THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2008/0271

IN THE MATTER OF THE COMPANIES ACT 1995

IN THE MATTER OF A PETITION FOR THE LIQUIDATION OF HOPE INVESTMENT CONSTRUCTION & ENGINEERING LTD

IN THE MATTER OF AN APPLICATION FOR THE APPOINTMENT OF THE OFFICIAL RECIEVER AS LIQUIDATOR OF HOPE INVESTMENT CONSTRUCTION & ENGINEERING LTD

BETWEEN:

DAPHNE RICHARDSON — Applicant-Respondent-Petitioner

-and-

HOPE INVESTMENT CONSTRUCTION & ENGINEERING LTD — Respondent

-and-

FIRST CARIBBEAN INTERNATIONAL BANK — Applicant

Appearances:
Mr. Clement Bird for the **Intervener/First Caribbean International Bank (Barbados Ltd) (FCIB)**
Dr. D. Dorsett for the **Claimant/Applicant/Judgment Creditor/Petitioner**
Mr. Trevor Kendall for the **Defendant/Respondent/ Judgment Debtor**

2010: April 16th
2010: May, 31st

Priority of Charges – Judgments Act – Statutory Charge on the whole of the proprietary interest of the premises – Registered Land Act – Overriding Interests.

DECISION

1. **Harris, J.:** The Claimant(also referred to as: Petitioner; Judgment Creditor and Daphne Richardson) obtained a Judgment against the Defendant Company(Also referred to as the Judgment Debtor and Hope Investment Construction & Engineering Ltd.) on the 29th July 2009 and is seeking to enforce that judgment[1].

2. The Claimant, on the 17th December 2009 filed a Petition for winding up of the Defendant Company pursuant to S.337(c) of the Companies Act 1995 on the grounds that the Company was unable to pay its debts[2].

3. The Defendant Company is indebted to the First Caribbean International Bank (**"FCIB"**) AND the Bank holds a registered charge on the subject property[3].

4. The Defendant Company has ceased trading as a going concern.

5. The effect and indeed the apparent intent of the Petitioner and the Petition were to bring the subject property into "hotchpots" as it were.

6. The secured creditor, The First Caribbean International Bank(Barbados Ltd)(**"FCIB"**) seemed to have gotten wind of the unfolding process and has now sought to intervene in the matter in order to protect its interest in the security[4] over the interests of the Petitioner in a winding-up of the Defendant/Judgment Debtor Company. The Defendant Company is the registered owner of the subject property and is also the Judgment Debtor (Hope Investment Construction & Engineering Ltd) of the Petitioner/Judgment creditor, Daphne Richardson.[5] The FCIB has filed an application pursuant to S. 382 of the Companies Act 1995 and the inherent jurisdiction of the Court, seeking permission to enforce its security under a legal charge registered on the 16th February 2005, over the subject Freehold property.

7. On the application of counsel for the Defendant, leave was granted on the 26th of February 2010 to the parties, to file written submissions in the matter and the hearing was adjourned to a later date. The FCIB and the Claimant/petitioner filed their written submissions. The Defendant/Judgment Debtor Company did not file any submissions in this matter. Both applications were heard together.

8. Relying substantially on the authority of Cleaver et al v Delta American Reinsurance Co.[6] the intervener, First Caribbean International Bank(**"FCIB"**), contends that;

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[1] A Judgment summons was issued and heard where the impecunious status of the Defendant Company was disclosed.
[2] The Judgment Debt
[3] Registered under the Registered Land Act, Cap 374.
[4] Sands- louison et al Civil Appeal #4 of 2007, Grenada, per barrow J.A at para 17.
[5] The subject property is registered under the Registered land Act(**"RLA"**)
[6] (2001) 58 WIR 123 P.C. per Lord Scott of Foscote; See also Hill v Royal Bank of Canada ANUHCV2006/0138; see further, pp 5 of the FCIB written submissions filed 9th March 2010.

(i) A secured creditor pre-dating the liquidation is entitled to realize his security and apply the proceeds to his use. He is not required to bring into general account, the proceeds of his security.[7]

(ii) Neither the Insolvent Company nor the Liquidator has title to the Security;[8]

(iii) The asset constituting the security never formed part of the Liquidation estate;[9]

(iv) It is only of the secured creditor elect to give up his security and prove for the full amount that the secured asset becomes part of the liquidation estate;[10]

(v) The Mortgagors interest is Limited to an equity of redemption.[11]

9. Further, Counsel for First Caribbean International Bank (FCIB)contends that where a liquidation ensues, the secured creditors rights under the security are not prejudiced and the liquidator cannot restrain the secured Creditors sale, save by either;
   a. Paying the amount due or
   b. Paying the amount Claimed in Court.[12]

10. Counsel for the (FCIB) submits further, that a Mortgagee is entitled to enforce his security notwithstanding the liquidation of the Mortgagor and that leave will normally be granted a secured Creditor seeking to enforce his security.

11. I accept as the applicable Law in relation to liquidation, that which is submitted by Counsel for the FCIB above.

12. The First Caribbean International Bank (FCIB) contends that it has a priority over the security (the subject property) and entitled to pursue its right of sale of the Security. It contends that the petitioner ought not to be allowed in the winding up process to affect the Security interests of the (FCIB) or its right of sale (equity of redemption) as a Mortgagee.

13. Prior to the date of the adjourned hearing of the Intervener/FCIB's application, the Petitioner/Judgment creditor, Daphne Richardson, filed an application seeking an order of the Court that the registered property of the Judgment Debtor Company be sold so as to satisfy the Judgment of the Court which was entered in favor of the Petitioner, Daphne Richardson on the 7th July 2009. Daphne Richardson's application was to sell the property as provided under the Judgments Act Cap 227; an Act, which if complied with, rendered the said Judgment a Charge on all of the property of the Judgment Debtor Company. At the adjourned hearing of the FCIB's application, Counsel for the Petitioner (Daphne Richardson) accepted,[13] that in a winding-up the subject property did not fall into "hotchpots" and thus, in a winding up, would be subject to the priority of the registered charge[14].

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[7] See the ***Cleaver case***, ante, para. 26 thereof.

[8] Ibid, para 27.

[9] Ibid, para 28

[10] Ibid para 29,

[11] Ibid para 32.

[12] Halsbury's laws Vol. 7(2) 4th edit. Para 1600

[13] Impliededly if not expressly.

[14] In the absence of a Charge registered with the Company Registry, the FCIB contention for its priority interest is not entirely clear. However, in the end, the Petitioner, appears to have conceded that point- regardless of whether the charge is registered at the company registry or land registry - and is now pursuing her options under the Judgment Act. See also The Law of Corporate Receivers and Receiver-Managers by Anthony Burgess, pp26-30.

THE JUDGMENT ACT

14. The effect of the Petitioners compliance with the said S.3 of the Judgment Act is to render the Judgment effective as a Charge upon all lands of the Judgment Debtor and more specifically, to operate as a Charge on the (FCIB) Security interest- the subject property- to the extent of the Defendant/Judgment Debtors interest in the property.

15. Counsel for the Petitioner/Judgment Creditor submits that this Judgment Act creates a special class of Charge that supersedes the prior registered Charge of the FCIB. Counsel contends that whereas the (FCIB) Charge is merely a right limited to the parameters of the "equity in redemption", the Claimants statutory Charge goes to the whole of the proprietary interest in the subject property and is in effect, a part of the property[15]. This interest extends to every interest that one can hold in property and therefore the Chargee/ FCIB takes subject to the Petitioners Interest[16].

16. Counsel for the Petitioner submits that S.3 of the Judgments Act of Antigua and Barbuda renders the Claimant an equitable Mortgagee. He contends further, that in any event, as a Judgment creditor, the Petitioner has an "*overriding interest*" in the property pursuant to s. 28(e) of the Registered Land Act Cap 374.

17. Counsel has cited several authorities[17] in support of his contentions including setting out S.13 of the English Judgments Act of 1838.

18. Counsel for the First Caribbean International Bank (Barbados ltd)(FCIB) referred to the Companies Act[18], the Bankruptcy Act, Cap 41 and the Registered Land Act Cap 374(**"RLA"**)[19] and the various provisions therein that support the priority of the FCIB Registered Charge. There is no dispute the FCIB Charge is first in time.

COURT'S FINDINGS

19. At the onset, let me say that the Claimants understanding of an 'overriding interest' under S.28 of the Registered Land Act (R.L.A) is at variance with that of the Court. The 'overriding interest', does not in my view, merely by being an overriding interest, override the priority of the prior registered charge interest of FCIB, but merely overrides the requirements for the specified interest to be registered – the S.3 Judgment in this case. Thereafter, the Registered Land Act and the Law provides for the process of determining the priority of interest.

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[15] Bland v Ingrams Estate Ltd. [2001] CH 767; Bowes v Hope Life Int. and Guarantee Co. (1865) II HLC 389;(1865)ER 1383;Boyle, ex parte (1853)3 De GM & G 515, (1853) 43EK 202;Bristol Corporation v Virgin [1928]2 KB 202; Hartly v Hudson (1879)4 CPD 367 Westminster City Council v Haymarket Publishing Ltd. [1981}1 WLR 677

[16] See Denning M.R. in Westminster Council v Haymarket Publishing (C.A.) [1981]1 WLR 667; see also The Lord Mayor, Etc of the City of Bristol v Virgin an others, [1928] 2 KB 622(628).

[17] Bristol Corporation v Virgin [1928] 2KB 622

[18] Section 250, 254, 289, 348(2), 381, 382, 456(2) 543(1)

[19] Sections 2, 64(1), (3), 72(1), 72(2), 161.

20. There can be no dispute that a Judgment in compliance with S.3 of the Judgments Act is an overriding interest under the R.L.A.

21. So, we now have two Charges recognized by the R.L.A., both of which are created by statute; which one has priority? Counsel for the FCIB contended that the FCIB Charge ranked above that of the Petitioner/Judgment Creditor. Counsel referred to several sections of the RLA and case authorities in support of the priority of the FCIB duly Registered Charge under the RLA.[20]

22. The Petitioner submits that her later-in-time" Statutory Charge" goes to the very essence of the proprietary interest in the land. I do not know this fact, if correct, helps the Claimant. The undisputed existing owner of all the interests in the land – is the Defendant Company - by virtue of that plethora of interests that he, as do all registered title owners have, in the land (and he can confer no greater interest to any one). However, this interest is without dispute subject to the First Caribbean International Bank's (FCIB's) Charge[21]. So how then, can the Petitioner, at best standing in the shoes of the Defendant, not also be subject to the Chargee's interest?

23. The very S.13 of the English 1838 Judgment Act referred to and relied upon by the Petitioner, upon proper construction, refers to the Judgment creditor's interest crystallizing <u>from the time of registering the Judgment</u>.

24. Turner LJ in the ***ex parte Boyle case***[22] understood the English Act to create a Charge "...at the time of entering the memorandum..." The Petitioners money Judgment then, would affect the charged property from the time of compliance with S.3 of the Judgments Act – a date after the registered Charge of FCIB[23].

25. Both ***ex p Boyle*** and ***S. 13 of the English 1883 Judgments Act*** appear to make allowances for the age old rule as to priority of interests; ***"The earlier in time the stronger in Law".***

26. The stronger case authorities cited by the Claimant revolve around legislation of the U.K. pertaining to Housing, Health, Planning and other statutes which upon their proper construction, impose as a priority, Charges imposed for the public good such as Town Council property rates and taxes, which in several instances are found by the Courts to run with and as part of, the land. Whereas the relevant UK Statutes can be interpreted to cause the said charges to run with the land, there is nothing in the Judgments Act of Antigua and Barbuda or the RLA that leads this Court to that interpretation.

27. In the ***Westminster Council case***, Denning MR identified the issues in that case as; whether a statutorily imposed surcharge applies to commercial buildings *which were mortgaged to the hilt;* whether the *surcharge was payable by the Mortgagor, or the mortgagee;* and if it is not paid, how can it be enforced[24]. Lord Denning there acknowledged that the resolution of the question came down to "*the interpretation of two sections which were inserted in the General Rate Act 1967 of the Local Government*

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[20] At the time of rendering the decision on these applications, counsel for FCIB submitted a Canadian authority on the question of the ranking of the priority of registered charges; <u>The Bank of Hamilton</u> v <u>MaryAnn Hartery</u> and others, [1919] The Supreme Court of Canada Vol. LVIII pp338.

[21] The Petitioners claim of a prior interest does not deny the FCIB has an interest, albeit a subservient interest.

[22] (1853) 3 De GM&G 515; (1853) 43 ER 202. Authority was provided to the Court by counsel for the Petitioner.

[23] The Judgment becomes effective as a Charge on the property of the Judgment Debtor, upon the Judgment creditor filing an application to the Court for an order for sale.

[24] ***Westminster Council case*** *ant.* pp 679C-D.

Act 1974"[25]. In that case the Bank claimed that the six million pound mortgage debt Charge took priority over the City Council's surcharge of 16,940.93 Pounds that the mortgagor had racke d up with the City Council for failing to rent out its building, contrary to law. The finding in favor of the priority of the surcharge over the Bank's mortgage Charge is perfectly understandable having regard to all the issues in that matter and to the legislative framework pertaining to the circumstances of that case. Denning MR, at pp 681A-C, notably, was also concerned that to hold otherwise would leave it open to companies to manipulate their affairs to avoid the Charge altogether.

28. The other significant authority relied on by the Petitioner/Judgment creditor is the ***Lord Major case*** (see fn. 15 *ante*). Here too, the case turned on the interpretation of a specific Act – in this case the Housing Act, 1925, of the UK. In this case, after the Local authority served the owner of certain premises with several notices to repair under the Housing Act without response; the authority did the work themselves pursuant to the said Housing Act, at a cost to the local authority. The said Act has several sections that significantly impact on its interpretation.[26] The local authority brought an action claiming a declaration that under the said housing Act they were entitled to a charge on the premises and that the charged ranked in priority to the mortgage of the defendants. On appeal Salter J held that the charge was a "*charge on the entirety of the premises, the whole proprietary interests of the premises*[27]". He held that the on the words of the Statute, the local authorities Charge must rank in priority to the rent charge and the mortgage[28]. (emphasis mine). Again, looking at the words of the UK statute, the intention to bind the property and give the local Authority the first bite as it were, is evident. The ***Major case*** turns on its facts and the specific legislation and the mischief that the legislation seeks to remedy. The relevant statutory enactments in Antigua and Barbuda and more particularly the Judgment Act, in my view does not permit the interpretation that the Petitioner asks of the Court.

29. I am of the view that none of the building blocks of the judgments in those two or any other Judgment relied upon by the Petitioner, exists in the instant case. The instant case is therefore distinguishable. Further, interpreting the Judgment Act, the Company Act, the Bankruptcy Act and the Registered Land Act simply does not lead the court to the conclusion that the Judgment Act seeks to displace the priority rank of the registered Charge in this matter. Indeed, following Denning MR in the ***Westminster Council case*** [29] and reversing the position of the parties; to hold otherwise would permit companies to manipulate their affairs to avoid a registered charge altogether.

30. The Registered Land Act (R.L.A.) together with the common and common Commercial Logic of the precedence of prior registered interests (inclusive of overriding interest[30]) has not been upset by the Claimants arguments and authorities in this matter.

31. Several of the authorities on the point of the ranking of priority of registered interests, appear to concern matrimonial property and constructive trusts relating to acquisition of proprietary interests relating back to a time prior to the subsequent registration of the charge/interest. They all acknowledge the first in time as having priority. In these type of cases the chargor/husband, invariably, would for instance, borrow money after marriage

[25] ***Ibid*** pp 679H.
[26] *Ibid.* pp 622 and 623
[27] *Ibid.* pp 628.
[28] The Court at first instance had already held the Charge to rank in priority to the mortgage.
[29] *Ante.*
[30] That is, if the overriding interest was first in time it would apparently take priority over the Registered Interest.

and after the acquisition of the property and Charge it. Subsequently, in an action by the wife for an interest in the matrimonial property on the grounds of a constructive trust(Common intention) the court looks to the common intention at the time of marriage or acquisition which predates the registration of the Charge. Technically then, the wife's subsequent action relates back to an earlier time and in fact represents the creation of an interest earlier in time than the date of registration of the Charge.[31] In these circumstances the Bank/Chargee's interests are understandably found to rank below that of the Wife's interest.

ORDER

32. For the reasons provided above, IT IS HEREBY ORDERED AS FOLLOWS:
   i. That the application of Daphne Richardson filed March 01 2010 is dismissed;
   ii. Judgment for the First Caribbean International Bank on the application of the said First Caribbean International Bank, filed Feb 23 2010 as follows;
   iii. That the Registered Charge of the First Caribbean International Bank(Barbados ltd) registered on the 16th February 2005 is ranked in priority to the Charge under the Judgment Act;
   iv. That the First Caribbean International Bank(Barbados Ltd) is permitted to proceed to realize its registered security interests more particularly described as Registration Section: Central; Block: 14 2090B; Parcel: 227.
   v. That cost of this application to the First Caribbean International Bank (Barbados Ltd) in the sum of $750.00 unless otherwise agreed between the parties in writing.

David C. Harris
High Court Judge
Antigua & Barbuda

[31] See CIBC Cayman Ltd v Christiansen and E Christiansen 2008 CILR 103; the wife's interest here is an overriding interest.