



[2016] JMSC CIV 50

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2009HCV00133**

<b>BETWEEN</b>	<b>GORDON STEWART OJ</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>NOEL SLOLEY SNR</b>	<b>FIRST RESPONDENT</b>
<b>AND</b>	<b>NOEL SLOLEY JNR</b>	<b>SECOND RESPONDENT</b>
<b>AND</b>	<b>GORDON BROWN</b>	<b>THIRD RESPONDENT</b>
<b>AND</b>	<b>DEBORAH LEE SHEUNG</b>	<b>FOURTH RESPONDENT</b>
<b>AND</b>	<b>JAMAICA TOURS LIMITED</b>	<b>FIFTH RESPONDENT</b>

**IN CHAMBERS**

Mr Hugh Wildman, Mr Jerome Spencer and Barbara Hinds instructed by Patterson Mair Hamilton for the claimant

Mr Abraham Dabdoub instructed by Dabdoub Dabdoub and Co for the fifth respondent

March 31 and April 11, 2016

**CIVIL PROCEDURE – APPLICATION TO SET ASIDE PROVISIONAL CHARGING  
ORDER – PARTS 11, 17, 48 AND 65 OF THE CIVIL PROCEDURE RULES –**

**WHETHER THERE WAS MATERIAL NON-DISCLOSURE ON THE WITHOUT NOTICE APPLICATION FOR THE PROVISIONAL CHARGING ORDER – SECTIONS 28D, 28E AND 47 OF THE JUDICATURE (SUPREME COURT) ACT – WHETHER JUDGE OF EQUAL JURISDICTION CAN SET ASIDE ORDER OF OTHER JUDGE**

**SYKES J**

**Why are we gathered here?**

- [1] Mr Gordon Stewart is applying to set aside a without notice order made by Laing J on March 11, 2016. Jamaica Tours Limited ('JTL') applied for and his Lordship granted a provisional charging order over 499,999 shares held by Mr Stewart in Gorstew Limited ('Gorstew'). In addition, Laing J granted an injunction preventing Mr Stewart from charging or disposing of the shares. A stop notice was also issued and the effect of that notice was to prevent Mr Stewart, the secretary of Gorstew and the Registrar of Companies from registering the transfer of the shares or making any payment or interest in respect of the shares.
- [2] The provisional order was sought to enforce a judgment debt for costs awarded in favour of the applicant arising from failed contempt proceedings brought by Mr Stewart.

**The grounds of the application**

- [3] The application for discharge of Laing J's order rests on these grounds:
- (i) material non-disclosure;
  - (ii) no justifiable reason for proceeding without notice;
  - (iii) absence of evidence showing the risk of dissipation of assets;
  - (iv) no undertaking as to damages and no order was made dispensing with that requirement;

(v) the order made by Laing J did not comply with Part 11, 17 and 48 of the CPR.

[4] The affidavit in support of the application is sworn to by Mr Jerome Spencer, attorney at law.

### **The history of the matter**

[5] Mr Jalil Dabdoub swore the affidavit in support of the application made before Laing J. The contempt proceedings was dismissed in May 2010 by Roy Anderson J with costs to JTL to be taxed if not agreed. Mr Stewart's appeal against the dismissal was dismissed by the Court of Appeal in July 2011 with costs to JTL. This means that there were now two costs orders against Mr Stewart: one from the Supreme Court and the other from the Court of Appeal. The order of Laing J covered a third costs order from the Court of Appeal which will be explained later.

[6] To complete the history of the contempt matter. Mr Stewart sought leave from the Court of Appeal to take his case to the Judicial Committee of the Privy Council. The Court of Appeal refused leave. The Privy Council was petitioned and it too refused leave to appeal. This means that the merits of the contempt proceedings are now at an end and the only remaining matter is that of costs arising from the proceedings in the Supreme Court and the Court of Appeal.

[7] A word must be said about the relevant rules before continuing with the affidavit of Mr Jalil Dabdoub.

### **The rules necessary for the history of the matter**

[8] The rules about to be cited apply to the taxation of costs in the Supreme Court and the Court of Appeal. They apply to the Court of Appeal because rule 1.18 of the Court of Appeal rules says that Parts 64 and 65 of the Civil Procedure Rules ('CPR') apply to the award of and 'quantification of costs of an appeal subject to

any necessary modification and in particular to the amendments set out in this rule.'

- [9] The court notes that under rule 65.18 (1) of the CPR the taxation of proceedings commences with the receiving party (in this case JTL) filing the bill of costs at the registry and serving a copy of the bill on the paying party (in this case Mr Stewart). The rule goes on to say that the bill of costs must be filed and served within three months of the date of the order or event entitling the receiving party to receive costs. Rule 65.18 (3), (4) and (5) speaks to the contents of the bill of costs and emphasises that it need not take any particular form. Rule 65.18 (6) requires the bill of costs to have attached to it a notice informing the paying party that he needs to serve points of dispute if he is disputing any item or amount (rule 65.20). The bill should also contain information notifying the paying party of the consequence of not filing points of dispute.
- [10] Rule 65.20 informs the paying party of what he needs to do if he is disputing the sums claimed by the receiving party. To challenge the sums claimed by the receiving party, rule 65.20 (3) requires the paying party to file and serve points of dispute 28 days after the date of service of the bill of costs. Rule 65.20 (4) states that if the paying party files the points of dispute outside of the 28-day period '[the paying] may not be heard further in the taxation proceedings unless the registrar gives permission.'
- [11] The rules contemplate that the paying party may be inactive. It has provisions that prevent the paying party from delaying the process. In addition to the paying party not being heard if he is out of time, rule 65.20 (5) provides that the receiving party may request a default costs certificate if (a) the period for filing the points of dispute has passed and (b) no points of dispute have been served on the receiving party. Rule 65.20 (6) states that if 'any party (including the paying party) serves points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate.' It has been decided by the Supreme Court that issue in this context means signed (**Charela**

**Inn Ltd v United Church Corporation** Claim No 2004HCV02594 (unreported) (delivered July 8, 2011) (Brooks J (as he was at the time, now Justice of Appeal)). The Court of Appeal has also decided that the date of filing of the default costs certificate is the date from which it takes effect even if it is signed after the date of filing (**Auburn Court Limited and another v National Commercial Bank** SCCA No 27/2004 (unreported) (delivered March 18, 2009) (Harris JA)).

- [12] Rule 65.21 permits the receiving party to obtain a default costs certificate if there is proof that (a) the paying party was served with the bill of costs and (b) no points of dispute have been received the receiving party. Once this is established the rule says that the ‘registrar must then sign the default costs certificate.’ Even after this, the paying party may get back in the ring by applying to set aside the default costs certificate (rule 65.22 (1)). The registrar must set aside the default costs certificate ‘if the receiving party was not entitled to it’ (rule 65.22 (2)).
- [13] Rule 65.26 permits either the receiving or paying party to appeal the registrar’s taxation to a judge of the court dealing with the taxation. That is to say, an appeal from the Registrar of the Supreme Court goes to a Supreme Court judge and an appeal from the Registrar of the Court of Appeal goes to a judge of the Court of Appeal. Rule 65.28 details the procedure for appeal.

### **Continuation of the history in the Supreme Court**

- [14] The court now returns to Mr Jalil Dabdoub’s account after that necessary digression. As far as the Supreme Court part of the history is concerned, the bill of costs was served on Mr Stewart’s attorneys at law on May 1, 2012.
- [15] There is no dispute that Mr Stewart’s attorneys at law, by way of letter to JTL’s attorneys at law, acknowledged that they had received the bill of costs but took the view that taxation could not begin unless the parties attempted to agree costs.

- [16]** The written submissions filed on behalf of JTL makes the complaint that JTL had to file three requests for the default costs certificate. The first two were filed in June 2012 and another in July 2012, and on each occasion, after filing they could not be found. This explains the September 7, 2012 filing of the third application for a default costs certificate. The default costs certificates issued was in the sum of \$25,869,542.39. As of March 2016 that sum has increased, by virtue of interest, to \$35,182,577.64. The request for the default costs certificate was filed on September 7, 2012 and signed on the same day.
- [17]** On September 25, 2012, Mr Stewart filed points of dispute and served them on JTL by September 28, 2012. By any measure this was well outside the 28-day period set by the rule after Mr Stewart was served on May 1, 2012. Not only that, it was filed after the registrar has signed the default costs certificate.
- [18]** What is undeniable is that no points of dispute were served within the 28-day period set by the CPR. Mr Stewart has not challenged JTL's assertion that the bill of costs has complied with the relevant rules and in particular that it contained a notice telling him that if he wished to dispute the bill of costs he must file and serve the points of dispute within 28 days of service of the bill of costs. The notice also stated that should he fail to file the points of dispute then JTL will proceed to get a default costs certificate. In other words, Mr Stewart was told (a) what he needed to do in order to challenge the bill of costs; (b) the time frame within which need to file and serve the points of dispute and (c) the consequence of failing to abide the rules.
- [19]** The default costs certificate having been issued Mr Stewart applied under rule 65.22 (1) to set aside the default costs certificate. It was heard by the Registrar of the Supreme Court over three days in October and November 2013. The decision was handed down February 19, 2016. The application was refused.
- [20]** On March 10, 2016 JTL applied for the provisional charging order which was granted by Laing J on March 11, 2016.

- [21] Mr Jerome Spencer in an affidavit filed on behalf of Mr Stewart states that on March 11, 2016 his firm of attorneys, that is Patterson Mair Hamilton, were served with Laing J's order along with other relevant documents.
- [22] Mr Spencer says that on March 7, 2016 he filed a without notice application for permission to appeal the registrar's decision of February 2016. He also says that on March 9, 2016 (a day before the provisional charging order application was filed and two days before the application was heard) he spoke to Mr Dabdoub who asked about 'the payment of costs' and he told Mr Dabdoub that they 'were the subject of challenge in the Court of Appeal and Supreme Court.' Mr Spencer, in a subsequent affidavit, has accepted that he did not explicitly say to Mr Dabdoub that documents were actually filed on March 7 seeking permission to appeal the registrar's decision.
- [23] Mr Jalil Dabdoub in an affidavit filed in response to Mr Spencer's has said that when the matter came before Laing J on March 11, 2016, no application appealing the registrar's decision had been served on JTL. Mr Jalil Dabdoub has also said that on March 11 there was no such application on file and neither was there one on the file up to March 14, three days after Laing J had granted the order.
- [24] Mr Jalil Dabdoub says that the secretary to the registrar indicated that on Friday, March 11 **after** Laing J granted the order the Mr Spencer attended upon the registrar's chambers and indicated that he had filed the application seeking leave to appeal the registrar's decision by fax on March 7.
- [25] The fax copy of the application for permission to appeal, exhibited to Mr Spencer's first affidavit, bears two date stamps of the Supreme Court: one dated March 11, 2016 which was crossed out; another bearing March 7, 2016. The crossed out date stamp was not initialled. This document was exhibited presumably to show that it was filed on March 7.

[26] On an examination of the fax copy the court must note that even assuming that the application seeking permission to appeal was filed on March 7, 2016 that application may well be out of time. Rule 65.28 requires that the notice be filed within 14 days after the date of the decision the appellant wishes to appeal. The registrar's decision was handed down in February 19, 2016. Based on Part 3, all periods of time expressed as a number of days are to be computed as clear days. Part 3 also says the counting for clear days begins on the day immediately following the event from which triggers the count. February 19, 2016 was a Friday and therefore the count would begin on February 20 and end on March 5, 2016 which was a Saturday. The rules say that when the period specified ends on a Saturday, Sunday or public holiday, then the period ends at 4:00pm on the next ordinary business day. In this case, the next ordinary business day would be Monday, March 7, 2016. There is no time written on the exhibited hard copy which bears the two Supreme Court stamps. As far as the fax copy is concerned the top left hand corner of both pages show this 'Mar 07 16 07:51p.' This may well be a reference to 7:51pm. There is also on this document a hand written notation from a registry staff member that is dated March 8, 2016. There is no clear evidence to show that the filing took place before 4:00pm on March 7, 2017, assuming that was the day it was faxed. The court makes no definitive pronouncement on this since the parties did not focus on this aspect of the case but the point cannot be ignored that this may become an issue in the future regardless of the outcome of this application.

### **Continuation of the history in the Court of Appeal**

[27] After the Court of Appeal dismissed the appeal from the contempt proceedings, as noted earlier, a costs order was made against Mr Stewart. This was the first costs order from the Court of Appeal that formed the basis of the provisional charging order. As was the case in the Supreme Court, JTL served Mr Stewart with a bill of costs along with the requisite notices informing Mr Stewart of the right to challenge the bill of costs, the need to file points of dispute within 28 days



of service if he is challenging the bill of costs as well the risk of a default costs certificate being issued.

- [28] Mr Stewart did not file his points of dispute within the time set. It is not clear when the bill of costs was served on Mr Stewart. JTL applied for a default costs certificate on September 7, 2012. It was signed on September 18, 2012. The date of issue is September 7, 2012. It is necessary to explain why the default costs certificate was said to have been issued on September 7, 2012 although it was signed on September 18, 2012. **Charela Inn** decided that 'issue' means signed and **Auburn Court** says that the date of filing is the date of issuance even if it is signed after the date of filing. The sum in this bill of costs was \$2,774,240.00.
- [29] Mr Stewart filed his points of objection on September 25, 2012. This was after the default certificate was signed by the Registrar of the Court of Appeal. As was done in the Supreme Court, Mr Stewart applied to set aside the default costs certificate on the ground that JTL was not entitled to it (rule 65.22). The registrar heard the application on April 14, 2015 dismissed it on April 27, 2015.
- [30] Mr Spencer in his affidavit has confirmed that Mr Stewart did not appeal the registrar's decision. What was pursued was an application to discharge the registrar's order. That application was heard by Paulette Williams JA (Ag) ('the single judge'). A preliminary objection was taken that her Ladyship did not have any jurisdiction to hear that application. Her Ladyship agreed and the application was dismissed on February 18, 2016 with costs to JTL. This is the second costs order from the Court of Appeal and the third costs order that was the subject of the provisional charging order issued by Laing J.
- [31] Mr Spencer swore that Mr Stewart filed his application to discharge the single judge's order on March 4, 2016. This being in the Court of Appeal, it would not be on the Supreme Court's file. Since it was not filed in the Supreme Court then Laing J would not know about it unless it came to his Lordship's knowledge by some other means.

