

IN THE COURT OF APPEAL

Civil Appeal No.9 of 1992

BETWEEN:

ALRIC C. HILLOCKS AGENCIES LTD.

Appellant

and

SAUNDERS INTERNATIONAL SALES CORP.

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice Dennis Byron J.A.
The Honourable Mr. Justice Satrohan Singh J.A.

Appearances: Mr. C. Dougan & Mr. D. Delves for the Appellant
Mr. H. Forde QC., Mrs. Hughes Ferrara, Mr. A.
Cummings for the Respondent

1993: April 7;
July 19.

JUDGMENT

BYRON J.A.

On 23rd September 1992 the learned Monica Joseph J. delivered a judgment granting leave to the respondent to ~~issue~~ a writ of possession against the appellant, ordering that arrears of rent assessed at \$80,000.00 for the period October 1991 to July 1992 and rent accruing up to the delivery of possession be paid out of funds paid into court, and dismissing the appellant's originating summons.

The appellant has appealed against that judgment on grounds now set out in full: -

- "(1) The learned trial Judge was wrong in Law in holding that the order of 20th November 1990 amounted to an order for sale rather than an order directing how an order for sale should be carried out.
- (2) The learned trial Judge erred in Law in holding that Solicitors could consent to the Sale of Real Property and in effect that there may be a consent order pertaining thereto.
- (3) The learned trial Judge was wrong in Law in holding that a consent order falls within the Provisions of Order 31 of the Rules of the Supreme Court 1970."

The background to this appeal was that on 1st December 1987 the respondent entered judgment in default of defence against the

appellant for US\$85,256.66 and \$60.00 for costs on a writ of summons claiming money due for hardware supplies. On 12th February 1990 the respondent issued a summons against the appellant praying for an order that: -

"the hereditaments and premises described in the schedule hereto be sold subject to all prior encumbrances (if any) in satisfaction of the judgment debt, interest and cost herein and that all necessary and proper directions be given for carrying out such sale and that the conduct of the sale may be committed to the plaintiff."

The parties appeared before Matthew J. on 9th November 1990 and consented to an order which was entered on 20th November 1990. That order contained, inter alia, the following provisions: -

"IT IS HEREBY ORDERED by consent that leave be granted and is hereby granted to the plaintiff to proceed with the sale of the hereditaments and premises as prayed for in the summons.

IT IS FURTHER ORDERED that the Solicitors of the plaintiff have the conduct of the said sale and that it be by private treaty or public auction."

On 17th May 1991 there was a further consent order for the delivery up of possession of the said premises within eight (8) weeks of the signing in court of the Certificate of Sale, and on default for the accrual of rent at \$8,000.00 per month to be paid to the owner of the said premises.

On the 19th July 1991 the Registrar of the High Court executed an Indenture of Conveyance evidencing the sale of the said premises to Square Deal Shipping Agency Limited for \$1,200,000.00, and on 24th July 1991 the Certificate of Sale was signed in court. The appellant never delivered up possession nor paid the rent and the respondent instituted proceedings for relief.

The appellant issued an originating summons against the respondent as first defendant and Square Deal Shipping Agency Limited as second defendant seeking the determination of the following questions: -

"(1) whether on a consent order for sale of land the party having conduct of the sale is bound to accept the highest offer.

(2) whether the salewas properly conducted.

And the plaintiff further seeks an order of the court that the aforementioned sale is null and void."

It is very significant that this appeal does not challenge any

ruling of the learned trial Judge with regard to the conduct of the sale or its validity. Instead it attacks her ruling on the validity of the consent order for sale, the argument being that if it was not a valid order for sale then the sale made under its purported authority must be rescinded.

The appellant was faced with two hurdles. In the first place he did not join Square Deal Shipping Agency Limited as a party to this appeal, nor serve it as a party interested.

Counsel for the respondent did not stand on his procedural objection that the failure of the appellant to join Square Deal Shipping Agency Limited as a party to the appeal or serve it with notice of appeal was fatal to the appellant's success. No doubt this was influenced by the court's power under Order 64 Rule 7 in a proper case to direct the service of the notice of appeal on proper parties and to adjourn the hearing in the meantime. It is nonetheless clear that the rules of natural justice, would not permit the court to make any order that would have the effect of nullifying the sale of the property and thereby destroying the rights acquired under it without hearing Square Deal Shipping Agency Limited, and any incumbrancer who may have been paid from the proceeds of the sale. The appellant, however, made no application to invoke the exercise of this discretion, and this was no doubt influenced by the submission of counsel for the respondent, that it would be futile to provide any such opportunity because the case of the *Bellcairn* [1885] Vol.X Probate Division p.161 is authority for the proposition that the court would not rescind a consent judgment if the effect would be to prejudice the rights of third parties.

In the second place the appellant has never instituted any proceedings to set aside or appeal against the consent order for sale and it has not been affected by any order of the court.

The effect of the authorities is that the court must enforce obedience of its order. It is pointless for the appellant to raise arguments as to the validity or invalidity of the order except in proceedings specifically brought to discharge it. In **ROBERTSON v ISAACS** [1985] 1 A.C. 97, the well known Privy Council decision emanating from St.Vincent and the Grenadines Lord Diplock affirmed the principle in these words: -

"The contrasting legal concepts of voidness and voidability form part of the English Law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or

regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies."

In that decision the forceful language of Romer L.J. in the English Court of Appeal case of **HADKINSON v HADKINSON** [1952] 2 All E.R. 567 at 569 was approved when he stated: -

"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 uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

The decisive effect of this learning applies with equal force to consent orders, whatever the category of consent, for the expression "by consent" is sometimes ambiguous as was explained in **SEIBE GORMAN & CO. LTD v PNEUPAC LTD** [1982] 1 All E.R. 377 at 380 by Lord Denning M.R.: -

"There are two meanings to the words 'by consent'. That was observed by Lord Greene M.R. in **CHANDLESS-CHANDLESS v NICHOLSON** [1942] 2 All E.R. 315 at 317, [1942] 2 K.B. 321 at 324. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the 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 altered or varied 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."

The need to discover the meaning in which the words by consent was used in this case would have been relevant, had there been an application to set aside, or vary the order and the court had to consider what method could be employed to effect that objective. In this appeal, however, we are not faced with any such application, the appellant, has merely questioned the ruling of the trial Judge that the parties were in fact bound by that "consent order". The answer is supplied by the words of Lord Blanesburgh in **KINCH v WALCOTT** [1929] All E.R. 720 at 725: -

"A party bound by a consent order, as was tersely

observed by Byrne J. in *WILDING v SANDERSON* [1897] 2, CH 544,

"must when once it is completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose."

In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the court; the second stands unless and until it is discharged on appeal. And this simple consideration supplies at once the answer to this appeal."

The effect of the authorities is that if there was an order for sale the appellant would be bound by it, and arguments as to its regularity or lack of it, its statutory basis or lack of it, the Solicitor's authority to consent or lack of it, can avail nothing because these proceedings were not instituted to set aside that order, and the court must compel obedience to it.

Counsel for the appellant submitted that the document on record was not an order for sale because: -

- (i) it was defective in form
- (ii) it could not be construed as an order for sale, and
- (iii) the subject matter of the order did not allow for consent by Solicitors.

The objection to form was that the consent order was signed by the Solicitors of the parties and the Registrar and not the Judge. However the Rules of the Supreme Court 1970 supplies a complete rebuttal. By Order 42 Rule (1)(4) the order must be marked with the name of the trial Judge before whom it was made and by Rule 5(4) the order is to be signed, sealed and filed by the Registrar. The Rules do not require that the trial Judge or parties to an order, by consent or otherwise, sign it. The Solicitors on record usually signify the agreement of the parties by signing the formal or a draft order, and the trial Judge may sign it for purposes of identification. In my view the order for sale is an order of the court as it was signed, sealed and filed in accordance with the provisions of Order 42 of the Rules of the Supreme Court 1970.

The submission on the construction of the order of 20th November 1990 was that it had a drafting deficiency, in that it omitted to order the sale, and merely gave directions for the conduct of the sale. The words of the order and the summons on which it was based, however, refutes this argument for by the

application of an elementary rule of construction the order expressly incorporated the terms of the summons and there could be no doubt that it was for the sale of the hereditaments and premises described in the schedule to the summons in satisfaction of the judgment debt.

Counsel for the appellant submitted that the subject matter of the order did not allow for the consent of the parties and the order was therefore invalid. He argued that Section 50 of the Civil Procedure Code Cap.81 of the Revised Laws of St.Vincent and the Grenadines 1990, (which provides that where the holder of a judgment for money applies to the court for an order for sale if the court be satisfied by evidence that (i) the judgment remains unsatisfied (ii) the judgment debtor is beneficially entitled to the property and (iii) there is no other property against which the judgment can be enforced, it can make the order), impliedly repeals and replaces Order 31 of the Rules of the Supreme Court 1970 and has the effect of making consent orders for the sale of land to satisfy a judgment for money invalid and without authority as they would be made without evidence. Apart from other deficiencies, this argument falls prey to the principle that an order of the court must be enforced until it is set aside, which has been examined earlier.

Counsel for the appellant also argued that the order for sale was collateral to the action and the Solicitor, therefore, had no implied authority to consent to it. He referred to the case of **WAUGH v H.B. CLIFFORD** [1982] 1 All E.R. 1095 in which after considering the authorities Brightman L.J. said at 1104: -

"The law thus became well established that the Solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve any matter "collateral to the action", and an ostensible authority, as between himself and the opposing litigant to compromise the suit without actual proof of authority, subject to the same limitation, and that a compromise does not involve a "collateral matter" merely because it contains terms which they could not have ordered by way of judgment in the action."

Counsel submitted that the making of the order for sale was collateral because the action, for the recovery of a money debt, had been successfully concluded when judgment was entered. I do not agree. The whole purpose of the litigation was to enforce the payment of the money claimed and the order was directly pursuant to

the summons and gave the specific relief prayed for. The proceedings in execution of the judgment debt are intrinsic rather than collateral to the action. I would therefore reject this contention. In any event the issue of implied authority was irrelevant because the trial Judge had found as a fact on the basis of the evidence before her that the appellant had expressly authorised his Solicitor to consent to the order; and there has been no appeal from that finding.

In dismissing this appeal I would adopt the words of Farwell J., in *RE NEWEN CARRUTHERS v NEWEN* [1903] 1 CH. 812, who, after holding that a Solicitor on record has a general authority to compromise an action on behalf of his client, provided he acts bona fide and reasonably, and not in defiance of his direct and positive instructions concluded: -

"I think it would be calamitous if it were possible that parties who have entered into an agreement such as this should be able to get out of it on any such suggestions as I have heard before me today."

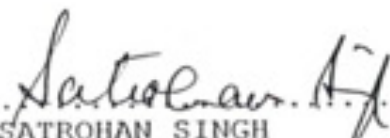
I would dismiss this appeal with costs certified fit for two counsel.


.....
C. M. DENNIS BYRON
Justice of Appeal


.....
SIR VINCENT FLOISSAC
Chief Justice

I concur.

I concur.


.....
SATROHAN SINGH
Justice of Appeal