

5 ST JAMES COURT

5 ST JAMES COURT

SECURITIES UNDER MAURITIAN LAW

What are securities?

- ❑ SECURITIES may be summarised as legal mechanisms intended to ensure the timely settlement of a debt. They constitute guarantees which a lender or creditor receives from a borrower or debtor and which may be enforced by the creditor, should the debtor default upon his payment obligations or become insolvent.
- ❑ Securities may be created by operation of law or through a contract, in favour of natural or moral persons, including particular institutions. They may be granted over movable or immovable property (“sûretés réelles”), or be provided by a person (“sûretés personnelles”). Depending on their nature and on the time of their creation, securities may allow additional protections and privileges, such as priority, to certain creditors.
- ❑ In Mauritius, the principal governing legislation is the CIVIL CODE. Mauritian Law permits, inter alia, fixed and floating charges, mortgages (“hypothèque”), “gage sans déplacement” (being a form of pledge), pledges (“nantissement”), set-off, assignment of receivables and retention of title as forms of security.

5 ST JAMES COURT

TYPES OF SECURITIES

Sûretés réelles

- ❑ A “sûreté réelle” is granted by a debtor over his property, be it movable or immovable.
- ❑ The most common types of “sûretés réelles” are Fixed and Floating charges.
- ❑ Fixed and Floating charges may only be granted by a debtor in favour of prescribed financial institutions, referred to as “Institutions Agréées”.
- ❑ Articles 2202-1 and 2202-2 of the Civil Code.

« Article 2202-1: Toute sûreté fixe ou flottante régie par les dispositions du présent chapitre ne peut être inscrite qu'au seul profit d'une institution agréée visée à l'article 2202-2 à l'exclusion de tout autre créancier. »

5 ST JAMES COURT

□ « Article 2202-2:

En application des dispositions de l'article 2202-1, peuvent, seuls, être titulaires de sûretés fixes ou flottantes, en leur qualité d'institution agréée-

- 1. le gouvernement mauricien;*
- 2. toute banque établie conformément aux dispositions du Banking Act;*
- 3. toute compagnie d'assurances;*
- 4. la Banque de Développement et la Banque des coopératives;*
- 5. la Mauritius Housing Corporation;*
- 6. toute société coopérative, sous réserves des articles 2203 et suivants;*
- 7. toute institution ou tout organisme de financement mauricien ou étranger, agréé par règlement du ministre des finances. »*

5 ST JAMES COURT

- ❑ “Institutions Agréées” are financial institutions entitled to take fixed and floating charges by virtue of the Civil Code and the "Institutions Agréées Regulations 1988“ and are defined as those entities appearing in the Schedule to the said regulations.
- ❑ Banks are “Institutions Agréées”.
- ❑ Which other institutions are “Institutions Agréées”?
 - The matter has been conclusively determined by the Supreme Court of Mauritius.
 - ***BONNET DES ARNOUX P E & ORS v BPCE INTERNATIONAL ET OUTRE MER & ANOR*** [2016 SCJ 241]

5 ST JAMES COURT

- *"It is clear that the learned Judge in Chambers analysed the submissions made by the appellants for the purpose of considering whether to exercise his discretion and grant the prayer sought. With regard to respondent No. 1, the learned Judge in Chambers was of the opinion that the above provisions show that article 2202-1 allows only an "institution agréée" aimed at in article 2202-2 to create a fixed or floating charge as a creditor over the asset of the debtor for loans advanced to it. Article 2202-2 gives a list of those "institutions agréées". In that list, under item 7, it is provided that **"toute institution ou tout organisme de financement mauricien ou étranger, agréé par règlement du ministre des finances."** [Emphasis added].*
- *In compliance with item 7 which gives the power to the Minister to make these Regulations, the Minister made the Regulations cited as the "Institutions Agréées Regulations 1988" where it is specified that they are "Regulations made by the Minister under Article 2202-2 of the Code Napoléon". Under Regulation 2(1) it is provided that "Every body specified in the Schedule shall, for the purposes of article 2202-2 of the Code Napoléon, be an "institution agréée".*

5 ST JAMES COURT

❑ *"One of the "institution agréée" listed in the Schedule is "Any body corporate not registered in Mauritius and having no place of business in Mauritius".*

❑ *Article 2202-2 sets out the numerous banks and institutions accepted as "institutions agréées" that can benefit from the provisions of that article, and further, under item 7, it provides that will also be "institutions agréées" all the institutions or financial institutions "toute institution ou tout organisme de financement mauricien ou étranger" accepted by the Minister of Finance.*

In accordance with this power given to him, the Minister has provided, by virtue of the Regulations that "Every body specified in the Schedule shall, for the purposes of article 2202-2 of the Code Napoléon, be an "institution agréée". The purpose of the Regulations was to give effect to the provisions of article 2202-1 which allows only an "institution agréée" aimed at in article 2202-2 to create a fixed or floating charge as a creditor. The learned Judge in Chambers was of the view that it was clear that the Minister must have intended to be "institutions" or "organismes de financement" accepted by him as "institutions agréées" those listed in the Schedule, including what is listed as "Any body corporate not registered in Mauritius and having no place of business in Mauritius"."

5 ST JAMES COURT

Fixed and Floating Charges- General Introduction

- ❑ Fixed and Floating charges are relatively simple to create and costs associated with their creation are *ad valorem*.
- ❑ Fixed and Floating charges are created by deed. To be valid, the Fixed or Floating charge must be **inscribed**.
- ❑ The contents of the deed witnessing the creation of Fixed or Floating set out the terms of the charge and may allow for the appointment of a Receiver or a Receiver/Manager or crystallization of a Floating charge.
- ❑ Fixed charges are generally granted over immovable property, and the property given as security is clearly specified and particularized.
- ❑ For a Floating charge, no specific property needs to be particularised given that the security may also be granted on any properties to be acquired in the future.

5 ST JAMES COURT

Fixed and Floating Charges- General Introduction

- ❑ In practice, Fixed and Floating charges are also subject to the INSCRIPTION OF PRIVILEGES AND MORTGAGES ACT 1946, the REGISTRATION DUTY ACT 1804, the INSOLVENCY ACT 2009 and the COMPANIES ACT 2001.
- ❑ Provision is made in the abovementioned legislations for the delay in which to inscribe charges, the costs associated with the same, the format in which a deed of Fixed or Floating Charge needs to be presented, the priority given to charges in situations of insolvency and for an obligation upon companies to register charges over its property.
- ❑ Several charges may be granted over the same property, raising the question of priority. The order of priority depends on the date of inscription. In cases of insolvency, the priority list of payments to preferential creditors is set out in the Fourth Schedule of the Insolvency Act 2009.
- ❑ The concepts of “inscription” and “crystallization” will be covered separately during this presentation.

5 ST JAMES COURT

Fixed Charges

- ❑ Fixed Charges are created pursuant to Article 2202-16 of the Civil Code.

Article 202-16:

La sûreté fixe grève seulement les biens qui sont spécialement désignés dans l'acte constitutif et jusqu'à concurrence de la somme mentionnée lors de son inscription.

Elle est, de sa nature, indivisible, et subsiste en entier, sur tous les biens affectés, sur chacun et sur chaque portion de ces biens.

- ❑ The property which is the subject of the charge must be clearly specified.
- ❑ The value of the charge is up to the amount of the debt contracted by the debtor.
- ❑ A Fixed Charge burdens the entirety of the charged property and cannot be deemed to be divided or to cover only part of the property.

5 ST JAMES COURT

Fixed Charges- continued

- ❑ The property which is the subject of a Fixed charge cannot be disposed of by the debtor without the approval in writing of the financial institution which holds the charge.
- ❑ A Fixed charge may be created by private or notarial deed.
- ❑ The deed must be registered with the Registrar General of Mauritius and inscribed in the public registers kept at the office of the Conservator of Mortgages. The inscription is mandatory and it goes to the validity of the charge. The formalities have to be completed within 8 days (or 3 months if the grantor holds a global business licence issued by the Financial Services Commission).
- ❑ Fixed charges may be enforced either in accordance with the terms of the deed creating them or in accordance with the powers of enforcement conferred by the Civil Code.
- ❑ A Receiver or Receiver/Manager appointed pursuant to the terms of a deed may take over the administration of a debtor company and sell assets by action, refer the matter to Court or effect private sales after tender. Rights conferred by the Civil Code upon the holder of a Fixed Charge are at Article 2202-26.

5 ST JAMES COURT

Fixed Charges- continued

□ Article 2202-26:

2202-26. Sous réserve de stipulations contraires mentionnées dans l'acte constitutif, l'institution agréée, le titulaire d'une sûreté fixe, dispose, sur les biens grevés, des droits suivants:

- 1. du droit de pratiquer toute saisie, y compris une saisie-arrêt, sur tout ou partie des biens grevés, à tout moment et sans préavis, dès lors que la créance devient exigible;*
- 2. du droit de vendre publiquement, par l'intermédiaire d'un courtier assermenté ou d'un commissaire priseur, selon le cas, le ou les biens mobiliers grevés, après à un délai de trois semaines à partir de leur saisie;*
- 3. du droit de vendre, conformément au Sale of Immoveable Property Act, le ou les biens immobiliers saisis.*

5 ST JAMES COURT

Fixed Charges- continued

- ❑ The enforcement of fixed charges is effected by a power of seizure given to an usher of the Supreme Court. Notice is given to the debtor and certain minimum time frames are required for the public sale, which is either effected by an Usher or a Sworn Auctioneer as regards movable assets and chattels. Immovable properties must be sold in accordance with the provisions of the Sale of Immovable Property Act
- ❑ A Fixed Charge is directly executory and there is no need for a notice “commandement” to be served.

❑ ***JOHAR B. H. v THE MAURITIUS COMMERCIAL BANK LTD*** [2016 SCJ 152]:

We are in entire agreement with the reasoning and conclusions in these cases and we fully subscribe to the decision therein which is to the effect that:

*(1) There was no need for a notice “commandement” to be served on the appellants or either of them as the Bank was proceeding by virtue of fixed charges subscribed to by the appellants. It is settled law that the holder of a fixed charge is empowered, pursuant to Article 2202 – 26 alinéa 1 of the Civil Code to effect the seizure of properties given as security without notice upon the debt becoming demandable and that such provision is a “disposition special” relating to the seizure of property guaranteed by a fixed charge (vide **Somit Ramphul & Anor v. The Mauritius Commercial Bank Ltd** [2001 SCJ 80] and **R. Khodabocus v. The Mauritius Commercial Bank Ltd** [2011 SCJ 422]).*

5 ST JAMES COURT

Floating Charges

- ❑ A Floating charge is created pursuant to Article 2202-34 of the Civil Code:

2202-34.

La sûreté flottante grève, jusqu'à concurrence de la somme mentionnée lors de son inscription, l'ensemble des biens présents qui appartiennent aux constituents ainsi que les biens futurs, au fur et à mesure de leur acquisition.

Cependant, les parties peuvent convenir dans l'acte constitutif que la sûreté flottante ne grèvera qu'une partie des biens du débiteur ou ne concernera que ses biens présents.

- ❑ As with Fixed charges, the instrument creating the Floating charge can be made by private or notarial deed and have to be registered with the Registrar General of Mauritius and inscribed in the public registers kept at the office of Conservator of Mortgages.

5 ST JAMES COURT

Floating Charges- continued

- ❑ A Floating charge takes its ranking among the other secured creditors and in respect of the assets charged on the date of its inscription with the Conservator of Mortgages.
- ❑ The date of inscription will therefore determine whether it is a first ranking security or not. Inscription and ranking will be covered in more depth during this presentation.
- ❑ A Floating charge is an executory title, which means that there is no need for a judicial enforcement. However, enforcement will be subject to crystallising (converting) the Floating charges into a Fixed charge by drawing up an inventory of the specific assets over which the charge will be realised. The conversion into a fixed charge does not affect the ranking of the security which will remain determined by the date of inscription of the Floating charge. Once the assets have been identified and crystalized into a Fixed charge, the beneficiary may proceed to the realisation of the security based on the nature of the underlying asset.
- ❑ An explanation of the process of crystallization follows.

5 ST JAMES COURT

Floating Charges-Crystallisation

- ❑ Crystallisation of floating charges in Mauritius is governed by articles 2202-41 to 2202-52 of the Civil Code.

- ❑ Article 2202-41 covers the situations where a Floating charge is crystallised “as of right”:
Sous réserve de l'accomplissement, par l'institution agréée, des formalités requises par l'article 2202-44; la sûreté flottante est cristallisée de plein droit:
 1. *à la mort du constituant;*
 2. *à la date de toute ordonnance de mise sous séquestre prise contre le constituant par la juridiction compétente;*
 3. *sur présentation d'une requête en liquidation contre la société ou la compagnie qui a constitué la sûreté flottante ou d'une résolution prise par la société ou la compagnie, en vue de sa liquidation;*
 4. *à la dissolution de la société ou de la compagnie ou de l'association qui a constitué la sûreté flottante.*

- ❑ Article 2202-42 provides that a floating charge may be crystallised by a prescribed institution (the lender) if it has been granted a discretionary power to do so under the terms of the floating charge document.

5 ST JAMES COURT

Floating Charges-Crystallisation

- ❑ Article 2202-42 reads as follows:

La sûreté flottante peut être cristallisée à l'initiative de l'institution agréée lorsque celle-ci dispose de la faculté discrétionnaire de procéder à cette cristallisation en vertu d'une stipulation expresse de l'acte constitutif.

- ❑ An example of wording used in a deed of Floating Charge is below:

In conformity with Livre Troisième Titre Dix-Huitième Chapitre Dixième of the Mauritian Code Napoléon, for any of the reasons set out under the provisions of the Mauritius Code Napoléon or at any time after the occurrence of an Event of Default which has not been waived, the Lender may exercise the option of crystallising the floating charge contained in this Deed and converting the floating charge over any or all of the Security Assets into a fixed charge; and upon such conversion being made, the Lender shall cause the inventory referred to in Article 2202-49 of the Mauritian Code Napoléon to be made, and shall further fulfil the other formalities prescribed by the law for the enforcement of such charge as if it was a fixed charge in accordance with the law. However, the Lender may not exercise such option in respect of any Event of Default after the same has been remedied.

5 ST JAMES COURT

Floating Charges-Crystallisation

- Article 2202-43 provides that crystallisation may be effected in case of the occurrence of an event of default on the part of the borrower or in case of failure by the borrower to fulfill its obligations.

2202-43. L'institution agréé peut aussi procéder à la cristallisation de la sûreté flottante sur tous les biens grevés, dans les deux cas suivants:

- 1. à la suite de l'inexécution par le débiteur d'une des obligations qui lui incombent en vertu de l'acte constitutif ou de la loi;*
- 2. lorsqu'un tiers saisi à un bien grevé d'une sûreté flottante.*

- A prescribed institution which proceeds with crystallisation in the above circumstances must give notice to the Conservator of Mortgages, stating the reasons for crystallisation and citing the relevant article of the Civil Code under which it exercises this power, as per Article 2202-44. The Conservator of Mortgages will then inscribe the notice into his record.

5 ST JAMES COURT

Floating Charges-Crystallisation

- ❑ Article 2202-44 reads as follows:

Dans tous les cas, l'institution agréée qui procède à la cristallisation, doit transmettre à la conservation des hypothèques un avis de cristallisation contenant une requête au conservateur des hypothèques de faire mention de la cristallisation au volume de sûreté flottante mentionnée dans l'avis.

L'avis de cristallisation doit mentionner les motifs de celle-ci ainsi que les dispositions du présent Code sur lesquelles sont fondées ces motifs.

- ❑ Inscription of the notice entitles the prescribed institution to take provisional measures to protect the property, in accordance with Article 2202-46.

5 ST JAMES COURT

Floating Charges-Crystallisation

❑ Article 2202-46 reads as follows:

L'enregistrement de l'avis de cristallisation a pour effet immédiat de permettre à l'institution agréée, de prendre, à tout moment et sans préavis, les mesures conservatoires nécessaires afin d'éviter que le constituant ne dispose ou ne se dessaisisse de tout ou partie des biens qui étaient grevés par la sûreté flottante. L'institution agréée peut notamment, à la suite de cet enregistrement pratiquer immédiatement et sans conditions, toute saisie de nature purement conservatoire ou faire apposer aussitôt des scellés surtout ou partie des biens grevés.

L'huisier, requis à cette fin par l'institution agréée, aura le pouvoir d'agir, sans formalités préalables judiciaires ou extrajudiciaires, sur simple production de l'acte constitutif de la sûreté et de l'avis de cristallisation.

Toutefois les mesures conservatoires prises par l'institution agréée devront être levées, si, dans les 30 jours de l'enregistrement de la cristallisation, la sûreté flottante n'a pas été transformée, en application de l'article 2202-49, en une sûreté fixe sur les biens qui ont fait l'objet de ces mesures.

5 ST JAMES COURT

Floating Charges-Crystallisation

- ❑ Once the Conservator of Mortgages has inscribed the notice of crystallization, the following steps must be taken:
 - the prescribed institution must cause an Usher of the Supreme Court to carry out a full inventory of the property burdened by the floating charge,
 - the inventory must be signed in duplicate by two witnesses, and
 - the inventory, in duplicate, must be sent to the Conservator of Mortgages.
- ❑ The Conservator of Mortgages will record the details of the inventory and from the date of his recording the same, the floating charge is converted to a Fixed charge.
- ❑ Notice of the crystallization must be served upon the debtor.
- ❑ As from the point this notice is served, the debtor can no longer dispose of any of the charged property, save with the approval of the prescribed institution.
- ❑ The rules relating to Fixed charges will thereafter apply.

5 ST JAMES COURT

Inscription

- ❑ In Mauritius, excluding insolvency proceedings, the priority of a charge is determined by whether it is “inscribed”.
- ❑ Inscription applies only to certain categories of charges such as Fixed and Floating charges or mortgages. Fixed and Floating Charges will be invalid, unless inscribed, as per Article 2202-9 of the Civil Code.

2202-9. Toute sûreté fixe ou toute sûreté flottante sera sans effet si elle n'a pas été inscrite à la conservation des hypothèques.

- ❑ Inscribed charges rank in the order of their inscription.
- ❑ Inscription is to be distinguished from registration. Specific charges must be registered at the Office of the Conservator of Mortgages under the provisions of the Registration Duty Act 1804, with applicable time limits, as specified in the 6th Schedule of the Act.

5 ST JAMES COURT

Inscription - continued

❑ However, it is “inscription” which grants priority to a charge under Mauritian law and charges which are subject to inscription must be so inscribed to be valid and to be granted priority. The order of priority will be the order of inscription.

❑ Article 2202-53 of the Civil Code:

Toute sûreté fixe ou flottante confère un droit de préférence dont le rang se détermine au jour de son inscription à la conservation des hypothèques.

Sous réserve de l'intérêt des créanciers ou des tiers, une cession de priorité peut être valablement consentie entre titulaires de sûretés fixes ou flottantes.

Lorsque plusieurs inscriptions sont requises le même jour, elles viennent en concurrence quel que soit l'ordre d'inscription dans le registre et les sûretés qu'elles mentionnent sont réputées de même rang.

5 ST JAMES COURT

Inscription - continued

- ❑ The duration of inscriptions is specified in Section 61 of the Transcription and Mortgage Act 1964.
- ❑ Section 61 of the said Act reads as follows:
 - 61. Duration of inscriptions*
 - (1) Subject to section 41, an inscription shall be valid for a period of 40 years from its date.*
 - (2) An inscription may be renewed within the period specified in subsection (1) and such renewal shall be made in the form set out in the Fifth Schedule and shall have the same legal effect as an inscription.*
 - (3) Subsections (1) and (2) shall apply to inscriptions made ex-officio by the Conservator.*
- ❑ This Section was amended by Section 18 of the Finance (Miscellaneous Provisions) Act 2011. The duration of inscriptions was previously of 10 years.

5 ST JAMES COURT

Inscription - continued

- ❑ This provision is mirrored at Article 2202-8 of the Civil Code, which was also amended at the same time.
- ❑ Article 2202-8 reads as follows:

2202-8. L'inscription d'une sûreté fixe ou flottante conserve ses effets jusqu'au complet remboursement de la somme due par l'emprunteur ou sa caution ainsi que des intérêts, commissions et frais et accessoires en découlant.

L'inscription conserve aussi ses effets jusqu'à l'exécution de toute obligation qui serait stipulée dans le titre constituant la sûreté.

Nonobstant les dispositions des alinéas précédents pendant quarante années seulement à compter du jour de sa date; son effet cesse si l'inscription n'a pas été renouvelée avant l'expiration de ce délai

5 ST JAMES COURT

Inscription - continued

- The material amendment came into effect on 13th December 2011.
- The question therefore arises: what is the duration of validity of charges inscribed prior to 13th December 2011?
- Are existing charges given an additional extension of 40 years?

5 ST JAMES COURT

Inscription- continued

- ❑ As at 13th December 2011 (i) all existing inscriptions are valid for a period of 40 years as from the date of their inscription or from the date of a previous renewal and (ii) all subsequent inscriptions are valid for a period of 40 years.

- ❑ An inscription existing before 13th December 2011 and which had any period of validity remaining as at 13th December 2011 will have that period of validity extended according to the difference between 40 years and December 2011 minus the date of inscription, without the need for renewal.

5 ST JAMES COURT

Inscription- continued

Example:

- A charge was inscribed in December 2002.
- As at 2002, the inscription was valid for 10 years, i.e., until December 2012.
- In December 2011, the law extended the period of validity to 40 years as from the date of inscription.
- As at December 2011, the inscription has existed for 9 years.
- If the new law had not come into force, the inscription would have had an additional 1 year of validity.
- With the coming into force of the law in December 2011, the inscription now has 31 additional years of validity as from December 2002.
- The inscription is valid until December 2042, i.e., 40 years as from its first inscription in 2002 and 31 years as from the coming into force of the law in December 2011.

5 ST JAMES COURT

Inscription - continued

- Case: ***DAMREE B Y v THE MAURITIUS COMMERCIAL BANK LTD*** [1998 SCJ 352]

What is the effect of not inscribing a fixed or floating charges? The answer is to be found in article 2202-9 of the Civil Code which provides that such charges shall be of no effect. It does not obviously result from that that the debt is extinguished. Far from that for the document embodying the contract of loan would be proof of the existence of the debt until the debtor proves that the debt had been settled.

I subscribe to the interpretation of learned counsel for the respondent that a charge which had not been renewed would have the same effect as one which had never been inscribed meaning that the creditor will not be able to take advantage of the simple procedure laid down in the Civil Code more especially the benefits under article 2202-26

5 ST JAMES COURT

Inscription - continued

❑ Case: **RAMSAHA S N & Anor v B N P I [2002 SCJ 41]**

It is to be noted, however, that though the floating charge may lapse if the inscription is not renewed in time, the beneficiary of the charge is not precluded from taking a new inscription with the only result that the charge would, upon renewal, become effective as from its date of renewal .

5 ST JAMES COURT

NOTABLE CASES

❑ **AQUACHEM LTD v DELPHIS BANK LTD (IN RECEIVERSHIP) & ORS [2005 PRV 92]:**

The concept of a floating charge is not native to the civilian system of property law which exists in Mauritius and was introduced by the Loans, Charges and Privileges Act 1969. This Act was repealed when its provisions (with amendments) were inserted into the Code Napoléon by the 1983 Act as Chapter 10 of Title 18 .

Section 2202 permits the creation of floating charges. By section 2202-1 they may be created only in favour of “approved institutions”, but these include banks and it is agreed that the bank is therefore an approved institution. Unlike the law in England, it would appear from section 2202-35 that floating charges may be granted by individuals as well as by companies.

5 ST JAMES COURT

NOTABLE CASES- continued

❑ AQUACHEM LTD v DELPHIS BANK LTD (IN RECEIVERSHIP) & ORS [2005 PRV 92]:

Sections 2202-41 to 2202-43 deal with the circumstances in which the floating charge may be crystallised, a term which is not expressly defined but which is well understood in English law and which by section 2202-40 converts the floating charge into a fixed charge on the chargor's assets at the time of crystallisation. Until then he has, by section 2202-38, the right to deal with the assets as if there had been no charge. Section 2202-41 lists the cases in which crystallisation takes effect automatically ("de plein droit") and section 2202-42 provides that the charge may be crystallised by the approved institution if the charge instrument expressly gives it a discretionary power to do so.

5 ST JAMES COURT

NOTABLE CASES- continued

❑ **AQUACHEM LTD v DELPHIS BANK LTD (IN RECEIVERSHIP) & ORS [2005 PRV 92]:**

*By section 2202-40, however, crystallisation converts the floating charge into a fixed charge only if certain formalities are observed. One of these, in section 2202- 47, is that a copy of the notice of crystallisation, which by section 2202-44 must contain the reasons for crystallisation and the provisions of the Code on which they are based, should be sent to the chargor. On receipt of the notice the chargor has ten days in which to apply to the Judge in Chambers to set it aside. In *Ramphul v Mauritius Commercial Bank Ltd [2001] MR 49, 53 Seetulsingh J* said of section 2202- 47 that because the approved institution holding the charge was likely to be “a powerful body as opposed to an individual”, the legislature had “decided to afford some protection to the individual debtor” by giving him the opportunity to have the crystallisation set aside. This seems to their Lordships to be right.*

5 ST JAMES COURT

NOTABLE CASES- continued

❑ ATELIER ETUDE LIMOUSIN& ORS v BPCE INTERNATIONAL ET OUTRE MER & ANOR [2014 SCJ 166]:

I shall refer to Development Bank of Mauritius Ltd. v M.Y. Flore and Anor [1998 MR 91] and Damree Bibi Yasmeeen v Mauritius Commercial Bank [2004 SCJ 209] as authorities for the proposition that the charge does not become a useless piece of document if it has not been renewed after the validity period of 10 years. It simply loses its ranking as opposed to other secured creditors. More important is article 2202-9 of the Civil Code which provides that 'Toute sûreté fixe ou toute sûreté flottante sera sans effet si elle n'a pas été inscrite à la conservation des hypothèques', reproducing what used to be the text under section 10 of the then Loans, Charges and Privileges (Authorised) Bodies Act 1969. In view of the two decisions quoted above, a charge which has not been inscribed simply does not have priority over others which have been inscribed even if that charge was taken before those that have been inscribed. Inscription has only to do with priority of the privileges and failure to inscribe the charge does not result in a lapse of the 'droit hypothécaire.

5 ST JAMES COURT

NOTABLE CASES- continued

❑ CHAN SUI KO T Y v MAUDARBOCUS S M R AND ANOR [2011 SCJ 220]:

The contention to the effect that the learned Judge's Order cannot be complied with as the assets covered by the floating charges have not been identified is clearly, in my view, frivolous and vexatious as this argument has been raised, and rejected, in an appeal by the present respondents and the Mauritius Freezone Logistics Ltd against the Order of the Judge in Chambers with which we are concerned vide Mauritius Freezone Logistics Ltd & Ors v Teck Yan Chan Sui Ko [2007 SCJ 47].

Dealing with the ground of appeal to the effect that the learned Judge wrongly ordered all the assets of Mauritius Freezone Logistics Ltd to be handed over to the present applicant when no inventory of those assets had taken place, the appellate Court said: "There is no merit in the last ground of appeal relating to the order made by the learned Judge in Chambers for all the assets of the first appellant to be handed over to the respondent since the latter had necessarily to be put in possession of all the assets of the first appellant in order to manage properly the latter's affairs. Moreover, it stands to reason that the respondent had to be put in possession of all the assets of the first appellant before making an inventory of those assets, as rightly submitted by learned Counsel for the respondent."

5 ST JAMES COURT

NOTABLE CASES- continued

❑ RAMPHUL v/s THE MAURITIUS COMMERCIAL BANK LTD [2001 SCJ 81]:

The note at the beginning of the Titre Dix-huitième Chapitre Dixième in the Civil Code refers to the intention of the Legislator to repeal the former Loans, Charges and Privileges (Authorised Bodies) Act and to re-enact certain of its provisions with necessary modifications -

..... Les principales innovations résident dans l'ouverture à la consultation publique des registres concernant tant les sûretés fixes que flottantes et dans l'institution d'une procédure de saisie-conservatoire destinée à éviter les détournements de biens grevés, généralement effectués aux dépens du créancier durant la période d'inventaire. Thus the whole procedure of "crystallisation" or freezing of the floating charge is introduced into our law and is described up to art 2202-48, whereas the procedure of 'transformation' or conversion is set out from art. 2202-49.

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THANK YOU

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