



- [1]** On the 24<sup>th</sup> July 2018 a Provisional Charging Order (the “PCO”) was granted to Sagicor Bank Jamaica Limited (“the Bank”) against their Judgment Debtor, Marvalyn Taylor-Wright. It was made final on the 7<sup>th</sup> June 2019 by Nembhard, J. The Final Charging Order (“the FCO”) was registered by the Bank on the 31<sup>st</sup> July 2020 on property known as Lot 20A, 8 Strathairn Avenue in the Parish of St. Andrew which is comprised in the certificate of title registered at Volume 1401 Folio 966 of the Register Book of Titles (“the Property”). The Property is registered in the sole name of the Judgment Debtor and was not one which was identified by name in the Bank’s application for charging order or in the FCO.
- [2]** By her Urgent Notice of Application to Discharge/Vary Final Charging Order, which was filed on the 29<sup>th</sup> December 2020 (“the Application”), the Intervener applies for a discharge or variation of the FCO which she says is too widely worded. She asks that the impugned order, which will be reproduced later in these reasons for decision, be varied to apply only to the land and personal property particularised in the FCO. It is her contention that she is an interested person who is permitted to make the Application on the basis that she owns the entire beneficial interest in the Property.
- [3]** The Application is supported by the unchallenged evidence contained in the Affidavit of Urgency sworn and filed on the 28<sup>th</sup> and 29<sup>th</sup> December 2020 respectively; and the Affidavit of Karen Osbourne sworn and filed on the 17<sup>th</sup> and 29<sup>th</sup> December 2020 respectively.
- [4]** I am advised that the Application was served on the Supervisor of Insolvency, but that he no longer has an interest in the proceedings, the Certificate of Assignment issued by him to the Judgment Debtor having been annulled by Nembhard, J on the 7<sup>th</sup> June 2019. I am also advised that the Application was served on the Attorneys-at-Law for Marvalyn Taylor-Wright, the Judgment Debtor, on the 5<sup>th</sup> January 2021. Mrs. Taylor-Wright did not attend the hearing nor was she represented.
- [5]** Following the contested hearing of the Application on the 27<sup>th</sup> January 2021, a decision thereon was reserved to today’s date.

## ISSUES AND DISPOSITION

- [6] There are two (2) issues which I believe to be dispositive of the Application. They are whether the Intervener is an interested person within the meaning of rule 48.6(2)(a) of the Civil Procedure Rules (“the CPR”) and therefore permitted to apply for a discharge or variation of the FCO; and whether the FCO, which does not identify the Property, ought properly to apply to it. I find that the Intervener is an interested person and that the FCO should not apply to the Property. In consequence, it is appropriate that the widely worded order in the FCO be varied to limit it to only such land or personal property which has been identified in it. The Application to vary the FCO is accordingly allowed.

## REASONS

### *Whether Intervener is an interested person*

- [7] The Court is empowered by section 28 D of the **Judicature (Supreme Court) Act**, to make a charging order on the application of a person who is prosecuting a judgment or order for the payment of money in accordance with the CPR. Where a final charging order has been made, an application for its discharge or variation may be made by the judgment creditor, judgment debtor, or an interested person, pursuant to CPR 48.10(1).
- [8] The qualification requirements for interested persons are prescribed at CPR 48.6 which provides thus.

*(1) The persons specified in paragraph (2) have an interest in the charging order proceedings as well as the judgment creditor and the judgment debtor and are referred to in this Part as “the interested persons”.*

*(2) The interested persons are –*

*(a) any person who owns the land, stock or assets to be charged jointly with the judgment debtor;*

- (b) the company whose stock is to be charged;*
- (c) any person who is responsible for keeping the register of stock for that company*
- (d) if the stock is held under a trust, the trustees or such of them as the court may direct;*
- (e) if the stock is held by the judgment debtor as a trustee, such of the other trustees and beneficiaries as the court may direct;*
- (f) if the stock is held in court, the registrar; and*
- (g) any other person who has an interest in the personal property to be charged.*

**[9]** It was correctly conceded by Counsel for the Intervener, on the submission of Counsel for the Bank, that the class of persons within which the Intervener could possibly fall, having regard to the property which is the subject of the Application, is that specified at CPR 48.6 (2)(a). It was nevertheless submitted on behalf of the Bank, that the Intervener did not qualify as such a person on account that she did not own the land charged jointly with the Judgment Debtor. I do not agree with that submission.

**[10]** In **Levy v Ken Sales & Marketing Ltd.** [2008] UKPC 6, to which I referred the parties and permitted written submissions if so advised, Lord Scott in delivering the decision of the Board made what I believe to be a useful observation. He stated, so far as is relevant, that

*[22] A person with an arguable case for being the owner of an equitable interest in land must...be in general a member of the class of persons entitled to object to the making of a charging order. Their Lordships, if it were necessary to do so, would incline to give a wide construction to the words “any person who owns the land ...” in Rule 48.6(2)(a).*

**[11]** While the statement is obiter and does not bind the court, I agree entirely with the observation made for the reasons set out below.

- [12] Firstly, it does not appear to me that the word “*own*” in the rule is meant to be term of art. In its ordinary use, it signifies that something belongs to a person or thing. Ownership in CPR 48.6 (2)(a) is referable to property, whether land, stocks or assets. We are helpfully assisted with a definition for “*land*” at CPR 48.1 (2) which provides that it “*includes any interest in land*”. When these two rules are looked at together, I believe that it has been made abundantly clear, that “ownership of land” is not to be confined to legal and beneficial interests reflected on a certificate of title where registered land is in issue, but that it extends to beneficial interests which may not be so reflected.
- [13] It is well established that where land is registered, the person on title holds the legal and beneficial interest until they are separated. Equally well established is that a registered proprietor may hold the beneficial interest for some other person, whose name and interest may not be reflected on the register at all. In these circumstances, I believe a court is permitted to find that there is sufficient unity of interest in the land between the judgment debtor who is registered on title and a person who is able to demonstrate by cogent evidence that some beneficial interest in the property is owned by her, notwithstanding the absence of her name on the register. This is sufficient to establish joint ownership as contemplated by CPR 48.6(2)(a).
- [14] On an application for the variation or discharge of a charging order, the cogent evidence need not be in the form of a prior declaration that the applicant owns the beneficial interest claimed. It is sufficient that evidence is presented in support of the application upon which the court can conclude that the claim to a beneficial interest in the property to be charged is not fanciful or without merit on its face. I do not believe that an applicant should be required to go any further at this stage in order to establish her standing to approach the court so as to make the application for variation or discharge. The court, having satisfied itself of this threshold issue, will no doubt go on to consider whether the applicant is entitled to the relief claimed on the application, having regard to all the circumstances of the case. This brings me to the evidence on the Intervener’s application.

- [15] The Bank accepts in paragraph 7 of its written submissions filed on the 27<sup>th</sup> January 2012, that if all the Intervener says is true, she would have an equitable interest in the Property.
- [16] The evidence of the Intervener is unchallenged and is accepted by this court. Briefly, it is that she purchased the Property from the Judgment Debtor in 2009. She has had possession of the Instrument of Transfer, duplicate certificate of title, discharge of mortgage and the Property since then. Substantial documentary proof has been provided by her in these regards, including evidence of her having entered into rental agreements with tenants at the Property over the years. She also avers that it was because she was in possession as described, that the registration of the transfer was not prioritised and went unaddressed for several years. It is in these circumstances that she contends that she, and not the Judgment Debtor is entitled to the entire beneficial interest in the Property. The FCO has been registered on the certificate of title by the Bank.
- [17] It appears to me that where the property charged is land, any person who has an arguable case that the beneficial interest in the land belongs to them and that there is unity of interest between himself and the judgment debtor in that regard, is an interested person within the meaning of CPR 48.6 (2)(a). The Intervener, on the evidence presented in support of the Application, has demonstrated that she so qualifies. Accordingly, I find that she is an interested person who is permitted to make an application for the variation or discharge of the FCO obtained by the Bank and which has been registered on the Property.

*Inapplicability of the FCO to the Property and appropriateness of its variation*

- [18] The following order, which the Intervener seeks to have varied or discharged appears on the FCO:

(1) ...

(2) ***Land, stock and other personal property (including money wherever situate) belonging to the Respondent/Judgment Debtor***

are charged with the balance judgment debt in the sum of J\$48,850,750.60 together with interest at the per diem rate of \$11,015.81 from May 14, 2018 to the date of payment together with costs of J\$21,067,046.61 and £35,681.49 (with interest on those amounts at the rate of 6% and 3%, per annum, respectively) incurred by the Applicant in this action and its related appeals in the Court of Appeal and to Her Majesty through the Judicial Committee of Her Privy Council, to protect and enforce its rights to recover the money owed to it by the Respondent, **including**:

- a. *the lands comprised in certificate of title registered at Volume 1206 Folio 49 of the Register Book of Titles.*
- b. *Personal property as follows:*
- i. *2004 Grey Nissan Sunny Motor Car bearing registration number 1571FK;*
  - ii. *Mitsubishi Pajero bearing registration number 7227EJ;*
  - iii. *2014 Mitsubishi Pajero bearing registration number 1380GP; and*
  - iv. *2006 Mercedes Benz bearing registration number 2784ES.*

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**[Emphasis added]**

[19] The order is in the terms sought by the Bank on its charging order application. The use of the word “*including*” suggests that the land and personal property to be charged was not limited to those which are particularised at paragraphs (a) and (b). It is therefore unsurprising that the Registrar of Titles, on presentation of the FCO, permitted its registration on the certificate of title for the Property.

[20] It is the Intervener’s argument that the FCO was irregularly obtained and irregular in nature as the Bank’s application for charging order and supporting evidence breached CPR 48.3(2) (e) and (h). While it was also contended in a ground of the application that CPR 48.6 (g) was breached, Counsel for the Intervener conceded that the provision was inapplicable, having regard to the nature of the property which is the subject of the Application.

- [21] The Bank did not address the allegation of irregularity in its written submissions. It is its submission that even if the Intervener was found to be an interested party, the FCO should not be varied or discharged. This is on the ground that the Bank's registration of the FCO gave it a legal interest which ranks in priority to the Intervener's admitted equitable interest.
- [22] That the charge imposed by a charging order is in the nature of an equitable charge was confirmed by the Court of Appeal in **Bardi Ltd. v McDonald Milligen** [2018] JMCA Civ 33 [15]. The nature of an equitable charge on land is stated thus in Halsbury's Laws of England, 5<sup>th</sup> Edition, Volume 77, 2016 [106],

*[106] An equitable charge arises where a particular asset or class of assets is appropriated to the satisfaction of a debt or other obligation of the chargor or a third party, so that the chargee is entitled to look to the asset and its proceeds for the discharge of the liability. This right creates a transmissible interest in the asset. It is a security interest created without any transfer of title or possession to the beneficiary, which can be created by an informal transaction for value and over any kind of property.*

*An equitable charge on land is a security which does not create a legal estate, but only confers an equitable interest in the land upon the creditor. It entitles the holder to have the property comprised in it sold by an order of the court to raise the money charged on it, but, in the absence of any express provision to that effect, it does not amount to an agreement to give a legal mortgage, although it may, if duly registered, take priority over a legal estate.*

- [23] One of the orders in the FCO permits the Bank to sell property to which it relates and apply the same in discharge of the Judgment Debtor's liability to the Bank.
- [24] For the FCO to have the effect for which the Bank contends however, the FCO must have been properly issued by the court and applicable to the

Property which has in fact been charged. The Application for Charging Order filed on behalf of the Bank on the 20<sup>th</sup> July 2018 and the supporting Affidavit of Andrew Foreman sworn and filed on the 19<sup>th</sup> and 20<sup>th</sup> July 2018 respectively, do not identify the Property as one to be charged nor do they indicate that the Judgment Debtor has a beneficial interest in it. On enquiry of the court as to the effect of the default, it was Mr. Hickson's submission that it goes to the issue of notice but does not affect the validity of the FCO.

[25] While I will accept that identification of the property to be charged assists in the identification of persons who should be notified of the application, and would also go further to agree that a charging order is not rendered invalid or irregular because of its failure to identify a particular property; I am of the view that a charging order can only properly apply to property which was identified in charging order application.

[26] The court's power to grant a charging order is vested by statute, which requires that it be exercised in accordance with the CPR. While an application for charging order may be made without notice, it must be supported by evidence on affidavit: CPR 48.2(1). The CPR goes further to set out the evidence which is "required" to support an application for a charging order. CPR 48.3, among other things, which are not immediately relevant, provides that

48.3 (1) ...

(2) *The affidavit **must** –*

(a) ...

(e) *where the application relates to land, identify that land;*

(f) ...

(g) *in the case of any other personal property [other than stock which is addressed at paragraph (f)] -*

*(i) identify that property; and*

*(ii) state whether any other person is believed to*

*have an interest in the property; and*

*(h) state that to the best of the deponent's information and belief the debtor is beneficially entitled to all or some part of the land, stock or personal property as the case may be.*

**[Emphasis added]**

- [27]** I am of the view that the requirements of CPR 48.3(2) are mandatory in light of the use of the word “must” in the provision; and on consideration of the purpose, nature and effect of a charging order. Consequently, where the property to be charged is land, the affidavit evidence should identify the property to be charged and include an averment that to the best of the deponent's information and belief, the judgment debtor is beneficially entitled to it.
- [28]** Pursuant to CPR 45.2 (b), money judgments may be enforced by a charging order under Part 48 of the CPR. Where a charging order is granted, whether provisionally or finally, only dispositions by the judgment debtor of her interest in property to which the charging order applies are invalid against the judgment creditor:48.9(1). The charging order therefore provides security to the judgment creditor against his judgment debtor.
- [29]** Where that security is obtained but proves an insufficient impetus for the judgment debtor to satisfy the judgment debt in full, the judgment creditor is able to enforce the charging order by way of sale of the property charged pursuant to CPR 48.11. The object of such an order is to secure the expeditious sale of the property charged at a price that is fair to both the judgment creditor and the judgment debtor in aid of extinguishing the debt.
- [30]** Identifying the property to be charged in an application for a charging order makes certain the property which is to be charged. The affiant for the judgment creditor having made this identification and stated that to the best of his information and belief the judgment creditor has a beneficial interest in it, the judgment debtor is placed in a position to respond to the averment. One available response is that the beneficial interest in the property is owned wholly or partly by some person other than the judgment debtor. It also gives

the judgment debtor an opportunity, certainly before a final charging order is granted to say for example, that he has no interest in the property and it ought not to be charged in satisfying her debt to the judgment creditor. These disclosures are material in an application for a charging order as they enable the court to direct that notice of the application be given to such other persons, so that the propriety of charging the property to satisfy the debt owed by the judgment debtor to the judgment creditor may be enquired into and determined.

- [31]** In addition to putting the court in a position to afford interested persons an opportunity to be heard before a final charging order is made, which is capable of affecting their interest in the property, the identity of the property and the averment as to the judgment debtor's beneficial entitlement also ensures that a charging order obtained by a judgment creditor is of value. The court would be loathed to act in futility by granting a valueless charging order.
- [32]** I bear in mind that the security provided by a charging order does not satisfy the judgment debt on its own. By itself it is unlikely to compel a judgment debtor who has no beneficial interest in the property charged to seek to satisfy the judgment debt because he has no pecuniary interest in the said property. It is therefore useless as moral coercive tool.
- [33]** In order to enforce the charging order, the judgment creditor, pursuant to CPR 48.11 may apply for and obtain an order by sale of the property charged. Where the judgment debtor has no beneficial interest in the property, it is difficult to see how he could claim to be entitled to any of the proceeds from the sale of such property for any reason, including to satisfy his judgment debt. The judgment creditor is in no better position.
- [34]** The failure to identify the property to be charged and the judgment debtor's beneficial interest in the said property therefore have serious consequences for the court, the parties who are bound by the judgment to which the charging order application relates, as well as persons who have a legitimate beneficial

interest in the property but have no interest in the ligation which gave rise to the judgment debt.

[35] Further, when I examine the provisions of Part 48 of the CPR, I am unable to identify any power in the court to grant what is in effect a “global charging order” which is capable of attaching to property which was not identified in the application and in which the judgment debtor was not stated to have a beneficial interest, wherever they may be found.

[36] The Property was not identified in the Bank’s application for charging order and but for the widely worded order which appears on the FCO, it could not have been registered on its certificate of title and stand in the way of the Intervener’s effort to have her transfer registered on the relevant certificate of title.

[37] It is in all these circumstances that I agree with the Counsel for the Intervener that the broadly worded FCO obtained by the Bank is irregular. Having found that the Intervener is an interested person and that the court is not empowered to grant a charging order in respect of property which was not identified in the application, I believe that this is an appropriate case for variation of the FCO to limit it only to property identified in the Bank’s charging order application.

## **ORDER**

[38] It is ordered as follows:

1. The Intervener’s application for a variation of the order numbered 2, which is contained in the Final Charging Order granted by Nembhard, J. on the 7<sup>th</sup> June 2019 is granted, to cause the said order to now read:

- 2. The interest of the Judgment Debtor (Marvalyn Taylor-Wright) in the land and personal property specified below stands charged with the balance judgment debt in the sum of J\$48,850,750.60 together with interest at the per diem*

*rate of \$11,015.81 from May 14, 2018 to the date of payment together with costs of J\$21,067,046.61 and £35,681.49 (with interest on those amounts at the rate of 6% and 3%, per annum, respectively) incurred by the Judgment Creditor in this action and its related appeals in the Court of Appeal and to Her Majesty through the Judicial Committee of Her Privy Council, to protect and enforce its rights to recover the money owed to it by the Judgment Debtor (Marvalyn Taylor-Wright):*

- a. *the lands comprised in certificate of title registered at Volume 1206 Folio 49 of the Register Book of Titles.*
- b. *Personal property as follows:*
- i. 2004 Grey Nissan Sunny Motor Car bearing registration number 1571FK;*
  - ii. Mitsubishi Pajero bearing registration number 7227EJ;*
  - iii. 2014 Mitsubishi Pajero bearing registration number 1380GP; and*
  - iv. 2006 Mercedes Benz bearing registration number 2784ES.*

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2. The entry by the Registrar of Titles of the Final Charging Order granted by Nembhard, J. on the 7<sup>th</sup> June 2019 on property known as Lot 20A, 8 Strathairn Avenue in the parish of St. Andrew which is comprised in the certificate of title registered at Volume 1401 Folio 966 of the Register Book of Titles is to be cancelled.
3. Costs of the application to the Intervener to be taxed if not sooner agreed.
4. The Judgment Creditor's oral applications for leave to appeal and for a stay of execution of order 2 herein are refused.
5. The Intervener's Attorney-at-Law is to prepare, file and serve this order.

**Carole Barnaby  
Puisne Judge**