

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

SVGHCV2012/0155

BETWEEN:

FANTASEA TOURS LTD

APPLICANT/CLAIMANT

-AND-

BANK OF SAINT VINCENT AND THE GRENADINES

INTERESTED PARTY

-AND-

HAZECO TOURS LTD

FIRST RESPONDENT/1st DEFENDANT

CLINT HAZEL

SECOND RESPONDENT/2nd DEFENDANT

-AND-

MILDRED “MILLIE” HAZEL

THIRD RESPONDENT/3rd DEFENDANT

Appearances: Mr Grant Connell, Counsel for the Applicant/Claimant, Mr Joseph Delves Counsel for the First Respondent/1st Defendant, Second Respondent/2nd Defendant, Third Respondent/3rd Defendant and Mr Richard Williams Counsel for the Interested Party.

2015: Apr. 13
May 11
Jun. 17

JUDGMENT

BACKGROUND

[1] **Henry, J.:** This case involves a dispute between Fantasea Tours Ltd (“Fantasea”) on the one hand and Hazeco Tours Ltd (“Hazeco”) and Mr and Mrs

Clint Hazel on the other hand. Long time friends and business associates Mr and Mrs Kim and Earl Halbich and Mr and Mrs Clint and Mildred Hazel are directors and shareholders of Fantasea and Hazeco respectively. Fantasea and Hazeco were engaged in a mutually beneficial enterprise as cruise ship agents and tour operators whereby, pursuant to an oral agreement, each served as agent for the other on different occasions. Whichever was agent for a specific event, would within one month of the event, pay to the other company the fees collected on its behalf.

- [2] Fantasea alleges that between 2009 and 2011, Hazeco failed to pay to it fees and interest¹ totaling \$174,355.00. Fantasea sued Hazeco and its directors Mr and Mrs Hazel to recover that sum. Neither Hazeco nor the Hazels filed a defence to the suit. Consequently, Fantasea obtained a default judgment of \$175,870.00.¹ The judgment remains wholly unsatisfied. Fantasea has applied to the court for an order to effect sale of three properties belonging to Mr and Mrs Hazel and Hazeco. Two of the properties are located at Ottley Hall and are registered in the names of Mr and Mrs Hazel. The third property is situated at Lower Bay, Bequia and is registered in the name of Hazeco. All three properties are heavily mortgaged to the Bank of Saint Vincent and the Grenadines (“the Bank”) who has a first legal mortgage on them. The Bank claims that the mortgagors have defaulted on repayment of the loans. The Bank has also indicated that it is currently involved in a separate lawsuit against the Hazels and Hazeco to recover the sums loaned to them. It supports the grant of an order for sale of the three properties provided that any sums realized are first expended towards satisfaction of the said non-performing mortgages.
- [3] Mr and Mrs Hazel and Hazeco object to the grant of an order for sale, and argue *inter alia* that because Fantasea’s application is made pursuant to the Civil

¹ At a rate of 2% per month.

Procedure Rules 2000 (“CPR”) instead of the Civil Procedure Code (“Code”)² and uses an incorrect procedure and form, the application is procedurally defective and must therefore fail. They also dispute the interest component of the judgment. However, there is no legal basis on which the judgment can be reduced at this point. It is a validly entered judgment which stands unless set aside. The court will therefore not interfere with calculation of the judgment sum.

ISSUE

[4] The issues are twofold:

1. Whether Part 55 of the CPR empowers the court to make an order for sale of land on application by the judgment creditor, Fantasea?
2. Whether the court should make an order for sale of any of the three properties?

ANALYSIS

Issue 1 – Does Part 55 of the CPR empower the court to make an order for sale of land on application by the judgment creditor, Fantasea?

[5] Fantasea has applied³ for an order “in accordance with Part 55.2 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 to effect sale of two properties” owned by Mr and Mrs Hazel. By amended application⁴ it also sought sale of a property which is owned by Hazeco. Mr Hazel, Mrs Hazel and Hazeco contend that rule 55.2 does not authorize the court to order the sale of a judgment debtor’s land.⁵ They submit that the court’s authority to order such a sale is found in the Civil Procedure Code and that Fantasea’s application did not refer to the Code.⁶ They submit further that this omission is fatal and the application should be dismissed. In support they cite the case of **Francis**

² Cap. 120 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

³ Filed on July 25, 2014.

