

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G 216 OF 2016

BETWEEN:

**ROLANDO HYDES AND DAWN HYDES
(TRADING AS GREEN VALLEY NURSERY)**

Plaintiffs

AND

**(1) EMPIRE DEVELOPMENT COMPANY LIMITED
(2) LEWIS EBANKS**

Defendants

Appearances:

Mr. Phillip Ebanks for the Plaintiffs
Mr. Lewis Ebanks in person for the 1st Defendant

Heard:

6 February 2019

Draft Judgment circulated: 7 February 2019

Final Judgment delivered: 12 February 2019



HEADNOTE

Civil procedure - execution - charging order - principles to be applied when making a charging order absolute - burden of proof on the Defendant - opposition to making of charging order in circumstances where there is no equity in the relevant property

JUDGMENT

The Background

1. The Plaintiffs apply for the charging order *nisi* which had been imposed over the 1st Defendant's ("the Defendant") property at Registration Section South Sound, Block 15C, Parcel 191 ("the Property") to be made absolute. The Property is bare land which is a stand-alone block and parcel.

2. On 16 April 2018 the Plaintiffs obtained judgment in respect of unpaid invoices in relation to the supply of plants and provision of nursery services to the Defendants. The Defendant was found liable in the sum of CI\$21,754.30 and was ordered to pay the Plaintiffs' costs on the standard basis. The claim against the 2nd Defendant was dismissed.

3. The Plaintiffs seek an order that the Property stand charged for:
 - (i) the sum of CI\$21,754.30 which is outstanding and due to the Plaintiffs from the Defendant, pursuant to the 16 April 2018 Order;
 - (ii) interest on the above sum for the period commencing from the date of filing of the Writ (22 November 2016) until the sum is paid. Interest was CI\$992.36 as at 22 October 2018 and increasing at a daily interest of CI\$1.42, accruing;
 - (iii) costs pursuant to the Default Costs Order dated 3 October 2018, in the sum of CI\$12,45; and
 - (iv) legal costs of the charging application, such sum to be added to the sums due under the charge over the Property if not settled.



The Power to Impose a Charging Order

4. The power for the Court to make a charging order is set out at GCR O.50, r.1.
5. Order 50, r.2 sets out the requirements for an Ex-parte Application for a Notice of Order to Show Cause, which were complied with in course of that application before McMillan J. on the November 2018. A copy of McMillan J.'s Notice to Show Cause was served on the Defendant on 3 January 2019. At the first hearing of the Notice on 10 January 2019, I ordered that a copy of the Notice to Show Cause be served on the Cayman National Bank ("the Bank") as the Defendant has a loan with them secured by a first charge against the Property. A copy of the Notice was served on the Bank on 16 January 2019. The Bank has not sought to play any part in these proceedings and has not contacted the parties outlining any concerns about the orders sought by the Plaintiffs.
6. Order 50, r.3 relates to the types of and form of orders that may be made on further consideration.
7. As this application relates to an order imposing a charge on an interest in land Order 50, rule 4A applies as follows:
 - (1) An order made under rule 1 in respect of any interest in land shall be registered in the incumbrances section of the relevant land register.
 - (2) When making an order, in Form 33 of Appendix I, to which this rule applies the Judge shall also sign an order in Form RL9A and it shall be the judgment



creditor's duty to present the original of such order, together with at least three copies, to the Registrar of Lands for registration.

- (3) When the judgment creditor receives back from the Registrar of Lands the receipted copies of the order, he shall forthwith file one copy in Court and serve one copy on the judgment debtor.
- (4) If an order nisi to which this rule applies –
 - (a) is made absolute without any modification, the fact that it is made absolute shall not be registered;
 - (b) is made absolute with modifications, a variation of charge order in Form RL10B shall be signed by the Judge; or
 - (c) is discharged, a discharge of charge order in Form RL10A shall be signed by the Judge,

and it shall be the duty of the judgment creditor to present such order together with the appropriate number of copies to the Registrar of Lands and file and serve the receipted copies in accordance with the provisions of paragraph (3) of this rule.

- (5) If an order to which this rule applies relates to more than one registered parcel of land, the Judge shall sign separate orders, Form RL9A or RL10A or RL10B, as the case may be, in respect of each parcel.
- (6) A charging order or variation of charge or discharge of a charging order to which this rule applies shall take effect from the date upon which it is registered in the incumbrances section of the relevant land register.



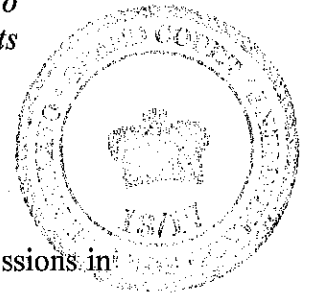
The Principles to be Applied when Making a Charging Order Absolute

8. In *Vento and Others v Westminster Hope & Turnberry Ltd* [2015] (2) CILR 249 Chief Justice Smellie helpfully outlined the factors which the Grand Court should take into account when considering making a charging order absolute. The Chief Justice, with reference to paragraph 1 of Schedule 3 of the Judicature Law (2013 Revision), stated that in exercising its discretion as to whether to make a charging order the Court must consider all of the circumstances of the case and, in particular, any evidence before it as to (i) the personal circumstances of the debtor; and (ii) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order. The Chief Justice opined that the principles in exercising the Court's discretion in granting a charging order are "well settled" and in this regard he highlighted the "classic statement" of Lord Brandon at page 690 in *Roberts Petroleum Ltd v Bernard Kenny (in liquidation)* [1982] 1 All ER 685, which he felt should apply. Lord Brandon's dicta are as follows:

"In cases where a charging order being made absolute is not precluded by a winding-up order, those principles can, in my view, be summarised as follows:

- 1. The question whether a charging order nisi should be made absolute is one 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 its 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 equity, so far as possible, to all the various parties involved, that is to say the judgment creditor, the judgment debtor, and all other unsecured creditors.*
6. *The following combination of circumstances, if proved to the satisfaction of the court, will generally justify the court in exercising its discretion by refusing to make the order absolute: (i) the fact that the judgment debtor is insolvent; and (ii) the fact that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding.*
7. *In the absence of the combination of the circumstances referred to in (6) above, the court will generally be justified in exercising its discretion by making the order absolute."*

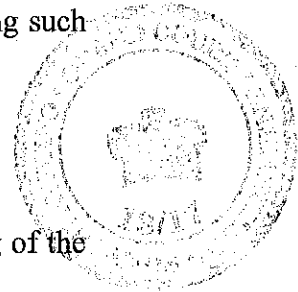


The Defendant's Contentions

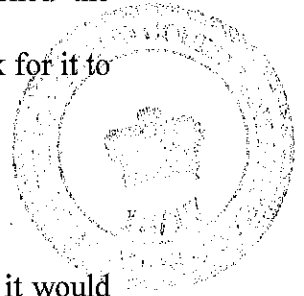
9. Mr. Lewis Ebanks, the sole director of the Defendant, sets out his submissions in his affidavit sworn on 30 January 2019, in his oral evidence given at this hearing and in his oral submissions made at the hearing. He highlights that there is no equity in the Property. At the hearing Mr. Ebanks presented a valuation report prepared by Charterland, chartered surveyors, dated 5 August 2016. In the report Charterland gives the Property a market value of CI\$350,000 (net) and a value of \$280,000 (net) with the special assumption that the sale of the Property can be completed within 90 days. Mr. Ebanks also produced at the hearing an email dated 22 November 2018 from a manager in the Debt Collection and Recoveries Department of the Bank indicating that the loan which is secured against the Property had an approximate outstanding balance of US\$1,193,305.26. Mr. Ebanks indicated that that balance has increased since November 2018 due to additional interest charges. Therefore, on the evidence before me, the Property has a considerable negative equity at this time.

10. In light of the above, it is rightly contended that the Plaintiffs would not have the judgment satisfied if the Property were sold at this time as there would be nothing left after the first charged security to the Bank was discharged upon the sale of the Property. As a consequence, it is argued that when considering any prejudice to the Plaintiffs if no charging order was made absolute, there would be no point in the Plaintiffs, who are the only creditor seeking a charging order, obtaining such an order.

11. The Defendant contends that it would be unduly prejudiced by the making of the charging order as it may prevent the progression of a development project that it is currently working on. Regrettably, Mr. Ebanks was rather vague in his evidence in chief and at paragraph 6 of his affidavit about the intended use of the Property and the status of the apparent development being undertaken on the Property. He simply said that the Defendant was not currently engaged in any economic activity, but was continuing to work diligently towards new development opportunities which it felt confident would enable it to meet the obligations under the judgement debt "*in the not too distant future*". It was only during cross-examination that helpful further details emerged. Counsel for the Plaintiffs produced online documentation from CIREBA which showed that RE/MAX Realtors were marketing phase 3 of the development on the said Property. During cross-examination Mr. Ebanks stated that he did not know how many units had been reserved, but he then accepted that twenty two units may have been reserved after Counsel had put this figure to him. Mr. Ebanks then stated that the project



involved the building of sixteen one-bedroom units costing \$239,000 each, and eleven two-bedroom units costing \$319,000 each, and four units costing \$379,000 each. It is clearly a substantial project, with potential income from sales of over \$7 million. The RE/MAX material placed before the Court states that completion of the Property, depending on the building selected, should be between 12 to 24 months and that the balance would be due upon completion, which was scheduled to be on 24 October 2018. This makes it appear that the project is beyond merely diligently working towards a future development. Mr. Ebanks stated that RE/MAX had those dates wrong, because the project had only reached the reservation stage and that he would need to seek financing from the Bank for it to proceed.



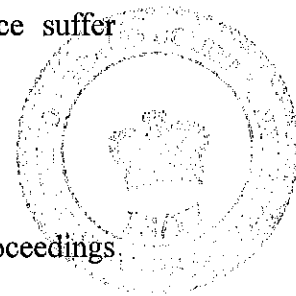
12. Mr. Ebanks highlighted that if a charge was placed against the Property, it would cause great difficulties in him raising financing from the Bank. There is no evidence from the Bank to support such a contention. In fact there was no meaningful evidence about the Bank's intended or possible financial support for the development project. Any Bank would of course have to be made aware of the judgment debt against the Defendant if that party sought to borrow any sums, whether for this proposed development or for other reasons. He contended that it may also put off prospective purchasers if they made a search in relation to the Property. He contends that the above would be the prejudicial effect of the making of the order and that, when seeking to do equity for the parties, it would

be disproportionate to the benefits (if any) that the Plaintiffs would have due to the negative equity in the Property.

13. The Defendant contends that if the charge is made absolute and the Plaintiffs subsequently seek to enforce the charge, the Bank would be compelled to foreclose on the Property and that the Bank may as a consequence suffer prejudice itself.

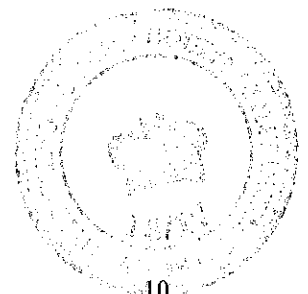
14. In light of the Bank's apparent disinterest to involve itself in the proceedings before me, it having been notified of the Notice and of today's hearing, the Defendant does not seek to forcefully argue any prejudice to that secured party's interest in relation to the Property. Similarly, in light of the Bank's apparent lack of concern about these proceedings, the Defendant does not seek to forcefully pursue its submission concerning its obligations not to take any action which might prejudice the Bank's security attached to the Property.

15. Neither party was able to produce any case authority outlining how a court may exercise its discretion in a case where there is limited or no equity in the relevant property. Mr. Ebanks contended that the case precedent could be found and that this is because, in such instances, the Court would never make a charging order absolute. From my experience, very few charging order applications are opposed in the Cayman Islands. That does not mean that a defendant, when seeking to discharge its burden of showing why a charging order *nisi* should not be made



absolute, cannot seek to argue the equity point to try to persuade the Court that a charging order should not be made.

16. At the hearing I supplied the parties with a Judgment of H.H. Judge Li in the case of *Ip Hon Nam v Chan Moon Kau* Civil Action 15849 of 2000 delivered in the District Court of the Hong Kong special administrative region on the 11 February 2002. That judgment is, of course, in no way binding on this Court and there are distinguishing features, in particular that it is an action involving a property which is the matrimonial home and residence of the defendant and his family. However, the approach of the Learned Judge is helpful, as the arguments being relied upon by the Defendant in the matter before me are similar to those made on behalf of the Defendant in that case. In addition, the general principles governing the exercise of the discretion of the Court in that jurisdiction are very similar to those applied in the Cayman Islands. At the outset of the hearing, Counsel for the Plaintiffs appeared to argue that the fact that there may be little or no equity in property is not a factor the Court should consider at a charging order hearing. I agree with H.H. Judge Li that “*weighty consideration*” may be given to the fact that there is negative equity in a property, especially if an order for sale is sought. I am also satisfied that the negative equity factor is an historically recognised possible argument when there is opposition to the charging order being made absolute, even in the absence of case precedent placed before this Court.



The Plaintiffs' Contentions

17. It appears that, although not specifically agreeing with the figures presented by the Defendant, the Plaintiffs now accept that there is presently considerable negative equity in the Property. The Plaintiffs do not accept, although they did not explore it during cross-examination to any meaningful degree, that the Defendant had other financial interests, for example in bank accounts or chattels.

18. The Plaintiffs adopt the view of Batts J. expressed at paragraph 17 in his ruling in the Supreme Court of Jamaica case of *First Global Bank Limited v D'Oyden Williams and Tracey Ann Williams* [2015] JMSC Civil 11), namely that:

"The purpose of the Charging Order is to give notice to all the world that if the joint owners decide to treat with the premises there is a third party who has a judgement awaiting satisfaction with respect to one or other or both joint owners"

19. The Plaintiffs contend that this purpose becomes even more important in the current case where it is evident that the first defendant seeks to further encumber the land with additional borrowing to fund the development project. If no charge was placed against the Property, this would mean that the Plaintiffs would fall further behind in the 'pecking order' in relation to the proceeds of any sale from the Property. In addition, the Plaintiffs are aware that the Defendant was unable to meet its obligations for services they provided to it, and that there would be a concern that future service providers for the intended project may find themselves in the same position and then seek to have charges placed against the Property.

This would further prejudice the Plaintiffs' position in relating to enforcement of its judgment debt.

20. Counsel for the Plaintiffs made it patently clear at the hearing, saying on instructions, that if the charging order were made absolute they would not, unless the equity position changed, seek to have the Property sold. Counsel conceded that there would be no point in doing that due to the negative equity. If an application were made to the Court for an order for sale by private treaty, the Court would be obliged to consider the negative equity and would be unlikely to make such an order in such circumstances as it would bring no benefit to any party.



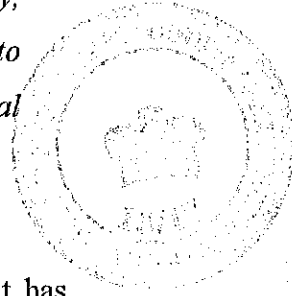
21. However, the Plaintiffs argue that the charge is necessary because the Defendant is clearly conducting its affairs in a way that may either affect the property and increase the value of the Property by means of development or result in financial gain.

Conclusions

22. In the circumstances of the case before me I agree with the well-expressed sentiments of H.H Judge Li in *IP Hon Nam v Chan Moon Kau*, when the Learned Judge stated:

“Many things may happen between the time of making of the charging order absolute and the time when the court is obliged to consider making an order for sale. The property market may have risen. The judgment

debtor may have found the means to discharge the bank's mortgage, thereby leaving himself with valuable equity in the property. For the time being, i.e on an application for charging order, the principal consideration, after taking into account all factors in circumstances is whether the property should be preserved so that perhaps someday, sooner or later, judgment may be satisfied by taking further steps to enforce the charging order. In general, there cannot be hardly any real ground to oppose a preservative charging order."



23. I am not satisfied that on the evidence produced by the Defendant that it has discharged its burden of showing why the order *nisi* should not be made absolute. The contention that prejudice would be caused is not backed up by hard evidence, for example from the potential lending bank who will, in any event, be aware of the judgment debt. The Defendant is intending to embark on a significant development project which may generate income of \$7 million, yet it makes no suggestion about other ways in which it will satisfy a CI\$21,754.30 judgment debt, save to say at the end of the project. A submission that the Grand Court should not make the order absolute in order to place a veil disguising the Defendant's current inability to meet its obligation under the judgment debt so as to not 'scare off' prospective purchasers of units at the development is not an attractive one.
24. Accordingly, taking into account all of the circumstances of this case (whether they arose before or after making of the order *nisi*) when exercising my discretion

so as to do equity, so far as possible, all the parties involved, I am satisfied that it is appropriate to make the charging order absolute.

25. Having regard to the Notice to Show Cause ordered by McMillan J. the Defendant's interest in the Property shall stand charge for the payment of:
- (i) the sum of CI\$21,754.30 which is outstanding and due to the Plaintiffs from the Defendant, pursuant to the 16 April 2018 order;
 - (ii) interest on the above sum for the period commencing from the date of filing of the Writ (22 November 2016) until the sum is paid. Interest was CI\$992.36 as at 22 October 2018 and increasing at a daily interest of CI\$1.42, accruing; and
 - (iii) costs pursuant to the default costs order dated 3 October 2018, in the sum of CI\$12,450; and

Costs

26. As the standard rule is that costs follow the event, and as the Plaintiffs have been the wholly successful party, my preliminary view is that the Defendant should pay the Plaintiffs' costs of this application on the standard basis, to be taxed if not agreed. However, if either party wishes to be heard on the issue of costs before a final costs order is made, then they must notify the Court in the appropriate manner no later than seven days after receipt of the final version of this judgement. If they fail to do so then an order will be made for the Defendant to

pay the Plaintiffs' costs of this application on the standard basis, to be taxed if not agreed.

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a horizontal line that extends to the right and then loops back under the signature.

THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT

