

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2004//0194

BETWEEN:

DEXTER BRANDY GREENE

Judgment Creditor (Deceased)

and

JOUNIE GUMBS

Respondent /Judgment Debtor

Appearances:

Ms. Natasha Grey for the Applicant.

Mr. Victor Elliott-Hamilton for the Respondent/Judgment Debtor.

2021: December, 03
2022: July, 14

JUDGMENT

- [1] **WARD, J.:** This is an application by the administrators of the estate of the deceased judgment creditor to be substituted as judgment creditor in Claim No. SKBHCV 2004/0194 and for leave to issue a writ of execution against the assets of the judgment debtor, Jounie Gumbs ("the respondent") notwithstanding that six years have passed since the date judgment was entered against the judgment debtor. They also seek Charging Orders and Attachment of Debt Orders over several properties said to be owned by the respondent and funds standing to the credit of the respondent in various bank accounts. The applications are supported by an affidavit of Sheryl Francis-Walters, the former common law spouse of the deceased, and two affidavits sworn by Mr. Jared Tennant, an attorney in the law chambers of the applicants' lawyers. Save for the application to be substituted

as judgment creditor, all of the other applications are resisted by the respondent who swore an affidavit in opposition.

Background

- [2] The deceased judgment creditor and the respondent were very good friends. On 19th September, 2001 (Independence Day), they were travelling together in the respondent's vehicle when the vehicle became involved in a serious motor vehicle accident owing to the respondent's negligence. The deceased sustained serious injuries including a permanent paraplegia secondary to spinal cord injury, several fractured ribs, incontinence. His injuries resulted in him being confined to a wheelchair for the remainder of his life.
- [3] Sometime in 2004, the deceased judgment creditor brought suit against the respondent, who did not dispute liability. On 8th November 2006, following an assessment of damages hearing before the master, the judgment creditor was awarded a global sum of \$596, 242.47 with interest at the rate of 5% until the debt is paid.
- [4] The judgment creditor died intestate on 21st December 2009 without having taken any steps in court to enforce the judgment. He left three minor children.
- [5] In July 2012, the mothers of the minor children of the deceased pooled resources in order to lodge an application to the High Court of Saint Kitts for Letters of Administration to be granted in the Estate of the deceased. On 30th December 2015, the High Court granted Letters of Administration in the said estate to Esther Webb, Sheryl Francis and Curtis Jocelyn, the current administrators and the applicants herein.
- [6] On 5th March 2021 the applicants made a without notice application for the orders identified above. The court directed that an inter partes hearing be held, which was heard on 3rd December 2021 and at which Mr. Tennant and the respondent were cross-examined on their affidavits. Mr. Tennant was originally counsel on record for the applicants. However, since he gave an affidavit in support of his client's application, which was not merely formal, he relinquished conduct of the matter. Ms. Grey now acts for the applicants and has adopted Mr. Tennant's previously filed written submissions.

The submissions

Application to be substituted

- [7] As it relates to the application to be substituted as the judgment creditors in the claim, there was no objection to this order being granted, it being accepted that as personal representatives of the estate the applicants could bring an action and be substituted in the place of the deceased. This issue, therefore, need not detain us further. I will therefore turn to the various orders sought and the submissions made in relation thereto.

Writ of execution

- [8] On behalf of the applicants, it was acknowledged that having brought this enforcement action some fourteen (14) years after the grant of judgment, a preliminary question that arises is whether the action is statute-barred pursuant to the operations of the Limitation Act, Cap 5.09 which provides that an action shall not be brought upon any judgment after the expiration of twelve years from the date on which judgement became enforceable and no arrears of interest in respect of any judgement debt shall be recovered after the expiration of six years from the date on which interest became due. Learned counsel for the applicants, Ms. Natasha Grey, submitted that it was not barred as the Act does not apply to the issue of execution on judgments which is what is sought here. However, counsel acknowledged that rule 46.2 (c) of the **Civil Procedure Rules 2000** (CPR) requires an applicant for the issue of a writ of execution to obtain permission of the Court where 6 years have elapsed since the judgment was entered. The applicants submitted that good reasons have been furnished for the delay in seeking to enforce the judgment as mandated by CPR 46.3(2)(b).
- [9] The applicants submitted that the delay was due to several identifiable factors and variables which show that the applicants were not dilatory in their efforts to pursue the respondent and to seek to enforce the judgment against him. The delay is said to be directly due to deliberate actions on the part of the respondent to hide his address and assets in the Federation; bureaucratic inefficiency on the part of the High Court Registry which only issued the grant in December 2015; legal advice against pursuit of the respondent when it was not meritorious and wise to do so in light of his financial situation then; and the severe ill-health of the initial Judgment Creditor. They say additionally that during this time, the respondent had acknowledged the debt. The applicants submitted that these

factors take this case out of the ordinary and justify the grant of permission in respect of the application for a writ of execution.

- [10] For the respondent, learned counsel, Mr. Victor Elliott-Hamilton, submitted that the reasons proffered by the applicants for the prolonged delay are unacceptable as they lack important particulars and contain bald assertions. No explanation is given for the applicants' failure to act promptly after they obtained a grant of Letters of Administration in 2015. The excuse that their attorneys could not locate the respondent cannot hold in the face of the respondent's evidence that he has been a member of the constituency group and supporter of one of the partners of the applicants' law firm for over 20 years and also knows well another partner in the said law firm who is also a member of the same political party. Mr. Hamilton further submitted that the applicants' affidavits in support fail to state any specific instance or attempt to locate the respondent between 2015, when the grant was obtained, and 2017 when the applicants' lawyers served a demand letter on the respondent. Mr. Hamilton further submitted that the administrators took no further steps between 2017 and 2021 - a further period of almost six years from the date they obtained the grant. Mr. Hamilton submitted that the respondent's random acts of generosity towards one of the children of the deceased is not an acknowledgment of the debt but on account of the friendship which the respondent shared with the deceased. Mr. Hamilton submitted that the delay is extremely prejudicial to the respondent and persons who jointly hold property with him.

