

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2010

CLAIM NO. AXAHCV 0019/1977

BETWEEN:

AUDREY OPHELIA SMITH

Claimant/Applicant

And

HILTON FLEMING

Defendant/Respondent

Appearances:

Ms. Nicola Byer for the Claimant/Applicant

Mrs. Keesha Carty for the Defendant/Respondent

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2010: October 14
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DECISION

[1] **BLENMAN, J:** This is an application for permission to enforce the judgment of Mr. Justice St Bernard dated 31st July 1981.

- [2] Mrs. Audrey Ophelia Smith has applied to the court for permission to issue a writ of Possession in relation to Registration Central East Block, 89319B, Parcel 82 (the property).
- [3] This would ordinarily have been regarded as a straight forward application. However, it attracted a complication of its own since the judgment of Justice St Bernard could not be located in the court's records even though the court's file was located. Up to the date of rendering this decision, the Court Registry was still unable to locate a copy of Justice St Bernard's judgment.
- [4] In addition, Mr. Hilton Fleming in whose name the property is registered vigorously opposes the application. He contends that he has always been in possession of the property and was totally unaware that St Bernard J had given judgment against him.

Background

- [5] There is some dispute as to whether the land in question was owned by the person from whom Ms. Olive Rogers is alleged to have purchased it from or whether it was owned by the person's husband. For the purposes of the present application, the court need not concern itself with that.
- [6] The genesis of this dispute seems to be that Mr. Hilton Fleming claims to have purchased the property from Mr. Rogers who he says was its owner. However, Mrs. Smith claims to have purchased the property from Mr. Rogers' wife. However, much of the background to this matter is not of immediate concern to this court for reasons that will become apparent very shortly. There are many disputes as to what is the factual background.
- [7] For the sake of convenience the court proposes to briefly, refer to the background as provided by each party.

[8] Based on Mrs. Audrey Ophelia Smith, claim the background is as follows-

During the 1970, Anguilla underwent a cadastral survey island wide and claims and objections were made by persons in occupation of land. Mrs. Smith made claim to a parcel of land and at the subsequent adjudication hearing she was denied the land. The land was transferred to Mr. Hilton Fleming and registered in his name. Mrs. Smith being dissatisfied with the decision of the adjudication officer appealed against that decision to the High Court. The matter was heard by St Bernard J.

[9] St Bernard J, as he then was, appears to have delivered a judgment in the High Court, in the matter, in favour of Mrs. Smith. However the court was unable to locate a copy of the judgment.

[10] On Mrs. Smith's claim, the judgment had the effect of reversing the order of the adjudicating officer and awarding the property to her.

[11] She says that having received St Bernard J's judgment, she caused her son to take the only copy of the judgment, that she had, to the Department of Lands and Surveys in order for the requisite steps to be taken to demarcate the boundaries. This process was apparently commenced but never completed. This is so even though a caution was placed in the Land Register, in relation to the property.

[12] Mrs. Smith says that Mr. Hilton Fleming, in December 2006, purported to carry out certain acts of ownership on the property and it was only then that she discovered that the property was not registered in her name.

[13] In November 2007, Mr. Hilton Fleming made an application to the High Court to have the restriction which was placed on the land removed. There was a hearing between the parties and Mr. Hilton Fleming caused his application to be withdrawn.

[14] Mrs. Smith says that it was at that point that she enquired at the High Court Registry and the Department of Lands and Surveys for a copy of St Bernard's

judgment and both departments were unable to locate a copy. She made several enquiries of the Court Registry to no avail. It was not until around 9th November 2009, that she was able to get a copy of the judgment of St Bernard J which confirmed that the land belonged to her.

- [15] On presenting the judgment to Mr. Hilton Fleming, she says that, he has refused to accept the efficacy of the judgment.
- [16] It is in those circumstances that she seeks the court's permission to issue the Writ of possession in order to be able to access the land.
- [17] On Mr. Hilton Fleming case, he contends that he was never aware that the court had rendered judgment in Mrs. Smith's favour.
- [18] Mr. Hilton Fleming appears to be questioning the efficacy of the St Bernard J judgment since he says he was never provided with a copy of same.
- [19] In addition, he complains that it is passing strange that the judgment can now be found in the file at the Department of Lands and Surveys when he had requested a copy of it long ago. Searches were then carried out and no judgment was located in the department's file. He too says that the Court Registry could not locate a copy of the judgment.
- [20] He maintains that there have always been disputes in relation to the land which is registered in his name. More importantly, Mr. Hilton Fleming asserts that since 28 years have elapsed since St Bernard J delivered the judgment, Mrs. Smith cannot properly seek to enforce it now. Once 12 years have expired, as a consequence of the Limitation Act, judgments are rendered unenforceable.
- [21] It is evident that the parties are not agreed as to the background for the facts.
- [22] It is noteworthy that, the affidavit evidence presented by both sides are in conflict and were not tested by cross examination; therefore the court was unable to find facts where the evidence presented is not accepted. However, both Learned

Counsel have quite wisely agreed that the court should seek to determine the legal issue which arises for determination.

Issue

- [23] The main issue that arises for the court to resolve is:
- (a) Whether a judgment that was rendered in excess of 12 years ago can be enforced.
 - (b) Should the court determine that question positively, the ancillary issue for the court to determine is whether the court should grant permission to have a writ of possession issue approximately 28 years after the judgment was rendered.

Law

- [24] Section 3(4) of the Limitations Act RSA Ch 160 Laws of Anguilla provides as follows:

“An action shall not be brought upon any judgment after the expiration of 12 years from the date on which Judgment became enforceable and no arrear of interest in respect of any Judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.”

Part 4,6.2 (c) of CPR 2000 provides that “A writ of execution may not be issued without permission if 6 years have elapsed since the judgment was entered.”

Defendant/Respondent’s Submissions

- [25] Learned Counsel, Mrs. Carty urged the court not to grant permission to Mrs. Smith in order to enforce the judgment. Mrs. Carty argued this, since the judgment of St Bernard J (as he then was) was delivered on 31st July 1981 (some 28 years ago). Mrs. Audrey Smith would be debarred from seeking its enforcement since more than 12 years have elapsed. This violates section 4 of the Limitations Act.

- [26] In support of this contention, Learned Counsel, Mrs. Carty referred the court to *Morrison Knudsen International Inc v The Consultant Limited and Barclays Bank PLC* Civil Appeal No.15/2002 Grenada.
- [27] Purporting to rely on the dicta of Byron CJ, as he then was, Mrs. Carty referred the court to Byron CJ's dicta when he said "in matters of limitation of the right to sue on a judgment has always been regarded as quite distinct from the right to issue execution under it, but the court will not give leave to issue execution when the right of action is barred." Learned Counsel, Mrs. Carty said that while Part 46.2 (c) CPR 2000 gives the court a discretion to give permission to enforce a judgment even though 6 years have elapsed, the discretion will not usually be exercised after the limitation period has elapsed. In further support of her arguments Mrs. Carty, Learned Counsel also referred the court to *W T Lamb & Sons Ltd v Rider* (1948) *2 All ER 402*.
- [28] Learned Counsel, Mrs. Carty maintained that the application before the court was statute barred in so far as more than 12 years had elapsed since the judgment was rendered. The court has no jurisdiction to grant permission to issue the writ of possession, in these circumstances.
- [29] In any event, Mrs. Carty implored the court not to exercise its discretion and grant leave to the Mrs. Smith in as much as 28 years have elapsed, since the judgment was rendered.
- [30] Finally, Learned Counsel, Mrs. Carty maintained that while CPR Part 46.2 gives the court the discretion to give permission to enforce a judgment after 6 years; however the court will not exercise its discretion after the limitation period of 12 years, as provided in the Limitation Act has expired.
- [31] Accordingly, Mrs. Carty urged the court to dismiss the application and to award costs.

Applicant's Submissions

- [32] Learned Counsel, Ms. Nicola Byer urged the court to grant Mrs. Smith permission to issue the writ of possession in order to enforce the judgment of St Bernard J.
- [33] Ms. Byer asked the court to accept that St Bernard J's judgment is unequivocal and gave title the property to Mrs. Smith.
- [34] Ms. Byer, Learned Counsel argued that Mrs. Smith merely seeks to enforce the judgment. The Limitation Act has no application but rather the application is governed by CPR 2000.
- [35] Ms. Byer stated that in so far as the Mrs. Smith has merely applied for permission to enforce the judgment by issuing the writ of possession section 3 (4) Limitation Act has no relevance.
- [36] Learned Counsel, Ms. Byer advocated that the governing provision is that of Part 46.2 of CPR 2000 and not the Limitation Act. Mrs. Smith seeks to enforce the judgment that she obtained several years ago.
- [37] In support of her arguments, Ms. Byer also referred to *Morrison Knudsen International Inc v The Consultant Limited & Barclays Bank PLC* *ibid*. In that case the appellant had obtained a judgment in 1990. Ten years later in 2000, the appellant attempted to apply for an order for sale and the court found it necessary to distinguish between the requirements which were applicable to actions as distinct from those applicable to writs of execution. The application was dismissed as being contrary to Part 46.2 of CPR 2000.
- [38] The Appellant thereafter appealed to Court of Appeal and Byron CJ as he then was, gave a very careful exposition of the applicable principles that relate to the enforcement of judgments. The distinction was made clear as to the circumstances that fell within the ambit of the Limitation Act and those that were governed by CPR 2000.

[39] At paragraph 15 of the judgment Byron CJ stated:

"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 the land charged with the judgment debt. On the other hand fresh proceedings are issued where the judgment is not being strictly enforced but the proceedings based on the judgment creates a new basis for enforcement."

[40] Relying on the above judicial pronouncement, Learned Counsel, Ms. Byer asked the court to give permission for Mrs. Smith to issue the writ of possession. Ms. Byer also submitted a copy of the helpful House of Lords decision in *Lowsley v Forbes* [1998] 3 WLR 501.

[41] Finally, Ms. Byer said that taking into account all of the circumstances of the case, the court should exercise its discretion in favour of the applicant and grant the requisite permission.

Court Analysis and Findings

[42] It is regrettable that both sides did not find it convenient to agree on the facts and proceeded to have the trial determined only on the questions of the law.

[43] Equally, it is very unfortunate that the High Court Registry, though it was able to locate the file number 0019/1997, was unable to find the very important judgment of Bernard St J.

[44] The court's task was however made a bit easier since both learned counsel, who appeared in the matter, on behalf of each party quite properly did not take issue with the validity of the judgment of St Bernard J, a copy of which was provided to the court by the Registrar of Lands. The court is extremely grateful that the Registrar of Lands was able to locate a copy of the judgment of St Bernard J and has kindly provided a copy to the court.

Enforcement of Judgment

- [45] The court now proposes to address the first issue; whether a judgment of the court that was rendered in excess of 12 years can be enforced.
- [46] It is clear that the judgment of St Bernard J was rendered in excess of 12 years ago. To put simply, the court has to determine which statutory regime is applicable to the application to obtain permission in order to issue the writ of possession. The court has given very careful consideration to the very helpful arguments of both Learned Counsel, Mrs. Carty and Ms. Byer.
- [47] Execution is essentially a matter of procedure, which the court subject to its rules, utilize in order to enforce its judgments or orders. The court is not of the considered opinion that the Limitation Act has any relevance to the application at bar.
- [48] The court accepts the submissions of Learned Counsel, Ms. Byer in preference to those advanced by Learned Counsel, Mrs. Carty. The court is of the considered opinion that the Limitation Act has no relevance to the application at bar. The application at bar is not an "action" within the purview of the Limitation Act rather it is an application for permission to issue enforcement proceedings in the nature of, as stated earlier, a writ of possession. This application clearly falls within the ambit of Part 46.2 of CPR 2000.
- [49] The court is unable to see how it is possible to read the Limitation Act section 3(4) together with Part 42.6 of CPR 2000 in order to prevent an applicant from issuing a writ of possession. By way of emphasis the two legislative schemes have very distinct and separate operations.
- [50] By way of emphasis, the statutory provision in the Limitation Act applies in circumstances where a claimant seeks to sue on a judgment whereas when the claimant seeks to enforce a judgment by issuing for example a writ of possession, Part 42.6 of CPR 2000 is relevant.

- [51] In *W.T. Lamb & Sons v Rider. Same v Same* ibid at page 407, the Court of Appeal stated that “the right to sue on a judgment has always been regarded as quite distinct from the right to issue execution on it. The two conceptions have been the subject of different legislative treatment. The Common Law Procedure Act and RSC, Ord 4 2 were concerned alone with procedural machinery for enforcing a judgment when attained.”
- [52] In fact in the *W.T. Lamb* case ibid Scott LJ quite helpfully analysed the distinction between the right to sue on a judgment and the right to issue execution under it. He stated that “the two conceptions have been subject to different treatment.”
- [53] Scott LJ also examined the history of the Limitation Act and juxtaposed that with the examination of the history of the Common Law Procedure Act, the latter which was the predecessor to the Rules of Supreme Court.
- [54] The Court also finds the pronouncements of Byron CJ, as he then was, at paragraph 5,6 & 7 of *Morrison Knudsen v Consultant Ltd and Barclays Bank PLC* ibid quite helpful when he stated as follows paragraph 5.

“The effect of delay in the enforcement of legal rights is a highly regulated feature of the law. In this case there are two relevant regimes. The first is under the Limitation Act Cap 173 and the other is under the Rules of Court (Civil Procedure Rules 2000).”

- [55] And at paragraph 9 Byron CJ stated that “The Rules of Court govern writ of execution to be issued in accordance with the provisions of CPR 2000 Part 46.2 which prescribes “A writ of execution may not be issued without permission if (c) 6 years have elapsed since the judgment was given.
- [56] At paragraph 11 of the judgment Byron CJ in buttressing his view referred to *Halsburys Laws of England Fourth Edition* (reissue) Vol. 28 Para 815.
- [57] *Halsbury Laws of England Fourth Edition* (reissue) Vol. 28 Para 815 refers to the distinction between the issue of an execution to enforce a judgment and an action to enforce a judgment. It states:

“Actions. The Limitation Act 1980 applies to all actions of the classes for which a period of limitation is laid down by the Act, except actions for which a special period of limitation is provided by some other enactment. ‘Action’ includes any proceedings in a court of law, including an ecclesiastical court. This definition is wide enough to cover a set-off or counterclaim, any form of initiating process (including a creditor’s petition to wind up a company), and an application in the course of a winding up for a declaration that a director of a company is to make a contribution to a company’s assets. It also comprises some proceedings, for example an application for a distress warrant for arrears of rates, which are not actions in the ordinary sense of word. It does not, however, cover the issue of an execution on a judgment, as distinct from an action to enforce a judgment, nor does it cover most criminal proceedings.”

- [58] This is emphasized and further clarified in footnote 1 to paragraph 916 of the *Halsbury’s Laws of England Fourth Edition* (reissue) which states:

*“Despite the wide definition of “action” contained in the Limitation Act 1980 sec 38(1), an action upon a judgment applies only to the enforcement of judgments by suing on them and does not apply to the issue of executions upon judgments for which the leave of the court is required, after six years have elapsed, by RSC Ord 46 r 2(1) (a); in matters of limitation the right to sue on a judgment has always been regarded as quite distinct from the right to issue execution under it, but the court will not give leave to issue execution when the right of action is barred see **National Westminster Plc v Powney** (1990) 2 All ER 416 and **WT Lamb & Sons v Rider** [1948] 2 KB 331, 2 All ER 402 CA.”*

- [59] In the leading case of *WT Lamb & Sons Ltd v Rider* (1948) 2 All ER 402 the court rejected the argument that the rule of court, which provided that where six years had elapsed after judgment a party intending to execute required leave to issue execution, was inconsistent with the provision of the Limitation Act, which provided for a twelve year limitation period for bringing actions on a judgment and was therefore invalid. The court was obliged to consider whether there was a distinction between the issue of execution and bringing an action on a judgment. In a scholarly dissertation which produced a historical review and explanation of the law Scott LJ revealed that at one time the law presumed a judgment to have been satisfied when a year and a day had elapsed without execution being issued on it and at common law the only remedy in such a case was by an action of debt on a judgment. The new judgment could then be executed. Another example of

bringing an action on a judgment, not mentioned in the Lamb case, is the case of a foreign judgment, where in order to obtain a judgment which could be executed, it is necessary first to sue on the foreign judgment to obtain a judgment which could be executed. After his review, Scott LJ stated at page 407 (G) of the judgment:

"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. A refusal by the court, whether before or after the passing of the Common Procedure Act, 1852, to place this machinery at a plaintiff's disposal in no way affected his right to sue on the judgment at any time within the statutory limit of time – as indeed was expressly recognized by the proviso to s. 130 of that Act."

