

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Nos. 151 and 152 of 2004

BETWEEN:

COTTLE CATFORD & CO (A Firm)

**CLAIMANT/
JUDGMENT CREDITOR**

AND

DELVINA WATSON

**DEFENDANT/
JUDGMENT DEBTOR**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

2014: March 04, 07

April 23

May 07

June 10

July 28

November 21 (oral decision given)

2019: August 16 (written reasons for decision)

Mr. Elliott D. Mottley Q.C., Mr. Philip V. Nicholls, and Ms. Charmaine Delice-Hunte, Attorneys-at-Law for the Claimant/Judgment Creditor.

Mr. Vernon O. Smith Q.C., Mr. Michael T. Springer Q.C. and Mr. Alvan D. Babb, Attorneys-at-Law for the Defendant/Judgment Debtor.

REASONS FOR DECISION

Introduction

- [1] The issue before the Court is whether an injunction should be discharged because the recovery of the debts by the Judgment Creditor (“the Creditor”) is now statute-barred.

Background

- [2] In Suit No. 151 of 2004, the Creditor claimed various sums totalling \$168,847.04 from the Judgment Debtor (“the Debtor”). The monies were lent to the Debtor, who was a client of the Creditor, and the wife of a now deceased partner of the Creditor.
- [3] The Debtor acknowledged service of the Writ on 13 February 2004, and indicated that she did not intend to contest the proceedings. A default judgment was entered against her on 04 May 2004. She was required to repay the Creditor the judgment debt with interest at the rate of 8 percent per annum, from the date of judgment until the date of payment, with costs to be taxed. Costs were taxed in the sum of \$1,608.25.
- [4] Suit No. 152 of 2004 was similar in content and disposition by the court. The default judgment in this suit was for \$96,300, with 8 percent interest, and taxed costs of \$1,170.25. The two suits were consolidated, but the Court is unable to ascertain when consolidation occurred.

- [5] On 05 March 2005, Reifer J (Ag.), as she then was, granted an order for service on the Debtor, by newspaper advertisement, of judgment summonses filed on 22 February 2005. This order was stayed on 04 April 2005 by the then Chief Justice Sir David Simmons, on an application stating that the Creditor could easily be found.
- [6] An order for the oral examination of the Debtor was granted by Goodridge J., as she then was, on 03 January 2006. But it was not until 2007 that Cornelius J. was able to conclude the examination of the Debtor.
- [7] In early 2007, the Creditor sought to garnish rents due to the Debtor, and to levy on goods, chattels and personal property owned by the Debtor. The file does not indicate any judicial rulings on these two applications. The Creditor's *ex parte* application of 09 May 2012, for a charging order, is yet to be heard. And additionally, there are numerous letters in which counsel for the Creditor pleaded for dates of hearing, in order to expedite the recovery of the debts.
- [8] It is against this background that the Creditor filed an urgent application for interlocutory relief on 22 June 2012. The Creditor's counsel Mr. Philip Nicholls filed two affidavits in support of the application. The first affidavit was filed with the notice of application, and detailed the background to the

application. Mr. Nicholls gave the reason for the *ex parte* application as his concern that the Debtor would sell certain properties, and thereby frustrate any attempts to secure a charging order against the properties, or to secure payment of the debts.

- [9] The supplemental affidavit was filed on 28 June 2012. Mr. Nicholls refuted assertions by the Debtor that she had repaid the debts in full in 2007. The application was certified as urgent by the Honourable Chief Justice on the same day that it was filed, and assigned to this Court for hearing.
- [10] The Court heard the application on 29 June 2012, and granted the Creditor an *ex parte* injunction that restrained the Debtor either “by herself or by her servants or agents or any of them or otherwise howsoever from selling, alienating, disposing or anyway dealing with the properties described in this order until satisfaction of judgment in this action”. Two properties were identified at Worthing, Christ Church, and a third property at Lot 2 Long Bay, St. Philip.
- [11] On 05 October 2012, the Debtor applied for the setting aside of the injunction, and requested orders:
1. declaring that the judgments against the Debtor were settled by the Debtor to each partner of the Creditor in payments representing their respective shares in the partnership;

2. declaring that the Debtor had liquidated the debts in full;
3. declaring that the order for interlocutory relief applied for by the Creditor on 22 June 2012 be set aside as it was without merit with no basis for the application;
4. declaring that the Debtor is free to sell the three properties;
5. that at the time of the payments by the Debtor, she was entitled to settle the debt by making payments to the partners in accordance with the Partnership Act, Cap.313; and
6. that the Creditor pay the costs of the application.

[12] Affidavits were filed by the Debtor, and by counsel for the Creditor and the Debtor. During the hearing of the application to discharge the injunction, on 23 April and 07 May 2014, counsel and the Debtor were cross-examined on their affidavits. When the trial resumed on 10 June 2014, senior counsel for the Debtor, Mr. Vernon Smith Q.C., informed the Court that in the interest of time he would not be continuing his cross-examination of the Creditor's attorney-at-law.

[13] Mr. Smith Q.C. then made an oral application for an *in limine* submission. He contended that the injunctive relief granted by the Court on 29 June 2012 was statute-barred. This issue was not raised by the Debtor in her application to

discharge the injunction. The Court made the following orders consequent upon the oral application:

1. the Debtor was required to file and serve written submissions on the limitation point and on the application of counsel for the Creditor for costs for the day, on or before 20 June 2014;
2. the Creditor was to file and serve written submissions on or before 04 July 2014; and
3. counsel for the Debtor was given carriage of the order.

The Submissions and the Court's Ruling

[14] The Debtor's position is that the proceedings are time-barred under section 45 (1) of the Limitation of Actions Act ("Cap.231"). Section 45(1) provides that:

"No action may be brought upon any judgment after the expiration of 6 years from the date on which the judgment became enforceable".

[15] On behalf of the Debtor, Mr. Michael Springer Q.C. contended that:

"An action means a proceeding or a step taken in the matter for the purpose of obtaining specific relief. In the instant matter it is a proceeding taken by the [Creditor] for the purpose of enforcing the judgments which were given on the 19/3/2004. Hence it is statute-barred. See **Lowsley and Another v. Forbes (t/a L.E. Design Services) [1998] 3 All ER 897.**

Furthermore, since there has been no acknowledgment in writing or part payment of the debt within the last 6 years, then no fresh action may be taken on the judgment”. (See paras. 8 and 9 of written submissions filed on 20 June 2014).

- [16] No written submissions were filed on behalf of the Creditor, and the Court declined to consider an affidavit filed by Mr. Nicholls in breach of the order made on 07 May 2014. (See para. [13] supra). However, at the trial on 28 July 2014, Mr. Elliot Mottley Q.C. made submissions on behalf of the Creditor.
- [17] Mr. Mottley Q.C. argued that counsel for the Debtor had misconstrued the **Lowsley** case. He contended that an action means a fresh action, and does not include proceedings by way of execution. The Creditor’s application for injunctive relief had the same claim number as the original suits, and was a proceeding by way of execution.
- [18] Mr. Smith Q.C. countered that execution was a specific terminology under the Rules of the Supreme Court 1982. He was adamant that an application for an injunction is not execution.
- [19] At the end of the oral submissions, the Court gave an undertaking to deliver a ruling that was “not too complex”. On 21 November 2014, the Court informed the parties that after due consideration of the submissions, the *in*

limine submission was dismissed. The application for injunctive relief was not a new action, but part of the process for enforcing the judgment.

[20] The Court declined an invitation from Mr. Smith Q.C. to expand on its reasons for not upholding the *in limine* submission. The Court thought it best to proceed to complete the hearing of the Debtor's application to discharge the injunction. This application was ongoing when the *in limine* point was raised by Mr. Smith Q.C.

[21] The Court made the following orders:

1. the *in limine* submission was dismissed;
2. costs were awarded to the Creditor to be agreed or taxed;
3. Mrs. Joyce Griffith and Mr. Alan Watson were to be subpoenaed to give evidence in the matter with respect to the receipts allegedly signed by them on 16 April, 2007; and
4. further hearing of the matter was adjourned to 24 February 2015, and 03, 17 and 31 March 2015 at 2.00 pm each day.

[22] Despite the fact that the hearing of the application to discharge the injunction was not completed, the Debtor filed a notice of appeal on 04 December 2014. The appeal challenged the entirety of the order made on 21 November 2014. (See para. [21] *supra*).

Discussion

[23] Section 45(1) of Cap.231 is *in pari materia* with section 24(1) of the UK Limitation Act 1980 (c.58). The UK legislation is drafted as follows:

“An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable”.

When this draft is compared to section 45(1) of Cap.231, (see para. [14] supra), it is obvious that the slight difference in drafting style should not lead to a different interpretation of the two sections.

[24] The UK provision was interpreted by the House of Lords in the **Lowsley** case. It was a unanimous decision of five Law Lords. The court held that on its true construction, the word “action” meant a fresh action. Therefore, the section did not bar the execution of a judgment after six years. It only barred the bringing of a fresh action on the judgment.

[25] The facts of **Lowsley**, in so far as they are relevant to the present case, may be gleaned from the headnote. In February 1981, the respondents obtained a judgment by consent against the appellant in the sum of £70,000. By July 1992, the judgment debt with interest had increased to £184,199. The respondents obtained leave to enforce the judgment; a charging order against the appellant’s property; and garnishee order over his bank account. The appellant applied to set aside the garnishee and charging orders on the ground that execution of the judgment was time-barred.

[26] In this case, the various applications by the Creditor for enforcement of the judgments have not been heard. Two of the applications were made in 2007, less than three years after the default judgments were entered on 04 May 2004. The application for the charging order was dated 09 May 2012, some eight years after the default judgments. On the authority of **Lowsley** the latter application would not be statute-barred.

[27] What is at the heart of the Debtor's objection is the grant of injunctive relief by the Court. According to Mr. Smith Q.C., an application for an injunction is not execution; rather, it is a new action that is statute-barred.

[28] The two suits against the Debtor were filed in 2004. Execution of the judgments by the Creditor was then governed by the Rules of the Supreme Court, 1982. Order 45 of the 1982 Rules provides that:

“1. (1) Subject to the provisions of these Rules, judgment or order for the payment of money, not being a judgment or order for the payment of money into Court, may be enforced by one or more of the following means

(a) writ of *fi-eri-facias*;

(b) a charging order;

(c) garnishee proceedings;

(d) the appointment of a receiver;

(e) in a case in which rule 5 applies, an order of committal;

(f) in such a case, writ of sequestration”.

[29] The Court accepts that an application for injunctive relief is not a method for the enforcement of a judgment identified in Order 45 of the 1982 Rules. However, the Court is persuaded that the Creditor did not bring a new action that was statute-barred.

[30] In **Ridgeway Motors (Isleworth) Ltd v. ALTS Ltd [2005] 2 All ER 304**, the Court of Appeal considered the legislative history of section 24(1) of the UK Limitation Act. (See para. [23] supra). Mummery LJ opined that:

“.....in **Lowsley’s** case it was unanimously held by the House of Lords that the expression ‘[a]n action....upon a judgment’ in s.24(1) has a special legal meaning derived from its legislative history. “An action....upon [a] judgment’ has been treated....by the courts, by the Law Reform Committee and by Parliament itself as having the special or technical meaning of a ‘fresh action’ brought upon a judgment in order to obtain a second judgment, which can be executed”. (Para.[29] of judgment).

[31] Andrew McGee explains that:

“The practice of bringing an action on a judgment was common in the days when the common law presumption was that a judgment was satisfied after a year and a day if no execution had been issued. In such cases the only way to “enforce” the judgment was by an action of debt upon it. The right to bring the second action has been said to depend upon an implied contract to honour the first judgment, though that might be thought to be something of a

fiction. Even today bringing a second action in this way is a matter of right, although the court may decline to give judgment in the second action if it regards it as an abuse of process". (In "Limitation Periods", 6th ed., 2010, Sweet & Maxwell at para.17.003).

- [32] The Creditor's application for injunctive relief is neither a fresh action or a new action as understood by the common law. It was a continuation of the existing suits, and part of the Creditor's attempts to recoup the amounts due from the Debtor. It is not unusual for injunctions to be used as an aid to the enforcement of judgments. (See **MWP v. Emmott [2019] EWCA Civ. 219**, and **Markham v. O'Hara [2019] EWCA Civ. 397**). And the 1982 Rules contemplated the use of injunctions to facilitate the enforcement of judgments. (See Order 45 Rule 8, and Order 50 Rule 10(4)).
- [33] The injunction granted by the Court in this matter, facilitated the enforcement of the judgments by identifying and restricting the use of real property owned by the Debtor. It was contemplated that the proceeds from the sale of any or all of these properties could be used to satisfy any outstanding debts.
- [34] In the **Ridgeway** case, (para.[30] supra), the appellant argued that a winding-up petition was statute-barred. It was held that the petition was not an action upon a judgment, and therefore not statute-barred. According to Mummery LJ:

“A winding-up petition is neither (a) an action upon a judgment in the special sense of being designed to re-establish by legal proceedings the liability of the company to pay a judgment debt and obtain another judgment for it, nor (b) a process of execution of the judgment on which the petition is based. It is *sui generis*, being in the nature of a wider legal proceeding available for the collective enforcement of the admitted or proved debts of the company for the benefit of the general body of creditors on a *pari passu* basis.....”. (Para. [29] of judgment).

- [35] The injunction granted on 29 June 2012 resulted from an application within the original 2004 suits filed by the Creditor. It was part of a process available to the Creditor in its efforts to enforce the judgments. The application was not statute-barred by section 45(1) of Cap.231.

Disposal

- [36] The *in limine* submission is dismissed with costs to the Creditor to be agreed or taxed.

Apology

- [37] The Debtor filed her appeal in December 2014. After notification of the appeal, the Court awaited receipt of the relevant transcripts. These were received late in 2017. In addition to the transcripts, the Court made ongoing requests for the relevant files. These files were necessary to confirm the factual background to the appeal. In particular, the Court wished to confirm

whether the Debtor had also applied for the discharge of an injunction granted on 19 November 2013.

[38] A file for Suit No. 152 of 2004 was produced to the Court during the week of 29 July 2019. It was incomplete, and did not contain a record of all the orders made by this Court. The other files in this matter are yet to be made available to the Court.

[39] It is in these circumstances that the Court tenders an apology for the delay in finalising the written reasons for the dismissal of the *in limine* submissions made on behalf of the Debtor.

Dr. Sonia L. Richards
Judge of the High Court