

SAINT LUCIA

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

**CLAIM NO. 695 of 1995
Consolidated with
CLAIM NO. 789/1995**

BETWEEN:

**(1) PETER JN MARIE
(2) CLOTILDA JN MARIE**

Claimants

and

WINSTON F. CENAC

Defendant

and

NATIONAL COMMERCIAL BANK OF SAINT LUCIA LIMITED

Ancillary Defendant

AND

NATIONAL COMMERCIAL BANK OF SAINT LUCIA LIMITED

Claimant

and

**(1) LAURIMA LOWRIE
(2) PETER JN MARIE
(3) CLOTILDA JN MARIE**

Defendants

and

WINSTON F. CENAC

Ancillary Defendant

Appearances:

Mr. Alvin St. Clair for Peter Jn Marie and Clotilda Jn Marie

Mr. Dexter V. O. Theodore for Winston F. Cenac

Ms. Leandra Verneuil for Laurima Lowrie

Mr. Hilford Deterville QC, with him is Ms. Diana Thomas for National Commercial Bank of Saint Lucia Ltd.

2003: October 27

2004: March 01

JUDGMENT

1. **HARIPRASHAD-CHARLES J:** These are consolidated actions. Claim No. 695/1995 is a claim by Mr. Peter Jn Marie and Clotilda Jn Marie (the Jn Maries) seeking damages for alleged professional negligence and breach of contract against one of the island's most distinguished and learned Queen's Counsellor, Attorney-at-Law I and Notary Royal, Mr. Winston Cenac. Mr. Cenac proceeded to join the National Commercial Bank of Saint Lucia Limited (the Bank) as the ancillary defendant in the claim alleging breach of their statutory duty in failing to claim an interest in Parcel 1243B 52 as required by the Land Adjudication Act.
2. Claim No.789 of 1995 was instituted by the Bank against Laurima Lowrie, Peter Jn Marie and Clotilda Jn Marie as the defendants. It sought among other things, a declaration that it is the absolute owner of the parcel of land registered in the Land Register Number 1243 B 52. The Jn Maries swiftly moved to join Mr. Cenac as the ancillary defendant in this suit alleging that if they are liable to the Claimant, then they are entitled to be indemnified by Mr. Cenac in respect of their liability to the Claimant since having accepted the retainer, he was under a duty to exercise all due care, skill and diligence as a Solicitor and Notary Royal in investigating the title of the intended vendor, advising the Jn Maries and preparing the Deed so that the land could be transferred to the Jn Maries free and clear of all encumbrances.

The Facts

3. This case has an unusually long and complex history. By a judgment of the High Court of Justice dated 30th April 1986 and registered in the Registry of Deeds and Mortgages on the 8th May 1986 in Volume 139 a Number 153224, Laurima Lowrie was ordered to pay the Bank the sum of \$27,021.00 with interest at 13% per annum. The said judgment was not registered at the Land Registry.
4. Ms. Lowrie was at the time of the registration of the Judgment the owner of a parcel of land registered in the Land Registry as Parcel Number 1243B 52. By virtue of the provisions of Article 2002, the Judgment became a judicial hypothec over the land from the date of its registration.

5. By an agreement for sale executed before Mr. Cenac on 28th August 1987, Ms. Lowrie agreed to sell to the Jn Maries a portion of land not less than 25 acres (the land) for the sum of \$116,760.00. The said agreement was filed in the Land Registry on 21st September 1987 as a caution against the land.
6. On 20th March 1989, J.C. Collymore obtained a judgment for \$69,040.00 against Ms. Lowrie. The said judgment was registered in the Registry of Deeds and Mortgages on 20th March 1989. On 30th January 1990, J. C. Collymore filed a caution against the said parcel of land as judgment creditor.
7. On 30th October 1989, a Deed of Sale was executed in respect of the said parcel of land between Ms. Lowrie (as vendor) and the Jn Maries (as purchasers) before Mr. Cenac. The said Deed was presented for registration on 6th February 1990 but was refused by the Registrar of Lands on the ground that the caution filed against the land by J.C. Collymore forbade the registration of dispositions of the land and making entries affecting the same.
8. On 6th June 1990, Mr. Cenac caused proceedings to be instituted in the names of the Jn Maries in the High Court to remove the caution by J.C. Collymore or alternatively, permitting the registration of the Deed of Sale prepared by him.
9. On 18th December 1990, before the determination of the proceedings mentioned above, a second caution was lodged against the land by the Bank.
10. By virtue of a writ of execution issued on behalf of the Bank, the Sheriff on 7th January 1991, seized the land in the hands of Ms. Lowrie.
11. By a Deed of Sale and Adjudication made on 2nd April 1991 the Bank caused the land to be seized and sold at a judicial sale by virtue of their registered judgment, whereupon the said Bank purchased the land and on 10th October 1991, the Bank caused the sale to be registered at the Registry of Deeds and Mortgages in Volume 130 No. 166062 (the Sheriff sale). Notice of

the seizure and sale of the land was published in the Official Gazette on 26th January, 2nd February and 9th February 1991 respectively. There was no opposition to the Sheriff Sale.

12. Some three weeks thereafter, on 24th April 1991, Matthew J. ordered the registration of the Deed of Sale prepared by Mr. Cenac but made no order for the removal of the cautions against the land. The Jn Maries appealed the judge's ruling. They prayed, among other things for a declaration that a caution entered by J.C. Collymore ought not to have been so entered because it was contrary to the terms of a previous caution entered by them. They applied for its removal. By judgment dated 26th October 1992, the Court of Appeal dismissed the appeal and re-affirmed the judge's ruling.
13. On 18th November 1992, the Deed of Sale prepared by Mr. Cenac in favour of the Jn Maries was registered in the Land Registry but the cautions against the land remain registered at the Land Registry while the judicial sale to the Bank remains registered at the Registry of Deeds and Mortgages. On 3rd August 1993, the Bank applied to be registered as owner of the land under the provisions of section 80 of the Land Registration Act 1984 but the application was turned down.

The Issues

14. Against this unpleasant background, the assistance of the Court is sought to resolve the following issues namely:
 - (i) Whether the claim filed by the Jn Maries with respect to breach of contract and professional negligence is statute barred.
 - (ii) Whether the registration of the Judgment in favour of the Bank constituted an overriding interest with respect to the land with the effect that persons dealing with the "land" would be deemed to have notice.
 - (iii) What is the effect of the Sale by the Sheriff? Does the formalities which surround such a sale have the effect of rendering null and void any purported sale by the Judgment Debtor to a third party in these circumstances?
 - (iv) Whether Mr. Cenac was negligent in the execution of the Deed of Sale dated 30th October 1989 or alternatively, was he duty bound to search the records in the Office of Deeds and Mortgages?

Whether the Jn Maries' claim is statute-barred?

15. In his defence filed on 20th June 1996, Mr. Cenac alleged that the claim for negligence brought against him by the Jn Maries is extinguished under the provisions of Article 2122 and Article 2129 of the Civil Code of Saint Lucia (the Code) in that the negligence alleged occurred more than 3 years preceding the commencing of the action.
16. In respect of the Jn Maries' claim for breach of contract, Mr. Cenac alleged that like the claim for negligence, this claim is also extinguished under the same sections of the Code in that the breach occurred more than 6 years preceding the commencement of the action, that is to say from the date of the agreement for sale dated 28th August 1987.
17. On the date of the trial, Counsel agreed that this issue would not be pursued any further.

Overriding Interest

18. By a judgment of the High Court of Justice dated 30th April 1986 and registered in the Registry of Deeds and Mortgages on 8th May 1986, Ms. Lowrie was ordered to pay to the Bank the sum of \$27,021.00 with interest at the rate of 13% per annum from 15th March 1982 until payment.
19. By Article 1908 of the Code, a hypothec is a real right, and it is a charge upon immovables specially pledged by it for the fulfillment of an obligation, in virtue of which charge the creditor may cause the immovables to be sold in the hands of whosoever they may be.
20. By Article 1913, a judicial hypothec is that which results from judicial acts. By Article 1923, judicial hypothec results from judgments of the courts ordering the payment of a specific sum of money. Judicial hypothec affects generally the immovables owned by the debtor at the time of the registration of such hypothec and those subsequently owned by him unless the same are exempt from seizure or are incapable of alienation otherwise.
21. By virtue of the provisions of Article 2002 of the Code, the judgment became a judicial hypothec over the land from the date of its registration. Thus, the Bank became entitled to a judicial hypothec on 8th May 1986.

22. By an agreement for sale executed on 28th August 1987, Ms. Lowrie agreed to sell the land to the Jn Maries. The said agreement was registered in the Land Registry on 21st September 1987 as a caution against the property. On 18th December 1990, the judicial hypothec aforementioned was registered in the Land Registry as a caution against the property.
23. Under section 28 (e) of the Land Registration Act, No. 12 of 1984 (the Act), a judicial hypothec confers an overriding interest.
24. Justice of Appeal, Byron (as he then was) in *Peter Jn Marie et al v Laurima Lowrie et al*¹, at page 3 stated:

“The judgment creditor also had an interest to protect. He became entitled to a judicial hypothec by virtue of Article 1923 of the Civil Code which by section 28(e) of the Registered Land Act 1984 is an overriding interest on the land...I see no reason therefore why the caution should be removed, as it was based on the legal interest which has not been discharged and which attaches to the land.”

25. It is axiomatic that at the date of the execution of the agreement for sale, the Bank had an overriding interest in the land, which interest it had every right to protect. It therefore follows that the Jn Maries bought the land subject to any overriding rights or interest including the Bank's overriding interest.

Effect of the overriding interest

26. Mr. Theodore submitted that the Bank should have registered the judicial hypothec not only in the Registry of Deed and Mortgages but also in the Land Registry. He submitted that by Article 1967, registration gives effect to real rights and establishes their order of priority. By Article 1969, certain specified rights are exempt from the formality of registration. By extension, all other real rights should be registered.
27. Mr. Theodore next submitted that it is in the public good that hypothecs be registered in the Land Registry. I do not disagree with Mr. Theodore but the Code does not specifically state that judicial hypothecs should be registered in the Land Registry.

¹ Civil Appeal No. 11 of 1991 (Saint Lucia) (unreported)

28. By virtue of Article 1941 of the Code, the Bank as the Judgment Creditor or the holder of a judicial hypothec has the rights set out below namely:

“Creditors having a registered privilege or hypothec upon an immovable may follow it into whatever hands it passes and cause it to be sold judicially in order to be paid out of the proceeds, according to the order of their claim.”

29. Mr. Deterville QC for the Bank submitted that the purchaser at a judicial sale was entitled to take the property free and clear of all encumbrances. He relied on Article 1498 of the Code which speaks of forced sales:

“In the case of sales...the party acquiring the property cannot be evicted. The hypothecs and other charges are extinguished, the creditors having their recourse in the manner specially provided by law.”

30. He argued that by virtue of the above, the Bank is the purchaser at a judicial sale free from all encumbrances and is entitled to be registered as proprietor of the land. He also contended that notice of the sale and seizure of the land was published in the Saint Lucia Gazette and no opposition was filed.

31. I am more inclined to accept the submissions of Mr. Deterville that where there is a judicial hypothec placed on immovable property whether it be registered in the Land Registry or the Registry of Deeds and Mortgages, a third party is deemed to have notice of the judicial hypothec.

Section 8 of the Land Adjudication Act 1984

32. The Land Adjudication Act, No. 11 of 1984 (LAA) came into force on 8th August 1984. By section 8 of the LAA every person claiming an interest in land was under a legal obligation to do so within a specified time.

33. Mr. Theodore submitted that the Bank as a person with an interest in the land was duty bound to record its claim with the Land Adjudication Officer. In due course, the Recording Officer, in

preparing the adjudication record would, pursuant to section 18 of the LAA record such particulars in the adjudication record.

