

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2012/0219

BETWEEN:

LORNA NEWTON NÉE GOODGIE

CLAIMANT

and

CORNELIUS GLOSTER

and

RICARDO DE SHONG

DEFENDANTS

Appearances:

Mr. Cecil 'Blazer' Williams for the Claimant.

First defendant in person, unrepresented.

Ms. Danielle France holding papers for Mr. Richard Williams for the second defendant.

2017: Feb. 27

Mar. 29

DECISION

BACKGROUND

- [1] **Henry, J.:** Mrs. Lorna Newton née Goodgie filed¹ a claim against Mr. Cornelius Gloster and Mr. Ricardo De Shong in which she sought repayment of \$199,000.00. She alleged that Cornelius Gloster and Ricardo De Shong had executed a series of promissory notes in favour of her father Sheldon Goodgie

¹ On 31st July, 2012.

(aka Cheldon Goodgie) by which they promised to pay him that sum. She alleged further that Mr. Gloster and Mr. De Shong promised to pay the monies to her in the event of her father's demise. She claimed that they had not done so and she therefore sought to recover that sum and costs.

- [2] Mr. De Shong admitted the claim in his acknowledgement of service². Mr. Gloster has not. Mrs. Newton requested and was granted judgment on admissions against Mr. De Shong in the amount of \$126,310.00. Mrs. Newton subsequently filed a judgment summons,³ the hearing of which was adjourned to facilitate settlement negotiations. In the intervening period a consent order was lodged at the court office and settled by the Registrar⁴. In it, the parties purported to settle the claim. A final order was subsequently filed and entered as an order of court.
- [3] The order directed the sale of property owned by Ricardo De Shong at Edinboro ('the subject property'). It also mandated Mr. De Shong to vacate the premises. On the basis of the 'consent order' Mrs. Newton applied for an order that Mr. De Shong be excluded from the subject property. Mr. De Shong filed an application in which he challenged the validity of the consent order. He submitted that he was unrepresented at the time the order was filed. He contended that Mr. Jomo Thomas who purportedly sanctioned the filing of the order on his behalf, was not on the record as his legal practitioner and was not acting for him.
- [4] Mr. De Shong submitted that the consent order was irregular and filed in violation of the Civil Procedure Rules 2000 ('CPR'). He applied for it to be struck out. He produced a copy of the identical consent order signed by him and Mrs. Newton which appeared to have been entered 3 days before the impugned order. He prayed that that both the settled and final order be set aside. Mr. Gloster made no submissions relevant to the issue. For the reasons outlined in this decision, both consent orders are set aside.

² Filed on 24th August, 2013.

³ On 30th April, 2014.

⁴ On 22nd September, 2014.

ISSUES

[5] The issue is whether the impugned consent orders are invalid and should be set aside.

ANALYSIS

Issue – Are the impugned consent orders invalid and should they be set aside?

[6] The consent order which Mr. De Shong is seeking to have set aside, is worded in exact terms as the copy of a consent order he exhibited⁵ ('the settled order'). They both provide:

'By Consent it is hereby ordered that:

- (1) The property situate at Edinboro and owned by Ricardo Deshong the judgment debtor, is to be put up for sale provided that the Mortgage made between the judgment debtor and the Bank of Nova Scotia is satisfied or if not satisfied the Bank is joined to the Conveyance.
- (2) The Judgment Creditor is to take control of all matters pertaining to the sale of the said property.
- (3) The judgment debtor is to vacate the said property within one month of completion of sale.
- (4) The judgment Creditor to have carriage of the Order.'

[7] On the exhibit⁵ produced by Mr. De Shong, the signatures of Lorna Newton and Ricardo De Shong appear immediately above those of Cecil A. Blazer Williams and Jomo Thomas respectively. The first page of that document contained the hand-written notation 'settled as amended' followed by initials which appear to be those of the then Registrar of the high court, Mrs. Gibson-Marks. It is dated 19.9.14. The referenced signatures were missing from the final order filed and entered three days later. That consent order ('the final order') was signed only by the Registrar.

[8] Mr. De Shong has applied for both orders to be set aside on the grounds that they were not drafted in accordance with the mandatory requirements of CPR 42.7 in that they were not signed by legal practitioners for both parties. He invoked the court's inherent jurisdiction to set aside the orders. Mrs. Newton submitted that there is a settled consent order signed by her legal practitioner Mr. Cecil Blazer Williams and by Mr. Jomo Thomas on Mr. De Shong's behalf which was filed on 10th September, 2014.

⁵ To his affidavit filed on 10th February, 2017 as 'R.D. 3'.

She contended that a practice has developed whereby orders which do not contain the signatures of legal practitioners have been entered as final consent orders where a draft consent order was previously settled by the court.

- [9] Mrs. Newton urged that even if the practice does not strictly comply with the CPR, the consent order should not be invalidated by the procedural error. She urged the court to make an order to put things right as it did in the case of **Faelleseje A Private Danish Foundation v Lesline Bess Court Appointed Representative of the Estate of Othniel Sylvester Deceased**⁶. In that case, the court gave effect to a final consent order which was not signed by the parties' legal practitioners. It took into account that the draft consent order had been signed by the parties and their legal practitioners and its terms settled by the judge.
- [10] Mr. De Shong supported his application by affidavit evidence. He deposed that the settled order was signed by Mrs. Newton and her lawyer Mr. Williams, him and Mr. Jomo Thomas. He declared that Mr. Thomas was never his attorney and that Ms. Mandela Campbell was his lawyer when the order was signed. He averred that Ms. Campbell remained his lawyer on record until Mr. Richard Williams filed a Notice of Acting subsequently. He provided no explanation regarding how he came to sign the consent order without his legal practitioner or why Mr. Jomo Thomas' signature appeared on the document.
- [11] Mr. De Shong averred that the final order is not a valid order since it does not contain the signatures of the legal practitioners Mr. Cecil Blazer Williams and Ms. Mandela Campbell. He contended further that the orders cannot simply be characterized as procedural errors but rather that they were made in flagrant breach of the CPR and are irregular. He submitted that he was unrepresented when the consent order was made. He contended that CPR 42.7(1) stipulates certain mandatory requirements of a validly constituted consent order, namely that it must be drawn on the terms to be agreed, expressed as being by consent, signed by the legal practitioners for the parties and filed at the court office.
- [12] Mr. De Shong argued that the final order was expressed to be by consent and drawn in the terms agreed but was not signed by his legal practitioner. He submitted that the CPR mandates that where a

⁶ SVGHCV2004/0086A (unreported, decided Dec. 5, 2016).

party changes its legal practitioner, the latter must file a Notice of Change of solicitor. He contended that since Mr. Jomo Thomas did not file and serve such notice of change of solicitor his signature did not qualify as signature of his legal practitioner and the settled order was thereby invalidated. He thereby implied that although he had changed his legal practitioner, Mr. Thomas had failed to make the necessary filings to reflect this. Mr. De Shong contended further that the final order was likewise invalidated by the absence of signatures of the parties' legal practitioners.

- [13] Mr. De Shong contended that CPR 42.7(3)(a) outlines certain types of judgments which may be entered by consent. In this regard, he submitted that such judgments were limited to orders for costs, delivery of goods and the payment of debt or damages. He reasoned that but for the lack of signature, the impugned consent orders would have been captured under sub-paragraph (iii) of that provision. He added that CPR 42.7(3) (b) sets out other kinds of consent orders which may be made, and that because the subject matter of the impugned consent order dealt with land, it does not fall under any of the categories described in that sub-rule. He cited the decision in **Keith Edwards and Eunice Edwards**⁷ in support.

- [14] In that case, Michel J. ruled that CPR 42.7 expressly exempts land matters from the consent order regime. He stated:

‘The fact that the terms of the order were agreed to by the disputing parties and that the order is therefore stated to have been by consent, does not transition it from being an order under rule 42.4 to a consent order under rule 42.7, because sub-rule (3) rule 42.7 enumerates the kinds of case to which rule 42.7 apply, and an order involving land matters like the severing of joint proprietorship and/or the partitioning of jointly-owned property, could not be made under rule 42.7’.

- [15] Mr. De Shong submitted further that enforcement proceedings in respect of money judgments are limited to charging orders, garnishee orders, judgment summonses or order for seizure and sale of goods. He contended that the judgment on admissions obtained by Mrs. Newton can be enforced only through those mechanisms and not by sale or vacant possession of property. He concluded that an

⁷ ANUHCv2002/0204.

order for sale is made only under certain conditions as provided in CPR 55 which have not been satisfied in the case at bar.

[16] He added that Mrs. Newton has used an incorrect procedure to enforce the judgment debt and the consent orders should therefore be set aside. Mrs. Newton submitted that consent orders may be contractual or non-contractual and that the parties are at liberty to contract with each other.

[17] CPR 42.7 set out the regime governing consent orders. Sub-rule (1) is self-explanatory and provides:

‘42.7 (1) Subject to paragraphs (2) to (5), a consent order or judgment must

be –

(a) drawn in the terms agreed;

(b) expressed as being “By Consent”;

(c) signed by the legal practitioner acting for each party to whom the order relates; and

(d) filed at the court office for sealing.’

[18] The settled order and the final order were drawn in the terms agreed and expressed to be by consent. They accordingly satisfy paragraphs (a) and (b) of sub-rule (1). However, whereas the final order was filed at the high court office and sealed, it has not been established that the settled order was so filed or sealed. Other than the copies exhibited by Mr. De Shong and attached to Mrs. Newton’s submissions, no copies or originals of the settled order are on the court’s file.

[19] Draft orders are merely lodged. It is not usual to file them. The exhibited copy provided by Mr. De Shong contained the court stamp but it had been struck through without any indication of who did so. There is no evidence that it was filed or sealed. The final order was.

[20] The settled order was signed by Mrs. Newton and her counsel. Mr. De Shong admitted signing it. He denied that Mr. Jomo Thomas was his legal practitioner. I make no finding that Mr. Thomas was. I find that the final order was not signed by the parties’ legal practitioners.

[21] Even though the order was not signed by Mr. De Shong’s legal practitioner, by signing it, Mr. De Shong signified agreement with its contents. He did not suggest otherwise nor did he allege that

his signature was involuntary or coincidental. I infer that he signed it willingly intending to be bound by its contents. The absence of his legal practitioner's signature would not necessarily invalidate the order.

[22] The stipulation for a consent order to be signed by a party's legal practitioner simply embodies the requirement for the party to record his or her agreement with the terms. To hold that a legal practitioner can but a party cannot bind a party to such an agreement, would be illogical and contrary to principles of contract law. I am satisfied that both orders substantially complied with paragraph (c) of sub-rule (1).

[23] In light of the foregoing, I find that the settled consent order satisfied the requirements of sub-rule (1). The final consent order did not. Having regard to the submissions made by the parties, it is necessary to examine both orders against the provisions of sub-rule (3) which lists the types of judgments or orders which may be the subject of a consent order.

[24] CPR 42.7 (3) provides:

(2) 'Except as provided by paragraphs (4) and (5), this rule applies to the following kinds of judgments or orders –

(a) a judgment for –

- (i) **costs;**
- (ii) **the delivery up of goods** with or without the option of paying the value of the goods to be assessed or the agreed value; and
- (iii) **the payment of a debt or damages** (including a judgment or order for damages or the value of goods to be assessed);

(b) an order for the –

- (i) **discharge from liability of any party;**
- (ii) **dismissal of any claim**, wholly or in part;
- (iii) **payment, assessment or waiver of costs**, or such other provision for costs as may be agreed;
- (iv) **payment out of money which has been paid into court;**

- (v) **setting aside of a default judgment** under Part 13;
- (vi) **stay of enforcement of a judgment**, either
unconditionally or on condition that the money due under
the judgment is payable on a stated date or by
instalments specified in the order; and
- (vii) stay of proceedings on terms which are attached as a schedule to
the order but which are not otherwise part of it (a “**Tomlin
Order**”);’ (bold added)

[25] The sub-rule expressly limits the use of consent orders to judgments or orders for costs, delivery of goods, payment of a debt or damages, discharge of a party from liability, dismissal of claims, payment, assessment or waiver of costs, payment out of money paid into court, setting aside default judgment, stay of enforcement of a judgment and Tomlin orders. The impugned orders do not fall into those categories. Therefore, Mrs. Newton and Mr. De Shong could not activate its provisions for the purposes of finalizing and recording an agreement for the sale of the property at Edinboro.

[26] Furthermore CPR 42.7 (4) excludes from the consent order regime, orders or proceedings ‘where the court’s approval is required⁸ ... before an agreed order can be made.’ Such approval is mandated before a judgment creditor can realize a judgment debt for payment of money through an order for sale of real property. The Civil Procedure Code⁹ stipulates that a judgment creditor must in such circumstances apply to court for an order for sale.

[27] Before the parties purported to file the consent order, no application was made in the instant case for a judge to affirm its terms. It was not sanctioned by a judge as in the **Faelleseje**⁶ case referred to by Mrs. Newton. It seems to me that the requirement for an application for an order for sale may be deemed to be satisfied if, by agreement and without a formal application, the parties bring to the judge’s attention for approval, a duly executed agreement for sale as in **Faelleseje**⁶.

⁸ Pursuant to the CPR or any enactment.

⁹ Cap. 120 of the Revised Laws of Saint Vincent and the Grenadines, 2009, section 50.

- [28] In such a situation, the judge may settle the draft consent order and make it an order of court, on being satisfied that all necessary pre-conditions have been complied with and that all parties have given their unequivocal consent to it. Such scrutiny did not take place in the instant case. The draft consent order was not presented to a judge for approval. It therefore could not be lodged, processed and filed as a consent order under CPR 42.7.
- [29] Mrs. Newton has asked that the court make an order to put things right pursuant to CPR 26.9. That rule authorizes the court to validate a procedural error or default in compliance with a rule. As demonstrated in the preceding analysis, Mrs. Newton's default arose by the omission to take mandatory steps to bring the parties' agreement to a judge's attention for approval. It amounts to a substantive delinquency which runs afoul of the objective underpinning CPR 42.7 and section 50 of the Civil Procedure Code.
- [30] Within the context of this case, those legislative provisions aim collectively to ensure that decisions with far-reaching consequences for a judgment debtor (with respect to his ownership of land) are not made and finalized without review and sanction by a senior judicial officer. The time for scrutiny of the impugned orders has passed. It cannot be done retroactively as doing so is likely to be prejudicial to one party. The **Faelleseje** decision is distinguishable from the instant case and does not assist Mrs. Newton. I therefore make no order to regularize the consent orders.
- [31] Having considered the submissions from both parties, I agree with Mr. De Shong that the final consent order was irregular and made contrary to CPR 42.7 (3) and (4) Neither the settled nor final consent order fit within the categories of orders which may be filed by consent under CPR 42.7(3). They are also excluded from coverage under CPR 42.7, because the court's approval is required before an order is made for the sale of real property in satisfaction of a judgment debt⁹. They are therefore irregular and invalid and are therefore set aside.
- [32] It follows that Mrs. Newton's application for vacant possession and exclusion of Mr. De Shong from the subject property, is without a factual or legal basis. It is accordingly dismissed.

Miscellaneous

[33] Mr. De Shong made further submissions which relate specifically to Mrs. Newton's substantive application for an order excluding Mr. De Shong from the property. It is not necessary to consider them. They are not entertained at this time. Usually a successful party is entitled to receiver costs. However, I am convinced that Mr. De Shong signed the settled order thereby agreeing to a certain course of action. Mrs. Newton alleged that he has not made good. She may be entitled to pursue other options to secure relief. The justice of this case would in the premises be best served without awarding costs. Each party shall bear his or her own costs.

ORDER

[34] It is accordingly ordered:

1. The settled consent order dated 19.9.14 and the final consent order filed on 22nd September, 2014 are irregular and invalid and are hereby set aside.
2. Lorna Newton née Goodgie's application for an order for vacant possession of the subject property at Edinboro and that Mr. De Shong be excluded from the subject property is dismissed.
3. Each party shall bear his or her own costs.

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Esco L. Henry
HIGH COURT JUDGE