EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2014/0017

BETWEEN:

[1] AQUADUCT LIMITED
[2] BERTILLE DA SILVA

Appellants

and

[1] FAELESSEJE
[2] LESLINE BESS
(Court Appointed Representative of the Estate of Othneil R. Sylvester deceased)

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal

Appearances:

Frederick A. Gilkes and Yuri J.R. Saunders for the appellants
Stephen Williams holding for Richard Williams for the first respondent
Graham Bollers as amicus curiae for court-appointed receiver

2015: April 17.
2016: April 18.

Civil Appeal – Interlocutory Appeal – Preliminary Issues – Enforcement Proceedings – Provisional Charging Order – Objection to Grant of Final Charging Order – Part 48 of Civil Procedure Rules 2000 – Summary Proceedings – Whether there should be a separate trial of preliminary issues - Whether learned judge erred in fact and law by ruling that in giving directions for the filing of affidavit evidence and disclosure of documents the preliminary objection taken by appellants was implicitly ruled on – Whether learned judge conflated

procedure appropriate to summary hearing of dispute with procedure for fair disposal of said dispute where dispute could not be fairly resolved summarily

This appeal arises out of enforcement proceedings under Part 48 of the Civil Procedure Rules 2000 ("CPR 2000") in relation to a judgment debt of EC $5,212,500.00 obtained by Faelesseje against the estate of the late O. R. Sylvester ("the Estate"). Faelesseje had applied ex-parte for a provisional charging order pursuant to Part 48 to charge a 50% share or interest in Aquaduct Limited ("Aquaduct") for the purpose of fulfilling a debt owed by the Estate to Faelesseje.

On 31st January 2014, the appellants filed a formal objection to the granting of a final charging order on the grounds that: O.R. Sylvester only had 1 share in Aquaduct (that is, 1/7th of the issued shares); the Estate does not now, nor did O.R. Sylvester ever own a 50% share or interest in Aquaduct; if the provisional order were made absolute, it would essentially fix on shares to which the Estate is not entitled; the judgment creditor (first-named respondent) is only peripherally concerned with the issues - that is, a dispute between the appellants and the second-named respondent, judicial resolution of which would require a claim form, pleadings, evidence and cross-examination. The core of the appellants' objections therefore is that a new claim form is required to properly commence proceedings in order to determine the extent of O.R. Sylvester's true shareholding in Aquaduct.

At the first hearing of the charging proceedings, counsel for the appellants implored the court to consider their submissions and objections. The court proceeded to give directions for the filing of further affidavit evidence and for the disclosure of documents. The appellants filed affidavits seeking to dispute the proposition that O.R Sylvester had a 50% stake in Aquaduct. When hearing of the matter began before the judge, the appellants' counsel took a preliminary point of law that the court had no jurisdiction to resolve Sylvester's claim to a 50% beneficial ownership in Aquaduct by what appeared to be summary proceedings within the Part 48 charging proceedings. The appellants' counsel submitted that the court's jurisdiction under Part 48 in such a case is limited to making a determination as to whether the provisional charging order ought to be made absolute. Although rule 48.8(4) contemplates that where a dispute as to ownership arises which can be "fairly resolved summarily" the court may enquire into the beneficial ownership of assets sought to be charged, it was impossible to resolve the present matter summarily as it concerned an extremely contentious dispute between Bertille Da Silva and the Estate. The appellants contend that in order to ensure fairness of the proceedings, the court was obliged to give directions for trial of that dispute, with all the normal incidents of trial under the CPR 2000.

The respondents submitted that the matter is not complex and that the judge's approach was correct having regard to the overriding objective of the CPR when she interpreted Part

48. They argued that the issues to be determined were well-known from the provisional charging order, the objections filed and the affidavits in support of the objections. The learned judge ordered a trial of the sole issue "what is the shareholding or beneficial interest of the judgment creditor in the first appellant". The respondents further posited that the learned judge having read the appellants' objections and determining that there was an issue which could not be tried summarily gave directions for affidavits to be filed and for disclosure to be made by both sides in order to determine the issue in the most efficient manner.
The learned judge ruled that she had given directions for the filing of further affidavit evidence after the appellants' objections and this implicitly amounted to a dismissal of the said objection. The preliminary point of law was in effect the same objection. The court had jurisdiction to try a substantial issue of fact that had arisen between the parties in the course of Part 48 proceedings and had given proper directions for the trial of the issues that had arisen.

In appealing the decision of the learned judge, the appellants advanced five grounds of appeal. In Ground A, the appellants complained that the learned judge erred in fact and law by finding that by giving directions for the filing of affidavit evidence and for disclosure of documents, she had implicitly ruled on the preliminary objection that the appellants had taken. The appellants contended that the judge made no ruling on the objection and the directions she gave cannot amount to an implicit ruling on the preliminary objection. The appellants further argued that they ought not to be prejudiced by their failure to understand that by giving directions for the filing of further evidence, the judge's intention was to dismiss their preliminary objection. In Grounds B, C, and D, the appellants' essential complaint is that the learned judge conflated the procedure that was appropriate to the summary hearing of a dispute, arising in the course of the charging proceedings, as to the ownership of the asset sought to be charged, with the procedure that she ought to have directed for the fair disposal of that dispute once she recognised that the dispute could not be fairly resolved summarily. Grounds E and F relate to the prejudice caused by the manner in which the Court has allowed the matter to proceed.

Held: allowing the appeal and making the orders set out in paragraph 37 of the judgment below and ordering costs to the appellants in the court below and on the appeal, that:

1. The court and the parties should give careful consideration to the issues to be determined when making an order for a split trial. Where a claim is highly fact sensitive, it is important to establish the factual premise for the issue of law on which the judge was invited to rule. Preliminary issues should not be set in motion in a casual and unstructured way. There is a need for absolute clarity when a court orders the trial of a preliminary issue. The right approach to preliminary issues should be (inter alia) that the questions should usually be questions of law and should be decided on the basis of a schedule of agreed or assumed facts.

The preliminary point of law taken by the appellants was that the court had no jurisdiction to resolve Sylvester's claim to a 50% beneficial ownership in Aquaduct by what appeared to be summary proceedings within the Part 48 charging proceedings. In the circumstances, the learned judge ought to have addressed that point directly and was plainly wrong by ruling that the directions she had given for the filing of further affidavit evidence and cross-examination after the appellants' objections implicitly amounted to a dismissal of the said objection.

Mcloughlin v Jones [2002] QB 1312 applied; **Larkfleet v Allison Homes Eastern Limited** [2016] EWHC 195 applied; **Lady Arden in Royal & Sun Alliance Insurance plc frv T & N Limited** 2002] EWCA Civ 1964 applied; **Tilling v Whiteman** [1979] 1 All ER 737 applied; **SCA Packaging Ltd v Boyle** [2009] UKHL 37 applied; **Ashmore v Corporation of Lloyd's** [1992] 2 All ER 486 applied.

2. CPR 48.8(4) entrusts the judge with a discretion to give directions for the resolution of any objection that cannot be resolved summarily. The directions adverted to in this rule would place a court in a position to resolve, fairly and properly, the substantial issues of fact and law that had arisen between the Estate and the Appellants as to the Estate's shareholding in Aquaduct. By giving directions, the learned judge prima facie accepted that the dispute as to the ownership of the shares could not be resolved summarily. Having determined that a summary resolution of those issues was not possible, the learned judge could not properly realise the objective of a fair resolution of that issue by the mere filing of further affidavit evidence. Given the importance of the issues, their resolution necessitated the rigours of a trial and most importantly, pleadings that would facilitate a fair trial. The learned trial judge was therefore unfair to the appellants and plainly wrong in her approach of adopting a procedure akin to that of a summary resolution of the dispute.

   In Re U (children) [2015] EWCA Civ 334 applied; **Broughton v Kop Football (Cayman) Ltd** [2012] EWCA Civ 1743 applied; **Prince Abdulaziz v Apex Global Management Ltd & Anor** (Rev 2) [2014] UKSC 64 applied; **Royal & Sun Alliance Insurance plc v T &N Limited** 2002] EWCA Civ 1964 applied; **In The Matter of TG (A Child)** [2013] EWCA Civ 5 applied; **Re S-W (Children)** [2015] EWCA Civ. 27 applied.

3. A fair resolution of the important issue of the property rights of the various persons claiming ownership of the shares that ought to be charged in the charging proceedings required the filing of pleadings that defined the bases of the competing claims. The filing of affidavit evidence was no substitute for pleadings in determining and fairly resolving this issue. In relation to issues of disclosure,

discovery and reception and treatment of evidence, the directions given were no substitute for Parts 28 and 29 of the CPR 2000 which would have been fully in play had the nature of the learned judge's directions been addressed to the trial of the dispute of fact that arose as distinct from the summary disposal of the dispute. Therefore, the learned judge was plainly wrong and caused the appellants substantial prejudice in dismissing the preliminary objection and embarking by way of proceedings that are not in accordance with the normal incidents of a trial under the CPR.

Parts 28 and 29 of the Civil Procedure Rules 2000 applied.

JUDGMENT

[1] **BAPTISTE JA**: This appeal stems from enforcement proceedings under Part 48 of the **Civil Procedure Rules 2000** ("CPR 2000") in respect of a judgment debt of EC $5,212,500.00 obtained by Faelesseje against the estate of the late O. R. Sylvester ("the Estate"). Faelesseje had applied ex-parte for a provisional charging order pursuant to Part 48 of the CPR to charge a 50% share or interest in Aquaduct Limited ("Aquaduct"). The provisional charging order operated to charge 50% of the share or interest in Aquaduct for the purpose of satisfying a debt owed by O. R. Sylvester's estate to Faelesseje.

[2] By application filed pursuant to rule 48(2) of CPR 2000, the appellants formally objected to the granting of a final charging order on the grounds that: O.R. Sylvester only had 1 share in Aquaduct (that is, 1/7th of the issued shares); the Estate does not now, nor did O.R Sylvester ever own a 50% share or interest in

Aquaduct; if the provisional order were made absolute, it would necessarily fix on shares to which the Estate is not entitled; that the judgment creditor (first-named respondent) is only peripherally concerned with the issues - that is, a dispute between the appellants and the second-named respondent, judicial resolution of which would require a claim form, pleadings, evidence and cross-examination. The crux of the appellants' objections therefore is that proceedings to determine O.R. Sylvester's true shareholding in Aquaduct must properly be commenced by a new claim form.

[3] In the court below, at the first hearing of the charging proceedings after the appellants filed their formal objection, their counsel urged the court to consider their submissions and objections. The court proceeded to give directions for the filing of further affidavit evidence and for the disclosure of documents. The appellants filed affidavits seeking to dispute the suggestion that O. R Sylvester had a 50% stake in Aquaduct. When hearing of the matter began before the judge, the appellants' counsel took a preliminary point of law that the court had no jurisdiction to resolve Sylvester's claim to a 50% beneficial ownership in Aquaduct by what appeared to be summary proceedings within the Part 48 charging proceedings.

[4] The appellants' counsel submitted to the judge that the court's jurisdiction under Part 48 - after having granted a provisional charging order, is limited to making a determination as to whether the order ought to be made absolute. Rule 48.8(4) of CPR 2000 contemplates that the court may make some enquiry into the beneficial ownership of assets sought to be charged where a dispute as to ownership emerges which can be "fairly resolved summarily". As it was impossible to resolve summarily, what clearly was an extremely contentious dispute between the second appellant, Bertille Da Silva and the Estate, the court was obliged to give directions

for trial of that dispute, with all the normal incidents of trial under the CPR 2000, in order to ensure the fairness of the proceedings.

[5] In response, counsel for Faelesseje and for the receiver appointed to obtain payment of the judgment debt, submitted that there was no material difference between the originating proceedings to determine the issue of O.R. Sylvester's ownership in Aquaduct and the course taken by the judge. Further, the preliminary point was determined on 17th July 2014 insofar as the court had given directions under CPR 48.8(4) for the resolution of any dispute which cannot be resolved summarily.

[6] The learned judge ruled that she had given directions for the filing of further affidavit evidence after the appellants' objections and this implicitly amounted to a dismissal of the said objection. The preliminary point of law was in effect the same objection. The court had jurisdiction to try a substantial issue of fact that had arisen between the parties in the course of Part 48 proceedings and had given proper directions for the trial of the issues that had arisen. Rules 27.2(3) and 48.8(4) of CPR 2000 used the word "summarily" and what is contemplated by rule 27.2(3) is that evidence would be presented and there would be cross-examination. That fact fortified the court's view that the directions for filing of evidence and cross-examination in the proceedings in question were appropriate.

[7] Mr. Gilkes, the appellants' counsel, submitted on appeal that a substantial dispute having arisen as to the ownership of the asset sought to be charged, the mere filing of affidavits and cross-examination would, in the circumstances of this case be inadequate. The learned judge accordingly erred in failing to appreciate that once a substantial dispute had arisen in the course of the charging proceedings as

to whether the Estate, as a judgment debtor, did in fact own the assets sought to be charged, the fair resolution of that dispute required her to direct an issue to be tried between the persons contesting ownership of the shares and to postpone the determination of the charging proceedings until such time as such issue had been determined. Mr. Gilkes suggested that the only direction that the learned judge should have given was for the Estate to institute proceedings as claimant, particularising the basis of its claim to a 50% shareholding in Aquaduct and naming as defendants in the proceedings all persons that might be affected by its claim.

[8] The respondents posit that the judge ordered a trial of the sole issue "what is the shareholding or beneficial interest of the judgment creditor in the first appellant". The matter is not complex. The learned judge having read the objections of the appellants gave directions for affidavits to be filed and for disclosure to be made in order to determine the issue in the most efficient manner. In the premises, the respondents submit that the judge's approach was correct having regard to the overriding objective of the CPR when she interpreted Part 48. The issues to be determined were well-known from the provisional charging order, the objections filed and the affidavits in support of the objections. The court determining that there was an issue that could not be tried summarily, ordered the filing of affidavits relevant to the issue with a requirement for disclosure by both sides. Further, the judge's discretion was exercised within the generous ambit of the wide discretion given by Part 26 of the CPR.

[9] I pause here to consider the regime under the CPR with respect to charging orders. CPR 48.2(1) and (2) deal with the manner of making an application for a charging order; it is made by a without notice application supported by affidavit evidence. CPR 48.3 sets out the evidence required in support of the application. In the first instance, the court must deal with an application for a charging order

without a hearing and may make a provisional charging order. CPR 48.7 deals with service of provisional charging orders and the copy of the affidavit in support of the application. The judgment creditor must serve a copy of the order on the interested persons listed in the affidavit in support of the application. CPR 48.6 sets out who the interested persons are. The provisional charging order must state the date, time and place when the court will consider making a final charging order.

[10] CPR 48.8(1) deals with filing of objections to a provisional charging order and the making of a final charging order. Any interested person as defined by CPR 48.6, any judgment creditor and the judgment debtor may file objections to a provisional charging order: CPR 48.8(2). The objection must be filed not less than 14 days before the hearing: CPR 48.8(3). The power of the court at the hearing is set out in CPR 48.8(4): if satisfied that the judgment debtor has been served the provisional charging order, the court is empowered to (a) discharge the provisional charging order; (b) give directions for the resolution of any objection that cannot be resolved summarily; or (c) make a final charging order. It seems to me that implicit in the power to give directions for the resolution of any dispute that cannot be resolved summarily, is the power to direct a trial of that issue in a non-summary manner.

[11] I now deal with the grounds of appeal. The appellants advanced five grounds of appeal. In summary, the first ground (Ground A) deals with the question of whether the appellants' preliminary objection had been addressed by the court in July 2014. The respondents did not address Ground A in their skeleton or oral arguments. The appellants complained that the judge erred in fact and law by finding that by giving directions for the filing of affidavit evidence and for disclosure of documents, she had implicitly ruled on the preliminary objection that the

appellants had taken, which was in substance the same as the one that they took in October 2014. The appellants contended that the judge made no ruling on the objection and the directions she gave cannot amount to an implicit ruling on the preliminary objection. The appellants further argued that they ought not to be prejudiced by their failure to understand that by giving directions for the filing of further evidence, the judge's intention was to dismiss their preliminary objection.

[12] It would be useful to make some observations with respect to preliminary issues. The court, and the parties, should give careful consideration to the issues to be determined when making an order for a split trial. Where a claim is highly fact sensitive, it is important to establish the factual premise for the issue of law on which the judge was invited to rule. There is a need for total clarity when a court orders the trial of a preliminary issue of law. Preliminary issues should not be set in motion in a casual and unstructured way. The right approach to preliminary issues should be (inter alia) that the questions should usually be questions of law and should be decided on the basis of a schedule of agreed or assumed facts. Authorities for these propositions are: (1) **Mcloughlin v Jones**[1] in which the Court of Appeal made clear what the approach should be in terms of ordering and hearing the trial of preliminary issues and (2) **Larkfleet v Allison Homes Eastern Limited**[2] where Mr. Justice Fraser pronounced on the need for total clarity when a court orders the trial of a preliminary issue.

