Hilary Term
[2022] UKPC 7
Privy Council Appeal No 0075 of 2019

JUDGMENT

First Caribbean International Bank (Barbados) Ltd and another (Respondents) v Interested Creditors (Appellants) (Saint Lucia)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Lucia)

before

Lord Briggs
Lord Leggatt
Lord Burrows
Lady Rose
Lord Lloyd-Jones

JUDGMENT GIVEN ON
14 March 2022

Heard on 8 February 2022

Appellants
Colin Foster
(Instructed by Colin Foster's Chambers (St Lucia))

1st Respondent (First Caribbean International Bank (Barbados) Ltd)
Renee St Rose
Marie-Ange Symmonds
(Instructed by Fosters (St Lucia))

2nd Respondent (Sunset Village Inc (In Liquidation))
Bota McNamara
(Instructed by McNamara & Co (St Lucia))

LORD BRIGGS:

1.
The issue in this appeal is whether certain judgment creditors of a company now in liquidation have lower, equal or superior priority in the liquidation with the holder of a first registered charge in relation to the proceeds of sale of the company's main asset. The judge decided that the judgment creditors had equal priority with the first chargee. The Court of Appeal held that the first chargee had

priority. The judgment creditors claim before the Board that they have priority over the first chargee. There is no relevant dispute of fact. The answer turns on the law of St Lucia.

2.
The unfortunate company now in liquidation is Sunset Village Inc ("SV"), which was incorporated in St Lucia in December 2005. In September 2006 SV purchased a 35 acre development site in Beausejour, St Lucia, with a view to its development into a residential resort village to be known as Bayview, comprising up to 140 residential villas with communal leisure, sporting and social facilities. The villas were to be sold off-plan, with stage payments made towards the purchase price during construction.

3.
In November 2007 SV obtained a development loan of EC$13,584,500 from First Caribbean International Bank (Barbados) Ltd ("the Bank") secured by a hypothecary obligation mortgage debenture and floating charge ("the First Charge") over Bayview, which was duly registered at the Land Registry of St Lucia on 29 January 2008. The First Charge qualifies as a hypothec under the Civil Code of St Lucia.

4.
In late October 2009 the development project collapsed. Works ceased and have never been re-commenced. By that time there were a number of contracting purchasers of villas off-plan which had either been left incomplete or entirely unbuilt, who had begun making stage payments pursuant to those contracts. Among them were the Appellants ("the Interested Creditors").

5.
In not later than November 2009 the Bank made demand for payment under the First Charge, by reason of which that part of its security consisting of a floating charge crystallised, over the whole of the remaining assets of SV.

6.
On 2 September 2011 the Bank appointed Oliver Jordan as receiver/manager under the First Charge. Mr Jordan had power to manage the affairs of SV while seeking to sell Bayview. Meanwhile, in 2011 and early 2012 the Interested Creditors all obtained default judgments against SV for damages to be assessed for breach of their respective purchase agreements. Their applications for assessment of damages were each settled, as the result of negotiations conducted or at least controlled by Mr Jordan under his management powers, leading to orders by consent for assessed damages in specific sums ("the Consent Orders") which the Interested Creditors then registered at (inter alia) the Land Registry of St Lucia as judicial hypothecs between February and April 2012.

7.
On 18 May 2012 the Bank petitioned for the winding-up of SV. A winding-up order was made on 27 June 2012 and Mr Jordan was appointed liquidator. On 15 August 2012 Mr Jordan contracted to sell Bayview for EC$6.5m, and the sale was duly sanctioned by the court at that price in November 2012. The amount by then owing to the Bank was in the region of EC$13m, and therefore substantially exceeded the net proceeds of sale. By that time disappointed purchasers had registered judicial hypothecs securing their assessed damages claims in the aggregate sum of EC$11.3m. There were also unsecured creditors including further disappointed purchasers, whose claims were estimated to be EC$8.3m.

8.

In June 2013 Mr Jordan sought the directions of the court as to how and to whom he should disburse the net proceeds of sale. This led to a fully contested hearing before Wilkinson J on 18 October 2016, at the end of which she directed that, after payment of preferential creditors and liquidation expenses, all creditors of SV were to be paid pari passu.

9.
Both the Bank and the Interested Creditors were dissatisfied with that outcome. The Bank appealed on the basis that the First Charge entitled it to first priority, and therefore to the whole of the net proceeds of sale of Bayview. By a Counter-Notice by way of cross-appeal the Interested Creditors claimed that the amounts in the Consent Orders represented expenses of Mr Jordan as receiver and liquidator, and therefore took priority over the Bank's claims under the First Charge.

10.
By its order dated 20 September 2018 the Court of Appeal (Baptiste, Blenman and Michel JJA) allowed the Bank's appeal and dismissed the Interested Creditors' Counter-Notice, holding that, as first registered secured creditor, the Bank was entitled to the net proceeds of sale, in priority to other secured creditors, including the Interested Creditors.

11.
The analysis of the Court of Appeal may be shortly summarised as follows:

(i)
Under the complementary provisions of the Companies Act, the Commercial Code and the Civil Code of St Lucia, securities by way of hypothecs rank in priority in the liquidation of the obligor in the order in which they are registered.

(ii)
The Bank's First Charge and the Interested Creditors' Consent Orders were all hypothecs (the latter being judicial hypothecs) and the Bank's hypothec was registered first.

(iii)
Accordingly the Bank's First Charge had priority over the Interested Creditors' Consent Orders.

Apart from observing, at para 44, that it was entirely misconceived, the Court of Appeal said nothing in their judgments about the Interested Creditors' claim that they were entitled to priority over the Bank because the Consent Orders constituted expenses of Mr Jordan as receiver or liquidator. That claim was, submitted Mr Colin Foster for the Interested Creditors, simply dismissed out of hand, as was a claim based on estoppel.

12.
In their Grounds of Appeal the Interested Creditors focus mainly upon their claim based upon the alleged priority of Mr Jordan's expenses. That also occupied almost all Mr Foster's time in his oral submissions. The Board will do likewise.

13.
The "expenses" claim may be summarised as follows:

(i)
Mr Jordan incurred a personal liability to each of the Interested Creditors under the Consent Orders, having actively negotiated each of them on behalf of SV under his management powers as receiver.

(ii)

Acting in that capacity, he enjoyed a right of indemnity against SV and its assets in respect of the personal liability which he incurred.

(iii)
The incurring of that personal liability was a “privileged expense” not requiring registration and ranking in priority to the claims of any secured creditors in the liquidation of SV, pursuant to articles 1903 and 1969 of the Civil Code of St Lucia.

(iv)
The Interested Creditors, as the persons to whom that liability of Mr Jordan was owed, were entitled to be subrogated to his priority claim against the assets of SV in liquidation.

14.
In the Board’s opinion, every step in that ingenious argument, except perhaps the last, is wrong. As for step (a), Mr Jordan did not incur any personal liability to the Interested Creditors under the Consent Orders, merely because he took an authorised part as manager of the affairs of SV in their negotiation. Section 297(1) of the St Lucia Companies Act provides:

“(1) A receiver of assets of a company appointed under section 287(3) or under the powers contained in any instrument -

(a) is personally liable on any contract entered into by him or her in the performance of his or her functions, except to the extent that the contract otherwise provides; and

(b) is entitled in respect of that liability to an indemnity out of the assets of which he or she was appointed to be receiver,

…”

The Consent Orders relied upon by the Interested Creditors adopt a fairly standard form. They are intituled in the High Court proceedings in each of which the relevant Interested Creditors had already obtained default judgment for damages to be assessed. They identify the relevant Interested Creditors as the claimants and SV as the defendant, and (usually) refer to the assessment hearing as the occasion for the order. They then set out the specific sums for which money judgment is ordered for the claimants against SV. They are signed under the rubric “I Consent” by counsel (or legal representative) for the claimants and counsel for the defendant respectively, and then counter-signed by the court registrar. It is to be noted that Mr Jordan is not mentioned in any of them, either by name or by reference to his then office as receiver. All the Consent Orders preceded the commencement of SV’s liquidation.

15.
The Board is prepared to accept that a consent order generally records a contract so that, for example, a consent order in which a receiver is named as a party and incurs a monetary obligation could in principle constitute a contract within the meaning of section 297(1). But the Consent Orders were not contracts “entered into” by Mr Jordan within the meaning of section 297(1). Furthermore, the Consent Orders did not purport to impose any monetary or other obligation upon Mr Jordan. All they did was to determine, as between SV and each of the Interested Creditors, the liquidated amount of the damages for which they had already obtained default judgments against SV. All that Mr Jordan did was to play a part in their negotiation as, for that purpose, a duly authorised manager of SV, his authority (which was not in issue) coming from the terms of the Bank’s First Charge and his deed of appointment as receiver.

16.
It follows that, for the purposes of step (b) Mr Jordan's undoubted right of indemnity for his proper expenses and liabilities was not engaged by the Consent Orders, nor by his negotiation of them.

17.
As for step (c), article 1969 of the Civil Code provides, by way of exception from priority depending upon the order of registration, that:

"The following rights are exempt from the formality of registration:

1. The privileges mentioned in paragraphs 1, 5, 8 and 9 of article 1903.

2. Hypothecs in favour of the Crown."

Article 1903, paragraph 1, gives first ranking status to:

"Law costs and the expenses incurred for the common interest of the creditors".

In the Board's view, even if Mr Jordan had incurred an expense within the meaning of paragraph 1 (which for reasons already given he did not), it would not have been incurred for the common interest of the creditors. Mr Jordan was acting at that stage in the interests of the Bank as its receiver, not as SV's liquidator. His then duty was, within well recognised limits (such as obtaining a proper price on any sale), to advance the interests of the Bank, not the general body of SV's creditors. When the Board asked Mr Foster how it could conclude otherwise, he pointed to Mr Jordan's very full reports as receiver. But they demonstrate no such thing. His third report annexed the legal advice which he had received as to his duties, which included this passage:

"So long as a receiver bona fide believes that the exercise of his powers is in the legitimate interests of his appointor, his exercise is not constrained by reason of the fact that the exercise will occasion damage or loss to the debtor. If the appointor's interests as be or as the receiver sees them conflict with the interests of the debtor, the receiver can give preference to the appointor's own interests and the only duty owed to the debtor in such circumstances is to act in good faith (see In re Potters Oil [1986] 1 WLR 201 at 206)."

There is no reason to suppose that when acting as receiver Mr Jordan was doing other than acting in accordance with that advice.

18.
For those reasons the Interested Creditors' appeal, to the extent that it is based upon the expenses argument, must fail. Apart from that, nothing in Mr Foster's submissions cast any doubt upon the correctness of the thrust of the Court of Appeal's view, which was that priority depended upon the order of registration, as clearly provided by the Civil Code of St Lucia.

19.
The estoppel ground sought to argue that Mr Jordan's conduct in negotiating the Consent Orders had been sanctioned by the Bank, so that the Bank was affected by the Consent Orders in creating expenses having priority over the First Charge. In the Board's opinion this argument, upon which Mr Foster sensibly dwelt only briefly in his oral submissions, takes the Interested Creditors no further. The Consent Orders created no such expenses. They merely crystallised SV's liabilities as a judgment debtor, and the Bank was not party to them, or to the negotiations which preceded them. While it does appear (from Mr Jordan's reports as receiver) that he was advised that the Consent Orders would give the Interested Creditors equal priority with the Bank, it has not been part of their case that any such

representation was made to them, still less one on which they relied. They were legally represented in the negotiations which led to the Consent Orders and may be assumed to have relied upon their own legal advice as to their effects.

20.
The final, procedural, ground of appeal was that the Interested Creditors had been denied a proper opportunity to advance oral argument in support of their appeal, mainly in relation to the expenses and estoppel arguments. The Board rejects this ground, for two reasons. First, it appears that the Court of Appeal kept oral argument within tight time limits because it had received and read substantial written submissions. That was a matter for their case-management discretion. Secondly the Board has read and heard copious written and oral arguments on the Interested Creditors' case, in particular in relation to the expenses point, and has concluded that they should be rejected on their merits.

21.
In its written case SV by its liquidator questioned whether the Consent Orders provided any security at all to the Interested Creditors, even as against the other unsecured creditors of SV. The Board does not consider it appropriate to enter into this issue, again for two reasons. The first is that it has not been raised by way of cross-appeal, or addressed by the Interested Creditors. The second is that the Bank appears to have become entitled to the whole of the proceeds of the liquidation (apart from any amount due to preferential creditors or on account of liquidation expenses), so that any question of priority as between the Interested Creditors and the unsecured creditors is of no practical importance.

22.
The Board will therefore humbly advise Her Majesty that this appeal should be dismissed.