⁴ Filed on March 16, 2015.

⁵ See paragraphs 2 and 3 of Hazeco’s and Mr and Mrs Hazel’s submissions filed on March 27, 2015.

⁶ Ibid. at para. 3 of the Hazel’s submissions.

Monrose v Bank of Saint Lucia Limited⁷ in which the applicable provisions of the Saint Lucia Civil Code and Civil Procedure Code were examined.

- [6] Fantasea neither conceded nor disputed this challenge to the legal basis of its application. It argued that the Code is slightly different to the Saint Lucia Civil Code which limits the manner in which a court may effect a sale. They concede that if the enabling legislation sets limitations the CPR cannot act outside the ambit of that legislation, but insist that the Code sets no such limits. Fantasea has steadfastly maintained its reliance on Part 55 of the CPR to ground its application for an order for sale and did not seek to invoke any provision of the Code or any other enactment.
- [7] In the **Monrose case**, Bank of Saint Lucia Ltd. obtained a judgment of default of defence against Francis Monrose and subsequently applied to the court pursuant to Part 55 of the CPR for an order to sell Monrose's land by private treaty. Monrose opposed the application on the ground that it is not Part 55 of the CPR but rather the Civil Code and Code of Civil Procedure which together empower the court to make an order for sale of land and govern the procedure.
- [8] The Court of Appeal after considering the Saint Lucia Civil Procedure Code and the Civil Code concluded that Part 55 of the CPR does not give the court a "free standing power" of sale but rather envisages sale of a judgment debtor's land only if an enactment authorizes such sale and if the court determines that it is necessary and expedient to make such an order. Pereira JA. (as she then was) explained:⁸

"...the Part 55 procedure may be engaged only where (i) an enactment so authorises; and (ii) it is necessary or expedient."

⁷ HVCAP2011/011, Eastern Caribbean Court of Appeal.

⁸ Ibid. at paras. [14], [16] and [24] (a) and (d).

*“CPR Part 55 does not give to the court a power of sale which is ‘at large’. It is Part 55 which directs one to an enabling statute for grounding the court’s power to order a sale. The statute in Saint Lucia is the **Civil Code**.”*

“...it is clear that Part 55 does not give a free standing power to the court to order a sale.”

- [9] Saint Vincent and the Grenadines has a Civil Procedure Code but no Civil Code. The parties agree that the comparable law in Saint Vincent and the Grenadines is the Code which is substantially different from the Saint Lucia Civil Procedure Code and Civil Code. It is necessary to examine the provisions of the Code and CPR 55 to determine what if any powers are vested in the court to grant an order of sale under those provisions. Sections 49 and 50 of the Code provide in part:

“49. Enforcement for judgement for money against lands

*Whenever the holder of a judgement for money shall be desirous of enforcing the same against the lands tenements and hereditaments of the judgment debtor, **he shall apply to the Court for an order of sale.***

50. Order for sale

*If the Court, on such application, is satisfied, upon oath or by affidavit, that the judgement remains wholly or in part unsatisfied, and that the judgement debtor is beneficially entitled to any interest in any messuages, lands, tenements and hereditaments within Saint Vincent and the Grenadines, and that there is no property of the judgement debtor within Saint Vincent and the Grenadines other than such messuages, lands tenements or hereditaments against which the judgement can be enforced, **the Court may grant the application, and order that the beneficial interest of the judgement debtor... be sold, and the same shall be sold accordingly...**”.* (bold mine).

[10] Rules 55.1 and 55.2 of the CPR are also relevant and provide:

“55.1 (1) This Part deals with the sale of land –

- (a) under any enactment which authorizes the court to order a sale; and
- (b) when it appears to the court to be necessary or expedient that the land should be sold.

(2) In this Part –

“**land**” includes any interest in, or right, over land.

55.2 (1) An application for an order for sale must be supported by affidavit evidence.

(2) The evidence under paragraph (1) must –

- (a) exhibit a current valuation of the land by a qualified land valuer or surveyor;
- (b) identify the land in question; and
- (c) state –
 - (i) any restriction or condition that should be imposed on the sale for the benefit of any adjoining land of the judgment debtor or otherwise;
 - (ii) the full names and addresses of all persons who to the knowledge or belief of the applicant have an interest in the land;
 - (iii) the nature and the extent of such interest;
 - (iv) the grounds on which the court should order a sale of the land;
 - (v) the proposed method of sale and how such method will prove most advantageous;
 - (vi) the reason for seeking an order for sale; and
 - (vii) whom it is proposed should have conduct of the sale.

(3) The application and copies of the evidence in support must be served in accordance with Part 5 on the judgment debtor and every person who has an interest in the land.”

[11] An examination of those provisions demonstrates that section 49 of the Code is similar to and of the same effect as Article 1493 of the Saint Lucia Civil Code which provides:

“The creditor who has a judgment against his debtor may take in execution and cause to be sold, in satisfaction of such judgment, the property of his debtor, moveable and immovable, ...subject to the rules and formalities provided in the Code of Civil Procedure.”

Pereira JA (as she then was) in the **Monrose case** commented on that provision as follows⁹:

“In my view it is Article 1493 of the Civil Code, which empowers the sale of a judgment debtor’s land.”

From the foregoing, it is clear that it is section 49 of the Code and not CPR 55 which empowers the court in this jurisdiction to make an order for sale of a judgment debtor’s land.

[12] Fantasea’s application for an order for sale of Mr and Mrs Hazel’s and Hazeco’s realty is stated expressly to be made pursuant to CPR 55. Fantasea has not invoked or invited the court to consider the provisions of the Code or any enactment which authorizes such sale. It is important to note that the High Court of Saint Vincent and the Grenadines is a creature of statute having been established by the Court Order.¹⁰ Its jurisdiction is outlined in the Eastern

⁹ Supra. at para. [21] of the **Monrose case**.

¹⁰ UK Statutory Instrument No. 223 of 1967.

Caribbean Supreme Court (Saint Vincent and the Grenadines Act (“the Act”).¹¹ The Act vests the High Court with all jurisdiction which was vested in the former Supreme Court by the Supreme Court Act, 1941 or any law passed by the legislature.¹² It also requires each judge to recognize and give effect to any rights, obligations and liabilities created by statute and in each cause to grant all remedies arising in the claim so that all matters in controversy may be finally and completely resolved to prevent multiplicity of legal proceedings.¹³ The court also has a statutory duty to take judicial notice of all legislation enacted in the jurisdiction.¹⁴

[13] In considering the instant application the court cannot close its eyes to the provisions of the Code even though it was not invoked by Fantasea. Based on the foregoing, although Fantasea did not expressly invoke the provisions of the Code in its application or submissions, in doing justice between parties, the court is enjoined by the Act to consider all applicable enactments which impact on determination of the issues between the parties. That is the effect of sections 6,

¹¹ Cap. 24 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

¹² See section 6 which states:

“There shall be vested in the High Court all jurisdiction which was vested in the former Supreme Court by the Supreme Court Act, 1941, or by any Law of the legislature of Saint Vincent and the Grenadines or any other law for the time being in force in Saint Vincent and the Grenadines,...”.

¹³ See sections 19 and 20 which provide respectively:

“19....each judge shall recognize and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations and liabilities existing by the common law or bay any custom, or created by any statute, in the same manner as these matters have hitherto bee recognized and given effect to.

20. The High Court ... in the exercise of the jurisdiction vested in them by this Act, shall in every cause or matter pending before the court, grant either absolutely or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that, as far as possible, all maters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided.”

¹⁴ Section 45 of the Evidence Act Cap. 220 of the Revised Laws of Saint Vincent and the Grenadines, 2009. See also **Vol. 17 Halsbury’s Laws of England 4th ed. paras. 100 and 150.**

19 and 20 of the Act and section 45 of the Evidence Act. CPR Part 55.1(1) (a) puts the court on enquiry as to the existence of an enactment which authorizes it to order sale of a judgment debtor's land. The only statute which confers this authority is the Code.

[14] In giving effect to CPR Part 55.1(1)(a) the court must examine the provisions of the Code to ascertain whether that power is circumscribed and how that power is to be exercised. If the Code places restrictions on the exercise of that power or prescribes a procedure and forms which are not utilized by the Fantasea, the application must fail. If no such limitations or procedures are stipulated the application will not fail merely because Fantasea did not expressly invoke the enactment. To hold so would be deny effect to the express provisions of the Act and could undoubtedly result in unnecessary multiplicity of actions.

[15] It is established that the court has no "stand alone" jurisdiction under Part 55 to make an order for sale of Hazeco's and Mr and Mrs Hazel's land. However, I find that while the court has no such authority under the CPR, an application under rule 55 requires that the court consider whether an order for sale of the subject land should be made under the Code and whether it is necessary and expedient to make such an order. For these reasons, I find that the court has the authority to make an order for sale of the subject properties belonging to Hazeco and Mr and Mrs Hazel pursuant to section 50 of the Code although Fantasea made no reference to the primary legislation conferring that power.

Issue 2 – Should the court should make an order for sale of any of the three properties?

[16] Hazeco and Mr and Mrs Hazel contend that Fantasea has used the wrong form in making its application. The Hazels and Hazeco have not indicated which form they contend should have been used. They cite the **Monrose case** as authority

for that submission.¹⁵ In that case, the court concluded that where the empowering law prescribes a form for presenting the application, an applicant must use that form. It also stated that where no such form is prescribed the procedure outlined in CPR 55 is to be adopted.¹⁶ The Code does not prescribe a form to be used for making an application for an order for sale. In the absence of such forms, the default position outlined in the general rule¹⁷ is operationalized and incorporated in CPR 55.2.¹⁸ This procedure contemplates initiation of the process by Notice of Application (Form 6) under Part 11. Fantasea has used that form. Its application is therefore not invalidated on this basis.

- [17] Hazeco and Mr and Mrs Hazel also contend that the court may make an order for sale of the subject properties only if they have no other property in Saint Vincent and the Grenadines against which the judgment can be enforced. This submission is correct, but must be qualified by the caveat that such other property must be sufficient to satisfy the entire debt.¹⁹ If the other property which

¹⁵ Supra at para. 5 of their written submissions, where they refer specifically to para. [18] of the **Monrose case**.

¹⁶ Supra. at para. [18] of the **Monrose case**.

¹⁷ See CPR 11.6 (1) which states:

“The general rule is that an application must be in writing in Form 6.”

¹⁸ See **Monrose Case per Pereira JA (as she then was) at para. [18]** where she stated:

“CPR Part 55.2 refers to an application for an order for sale. Significantly, it does not state the form in which the application is to be made. This must be a tacit recognition of the fact that the empowering enactments specify and set out its own form for making the application. This in turn must mean that the general rule in CPR 11.6(1) regarding the form an application shall take, (being Form 6 under CPR) does not apply in relation to an application for an order for sale of land by way of execution and enforcement of a judgment debt pursuant to those enactments. The general conclusion to which I have arrived is that once the enactment empowers the court to order a sale, directs that such an application be made to the court, and does not delimit the manner by which such a sale may be carried out, then CPR Part 55 governs the procedure and the court, on making the order may also direct the manner of sale...”

¹⁹ See **per Mitchell JA [Ag.] at para. [12]** where he held:

“...a sale of real estate, when there exists personal property sufficient to satisfy a judgment debt, is an extreme method of enforcement, and one capable of abuse. The Legislature of

exists falls short of full satisfaction of the debt, the court may make an order for sale of realty to meet such shortfall.

[18] Part 55(2) of the CPR mandates that an application for order of sale be supported by affidavit evidence which:

1. identifies the land in question;
2. exhibits a current valuation of the land by a qualified land valuer or surveyor;
3. states any restrictions or conditions that should be imposed on the sale for the benefit of any adjoining land of the judgment debtor or otherwise;
4. provide the names and addresses of all persons who to the knowledge or belief of the applicant have an interest in the land and the nature of their interest.
5. indicate the reasons for seeking and the grounds on which the court should order a sale of the land;
6. identify the proposed method of sale and why such method will prove most advantageous and whom it is proposed should have conduct of the sale.

