IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
COMMERCIAL DIVISION
CLAIM NO:. BVIH(COM) 114 of 2017

B E T W E E N:

COMMERCIAL BANK OF DUBAI

Claimant/Applicant

-and-

[1] ABDALLA JUMA MAJID AL-SARI

First Defendant

[2] MOHAMED ABDALLA JUMA AL-SARI

[3] MAJID ABDALLA JUMA AL-SARI

Second and Third Defendants/Respondents

Appearances:

Ms Claire Goldstein, Christopher Pease and Sarah Bolt for the Applicant

Mr Scott Cruickshank for the Third Respondent

2019: 6 February

2019: 1 May

Application for final charging order-Whether British Virgin Islands court has jurisdiction to grant Charging Orders-Whether undertaking given in foreign court binds local court in making order

REASONS FOR DECISION

[1] Adderley, J: This was an application for a final charging order over the shares of British Virgin Islands ("BVI") defendant companies to enforce a judgment debt for US$118,103,593.87 plus interest at a rate of 1% per annum from 4 December 2012 to the date of the Order plus post judgment interest and costs. The debt was incurred by the claimant pursuant to a summary judgment ordered against them by Wallbank J on the 7 June 2018. The application was also for the appointment of Mr Paul Pretlove as receiver over the shares, and that the receiver be entitled to sell the shares to realize the value of shares in the BVI companies.

[2] On 19 February 2019 I granted the applications as prayed and stated that my reasons would follow. These are my reasons. They are bifurcated under two discrete headings, firstly the jurisdiction of the court to make charging orders, and secondly, whether a final charging order should be made in this case.

THE JURISDICTION TO MAKE CHARGING ORDERS

[3] As impacting the grant of this application, in argument the claimant's addressed a recent judgment in Stichting Nems v Gitlin BVIHC (COM) No 1 of 2018, unreported (19 December 2018) ("Stitchting Nems").

[4] In Stichting Nems I held that the BVI court had no jurisdiction to grant charging orders. I observed that "No legislation, statutory provision or common law authority which confers jurisdiction on the BVI court to make charging orders has been drawn to the courts attention." This was in circumstances where there was some authority namely Levy v Ken Sales & Marketing Ltd;[1] an authority that in the absence of statutory authority rules cannot confer jurisdiction on the court. I had stayed my decision for 4 months.

[5] On 19 February upon the application of the applicants, I did not follow Stichting Nems on the jurisdictional issue, because I concluded that the decision was *per incuriam* on the issue of jurisdiction only. All other issues in the judgment, subject to any appeal, stand.

[1] [2008] UKPC 6.

[6] As appears from the historical development of the legislation outlined below by the applicant the BVI court does in fact have jurisdiction to grant charging orders.

[7] The starting point in relation to the jurisdiction of the BVI Court is found in Part I of the Eastern Caribbean Supreme Court Act 1969 (the 1969 Act) sections 6 and 7. Section 6 provides as follows:

> **"**6. There shall be vested in the High Court all jurisdiction which was vested in the former Supreme Court by the Supreme Court Act or by any law of the legislature of the Territory or any other law for the time being in force in the Territory and such jurisdiction shall include:
>
> **"(i)** The jurisdiction which was vested in or capable of being exercised by all or any one or more of the judges of the former Supreme Court sitting in Court or Chambers or elsewhere when acting as judges or a judge pursuant to any Order in Council, Act, Ordinance or any other law for the time being in force in the Virgin Islands.
> **"(ii)** All the powers given to the former Supreme Court or to any judge or judges thereof by any Act, Ordinance or any other law for the time being in force in the Territory;
> **"(iii)** All ministerial powers, duties and authorities incidental to any and every part of that **jurisdiction."**

[8] The marginal note to section 7 reads "Jurisdiction of High Court". The section provides:

> **"**7. The High Court shall have and exercise within the Territory all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as on the first day of January 1940, were vested in the High Court of Justice in **England."**

[9] The effect of section 6 is, therefore, to vest in the Eastern Caribbean Supreme Court the jurisdiction that had vested in the former Supreme Court (of the Virgin Islands), while section 7 vested in the Eastern Caribbean Supreme Court the jurisdiction that had vested in the High Court of Justice in England as at 1 January 1940.

[10] It should be noted that these sections import jurisdiction, in contradistinction to the importation of procedure, as provided for in section 11. The marginal note to section 11 of the 1969 Act reads: "Practice in civil proceedings, and in probate, divorce, and matrimonial causes". The section provides:

> **"11.** The jurisdiction vested in the High court in civil proceedings, and in probate, divorce, and matrimonial causes, shall be exercised in accordance with the provisions of this Ordinance and any other law in operation in the Territory and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice **of England."**

[11] Section 7 clearly allows importation of legislation conferring the jurisdiction (existing as at 1 January 1940), and section11 (1) allows the importation of legislation setting the procedure for exercising that jurisdiction. This distinction has been made clear by numerous Court of Appeal decisions including, among others, Panacom International Inc [1997] 47 WIR 139, and Veda Doyle v Agnes Deane HCVAP 2011/20. Each of the Territories has a section 11(1) in its legislation which are worded verbatim except for the Territory's name. There are clear examples of where the Eastern Caribbean Supreme Court accepted jurisdiction under these provisions. In *Halliwell Assets Inc and others v Hornbeam Corporation*,[2] the Court of Appeal held that the BVI court could exercise the same costs jurisdiction that was conferred on the English court by section 50 of the 1925 Act; and in ***Matthews v O'Neal***,[3] a differently constituted court held that section 7 conferred on the BVI court a jurisdiction analogous to that conferred on the English court by section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 concerning interest on pre-judgment damages.

[12] The jurisdiction under the 1969 Act had been derived from the jurisdiction of the English High Court having been passed on through a series of BVI legislation from the Supreme Court (Civil Procedure) Act 1906 (s.46), the Supreme Court Act 1939 (s. 22), and finally the 1969 Act. The Supreme Courts Order 1967("the 1967 Order") (s 17) provided:

> **"Subject to the provisions of this Order and any other law in force in any of the States, the** Chief Justice and any other two judges of the Supreme Court selected by him may make rules of court for regulating the practice and procedure of the Court of Appeal and the High Court in **relation to their respective jurisdiction and powers in respect of any of the States."**

The ability to obtain charging orders existed under The Rules of the Supreme Court 1970 (Order 71) and under the Civil Procedure Rules 2000 by practice directions under the 1967 Order.

ORIGIN OF CHARGING ORDERS IN ENGLAND

[13] Prior to 1838, a judgment creditor could only pursue one of two general types of remedies. The judgment creditor could either—

1. seek to have the judgment debtor imprisoned until the judgment was satisfied, or

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[2] BVIHCMAP 1 of 2015, unreported (12 October 2015) (Pereira CJ, Thom and Gonsalves JJA concurring).

[3] BVIHCVAP 19 of 2015, unreported (16 January 2018) (Michel JA, Blenman and Stollmeyer JJA concurring).

2. seek to have the judgment satisfied out of the judgment debtor's assets by issuing a writ of *elegit* or *fieri facias*.[4]

[14] The writs of *elegit* and *fi fa*, however, could only reach the judgment debtor's legal interests. Equitable interests were beyond its grasp, as were intangibles including money.[5]

Considerable development however was made by the passing of the Judgments Acts 1838 and 1840. This limited the use of imprisonment and introduced a new remedy which could not be granted under the common law, namely the charging order.

[15] Section 14 of the Judgments Act 1838 allowed a judgment creditor to obtain a charging order on—

> **"**...any government stock, funds or annuities, or any stock or shares of or in any public company **in England (whether incorporated or not) standing in [the debtor's] name in his own right or in the** name of any person in trust for him [and] it shall be lawful for a Judge of one of the Superior Courts, on application of any Judgment Creditor, to order that such Stock, Funds, Annuities or Shares or such of them or such Part thereof respectively as he shall think fit, shall stand **charged**…**"**

[16] Section 1 of the Judgments Act 1840 provided that the provisions of section 14 of the 1838 Act—

> **"**...shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well as in any such stock, funds, annuities or shares as [are mentioned in section 14 of the 1838 Act] as also in the **dividends, interest or annual produce of any such stock, funds, annuities, or shares."**

