EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2017/ 0037

BETWEEN:

ROYAL BANK OF CANADA

Claimant/ Respondent

And

1. BERNARD WELLS
2. JOAN MARTHA WELLS

Defendants/ Applicants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

Appearances:
Ms Danielia Chambers for the Claimant/ Respondent
Mrs Wauneen Louis-Harris for the Defendants/ Applicants

2018: December 20
2019: March 20
May 16, 21

Application to Fix Upset price - Application to Vary Consent Order – Stay of Execution – Leave to Oppose Sale of Immovable Property

DECISION

[1] ST ROSE-ALBERTINI, J. [Ag]: **Mr Bernard Wells and his wife Mrs Joan Wells ("the applicants")** are judgment debtors of the Royal Ba**nk of Canada ("the respondent").** In order to satisfy its judgment debt, the respondent has filed a writ of execution and **application to fix upset price for the judicial sale of the applicants' immovable property.** In response, the applicants have filed two applications seeking the following relief:-

1. That a consent order dated 24th October, 2017 in which judgment was entered for the respondent and the applicants were ordered to pay the judgment debt by way of monthly installments, be varied to reduce the monthly installment and interest rate and that enforcement of the judgment is stayed.

2. That leave be granted to file an opposition to the sale of the immovable property.

[2] In addition the applicants ask that the application to fix upset price be struck out on the ground that it is a nullity, having been filed before the writ of execution was issued and prior to seizure of the immovable property.

[3] The respondent opposes these applications on the basis that the applicants agreed to enter judgment in the terms contained in the consent order, inclusive of interest at the stipulated rate and should not be permitted to launch a collateral attack on the legitimacy of the judgment, which remains a valid and subsisting order of the court, that has not been set aside, varied or appealed. The applicants have not provided any acceptable reason for opposing the sale and there can be no prejudice to any of the parties by filing the application to fix the upset price along with the writ of execution or prior to seizure of the immovable property.

The Issues

[4] The issues which arise for consideration are:-

1. Should the consent order be varied and a stay of execution granted?

2. Should leave be granted to oppose the judicial sale of the **applicants' immovable** property?

3. Is the application to fix upset price a nullity having been filed before the writ of execution was issued and before the immovable property was seized by the Sheriff?

Background

[5] These applications stem from enforcement proceedings in the action[1] brought by the respondent to recover sums owed by the applicants on a loan obtained from the respondent. The loan was secured by two hypothecary obligations[2] registered over Parcel No. 1254B 290, the immovable property of the applicants.

[6] In the substantive claim the applicants filed a defence alleging that the incorrect interest rate was applied to the debt, and that the actions of the respondent were harsh and unconscionable, to warrant redress under section 2 of the Moneylending Act[3]. The defence also set out the circumstances which led to their inability to pay the loan installments, the attempts made to restructure the debt, and their willingness to pay a lower installment to service the loan. The respondent filed a reply to the defence and the claim was subsequently settled by a Consent Order of the court dated 24th Oct**ober 2017 ("the consent order")** in which the parties agreed to the terms of judgment to be entered against the applicants as follows:-

> ***"1.*** *That Judgment be and is hereby entered for the claimant against the defendants for the sum of EC$333,951.82 together with interest on $256,032.74 at the rate of 7.99% per annum from 13th December 2016 to the date of payment and costs in the sum of $7,500.00.*

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[1] Filed on 19th January 2017

[2] Executed on 31st December, 2001 and 12th January, 2009 and registered in the Land Registry as Instrument No. 214/2003 and Instrument No. 331/2009 respectively

[3] CAP 12.10 of the Revised Edition of the Laws of Saint Lucia

2. The defendants do pay the sum of $2,200.00 per month commencing on the 30th day of October 2017 and continuing thereafter on the last working day of each succeeding month until the entire debt inclusive of interest and costs is paid in full.

3. In default of any one installment the entire balance inclusive of interest and costs becomes immediately due and payable."

[7] The applicants defaulted on their first installment which fell due on 30th October, 2017 and on 31st July 2018, the respondent initiated enforcement proceedings by filing a Writ of Execution after Judgment against Immovables ("the writ of execution"), Praecipe, Instructions to Levy and the Application to Fix Upset Price. The writ of execution was subsequently issued on 2nd November 2018 and given a returnable date of 2nd March 2019. The property was seized by the Sheriff on 13th November, 2018 and the first hearing of the application to fix the upset price was scheduled for 20th December 2018. On that day the applicants filed the two applications before the Court, as well as an affidavit in answer opposing the respondent's application to fix the upset price. At the Court's direction an alternate valuation was filed by the applicants on 25th January, 2019 and the respective applications were heard on diverse dates.

Should the consent order be varied and a stay of execution granted?

[8] The application to vary the consent order seeks to reduce the monthly installment payment from $2,200.00 to $1,500.00 and challenges the interest rate applied in the judgment.

[9] The affidavit in support is deposed by the second applicant, Mrs Wells. In summary, the applicants say that they faithfully serviced the loan for 10 years from 2003 to 2013 until their financial circumstances resulted in their inability to continue servicing the loan. Mr Wells lost his job in 2012 and Mrs Wells continued payments until she too lost her job in 2013. Following this, Mrs Wells held various short job stints and in 2017 commenced her own business as a real-estate agent, from which she receives commissions from sales.

