

Court of Appeal
First Western Capital Ltd. v. Wardle
Date: 1984-12-12

D. W. Shaw, Q.C., for appellant.

F. Potts, for respondent.

(Vancouver No. CA002537)

12th December 1984. The judgment of the court was delivered by

[1] HUTCHEON J.A.:— The appellant Ronald John Hancock is a judgment debtor and these proceedings concern the order obtained by the judgment creditor, First Western Capital Ltd., to sell his interest in his matrimonial home and in two leaseholds. The issue is whether the court has jurisdiction to require the sales to be subject to the approval of the court. In the view of the chambers judge, the Court Order Enforcement Act (the "Act") was a complete code for the administering of the sale of land under execution, and consequently there was no discretion under s. 88 of that Act to impose conditions on the sale of the property. I have concluded that the Act is not a complete code, and that the court retains jurisdiction over the conduct of the sale.

[2] For a full understanding of the issue, I must set out the pertinent sections of the Act that apply after the report of the registrar setting out the land to be sold has been confirmed by the Supreme Court pursuant to an application under s. 86(5):

88.(1) Where in a summary way or on the trial of an issue, or as the result of inquiries under sections 84 to 87, inclusive, or otherwise, any land or the interest of any judgment debtor in it is found liable to be sold, an order shall be made by the court declaring what land or what interest in it is liable to be sold, and directing the sale of it by the sheriff of the county or jurisdiction in which the land is situated, but where a premises situated on the land or interest in it of a judgment debtor is the matrimonial home of the debtor and his spouse, the court may defer the sale, subject to the performance by the judgment debtor of terms and conditions of payment or otherwise as the court imposes.

(2) [Not relevant] ...

92. (1) All proceedings which may be taken before the Supreme Court under this Part, and all the powers which may be exercised by the Supreme Court in those proceedings, where the judgment has been recovered in a County Court, may be taken before and be exercised by the County Court in which the judgment was recovered, and where the judgment has been recovered in a Provincial Court, may

be taken before and be exercised by the County Court in the territorial limits of which the judgment was recovered, and all of the foregoing provisions of this Part apply, with the necessary changes, and as far as applicable, to the proceedings.

(2) [not applicable]

93. The sheriff shall not offer the land for sale within a period less than one month from the day on which the order for the sale of it is delivered to him.

94. (1) Before land is offered for sale under any order, the sheriff shall advertise in the Gazette, specifying

(a) the particular property to be sold;

(b) the name or names, if more than one, of the plaintiffs and defendants in every proceeding;

(c) the charges, if any, appearing on the register against the land;

(d) the date of the registration of encumbrances or charges;

(e) the time and place of the intended sale; and

(f) the amount of the judgment.

(2) For 7 days next preceding the Sale, unless otherwise ordered by the court, the sheriff shall similarly advertise in a newspaper of general circulation published or circulating in the county in which the land is situated, and shall, before or immediately after the first publication of the advertisement, post a printed or written copy of the notice of sale, in a suitable frame to be provided by him for the purpose, in his own office.

(3) The court in which the order for sale is made may dispense with any of the requirements of this section, except as to advertising in the Gazette, or may modify or make other provisions as to advertising ...

97. If at the time appointed for the sale under an order no bidders appear, or if in the opinion of the sheriff the biddings are not sufficient to justify a sale, he may adjourn the sale.

98. (1) On a sale of land under this Part, the sheriff shall execute to the purchaser a conveyance, under his hand and seal, of the land sold, in Form C of Schedule 3, or to similar effect, and shall in the conveyance fully, distinctly and sufficiently describe the land and interest in it which has been sold; and the conveyance, when delivered to the purchaser, and registered in the land title office for the land title district in which the land is situated, vests in him, according to the nature of the property sold, all the legal and equitable estate and interest of the execution debtor in it at the time of the registration against the land of the first judgment, as well as at the time of the sale, or at any intermediate time, discharged from the first judgment and from all judgments and other charges against the execution debtor and his land, subsequent to the first judgment.

(2) [Not relevant]

(3) [Not relevant] ...

100. The purchaser at a sale is not bound to ascertain whether the requirements of this Part have been performed, and notwithstanding a breach of this Part or any impropriety or irregularity in the sale or otherwise of which the purchaser may or may not have notice, if he is not a party to it, and notwithstanding any informality in the conveyance of the property sold, the conveyance, when executed by the sheriff and delivered to the purchaser, shall be deemed to be valid.

101. For this Part, a proceeding shall not be deemed to have abated, nor shall any order for the sale of land nor any sale under it be in any way affected, by reason of the marriage, death or bankruptcy of any of the persons named in the judgment, the intent and object of this Part being to pass to a purchaser at a sale, under an order for the sale of land, an absolute title to the estate and interest of the execution debtor in the land purchased at the sale; but nothing in this Part shall affect the right of the execution debtor to receive rent or interest which is due for the land previous to the day of the sale of it ...

106.(1) Every sale of land under an order made under this Part shall be conducted by the sheriff or his deputy in person, and for his services he is entitled to receive the same fees, expenses and poundage as are allowed the sheriff for the sale of land by execution under the *Supreme Court Act* and Rules.

(2) Where the land of the execution debtor is advertised under an order for sale of it, but is not sold by reason of satisfaction having been otherwise obtained, or for some other cause, and no money is actually levied on the execution, the sheriff is entitled to receive fees, expenses and poundage based on the assessed value of the land at the same rate as is allowed for fees, expenses and poundage under the Supreme Court Rules.

(3) [Not relevant]

(4) [Not relevant]

107. The sheriff of each district shall enter in a register, to be kept by him especially for the purpose, particulars of each sale effected by him.

[3] In the present case, the application of the debtor to defer the sale in exercise of the power to do so in s. 88 was dismissed prior to the making of the order for sale. The position of the creditor is that, so far as the sale is concerned, the power to defer the sale of a matrimonial home is the only discretionary power the court has on the application; s. 88 provides that "an order shall be made by the court declaring what land or what interest in it is liable to be sold, and directing the sale of it ..." It follows from this argument that, for example, the judge could not fix a reserve price.

[4] In a 1983 study paper prepared for the Law Reform Commission of British Columbia entitled "The Office of the Sheriff" the authors, Gordon Turriff and Elizabeth Edinger, suggest at p. 173:

Though (the Court Order Enforcement Act) directs sale by public auction personally conducted by the sheriff in the usual case, there is no reason for the sheriff not to apply for directions under R. 42(26) if, for example, in his opinion a private sale might be preferable.

Rule 42(26) reads

(26) A sheriff, judgment creditor or judgment debtor may apply to the court for directions under Rule 43 concerning the sale of any property taken in execution.

Under R. 43(4) the court is given the power to give such direction as it thinks fit for the purpose of effecting a sale, including making the sale "conditional on the approval of the court".

[5] The authors do not cite any authority for their suggestion. With respect, I think the language of R. 42(26) and the history of execution proceedings for the sale of land require a contrary conclusion.

[6] First, the words "concerning the sale of any property taken in execution" in the context of rules dealing with writs of execution are not readily extended to describe land that is the subject of an order for sale under s. 88. They are more appropriate to describe goods and chattels that have been seized ("taken in execution") under a writ of execution.

[7] Secondly, and more importantly, the history of execution proceedings against land shows that those proceedings have taken place outside of the Rules of Court. In the rules that were in force before 1st February 1977 we find the following:

ORDER XLIII

(See *Execution Act*, R.S.B.C. 1948, chapter 114, as to execution against lands).

There was a separate order (O. 51) that made provision for sale of land in cases such as a partition action or a debenture holder's action. Among those provisions was found the rough equivalent of R. 43, including sale with the approbation of a judge and power to fix a reserve bid.

[8] My conclusion is that R. 42(26) and R. 43 are not part of the procedure in execution proceedings against land.

[9] The comment in the study that the statute directs sale by public auction is consistent with the inference that one could draw from s. 97 in its use of the word

"bidders" and "biddings" and with the form of the conveyance to be executed by the sheriff. [Schedule 2] Form "C" recites:

FORM C

FORM OF CONVEYANCE

I,, Sheriff for, state:

That, under an order for the sale of land issued on a judgment of the Court, in a proceeding by against, all the estate, right, title and interest of the defendant and in the land hereafter described *were sold by me at public auction on [month, day], 19, to (he being the highest bidder), for \$.* (The italics are Hutcheon J.'s.)

[10] Although the Act does not direct sale by public auction, that is the only method contemplated by its provisions.

[11] Those provisions were changed in the revision of the statute in 1979. The present s. 97 now reads:

97. If at the time appointed for the sale under an order no bidders appear, or if in the opinion of the sheriff the biddings are not sufficient to justify a sale, he may adjourn the sale.

Prior to the 1979 revision consolidation the section of the Execution Act, R.S.B.C. 1960, c. 135, read in this way:

51.(1) If at the time appointed for the sale under an order no bidders appear, or if in the opinion of the Sheriff the biddings are not sufficient to justify a sale, he may adjourn the sale from time to time.

(2) In case of any adjournment a writ of *venditioni exponas* may be issued, and on the delivery thereof to the Sheriff he shall sell the lands referred to therein for the highest bidding made the next time they are offered for sale; but such lands shall not be offered for sale under a writ of *venditioni exponas* until after they shall have been advertised for sale, and the notices of sale posted as aforesaid, unless otherwise ordered by a Judge of the Court in which the order for sale is made.

[12] The issue of a writ of *venditioni exponas* (you expose to sale) was mentioned in the Supreme Court Rules in this way:

[MR.617] 5. Writs of *venditioni exponas*, and all other writs in aid of writs of *fieri facias*, against goods, may be issued and executed in like cases as heretofore. (Forms 4 and 9, App. H.)

[13] Form 4 directs that the necessary variations throughout the form be made in the case of lands and tenements.

[14] According to the note in Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd ed. (1972), vol. 19, at p. 46, a writ of venditioni exponas, as is the case of all other writs in aid, cannot issue without the leave of the court. This was one example, then, of the court retaining jurisdiction over the sale. The fact that the provision has been removed from the Act in the course of a revision is another reason to support the view that ss. 88 to 106 of the Act are not a complete code.

[15] There are other reasons. Suppose the sale made by the sheriff be one that is collusive. Would the court be powerless to set such a sale aside? In *McGill v. McGlashan* (1857), 6 Gr. 324, Vice Chancellor Esten said at p. 329:

That a court of equity has jurisdiction to interfere and declare void a sale of this description, I apprehend cannot be disputed.

[16] What if the purchaser fails to complete? This was the question in *Reyes. v. Saranic* (1978), 6 R.P.R. 272, 94 D.L.R. (3d) 387, 29 N.S.R. (2d) 599, 45 A.P.R. 599 (C.A.). The sheriff, as an officer of the court, sought and obtained directions as to the decisions he was entitled to make.

[17] In the case of *Kingsmill v. Bank of Upper Can.* (1863), 13 U.C.C.P. 600, the court rejected the proposition that the purchaser could reduce the purchase price by the amount owed by the sheriff to the purchaser.

[18] There are illustrations, then, of the proposition that ss. 88 to 106 are not a complete code once an order has been made for the sale of land in execution proceedings. In my view, the court, in making an order directing a sale of land, retains jurisdiction over that sale and in particular may require that the sale be subject to the approval of the court.

[19] There are good reasons to invoke that jurisdiction in this case. Firstly, the interest that is to be sold is an undivided one-half interest in a matrimonial home. That represents a special circumstance.

[20] Secondly, the order in this case provides as follows:

THIS COURT FURTHER ORDERS THAT THE Petitioner be at liberty to deliver a certified copy of this Order to the Sheriff of the County of Vancouver and upon such

delivery the Sheriff shall offer for sale the lands and premises herein described in accordance with this Order and the provisions of the *Court Order Enforcement Act*.

[21] That provision of the order reflects accurately the language of s. 88 "and directing the sale of it by the sheriff of the county ... in which the land is situated".

[22] Prior to 1976, the Sheriffs Act, R.S.B.C. 1960, c. 355, provided in ss. 3 and 9:

3. The Lieutenant-Governor in Council may appoint a Sheriff for each county, or for any less or greater jurisdiction ...

9. In the event of the office of Sheriff of any county or jurisdiction being for the time being vacant, or in the case of the absence or illness of any Sheriff, it is lawful for any Judge of the Supreme or County Court, for the purpose of the due service, carrying-out, or execution of any order, writ, or process of such Court in any cause or matter, to empower, by appointment in writing intituled in the cause or matter and given under the hand of the Judge, any person to perform the duties of a Sheriff in the cause or matter; and the appointment shall be filed in the district registry of the Court, and the person appointed shall furnish, to the satisfaction of the Registrar of the Court, such security as the Judge directs.

[23] In 1976 the Sheriffs Act R.S.B.C. 1960 c. 355 was repealed and the Sheriffs Act, 1976 (B.C.), c. 50, was enacted (now R.S.B.C. 1979, c. 386). The new Sheriff Act contains 11 sections in contrast to the 60 sections in the repealed statute. The only sections relevant to this matter are:

1. In this Act

"director" means the director of sheriff services ...

3....

(3) The director is a sheriff.

4. The director and each sheriff has jurisdiction throughout the Province to exercise all the powers and perform all the duties imposed on him under this or any other enactment.

5. A sheriff is an officer of all of the courts in the Province.

[24] According to the authors of "The Office of the Sheriff" (cited above) there is now only one sheriff in British Columbia, the director of sheriff services (s. 3(3)). There is no "Sheriff of the County of Vancouver". If there is a sale, who is to execute the conveyance (s. 98(1)) "under his hand and seal" to vest in the purchaser the interest of the debtor "discharged from the first judgment and from all judgments and other charges against the execution debtor and his land, subsequent to the first judgment"?

[25] In the interest of the purchaser as well as the debtor, the better approach in this case is to make all of the proposed sales subject to the approval of the court. When the application is made to approve a sale, the question of the execution of the conveyance can be settled in a way to achieve the objective of the Act, namely, to vest in the purchaser a safe, marketable title.

[26] I would allow the appeal and vary the order to require that any sale of land be subject to the approval of the Supreme Court.

Appeal allowed.