

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.9 of 1991

BETWEEN

VOICE BUILDINGS LIMITED

Appellant/Petitioner

and

CANADIAN IMPERIAL BANK OF COMMERCE a body  
corporate incorporated by Chapter 50 of the  
Acts of the Parliament of Canada for the year A.D.  
1969 governed by the provisions of the Bank Act of the  
Parliament of Canada

Plaintiff/Respondent

and

(1) MICHAEL GORDON  
(2) LYNDELL GORDON

Defendants/Respondents

and

THE SHERIFF OF THE HIGH COURT OF JUSTICE  
OF SAINT LUCIA

Respondent

and

WAREFACT LIMITED

Respondent

Before: The Honourable Mr. Justice Byron - President  
The Honourable Miss Justice Joseph J.A (Ag.)  
The Honourable Mr. Justice Singh J.A. (Ag.)

Appearances: Mr. Winston Cenac Q.C. and Mr. D. Theodore for the  
Appellant/Petitioner and Defendants/Respondents  
Mr. K.Monplaisir Q.C. for the Plaintiff Respondent  
Mrs Angella Hudson-Phillips Q.C. and Mrs. S.Lewis for  
the Respondent Warefact Limited

-----  
1991: Jan. 28, 29,  
1992: May 25.  
-----

JUDGMENT

BYRON, J.A.

On 17th September, 1987, in the execution of process to  
satisfy a judgment debt in favour of the plaintiff/petitioner, the  
Sheriff sold the Voice Building to Warefact Ltd. The appellant,  
the judgment debtor, petitioned the Court to set aside the sale.  
Miss Justice d'Auvergne dismissed the petition.

In this appeal against that decision it is the contention of  
the appellant that the sale should have been declared invalid and  
set aside.

The appeal raises two questions of law, namely:

- 1) Whether there were three people present and bidding at the sale in accordance with Article 600 of the Civil Code of Procedure; and
- 2) Whether the purchaser had used an artifice to prevent bidding contrary to Article 558 of the Civil Code of Procedure.

**The Background Facts found by the trial Judge**

On 27th January 1987 a default judgment was entered for Canadian Imperial Bank of Commerce, against the appellant for \$39,785.20 together with interest and costs.

The judgment creditor issued a writ of execution against the property known as the Voice Building on Bridge Street. In February 1987 Ronald Gardiner, a Chartered Quantity Surveyor valued the property at the instance of Michael Gordon at \$1,176,450.00 E.C.

On 17th September 1987 the Sheriff sold the property by Public Auction to the Respondent, Warefact Ltd. for \$952,300.00. The trial Judge found that this was a fair price for the property. At the sale there were five persons who took active part in the bidding, but they were not all present throughout the sale. At the commencement of the sale there were three persons present and bidding. Two others arrived and participated in the bidding. Then as the bidding got higher one by one they left until when the final bid was cast and the property declared to the Warefact Ltd., only the representative of the purchaser was present.

When the bidding reached \$952,250.00 Michael Chastanet and Lincoln St. Rose, on behalf of Warefact Ltd., signed an agreement for a lease of the ground floor of the Voice Building, prepared in Chastanet's handwriting, at the sale and it was witnessed by Miss Lorna Mynns. This document was admitted in evidence.

The Judge found that Michael Chastanet and Lincoln St. Rose

agreed not to bid against each other on the understanding that Lincoln St. Rose would rent the bottom floor of the Voice Building to him if Michael Chastanet stopped bidding.

**WERE THREE PERSONS PRESENT AND BIDDING?**

**Article 600 of the Civil Code of Procedure prescribes:**

"No sale can take place unless there be three persons present and bidding exclusive of the Sheriff and his officers."

Counsel for the appellant submitted that this provision meant that three persons must be present and bidding at the time when the contract of sale comes into effect, that is when the property is being knocked down by the Sheriff, or in the alternative he argued that no bid could be made unless three persons were present and bidding at the time the bid was made.

Counsel for the Respondent submitted that this provision meant that the sheriff is required to ensure that at the point he opens the sale there are three persons present for the express purpose of bidding.

No case law was submitted to us on the meaning of this Article. We were referred to rules of construction of statutes; e.g. that the statute should be read as a whole so that the interpretation of the Article (i) fits into the scheme of the statute, (ii) ensures that the statute is construed so as to (a) avoid absurdity; (b) make it operate; and (c) correct the mischief intended to be corrected.

It was generally accepted that the legislature intended to protect the interest of creditors and of judgment debtors in realizing the best possible returns at judicial sales, and to prevent fraud and unfair practices in the conduct of such sales. A requirement for three persons to be present and bidding at an auction sale reduces the chance of a mock sale and increases the chance of competitive bidding to reach a high price.

A requirement that the persons present and bidding must stay to the end of the sale is unnecessary in the scheme of the statute and seems inconsistent with the idea of an auction sale. When a bidder has reached the limit of his ability or willingness to bid, by what method is he to be restrained from leaving? If as so often happens the bidding becomes a contest between two people and all

others drop out because the price has gone beyond their range and they leave the floor to the remaining active bidders, will the sale be annulled as contravening Article 600 if they also leave the sale? This would not make any sense to me.

The word "sale" in its statutory context includes both the making of bids and the knocking down to the final bidder. Both of these activities would be events at the sale. The only meaning that encompasses the idea of the legislature is that the word sale refers to the process of selling. In Article 600 it means the "auction sale" and not any particular event at the sale.

Article 600 therefore prohibits the Sheriff from conducting an auction sale unless there are three persons present and bidding. In order to give effect to that provision therefore the sheriff must ensure that at the commencement of the sale there are three persons present and bidding.

The facts found by the Judge clearly indicate that at the commencement of this sale there were three persons present and bidding and eventually there were five persons present and bidding. Over 50 bids were made. It would seem to be absurd to rule that there was a breach of Article 600 because at a particular event at the sale there were less than three persons present.

This ground of appeal fails.

#### **DID THE PURCHASER USE AN ARTIFICE TO PREVENT BIDDING?**

The St. Lucia Code of Civil Procedure - Article 558 prescribes:

"Sheriff's sales may be annulled:

1. At the instance of the judgment debtor, or of any creditor or other interested person: If fraud or artifice was employed, with the knowledge of the purchaser, to keep persons from bidding;....."

Counsel for the appellant submitted that an agreement made between two persons bidding at an auction sale whereby one agreed to rent part of the building purchased to the other if he stopped bidding against him is an artifice to keep him from bidding and that the trial Judge should have set aside the sale on that ground

The learned trial Judge found quite correctly that it is well settled in the English Common Law that such an agreement is not improper or fraudulent and will not be a ground for setting aside an auction sale.

4th Edition Halsbury's Laws of England Volume 2 paragraph 744 states:

"Improper or fraudulent acts, which are likely to prevent the property put up from realizing its fair value and to "damp" the sale, will invalidate any purchase by persons guilty of or privy to such acts, and will justify the auctioneer in withdrawing the property.

At common law an agreement between two or more persons not to bid against each other at an auction, even if amounting to what is popularly known as a "knock out", is not illegal, nor does it invalidate the sale."

In *Re Carew's Estate* (1858) 53 E.R. 869, the head note reads:

"On a sale under the court, two persons agreed not to bid against each other, but that one should bid up to L1500 and divide the lot between them. They bought it for L650. Held, that this agreement furnished no ground for opening the bidding, or annulling the sale". Sir John Romilly M.R. stated at 870"

".....I find that it does not bear out the proposition that a mere agreement, between two persons, each desirous to buy a lot that they will not bid against each other, is sufficient to invalidate a sale to one of them."

