

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO SLUHCV2013/0157

BETWEEN:

**ST .HONORE DE SAINTE LUCIE LIMITED
(IN RECEIVERSHIP)**

Claimant

and

1st NATIONAL BANK ST.LUCIA LIMITED

Defendant

Appearances:

Anthony Bristol for the Claimant
Geoffrey Du Boulay for the Defendant

2013: 24th July,
2013: 1st November

DECISION

- [1] **BELLE. J:** Mr. Richard Peterkin of Vigie Castries provided affidavit evidence in which he stated the he was appointed receiver of the St Honore De saint Lucie Limited (hereinafter referred to as the Company) by First Caribbean International Bank (Barbados) Limited (hereinafter referred to as 'FCIB').
- [2] Mr Peterkin deposed that the Company had in 1997 borrowed money from CIBC Caribbean Limited in "the sum of \$100,000,000" which was secured by an Hypothecary Obligation and Mortgage Debenture dated 7th January 1997 which pledged as security "a fixed first charge by way of legal mortgage over Immovable Property." However the document exhibited as RP2 shows a figure of \$100,000.
- [3] The Immovable Property as defined in the document, means "all or any part of the immovable property now or hereafter belonging to or vested in The Mortgagor". This charge was registered at the Companies Registry.

- [4] Mr. Peterkin outlined that the Company secured subsequent loans from FCIB in the aggregate sum of Two Million One Hundred Thousand Eastern Caribbean Dollars (ECD\$2,100,000.00) (This is hereafter referred to as the FCIB Debt).
- [5] Under the Security Documents for the three hypothecary obligations the Company pledged as security:
- "a first fixed charge by way of legal mortgage over the Immovable Property" . The Immovable Property, as defined in the said Security Documents is "all or any part of the immovable property now or hereafter belonging to or vested in The Mortgagor".
- [6] Deed of sale instrument No. 2954/2005 refers on its face to a sale to St Honore De Sainte Lucia Ltd of a Parcel of land situate at Corinth, Quarter of Gros Islet measuring 21,735, Registry Map 1252B Parcel Number 1119, for \$100,000.00, executed the 24th day of May, 2005.
- [7] Exhibit RP 5 to Mr Petrkin's affidavit is a copy of the Floating Charge by St Honore De Ste. Lucie Limited in favour of First Caribbean International Bank (Barbados) Limited, to secure advances up to a limit of \$1,600, 000.00 (making an aggregate of EC\$1,700,000.00) and other sums hereby secured together with interest thereon at the rate of 9.55% variable per annum / Block 1252B Parcel1119.
- [8] Mr Peterkin stated further that the Company defaulted on its obligations and stopped making payments towards the 1st National Debt in 2011 and the FCIB Debt in or about 2008. FCIB commenced legal proceedings against the Company and obtained default judgment on 4th March 2009. The payoff balance at the time of filing the affidavit was Three Million and Fifty Five Thousand Nine Hundred and Twenty Five Eastern Caribbean Dollars (ECD\$3,055,925).
- [9] It was also noted that the Company borrowed in or about 2003, Six Hundred Thousand Eastern Caribbean Dollars (ECD\$600,000) from the 1st National Bank (hereafter referred to as the Bank) which is the Defendant/ Respondent. While the Company made monthly payments to the Bank's debt, it was never secured by way of charge against the Property. To date the sum of One Hundred and Eighty Two Thousand Five Hundred and Forty Six Eastern Caribbean Dollars and Five Cents(ECD\$182,546.05) remains due and owing to the Bank.
- [10] Mr Peterkin stated that in the course of the receivership he determined that the land and assets should be sold to satisfy the obligation to FCIB as the only secured creditor (at the time). He

ensured that he would obtain a commercially reasonable price by engaging the company Engineering Construction and Management Consulting Limited to prepare a valuation report.

[11] After marketing the property for about a year the best offer received was the sum of Two Million Six Hundred Thousand Eastern Caribbean Dollars (ECD\$2,600,000) by John Francis Associates Limited.

[12] Consistent with the evidence of the Defendant Bank the Claimant's evidence is that on the 10th August 2012 the Bank lodged a caution against the Property, claiming an interest in the land and preventing the registration of dealings and the making of entries on the Land Register and the caution has delayed the sale.

[13] Mr Peterkin concluded that if the Bank's caution is not removed and the litigation proceedings are not stayed including any further applications for judgment or other orders intended to stymie the sale, the purchaser will withdraw and the sale will fall through. He also concluded that he is unlikely to receive another offer which matches or betters the existing offer in the near future.

[14] On April 4th 2013 the Bank's Clarette Auguste Taylor filed an affidavit in which she stated that the Bank had filed caution on 10th August, 2012 as instrument No. 3667/2012 claiming an interest in Block 1252B Parcel 1119 as the intended grantee of an Hypothec over the Property. She quoted from an affidavit which she had deposed in support of the caution in the following terms:

"In 2005 the property was acquired by the Claimant (hereinafter 'St Honore') with monies loaned to St Honore by the Bank in 2003 for the purpose of the said acquisition.

[15] As security for the loan (to acquire the Property), St Honore was to have registered a first hypothecary obligation and mortgage debenture (hereafter the "First Hypothec") over the property in favour of the Bank

[16] St Honore failed to execute and /or register the First Hypothec in favour of the Bank, and instead registered a first hypothecary obligation and mortgage debenture in favour of First Caribbean International Bank (Barbados) Limited (FCIB)."

[17] It is notable that the Defendant did not describe the circumstances under which the Company failed to execute and register the Hypothec at the time when the loan was granted. The effect of this is that there was no hypothec but an agreement for a loan. There was not registered security.

- [18] However pursuant to this loan the Bank instituted proceedings against the Company in suit No. SLUHCV2013/0102 claiming breach of contract for the balance of the proceeds of the loan from the Bank to the Company in the sum of \$180,418.55 together with interest on that sum \$149,012.20 at the rate of 11% per annum from 29th January, 2013 until the date of payment pursuant to the facility dated 30th October , 2003.
- [19] The Company's receiver did not file a defence and the Bank requested a judgment in default which was eventually entered on 15th March, 2013. On 18th March, 2013 the Bank applied to formally register the Judgment against the Property at the Land Registry (Saint Lucia).
- [20] Consequently the Bank withdrew the Caution which had been previously registered.
- [21] The Defendant Bank states the issue before the court as follows:
- "Whether the receiver or the court, in the absence of the secured creditor's consent or other legal judicial process, has the power or authority to sell or authorise the sale of an immovable so as to effect a discharge or cancellation of the hypothec and thereby forcibly convert the hypothec/ immovable into money.
- [22] However it is evident that there are several sub issues which must be resolved along the way. One of them is: what is the significance of a receivership?
- [23] The second issue is which entity has priority in terms of the action being taken by the receiver to sell the property?
- [24] Part of the factual background is that the defendant had granted a loan to the company prior to the receivership. But the said company failed to execute or register a Hypothec in favour of the Respondent but instead registered a Hypothec in favour of F.C.I.B.
- [25] Pursuant to this Hypothec and the rights thereunder the Company was placed in receivership.
- [26] The Defendant Bank filed a claim against the company in Receivership and having obtained a default judgement placed a caution on the Register hence this claim which had to be made to remove the caution inter alia.
- [27] The question at hand therefore is what is the effect of the judicial hypothec which came into being on the entry of judgement by the Claimant in the said claim against the company?

[28] The Bank would have been aware at the time of filing the Claim that the receiver had specific duties in relation to the Company.

[29] Based on these facts at this juncture it is important to note the statutory context.

[30] Section 287 (4) of the Companies Act Cap13.01 states:

A receiver appointed under subsection (3) has, subject to any order made by the court, power

(a) To take possession of the assets that are subject to the security interest and to sell those assets; and

(b) If the security interest extends to that property-

(iii) to compromise , settle and enter into arrangements in respect of claims by or against the company.

[31] The facts are that the Bank filed its claim after the Company had been placed in receivership. The status of its matter can be in the circumstances no more than a claim pursuant to which the receiver may settle and enter into an arrangement. This would be a useless piece of legislation if in spite of the section it remained possible for a litigant to file a claim and become entitled to more than what section 287 (3) (b) (iii) of the Companies Act implies. Section 295 of the Companies Act merely facilitates the performance of the receiver's various duties.

[32] The next question is what becomes of the judicial hypothec?

[33] Counsel outlined in detail the status of a judicial hypothec.

[34] Counsel for the Defendant submitted that Article 1908 of the Civil Code of Saint Lucia Cap 4.01 of the 2001 Revised Laws of Saint Lucia provides that an:

"Hypothec is a real right and is a charge upon immovables specifically pledged by it for the fulfilment of an obligation, in virtue of which charge the creditor may cause the immovables to be sold in the hands of whomsoever they may be, and has a preference upon the proceeds as fixed by this Code."

[35] Article 1938 of the Code states:

"Hypothecs do not divest the debtor or other holder of the hypothecated property either of whom continues to enjoy and may alienate it, subject however to the privilege charged upon it."

[36] This provision gives rise to the issue of priority of interests and Articles 1967 and 1968 of the Civil Code answer the implied question in the following terms:

[37] Art. 1967: "Registration gives effect to real rights and establishes their order of priority according to the provisions contained in this Book

[38] Art. 1968: All real rights subject to be registered take effect from the moment of their registration against creditors whose rights have been registered subsequently or not at all. If however a delay be allowed for the registration of a title and it be registered within such a delay, such title takes effect against subsequent creditors who have obtained priority of registration."

[39] Counsel has not claimed that the Bank applied for an extension in registering the hypothec because of a previous delay. It follows that the registered security held by FCIB and pursuant to which a receiver was appointed, is an interest that takes priority pursuant to Article 1967 of the Civil Code in relation to the Bank's interest.

[40] Indeed the issue of priority does not determine only who gets paid first after sale of the immoveable property. It also applies to the ranking of the interests registered as hypothecs and privileges. In **National Insurance Corporation v Winmark Limited Privy Council Appeal No.36** of 2008 Lord Hoffman stated after referring to article 1967 at paragraph 11 of the judgment:

"The St Lucia system for priorities of real security rights over immovable property is therefore clear. Prima facie, a privileged debt takes priority over a hypothec and privileged debts rank inter se according to the order of priority established by article 1903, as supplemented by other legislation. But the prima facie rule has in many cases been displaced by the requirement of registration, which may result in a registered hypothec or inferior privileged debt taking priority over a registrable but unregistered privileged debt."

[41] If a registered inferior privileged debt can take priority over a superior but unregistered privileged debt why can a registered hypothec not take priority over an unregistered debt which only became registered after the company is placed in receivership?

[42] It therefore follows that the earlier mentioned articles 1908 and 1938 cannot be construed in absolute terms. The effect of later registration is that the rights accruing therefrom are subject to the rights of the earlier hypothec which included a power to recover the debt owed by the Company by way of receivership.

[43] The latter interpretation of the law makes sense. But it would not make sense for the law to permit the same court to appoint a receiver on the basis of a Creditor's application and then permit a creditor who registers his security later in time to thwart the receiver's efforts to pay the debts of the company in a just manner by claiming to have the right to require that its permission be granted before a sale of property can be effected.

[44] I do accept the submissions of counsel for the Claimant that the registration of the hypothec by the Defendant can be cancelled by an order of the court based on the proper construction of Article 2028 of the Civil Code. I am also of the view that it is the only way to attribute priority in the manner in which the legislation intends pursuant to articles 1967 and 1968.

[45] I also am in agreement with counsel's submission that based on the inherent jurisdiction of the court that the court would not permit the Defendant's judicial hypothec to stand in the way of the receivership. I apply the decision of Goff J in **Stewart Chartering Ltd v C & O Management SA and others** 1980 1 ALL ER 718 where the learned judge states:

"The solution to this problem lies, in my judgment, in the inherent jurisdiction of the court to control its own process, and in particular to prevent any possible abuse of process. If the plaintiffs were unable to obtain a judgment in the present case without abandoning their Mareva injunction, it would be open to a defendant to defeat the very purpose of the proceedings simply by declining to enter an appearance. Such conduct would be an abuse of the process of the court; and in my judgment the court has power to take the necessary steps, by virtue of its inherent jurisdiction, to prevent any such abuse of its process."

[46] I also agree that it would have been unnecessary and an abuse of process for the Claimant /Applicant to mount a defence against the Defendant's claim simply to prevent the Bank from obtaining a judicial hypothec. For the court to permit the receiver's conscious effort to facilitate a fair process of dealing with the Company's debts to be defeated by the Bank's insistence that its permission must be sought to sell the property and give effect to the receivership process, would be a further abuse.

[47] In the circumstances I hold that the Defendant's hypothec is second in priority to the Claimant's hypothec and that the registration of the Bank's hypothec should be cancelled to permit the sale of the property pursuant to the powers conferred on the receiver by the Companies Act.

[48] The Court's formal order then is as follows:

- (1) First Caribbean International Bank limited be and is hereby declared the first secured creditor with priority to the proceeds of the sale.
- (2) The registration of the Judicial Hypothec by 1st National Bank St Lucia Limited be cancelled in relation to the Land Register of Block and Parcel 1252B 1119.
- (3) The Claim filed by 1st National Bank St .Lucia Limited dated 11th February 2013 be and is hereby stayed.
- (4) The Receiver be and is hereby authorised to sell the parcel of land situate in Corinth in the quarter of Gros Islet and registered in the Land Registry as Block and Parcel Number 1252B 1119, together with the building thereon as well as any furniture, fittings, fixtures, machinery, equipment motor vehicles or stock in trade in or upon the Property for the sum of Two Million Six Hundred Eastern Caribbean Dollars (\$\$2,600,000).
- (5) The proceeds of the sale be distributed in the manner set out in paragraph (5) and (6) of the Claim Form
- (6) The applicant be granted the costs of the Claim to be assessed if not agreed.



Francis H V Belle

High Court Judge