[13] The preliminary point of law the appellants took was that the court had no jurisdiction to resolve Sylvester's claim to a 50% beneficial ownership in Aquaduct by what appeared to be summary proceedings within the Part 48 charging proceedings. In my view, the judge ought to have addressed that point directly,

[1] [2002] QB 1312 paras 61-66, David Steele J.
[2] [2016] EWHC 195.

rather than ruling that she had given directions for the filing of further affidavit evidence and cross-examination after the appellants' objections, and this implicitly amounted to a dismissal of the said objection.

[14] It cannot be doubted that the power to order preliminary issues or the separate trial of different issues is a valuable case management tool. Its utility is enhanced where the court is confronted with a key point of law which turns on the interpretation of a statute and which, if decided in one way, can reduce the need for an expensive trial. This tool, however, has to be used with great care.[3] Circumspection in its use is dictated by the fact that, as Lord Scarman said in **Tilling v Whiteman**,[4] "preliminary points of law are too often treacherous short cuts. Their price can be as here delay, anxiety and expense".

[15] In **SCA Packaging Ltd v Boyle**,[5] the House of Lords addressed the issue as to whether a preliminary hearing was appropriate. Lord Hope noted that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly. His Lordship endorsed Lord Scarman's statement in **Tilling v Whiteman** that preliminary points of law are too often treacherous shortcuts, and noted that this is even more so where the points to be decided are a mixture of fact and law. Lord Hope further stated that:

> "The essential criterion for deciding whether to hold a pre-trial hearing is whether, as it was put by Lindsay J in CJ **O' Shea Construction Ltd v Bassi** [1998] ICR 1130, 1140, there is a succinct knock out point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where the preliminary issue cannot be divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case, it is preferable that there should be only one hearing to determine all the matters in dispute".

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[3] [2002] Royal & Sun Alliance Insurance plc v T & N Limited EWCA Civ 1964, para. 46, Lady Arden.
[4] 1980 AC 1, para. 25; [1979] 1 All ER 737.
[5] [2009] UKHL 37, para. 9.

[16] In **Ashmore v Corporation of Lloyd's**,[6] the trial judge decided to order preliminary issues of law; he considered the dangers involved in that course and the guidance of the House of Lords in **Tilling v Whiteman**. His decision was upset by the Court of Appeal but upheld by the House of Lords. Lord Templeman stated that where a judge, alive to the possible consequences, decides that a particular course should be followed in the conduct of the trial, in the interests of justice his decision should be respected by the parties and upheld by an appellate court unless there are very good grounds for thinking that the judge was plainly wrong.

[17] In a similar vein in **Ashmore**, Lord Roskill expressed the view that a trial judge who has had control of the proceedings in its interlocutory stages is in a far better position to deal with these matters than any appellate court can be. Lord Roskill noted that this was particularly true in the case under consideration where the judge had not only listened to part of a lengthy opening speech but also to almost as lengthy argument as to whether the already amended points of claim should be re-amended. Lord Roskill proceeded to make this very apt statement:

> "In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see that they are tried expeditiously and inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of a trial judge's time as is necessary for a proper determination of the relevant issues".[7]

[18] I respectfully endorse these salutary principles espoused in **Ashmore v Corporation of Lloyd's**, as well as the applicable principles pertaining to the

[6] [1992] 2 All ER 486.
[7] [1992] 2 All ER 486, para. 488.

treatment of preliminary issues. However, the judge's approach in not dealing with the preliminary issue frontally merits criticism. It appears to me that the judge was plainly wrong in her approach. The learned judge should have expressly ruled on the objection. The directions she gave cannot amount to an implicit ruling on the preliminary objection. In the circumstances, the appellants' complaint is entirely justified.

Grounds B, C, D

[19] The next three grounds of appeal – B, C and D relate to what the appellants consider to be the nub of the matter. Reduced to their essentials, the appellants complain that the learned judge conflated the procedure that was appropriate to the summary hearing of a dispute, arising in the course of the charging proceedings, as to the ownership of the asset sought to be charged, with the procedure that she ought to have directed for the fair disposal of that dispute, once she recognized that the dispute could not be fairly resolved summarily.

Grounds B, C and D are as follows:

Ground B

The Honourable Judge erred in law in failing to draw a distinction between issues arising in the course of charging proceedings which could fairly be resolved summarily and those which could not and which would require directions for their fair resolution and in conflating the process that would be the usual incident of a summary resolution of the issues with that which the court should properly direct pursuant to rule 48.8(4) of the CPR for the fair resolution of such issues.

Ground C

The Honourable Judge erred in law in failing to appreciate that once a substantial dispute had arisen in the course of the said charging proceedings as to whether the Estate, as judgment debtor, did in fact own the shares sought to be charged, the fair resolution of that issue required her to direct an issue to be tried between the persons contesting the ownership of the shares and to postpone the determination of the charging proceedings until such time as such issue had been determined.

Ground D

The Honourable Judge erred in law in failing to appreciate that the directions that she ought properly to have given for the fair resolution of the said issue should have included directions for the Estate to institute proceedings, as claimant, particularising the basis of its claim to a 50% shareholding in Aquaduct as well as the basis of its entitlement to the consequential orders that the Court would have to make in giving effect to such claim, and naming as defendants in such proceedings, all persons that might be affected by the Estate's claims.

[20] The complaints in these grounds are really an attack on the case management decision of the judge. It is necessary at this stage to set out the orders made by the judge. On the 17th July 2014 the learned judge ordered that:

> "Aquaduct Limited is required to file affidavit evidence outlining the respective shareholding in the Company exhibiting thereto the most recently filed annual returns and details relating to the respective contributions of each director and shareholder in the acquisition of the company's assets, namely, property at Peniston Valley comprising land in excess of two hundred acres. Such details to be supported by related financial documents including cancelled cheque, bank drafts, mortgage and other agreements or correspondence relating to purchase of the said lands; such details to be filed and served on or before 15th September 2014".

By a further order on 18th September 2014, the learned judge ordered that:

"1. Aquaduct Ltd is granted an extension of time to September 30, 2014 to comply with paragraph 1 of the Court's Order dated the 17th July 2014. Specifically, Aquaduct Ltd is directed to file an affidavit containing particulars and specific consisting of "Reasonable documentations information and explanation" reported provide by Monsieur Da Silva and Da Silva DeFreitas & Associates which informed their conclusion regarding the shareholders interest quantified in letter dated 11th April 2013 exhibited as "S27".

2. The Respondent is granted an extension of time to 9th October 2014 to file an affidavit in response.

3. The Claimant/Applicant is to file any affidavit in response on or before the 13th October 2014.

4. All affiants are to attend Court on the date of the adjourned hearing for cross examination.

5. Matter is adjourned to 16th October 2014.

6. Claimant has carriage of this order".

[21] In ordering as she did, the learned judge was in essence making a case management decision. A case management decision is peculiarly that of the first instance judge. As Lady Justice King stated in **Re U (children)**:[8]

> "It has always been the case that a case management decision is peculiarly that of the first instance judge and the Court of Appeal will be slow to interfere with such a determination".

In like vein, Lewison LJ opined in **Broughton v Kop Football (Cayman) Ltd**:[9]

> "Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion of the first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant

[8] [2015] EWCA Civ 334, para 32.

[9] [2012] EWCA Civ 1743, para. 51.

> factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decision as the judge. The question is whether the judge's decision was wrong in the sense that I have explained".

[22] In **Prince Abdulaziz v Apex Global Management Ltd & Anor**[10] Lord Neuberger stated that it would be inappropriate for an appellate court to reverse or otherwise interfere with a case management decision unless it was - using the words of Lewison J - "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree".

[23] As Lady Justice Arden stated in **Royal & Sun Alliance Insurance plc v T & N Limited**,[11] the principle that an appellate court should only interfere in matters of case management where a judge is plainly wrong is well-established and has been emphasised on many occasions since the introduction of the CPR. Case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process. Moreover, the judge dealing with case management is often better equipped to deal with case management issues.

[24] An appellate court has to be cognisant of the limited scope for appellate interference and the need to guard against frustration or derailment of case management by interlocutory appeals. Sir James Munby addressed the matter in **In The Matter of TG (A Child)**.[12] Sir James reminded that the circumstances in which an appeal court can or should interfere at the interlocutory stage with case management decisions are limited. An appeal court can interfere only if there has

[10] [2014] UKSC 64, para. 13.
[11] [2002] EWCA Civ 1964, para. 47.
[12] [2013] EWCA Civ 5, para. 36.

been serious error or if the case management judge has gone plainly wrong; otherwise the entire purpose of case management, which is to move cases forward as quickly as possible, will be frustrated, because cases are likely to be derailed by interlocutory appeals. I respectfully agree with those observations.

[25] Fairness is an important component of case management. The task of the case management judge is to arrange a trial which is fair. As Sir James Munby stated in **Re S-W (Children)**,[13] in the context of case management, fairness has two aspects: firstly, the case management hearing itself must be conducted fairly; secondly, the task of the case management judge is to arrange a trial that is fair.

[26] In **TG (A Child),** Sir Mark Hedley made some pertinent comments relating to case management, at paragraphs 83, 84 and 85. His Lordship explained that true case management is tailored to the actual case being managed. Although judges must comply with the Rules, case management remains an art. The judge should have the "feel" of the case and what is required for that case to be fairly and proportionately tried. Case management judges are expected to use intellect, imagination and judgment to procure the expeditious and fair hearing of the cases entrusted to them. I respectfully endorse those remarks.

[27] These very salutary principles cited in the cases above relating to case management, will guide me in determining this appeal. I recognise that CPR 48.8(4) entrusts the judge with a discretion to give directions for the resolution of any objection that cannot be resolved summarily. By giving directions, the judge prima facie accepted that the dispute as to the ownership of the shares could not be resolved summarily. The appellants submit that the directions adverted to in

[13] [2015] EWCA Civ. 27, para. 53.

rule 48.8(4)(b) are directions that would place a court in a position to resolve, fairly and properly, the substantial issues of fact and law that had arisen between the Estate and the Appellants as to the Estate's shareholding in Aquaduct. The appellants complain that the judge, having determined that a summary resolution of those issues was not possible, could not properly realise the objective of a fair resolution of that issue by the mere filing of further affidavit evidence. The appellants contend that given the importance of the issues, their resolution necessitated the rigours of a trial and most importantly, pleadings that would facilitate a fair trial. Yet the procedure adopted by the learned judge appeared to be akin to that of a summary resolution of the dispute. I agree with the arguments of the appellants and I am of the view that the judge was plainly wrong in her approach. The approach adopted by the learned judge was also unfair to the appellants.

[28] The appellants itemised the severe prejudice occasioned to them by the learned judge's approach with respect to the matter of the extent of the Estate's interest in Aquaduct. In that regard they point out that:

(a) The dispute between the Estate and the appellants has not been framed by pleadings setting out how Mr. Sylvester came by a 50% share of Aquaduct. The Estate must demonstrate an entitlement to compel Aquaduct, a registered company, to issue shares to it either in accordance with sections 238-245 of the Companies Act or otherwise. Or it must demonstrate its entitlement to (1) a declaration that shares currently standing in the names of other persons are in fact held on trust for it and (2) an order for the transfer of those shares to it or an order for the issue of shares to it.

(b) It is most unfair for the appellants to be placed in the position of defendants to a claim when they do not know what the factual foundation of that claim is. In a trial under the CPR, when such factual foundation is set out in a statement of case, a defendant would ordinarily be able to make an application to strike out the claim if the facts do not support or disclose a cause of action known to the law.

(c) In the proceedings currently engaging the learned judge, parties other than the Estate have been permitted to file numerous affidavits, each one expanding on the nature of the dispute and providing a different basis upon which the Estate's claim to shares could be predicated. Having permitted such evidence to be adduced, and permitted such parties to take part in the proceedings, the learned judge will presumably take into account all of the evidence before deciding the Estate's shareholding in Aquaduct.

(d) In the instant proceedings, the judgment creditor has been allowed to adduce evidence first, followed by the appellants, presumably on the basis that, in charging proceedings, the burden is on the interested party, who claims ownership of the asset sought to be charged to justify his claim to the asset. It is apparent therefore that despite the learned judge's professed position that she has not embarked on a summary resolution of the dispute that has arisen as to the ownership of the shares and that she has directed a trial of the dispute, she has, in fact, proceeded in a manner consistent with a summary hearing of the dispute within the charging proceedings.

[29] In the premises, Mr. Gilkes properly complains that the learned judge was wrong in dismissing the preliminary objection and embarking by way of proceedings that

are not in accordance with the normal incidents of a trial under the CPR and that the appellants have been caused substantial prejudice.

[30] I agree with Mr. Gilkes that the incidents of a formal trial under the CPR were imperative for the following reasons. A fair resolution of the important issue of the property rights of the various persons claiming ownership of the shares that ought to be charged in the charging proceedings required the filing of pleadings that defined the bases of the competing claims. The formal disclosure of documents would also be required to aid the proper ventilation of the issues along with the appropriate witness statements.

[31] A fixed date claim form would define the issues in contention between the parties and would have been addressed to and served upon the parties affected by the order(s) sought. It would also be clear that the claimant filing the fixed date claim form would have the burden of proving the claims made. The filing of affidavit evidence was no substitute for pleadings in determining the issues to be resolved and securing a fair resolution of them.

[32] In relation to issues of disclosure, discovery and reception and treatment of evidence. The directions given were not substitute for Parts 28 and 29 of the CPR which would have been fully in play had the nature of Her Ladyship's directions been addressed to the trial of the dispute of fact that arose, as distinct from the summary disposal of the dispute.

[33] Since the provisional charging order operated to charge 50% of the shares or interest in Aquaduct for the purpose of satisfying a debt owed by the Estate, notwithstanding that only 1/7th of the company's shares actually stood in the name of Mr. Sylvester, it followed that the learned judge, in making the provisional order

final, would have to interfere with the existing shareholding of the company either by declaring that some of the existing shareholders held their shares on trust for the Estate or by ordering Aquaduct to issue shares to the Estate, sufficient to give the Estate a 50% shareholding in the company. Making the provisional charging order final therefore necessitated the grant of relief to which the Estate needed to demonstrate its entitlement.

[34] It follows therefore that some or all of the other shareholders would have to be parties to the proceedings. Furthermore, since the said shareholders would be affected by the relief that the Estate would have to obtain, preliminary to making the provisional order final, the affected shareholders would be entitled to know the basis upon which their interests in Aquaduct were to be interfered with.

[35] Because the learned judge never sought to have the issues defined, or to consider the orders that she would ultimately have to make - preliminary to making the provisional order final, and their implications, she never considered that in the present case, the property rights of the affected shareholders were likely to be affected by such orders that she would ultimately have to make. She accordingly failed to ensure that all of the persons who would be affected by the orders that she would have to make were before the Court. Only two of Aquaduct's shareholders, namely, Mr. Da Silva and the Estate, are taking part as interested parties in the proceedings currently engaging Her Ladyship.

[36] The final two grounds of appeal, grounds E and F, relate to the prejudice caused by the manner in which the Court has allowed the matter to proceed. The issue of prejudice has been adequately addressed as the appellants have undoubtedly shown the prejudice occasioned to them by the judge's approach.

[37] For all the reasons advanced, the appeal is allowed. It is ordered that:

(a) the proceedings in which the Honourable judge is currently engaged in claim No. 86A of 2004 with a view to determining the issue of the second-named respondent's entitlement to half (50%) of Aquaduct's shares be set aside and the charging proceedings in claim No. 86A of 2004 stayed pending the hearing and determination of the said issue in the manner directed by this Honourable Court;

(b) the second-named respondent do, within two months, institute and serve proceedings, as claimant against the other shareholders of Aquaduct, as defendants, or against such of them as may be affected by the second named respondent's claim to half (50%) of the shares of Aquaduct, setting out in such proceedings what share is being claimed and the basis or bases of such claim;

(c) in default of filing of the said proceedings within the time specified by this Honourable Court, the said charging proceedings in claim No. 86A of 2004 do forthwith stand dismissed with costs to be paid by the respondents to the appellants;

(d) the costs of this appeal and such portion of the costs in the court below as the appellants may be entitled to recover consequent upon its success in this appeal be paid by the respondents to the appellants.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

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