In the case of *Rawlings v General trading Company* (1921) 1 K.B. 635 this principle was affirmed in litigation between the parties to an agreement not to bid against each other. They had agreed that one of them would bid for certain goods and that the goods if purchased would be divided equally between them. Atkin L.J. discussed whether such an agreement could be illegal. He concluded the debate at page 648:

"Why it should be illegal for two possible competitors to agree to a joint adventure in the purchase of an article offered for sale in any of the ways I have mentioned I cannot discern. If, of course, there is any combination to make misrepresentations express or implied with intent to deceive the seller, which are proved to have deceived the seller, the seller will presumably have his remedy, and the agreement so to deceive will be illegal and unenforceable; but I can see no evidence of such an agreement in the present case."

Atkin L.J. was clearly distinguishing between a combination to make representation to deceive and an agreement between two persons wishing to buy the same property not to compete at an auction sale, the latter being a proper and legally binding arrangement.

The English Statute law on this subject has not changed the common law except in relation to dealers who are prohibited from making such arrangements. (See *The Auctions (Bidding Agreement) Act 1927-1969*).

Counsel for the appellant submitted however, that the English Common and Statute Law was totally irrelevant and useless in

helping to interpret Article 558. He advocated that one method of interpretation was to discern the ordinary and common usage of the word "artifice" because as he conceded the agreement was not fraudulent.

He argued that the word "artifice", did not connote any deceitfulness or fraud. He argued that the words "fraud and artifice" are disjunctive and bear different meanings. He urged that in its ordinary usage artifice simply meant a "contrivance", or "or a manoeuvre", or "an ingenious expedient".

Both Counsel referred to several dictionaries.

The Shorter Oxford Dictionary in which the definitions of artifice include "An ingenious expedient, a manoeuvre, device, trick.

The Dictionnaire du Droit Civil -

Artifice: Ruse, deguisement, moyen employe pour tromper - V.  
Dol, Escroquerie, Fraude.  
Trick, Disguise, method employed to deceive.  
Fraud, Swindle, Fraud.

Black's Law Dictionary:

Artifice: An ingenious contrivance or device of some kind, and when used in a bad sense, it corresponds with trick or fraud. It implies craftiness and deceit, and imports some element of moral obliquity.

The Attorney's Pocket Dictionary:

Artifice: Trick or manoeuvre, implying deceit; a stratagem.  
See U.S. v Corlin, 44 F. Supp. 940.

After perusing all the dictionaries it seems clear that in its ordinary usage the word artifice does imply deceitfulness and trickery. The phrase "the method employed to deceive": seems to incorporate all the aspects of the word and I would adopt it as the definition of the word's ordinary usage.

In the annotated Quebec Code there is some indication of the meaning attached to the word in its statutory context. Under the section execution Des Immeubles-Art 784, Movens De nullite,

a) Dol au artifice  
note 20:

"Where by artifices, such as the passing of false deeds changing the tenanis at aboulissants, a sheriff's sale has been carried out so as to mislead creditors, and the

public, the sale will be set aside on the petition of a hypothecary creditor, who would otherwise be deprived of his security by such fraudulent manoeuvres. C.B.R. 1881. R.A.C. 868."

This example of the application of the word artifice clearly indicates the appropriateness of the phrase "method employed to deceive". The artifice was the passing of false deeds the effect of which was to mislead.

Counsel for the appellant then submitted that the Court should consider case law from Quebec because Article 558 was identical with provisions of the Quebec Code. He referred to the essay The Interpretation of the Civil Code of St. Lucia by Mr. V.F. Floissac Q.C. as he then was which stated:

"Another rule which is not strictly a rule of interpretation, but which may be so regarded, is the judicial precedent rule. According to that rule, where an article of our code is identical in terms with, equivalent to, evidently derived from or even similar to an English statutory provision or a Quebec codal provision and that provision has received a hitherto unchallenged English or Quebec judicial interpretation as the case may be, that judicial interpretation should normally be applied to our article."

In accordance with that principle a number of cases from Quebec based on the Article which was in identical terms were referred to.

The case of Perrault v Couture 1872. The headnote reads:

"The Sheriff of the district of St. Hyacinth was selling by virtue of an execution in a Supreme Court action an immovable on which the plaintiff and the defendant had put bids. The defendant promised the plaintiff that if the latter would cease to bid he would pay him the sum of \$15.00 the plaintiff accepted and ceased bidding. The plaintiff sued the defender for the \$15.00 agreed....."

Sicotte J. in dismissing the action, said:

"Our code Article 989 and 990 gives the general rule for nullity of obligations in the following terms:

'The contract without consideration or founded on an illegal consideration is without effect. the consideration is illegal when it is prohibited by law or contrary to good morals or public order.'

The judicial sales ordered for the acquitment of judgments are of an interest to public order; general interest as those of the creditors and debtors, is that the goods be sold for the most high price. An understanding between the bidders to prevent this result is to make a wrong against the creditors as well as against the debtor and in preventing and inhibiting the bids one does an immoral thing, contrary to equity and justice and it is punishable."

Counsel submitted that the facts in this case show an immoral act and that it should vitiate the sale. It should be noted however that this case was not based on the Article which prohibits the employment of fraud or artifice to prevent bidding. It was based on a completely different principle, namely, that there was an illegal consideration, and does not help to determine whether agreements between bidders were artifices and capable of vitiating a sale under Article 558.

Just two years after Perrault's case came the case of Berard dit Lepine v Barrette (1874) 5 R.L. 703. In this case the headnote reads in part:

"6. Agreement by a purchaser to pay a creditor the amount of his claim on condition that he refrain from bidding is not a fraud under the terms of Article 714."

Routhier J's discussion of the rationale of this principle is instructive.

He said:

"Careful examination of all the circumstances of the case lead me to believe that the purchasers acted openly and in good faith, and did not exclude a bidder by artifice, but simply removed a creditor's interest by purchasing his debt. I see nothing illegal in this. In addition the purchaser's actions are evidence, not of a wish to buy cheaply, but simply a wish to pay no more than the property was worth.

In France the purchaser's actions would be far more difficult to justify as the law is extremely severe concerning adjudication. Article 412 of the Code Penal Francais, after declaring liable to prison and fine anyone who by (translation) assault, violence or threat, interferes with free auction, goes on to say, (translation) "The same penalty applies to any one who, by gift or promise excludes bidders."

Note the great disparity between French law and our law on this point.

The former penalizes gifts and promises, the latter only fraud and artifice!

And what is fraud? Labeon defined it as "omnis calliditas, fallacia, machinatio ad circumvenidum, fallendum decipeindum alterum adhibita", a definition accepted by all drafters of French law (Bedarride, *Dol et Fraude*, vol. 1, Page 4, Nos. 15 and 16).

For Fraud to exist, there must be schemes and artifices intended to deceive. Furthermore, the schemes must have in fact deceived; in the words of Bedarride, No. 37, (translation) "Fraud exists only when there is illicit material fact on the one side, prejudice on the other". My question is, in the present case, where is the illicit material fact? Is the purchase of a debt, which is offered to you, in itself an illicit action? Certainly not. Would it become illicit by being concurrent with an adjudication? No again, unless the law expressly so provides. In France the law expressly declares it

illicit by the use of the words gift or promises which, in this case, could be said of the material with which the purchasers are charged. However in our law, this material fact does not constitute the fraud required to vacate the adjudication.

Even in France, where the law is so rigorous and so formal, as we have seen, it was decided (translation) "that the fact that a registered creditor avoided bidding high in consideration of a commitment by the purchaser to pay his debt does not constitute the offence of interfering with free auction" (Daloz, Rep. vo vente publique d'immeubles No. 2231). Again, (translation) "Agreement between two bidders to refrain from bidding on a lot which meets the requirements of one of them is licit". Daloz No. 2297.

These two cases are extraordinarily to the case at bar. should be added that a number of contrary decisions have been handed down.

It therefore seems to me to be incontrovertible that, in our law, the fact of removing a creditor's interest in bidding, by purchasing his debt, is not illicit and does not vacate the adjudication."

The case of Grenier v Leroux (1878) 1 L.N. 231 decided that :

"An agreement between two persons that one of them shall bid up a property at Sheriff's sale to a certain figure, and then re-sell it to the other, is perfectly legitimate."

The case of Beaudette v Mahoney (1879) 5 Q..R 165, decided that:

"An agreement by a creditor of a judgment debtor not to bid at auction sale in consideration of being paid a portion of his debt out of the profit to be made on resale is not void between the parties to it.

Such agreement is not tainted with fraud."

Duhamel v O'Sullivan (1906) 15 B.R. 109 was a case where two beneficiaries of an estate agreed in writing not to bid against another beneficiary on the auction sale of 2 lots of the estate, on the condition that if he purchased he would pay \$1500.00 for their part of the inheritance and in addition their costs and disbursements in relation to pending litigation in which all were parties.

There was a division of opinion in the court as to whether the agreement which was made in respect of a sale to take place on 15th September 1890 could be enforced when the sale in fact took place several years later. However on the issue of the legality of the agreement Cimon J. who delivered the judgment of the majority of the court stated at p. 115:

"I have no doubt that the agreement of 15th September 1890 was perfectly legal."

1 And Blanchet J. who delivered the dissenting judgment said at  
p. 110:

"This agreement between two interested parties is not illegal as this court decided in the case of Beaudette v Mahoney."

The case of Lymburner v Courtier (1923) R.J.Q. 341, Martin J.  
at p. 344 said:

Was fraud or artifice employed with the knowledge of the purchaser to keep persons from bidding? An agreement between appellant and Maurice Courtois, one of the joint owners, executed on the 11th of May, 1921, is produced, but there is nothing illegal in that agreement. It did not keep persons from bidding at the sale and can in no way be construed as having had that effect.

I think the rule of law on this question is correctly laid down by Mr. Justice Routhier in the case of Berard dit Lepine v. Barette & Lambert, where he points out that the provisions of art. 412 of the Code penal francais are more severe than the provisions of our Code of Procedure and punish those who prevent bidders par dons ou promesse, while our Code requires that fraud or artifice must be employed with the knowledge of the purchaser to keep persons from bidding. See Dalloz."

And at p.344 Greenshields J. said:

I take it to be our law that there must be fraud or artifice employed to prevent bidders from bidding, and that to the knowledge of the adjudicataire. I find that no fraud or artifice has been established, and if any was, it was not to the knowledge of the adjudicataire, appellant."

The case law from Quebec indicates that it is well settled that Article 558 does not prohibit the making of an agreement between two interested parties not to bid against each other at an auciton sale.

The cases indicate that the words fraud and artifice bear similar connotations, and that the article requires that something be done with the intention to deceive and which does deceive. The rationale of these cases seems to be that where someone has a legitimate interest and makes a commercial arrangement to promote that interest even if it is made concurrent with a sheriff's sale or with the intention of allowing the purchaser to buy the property without competition from the other party to the agreement, that agreement is not a fraud or artifice. I do not see any distinction between the case where the person who agreed not to bid at the auction sale was a (i) judgement creditor (Berard dit Lepine v Barette; and Beaudette v Mahoney) (ii) an intended purchaser

(Grenier v Leroux) (iii) an intended lessee of part of the premises. (This instant case).

The ordinary usage of the word artifice indicates the concept of deception, and the words of Article 558 require that a distinction be drawn between an agreement which benefits the parties to it, and some device which deceives or misleads others.

The agreement in this case clearly deceived no one. It was an open agreement intended to promote the interests of the parties to it by providing for the lease of part of the premises being sold and limiting or ending competition between parties who were interested in the sale.

It is also clear that both the common law cases and the cases based on Quebec Code have consistently held that such an agreement is not capable of invalidating a sale, as it is neither fraudulent nor an artifice.

In the circumstances this ground of appeal must fail.

I therefore dismiss this appeal with costs to be taxed.

C.M.D. BYRON,  
Justice of Appeal

MONICA JOSEPH,  
Justice of Appeal (Acting)

SATROHAN SINGH,  
Justice of Appeal (Acting)