[17] The 1838 and 1840 Acts therefore vested jurisdiction in the court to grant such orders against company shares, and the English court regularly exercised its power to make charging orders under the 1838 and 1840 Acts in relation to shares in private companies.[6] As stated by Lord Bingham in *Société Eram Ltd v Cie International at [10]*—

> *"As many a claimant has learned to his cost, it is one thing to recover a favourable judgment, it may prove quite another to enforce it against an unscrupulous defendant. But an unenforceable judgment is at best valueless, at worst a source of additional loss. This was a problem which our Victorian forebears addressed with characteristic energy and pragmatism. The Judgments Acts of 1838 (1 & 2 Vict c 110) and 1840 (3 & 4 Vict c 82) allowed choses in action to be taken in execution."*[7]

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4 Hansard, House of Lords debate on the Charging Orders Bill, 2 July 1979 **[24]**.

5 Equitable interests could be enforced by way of the appointment of a receiver by way of equitable execution.

6 See, *eg*, *Gill v The Continental Union Gas Company Limited* (1872) LR 7 Exch 332 ; *Daponte v Schubert and Roy Nominees Limited* [1939] Ch 958 ; and *Hawks v McArthur and others* [1951] 1 All ER 21 (Ch) .

7 [2003] UKHL 30, [2004] 1 AC 260 at 267B to C, para 10: **[**.

The creation of the charging order enabled a judgment creditor to obtain orders against land and against company shares and government securities.

[18] As Lord Bingham goes on to describe, the introduction of charging orders was closely followed by the garnishee order by the Common Law Procedure Act 1854 (17 & 18 Vict c 125), which made it lawful for a judge to attach debts owed to the judgment debtor by third parties.[8]

[19] The histories of the charging order and the garnishee order are closely linked and essentially follow the same jurisdictional pathway after 1875, when the procedure established by the Acts became regulated by the Rules of Court scheduled to the Supreme Court of Judicature Act 1875.

[20] The Supreme Court of Judicature Act 1875 (*the 1875 Act*) introduced what is a recognisably modern system and introduced a consolidated procedural system which included charging orders by Order 46. Order 46, as set out in the First Schedule of the 1875 Act, provided as follows:

> **"CHARGING OF STOCK OR SHARES OR** DISTRINGAS
>
> **"1** An order charging stock or shares may be made by any Divisional Court or by any judge and the proceedings for obtaining such order shall be such as are directed and the effect shall be such as is provided by 1&2 Vict c 110 ss 14 and 15 [ie, the 1838 Act] and 3&4 Vict **c 82 s 1 [ie, the 1840 Act.]"**

[21] Other relevant statutory provisions include section 16 of the 1875 Act, which provided that—

> **"The Rules of Court in the First Schedule to this Act shall come into operation at the** commencement of this Act and as to all matters to which they extend shall thenceforth regulate the proceedings in the High Court of Justice and Court of Appeal. **"**

[22] Section 21 of the 1875 Act contained a saving provision that continued any jurisdiction that had been granted by a previous act of parliament. That provided as follows:

> **"Save as by the principal Act or this Act or by any Rules of Court, may be otherwise provided, all** forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively under or by virtue of any law, custom, general order or rules whatsoever and which are not inconsistent with the principal Act or this Act or any rules of Court may continue to be used and practiced in the said High Court of Justice and the said Court of Appeal respectively , in such and the like cases, and for such and the like purposes as those to which they would have been applicable in the respective courts of which the jurisdiction **is so transferred, if the principal Act and this Act had not passed".**

[23] Section 24 of the 1875 Act further provided—

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[8] See *Société Eram Ltd v Cie International* [2004] 1 AC 260 at 267B to 268G, paras 10 to 11: .

> **"Where any provisions in respect of the practice or procedure of any courts the jurisdi**ction of which is transferred by the principal Act or this Act to the High Court of Justice or the Court of Appeal, are contained in any Act of Parliament, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary for adapting the same to the High Court **of Justice and the Court of Appeal ..."**

[24] The effect of the 1875 Act in relation to the jurisdiction to grant charging orders therefore was—

1.1 to continue the jurisdiction which had been granted under the 1838 and 1840 Acts, and

1.2 to delegate to the rules attached to the Act the procedure as to the exercise of that jurisdiction.

[25] In 1883 the English Rules of the Supreme Court were promulgated pursuant to section 24 of the Supreme Court of Judicature Act. These maintained the original jurisdiction (stemming from the 1838 and 1840 Acts) and continued the same language as the existing Order 46.

[26] The final development in England and Wales relevant to the issue of jurisdiction came in 1925 pursuant to the Supreme Court of Judicature (Consolidation) Act 1925 (*the 1925 Act*).

[27] Section 18 of the 1925 Act provided that all of the jurisdiction that was formerly vested in or capable of being exercised by any of the courts listed therein was to vest in the High Court of Justice in England.

[28] In addition, section 99(1)(f) of the 1925 Act provided that rules of court could be made for—

> **"regulating and prescribing the procedure and practice to be followed in the Court of Appeal or** the High Court in cases in which the procedure or practice is regulated by enactments in force immediately before the commencement of this Act or by any provisions of this Act re-enacting any such enactments (including so much of any of the Acts set out in the First Schedule to this **Act as specified in the third column of that Schedule)[.]"**

[29] The First Schedule is headed "ENACTMENTS CONTAINING AND REGULATING MATTERS WITH RESPECT TO WHICH RULES OF COURT MAY BE MADE". The Judgments Acts 1838 and 1840 are included amongst those Acts referred to in section 99(1)(f). In addition, section 99(1)(g) gave power to rules of court to repeal any legislation concerning matters in relation to which rules were made under section 99.

[30] In summary, therefore, the jurisdiction to grant charging orders was originally contained in the 1838 and 1840 Acts but over the course of the 19th and 20th centuries, the jurisdiction was replaced and

regulated by procedural rules (rather than statutory provisions). This is recorded by the Law Commission's Report No 74 (see, in particular, paragraphs 18 to 20).[9]

THE APPLICATIONS

[31] The applications in this case were for a final charging order, for the appointment of Mr Paul Pretlove as receiver over the shares, and that the receiver be entitled to sell the shares and to realize the value of shares in the BVI companies.

[32] The applications followed an unsuccessful application by the third defendant to set aside the Order for summary judgment of Wallbank J made the 7 June 2018. That judgment was the result of a suit at common law by the Commercial Bank of Dubai in the BVI on a final and conclusive money judgment dated 27 February 2017 from the Sharjah Federal Appeal Court of the United Arab Emirates ("the Sharjah Judgment").

[33] The application to set aside was based on arguments related to service and on the basis of an undertaking given to the English court. The arguments with respect to there not having been proper service was found to be unsupported by the evidence, and are also contrary to the order on its face. I therefore dismissed those arguments.

[34] By seeking enforcement in the BVI court the third respondent argued that the claimant was in breach of an undertaking made to the High Court of England Commercial Division in Action 1396 of 2014 where a Freezing Order was made in favour of the Commercial bank of Dubai against the defendants, and against Westdene Investment Limited, Hortin Holdings Limited and Lodge Hill Limited, (the BVI companies whose shares are sought to be charged), as the Fourth to Sixth "Chabra" defendants.

[35] The Schedule B undertaking in the Freezing Order at paragraph 8 reads as follows:

> "The applicant will not without the permission of the court seek to enforce this order [the Freezing Order] in any country outside England and Wales or seek an order of a similar

[9] In relation to garnishee orders, the corresponding move from statutory foundation to Rules of Court is as explained in *Société Eram Ltd v Cie International*, above, at 267, [10] and [11] (Lord Bingham).

nature including orders conferring a charge or other security against the Respondents or the respondents' assets, other than (i) in the Sharjah Proceedings, and (ii) against the Fourth to Sixth Respondents in the Courts of the British Virgin Islands.

[36] Since on its face enforcement actions in the Sharjah Proceedings and against the BVI companies in the courts of the BVI are expressly exempted from the undertaking, the third respondent's objection on this ground is still born. In addition, the English Freezing injunction was obtained in support of and pending the BVI enforcement action, and in as much as the BVI companies were joined as "Chabra" defendants the Freezing order itself envisaged that the assets of those companies would be used for the purpose of enforcement.

[37] Furthermore the form of undertaking is not engaged if the court in the country outside England and Wales is, as in this case, exercising its own independent discretion to grant a remedy independent of and not deriving from the English order (see *E & Ors v M; F v M.* [1990] Ch 48), or where the order sought abroad does not amount to the direct or effective enforcement of the freezing order (see *Akcine Bendrove Bankaa Snoras v Vladimir Antonov, Raimondas Baranauskas, Poetpin Limited*). The charging order is such an independent order where this court is exercising its own independent discretion. The form of undertaking in the English freezing order has its origin in the worldwide freezing injunction obtained in Derby & Co v Weldon the purpose of which in that case was to preclude the plaintiffs from making an application to a foreign court to enforce a freezing injunction without first seeking leave of the English court. The English court wanted to ensure that under the law of that country such an application would have a substantially similar effect to a mareva injunction in England and not a more far reaching effect (such as the assets being attached as a form of security for the plaintiff's claims, which is not the purpose of a mareva injunction. I dismissed the respondents' submission on that ground also).

THE FINAL CHARGING ORDER AND SALE OF SHARES

[38] A provisional charging order was granted ex parte in accordance with CPR Part 48.7 on 13 September 2018. In order for the court to grant a final charging order the provisional charging order must have been served on the judgment debtors and interested persons pursuant to CPR 48.6. On the evidence the provisional charging order and the necessary documents have been duly served on interested parties. The persons upon whom the documents must be served was set out in the Sixth affidavit of Souhayel Tayeb filed in support of the provisional charging order

application. They included the second and third defendants, the BVI companies, the Registered Agent, Trident Trust Company (BVI) Limited and Union National Bank, which is the only other known creditor. Service was deemed to have taken place on 26 September 2018, at least 28 days before the hearing for the final charging order as required by CPR48.7(5). The hearing was also advertised in a local newspaper. The affidavit of service was filed on 15 October and the hearing date set out in the provisional charging order was the 25 October 2018. On the evidence I am satisfied that the provisional charging order was served on the judgment debtor.

[39] Part 48(8)(4) of the CPR provides that if the court is satisfied that the provisional charging order has been served on the judgment debtor the court has the power at the hearing to-

(a) Discharge the provisional charging order

(b) Give directions for the resolution of any objection that cannot be fairly resolved summarily; or

(c) Make a final charging order

[40] The English Court of Appeal has given guiding principles for the exercise of the discretion to grant a final charging order. In Roberts Petroleum Ltd v Bernard Kenny Ltd [1982] 1 W.L.R. 301 at 307 Lord Brandon stated:

> "In cases where a charging order being made absolute is not precluded by a winding up order, those principles can, in my view, be summarized as follows:
>
> (1) The question whether a charging order nisi should be made absolute is on for the discretion of the court
>
> (2) The burden of showing cause why a charging order nisi should not be made absolute is on the judgment debtor.
>
> (3) For the purpose of the exercise of the court's discretion there is, in general at any rate, no material difference between the making absolute of a charging order nisi on the one hand and a garnishee order nisi on the other.
>
> (4) In exercising the discretion the court has both the right and the duty to take into account all the circumstances of any particular case, whether such circumstances arose before or after the making of the order nisi.

(5) The court should so exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is to say, the judgment creditor, the judgment debtor, and all unsecured creditors."

[41] The defendant opposed the granting of the final charging order on the sole ground of the breach of the undertaking discussed earlier. The applicant objected to the court considering the affidavit in which it was raised on the ground that it was late but on the principles enunciated above that would not be fair and so I dismissed the objection. Nevertheless,, I have already given reasons for having dismissed that objection on the merits. In the circumstances there was no technical impediment to the court granting the final charging order.

[42] I therefore made a final charging order.

[43] I accepted the evidence and submission of the applicant that in the interests of the overriding objective of the rules and to save costs and delay for all parties the court should make an order for the sale of the shares on this application. I therefore acceded to the application and appointed Paul Pretlove of Kalo (BVI) Limited as the receiver with authority to sell the shares and to realize the value of the assets in the BVI companies.

[44] Costs to the applicant to be assessed in accordance with the Rules if not agreed.

[45] I wish to thank counsel for their research especially in relation to the jurisdictional issue which was substantially followed in the judgment.

Hon Mr Justice K. Neville Adderley
Commercial Court Judge

By the Court

Registrar