



# FOSTERS

Barristers-at-law, Solicitors, Notaries Royal

## *Judgment Insight*

### **Ranking of Creditors in a Liquidation under Saint Lucian Law – important clarification by the Court of Appeal – September, 2018**

**FOSTERS successfully represented a leading financial institution in clarifying the ranking of creditors in a liquidation, dispelling the notion that a first charge holder of an Hypothecary Obligation, Mortgage Debenture and Floating Charge could rank pari passu with other secured and unsecured creditors in a liquidation.**

In this landmark judgment, FirstCaribbean International Bank (Barbados) Limited v Sunset Village Inc. (in Liquidation), the Court of Appeal clarifies the ranking of creditors in a liquidation in Saint Lucia. At present, Saint Lucia has no specific Insolvency Act or Rules to outline the ranking of the creditors of a company in a liquidation. The Liquidator and Interested Creditors (comprising of judgment creditors who had invested in the developer, Sunset Village Inc.) argued that in the absence of specific Insolvency legislation, the court ought to apply the Insolvency Act and Rules of the United Kingdom pursuant to section 11 of the Supreme Court Act (St. Lucia) and find that creditors rank pari passu. The judge at first instance agreed and so declared.

FirstCaribbean International Bank (Barbados) Limited represented by Renee T. St. Rose of FOSTERS argued on appeal that the laws of Saint Lucia were satisfactory and sufficient to determine the ranking of creditors in a liquidation and the court was not at liberty to apply the laws of the United

Kingdom to determine questions of privilege and rights of lien held by creditors or dispel the intrinsic rights conferred on creditors by the Civil Code of Saint Lucia, to rank in accordance with the date of registration. While enacting the Companies Act, Parliament could not have intended to deprive a first charge holder of the right to rank ahead of all other creditors, secured and unsecured, as provided for in the Civil Code and if intended, would have so explicitly provided. She contended that the Civil Code, Companies Act and Bankruptcy Laws under the Commercial Code of Saint Lucia provided that the Appellant bank's Hypothecary Obligation, Mortgage Debenture and Floating Charge ranked ahead of all creditors in the distribution and the bank was entitled to the full proceeds of sale, less liquidators costs and expenses. The Court of Appeal agreed with these contentions.

A summary of the determinations of the Court of Appeal are set out below.

***The ranking of creditors in a liquidation are to be determined in accordance with the Civil Code, Companies Act and Bankruptcy laws under the Commercial Code of Saint Lucia and the Bankruptcy laws must be construed to give effect to Article 2011 of the Civil Code.***



The Civil Code of Saint Lucia provides that the property of a debtor is the common security of all its creditors and the proceeds thereof are to be shared by them proportionately to the amount of their debts, except where there is a cause of legal preference. Hypothecs are a real right and a cause of legal preference and as such regard has to be given to the ranking of a hypothec holder in the distribution of the proceeds of sale.

Article 2011 of the Civil Code provides that real rights, such as hypothecs rank in accordance with their date of registration.

Section 464(2) of the Companies Act provides that in ranking creditors in a liquidation, the same rules shall prevail and be observed in relation to the rights of secured and unsecured creditors as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.

Therefore, in determining the ranking of creditors in a liquidation, regard must then be had to the Bankruptcy laws under the Commercial Code of Saint Lucia and the rights of secured and unsecured creditors in relation to persons adjudged bankrupt. In construing and interpreting section 464(2) of the Companies Act, the Court applied the Indian case of Jitendra Nath Singh v Official Liquidator anors Civil Appeal No.6755 OF 2012.

Article 572 of the Law of Bankruptcy provides for a secured creditor to either (i) realise its security or (ii) surrender it. If it is not realized or surrendered, which was the case in this appeal, the creditor is entitled to be paid in priority from the sale of the security and to thereafter claim any balance from the general pool. Article 572 also

provides for the claims of mortgagees and privileged creditors and in so doing also provides for the mortgagees and privileged creditors to be paid in priority from the sale of the property of the debtor. The Court found that the Appellant was also a mortgagee under Article 572 by virtue of the Mortgage Debenture and Floating Charge.

Article 573 then provides for payment of debts in relation to the balance of claims of secured creditors and unsecured creditors and provides then for them to rank *pari passu*. This is of course after observing the respective rights of secured and unsecured creditors provided for in Article 572.

Whilst Article 572 does not provide for the ranking between secured creditors, the court held that Article 572 must be construed to give effect to the Civil Code and the order of ranking provided for in Article 2011. Support for this application can also be found in the Indian case of ICICI Bank Ltd. v SIDCO Leathers Ltd.[2006] SUPP 1 SCR 528.

The court consequently found that the secured creditors and creditors would rank in accordance with the date of registration of their hypothecs.

Arising from this Judgment is the procedure that must be followed by Secured Creditors when a company goes into liquidation. Secured creditors must first determine whether they intend to realise the security or surrender it to the general pool of creditors. This is usually important in cases where the secured creditors security may not satisfy its debt and the remaining assets of the company far exceed the security.



If the secured creditor chooses not to surrender the security or realise it, they are paid in priority to other creditors from a sale of the asset and claim the balance from the general pool of creditors. The surrender of security by a secured creditor requires a conscious and positive act on the part of the secured creditor.

The Court of Appeal also made the following determinations.

***Section 11 of the Supreme Court Act of Saint Lucia is not intended to import substantive statutory provisions of the United Kingdom into the laws of that country.***

Applying Panacom International Inc. v Sunset Investments Ltd et al (1994) 47 WIR 139, it is not open to any local court to import the substantive statutory provisions of the United Kingdom into the laws of that country. The English law intended to be imported by section 11 of the Supreme Court Act of Saint Lucia is the procedural law, which is adjectival and purely ancillary to substantive English law. In essence, the court is not entitled to import laws of the United Kingdom to determine the intrinsic rights of creditors established under the laws of that country. The court could not have imported the laws of the United Kingdom to determine the rights of privilege and lien of creditors in Saint Lucia.

***Article 917A of the Civil Code of Saint Lucia only enables the local court to import the common law of England and not the statutory provisions of England and Wales***

The Court next considered the applicability of Article 917A of the Civil Code of Saint Lucia which provides that the laws of the United Kingdom for the time being applied in

relation to among other things contracts. The Court stated that Article 917A only enables the local court to import the common law of England and not the statutory provisions of English and Wales. The court applied the dicta of Lord Hodge in Nelson and Others v FirstCaribbean International Bank (Barbados) Limited, another leading authority on hypothecs where FOSTERS was successful.

***Consent Orders entered by a Receiver are judicial hypothecs and no more. They are not expenses in a receivership.***

The Court held that expenses in the liquidation are expenses that are incurred during the liquidation process. The Consent Orders and judgments of the Interested parties predated the liquidation and are judicial hypothecs and nothing more.

***Renee T. St. Rose is a Partner of FOSTERS with extensive experience in Insolvency Law.***



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***Please note that this Judgment Insight is intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice***



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