[2018] JMCA Civ 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 54/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**MARGIE GEDDES**	**APPELLANT**
A N D	**McDONALD MILLINGEN**	**RESPONDENT**

Michael Hylton QC, Roderick Gordon and Miss Kareene Smith instructed by Gordon McGrath for the appellant

Vincent Chen and Makene Brown instructed by Chen Green & Co for the respondent

9, 10, November 2017 and 23 March 2018

PHILLIPS JA

[1] I have read in draft the judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing to add.

P WILLIAMS JA

[2] The appellant, Mrs Margie Geddes, is a former client of the respondent, McDonald Millingen, a firm of attorneys-at-law. In 2011 the respondent filed a claim against the appellant for fees for work done between 1999 and 2008, on a quantum

meruit basis. On 19 April 2011, the respondent filed a bill of costs and when there were no points of dispute filed, the matter proceeded to taxation. A default costs certificate was issued against the appellant for US$1,048,807.19.

[3] The respondent obtained an exparte provisional charging order on 18 December 2012, in respect of shares held by the appellant in Bardi Limited as well as shares in Desnoes and Geddes Limited, "D&G", issued to and registered in the name of Bardi Limited. On 11 April 2013 the appellant applied to strike out the claim for costs, or in the alternative, to set aside the default costs certificate. This application was heard in March 2014 and judgment was reserved and is still being awaited at this time. An application for a final charging order was also before the court at the time, however, that matter was deferred pending the determination of the application relating to the default costs certificate.

[4] In December of 2015, the appellant's attorneys-at-law were approached by attorneys-at-law for Heineken Sweden AB with an enquiry as to whether the appellant would be willing to accept an offer to purchase shares held by Bardi Limited and under her control in D&G. The attorneys-at-law for Heineken Sweden AB indicated a willingness to assist in coming to a resolution, which would permit the sale of the shares pending the outcome of the matter of the charge on the shares. The appellant was later advised that Heineken Sweden AB would be seeking to acquire majority share ownership in D&G and was offering to purchase shares at "a significant premium to the current trading price".

[5] The appellant applied to have the provisional charging order varied. The application was heard by Morrison J on 20 January 2016 and was refused. The appellant sought and was granted permission by this court to appeal this decision. On 25 May 2016, the notice and grounds of appeal were filed.

[6] The learned judge did not give written reasons for his decision. Mr Hylton QC, in making submissions on behalf of the appellant, noted that there is no dispute that the findings of law set out in the grounds of appeal accurately summarize the reasons the learned judge gave orally. These findings were set out as follows:-

> " a) That the Court has no jurisdiction to vary an exparte provisional charging order where a stay of execution is not in place or is not being granted.
>
> b) That the Court has no jurisdiction to vary an exparte provisional charging order in the absence of an appeal."

[7] Mr Hylton identified two main issues that arise in the appeal:-

> "(1) Did the learned trial judge have jurisdiction to vary the provisional order?
>
> (2) If he did, should he have exercised it in the appellant's favour?"

Issue 1

Submissions

[8] Mr Hylton submitted that the learned judge plainly had the power to vary the provisional charging order. It was his submission that a fundamental position that exists in civil law is the jurisdiction of the court to set aside an order made exparte.

The jurisdiction exists to vary or set aside exparte orders pursuant to rules 11.16 and 11.18 of the Civil Procedure Rules 2002 ("CPR").

[9] Further, Mr Hylton noted that rule 48.10 of the CPR specifically provides that the court can vary a final charging order. Thus he contended that the power to vary a final inter-partes order must include the lesser power to vary a provisional charging order. Queen's Counsel found support for this submission in an authority supplied in the respondent's submissions: **W E A Records Ltd v Visions Channel 4 Ltd and others** [1983] WLR 721.

[10] Mr Hylton submitted that rule 26.1(7) of the CPR specifically grants the court wide discretion to vary an order made by the same court. He relied on **TV v PJ** [2014] EWHC 1780 (Fam) in support of this aspect of his submissions.

[11] Mr Hylton noted that there are authorities that acknowledge that a charging order is in effect an equitable remedy. One such authority he referred to was from this court, **Paul Hoo v Epsilon Equities Ltd** [2014] JMCA Civ 1. It was his contention that such a finding is important in these proceedings as in exercising an equitable jurisdiction, the court has a wide discretion to make any order it deems fit that will achieve justice for the litigants.

[12] Mr Hylton concluded his submissions on this issue by observing that this court had varied a provisional charging order in not dissimilar circumstances in **DYC Fishing Limited v Perla Del Caribe Inc** [2012] JMCA App 18.

[13] Mr Chen submitted that the proceedings which were before the learned judge were enforcement proceedings and the jurisdiction of the court as to charging orders is to be found in Section 28D of the Judicature (Supreme Court) Act. He contended that these are specific proceedings that arise after judgment and as such, those provisions of the CPR on which Mr Hylton relied are not applicable to enforcement proceedings.

[14] Mr Chen's contention therefore was that Part 11 and Part 26 of the CPR deal with issues that arise before trial and during a trial and generally matters before judgment is entered. All proceedings after judgment, being enforcement proceedings, were to be guided by those provisions relating to enforcement.

[15] It was Mr Chen's submission that since the provisions of Part 48 are dealing with the coercive power of the court being brought to bear on a debtor who owes money, no other rule of the CPR can apply. If other rules were to be relied on, Mr Chen contended, this would open floodgates for interference with enforcement. He submitted that a view that any other rule applies would result in the weakening of the coercive force of the court.

[16] Mr Chen referred to **Finney v Hinde** (1879) 4 QBD 102 and **WEA Records Limited v Visions Chanel 4 Ltd** in support of his submissions.

[17] In response to Mr Chen's submission that the other parts of the CPR were inapplicable to Part 48, Mr Hylton invited this court to note rule 11.1 of the CPR that outlines the scope of that part.

Discussion and disposal

[18] Charging orders, as a method of enforcement, did not exist in Jamaican jurisprudence prior to the passing of the CPR. The CPR replaced the Judicature (Civil Procedure Code) which was primary legislation. The CPR were made by the Rules Committee acting under the Judicature (Rules of Court) Act and is secondary legislation.

[19] In **Beverly Levy v Ken Sales and Marketing Ltd** [2008] UKPC 87, Lord Scott of Foscote made the following observation at paragraph 19:

> "…There appears to have been no statutory power for courts in Jamaica to make charging orders until the recent enactment of legislation enabling courts to do so. That legislation came into effect on 25 March 2003 ... The Civil Procedure Rules 2002, which came into effect on 1 January 2003, contain Rules relating to the making of charging orders but while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction."

[20] The Privy Council was referring to the Judicature (Supreme Court) (Amendment) Act which was passed in March 2003. In particular section 28D, which in dealing with charging orders provides:

> "The Court may, on application of the person prosecuting a judgment or order for the payment of money, make a charging order in accordance with the Civil Procedure Rules, 2002 in relation to the enforcement of judgments."

[21] Hence, the primary statutory provision giving the Supreme Court power to make charging orders was section 28D of the Judicature (Supreme Court) Act and the

relevance and necessity of section 28D must be appreciated in that context. It does not seem that that section was creating a procedure that was to stand alone, independent of the rest of the provisions of the CPR.

[22] The fact that section 28D speaks to the court making a charging order for the purpose of enforcing a judgment in accordance with the CPR, must mean that enforcement is to be in accordance with all the relevant provisions of the CPR and not just Part 48. Part 48 outlines the procedure for the making of the application, but does not contain the details necessary to give effect to the procedure. Hence, resort has to be had to other provisions of the CPR.

[23] It should first be noted that rule 2.2 of the CPR provides inter alia:

> "(1) Subject to paragraph (3) these Rules apply to all civil proceedings in the court.
>
> (2) '**Civil proceedings**' include Judicial Review and applications to the court under the Constitution under Part 56.
>
> (3) These Rules do not apply to the following proceedings -
>
> (a) insolvency (including winding up of Companies);
>
> (b) proceedings when the court acts as a Prize Court; and
>
> (c) any other proceedings in the court instituted any enactment, in so far as rules made under that enactment regulate those proceedings.
>
> ..." (Emphasis is as in original)

[24] The argument that the application for a charging order is a part of enforcement proceedings and is therefore not a part of civil proceedings to which the CPR applies can be countered with the fact that enforcement proceedings are not specifically declared one of the proceedings to which the rules do not apply.

[25] As has already been indicated, Part 48 of the CPR that deals with charging orders does set out rules that regulate the procedure for obtaining such an order. Some of the definitions for terms applicable under this part are found elsewhere in the rules.

[26] Part 43 which deals with enforcement - general provisions provides at 43.1(2):

> "In this Part and in Parts 44 to 53:
>
> 'Judgment creditor' means the person who is entitled to enforce a judgment or order; and
>
> 'Judgment debtor' means the person who is liable to enforcement under the judgment or order, even though the judgment or order is not a money judgment."

[27] The application for a charging order is to be made without notice but must be supported by evidence on affidavit (see rule 48.2(1) of the CPR). The evidence to be contained in the affidavit is set out at rule 48.3. However, the rules relating to the general requirements for an affidavit are found in another part of the CPR at Part 30.

[28] Further, rule 48.7 which provides for the service of the provisional order and of copies of the affidavit in support of the application for the order, commences as follows:-

> "48.7 (1) where the court makes a provisional charging order the judgment creditor must serve on the judgment debtor in accordance with Part 5:-
>
> (a) the order, and
>
> (b) a copy of the affidavit in support of the application for the order."

[29] The specific complaint that Part 11 and Part 26 do not apply to Part 48 is to be considered against the opening provisions of both those parts. Mr Hylton invited the court to consider rule 11.1 of the CPR which provides:

> "This Part deals with applications for court orders made before, during or after the course of proceedings."

The charging order, that, as Mr Chen stressed, is an order required after the course of proceedings for enforcement of the court's judgment, clearly would be governed by this Part.

[30] Rule 48.10 of the CPR deals with the application to discharge or vary a final charging order and outlines who may make such an application and on whom the notice of application must be served. The rules relating to a notice of application are to be found in Part 11.

[31] Part 26 which deals with Case Management - The Court's General Powers of Management, provides at rule 26.1(1):

> "The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any enactment."

This provision clearly establishes that Part 26 would encompass Part 48.

[32] Consequently, it is clear that the rules relied on by Mr Hylton are indeed applicable to Part 48. Rule 11.16 and rule 11.18 of the CPR gives the court power to deal with applications to set aside or vary orders made on application without notice and those made in the absence of a party.

[33] Rule 26.1(7) provides:

> "A power of the court under these Rules to make an order includes a power to vary or revoke that order."

[34] Section 28D of the Judicature (Supreme Court) Act provides the statutory jurisdictional basis of the power of the judge to make a charging order but does not limit the exercise of that power to Part 48. All other relevant provisions necessary to give effect to the procedure for applying for a charging order as the method of enforcing a judgment are applicable to Part 48. The learned judge was therefore incorrect when he declined to consider the application before him on the basis that he had no jurisdiction to do so.

Issue 2

Submissions

[35] Mr Hylton submitted that since the learned judge did not purport to exercise a discretion at all, this court would therefore have to exercise an original jurisdiction. He noted that in **DYC Fishing Limited v Perla Del Caribe Inc**, Phillips JA had observed in similar circumstances, that the court would be "exercising an unfettered discretion, which of course, must be exercised judicially" (see paragraph [31]).

[36] Mr Hylton contended that there were at least two curious things about the ex parte provisional order. The first is that it is created over shares owned by Bardi Limited, which was not a party to the litigation, and did not owe any debt, to secure a debt owed by the appellant. The second is that, the debt was for a little over US$1,000,000.00, but the charge was over shares which were worth more than US$5,000,000.00 based on the price at which they were trading on the stock exchange at the time.

[37] Mr Hylton went on to note that the value of the shares would have increased significantly with the offer that had been made to purchase them by Heineken Sweden AB when it had acquired a controlling interest in D&G. He therefore contended that the application before the learned judge was to vary the charge so that it would still secure the debt. He submitted that the charging order should be made in respect of property of equivalent value.

[38] The variation, Mr Hylton said, which was proposed by the appellant as outlined in the notice and grounds of appeal, was to vary the order so that:-

> "a. The order continues to apply to shares of a value equivalent to the amount payable pursuant to the default costs certificate dated January 30, 2011; or alternatively
>
> b. A sum equivalent to the amount payable pursuant to the default costs certificate dated January 30, 2011 be placed in escrow to secure the said costs, pending further order of the court below."

[39] It was Mr Hylton's contention that cash would provide greater security and liquidity to the respondent and greater certainty to the court. In any event, he noted, there is no dispute that:

> "a. The value of the property charged far exceeds the amount of the judgment debt;
>
> b. The property charged can be divided so that the charge can apply to property of equivalent or approximate value; and
>
> c. The appellant is prepared to replace the property charged by cash."

In these circumstances, he urged that a variation is more than justified.

[40] Mr Chen placed much emphasis on the fact that the charging order had brought the coercive powers of the court into play. He contended that since this was to force the debtor to pay what it owed, the judgment creditor was free to have any property charged even if it was property greater in value than what was owed.

[41] Mr Chen further submitted that the learned judge could not vary the exparte order because the process was still incomplete. He noted that, in effect, King J is still seized of this matter and it is inappropriate for this court to deal with the issue as it is still extant before that judge in the court below. Further, he contended that there is no order capable of being varied by this court and in any event the parties have agreed that the status quo should be maintained until King J has ruled in relation to the issue of the default costs certificate. The existence of such an agreement, was however, denied by Mr Hylton.

[42] Mr Chen pointed out that, in this case, there had been no stay of execution and hence there should be no monies paid out before King J rules. Mr Chen concluded that there can be no interference with the property charged.

Discussion and disposal

[43] The Charging Order Act 1979 of England provides a useful definition of a charging order. It is defined as an order "imposing on any such property as may be specified in the order as charge for securing the payment of any money due or to become due under [a] judgment or order".

[44] Stuart Sime in the text A Practical Approach to Civil Procedure 15th Edition at paragraph 44.31, makes the point that:

> "A charging order therefore secures a judgment debt; it does not of itself produce any money.... Once obtained and registered at the Land Registry a charging order can give a measure of long term security, which is necessary if there is no immediate prospect of recovery by other methods."

[45] The charging order effectively prevents the owner of the property charged from dealing with the property in a manner detrimental to the ability of the judgment creditor to obtain satisfaction of a money judgment. Hence, Mr Chen is correct that it is the coercive power of the court that is being called upon, these being enforcement proceedings that interfere with an owner's right to deal with the property charged.

[46] It is necessary however that these powers be exercised equitably having regard to the interests of all the parties involved. The interest of the judgment creditor is to

recover what is owed. In this regard, the court needs to be satisfied that what is charged will be sufficient to satisfy the debt if an order of sale is eventually made.

[47] The rights of the judgment debtor ought also to be borne in mind. In **Robinson v Bailey** [1942] Ch 268, a plaintiff sought to obtain an order charging 3333/ local loans stock of the defendant who had been ordered to pay her 50/a year and had fallen into arrears. Simmons J declined from making such a charging order final and discharged it on the application of the defendant. At page 271 the judge had this to say:-

> "I cannot conceive that it would be proper for the court, by reason of an apprehended future failure of the defendant to satisfy the terms of the judgment, to lock up so disappropriate an amount of his property to satisfy so small a debt."

[48] The purpose of the charging order should not be to interfere with property that is far in excess of what is owed. It is true that there may be times that the only property owned by the judgment debtor is valued in excess of what is owed and the court may have to make a charging order in relation to it. However the order cannot be used as a "a lever to force the defendant to comply with his obligation" (see **Robinson v Bailey**).

[49] The fact that the decision of whether or not to set aside the default costs certificate remains outstanding since 2014 is regretted and ought to be borne in mind. However, the question of whether the charging order should be varied involves

different issues and consideration from that matter. What remains important is that there are sums that remain charged to satisfy the debt that may be due under that default costs certificate.

[50] There is no dispute that the value of the property charged far exceeds the amount of the judgment debt. A just resolution of this matter will be to vary the charging order such that the value of the property charged would be proportionate to the debt. Changing the subject matter of the charge from the shares to monies which would then have to be placed in escrow would not be appropriate while the provisional charging order remains. In the circumstances, the proposal by the appellant that the charging order be varied so that the order continues to apply to shares of a value equivalent to the amount payable pursuant to the default costs certificate dated 30 January 2011, finds favour and is more acceptable.

[51] I would therefore make the following orders:

(1) The appeal is allowed;

(2) The order of the Honourable Mr Justice B Morrison dated 20 January 2016 is set aside;

(3) The exparte provisional charging order dated 18 December 2012 is varied as follows:

(1) A charging order is hereby granted in respect of:

(ii) 7,500,000 ordinary shares (and dividends arising therefrom) in Desnoes and Geddes Limited issued to and registered in the name of Bardi Limited;

(2) The defendant Margie Geddes is hereby restrained from selling or charging the shares held by her in Bardi Limited and 7,500,000 shares held by Bardi Limited in Desnoes and Geddes Limited until the hearing of an application for a final charging Order.

(3) Costs of the appeal and in the court below to the appellant to be taxed if not agreed.

STRAW JA (AG)

[52] I too have read the draft judgment of P Williams JA and agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

(1) The appeal is allowed;

(2) The order of the Honourable Mr Justice B Morrison dated 20 January 2016 is set aside;

(3) The exparte provisional charging order dated 18 December 2012 is varied as follows:

(1) A charging order is hereby granted in respect of:

(ii) 7,500,000 ordinary shares (and dividends arising therefrom) therefrom) in Desnoes and Geddes Limited issued to and registered in the name of Bardi Limited;

(2) The defendant Margie Geddes is hereby restrained from selling or charging the shares held by her in Bardi Limited and 7,500,000 shares held by Bardi Limited in Desnoes and Geddes Limited until the hearing of an application for a final charging Order.

(3) Costs of the appeal and in the court below to the appellant to be taxed if not agreed.