

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2020/0167

BETWEEN:

JTRUST ASIA PTE. LTD.

Claimant/
Applicant

and

MITSUJI KONOSHITA

Defendant/
Respondent

Appearances:

Ms. Marcia McFarlane, with her Ms. Jhneil Stewart for the Claimant/Applicant
Mr. Robert Nader, with him Mr. Richard Baird for the Defendant/Respondent

2021: November 1.

JUDGMENT

- [1] **WALLBANK, J. (Ag.):** These are the written reasons for an *ex tempore* decision given at a hearing on 1st November 2021, awarding the Defendant his costs of an application by the Claimant. The Claimant had applied for an order for sale of the Defendant's shares in a company incorporated in this jurisdiction, towards satisfaction of a judgment against the Defendant in favour of the Claimant. I had dismissed the Claimant's application at an earlier hearing on 27th July 2021, following the satisfaction of the judgment.

Background facts

- [2] On 6th October 2020, the Court of Appeal of the Republic of Singapore ordered the Defendant and other parties to pay damages to the Claimant in a sum of over US\$70 million. The Claimant commenced proceedings in this Court to enforce the Singapore Court's judgment at

common law. While the common law enforcement claim was on foot, payments made in Singapore satisfied part of the judgment debt. On 18th January 2021, I gave summary judgment on the claim in favour of the Claimant, entering judgment in the amount of the debt that was calculated then to be outstanding, including accrued interest.

- [3] The Claimant then initiated enforcement of the summary judgment by applying for a charging order over the Defendant's shares described above. On 25th February 2021, upon an application by the Claimant, I granted a provisional charging order upon the papers without a hearing, in accordance with the procedure prescribed by rule 48.5(1), Civil Procedure Rules 2000 ('CPR') and directed in accordance with CPR 48.7(4) that the application be listed for hearing on 15th April 2021 (the 'April hearing') for the Court to consider making the charging order final.
- [4] On 16th March 2021, the Claimant filed a further application, within the same proceedings in which the summary judgment and the provisional charging order had been granted. In that further application, the Claimant asked the Court to make, at the April hearing, an order for the sale of the Defendant's shares at the same time as a final charging order.
- [5] Another partial payment towards satisfaction of the judgment was made shortly before the April hearing. In the Defendant's skeleton argument for that hearing, he did not oppose the provisional charging order being made final. However, he asked the Court: (i) to dismiss the application for an order for sale (for the reasons which I will explain below), and (ii) in the alternative, to adjourn the hearing to allow further time for the judgment debt to be satisfied in full.
- [6] The April hearing was adjourned due to an overrun caused by a separate application involving the same parties. By an order dated 26th May 2021, the provisional charging order was made final and the application for an order for sale was adjourned to 14th July 2021. In the meantime, though, since the Defendant had repeatedly enunciated his intentions to settle the judgment in full, I allowed a series of short appointments to facilitate updates from the parties on payments made towards the satisfaction of the judgment.
- [7] Shortly before the 14th July 2021 hearing, the outstanding balance of the judgment debt was satisfied. I adjourned the matter to hear further argument with respect to a dispute which had arisen over the interest payable on the judgment debt. On 27th July 2021, I determined the

interest issue (in the Defendant's favour), discharged the charging order, dismissed the application for an order for sale and made several orders in relation to costs.

Arguments on Costs of the Order for Sale Application

- [8] The Claimant argued that it was entitled to its costs of the order for sale application since it was entitled to pursue enforcement remedies. It further argued that but for the order for sale application, the Defendant would not have settled the judgment debt. The Defendant, on the other hand, argued that he should be considered to be the successful party and be awarded his costs because the order for sale application was destined to fail from the outset, regardless of whether the Defendant later satisfied the judgment debt.
- [9] Resolving this issue required the consideration of the parties' submissions with respect to the charging order jurisdiction vested in this Court and the circumstances in which the Court has power to make an order for the sale of charged shares or other property. That is because an order for sale is a next step towards compulsive satisfaction of a judgment following the making of a charging order.
- [10] Having heard the parties on 1st November 2021, I was persuaded that the Defendant's submissions should be accepted.
- [11] I ruled orally that the Court had no power to make the order for sale that the Claimant had sought. I was persuaded that the Court's jurisdiction to make orders for sale does not derive from the CPR.
- [12] Had the judgment debt remained unsatisfied at the time of the 14th July 2021 hearing, I would have considered myself compelled to dismiss the Claimant's application in any event. The Defendant should therefore in my respectful judgment be regarded as the successful party in respect of the order for sale application and have his costs thereof. The following is a summary of the Defendant's submissions, which I accepted as correct and adopt as the Court's reasons.

The charging order jurisdiction in England

- [13] This Court's jurisdiction to grant charging orders was considered and enunciated in considerable detail by the Court of Appeal in **Stichting Adminisratiekantoor Nems v**

Radchenko¹ and by this Court in **Commercial Bank of Dubai v Al-Sari**.² As explained in those decisions, the relevant jurisdiction can be traced back to section 14 of the English Judgments Act 1838 (1 & 2 Vict. c. 110) (the ‘**1838 Act**’), the scope of which was extended by section 1 of the English Judgments Act 1840 (3 & 4 Vict. c. 82) (the ‘**1840 Act**’). Section 14 of the 1838 Act provided:

“And be it enacted, That if any Person against whom any Judgment shall have been entered up in any of Her Majesty’s Superior Courts at Westminster shall have 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 his Name in his own Right, or in the Name of any Person in Trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the 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 with the Payment of the Amount for which Judgment shall have been so recovered, and Interest thereon, and such Order shall entitle the Judgment Creditor to all such Remedies as he would have been entitled to if such Charge had been made in his Favour by the Judgment Debtor; provided that no Proceedings shall be taken to have the Benefit of such Charge until after the Expiration of Six Calendar Months from the Date of such Order.”

[14] The present dispute concerns the concluding words to section 14, ‘provided that no Proceedings shall be taken to have the Benefit of such Charge until after the Expiration of Six Calendar Months from the Date of such Order’. The Defendant submitted that the effect of those words was that an order enforcing a charging order by the sale of the charged property could only be made in separate proceedings, commenced more than six months after the charging order was first made (that is, when the provisional charging order was granted). The Defendant referred to the requirement for filing separate proceedings as the ‘separate proceedings proviso’ and to the requirement for a six-month period to pass before filing such proceedings as the ‘six-month proviso’. I shall adopt the same terminology.

[15] This submission was not considered in **Stichting Adminisratiekantoor Nems v Radchenko** or in **Commercial Bank of Dubai v Al-Sari**. The Court of Appeal in **Stichting Adminisratiekantoor Nems** was concerned only with the jurisdiction to grant a charging order and did not address the power to enforce such an order by sale. This Court in **Commercial Bank of Dubai v Al-Sari** in fact made an order for sale at the same time as a final charging order, within the same proceedings and less than six months after the date of his provisional charging order. However, it appears from the learned Judge’s reasons at paragraph [15] that

¹ BVIHMAP2019/0003 (unreported, delivered 29th March 2019) at paragraphs [7]-[12] (Pereira CJ).

² BVIHC (COM) 2017/0114 (unreported, delivered 1st May 2019) at paragraphs [3]-[30] (Adderley J).

he may have relied on an extract of section 14 of the 1838 Act which did not include the words on which the Defendant relies. In any event, it is apparent that he was not addressed in relation to the submission now made by the Defendant.

- [16] The Defendant submitted that the six-month proviso has been recognised in England since the earliest days of the charging order jurisdiction. In **Watts v Jefferyes; Ex parte Reece**,³ an order *nisi* (or provisional charging order) had been granted, charging shares in a company. Lord Truro LC held that the judgment debtor could be restrained from diminishing the value of the charged shares through the payment of dividends until the judgment debtor became entitled to exercise his security. In so finding, he confirmed that the charging order could not be enforced until after six months had elapsed. He said:

“The only question, therefore, is, whether, before the six months have expired, the proviso in the 1 & 2 Vict. c. 110, excludes the plaintiff's right to a stop order on the dividends payable to the debtor. I think it does not. The obvious intention of the 1 & 2 Vict. c. 110, s. 14, was to secure to the judgment creditor, by impounding, any stock to which the debtor might be entitled; and this intention is carried into effect, by prohibiting a transfer of the stock after the required notice shall have been given of the order; showing, therefore, that although the proviso restrains the creditor from realising the benefit of his security during the six months, yet that the debtor was not to derive any benefit from that delay, or to be permitted to diminish the security. The 3 & 4 Vict. c. 82, declares and enacts that the previous statute shall extend to the interest of the debtor in stock standing in the name of the accountant general, and to dividends upon stock; and by both statutes it is enacted, that the charging order shall entitle the creditor to all the remedies which would have resulted from a charge actually made by the debtor entitled to the stock or dividends. It is clear that the judgment debtor would not be entitled to any benefit from the stock after service of notice of the order, even during the six months allowed for redemption; and I think it is equally clear that the debtor is not entitled to intermeddle with the dividends, and especially as the charging order is to have the same effect as a charge made by the debtor himself; and it is obvious that, if the debtor had charged the dividends, he could not be entitled to receive them after such charge, although, by the terms or effect of the instrument, the party entitled to the benefit of the charge might be restrained from enforcing it during six months. If the respondent's interpretation of the statute is correct, the security of the creditor would be very different, when the debtor is entitled to the dividends, from what it is when such debtor is entitled to the stock. No part of the security upon the stock could be diminished; but if the dividends which should accrue during the six months might be received by the debtor, the security of the judgment creditor would be diminished *pro tanto*, and it might constitute the whole interest of the debtor. The correct construction of the proviso in the statute seems to be, that, although no steps can be taken to enforce immediate payment of the debt, by realising the security, yet that the judgment creditor may, in the meantime, by force of the order, prevent the security given him by the statute from being defeated or diminished *pro tanto*, by stopping payment to the debtor of part of his security.”

³ (1851) 16 L. T. 501; 3 M. & Gord. 372.

- [17] The reason for the six-month proviso was explained in **Cragg v Taylor**.⁴ There must be an opportunity for third parties to come forward, should they wish to assert an equitable interest in the charged property. Channell B said:

“It must be recollected that by the statute no proceeding can be taken to have the benefit of the order until the expiration of six months from its date; there will, therefore, be abundant time for any person who claims an equitable interest in these shares to establish his rights.”

- [18] The separate proceedings proviso, on the other hand, was a by-product of having separate courts of law and of equity prior to the Judicature Acts. A common law court could grant a charging order, but to obtain an order for the sale of the charged property, it was necessary to file suit in the courts of equity.

- [19] The consolidation of the common law and equity courts into the Supreme Court of Judicature, comprising the (England and Wales) High Court of Justice and the Court of Appeal, was effected by the Supreme Court of Judicature Act 1873 (36 & 37 Vict. c. 66) and the Supreme Court of Judicature Act 1875 (38 & 39 Vict. c. 77) (the ‘**1875 Act**’). Adderley J in **Commercial Bank of Dubai v Al-Sari** explained the effect of both the 1875 Act and the 1883 Rules of the Supreme Court on the charging order jurisdiction. At paragraphs [24]-[25], he summarised the position as follows:

“[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.”

- [20] The ‘existing Order 46’, as Adderley J explained at paragraph [20], had been set out in the First Schedule to the 1875 Act. Order 46, rule 1 provided that:

“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

⁴ (1866) LR 1 Ex 148.

the effect shall be such as is provided by the Acts 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1.”

[21] Thus, notwithstanding the enactment of the Judicature Acts and the Rules of the Supreme Court, the exercise of the charging order jurisdiction in England continued to be governed by the 1838 Act and the 1840 Act.

[22] Did the consolidation of law and equity into the same court mean that separate proceedings to enforce a charging order were no longer necessary? The point was considered in **Leggott v Western**.⁵ It was held there that the separate proceedings proviso survived the Judicature Acts. Lopes J said:

“I am of opinion that the Court has no power to make the order asked for in this case. It is necessary to refer to the statute in order to see what was the position of the plaintiff at the time the charging order was made absolute. The words of s. 14 of 1 & 2 Vict. c. 110, are, “such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor.” It is admitted that before the Judicature Acts it would have been necessary for him to institute separate proceedings in order to obtain a sale or foreclosure of the shares subject to the charging order; but it is contended, under s. 24 of the Judicature Act, 1873, and the observations of the late Master of the Rolls upon that Act in *Salt v. Cooper* are relied on to shew, that the Court would now be justified in ordering a sale of the shares by way of enforcing the judgment obtained in this action without it being necessary for the plaintiff to institute separate proceedings. I think the Court has no such power. I think that having obtained the charging order the plaintiff has the same remedies he would have had, and is in the same position as he would have been before the passing of the Judicature Acts, and therefore that it is necessary for him to institute separate proceedings to obtain an order for sale of the shares.”

[23] Cave J said:

“I am of the same opinion. ... The powers given by the legislature do not extend to enabling the Court to order a foreclosure or sale in a case like the present where that relief is not claimed in the action. In the Judicature Acts themselves there is no reference to charging orders; but there is in the rules. By Order XLVI., r. 1, orders charging stock or shares may be made by a divisional Court or by a judge, and the effect shall be such as is provided by 1 & 2 Vict. c. 110, ss. 14, 15. The effect of s. 14 is to entitle the judgment creditor to the same remedies as he would have had if the charging order had been created by contract between himself and the debtor. There is not one word in Order XLVI., to shew any intention to increase the power of the Court in respect of enforcing charging orders. The effect is to be such as is provided by 1 & 2 Vict. c. 110, and not such as is provided by that Act plus the Judicature Act, 1873. I have received no satisfactory answer to the question I asked during the course of the argument, whether, if the plaintiff obtained in an action an interlocutory order against the defendant with costs, and the defendant gave him a mortgage to secure payment of

⁵ (1884) 12 QBD 287.

those costs, the Court could in that action order a foreclosure or sale of the property so mortgaged. If it could be done in this case, it could be done in that, but I am of opinion that the Court has no jurisdiction to do it in either, and that the plaintiff must bring a fresh action to enforce his charging order by a sale of the shares.”

- [24] The next change to affect the administration of the charging order jurisdiction in England came about with the Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. 5 c. 49) (the ‘**1925 Act**’). Section 99 of the 1925 Act included the following provisions:

“(1) Rules of Court may be made under this Act for the following purposes: –

...

(f) 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 is specified in the third column of that Schedule);

(g) For repealing any enactments which relate to matters with respect to which rules are made under this section;

...

(4) Rules of court may be made by the Lord Chancellor together with any four or more of the following persons, namely, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, and four other judges of the Supreme Court, two practising barristers being members of the General Council of the Bar, and two practising solicitors of whom one shall be a member of the Council of the Law Society and the other a member of the Law Society and also of a provincial Law Society.

The four other judges and the barristers and solicitors to act as aforesaid shall be appointed by the Lord Chancellor in writing under his hand and shall hold office for the time specified in the appointment.

(5) Rules of court made under this section shall be laid before Parliament, but section one of the Rules Publication Act, 1893 (which requires notice to be given of a proposal to make statutory rules), shall not apply to rules so made.”

- [25] The 1838 Act and the 1840 Act were amongst the enactments set out in the First Schedule to the 1925 Act. Therefore, sections 99(1)(f) and (g) of the 1925 Act empowered the persons specified in section 99(4) to make rules with respect to the charging order jurisdiction conferred by the 1838 Act and the 1840 Act. Such rules could regulate and prescribe the procedure and practice to be followed in cases invoking that jurisdiction, they could re-enact those enactments, or they could repeal those enactments.

[26] As it happened, no such rules were made, or at least not at a time that affects the charging order jurisdiction that came to be vested in this Court. Adderley J said in **Commercial Bank of Dubai v Al-Sari** at paragraph [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).”

[27] That is a correct summary. However, it remains necessary for the purposes of the present dispute to consider exactly what occurred, and when it occurred, with respect to the process described. As at 1st January 1940, the relevance of which date is addressed below, the six-month proviso and the separate proceedings proviso remained in effect in England. Their amendments in England occurred only later.

[28] This is illustrated by the 1939 decision in **Daponte v Schubert**.⁶ The plaintiff commenced separate proceedings by way of an originating summons, issued some 15 months after a charging order had been made. The issue in the case concerned whether a charging order could be enforced by an order for foreclosure on the charged shares, rather than an order for their sale. The relevance of the decision for present purposes is twofold. First, it confirms that section 14 of the 1838 Act was still in force in 1939 and had not been repealed pursuant to the power conferred by section 99(1) of the 1925 Act. Second, in its discussion of **Leggott v Western**, there is no suggestion that the separate proceedings proviso had ceased to have effect.

[29] There is also the decision in **Pateras v Pateras**.⁷ The report of that judgment states that, more than two decades later, it was still the case that ‘six months must elapse from the date of the charging order before proceedings could be taken in respect of it’.

[30] Later, the power conferred by section 99(1) of the 1925 Act was exercised. The Rules of the Supreme Court 1962 (Revision) (SI 1962/2145) and the Rules of the Supreme Court 1965 (Revision) (SI 1965/1776) revised and reintroduced the applicable rules. That is why, in paragraph 20 of the Law Commission’s Report No. 74 in 1976 (referred to above in the extract from **Commercial Bank of Dubai v Al-Sari** at paragraph [30]) it is recorded that charging

⁶ [1939] Ch 958.

⁷ [1961] 1 WLUK 440.

orders were regulated by Order 50, rather than Order 46, of the Rules as then in force. The Report also stated in that paragraph that '[t]he rules aim to reproduce the effect of the earlier enactments without any radical alterations'.

[31] Later still, the charging order jurisdiction in England was put on a more modern statutory footing. In response to the Law Commission's Report No. 74, the Charging Orders Act 1979 (the '**1979 Act**') was enacted. When the Civil Procedure Rules 1998 (SI 1998/3132) were enacted, Order 50 of the Rules of the Supreme Court was incorporated with modifications into Schedule 1. Today, the charging order jurisdiction in England is governed by the 1979 Act and Part 73 of the Civil Procedure Rules.

[32] However, these later developments are of no consequence to the present matter. It is the charging order jurisdiction that was vested in the High Court of Justice in England on 1st January 1940 which came to be vested in this Court upon its establishment in 1969. As explained below, that jurisdiction included the separate proceedings proviso and the six-month proviso, as created by section 14 of the 1838 Act, which were not amended in England until after the relevant date.

The charging order jurisdiction in the Virgin Islands

[33] The establishment of this Court and the vesting of jurisdiction in it were considered by the Court of Appeal in **Stichting Administatiekantoor Nems v Radchenko** at paragraphs [7]-[12] and in **Halliwel Assets Inc v Hornbeam Corporation**⁸ at [10]-[12] and by Adderley J in **Commercial Bank of Dubai v Al-Sari** at [7]-[12].

[34] First in time was the Supreme Court Act 1939 (CAP. 76) which by section 22 vested in the Supreme Court of the Windward Islands and Leeward Islands, upon its creation on 1st January 1940, the jurisdiction that was vested in the English High Court at that date.

[35] In relation to the BVI court, there are two main pieces of relevant legislation.

[36] The first is the West Indies Associated States Supreme Court Order 1967 (SI 1967/223) (the '**Supreme Court Order**'). This Order was made by Her Majesty in Council (that is, the Privy Council) pursuant to section 6 of the West Indies Act 1967. The Supreme Court Order was extended to the colonies of Montserrat and the Virgin Islands. Section 2 of the Anguilla,

⁸ BVIHMAP2015/0001 (unreported, delivered 12th October 2015) (Pereira, CJ).

Montserrat and Virgin Islands (Supreme Court) Order 1983 (SI 1983/1108) renamed the Supreme Court Order with respect to the Territory of the Virgin Islands, as the Eastern Caribbean Supreme Court Order and provided that it may be cited as the Supreme Court Order.

[37] The second is the West Indies Associated States Supreme Court (Virgin Islands) Ordinance 1969 (CAP. 80) (the '**1969 Act**'). This Act was enacted by the Virgin Islands legislature and was renamed as the Eastern Caribbean Supreme Court (Virgin Islands) Act by the West Indies Associated States Supreme Court (Virgin Islands) (Amendment) Act, 1993. Both sections 6 and 7 of the 1969 Act vested in the High Court of the Virgin Islands, the English High Court's charging order jurisdiction as it had existed on 1st January 1940.

[38] The Eastern Caribbean Supreme Court, as it is now named, was established by section 4 of the Supreme Court Order. Pursuant to section 4(2), it consists of a Court of Appeal and a High Court of Justice. Section 10 provides that:

"The High Court and Court of Appeal may exercise such jurisdiction and powers, and any judge or the Chief Registrar of the Supreme Court may exercise such functions, as may be conferred upon them respectively in relation to Montserrat or the Virgin Islands by or under any law in force in Montserrat or the Virgin Islands, as the case may be".

[39] The jurisdiction exercisable by the High Court in the Virgin Islands was not conferred by the Supreme Court Order. Instead, that jurisdiction was conferred by the 1969 Act. Section 6 of the 1969 Act vested in the High Court the jurisdiction that was vested in the former Supreme Court of the Windward Islands and Leeward Islands. Section 7 of the 1969 Act vested in the High Court the jurisdiction that was vested in the English High Court on 1st January 1940.

[40] The exercise of the charging order jurisdiction in the Virgin Islands, as in England, is regulated by rules of court. Section 85(1) of the 1969 Act states:

"The Chief Justice and any other two judges of the Supreme Court may by order provide that any rules of court made under section 17 of the Courts Order shall have effect as part of the law of the Territory subject to such exceptions, adaptations or modifications as may be specified in the order and any such order may include provisions for the amendment or revocation of any rule of court so having effect immediately before the prescribed date."

[41] The reference to the 'Courts Order' is to the Supreme Court Order, section 17(1) of which provides that:

“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.”

- [42] Rules of court regulating the exercise of the High Court’s charging order jurisdiction are set out in Part 48 of the Civil Procedure Rules, as made pursuant to section 17 of the Supreme Court Order and given legal effect in the Virgin Islands pursuant to section 85(1) of the 1969 Act. Section 11 of the 1969 Act directs the Court to exercise its jurisdiction in accordance with those rules (amongst other laws):

“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.”

- [43] Although section 11 allows for the importation of English procedural law, it does not allow for the importation of substantive law. This has been made clear by the Court of Appeal in numerous decisions, such as **Panacom International Incorporated v Sunset Investments Limited**⁹ and **Doyle v Deane**.¹⁰ Accordingly, it does not provide a means for this Court to apply English substantive law, post-dating 1st January 1940, which affects the English High Court’s charging order jurisdiction.

- [44] Additionally, none of the provisions cited above authorise the making of rules of court which are inconsistent with enactments of the Virgin Islands legislature. Such rules may only, pursuant to section 17 of the Supreme Court Order, ‘regulat[e] the practice and procedure of the Court of Appeal and the High Court in relation to their respective jurisdiction and powers’. Where an inconsistency arises between a rule made pursuant to section 17 of the Supreme Court Order and a provision of an enactment of the Virgin Islands legislature, the provision of the enactment must prevail. Such provisions include the separate proceedings proviso and the six-month proviso, as given effect in the Virgin Islands by sections 6 and 7 of the 1969 Act.

- [45] The Defendant submitted that the point may be tested this way: if section 14 of the 1838 Act had been reproduced in a provision of an Act of the Virgin Islands legislature, rather than given

⁹ (1994) 47 WIR 139.

¹⁰ GDAHCVAP2011/0020 (unreported, delivered 16th April 2012).

effect through sections 6 and 7 of the 1969 Act, could a rule of court take effect in the Virgin Islands if it was inconsistent with that provision? The answer must be no.

- [46] The Defendant makes this point because CPR 48.2(3) states that '[a]n application for a charging order relating to stock may incorporate an application for an order for sale of such stock under rule 48.11.' This rule is inconsistent with the separate proceedings proviso, in that it would allow for an order for sale to be sought by interim application within the same proceedings as those in which the charging order is made. It is also inconsistent with the six-month proviso, in that it would allow for an application for an order for sale to be brought before the charging order has been granted.
- [47] The Defendant submitted that the analysis set out above compels the Court to find that CPR 48.2(3) does not have effect in the Virgin Islands. The same applies in part to CPR 48.11, though only to the extent that it would allow for an order for sale to be sought by way of interlocutory application rather than commencing separate proceedings. The separate proceedings proviso and the six-month proviso confine the Court's power to grant an order for sale, in the exercise of its charging order jurisdiction, by operation of sections 6 and 7 of the 1969 Act. Rules of court that are inconsistent with such enactments cannot be given effect by the High Court in the Virgin Islands.
- [48] That is not to say, submitted the Defendant, that CPR 48.2(3), or any part of CPR 48.11, is necessarily invalid. Those rules may have effect in other States or Territories to which the Supreme Court Order applies, if the charging order jurisdiction there is governed by differently worded legislation. They may in the future have effect in the Virgin Islands if legislation is brought into force to amend the charging order jurisdiction here. But they cannot have effect in this Territory at this time.

The Claimant's submissions

- [49] The Claimant argued that the separate proceedings proviso and the six-month proviso were validly overridden, or impliedly repealed, by CPR 48.2(3). That submission relied upon sections 99(1)(f) and (g) of the 1925 Act (which the Claimant argued enabled the variation of enactments by rules) and Adderley J's observation in **Commercial Bank of Dubai v Al-Sari** at paragraph [30], extracted above, that 'over the course of the 19th and 20th centuries, the [charging order] jurisdiction was replaced and regulated by procedural rules (rather than statutory provisions)'. To address the analogy of whether a rule making body can vary primary

legislation, the Claimant argued that section 99(i)(f) and (g) of the 1925 Act and its First Schedule specifically empowered a rule making body to pass rules that would in effect vary the procedure stipulated by section 14 of the 1838 Act. The Claimant therefore invited the Court to find that these provisos were, by virtue of section 99(1)(f) and (g) of the 1925 Act, capable of amendment or repeal by later rules such as CPR 48.2(3). Therefore, with the passing of CPR 48.2(3), this had the effect of varying the separate proceedings proviso and six-month proviso.

[50] As it relates to the issue of costs and conduct, the Claimant argued that its conduct was reasonable and that it was justified in bringing an application since it was the victim of a fraud. The Claimant also argued that an application for a final charging order was the natural next step for the Claimant to recover its money. The Claimant argued that the order for sale application was a necessary accountability tool for the Defendant to pay the summary judgment.

[51] With great respect, the Claimant's arguments do not persuade me. It is true that sections 99(1)(f) and (g) of the 1925 Act empowered the persons specified in section 99(4) of that Act in effect to convert the entirety of the English High Court's charging order jurisdiction to the status of procedural rules. However, they did not do so, at least not until after 1st January 1940. Both provisos continued up to that date to have effect in England pursuant to section 14 of the 1838 Act and subsequently, in the Virgin Islands, pursuant to sections 6 and 7 of the 1969 Act.

[52] It is also true that the jurisdiction vested in this Court in the Virgin Islands by sections 6 and 7 of the 1969 Act included such jurisdiction as had been vested in the English High Court by the 1925 Act. However, the rule-making power conferred by sections 99(1)(f) and (g) of that Act was not a jurisdiction that was vested in the English High Court. Rather, it was a power conferred on the persons specified in section 99(4), who included not only judges but also two practising barristers and two practising solicitors, and whose rules were required by section 99(5) to be laid before Parliament. For this reason, the rule-making power conferred on those persons by section 99(4) of the 1925 Act is not one that came to be inherited by this Court.

[53] Moreover, the CPR that apply in the High Court in the Virgin Islands are not made by the Court. Rather, they are made by the judges specified in section 17 of the Supreme Court Order and are given effect in this Court and in this Territory by section 85 of the 1969 Act. When those judges make rules of court, they are exercising a power conferred on them by those provisions. They are not exercising the jurisdiction vested in this Court by sections 6 and 7 of the 1969 Act.

Accordingly, it is beside the point whether that jurisdiction included the rule-making power conferred by section 99(4) of the 1925 Act.

Further considerations

- [54] The Charging Orders Act 2020, as enacted by the Virgin Islands legislature and Gazetted on 26th March 2020, would leave it to the CPR and to the Court's discretion to determine the procedural manner in which and the time at which a charging order may be enforced. However, that Act has not yet been brought into force.
- [55] Whilst CPR 48.2(3) would do away with both provisos, in England only the six-month proviso has been abolished. In its place, rule 73.7 of the English Civil Procedure Rules prescribes detailed requirements as to service. These requirements are similar to those in CPR 48.6 and 48.7 and are intended to draw the charging order application in a timely manner to the attention of others who may wish to assert an interest in the property.
- [56] A version of the separate proceedings proviso, however, remains in effect in England. Pursuant to rule 73.10C of the English Civil Procedure Rules, a person who seeks an order for the sale of charged property must file a new claim in accordance with the 'Part 8 procedure'. In **PT Ventures SGPS SA v Vidatel Ltd**¹¹ at paragraph [22], Justice Jack observed that this procedure bears some similarities with the fixed date claim procedure under rule 27.2 of this Court's Civil Procedure Rules.
- [57] The Claimant submitted that the continuing effect of the separate proceedings proviso and the six-month proviso under Virgin Islands law is absurd. However, that submission seems to me to assume the conclusion that an order for sale should be available in the circumstances in which the Claimant applied for one, and to reason backwards from there that its unavailability in those circumstances must be absurd. The Defendant's submissions, on the other hand, traced the development of the charging order jurisdiction in England and in the Virgin Islands to show how both provisos continue to have legal effect in this Territory. Being persuaded that the Defendant's analysis appears to be correct, this Court should not shrink from drawing the conclusion that the analysis compels. As the Defendant has observed, if this outcome is thought to be absurd, then it is for the Virgin Islands legislature to rectify this. The mechanism

¹¹ BVIHC (COM) 2015/0117 (unreported, delivered 16th March 2020).

for doing so currently reposes in the Charging Orders Act 2020 and has yet to be brought into effect.

[58] I take this opportunity to thank Counsel for their most helpful assistance in this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar