

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

AXAHCV 2017/0039

BETWEEN:

JOHN DYRUD

Applicant

and

PALMAVON JASMINE WEBSTER

Respondent

Appearances:

Ms. Jean M. Dyer, J. M. Dyer & Co. of counsel for the Applicant
Mr. John Carrington QC, with him Ms. Rayana Dowden, instructed by Webster LP
of counsel for the Respondent

2020: July 6;
November 3.
Reissued

Enforcement of Arbitration Award – Application for charging order – CPR 48.3 – Evidence in support of application for charging order – Interested persons – CPR 48.6 – Service of provisional charging order – CPR 48.7 – Final charging order – CPR 48.8 – Application for sale of land – CPR 55.1 – Whether necessary or expedient that the land should be sold – Whether applicant compliant with all the provisions of CPR 55.2 (1), CPR 55.2 (2) – Service on persons having interest in the land – Whether failure to serve interested persons having an interest in the land to be sold in compliance with CPR 55.2(3) fatal to the application for sale – Whether points of opposition filed by respondent otherwise than in compliance with CPR 48.8(3) – Sections 3, 4, 5 and 6 Judgments Act, R.S.A. c. J10 – Set off – Whether respondent entitled to claim right of set off

DECISION

[1] **INNOCENT, J.:** This matter comes before the court on an application by Mr. John O. Dyrud (the 'Applicant') to enforce an interim arbitration award dated 7th December 2015 and the final arbitration award dated 2nd November 2016, and amended on 9th May 2019 (the 'Arbitration Awards').

[2] The Applicant was granted leave to enforce the Arbitration Awards summarised at paragraph 324 of the Final Award by entering judgment against Ms. Palmavon J. Webster (the 'Respondent') in the following terms:

- (a) That the specific performance of the Partnership Withdrawal Agreement (as defined in the Awards) is valid and enforceable and is to be adhered to;
- (b) The total sum owed by the Respondent to the Applicant is US\$1,005,601.40 which includes the additional loan by the Applicant to the WDM Partnership;
- (c) The Respondent shall pay to the Applicant the amount of US\$887,436.40 (being the sum of US\$1,082,586.48 less the sums of US\$112,250.00 and US\$82,900.00 (having already been paid on account));
- (d) WEBSTER, formerly WDM, shall repay to the Applicant the sum of US\$118,165.00;
- (e) The amount owed to the Applicant by the Respondent shall be secured by a charge over the Respondent's shareholdings in First Anguilla Trust Company Limited;
- (f) The Claimant is entitled to interest on loans made for the purpose of the WDM Partnership;
- (g) The sole source of funds for the Statutory Minimum Capital was provided for by the claimant to establish FATCL;
- (h) The Claimant be credited with 100% of the Statutory Minimum Capital in FATCL and FNTCL;
- (i) The Claimant has an interest in Sea Island Realities Ltd.;
- (j) The Claimant should be awarded 100% of the contribution to the Statutory Minimum Capital requirement.¹

¹ Order of Ramdhani J. (Ag.) dated 30th April 2018

- [3] By order dated 19th June 2018, paragraph (A) of the order of 30th April 2018 was amended by inserting the words “by both parties” at the end of the paragraph.
- [4] On 7th May 2019, the Applicant filed a without notice application for a charging order with respect to the Respondent’s legal and beneficial interest in Sea Island Realities Limited., WDM Limited, WEBSTER LP, and other personal property belonging to the Respondent to secure the sum of US\$1,005,601.40, together with interest at the rate of 10% per annum from 21st December 2012 to 19th June 2018 together with costs of the application for the charging order.
- [5] The provisional charging order was granted by the court on 22nd May 2019 subject to any unsecured third party or unsecured creditors interests and that a copy of the provisional charging order be served on the Respondent in accordance with CPR 5.
- [6] On 7th May 2019, the Applicant filed an application for an order of sale pursuant to section 3 of the Judgments Act.
- [7] The Respondent filed notice of objection to the provisional charging order being made final pursuant to CPR 48.8(3) and a subsequent affidavit setting out the grounds of opposition.
- [8] On 22nd July 2019, the Applicant and the Respondent entered into a consent order wherein the Respondent agreed to make interim monthly payments of US\$5,000.00 towards the satisfaction of the judgment debt, and to prepare and submit an accounting of the matters for which set off is being claimed and that the shares in FATCL and FNTCL shall be valued. Each party was at liberty to appoint and instruct their own valuer who would each receive identical instructions.
- [9] The essence of the Respondent’s arguments is that the enforcement proceedings ought to be stayed pending the determination of the Respondent’s claim for unfair

prejudice and oppression² and the consideration of the various rights to set off against the judgment debt to which she claims to be entitled.

[10] The court understands the Respondent's position to be that, in light of the remedies sought by the Respondent in the claim for unfair prejudice and oppression, notably the valuation and buyout of her shares in FATCL, the Respondent will be in a position to set-off against the judgment debt and amounts due and owing from the Applicant if he is ordered to buy out her shares in FATCL.

[11] According to the Respondent, whereas she is the beneficial owner of 50% of the shares in FATCL and FNTCL, she has proposed to the Applicant the liquidation of the two entities as a means of satisfying the judgment debt.³ The Respondent offered that the Applicant should use the shareholdings for the purpose of enforcing the judgment debt. Furthermore, the Respondent stated that an offer has been made to the Applicant to take over her shares in FATCL and FNTCL, which she said are worth a considerable sum, and could quite possibly be equal or may more than exceed the amount of the debt. This, the Respondent said, would result in a fair and just resolution of the enforcement proceedings.⁴

[12] In addition, the Respondent claims that she is entitled to set off personal and other business debts that were jointly incurred by the parties prior to December 2006 and not recorded in the Partnership accounts. These debts, she says, were not specifically excluded from the Partnership Withdrawal Agreement ('PWA') and were not considered in the arbitration proceedings.

[13] According to the Respondent, these debts were outside the scope of the PWA but are entitled to be set off. She alleged that she has paid off the Applicant's debts in

² AXAHCv 2018/0044 Palmavon J. Webster v John Dyrud and FATCL

³ At para. 6 affidavit PJW 13th June 2019

⁴ At paras. 9-10 affidavit of PJW 13th June 2019 (Exhibit PJW1)

the sum of upwards to US\$500,000.00 and that she reserves the right to set off these sums against any amounts ordered to be paid to the Applicant.⁵

- [14] The Applicant contended that the Respondent is not entitled to claim a right of set-off against the judgment debt by virtue of the proceedings in the claim for oppression and unfair prejudice wherein she seeks an order for the buyout of her shares in FATCL.⁶
- [15] In addition, the Applicant argued that no judgment has been rendered in the oppression and unfair prejudice claim. Therefore, until a decision is made on the merits of that claim no right of set-off is triggered until she obtains an enforceable judgment.
- [16] In his oral and written submissions to the court, Mr. Carrington, QC set out what has been described as certain overarching principles which the court should first determine before embarking on the consideration of the merits of the substantive applications.
- [17] According to Mr. Carrington, QC, the first overarching principle is the valuation of the outstanding debt. This aspect of the Respondent's opposition relates to the enforcement proceedings in their entirety, that is, both with respect to the final charging order and the order for sale of land.
- [18] The Respondent's first line of attack is with respect to the rate of interest that should attach to the judgment debt. The Applicant claims interest on the judgment debt at the rate of 10% per annum. On the contrary, the Respondent contends that the rate of interest to be applied to the judgment debt is 5% per annum as no other rate was specified in the judgment itself.

⁵ At para. 20 affidavit PJW 13th June 2019

⁶ See: para. 7 affidavit of JOD 7th May 2019

- [19] The Applicant contended that, the 10% per annum rate of interest claimed by the Applicant was a rate applicable to loans made by the Applicant to the partnership under the Partnership Act.⁷ The Respondent laid this argument to rest by countering that the sum of US\$118,165.00 sought to be recovered as part of the judgment debt was not related to any loan by the Applicant as partner in the Partnership and therefore could not attract a rate of interest at 10% per annum.
- [20] The second overarching issue identified by the Respondent was whether the Applicant was entitled to enforce the judgment debt at all. The Respondent contends that during cross-examination of the Applicant in the arbitration proceedings, the Applicant conceded that he directed that 50% of the shareholdings in Sea Island Realities Inc., which had originally been beneficially owned by the Respondent, be transferred to him in satisfaction of all his claims under the Partnership Withdrawal Agreement.⁸
- [21] The Respondent further contended that the issue raised relative to the transfer of the 50% shareholding in Sea Island Realities Inc. does not concern the Applicant's conduct in the carrying out of that transaction, but is concerned with the question of whether or not there has been "accord and satisfaction" in relation to the Applicant's claims against the Respondent. According to the Respondent, the debt owed to the Applicant had already been repaid through the transfer of shares in Sea Island Realities Inc. of which she is a director. This fact, she said, was disclosed during the arbitration proceedings.⁹
- [22] It was submitted on the Respondent's behalf that this transaction was not considered in the arbitration proceedings as it did not lie within the remit of the arbitrator's terms of reference.

⁷ R.S.A. c. P5

⁸ See: at paras. 10-12, 2nd Affidavit of Palmavon J. Webster ('PJW') and Exhibit PJW3

⁹ At paras. 7-13 affidavit PJW 19th July 2019

- [23] On the contrary, the Applicant argued that the Respondent's reliance on the transactions involving Sea Island Realty Inc. involves a re-litigation of an issue that had already been determined by the arbitrator in the arbitration proceedings.¹⁰
- [24] The Applicant vehemently denied that he testified in the arbitration proceedings that the debt owed to him had already been repaid to him in the manner alleged by the Respondent.¹¹
- [25] The Respondent also relied on the third overarching principle, which referred to the terms of paragraph 2(e) of the order dated 30th April 2018, wherein it was adjudged that the amount owed by the Respondent was secured as a charge over the Respondent's shareholdings in FATCL. In the circumstances, the Respondent contended that the Applicant is required to give an account of his dealings with this charge before the court makes an order for the enforcement of the judgment debt. The Respondent submitted that, should the court hold otherwise, such an enforcement could be considered oppressive to the Respondent if the judgment debt had been satisfied from the charge.
- [26] The Respondent relied on the proposition that the amounts owed to her for dividends from FATCL and FNTCL, which she says has been withheld by the Applicant, ought to be set-off against any debt due to the Applicant.¹²
- [27] The fourth overarching principle identified by the Respondent is what may aptly be described as the offer of the sale and/or transfer of the Respondent's shares in FATCL and FNTCL to the Applicant. The Respondent contends that apart from not complying with the order of 22nd July 2019 which provided for the valuation of her shares in the abovementioned entities, the Applicant has, without good reason, refused to accept her offer of the transfer of the shares which she says is sufficient to offset her indebtedness to the Applicant.

¹⁰ At paras. 315 and 316 of the Arbitration Award

¹¹ At paras. 8 and 9 affidavit of JOD and Exhibit PJW3

¹² At para. 6 affidavit PJW 19th July 2019

- [28] The Respondent also relied on the fifth overarching principle which involved the consideration of the Respondent's cross-claims against the Applicant with respect to monies spent by the Respondent, which included the payment of legal fees and bank loans. These matters, the Respondent argued, should be dealt with prior to any consideration and determination of the enforcement proceedings as they would inevitably affect the quantum to be recovered. The Respondent contends that the matters contained in the Applicant's third affidavit are unsatisfactory. On this basis, the Respondent claims that she is entitled to set off those payments against the judgment debt which the Applicant seeks to enforce.¹³
- [29] The Applicant denied that the Respondent made any payments on his behalf as she alleged.¹⁴ This is particularly so in the case of **Jenny Lindsay v Webster Dyrud Mitchel and others**.¹⁵ The Applicant denied that he is or was liable jointly or otherwise in respect of this judgment. In support of this denial, the Applicant relied on clause 1.3 of the PWA which he said canvassed work undertaken by the firm and did not encompass the constructive dismissal claim.¹⁶ This finding of the arbitrator binds the Respondent. Therefore, she cannot rely on the same to claim a right of set-off against the Applicant.
- [30] The Respondent's claim that she had paid loans made to Sea Island Realities Inc. for which the Applicant was jointly liable was refuted by the Applicant. The Applicant stated that any loans which were obtained by Sea Island Realities Inc. were for the use and benefit of the WDM Partnership and that parcel 47 was used as security for the repayment of certain loan facilities which were made available to WDM. The Applicant contended that the indebtedness for these loans was that of WDM, the Respondent and Webster LP solely in light of the arbitration award.¹⁷

¹³ At paras. 15-20 affidavit of PJW 19th July 2019

¹⁴ At paras 13 et seq. affidavit JOD 18th May 2019

¹⁵ AXAHCV 2003/0060

¹⁶ At para. 14 affidavit of JOD; para. 307 Final Award

¹⁷ At para. 18 et seq. affidavit JOD 18th May 2020

- [31] It appears that the Applicant relied on the fact that the issue of WDM's indebtedness to FCIB was the subject of proceedings in an application for leave to file a derivative action claim against the Applicant and WDM. The suggestion made by the Applicant appears to be that the issue of the liability for that indebtedness had already been resolved in the arbitration proceedings.
- [32] The Applicant also contended that the property used by WDM was used to secure WDM's loan facility at FCIB. He contended that the arbitrator held in the Final Award that the Applicant had no liability for the debts of WDM.¹⁸ The thrust of the Applicant's argument was that the issue having already been determined in the arbitration proceedings, the Respondent cannot now seek to re-litigate the issue in the enforcement proceedings.¹⁹
- [33] The Respondent also relied on the Applicant's petition for the winding up of Sea Island Realities Inc. as the sixth overarching issue. The Respondent conceded that it was open to the Applicant to employ various means of enforcing the judgment debt. However, this concession was made subject to the proviso that, the court, in exercising its discretion, ought to consider the evidence in relation to the winding up proceedings. Furthermore, the Respondent contends that the Applicant has given no evidence in relation to the winding up proceedings.
- [34] In a nutshell, the Applicant contended that the Respondent has no legal right of set-off. Therefore, she cannot avail herself of this in order to stay or dismiss the enforcement proceedings. According to the Applicant, the Respondent has initiated a baseless, unfair prejudice claim, which incidentally is not for a liquidated sum, in order to seemingly utilise to her advantage a right of set-off to counter the Applicant's attempts at enforcing the arbitration award.²⁰

¹⁸ Paragraph 307 Final Award

¹⁹ At paras. 23 and 24 affidavit of JOD 18th May 2020

²⁰ At para. 6 affidavit of JOD 18th May 2020

- [35] The Respondent's submissions in relation to the objections taken to the grant of an order for the sale of Parcel 57 rests on two primary bases. Firstly, that no application has been made by the Applicant for an extension of time pursuant to section 4 of the Judgments Act. Therefore, the Respondent argued that the application for the sale of parcel 57 is deemed abandoned. Secondly, that the Applicant has not satisfied the conjunctive requirements of CPR 55.1.
- [36] It appears that the Applicant, in anticipation of the Respondent taking the point under section 4 of the Judgments Act, filed an application pursuant to section 3 of the Judgments Act on 6th July 2020 on the grounds that the court has the jurisdiction to extend the life of the application for order for sale.
- [37] According to the Respondent, the Applicant has not led evidence as to the reason why it is necessary or expedient for the court to make an order for sale.
- [38] More importantly, the Respondent has raised the issue that the evidence placed before the court highlights what may be described as a substantial dispute with respect to whether the Respondent holds any legal or beneficial interest in parcel 57.²¹
- [39] In the circumstances, the Respondent argued that the proper course that the court should adopt in such a case is to order pleadings on the issue and determine the issue.
- [40] It appears that the Respondent's submissions on this point also raises the issue of the likely unsecured beneficial interest that third parties may have in Parcel 57.
- [41] In opposition to the application for an order for the sale of Parcel 57, the Respondent stated that she does not or no longer holds a beneficial interest in Parcel 57 and that there are other persons beneficially interested in that land.²²

²¹ 2nd Affidavit of PJW at paras. 23-24

²² At para. 21 affidavit of PJW 13th June 2019

- [42] The Respondent further alleged that the Applicant is a nominee director of a company that holds the beneficial interest in Parcel 57, and that there are other persons also beneficially interested in this property. She claimed that the Applicant has in his possession all the documentation which would evidence the transfer of her interest in Parcel 57 to the said company.
- [43] The Respondent further alleged, in opposition to the order for sale, that the Applicant approved and witnessed a trust agreement that established a family trust. McCoy Webster was named trustee, and it was by virtue of that trust arrangement and agreed financing structure for the purpose of raising capital that the Respondent says she transferred her beneficial interest in Parcel 57 to McCoy Webster. The Respondent claimed that the Applicant is aware of this transaction since the documents were retained by FATCL and was, for all intents and purposes, under his custody and control.²³
- [44] In the circumstances, the Respondent opposes the order for sale on the ground that the Applicant has failed to serve notice of the application for sale on those other persons who are beneficially entitled to Parcel 57 as required by the CPR. Therefore, on that basis, the Respondent argued that the application for the sale of Parcel 57 must be stayed.
- [45] The Respondent also submitted that the court has a discretion pursuant to CPR 55 and, that this discretion should not be exercised in favour of an order for sale since the Applicant has not fully complied with the provisions of CPR 55.2(c) insofar as the application for sale does not address matters that ought to be addressed by supporting evidence.
- [46] The Applicant denied that he had any personal knowledge of other persons being beneficially entitled or interested in Parcel 57 in the manner alleged by the

²³ At para 23 et seq. affidavit of JOD 19th July 2019

Respondent, or at all. He stated that to the best of his knowledge Parcel 57 is legally and beneficially owned by the Respondent.²⁴

[47] The Applicant alluded to the Respondent's evidence given on oral examination to the effect that Parcel 57 had been transferred to a relative to settle a transaction but same could not be registered because of an existing encumbrance on Parcel 57. She claimed that the relative had died and that the Estate of McCoy Webster now holds the beneficial interest in Parcel 57.²⁵ In her oral examination the Respondent had also stated that she had mortgaged Parcel 57 to the Anguilla Development Board (the 'ADB') in 2015.

[48] The Applicant stated that the application for order for sale, the order of charge by judgment by order of the Registrar of Lands and the Notice of Hearing were served on ADB. It appears that the ADB has not, at the time of this hearing, filed a discharge of the existing charge in their favour although the loan had been paid off in full.²⁶

[49] Having examined the application for the provisional charge to be made final, points of opposition relied on by the Respondent and the parties' arguments in relation to the facts and the law, the court has arrived at the following conclusions.

[50] That the debt which the Applicant seeks to enforce has not been properly quantified or valued. On the contrary, the Applicant argued that there is no such requirement under CPR 43.2(1) and relied on the proposition that once a judgment order has become enforceable, the court must issue an enforcement order if the judgment creditor files the appropriate request.

[51] The court holds the view that the situation is not as simple and straightforward as the Applicant suggests. It appears that much would depend on the kind of

²⁴ At para. 11 affidavit JOD 16th July 2019

²⁵ At paras. 12-13 affidavit JOD 16th July 2019

²⁶ At para. 15 affidavit of JOD 16th July 2019

enforcement proceedings that the judgment creditor is embarking on. In the present case, the Applicant is seeking both an order for sale and the making of the provisional charging order final. Both applications are governed by rules that guide the exercise of the court's discretion in making the orders sought.

[52] In considering whether to exercise its discretionary power to make a charging order, the court must first decide from whence its power to so do emanates. The Respondent contends in her submissions that the Applicant has failed to demonstrate that the court has the jurisdiction to make a charging order. According to the Respondent, the court's jurisdiction to make a charging order must be derived from statute and not by reference to any procedural rule.

[53] The court agrees with this submission. The power of the court to make a charging order derives from statute. The CPR itself does not confer jurisdiction on the court to make a charging order. The CPR merely provides the procedural rules to guide the court in the exercise of the jurisdiction conferred by statute. The question that arises is whether the Applicant's failure to state the basis of the court's jurisdiction to make the charging order in the application is fatal to the enforcement proceedings. The court is of the view that it does not.

[54] In the case of **Stichting Administratiekantoor Nems v Anna Radchenko and another**,²⁷ the Court of Appeal of the Eastern Caribbean Supreme Court considered the jurisdiction of the Supreme Court to make charging orders. In afore-cited case the court below had granted ex parte a provisional charging order over shares in a company registered in the BVI said to be beneficially owned by one of the respondents towards enforcement of a money judgment in favour of the appellant.

[55] The first respondent objected to the grant of the provisional charging order and the said provisional charging order being made final under CPR 48.10 on the ground

²⁷ [2019] ECSCJ No. 186

that she and not the second respondent was the legal and beneficial owner of the shares. At the hearing of the application for a final charging order, the interested party raised the preliminary objection that the BVI Court had no jurisdiction to grant charging orders and that Part 48 of the CPR are procedural rules only which in essence provided for how the court would exercise the jurisdiction were such given.

[56] The learned judge in the court below in delivering his judgment held that no statute had been drawn to his attention that gave power to the BVI Court to make charging orders. He concluded that there is no statutory underpinning for CPR 48 which purports to empower the court to grant charging orders and that there was no power to do so under the common law.

[57] The learned judge dismissed the application to make the charging order final and discharged the provisional charging order. On appeal, the Court of Appeal allowed the appeal and reinstated the provisional charging order. The Court of Appeal also remitted the application for the final charging order to the court below to be heard on its merits. In delivering the judgment of the Court of Appeal, Pereira CJ said:

"The learned judge was correct in holding that the Territory of the Virgin Islands has not enacted its own domestic law conferring on the court jurisdiction to grant charging orders in aid of enforcement proceedings. He was also correct to hold that CPR Part 48 does not confer jurisdiction but merely provides for how the jurisdiction, once conferred, must be exercised. Although the learned judge was referred to section 7(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act¹ which is the reception provision for substantive English Law up to 1st January 1940, he was not referred to the Judgments Act of England of 1838 and 1840 which were still in effect as of 1st January 1940. We say this because at paragraph 16 of his judgment he said:

"No legislation, statutory provision or common law authority which confers jurisdiction on the BVI court to make charging orders has been drawn to the court's attention. The Charging Orders Act 1979 of England cannot be imported by virtue of section 7 of the Supreme Court Act because it is subsequent to 1940, nor can it be imported by virtue of section 11 because it is substantive and not procedural. I

am therefore constrained to find that the BVI court has no jurisdiction to make charging orders".

In England and Wales prior to 1st January 1940 there was in force the Judgments Act 1838 and 1840. Section XIV of that Act allowed a judgment creditor to apply for and obtain an order charging 'the Stock, Funds, Annuities, or Shares' of a judgment debtor with the payment of the amount of the judgment, and interests recoverable by the judgment creditor. Section 1 of the Judgments Act, 1840 merely extended the scope of section 14 of the 1838 Act to include "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".

The Supreme Court Order which came into effect in all the former Eastern Caribbean colonies of the United Kingdom on 22nd February 1967 was passed pursuant to section 6 of the West Indies Act 1967 of the United Kingdom. This Order was also extended to the remaining colonies of Montserrat and the Virgin Islands. By section 4 of the Supreme Court Order, the Eastern Caribbean Supreme Court was established and section 9 provided for the Court to have "such jurisdiction and powers as may be conferred on it by the Constitution or any other law of the State." The Supreme Court Order was followed by the enactment in the Virgin Islands of The West Indies Associated States Supreme Court (Virgin Islands) Act ("the Supreme Court Act") in 1969. The Supreme Court Act then provided in section 6 that the High Court is vested with all the jurisdiction which was vested in the former Supreme Court by the Supreme Court Act, other laws of the Legislature of the Territory, or any other law for the time being in force in the Territory. The Supreme Court Act then went on to expressly provide in section 7(1) that:

"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."

It would accordingly follow that the Judgments Acts of 1838 and 1840 of England which gave jurisdiction to a judge of a superior court in England to grant charging orders over shares in which a judgment debtor held an interest in favour of a judgment creditor would have been similarly conferred upon a judge of the High Court of the Virgin Islands (a superior court of record) by virtue of section 7(1) of the Supreme Court Act. The BVI Court therefore has, and has had the jurisdiction, to grant charging

orders by virtue not only of the current Supreme Court Act but also its precursor the Supreme Court Act Cap. 76 enacted on 1st January 1940 by virtue of section 22 of that Act.”²⁸

- [58] For the sake of completeness, it will be necessary to examine whether Anguillian law contains an analog of the BVI statutory provisions that can be applied in the same way in the present case. Section 9 of the West Indies Associated States Supreme Court Order²⁹ provides that the High Court shall have, in relation to a State, such jurisdiction and powers as may be conferred on it by the Constitution or any other law of the State. Section 5 of the Eastern Caribbean Supreme Court (Anguilla) Act³⁰ provides that the High Court shall have and exercise within Anguilla all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as on the 1st day of January, 1940, were vested in the High Court of Justice in England.
- [59] Therefore, when transposed to Anguilla, the statutory provisions relied on by the Court of Appeal in **Stichting Administratiekantoor Nems v Anna Radchenko and another**, satisfies the court that it has the power to make charging orders. The mere fact that the Applicant did not recite the statutory basis for making the application or the jurisdiction from which the power to make a charging order was derived, is not inimical to the court’s jurisdiction to grant the same. In the circumstances, there is no merit to the Respondent’s contention on this point.
- [60] Having crossed the hurdle of the jurisdictional point raised by the Respondent, the procedural complaints made by the Respondent will now be considered.
- [61] In the present case, the Respondent argued that the court should discharge the provisional charging order on the grounds that the Applicant has not complied with the provisions of CPR 48.7 by failing to serve the interested parties with the provisional charging order. CPR 48.6 defines interested party.

²⁸ At paras. 8-12

²⁹ S.I. 1967 No. 223

³⁰ R.S.A. c. E15

- [62] In the case of **Stichting Nems v Igor Borisovitch Gitlin**,³¹ the BVI Commercial Court had to consider a similar issue. The court in that case discharged the provisional charging order on the grounds of improper service on an interested party.
- [63] It is on this basis that the Respondent seeks to have the court exercise its powers pursuant to CPR 48.8 (4)³² to either discharge the provisional charging order or give directions for the resolution of the objections raised by the Respondent which the Respondent says cannot fairly be resolved summarily.
- [64] The approach to the exercise of the court's discretion to make a final charging order also arose in the case of **Commercial Bank of Dubai v Abdalla Juma Majid Al-Sari and others**.³³ The court, in determining how the court should exercise its discretion, relied on the decision in **Roberts Petroleum Ltd**³⁴ and reinforced the point that the affidavit in support of the application to make the charging order nisi absolute must not only state the persons upon whom the documents are to be served, but must also name the interested parties or other unsecured creditors. In addition, the applicant for a final charging order must prove service on the interested parties and the unsecured creditors.

The Winding up Proceedings

- [65] The Applicant instituted winding up proceedings in respect of both Sea Island Realities Inc. and WDM Ltd. This fact was not disclosed in the affidavit in support of the application for a final charging order. There has been no order by the court for the winding up of the two companies which precludes the present application.

³¹ [2018] ECSCJ No. 351 At paras. 18-19 and 31

³² (4) At the hearing if satisfied that the provisional charging order has been served on the judgment debtor, the court has power 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.

³³ [2019] ECSCJ No. 156

³⁴ *Infra*

Therefore, the court must then exercise its discretion in accordance with CPR 48 in determining whether to make the final charging order.

[66] In **Roberts Petroleum Ltd v Bernard Kenny Ltd**,³⁵ the principles that ought to guide the exercise of the court's discretion in making a charging order nisi absolute were considered. Lord Brandon of Oakbrook delivering the judgment of the court said:

"Cases like the present one involve a conflict between two well-established principles of law. The first principle is that a judgment creditor is in general entitled to enforce a money judgment which he has lawfully obtained against a judgment debtor by all or any of the means of execution prescribed by the relevant rules of court. Such rules provide, among other things, for the enforcement of a judgment debt by means of an executing order on the judgment debtor's lands or interests in land and the appointment of a receiver. The second principle is that, when a judgment debtor, whether he be a natural person or a corporate body, has become insolvent, all the unsecured creditors should be treated equally, each receiving the same proportionate share of the inadequate fund available as all the others.

...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 do 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.

³⁵ [1982] 1WLR 301

- (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 circumstances referred to in (6) above, the court will generally be justified in exercising its discretion by making the order absolute.”³⁶

[67] The case of **Aquaduct Limited and another v Faelesseje and another**³⁷ is instructive in relation to how the court must exercise its discretion in determining whether to grant a final charging order. In **Aquaduct Limited** the appellants filed a formal objection to the granting of a final charging order on the grounds that the deceased only had 1 share in Aquaduct and that the Estate of the deceased nor the deceased ever owned a 50% share or interest in Aquaduct; if the provisional order were made absolute, it would essentially fix on shares to which the Estate is not entitled; the judgment creditor (first-named respondent) is only peripherally concerned with the issues - that is, a dispute between the appellants and the second-named respondent, judicial resolution of which would require a claim form, pleadings, evidence and cross-examination. The core of the appellants' objections therefore, was that a new claim form was required to properly commence proceedings in order to determine the extent of the deceased true shareholding in Aquaduct. The court proceeded to give directions for the filing of further affidavit evidence and for the disclosure of documents. The appellants filed affidavits seeking to dispute the proposition that the deceased had a 50% stake in Aquaduct. When hearing of the matter began before the judge, the appellants' counsel took a preliminary point of law that the court had no jurisdiction to resolve Sylvester's claim to a 50% beneficial ownership in Aquaduct by what appeared to be summary proceedings within the Part 48 charging proceedings. The appellants' counsel submitted that the court's jurisdiction under Part 48 in such a case is

³⁶ *Infra* at p. 307

³⁷ [2016] ECSCJ No. 61

limited to making a determination as to whether the provisional charging order ought to be made absolute. Although rule 48.8(4) contemplates that where a dispute as to ownership arises which can be "fairly resolved summarily" the court may enquire into the beneficial ownership of assets sought to be charged, it was impossible to resolve the present matter summarily as it concerned an extremely contentious dispute between Bertille Da Silva and the Estate. The appellants contended that in order to ensure fairness of the proceedings, the court was obliged to give directions for trial of that dispute, with all the normal incidents of trial under the CPR 2000. The learned judge ruled that she had given directions for the filing of further affidavit evidence after the appellants' objections and this implicitly amounted to a dismissal of the said objection. The preliminary point of law was in effect the same objection. The court had jurisdiction to try a substantial issue of fact that had arisen between the parties in the course of Part 48 proceedings and had given proper directions for the trial of the issues that had arisen.

[68] On appeal, the main complaint advanced by the appellants was that the learned judge had conflated the procedure that was appropriate to the summary hearing of a dispute, arising in the course of charging proceedings, as to the ownership of the asset sought to be charged, to the procedure that she ought to have directed for the fair disposal of that dispute and she recognised that the dispute could not be fairly resolved summarily.

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

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

[71] The Court of Appeal also held that a fair resolution of the important issue of the property rights of the various persons claiming ownership of the shares that ought to be charged in the charging proceedings required the filing of pleadings that defined the bases of the competing claims. The filing of affidavit evidence was no substitute for pleadings in determining and fairly resolving this issue. In relation to issues of disclosure, discovery and reception and treatment of evidence, the directions given were no substitute for Parts 28 and 29 of the CPR 2000 which would have been fully in play had the nature of the learned judge's directions been addressed to the trial of the dispute of fact that arose as distinct from the summary disposal of the dispute. Therefore, the learned judge was plainly wrong and caused the appellants substantial prejudice in dismissing the preliminary objection and embarking by way of proceedings that are not in accordance with the normal incidents of a trial under the CPR.

[72] Baptiste JA delivering the judgment of the Court of Appeal reasoned that:

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

Because the learned judge never sought to have the issues defined, or to consider the orders that she would ultimately have to make - preliminary to making the provisional order final, and their implications, she never considered that in the present case, the property rights of the affected shareholders were likely to be affected by such orders that she would ultimately have to make. She accordingly failed to ensure that all of the persons who would be affected by the orders that she would have to make were before the Court.”³⁸

[73] In **Keithley Lake and others v Richard Vento and others**,³⁹ the Court of Appeal had to consider the question of whether the learned Master erred in failing to make enquiries into an alleged unregistered interest in land. In **Keithley Lake v Richard Vento** the respondent, seeking to enforce an arbitration award, applied to the court for an order for the sale of four properties, one of which was registered to the appellant with absolute title, and in which another party claimed to have an unregistered interest. The learned Master heard the application and ordered that the properties be sold by public auction. One of the main issues arising on the appeal was whether the learned Master was required to make an order in respect of the unregistered interest of the interested party.

[74] The Court of Appeal held, allowing the appeal that CPR 55.5 empowered the court to give directions to facilitate the sale of property, including directions that an inquiry be made into the interest of any interested persons in the land and the extent of such interest in the net proceeds of sale.

³⁸ At para 34-35

³⁹ [2019] ECSCJ No. 235

- [75] The Court of Appeal also held that while the Master's order recognized the interested party's interest in the property, there was no specific finding in relation to the nature and extent of her interest in the property. In light of the fact of unresolved claims that the interested party held an interest in the property, which would have to be accounted for in the substantive order, the Master was required to make a specific finding regarding the interest, and if necessary, give directions for an inquiry into the existence or otherwise of the interested party's interest.
- [76] In respect of whether the Respondent can claim a legal right of set off in opposition to the provisional charging order being made absolute, the court is guided by the decision in **Glencore Grain Ltd. v Agros Trading Co. Ltd.**⁴⁰ The principle derived from **Glencore v Agros** is that a party could only set off its debts when judgment had been obtained even though liability, if admitted, was irrelevant. The set off would take place only on judgment.
- [77] Consequently, legal set off is confined to debts which at the time when the defence of set off is filed were due and payable and either liquidated or in sums capable of ascertainment without valuation or estimation. Legal set off does not take effect until judgment in the action.⁴¹

Conclusions

- [78] The court finds that the Respondent is not entitled, in the circumstances, to claim a right of set off with respect to debts which she alleged are owed to her by the Applicant. This aspect of the Respondent's opposition has not been made out. The court has formed the view that issues related to the respective indebtedness of the Applicant and the Respondent with respect to the WDM partnership had been finally and distinctly determined in the arbitration proceedings.

⁴⁰ [1999] 2 All ER (Comm) 288

⁴¹ Per Clarke LJ at para 17

- [79] In addition, the Respondent's argument in respect of a right of set off likely to be obtained as a result of her claim for unfair prejudice and oppression is untenable. To date, the matters in dispute between the parties in that claim have not been determined, and although there has been valuation of the Respondent's shareholdings in FATCL, there has been no agreement between the parties or any determination by the court with respect to the buyout of the Respondent's shares by the Applicant.
- [80] In the circumstances, there is clearly no enforceable judgment pursuant to which the Respondent can claim a right of set off.
- [81] The Respondent's claim to a right of set off with respect to what was described as loans paid for the Applicant's benefit to various creditors, particularly in respect of the WDM partnership, is unsustainable. This issue, as far as the court is concerned, was already determined in the Applicant's favour in the arbitration proceedings.
- [82] The court is also of the view that the Applicant is not entitled to claim interest at the rate of 10% pursuant to the Partnerships Act. The rate of interest that ought to be attached to the debt adjudged to be paid is at the statutory rate of 5%. Indeed no rate was applied in the arbitration award or in the judgment entered when leave was granted to enforce the award.
- [83] With respect to the question of the Anguilla Court's jurisdiction to grant a charging order, the court holds the view that it has jurisdiction to make a charging order by virtue of section 5 of the Eastern Caribbean Supreme Court (Anguilla) Act and section 9 of the West Indies Associated States Supreme Court Order. Indeed, the court's power to make a charging order does not emanate from the provisions of the CPR. However, the court is of the view that the mere fact that the Applicant failed to specifically state that the application for the charging order was made pursuant to the relevant statutory enactment is not fatal and the court, being

clothed with jurisdiction as aforementioned, is competent to make a charging order.

[84] In addition, the court finds that the Applicant failed to comply with the provisions of CPR 48.7 as it relates to service of the application for the charging order on interested parties, particularly as it relates to the Respondent's legal and beneficial interest in Sea Island Realties Limited and WDM Limited. Therefore, the application for the interim charging order to be made absolute in respect of the Respondent's legal and beneficial interest in those entities cannot be granted.

[85] There is a substantial dispute regarding the Respondent's legal and beneficial interest in Parcel 57 and whether any third party holds an unregistered or other interest in the subject property which cannot be determined in a summary manner. In the circumstances, the court is of the considered view, that in keeping with the provisions of CPR 48.8(4) (b), the court ought to order pleadings on the issue in order to effectively determine the issue.

Order

[86] In the circumstances, the court's order is as follows:

1. The application for the sale of the property Registration Section West End Block 17810B Parcel 57 is stayed.
2. The Respondent and any other interested party (including the Estate of McCoy Webster) shall file and serve witness statements, submissions and authorities in relation to the unregistered interest in Parcel 57 within 28 days of the date of this judgment.
3. The Applicant may file and serve witness statements, submissions and authorities in response within 28 days of the service of the documents by the Respondent or any other interested party.

4. Thereafter the application for the sale of Parcel 57 shall be determined by the court upon compliance with paragraphs 2 and 3 hereof.
5. The interim charging order with respect to the Respondent's legal and/or beneficial interest in Webster LP, the Respondent's 2004 BMW X3 and 2004 Mini Cooper is hereby made final and absolute.
6. The application for the interim charging order to be made final in respect of the Respondent's legal and/or beneficial interest in Sea Island Realities Ltd. and WDM Limited is dismissed.
7. The Applicant shall have carriage of this order and shall serve copies of the order on the Respondent or any other interested party.
8. The costs of the present application are awarded to the applicant and are to be assessed if not agreed within 21 days of this order.

Shawn Innocent
High Court Judge

By the Court

Registrar