

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No.: G 39 of 2020

IN THE MATTER OF AN APPLICATION MADE PURSUANT TO THE THIRD SCHEDULE OF THE
JUDICATURE LAW (2017 REVISION) AND GCR ORDER 50

AND IN THE MATTER OF AN APPLICATION BY MCGLYNN ENTERPRISES LTD TO OBTAIN A
CHARGE OVER REAL PROPERTY OWNED BY MAGDA-ZOE EMBURY SITUATED AT PROSPECT,
BLOCK 22D, PARCEL 118 AND SAVANNAH, BLOCK 27C, PARCEL 203

IN CHAMBERS

Appearances: Mr. Andrew Jackson of Appleby for McGlynn Enterprises
Ltd, *ex parte*

Before: The Hon. Justice Robin McMillan
Heard: 7 May 2020

Judgment Delivered: 7 May 2020

Reasons for Judgment: 21 May 2020



HEADNOTE

Costs in respect of Charging Order Applications – The distinction between untaxed and unascertained costs previously awarded and the costs of the Application itself - The need to protect a judgment debtor from an inappropriate and crushing burden

REASONS FOR JUDGMENT

1. This matter arises from an *ex parte* Summons Application made pursuant to the Third Schedule of the Judicature Law (2017) and Order 50 of the Grand Court Rules 1995 (Revised Edition) (“GCR”).

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2. McGlynn Enterprises Ltd (“the Applicant”) sought charging orders to secure payment of money due under a Summary Judgment of Gunn Act. J dated 22 January 2019 against Magda-Zoe Embury (“the Respondent”), under which the Respondent was required to pay the sum of US\$48,795.79, with interest and the sum of US\$73,824.90 with interest.
3. GCR O.50 provides a two-stage process in respect of charging orders:
 - 3.1. Pursuant to GCR O.50, r.1(2), the judgment creditor must first seek a charging order to show cause by *ex parte* originating motion, being “*an order, made in Form No. 33 in Appendix 1, to show cause, specifying the time and place for further consideration of the matter and imposing the charge in any event until that time*”.
 - 3.2. Secondly, pursuant to GCR O.50, r.3, any charging order granted on the *ex parte* application may then be made absolute, with or without modifications, or discharged upon further consideration at the directed *inter partes* hearing.
4. Accordingly, this Application has been made by *ex parte* Originating Motion. Furthermore, the draft Order was submitted to the Court in Form No. 33 of Appendix 1 to the GCR.
5. The Court on 7 May 2020 had no difficulty on the facts in granting the Application, with the requirement in due course that it was open to the Respondent to show cause to the contrary at the subsequent *inter partes* hearing.
6. However at the *ex parte* hearing an issue also arose as to whether it was open to the Court to include the costs so far awarded in the proceedings in the amount to be secured by the Charging Orders themselves.
7. Having considered the question and having been shown by counsel entirely properly relevant authority on it, the Court declined to include those broader awarded costs on the basis that the Court had no jurisdiction to do so.



8. In reaching this conclusion, the Court gave careful regard to the terms of Form 33, which stipulates that the asset shall stand charged with the payment of the relevant amount *“together with the costs of this application.”*
9. Significantly there is no reference in Form 33 to any unascertained costs being awarded which are of any wider scope than those of the immediate Application itself.
10. This interpretation is further validated by certain dicta of Walton J in *A & M Records Inc. v. Darakdijan* [1975] 1 W.L.R. 1610.
11. The learned Judge states at page 1613 A-D:

“But can one impose a charge before there is an ascertained sum, or before, in the case of costs, the costs have been taxed? My answer to that is clearly in the negative, and I arrive at it primarily from the point of view that this is quite clearly a section for the enforcement of judgments and orders; it is not a section designed to impose in any way a penalty or disability on the judgment debtor because he has to pay a sum. If it were not restricted to ascertained sums but could be imposed for any sums which are unascertained at the date of the imposition of the charging order, for example, sums due under an inquiry as to damages, or even merely, without going outside the boundaries of the present case, in respect of unascertained costs, it seems to me that the most alarming results would follow. It would mean, in substance, that the charge having been imposed, the asset, whatever it was, on which the charge was imposed, was in the hands of the judgment debtor completely sterilised, because he could not dispose of it or raise money upon it in any way, since it would be utterly impossible for the intending purchaser or lender of money – mortgagee – to know what the amount of the equity remaining in the debtor might or might not finally turn out to be. It would be an absolutely crushing burden upon the judgment debtor”.



12. The Court was invited to conclude that this reasoning was somehow unconvincing, particularly in relation to untaxed costs.
13. With great respect, this Court is constrained to disagree. The successful party's costs could have been taxed and thus ascertained before the present Application was brought before the Court had the Applicant been so minded to take that step at an earlier phase.
14. There is no indication in Walton J's judgment that the terms of a Form equivalent to Form 33 were considered. The main question before the learned judge related to the power to impose a charge under section 35 of the Administration of Justice 1956.
15. Moreover, as Walton J has pointed out, the course proposed could impose an indeterminate and crushing burden upon the judgment debtor. Because the judgment debtor is not represented at this stage of the proceedings to raise the objection on her own behalf, it is entirely appropriate in the interests of justice that it should be determined by the Court.
16. For these reasons, for the purpose of the charges, costs are awarded to the Applicant only in respect of this Application. It is of course open to the Applicant to pursue recovery of its other costs in the normal way.

Robin McMillan

**THE HON. JUSTICE ROBIN MCMILLAN
JUDGE OF THE GRAND COURT**