Fantasea is also required by section 50 of the Code, to satisfy the court that there is no other property belonging to the Hazels and Hazeco against which the judgment can be enforced.

Description of land and other property, valuation, restrictions, interested parties

[19] Mr Earl Halbich gave evidence by affidavit²⁰ on Fantasea's behalf. He deposed that he is the Manager and one of Fantasea's directors. He described the 3

*Grenada has seen it fit to prohibit it, unless the judgment creditor satisfies the court that there is no other asset owned by the debtor **sufficient to meet the judgment debt.***" (bold mine)

²⁰ Filed on July 15, 2014 and March 16, 2015 respectively.

properties for which an order of sale is being sought.²¹ They are registered by Deeds of Conveyance 2743 of 1997, 3164 of 2003 and 1936 of 1991 respectively. The first lot comprises 1 acre and is described as agricultural land at Ottley Hall/Lowmans Hill valued at \$371,000.00 with a forced sale value of \$315,000.00. The second property consists of 1 acre and 11 poles of land, on which is constructed a two-level residential property at Ottley Hall occupied by the Hazels as their home. A value on the open market of \$546,000.00 is attributed to it with a forced sale value of \$491,000.00.²² The Bequia property is comprised of condominiums. Mr Halbich did not exhibit a valuation of the condominiums in Bequia and explained that he was unable to obtain one. He states that as far as he is aware there are no restrictions or conditions that should be imposed on the sale of those properties for the benefit of any adjoining land of the judgment debtor or otherwise. He acknowledged that the three properties are mortgaged to Bank of Saint Vincent and the Grenadines (“the Bank”).

Reasons and grounds for order of sale, proposed method of sale

[20] Mr Halbich deposed that Fantasea is seeking an order of sale because it has incurred tremendous financial hardship and is in dire need of funds to save its business and because the Hazels and Hazelco have made no attempts to settle the outstanding debt. He testified also that a Writ of Execution obtained on February 27th 2013 was returned *Nolla Bona* on June 2, 2014. He claims that this signifies that the Marshal did not find any goods belonging to the debtors which could be seized and sold to satisfy the debt. He admitted²³ having knowledge that the Hazels own two vehicles (a 1995 Suzuki Escudo and a 1993

²¹ Supra. At para. 10 of his affidavit filed on July 15, 2014 and para.4 of his affidavit filed on March 16, 2015.

²² The valuations are dated July 21, 2014, around the date that the application was filed.

²³ In his second affidavit.

Suzuki Sidekick) however he claims that they are virtually of no commercial value as they are both old and not in good condition. He provided no approximate value for either vehicle.

[21] Mr Halbich did not indicate what steps if any Fantasea took to identify other properties owned by the Hazels or Hazeco. Interestingly, he only referred to the Bequia property after Mr Sten Sargeant, attorney for the Bank mentioned it in his affidavit. Similarly, Mr Halbich only mentioned that the Hazels owned two vehicles after the Hazels referred to this in their affidavit. Fantasea has not provided any details of the contents of the condominiums or the Hazels' residence, nor has Fantasea indicated that there are no such contents. This does not assist the court in deciding whether or not there is other property which could be sold to satisfy the debt.

[22] Mr Halbich opined that the combined value of the three properties exceeds 5 million dollars. He deposed that Hazelco and the Hazels owe Bank of Saint Vincent and the Grenadines \$2.6 million which is greater than the value of the two properties at Ottley Hall. He reasons that unless the property owned by Hazeco is sold, the proceeds from the sale of the Ottley Hall properties would not be enough to satisfy the judgment debt. He proposes that the sale be by public auction under the Registrar's control which is the most expeditious avenue to secure the best market value for the properties. He named two realtors whom he considers would be able to provide advertising services.²⁴

The Bank's Position

[23] Mr Sten Sargeant swore an affidavit²⁵ on behalf of the Bank of Saint Vincent and the Grenadines as their attorney.²⁶ He deposed that Mr and Mr Hazel and

²⁴ i.e. Either Mr Simon Kamara of Liberty Properties or Mr Joseph Lewis of Horizon Real Estate Limited.

²⁵ Filed on March 9, 2015.

