EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2013/0030

BETWEEN:

1ST NATIONAL BANK ST. LUCIA LIMITED

Appellant

and

ST. HONORE DE SAINTE LUCIE LIMITED (In Receivership)

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Geoffrey DuBoulay, with him, Ms. Sardia Cenac-Prospere, instructed by Floissac Flemming & Associates for the Appellant

Mr. Sydney Bennett, QC, with him, Mr. Anthony Bristol, instructed by Colonial Chambers for the Respondent

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2014: July 16;
2015: January 15.

Civil appeal – Judicial hypothec – Receivership – Sale of property – Companies Act – Civil Code – Code of Civil Procedure – Loans obtained by respondent from appellant and another bank secured by property owned by respondent – Judicial hypothecs registered by both banks – Whether appellant as junior creditor could be overreached – Whether learned judge erred in his interpretation and application of receiver's powers under mortgage debenture and the Companies Act – Whether learned judge erred in cancelling appellant's registered judicial hypothec under article 2028 of the Civil Code and authorising private sale of property by receiver under s. 287(4) of the Companies Act

In 1997, the respondent company obtained a loan of $100,000.00 from CIBC Caribbean Limited, secured by a hypothecary obligation and mortgage debenture. This hypothec pledged as security a first fixed charge by way of legal mortgage over the respondent's

immovable property and other specific assets, and a first floating charge over its general assets. The immovable property was defined as 'all or any part of the immovable property now or hereafter belonging to or vested in [the respondent]'. The hypothec was registered in the Office of Deeds & Mortgages, and the Registry of Companies. The respondent subsequently obtained a loan from the appellant in the amount of $600,000.00 to purchase property registered as Block 1252B Parcel 975, which, after May 2005, became Parcel 1119 ("Parcel 1119"). This loan was secured by a mortgage debenture over the respondent's fixed and floating assets, including Parcel 1119. The appellant however, did not register the mortgage debenture. The respondent obtained two further loans from CIBC Caribbean Limited, which by then, had become FirstCaribbean International Bank (Barbados) Limited ("FCIB"). The second loan was secured by a hypothec for $1,600,000.00 and the third, by a hypothec for $400,000.00. Both of these securities incorporated the terms and conditions of the first hypothec obtained from FCIB and specifically listed Parcel 1119 as immovable property secured by the loans. The second and third hypothecs were registered in the Registry of Companies and the Registry of Lands. The respondent defaulted on its obligations to both banks and stopped making loan payments to FCIB in or about 2008 and to the appellant, in 2011.

On 17th January 2012, FCIB appointed a receiver over the respondent company, who determined that it was necessary to sell Parcel 1119 in order to pay at least a part of the amounts outstanding to FCIB. The property was valued at $3,730,000.00, but after having been marketed by the receiver for nearly one year, the best offer that was received was $2,600,000.00. This amount was insufficient to cover the costs of the receivership and the FCIB debt, far less the appellant's debt.

On 10th August 2012, the appellant lodged a caution in the Registry of Lands preventing any dealings or the making of any entries in the Register of Parcel 1119. This prevented the completion of the sale of the property. On 11th February 2013, the appellant filed a claim in the High Court against the respondent for the remaining sum due under the loan which it had obtained from it, plus accruing interest and late charges. On 27th February 2013, the respondent applied to the High Court under section 295 of the Companies Act[1] seeking, inter alia, to have FCIB declared the first secured creditor with priority to the proceeds of the sale; to have the appellant's caution removed from the Land Register of Parcel 1119 and the appellant's claim dated 11th February 2013 stayed; and to authorise the receiver to sell Parcel 1119 for the sum of $2,600,000.00. On 15th March 2013, the appellant had judgment entered in default of defence against the respondent in its claim dated 11th February 2013, and it registered this judgment at the Land Registry as a judicial hypothec against Parcel 1119. With this judicial hypothec in place, the appellant removed the caution, and asserted that its position was that it was entitled to maintain its rights as a secured creditor. It later narrowed this to mean that Parcel 1119 could not be sold free of its (the appellant's) judicial hypothec. The appellant however, did not claim that it had any priority over FCIB to the assets of the respondent company.

The learned trial judge delivered his decision on 1st November 2013, and found in favour of the respondent. He authorised the receiver to sell Parcel 1119, declared FCIB as the first

[1] Cap. 13.01, Revised Laws of Saint Lucia 2008.

secured creditor with priority to the proceeds of sale, and cancelled the appellant's judicial hypothec. In coming to this decision, he made the following findings: that section 287(4) of the Companies Act gives the court the power to authorise a receiver to sell secured property in spite of a claim for a judicial hypothec that was registered later in time; that FCIB's hypothec had priority over the appellant's judicial hypothec; and that the registration of the appellant's judicial hypothec can be cancelled pursuant to article 2028 of the Civil Code.[2]

The appellant appealed to this Court, contending that a receiver's power of sale under section 287 of the Companies Act must be exercised subject to the rights of all creditors under the Civil Code and the Code of Civil Procedure[3] (together, "the Codes"), including the right of a junior or subsequent creditor to withhold consent to an intended sale. While there are procedures in the Codes for extinguishing a junior hypothec and selling the secured property free of the hypothec, none of these were followed in this case. Accordingly, the learned trial judge erred in cancelling the appellant's registered judicial hypothec and authorising the private sale of Parcel 1119 by the receiver.

Held: allowing the appeal, setting aside the order of the learned judge, and ordering the respondent to pay the appellant's costs of the appeal and in the court below, that:

1. In Saint Lucia, a receiver appointed under a debenture and exercising a power of sale does not have a common law right to overreach junior creditors, and the court does not have an inherent power to make an order allowing the receiver to do so. The system for realising secured property is contained in two complementary statutory regimes, namely, the **Civil Code** (which incorporates the **Code of Civil Procedure** in this regard), and the **Companies Act**. Neither of these can be ignored if it contains provisions that are relevant to the proposed sale of secured property. While the **Civil Code** does contain a procedure for overreaching junior creditors, the **Companies Act** does not. In particular, the court does not have the power under the general words in section 295 of the **Companies Act**, ('the court may make any order it thinks fit') to extinguish a junior hypothec and thereby take away that secured creditor's right to have the secured property sold by the courts by public auction. Such general words do not give a receiver the right to exercise a power which contravenes the express provisions of the **Civil Code**. Accordingly, in the present case, the court does not have the power under the hypothec or the **Companies Act** to order the sale of Parcel 1119 free and clear of the appellant's judicial hypothec.

   Nelson and others v First Caribbean International Bank (Barbados) Limited [2014] UKPC 30 considered; **In Re B. Johnson & Co. (Builders) Ld.** [1955] Ch 634 distinguished; **Peat Marwick Limited v Consumers' Gas Company** 1980 CarswellOnt 167 distinguished; **Montreal Trust Co. v Atlantic Acceptance Corp.** 1966 CarswellOnt 77 distinguished.

[2] Cap. 4.01, Revised Laws of Saint Lucia 2008.
[3] Cap. 243, Revised Laws of Saint Lucia 1957.

2. Section 289 of the **Companies Act** preserves the right of secured creditors to participate in the distribution of the net sale proceeds according to their priority. However, the rights protected do not extend to withholding consent to the realisation of the secured property in a sale that is otherwise in accordance with the laws for selling property that is subject to a junior hypothec.

3. There being no issue of consent in this case and no evidence or submission that the registration of the appellant's hypothec was irregular or void in any way, the respondent cannot rely on article 2028 of the **Civil Code** to cancel the appellant's junior hypothec. The learned judge erred in finding that it was possible for the hypothec to be cancelled under this article of the **Civil Code**.

JUDGMENT

[1] **WEBSTER JA [AG]**: This appeal concerns the important issue of the ability of a receiver appointed under a debenture to sell real property secured by a hypothecary obligation and mortgage debenture free from a subsequent judicial hypothec over the same property. The High Court judge decided that the receiver could sell the property free of the subsequent hypothec. This is an appeal against that decision.

Background

[2] In 1997, the respondent, St. Honore de Sainte Lucie Limited ("the Company"), borrowed $100,000.00 from CIBC Caribbean Limited secured by a hypothecary obligation and mortgage debenture dated 7th January 1997 ("the First Hypothec") which pledged as security a first fixed charge by way legal mortgage over the Company's immovable property and other specific assets and a first floating charge over its general assets. The immovable property is defined as 'all or any part of the immovable property now or hereafter belonging to or vested in [the Company]'. The First Hypothec was registered in the Office of Deeds & Mortgages and the Registry of Companies.

[3] In 2003, the Company borrowed $600,000.00 from 1st National Bank St. Lucia Limited ("the Bank"), to purchase real property situated at Corinth in the quarter of Gros Islet which was then registered as Block 1252B Parcel 975, and since May

2005 as Parcel 1119 ("Parcel 1119" or "the Property"). The loan was secured by a mortgage debenture over the fixed and floating assets of the Company, including Parcel 1119, but the Bank did not register the mortgage debenture.

[4] The Company secured two other loans from CIBC Caribbean Limited which had by then had become FirstCaribbean International Bank (Barbados) Limited ("FCIB"), making its total borrowing from FCIB $2.1 million. The new loans were secured by a second hypothec dated 1st December 2005 for $1,600,000.00 and a third hypothec dated 10th February 2006 for $400,000.00. Both securities incorporated the terms and conditions of the First Hypothec and specifically listed Parcel 1119 as immovable property secured by the loans. The second and third hypothecs were registered in the Registry of Companies and Registry of Lands.

[5] The Company stopped making payments on the FCIB loans in or about 2008 and on the Bank's loan in 2011.

[6] On 17th January 2012, FCIB appointed Mr. Richard Peterkin as the receiver and manager of the Company ("Mr. Peterkin" or "the Receiver"). Mr. Peterkin deposed that in the course of his duties as receiver he determined that it was necessary to sell Parcel 1119 in order to pay at least a part of the amounts outstanding to FCIB. He obtained a valuation of the Property from Engineering Construction and Management Consulting (ECMC) Limited which valued the Property at $3,730,000.00. He marketed the Property for almost one year and the best offer that he received was $2,600,000.00 from John C. Francis Associates Limited which was insufficient to cover the costs of the receivership and the FCIB debt, far less the Bank's debt which then stood at approximately $165,000.00.

[7] On 10th August 2012, the Bank lodged a caution in the Registry of Lands preventing any dealings or the making of any entries in the register of Parcel 1119. Mr. Peterkin deposed that the caution was preventing the completion of the sale of Parcel 1119 to John C. Francis Associates Limited and that it was unlikely that he would get a better offer.

[8] On 11th February 2013, the Bank filed claim no. SLUHCV2013/0102 against the Company for the sum of $180,418.55 being the amount then due on the loan from the Bank, plus accruing interest and late charges.

[9] On 27th February 2013, the Company applied to the High Court under section 295 of the **Companies Act**[4] seeking the following relief:

(1) FCIB be and is hereby declared the first secured creditor with priority to the proceeds of the sale.

(2) The caution filed by the Bank be removed from the Land Register of Parcel 1119.

(3) The claim filed by the Bank dated 11th February 2013 be stayed.

(4) The Receiver be authorised to sell Parcel 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 $2,600,000.00.

(5) The proceeds of the said sale be distributed as follows:

(a)	Vendor's Tax	$93,250.00
(b)	Cable & Wireless	$150,000.00
(c)	Severance payments to employees	$25,000.00
(d)	Receiver's fees	$150,000.00
(e)	Legal fees	$25,000.00
(f)	FCIB	$1,991,750.00

(6) Further or alternatively to paragraph 5, that

(a) the proceeds be distributed as set out in paragraph 5 (a)-(e) above;

(b) that FCIB be paid $1,826,750.00;

[4] Cap. 13.01, Revised Laws of Saint Lucia 2008. Section 295 is set out at para. 28(d) below.

(c) the sum of $165,000.00 be held in an escrow account until the determination of the issue of priority by this Honourable Court;

(d) the issue as to the priority of the debt owed to the Bank be determined at a date to be set by this Honourable Court.

The claim is supported by an affidavit by Mr. Peterkin. The substance of his affidavit is set out in the preceding paragraphs.

[10] On 4th April 2013, the Bank filed an affidavit by Clarette Auguste-Taylor opposing the claim. The main point of the affidavit is that on 15th March 2013, the Bank had entered a judgment in default of defence against the Company in claim no. SLUHCV2013/0102 and on 18th March 2013, had registered the judgment at the Land Registry as a judicial hypothec against Parcel 1119. With the judicial hypothec in place, the Bank removed the caution and asserted that its position is that it is entitled to maintain its rights as a secured creditor which it later narrowed to mean that Parcel 1119 could not be sold free of its judicial hypothec. The Bank does not claim that it has any priority over FCIB to the assets of the Company.

The Trial

[11] The claim was heard by the learned trial judge on 24th July 2013 and on 1st November 2013, he delivered his decision and made the following orders:

(1) FCIB 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 the Bank be cancelled in relation to the Land Register of Parcel 1119.

(3) Claim no. SLUHCV2013/0102 filed by the Bank be and is hereby stayed.

(4) The Receiver be and is hereby authorised to sell Parcel 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 $2,600,000.00.

(5) The proceeds of the sale be distributed in the manner set out in paragraphs 5 and 6 of the claim form.

(6) The applicant be granted the costs of the claim to be assessed if not agreed.

[12] In coming to his decision the learned judge made the following findings:

(a) that section 287(4) of the **Companies Act** gives the court the power to authorise a receiver to sell secured property in spite of a claim for a judicial hypothec that was registered later in time;
(b) that FCIB's hypothec had priority over the Bank's judicial hypothec;
(c) that the registration of the Bank's judicial hypothec can be cancelled pursuant to article 2028 of the Civil Code;

Accordingly, he authorised the Receiver to sell Parcel 1119, declared FCIB as the first secured creditor with priority to the proceeds of sale, and cancelled the registration of the Bank's judicial hypothec.

[13] Counsel for the Bank, Mr. Geoffrey Du Boulay, who appeared with Ms. Sardia Cenac-Prospere, submitted that there was one main issue to be decided by this Court, namely, whether the learned judge erred in cancelling the Bank's registered judicial hypothec and authorising the private sale of Parcel 1119 by the Receiver. In considering this main issue he invited the Court to consider the six grounds of appeal in the Notice of Appeal which are set out and analysed below.

Ground (a) – The learned judge erred in his interpretation and application of the Receiver's powers under the mortgage debenture, the Companies Act and particularly, section 287(4)(b)(iii) thereof

[14] The Bank contends that a receiver's power of sale under section 287 of the **Companies Act** must be exercised subject to the rights of all creditors under the **Civil Code**[5] and the **Code of Civil Procedure**[6], including the right of a junior or subsequent creditor to withhold consent to an intended sale. If consent is withheld the secured property must be sold subject to the subsequent hypothec. Further, there are procedures in the Codes for extinguishing a junior hypothec and selling the secured property free of the hypothec, but they were not followed in this case. The Bank was therefore denied the right granted under the Codes to have Parcel 1119 sold under the court's supervision by public auction. Instead the court authorised its sale under a private contract negotiated and settled by the Receiver with John C. Francis Associates Limited.

[15] In dealing with the Bank's submissions on this ground it is necessary to consider the relevant provisions of the Codes and the **Companies Act**.

[16] The essence of a hypothec is set out in article 1908 of the **Civil Code** which provides that:

> "Hypothec is a *real right*, and is a charge upon immovables specially 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."

The hypothec that is the subject of this appeal is a judicial hypothec which is described in article 1923 as:

> "Judicial hypothec results from judgments of the courts of Saint Lucia ordering the payment of a specific sum of money. Such judgments likewise involve hypothec for interest and costs without specifying the amount subject to the restrictions contained in the Book respecting *Registration of Real Rights*.

[5] Cap. 4.01, Revised Laws of Saint Lucia 2008.
[6] Cap. 243, Revised Laws of Saint Lucia 1957.

…

"Judicial hypothec affects generally the immovables owned by the debtor at the time of the registration of such hypothec and those subsequently owned by him unless the same are exempt from seizure or are incapable of alienation otherwise."

[17] The remedies of a creditor holding a hypothec, including a judicial hypothec, are set out in article 1942:

> "In order to secure his rights the creditor has two remedies, namely, the hypothecary action and the action to interrupt prescription. …"

The hypothecary action is relevant to this appeal. The procedure for this action is contained in articles 1943 to 1965 of the **Civil Code**. They set out a procedure for the holder of the hypothec to surrender it to the court to be sold. Article 1962 in turn refers to the **Code of Civil Procedure** for the procedure for the surrender and sale of the property secured by the hypothec. Articles 772 to 788 of the **Code of Civil Procedure** set out a procedure for a person acquiring immovable property to apply to the court to confirm title to the property and discharge all hypothecs affecting the property. Article 784 provides that:

> "Upon proof of the observance of all the formalities hereinabove prescribed, judgment is pronounced, confirming the title deed as free from all hypothecs."

Finally, article 1966 of the **Civil Code** provides that hypothecs become extinct by, inter alia, a judicial sale or a judgment of confirmation of title under the **Code of Civil Procedure**.

[18] The only case to which I have been referred dealing with the hypothecation action in Saint Lucia is **Nelson and others v First Caribbean International Bank (Barbados) Limited**,[7] a decision of the Privy Council on appeal from this Court. The judgment was delivered by Lord Hodge. The facts of the case are not immediately relevant because they involve an attempt by the mortgagee of immovable property secured by a hypothec to say that the mortgagee's rights were limited to realising the security and the mortgagee could not bring a personal

[7] [2014] UKPC 30.

action against the mortgagors for the monies outstanding on the loan. The Privy Council rejected this suggestion and in doing so Lord Hodge dealt briefly with the hypothecary action. He confirmed that a creditor's right to realise his security is by bringing a hypothecary action under article 1942 and then dealt with the object of the hypothecary action in the following terms:

> "The object of the hypothecary action, as Article 1946 of the Civil Code states, is to have the holder of the immoveable surrender it so that it can be sold. William Marler (para 942)[8] stated:
>
> > "The pure hypothecary action is real and not personal. It does not arise from any personal obligation contracted by the holder of the immoveable towards the creditor, even when there is such a obligation. It is the exercise of the creditor's right of hypothec, in virtue of which he may follow the immoveable hypothecated and cause it to be sold in the hands of whomsoever it may be, so that he is paid out of the proceeds."[9]

[19] The object of the hypothecary action is also summed up in paragraph 3.2 of the Company's skeleton argument as follows:

> "Essentially what is contemplated is a hypothecary action to compel surrender of the property and judicial sale. Upon such sale all privileges and hypothecs affecting the hypothecated property are extinguished and the interest of the secured creditors is transmuted to a right to share in the proceeds of sale in accordance with the scheme of priorities established by the Code. This ensures that the purchaser of the hypothecated property obtains title free and clear of all privileges and hypothecs."

[20] Counsel for the Bank submitted that the hypothecary action and a judicial sale under the **Civil Code** are the only ways (on the facts of this case) to overreach and discharge a junior hypothec (such as the Bank's judicial hypothec). In making this submission, counsel was obviously relying on article 1966 of the **Civil Code** which lists eight ways to extinguish a hypothec including the two that are relevant to this appeal, namely:

> "6. By judicial sale and also by expropriation for public purposes, the creditors in such case retaining their recourse upon the price of the property;

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[8] This is a reference to the text: William Marler: The Law of Real Property – Quebec (Burroughs and Company [Eastern] Limited 1932).
[9] At para. 14 of the judgment.

7. By judgment of confirmation of title, as provided in the Code of Civil Procedure;"

[21] Mr. Sydney Bennett, QC, who appeared with Mr. Anthony Bristol for the Company, submitted that the Receiver has a separate right under the **Companies Act** to realise FCIB's security by selling Parcel 1119 free of the judicial hypothec to recover the amount due to FCIB. The power of sale arises firstly by contract under the terms of the three hypothecs granted to FCIB. Clause 7 of the First Hypothec gives FCIB the power to appoint a receiver and manager once the debts owing under the loan become due and payable. The Receiver was appointed by FCIB on 17th January 2012. Under sub-clause 7(c) the receiver so appointed 'shall be the agent of the mortgagor' and 'shall have authority and be entitled to exercise the powers hereinafter set forth in addition to and without limiting any general power conferred upon him by law'.

Clause 7(c) then lists the express powers of the receiver including the power:

> "(v) to sell ... the mortgaged premises and generally on such terms and conditions as the Receiver and Manager shall think fit, to carry any such sale or letting into effect by assigning, transferring, leasing or letting in the name and on behalf of the mortgagor."

[22] Mr. Bennett, QC relied on the cases of **In Re B. Johnson & Co. (Builders) Ld.**[10] and **Peat Marwick Limited v Consumers' Gas Company**.[11] He submitted, in effect, that both cases support the general proposition summed up in the following passage from the judgment of Houlden JA, writing for the Ontario Court of Appeal in the **Peat Marwick Limited** case:

> "It seems to me that the receiver and manager in a situation like the present is wearing two hats. When wearing one hat, he is the agent of the debtor company; when wearing the other, the agent of the debenture holder. In occupying the premises of the debtor and in carrying on the business, the receiver and manager acts as the agent of the debtor company. In realizing the security of the debenture holder, notwithstanding the language of the debenture, he acts as the agent of the

[10] [1955] Ch 634.
[11] 1980 CarswellOnt 167.

debenture holder and thus is able to confer title on a purchaser free of encumbrances."[12]

Applied to this case, the Receiver was wearing two hats. In conducting the company's business he was acting as the Company's agent. However, when he was realising the secured property by exercising the power of sale granted under the hypothec and confirmed by the court he was acting as the agent of the security holder, in this case FCIB, and for FCIB's benefit. As such, he could overreach the junior creditor and pass a clear title to the purchaser.

[23] Mr. DuBoulay argued strenuously that the court ordered sale could not have the effect of overreaching the junior hypothec unless the sale was carried out in accordance with the relevant provisions of the **Civil Code** and the **Code of Civil Procedure**. Further, that the cases relied on by the Company should not be followed in Saint Lucia because of the difference in the statutory regimes between Saint Lucia on the one hand and England and Ontario on the other.

Analysis

[24] In Re B. Johnson & Co. is a decision of the Court of Appeal of England involving the status of a receiver for the purposes of misfeasance proceedings under section 333 of the Companies Act, 1948. In England the power to overreach a junior creditor by a mortgagee exercising a power of sale is contained in section 104 of the Law of Property Act, 1925 which provides that such a sale frees the property from 'all estates, interests, and rights to which the mortgage has priority'. The receiver in the case was appointed under the terms of a debenture which provided in clause 8 that he was appointed 'to be a receiver of all or any part of the property hereby charged in like manner in every respect as if the bank were mortgagees within the meaning of the Law of Property Act, 1925'.[13] The incorporation into the debenture of the Law of Property Act, 1925, which would include the overreaching provision in section 104, supports Mr. DuBoulay's point that the Court of Appeal in **In Re B. Johnson & Co.** proceeded on the assumption

[12] At para. 19.
[13] In Re B. Johnson & Co. (Builders) Ld. [1955] Ch 634 at 644.

that the receiver's powers included the power to overreach in section 104 even though there was no specific reference to the section in their Lordships' judgments.

[25] **Peat Marwick Limited v Consumers' Gas Company** was decided by the Court of Appeal of Ontario where section 98 of the Land Titles Act (Chapter 230) provides that on a sale by a chargee under a power of sale contained in a registered charge the Registrar of Lands may delete from the register any entry ranking subsequent to the chargee's charge and all such later interests shall cease to affect the land. There is no mention in the judgment of Houlden JA of the Land Titles Act, nor any other legislation or other law in Ontario giving a receiver the power to overreach junior creditors, probably because the main issue in the case did not involve the receiver's power to overreach junior creditors.

[26] Saint Lucia does not have similar provisions to section 104 of the Law of Property Act, 1925 in England (the **In Re B. Johnson & Co.** case), nor section 98 of the Land Titles Act in Ontario (the **Peat Marwick Limited** case). Both sections give a mortgagee or chargee exercising a power of sale the right to overreach junior creditors. This right must be created by statute and this was not done in Saint Lucia. Therefore, the cases are distinguishable and should not be followed in Saint Lucia.

[27] I am satisfied that in Saint Lucia a receiver appointed under a debenture and exercising a power of sale does not have a common law right to overreach junior creditors and the court does not have an inherent power to make an order allowing him to do so. If the right exists it must be pursuant to a statute.

[28] Mr. Bennett, QC's further submission is that the Receiver in this case is exercising a statutory power conferred by section 289 of the **Companies Act**[14] to realise the secured property of those on whose behalf he was appointed (FCIB) which involves selling the Property pursuant to the sale ordered by the learned judge

[14] Section 289 is set out in para. 28 below.

under the **Companies Act**. It is a statutory power and as such does not depend on agency.

[29] The relevant provisions of the **Companies Act** are:

(a) Section 289, which gives a receiver the power to realise the secured property.

Section 289 provides that:

> "A receiver of any property of a company may, subject to the rights of secured creditors, receive the income from the property, pay the liabilities connected with the property, and realise the security interest of those on behalf of whom he or she is appointed; …"

(b) Section 287, which confers the power of sale. Under sub-section (1) the debenture holders are entitled 'to realise any security interest' for their benefit. Sub-section (3) sets out the debenture holders' power to appoint a receiver and sub-section (4) gives him the power, subject to any order made by the court, to 'take possession of the assets that are subject to the security interest and to sell those assets'.

(c) Section 293, which states that a receiver under an instrument shall act in accordance with the instrument and 'any directions of the court given under section 295'.

(d) Section 295, which complements section 293 and gives the court the power to give directions and orders to a receiver. Section 295, insofar as it is relevant, states:

> "Upon an application by a receiver or receiver-manager of a company, whether appointed by the court or under an instrument, or upon an application by any interested person, <u>the court may make any order it thinks fit.</u>" (Underlining added)

The combined effect of these sections is set out in the following paragraphs.

[30] The receiver must "realise" the secured property which means that he must take possession of the property and convert it into money by selling it. In doing so he acts in the interest of and for the benefit of those who appointed him.

[31] The receiver must realise the secured property subject to the rights of the secured creditors. This does not restrict his right to realise the secured property but goes to the rights of the secured creditors to participate in the distribution of the net proceeds of sale. Those creditors having a prior right must be paid before the creditor who appointed the receiver, but subsequent creditors are paid after. In other words, the main right of secured creditors that is preserved by section 289 is their right to participate in the distribution of the net sale proceeds according to their priority. The rights protected do not extend to withholding consent to the realisation of the secured property in a sale that is otherwise in accordance with the laws for selling property that is subject to a junior hypothec.

[32] There still remains the question whether in a sale of secured property under section 287(4) of the **Companies Act** the court can order the sale to be free of a subsequent judicial hypothec using its general power under section 295 to make 'any order it thinks fit' in ordering a sale. I have already expressed the view that there is no common law right to overreach junior creditors and the court does not have an inherent power to do so.[15] This is because, as both sides agree, the system for realising secured property is contained in two complementary statutory regimes, namely the Codes and the **Companies Act**. This means that neither can be ignored if it contains provisions that are relevant to the proposed sale. In this case the **Civil Code** contains a procedure for overreaching junior creditors – the hypothecary action in articles 1942-1965 which incorporates the confirmation of title procedure in articles 772-788 of the **Code of Civil Procedure**. Article 1966 then confirms that a hypothec is extinguished by a judicial sale or a judgment of confirmation of title.[16]

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[15] See para. 27 above.

[16] The relevant provisions of article 1966 are set out in para. 20 above.

[33] The lawmakers are presumed to have been aware of the relevant provisions in the Codes when they enacted the **Companies Act** and they did not include provisions for overreaching junior hypothecs as was done in England and Ontario. In the circumstances I do not think that the court has the power under the general words in section 295 in making 'any order it thinks fit' to extinguish a junior hypothec and thereby take away that secured creditor's right to have the secured property sold by the courts by public auction. Further, such general words do not give a receiver the right to exercise a power which contravenes the express provisions of the **Civil Code**. To illustrate the potential importance of this right the market value of Parcel 1119 was professionally appraised at $3,730,000.00 and the court ordered selling price is $2,600,000.00, well below the market value. While there is no impropriety suggested in the Receiver's conduct in proposing this price to the court, we are left to speculate whether the Property could have realised a higher price in a public auction sale, thereby increasing the Bank's chance of securing a return on its debt, however small, following the payment of the prior debts.

[34] The Company relied on the case of **Montreal Trust Co. v Atlantic Acceptance Corp.**[17] to illustrate the court's wide discretion in making an order for the realisation of secured property by a receiver. The Court of Appeal of Ontario exercised its 'inherent equitable jurisdiction' to extend the meaning of the word 'realisation' in a trust deed creating a floating charge to include a realisation by some form other than by 'sale, transfer or exchange' as set out in the deed.[18] Mr. Bennett, QC submitted that this Court should adopt a similar approach and exercise the wide discretion in section 295 to confirm the learned judge's order to sell Parcel 1119 free of the junior hypothec. However, the case is distinguishable because it was not creating a new right but extending the ways in which an existing right could be exercised, and the court was interpreting a deed, not a statute. The Company in this appeal is asking the Court to interpret a statute in a manner that would have the effect of taking away a right granted by another statute.

[17] 1966 CarswellOnt 77.
[18] See para. 12 of the judgment.

[35] Having considered the receiver's powers under the hypothec and the court's powers under the **Companies Act** I am satisfied that the court does not have the power under the hypothec or the Act to order the sale of Parcel 1119 free and clear of the Bank's judicial hypothec. I would therefore allow ground (a) of the notice of appeal.

Grounds (b) and (c)

[36] Grounds (b) and (c) deal with the issue of priorities. Mr. DuBoulay made it clear in his written and oral submissions that this appeal is not about priorities – the sole issue is the court's ability to cancel the Bank's judicial hypothec and order a sale of Parcel 1119 free and clear of the hypothec. FCIB has priority and it is clear that if the court ordered sale is carried out, the Property will be sold for an amount that will not cover the debts ranking prior to the Bank's debt. Therefore, there is no useful purpose in dealing with the grounds of appeal relating to priority other than to say it is not necessary to disturb the learned judge's findings on this issue.

Ground (d) – The learned judge erred in holding that the Bank's judicial hypothec should be cancelled to permit the sale of the Property pursuant to the powers conferred on the Receiver by the Companies Act and pursuant to article 2028 of the Civil Code in the absence of a finding that the Bank's judicial hypothec had been satisfied or was registered without right or irregularly or upon a void or informal title or that the right registered was annulled, rescinded, or extinguished by prescription or otherwise.

[37] In dealing with ground (a) I concluded that the court does not have the power under the **Companies Act** to order a sale by the Receiver free of the Bank's hypothec. This disposes of the first part of this ground of appeal in the Bank's favour.

[38] The second part of this ground is that the learned judge erred in finding that the hypothec could be cancelled under article 2028 of the **Civil Code**. I agree with

counsel for the Bank that article 2028 cannot be resorted to in this case. Article 2028 provides that:

> "The registration of real rights, or the renewal thereof, may be cancelled with the consent of the parties, or in virtue of a judgment from which there is no appeal, or which has become final."

At first blush this appears to apply to the order made by the learned judge. However, following the usual rules of interpretation, article 2028 must be read in the context of the rest of the **Civil Code** and in particular, articles 2029 and 2030 which read:

> "2029. If the cancelling be not consented to, it may be demanded from the proper court by the debtor or other holder, by any subsequent hypothecary creditor, by a surety, or by any party interested, together with whatever damages may be due.
>
> "2030. The cancelling is ordered when the registration or the renewal has been effected without right or irregularly, or upon a void or informal title, or when the right registered has been annulled, rescinded, or extinguished by prescription or otherwise."

There is no issue of consent in this case and no evidence or submission that the registration of the Bank's hypothec was irregular or void in any way. Therefore, the Company cannot rely on article 2028 to cancel the Bank's hypothec.

[39] The Company did not seriously dispute this position but submitted in response that the cancellation of the hypothec could be based on article 2037 of the **Civil Code** which reads:

> "The registration at length of confirmations of title, sheriff's sales, and other sales having the effect of discharging property from hypothecs, is equivalent to the registration of a certificate of the discharge or of the extinction of all rights which are discharged by such sales or confirmations of title; and it is the duty of the Registrar in such case to make mention thereof in the margin of each entry establishing a previous right extinguished by such sale, confirmation of title, or decree of adjudication."

However, this article cannot be used to create the right to cancel a hypothec. What it does is to give to a person who has the benefit of a sale 'having the effect of discharging property from [a hypothec]' a procedure for registering the sale

discharged from the hypothec. Having concluded that a sale under section 287 of the **Companies Act** does not have the effect of discharging the junior hypothec I am constrained to find that the Receiver cannot rely on article 2037 to discharge the junior hypothec.

[40] I would allow this ground of appeal.

Grounds (e) and (f)

[41] Having regard to my findings under grounds (a) and (d) that the learned judge did not have the power under the **Companies Act** or otherwise to cancel the Bank's hypothec it is not necessary to deal with these grounds.

Disposal of the Appeal

[42] The effect of my findings above is that a debenture holder who has security over real property in Saint Lucia must comply with the requirements of the **Civil Code** and the **Code of Civil Procedure** in order to realise its security in circumstances where it wishes to sell free of subsequent or junior hypothecs. It may be that the time has come for Parliament to update the laws relating to realising security over immovable property. But that is a matter for Parliament. For my part, I am constrained to apply the law as I find it.

[43] I would allow the appeal, set aside the learned judge's order and order the Company to pay the Bank's costs of the appeal and in the court below.

Paul Webster
Justice of Appeal [Ag.]

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal