THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0025

IN THE MATTER OF: **AN APPLICATION BY MARCUS A. WIDE AND DAVID HOLUKOFF IN THEIR CAPACITY AS JOINT RECEIVERS OF BOTTLERS (ST. VINCENT) LTD. PURSUANT TO SECTION 295 OF THE COMPANIES ACT, CAP. 143 OF THE LAWS OF SAINT VINCENT AND THE GRENADINES REVISED EDITION 2009, FOR AN ORDER FOR DIRECTIONS WITH REGARD TO DISTRIBUTION TO PREFERENCE CREDITORS**

BETWEEN:

MARCUS A. WIDE AND DAVID HOLUKOFF JOINT RECEIVERS OF BOTTLERS (ST. VINCENT) LTD	**APPLICANT**
AND	
BOTTLERS (ST. VINCENT) LTD. IN RECEIVERSHIP	**RESPONDENT**
AND	
EUGINE MOFFORD	**FIRST INTERESTED PARTY**
AND	
THE NATIONAL INSURANCE SERVICES	**SECOND INTERESTED PARTY**
AND	
THE GOVERNMENT OF SAINT VINCENT AND THE GRENADINES	**THIRD INTERESTED PARTY**
AND	
THE COMMERCIAL TECHNICAL AND ALLIED WORKERS UNION	**FOURTH INTERESTED PARTY**

Appearances:

Mr. Grahame Bollers for the Applicants
Mr. Richard Williams for the First Interested Party
Ms. Danine Jones of National Insurance Services for the Second Interested Party
No submissions for the Third and Fourth Interested Parties

2018: October 18
2019: February 15

JUDGMENT ON SUBMISSIONS

Byer, J.:

[1] By Notice of Application dated the 25th July 2018 the First Interested Party filed an application seeking the following: "[that]*Paragraph 3 of the Order of Justice Nicola Byer dated the 24th January 2018 and entered on the 31st January 2018 be varied to read; that the Joint receivers are directed and empowered upon adjudicating all claims received, to distribute the funds derived from the floating assets in accordance with S 21 and S 25 of the Protection of Employment Act Chapter 212 of the Laws of Saint Vincent and the Grenadines and not in accordance with S 457 of Companies Act which has been impliedly repealed by the virtue of the Protection of Employment Act CAP 212 of the Laws of the Saint Vincent and the Grenadines".*

[2] The basis of the application was founded within the terms of the order made by this court on the 24th January 2018 in which the receivers had applied for directions in the "identification and quantification of claims by creditors of the company prior to making any distributions of funds to creditors"[1].

[3] Upon this court having been satisfied on the information provided to the court by the receiver that Section 457 of the Companies Act applied, the court ordered in the following terms at paragraph 3: *"the joint receivers are directed and empowered upon adjudicating all claims received to distribute the funds derived from the floating assets in accordance with section 457 of the Companies Act amongst all preferential creditors including the 51 former employees compiled in the Joint Receivers' list upon the earlier of the claims bar deadline passing and no additional claims being received or the 60 day appeal period lapsing if no appeals are filed or upon the court's ruling on any appeals filed."*

[4] The First Interested Party therefore sought an order of this court to amend the order and the court in agreement with counsel for the joint receivers ordered that all the interested parties to the winding up of the company should have an opportunity to be heard on the way the distribution of the company's assets should proceed. These interested parties included the National Insurance Services (the Second interested party), the Government of Saint Vincent and the Grenadines (the

[1] Paragraph 2 of the recitals contained in the order of court made on the 24/1/18

Third interested party) and The Commercial Technical and Allied Workers Union (the Fourth interested Party).

[5] Upon the order having been made for submissions to be filed, this Court received submissions only from the First and Second interested parties and the Joint Receivers.

[6] This decision is therefore based on those submissions as received, which although filed within the time limits given by the Court, was not brought to the Courts attention until January 2019.

[7] The issue for this court can therefore be distilled as follows:
What is the appropriate scheme for the distribution of the assets of the company- Bottlers (St Vincent) Ltd.?

Analysis

[8] The nub of the argument for the First Interested Party (FIP) is that by the provisions of the Protection of Employment Act CAP 212 of the Laws of Saint Vincent and the Grenadines and in particular, Sections 21 and 25 thereof (the PEA) provision was specifically made for the manner in which an employer's business is to be wound up.

[9] Sections 21 and 25 state as follows:

Winding Up

21. (1) Where an employer's business is wound up or becomes insolvent, the employment relationship shall be terminated, one month from the date of winding up or the appointment of a receiver, unless it is otherwise terminated pursuant to Sections 7, 9, 12 or 15 within that period.

21. (2) This section shall not apply where, notwithstanding the winding up or insolvency, the business continues to operate or has been transformed.

21. (3) Where an employer's business is wound up or a receiver has been appointed, an employee or any person legally entitled to claim on his behalf payment to which he is entitled shall have priority over all creditors including the Crown for the following sums:

(a) wages, overtime pay, commissions and other forms of remuneration relating to work performed during the twenty six weeks preceding the date of the institution of winding up proceedings or the appointment of a receiver;

(b) holiday pay that is owing as a result of work performed during the two years preceding the date of the institution of winding up proceedings or the appointment of a receiver;

(c) sums that are owing in respect of other types of paid absence accrued during the twelve months preceding the date of the institution of winding up proceedings or the appointment of a receiver; and

(d) severance pay, compensation for unfair dismissal and other payments that are owing in respect of the termination of employment.

Computation of Severance Pay

25. (1) The rate of severance pay which is payable by an employer shall be:

(a) Two weeks pay for each year of continuous service from two to ten years;

(b) Three weeks pay for each further year of continuous service from eleven to twenty-five years;

(c) Four weeks pay for each further year of continuous service in excess of twenty-five years;

at the rate of pay at the time of termination, a half year or more to count as a full year and less than half year to be excluded from the calculations.

25. (2) In the case of employees who are not paid on a piece work basis, one week's pay shall be the single time rate for a week's work, premium pay and bonus shall be excluded.

25. (3) In the case of employees paid on a piece work basis, one week's pay shall be equal to the aggregate of the employee's earnings for each of the thirteen weeks preceding the termination of his employment whether consecutive or not divided by thirteen.

25. (4) An employee who works with the same employer for three or more seasons shall be deemed to have met the requirement of continuity if he worked for three fourths of the number of working days in the season reckoning backwards and to qualify for severance pay for three-fourths of the number of working days in each of the reckoning years.

25. (5) In the case of a seasonal worker one week's pay shall be equal to his total earnings for the last three seasons, divided by the number of days multiplied by five or six working days where a week is normally six working days per week.

25. (6) Employment of a seasonal worker shall be regarded as terminated if the worker offers himself for work at the beginning of the season and is not re-employed by his employer within the first four weeks of the season.

25. (7) An employee whose work is intermittent but who works with the same employer in each of the two years immediately preceding the date of termination of his employment shall be deemed to meet the requirement of continuity and shall qualify for severance pay in respect of any particular year if he has worked for a total of at least one hundred days in that year.

25. (8) In the case of an employee referred to in subsection (7), one week's pay is equal to one-thirteenth of the total of the last thirteen weeks earnings in the twelve months immediately preceding the date when he last worked for that employer.

25. (9) The employment of a worker to whom the provisions of subsection (7) applies shall be deemed to be terminated if he offers himself for employment when his employer next re-employs workers and he is not within four weeks re-employed."

[10] The submission continues that because these provisions came into force after the passage of the Companies Act (CA) which at Section 457 states a different manner of priority on a winding up of a company, that the later Act (the PEA) by implication has repealed the provisions of Section 457 in the CA and therefore these later provisions should prevail. The submission went on to state, that due to the extent of the inconsistencies that existed between the two Acts, that the later PEA should prevail and be the operative Act that rules both distribution and calculation.

[11] The Second Interested Party (SIP) submitted to the court that in their case, they also sought to vary the order of the court and that instead of the CA being the applicable piece of legislation that the Bankruptcy and Insolvency Act CAP 136 (BIA) should be applicable, or in the alternative that rather than Section 457 being the operative section, that Section 299 of the CA should be applicable.

[12] Before this court addresses its mind to the substance of these submissions it is important for me to make a comment in the way in which these submissions were made to the court.

[13] It is entirely inappropriate for any party before this court to attempt to make an application for variation of an order by way of submissions. It appears that this is a practice that seems to be emerging at this bar. It is something that needs to come to a grinding halt. I therefore do not consider that there is presently before me any application for variation on behalf of the SIP and

therefore in considering the submissions of the SIP, I do so in the context of the properly filed application on behalf of the FIP.

[14] That being said, the gravamen of the submissions of the SIP was that Section 126 of the BIA made express provision for the National Insurance Services (NIS) to be a preferred creditor. This submission was proferred on the basis that this position was entirely in keeping with the intention of the legislature in setting up the NIS and its inherent mandate.

[15] The SIP submitted that the provisions of section 457 would not foster the mandate established for the NIS in so far as the priorities established by section 457, in their submissions, did not include sums due to the NIS. It is in this vein that they therefore argue that the BIA is the appropriate statutory framework. However, in any event, if the BIA was not to be applied then certainly Section 457 of the CA was inappropriate and that Section 299 should operate.

[16] In response to both of these submissions the Joint Receivers (JR) identified and responded to two issues:

1. Whether the provisions of the BIA were applicable to the liquidation proceedings of this matter.
2. Whether the PEA had impliedly repealed the provisions of Section 457 of the CA.

[17] In relation to the first issue the Joint receivers' submission was that the BIA came into force on the 16 March 2015 while the appointment of the JR was May 2013, some two years earlier. In the submission the JR maintained that there being no provision in the BIA that made it retroactive, retroactivity of an Act could not be implied, and it was therefore not open to this court to make any such finding.

[18] In relation to the second issue the JR accepted the proposition of law that there can in fact be implied repeal of a later law by an earlier law, however this can only be achieved if the earlier Act's provisions are so repugnant and inconsistent to the later Act that the two are unable to stand together.

[19] The submission to this court in this regard was therefore that there was no such repeal in the present circumstances. Counsel for the JR did not address the court as to how in fact the apparent inconsistencies between the PEA and the CA should be read, but submitted that since there was no such repugnancy as was required to invoke implied repeal, that there was no repeal. In a somewhat circuitous but logical argument, the JR submitted that upon the creation and coming into law of the BIA (an act later in time to the PEA) there was specific provision made incorporating the provisions of the CA in particular section 299 and thereby 457. This inclusion in this later act meant that the CA provisions regarding priority had been reaffirmed even after the PEA. They therefore

submitted that if the provisions of implied repeal in fact could be relied upon in the manner stated by the FIP then by logical extension the BIA had in turn repealed the inconsistent provisions of the PEA.

[20] In looking at the breadth of arguments that were provided to this court it became clear that indeed it is not settled as to how receivers should proceed in circumstances where a company has entered receivership after having been operational for an extended period of time and in particular, where there were employees at the time of winding up.

[21] However, before I delve into the substance of the application, I wish to make it clear that this court does not accept the proposition by the SIP that the BIA applies to this liquidation.

> *"The essential idea of a legal system is that current law should govern current activities. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. We believe that the nature of law is such that '... those who have arranged their affairs ... in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset'"*[2]

[22] There is therefore in this court's mind a settled presumption against retrospectivity. Thus, where an Act which does not state expressly that the same applies retrospectively, it is a question of how that presumption would or could be rebutted. Lord Mustill in the case of **L'office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co Ltd**[3] explained that the basis of the presumption is 'no more than simple fairness'.

> "*Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say".*

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[2] Bennion on Statutory Interpretation 7th Ed Section 5.12; **Solar Energy Holdings Ltd v Secretary of State for Energy and Climate Change** [2014] EWHC 3677; **EWP Ltd v Moore** [1992] QB 460 at 474

[3] [1944]1AC 486

[23] In this regard I therefore am fortified that in the instant case there would be a manifest unfairness if the provisions of the BIA would apply to a liquidation effected some two years before its proclamation just for the purposes of assisting the SIP in its recovery of what seems to be substantial funds from the company in receivership. This reason, in this court's mind cannot and does not rebut the presumption and I maintain that the BIA does not apply in the present case.

[24] With regard to the substantive issue of the implied repeal of Section 457 by Sections 21 and 25 of the PEA, I am also of the opinion that there was no such implied repeal, at least not in the manner submitted by the FIP.

[25] Section 457 of the CA is entitled Preferential Payments. This is what is provides for in its entirety:

457. (1) In a winding up of a company there shall be paid in priority to all other debts-

(a) all rates, charges, taxes, assessments or impositions, whether imposed or made by the Government or by any public authority under the provisions of any Act, and having become due and payable within twelve months next before the relevant date;

(b) all wages or salary (whether or not earned wholly or in part by way of commission or for time or piece work) of any employee, not being a director, in respect of services rendered to the company during four months next before the relevant date; or

(c) all severance benefits, not exceeding the equivalent of forty five days basic wages or salary, due or accruing to an employee, not being a director, whether retrenched by an employer, a receiver, a liquidator or some other person.

457. (2) Where any payment on account of wages, salary or severance benefits has been made to any employee of a company out of money advanced by some person for that purpose, that person shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which that employee would have been entitled to priority in the winding up has been diminished by reason of the payment having been made.

457. (3) The debts and claims to which priority is given by subsection (1) shall

(a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions, and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under

any floating charge created by the company, and paid accordingly out of any property comprised in or subject to that charge.

457. (4) Subject to the retention of such sums as are necessary for the costs and expenses of the winding up, the debts and claims to which priority is given by subsection (1) shall be discharged forthwith so far as the assets are sufficient to meet them".

[26] It is clear from the provisions of Section 457 that this sets out clearly as noted in the heading of the Division under which it falls in the CA to be "Applicable to every mode of winding up: Proof and ranking of claims".

[27] In this court's mind it is clear that this legislation was meant to provide a comprehensive regime in which the ranking of claims is to be considered on a winding up. Indeed I am satisfied that the entire intention of the CA was to provide a clear and transparent framework for the management and dissolution of companies within this jurisdiction.

[28] Then came along the PEA that was the breath of fresh air in relation to providing "better provisions for the promotion of the employment relationship"[4]. It was clear that its precursor the Protection of Employment Act CAP 150 had not provided a comprehensive framework for the protection of employees upon the winding up of companies and the PEA rectified the same by the enactment of Sections 21 and 25.

[29] The question however for this court therefore must be - did these provisions repeal the manner in which the CA had determined that the dissolution of a company in these circumstances would be undertaken?

[30] Implied repeal has been defined in Bennion on Statutory Interpretation as "where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier *so far as is necessary to remove the inconsistency between them"*.[5] (My emphasis added)

[31] Thus in so far as the PEA states that the payment to the workers should take in priority to those as identified in Section 457 (1), this court must consider if this should occur resulting in the sought variation.

[4] Preamble to the PEA
[5] 7th Ed Section 85

[32] In the case of **The Permanent Secretary of the Ministry of Finance v. Financial Investment and Consultancy Services Limited[6],** Webster JA considered similar arguments surrounding implied repeal. In paragraph 27 of the case, he had this to say "*based on the authorities cited above, I am satisfied that the test to be applied is that where there is inconsistency between two pieces of legislation the later enactment … must be so inconsistent with or repugnant to the earlier enactment … that the two cannot stand together and effect cannot be given to both at the same time. Further, the test is always subject to the exception embodied in the maxim generalia specialibus non derogant"* and went on to identify at paragraph 29 that *"the court will not lightly find a case of implied repeal, and the test for it is a high one*".[7]

[33] Thus for this court and for any court the mere existence of later legislation which appears "repugnant" or "inconsistent" with an earlier portion of legislation is not enough.

[34] In using the stepped approach as in the case cited above, the court accepts the following. There are in fact inconsistencies between Section 457(1) of the CA and the PEA. The PEA, an Act for better employer/employee relationships had as its focus these parties. The CA has as its focus the management of companies and the parameters within which they must operate within this jurisdiction.

[35] It is therefore apparent that even from the perspective of focus and mischief meant to be dealt with, they are fundamentally different.

[36] When this inspection is taken to the specific provisions that are said to be in conflict, it is again clear that there are inconsistencies. The PEA with its employer/employee focus seeks to rank these interests ahead of even the government, while the CA with its wider focus ranks that group of persons (employees) after the sums that are due to the state and state entities.

[37] I do not accept that when one looks to the intention of the purported amending act (the PEA) that it was intended to displace the specific framework in the context of companies across this jurisdiction. I do not accept that the PEA was intended to affect in the manner it appears to do, the ranking of priorities for payment on a winding up.

[38] Indeed the section in the PEA refers to "winding up", but when one looks at the language of this provision the focus of the PEA in its totality is clear – protection of the employee only with no due consideration as to the wider obligations to or by the state or the employer.

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[6] GDAHCVAP2016/0001

[7] Per Buxton LJ R**. (on the application of O'Byrne) v. Secretary of State for the Environment Transport and the Regions** [2001] ENCA CW499 at Para 22

[39] The PEA was brought into force in 2003 and then some 12 years later the BIA was proclaimed. There was in this Court's mind at that time, an opportunity to revisit the approach to be taken with regard to establishing priorities during a receivership but instead it reaffirmed that "the priorities in receivership of distribution of the property of a debtor shall be as established by Division C of Part II of the Companies Act"[8]. This is in effect Section 299 which in turn refers to Part IV and thereby Section 457.

[40] As was recognised in a case out of Australia[9] which of course only provides persuasive authority to this court, the judgment of Perram J considered the provisions of apparently two inconsistent statutes. The Court therein, determined that far from the first Act being repealed it was in fact simply amended to incorporate the parts of the later legislation that would make logical sense to the operation of the first Act.

[41] I am of the opinion that a similar approach would and should operate in the instant case at bar.

[42] Indeed, I accept that the very general manner in which the PEA sought to affect the priorities established by Section 457(1) was ineffective and the maxim *"generalia specialibus non derogant"* applies.

[43] However, the PEA did make provision, indeed its primary focus, was for the better treatment of employees within the winding up process. I therefore accept that Section 457(1) (b) must now be read taking into account the provisions of the PEA that speak to the period as to <u>when</u> the calculation will commence <u>and</u> as to <u>how</u> that calculation is to be made.[10]

[44] Therefore, on the application of the FIP, I find that the entirety of Section 457 has <u>not</u> been repealed as prayed but only 457(i) (b) with regard to the computation of time and that Section 21(3) must be read in place of Section 457(i) (b) to reflect the intention with regard to a better payment out to those affected employees.

[45] In light of the fact that the SIP has made <u>no</u> application, there is nothing before the Court upon which this Court can make a determination with reference to their entitlement under the liquidation.

[46] However, I do find that the NIS's outstanding sums fall within the parameters of Section 457(i) (a) and further do find that the NIS contributions owed by the company can be considered as an "*imposition*" imposed by a public authority under the provision of any Act as set out in the wording of the CA[11].

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[8] Section 23 BIA

[9] **Australian Prudential Regulation Authority v ACN 000007 492 (In Liq)** [2011] FCA 353 (13 April 2011)

[10] Sections 21 and 25 of the PEA

[11] Section 457 (10) (a) Companies Act

THE ORDER OF THE COURT IS THEREFORE AS FOLLOWS:

1. The Application filed on 25 July 2018 is granted in part and there is an implied repeal of a portion of Section 457 (1) (b) as indicated.

2. The order of this court made on the 24 January 2018 is therefore varied at paragraph 3 as follows:
   "the joint receivers are directed and empowered upon adjudicating all claims received to distribute the funds derived from the floating assets in accordance with section 457 of the Companies Act amongst all preferential creditors including the 51 former employees ***whose compensation is to be by reference to sections 21 and 25 of the Protection of Employment Act*** *compiled in the Joint Receivers' list upon the earlier of the claims bar deadline passing and no additional claims being received or the 60 day appeal period lapsing if no appeals are filed or upon the court's ruling on any appeals filed."*

3. No order as to costs.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar