

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

SAINT CHRISTOPHER AND NEVIS

SAINT CHRISTOPHER CIRCUIT

Claim No. SKBHCV2012/0371

BETWEEN

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Original Applicant / Respondent

-and-

EXCLUSIVE RETREATS LIMITED

Respondent

-and-

SOCIAL SECURITY BOARD

Applicant

Appearances:

Leon Charles for the Applicant, Social Security Board; and
Garth L. Wilkin for the Original Applicant/ Respondent.

2022: May 09 – via email

DECISION

Application to be added as a party and to set aside sale
in statutory mortgage realization proceedings

[1] **PARIAGSINGH, M:** - On January 26, 2021 the original applicant (“the bank”) applied to settle the scheme of division of the proceeds of sale after the respondent’s property was sold under statutory mortgage realization proceedings. The respondent’s property was sold for the sum of \$540,000.00 USD and the purchase price has been paid into Court. Under the draft scheme of division submitted by the bank, if the proceeds of sale are applied to the mortgage debt first, there will be a deficit. Consequently, no other creditors, secured or otherwise will benefit from the proceeds of the sale.

[2] By application filed on July 30, 2021 the applicant (The Social Security Board) applied for an order that it be added as a party to these proceedings. The crux of the applicant's application is that it has priority to seize and sell the respondent's property and also to apply the proceeds of sale to debts owed to it by the respondent. In the alternative, the applicant contends that the sale by the bank was unlawful, null and void and seeks an order that it be set aside.

[3] The main issue to be determined in this application is; whether the applicant has priority to seize and sell the respondent's property? The other satellite issues will depend on the resolution of this issue. Though both parties filed affidavits, the issue to be resolved in the large is a legal issue.

ANALYSIS:

[4] The applicant is a statutory body established pursuant to section 3 of the Social Security Act¹. The applicant contends that the respondent is indebted to it in the sum of \$757,697.92 and this sum should be included in the scheme of division of the sale price as a debit in priority to the debt owed to the bank. The applicant alleges that this sum represents outstanding contributions due and owing under the Social Security Act, the Housing and Social Development Levy Act and the Protection of Employment Act for between the periods February 2005 to August 2011.

[5] The applicant contends that the bank had notice in writing by letter dated June 19, 2014 of its claim of statutory priority to any property owned by the respondent which is seized by any creditor of the respondent. The applicant further contends that only after the property had been sold (on November 26, 2020), on December 03, 2020, did the bank respond and indicate that the property had been sold and that a response would be sent to the letter.

¹Cap. 22.10

- [6] On April 01, 2021, after this application was filed, the bank wrote to the applicant's counsel and indicated that application to settle the scheme of division was filed and that the bank was contesting the position advanced by the applicant.
- [7] The applicant contends that the bank acted in bad faith by not responding to its letter of June 19, 2014 in a timely and direct manner, taking steps to settle the scheme of division of the sale price before addressing the applicant's position and by taking steps to settle the scheme of division without giving notice to the applicant.
- [8] In the alternative, the applicant contends that the sale by the bank was unlawful and null and void as the bank failed to comply with the provisions of sections 70 to 75 of the Income Tax Act². In the further alternative, the applicant seeks to be included in the scheme of division of the sale.
- [9] The respondent is a registered employer with the applicant and has been in operation since March 2005. Throughout its existence, the respondent has employed some seventy-six persons.
- [10] The applicant contends that as a registered employer, the respondent was under a statutory duty to pay contributions on behalf of its employees under the Social Security Act, the Protection of Employment Act and the Housing and Social Development Levy Act. It contends that the respondent did not honour its commitments under these Acts resulting in the respondent being a debtor to the applicant.
- [11] The applicant has also obtained several judgments in the Magistrate's Court, not the High Court, against the respondent for outstanding sums. The applicant contends that it has a statutory right to seize and sell the respondent's property pursuant to Sections 70 to 75 of the Income Tax Act.

²Cap. 22.10

[12] **Section 44 of the Social Security Act** states that:

Recovery of Social Security contribution by sale of goods, etc.

44. (1) Subject to subsection (2) of this section, the provisions dealing with the recovery of income tax as provided in sections 70 to 75 in the Income Tax Act shall apply *mutatis mutandis* to the recovery of any contribution under this Act.

(2) Every reference to the word “collector” and the word “tax” in sections 70 to 75 of the Income Tax Act shall be read as a reference to the word “Director” and the word “contribution” respectively for purposes of this Act

[13] Applying Section 44 to Sections 70 to 75 of the Income Tax Act in the manner prescribed it reads:

70. [Contribution] in arrear.

Where the whole [contribution] or an instalment is not paid on or before the prescribed date or dates then such [contribution] shall be deemed to be in arrear and it shall be lawful for the [Director], in his or her official name, to sue for and recover the [contribution] or such portion thereof as a civil debt in a court of competent jurisdiction or to issue a warrant under his or her hand directed to the Provost Marshal of the State setting out in the same or in a schedule thereto the several sums due on account of the [contribution] from the persons against whom the warrant is directed.

71. Penalty for non-payment of [contribution].

When any [contribution] becomes in arrear a fine in the sum of five per centum shall be added thereto and failing payment within one month of the date of notice of such fine, ten per centum per annum from the due date of payment to the actual date of payment shall be added thereto, and the provisions of this Act, relating to the collection and recovery of [contribution] shall apply to the collection and recovery of such sum.

72. Recovery by levy on goods.

Where [contribution] is in arrear the [Director] may, and the Provost Marshal, immediately on receipt of a warrant, shall proceed to levy upon the goods, chattels and lands of the persons against whom the warrant is directed and to sell in the manner provided in section 75 of this Act so much of the same as may be required to satisfy the several sums due on account of the [contribution] from the persons against whom the warrant is directed.

73. Priority of claim for [contribution].

(1) No property, goods or chattels whatever, belonging to any person at the time any [contribution] becomes in arrear, shall be liable to be taken by virtue of any execution or other process, warrant, or authority whatever, or

by virtue of any assignment, on any account or pretence whatever, except at the suit of the landlord for rent, unless the person at whose suit the execution or seizure is made, or to whom the assignment was made, pays or causes to be paid to the [Director], before the sale or removal of the goods or chattels, all arrears of [contribution] which are due at the time of seizure, or which are payable for the year in which the seizure is made: Provided that, where [contribution] is claimed for more than one year, the person at whose instance the seizure has been made, may, on paying to the [Director] the [contribution] which is due for one whole year, proceed in his or her seizure in like manner as if no [contribution] had been claimed.

- (2) In case of neglect or refusal to pay the [contribution] so claimed or the [contribution] for one whole year, as the case may be, the Provost Marshal or the [Director] or shall distrain the goods and chattels notwithstanding the seizure or assignment, and shall proceed to the sale thereof for the purpose of obtaining payment of the whole of the [contribution] charged and claimed, and the reasonable costs and charges attending such distress and sale, and the Provost Marshal and every [Director] so doing shall be indemnified by virtue of this Act.

74. Sale to be by public auction.

- (1) Every sale under this Act shall be by public auction held at such time and place as the [Director] or Provost Marshal shall direct, and notice of such sale shall be given in the Gazette for two consecutive weeks before the day of sale.
- (2) The proceeds of the sale shall be applied to the payment of the [contribution] due and the expenses of levy and sale and the surplus, if any, shall be paid on application to the person entitled thereto.

75. Commission to Provost Marshal.

- (1) There shall be paid to the Provost Marshal in respect of the duties performed by him or her under this Act a commission at the rate of two and a half per centum over and above the other expenses of the levy and sale on the nett proceeds of any sale under this Act.
- (2) All sums of money received or recovered by the Provost Marshal as commission shall be paid into the Treasury

[14] The scheme set up for the enforcement of a contribution being in arrears is clear. The Director has two options. The Director may either sue in his own name to recover the sums as a civil debt or issue a warrant under this hand to the Provost Marshal setting out the sums in arrears. There is no evidence in before the Court that either of these two processes were followed in relation to the debt now claimed by the applicant.

[15] It follows that if a judgment is obtained in civil proceedings it may be enforced in the usual course by any method of enforcing a civil debt. If the Director issues a warrant the Provost Marshal may proceed to levy and seize the goods, chattels or land of the debtor for the purpose of conducting a sale by public auction to recognize the debt due.

[16] The nub of one of the bank's arguments is that 'property' as defined in Section 73 Income Tax Act does not include land. Reliance is placed on the principle of *ejusdem generis* principle as set out in **Bennion on Statutory Interpretation, 6th Edition at page 1105** where it is stated:

'whereby words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character'.

[17] The bank submits that property as used in Section 73 Income Tax Act is restricted to the types of property like 'goods' and 'chattels' being movable property. The literal wording of Section 73 of the Income Tax Act which deals with property refers to 'property' it does not refer to land.

[18] In English law, property is either realty, which comprises freehold land, or personalty, which comprises everything else, including leasehold land and land held on trust for sale; pure personalty is the term used to denote chattels and other forms of personal property having no connection with land.

[19] Taking the purposive approach it is clear that Parliament intended there be a statutory restriction on the sale of any property of a person who owes any outstanding tax, and by extension contribution, to the Crown. The legislature created a scheme of priority in these statutory debts over the interest of any other creditors.

[20] In my view, the Crown has the first right of levy and sale over any property of a subject over and above any other creditor including the bank. This view is buttressed by the view that the proceeds of sale must first be applied to liquidating any outstanding

contribution and expenses of levy and sale and the surplus, if any, shall be paid on application to the person entitled thereto. This is provided for in s. 74(2) Income Tax Act.

[21] In my view the owing of a tax or contribution, creates a statutory encumbrances on the property of the person in arrears with first priority. This explains why the Director has the first right to sell the property. This is of course subject to the provisions of the Tax Administration and Procedures Act³.

[22] Section 3 of Tax Administration and Procedures Act states that:

3. Except as may otherwise be provided for in this Act, this Act shall apply to—
(a) taxes imposed under a tax law; and (b) any other taxes which may, from time to time be introduced, the administration of which the Department is responsible.

[23] In my view, this section must be read in line with Section 44 of the Social Security Act and Sections 70 to 75 of the Income Tax Act. Of note is that both the Social Security Act and Income Tax Act came into force before the Tax Administration and Procedures Act. Outstanding contributions are outstanding taxes and subject to the tax laws of this jurisdiction.

[24] Section 30 of Tax Administration and Procedures Act states that:

Crown's lien on taxpayer's property.

30. (1) Subject to the provisions of this section, where a taxpayer fails to pay a tax by the due date, the amount owing and the interest on the amount, together with the costs of collection that may accrue, shall create a lien in favour of the Crown on all property belonging to the taxpayer, and that lien shall, subject to subsection (3), have priority as against all other interests.

(2) The lien specified in subsection (1) shall accrue on the due date and shall continue until the liability is satisfied.

³Chap 20:52

- (3) The lien imposed by this section shall not be valid against the interest of—
- (a) a person who is a bona fide purchaser of the property for value from the taxpayer;
 - (b) a holder of a security interest in the property granted by the taxpayer;
or
 - (c) any other lien holder specified in regulations made under this Act; if that interest accrues before the persons mentioned in paragraphs (a), (b) and (c) have actual knowledge of the lien, or before a notice of the lien is duly registered, whichever occurs first.
- (4) Regulations made under this Act may prescribe procedures for filing the notice of lien and may prescribe categories of interests against which the lien shall not be valid, notwithstanding the fact that the lien had been filed earlier.
- (5) The Comptroller may file a civil action in the High Court to enforce the lien imposed by this section.
- (6) An affected person may— (a) apply to the Comptroller for a release of the lien on that person's property; or (b) appeal against a decision by the Comptroller not to release the lien, to the High Court.

[25] I am of the view that whilst the Crown has a lien on the property of the respondent for unpaid taxes, this lien does not rank above the interest of the bank which holds a security interest in the property granted by the respondent.

[26] In my view "property" as defined in Section 73 of Income Tax Act does not include real property. It refers to movable property, good and chattels of the debtor. In any event, if it did, by virtue of Section 30 of Tax Administration and Procedures Act, the lien for the unpaid contributions due and owing to the applicant, if any, does not rank in priority to the bank which is a secured creditor.

[27] The law specially provides for when a charge on land is created in Section 3 of the Judgements Act⁴ which states that:

3. A judgment already entered up or hereafter to be entered up against any person in the High Court shall operate as a charge upon all lands of such person within the State to the extent of his or her beneficial interest therein:

Provided that no such judgment shall affect any such lands as to purchasers, mortgagees, or creditors, unless and until the person entitled to the benefit of such judgment shall have filed an application to the Court for an order for the sale of such lands towards satisfaction thereof.

[28] In this application, there is no evidence of any judgment being entered up in the High Court against the respondent which would have created a charge against the land owned by the respondent. In the absence of such and considering Section 30 (3)(b) Tax Administration and Procedures Act, the applicant does not rank in priority over the bank's interest.

[29] Consideration of the other relief claimed therefore does not arise.

[30] For the these reasons, it is hereby ordered that:

- (1) The application filed on July 30, 2021 is dismissed;
- (2) The schedule of division is settled in terms of the draft filed by the bank on January 26, 2021; and
- (3) The applicant shall pay the bank's costs of this application to be assessed by this court in default of agreement within 28 days on the application of either party.

**Alvin Shiva Pariagsingh
High Court Master**

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Registrar

⁴Chap 3:14