

BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT

CIVIL JURISDICTION

No. 940 of 2010

BETWEEN:

BUTTERFIELD BANK (BARBADOS) LTD

CLAIMANTS

AND

MAYBELLA INC
SANDREAN JUANN COOKE

FIRST DEFENDANT
SECOND DEFENDANT

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court

Ms. Richelle Connell of Messers Clarke Gittens and Farmer for the Claimant

2013: May 3, 9

DECISION

BACKGROUND

- [1] The Claimant is a bank which granted loan facilities to the First and Second Defendants secured by the charges by way of legal mortgage hereinafter described in this decision.
- [2] The First Defendant is a limited liability company registered under the *Companies Act Cap. 308* of the Laws of Barbados.
- [3] The Second Defendant was the sole director of the First Defendant.
- [4] On 24th April 2013 the Claimant filed an application pursuant to *Part 46.2(2)* of the *Supreme Court (Civil Procedure) Rules 2008* (“*the CPR*”) for an Order permitting the Claimant to issue a Writ of Possession to enforce the Order of Clarke J (ag) made on 23rd June 2011. Though the application was

not headed without notice, the claimant sought to proceed on a without notice basis. A summary of the terms of the Order of Clarke J (ag) is as follows:

1. The Defendant to deliver to the Claimant possession of:
Lot 219 Atlantic Shores, Christ Church and a 192nd part share or interest of and in the Open Space on the Plan certified on the 23rd day of February 1971 by L. G. Quintyne, Sworn Surveyor.
2. The Defendant to deliver to the Claimant possession of:
553 square metres of land at Pegwell, Christ Christ Church.
3. That there be a stay of execution until the 23rd day of March 2012.
4. In the event that the Claimant obtains a sale of the properties described in clauses 2 and 3 of this Order before the 23rd day of March 2012 the Defendants do vacate the said property and deliver vacant possession to the Claimant prior to the completion of the sale upon receipt of 28 days' notice of such sale from the Claimant.
5. That the Claimant not be required to seek leave of this Honourable Court to issue a Writ of Possession upon expiration of the period in clause 3 of this Order.

THE EVIDENCE

- [5] The Claimant filed an affidavit in support of its application on 24 April 2013. This was sworn to by Mr. Anthony Leroy Pilgrim, a banker, employed by the Claimant. At paragraph 8 of his affidavit he deposed that he received a letter dated 2nd January 2013 from Mr. Zachary Cooke, son of the First Defendant ("the Son"), which informed him that Sandrean Cooke (the deceased), the Second Defendant, died on 24th November 2012.
- [6] The 2nd January letter also advised that Messrs. Hanschell & Company Attorneys-at-Law were appointed to represent the estate of the deceased.
- [7] He further deposed that up to and including 24th November 2012 the Claimant had not issued the Writ of Possession to enforce the Order of 23rd June 2011.
- [8] At paragraph 10 of his affidavit, Mr. Pilgrim deposed that the Claimant's Attorney-at-Law, by letter of 13th February 2013 (sent by registered mail) to Hanschell & Company, Attorneys-at-Law, demanded payment of the monies then due under the loan facilities ("Loan Accounts") given to the First and Second Defendants and secured by Mortgages dated both dated the 31st day of October 2007 and registered in the Land Registry as Deed Nos. 1865 of

2008 and 9773 of 2007 respectively. This letter was exhibited to the affidavit as Exhibit "ALP 3". Paragraph 3 of the letter provided, *inter alia*, as follows:

We are instructed by Mr. Zachary Cooke that you act on behalf of the Estate of Sandrean Juann Cooke, (deceased)...

Demand is now made that you pay the sum of \$1,965,162.56 together with legal expenses of \$304.25.

- [9] He deposed that the estate of the Second Defendant had failed to pay the monies owed.
- [10] Mr. Pilgrim deposed at paragraph 12 that the Claimant had found a willing purchaser for the properties who had shown the interest in, and the capability of, purchasing the same.
- [11] Paragraph 13 of the affidavit provided an account and calculation of the balance due under the loans. The balance under Loan Account No. 85000000545 was **\$1,931,289.88**. The balance under Loan Account No. 80000009858 was **\$33,872.68**. Interest continued to accrue under both loan facilities.

THE ISSUE

- [12] When the matter came on for hearing on 3rd May 2013 the Court raised with Ms. Richelle Connell, Attorney-at-Law for the Claimant, the propriety of asking the Court to make the Orders sought, without notice, in a situation where the Second Defendant was deceased and there was no one appointed to represent the estate.
- [13] Accordingly, the issue arising in this matter is whether the Court ought to permit the issuance of the writ of possession on a without notice application where the Second Defendant has died and no letters testamentary have been issued and no one has been appointed to represent her estate.

THE SUBMISSIONS

- [14] On 7th May 2013 Ms. Connell handed to the Court her written submissions in respect of the matter. Those submissions are, basically, as follows:
- [15] Where a party to an action dies the normal practice is to allow the action to continue either against or by the estate of the deceased by the appointed personal representative of the estate (**Part 21(6) CPR**).
- [16] Counsel contended that, in circumstances where there is no appointed personal representative, the Court has the power to appoint a personal representative to represent the estate of the deceased in order to have proceedings continued.
- [17] She further submitted that an application for leave to issue the writ of possession may be made without notice under **Part 46.3(1) CPR**.

- [18] Counsel submitted that awaiting the appointment of a representative by the Court will not change the inevitable; even if the Second Defendant were present the result would be the same. Ms. Connell also submitted that there was no legal point which could be taken for which the Second Defendant was a necessary party; hence the application was made *ex parte* (without notice). Counsel also submitted that the Order of Clarke J (Ag) did not require the Claimant to seek the leave of the Court to issue a writ of possession.
- [19] Ms. Connell also submitted that the overriding objective as outlined in **Part 1.2 CPR** is applicable. She contended that dealing with cases justly included, but was not limited to, saving expense and dealing with matters in a way which was proportionate to the financial position of each party. She reiterated that the outcome would be the same whether a representative of the estate was appointed or not.
- [20] In support of her submission that the CPR contemplated situations where there was no representative or none was appointed, Counsel pointed to the letter dated 2nd January 2013, where the Claimant was advised that Hanschell & Company were appointed to represent the interest(s) of the beneficiaries of the deceased's estate. She also referred to the letter of 13th February 2013 where demand was sent to Hanschell & Company, in care of the estate of Sandrean Cooke, for payment and the fact that there had been no response to the letter nor payment of outstanding sums.
- [21] Counsel raised two further points in her conclusion:
1. The Claimant would be unduly prejudiced as it had found a willing and able purchaser for the properties, the debt owed to the Claimant by the Defendants remained outstanding and costs continued to escalate with each passing day; and
 2. The Second Defendant would suffer no prejudice by the granting of the order sought without notice as the outcome would be the same whether a representative was appointed or not.

DISCUSSION

- [22] **Part 46.2 CPR** provides:

A writ of execution may not be issued without permission where:

...

- (d) the judgment debtor has died and the judgment creditor wishes to enforce the judgment or order against the assets of the deceased person which have passed to that person's personal representatives since the date of the judgment or order;

...

- (f) the judgment was given or the order was made subject to conditions.

[23] *Part 46.3(1) CPR*, quoted by Counsel for the Claimant, provides that:
An application for permission may be made without notice unless the court otherwise directs, but must be supported by evidence on affidavit.

[24] *Part 46.3(2)* provides that on an application for permission, the applicant must satisfy the Court that they are entitled to proceed to enforce the judgment or order and in particular:

- (a) where the judgment is a money judgment, as to the amount
 - (i) originally due; and
 - (ii) due together with interest at the date of the application;

...

- (d) where rule 46.2 (*d*) or (*e*) apply, that a demand to satisfy the judgment or order has been made on the person holding the assets, and that that person has refused or failed to do so.

...

[25] A proper interpretation of *Part 46.2 CPR* shows that a writ of execution may be issued without permission where:

1. The debtor has died; and
2. The creditor wishes to enforce the Order against the assets which have passed into the hands of the deceased's personal representatives since the date of the judgment or order. (emphasis mine)

[26] No personal representative has been appointed by the grant of letters testamentary. The debtor died intestate. Messrs. Hanschell & Company cannot be described as the personal representatives of the estate of the deceased. They are merely the Attorneys-at-Law representing those who are applying for a grant.

[27] Under *Part 46.3(d) CPR* a demand to satisfy the judgment or order must be made on the person holding the assets. In these circumstances, the demand was made on Messrs. Hanschell & Company, as aforesaid, not on the son of

the deceased who was made known to the Claimant. That is clear from the 13th February 2013 correspondence to Hanschell & Company. **Part 46.3(d) CPR** requires demand to be made on the person holding the assets of the deceased.

[28] Even if it could be argued that Messrs. Hanschell & Company were the agents of the prospective applicants, without a grant of administration having been given by the Court to the Son or some other person, the assets could not be said to have passed to the personal representative nor the beneficiaries.

[29] In these circumstances, no one has the right to the assets of the deceased until letters of administration are granted, since an administrator derives his power from the grant of letters of administration, whereas, an executor derives his authority from the appointment in the will.

[30] Counsel has, therefore, not properly addressed the requirements of **Parts 46.2** and **46.3 CPR** in her submissions.

[31] I agree with Counsel for the Claimant that the normal practice is to appoint someone to represent the assets of the deceased by virtue of **Part 21.7 CPR**. That is the reason why the issue was raised with Counsel in the first place.

[32] **Part 21.7(1) CPR** provides as follows:

“Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representative, the court may make an order appointing someone to represent the deceased person’s estate for the purposes of the proceedings.”(my emphasis)

[33] I have also given consideration to the following provisions:

CPR 21.7(4): The Claimant may take no step in the proceedings apart from applying for an order to have the personal representative appointed under this rule until the court has appointed someone to represent the deceased person’s estate.

CPR 21.7(5): A decision in proceedings where the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person’s estate.

CPR 21.8(1): If a party to proceedings dies, the court may give directions to enable the proceedings to be carried on.

CPR 21.8(2): An order under this rule may be made on or without an application.

[34] It is clear to this Court that the above rules require the appointment of an individual to represent the estate of the deceased and that proceedings are stayed under **Part 21.7(4) CPR** until the Court has appointed someone to represent the deceased person's estate. No steps have been made to have someone appointed even though a person (the Second Defendant's son) has been identified as a capable representative.

The Subsidiary Issue

Is there a reason to depart from the requirements of Part 46.2 CPR?

[35] The thrust of Counsel's submission is that the overriding objective allows a departure from **Part 46.2 CPR**. As noted at paragraph [18] above, Counsel submitted that it is inevitable that the estate must pay the monies outstanding and there was no possible argument the estate could raise that would change the inevitable.

[36] The overriding objective states as follows:

CPR 1.1(1): The overriding objective of these Rules is to enable the court to deal with cases justly

(2): Dealing justly with cases includes, so far as practicable,

- (a) ensuring that the parties are on equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate to
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

- [37] As noted above, this part requires the Court to deal with cases justly and to ensure the parties are on an equal footing. It is not confined to money issues and saving expense only.
- [38] The duty to act justly and fairly requires that each side is properly represented. This also includes the right to be heard. Compliance with the **CPR** ensures that the overriding objective is achieved.
- [39] I do not believe that this objective of hearing all sides can be sacrificed on the altar of financial expediency by arguing that there is no issue that the other side can raise. It is clear that they can raise the issue that they have no *locus standi* in the matter until properly clothed in the vestments of administrators of the estate by a grant of letters testamentary or an order of court. In addition, one cannot know whether there has been a material change in the circumstances of the estate between the date of the Order of Clarke J (ag) and the present time unless the estate is represented. It is also possible that the representatives might not oppose the application.
- [40] Paragraph 4 of the Order of Clarke J (ag) requires that notice be sent to the Second Defendant in the event that the Claimant obtains a sale of the property so that possession can be given up by her.
- [41] Since the Second Defendant is dead, notice is required to be sent to a properly constituted personal representative not the Attorneys for a proposed applicant for a grant. The Order of Clarke J. (ag) which provided the requirement of notice is not rendered nugatory by the death of the Second Defendant.
- [42] It must be noted that paragraph 4 of the said Order required 28 days notice of any sale to be given to the Second Defendant by the Claimant. That notice was never sent. It seems to me that service of the 28 days' notice is a pre-condition to the Defendants giving vacant possession to the Claimant. They can only comply with the order for possession under paragraph 4 if they are aware that a sale has been obtained.
- [43] Counsel drew to the Court's attention that the 28 days' notice contained mentioned above related to a situation where the Claimant had obtained a sale of the property on or before 23 March 2012, the period of the stay of execution, which period had expired at the date this application was filed. I do not think that this point makes a material difference to the outcome of this matter.

- [44] If the period of stay had expired, there was nothing to prevent the Claimant giving notice that a sale had been obtained so that the Defendants could make arrangements for vacant possession. Whilst paragraph 5 of the Order states that the Claimant is not required to seek the leave of the Court to issue a writ of possession upon the expiration of the stay. It is silent with respect to the provision of notice to the Defendant. The death of the Second Defendant caused the Claimant to seek leave under *Part 46.2 CPR*.
- [45] Paragraph 12 of Mr. Pilgrim’s affidavit states that “The Claimant has found a willing purchaser for the properties who has shown both interest and the capability to purchase the same. The Claimant is desirous of selling the said properties in an effort to end the continuing debt increase.” The Claimant is notifying the Court that a sale might be forthcoming. Although paragraph 4 of the Order speaks to a sale being obtained, I believe that the true purport and intent of Paragraph 5 of the Order is that the Defendant’s should be informed, by notice, that their properties were going to be sold so that they could make appropriate arrangements to give vacant possession to the Claimant.
- [46] Similarly, the service of this application upon the Defendants would have provided the First Defendant and any person appointed to represent the Second Defendant with notice. The affidavit of Mr. Anthony Pilgrim, particularly paragraph two thereof, would have informed them of the circumstances which occurred since Clarke J’s (ag) order.
- Other relevant considerations*
- [47] The First Defendant was represented by Attorney-at-Law Ms. Zarina Khan for whom Mr. Ivan Alert held papers before Reifer J on 28th February 2012 and 18th April 2012 respectively. No notice was served on the First Defendant which is a limited liability company. Even though the sole director has died it would still be important to ascertain if a new director had been appointed by the shareholders and what is the present status of the company. It would be improper not to serve the application on the First Defendant and to allow the Claimant to proceed without notice to both Defendants.
- [48] For the above reasons, therefore, the answer to the question “is there a reason to depart from the requirements of Part 46.2 CPR?” is in the negative.
- DISPOSAL**
- [49] In the circumstances, the application for permission to issue the writ of possession without notice is refused.
- [50] The Court makes the following directions:

1. T
hat the Claimant take such steps as are required by the

CPR to have a person appointed to represent the estate of the deceased so that the proceedings may be properly continued within 28 days of today's date; and

2. T
he Claimant to serve the application and affidavit in support thereof on the First Defendant within 28 days of today's date.

William J. Chandler
Judge of the High Court