34. He next submitted that the effect of section 8 read together with section 18 is that if an owner of an interest in land failed to claim his interest under section 8 then it is not entered in the Adjudication Record when the record becomes final.

35. It is submitted that the effect of such finality is that a third party is not affected by any interest which is not entered on the Land Register through failure to claim that interest under section 8.

36. I do not agree with Mr. Theodore's argument. The same could be said of the Jn Maries. Why did they not claim their interest under the LAA? I only see Claim No. 56623 filed by Ms. Lowrie.

The Jn Maries' caution

37. Mr. Deterville tenaciously argued that the subsequent registration of the caution by the Jn Maries did not affect the priority of the Bank's overriding interest, neither did it affect the Bank's failure to lodge a caution on the property after obtaining the judgment.

38. Byron JA in the Jn Marie's case referring to the Land Registration Act in general and sections 86 et seq. in particular which deals with cautions had this to say:

"Looking at the scheme of the legislation a caution does not confer any interest on the cautioner. It is based on an interest which the cautioner claims to have. It does not provide any priority for the cautioner. It provides machinery whereby any person who claims certain interests will have an opportunity to object to the registration of any disposition or the making of entries affecting the same."

39. It follows therefore that the Jn Maries never acquired any priority over the Bank's interest by virtue of their agreement for sale nor the subsequent registration of the caution. The Bank had first priority; it exercised its right via a judicial sale so that the Bank as purchaser at the judicial sale is entitled to be registered in the Land Registry as registered proprietor.

The Sheriff's Sale and Seizure

40. Section 56(1) of the Land Registration Act provides that a proprietor may transfer his land to any other person with or without consideration. Subsection 2 states that such transfer shall be completed by registration of the transferee as proprietor of the land. In the circumstances, the Jn Maries effectively became the registered proprietors of the land on 18th November 1992.
41. By virtue of Article 505 of the Code of Civil Procedure where there is an alienation of immovable property under seizure, that alienation would be null and void. Since the property was under seizure at the time of the sale by Ms. Lowrie to the Jn Maries, the registration of such deed would be null and void.
42. Further, the conjoint effect of Article 1975 and Article 1974 is the registration of a title conferring real rights in or upon the immovable property after its seizure is without effect. Such a sale could only be effected by the Sheriff.
43. By Article 554 of the Code, a Sheriff's sale discharges immovables from all servitudes with which they are charged, except those established by law. It discharges property from all other real rights not mentioned in the condition of sale. Therefore, a Sheriff's sale confers more rights upon a purchaser than an ordinary sale: see *Garcia Transport Ltee v Royal Trust Co.*². It is generally final and binding.
44. Taschereau J. noted in *Boileau v Procureur General du Quebec* ³:
- “Given their roles in the execution of judgments and the rights conferred by them, as well as the necessity for guaranteeing the stability and certainty of titles, Sheriff's sales cannot be easily attacked.”
45. More recently, in *Town of Anjou v C.A.C. Realty Ltd* ⁴, The Supreme Court of Canada dismissed an appeal against a judgment of Turgeon J.A. who wrote at page 199:

² (1992) 2 SCR 499

³ (1957) SCR 463 at page 470

⁴ (1978) 1 SCR 819 affirming (1974) C.A. 197

“A Sheriff’s sale is a procedure which confers more absolute rights on the purchaser than a voluntary sale. It is preceded by strict formalities aimed at protecting the judgment debtor and the purchaser. It should be remembered that under article 577 CCP the adjudication of property under execution transfers the ownership thereof to the purchaser from its date, and that this principle is in the public interest.”

46. The importance of protecting the Sheriff’s sale should be emphasized. It attacks one of the most important acts of procedure of any court of record – the enforcement of its own judgment, and puts in issue not only the regularity of that procedure, but jeopardizes the rights of innocent third parties, who purchase property put up for public judicial sale under all the solemnities and formalities of the law. So an attack upon the Sheriff’s sale is to my mind, an attack upon a title conferred not just by an individual but by the justice system as a whole.
47. Coming back to the present case. The Sheriff sold the land to the Bank. It follows therefore that the Bank is the only person entitled to have its Deed of Sale registered in the Land Registry as registered proprietor with absolute title.

Whether Mr. Cenac was negligent in the execution of the Deed of Sale?

48. It is well established that the exercise of professional judgment in a particular way may, or may not, constitute professional negligence. Professional negligence occurs only where no ordinarily competent solicitor exercising reasonable care and skill would have done or omitted to do what was done or omitted to be done: *Hunter v Hanley*.⁵
49. The question whether Mr. Cenac had acted negligently had to be determined on the basis of the particular facts of this case. The facts stated, I hope comparatively briefly are that Mr. Cenac executed a Deed of Sale in favour of the Jn Maries without searching the records in the Office of Deeds and Mortgages. Had he done the search, he would have found out that the land was subject to two judicial hypothecs. Proceedings were filed in the High Court as well as the Court of Appeal for the registration of the Deed of Sale. The Court of Appeal affirming the decision of Matthew J. ordered that the Deed of Sale in favour of the Jn Maries be registered

⁵ 1955 S.C. 200

but the caution was not removed. To date, the land is still encumbered and the Jn Maries have been unable to obtain an absolute title free and clear of all encumbrances.

50. They have sued Mr. Cenac for breach of contract for negligently performing the work contracted to do.

51. Mr. Theodore submitted that Mr. Cenac as Notary Royal duly prepared:

(a) An agreement for sale between Laurima Lowrie as vendor and the Jn Maries as purchasers dated 28th August 1987 and

(b) A Deed of Sale by the said Laurima Lowrie to the Jn Maries as purchasers and the said agreement was entered on the Land Register as a caution and eventually caused to be registered the said Deed of Sale having caused diligent searches to be made in the Land Registry which search revealed that the said land was free and clear of all encumbrances and was registered in the name of Ms. Laurima Lowrie as absolute proprietor.

52. Mr. Theodore forcefully argued that by virtue of section 38 of the Land Registration Act, Mr. Cenac was not required nor was he concerned to search any register kept under the provisions of Book Eighteenth of the Civil Code, that is to say, any register kept in the Registry of Deeds and Mortgages established by the Civil Code and that at all relevant times he acted in accordance with and relied upon that provision of the law.

53. Before the coming into force of the Land Registration Act on 15th July 1985, registration in the old Registry of Deeds and Mortgages pursuant to Book Eighteenth was considered notice to the world.

54. But, section 38(1) of the Act provides as follows:

“No person dealing or proposing to deal for consideration with a proprietor shall be required or in any way concerned...(c) to search any register kept under the provisions of Book Eighteenth of the Civil Code.”

55. Book Eighteenth of the Code deals with registration of all real rights. It starts at Article 1967 and ends at Article 2046.
56. Mr. Theodore submitted that the provision is crystal clear: if you are dealing with a proprietor, you are not required to search the records in the Office of Deeds and Mortgages. He next submitted that the Jn Maries, as persons dealing with Ms. Lowrie, the then proprietor of the land, could not be deemed to have had knowledge of the judgments registered in Book Eighteenth when section 38 specifically states that persons dealing with registered proprietors are not required to search the Registry of Deeds and Mortgages.
57. He argued that it is inconceivable that legislation would enact that a person is not required to search a particular book and yet at the same time, in the same breath, enact expressly or impliedly that that person will be bound by what is written in the book in question.
58. According to Mr. Theodore, the action of Notary, Mr. Cenac in not searching the Registry of Deeds and Mortgages was not negligent in the face of section 38.
59. Alternatively, Counsel submitted that assuming but not admitting that an error was made by the Notary, he was not answerable for it because it amounted to an error in judgment upon a point of new occurrence, or a nice or doubtful construction.
60. As I already stated, it is well settled that the exercise of professional judgment in a particular way may, or may not, constitute professional negligence against an attorney, the professional adviser or the procurator.
61. Mr. Theodore contended that only if Mr. Cenac has been guilty of gross negligence, then an action may be maintained. This principle had been established years before when Tindal CJ stated in the case of *Godefroy v Dalton*⁶ that an attorney was “not answerable for error in judgment upon points of new occurrence, or a nice or doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law” and held that in that

⁶ (1830) C.P. 6 Bing 454-459

case the attorney's non-production of a record of judgment was not such gross negligence as to make him answerable.

62. Mr. St. Clair argued that Mr. Cenac was retained to convey certain lands to the Jn Maries and to ensure that at the time of such conveyance, the Jn Maries would get exactly what they retained their Attorney to do: to obtain a free and clear title of the land. According to Mr. St. Clair, "Mr. Cenac is no ordinary Attorney." In his treatise "*Coutume de Paris*", an authority on the evolution of Land Law in Saint Lucia, Mr. Cenac as the author wrote:

"It has been seen that a registered proprietor of land with an absolute title holds the land subject to overriding interests. These interests need not be noted or entered in the register."

63. Mr. St. Clair further submitted that Mr. Cenac with the knowledge that the effect of an overriding interest was to effectively create an encumbrance on the land and with the knowledge that an overriding interest may well not appear on the register in the Land Registry, failed to make the necessary searches in the Office of Deeds and Mortgages where such overriding interests are registered.

64. I am in agreement with Mr. St. Clair that notwithstanding the provisions of Section 38, Mr. Cenac with his particular knowledge, expertise and wealth of experience in land law was under a duty to conduct the necessary searches of the records in the Office of Deeds and Mortgages so as to satisfy himself that there was no overriding interest against the land at the date of the execution of the agreement for sale and the Deed of Sale before he ventured to transfer funds to the vendor, Ms. Lowrie.

65. I do not think that this case raises any points of new occurrence, or a nice or doubtful construction. Instead, it is a long established tradition in Saint Lucia that before an Attorney as Notary Royal executes a Deed of Sale, he must ensure that a search is conducted not only in the Land Registry but also in the Registry of Deeds and Mortgages. This is the practice in Saint Lucia.

66. In the circumstances, Mr. Cenac can be said to be wanting in his duty as an Attorney in failing to cause the transfer of the land free and clear of all encumbrances to the Jn Maries.

67. The matter does not end here. The purpose of the courts when recognizing tortious acts and their consequences is to compensate those claimants who suffer actionable breaches of duty, not to act as second-line disciplinary tribunals imposing punishment in the shape of damages.

Conclusion

68. In the premises, I would therefore order that Mr. Cenac do pay to the Jn Maries damages and costs to be assessed before a Judge in Chambers.

69. Then there is the claim brought by the Bank. In the light of my findings, the inescapable conclusion that the court could come to is as follows:

- (i) That the Deed of Sale executed before WINSTON CENAC, Notary Royal on 30th October 1989 and registered in the Land Registry on the 18th November 1992 as Instrument No. 4276/92 be improbated.
- (ii) That the original of the Deed of Sale executed before WINSTON CENAC, Notary Royal on the 30th day of October 1989 and registered in the Land Registry on the 18th November 1992 as Instrument No. 4276/92 be declared null and void, as well as all copies thereof.
- (iii) That the Claimant, the National Commercial Bank of Saint Lucia Limited (now Bank of Saint Lucia Limited) be declared the absolute owner of the parcel of land registered in the Land Register as Parcel No. 1243B 52.
- (iv) That the Land Register relating to Parcel No. 1243B 52 be rectified by deleting all claims, cautions and restrictions entered against the said parcel of land.
- (v) That Mr. Winston Cenac do pay Costs to the Claimant Bank. If there is no agreement on costs, then Counsel must follow the guidelines laid down by the Court of Appeal in the recent judgments of *Rochamel Construction Limited v National Insurance Corporation*⁷ and *Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited et al.*⁸

⁷ Civil Appeal No. 10 of 2003 (unreported) Saint Lucia

⁸ Civil Appeal No. 15 of 2003 (unreported) Saint Lucia

70. Lastly, I thank all Counsel for their industry.

Indra Hariprashad-Charles

High Court Judge