JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 93 OF 2000

SUIT NO C.L. NO: 337/1990

BEFORE: **THE HON MR. JUSTICE FORTE, P**
THE HON MR. JUSTICE HARRISON, J.A.
THE HON MR. JUSTICE SMITH J.A. (AG.)

BETWEEN:	**JAMES BROWN**	**DEFENDANT/APPELLANT**
AND	**NEVILLE BALLIN**	**PLAINTIFF/RESPONDENT**
AND	**VIRNA BALLIN**	**PLAINTIFF/RESPONDENT**

Rudolph Francis and Ms Aisha Mulendwe for Appellant

Raphael Codlin instructed by Errol Hall for Respondents

23rd & 24th October, 2001

SMITH, J.A. (Ag.)

This is an appeal against the order of Reckord, J. made in Chambers on the 5th day of July 2000.

Background

On the 3rd October, 1996, Ellis, J. gave judgment in the sum of $1,736.870.00 for the respondents in an action brought by them against the appellant. A writ of Seizure and Sale was issued against the appellant judgment

debtor and was returned endorsed "nulla bona". Consequently, sale of land proceedings were commenced. A summons seeking an order for sale of the appellant's property was filed and served.

On the 12th August 1998, Theobalds, J. in Chambers ordered the property of the appellant registered at Volume 1063 Folio 926 of the Register Book of Titles, the subject of the action, be sold by public auction. Attempts were made to have the said property sold at public auction. These were to no avail.

Following this failure, the respondents applied by summons dated 31st May 2000, for an order that the property be sold by private treaty. The summons was heard by Reckord, J. in Chambers on the 5th July 2000. Reckord, J. granted the order sought.

Before us the appellant relies on one ground:

> "The learned trial judge in purporting to exercise the power of jurisdiction not given to a judge to order by private treaty, but specifically conferred on the Court rendered the said order "null and void" in law for want of jurisdiction."

The order of Reckord, J. was made pursuant to section 622 of the Civil Procedure Code which reads:

> "All sales in execution of judgments or orders shall be conducted according to such orders as the Court may make and all such sales shall be made by public auction:
>
> Provided that it shall be competent to the Court to authorise the sale to be made in such other manner as it may deem advisable."

The burden of Mr. Francis' submission is that "the Court" in section 622 means a judge sitting in open court. Therefore Reckord, J. had no jurisdiction at Chambers to make the order. He relies on ***Baker v Oakes*** (1877) 2 Q.B.D 171. ***In re Davidson*** (1899) 2 Q.B.D 103. ***Clover v Adams*** (1881) 6 Q.B.D. 622 and **Cooke v The Newcastle and Gateshead Water Co.** (1882) 10 Q.B. D 332.

Mr. Codlin for the respondents contends that Reckord, J, had jurisdiction to make the order under section 622. He argues that it has been the practice for decades for a judge at Chambers on application, to issue a writ for the sale of land of the judgment debtor pursuant to section 621 of the Judicature (Civil Procedure Code) Law. This section provides in part:

> "The Court may on the application of the person prosecuting a judgment or order issue a writ for the sale of the land of the judgment debtor."

This practice he submits, has been galvanized into "a rule of law". Alternatively, he contends that the non-compliance with the provision of section 622 was a mere irregularity and the order of Reckord, J. would be saved by the provisions of sections 678 and 679 of the Civil Procedure Code Law.

We may say at this point that we do not agree that such non-compliance with section 622 is a mere irregularity. It involves the jurisdiction of the judge to make the order at Chambers and cannot in our view be so described.

Analysis of the law and submissions

In ***Baker v Oakes*** (supra) the headnote indicates, that by Order LV RSC (England) where an action is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shown to the judge before whom such action is tried or the Court shall otherwise order. By section 39 of the Judicature Act, 1873, any judge of the High Court may exercise any jurisdiction of the Court exercised before the Act by a judge at Chambers.

A jury returned a verdict for a small amount beyond a sum paid into court; no application as to costs was made at the trial, but some time afterwards the judge who tried the action, sitting at Chambers, made an order depriving the plaintiff of costs from the time of payment into court. On appeal the Divisional Court set aside the order for want of jurisdiction. On further appeal to the Court of Appeal it was held that the judge had no jurisdiction either as the judge who tried the action because no application had been made at the trial as required by Order LV, or the judge at Chambers because Order LV expressly confined the power to the Court and s. 39 did not apply as no such power existed before the Act.

At p. 174 Cockburn CJ. said:

> "Order LV which it is admitted is the Order which governs the case, gives jurisdiction only to the judge at the trial or to "the Court" without the alternative "or a judge". It is clearly therefore, not a case in which it was intended to give jurisdiction to a judge at Chambers. In all other Sections or Orders in which the intention is to give jurisdiction to a judge at

> Chambers, the power is given to the Court or a judge ..."

Brett, J.A. had this to say (p. 176):

> "Secondly it was argued that the judge had jurisdiction as a judge at Chambers. If the term of Order LV were " or the Court or a judge shall otherwise order" that would be so."

In dealing with the submissions on section 39 of the Judicature Act, Brett, J.A. said (p. 176):

> "... that section does not enable a judge of the High Court to do anything that a judge could not have done before the passing of the Act, and before the passing of the Act a judge at Chambers could not have made this order as to costs."

The decision in ***Baker v Oakes*** was referred to with approval by their Lordships in ***Mason v Desnoes and Geddes*** (1990) 30 W.I.R. 214. In construing s. 354 of the Civil Procedure Code the Board per Lord Oliver said (p. 219):

> "The reference to "the Court or a judge" makes it clear that this jurisdiction is one which may be exercised by the Judge in Chambers (see ***Baker v Oakes*** (1877) 2 Q B D 171)."

In ***Cooke v New Castle and Gateshead Water Co.*** (supra) it was held that the language of section 58 of the Judicature Act 1873 which made a referee's report equivalent to a verdict unless set aside by "the Court" did not confer upon the judge ordering the reference power to set aside the referee's report. It was held that "the Court" in section 58 meant a Divisional Court.

Baker v Oakes was followed in ***In re Davidson*** (supra) ***and Clover v Adams*** (supra).

It would seem therefore that "the Court" in section 622 of the Civil Procedure Code refers to the Court sitting in banc i.e. in open Court. The question for this Court therefore, is whether in light of the present statutory framework and the existing practice and procedure a judge in Chambers may exercise such power on behalf of "the Court."

In this regard, we are of the view that section 39 of the Judicature (Supreme Court) Act is relevant. It reads:

> "A single judge of the Supreme Court may exercise in Court, or in Chambers any part of the jurisdiction of the Court which before the passing of this Act might have been exercised in the like manner or which may be directed or authorized to be so exercised by rules of Court to be made under this Act. In such cases a Judge sitting in Court shall be deemed to constitute a Court."

This statutory provision has its genesis in section 39 of the Supreme Court of Judicature Act 1873 (U.K.) In ***Clover v Adams*** (supra) Grove, J said (p. 624):

> "By the operation of the Judicature Act 1873, s. 39, a judge at Chambers has the jurisdiction of the High Court generally and represents all the Courts ..."

Section 39 (Jamaica) seems to be an abridged version of section 61 of the Supreme Court of Judicature (Consolidation) Act, 1925 England which gives the judge at Chambers the jurisdiction of the High Court, generally. The Supreme Court Practice 1970 Vol. 1 32/11-13 (England) states the general rule as follows:

> "The general rule with regard to jurisdiction acquired by statute is stated in ***Smeeton v Collier*** (1847) Ex. 457 to be that where a statute in general terms and without any special limitation either expressly or to be inferred from its terms gives any power to one of the Supreme Courts, that power may be exercised by a Judge at Chambers as the delegate of the Court and it is only in cases of special limitation, or where the statute contains expressions from which it may be inferred that the application was intended to be made in open Court that the Judge in Chambers has no jurisdiction. This rule of construction is still applied."

Thus, for example, if the statute uses the words "on application by motion ..." it would be clear that it is intended that the application must be made in open court and not in Chambers. Section 622 has no special limitations and there is nothing from which it may be inferred that the application for sale of property by private treaty was intended to be made in open court. Indeed as Mr. Codlin submitted it has been the practice for decades for such application to be made in Chambers.

We have seen that the words "the Court" in an Act of Parliament means the Court sitting in banc. On the other hand "the Court" in the Rules of the Supreme Court (1965) England means the High Court or anyone or more of its Judges whether sitting in court or in Chambers, or a Master or Registrar dealing with matters in which he has jurisdiction and powers of a Judge in Chambers. See O.1 r. 4(2). In this provision the expression "the Court" is used in place of the time honoured "the Court or a judge." The latter expression is rarely used in the R.S.C. (England). Of course where the words "the Court or a Judge" are used, jurisdiction is given to a Judge in Chambers as well as in Court – ***Baker v***

Oakes; Kenneth Mason v Desnoes and Geddes Ltd (supra); ***and Bruce Golding v The Jamaica Observer Ltd et al*** SCCA motion No. 9/2000. In such a case the applicant has an option and may proceed either by summons or motion but subject to costs if the more expensive method is unnecessarily followed.

In the light of the foregoing reliance may be placed on Section 686 of the Civil Procedure Code a general provision, which states:

> "Where no other provision is expressly made by Law or by Rules of Court the procedure and practice for the time being of the Supreme Court of Judicature in England shall, so far as applicable, be followed and the forms prescribed shall, with such variations as circumstances may require, be used."

"The Court" is not defined in our Civil Procedure Code or the Rules of the Supreme Court. We are therefore, clearly of the view that the general rule as stated in the Supreme Court Practice (1970) Vol. 1 (England) (supra) is applicable to this country. Also applicable is Order 1 Rule 4(2) of the Rules of the Supreme Court (1965) (supra).

For the reasons given we hold that an application for sale of property may be made by summons to a judge in Chambers pursuant to section 622.

The order of Reckord, J is accordingly affirmed. The appeal is dismissed with costs to the respondents to be taxed if not agreed.

FORTE, P.
I agree

HARRISON, J.A.
I agree