

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**SAINT LUCIA
COMMERCIAL DIVISION**

CLAIM NO. SLUHCM2018 /0088

BETWEEN:

**HARLEQUIN BOUTIQUE HOTEL LIMITED
[In Liquidation]**

Applicant

And

JP SERVICES CORPORATION

Respondent

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr. Garth Patterson QC with Mr Mark Maragh, for the Applicant

Mr. Deale Lee, for the Respondent

Ms Renee T. St Rose, for United Kingdom Financial Services Compensation Scheme as Interested Creditor

Mrs Candace Polius, for National Insurance Corporation as Interested Creditor

2019: September 23; 30

DECISION IN CHAMBERS

[1] **ST ROSE-ALBERTINI, J. [Ag]:** In this application, the Joint Liquidators of Harlequin Boutique Hotel Limited ("HBH") have sought declarations that a judicial hypothec resulting

from a default judgment dated 14th November, 2018, which was registered at the Office of Deeds and Mortgages on 8th August, 2019 in Vol. 172A No. 220646 and at the Land Registry in Saint Lucia on 9th August, 2019 as Instrument Number 3135/2019 is void under various provisions of law. Moreover, the Liquidators have sought orders for the cancellation of the said judicial hypothec.

The Issues

- [2] The sole issue for determination is whether the circumstances of registration of the default judgment as a judicial hypothec renders the hypothec void and subject to cancellation?

Background

- [3] On 5th October, 2018, a petition for the compulsory winding-up of HBH was filed in the commercial court.
- [4] On 23rd October, 2018 JP Services Corporation (“JPS”) who is the respondent in this application filed a claim against HBH in the civil court¹ for recovery of substantial sums as liquidated damages. The claim arose from a failed management contract with HBH, under which JPS was engaged to operate and manage a hotel property owned by HBH. Incidentally, the claim should properly have been filed in the commercial court pursuant to Part 69C.1 (2) & (3) of the Civil Procedure Rules 2000.
- [5] On 14th November, 2018 a judgment in default of acknowledgment of service was entered against HBH in favour of JPS for *“the sum of \$14,364,000.00 together with interest at the rate of 6% per annum from December 8, 2017 and costs in the sum of \$2,850.00”* (the “default judgment”).

¹ Claim No. SLUHCV2018/0522

- [6] On 20th November, 2019 the Court appointed Joint Provisional Liquidators and ordered inter alia that the petition be advertised.
- [7] On 14th January, 2019, by order of the Court, HBH was compulsorily wound up and the Joint Provisional Liquidators were appointed as Joint Liquidators of HBH.
- [8] On 21st May, 2019, the Joint Liquidators applied for and received the approval of the Court for the sale of HBH's sole asset, the immovable properties registered as Block 1256B Parcels 25 and 26 in the registration quarter of Gros-Islet, on which the hotel is situate. The agreed purchase price was USD\$3,000,000.00. The Managing Director of JPS Mr Jeffrey Coyne along with Counsel for JPS were present at the hearing and did not object to the sale, except to say that arrangements would have to be made at the appropriate time for the release of any encumbrances affecting the immovable properties. All creditors were aware of the terms of the sale and the expected closing date, expressed to be ninety (90) days from the date of the Court's approval or 19th August, 2019.
- [9] Subsequently, on 8th August, 2019 the default judgment obtained by JPS was registered as a judicial hypothec at the Office of Deeds and Mortgages in Vol. 172A No. 220646. Then on 9th August, 2019 it was registered at the Land Registry as an encumbrance over the immovable properties of HBH under Instrument No 3135/2019.
- [10] The Joint Liquidators aver that the registration of the judicial hypothec came to their attention on 15th August, 2019 when they caused an updated search to be carried out prior to the planned closing of the sale. On 20th August, 2019 they filed this application for cancellation of the judicial hypothec, together with an application in the civil claim to set aside the default judgment.

Evidence and Submissions of HBH

- [11] The application is supported by an affidavit deposed by Ms. Lisa Taylor as Joint Liquidator of HBH, which in summary discloses that the judicial hypothec was obtained at a time when HBH was notoriously insolvent, a wind-up order had already been made, liquidators

were appointed and the winding up HBH had already commenced. It was obtained as a means of frustrating the sale of HBH's immovable properties, thereby impeding the progress of liquidation, to the severe prejudice and detriment of all creditors.

- [12] The legal arguments of HBH were contained in amended written submissions filed on 23rd September, 2019 and oral submissions by Counsel.
- [13] HBH's position is primarily that the judicial hypothec was obtained in circumstances which render it void by operation of law under Articles 1915 and 1974 of the Civil Code² (the "Code") and /or sections 390, 392 or 394 the Companies Act³ (the "Act"). Further, the Liquidators say it amounts to a disposition of the immovable properties of HBH, in circumstances precluded by the Act.
- [14] Mr Patterson QC argued that HBH was insolvent from as early as December 2017 when JPS sought to terminate the management contract and subsequently filed its claim in October 2018. The very basis of the claim was breach of contract for non-payment of expenses incurred by JPS in the management of the hotel. Counsel says that the same circumstances existed when the petition to wind up was filed on 5th October 2018 prior to the filing of JPS' claim and entry of default judgment. Presently, HBH is being wound up and it is clear from the value of its assets that there will be insufficient funds to cover all existing debts to creditors. The default judgment is in excess of twice the market value of the sole asset of HBH and Counsel argues that if this does not connote notorious insolvency, nothing else will. Thus, at the time the judicial hypothec was acquired, HBH was notoriously insolvent and JPS was fully aware.
- [15] Mr Patterson QC contends that the registration of the judgment as a hypothec contravened the provisions of section 394 of the Act, which says that when a winding-up order has been made no action or proceedings shall be proceeded with, against the company, except with leave of the court. He relied on the definition of 'proceedings' from the Supreme Court of Canada in **Markevich v. Canada**⁴. It is that the term "proceedings" ought to be construed

² Cap 4:01 of the Revised Edition of the Laws of Saint Lucia

³ Cap 13:01 of the Revised Edition of the Laws of Saint Lucia

⁴ [2003] S.C.J. No. 8

in such legislation to include both judicial and non-judicial acts taken in the course of proceedings and in this case it was the mechanism used by JPS to attach and enforce its judgment against the immovable properties of HBH, after winding-up had commenced.

Evidence and Submissions of JPS

- [16] JPS's evidence in response is contained in an affidavit deposed by its Managing Director Mr Jeffery Coyne. In summary, he avers that HBH is not notoriously insolvent as there is a surplus of asset value and the indebtedness of HBH does not exceed the value of its sole asset (the immovable properties and the hotel). Additionally, HBH has not been adjudged bankrupt as the wind-up order was premised on section 385 (a) of the Act pursuant to a resolution by the sole shareholder, that the company be wound up by the court.
- [17] The legal arguments of JPS were set out in skeleton arguments filed on 23rd September, 2019 and amplified in oral submissions of Counsel.
- [18] Mr Lee has argued that Article 1915 is not applicable as JPS had no knowledge that HBH was insolvent. This is strengthened by the fact that the company was wound up by a resolution of the sole shareholder and not on account of insolvency. He says that paragraphs 23-37 of Mr Coyne's affidavit explain the circumstances of JPS engagement to manage the hotel to enable the company to do better. He agreed that HBH was in distress and there were obligations which were unpaid but Mr Coyne believed that the company had asset value sufficient to cover its debts and could have done better. Mr Lee went on to say that Article 1974 is also not applicable as a judicial hypothec is not a title to property. It provides a charge and the judicial machinery must be engaged for that right to be enforced.
- [19] In relation to section 390, Counsel argued that a "*disposition*" is not defined in the Act and though the authorities treat disposition as an attempt to cheat other creditors, there has been no voluntary disposition by HBH of any of its assets. Black's Law Dictionary defines the term as parting with, giving up, and alienation of property, thus the ordinary English meaning of the term does not apply to the acquisition of a judicial hypothec which

is created by registration against the property of the judgment debtor. Thus the provision simply does not assist HBH.

- [20] In relation to Section 394, Counsel argued that the court must consider what constitutes 'an action' or 'proceedings' for the purpose of this provision. JPS says it refers to legal proceedings such as filing a claim or entry of judgment. The judgment was obtained before the wind-up order was made and there is no judicial function required to register the hypothec. It is purely an administrative process and as such it is not captured under section 394. Thus, having properly obtained the default judgment, JPS was entitled to register its judgment as a judicial hypothec.

The Relevant Statutory Provisions

- [21] The provisions of law which warrant examination are contained in various statutes and are reproduced below.

The Civil Code

*"1908. **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.*

1909. Hypothec is indivisible and binds in entirety all the immovables subject to it and each and every portion of them.

1910. Hypothec extends over all subsequent improvements and over alluvial increase of the hypothecated property.

It secures besides the principal and interest which accrues therefrom and any other sum which the debtor agrees to pay as a debt, absolute or contingent, in the act creating it and all costs incurred, subject to the restriction stated in the Book respecting Registration of Real Rights.

It is merely an accessory and subsists no longer than the obligation which it secures.

1911. Hypothec can take place only in the cases and according to the formalities authorized by law.

1912. Hypothec may be either legal, judicial, or conventional.

1913. Legal hypothec is that which results from the law alone.

Judicial hypothec is that which results from judicial acts.

Conventional hypothec results from agreement.

1915. Hypothec cannot be acquired, to the prejudice of existing creditors, upon the immovables of persons notoriously insolvent, or of traders within the 30 days previous to their bankruptcy.

1923. 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.

It also results from judicial suretyship and from any other judicial act creating an obligation to pay a specific sum of money.

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 or her unless the same are exempt from seizure or are incapable of alienation otherwise.....

1938. Hypothecs do not divest the debtor or other holder of the hypothecated property, either of whom continues to enjoy the property and may alienate it, subject however to the privilege or the hypothec charged upon it.

1967. Registration gives effect to real rights and establishes their order of priority according to the provisions contained in this Book.

1974. The registration of a title conferring real rights in or upon the immovable property of a person, if such registration take place within 30 days of the bankruptcy of such person or at a time when such person is notoriously insolvent, is without effect except in the case in which the delay given for the registration of such title, as mentioned in the following Chapter, has not yet expired.

2002. The judgments and judicial acts of the civil courts confer hypothecs from the date of their registration.....” [Emphasis added]

The Land Registration Act⁵

2. Interpretation

“hypothec” has the same meaning as in article 1908 of the Civil Code”

The Companies Act

“389. Power to stay or restrain proceedings against company

At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may, where any action or proceeding is pending against the company, apply to the court to stay or restrain further proceedings, and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

390. Avoidance of dispositions of property, etc. after commencement of winding-up

⁵ Cap 5.01 of the Revised Edition of the Laws of Saint Lucia

*In a winding-up by the court, **any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, is, unless the court otherwise orders, void.***

391. *Avoidance of attachments, etc*

Where any company is being wound up by the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up is void.

392. *Commencement of winding-up by the court*

(1)

(2) ***In any other case, the winding-up of a company by the court is deemed to commence at the time of the presentation of the petition for winding-up.***

394. *Actions stayed on winding-up order*

When a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose.” [Emphasis added]

Analysis

Is the judicial hypothec registered in Vol. 172A No. 220646 and as Instrument Number 3135/2019 void?

[22] I have considered the above provisions and the respective submissions and authorities of the parties.

[23] There is no question that a default judgment is a judicial act which confers a hypothec from the date of its registration (see Article 2002 above). Article 1967 of the Code stipulates that registration is what gives effect to real rights and establishes the order of priority. It means therefore that when default judgment is granted it does not automatically acquire the attributes of a judicial hypothec and must be registered at the Office of Deeds and Mortgages in order to create a charge over immovable property. When JPS received judgment on 14th November, 2018 it remained a paper judgment with no attachment to the immovable properties of HBH. In other words the default judgment did not in and of itself create an attachment or interest of any sort in the immovable property of HBH, whilst it remained unregistered. That would have changed when it was registered on 8th August, 2019.

[24] Further, the Land Registration Act does not recognize a judgment as an overriding interest unless it is registered as a charge. That Act recognizes the provisions of the Code where it states in the interpretation section that a hypothec has the same meaning as in article 1908 of the Code. Thus at section 28 it provides as follows:

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may subsist and affect the same, without their being noted on the register—

...

(e) any unpaid money which, without reference to registration under this Act, are expressly declared by any law to be a charge upon land;

[25] The point was elucidated in **Peter Jn Marie et al v Laurima Lowrie et al**⁶, where Byron JA held that:

‘The judgment creditor also had an interest to protect. He became entitled to a judicial hypothec by virtue of article 1923 of the Civil Code, which by section 28(e) of the Registered Land Act 1984 is an overriding interest on the Land.’

⁶ Civil Appeal No 11 of 1991, pages 3-4

- [26] It is clear on the wording of the Land Registration Act that unpaid money only becomes an overriding interest if and when it is expressly declared to be a charge on land. As such the registration of a judgment is necessary to give it effect as a judicial hypothec, otherwise, the judgment will not be recognized and protected as an overriding interest by the statute.
- [27] The decision in **Daphne Richardson v Hope Investment Construction & Engineering Ltd et al**⁷ is of similar effect. In both these cases, the courts accepted that an overriding interest was created upon registration under legislation. In the **Peter Jn Marie case** under the Code as a hypothec and in the **Daphne Richardson case** under the Judgments Act. In each instance the judgment became a charge on the land at the time of its registration, which is the time at which it was taken to affect the property.
- [28] On the evidence, the judicial hypothec was acquired on 8th August, 2019 by the act of registration at the Office of Deeds and Mortgages and was registered on the following day at the Land Registry. That was approximately 7 months after a wind-up order had been made in relation to HBH.
- [29] Mr Lee has argued that the wind-up order was made on the basis of section 385 (a) and not on grounds of insolvency. While that may be so, on the question of insolvency the evidence is telling. At the time the contract was executed by JPS in 2017, the hotel was already in financial distress. Since the provisional liquidators were appointed and the subsequent wind-up order made the Liquidators have provided reports to the Court on the financial position of HBH, which interestingly is not different to what obtained from as far back as December 2017 when JPS terminated the management contract with HBH. These reports have been served on all interested creditors including JPS. What is pellucid from the reports is that the company was insolvent when the winding up order was made on 14th January, 2019 and even more so on 8th and 9th August, 2019 when the judicial hypothec was registered. The hotel which was the main revenue earning arm of HBH had been closed for almost 9 months prior and there has been no revenue earning capability in HBH, while substantial debts remain unpaid, including the judgment debt to JPS.

⁷ Claim No. ANUHCv2008/0271

- [30] I agree that there is no violation of Article 1974 of the Code, since Article 1938 clearly states that a hypothec does not divest the debtor or other holder of the hypothecated property. It is merely a charge which attaches to the property and the judgment debtor or proprietor continues to have ownership and enjoyment of the property and may alienate it, subject to the hypothec charged upon it. A judicial hypothec is therefore not a 'title' within the context of Article 1974. Additionally, section 390 of the Act has not been contravened as it concerns disposition of property. No such disposition has been made in the circumstances contemplated by the section.
- [31] However, registration of the judicial hypothec on 8th and 9th August, 2019 after the winding-up order had been made was a clear violation of Article 1915 of the Code and sections 391 and 394 of the Act. On the evidence I accept that when the judgment was registered as a judicial hypothec HBH was notoriously insolvent, in that it was unable to pay its debts as they fell due. This falls squarely within the ambit of the prohibition in Article 1915 of the Code which says a hypothec cannot be acquired, to the prejudice of existing creditors, upon the immovables of persons notoriously insolvent. Section 391 of the Act is unequivocal as it says that where any company is being wound up by the court, any attachment put in force against the estate or effects of the company after the commencement of the winding-up is void. Once a wind-up order is made section 392(2) of the Act takes effect and the winding up is deemed to have commenced on the date the petition was presented. In this case the cut-off date is 5th October, 2018. Article 1908 says the hypothec is a charge on immovable property and Article 1910 says is an accessory. As such it must be considered an attachment which was precluded after the winding-up of HBH had commenced.
- [32] I find merit in the submission of HBH that the act of registering the judgment as a hypothec was a step which ought not to have been proceeded with in the claim, without the leave of the court, as required by section 394. While JPS would ordinarily have been entitled to register its judgment as a hypothec, having sat on that right for 9 months, it was precluded from doing so without leave, once the wind-up order had been made. These provisions are couched in precise and unambiguous language and the outcome is inescapable.

[33] I therefore conclude that the judicial hypothec is void by virtue of Article 1915 of the Code and sections 391 and 394 of the Act and will order that it be cancelled.

Conclusion

[34] I therefore make the following orders:-

1. The judicial hypothec created by registration of the default judgment at the Office of Deeds and Mortgages on 8th August, 2019 in Vol172A No. 220646 and subsequently registered at the Land Registry on 9th August, 2019 as Instrument No. 3135/ 2019 is void.
2. The Registrar of the High Court shall effect a cancellation of the registration of the default judgment on 8th August, 2019 recorded in Vol. 172A No. 220646.
3. The Registrar of Lands shall effect a cancellation of the entry of Instrument No. 3135/ 2019 on the Land Register for Block 1256B Parcels 25 and 26.
4. Cost is awarded to the HBH to be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar