

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

[CIVIL]

SAINT LUCIA

CLAIM NO. SLUHCV2010/ 1141

BETWEEN:

BANK OF SAINT LUCIA LIMITED

Judgment Creditor/ Respondent

and

- 1. DU BOULAY BUILDING SUPPLIES INC**
- 2. DESMOND DU BOULAY**

Judgment Debtors

and

J Q CHARLES LIMITED

Applicant/ Opposant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Ms. Cleopatra McDonald with Ms. Diana Thomas for the Claimant/ Respondent
Mr. Mark Maragh for the Applicant/ Intended Opposant

2020: July 29
August 5

DECISION IN CHAMBERS

- [1] **ST ROSE-ALBERTINI, J. [Ag]:** Bank of Saint Lucia Limited (the “Bank”) is a judgment creditor of (1) DuBoulay Building Supplies Inc and (2) Desmond DuBoulay (Mr. DuBoulay) by way of a series of judgment orders obtained in 2011 and 2012.

- [2] The Bank has filed a writ of seizure and sale in relation to Parcel No. 0231C 38 (the “Property”), of which Mr. DuBoulay is the registered proprietor. The Property was hypothecated as security for the debts owed.
- [3] JQ Charles Limited (“JQC”), a body corporate duly registered under the Companies Act¹, has filed an application for leave to oppose the writ of seizure and sale on the premise that it has an interest in the Property as an intended purchaser, and is currently before the Court in litigation for specific performance or damages against Mr. DuBoulay². JQC says that it has secured an inhibition order in that claim, which precludes the Bank from disposing of the Property, and its interest in the Property will be decimated if the sale is successful, thereby rendering its claim futile.
- [4] I determined that the application ought to be refused and provide my reasons in this decision.

The Issues

- [5] The issues presented for consideration are: -
1. Was the writ of seizure and sale filed by the Bank on 19th June 2019 defective and consequently void?
 2. Does the inhibition order obtained by JQC prohibit the Bank from disposing of the Property by way of judicial sale?
 3. If the opposition is unsuccessful, to what relief is the Bank entitled?

Chronology of Events

- [6] The events leading up to this application are summarized below and provide some insight into the state of play between the parties.

¹ Cap 13.01 of the Revised Edition of the Laws of Saint Lucia

² SLUHCM2018/ 0101

- [7] On 23rd September 2011, the Bank obtained a judgment order against Mr. DuBoulay and his company for the principal sum of \$3,141,910.73 plus fixed costs of \$2,727.50. On 18th October 2011 judgment was entered for interest in the sum of \$361,674.87. By order dated 16th January 2012, the interest rate on the principal debt was varied from 9 percent to 6.5 percent per annum and the parties agreed to the payment of monthly installments of \$17,000.00 until payment of the debt in full. The judgment debts remain unsatisfied and interest continues to accrue at the agreed rate of 6.5 percent.
- [8] On 1st December 2017, a writ of seizure and sale was filed for judicial sale of the Property. On 11th December 2017, an application was made for permission to issue the writ, as 6 years had elapsed from the date judgment was obtained. That application was granted on 12th December 2017.
- [9] On 16th October 2018, the Bank filed a notice of withdrawal of the writ of seizure and sale. The court's record, however, reveals that the writ was issued on 18th October 2018 and made returnable on 18th February 2019. No further steps were taken in relation to that writ.
- [10] On 19th June 2019, a fresh writ for seizure and sale was filed. It was issued on 23rd October 2019 and made returnable on 23rd February 2020. The Property was subsequently seized and advertised for sale and a judicial sale was scheduled for 29th January 2020.
- [11] On 27th January 2020, JQC filed an urgent application for leave to oppose seizure and sale on the grounds that (1) the writ is defective; and (2) JQC is involved in litigation with Mr. DuBoulay in relation to the purchase of the Property in Claim No. SLUHCM2018/0101, which was filed on 27th December 2018 and has secured an inhibition order dated 6th February 2019 which prohibits any dealings with the Property until determination of the claim or further order of the Court.
- [12] The application first came before the Court on 29th January 2020 and the Court ordered a stay of the sale pending determination of the opposition.

JQC's Submissions

[13] In summary, JQC put forward the following arguments:

1. That it has the requisite standing to bring this application as the intended purchaser of the Property, under an agreement for sale executed with Mr. DuBoulay in October 2018. The Property is required for the purpose of expanding its property development and rental business, and while it has met all its obligations under the agreement for sale, Mr. DuBoulay has failed or refused to complete the sale.
2. It has filed a commercial claim for specific performance and obtained an inhibition which precludes any dealings with the Property and that includes any dealings for the purpose of a judicial sale by the Bank.
3. Further, the writ was defective as it was issued without the permission of the court to do so after 6 years had elapsed from the date of the judgment.
4. The order dated 12th December 2017 granting such permission was spent as the writ filed in December 2017 was in fact issued and a fresh application for permission ought to have been made.
5. If the judicial sale takes place and the Property is sold it will render JQC's claim against Mr. DuBoulay nugatory and JQC could not be adequately compensated in damages. Therefore, the opposition is made to protect JQC's interest and the viability of its claim against Mr. DuBoulay.

The Banks Submissions

[14] In summary, the Bank's rebuttal is as follows: -

1. That it lawfully obtained judgments against Mr. DuBoulay and his company in 2011 and 2012 for debts owed, which to date remain unpaid and it is entitled to enforce judgment.

2. Mr. DuBoulay hypothecated the Property as security for the debts and a judicial hypothec in relation to the judgments was registered on the land register for the Property on 15th May 2012, as Instrument No. 2238/2012.
3. In 2017 prior to the claim filed by JQC against Mr. DuBoulay, the Bank had exercised its right of enforcement by way of a writ of seizure and sale which was subsequently withdrawn, and a fresh writ was lawfully filed on 19th June 2019.
4. The Bank was not enjoined in the application for the inhibition order and the order contains no prohibition against sale of the Property by the Bank, as a creditor. Further, the inhibition only prohibits dealings by Mr. DuBoulay and does not affect the enforcement rights of the Bank which were acquired earlier in time.
5. The writ filed on 19th June 2019 was not defective as the order granting permission to issue a writ was still in effect and fully applicable to that writ.
6. JQC is a stranger to these proceedings and has no standing to bring this application.

Analysis

- [15] I have given due consideration to the application, affidavit in support and exhibits of JQC and the affidavit in answer and exhibits of the Bank, together with the written submissions and authorities of the respective parties and oral submissions from Counsels.

Issue 1: Was the writ of seizure and sale filed by the Bank on 19th June 2019 and issued on 23rd October 2019 defective and consequently void?

- [16] Mr. Maragh argued on behalf of JQC that the order of 12th December 2017 granting permission to issue a writ was spent as it was obtained in relation to the writ filed on 1st December 2017 which was itself a nullity and, in any event, that writ was in fact issued on 18th October 2018.

- [17] He relied on earlier pronouncements of this Court in **First Caribbean International Bank (Barbados) Limited v Praise & Worship Tabernacle Inc et al**³ and **Royal Bank of Canada v Bernard Wells et al**⁴ as authority for JQC's position that the writ of execution was defective and amounted to a nullity, having been filed without the requisite permission to issue same, as 6 years had elapsed since the judgments were obtained.
- [18] I consider it necessary to examine the differences between those cases and the instant case. **First Caribbean International Bank (Barbados) Limited v Praise & Worship Tabernacle Inc. et al** concerned a case in which the writ of seizure and sale was filed prior to the judgment creditors application pursuant to CPR46.2(c), for permission to issue such writ. The order granting permission was not retroactive and made no reference to the earlier filed writ. This Court took the view that a fresh writ ought to have been filed after permission was granted and that the prior writ and everything which flowed from it including an application to fix an upset price were nullities. The rationale was that it is improper to invoke the process for issuance of a writ in circumstances where permission pursuant to CPR 46.2(c) is required and such permission had not been obtained. **Royal Bank of Canada v Bernard Wells et al** concerned an application to oppose seizure and sale in circumstances where the writ of seizure and sale was filed within the 6-year window for which no permission was required and the outcome in that case therefore has no bearing on the present application.
- [19] Although the facts of the present case might seem somewhat akin to that of **FCIB v Praise & Worship Tabernacle Inc. et al**, the difference here is that the Bank withdrew the defective writ on 16th October 2018 and the issuance of that writ on 18th October 2018 would have to have been erroneous. A fresh writ was subsequently filed on 19th June 2019, at which time no valid writ was yet issued pursuant to the order dated 12th December 2017 and that order was not spent. The order was couched in plain, unambiguous language, granting permission to issue "**a writ of execution**". Notwithstanding that the

³ CLAIM NO. SLUHCV2009/0498, delivered on 21st March 2018

⁴ CLAIM NO. SLUHCV2017/ 0037, delivered on 21st May 2019

application had referred to the writ filed on 1st December 2017; the wording of the order was not specific to that writ. I therefore concluded that it was not necessary in these circumstances to make a fresh application for permission.

- [20] Therefore, the writ filed on 19th June 2019 and issued on 23rd October 2019 complied with all the formalities and procedural requirements and was not defective.

Issue 2: Does the inhibition order obtained by JQC prohibit the Bank from disposing of the Property by way of judicial sale?

- [21] On this point, the applicable law is contained in sections 83 to 85 of the **Land Registration Act**⁵ which states:

“83. POWER OF COURT TO INHIBIT REGISTERED DEALINGS

(1) The Court may make an order, in this Division referred to as an inhibition, inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or hypothec.

(2) A copy of the inhibition under the seal of the Court, with particulars of the land, lease or hypothec affected thereby, shall be sent to the Registrar who shall register it in the appropriate register, and no inhibition shall bind or affect the land, lease or hypothec until it has been registered.

84. EFFECT OF INHIBITION

So long as an inhibition remains registered, no instrument which is inconsistent with it shall be registered.

85. CANCELLATION OF INHIBITION

The registration of an inhibition shall be cancelled in the following cases and in no other—

- (a) on the expiration of the time limited by the inhibition;***
- (b) on proof to the satisfaction of the Registrar of the occurrence of the event specified in the inhibition;***

⁵ Cap 5.01 of the revised Edition of the Laws of Saint Lucia

- (c) ***on the land, lease or hypothec being sold by a creditor, unless such sale is itself inhibited; or***
- (d) ***by order of the Court.” [Emphasis added]***

[22] In support of the Bank’s contention that the inhibition only restricted Mr. DuBoulay from dealing with the Property, Ms. McDonald referred the court to dicta in **Scottish Waggon Co. Ltd v Hamilton’s Trustee**⁶, where a court said ***“Inhibition is only a negative or prohibitory diligence; it prohibits the party inhibited from contracting any debt or granting any voluntary deed by which any part of his lands may be alienated or carried off to the prejudice of the creditor inhibiting……”*** She argued further that to succeed on this application JQC’s rights and interest in the Property would have to supplant that of the Bank and the Court would have to be satisfied that any interest which JQC could have in the Property would rank above the Bank’s registered charges and the judicial hypothec⁷.

[23] On perusal of section 85 and the authorities provided by Counsel for the Bank, in my judgment, it is correct to say that the inhibition did not in any way affect the Bank’s right of enforcement as judgment creditor, which right was acquired and registered earlier in time. The wording of the section suggests that if sale by a creditor is to be constrained this should be specifically stated in the inhibition order.

[24] The onus was on JQC to request in its application for the order, that the inhibition be extended to sale by a judgment creditor. Such application would have to be served on the creditor who would then be afforded the opportunity to be heard. Considering that the Bank was not a party to the proceedings and made no representation on the application for the inhibition; and that the order itself made no reference to restriction of a sale by the Bank as creditor, it cannot be said that the order was intended to bind the Bank. This is the only sensible inference to be drawn from section 85, which pellucidly states that the registration of an inhibition shall be cancelled on the land being sold by a creditor, unless such sale is itself prohibited.

⁶ (1906) 13 SLT 779, OH.

⁷ See Augustin Smith v 1st National Bank of Saint Lucia Limited SLUHCVP2013/0091, delivered on 20th March 2015

[25] I agree that in the circumstances of this case, the inhibition was granted in the context of the application and restricted Mr. DuBoulay as the defendant from dealing with or disposing of the Property pending determination of JQC's claim. It did not in any way seek to restrict the Bank's right of enforcement of its judicial hypothec which was earlier in time to JQC's claim and the inhibition order. Additionally, JQC's interest in the Property, which is still undetermined, having its foundation in acts and events which arose subsequent to registration of the Bank's charges could not, by any stretch of the imagination, override the Bank's charges and enforcement of its rights against the Property.

[26] I therefore concluded that the inhibition order did not prohibit the Bank from disposing of the Property by way of judicial sale and that such a sale would lead to cancellation of the inhibition in favour of the Bank's prior rights and charges.

Issue 3: To what relief is the Bank entitled?

[27] Article 518 of the **Code of Civil Procedure**⁸ (the "CCP") deals with the liability incurred by an unsuccessful opposant. It states: -

"518. Every party who opposes unsuccessfully the sale of an immovable or of a rent under seizure, is liable towards the party seizing and the defendant, not only for the costs incurred upon his opposition, but also for all damages incurred upon his opposition, but also for all damages resulting therefrom, including interest upon the amount due to the plaintiff, for the time during which the sale was stopped."

[28] As the application was unsuccessful and the date of the sale has passed, the Sherriff may proceed by way of articles 523 and 524 of the CCP under a writ of *venditioni exponas*. These articles stipulate that: -

"523. When oppositions are decided before the day fixed for sale, if the seizure is not set aside, and if no new notice of sale be required, the Sheriff on the day of sale may proceed upon the writ in accordance with the judgment of the Court. But

⁸ Cap 4.01A of the revised Edition of the Laws of Saint Lucia

if the oppositions are not decided until after the day fixed for the sale, the Sheriff can only proceed to sell under a writ of venditioni exponas, and in conformity thereto, and after three further consecutive publications in the Gazette.

524. The execution of a writ of venditioni exponas cannot be stopped by opposition, unless for reasons subsequent to the proceedings by which the sale was suspended in the first instance and upon the order of the Judge.”

- [29] Under article 518, the Bank is entitled to costs, as well as damages incurred and resulting from the failed opposition. It has also been established that on such applications the prejudice to the Bank is the delay in collection, which is compensated in interest.
- [30] The Bank has requested reimbursement of the cost incurred for filing the writ and advertising the sale which was scheduled for 29th January 2020. In my view, this is not an expense which was incurred by or resulted from the opposition. It is a cost which would have been borne by the Bank to exercise its right against the judgment debtors and is recoverable from the sale of the Property. Had the application been determined ahead of the sale date of 29th January 2020, the sale would have gone ahead on that date. Having been determined after that date, the process continues under article 523 which says how the Sheriff should proceed to reinstate a sale. This cost will not be allowed as the sale was only suspended and the Bank has not been deprived of its right to continue with a sale, once the requisite steps are taken under article 523.
- [31] On the other hand, the costs to be incurred for initiating and advertising a sale pursuant to a writ of *venditioni exponas* under article 523, are costs which would flow directly from the opposition and must be borne by JQC. In addition, interest on the judgment debt for the period the sale was suspended, and the cost of this application are also recoverable.
- [32] Interest on the judgment debt has been agreed at 6.5 percent per annum in the judgment order dated 16th January 2012 and that is the rate which applies currently. Consequently, the Bank would be entitled to payment of interest from JQC, at the stated rate.

Conclusion

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

1. The application for leave to oppose the writ of seizure and sale issued on 23rd October 2019 is dismissed.
2. JQC will pay interest to the Bank at the rate of 6.5% per annum commencing from 29th January 2020 until the next date fixed for judicial sale of Parcel No. 0231C 38.
3. JQC shall pay to the Bank the cost associated with any filings and further advertisements of a sale pursuant to article 523 of the Code of Civil Procedure.
4. Cost is awarded to the Bank on this application in the sum of \$2,500.00.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar