SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 2003/0444

BETWEEN:

HEIRS OF CAMSELLE ST. CATHERINE

Claimant

and

[1] DARIUS ST. CATHERINE
[2] ST. ROSE ST. CATHERINE aka ST. ROSE CAMSELLE
[3] REGINA ST. CATHERINE aka CATHERINE CAMSELLE
[4] SEMEPHER ST. CATHERINE aka SEMEPHER CAMSELLE
[5] PATRICK SMITH

Defendants

Appearances:
Lydia B. Faisal for Claimant
Kim St. Rose for 1st and 2nd and 4th Defendants
Dexter Theodore and Alberton Richelieu for 5th Defendant

2010: January 22;
March 22.
2011: January 20

JUDGMENT

Background

[1] GEORGES, J.(Ag): This is a claim by the claimant for improbation of a Declaration of Succession registered as Instrument No. 2071/2000 and every deed of sale executed by the 1st, 2nd, 3rd and 4th named defendants or alternatively an account in respect of any property sold. Consequent upon the death of the 3rd

named defendant on 18th February 2001 the action against her was discontinued on 5th February 2004.

[2] By notice of application dated 21st January 2004 the claimant applied to the court pursuant to Rule 12.10(4) of the Civil Procedure Rules (CPR) for default judgment against the 1st, 2nd and 4th named defendants in such form as the court considered the claimant entitled to on the statement of claim. The defendants it was averred in the affidavit in support having been duly served with the claim form had failed to enter either an acknowledgment of service or a defence.

[3] Upon the application coming on for hearing on 10th March 2004 and upon reading the affidavit deposed to by the claimant/applicant Ola Mae Edwards J (as she then was) ordered that:-

(1) The Declaration of Succession registered as Instrument No. 2071/2000 be improbated.

(2) The Deed of Sale executed by the defendants in favour of Patrick Smith be improbated.

(3) Costs in the sum of $6,300.00 to the claimant be paid by the 1st, 2nd and 4th defendants.

The defendants for all intents and purposes had apparently chosen not to defend the claim.

[4] Subsequently the 5th named defendant (Patrick Smith) on 1st October 2008 successfully applied to Justice Brian Cottle to be joined to the proceedings and duly filed an ancillary claim form and statement of claim on 24th October 2008 which were served on the defendants.

[5] In this he applied for an order to vary the judgment/order of Madam Justice Ola Mae Edwards dated 10th March 2004 by deleting paragraph 2 thereof relating to

the improbation of the Deed of Sale. Although that paragraph was deleted from the order paragraph 1 by which the Declaration of Succession had been improbated remained in full force and the registration of that Declaration of Succession was later cancelled and a new Declaration of Succession dated 23rd March 2007 supplanted it and is registered as Instrument No. 2083/2077 by which the estate of the late Camselle St. Catherine was presumably then in the name of the rightful Heirs of Camselle St. Catherine.

[6] The defendants to the ancillary claim duly filed their defences and witness statements were filed and served by all parties.

[7] By notice of application made pursuant to Part 11 of the CPR and filed 30th October 2009 the claimant's attorney applied to the court for the following declarations and orders namely:

(1) That there is an existing order of the court in claim SLUHCV 2003/0444 made on the 10th day of March 2004.

(2) That by virtue of the order entered in Claim SLUHCV 2003/0444 on the 10th day of March 2004, which has not been appealed or set aside by the Court of Appeal, the issues in the claim are res judicata and cannot be reopened for trial.

(3) Any further litigation in Claim SLUHCV 2003/0444 be stayed until the order of March 10th 2004 is set aside on appeal.

The claimant filed a 16-paragraph affidavit in support of the application.

[8] Written submissions and legal authorities as well as skeleton arguments were filed and exchanged by counsel towards the end of November and early December 2009. On 11th December 2009 on the claimant's application to stay the present proceedings it was agreed that counsel would make oral submissions on Friday 22nd January 2010 based on their written submissions and legal authorities the

outcome of which would determine whether the trial fixed for 24th and 25th March 2010 would proceed.

The Issues

[9] Broadly speaking the issues which fall to be determined may be summarized thus:

(1) What is the effect of the order of Madam Justice Ola Mae Edwards made on 10th March 2004?

(2) Whether the order of Justice Brian Cottle made on 1st October 2008 is capable of revoking the order of 10th March 2004, that said order having by then been fully executed?

(3) Whether the 5th named defendant (Patrick Smith) invoked the correct procedure when he applied firstly to be added as a defendant to these proceedings and secondly to vary the said order dated 10th March 2004 by deleting paragraph 2 which improbated the Deed of Sale that had been executed by the defendants in his favour and substituting therefor an order that he be at liberty to file a defence?

[10] Learned counsel for the claimant submitted that the main objects of the Order made by Madam Justice Ola Mae Edwards were:

(1) To set aside and improbate the Declaration of Succession registered as Instrument No. 2071/2000, which contained fraudulent misrepresentations as had been pleaded by the claimant.

(2) To set aside and improbate the Deed of Sale to the 5th defendant, which originated from the said fraudulent Declaration of Succession.

(3) To return the lands which were the subject of the abovementioned Declaration of Succession and the Deed of Sale to the rightful proprietors "Heirs of Camselle St. Catherine".

[11] Learned counsel further submitted that since the order of March 10th 2004, the two fraudulent instruments which infringed the rights of the heirs are no longer in existence. The land now vests in the rightful owners – Heirs of Camselle St. Catherine. The said order of March 10th 2004 has therefore been given full effect and is no longer pending execution.

[12] Despite the order of Justice Cottle made on 1st October 2008, the court ought not to proceed upon an error counsel submitted whereby the claimants and the defendants are being made to re-litigate the matters between them that have already been litigated adjudicated upon and executed. To do so learned counsel argued would violate the express statutory provision of Article 1171 of the Civil Code which states that:

> "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 of parties acting in their same qualities and for the same thing as in the action adjudged upon."

[13] The fact that the 5th named defendant was not a party to the litigation did not negate the presumption counsel contended as the claimant- and the defendants would inevitably have to revisit/relitigate the closed and settled issues. Examination of the witness statements reveal that all of the matters that were before the High Court are again being revisited, learned counsel pointed out. The principle of res judicata prevents the re-litigation of such matters counsel submitted.

[14] By notice of application made on 3rd June 2008, the 5th defendant applied to the court pursuant to Parts II and 13 CPR for the following orders namely:

(1) That he be added as a defendant to the action;

(2) that the order dated 10th March 2004 be varied by deleting paragraph 2 and substituting an order that he be at liberty to file a defence;

(3) inhibiting until further order any dealing with Block 122B Parcel 68.

[15] In response Justice Cottle ordered that:

(1) The application be granted and;

(2) leave be granted to Mr. Patrick Smith (i.e. the 5th defendant) to file and serve defence by 24th October 2008.

[16] Whatever the effect of the order learned counsel submitted it certainly did not have the effect of reversing the entry on the Land Register for Block 122B Parcel 68 of the Heirs of Camselle St. Catherine as proprietors thereof pursuant to the order of 10th March 2004. The said lands remained in the name of the Heirs of Camselle St. Catherine, counsel contended and in order to rectify the Land Register, the 5th defendant would have to satisfy the court that the registration of the Heirs of Camselle St. Catherine as owners had been obtained or made by fraud or mistake pursuant to section 98 (1) Land Registration Act Cap. 5.01 of the Revised Laws of St. Lucia. I fully agree.

[17] No such evidence had been put before the court by the claimant/applicant, Patrick Smith on 1st October 2008, when Justice Cottle made the order and indeed the court made no pronouncement regarding rectification of any land register. And the land register could only have been rectified if the order of 1st October 2008 had specifically so directed which was not the case. Hence the exclusion of paragraph 2 from the order of 10th March 2004 after it had been executed is of no effect on the rights of the Heirs of Camselle St. Catherine on Parcel 68.

[18] By seeking as it were to re-open the case on the basis of an order which does not specifically authorize it, learned counsel declared that the 5th defendant would be

proceeding in error of fact law and procedure and should not be permitted to do so. Since there was an existing order of the court in force in claim SLUHCV2003/0444 made on 10th March 2004 (by Justice Ole Mae Edwards) which had not been appealed or set aside by the Court of Appeal and the issues of which were res judicata any further litigation in the said claim ought to be stayed until the order of 10th March 2004 was set aside on appeal.

[19] Counsel for the 1st, 2nd and 4th defendants supported the application.

[20] Chronologically Mrs. Lydia Faisal, counsel for the claimant explained that the initial action had been discontinued against the 3rd defendant who had died on 18th February 2001 and she had been removed from the record a long time ago.

[21] By order of the court dated 10th March 2004 the claimant was granted improbation of a declaration of succession registered as Instrument No. 2071/2000. She was also granted improbation of a Deed of Sale to Patrick Smith based on the Claimant's allegations of fraud and was awarded costs of $6,300.00. This counsel maintained was not a default judgment. It was she declared a judgment entered by the court after examination of the claimant.

[22] About two to three years after that judgment was entered the 5th defendant (Patrick Smith) alleged that he had heard about the judgment in 2006 to 2007. According to the claimant's affidavit, meetings were held at Messrs McNamara's offices between the claimant (represented by Agatha Jules) and the representatives of the 5th defendant (Patrick Smith) to renegotiate the repurchase of the property. That fell through and an application by way of petition was subsequently made on 3rd June 2008 on behalf of the petitioner seeking to add the 5th defendant as a party to this claim which as has been seen, had already been adjudicated by Justice Ola Mae Edwards on 10th March 2004.

[23] On 1st October 2008, Justice Brian Cottle granted the application to join the 5th defendant as a party to that suit and to file and serve a defence by 24th October 2008 – some four years after the judgment of Justice Ola Mae Edwards. That judgment was never appealed or set aside. And although paragraph 2 of the order was varied by deleting the paragraph relating to the improbation of the Deed of Sale by the (presumed) Heirs of Camselle St. Catharine to Patrick Smith, paragraph 1 by which the Declaration of Succession was improbated remained in force and the registration of that declaration of succession is now cancelled, no longer exists and a new declaration of succession dated 23rd March 2007, now exists registered as Instrument No. 2083/2007 by which the estate of the late Camselle St. Catherine is at present in the name of the rightful heirs of Camselle St. Catherine.

[24] As Ms Kim St. Rose, counsel for the 1st, 2nd and 4th defendants aptly put it in her oral and written submissions it is against that background that the court and the parties find themselves on the cusp of another trial of the very same issues previously decided by Edwards J (as she then was). For although each of the parties has taken steps in compliance with the directions given by the court at case management conference on 26th January 2009, it has since become apparent that to proceed to trial would inevitably entail re-litigation of the matter and hence the present application by the claimant for declarations that the issues in this claim are res judicata cannot be reopened and that the trial ought therefore to be stayed until the said order is set aside on appeal.

[25] I fully agree on the ground that by virtue of the evidence which the court accepted prior to making this said order the 5th defendant is estopped from defending the matter at this point in time on the grounds on which he has chosen to rely for to do so would clearly and inevitably necessitate a decision on the factual issues most of which have already been determined by the court in arriving at the decision to improbate both deeds.

[26] Learned counsel posited that if the improbation of the declaration of succession stands as it must and does – the court having heard evidence in this case and found that both documents (the declaration of succession and the deed of sale, the latter of which had already been cancelled in the land registry) of what value can the deed of sale be premised as it is on the false declaration of succession with or without a trial – since nemo dat quod not habet. The answer is a resounding none whatsoever.

[27] Counsel further posited whether a trial could proceed against the 1st, 2nd and 4th defendants in a matter in which a judgment against them improbating the Declaration of Succession has already been given, the court having heard evidence showing that some of the said defendants did not execute the relevant documents with full knowledge of the facts and in fact two of them did not execute it at all as alleged in both Deeds? Further, can the 5th defendant now seek to recover damages for a fraud to which he is a party, whether actual or imputed? Can he in these circumstances claim to be a bona fide purchaser for value without notice? The answer is obviously no.

[28] Whilst by virtue of the Land Registration Act, counsel acknowledged that a purchaser may not be obliged to enquire into the circumstances in which the defendants came to be registered, this could scarcely hold where there is fraud of which the purchaser is/was aware and his averment of good faith could surely not hold in light of the fact that his solicitor was fully aware of the falsity of both the Declaration of Succession and the Deed of Sale which knowledge would at the very least be imputed to him on the authority of Sir Nicholas Browne-Wilkinson VC's judgment in Strover and Another v Harrington and Others [1988] 2WLR 572 at page 586 paragraphs E and F where the Vice Chancellor declared:

> "In this, as in all other normal conveyancing transactions, after there has been a subject to contract agreement the parties hand the matter over to their solicitors who become the normal channel for communication between vendor and purchaser in all matters relating to that transaction. In so doing, in my judgment the parties impliedly give actual authority to those solicitors to receive on their behalf all relevant information from the

> other party relating to that transaction. The solicitors are under an obligation to communicate that relevant information to their own clients. At the very least, the solicitors are held out as having ostensible authority to receive such information. Whether there be express or ostensible authority, the purchaser is in my judgment estopped from denying that he received the information relating to the transaction which has been communicated to his solicitors acting in the same transaction. In my judgment, such knowledge should be imputed to the principal."

[29] Quite apart from that the 5th defendant was present when the Deed of Sale was executed. If he was indeed present he would have been aware that neither the 3rd nor the 4th defendant was present at the execution of the deed.

[30] While the 5th defendant's claim now appears to be based on being a bona fide purchaser for value without notice of the fraud which issue has not been specifically litigated before – because of the findings already made by the court and in particular with the involvement of the Notary who executed the deed of sale - that issue had practically been decided by the court even if not in specific terms as such. Therefore it is not open to him to maintain that he is a bona fide purchaser for value without notice.

[31] Cottle J's order dated 1st October 2008 granted the 5th defendant's application to set aside the deed of sale but the order in that format would be incapable of achieving this if presented to the Land Registry. And whilst there may be other tangential issues which the court has not decided the fact that it has made other findings – specifically on the issue of fraud – is at odds with the 5th defendant's position and the court cannot now come to a different conclusion.

[32] For although it is doubtless true that this matter has erroneously been permitted to proceed to the point which it has, it is clear that the way forward would inevitably entail relitigation of the issues which would to my mind justify this court granting the stay sought by both counsel for the claimant and the 1st, 2nd and 4th defendants.

[33] In opposing the stay Mr. Alberton Richelieu for the 5th defendant contended that the application by the claimant was essentially based on the principle of res judicata which enjoins that the same issues between the same parties must not be relitigated and went on to point out that the 5th defendant was not in fact a party to the initial proceedings. Res judicata which he submitted is rooted in public policy and dictates that the same issues between the same parties ought not to be relitigated and so a person in the position of the 5th defendant who was not a party to the initial proceedings and was not duly served and who has an interest in the said proceedings should not to be shut out from bringing a genuine claim if he applies to be joined as a party in those initial proceedings.

[34] The principle of res judicata counsel added was declared in Artcle 1171 of the Civil Code (set out at paragraph 12) and referred to Article 381 of the Civil Code of Procedure which stipulates that:

> "Any person whose interests are affected by a judgment rendered in a case in which neither he nor persons representing him were made parties, may file an opposition to that judgment."

Cottle J proceeded to set aside the judgment of the Claimant in favour of the 5th defendant without any objection being raised regarding the manner/procedure in which he had approached the court. Nor was the judge's jurisdiction to entertain the application questioned. Nor was his decision appealed counsel pointed out.

[35] The question which arises is whether it was open to Cottle J as a judge of coordinate jurisdiction with Justice Edwards to vary or set aside her order of 10th March 2004. Mr. Richelieu submitted that the judgment of Edwards J was not a final judgment because it had not been determined on the merits and so was a default judgment. Counsel for the claimant and the 1st, 2nd and 4th defendants contended otherwise. As I see it and have so indicated earlier I am fully satisfied that Edwards J could only have entered judgment for the claimant and made the orders which she did on the basis of evidence adduced before her – that is on the merits of the case which would have been a final judgment on the merits and not a

default judgment as Mr. Richelieu contends. The point is well illustrated by Lord Millett in Privy Council Appeal No 22 of 2004 in Leymon Strachan v The Gleaner Company Limited and Dudley Stokes at paragraphs 15-16 where the learned law lord declared in paragraph 16:

> "…once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing: see Pugh v Cantor Fitzgerald International [2001] EWCA Cir 307 citing Lunnon v Singh (unreported) 1 July 1999 EWCA. If he wishes to do so, he must appeal or apply to set aside the judgment, while it stands the issue of liability is res judicata."

Mutalis mutandis while the judgment of Edwards J stands the 5th defendant must appeal or apply to set in aside since the issue of fraud is and remains res judicata.

[36] In all the circumstances of this case therefore there is in my view no justifiable reason why the claimant should be refused a stay of these proceedings and afford the 5th named defendant an opportunity "to show cause" why the Deed of Sale ought not to have been improbated premised as it is on a declaration of succession which is itself fraught with fraud and has been improbated and supplanted.

[37] Mr. Dexter Theodore also counsel for the 5th defendant filed a list of five authorities three of which I have perused with consummate interest and have found to be helpful. I refer to the Malaysian case of Bernad v Abdullah delivered 12th May 2009 on the issue of res judicata. Then there was Noellina Maria Prospere (née Madore) v Frederick Prospere and Jennifer Remy Privy Council Appeal No. 18 of 2005 and Strachan v The Gleaner Company Limited and Anor Privy Council Appeal No. 22 of 2004 to which I have earlier adverted.

[38] In his written submissions Mr. Theodore wrote that the existing order was that the declaration of succession be improbated and that part of the order of 10th March 2004 improbating the deed of Patrick Smith had been set aside. It did not follow he argued that because the declaration of succession was improbated that the deed of sale which was executed when it was still extant is ineffectual.

[39] Reference was made to section 38 of the Land Registration Act Cap. 5.01 subsection 1(a) of which declares that a person dealing or proposing to deal for consideration with a proprietor shall not be required to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered but subsection 3 itself states that nothing in this section shall relieve a purchaser in good faith and for consideration of his obligation to search the Register.

[40] As the evidence shows the issue of Imputed fraud looms large in that transaction and it is the claimant's case that the 5th defendant cannot maintain that he is/was a bona fide purchaser for value. And although he was not a party to the proceedings of 10th March 2004 his legal practitioner was central to it in circumstances where his knowledge and involvement could clearly be imputed to him and he as a result would be inextricably bound.

[41] Mr. Theodore went on to rely on paragraph 19 of the judgment of Lord Bingham who delivered the opinion of Her Majesty's Board in Noellina Maria Prospere Nee Madore v Frederick Prospere & Jennifer Remy Privy Council Appeal No. 18 of 2005 thus:

19. The effect of the Court of Appeal's judgment in the first action was to set aside the judge's declaration that the deed of sale was null and void, and thus to leave the deed of sale unchallenged on the register. But even if it be assumed (despite the narrow basis on which it was put) that the judgment resolved the issue of title to the land, it did so only as between Ms Remy and Mr. Prospere. Mrs. Prospere was not a party, and there is nothing to suggest that Mr. Prospere was acting on her behalf or with her authority. It follows that she was not bound by that judgment and cannot be prevented by it from pursuing her claim to the land in a later action, however illogical that conclusion may appear. She could have applied to be joined in the first action, as Ms Remy did in the third. There is no reason to question the finding of the judge, quoted above, that Mrs Prospere was fully alive to the

proceedings. But she was not a party or represented, and that is fatal to a plea of res judicata based on that judgment.

[42] The circumstances of that case are in my view different and therefore distinguishable from the instant case and this is precisely why Her Majesty's Board went on to say that on this point it respectfully disagreed with the courts below which based their decisions on the fundamental principle of res judicata.

[43] And I certainly do not share the view put forward by Mr. Theodore that the issue of imputed fraud was one for determination at the trial as this had already been decided and the 5th defendant would be estopped per rem judicatum from pleading or re-litigating it. The public policy of the law is that it is in the public interest that there should be finality in litigation – interest rei publicae ut sit finis litium.

[44] Learned counsel further contended that the judgment of Justice Ola Mae Edwards dated 10th March 2004 had not been determined on the merits. As indicated earlier I incline to the view advanced by 1st, 2nd and 4th defendants that it was and so stands unless and until reversed or set aside by a court of competent jurisdiction. For without any doubt the issue of fraud lies at the heart of this matter of which the 5th defendant purchaser had knowledge and his averments of good faith cannot therefore hold in light of the fact that his lawyer was aware of the falsity of both the declaration of succession as well as the deed of sale which have been improbated and the latter since cancelled.

[45] For those reasons I grant the declarations and order sought by the claimant in the following terms, that is to say:-

(1) That there is an existing order of the court in Claim SLUHCV 2003/0444 made on the 10th day of March 2004.

(2) That by virtue of the order entered in Claim SLUHCV 2003/0444 on the 10th day of March 2004, which has not been appealed or set aside by the Court of Appeal, the issues in the claim are res judicata and cannot be reopened for trial.

(3) Any further litigation in Claim SLUHCV 2003/0444 be stayed until the order of March 10th 2004 is set aside on appeal.

Ephraim Georges
High Court Judge (Ag)