EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2013/0303

BETWEEN:

PRECONO LIMITED

Claimant

and

THE LANDING (ST. LUCIA) LIMITED
(In Receivership)

Defendant

Before:
Ms. Agnes Actie — Master

Appearances:
Ms. Kristan Henry for the Claimant
Mr. Ramon Raveneau for the Defendant

2015: March 6;
July 22.

Case management powers – Default judgment- Disputing the court's jurisdiction and stay of proceedings- Judicial hypothecs- Whether judgment should be given against a notoriously insolvent company -Article 1915 of Civil Code Ch 242.

JUDGMENT

[1] **ACTIE, M.:** This case for the facts which I refer below involves two separate applications. One is the claimant's request filed on 11th March 2014 for a judgment in default of defence. The claimant as specified on the claim form and statement of case filed on 9th April 2013; amended claim form filed on 1st October 2013 and further amended claim filed on 16th April 2014: claims for damages for a debt due and owing by the defendant for work done pursuant to a contract entered into by

the parties. The defendant filed an acknowledgment of service but to date has not filed a defence.

[2] The other application is the defendant's, filed on 18th July 2014, seeking the following reliefs:

(a) a declaration that this honourable court should not exercise its discretion at this time to adjudicate upon the claim;

(b) a declaration that the claim filed could not result in the remedy which the claimant seeks and so is an abuse of process;

(c) a declaration that the claim be struck out or stayed until such time as it can be made viable.

The application is headed "Notice of Application (Civil Procedure Rules 9.7 (1)(b); 26.1(2). The heading is obviously flawed as the CPR does not contain 9.7(1)(b).

[3] Chronologically the request for the judgment in default for defence filed by the claimant on 11th March 2014 was first in time to the defendant's application for the stay of proceedings filed on 18th July 2014. CPR 2000 Part 12.5 states that the court office at the request of the claimant **must** enter judgment for failure to defend if the stated conditions are satisfied. It has been said that this process involves no judicial decision or discretion. It does not even require approval, and that the entry of default judgment is more in the nature of an administrative act than of a judicial character, see 14 **Atkin's Court Forms**[1].

[4] The Court in **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited**[2] held that the overriding objective of the Rules is not furthered when the course and result of litigation can be severely influenced and indeed definitively

[1] 2nd Edition, 1996 issue, at 323.
[2] St Kitts and Nevis Civil Appeal No.6 of 2002.

determined by the vagaries of the court office in determining which of two extant applications should be heard first in time. Saunders JA as he then was states:

> "[17] …… it is important to re-emphasise an important philosophical change that has been brought about by the new CPR. It is that fundamentally, responsibility for the active management of cases now resides squarely with the court. Here we had a situation where an application was filed and was awaiting the fixing of a hearing so that a Judge in Chambers could decide whether or not the statement of claim should be struck out as being an abuse of the court's process. This application was followed by a later application or request to the Registrar to enter a judgment in default of Defence. If the earlier application to strike out the Claim had been heard first and decided in the bank's favour then there would have been no claim for which to enter default judgment. The suit would have been put to an end. That possible outcome was sufficient in itself to have dictated that the striking out application should have been heard first. Because the later application/request was first entertained, the result was to conclusively deny the bank of its right to a hearing of what was a serious application and one that could have resulted in the dismissal of Caribbean's entire claim".

[5] The evidence before the court indicates that the request for default judgment was chronologically filed first in time and should have been first determined by the court office. It is always the duty of the court to further the overriding objective by actively managing cases. Part 2.6(3) expressly provides for the court staff to consult a judge, master or registrar before taking any step under the rules. The court office needs to act with alacrity to process such applications in an effort to avoid delay and confusion as is presently before this court.

[6] The failure of the court office to process the claimant's request for default judgment in a timely manner as mandated by the Rules has now brought the claimant in this unenviable position of defending its request for a default judgment rather than enforcing its judgment together with other creditors.

The defendant's application

[7] The defendant's application to stay proceedings or in the alternative to strike out the proceedings is grounded on Article 1915 of the **Civil Code of Saint Lucia**[3]. Article 1915 provides:

> "Hypothec cannot be acquired, to the prejudice of existing creditors, upon the immovable of persons notoriously insolvent, or of traders within the thirty days previous to their bankruptcy".

[8] The defendant avers that the defendant is notoriously insolvent. This assertion is supported by an affidavit deposed by Mr Anthony Bristol, a receiver appointed on 14th December 2012 under Hypothecary Obligations entered into by the defendant in favour of Bank of Saint Lucia Limited. The receiver deposed that the defendant had from 2005, borrowed money secured by various security instruments. Defaults having been made on payments, the defendant's movable and immovable assets were sold. The apportionment of the proceeds to individual creditors was made as defined in an order made by Wilkinson J on 13th October 2014. The Order directed the receiver to distribute the proceeds of sale in order of priority of privileged creditors and other secured creditors named therein. The order of Wilkinson J. named other creditors who obtained judgments after the appointment of the receiver/manager but agreed to stay proceedings in their favour pending the sale of the immovable property. The receiver in his affidavit deposed that all the assets of the company, movables and immovables have been sold and there are no assets remaining. The receiver further deposed that the proceeds of sale were insufficient to satisfy the defendant's debts.

[9] The defendant contends that the claimant cannot now obtain a judgment as this juncture as it would result in the creation of a judicial hypothec in favour of the claimant and a charge upon the defendant's immovable property. The defendant alleges that the defendant is notoriously insolvent having been unable to meet its financial commitments and obligations to its creditors. It is argued that if granted, the judgment would impair the sale of the defendant's assets to the prejudice of

[3] St. Lucia Revised Ord. 1957 Vol. IV.

the Bank who is a first secured creditor. The defendant avers that the claim is an exercise in futility as the debt cannot be realized given the present status of the defendant's company.

[10] The claimant in response contends that it is not subject to the provision of Article 1915 as the article speaks to registration of hypothecs against immovables. The claimant avers that the defendant application is premature. The claimant states that Article 1017 of the Civil Code establishes a right to pursue the claim whereas Article 1915 is restrictive only in relation to enforcement of judgment. The claimant avers that the defendant asserts that the company is notoriously insolvent without any proof as the appointment of a receiver by itself cannot presume that the defendant is notoriously insolvent. The claimant further contends that the defendant has not attempted to defend the claim and the claim should not be stayed or struck out.

The defendant's application challenging the court's jurisdiction

[11] The defendant clearly fails under the CPR 9.7 as the application was made long after the period for filing a defence and no application was made for the court to exercise its inherent jurisdiction. Be that as it may, the defendant has also in the alternative made its application pursuant to CPR 26.1(2) to strike out the claim or for a stay until such time as the claim can be made viable.

The nature of hypothecs

[12] Article 1908 of the **Civil Code of Saint Lucia**[4] defines a hypothec as a real right, and a charge upon immovable **specially** (emphasis added) pledged by it for the fulfillment of an obligation, in virtue of which charge the creditor may cause the immovable to be sold in the hands of whomsoever they may be, and has a preference upon proceeds as fixed by the code.

[4] Ch. 242 of the revised laws (1957).

[13] Article 1923 of the Code defines a judicial hypothec as results from judgments of the court ordering payments of a specific sum of money. A judicial hypothec affects generally the immovable 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.

[14] Article 2002 provides that judgments and judicial acts of the civil court confer hypothecs from the date of their registration.

[15] Counsel for the defendant submits that the defendant is notoriously insolvent and as a result the court should not enter judgment in favour of the claimant. The defendant relies on Article 1915 of the Civil Code. Article 1915 states:

> "a hypothec cannot be acquired, to the prejudice of existing creditors, upon the immovable of persons notoriously insolvent, or of traders within the thirty days previous to their bankruptcy".

[16] The Article does not define "notoriously insolvency". However insolvency may be said to be the state of a person who for any reason is unable to meet his obligations as they respectively become due. Insolvency has been defined by Lord Thankerton in **the Farmers' Creditors Arrangement Act reference, Attorney-General for British Columbia v. Attorney General for Canada**[5] as follows*:*

> "In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors;

[17] To my mind the object, intent and purpose of the Article 1915 is plain and sufficiently well expressed. A hypothec cannot be **acquired,** to the prejudice of existing creditors where a debtor is insolvent or within the thirty days previous to their bankruptcy. The effect of article 1915 is that a hypothec acquired upon the

[5] [1937] A.C. 391], at p. 402.

immovable of notoriously insolvent persons or within 15 days previous to a trader becoming bankrupt is invalid. Where a creditor has knowledge of the insolvency of his debtor he cannot take a valid hypothec of his debtor. It means for example, a creditor who obtained a hypothec from a trader who became bankrupt within thirty days after the registration of the hypothec would not avail of the hypothec because of its ineffective registration. Likewise a judicial hypothec is ineffective and cannot affect the immovable of a person who is notoriously insolvent.

[18] An order of the court directing the payment of a sum under a claim does not automatically create priority in favor of the judgment creditor to the prejudice of existing creditors as advanced by counsel for the defendant. Article 2002 of the code provides that judgments and judicial acts of the civil court confer hypothecs from the date of their registration. Article 1923 clearly states that judicial hypothec affects generally the immovable owned by the debtor at the time of the registration of such hypothec. Hypothecs are of no effect unless registered. The registration secures payment of the sum ordered to be paid in favour of the creditor.

[19] The Supreme Court of Canada in **Larue v. Attorney General for Quebec/Larue v. Royal Bank of Canada**[6] states:

> "Moreover, it seems impossible to exclude from the description, "certificates of judgment," "judgments operating as hypothecs," the judgments and judicial acts of the civil courts which confer hypothecs under art. 2121 of the Civil Code. These judgments may, under the provisions of the article, be registered, and the registration is effected not otherwise than by producing to the registrar, accompanied by the statutory notice identifying the lands, an exemplification or certified copy of the judgment, which is the document in respect of which the requisite entries are made by the registrar; it is from the registration that the hypothecs result, and I should think therefore that these judgments and judicial acts, when registered, are not inappropriately described as "certificates of judgment" or "judgments operating as hypothecs."
>
> …….
>
> The word "hypothec" is apt to refer to the real right described in the code under that name (arts. 2016 *et seq.* C.C.). A judgment operates as a "hypothec" in the province of Quebec when it is registered upon

[6] [1926] S.C.R. 218.

> immovable property belonging to the debtor (arte. 2034, 2121 C.C.), and the "hypothec" thereby acquired is the "judicial hypothec" which, in the language of the code, "results from the judgments**."**

[20] Neither Article 1915 or 1923 precludes the entry of a judgment in favor of the claimant. The granting of the judgment does not create any priority over existing creditors as the defendant asserts. The interpretation of the Articles clearly speaks to registration and not insolvency or bankruptcy.

[21] It is the registration of the judgment on the immovable that creates the judicial hypothec. A creditor who has obtained a judgment remains a creditor and shall be reduced to equality with the general body of creditors. There is nothing in the nature of the judicial hypothec in the Code which exempts it from the possibility of being treated in the like manner. A creditor who wishes to realize his debt under a judgment must proceed by way of enforcement. Likewise, there is nothing in the nature of a judicial hypothec which distinguishes it from an execution upon immovable and the execution may be lawfully postponed as demonstrated in the order made by Wilkinson J. on 13th October 2014. The postponing of an execution for the benefits of creditors is guided by the court. It is within the purview of the court to regulate the priority of creditors under the rules of priority as was done by Wilkinson J.

[22] The receiver in his affidavit deposed that the sole immovable property owned by the defendant was sold but the proceeds were insufficient to satisfy the debts owed by the defendant. This assertion further buttress the point that there is no potential prejudice to existing creditors as it appears that the defendant does not possess any immovable property for which to register the hypothec. The Order of Wilkinson J detailed the privileged creditors along with other secured creditors who have since obtained judgments against the defendant. Proceedings in favor of the secured creditors were, by consent, stayed to give effect to the order to facilitate the sale of the immovable property owned by the defendant.

[23] I am in agreement with claimant's counsel that the defendant's application is premature. The grant of the default judgment is merely to secure the claimant's interest in the event that the financial status of the defendant company improves in the future.

[24] I am of the view that the defendant's application to strike out the claim or in the alternative to stay the proceedings has no merit and is accordingly dismissed with costs to the claimant in the sum of $500.00.

[25] The claimant is entitled to its judgment in default of defence having satisfied the requirements of CPR 12.5. The court notes however that claimant has not substantiated the amount claimed in the statement of claim with any supporting evidence and therefore an assessment of the damages needs to be conducted.

Order

[26] Accordingly it is ordered as follows:

(1) The defendant's application to strike out the statement of claim or in the alternative to stay the proceedings is dismissed with costs to the claimant in the sum of $500.00.

(2) Judgment in default of defence is granted to the claimant in a sum to be determined on an assessment of damages.

(3) The claimant shall file and serve witness statements with submissions and authorities within twenty one (21) days of today's date.

(4) The defendant if interested in participating in the assessment shall comply with the provisions of CPR 12.13 and 16.2 of the Civil Procedure Rules 2000.

(5) The assessment of damages is set for a date to be arranged by the court office and to inform the parties.

Agnes Actie
Master