[2017] JMCC Comm 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016 CD 00332

BETWEEN	**McDONALD MILLINGEN**	**CLAIMANT**
AND	**MARGIE GEDDES**	**DEFENDANT**
AND	**BARDI LIMITED**	**INTERESTED PARTY**

IN CHAMBERS

Mr. Vincent Chen instructed by Chen Green & Co for the claimant/ respondent

Mr. Rodrick Gordon and Ms. Karen Smith instructed by Gordon McGrath for the defendant

Mr. Michael Hylton Q.C and Melissa McLeod instructed by Hylton Powell for the interested party/ applicant

Civil procedure – Application to discharge provisional charging order and injunction – Whether there was material non – disclosure on the without notice application for the provisional charging order

Heard: April 3 and October 20, 2017

SIMMONS J

[1] This is an application by Bardi Limited to discharge the ex parte provisional charging order and injunction granted to the claimant, which is a firm of Attorneys, on December 18, 2012.

BACKGROUND

[2] The ex parte charging order was granted in respect of the following:-

(i) Two (2) ordinary shares (and dividends arising therefrom) held by Margie Geddes in Bardi Limited.

(ii) 84,000,000 ordinary shares (and dividends arising therefrom) in Desnoes & Geddes Limited issued to and registered in the name of Bardi Limited.

The order for injunction restrained the defendant, Margie Geddes, from selling or charging the shares held by her in Bardi Limited and the 84,000,000 shares held by Bardi Limited in Desnoes & Geddes Limited until the hearing of an application for a final charging order

The application for the Final Charging Order was scheduled to be heard on April 24, 2013. That application has not been heard as the defendant applied to set aside the default costs certificate on which it is based. The decision in respect of that application is still pending.

[3] The application for the provisional charging order was based on the following grounds:-

"(a) The claimant/applicant obtained in its favour a Default Costs Certificate in the sum of US$1,048,807.19 against Margie Geddes which remains due and outstanding notwithstanding demands being made for payment of same.

(b) The applicant can enforce its judgment debt by charging stock including shares in which the defendant has a beneficial interest pursuant to rule 48.1(1)(b) and 48.1(2) of the Civil Procedure Rules.

(c) The defendant Margie Geddes has a beneficial interest in the ordinary shares in Bardi Limited and the assets of Bardi Limited

which includes 84,000,000 shares in Desnoes & Geddes Limited.

(d) Pursuant to section 28A of the Judicature (Supreme Court) Act".

[4] The application was supported by the affidavit of Mr. Malcolm McDonald, (an attorney-at-law and partner in the claimant) which was sworn to on October 26, 2012.

[5] In his affidavit, Mr. McDonald stated that on January 30, 2012 the claimant obtained a default costs certificate in the sum of United States one million forty-eight thousand eight hundred and seven dollars and nineteen cents (US$1,048,807.19) against the defendant, Mrs. Margie Geddes, for work done on her behalf over a period exceeding five (5) years.

[6] It was further stated that the claimant and the defendant were litigants in Claim No. 2008 HCV 4243 and Supreme Court Civil Appeal No. 44 of 2009 which were determined in the defendant's favour. The defendant's costs in the Court of Appeal were taxed in the sum of Jamaican two million two hundred and five thousand nine hundred and fifty six dollars and seventy five cents (J$2,205,956.75).

[7] Mr. McDonald stated that he was advised by his attorneys-at-law that they communicated with the defendant's attorneys-at-law by letter dated, June 26, 2012, requesting that the defendant's taxed costs be set off against the claimant's default cost certificate and that the difference be remitted to the claimant's attorneys-at-law.

[8] He indicated that the claimant had not received any payment from the defendant who was resident in the United States of America. It was further stated that no application was filed to challenge the default cost certificate.

[9] Mr. McDonald also stated that to the best of his knowledge, information and belief the defendant is the sole legal and beneficial owner of all the ordinary shares in Bardi Limited and as such, is the sole shareholder of that company.

[10] He also indicated that Bardi Limited's annual returns shows that the defendant is the holder of one ordinary share in that company and that the other ordinary share is held by the estate of Mr. Paul Geddes, who was the late husband of the defendant. Mr. McDonald deposed that the defendant is the sole executrix and sole beneficiary of the estate of Mr. Paul Geddes.

[11] He further stated that the defendant is one of two directors of Bardi Limited which holds 84,000,000 ordinary shares in Desnoes & Geddes Limited (D & G). He stated that to the best of his knowledge, information and belief, Bardi Limited does not trade or otherwise operate. He indicated that its annual returns state that the total amount of indebtedness of the company in respect of all mortgage and charges of the kind required to be registered with the Registrar under the Companies Act was nil.

[12] Mr. McDonald asserted that he is of the belief that the company had not traded from December 2011 to the time of filing the claimant's application and had not incurred trade debts or mortgages or charges over its assets. He concluded that in the circumstances, the defendant as the sole shareholder is beneficially entitled to its assets which are the 84,000,000 shares in D & G.

[13] Mr. McDonald indicated that he believed that the defendant would take steps to sell or otherwise dissipate the assets of Bardi Limited which would affect the value of the share capital of the company and frustrate the claimant's ability to recover its costs. He also deponed, that to the best of his knowledge, information and belief, the defendant has, according to the judgment of the Honourable Court attempted to dispose of assets of Bardi Limited in an effort to defeat the claims of creditors against the company.

[14] A number of documents were exhibited to Mr. McDonald's affidavit. They include:-

(iii) A copy of the default costs certificate dated January 30, 2012;

(iv) A copy of the certificate of costs obtained in the defendant's favour in the Court of Appeal;

(v) A copy of the letter to the attorneys-at-law of the defendant dated June 26, 2012;

(vi) A copy of Bardi Limited's annual returns ending December 31, 2011;

(vii) A copy of the Grant of Probate in respect of the estate of Mr. Paul Geddes (with the will of the deceased attached); and

(viii) A copy of the judgment of Justice McIntosh in Suit No CL 1999/J103 and Suit No CL 1999/J104

[15] After the grant of the provisional charging order, the defendant filed a Notice of Application on April 11, 2013 seeking, among other things, orders that the claimant's claim for costs be struck out and the default costs certificate issued on January 30, 2012 be set aside. In the alternative, she sought the following orders:-

(i) That she be permitted to file Points of Dispute in relation to the claimant's Bills of Costs; or

(ii) That the enforcement of the Default Costs Certificates be stayed pending consideration of the application.

[16] The application was heard.

[17] Subsequently, Heineken Sweden AB made a mandatory take-over offer to purchase the shares held by third parties in D & G.

[18] Mrs. Geddes, once again, sought the court's assistance. This time, she asked the court to vary its earlier pronouncements. Specifically she requested, among other things, that: -

(i) the provisional charging order obtained on December 18, 2012 be varied to substitute the charged asset from shares in Bardi Limited and Desnoes & Geddes Limited with a United States dollar account in escrow;

(ii) the court permit a variation to the effect that the amount of one million four hundred thousand United States dollars (US$1,400,000.00) be placed in an escrow account in the joint names of the claimant and defendant's attorneys-at-law and held at an agreed financial institution immediately upon the release of the charged shares;

(iii) in the alternative, a fair amount, in a United States dollars amount that the court deems fit, be placed in an escrow account in the joint names of the claimant and defendant's attorneys-at-law, and held at a financial institution upon the release of the charged shares.

[19] The amended Notice of Application was filed on March 21, 2016 and it was supported by the affidavit of Mrs. Geddes sworn on March 18, 2016 and filed on March 21, 2016.

[20] The application was refused by Morrison J. It is now the subject of an appeal.

[21] Subsequent to that Bardi Limited made an application to be added as an interested party to the claim and for the claim to be transferred to the Commercial Division of this court.

THE APPLICATION BEFORE THE COURT

[22] Bardi Limited seeks the following orders:-

(i) That the order made on December 13, 2012 granting a charging order in respect of 84,000,000 ordinary shares (and dividends arising therefrom) in D & G issued to and registered in the name of Bardi Limited be discharged.

(ii) That the injunction granted on December 13, 2012 in relation to the said shares be discharged.

(iii) That the claimant pays the costs of this application to the applicant on the indemnity basis to be taxed immediately if not agreed.

(iv) Such further or other relief as the court deems just.

[23] The grounds of the application are quite substantial and I do not propose to list them all. They state in part:-

(1) The applicant owns the shares which are the subject of the order and is therefore an interested person.

(2) The applicant objects to the charging order on the basis that its shares are not jointly owned with the judgment debtor and it owes no debt to the judgment creditor.

(3) The affidavit in support of the application does not comply with rule 48.3(2)(f)(iii) and (iv).

(4) The application for the injunction was made, pursued and enforced in circumstances that constitute an abuse of the court's process in that:-

(a) The claimant was guilty of material non-disclosure and material misstatements including that:-

(i) The shares held by Bardi Limited in D & G Limited are not held jointly with the defendant

(ii) The defendant is not the sole shareholder of Bardi Limited; and

(iii) Bardi Limited did not owe a debt to the claimant

(b) The claimant applied for, secured and enforced the injunction against the relevant shares when the claimant knew this was entirely unjustified and unsupported by the evidence.

(c) The claimant secured and enforced the injunction in a manner and in circumstances that were calculated to secure a tactical advantage by attempting to force the defendant to abandon her challenge to the claimant's default costs certificate.

(5) The claimant failed to give an undertaking as to damages and there was no evidence that it could pay any damages that might be caused by the injunction.

[24] The application is supported by the affidavits of Paula Jackson sworn on June 30, 2016 and Kereene Smith sworn on June 30, 2016.

THE APPLICANT'S SUBMISSIONS

[25] Mr. Hylton Q.C. submitted that the court has the power to set aside the Orders on various bases. He directed the court's attention to rules 48.8 (2) and (3) of the ***Civil Procedure Rules*** (***CPR***) which provide, among other things, that an interested person may file an objection to a provisional charging order not less than fourteen (14) days before the hearing of an application to discharge or make the provisional order final. Learned Queen's Counsel pointed out that the court has not yet heard an application to make the provisional charging order final and therefore the applicant may still object if the court is satisfied that it is an interested person.

[26] The court's attention was also directed to rules 48.6(2) and 48.8(4) of the ***CPR***. The former provides, among other things, that an interested person is any person who owns the stocks to be charged jointly with the judgment debtor or any other person who has an interest in the personal property to be charged. The latter provides, in part, that the court has the power to discharge a provisional charging order.

[27] It was submitted that since the applicant owns the D & G shares which are the subject of the charging order it is an interested person, for the purposes of rule 48 and can therefore apply to the court to discharge the provisional charging order.

[28] Learned Queen's Counsel contended that the applicant objects to the provisional charging order on the basis that it is the sole owner of the shares which have been charged and it owes no debt to the respondent/judgment creditor. He also indicated that Bardi Limited wishes to sell its shares in D & G and has been prevented from doing so by the orders.

[29] Reference was made to the case of ***First Global Bank Limited v Rohan Rose*** [2016] JMCC Comm 19 in support of that submission. In that case it was found that the court should not have made a provisional charging order over the applicant's property for which she was the sole owner. As a result, the provisional charging order was varied. A final charging order was granted but only in respect of items belonging to the respondent alone or jointly held by the respondent and the applicant.

[30] It was submitted that rule 11.16 of the ***CPR*** provides another basis upon which the court can set aside the order. That rule states that a respondent to whom notice of an application was not given, may apply to the court to set aside or vary any order made in respect of that application.

[31] Mr. Hylton Q.C. also submitted that since the orders were made on an *ex parte* application, they may be set aside at an *inter partes* hearing. He also stated that the applicant has not been served with a copy of the orders and therefore the time for making the application has not started to run.

[32] The court was also reminded that rule 26.1(7) of the ***CPR*** provides that the power of the court to make an order includes the power to vary or revoke that order.

[33] It was submitted that the provisional charging order should be discharged because the instant case is not one where it would be appropriate to 'pierce the corporate veil'. In such circumstances, it was argued, that there is no basis on which to maintain the charging order over the applicant's shares to secure Mrs. Geddes' debt.

[34] Learned Queen's Counsel further submitted that because the claimant/respondent clearly recognises that the court cannot make a charging order over property that is not owned by the defendant, it now argues that Bardi Limited and Mrs. Geddes should not be treated as separate legal entities. On this basis the respondent urges the court to 'pierce the corporate veil' in order to justify the continuation of the injunction and the charge over the applicant's shares.

[35] Mr. Hylton Q.C. argued that both as a matter of fact and law the respondent's contention is misconceived.

[36] Learned Queen's Counsel then highlighted what he referred to as "facts" which were outlined in the 2016 McDonald affidavit which the respondent relied on to justify 'piercing the corporate veil'. They are:-

(i) Bardi Limited has no assets in Jamaica other than the D & G shares

(ii) Bardi Limited has no directors other than Mrs. Geddes

(iii) Bardi Limited does not file annual returns

(iv) Bardi Limited "exists for the sole reason of holding Mrs. Geddes shares in D & G and nothing else"

(v) The legal work which is the subject of this claim and the default cost certificate was to represent Mrs. Geddes and Bardi Limited to protect the latter's interest in legal proceedings.

(vi) There was a contingency agreement with Mrs. Geddes for the claimant to be paid any surplus in the assets of Bardi Limited.

[37] Mr. Hylton Q.C. submitted that it is clear from the unchallenged documentary evidence, which the 2016 affidavit of Mr. McDonald failed to disclose, that these "facts" are all either untrue or misleadingly incomplete.

[38] He submitted that the 2nd affidavit of Paula Jackson points out that the applicant owns several other shares in addition to the D & G shares and exhibits the applicant's Financial Statements for the year ended December 31, 2014 and a Mayberry Portfolio Statement as at December 31, 2015.

[39] Mr. Hylton Q.C. contended that the 2nd Jackson affidavit also exhibits documents which make it clear that the claimant/respondent was aware of the fact that the applicant had other assets. These documents include a letter from the claimant/respondent to the applicant's provisional liquidator providing him with, among other things, a list of the applicant's various shareholdings and an affidavit sworn by Malcolm McDonald in 2008 in another claim against Mrs. Geddes in which he listed various shares held by the applicant.

[40] He submitted that it is also important to bear in mind that Mrs. Geddes only recently became the sole director of the applicant as the 2nd Jackson affidavit points out. At the time the orders were made, the applicant had another director, Mrs. Felicity Brandt.

[41] Learned Queen's Counsel submitted that contrary to the 2016 McDonald affidavit, the applicant does in fact file annual returns. The most recent annual returns (up to December 31, 2015) are exhibited to the 2nd Jackson affidavit as are the certificates of incorporation and good standing.

[42] Mr. Hylton Q.C. contended that the 2016 McDonald affidavit alleges repeatedly that the legal work which is the subject of this claim was done for both Mrs. Geddes and the applicant. However, all the respondent's previous documents indicate that this is not true.

[43] He pointed out that in the 2012 McDonald affidavit it was expressly stated that the default costs certificate covered “work done on Mrs. Geddes’ behalf”.

[44] Learned Queen’s Counsel pointed out that in a previous claim the respondent recognised the separate legal personality of the applicant and did not only sue Mrs. Geddes. It sued the applicant as a separate defendant and referred to separate work done for each of them.

[45] Mr. Hylton Q.C. further pointed out that in the 2008 McDonald affidavit, Mr. McDonald explained that his firm was separately retained to act on behalf of the applicant and on behalf of Mrs. Geddes and for different purposes.

[46] He stated that the respondent/claimant was retained on behalf of the applicant to defend it against a suit by Jorril Financial Incorporated and later, to enforce the applicant’s rights under an Agreement for Sale of shares. On the other hand, the claimant was retained by Mrs. Geddes personally to protect her interest as the sole shareholder of the applicant. The claimant billed Bardi Limited and was paid for the work it did on its behalf.

[47] It was submitted, that it is clear from the respondent’s documents, that it treated the applicant as a separate legal entity and not merely, Mrs. Geddes’ alter ego.

[48] It was further contended, that the allegation contained in the 2016 McDonald affidavit that there was a contingency agreement between Mrs. Geddes and the respondent/claimant is at best, misleading. Mr. Hylton Q.C. submitted that the respondent failed to disclose that in previous proceedings it had alleged the existence of such an agreement and the Court of Appeal in ***Margie Geddes v Messrs McDonald Millingen*** [2010] JMCA Civ 2, ruled that there was no such agreement.

[49] Learned Queen’s Counsel stated, that the 2016 McDonald affidavit refers to the debt the applicant owes to Mrs. Geddes but failed to disclose that the debt was secured by a promissory note. It was argued, that the fact that Mrs. Geddes

required a formal loan document certainly indicates that she considered the company to be a separate legal entity.

[50] It was submitted that based on the unchallenged evidence, the applicant is a separate legal entity and not the alter ego of Mrs. Geddes.

[51] Mr. Hylton Q.C. also submitted that even if the facts had been as the respondent alleges, the authorities show, that that the court cannot 'pierce the corporate veil' in the circumstances of this case. Reference was made to the case of ***International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461*** (unreported), Court of Appeal, Jamaica, SCCA 135/2008, judgment delivered 4 December 2013 in support of this contention. Reference was also made to the cases of ***Adams and others v Cape Industries plc and another*** [1991] 1 All ER 929 and ***Prest v Petrodel Resources Limited*** [2013] 4 All ER 673.

[52] It was submitted that in the instant case, there is no justification for 'piercing the corporate veil' as there is no evidence or even a suggestion that the applicant was formed or exists to shield Mrs. Geddes from her existing liability to the claimant/respondent. Mr. Hylton Q.C stated that the defendant was incorporated almost 30 years ago and owned the shares long before the dispute with the claimant/respondent arose so there can be no suggestion that the shares were transferred to it because of this claim.

[53] In the circumstances, learned Queen's Counsel contended that the statement in the McDonald affidavit that Mrs. Geddes is *"entitled to the assets of Bardi Limited"* and the statement in the Manning affidavit that Mrs. Geddes has a *"beneficial interest in the eighty four million (84,000,000) shares held by Bardi Limited in Desnoes and Geddes Limited"* are wrong as a matter of law.

[54] It was further submitted, that the injunction should be set aside on the basis that the respondent failed to give an undertaking as to damages and there was no evidence that it could pay any damages that may become due, because of the injunction. Learned Queen's Counsel pointed out that even when the respondent

sought and obtained an extension of the injunction, it still failed to give an undertaking as to damages, or provide evidence of its ability to honour any such undertaking. The court was directed to rule 17.4 (2) of the ***CPR*** in this regard.

[55] Reference was also made to the case of ***Olint Corp Limited v National Commercial Bank*** [2009] UKPC 16 in support of that submission. In that case, the Privy Council declared that when an injunction is granted, the beneficiary of the injunction should usually be required to give an undertaking as to damages. Mr. Hylton Q.C. submitted that the purpose of the undertaking is to protect the party who is restrained by the injunction against any damages he may suffer while the injunction is in force should it turn out that the injunction ought not to have been granted.

[56] He emphasised that the authorities evince that the applicant must not only give an undertaking but must also provide evidence of an ability to satisfy the undertaking. The court was directed to the judgment of Mangatal JA (Ag) in ***TPL Limited v Thermo-Plastics (Jamaica) Limited*** [2014] JMCA Civ 50 in support of this submission.

[57] It was submitted, that the respondent's contention that there was no need for an undertaking in this case because the provisional charging order was not an interim order is untenable. Mr. Hylton Q.C. submitted that the injunction was granted *ex parte* pending the *inter partes* hearing of the application for a final charging order. He stated that at the *ex parte* hearing the court had not heard from the applicant who is the most affected third party and as such it is no answer to say that "no undertaking was requested from the claimant".

[58] Learned Queen's Counsel made submissions regarding the importance of the requirement of an undertaking. He submitted that in this case the evidence indicates that the orders prevented the applicant from accepting an offer of United States twenty one million dollars (US$21,000,000.00) for the shares at a time when they had been trading for just over United States five million dollars

(US$5,000,000). Since then, the shares have been delisted. This, in his view, demonstrates the importance of an undertaking.

[59] Learned Queen's Counsel argued that the respondent's contention that the court should not entertain the applicant's application because the parties had agreed to adjourn the arguments in relation to the provisional charging order pending a decision on the validity of the default cost certificate is flawed for a number of reasons.

[60] Firstly, the evidence does not support a contention that there was some binding agreement that the application to make the provisional charging order final would be effectively stayed pending the court's decision. There is no correspondence or minute of order reflecting such an agreement and the effect of paragraph six (6) of the Manning affidavit and paragraph three (3) of Kereene Smith's affidavit is merely that the parties made the sensible decision that Mrs. Geddes' application to set aside the default costs certificate should be heard first.

[61] Secondly, the present application is entirely different. The grounds and issues that arise for consideration here were not before the learned Judge and could not have been the subject of any agreement between the parties.

[62] Finally, and in any event, the applicant was not made a party to these proceedings until September 23, 2016 therefore any agreement between the parties could not have been the subject of any agreement between the parties.

[63] Learned Queen's Counsel also contended that the respondent's argument that this application should await the hearing of Mrs. Geddes' appeal of the order of Morrison J is flawed for similar reasons. That appeal he said, relates to Mrs. Geddes' application to vary the provisional charging order. Mr. Hylton Q.C. submitted that the relief sought and the issues raised in the present application are entirely different. Also, the applicant was not a party to that application and is not a party to the appeal.

[64] It was submitted that if the court does not find favour with Mr. Hylton's arguments the court should vary the injunction to restrain Mrs. Geddes from causing or presumably allowing the applicant to deal with its shares. However, if the court does not find that the applicant is Mrs. Geddes' alter ego there would be no basis for preventing her from acting as the applicant's agent and allowing the company to deal with it shares.

[65] In respect of costs, learned Queen's Counsel directed the court's attention to rules 65.17(1) and (3) of the ***CPR*** which provide that where the court has a discretion as to the amount of costs to be awarded to a party it should allow the amount the court deems reasonable. He stated that in such a case, the court is required to take all the circumstances into account in making its determination.

[66] He also submitted that the court has a discretion as to whether costs should be awarded on an indemnity basis. Learned Queen's Counsel stated that the bases on which the court can and should award costs on the indemnity basis include where the paying party has acted in a highly unreasonable manner or where it has pursued an application which was very weak or was irreconcilable with the contemporaneous documentary evidence.

[67] Mr. Hylton Q.C. referred to the cases of ***RBTT Bank Limited v YP Seaton*** [2014] JMSC Civ 139 and ***Port Kaiser Oil Terminal SA v Rusal Alpart*** [2016] JMCC Comm 10 and further submitted that in making the application for the orders and in enforcing them the respondent acted in a highly unreasonable manner and pursued an application which was completely irreconcilable with the contemporaneous documentary evidence.

[68] He stated that even if the respondent did not know the law, it knew its documents. Therefore, it knew at all material times, that Mrs. Geddes did not own the D & G shares. It also knew that it had billed the applicant separately and had been paid. In addition, it knew that the applicant was not a defendant to the claim and that the judgment debt was owed by Mrs. Geddes and not the applicant. Mr. Hylton Q.C. argued that the situation is compounded by the fact that the

respondent is a firm of attorneys-at-law who had represented both Mrs. Geddes and the applicant and had treated them as separate legal entities in previous litigation. He stated that despite these facts, the respondent pursued and obtained the orders in respect of the D & G shares. It was submitted that tin the circumstances, costs should be awarded on an indemnity basis.

THE RESPONDENT'S SUBMISSIONS

[69] Mr. Chen began his submissions by outlining the history of the matter.

[70] He stated that Mr. Paul Geddes, the deceased husband of Mrs. Geddes who held substantial shares in D & G wished to benefit his wife, children and grandchildren upon his death. In order to achieve this at a very low cost he transferred his shares in D & G to Bardi Limited.

[71] Both he and the defendant held equal shares in Bardi Limited and the defendant was the intended recipient of all the shares in D & G upon Mr. Geddes' death. However, Mr. Geddes' children and grandchildren were also supposed to benefit from the D & G shares by receiving cash. Mr. Geddes, it was said, created a series of promissory notes in Bardi Limited payable to a trust company and were to be held in trust for the children and grandchildren.

[72] Upon Mr. Geddes' death, Mrs. Geddes became the sole beneficiary of his estate and she also became the sole owner of all the shares in Bardi Limited. She was dilatory in taking steps to cause Bardi Limited to pay the promissory notes and this resulted in court proceedings and a Mareva injunction being imposed to restrain Bardi Limited from removing its assets from the jurisdiction.

[73] As a result, the trustees for the children and grandchildren held a judgment against Bardi Limited for the amount of the promissory notes. Court proceedings were brought to vary the Mareva Injunction. At the hearing of that application Bardi Limited sought to challenge the validity of the promissory notes.

[74] Mrs. Geddes, through Bardi Limited, had entered into an agreement with Bastion Holdings Limited to sell the D & G shares to Bastion. In order to facilitate this sale, the application was brought to vary the Mareva injunction which would result in Bastion owning the D & G shares. The principal of Bastion was "a man of straw" and a friend of Mrs. Geddes.

[75] Counsel submitted that this is evidence of Mrs. Geddes' attempt to hold on to the D & G shares and to deny others of the benefit to be derived from them and is evidence that she has always treated the shares as her own. He also stated that after the death of Mr. Geddes, it was she who was the directing mind and will of Bardi Limited and could therefore make the decision as to the sale of its principal asset.

[76] Mr. Chen continued to outline the history. He stated that McIntosh J refused to vary the Mareva injunction and summary judgment was entered in favour of the claimant. Mrs. Geddes then became liable to pay the promissory notes and could not dispose of the D & G shares until that was done. Steps were also being taken on behalf of her step children and step grandchildren to wind up Bardi Limited and for a liquidator sell its assets to satisfy the promissory notes.

[77] Mr. Malcolm McDonald, a partner in the firm McDonald Millingen was engaged to extricate Bardi Limited from its predicament and bring about the state of affairs whereby Mrs. Geddes could regain and retain the D & G shares.

[78] Mr. Chen referred to e-mail exchanges between Mrs. Geddes and Mr. McDonald which in his opinion confirm that Mrs. Geddes regarded the D & G shares as her personal asset and that Bardi Limited was a mere holding company.

[79] He stated that after Mr. McDonald had succeeded in getting Bardi Limited out of liquidation by causing Mrs. Geddes to pay United States six million and forty seven thousand five hundred and four dollars and twenty cents (US$6,047,504.20) to the Trustee in Bankruptcy, Mrs. Geddes wrote to him by e-

mail of April 4, 2008 to say that she would keep the D & G shares in Bardi Limited or take them personally as she wanted to shut down Bardi Limited.

[80] Counsel submitted that this, again, is clear evidence that Mrs. Geddes regarded the shares as her own property and that she was interchangeable with Bardi Limited.

[81] Counsel further directed the court's attention to e-mail exchanges between Mr. McDonald and Mrs. Geddes dated April 7, 2008. Mr. Chen also referred to the e-mail exchanges of January 15, 2008 to March 5, 2008 in which Mrs. Geddes agreed to transfer 40% of the D & G shares to Mr. McDonald as payment for his services.

[82] Reference was also made to an e-mail dated April 16, 2008 in which Mrs. Geddes in discussing the D & G shares stated, in part:-

> *"it (referring to Bardi Limited) is merely a holding company not an operating company…I need to make money with these shares. Adding more costs to the basis now would be fiscally irresponsible".*

[83] Counsel submitted that on a preponderance of the evidence the court is entitled to find that Mrs. Geddes is the alter ego of Bardi Limited. He stated that they are one and the same.

[84] Mr. Chen also argued that the acts, agreements, engagements and promises of Mrs. Geddes done in relation to the D & G shares and Bardi Limited were done as the agent of Bardi Limited and are binding on the company.

[85] It was submitted that the proposition that an individual can be regarded as the alter ego of a company and be treated as one and the same for many reasons is well established. Counsel relied on the case of ***Tesco Supermarkets Ltd v Nattrass*** [1972] AC 153. He submitted that in this case Lord Diplock set out the basis upon which a natural person may be deemed the alter ego of a company.

[86] It was further submitted that the English Court of Appeal made the court's position on an agent's ability to be the alter ego of a company more explicit in ***Stone Rolls Ltd (in liquidation) v Moore Stephens (a firm)*** [2008] EWCA Civ 644. In that case the court applied the dicta of Lord Reid in ***Tesco*** (supra), of Hoffman LJ in ***El Ajou v Dollar Land Holdings plc*** [1994] 1 BCLC 464 and ***Meridian Global Funds Management Asia Ltd v Securities Commission*** [1995] 2 BCLC 116.

[87] Counsel stated that in the recent case of ***Pfizer v Medimpex*** [2012] JMCA Civ 23 an Attorney-at-law who held a power of attorney from Pfizer and was a mere agent applied on its behalf for letters of patent and did so as its alter ego. Mr. Chen stated that in that case, the concept that an agent can be the alter ego of a company was accepted by our Court of Appeal.

[88] Counsel contended that according to ***Halsbury's Laws of England***, the relation of agency arises:

> *"…whenever one person, called the 'agent', has authority to act on behalf of another, called the 'principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent".*

[89] In respect of the relationship of agency between the company, the principal, the director and the agent, Counsel relied on the cases of ***Ferguson v Wilson*** (1866) L.R 2 Ch. App 77 and ***Great Eastern Railway Company v Turner*** (1872) L.R. 8 Ch. App 149.

[90] It was submitted that Mrs. Geddes being the mind, will and driving force of Bardi Limited, is its alter ego, and that is still the position even where she acts as a mere agent.

[91] Mr. Chen argued that for several years Mrs. Geddes proceeded as though the D & G shares belonged to her and made no distinction between Bardi Limited and herself in her dealings with them.

[92] He stated that in previous court proceedings (challenging the validity of the cost certificate and enforcement of the charging order) Mrs. Geddes did not raise the point that there was a difference between Bardi Limited and herself in respect of the D & G shares. Counsel submitted that the making and service of the provisional charging order and the issue of the injunction, in effect, restrained Mrs. Geddes from dealing with them.

[93] Counsel pointed out that the provisional charging order and injunction were served on Mrs. Geddes in April 2013. Thereafter, an application was filed which sought various orders including orders striking out the claim and setting aside the default costs certificate. Mr. Chen stated that the issues of the ownership of the D & G shares and the liability of Bardi Limited were not raised in those applications.

[94] It was further pointed out that in an affidavit sworn to on March 18, 2016, Mrs. Geddes makes it clear at paragraph three (3) that the claimant had acted on her behalf in bankruptcy proceedings involving Bardi Limited in the period 2006-2008 and during that period she faithfully paid all legal fees as per invoices sent to her save for the invoice relating to a purported contingency fee agreement. Those invoices related to Bardi Limited for work done for the company at Mrs. Geddes' request.

[95] Counsel also directed the court's attention to paragraphs five (5) and seven (7) of the said affidavit. He pointed out that in both paragraphs Mrs. Geddes makes it plain that she is the owner of the shares in Bardi Limited as well as the D & G shares as she often refers to the shares as "*my shares* in Bardi Limited and Desnoes & Geddes Limited".

[96] Counsel also directed the court's attention to paragraphs thirteen (13), sixteen (16) and seventeen (17) of the said affidavit. In paragraph thirteen (13) Mrs.

Geddes states that she wishes to take advantage of a potential sale while it remains possible. This was in reference to the takeover offer of D & G by Heineken. Mr. Chen contended that this also demonstrates that Mrs. Geddes was treating the D & G shares as her own property and made no distinction between herself and the Bardi Limited.

[97] Mr. Chen submitted that the provisional charging order was not challenged by the applicant on the present ground since it was made in 2012. He argued that on the occasion of an offer being made by Heineken for the purchase of the D & G shares at a substantial premium, no challenge was made to the *ex parte* order on the basis that there was a difference in the status of the applicant and Mrs. Geddes. Instead, an application was made for variation of the charging order to permit the sale of the shares and the payment into court of an amount in United States dollars to secure the charging order.

[98] Counsel pointed out that the application was refused and was appealed. It was reiterated that no challenge was made on the basis that there was a distinction between the applicant and Mrs. Geddes. It was after the hearing at the Court of Appeal that Bardi Limited applied to be joined in the action and raised for the first time the question as to its liability and the ownership of the D & G shares.

[99] Mr. Chen contended that the position of the respondent has always been and continues to be, that the applicant is free to sell the D & G shares and that the amount due in respect of the default cost certificate should be paid out of those proceeds.

[100] It was argued that the continued refusal to do so and the present attempt to free the D & G shares is yet another attempt by Mrs. Geddes to avoid paying legitimate expenses or to shield the D & G shares from exposure to do so, in an attempt to garner to herself their maximum value subject to the payment of the promissory notes.

[101] Mr. Chen stated that the issue as to whether Morrison J was correct when he ruled that he had no jurisdiction to vary a provisional charging order in circumstances where the provisional charging order would continue to be in force was adjourned before the Court of Appeal. The appeal has not yet been heard. Counsel argued that the present application for the discharge of the charging order against Bardi Limited is another attempt by Mrs. Geddes to frustrate the judgment creditor and is premature. Counsel argued that it should not be heard until after the Court of Appeal has had an opportunity to give mature consideration to the issues that arose in that appeal.

[102] It was submitted that there was no abuse of the court's processes as claimed as Bardi Limited and Mrs. Geddes are one and the same. The application to enforce the default cost certificate was brought in a timely manner and remained outstanding for upwards of two years before Mrs. Geddes attempted to vary it.

[103] It was argued that the provisional charging order is an enforcement order and the claimant was a judgment creditor, having received a default costs certificate. Counsel submitted that a default cost certificate has the same effect as a judgment and in those circumstances, no undertaking is required by the rules or the law as it is not an interim order.

[104] Mr. Chen submitted that any procedural defect in obtaining the provisional charging order should be corrected by the court in the exercise of its discretion pursuant to rule 26.9 of the ***CPR*** to avoid an injustice.

[105] In respect of costs, it was contended that the actions of the respondent are entirely reasonable and were taken to enforce a default cost certificate that was issued from January 30, 2012. On the contrary, the actions of Bardi Limited to make the present application in circumstances where:-

(i) it has received the benefit of the work giving rise to the default cost certificate;

(ii) the driving force behind it is Mrs. Geddes;

(iii) the asset the subject of the provisional charging order is the D & G shares which is a gift to Mrs. Geddes from her late husband;

(iv) Mrs. Geddes has in the past sought to deny her step children and step grandchildren of the benefit of the promissory notes created by Mr. Geddes to benefit them out of the very same D & G shares;

(v) Mrs. Geddes has attempted to defeat the exposure of the D & G shares to the payment of the promissory notes by creating a sham contract in favour of Bastion Holdings Limited;

(vi) Mrs. Geddes has acted in a manner designed to delay and frustrate the respondent in its efforts to collect fees earned by it, first by taking a legal point to resile from her agreement to give the respondent a percentage of the D & G shares as recompense for its work and upon a default cost certificate being issued on a work done basis to challenge it and to take all manner of spurious points to delay and obfuscate;

(vii) Notwithstanding that the Court of Appeal is yet to hear the appeal as to the correctness of the refusal of Morrison J to vary the provisional charging order, to bring a new action in the name of Bardi Limited and to consolidate it with the action pertaining to the charging order; and

(viii) Now to pretend that Bardi Limited is a separate legal entity when Mrs. Geddes has always treated it as her alter ego solely for the purpose of removing the D & G shares from the effect of the provisional charging order; is reprehensible and unreasonable and she should be made to pay costs on an indemnity basis by ordering Bardi Limited her alter ego to pay costs on that basis.

[106] In sum, Mr. Chen submitted that:-

(i) The applicant, Bardi Limited is the alter ego of Mrs. Geddes, who has acted throughout as the owner of all the shares in Bardi Limited and

who is the beneficial owner of its principal asset, the D & G shares and who is currently the sole shareholder of Bardi Limited.

(ii) Bardi Limited is a mere vehicle used by Mrs. Geddes to hold the D & G shares on her behalf. The work undertaken by the respondent was done at the request of Mrs. Geddes to free Bardi Limited from liquidation.

(iii) The present position taken by Bardi Limited is a further attempt by its shareholder Mrs. Geddes to avoid paying the debts she has incurred by removing her main asset from the jurisdiction of the court and it would be unjust to allow this to be done and the court should treat Mrs. Geddes and Bardi Limited as one and the same to avoid such an injustice.

(iv) In the event that the court does not find favour with the foregoing arguments and removes the Mareva injunction in relation to the D & G shares held by Bardi Limited, the injunction and charging order should be retained in respect of Mrs. Geddes to prevent her from using her share ownership and control of Bardi Limited from selling, disposing, alienating or charging directly or indirectly Bardi Limited's D & G shares.

DISCUSSION

Discharge of the Provisional Charging Order

[107] It is my understanding that the applicant is not challenging the orders relating to Mrs. Geddes' shares, which are made against her personally.

[108] Bardi Limited has asked that the provisional charging order be discharged on the basis that its shares in D & G are not jointly owned with the defendant and it owes no debt to the respondent/claimant.

[109] This ground would ordinarily be considered during the hearing of an application to make the provisional order final, where an objection has been filed. Rule 48.8

of the ***CPR*** states that where an interested person objects to a provisional charging order being made final, they must file the objection fourteen days before the hearing. Once that has been done, the court has the power to either make a final charging order, discharge the provisional order or give directions for the resolution of any objections that cannot be fairly resolved summarily.

[110] The matter which is currently before this court is for a discharge or variation of the order simpliciter and not one in which the court is required to consider whether the order should be made final. I suspect that the applicant has adopted this route as the decision on whether the default costs certificate ought to be set aside is not yet available. The parties have taken no issue regarding the court's jurisdiction to hear this application.

[111] In ***Richard Parr v Tiuta International Limited*** [2016] EWHC 2 (QB), a case that concerned charging orders, Mr. Justice Dingemans made the following observation:-

> *"There are obvious potential difficulties if judges set aside or vary orders made by judges of co-ordinate jurisdiction. I was referred to a number of authorities dealing with circumstances in which it is appropriate to set aside or vary an earlier order. These authorities establish that the circumstances in which the jurisdiction to set aside or vary might be exercised include situations where there was a material change of circumstances, where a Judge was misled, or where there was fraud"*

[112] It seems to me that the argument that the provisional charging order should be discharged on the aforementioned basis would therefore require an inquiry into whether the information that was before the learned Judge (who made the provisional charging order) conveyed that the shares held by the applicant in D & G were jointly owned by the applicant and Mrs. Geddes and that it was only she who was indebted to the respondent/claimant.

[113] The *ex parte* Notice of Application for the charging order indicates quite clearly that the 84,000,000 ordinary shares in D & G were issued to and registered in the name of Bardi Limited.

[114] The application states that Mrs. Geddes has a beneficial interest in the assets of Bardi Limited which includes the 84,000,000 shares it holds in D & G.

[115] Mr. McDonald's 2012 affidavit states, in paragraph eight (8) that to the best of his knowledge Mrs. Geddes is the sole legal and beneficial owner of all the ordinary shares in Bardi Limited and accordingly she is the sole shareholder of the company.

[116] Paragraph nine (9) of the affidavit states as follows:

> *"Margie Geddes is the holder of one ordinary share in Bardi Limited and the other ordinary share is held by the Estate of Paul Geddes. That Paul Geddes, deceased was the late husband of Margie Geddes. Margie Geddes, is the sole executrix and sole beneficiary of the estate of Paul Geddes deceased."*

[117] Paragraph ten (10) of the affidavit is also relevant, it states in part:-

> *"That Margie Geddes is one of two directors of Bardi Limited. Bardi Limited is the holder of 84,000,000 ordinary shares in Desnoes & Geddes Limited…the total amount of indebtedness of the company in respect of all mortgages and charges of the kind required to be registered with the Registrar under the Companies Act was nil. That I do verily believe that the company has not traded since December 2011 to present and has not incurred trade debts or mortgages or charges over its assets. That accordingly Margie Geddes the sole shareholder is beneficially entitled to the assets of Bardi Limited namely over 84,000,000 shares in Desnoes & Geddes."*

[118] It seems that the conclusion arrived at by the deponent that Mrs. Geddes was beneficially entitled to the assets of Bardi Limited (which included the shares held by the company in D & G) was based on the fact that she held shares in the applicant company and so did her late husband who named her as the sole

beneficiary of his estate. Mrs Geddes and her husband were the only shareholders and the company had not incurred any debts.

[119] It is my understanding that a company may register a share transfer or allotment of shares in the joint names of a number of holders. Share certificates or a single share certificate are/is then issued by the company. Resultantly, companies may have joint shareholdings within their register of members. Bearing this in mind, I am of the respectful view that there was no information before the learned Judge which conveyed that the shares in D & G were jointly held by Mrs. Geddes and the applicant. It was expressly stated that the shares were issued to and registered in the applicant's name.

[120] The *ex parte* application filed by the respondent and the affidavit in support did not assert that the applicant owed a debt to the respondent. The 2012 affidavit of Mr. McDonald discloses that the claim stems from work done on Mrs. Geddes' behalf.

[121] There is therefore no evidence that the learned Judge was misled or that there had been a material change in circumstances since the grant of the order.

[122] I am also mindful of the guidelines set out by Brooks JA in ***In the matter of Sharon Allen*** [2017] JMCA 7, where he said: -

> *"On the issue of jurisdiction, it must also be said that* ***Mason v Desnoes and Geddes Limited*** *and* ***Leymon Strachan v The Gleaner Company Limited and Anothe****r [2005] UKPC 33 demonstrate that a judge may, in certain circumstances, set aside an order made by a judge of concurrent jurisdiction. Examples of such circumstances are, firstly, if the application before the first judge was made, in the absence of a party, or, secondly, where the merits of the case were not decided at that first hearing. It is usual that the application to set aside is placed before the same judge who made the order, which is sought to be impugned. Where, however, as in this case, that judge is not available, another judge may hear and decide the application to set aside the first order."*

[123] In the instant case, the provisional charging order was made in the absence of Mrs. Geddes and not the applicant which only became a party September 23, 2016. The provisional charging order was granted in 2012, and its variation was sought in 2016 before Morrison J. yet it is only now, over four years later, that it is being challenged on this basis.

[124] It is also the contention of the applicant that the provisional charging order should be discharged because the affidavit in support of the application for the provisional charging order did not comply with rule 48.3(2)(f)(iii) and (iv) of the ***CPR***.

[125] Rule 48.3(2)(f) states that the affidavit in support of the application for a charging order must state:-

> *"(iii) whether any person other than the judgment debtor is believed to have an interest in that stock whether as a joint owner, a trustee or a beneficiary; and*
>
> *(iv) if so, give the names and addresses of such persons and details of their interest;"*

[126] The applicant's contention is that it is the sole owner of the D& G shares and is not indebted to the claimant/respondent. In those circumstances it is asserted that those shares should not be subject to the provisional charging order. The ground that the affidavit was deficient was not addressed in Mr. Hylton's submissions.

[127] That ground in my view appears to be inviting the court to review the exercise of discretion by a Judge of concurrent jurisdiction. There can be no dispute that such a course is not to be entertained. I consider it fitting to mention the case of ***Gordon Stewart OJ v Noel Sloley Snr et al*** [2016] JMSC Civ 50. In the judgment of Sykes J the following appears:-

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

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 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 (sic) a particular procedure then that is the rule that applies. There is therefore no breach of rule 11.8 (1) and (2).

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 renew the exercise of discretion of another judge of the Supreme Court."

[128] In light of the above, I find that this ground has no merit.

Discharging the Injunction

[129] It was the applicant's contention that the application was made and pursued and enforced in circumstances that constitute an abuse of the court's process as the claimant was guilty of material non-disclosure and material misstatements including that:-

(i) the shares held by Bardi Limited in Desnoes & Geddes Limited are not held jointly with the defendant

(ii) the defendant is not the sole shareholder of Bardi Limited; and

(iii) Bardi Limited did not owe a debt to the claimant

[130] In ***Port Kaiser Oil Terminal S.A v Rusal Alpart Jamaica (A Partnership)*** [2016] JMCC Comm 10, Batts J said the following:

"I also agree with Mr. Michael Hylton's further complaint, which is, that the Claimant failed to make full disclosure at the ex parte hearing. In this regard I respectfully adopt and apply the definition of material facts, as well as the duty to disclose formulated by my brother Sykes J, in ***North American Holdings Company Limited v Androcles Limited*** *[2015] JMSC Civ 151 Para 4 where he stated:*

> *"It is well established that an applicant who makes an ex parte or without notice application is under a very onerous duty to make full and frank disclosure to the court of all material facts. Material facts are those that affect or may affect how the discretion to grant or not to grant the freezing order is exercised. Material facts include the Claimant's case and any fact the Defendant could urge had he been present at the hearing. The nature of this duty is so great that the law requires the applicant to make all reasonable enquiries so that he is fully informed as circumstances allow about his claim before the application is made or heard so that the applicant is in a position to advise the court of all relevant matters, particularly those matters which the Defendant could have raised had he been told about the application and was present. The reason for this is that a without notice application is prima facie a breach of natural justice which requires that a person be heard or be presented with the opportunity to make representations before an order is made, especially an adverse order. This is true of all without notice applications. Of course there are some without notice applications where the full rigour of the rule is mitigated to some extent. An example is an application made by a law enforcement agency to enforce a statute.*

That duty is not discharged by placing documentation before the Court. It is incumbent on the applicant to point out to the Court anything in such documentation which may point in the absent Defendant's favour. Justice Sykes in the judgment cited makes this clear at paragraphs 13 and 14 of ***North American Holdings Company Limited v Androcles Limited*** *[2015] JMSC Civ 151. The duty is not new and was clearly stated by Ross J (as he then was) in Citibank NA v Office Towers Limited and Adela International Finance Company SA (1979) 16 JLR 502. It is time for*

all practitioners to recognize the importance and extent of the duty of full disclosure on ex parte applications."

[131] The foregoing extract highlights the importance of fully disclosing all material facts. Therefore, in my judgment, where a provisional charging order was obtained in circumstances where all of the relevant material was not presented to the court, there may be a basis for a discharge of that order.

[132] The grounds for setting aside the injunction overlap with the grounds advanced for discharging the provisional charging order. I have previously expressed my view as to whether the information before the learned judge conveyed that the shares were jointly owned and a debt was owed by the applicant company. I find that there was no material non-disclosure in respect of these grounds. It was disclosed that the shares were issued to and registered in the name of the applicant and that the claim concerned work done for Mrs. Geddes.

[133] That being said, in paragraph 11 of the 2012 affidavit Mr. McDonald did in fact state that Mrs. Geddes was the sole shareholder of the applicant company.

[134] The affidavit of Paula Jackson sworn on June 30, 2016 and filed on July 12, 2016 reads in part:

"4. I have been the Secretary of Bardi Limited since December 1, 2012….

5. There are two issued shares in Bardi Limited. One is owned by the Defendant, Mrs. Margie Geddes and the other is owned by Estate Paul H. Geddes. I understand that Mrs. Geddes is the beneficiary of the estate but as far as I am aware the Estate's share has never been transferred to her.

6. Bardi Limited has three bank accounts and I sign on all of them…"

[135] In respect of shareholdings, Mr. McDonald's 2012 affidavit differs from Miss Jackson's affidavit in one aspect only, Miss Jackson deponed that as far as she was aware the late Mr. Geddes' shares were never transferred to Mrs. Geddes.

[136] A Grant of Probate was exhibited to Mr. McDonald's 2012 affidavit. However, there is no evidence as to whether there was actual transmission of the shares.[1] Given the circumstances of the case and the nature of Mrs. Geddes' interest in the shares in the applicant company I am not persuaded that the assertion that she is the sole shareholder in Bardi Limited is a material misstatement.

[137] It was made clear to the learned judge that Mrs. Geddes was the holder of one ordinary share in Bardi Limited and that the other ordinary share was held by the estate of Mr. Geddes who left a will indicating that his wife was his sole beneficiary and a grant of probate was obtained.

[138] I therefore cannot agree with learned Queen's Counsel that the respondent was guilty of material non-disclosure and/or misstatements.

No undertaking as to damages

[139] Counsel submitted that the injunction should be set aside because no undertaking as to damages was given by the respondent and there was no evidence that it could pay any damages caused by the imposition of the injunction.

[140] A similar argument was made in ***Gordon Stewart OJ*** (supra) where, as can be seen from the passage earlier extracted (paragraph 127), Sykes J was of the view that such an argument could not be entertained as it was a challenge to the exercise of the learned judge's discretion.

[141] I agree with the position taken by Sykes J.

Separate Legal Personality

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[1] In the 2nd affidavit of Paula Jackson, the 2015 annual returns which was exhibited indicates, at number 9, that the estate of Mr. Paul Geddes is still a shareholder.

[142] It is the applicant's contention that as a result of the time honoured ***Salomon*** principle of separate legal personality it is the sole owner of the shares in D & G and that they should not be the subject of a charging order. It has relied on a number of cases***: International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461*** (supra), ***Adams and others v Cape Industries plc and another*** (supra) and ***Prest v Petrodel Resources Limited*** (supra) in support of that submission.

[143] In his submissions Mr. Hylton Q.C. criticized Mr. McDonald's 2016 affidavit. He stated that the respondent has clearly recognized that the court cannot make a charging order over property that is not owned by the respondent/claimant. He stated that with that in mind the respondent is now trying to persuade the court that the applicant and Mrs. Geddes should be treated as one.

[144] Mr. Hylton Q.C. addressed various facts relied on by Mr. McDonald in his 2016 affidavit to support the contention that the court should not treat the applicant company as a separate legal entity.

[145] In my judgment it was evident on the evidence before the learned judge that the shares in D & G were issued to the applicant and registered in its name. Having arrived at the conclusion that a provisional charging order should be granted in respect of such shares, it is not for me to say whether the exercise of the learned judge's discretion was proper or improper. This is a matter for the Court of Appeal.[2]

[146] Based on the foregoing, I therefore do not consider it appropriate to delve into the cases which have been cited[3] in respect of this issue and express an opinion

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[2] See ***Gordon Stewart OJ*** (supra)

[3] Neither will I delve into Mr. Hylton's criticism of the statements in Mr. McDonald's 2016 affidavit.

as to whether the shares held by the applicant should or should not be the subject of a charging order.

The matter before the Court of Appeal

[147] In ***Margie Geddes v McDonald Millingen*** [2016] JMCA App 12 the Court of Appeal granted permission to appeal the decision of Morrison J issued on January 20, 2016. As previously mentioned the applicant had applied to have the provisional charging order varied, but Morrison J had refused that application.

[148] P. Williams JA (Ag) (as she then was) stated the following:-

> *"In this case, the submissions made by learned Queen's Counsel as to the grounds on which the proposed appeal will be made cannot be said to have no merit. Whether the learned judge was correct that he had no jurisdiction to vary a provisional charging order in circumstances where the judgment debt would continue to be secured requires closer analysis. Such an analysis should be conducted in an appeal and it cannot be said it could not be determined in the applicant's favour."*

[149] She further stated:-

> *"This court will have to interpret this provision to assess whether provisional charging orders can be varied pursuant to rules 11.18 and 26 .1(7) and part 48 of the CPR as suggested by Mr. Hylton, or whether part 48 of the CPR is a regime in and of itself and does not embrace any other part of the CPR or has any provisions for varying a provisional charging order as Mr. Chen submitted. Since one possible interpretation would favour the applicant, this is one aspect of the appeal which would have a real prospect of success."*

[150] Learned Queen's Counsel submitted that the appeal relates to Mrs. Geddes application to vary the provisional charging order and as such raised different issues from those which arise in the instant case. He emphasized that the applicant was not a party to the application to vary the provisional charging order and is not a party to that appeal.

[151] Respectfully, I have a difficulty with the arguments advanced. An application was made to vary the provisional charging order to facilitate the sale of shares held by the applicant company in D & G to Heineken. Morrison J refused to vary the provisional charging order and Mrs. Geddes was granted permission to appeal the learned judge's ruling.

[152] The matter before the Court of Appeal is concerned with whether the provisional charging order can be varied pursuant to rules 11.18 and 26.7 of the ***CPR*** or whether part 48 of the ***CPR*** is a stand-alone regime which does not contemplate a variation under any other provision[4]. Notwithstanding this, the applicant company has applied to this court asking that the provisional charging order be discharged.

[153] Despite the fact that the applicant was not a party to the application to vary the provisional charging order and is not a party to the appeal I am mindful of Mr. Hylton's submission that the shares which are the subject of the appeal belong solely to the applicant company.

[154] In addition, it is my view that if I were to accede to the applicant's request to discharge the provisional charging order the matter before the Court of Appeal would only be one of academic interest as the applicant would have obtained the desired result.

CONCLUSION

[155] Based on all that has been stated above the application to discharge the provisional charging order and set aside the injunction is refused. Costs are awarded to the respondent/claimant to be taxed if not agreed. Leave to appeal is granted.

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[4] Similar arguments were advanced in respect of this application.