In The Supreme Court of Bermuda

CIVIL JURISDICTION

2000: No 195

BETWEEN:-

HAROLD DARRELL

First Plaintiff

and

HARDELL ENTERTAINMENT LIMITED

Second Plaintiff

-v-

THE BANK OF BERMUDA LIMITED

Defendant

and

BOARD OF INQUIRY APPOINTED UNDER THE HUMAN RIGHTS ACT

Interested Party

RULING

(In Chambers)

Date of hearing: 16th January 2013
Date of judgment: 18th January 2013

Mr Jaymo Durham, Amicus Law Chambers, for the Plaintiffs
Mr Ben Adamson, Conyers Dill & Pearman, for the Defendant
Mr Jai Pachai, Wakefield Quin, for the Interested Party

Introduction

1. By a summons dated 11th January 2013 the First Plaintiff, who is the judgment debtor, applied for an order (i) restraining the Defendant, which is the judgment creditor, from enforcing a writ of *fieri facias* ("*fi fa*") issued on the application of the Defendant against the First Plaintiff, and (ii) requiring the Defendant to return to the First Plaintiff the deeds to the property known as 12 Cedar Avenue, Pembroke ("the Property"). This is the Property against which the Defendant seeks to execute the writ. The summons stated that it was issued on behalf of both Plaintiffs. However I shall treat it as the application of the First Plaintiff as it does not relate to the Second Plaintiff, which, I am informed, has been struck off.

2. The First Plaintiff could instead have sought an order under Order 47, rule 1 of the Rules of the Supreme Court 1985 ("RSC"). This provides that on an application by the judgment debtor the Court has power to say the execution of a writ of *fi fa* if satisfied that there are special circumstances which render it inexpedient to enforce the judgment or order, or that the applicant is unable from any cause to pay the money. I do not hold it against him that he sought an injunction. But, having done so, he should be in no better position than if he had sought a stay of execution.

3. Order 47, rule 4 provides that the summons and a copy of the supporting affidavit must, not less than four clear days before the return day, be served on the party entitled to enforce the judgment or order. This application first came before me on 11th January 2013, having been issued ex parte due its urgency. But it would not have become urgent had it been made in a timely manner.

4. The Defendant's attorneys were given written notice of the application on 10th January 2013. However they did not receive notice of the time and date of the hearing until after it was scheduled to take place. The hearing was put back for several hours to give them the opportunity to attend if so instructed. They did not do so. This was no doubt due to the difficulties of taking

adequate instructions and undertaking adequate preparation at such short notice. I made an interim order suspending execution of the writ until today, when full argument could be heard.

5. I have had the benefit of affidavits sworn by the First Plaintiff on 10th January 2013 and JD Massa ("Mr Massa"), Associate General Counsel for the Defendant, on 15th January 2013. I have also had the benefit of helpful submissions from Mr Durham who appeared for the First Plaintiff, Mr Adamson who appeared for the Defendant, and Mr Pachai who appeared for the Interested Party, which is a creditor of the First Plaintiff.

6. I gave my decision at the end of the hearing. The application was dismissed. These are the reasons for that decision.

Background

7. On 15th November 2006 the Court ordered the Plaintiffs to pay the Defendant's costs of this action. On 15th February 2009 the Registrar taxed the Defendant's costs and awarded the Defendant $262,748.00. No costs have been paid to date.

8. On 6th November 2012, more than 3 years and 8 months later, the Defendant issued a writ of *fi fa* against the First Plaintiff in the sum of $331,010.00 and the cost of execution. The sum comprised the principal together with $68,262.00 interest. The writ, which was in standard form, was expressed to be enforceable against "*the goods, chattels, lands, houses and other property*" of the First Plaintiff.

9. On 29th November 2012 a bailiff, acting on behalf of the Provost Marshal General, served the First Plaintiff with a copy of the writ at the Property. The writ on the court file is endorsed with a note that the bailiff informed the First Plaintiff that he was taking walking possession of the Property. In his affidavit of service dated 29th November 2012 the bailiff stated that it was a writ of possession.

10. On 11th January 2013 the Plaintiffs issued the summons which is before me now. The First Plaintiff explains in a supporting affidavit sworn on 10th January 2013 that the Provost Marshal General informed him that execution was due to be levied against the Property on 11th January 2013. By that, the First Plaintiff understood him to mean that he would change the locks and exclude the First Plaintiff from the Property. Indeed, the locks had already been changed by the time that counsel for the First Plaintiff appeared before on 11th January 2013. Hence the urgency of the application.

Issues

11. The Defendant complained that the First Plaintiff had not complied with the duties of a party making an ex parte application. I need not go into that. The Defendant has had the opportunity today to present its case and address that of the First Plaintiff. I am satisfied that it has not been prejudiced by the fact that the application was initially made ex parte.

12. The application raises two points of law. First, whether the First Plaintiff has a right to the return of the deeds to the Property, or, put another way, whether the Defendant or the Provost Marshal General has a right to withhold them.

13. The second point is the ambit of the Provost Marshal General's powers to enforce the writ of *fi fa* against the Property, and in particular whether he is authorised by the writ to exclude the First Plaintiff from the Property before it is sold.

14. There is lastly a question for the Court's discretion. Namely, whether I should stay the writ of *fi fa* for a short time in order to give the First Plaintiff a chance to arrange finance to pay off the debt.

Return of title deeds

15. The First Plaintiff seeks the return of the title deeds to the Property in order to arrange a mortgage. His counsel, Mr Durham, submits that the Defendant no longer has a lien over the deeds as they were lodged as security for mortgage loans which have since been repaid. He relies on the decision of the Bacon CJ in the Chancery Division in Ex Parte Fuller, In re Long (1881) CJB 617 at 619: "*a lien can only exist where there is a lawful possession of the thing upon which it is claimed by the person who claims it.*"

16. The First Plaintiff exhibits a letter to the Defendant from one of his attorneys, Joseph Wakefield, asking to peruse the title deeds to the Property with a view to securing a mortgage to be raised privately within the next 30 days. Mr Wakefield asked that they be delivered to his offices. The letter was dated 31st December 2012.

17. The Defendant states that it holds the deeds to the order of the Provost Marshal General, whom, it is submitted, was entitled to seize them under the writ of execution, and who will need them in order to sell the Property.

18. In this regard, Mr Adamson referred me to the decision of this Court in Cates and Panchaud v Dill 1954: No 107, unreported. One of the issues was whether a judgment of the Court was a lien on land. The Court held at page 15 that a judgment in the Supreme Court binds the judgment debtor's lands as from the date of entry of the judgment and that goods and chattels are bound as from the date of delivery of a writ of execution with instructions to levy. By this, the Court meant that as of that date the judgment debtor's land or, as the case may be, goods and chattels, were subject to a charge or lien in favour of the judgment creditor. See pages 10 and 16. Insofar as it relates to land, this analysis was approved by the Court of Appeal in The Bank of NT Butterfield & Son Ltd v Rego Ltd, Civil Appeal No 11 of 1986, at page 4.

19. I conclude that, whether by reason of its judgment against the First Plaintiff or alternatively by reason of the delivery of the writ of execution to the Provost Marshal General, the Defendant has a lien over the deeds to the

Property. Consequently, the First Plaintiff is not at present entitled to have them back.

20. In the circumstances I need not consider the Defendant's alternative submission, namely that the debt secured by the deeds has not been repaid in full. The unpaid portion of the debt is said to be the cost of enforcing the mortgage. Whether the Defendant has a contractual right to treat the costs as part of the mortgage debt secured by the deeds would depend on the terms of the mortgage. Under a standard mortgage instrument the Defendant would have that right. But as a copy of this particular mortgage instrument was not available at the hearing I am unable to determine the point.

Provost Marshal General's powers on executing a writ of *fi fa*

21. A writ of *fi fa* authorises the seizure and sale of property belonging to the judgment debtor including immovable property. However, it does not authorise the Provost Marshal General to take possession of immovable property, which is what changing the locks and excluding the judgment debtor involves. Indeed a writ of possession is not available to enforce a judgment for payment of money. See RSC order 45, rule 1. A judgment creditor cannot obtain through the back door what he could not obtain through the front.

22. The scheme for the sale of immovable property seized under a writ of *fi fa* is set out in RSC Order 46, rule 7. Whereas the writ refers to property being "*seized*", rule 7 speaks of "*attachment*", but in this context "*attachment*" and "*seizure*" mean the same thing. See also the judgment of Buckley LJ, giving the judgment of the Court of Appeal of England and Wales in Cretanor Maritime Co Ltd v Irish Marine Ltd [1978] WLR 966 at 974 A – B:

" *'Attachment' must, I apprehend, mean a seizure of assets under some writ or like command or order of a competent authority, normally with a view to their being either realised to meet an established claim or held as a pledge*

or security for the discharge of some claim either already established or yet to be established."

23. Originally, the Provost Marshal General put the purchaser into possession of the debtor's lands taken in execution and sold by him without the need for intervention of the court. See section 19 of the Court Act 1831, as summarised in Cates and Panchaud v Dill at page 9. Today, the sale is supervised by the Court under Order 46, rule 7. However the Court will not make an order for possession of immovable property that has been attached in execution of judgment until the sale has taken place and become absolute. Thus Order 46, rule 7(8)(a) provides:

"*Where the property sold consists of immovable property in the occupancy of the judgment debtor … the Court shall, on the application of the purchaser, order delivery of the property to be made by putting the party to whom the property has been sold, or any person whom he may appoint to receive delivery on his behalf, in possession thereof and, if necessary, by removing any person who may refuse to vacate the same.*"

24. There would be no need for this provision if a writ of *fi fa* authorised the Provost Marshal General to take possession of the land prior to sale. But that does not mean to say that an order for attachment of immovable property is without teeth.

25. Besides being a formal precursor to an order for sale, an order for attachment prohibits the judgment debtor from dealing with the property. See, by parity of reasoning, the speech of Lord Bingham (with whom Lord Nicholls, Lord Hobhouse and Lord Millett expressly agreed) in Société Eram Ltd v Cie Internationale [2004] 1 AC 260 in the House of Lords at para 24, where he analysed the effect of attachment in the context of a garnishee order.

26. It also gives the judgment creditor priority over subsequent judgment creditors, and indeed unsecured creditors generally, based on the date of delivery to the Provost Marshal General. See Cates and Panchaud v Dill at

page 16: " *... where the Marshal has in his hands two writs of execution, he is bound to execute first the writ which he first received with instructions to levy.*" This principle is reflected in Order 46, rule 8(4), which provides that the priority of a writ, the validity of which has been extended under this rule, shall be determined by reference to the date on which it was originally delivered to the Provost Marshal General.

27. Similarly, section 43(1) of the Bankruptcy Act 1989 provides in material part that where a creditor has issued execution against the property of a debtor, he is not entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor, unless he has completed the execution before the date of various key events in the bankruptcy. Section 43(2) provides that, for the purposes of the Act, an execution against land is completed by seizure.

28. I have set out the legal consequences of an order of attachment because in this case the writ of *fi fa* has been enforced without regard to the distinction between attachment and possession. That is a matter of concern. In his affidavit of service the bailiff stated that the writ of *fi fa* was a writ of possession. It was not. It did not confer on the Provost Marshal General the right to take walking possession of the Property or to change the locks and exclude the First Plaintiff from it. If this is the general practice when enforcing writs of *fi fa* against immovable property it should stop.

29. The Defendant, or indeed the Provost Marshal General, is not without a remedy if the judgment debtor proves obstructive. Order 46, rule 7(2) provides that every sale in execution of a judgment shall be made under the direction of the Registrar and shall be conducted according to such orders, if any, as the Court may make on the application of any party concerned. As Ackner LJ (as he then was) stated in the Court of Appeal of England and Wales in Bekhor v Bilton [1981] 1 QB 923 at 942 G – H: "*where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective.*"

30. Thus the Court might order that a judgment debtor allows the Provost Marshal General and potential purchasers reasonable access to the property for the purposes of arranging the sale. Where a judgment debtor was obstructing the sale, the Court might, as a last resort, make an order that he be excluded from the property. Such an order would not flow directly from the writ of *fi fa*, but from the Court's inherent jurisdiction to make ancillary orders to ensure that the writ was effective.

31. I am conscious that in making these observations I have not had the benefit of hearing full argument. The First Plaintiff was supportive of the position that I have taken and the Defendant and the Interested Party were, quite properly, neutral. If the Provost Marshal General disagrees with the Court he has liberty to apply.

Whether to grant a stay of execution

32. The First Plaintiff seeks a stay of execution while he mortgages the property in order to repay the judgment debt. He is a businessman, and I am invited to conclude that, now that he is attending to this matter, there is a realistic prospect that his efforts to raise a mortgage loan will be successful.

33. However he has adduced no evidence that prior to his attorney's letter of 31st December 2012 he took steps of any kind to satisfy the judgment debt or to raise the money to do so. I have no doubt that the letter was prompted by service of the writ of *fi fa*. Neither has he adduced evidence of any steps taken after that letter was written, other than to file the instant application seeking the return of the deeds. He has not, for example, produced evidence that he has approached any potential lenders, let alone that there was any expression of interest from them.

34. I do not accept that the fact that the deeds were not in the First Plaintiff's possession prevented him from seeking a loan. The Defendant would no doubt have allowed him or a potential lender to inspect the deeds and would have provided them with a copy. Mr Massa states in his affidavit that if the

First Plaintiff had ever offered to use the Property to repay the Defendant, then, subject to reasonable safeguards, the Defendant would have been open to such a course. However no such offer was ever made.

35. The existence of other debts may be a complicating factor. Mr Massa states that pursuant to other costs orders the First Plaintiff owes $576,380.00 to the Defendant and more than $300,000.00 to the Government.

36. I am not satisfied that there are special circumstances which render it inexpedient to enforce the judgment. I therefore order that the stay of the writ of *fi fa* is lifted. For the avoidance of doubt, the First Plaintiff is permitted to remain in occupation of the Property pending further order of the Court. However I direct that he must give the Provost Marshal General and any potential buyers reasonable access to the Property for the purposes of arranging the sale.

37. I further direct that the sale of the Property shall take place no earlier than thirty days after the date of the hearing. This will give the First Plaintiff the opportunity to secure a mortgage privately within the next 30 days which he sought in his attorney's letter of 31st December 20102.

38. The application is therefore dismissed. Having heard the parties as to costs, I order that the First Plaintiff shall pay the Defendant's costs of the application. I make no order as to the costs of the Interested Party.

Dated this 18th day of January, 2013

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Hellman J