- [32] Under rule 65.28 the time for appealing any decision of the registrars of either the Supreme Court or Court of Appeal is 14 days. There is no doubt that the time for appealing the Registrar of the Court of Appeal's decision has long passed. Not only had the time passed there was also the plain fact that rule 65.26 makes it clear that the receiving party has a right of appeal and **'any paying party who has served points of dispute may appeal against a decision of a registrar in the taxation proceedings'** (emphasis added). It is obvious then that a paying party who has not served points of dispute cannot appeal. This may explain why Mr Spencer has classified the hearing before the single judge as an application to set aside the registrar's decision and not an appeal.
- [33] There is a distinction between setting aside the registrar's decision and appealing the registrar's decision. Although it is the registrar who issues the default costs certificate, rule 65.22 gives her power to set aside her own certificate, on application by the paying party, if it turns out, on closer examination, that the receiving party was not entitled to it. Such an application was made in this case to the registrar and that was refused. Thereafter the only possible room to manoeuvre must be by way of appeal and not by applying to a single judge to set aside the default costs certificate.
- [34] The judgment of Brooks JA in **Rodney Ramazan and another v Owners of Motor Vessel** [2012] JMCA App 37 is very clear that the power to set aside a default costs certificate obtained from the Registrar of the Court of Appeal may be exercised by the registrar, a single judge or the court. The judgment does not authorise an application to a single judge of the Court of Appeal to set aside a default costs certificate **after the registrar has heard and refused such an application**. It must be observed that in that case there was no indication that when Brooks JA heard and granted the application that there had been a previous hearing before the registrar. It seems to this court that after an unsuccessful application to the registrar to set aside her default costs certificate, the next step after the registrar's refusal can only be by way of appeal but the condition precedent for that appeal to be properly constituted is that the paying

party must have filed and served points of dispute. The consequence of all this is that the failure to file and serve points of dispute has far reaching consequences such as erecting an insurmountable barrier to an appeal from the registrar's refusal to set aside her own default costs certificate

**[35]** Even though Mr Spencer has said that what was before Paulette Williams JA (Ag) was an application to discharge the registrar's order, and subject to what the Court of Appeal has to say about its rules, it is difficult to see how the application before the single judge could be anything other than an appeal since it does not appear that there can be a further application (apart from an appeal) to set aside the registrar's decision not to set aside her default costs certificate.

**[36]** Now that the relevant histories are complete the court can now address the specific points raised by Mr Wildman.

### **Material non-disclosure**

**[37]** Mr Spencer's affidavit sought to raise the issue of material non-disclosure in this way. He alleges that JTL failed to disclose to the judge that Mr Spencer had spoken to Mr Abraham Dabdoub on March 9, 2016. The idea sought to be conveyed is that from this conversation Mr Abraham Dabdoub should have told Laing J that Mr Stewart was challenging the costs orders in both courts and the failure to inform Laing J of this was a material non-disclosure which should result in the order being set aside.

**[38]** There is more to this conversation. In his affidavit Mr Spencer said that he told Mr Abraham Dabdoub that 'costs were subject of challenges in the Court of Appeal and the Supreme Court.' Mr Spencer accepts that his communication with Mr Abraham Dabdoub was not pointed and specific, that it so say, he never actually said that the two costs orders were being appealed but, says counsel, in his second affidavit, his reference to 'costs were subject of challenged in the Court of Appeal and the Supreme Court' 'included the application filed in the Court of Appeal on March 4, 2016' and 'included a reference to the application filed on

March 7, 2016 [in the Supreme Court]' (paragraph 5 of second affidavit filed March 30, 2016).

[39] Mr Jalil Dabdoub filed an affidavit in response to Mr Spencer's. He states that when the application was heard by Laing J the filing spoken of by Mr Spencer was not served on JTL and therefore JTL and Mr Abraham Dabdoub would not have had any knowledge that Mr Stewart had actually filed an application to appeal the Supreme Court registrar's order. In addition, no such application was on the court file as of the date Laing J heard the order. Mr Jalil Dabdoub has also stated that on Monday, March 14, 2016 (three days after the order of Laing J), the court file was examined and no such application challenging the Supreme Court registrar's decision was found. JTL's counsel was advised by the Supreme Court registrar's secretary that on Friday, March 11, 2016 **after the order had been granted by Laing J**, Mr Spencer attended upon the Registrar with hard copies of an application which he said was faxed on March 7, 2016.

[40] It is agreed that Mr Spencer spoke to Mr Dabdoub in the terms stated above but it is also true that the communication did not become more specific. It is common ground that Mr Dabdoub did not inform Laing J of this conversation. In this court's view the conversation was too vague. Mr Spencer admits in an additional affidavit that he did not specifically tell Mr Dabdoub about the application challenging the Supreme Court registrar's decision but says that his reference to 'subject of challenge' included a reference to the applications.

[41] The question for the court is whether the communication with Mr Dabdoub was specific enough for Mr Dabdoub reasonably to have formed the view that Mr Stewart was in fact challenging both costs orders and therefore was under an obligation to bring to 'that fact' the attention of Laing J.

[42] As noted above, the documents seeking to challenge the decision of Paulette Williams JA (Ag) would not have been filed in the Supreme Court. They were not served on JTL at the time Laing J heard the matter. Mr Dabdoub could not have known that Mr Stewart was challenging the decision of the single judge unless

the conversation was sufficiently particular to convey to Mr Dabdoub that Mr Stewart was in fact challenging the Court of Appeal costs orders.

- [43] In respect of the filing of documents to appeal the Supreme Court registrar's decision, those documents were not on the file when the matter heard by Laing J on March 11. They had not been served on JTL before the hearing before Laing J.
- [44] In both case, Mr Stewart is relying on the conversation of March 9 to ground the submission of material non-disclosure. It is the view of this court that the conversation between Mr Dabdoub and Mr Spencer was not sufficient clear and specific so that Mr Dabdoub could reasonably have known that Mr Stewart was in fact challenging both costs order and therefore Mr Dabdoub was not under a duty to bring to the attention of Laing J that Mr Stewart had in fact taken steps to challenge the registrars' decisions. The ground that there was material non-disclosure therefore fails.
- [45] There are two points that must be addressed. This is the first one. After the close of submission, Mr Dabdoub submitted to the court the authority of **Clarendon Alumina Production Limited v Alcoa Minerals of Jamaica** (1988) 25 JLR 114, a decision of the Court of Appeal of Jamaica. The point of submitting the case was to show that it decided that the test for whether a without notice application ought to be set aside for non-disclosure is whether the party making the application (a) suppressed material facts so as to deceive the court and to obtain a benefit thereby, or (b) deliberately mis-stated the facts with a view to deceiving the court. If this is what this case decided then it is unique in that it would be fundamentally inconsistent with other decisions of the Court of Appeal of Jamaica and it would be inconsistent with the whole logic behind the principle of full, frank and fair disclosure (**Jamculture Ltd v Black River Upper Morass Development Co** (1989) 26 JLR 244; **Venus Investments Limited v Wayne Ann Holdings Ltd** [2015] JMCA App 24). As this court understands the principle, there is no requirement of deception or an intention to deceive the court before there can be

a finding of material non-disclosure. The principle is that whether there is material non-disclosure is decided objectively and does not depend on the intent of the applicant. Where there is material non-disclosure the court may discharge the without notice order or may discharge and reimpose it immediately upon terms. If there is an intention to deceive then that goes to the exercise the discretion of whether the order ought to be discharged immediately and not reimposed at all. This was in fact what happened in **R v Kensington Commissioners** [1917] KB 486. What **Clarendon Alumina** decided was that if the applicant deliberately suppressed information in order to mislead the court then he ought to be deprived of any benefit. But it did not decide that deliberate deception must be established before a without notice order can be discharged.