Discussion

- [11] The issue on this first limb of the application is whether the applicants have satisfied the court that there are good reasons for the delay in enforcing the judgment, which take this case out of the ordinary such that permission should now be granted to issue a writ of execution.
- [12] It is by now settled that section 4(4) of the Limitation Act does not apply to enforcement proceedings. That section provides:

“An action shall not be brought upon any judgment after the expiration of twelve years from the date on which judgement became enforceable and no arrears of interest in respect of any judgement debt shall be recovered after the expiration of six years from the date on which interest became due.”

[13] The non-applicability of the Limitation Act in the circumstances at bar was addressed in **Morrison Knudsen International Inc v The Consultant Limited et al**¹ by Byron CJ, as he then was. The difference between the issue of a writ of execution and an action upon a judgment for the purpose of determining whether the Limitation Act applies to the issue of a writ of execution was said to be that “A writ of execution is issued at the point where there is a judgment to be enforced and a proceeding is initiated to enforce it, for example by obtaining an order for sale of land charged with the judgment debt. On the other hand, fresh proceedings are issued where the judgment is not being directly enforced, but the proceedings based on the judgment creates a new basis for enforcement.” Put another way, the Limitation Act applies where a party seeks to sue on a judgment but not where he seeks to enforce the judgment by way of a writ of execution for example. See **Audrey Ophelia Smith v Hilton Flemming**²; **Lowsley v Forbes**³; and **W T Lamb & Sons v Rider**⁴ where, after an historical review of the law, the distinction was described thus:

“It follows from the above brief survey that the right to sue on a judgment has always been regarded as a matter quite distinct from the right to issue execution under it and that the two concepts have been the subject of different treatment. Execution is essentially a matter of procedure- machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders.”

[14] I therefore conclude that the Limitation Act does not apply to the situation at bar where the applicants seek to issue a writ of execution. Mr. Hamilton didn't seek to argue otherwise.

[15] The real issue arises when the requirements of CPR Part 46 are engaged. It provides, so far as material:

“Permission required to enforce in certain cases

46.2 A writ of execution may not be issued without permission if –

...(c) 6 years have elapsed since the judgment was entered;

¹ Grenada Civil Appeal No. 15 of 2002.

² AXAHCv0019/1977.

³ [1998] 3 All ER 897.

⁴ [1948] 2 KB 331.

46.3 (1) An application for permission may be made without notice unless the court otherwise directs but must be supported by evidence on affidavit.

(2) On an application for leave the applicant must satisfy the court that it is entitled to proceed to enforce the judgment or order, and, in particular must satisfy the court

(a) if the judgment is a money judgment – as to the amount –

(i) originally due; and

(ii) due together with interest at the date of the application;

(b) if rule 46.2 applies – as to the reasons for the delay;

[16] A writ of execution is defined as: (a) an order for the sale of land; (b) an order for the seizure and sale of goods a writ of fieri facias; (c) an order for sequestration of assets; (d) a writ of delivery, being either an order for recovery of specified goods or the recovery of goods or their assessed value; and (e) a writ of possession.

[17] The effect of CPR rules 46.2 and 46.3 read together is, first, that a writ of execution may not be issued without the permission of the Court where six (6) years has elapsed since the judgment was entered and, secondly, that permission is not to be had for the mere asking; an applicant must satisfy certain conditions before permission may be granted. Clearly then, the court has a discretion whether or not to grant permission.

[18] No issue arises as to the amount originally due on the judgment debt or with the interest due thereon. These sums have been clearly stated in the application and supporting affidavits. The issue engaged is the adequacy of the reasons for the delay advanced by the applicants.

[19] The case of **Patel v Singh**⁵ provides some guidance as to the principles to be applied when a court is moved to exercise its discretion to grant permission to issue a writ of execution where 6 years have elapsed since judgment was entered. In that case, the claimant obtained judgment in default against the defendant on 8th September 1992 in the sum of £19,649.69. On 30th September 1994, a certificate of judgment was issued allowing the judgment to be enforced in the High Court, but even before then, the claimant, on 15th July 1994, had obtained a writ of fieri facias but she was unable to

⁵ [2002] EWCA Civ 1938.

enforce the writ as she discovered that the defendant had left the United Kingdom and was apparently working in Germany. The judgment remained wholly unsatisfied. On 1st May 2002, the claimant having learnt the whereabouts of the defendant and that he had the means to satisfy the judgment, applied for permission to issue a writ of execution pursuant to Ord 46 r 2(1)(a). This provision is the equivalent of CPR 46.2. Leave was refused by the master. This decision was reversed on appeal to the High Court. On further appeal to the House of Lords their lordships recognised a general rule stated by Slade LJ in **National Westminster Bank plc v Powney**⁶ that, as a matter of principle, the passage of six years would be a sufficient ground in itself for refusing permission. Their Lordships went on to state:

“The policy of the rule seems to me to be that ordinarily after six years permission will not be given and that is underlined by the provisions of Ord 46 r 4(2), requiring the judgment creditor to explain his delay. In contrast there is no rule that the judgment debtor is to file evidence to state what prejudice, if any, he has suffered by the delay. In my judgment, therefore, consistently with what this court said in Powney, the court must start from the position that the lapse of six years may, and will ordinarily, in itself justify refusing the judgment creditor permission to issue the writ of execution, unless the judgment creditor can justify the granting of permission by showing that the circumstances of his or her case takes it out of the ordinary. That may be done by showing the presence of something in relation to the judgment creditor's own position, or, as Sir Anthony Evans suggested in the course of the argument, in relation to the judgment debtor's position. Thus the judgment creditor might be able to point, for example, to the fact that for many years the judgment debtor was thought to have no money and so was not worth powder and shot but that, on the judgment creditor winning the lottery or having some other change of financial fortune, it has become worthwhile for the judgment creditor to seek to pursue the judgment debtor.”

- [20] This case therefore establishes that in general, as a matter of principle, the passage of six years may, and will ordinarily in itself, justify refusing the judgment creditor permission to issue the writ of execution. This may not be so, however, where the applicant can show that the circumstances of his or her case take it out of the ordinary, thereby justifying the grant of permission.

⁶ [1991] Ch.339.

- [21] With these principles in mind, it becomes necessary to examine the reasons put forward by the applicants to explain the delay of fourteen years in seeking to enforce the judgment.

Respondent's whereabouts unknown

- [22] Ms. Francis-Walters deponed that after judgment was obtained, the deceased made frequent and repeated phone calls to the respondent asking him to start paying monies toward satisfaction of the judgment debt. She alleges that in the early part of 2007, the respondent furtively relocated from his house in Mattingley Heights to an unknown location, effectively making it extremely difficult to locate or find him. Around that same time, he also started to block or decline calls from the deceased. Ms. Francis-Walters further averred that the deceased and his relatives tried to ascertain the respondent's new home address but such efforts proved futile. She claims to have been informed by relatives of the deceased that from the latter part of 2007 to 2009, when the respondent was seen or happened upon occasionally, they would beg him to visit the deceased and to pay-off some of the judgment debt. He would often give assurances to pay the judgment sums, but such assurances came to nought. Ms. Francis-Walters alleges that following the death of the deceased in 2009, the respondent began appearing more frequently in the Sandy Point community where she and the deceased resided.
- [23] The respondent denies that he left his Mattingley Heights residence or sought to evade the judgment creditor. He points to the fact that all of the utility bills reflect his address as Mattingley Heights. He denies refusing to take or blocking calls from the deceased.
- [24] On the state of the evidence I am not at all persuaded by this evidence of Ms. Francis-Walters. In the first place, these alleged acts of the respondent are said to be relayed on information and belief in what was stated to her by relatives of the deceased. None of these persons gave evidence. They would have been best placed to speak to their efforts to locate the respondent. Further, none of the deponents of affidavits in support of the application say that they themselves were engaged in any attempt to locate the respondent. The result is that Ms. Francis-Walters' affidavit suffers from an appalling paucity of detail and particulars in relation to what specific attempts were made to locate the respondent and over what period. There is no evidence that anyone ever visited his residence at Mattingley Heights, for example. The respondent's uncontradicted evidence was that during that time he was a taxi tour operator operating out of Port Zante. It is a notorious fact that tour operators tend to be based at Port Zante on days when cruise ships are in port. It is difficult to accept that reasonable

enquiry could not have led to the discovery of the respondent's whereabouts. Indeed, it appears from Ms. Francis-Wlaters' own affidavit that from the latter part of 2007 to 2009 the deceased's family members would "happen upon" the respondent occasionally. This suggests to me that the respondent could with reasonable diligence be located. Further, the respondent's evidence is that he was well known to two partners in the applicants' law firm as he and they were active members of the same political party for over twenty years. I find that the applicants made no diligent attempts to ascertain the whereabouts of the respondent between 2007 and 2009.

[25] In written submissions, the applicants posit that the fact that two other addresses appear on documents addressed to the respondent supports an inference that he had abandoned his residence at Mattingley and was deliberately avoiding the applicants. The documents relied on by the applicants as refuting the respondent's assertions as to his residence at Mattingley heights consists of a Commitment letter dated 22, 2020 in which his address is stated to be "The Ghaut, Sandy Point, St. Kitts"; a 'Covenants to Loan Agreement' on which the same address is stated; correspondence from St. Kitts-Nevis National Bank as well as the payment receipt from SLH Horsford Company Limited lists the Judgment Debtor's address as 'The Ghaut, Sandy Point, St. Kitts'; a receipt from the Vehicle Licensing Authority dated September 30, 2021 in which his address is stated to be Green Tree Housing, Old Road, St. Thomas, St. Kitts".

[26] There are two problems with this argument. In the first place, the respondent's evidence is that he used his sister's address at Sandy Point, where he once lived, and an address at Green Tree Old Road as his mailing address because there was no mailbox at Mattingley Heights. He said when doing business, he used the Sandy Point address. The applicants' own evidence is that the respondent was regularly seen in Sandy Point at least from the latter part of 2007 and certainly from 2009. Secondly, these documents do not establish the applicant's case that between 2007 and 2009 the respondent was not residing at his Mattingley Heights residence for the simple reason that the documents are dated 2020 and 2021. In any event, there is no averment by the applicants that the respondent could not be located after 2009. It seems to me that it was not until 2016 or 2017 that the applicants showed any real interest in pursuing the respondent. But then, the issue was not that he could not be found but that he lacked the means to satisfy the judgment and so it was not worthwhile to pursue enforcement proceedings. I will return to this reason later.

Applicant's impecuniosity

- [27] Ms. Francis-Walters averred that owing to the financial demands of the funeral as well as the fiscal burdens of taking care of a family, household expenses and her limited income, she was unable to afford the services of an Attorney-at-Law to pursue the respondent between the date of the death of the deceased and June 2012. This seems to be posited partly as a reason for her inability to “afford the services of an Attorney-at-Law to pursue the Judgment debtor” between the date of death of the deceased and June 2012;⁷ and partly to serve as an explanation for the three-year delay in applying for a grant of Letters of Administration. I would only say that nothing is advanced by way of particulars of what these expenses were or of what her limited income was. Nothing by way of documentary exhibits of any kind have been supplied to support these assertions that she could not afford the services of an attorney. Nothing is said about the financial circumstances of the other two administrators. There is simply no evidential basis on which I could properly conclude that the administrators lacked the means to retain counsel.

Bureaucratic inefficiencies in the Registry

- [28] Ms. Francis-Walters averred that in July 2012, she and other mothers of the deceased children pooled their resources and made an application to the High Court for the grant of Letters of Administration. She then states: “On December 30, 2015, the High Court of Saint Kitts and Nevis granted Letters of Administration in the said estate to the current administrators, the applicants herein.” Notably, nothing is said about any efforts to do anything about the judgment debt while they waited three years for the grant. Nothing is said about their attempts to expedite matters at the Registry or to even enquire about the slow progress. One doesn't know whether the documents to lead the grant were in order. In the court's experience it is not uncommon for there to be delay in processing the application because the documents are not in order. I will not speculate whether this was so in this case. I will merely note that these alleged bureaucratic inefficiencies are not particularised and no evidence is given as to what steps the applicants took to expedite matters.
- [29] It is also noted that neither Ms. Francis-Walters nor Mr. Jared Tennant makes any allegations of bureaucratic inefficiencies on the part of the Registry in their respective affidavits. I have already stated what Ms. Francis-Walters says about this. Mr. Tennant merely says that following the

⁷ Affidavit in support at para 26.

acquisition of Letters of Administration by the applicants in December 2016 they engaged the firm's legal services in 2016 to ascertain the respondent's assets and financial circumstances. The charge of bureaucratic inefficiencies in the Registry first surfaces in the applicants' written submissions at paragraph 133 and was made for the obvious purpose of seeking to lay blame at the Registry's door for the period of three years between the application and the grant. This practice of seeking to bleed new evidence into written submissions is to be deprecated. If evidence had been led that properly demonstrated that the Registry was solely or largely to blame for this period of delay, then this court would have no hesitation in adopting the position taken in **National Westminster Bank PLC v Powney et al** that:

"It is...a cardinal principle of procedural law that no party should suffer unnecessarily from delay which is not his fault but rather a fault in the administration of justice...We have described this as a cardinal principle. But in matters of discretion it cannot always override other considerations. It is a factor to be taken into account."

- [30] Here, however, there is simply no evidence that this period of delay was solely attributable to inefficiencies in the Registry. Even if bureaucratic inefficiency is presumed on account of the length of time it took to grant Letters of Administration, it remains but one factor to be taken into account, as the authorities show. The fact that it took six years after judgment was entered before the applicants bestirred themselves to make the application for a grant and that there is no evidence of any other activity pursued by the applicants during the three years it took to obtain the grant would be relevant considerations. Nothing prevented them during this time from instructing the attorneys they had retained in 2012 to at least make efforts to investigate the respondent so that once the grant was in hand they could move promptly to move the court to enforce the judgment, beginning with an application for oral examination. Instead, they waited until 2016 to instruct their lawyers to investigate the respondent.

Respondent's impecuniosity

- [31] The applicants say that when eventually they were able to obtain legal representation in 2017 their legal advisors investigated the respondent and reported that while it was discovered that he was the owner of ten motor vehicles, they were subject to several liens secured by different financial institutions, namely, TDC Finance Ltd, S.L. Horsford & Company Limited and the Development Bank of Saint Kitts and Nevis. It was further discovered that the respondent had several unsecured loan

amounts outstanding with multiple creditors, totalling \$430, 000.00. He was discovered to be a self-employed taxi operator, whose earnings were used mainly to make monthly loan repayments, leaving him with limited finances to survive on.⁸ These discoveries led the applicants' counsel to the view that it would be unwise to pursue enforcement proceedings. However, they promised to discreetly monitor his situation for any change.

- [32] No thought seems to have been given to making an application to the court for oral examination which would have aided the applicants in a way which background enquiries may not have. The respondent could have been subjected to rigorous cross-examination on his financial circumstances.
- [33] The last activity undertaken by the applicants in 2017 in relation to the judgment debt seems to have been the issuing of a demand letter in February 2017. The respondent attended a meeting with the applicants' lawyers but told them that he was saddled with debt and could not satisfy the judgment debt. However, the applicants say that the respondent told their lawyers that on about five occasions in 2016 he had given the deceased's son free rides to his community and on four occasions that same year had given him small sums of money, not exceeding fifty dollars, which gestures were said to constitute acknowledgement and part-payment of the judgment debt.
- [34] I find it hard to treat seriously the submission that the respondent's random acts of giving free rides in his taxi and giving \$50.00 to the deceased on a few occasions were treated by the applicants' lawyers as acknowledgement of and in part-payment of the judgment debt⁹. I am inclined to agree with Mr. Hamilton's submission that these acts of generosity were simply on account of the friendship shared between the respondent and the deceased.
- [35] Nonetheless, the respondent has not denied that those indeed were his financial circumstances at that time. If so, the decision not to bring enforcement proceedings in 2017 may not be open to criticism. One wonders though what was the point of the demand letter with its threat of legal action if the applicants had determined and resolved that such a course would not be worthwhile because the respondent simply lacked the means to satisfy the judgment in any way. Being fully apprised of his financial circumstances they sent him a demand letter anyway. This does not seem to sit easily with the applicants' contention that the reason for not pursuing enforcement of the judgment in

⁸ 1st Affidavit of Jared Tennant, paras 18-19.

⁹ Affidavit of Jared Tennant at paras 23 - 24. Applicants' submissions at para 126.

2016/2017 was due to the respondent's lack of means. It may be that this was just a strategy employed to demonstrate that the applicants were still intent on pursuing the judgment debt but this is not stated in any affidavit and I can't speculate that this is so.

Respondent's changed circumstances

- [36] The applicants have not described what steps, if any, the applicants took between 2017 and 2021 towards enforcement of the judgment or to further investigate the respondent. The evidence suggests that after the initial investigation of the respondent by the applicants' counsel in 2017 they went dormant until 2021, when, they say, fresh investigations revealed that the respondent's financial circumstances had changed dramatically. The applicants aver that the respondent has repaid most of his former loans; has discharged liens on some of his motor vehicles and recently bought an expensive 2016 sport utility vehicle. They further allege that he is the owner of, or has a beneficial interest in, a car services business known as "Up to De Time Car Wash." It is further said that the respondent is now the registered proprietor of a house in Sandy Point on which he carried out construction and made additions in the latter part of 2020. The applicants also believe that he may be the holder of sufficient funds in accounts held at financial institutions in the Federation. In August 2021 a further search at the land registry revealed that the respondent was the registered owner of Lot 418 East, West Farm Housing Development.
- [37] The respondent denies these claims. He avers that the 10 vehicles listed by the applicants simply reflect either all the vehicles that he has ever owned or of which he has been registered as owner throughout his lifetime. He admits to being the current owner of a 2016 Hyundai Tuscon but says this was previously purchased by his son. It was written off for insurance purposes after an accident in 2017 but he was able to repair it and currently uses it occasionally. He admits to owning a 2007 Toyota Coaster Bus and a 2016 Nissan Urvan Bus which are both subject to Bills of Sale in favour of the Development Bank and S.L. Horsfords Co. Ltd respectively. He also admits ownership of a 2005 Daihatsu Lorry which he says is not in operable condition and which is not currently registered.
- [38] He further avers that the 1997 Mitsubishi Fuso Lorry is owned by his brother-in-law and sister. It was once registered in his name because he had a taxi licence while they did not. They have since obtained a taxi licence and the vehicle was transferred solely into their names in February 2021. He claims to have sold the 2000 Nissan Urvan Bus over 10 years ago. He also says that he sold the 2002 Nissan Urvan Bus. The 2006 Toyota Hiace Bus was involved in an accident four years ago and

he no longer owns it. The 2011 Mazda Demio was purchased by him and his wife for his daughter 5 years ago. It was registered in his name for the purpose of importing it. Once it was landed, he included his daughter's name on the vehicle's registration.

[39] As it relates to bank accounts, the respondent avers that he holds accounts with the St. Kitts-Nevis-Anguilla National Bank, and the Development Bank he has exhibited bank statements from the National Bank for the period June to September 2021.

[40] He denies being the owner of the car wash, which he claims is owned by his brother. He accepted under cross-examination that he is its general manager. His brother asked his daughter to manage the business since she was into marketing. He assists his daughter since he was largely unemployed owing to the pandemic. He has exhibited the business licence for the car wash, which is in the name of his daughter, Shajunee Gumbs.

[41] On balance I find that the respondent owns the car wash. Apart from his say so, there is no evidence of any involvement by his brother to establish that he is the owner. The respondent admitted under cross-examination that he is the general manager and that his daughter is a manager. The business license is in her name. Facebook posts and media interviews promoting the business all feature him as the central, indeed, only figure behind the business. On balance, I find that the applicants have proved that he owns the car wash.

[42] As it relates to the motor vehicles, the applicants have produced a document from the Police which lists ten vehicles registered to the respondent. The respondent denies that he currently owns all ten vehicles. Nonetheless, by his own admission, he is currently the owner of a 2016 Hyundai Tuscon, a 2005 Daihatsu Lorry, a 2007 Toyota Coaster Bus and a 2016 Nissan Urvan Bus. The latter two are subject to Bills of Sale in favour of the Development Bank and S.L. Horsfords Co. Ltd respectively. The issue really surrounds the other six vehicles.

[43] The letter from the Police Force attaching the Motor Vehicle Registry does not specifically state that the vehicles listed therein are currently owned by the respondent, as opposed to their having once been registered in his name. The applicants invite an inference that since they are currently registered in the respondent's name, then they are currently owned by him. That is clearly one inference to be drawn. However, the respondent seeks to rebut it by his evidence of their disposal over the years. This is merely his word as he has not produced any documentary evidence to support

these assertions of sale or other disposal. There is therefore force in the applicants' submission that the court can take judicial notice of the fact that every owner of a vehicle in the Federation, who sells or desires to make a gift of his vehicle must execute a Motor Vehicle Transfer document at the Traffic Department in order to effectively transfer it. In the absence of evidence of this, I find on a balance of probabilities that the respondent is the owner of all of the vehicles registered to him.

