BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Application No. 17 of 2018

BETWEEN

SYLVIA ERNESTA FIEDLER **Intended Appellant**

-AND-

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED **Intended Respondent**

Before The Hon. Sir Marston C.D. Gibson KA, Chief Justice; The Hon. William J. Chandler and The Hon. Margaret A. Reifer, Justices of Appeal (Acting)

2018: December 11 and 18;
2019: April 30

Ms. Bernadette D. Callender for the Intended Appellant
Mr. Barry L.V. Gale QC and Ms. Micaela Pile for the Intended Respondent

REASONS FOR DECISION

GIBSON CJ:

INTRODUCTION

[1] On 18 December 2018, we dismissed the application of the intended appellant, Sylvia Ernesta Fielder ("the intended appellant" or "Ms. Fielder") filed 27 September 2018 and awarded costs in favour of the intended respondent, First

Caribbean International Bank (Barbados) Limited ("the intended respondent" or "FCIB"), with reasons to follow. We provide those reasons now.

[2] In this matter, the intended appellant sought leave to appeal against a consent order (the Consent Order) made before the Master of the Supreme Court ("the Master") on 8 November 2017 that, *inter alia*, she (1) pay the sum of $620,840.70 together with interest; (2) provide access to the property by FCIB, its agents and valuers; (3) deliver up possession within 30 days of being notified of an agreement for sale; and (4) pay costs as prescribed by ***CPR Part 65***. There is also a related proceeding pending in this matter in the High Court which concerns a mortgage which Ms. Fieldler has with FCIB for the enforcement of the order of sale contained in the Consent Order.

BRIEF BACKGROUND

[3] The facts can be shortly stated. Ms. Fiedler is the owner of a property located at #90 Goodland Gardens in the parish of Christ Church. In 2006, she approached FCIB and obtained a mortgage to build apartments onto her home. She executed a deed of charge by way of legal mortgage dated 22 November 2006 in favour of the intended respondent to secure the sum of $250,000.00. The deed of charge was upstamped on 2 August 2007 and again on 19 June 2008 to cover the sums of $30,000.00 and $56,000.00 respectively making the aggregate sum secured $336,000.00. Interest was payable on the mortgage

loans at the rate of 8.05% per annum. She defaulted in the mortgage payments. In May 2009, the intended respondent gave notice of its demand for payment of the outstanding principal and interest.

[4] The intended appellant continued her default in repaying the mortgage sum and, up to the date of hearing, had not made a mortgage payment for nine (9) years. As a result, the intended respondent commenced an action against her on 20 June 2017 seeking:

> "The determination of the Court on the following relief namely:
>
> 1. Access to the property upon the expiration of 24 hours from service of notice to the Defendant;
> 2. Should the Defendant fail and/or refuse to provide access to the Property as provided for in 1 above; the Defendant shall deliver up possession of the Property to the Claimant within 30 days of being notified in writing by the Claimant of the Defendant's failure to grant access as provided in 1 above;
> 3. Possession of the Property within thirty (30) days of being notified in writing by the Claimant that an Agreement for Sale has been signed by a purchaser;
> 4. Final Judgment at the first hearing of the evidence before the Court in accordance with Rule 66.3 of the Supreme Court (Civil Procedure) Rules, 2008;
> 5. Costs;
> 6. Any and such other further relief as the Court sees fit; and
> 7. Liberty to apply."

[5] The parties' agreed position in terms of the relief claimed was reduced to a draft consent order which the Master approved on 8 November 2018. The intended appellant was not then represented by counsel. It is against that Consent Order which the intended appellant now seeks leave to appeal.

THE APPLICATION FOR LEAVE TO APPEAL

[6] It is useful to set out here the pertinent portions of the notice of application for leave to appeal filed 27 September 2018. It reads as follows:

> "The Claimant applies to the Court for an order that:
>
> 1. The time limited by the Civil Procedure Rules 2008 (CPR) Part 62.6 (1) (c) for the filing of an appeal be extended and/or that the Applicant/Intended Appellant be granted leave to appeal pursuant to CPR Part 62.6 (3).
> 2. The Claimant be granted relief from sanction pursuant to CPR Part 26.4.
> 3. Execution upon the judgment of 8th November 2017 be stayed pending determination of this application and/or the substantive appeal.
> 4. Costs of this application to be provided for."

[7] The grounds of the application were as follows:

> "(i) Special Reasons and Reasons for Delay:
>
> (a) The Applicant/Intended Appellant was a litigant in person;
> (b) The Applicant/Intended Appellant was unable to understand or appreciate the points of law and/or the complexity of issues relevant to a fair disposal of her application;
> (c) The Applicant was at the time for all intents and purposes a poor person and without the means necessary to litigate her case adequately or at all at the material time;"

THE POINTS *IN LIMINE*

[8] Mr. Barry Gale QC, counsel for FCIB, raised two points *in limine*. First, he contended that that no appeal lies in law against the Consent Order (the

jurisdiction point); and second, that the application for leave should be struck out as an abuse of process of this Court (the abuse of process point).

THE SUBMISSIONS

The Jurisdiction Point

[9] Mr. Gale QC drew the Court's attention to the draft Consent Order on file and pointed out that the words "by consent" had been entered by the Master and that the Master's stamp of approval and signature had been attached. Those changes were reflected in the filed order attached to Ms. Fieldler's affidavit filed 27 September 2018. It was therefore indisputable that the order was a consent order.

[10] Counsel drew our attention to Part 40.6 of the Civil Procedure Rules 1998 of the United Kingdom ("UK rules") which, he posited, was in *pari materia* with ***CPR 42.3***. He relied upon the commentary in Civil Procedure Volume 1 (Sweet & Maxwell, Thomson-Reuters 2015; "the White Book") where the learned authors opined that: "Historically speaking, the significant feature of the rule is that it enables a judgment or order to be entered and sealed by an officer of the court without the intervention of a judicial officer." He distinguished the order from orders made under the UK rules on the basis that an order was made before the Master and was therefore not an administrative consent order as contemplated by the UK rules.

[11] Mr. Gale QC further submitted that it was well established law that, where all parties agreed, a consent order, once entered, can only be set aside by a fresh action. He also contended that an application cannot be made to the court of first instance in the original action to set aside a judgment or order, except an interlocutory order, nor can it be set aside on appeal. He relied upon **Re Affairs of Elstein [1945] 1 All ER 272 CA** and the opinion of the learned authors of ***Halsbury's Laws of England*** **4th Edition Volume 26** para 562 entitled "Setting aside consent judgment or order." In conclusion, he argued that, since the order of 8 November 2017 was a consent order, no appeal could be made against it. For these reasons, he contended, the intended appellant's application ought to be struck out.

The Abuse of Process Point

[12] Mr. Gale QC also submitted that it was trite law that this Court had the inherent jurisdiction to prevent any litigant from using its process for an improper purpose. This was a proper power which "any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people" (*per* Lord Diplock in **Hunter v Chief Constable of the West**

Midlands Police [1982] AC 529, 536). Counsel noted further that, reflective of the inherent power to strike out the Claimant's case for misuse of the process and/or abuse of process, is the power given to the court under **CPR 26.3(3)(a)** which confers on the Court express power to strike out on the basis of an abuse of process.

[13] Mr. Gale QC argued that Ms. Fiedler was clearly misusing the process of this Court for the improper purpose of seeking to delay the inevitable sale of her property by FCIB which had an undisputed right to do so. This was particularly so since, in the court below, FCIB's power of sale had not been challenged in any way by Ms. Feidler. Counsel submitted that the application by Ms. Fiedler was an abuse of process of this Court on the following grounds:

> "a) The stay sought in this Court is substantially the same relief being sought in the court below.
> b) The application was an attempt to unfairly delay the right of the intended respondent to exercise its statutory power of sale of the property in the following circumstances:
>
> i. Ms. Fiedler has never disputed that she owed the bank both principal and interest;
> ii. She defaulted on her mortgage repayment for over nine years and had not made a single payment towards the outstanding money due;
> iii. She had not challenged the legal right of the bank to sell her property pursuant to its contractual and statutory power of sale; and
> iv. She had not challenged the consent order in so far as it required her to deliver up possession of the property within 30 days of being notified in writing by the bank

> that an agreement for sale had been signed by a third party."

In consequence, Mr. Gale QC submitted that the application for leave to appeal ought to be dismissed as an abuse of the process of this Court.

[14] Ms. Bernadette Callender, counsel for Ms. Fiedler, in her oral submissions, dealt with Mr. Gale's submissions in the reverse order. Beginning with the abuse of process point, she submitted that there was no dispute that there was another application pending in the High Court, and that an application seeking a stay pending that determination had been filed in this Court. However, she contended, the application for the stay was not the substantive relief sought in this court. She averred that she was seeking to invoke this Court's case management powers, namely, that this Court, upon making a determination to hear this matter or to grant leave, would be empowered to stay the matter so as to preserve the status quo.

[15] In her written submissions, Ms. Callender contended that the issues arose concerning whether the interest portion of the debt sought to be enforced in the court was statute-barred, the claim having been filed eight years after the last recorded payment. Consequently, an issue arose as to whether, in the circumstances, the Master had jurisdiction to determine that aspect of the intended appellant's claim or the matter as a whole. These issues were never articulated, nor was there evidence to support any exclusion of **section 48** of

the **Limitation of Actions Act, Cap. 231**. A further issue arose, Ms. Callender contended, as to whether the intended appellant's presence was a waiver of jurisdiction. She also posited that, once the issue of law was clarified, the question would be what was the amount of the debt actually due from the intended appellant?

[16] In response to the jurisdiction issue, Ms. Callender argued that, at the time the Consent Order was entered, the intended appellant was not represented by counsel and was therefore "a litigant in person" within ***CPR 42.7(3) (a)***. That rule, she urged, sets out the definition of a consent order, and also excluded anyone who was not represented by counsel. In consequence, the order was not a consent order and was therefore appealable. She noted that there was an amendment on the order, no party having endorsed it except the Master and that this was a matter of significance for this Court.

[17] With respect to Mr. Gale QC's submissions on the applicability of the UK law, Ms. Callender submitted that those rules did not apply to the present circumstances. She argued that the UK provisions spoke to powers granted to court officers to enter a judgment whereas ***CPR 42*** did not speak to court officers.

DISCUSSION

[18] It is clear that a positive determination of either of these two points will put paid to the intended appellant's application for leave to appeal. We turn now to discuss the two *in limine* points *seriatim*.

The law

[19] The relevant law is contained in ***CPR 42*** intituled "**Judgments and Orders**", specifically ***CPR 42.7*** which deals with "**Consent Orders and Judgments**." It provides that:

(1) This rule applies where

(a) none of these Rules prevents the parties agreeing to vary the terms of any court order; and
(b) all relevant parties agree upon the terms in which judgment should be given or an order made.

(2) Except as provided by sub-rules (3) and (4), this rule applies to the following kinds of judgment or order:

(a) a judgment for
(i) the payment of a debt or damages, including a Judgment or order for damages or the value of goods to be assessed;
(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; or
(iii) costs;

(b) an order for
(i) the dismissal of any proceedings, wholly or in part;
(ii) the 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");

(iii) the stay of enforcement of a judgment, either unconditionally or on condition that money due under the judgment is paid on a stated date or by instalments specified in the order;"

[20] **Sub-rule (3)** provides:

"(3) This rule does not apply
(a) *where any party is a litigant in person*;
(b) where any party is a minor or patient;
(c) in Admiralty proceedings; or
(d) *where the court's approval is required by these Rules or by any enactment before an agreed order can be made*."
(emphasis added)

[21] **Sub-rule (4)** states simply that "this rule does not allow the making of a consent order by which any hearing date fixed by the court is to be adjourned." For the sake of completeness, we note that **sub-rule (5)** provides that: "Where this rule applies, the order must be

(a) drawn in the terms agreed;
(b) expressed as being "By Consent";
(c) signed by the attorney-at-law acting for each party to whom the order relates; and
(d) filed at the Registry for sealing."

[22] We find it convenient here to set out the provisions of the UK rules. Part 40.6 provides as follows:

"This rule applies where all the parties agree the terms in which a judgment should be given or an order should be made.

(2) A court officer may enter and seal an agreed judgment or order if
(a) the judgment or order is listed in paragraph (3);

(b) none of the parties is a litigant in person; and
(c) the approval of the court is not required by these Rules, a practice direction or any enactment before an agreed order can be made.

(3) The judgments and orders referred to in paragraph (2) are –
(a) a judgment or order for –
(i) the payment of an amount of money (including a judgment or order for damages or the value of goods to be decided by the court); or
(ii) the delivery up of goods with or without the option of paying the value of the goods or the agreed value.

(b) an order for –
(i) the dismissal of any proceedings, wholly or in part;
(ii) the stay of proceedings on agreed terms, disposing of the proceedings, whether those terms are recorded in a schedule to the order or elsewhere;
(iii) the stay of enforcement of a judgment, either unconditionally or on condition that the money due under the judgment is paid by instalments specified in the order;
(iv) the setting aside under Part 13 of a default judgment which has not been satisfied;
(v) the payment out of money which has been paid into court;
(vi) the discharge from liability of any party;
(vii) the payment, assessment or waiver of costs, or such other provision for costs as may be agreed.

(4) Rule 40.3 (drawing up and filing of judgments and orders) applies to judgments and orders entered and sealed by a court officer under paragraph (2) as it applies to other judgments and orders.

(5) Where paragraph (2) does not apply, any party may apply for a judgment or order in the terms agreed.

(6) The court may deal with an application under paragraph (5) without a hearing.

(7) Where this rule applies –

> (a) the order which is agreed by the parties must be drawn up in the terms agreed;
> (b) it must be expressed as being 'By Consent';
> (c) it must be signed by the legal representative acting for each of the parties to whom the order relates or, where paragraph (5) applies, by the party if he is a litigant in person."

[23] The difference between the UK rules and **CPR 42.7** is the absence from CPR of the words "[a] court officer may enter and seal an agreed judgment or order if. . ." This is the distinguishing feature alluded to by Ms. Callender. The question then becomes whether the absence of these words renders the rationale behind **CPR 42.7** inapplicable. In our respectful view the answer is no. The absence of the words referred to above does not alter the purport and intent of the rule, namely to allow parties to enter an administrative consent order in the circumstances outlined in the rules. We therefore are of the opinion that the opinion of the learned authors of the White Book, quoted later in this decision, and which coincides with ours, is applicable.

[24] A consent order embodies the agreement of the parties to settle or compromise their action in court upon certain terms. The essence of the order is therefore mutual consent. In their work *Commonwealth Caribbean Civil Procedure*, 4th Edn, (Routledge, 2017), Gilbert and Vanessa Kodilinye (Kodilinye and Kodilinye) at p. 235 succinctly put the position thus:

> "The function of a consent order is to record the *agreement of the parties* with respect to certain interlocutory matters, or to record the terms of a compromise on settlement of an action.

> *Since the order is founded on a contract between the parties, the necessary elements of a contract must be present*."
> (emphasis added)

[25] In the Canadian case of **Childs v Childs ONCA 516 (Childs)**, the Court of Appeal of Ontario opined, at para [58] that:

> "Consent orders have their foundation in contract. There is great judicial resistance to granting leave to appeal consent orders. Leave should not be granted where the issue relates to the validity of the consent unless there is evidence before the court on the leave application that demonstrates an arguable case that at the time the consent was given, the party could not or did not consent. Such evidence may relate to factors that might undermine the enforceability of contracts, such as fraud, duress and undue influence."

[26] The factors mentioned in the ultimate paragraph of **Childs** are normally referred to as the vitiating factors. In **Williams and Withorn Development Co Ltd v MZ Holding Ltd, JM 2008 SC 87, Mangatal J**, in stating the principle, made the following observation:

> "I do not think that the fact that the CPR give the court wide procedural powers of case management can change the nature of a consent order which embodies an agreement between the parties. It therefore seems to me that the law as to setting aside or varying such an order is still governed by the law and interpretation of agreements applicable under the Law of Contract."

[27] We are of the view that those restatements of the common law approach to consent orders represent the law of Barbados.

[28] Having regard to the principles set out above, the question now is, what is the applicability of ***CPR 42.7***, if any, to the facts at bar? The essence of Ms. Callender's submissions centres around ***CPR 42.7(3)(a)*** and ***(d)*** which provide that ***CPR 42.7*** is inapplicable where any party is a litigant in person or where a judicial officer is required to grant approval before such an order can be made. However, it is clear that consent orders can be filed in the court administratively under ***CPR 42.7***. Support for this conclusion is found in Kodilinye and Kodilinye where the learned authors state, at p. 238:

> "In order to save time and costs, Rule 42.7 [Rule 43.7 (T&T)] enables certain types of consent orders to be entered administratively, without the need to obtain the approval of the court, provided that none of the parties is a litigant in person, a minor, or a patient."

[29] This is where, in our view, the opinion of the learned authors of the 2016 Edition of *The Supreme Court Practice UK (the 2016 White Book)* with respect to the English Rule 40.6, the analogue of our ***CPR 42.7***, becomes relevant. They state, at para 40.1.1, p. 1164, as follows:

> "Historically speaking, the significant feature of the rule is that it enables a judgment or order to be entered and sealed by an officer of the court without the intervention of a judicial officer….Consent orders not covered by this rule require an application to the court for approval"

[30] What is clear, then, is that consent orders cannot be entered administratively where a litigant is unrepresented, i.e. "a litigant in person." Hence, the

peremptory language in **sub-rule 5** which requires that, for the consent order to be entered 'administratively' or, as stated by Kodilinye and Kodilinye, "without the need to obtain the approval of the court", it must be, among other things, "signed by the attorney-at-law acting for each party to whom the order relates."

[31] When the law is applied to the case at bar, the distinguishing feature between this case and those within the purview of ***CPR 42.7*** is that the Consent Order here was made before the Master. It bears noting that, under **section 69A** of the **Supreme Court of Judicature Act, Cap. 117A**, the Master possesses all the powers of a Judge of the High Court in chambers. The Consent Order was, therefore, not an administrative consent order at all but one entered with "the intervention of a judicial officer" even though at the time, the intended applicant was unrepresented and "in person."

[32] This reveals the fallacy in the argument of counsel for the intended appellant that the order was an administrative consent order, invoking ***sub-rule 3*** of ***CPR 42.7*** simply because the intended applicant was "a litigant in person." Nothing in **Cap. 117A** or in the ***CPR*** precludes a litigant in person from appearing before a judicial officer and entering a consent order in circumstances such as these. Accordingly, there is nothing in ***CPR 42.7*** which precludes the enforcement of the consent order made in this case.

[33] The question now becomes whether anything has been shown which would justify an appeal against the order? The answer is no, there is not. It has not been pleaded before this Court nor has Ms. Callender contended that there are any of the usual vitiating factors which nullify a contract as grounds for this appeal. None are contained in the grounds of appeal and none of the positions taken before us justify the vitiation of the consent order.

[34] We note that Ms. Callender contended throughout the proceedings that ***CPR 42.7*** defined consent orders but later, and quite properly in our view, resiled from that position after being questioned about the interpretation of ***CPR 42.7***.

[35] It may be useful to set out the parts of the record where some of these concessions may be found:

> "REIFER, JA: Counsel, that is an argument that doesn't directly answer Mr. Gale's submission about the law as it relates to Consent Orders, because remember our starting point is, which I do not think you are disputing, that there was an order in the High Court which was signed, approved as a Consent Order. His submission in that regard is quite simple, which is, that this Court has no jurisdiction to hear an appeal of a Consent Order in the form that you have submitted. Is that not your submission, Mr. Gale?
>
> MR. GALE, QC: Ma'am, that is correct.
>
> REIFER, JA: Which is a very narrow and linear point. It takes you one place and nowhere else.
>
> MS. CALLENDER: Yes, My Lady. And that's the other point. I don't think it actually bears on the point that we were just discussing. My response to Mr. Gale's contention is he is quite

> correct. My submission is that Part 47.2 does define what a Consent Order is. It is not merely for procedure.
>
> …
>
> MS. CALLENDER: Essentially that is it, ma'am. Well, once there is a Consent Order the Court determines and pronounces on it as a Consent Order the appropriate course is the High Court. And in doing that –
>
> REIFER, JA: Yes, Mrs. Callender, just so I am absolutely clear: Are you conceding that Part 42.7 is not relevant, it does not define Consent Order in the context?
>
> MS. CALLENDER: I do accept that.
>
> REIFER, JA: I am making a very careful note, Ms. Callender."

[36] We take this opportunity to observe, as this Court has done in several prior decisions, that one of the bases upon which this Court will assess whether an application seeking leave to appeal ought to be granted is where there is a real prospect of success (see, ***Aaron Truss v Windsor Plaza, CV App No. 10/2005***). As Lord Woolf MR noted in an oft-quoted *dictum* in *Swain v Hillman* [2001] 1 All ER 91, 92, the words "realistic prospect of success" mean "realistic, as opposed to fanciful." In light of our decision above that there is no basis upon which the underlying Consent Order can be challenged, we determine that there is no basis upon which this application seeking to appeal from the Consent Order can succeed. The application fails and is accordingly struck out.

[37] Finally, Mr. Gale QC urged that we find this appellant's application to be an abuse of process. However, having regard to our conclusion on the jurisdictional point concerning whether the Consent Order can be appealed, and which disposes of the application, we find it unnecessary to rule on the issue of abuse of process.

COSTS

[38] Mr. Gale QC submitted that costs should follow the event and that costs should be certified fit for two counsel. Ms. Callender conceded that costs should follow the event, but resisted the certification of costs fit for two counsel on the basis that the matter was one which could adequately be handled by Mr. Gale QC alone.

[39] We have noted the concession of costs by Ms. Callender and, accordingly, we order the intended appellant to pay the costs of the intended respondent to be assessed if not agreed, but decline to certify costs fit for two counsel.

DISPOSAL

[40] In the premises, it is ordered as follows:

1. That the application for leave to appeal filed 27 September 2018 by the intended appellant is struck out.

2. The intended appellant pay the intended respondent's costs of the application to be assessed if not agreed.

Chief Justice

Justice of Appeal (Ag.)

Justice of Appeal (Ag.)