- [60] It would seem to me that there is a clear distinction between the two situations. 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.
- [61] Applying those principles to the application at bar, the court has no doubt that Part 46.2 CPR 2000 is applicable to the matter before the court.
- [62] The court is reinforced in its view having regard to *Lowsley and Another v Forbes* [1998] 3 WLR 501 *ibid*.
- [63] In *Lowsley and Another v Forbes* [1998] 3 WLR 501, in February 1981, the plaintiffs obtained judgment by consent against the defendant in the sum of \$70,000.00. The defendant then went abroad and the judgment debt remained unpaid. In 1992, some eleven years later, the plaintiffs discovered that the defendant owned property and a bank account in England. The master granted the plaintiff leave to enforce the judgment: a charging order. The defendant ought

to have the charging order set aside on the ground that execution of the judgment was time barred by section 24(1) of the Limitation Act 1980. The judge refused to set aside the charging order on the ground that "action" in section 24 (1) encompassed only fresh actions on a judgment and not charging orders by way of execution of a judgment.

[64] Section 24 provided as follows-

"An action shall not be brought upon any judgment after the expiration of six years.

[65] In *Lowsley and Another* *ibid*, The House of Lords had reason to consider whether the application for execution or enforcement of a judgment was subject to the time bar that is imposed by the Limitation Act . The court also had to determine what was meant by the words "an action upon any judgment" as stated in section 24(1) of the Limitation Act 1980. Their Lordships were very clear that the words meant a fresh action and did not include proceedings by way of execution of a judgment in the same action; and that the plaintiffs were entitled to obtain leave to enforce the judgment by way of garnishee, despite the passage of more than six years since the judgment had been entered.

[66] The court can do no more than to adopt those very helpful pronouncements. The court therefore reiterates that, the short answer is that, the application at bar falls exclusively to be determined in accordance with Part 42.6 CPR 2000. Accordingly, the applicant is required to seek the leave of the court in order to issue the writ of possession, insofar as in excess of six years have elapsed since the judgment was delivered.

[67] Having determined that the applicant has to seek the permission of the court in order to issue the writ of possession, the court now proceeds to determine the ancillary question:

Discretion to issue writ

- [68] Whether the court should exercise its discretion and grant the applicant the permission required to issue the writ of possession.
- [69] It is law that the granting of permission is a matter of discretion, but before granting the permission the claimant is required to give evidence explanatory of the long delay and the defendant is required to answer it.
- [70] The court of the view that based on the totality of circumstances, including the strong uncontroverted evidence that was led by Mrs. Smith, including that she was of the view that the necessary steps were taken; there is sufficient basis for the court to exercise this exceptional discretion in favour of the claimant. In this regard, great importance is the fact that while the court's file was located by the High Court's Registry, the judgment of St Bernard J unhappily was not located by the High Court's Registry thereby preventing Mrs. Smith from enforcing her right.

Costs

- [71] Learned Counsel, Mrs. Carty and Ms. Byer, Learned Counsel have quite helpfully agreed to costs in the sum of US\$800.00.

Conclusion

- [72] In the premises, there will be judgment for Mrs. Audrey Ophelia Smith against Mr. Hilton Fleming as follows:
- (a) The permission of the court is granted Mrs. Audrey Ophelia Smith to issue the writ of possession in relation to the property described as Registration Section Central East Block, 89319B, Block 82 against Mr. Hilton Fleming.
 - (b) Costs are agreed in US\$800.00.
- [73] The court gratefully acknowledges the assistance of both Learned Counsel.

Louise Esther Blenman
Resident High Court Judge
Anguilla