- [44] I further find that he owns property at Sandy Point and is joint owner of the property at West Farm housing development.
- [45] In so far as the bank accounts are concerned, I find that the respondent holds accounts with the St. Kitts-Nevis-Anguilla National Bank and the Development Bank. He has admitted this. The applicants have not adduced evidence to satisfy me that he also holds accounts at CIBC First Caribbean International Bank and Royal Bank of Canada (also called RBTT Bank (SKN) Limited. The mere sighting of him using their ATM machines or inside the banks purportedly conducting business is not conclusive. As Mr. Tenant accepted in cross-examination, customers' bank cards are networked for use at other banks with which they may not hold accounts. Therefore, being seen using an ATM doesn't give rise to the ineluctable inference that one holds an account with that particular bank.
- [46] In light of my findings with respect to the respondent's current assets, it is fair to say that his current financial circumstances are certainly not as dire as thought to be by the applicants when they investigated him in 2016/2017.
- [47] However, the discoveries relating to the respondent's present assets and financial circumstances were made by the applicants after at least 10 years of delay. While I have no doubt that the applicants' lawyers conducted investigations into the respondent's financial circumstances in 2016 this was 10 years after judgment was entered. I find that it was not until 2017 that the respondent was put on notice that the applicants were pursuing the judgment debt. In their written submissions, the bold assertion is made that "the unchallenged evidence of the applicants shows that between the period February 2017 and February 2021 the Judgment Debtor received multiple demand letters from the Applicants' Attorneys-at-Law informing him of his debt obligations, demanding his repayment of the debt and advising of their intention to pursue (sic) legal proceedings for enforcement against him should he fail to make payment.¹⁰" This assertion does not accord with the evidence.

¹⁰ Applicants' written submission, para 146.

The applicants exhibited only two pieces of correspondence addressed to the respondent: a demand letter dated 23rd February 2017 and a demand letter dated 7th January 2021. These are the only demand letters mentioned in Mr. Tennant's affidavit in support of the application. This makes it plain that the first time the respondent was placed on notice by counsel that the applicants were pursuing the judgment debt was February 2017. He heard nothing further from them until January 2021.

[48] The circumstances here are unlike those in **Patel and Singh** where the claimant had taken reasonably prompt steps after judgment to obtain a writ of fi fa only to find that the defendant had left the UK. After learning of his return, and having ascertained his ability to satisfy the judgment debt, the claimant promptly applied for permission to issue a writ of execution. It was in those circumstances that permission was granted, notwithstanding that ten years had lapsed since judgment was entered. That is a far cry from the apparent lethargy shown by the applicants in this case.

[49] The applicants ask me to find that the delay has occasioned the respondent no prejudice. In written submissions, they argued that it is of note that "nowhere in the evidence of the Judgment Debtor has he outlined the specific prejudice that he will face if the Court grants the requested Orders."¹¹ The simple answer to this is that CPR 46.2 places no obligation on the judgment debtor to prove prejudice. This was recognised in **Patel v Singh** where Gibson, LJ stated at paragraph 21:

"The policy of the rule seems to me to be that ordinarily after six years permission will not be given and that is underlined by the provisions of Ord 46 r 4(2), requiring the judgment creditor to explain his delay. In contrast there is no rule that the judgment debtor is to file evidence to state what prejudice, if any, he has suffered by the delay." (Emphasis added)

[50] Thus, a lapse of six years or more may be regarded as presumptively prejudicial to the judgment debtor. The longer the period that has been allowed to lapse since the judgment the more likely it is that the court will find prejudice to the judgment debtor: **Patel v Singh** (para 16). In this case, the period of delay is fourteen years. Prejudice to the respondent can be presumed. In any event he has stated in his affidavit that it is prejudicial to him. He has no obligation to furnish evidence of this.

[51] Before passing from this aspect of the application, it must be recorded that the Court has paid no heed to what amounts to attempts at emotional appeal masquerading as legal submissions. To

¹¹ Applicants' written submissions, para 165.

submit that the applicants would be immeasurably prejudiced if this application is refused because they would be saddled with a hefty legal bill with no ability or means to settle it,¹² and other submissions in similar emotive vein are of no utility, relevance or assistance to the court in resolving the legal issues before it.

Conclusion on first issue

- [52] Looking at the situation overall and with the overriding objective well in mind, but having regard to my rejection of the applicants' reasons for their inactivity between 2006 and 2012, and then between 2017 and 2021, I am unable to view the circumstances of this case as taking it out of the ordinary, thus justifying a departure from the general rule that the lapse of 6 years may and will ordinarily lead to permission to issue a writ of execution being denied. I accordingly decline to grant permission to do so.

Application for Provisional Charging Order

- [53] The applicants also apply for a provisional Charging Order pursuant to CPR Part 48 which deals with the enforcement of a judgment debt by charging either stock and or other personal property. An application for a charging order must be made without notice and supported by evidence on affidavit: rule 48.2 (2). Rule 48.3 stipulates the evidence required to support the application. Rule 48.3(2) requires, inter alia, that the affidavit evidence must certify the amount remaining under the judgment; identify the judgment to be enforced; state that the applicant is entitled to enforce the judgement; state that to the best of the deponent's information and belief the debtor is beneficially entitled to the stock or personal property as the case may be; state the name and address of every person who is believed to be an unsecured creditor of the judgment debtor; identify the properties of the Judgment Debtor to be made subjected to the charging order and state whether any other person is believed to have an interest in the property.
- [54] Unlike the case of a writ of execution, which requires the court's permission after six (6) years have elapsed since the entry of judgment, there is no requirement for the court's permission for this form of enforcement of a judgment. The requirements of rule 48 have been satisfied in my view, having regard to the contents of the affidavits in support of the application which have been extensively rehearsed in the preceding paragraphs. In light of my findings as it relates to the personal property

¹² Applicants' written submissions, para 170.

of which the respondent is either owner or the holder of a beneficial interest, I hold that the conditions for the grant of a provisional charging order over them are met. However, I take cognizance of the fact that there are secured creditors in respect of the 2007 coaster bus, which is subject to a Bill of Sale in favour of the Development Bank and the 2015 Nissan Urvan Bus H819, which is subject to a Bill of Sale in favour of S.L. Horsford and Co. Ltd. These will rank in priority over the charge.

Application for an Attachment of Debt Order

- [55] The applicants also seek an attachment of debts order requiring the St. Kitts-Nevis- Anguilla National Bank Ltd, to pay over \$10,000.00 per month until the debt is paid, CIBC First Caribbean International Bank the sum of \$5,000.00 monthly and the Royal Bank of Canada, the sum of \$5,000.00. As framed, the application seems to contemplate that the applicants are entitled to receive, not only the amount standing to the credit of the accounts of the respondents at the date of the service of the garnishee but also monies paid into the accounts subsequent to that date.
- [56] An application for an attachment of debts order is governed by Part 50 of the CPR, which provides a procedure by which a judgment creditor can obtain payment of all or part of a judgment debt from the judgment debtor. An attachment of debts order means the order served on a garnishee attaching a debt in the garnishee's hand. A garnishee means a debtor in whose hands a debt has been attached. Rule 50.2 (4) provides that a debt may be attached if it (a) is due or accruing to the judgment debtor from the garnishee on the date that the provisional order under rule 50.3 is served on the garnishee; or (b) becomes due or accrues due to the judgment debtor at any time between the service of the provisional order under rule 50.3 and the date fixed for the hearing to consider making the order final. This means that only debts actually due or accruing on the date of the service of the provisional order or which become due or accrue due to the judgment debtor between the service of the provisional order on the garnishee and the date fixed for the hearing to consider making the order final may be attached. It has been held that a debt accruing does not mean "any debt which may at any future time arise between the judgment debtor and the person sought to be made a garnishee, there being no contract at that time the judgment debtor and such person, or anything which can make any relation of any kind, legal or equitable, between them"; nor does it mean a debt which there is some probability may in future arise....It may be an equitable debt or a legal debt, a debt payable in the present or a debt accruing, but it must be a debt. It may be an accruing debt, payable in the future in consequence of a present obligation". See **Webb v Stenton**. My

understanding of these statements is that the applicants must show that the banks are indebted to the judgment debtor, in that, monies are standing to his credit in accounts held by him at the date the provisional order is served or there is a debt which they have a present obligation to pay, although payable between the date of service of the provisional order and the date appointed for determining whether to make the provisional order final. In both cases there is an existing debt. By definition, (rule 50.1(2)) attachment of debts order” means the order served on a garnishee attaching a debt in the garnishee’s hands. (Emphasis added) This underscores the point that the debt must be an existing one. As stated in **Webb v Stenton**:

- a. *The material question to be considered is this: Does the rule include debts which may hereafter arise, but which may or may not come into existence according to circumstances? I am of opinion that such a conclusion is excluded by the words of r 2 and also by r 3, which provides that service of an order that debts due or accruing to the judgment debtor shall be attached, on notice thereof to the garnishee, in such manner as the court or judge shall direct, shall bind such debts in his hands. It is impossible to say that a debt is in the hands of the garnishee when the debt does not exist.”*

[57] By rule 50.4 (1) an attachment of debts order may be made in respect of money standing to the credit of any account of the judgment debtor with a bank or other financial institution; provided that the order must not require a payment that would reduce the amount standing in the name of the judgment debtor with the bank or financial institution below EC\$50: rule 50.4(2). The application for the attachment of debts order may be made without notice but must be supported by evidence on affidavit: rule 50.3 (2).

[58] According to **Halsbury’s Laws of England** (2020) 12 A, 1386, the court will not grant speculative applications for third party debt orders (our attachment of debts order) and will only make an interim third party debt order against a bank if the judgment creditor’s application notice contains evidence to substantiate his belief that the judgment debtor has an account with the bank in question. Nonetheless, some latitude seems to be afforded to an applicant for a provisional order in terms of the level of detail he must supply to satisfy this requirement. In **Alawiye and another v Mahmood (trading as Amsons)**¹³ the claimant judgment creditors applied under CPR 72.4 for an interim third

¹³2006] 3 All ER 668.

party debt order against a bank. Such an application required an applicant to verify that the third party 'owes' money to, or 'holds' money to the credit of, the judgment debtor. On their application, the judgment creditors were able to establish that the judgment debtor had previously had an account which was in credit with the bank because he had earlier drawn, on the account named in the application, a cheque in their favour which had been honoured on presentation. They could not, however, establish that the bank was in debt to the judgment debtor at the time of the application. The master dismissed the application, holding that it could not be inferred merely from the previous existence of the bank account in credit that it still existed and was still in credit. The judgment creditors appealed.