[46] The second point is this. Mr Abraham Dabdoub submitted that since Part 48 permitted without notice applications and stipulated what must be in the affidavit in support, once the affidavit contains all that the rule says must be in it then it is immune from challenge. The court does not agree. The court is not convinced that the Part 48 requirements exclude the principles relating to without notice applications. What is stated at rule 48.3 (2) is the minimum requirement but it may well be that other information is relevant that the rule does not cover.

[47] It is well known jurisprudence that all without notice orders are provisional only (**Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd** [1991] 1 WLR 550). If there is other relevant information that the court ought to know about then it is difficult to accept the proposition that that information should not be brought to the attention of the court. This court is of the view that the duty of full, fair and frank disclosure is not dissipated because a rule permits or commands a without notice application. The court now addresses the second ground of the application.

### **Whether there was justifiable reason for proceeding without notice**

[48] Part 48 of the CPR makes provision for charging orders. Rule 48.1 (1) begins by saying that this part deals with the enforcement of a judgment debt by charging

'land, stock (including stock held in court) and other personal property.' Rule 48.1 (2) states that stock 'includes shares, securities and dividends arising therefrom.'

[49] Regarding the procedure, rule 48.2 (1) states that the '**application is to be made without notice** but must be supported by evidence on affidavit' (emphasis added). Rule 48.3 indicates what the affidavit in support of the application must contain. Rule 48.4 permits the judgment creditor to 'apply for a single charging order in respect of more than one judgment or order against a judgment debtor.' This explains why the application before Laing J dealt with three costs orders.

[50] Rule 48.5 (1) informs the judge to whom the application is made that 'the court **must** deal with an application for a charging order without a hearing and may make a provisional charging order.' The judge is also told that on 'the application of the judgment creditor the court may grant an injunction to secure the provisional charging order.' Under rule 48.5 (4) the judge is then required to set 'the date, time and place when the court will consider making a final charging order.'

[51] From these provisions two things are very clear: the applicant is to make the application without notice and the judge is to deal with the application without a hearing. In other words, the provisional charging order is not to be an on-notice hearing. The affected party is to be served with any provisional charging order made which will inform him of the date, time and place when the final charging order is to be considered and he can then turn up and make objection. At the hearing, if the court is satisfied that the provisional charging order should not have been made then it is discharged.

[52] It is not hard to see why the provisional charging order application is required to be without notice. This is an enforcement procedure. At this stage, liability has been established and the sum to be paid has been quantified. The defendant would by this time know the amount of money he is required to pay. He has not paid it and has not made any arrangements to pay. It may be that it can be said that the fact of non-payment when properly notified of the debt is itself evidence

of the risk of dissipation since there has not been any payment or arrangements to pay. In this particular case, there is no dispute that Mr Stewart was served with the bill of costs; there is no dispute that he did not file his points of dispute within the time; there is no dispute that the rules permit JTL to apply for a default costs certificate; there is no dispute that the rules command the registrar in both courts to issue the default certificate once the conditions are met. Finally, there can be no dispute the rule 48.2 (1) requires that the application be made without notice. Indeed rule 65.21 mandates that the registrar must issue the default certificate once the application is in proper order. In light of this it cannot be contended that there was no good reason to proceed without notice.

[53] Mr Wildman referred to **National Commercial Bank of Jamaica Limited v Olint Corp. Ltd.** [2009] 1 WLR 1405 where Lord Hoffman cautioned against proceeding without notice. However, his Lordship was not interpreting rule 48.2 (1) of the CPR which expressly states that that application for a charging order 'is to be made without notice.' The case does not displace the clear wording of the rule that the application is (not may) to be made without notice.

[54] Based on the rules of the CPR, JTL had good reasons for proceeding without notice and in any event, despite Lord Hoffman's views in **Olint**, his Lordship did say that at the end of the day it was matter entirely within the discretion of the judge. This court, being a court of equal jurisdiction with Laing J, cannot call into question his Lordship's decision to proceed without notice; that is a matter for the Court of Appeal. The court will move to the third ground.

#### **Absence of evidence of the risk of dissipation of assets**

[55] Mr Wildman put forward the submission that there was an absence of any evidence of the risk of dissipation and therefore the injunction ought not to have been granted. Admittedly, the affidavit in support of the application for the provisional charging order does not specifically speak to the risk of the dissipation of assets.



- [56]** Mr Wildman is asking for a complete discharge of the order of Laing J. Under this ground and the remaining two, Mr Wildman is saying that because there were breaches of the principles relating to the granting of freezing orders this meant that Laing J's order should be discharged forthwith. Consequently, this court has the power (and duty) to discharge the order if the order was granted in breach of (a) judge-made principles relating to freezing orders; and (b) in breach of Parts 11, 17 and 48 of the CPR.
- [57]** Mr Abraham Dabdoub submitted that Part 48 does not require evidence of the risk of dissipation before the injunction can be granted and neither does it require that there be evidence that had notice been given Mr Stewart may have taken steps to frustrate the order. Mr Dabdoub even went as far as saying that the injunction transforms the debt from an unsecured one to a secured debt.
- [58]** The court disagrees with Mr Dabdoub on this point. Under rule 48.5 (2) states the purpose for which the injunction may be granted. It is to secure the provisional charging order. It is to ensure that the receiving party has something of value which can be sold to recover his costs. The injunction under this provision is a freezing order and therefore subject to the principles applicable to freezing orders. Having said this, the crucial point at this stage is note that the judge in granting the freezing order has unlimited jurisdiction to so. The present understanding (at least in England) is that the relevant provision of the statutes referring to this power is that the statute did not confer the power on the court but confirmed the existence of the power. It can reasonably be argued that in this case the evidence of the risk of dissipation was not the strongest that has ever been put forward in a case but, as stated earlier, it may conceivable be said that a defendant who has been notified of the debt owing and has not made any arrangements to pay after a reasonable time may in and of itself raise the risk of dissipation. It may be easier to draw the inference of the risk of dissipation in a post-judgment context than a pre-judgment one. It is the view of this court that the conclusion that there is a risk of dissipation is an inference from all the

circumstances. The nature and quality of the evidence will be vary from case to case.

[59] It is well known that a freezing order can be granted in support of a judgment or order (including a costs order) even if the exact sum is not known (**Jet West Ltd v Haddican** [1992] 2 All ER 545). Rule 48.5 does not confer any new power; it merely recognises what had already been accomplished through judge-made law.

[60] The injunction itself does not confer any proprietary right on the judgment creditor. Indeed it could not because it is ancillary to the main remedy which is the provisional charging order. It was Lord Bingham in **Fourie v Le Roux** [2007] 1 All ER 1087 who stated at paragraph 2:

*Mareva (or freezing) injunctions were from the beginning, and continue to be, granted for an important but limited purpose: to prevent a defendant dissipating his assets with the intention or effect of frustrating enforcement of a prospective judgment. They are not a proprietary remedy. They are not granted to give a claimant advance security for his claim, although they may have that effect. They are not an end in themselves. They are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign: see Steven Gee Commercial Injunctions (5th edn, 2004) pp 77-83.*

[61] The implication of Mr Wildman's submissions will now be examined and the conclusion at the end of this analysis will be applied to the immediately succeeding sub-heading.

[62] In **Fourie**, the issue arose of whether a judge of equal jurisdiction can set aside the order of another judge on the ground that first judge did not have jurisdiction. Jurisdiction was being used in the peculiar sense of making order inconsistent with established guidelines as distinct from having the lawful authority to embark upon the actual hearing. The facts, for present purposes, was that a judge of the High Court had granted a freezing order upon the claimant's application in which he alleged fraud and deception. The defendants applied for a discharge of the

freezing order on the ground that the judge had no jurisdiction to make it. The deputy judge of the High Court discharged the order on the basis that 'in order to support the grant of a freezing order an applicant needed proceedings to enforce an existing cause of action that had either already been instituted or that would, pursuant to an undertaking given to the court, be instituted within a short time frame. He pointed out that, when the matter had come before the judge, proceedings for substantive relief had been neither commenced nor formulated.' The claimant's appeal to the Court of Appeal was dismissed. The claimant persisted to the House of Lords where he also lost.

- [63] The second judge took the view that a freezing order could only be granted if there was a substantive claim already filed or would soon be filed pursuant to an undertaking given by the applicant. Since there was no claim in existence or soon to be in existence, then it was said that the first judge did not have jurisdiction to grant the freezing order. On the jurisdiction point, Lord Scott stated the following at paragraph 25:

*The issue is, in my opinion, not whether Park J had jurisdiction, in the strict sense, to make the freezing order but whether it was proper, in the circumstances as they stood at the time he made the order, for him to make it. **This question does not in the least involve a review of the area of discretion available to any judge who is asked to grant injunctive relief. It involves an examination of the restrictions and limitations which have been placed by a combination of judicial precedent and rules of court on the circumstances in which the injunctive relief in question can properly be granted.** The various matters taken into account by the deputy judge and Sir Andrew Morritt V-C respectively in holding that Park J had no jurisdiction to make the freezing order were really, in my respectful opinion, their reasons for concluding that, in the circumstances as they stood when the matter was before him, it had not been proper for Park J to have made the order. That, in my opinion, is the real issue. (emphasis added)*

- [64] Lord Scott concluded at paragraph 35:

*In my opinion, in the circumstances as they stood before Park J, the protection for the defendant that ought to be associated with the grant of a without notice freezing order was absent. The protection ought to include directions about the institution of proceedings for substantive relief. Here there were none. **In the circumstances a challenge to the propriety of the making of the order was entitled to succeed, and to succeed for much the same reasons as were relied on by the deputy judge and Sir Andrew Morritt V-C for their conclusion that Park J had lacked jurisdiction to make the order.** I disagree with that conclusion but am in respectful agreement with them about the deficiencies in the case for the freezing order that had been laid before Park J. (emphasis added)*

[65] Lord Scott seems to be conceding that the first judge had jurisdiction in the sense of the lawful authority to embark upon deciding whether the freezing order should be granted. His Lordship's concern was whether it was a proper exercise of the power in the circumstances of the case.

[66] Lord Bingham expressed himself in this way at paragraphs 3 and 4:

*[3] In recognition of the severe effect which such an injunction may have on a defendant, the procedure for seeking and making Mareva injunctions has over the last three decades become closely regulated. I regard that regulation as beneficial and would not wish to weaken it in any way. The procedure incorporates important safeguards for the defendant. One of those safeguards, by no means the least important, is that the claimant should identify the prospective judgment whose enforcement the defendant is not to be permitted, by dissipating his assets, to frustrate. The claimant cannot of course guarantee that he will recover judgment, nor what the terms of the judgment will be. But he must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant.*

*[4] On his application to Park J, Mr Fourie failed to do this. It follows that the judge was wrong to make the order he did. It also follows, in my opinion, that Mr Jarvis QC, the deputy judge, was right to discharge it. There had been a clear neglect of the correct*

*procedure, and the court should not absolve the defaulting party from the consequences of its neglect by maintaining the order in force: see Siporex Trade SA v Comdel Commodities Ltd [1986] 2 Lloyd's Rep 428 at 436. That, I think, is so whether or not the deputy judge foresaw that Mr Fourie might, in the immediate future, re-apply successfully in accordance with the recognised practice.*

- [67] Lord Bingham was concerned with whether the first judge had sufficient regard to procedures for granting freezing orders.
- [68] The implication of **Fourie** was spelt out by Arnold J in **Cartier International AG and others v British Sky Broadcasting Ltd and others** [2015] 1 All ER 949. According to Arnold J Lord Scott (and the other Law Lords agreed) 'distinguish[ed] between the jurisdiction of the court--that is to say, its power to grant an injunction--and the practice of the court not to do so except in a certain way and under certain circumstances' (para 99). In **Fourie**, the first judge had the power to grant the injunction and so he had jurisdiction to make the order that he did. What he failed to do, it was said, was to have regard to the important safeguards which it is said existed for the protection of the defendant.
- [69] It may well be said that the first judge in **Fourie** had granted an order contrary to the previous learning on the area. The crucial question is whether this justifies a second judge of the same jurisdiction setting aside the order on the ground of a departure from established practice and procedure. An important question is how serious must the departure be since it cannot be that for every breach it necessarily follows that the initial judge's order can be set aside.
- [70] Arnold J accepted (as he was bound to do) Lord Scott's proposition that section 37 of the Supreme Court Act, 1981 which was the successor to previous sections in other statutes<sup>1</sup> is virtually identical in wording to section 49 (h) of the

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<sup>1</sup> Section 28 (8) of the Judicature Act 1873 which was repeated in section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925. Section 49 (h) of the Judicature (Supreme Court) Act, in the

Judicature (Supreme Court) Act ('JSCA') confirmed the power to grant injunctions (of which the freezing order is an example) but did not confer the power.

- [71] The very history of the freezing order, previously called a Mareva injunction, tells an interesting story. Apparently lawyers were applying for such an injunction for over one hundred years and were always told that they could not get it because that was not the practice to grant such injunctions before judgment in spite of the very wide words of section 28 (8) of the Judicature Act of 1873. The typical response was epitomised by Cotton LJ and Lindley LJ as stated by Lord Denning MR in **Mareva Compania Naviera SA v International Bulkcarriers SA** [1980] 1 All ER 213, 214 – 215:

*[In Lister & Co v Stubbs] Cotton LJ said (45 Ch D 1 at 13, [1886–90] All ER Rep 797 at 799):*

*'I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree.'*

*And Lindley LJ said (45 Ch D 1 at 15, [1890] All ER Rep 797 at 800): '... we should be doing what I conceive to be very great mischief if we were to stretch a sound principle to the extent to which the Appellants ask us to stretch it ... '*

- [72] Under the **Fourie** reasoning any judge that granted a Mareva injunction before it was recognised by the English Court of Appeal would be told that he had no

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relevant part reads: *A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such an order be made' and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just ...*

power to do so despite the fact that the statute would have told the judge that he could grant an injunction 'in all cases in which it shall appear to the Court to be just or convenient.' According to **Fourie** had the judge in **Nippon Yusen Kaisha v Karageorgis** [1975] 1 WLR 1093, the first reported case in England where the freezing order was upheld by the Court of Appeal, granted the freezing order another judge of the same court could have set it aside on the ground that it did not conform to existing practice and procedure notwithstanding the very wide words of the statute. The same outcome would have unfolded in **Mareva Compania Naviera** had the first judge granted the order and it came up before a second judge of the same court. Roskill LJ sums it up accurately in **Mareva Compania Naviera** at page 215:

***If the charterers were represented, it would no doubt be said on their behalf that the decision of this court in Lister & Co v Stubbs precludes this court, not as a matter of jurisdiction but as a matter of practice, from granting this injunction.***

*Indeed it is right to say that, as far as my own experience in the Commercial Court is concerned, an injunction in this form has in the past from time to time been applied for but has been consistently refused. This court should not, therefore, on an ex parte interlocutory application be too ready to disturb the practice of the past save for good reasons. But on the facts of this case, there are three good reasons for granting this injunction. (emphasis added)*

- [73] The House in **Fourie** did not indicate any criterion for the second judge to set aside the order of the first judge other than that the order did not conform to existing practice and procedure. It did not indicate whether the departure had to be significant or even a minor one will do, albeit in that case a strong case could be made for the grant of the freezing order there was a very, very significant departure from the norm. Even using the word significant presents problems because what may be significant in one context may not be so significant or may not be significant at all in another context. The **Fourie** standard seems a very broad standard that could apply to just about any order (not just freezing orders) that is not consistent with existing practice and procedure. It seems to cover not

only the actual facts of **Fourie** (and an argument could be made that the breach there was exceptionally serious in that no proceedings had commenced nor formulated) but any other instances where there is non-conformity with existing practice and procedure. For example, the CPR says a without notice injunction should not be granted for more than 28 days. This can be said to be the existing practice. Under the **Fourie** doctrine, if an injunction were granted for 29 days, then a second judge could set aside that order on the basis that the number of days did not conform to the existing standard. This would be so even if the applicant had met all the other criteria for the grant of an injunction. Surely, if **Fourie** is of general application then it seems to this court that it is in need of further refinement since it could hardly be the case that any breach of existing practice and procedure regardless of how innocuous or harmless should lead to an automatic setting aside of the order. Thus while it may be correct on the facts the broad standard is just too wide and may lead to uncertainty in application.

[74] It may be said that the specific defect in **Fourie** was that the safe guards to protect the defendants were not in place. Other than those parts of a freezing order that relates to third parties just about all the other parts can be seen to be for the protection of the defendant and thus any order that does not give effect to those protections may be seen as defective. This would mean that a 29 day injunction would be just as harmful as not identifying any substantive claim. Are these two breaches of the same level of seriousness to warrant the same consequence?

[75] This business of knowing when existing practice needs to change is quite tricky. The freezing order came about because the time for change had arrived and fortunately Lord Denning was available to make that change. In **Fourie**, Lord Scott himself recognised that practice and procedure do not stand still. His Lordship said at paragraph 30.

*The practice regarding the grant of injunctions, as established by judicial precedent and rules of court, has not stood still since The Siskina was decided and is unrecognisable from the practice to*



which Cotton LJ was referring in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30 at 39-40...

- [76] Lord Woolf MR in **Broadmoor Hospital Authority v R** [2000] 2 All ER 727, 732; [2000] QB 775, 786 (para 20) said much the same thing:

*The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. **The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.** (emphasis added)*

- [77] Arnold J in **Cartier International** cites the following from *Equitable Remedies* (Spry) (9<sup>th</sup> edn) as the correct approach to granting injunctions at paragraph 102:

*Where, in England and in other jurisdictions, the superior courts now exercise the powers of the former Court of Chancery, whether or not they are also able to grant legal injunctions or are affected by special Judicature Act provisions, their powers of granting injunctions are unlimited, provided that they have jurisdiction over the defendant in the circumstances in question. These powers are however exercised in accordance with the principles set out here under.*

*First, an injunction may issue in the protection of any legal right whatever, save for an applicable statutory provision provides to the contrary. For these purposes the relevant legal right must ordinarily be a present right of the plaintiff, as opposed to a right that he merely expects or hopes to acquire in the future.*

*Secondly, an injunction may issue in the enforcement of any equitable right. Here on a strict analysis the right to the injunction*

*itself represents pro tanto the equitable right in question. Hence in ascertaining whether an injunction may be obtained on this basis it is necessary to determine whether injunctions of the relevant kind were formally granted in the exclusive or concurrent jurisdiction of courts of equity, and if not, whether the principles underlying those jurisdictions should nonetheless now be treated as rendering the grant of the injunction appropriate.*

*Thirdly, an injunction may issue pursuant to its natural power to grant injunctions conferred in respect of a particular subject matter, such as family law or trade practises law.*

*Fourthly, an injunction may issue in the protection of a legal privilege or freedom. So an injunction may be obtained to prevent a person from harassing the plaintiff. Likewise even if, on the principles that have been set out here, an injunction is not otherwise obtainable to enjoying the bringing or continuation of proceedings in another court--whether in an inferior court, a court of special jurisdiction or a foreign court--it may nevertheless be obtained if the bringing or continuation of those proceedings would be unconscionable. Injunctions of these kinds may be granted whether or not inconsistent proceedings have been or will be commenced in the forum.*

*Fifthly, an injunction (such as a Mareva injunction or freezing order) may issue in other cases in which, on miscellaneous grounds, the conduct restraint would be unconscionable. It has been said in the House of Lords that this term includes conduct which is oppressive or vexatious or which interferes with the due process of the court. Here s. 37 of the Supreme Court Act 1981 and other such provisions merely confirm the width of the court's inherent powers.'*

- [78]** This court agrees with Dr Spry. This is consistent with Lord Woolf's approach. This means that question of whether an injunction is properly granted is not to be determined solely by whether it conforms to established practice and procedure but whether in the circumstances of the particular case it was properly granted having regard to words the unlimited power of the courts to grant injunction on such terms as it thinks fit and this determination is not for a judge of the same first instance jurisdiction as the judge who granted the initial order.

[79] Dr Spry in his *Equitable Remedies* (8<sup>th</sup> edn) p 323 states:

*The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.'*

[80] In my respectful view, this passage capture the essence of what happened in **Fourie** and what Mr Wildman is asking this court to do. Laing J had the jurisdiction and the power to make the orders that he did. The question of how the discretion was exercised or whether the exercise of the discretion was in accordance with existing practice is a matter for an appeal and not for another judge of the same jurisdiction. This means that the answer to this question can never ever be provided by second first instance judge after another first instance judge has granted the injunction. The answer can only be properly provided by an appellate court. This is as it should be.

[81] This court agrees with Arnold J's observation at paragraph 104:

*It is true, that as a matter of practice, that the court exercises its discretion in accordance with fairly well-settled principles, but those principles are not immutable. On the contrary, as Lord Scott pointed out, they have evolved over time as the court has faced new circumstances.*

[82] Based on this, a conclusion that the grant of an injunction in particular circumstances was not in accordance with 'fairly well-settled principles' should not lead to an automatic conclusion that the grant was bad. The enquiry should

be whether the grant in this case, even if outside of existing practice and procedure, justified by the facts and circumstance of the case. If not, then it is set aside. It is my view that once the first judge has jurisdiction and has exercise his discretion then it is not for another first instance judge to say that the discretion was not properly exercised. That is an appellate issue. The idea that existing practice and procedure should be determinative of whether an injunction was properly granted is always vulnerable to the obvious fact that a new circumstance may arise that was not captured by existing practice and procedure and even if it were, the question will still be whether the discretion was properly exercise in the particular case. In any event the words of section 49 (h) of the JSCA is not so restrictive.

- [83] This is not to say that guidelines have no value; they do. They ensure consistency; outcomes are predictable but the danger is that if they may be elevated over and above the unlimited power to grant injunction. The salutary words of Lord Nicholls in **Mercedes-Benz AG v Leiduck** [1996] AC 284, 308 are appropriate here:

*... the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive categories by judicial decision. The court may grant an injunction against a party properly before it where this is required to avoid injustice, just as the statute provides and just as the Court of Chancery did before 1875. The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time. The grant of Mareva injunctions itself gives the lie to this. As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yesteryear.*

- [84] This approach commended itself to the English Court of Appeal in **Samsung Electronics (UK) Ltd v Apple Inc (No 2)** [2012] EWCA Civ 1339, where a

publicity order was added to an injunction on the following bases stated at paragraph 75:

*[75] I have no doubt that the court has jurisdiction to grant a publicity order in favour of a non-infringer who has been granted a declaration of non-infringement. A declaration is a discretionary, equitable, remedy. The injunction is an adjunct to the declaration. It will not always be appropriate to grant it. Whether or not it is depends on all the circumstances of the case--as I said earlier where there is a real need to dispel commercial uncertainty. It is that test I propose to apply here.'*

[85] **Fourie** would say that such a publicity order if granted by a first instance judge as part of an interim remedy was wrongly granted and so could be set aside by another first instance judge because it did not accord with existing practice and procedure. It may be said that **Fourie** is not to be interpreted so broadly but the undeniable fact is that their Lordships did not put in place any criteria or criterion by which it could be determined in which circumstances another first instance judge could interfere with the exercise of the discretion of a first instance judge and when he could not since it really could not be sensibly argued that the power to interfere is broad and general and can be exercised once it can be said that the first judge went about the exercise of the discretion the wrong way.

[86] One final word on **Fourie**, the setting aside was not based on the applicant doing anything wrong but on the judge's error. The unchecked breadth of their Lordships' proposition is indeed a matter of concern.

[87] For all these reasons this court does not agree that it can set aside another Supreme Court judge's order on the basis that it does not conform to existing practice and procedure. This ground fails.

#### **Order of Laing J did not comply with Parts 11, 17 and 48 of the CPR**

[88] Mr Wildman submitted that there was non-compliance with Parts 11, 17 and 48 of the CPR. The submission is that rule 11.8 (1) and (2) requires that notice be given to the other party unless without notice applications is permitted by the

rules or a practice direction. In this case rule 48.2 expressly provides that the application 'is to be made without notice but must be supported by evidence on affidavit.' If a specific rule govern a particular procedure then that is the rule that applies. There is therefore no breach of rule 11.8 (1) and (2).

[89] Mr Wildman next submitted that there was a breach of rule 17.4 (2) of the CPR because no undertaking as to damages was given and there was no order from the judge exempting JTL from this requirement. It seems that this is a challenge to the manner in which Laing J exercised his discretion. This court, of equal jurisdiction, cannot entertain that submission. This court has no power to review the exercise of the discretion of another judge of the Supreme Court. The reasons for this conclusion have already been stated.

#### **Breach of section 47 of the Judicature (Supreme Court) Act**

[90] The final part of call for Mr Wildman was section 47 of the JSCA. Section 47 (1) in the relevant part states

*No costs shall be recoverable until they have been taxed by the Registrar or his deputy.*

[91] Thus counsel submitted that in this case there was non-compliance with this provision. There was no taxation of costs as required and thus no costs are recoverable. What Mr Wildman meant by this is that even if a bill of costs was served on the paying party and no points of dispute were served the registrar would be obliged to conduct a hearing in order to determine whether the receiving party is entitled to the costs sought. Counsel submitted that taxation is the process by which the figure which the receiving party is entitled to receive is determined and that process involves an actual hearing in which the receiving party appears before the registrar and justifies the amounts claimed. The registrar would then issue her certificate after this mandatory hearing has taken place.

[92] It is a cardinal principle of statutory interpretation that before one can properly arrive at an acceptable interpretation of a statute the entire statute must be read.

[93] Section 28D provides that the ‘Court may, on application of the person prosecuting a judgment or order for the payment of money, make a charging order in accordance with the Civil Procedure Rules, 2002 in relation to the enforcement of judgments.’ This is clear statutory authority for granting a charging order.

[94] Section 28E (1) of the JSCA states that subject to the provisions of the statute or ‘any other enactment and to rules of court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court.’ This is self-explanatory.

[95] Section 28E (2) states that ‘[w]ithout prejudice to any general power to make any rules of court, The Rules Committee of the Supreme Court may make provision for regulating matters relating to the costs of civil proceedings, in particular prescribing ... (b) **the manner in which the amount of any costs payable to the person or to any attorney shall be determined**’ (emphasis added). As will be seen below, the manner in which the amount of any costs is to be determined is what is meant by taxation of costs.

[96] The CPR are rules of court made under the Judicature (Rules of Court) Act. The CPR does provide for default costs certificate. Part 65 has a section 2 which is headed ‘Taxation Procedure.’ The provisions relating to the service of bill of costs, the time frames for response, and the points of dispute are all under this section. The CPR actually defines taxation. It is found in rule 64.2 (1) and that definition is as follows:

*‘Taxation’ means the procedure by which the amount of costs is decided by the registrar in accordance with Section 2 of Part 65*

[97] The court must accept this definition. This tells all plainly that taxation is done in accordance with the CPR and once that is done then the costs have been taxed.

[98] Mr Wildman placed two definitions of taxation before the court. The first is as follows:

*Taxation of costs is the procedure of examining, and altering where necessary, amounts payable by a party in an action. ... Where a party is dissatisfied with the taxation, an application may be made for a review of the decision.*

**[99]** The second is:

*Taxation of costs: the method by which the amount of costs payable by one party to another, or payable by a client to his solicitor, is determined by an officer of the court. ... The process consists of scrutinizing the bill of costs and applying to it the basis of taxation (see costs) ordered by the court. A dissatisfied party may apply for a review of the taxation by a judge who is assisted by assessors (a taxing master and a practising solicitor). ...*

**[100]** These definitions, as helpful as they may be, cannot be used in place of the one the CPR gives.

**[101]** Mr Wildman even cited cases to indicate what taxation meant and how it was to be done. This court need not refer to those cases because they cannot override the Jamaican CPR which is very definitive on the process by which the final figure awarded for costs is decided.

**[102]** The relevant parts of Part 65 have been mentioned earlier and need not be repeated there. However, the court will observe that what Part 65 has done is to relieve the taxing officer, in this case the registrar, from an actual hearing before her if the paying party does not seek to contest the receiving party's bill of costs. Part 65 places the onus of making the challenge on the paying party and not the registrar to conduct a formal hearing regardless of the paying party's response to the bill of costs. The logic seems to be that once the paying party is properly notified of the bill of costs and has the details required, if there is no challenge then it is taken that the paying party is satisfied with the amounts claimed by the receiving party and has agreed to pay those amounts. There is the opportunity to set aside the default costs certificate but only on the ground that the receiving party was not entitled to it.



[103] It could very well be that by not filing any points of dispute the paying party is indicating his agreement with the receiving party and thus there is no need for a formal hearing before the registrar. This court therefore sees no conflict between any aspect of the rule and section 47 of the JSCA. The statute did not say, describe or prescribe how taxation is to take place. That was left to the rules and the rules have (a) defined taxation of costs; (b) prescribed what must be done by parties to secure costs; and (c) stated some of the consequences for not acting in accordance with the taxation rules. Contrary to Mr Wildman's submissions the court is constrained to find that taxation in this case has in fact occurred and the default costs certificate is a taxed costs certificate and thus there has been full compliance with section 47 of the JSCA. It is all about the definition of taxation. The fact that it was not issued after a contested hearing before the registrar does not make it any less a taxed costs certificate; it is a species within the genus.

#### **Interest on costs**

[104] It is important to recall that an order for the payment of costs is a judgment debt within the meaning of section 51 of the JSCA and therefore enforceable like any other money judgment (**Branch Developments Ltd v The Bank of Nova Scotia** [2014] JMSC Civ 40 [30] - [32] (McDonald Bishop J (now Justice of Appeal))).

[105] Mr Spencer stated in his affidavit that interest does not begin to run until the registrar's has issued her certificate. This seems to be at odds with the judgment of McDonald Bishop J in **Branch Developments Ltd**. Her Ladyship established, from an examination of relevant case law, that an order that costs to be agreed or taxed is treated in the same manner as a judgment for damages to be assessed. What that means is that when the money amount is finally determined on the assessment of damages, the original order (properly called a judgment) is treated as if the money amount had been stated in the judgment when it was originally given. This is why, unless stated otherwise, interest runs on a judgment for costs from the date the judgment was given (see para 29 – 33 of **Branch Developments Ltd**).

[106] In addition her Ladyship demonstrated conclusively, that section 51 (1) of the JSCA applies to costs orders because costs orders are, in law, regarded as a judgment debt. Under section 51 (1) interest runs on every judgment debt 'from the time of entering up the judgment, until the same is satisfied, and such interest may be levied under a writ of execution on such judgment.'

[107] This point is dealt with since the affidavit suggests that there was an error in calculating the interest. The alleged error was predicated on interest running from the date the registrars issued the default cost certificate. If that is what Mr Spencer meant it is clearly contrary to the reasoning in **Branch Developments Ltd**, a decision which this court regards as correct in reasoning, analysis and conclusion. If there is an error in the interest calculations in this case then it has to be found in the actual calculations and not in the date from which interest runs.

#### **Meaning of costs to be taxed if not agreed**

[108] The form or order common in the Supreme Court is that costs to be taxed if not agreed or costs to be agreed or taxed. Either way they amount to the same thing, namely, if the parties do not agree on the costs then a detailed assessment proceeds provided that the bill of costs is prepared and served in accordance with the rules and the points of dispute are raised within the time and in accordance with the rules.

[109] An important question is how does this process begin? At the very least it should commenced with a bill of costs being sent by the receiving party to the paying party. This would inform the paying party of the amount the receiving party is claiming and why. The bill of costs sent to the paying party is in essence an invitation to him to accept and agree or put forward some other figure. If the paying party declines or refuses to respond then surely it cannot be expected that the receiving party is going to sit and wait indefinitely for a response. If the paying party does not respond within a reasonable time then surely the receiving party can proceed under the rules.

[110] It is my respectful view that the order cannot mean that the parties must necessarily have a discussion and if there is breakdown then and only then can the receiving party proceed with procedure under rule 65. It is this court's view that the registrars' interpretation of the order was quite in order. The registrars held that an unsuccessful attempt at agreement is not a condition precedent to taxation. There would be satellite litigation about whether an agreement was reached, when it was reached and the like, with the possibility of appeals.

[111] When JTL sent its bill of costs to Mr Stewart it was open to Mr Stewart to agree or raise objections. It was an invitation to agree or dispute. He did neither within the 28 day period. When JTL sent its bill of costs which was fully compliant with rule 65 it was not necessarily ruling out agreement. All it was doing was indicating what it thought was reasonable costs for it to receive but the service was done in such a manner that if Mr Stewart did not respond at all within the 28 days, as was the case, it could take full advantage of part 65 without filing and serving a bill of costs all over again if the formal requirements had not been followed in the first instance of filing and serving the bill of costs.

## Summary

[112] JTL did not breach the principle of material non-disclosure because the conversation between Mr Spencer and Mr Abe Dabdoub was too vague and non-specific to alert Mr Dabdoub to the fact that an appeal had in fact been filed.

[113] Part 48 requires that the application for a provisional charging order be done without notice. There was no breach of Lord Hoffman's principles in **Olint**. Part 48 authorises the judge to secure the charging order by the grant of an injunction. All this can take place on an application for a provisional charging order. Lord Hoffman's principle of notifying the affected party does not apply to applications for without notice provisional charging orders and injunctions in support of that application, since the rule requires that the application be done without notice. Part 48 provides good reason for proceeding without notice.

[114] This court being a court of equal jurisdiction with Laing J cannot question the exercise of his Lordship's undoubted discretion regarding the requirement of an undertaking as to damages. Finally, whether his Lordship did not give effect to Parts 11, 17 and 48 of the CPR is not a matter for this court. That is a matter for the Court of Appeal.

[115] Taxation is defined in the CPR and that is the only definition the court can accept. In any event, all taxation means is the procedure and method by which the costs to be received or paid by a party is decided. Taxation of costs in respect of cases in the Supreme Court and Court of Appeal means the procedure by which the amount of costs is decided by the registrar in accordance with Section 2 of Part 65. This is consistent with section 47 of the JSCA because that section does not define taxation and when read along with sections 28D and 28E it is clear that the CPR was intended to be the rules governing taxation of costs. The CPR was properly made by the Rules Committee acting under the power given to it by section 4 of the Judicature (Rules of Court) Act.

[116] The issuing of a default costs certificate is part of the process of taxation and it was properly issued. There was no breach of section 47.

### **Disposition**

[117] The application to set aside the order of Laing J fails. The application is dismissed with costs to JTL. Leave to appeal granted.