authority of the earlier judgment so as to cause the ownership of the property in dispute, to return to the former owners. According to the claimants, there was never any doubt in the mind of the defendants as to who the actual owner of the Property was, and at all times their occupation of the property was limited to use of an access and was at all times with consent of the owner. The ultimate objective of the claim is to seek to return the disputed property to the name of the second claimant the former registered owner.

[21] Based on the guidance of Roberge v Bolduc and Pesant v. Langevin it seems to me pellucid that it is the intention of the claimants in their assertion of misuses of fraud

to achieve precisely the outcome they may have obtained, had they challenged the first claim, and that although this claim is not identical to the cause of action in the first claim, the assessment of the truth of the assertions made to support the claim for possession is the collateral issue and is included in any defence to a claim for prescription . The assertions of fraud directly attack the affidavit evidence used to support the claim for title by prescription.

Identity of Cause

[22] Where the essence of the legal characterization of the facts is identical it usually follows that there is identity of cause. Roberge concludes that while the same body of facts can give rise to many causes of action, it is the legal characterization of these facts that is crucial. The court relied on the dicta of Taschereau C.J., speaking for the Court, in Cargill Grain Co. v. Foundation Co. of Canada, [1965] S.C.R. 594, who said:—

> "It is equally clear that a rule of law removed from the factual situation cannot be a cause of action in itself. The rule of law gives rise to a cause of action when it is applied to a given factual situation; it is by the intellectual exercise of characterization, of the linking of the fact and the law, that the cause is revealed. It would certainly be an error to view a cause as a rule of law regardless of its application to the facts considered. Accordingly, the existence of two applicable rules of law as the basis of the plaintiff's rights does not lead directly to the conclusion that two causes exist."

[23] Although characterised in fraud, the present proceedings are seek to have the court visit the basis on which prescription was granted. This to my view will require an identical exercise as was done in the first proceedings, and the effect will be to invalidate the order of the court granting title by prescription. I therefore find that there is identity of cause.

Was prescription interrupted by the Crown's acquisition of the property.

[24] The Application for title by prescription was commenced in Case Number SLUHCV2009/0728 and the present defendants were by order in those proceedings dated the 28th March 2011, declared the owner of the property. The states' compulsorily acquisition was in October of 2010.

[25] It seems to me clear, that the right of the defendants to claim ownership of the property by prescription after 30 years, is a right that would have accrued before the earlier proceedings were commenced. The court would have had to satisfy itself of that fact. Those rights can only by interrupted while they are in the course of accruing. Certainly, that is the implication of the language of Article 2047. It states:—

"In positive prescription title is presumed or confirmed and ownership is transferred to a possessor by the continuance of his possession."

[26] There is before me no evidence sufficient enough to convince me that the Crown's acquisition of the property interrupted prescription.

Was fraud or artifice practiced by the defendants in securing title by Prescription?

[27] Roberge v Bolduc acknowledges that unless appealed, the validity of a judgment is sacrosanct unless it is proven to have been obtained by fraud. According to the dicta of the case this is usually brought by a paulian action[1], which must allege fraud and is

[1] "A creditor who suffers prejudice through a juridical act made by his debtor in fraud of his rights, in particular an act by which he renders or seeks to render himself insolvent, or by which, being insolvent, he grants preference to another creditor may obtain a declaration that the act may not be set up against him.

taken in the name of the individual creditor exercising personal rights. Such action however, is prescribed after one year of knowledge of the alleged fraud.

[28] Article 375 of the Code of Civil Procedure being an article preserved by the Rules of the Supreme Court and by implication in the Civil Procedure Rules 2000 provides for an otherwise final judgment to be revoked by petition and affidavit when:—

(a) fraud or artifice has been made use of by the opposite party;

(b) judgment has been rendered upon documents which have been subsequently discovered to be false, or upon any unauthorised tender or consent disavowed after judgment;

(c) since they were rendered documents of a conclusive nature have been discovered which had been withheld or concealed by the opposite party;

(d) rendered upon admissions not authorised, subject to the provisions of article 190 and 192 of the code;

(e) the judgment has been given for things not prayed for;

(f) If the judgment grants more than has been asked;

[29] The petition and affidavit can be received only during the six months after the discovery of the fraud or the falsity.

[30] This provision however, relates to judgments which are not susceptible of being appealed from or opposed. Additionally Article 364 of the Code of Civil Procedure provides for an application by petition to be within a year and a day for a revision of any judgment rendered in the following circumstances namely:-

(i) In all cases of simple attachment, or attachment by garnishment, when the service has been effected under the provisions of article 66.

(ii) Whenever he has not been served personally or at his real domicile, or ordinary and actual place of residence. But when he has been personally served in the Colony with a copy of the judgment he must apply by petition within ten days from such service. If personally served beyond the Colony he must apply within six months of the service.

[31] Apart from the fact that the claimants have not brought themselves within the exceptions of the provision, the application was unsupported by affidavit and was brought well out of the time prescribed. In fact what has been filed in response to the application was a notice of opposition purporting to give evidence without the compliance requirements for evidence in interlocutory proceedings.

[32] Even where a third party can attack such a judgment, they must however, do this in a direct manner, not through a collateral attack in other proceedings. I reference the case of Van Finance Ltd. v. Sogelong Inc., [1989] R.D.J. 233 (C.A.), referred to in Roberge where a judgment on an action in giving payment had granted ownership of an immoveable property to one Sogelong Inc. Although the appellant third party did not oppose the judgment, in a later action against Sogelong Inc, it asked to be declared the owner of that same property. This would indirectly have had the effect of setting aside the judgment rendered on the action, in giving in payment. Tyndale J.A. comments, at p. 236 as follows:—

> *Although the judgment of 1 February 1980 may not be, strictly speaking, "chose jugée" as against the Appellant, because it was not a party, it nevertheless represents a total obstacle to Appellant's action as a judgment which retains its full force and effect unless and until set aside; it cannot be successfully attacked collaterally nor deprived of its effect in other proceedings even though its validity be there impugned.*

In Wilson v. R. (1983), 2 S.C.R. 594, the principle is expressed in these terms:

"It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment...."

[33] I can therefore offer the claimants no relief. Despite my cautionary approach to applications to strike, I am without alternative and in the circumstances of this case I find the claim is an abuse of process and must be struck out.

Conclusion

[34] Unless a judgment of a Court is appealed or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides. As a consequence I find the current proceedings in SLUHCV2012/0829 to be no more than a collateral attack on the validity of the judgment given in SLUHCV2009/0728, and must be struck out as an abuse of process.

Costs

[35] Costs are to be assessed unless otherwise agreed.

V. GEORGIS TAYLOR-ALEXANDER
HIGH COURT MASTER