- [59] It is worth quoting near verbatim what the Court of Appeal held. It held that in the absence of any contrary indication, the court could and should accept, as sufficient for the purposes of an interim third party debt order under CPR 72.4, evidence in which the judgment creditor was able to say no more than that the judgment debtor had previously had an account with the third party bank and that it had previously been in credit. The question was not only one of construction, and there were powerful considerations against a strict construction. In very many cases, the judgment creditor would not have knowledge in any detailed way of who owed what sums to the judgment debtor. That was particularly so in relation to the debts owed to the judgment debtor by his own banker. Such matters were usually not disclosed owing to a banker's duty of confidentiality. Thus the law had long recognised that a relatively relaxed or informal assertion that the third party owed money to the judgment debtor should suffice. Moreover, given the speed at which bank accounts could be closed or merged or have the credits therein transferred or reduced, a good number of applications would be prevented by insisting upon cogent evidence of the judgment debtor's account being in credit as at the very day of the application or any later day, a level of proof to which remarkably few judgment creditors could aspire. Nor would the floodgates be opened by adopting a relaxed view as to what evidence was sufficient. It behoved a judgment creditor to be as sure as he could of the existence of the debt from the third party to the judgment debtor because if, upon making an interim order, it transpired that there was no debt after all, the judgment creditor would be at great risk of being liable to pay the third party's costs. Furthermore, it could be said that the whole point of the interim stage was to establish whether there was, indeed, a present debt from the third party to the judgment debtor and to establish its amount whilst then procuring, if it were found to exist, that it was preserved. Those considerations and others required that evidence that did no more than indicate the earlier

existence of the account, and of its being in credit, could and should suffice where there were no contrary indications. Accordingly, the appeal would be allowed.

[60] This case aptly illustrates that the quality of evidence to be adduced by the applicants to satisfy the Court that there are funds standing to the credit of the respondents at the banks does not require the provision of detailed particulars of account number or balance on the account at the date of the application. If the court considers that on the evidence submitted the judgment creditor is entitled to an attachment of debts order, it must make a provisional order: CPR 50. 3 (2).

[61] I have found on the evidence that the respondent is the holder of accounts at the St. Kitts-Nevis-Anguilla National Bank and with the Development Bank. At the National Bank, he holds account No. 10260499 in which, as at 27th September, 2021, the balance stood at \$14, 994.70. He is also the holder of account No. 10129304, on which the last statement recorded a balance of \$57.50. Accordingly, I would have been prepared to hold that a provisional attachment of debts order may be made in respect of funds standing to the respondent's credit in accounts Nos. 10260499 and No. 10129304, held at the St. Kitts-Nevis-Anguilla National Bank. The garnishee would not then have to pay the judgment creditor anything except to the extent that the garnishee's debt to the judgment debtor is greater than the amount of the attachment of debts order: rule 50.9 (3); and not if the attachment of debts order would have the effect of reducing below \$50 the amount standing to the credit of the respondent: CPR 50.4 (2). There is also evidence that the respondent holds an account with the Development Bank. While there is no evidence as to the balance standing to the credit of the respondent, it is safe to say that there are funds in that account as the respondent's evidence is that he services loan payments using that account. That account would similarly have been liable to be attached.

[62] However, I am of the view that the banks not having been named as garnishees in these proceedings, it would not be appropriate at this stage to make such orders.

[63] As it relates to the alleged accounts with the CIBC First Caribbean International Bank and the Royal Bank of Canada, I have already stated that mere sightings of the respondent at their ATMs or within these banks does not afford evidence that the respondent holds accounts with these banks. Further, no evidence has been adduced by the applicants capable of supporting this assertion. The application for an attachment of debts order in respect of these banks would have been refused in any event, even if named as granishees.

Disposition

[64] For the reasons discussed herein, I make the following orders:

1. The administrators of the Estate of Dexter Brandy Green (deceased) are substituted as the judgment creditors in claim no SKBHCV2004/0194;
2. The application for permission to issue a writ of execution against the judgment debtor is refused;
3. A charging order is granted over the following personal properties owned by the judgement debtor:
 - (a) 1997 Mitsubishi Fuso Lorry bearing registration number GT 78;
 - (b) 2000 Nissan Urvan motor bus bearing registration number TA 129;
 - (c) 1993 Mitsubishi L300 motor bus;
 - (d) 2002 Nissan Urvan motor bus bearing registration number H 819;
 - (e) 2005 Daihatsu Delta Lorry bearing registration number GT 71;
 - (f) 2006 Toyota Hiace motor bus bearing registration number HA 111;
 - (g) 2016 Nissan Urvan motor bus bearing registration number T 5982;
 - (h) 2016 Nissan Urvan motor bus bearing registration number H 819;
 - (i) 2016 Hyundai Tuscon Sport Utility motor vehicle bearing registration number P9019;
 - (j) 2011Mazda Demio motor vehicle bearing registration number PA 7466; and
 - (k) 2009 Nissan Urvan bus bearing registration number HA 239.
4. The judgment creditors are permitted to effect service of the provisional charging order, provisional attachment of debt order on the judgment debtor's legal counsel;
5. The application for attachment of debts orders is refused but with liberty to the applicants to apply in the usual way;
6. Given that both parties have had some measure of success on the applications, I make no order as to costs.

[65] I regret and apologise for the lengthy delay in delivering this judgment. This was partly on account of an extended period of medical leave on which I was placed, together with other periods of personal leave. I gratefully acknowledge the assistance of counsel for their helpful closing submissions.

Trevor M. Ward QC
High Court Judge

By the Court

Registrar