²⁶ No power of attorney or other instrument of appointment was exhibited in proof Mr Sargeant's authorization from the Bank.

Hazeco “conveyed” the three properties to the Bank by a Demand Legal Mortgage²⁷ as security for loans totaling \$2,075,900.00, \$1,319,000.00 and 10% per annum and \$707,000.00 at 9 % per annum respectively. He averred that the principal amounts total \$4,101,900.00 and that the balance outstanding as at March 9, 2015 is \$3,339,604.05. Counsel for the Bank, Mr Stephen Williams submitted that the Bank has no objections to the court granting an order for sale of the three properties provided that the sums due and owing to the Bank are first deducted from the proceeds of such sale.

Hazeco’s and Hazels’ response

[24] For their part, Mr and Mrs Hazel admit²⁸ that they owe Fantasea part of the judgment debt. They offer a payment plan consisting of \$40,000.00 immediately and the remaining \$52,394.50 at the end of the 2015/2016 season or sooner if they sell their realty. They object to the sale of the Ottley Hall properties which they describe as their home that they share with their daughter Catrena and Mrs Hazel’s mother. They claim that Mrs Hazel’s mother owns a life interest in the agricultural property and that Catrena suffers from tachycardia which poses a potential for stroke and instant death. No documentary proof of Mrs Hazel’s mother’s life interest is provided either or details as to when and how it was created. No other information is provided as to Catrena’s age, employment status or otherwise. The Hazels attest that they own two motor vehicles, and that Hazeco owns condominiums in Bequia valued at \$7,000,000.00. They confirm that all of their realty is mortgaged to the Bank of Saint Vincent and the Grenadines and that they are currently involved in separate litigation before the court seeking a declaration that the mortgage is null and void and an injunction to prevent the Bank from selling or foreclosing. They report that the Bank is seeking foreclosure.

²⁷Bearing registration number 973 of 2009.

²⁸ See para. 5 of their joint affidavit filed on April 9, 2015.

Assessment and Conclusion

- [25] Through Mr Halbich's evidence, Fantasea has provided all of the information stipulated by CPR 55 (2) except for the valuation of the condominiums. I am satisfied that the Hazels and Hazelco owe Fantasea the sum of \$175,870.00 and that they have not made or attempted to make any payments to satisfy the debt since September 4, 2012 when judgment was entered against them. While Mr Halbich makes it appear that the two vehicles owned by Mr and Mrs Hazel would not realize sufficient funds to discharge the judgment debt, I have no valuation or other proper basis on which to assess how much is likely to be realized from their sale. Similarly, in the absence of details about the contents to the condominiums and the residence of the Hazels, I am also not satisfied that Fantasea has provided sufficient information on which I can conclude that the Hazels and Hazeco have no other property which would satisfy the debt. I make this observation having regard to the fact the Fantasea was still discovering property as late as one year after the application was made and in two instances only after mention was made of them by other parties in this matter.
- [26] It does not appear that sale of the Ottley Hall properties would realize enough to pay off the mortgage to the Bank and any part of Fantasea's debt. In fact, it is apparent that the sale of those properties is likely to leave a sizeable portion of the mortgage unsatisfied and no part of the proceeds could be utilized to pay Fantasea. An order for sale in those circumstances will not realize the objective of providing funds to Fantasea to satisfy the judgment debt. Such an order would be impotent to provide the requested relief. I therefore make no order of sale of either of the Ottley Hall properties.
- [27] There is no valuation of the Bequia property before the court. In this regard, Fantasea has failed to satisfy a pre-condition to an order for sale, as stipulated in CPR 55 (2)(a). In the premises, there is insufficient evidence before the court to prove that an order of sale would realize sufficient monies to satisfy the mortgage and also Fantasea's debt. Very significantly, Fantasea has not

provided details of other property which it seems from the evidence and which the court infers that Hazeco and the Hazels might own, particularly as it relates to the contents of their residence and the condominiums in Bequia. I therefore make no order for sale of the Bequia property.

[28] It is accordingly ordered:

1. Fantasea's application for an order of sale of the subject properties is dismissed.
2. Pursuant to CPR rule 64.6(2) there will be no order as to costs.

.....
Esco L. Henry
HIGH COURT JUDGE