Currently Mr Wells is employed at a garage where he earns a monthly income of approximately $1,000.00.

[10] The applicants say when they consented to the order, Mrs Wells was earning sufficiently to pay the agreed sum, however her finances have become increasingly strained due to a sluggish real estate market which has caused a slowdown in sales. They are unable to pay the full installment on a regular basis because she does not earn a regular income. However they have been making payments toward the judgment debt, albeit not the full monthly sum of $2,200.00.

[11] The applicants further say they were advised by their loans officer as agent for the respondent that the market interest rate was fluctuating and their mortgage would benefit from a reduced rate of 7.5% per annum from January 2013. However, the rate was never reduced, contrary to their mortgage agreement which also stated that the interest rate would be determined by market trends. They aver that the actions of the respondent continue to be harsh and unconscionable and they are entitled to redress under the Moneylending Act.

[12] The applicants complain that the respondent has proceeded to file the writ of execution, in spite of substantial payments made towards the loan prior to their default and the sum of $14,600.00 paid since judgment was entered. Moreover, the respondent has erroneously stated in the writ of execution and the application to fix the upset price that they are still indebted for the same sum stipulated in the claim form and statement of claim, despite these payments. Due to their financial circumstances they are able to pay $1,500.00 monthly and will face financial ruin through the loss of their family home, unless the order is varied and a stay is granted.

[13] **The respondent's affidavit in answer was deposed b**y Ms Brenda St Ville, Manager of Recoveries and Specialized Services. She stated that she is well acquainted with the **applicants'** accounts and securities, and that the consent order was breached from inception when the applicants failed to pay the first installment. Thereafter, the breach continued with no payments made for the months of December 2017, May 2018 and June 2018. Apart from the months of February, March and April 2018, the full installment of

$2,200.00 was never paid. In support, she exhibits a statement of the payments made by the applicants for the period 1st November, 2017 to 7th November 2018,[4] which confirms that they were not compliant.

[14] Ms St Ville deposed that from the date of judgment to the date of filing the writ, the applicants should have paid a total of $22,000.00, but have only paid $10,300.00. The consent order stipulates that in default of any one installment the entire balance of the debt, inclusive of interest, immediately becomes due and payable and the applicants are yet to settle the outstanding sum. When the writ of execution was filed on 31st July, 2018 the judgment debt stood at $366,471.28 and on 21st January, 2019 when the affidavit in answer was filed, the total debt inclusive of interest stood at $370,824.71.

[15] Ms St Ville deposed that the respondent never agreed to reduce the interest rate and by virtue of paragraph 4 of the Additional Hypothecary Obligation[5] which secured the loan, the **applicants'** covenanted ***"to pay monthly or at such other times as [the Respondent] may*** *from time to time fix,* ***interest.....at the Agreed Rate".*** **'The Agreed Rate' is defined in the** First Schedule of the hypothec as ***"7.99% per annum or such other rate as [the Respondent] may from time to time fix."***[6] The respondent has considered the balance owed, the agreed interest rate, and the age of the applicants and is unable to accept the proposed monthly installment of $1,500.00. To do so would extend the repayment period beyond 30 years, in circumstances where the applicants have not made consistent payments of the proposed sum, during the months that they failed to pay the installment as ordered.

[16] Counsel for the applicants Mrs Harris, in oral submissions, argued that a consent order may be varied where a change of circumstances has occurred, and the applicants have experienced a severe alteration in their financial circumstances. Consideration should be given to a reduction of the monthly payment, with a penal clause to emphasize the seriousness of compliance. It is only an interim measure to permit them to service the debt while interest continues to accrue, until they are in a position to increase the payments.

[4] See Exhibit BVS1
[5] Instrument No. 331/2009
[6] See Exhibit BSV2.

[17] Alternatively, Mrs Harris says a stay of execution may be granted by considering the factors outlined in the case of Marie Makhoul v Cicely Foster[7]. The main consideration is whether the applicants can show that they will face financial ruin if a stay is not granted. Counsel contends that the **applicants'** affidavit evidence is sufficient to establish this criterion and shows that the applicants will suffer severe ruin and hardship if a stay is refused.

[18] Counsel for the respondent Ms Chambers argued that when the consent order was made the applicants represented to the respondent that they were capable of satisfying the debt by monthly installments of $2,200.00. The respondent relied on this representation and accepted settlement by the agreed installments. The applicants were aware that they could not meet the agreed payments, but made no attempt to address this until the hearing of the application to fix an upset price. The payments made have not consistently amounted to the proposed sum of $1,500.00 and the applicants have not provided any evidence to show that they are able to maintain such payment. A further default on a reduced payment would only extend the life of the judgment debt beyond an acceptable period.

[19] Ms Chambers submits that once the order was breached and the entire balance of the judgment debt became due and payable, that limb of the order for payment by installments fell away and is incapable of being varied. The applicants ought to have initiated fresh proceedings for an order to pay the outstanding balance by installments. Counsel contends that the judgment is a valid order of the court which must be obeyed and relied on the case of Alric C Hillocks Agencies Ltd. v Saunders International Sales Corp.[8] in support of this position.

[20] Ms Chambers advanced the view that the order was agreed by the parties and stands as a contract between them. T**here are two meanings to the words "***by consent***"** when used in consent orders, as explained by Lord Denning MR in *Siebe Gorman & Co. Ltd v Pneupac Ltd*[9] when he said:-

[7] HCVAP2009/014 (Antigua and Barbuda, delivered 26th August 2009)
[8] Civil Appeal No. 9 of 1992
[9] [1982] 1 WLR 185 at page 380

> *"…….**One meaning is this: the words 'by consent' may evidence a real contract** between the parties. In such a case a court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is **this: the words 'by consent' may mean the parties hereto not objecting. In such a** case there is no real contract between the parties. The order can be varied or altered by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to **discover which meaning is used".***

[21] She submits that the meaning to be applied here is the one which relates to a contract between the parties, which a court may only interfere with on similar grounds for interfering with a contract. Unless such grounds are presented it is not possible to consider varying the consent order. Further, the applicants are precluded from challenging the interest rate, considering that the rate in the order is the same rate agreed to in the additional hypothec. In the circumstances, the Moneylending Act does not avail the applicants.

[22] Concerning the stay of execution, Ms Chambers submits **that the applicants'** evidence has not addressed this limb of the application. There is no basis for such an order, considering that the respondent is entitled to enforce judgment and the applicants have not provided any reason which precludes enforcement.

[23] In response, Mrs Harris contends that the cases cited by Counsel do not assist the respondent as a court may intervene to vary a consent order based on a change in circumstances. The application concerns a money judgment for which the respondent will be compensated by way of interest, which continues to accrue. The prejudice to the applicants is greater as they will be deprived of their family home. They are not refusing to pay the debt and have paid as best they could. They simply ask to be permitted to pay a reduced installment, subject to improvement in their financial circumstances.

Discussion

[24] I begin with the ruling of Byron JA in Alric C Hillocks Agencies Ltd. v Saunders International Sales Corp. where he adopted the position stated in Hadkinson v Hadkinson[10], that it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The obligation extends even to a case where the person affected by the order believes it to be irregular and it applies with equal force to consent orders. It is also the responsibility of the court to enforce obedience to such orders.[11]

[25] In Huddersfield Banking Co. Ltd v Henry Lister and Son Ltd[12], it was said that a consent order is an agreement by the parties to it, contained in an order of the court and a court has jurisdiction to set it aside on any ground which would invalidate an agreement between the parties. The law is amplified in Purcell v FC Trigell Ltd[13] and Siebe Gorman & Co. Ltd v Pneupac Ltd.[14] that such order will usually embody a genuine contract between parties, which resolved their disputes and must therefore be given contractual effect. Such consent order may be set aside or varied only on the same grounds which would justify the setting aside of a contract which has been entered into by legally competent persons, with full knowledge of the material issues.

[26] In this jurisdiction a contract may be set aside for various reasons including mistake, misrepresentation, impossibility of performance/frustration and breach of obligation.[15] However in De Lasala v De Lasala[16] the Privy Council authoritatively determined that a judge of the Supreme Court has no power to vary a consent order which is a final order, made previously in that court and the proper course for challenging such an order should be by way of appeal or by bringing a fresh action to set it aside. This ruling has been

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[10] [1952] 2 All E R 567 at 569
[11] Supra note 8 at pages 3-4 of the judgment
[12] [1895] 2 Ch 273
[13] [1967] P. No. 170
[14] [1982] 1 WLR 185
[15] See Article 917A and 954 of the Civil Code Cap 4.01
[16] [1979] 2 All ER 1146

applied in several cases within the jurisdictions of the ECSC[17], including Alric C Hillocks Agencies Ltd, relied on by the respondent.

[27] Applying these principles to the present case, there can be no doubt that the consent order is a final order which settled the claim between the parties. It reflects precisely the relief sought in the substantive claim. It is also an order which the applicants are obligated to obey. Having failed to pay the first installment by the due date, the applicants breached the order and from 31st October, 2017 the entire balance of the judgment debt became due and payable. When the writ was filed some nine months later the applicants had repeatedly breached the order and had paid less than half the amount which should have been paid, had they fully complied and the entire balance which has become payable is still outstanding

[28] The applicants ask that the monthly installment be varied due to a change in their financial circumstances and challenge the interest rate set in the order. In essence they seek to revisit the same issues advanced in their defence to the claim. They have not sought to institute a fresh action to set aside or vary the order. Instead they have come by way of an application under Part 11 of the Civil Procedure Rules 2000 **("the CPR")**. It is the law that such order may only be challenged by way of appeal or by bringing a fresh action to vary or set it aside on similar grounds for setting aside a contract. Consequently, it is not open to the applicants to make this request under Part 11.

[29] The issues in relation to the interest rate and redress under the Money Lending Act may not be raised on this application or in fresh proceedings as these matters are res judicata, having never appealed the consent order. Additionally, the applicants agreed to the terms of the order, including interest and the rate is the same as stated in the additional hypothec. It is the law in this jurisdiction that it is not open to a court to vary the interest rate legally agreed by the parties, post judgment.[18]

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[17] Eastern Caribbean Supreme Court
[18] See Article 1008 of the Civil Code and 1st National Bank v Michael Rocton et al

[30] If I am wrong and a change of financial circumstances could ground an application under Part 11, the applicants have not satisfied the Court that it would be appropriate to reduce the installments, as they have not provided any evidence of their ability to consistently make the proposed payment of $1,500.00. A review of the payment history provided by both parties confirms that at best their payments have been arbitrary.

[31] The application to vary was filed only after enforcement proceedings were instituted and in my view it would be unjust to adversely alter the respondent's position, by creating a fetter on its entitlement to recover the full debt, now that the matter has reached the stage of enforcement proceedings. It would set a dangerous precedent if a judgment debtor who has repeatedly failed to satisfy a judgment debt, could thwart enforcement by petitioning the court to vary an order to effectively put right the default. Such action would only serve to diminish the value of the judgment, to the point of rendering it almost useless.

[32] Regarding a stay of execution, the applicants have not established any legal basis for this relief. The Court of Appeal decision in Marie Makhoul v Cicely Foster does not assist the applicants, as it addresses the considerations for granting a stay in the context of a pending appeal, which is not the case here.

[33] In that case, George-Creque JA stated that:-

> *"The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly, there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favour particularly after a full trial on the merits."* [19]

[34] George-Creque JA went on to say that a stay may be granted in exceptional circumstances and "*the modern authority on the guiding principles …... is the case of Linotype-Hell Finance Ltd. v Baker where Staughton L.J. opined that a stay would normally be granted if the appellant would face ruin without the stay and that the*

[19] At paragraph 3

appeal has some prospect of success." Therefore financial ruin is not to be considered in a vacuum and a finding of some prospect of success in a pending appeal must also be evident.

[35] In Hammond Suddard Solicitors v Agrichem International Holdings[20] referred to in the Marie Makhoul case some of the considerations were outlined as follows:-

> ***"...Whether the court should exercise its discretion to grant a stay will depend on*** *all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?"*

[36] The applicants request is that enforcement of the judgment be stayed in an open-ended manner, pending improvement in their financial circumstances. The principles applied in the Marie Makhoul case would be of little assistance in this scenario, as a successful litigant is entitled to the fruits of judgment without restraint. It has been said that the inherent jurisdiction of the Court to grant a stay is discretionary and ought to be exercised with caution.[21] The reasons advanced by the applicants have not met the threshold to warrant this relief.

[37] I therefore conclude that there is no merit in the application to vary the consent order or the request for a stay of execution and that application fails.

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[20] [2001] EWCA 1915

[21] Blaircourt Property Development Limited v Artherton Martin et al DOMHCV2011/235 at paragraph 28

Should l**eave be granted to oppose the judicial sale of the applicants' immovable** property?

[38] That application is made pursuant to Articles 513 and 521 of the Code of Civil Procedure[22] **("the CCP")** and initially stated that the grounds were as contained in the affidavit in support which accompanied the application.

[39] Ms Chambers took the preliminary point, that the **applicants'** failure to state any grounds in the Notice of Application was a breach of CPR 11.7(1)(a) which stipulates that "*an* ***application must state briefly the grounds on which the applicant is seeking the order***". She relied on Beach Properties Barbuda Limited et al v Laurus Master Fund Ltd.[23] as authority that the failure is an abuse of process and the application should be struck out.

[40] Mrs Harris responded that the application has been amended to include the grounds and the point is no longer relevant. I note that the amended application was filed only after Counsel for the respondent raised the point in written submissions and having done so ahead of the hearing, Mrs Harris now says the defect has been cured and is no longer an issue.

[41] Whilst this may be the case, I believe the law on the point is worth repeating. In Beach Properties Barbuda Limited et al v Laurus Master Fund Ltd. the Court of Appeal unanimously agreed as follows:-

> *"This is a completely unacceptable practice. It is an abuse of the process of the court that should attract condign consequences. One objective of requiring that the application must state its grounds is to focus the thinking of lawyers. By being required to identify the grounds for making an application, before making it, lawyers are required to consider the merits of the application. A lawyer who has difficulty in formulating grounds for making an application has reason for thinking that perhaps it is because there are no grounds. The*

[22] CAP 4.01A of the Revised Edition of the Laws of Saint Lucia
[23] Civil Appeal No 2 of 2007 (Antigua and Barbuda, delivered 17th September 2007)

requirement of stating grounds also serves to clarify for the judge and the opposing party the basis on which the applicant claims to be entitled to the order sought. When an application states no grounds, it raises the suspicion that the application may be groundless, not just in form, but also in substance. That suspicion is heightened in a case such as this in which the failure to state grounds was deliberate: the section of the form requiring grounds to be stated was not simply overlooked. By telling the court to find the grounds in the affidavits the drafter revealed a clear advertence to the requirement of stating the grounds of the application and a conscious decision not to comply with the requirement. But even if it had been a case of laziness and not obfuscation that would have been a difference only of degrees. Failure to state the grounds of an application because it is too much trouble for the lawyer to do so is still very much an abuse of ***process."***[24] *[Emphasis added]*

[42] The ruling remains good law and the application could have been struck out without more, had the amended application not been filed ahead of the hearing.

[43] The applicants affidavit in support was also deposed by Mrs Wells and is similar in content to that in support of the application to vary, save the following:-

1. The quantum of debt stated to be due in the writ of execution fails to recognize the **applicant's payments to dat**e and a reduction in the interest rate would have had the effect of reducing the balance due on the judgment.
2. The property was advertised for sale in the Gazette and the notice did not mention the judicial hypothec placed on the property nor was an upset price fixed for the sale of the property.
3. If the property is sold, the applicants will lose their family home and thereby suffer serious prejudice.
4. The opposition is not being made with intent to unjustly retard the sale, but solely to obtain justice.

[24] At paragraph 19

[44] **The respondent’s affidavit in answer was also deposed by Ms St Ville and mirrored that** of the application to vary. She stated that there was no agreement between the parties pre or post judgment to vary the interest rate and there has been no publication of the advertisement for **judicial sale of the applicants’ property, since filing the writ of execution.**

[45] Mrs Harris called attention to Exhibit JMW1 which set out the payments made by the applicants post judgment. She argued that the respondent has not given a proper computation of the outstanding balance of the debt and the sum stated in the writ of execution is erroneous. Though a balance is owed, it should not be suggested that nothing has been paid and it is not open to the respondent to state the original sum claimed, when payments have been made towards the debt. Counsel subsequently acknowledged that t**he respondent’s affidavit did in** fact disclose the balance due as at 21st January, 2019 but says that figure is not stated in the writ and the interest rate continues to be harsh and unconscionable, as the applicants were promised a reduction, which would have significantly reduced the amount of the debt.

[46] Mrs Harris contends further that leave to oppose the sale will only be granted to obtain justice. There is no prejudice to the respondent as interest continues to accrue, whereas the prejudice to the applicants is unconscionable as they will be rendered homeless if the property is sold. Though they did not comply strictly with the order, they made payments as best they could and only ask that the justice of the case be considered in granting leave to oppose the sale, to save their home.

[47] Ms Chambers argued that once the applicants breached the order the respondent became lawfully entitled to enforce judgment through seizure and sale of the property. When the writ of execution was filed, the applicants were liable to pay the full balance of the debt which still remains outstanding. Counsel contends that Article 562 of the CCP deals with opposition to payments after a sale and it is at that stage that quantum will be addressed. Counsel also says a dispute relating to quantum is not a ground for opposing the sale, the applicants have not advanced any valid reason for opposing the sale and the respondent remains well within its right to pursue enforcement.

[48] In response Mrs Harris stated that Article 562 does not assist as it does not remove the prejudice to the applicants of losing their family home, if the property is sold.

Discussion

[49] Article 513 provides that the Sheriff is not to stop a judicial sale except by consent of the judgment creditor or an order of the court permitting the filing of an opposition accompanied by the requisite affidavit. Article 521 relates to oppositions by a third party to secure a charge over the property in his/her favour and is entirely irrelevant to the circumstances of this application. The applicants are not third parties and there is no evidence that the property is subject to any charge other than the hypothecs under which the judicial sale is being exercised.

[50] The more applicable provision is Article 519, which states:-

> ***"The party whose immovables or rents are seized may oppose the seizure or the*** *sale thereof, whether his or her opposition be founded on matters of form or on* ***matters of substance."***

[51] As it relates to form, Article 499 provides that seizure of immovables can be made by virtue of a writ, clothed with the same formalities as writs of execution against movables, ordering the Sheriff to seize and sell the immovables in satisfaction of the judgment for principal, interest, and costs. It requires that the date of the judgment be certified upon the writ, under the signature of the Registrar. Article 500 requires that the writ be addressed to the Sheriff and executed by him or one of his officers. The writ must be made returnable within 4 months from its date of issue and according to Article 502 seizure must be recorded by minutes which must contain specified information. Article 511 requires the Sheriff to advertise the sale of the immovables seized, in the Gazette, three separate times within 2 months from the date of the first publication and the advertisement must also contain specified information.

[52] As to form, the applicants complaint is this:- ***"The sheriff has by notice in the Saint Lucia*** *Gazette of Monday, 19th July 2004 published that the Property will be put up for sale on*

Wednesday 20 October at 10 o'clock in the forenoon and that the notice advertised did not *mention the judicial hypothec placed on the property in favour of the Opposants and nor was an upset* ***price fixed for the sale of the Property."***

[53] The applicants have not provided any evidence of the alleged publication. The respondents say that publication of the sale has not been advertised and there is nothing to suggest that it has. What is glaring is that the information predates even the filing date of the claim itself and can only be considered erroneous. Article 511 sets out the matters to be contained in the advertisement and information concerning judicial hypothecs registered over the property is not a requirement. This complaint is not a ground for opposing the sale.

[54] Regarding the compliant that no upset price has been fixed, Article 511A of the CCP makes provision for fixing an upset price **":.......***on an application made by the judgment creditor, notice of which shall b****e served on the judgment debtor……..".*** The right to apply is therefore that of a judgment creditor, the respondent.[25] The requirement is not mandatory and simply sets the minimum price for which the property may be sold, to ensure that the judgment creditor is able to recover the full amount of the debt.[26] The respondent has in fact filed the application and the applicants have opposed the proposed value. A judicial sale may proceed without an upset price and the Sherriff is not authorized to stop the sale if one is not set. This not a reason for opposing the sale.

[55] As to substance, the applicants allege that the sum stated in the writ is incorrect because it does not reflect payments made since the judgment. The law only requires that the date of the judgment be inserted or certified upon the writ. On the evidence the total debt inclusive of interest stood at $370,824.71 on 21st January, 2019 and has exceeded the original sum stated in the judgment. Furthermore, interest continues to accrue on the principal balance. In my view the quantum of the debt as stated in the writ of execution is not a matter of import which would entitle the applicants to oppose the sale. I agree that the issue of

[25] Laborie Cooperative Credit Union v Peter Emmanuel Civil Appeal No.4 of 2007
[26] First National Bank Ltd. v Paul Eloise SLUHCV2006/0045; First Caribbean International Bank (Barbados) Ltd v Jacob Morille SLUHCV1994/0432, delivered 17th September 2004

quantum affects collocation and distribution of the proceeds under Article 562. It is clear that the current debt exceeds the sum stated in the writ of execution and that complaint is not a sustainable ground for opposing the sale.

[56] The applicants continue to repeat their complaint in relation to the interest rate, but having agreed to repay the debt at the rate of 7.99% in the hypothec and subsequently in the consent order, they cannot now dispute that rate. The same challenge was raised in the defence to the claim and the issue has been settled between the parties. There is no basis on which the interest rate can be successfully challenged and it is not a ground for opposing the sale.

[57] It must be noted that the applicants freely mortgaged their family home as collateral for the loan. A primary consideration would have been that in the event the debt was not repaid the home would be put up for sale. This contemplates that the respondent has a right to foreclose, in the manner permitted by law, to satisfy the unpaid debt. The applicants always stood to lose their family home once the loan remained unpaid. That was part of the bargain they accepted for the borrowing, in-keeping with the requirements of the mortgage industry. Whilst their circumstances are indeed unfortunate, that does not preclude the respondent from enforcing judgment. I agree that the application for leave to oppose is more akin to efforts at retarding the sale, rather than seeking justice. It is tantamount to asking the Court to restrain the respondent from pursuing a lawful right, in circumstances where sale of the property may be the only viable remaining option for recovery of the debt.

[58] The applicants have not shown any reason in substance, form or otherwise which would disentitle the respondent from proceeding with the sale. I therefore conclude that the application for leave must fail.

Is the application to fix the upset price a nullity?

[59] The applicable law is found at Section V of the Second Chapter of the CCP from Articles 499 -605 and Part 46 of the CPR.

[60] Article 499 states:

> *"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 immoveables of the defendant and to sell them in satisfaction of the judgment pronounced against him for principal, interest and costs."*

[61] Article 500 of the CCP provides that:

> *"The writ is addressed to the Sheriff and is executed by the Sheriff himself or by one of his officers. It must be returnable on a day certain within four months from its date except in cases where the immovable is of no greater value that two hundred and eighty-eight dollars."*

[62] Article 511A of the CCP stipulates the procedure for fixing the upset price and it states:

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

[63] CPR 46.1 of the CPR provides that:

> *"In these rules "writ of execution" means any of the following:*
>
> *(a) an order for the sale of land (or in Saint Lucia, a writ for the seizure and sale of immovable property);…"*

[64] CPR 46.10 says that "*a writ of execution is valid for a period of 12 months beginning with the date of its issue. (2) After that period the judgment creditor may not take any step under the writ unless the court has renewed it."*

[65] On this issue, the applicants argue that merely filing a writ of execution is not a basis for filing an application to fix the upset price. It is the issuance of the writ and seizure of the property which sets the platform and gives validity to such application. Hence, it was improper and unlawful for the respondent to file this application before the writ was issued and the property seized.

[66] Mrs Harris submits that the scheme of Section V which is **entitled** "*The Seizure of Immovables in Execution*" **is** designed to bring about a significant alteration in the proprietary rights of a judgment debtor, after issuance of a writ of execution and seizure of the property. The writ must be filed, then issued, followed by seizure of the property and then followed by the filing of an application to fix the upset price. The chronological procedure must be followed in order to validate any of the steps taken under these provisions.

[67] Mrs. Harris argued that prior to seizure a judgment debtor continues to enjoy all proprietary rights but in a lawful seizure, a judgment debtor is stripped of possession. If the process which strips away the proprietary right of the judgment debtor is not adhered to, the seizure will be a nullity. It is only after seizure has taken place that a judgment debtor is restrained from alienating the property and has very limited rights as demonstrated in Articles 504 to 509. For instance, Article 509 prohibits the cutting of timber or the deterioration of the property and infringement attracts a term of imprisonment by order of a judge.

[68] Counsel relied on the decision of this Court in First Caribbean International Bank (Barbados) Limited v Praise and Worship Tabernacle Inc.[27] in support of the applicants position and says unless a writ is issued and the property seized there can be no authority to fix an upset price. This accords with the express wording of Article 511A where it states that an upset price may only be fixed for property '*seized*' by the Sheriff.

[69] Ms Chambers does not dispute the purpose of the scheme set out in Section V, but submits that it speaks primarily to seizure of the property and dismantling the rights of the

[27] SLUHCV2009/0498 delivered on 21st March, 2018

judgment debtor. Articles 408 - 510 which deal with the process for seizure, address these rights and make no mention of an upset price. It is only after Article 511 outlines the information to be contained in the advertisement, which includes the upset price if one has been fixed, that Article 511A speaks to fixing such price.

[70] Counsel submits that a **rigid interpretation of the word "*seized*"** in Article 511A brings about an absurd and impractical result because when the writ is issued it is made returnable within 4 months of the issue date[28], and within that time the Sheriff must advertise and conduct the sale within 2 months of seizure. Judgment creditors usually experience several constraints in fixing the upset price within that time, to facilitate the advertisement. Counsel says the impracticality comes about because there is no statutory requirement for notifying the judgment creditor of the date that the writ is issued or the date that the property is seized. Moreover, the court's schedule does not generally accommodate applications within such a short time and once the application is listed it must be served on the judgment debtor. Service may be prompt but it may also be that a judgment debtor cannot be located or is out of state. In such a case service is by way of notices published in the Gazette or newspaper, which takes time. The judgment debtor must be given an opportunity to be heard if the proposed value is opposed and that process also takes time. In most cases these steps are not concluded within the 2 month period between seizure and sale.

[71] To avert this Ms Chambers contends that the application may be filed and determined before or after the property is seized, without any prejudice to the judgment debtor. If the upset price is not set within the 2 month window there is a real risk of the property being sold at an undervalue, as there is nothing to prevent a bidder from offering any value, at the sale. Should that happen, a judgment debtor is still liable for the remainder of the debt and the judgment creditor must incur further cost and time, in seeking to enforce the balance due on the judgment. Whilst this is of some prejudice to a judgment creditor, a judgment debtor faces even greater prejudice, having to settle the balance of the debt which may be substantial, if the property sells at a value insufficient to liquidate the debt.

[28] See Article 500 of CCP

[72] Ms Chambers contends further that issuance of the writ and seizure of the property has no bearing on the application to fix the price, which is collateral to but not necessary for seizure or sale. It is an unimposing application which does not limit or interfere with the proprietary rights of the judgment debtor and the only factor considered is the value of the property. Hence the need for valuation reports and the judgment debtor has the opportunity to present a valuation or otherwise engage in the process. The upset price only serves a purpose if and when a judicial sale takes place and the sale is discontinued once the debt is paid off. Thus, the applicants have ample opportunity to save the property by paying off the debt.

[73] Counsel argued that a judgment creditor may decide to forego fixing an upset price or the judge or registrar may not fix one. If no application is made and no price is fixed, the sale must still continue. It is therefore a discretionary right which has no bearing on what takes place during seizure and fixing the price at any time after the writ is filed does not offend the proper procedure for seizure. Instead it assists the parties in securing a viable sale.

[74] Ms Chambers urged that the purposive approach and presumption against absurdity be applied to the interpretation of article 511A, to include property "*to be seized*", within the ambit of this Article. This would achieve the legislative intent of the provision, which is to permit a judgment creditor to protect the efficacy of a sale, by securing a minimum price. To maintain a strict interpretation would lead to an absurd and unjust outcome for both parties, with greater prejudice to the applicants who are duty bound to pay the debt. She referred to the case of Lennox Linton v Attorney General of Antigua & Barbuda among others, where the courts have recognized that rules of statutory interpretation are designed to assist in addressing instances where the provisions of a statute may result in absurdity and inconvenience, to ensure that the intention of a statute is achieved. In the majority of cases, the intent of Article 511A would not be achieved because it has become impractical to file the application and complete the process of fixing the price, within the prescribed time. The difficulties in the process must be taken into account when considering the interpretation of Article 511A.

[75] Counsel further stated that First Caribbean International Bank (Barbados) Limited v Praise and Worship Tabernacle Inc. does not assi**st the applicants'** as the outcome in the case hinged on a writ which was invalid, thus everything which flowed from that writ was also invalid. In the present case the writ of execution was properly filed, having obtained judgment a mere 9 months prior.

[76] In response, Mrs Harris says the ruling in the Lennox Linton case is apposite to the **applicants' case as it** emphasizes that a statute must be read as a whole in seeking to resolve a perceived absurdity. The provisions of Section V serve one purpose which is to alienate the rights of the judgment debtor to satisfy the judgment debt and the application contemplates that a judgment debtor would have already been deprived of these rights before a judgment creditor steps in to fix the upset price. The application cannot be considered in isolation to the scheme of Section V and there is no justification to warrant a departure from the natural and ordinary sense **of the word "*seized*"** .

Discussion

[77] Article 511A intends that an upset price be fixed for immovable property seized by the Sheriff. Applying the natural and ordinary meaning to the w**ord "***seized***"** it is clear that it is used in the sense of having detained, having possession of, or exercising control over, and connotes an act which has occurred. The price must therefore be fixed after the property has been seized.

[78] Article 511A does not expressly state when the application is to be filed, but it is implied that since it deals with the sale of the immovable property after seizure, it should be made after the property is seized. Nonetheless, it is evident that there are several factors which affect the listing of the application for hearing, service of the application on a judgment debtor, and disposal of same within the 2 month period between seizure and sale.

[79] In determining whether the word **"***seized***"** should be given a wider meaning for filing the application, I ask myself what purpose does the application serve and whether any party stands to be prejudiced if it is filed at the same time as the writ of execution. I agree with

Ms Chambers that the application is unimposing and does not affect any proprietary or other legal right of the judgment debtor. All that it does is alert the court office and the judgment debtor that the judgment creditor intends to fix a minimum price for which the property could be sold.

[80] The application must be served on the judgment debtor who has the right to oppose the proposed value or seek leave to oppose the sale itself. If the sale proceeds without a price and the property is sold below the threshold of the debt, the judgment debtor will be burdened with having to pay the balance of the debt, in circumstances where the property could have been sold at a fair value to relinquish the debt. The judgment creditor would also be left with the added cost of having to pursue further enforcement proceedings to recover the balance of the debt. There is no prejudice to the judgment debtor, who has the opportunity to engage in fixing the price ahead of the sale.

[81] I then contrast this with the restriction of operating within the 2 - 4 month window in which the property must be seized, advertised and sold with or without the upset price. The greater detriment is to the judgment debtor who runs the risk of the property being sold below value if a minimum price is not fixed by the time of the sale. The upset price protects the interest of both parties by ensuring that the price offered by bidders is at least commensurate with value of the property and sufficient to liquidate the debt, and in this way averts a sale which may leave a significant portion of the debt unpaid.

[82] Section V does not expressly state when the application should be filed and I note the practice by legal practitioners to file the application along with the writ of execution. In my view it is a practical step once a judgment creditor intends to pursue this method of enforcement and the writ is properly filed. I say so having taken into account the limited time for fixing the price within the window set by Article 500, the silence of Article 511A in terms of the time for filing and the ability of the court office to schedule a pending application immediately upon seizure. If a judgment creditor is clothed with the ability to file a writ, filing the application at the same time does not offend any rule or the scheme of Section V. It is only that the application should not to be considered before the property is

seized. The practice of the court office is to schedule the application for hearing, after the property has been seized and this conforms to Article 511A.

[83] In this case the writ was filed well within 6 years of the date of judgment and on this issue alone it is to be distinguished from First Caribbean International Bank (Barbados) Limited v Praise and Worship Tabernacle Inc. et al. In that case the writ was irregular, having been filed after 6 years had elapsed from the date of judgment, without obtaining permission as required by CPR 46.2(c). Consequently, the writ and everything connected to it, including the application to fix upset price, were considered nullities. In the present case the writ was properly filed within the period for which permission is not required and in such circumstances I do not consider the early filing of the application to be fatal. I therefore conclude that the application to fix the upset price is not a nullity.

[84] The writ was issued by the court office on 2nd November, 2018 and the property was seized by the Sheriff on 13th November, 2018. The application was properly listed for first hearing on 20th December, 2018 after seizure. In these circumstances it would not be necessary to consider a departure from the ordinary meaning of **the word** "*seized*" in order to deal with the application.

The Upset Price

[85] Having ruled that the application was validly filed and scheduled for hearing at the appropriate time, I now address fixing the upset price for sale of the property, noting that the writ issued on 2nd November, 2018 is still within the 12 month period within which the respondent may continue to take further steps.

[86] The applicants have presented a valuation[29] which assessed the market value of the property as $717,725.00. They contend that it would be prejudicial to them to have the price set below this value as they will recover a much lower sum, after the requisite payments are deducted.

[29] See Exhibit MJW1

[87] **The respondent's valuation on the other hand assessed the** market value as $642,315.00.[30] It gives a building size of 1937 square feet whereas the **applicants' i**s 1907 **square feet. The respondent's valuation makes pro**vision for depreciation at 12%, for which **the applicant's valuation** makes no such provision. The app**licants' valuation includes a** component called **"facilities"** which is valued at $60,000.00 which is not included in the **respondent's.** Both valuations state the replacement price per square foot as $25.00 for the land and $250.00 for the building. Interestingly the forced sale value is assessed at $575,000.00 in both valuations. In my view, these differences are insignificant having regard to the components which account for the disparity in values. I believe that fairness will be achieved if the price is set midway of the two values. I am inclined to fix the price at $680,020.00 and will so order.

Conclusion

[88] In light of the foregoing, I make the following orders:-

(1) The defendant**s'** applications are dismissed.

(2) The application to fix upset price is granted and the upset price in the sum of $680,020.00 is hereby fixed for the judicial sale of Parcel No. 1254B 290, the property of the defendants.

(3) Cost is awarded to the claimant in the sum of $1,500.00.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar

[30] See Exhibit BSV4