[2022] JMSC Civ. 239

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2014 HCV 01318

BETWEEN	**ORVILLE PALMER**	**1ST CLAIMANT**
A N D	**LORINDA PALMER**	**2ND CLAIMANT**
A N D	**GREGORY DUNCAN**	**DEFENDANT**
A N D	**MARK CAMPBELL**	**INTERESTED PARTY**

IN CHAMBERS BY VIDEO CONFERENCE

Mr.Craig Carter instructed by Althea McBean & Company for the Claimants

Mr. Gregory Duncan, Defendant in Person

Ms. Krishna-Kay Lawrence instructed by Karene N. Stanley & Company for the Interested Party.

HEARD: October 3, 10 And 18, 2022

JUDICATURE (SUPREME COURT) ACT – PART 48 CIVIL PROCEDURE RULES – REGISTRATION OF TITLES ACT – WHAT IS A CHARGING ORDER- APPLICATION FOR AN ORDER FOR SALE OF LAND- WHETHER FINAL CHARGING ORDER SHOULD BE DISCHARGED – WHETHER BENEFICIAL INTEREST IN PROPERTY WAS TRANSFERRED PRIOR TO THE GRANTING OF THE PROVISIONAL CHARGING ORDER

STAPLE J (AG)

BACKGROUND

[1] This is the final stage of a long and winding case in these Courts through which the Claimants seek to enforce a judgment they had obtained against the Defendant.

[2] The present application is one of the Claimants to sell two properties that were the subject of a final charging order made on the 1st June 2021.

[3] At the start of the hearing on the 3rd October 2022, Mr. Carter and Ms. Lawrence declared that they had agreed that in relation to the property registered at Volume 1520 Folio 505, that there was sufficient proof that this property had been disposed of by the Defendant to Mr. Mark Campbell and his nominee from before the imposition of the provisional charging order.

[4] So this matter proceeded along the point of whether or not the property registered at Volume 1520, Folio 506 had been similarly disposed of by the Defendant prior to the provisional charging order being imposed.

THE ISSUES

[5] There are several sub-issues of fact and law to be determined. These are:

(a) Did the Defendant and Mr. Mark Campbell have an agreement for the transfer of the properties registered at Volume 1520 Folio 505 and Volume 1520 Folio 506?
(b) If so, was the transfer of the Defendant's beneficial interest in those properties passed to the interested party prior to the making of the provisional charging order?
(c) If it was so transferred, can the sale be ordered and should the final charging orders be discharged?

The Charging Order in Jamaica: What is it, and What is its effect?

[6] Before I go further, it is very important to answer the question of what is a charging order in Jamaica and what is its effect.

[7] A charging order is a mechanism for the enforcement of a money debt owed by a judgment debtor to a judgment creditor. The power to impose a charging order is conferred by section 28D of the **Judicature (Supreme Court) Act**. In fact, that is all that section does to be quite blunt. The section simply says that the Court may

make a charging order in accordance with the Civil Procedure Rules 2002 (hereinafter the CPR).

[8] It is arguable that the charging order in Jamaica can be protected by the lodging of a caveat under section 139 of the **Registration of Titles Act.** Section 139 says,

> *"Any beneficiary or other person **claiming any estate or interest** (emphasis mine) in land under the operation of this Act, or in any lease, mortgage or charge, under any unregistered instruments, or by devolution in law or otherwise, may lodge a caveat with the Registrar…"*

[9] A charging order in Jamaica is arguably a "charge" (of a kind) and so capable of being protected by caveat under section. 139. This was the holding of the Court of Appeal in the case of ***Ken's Sales and Marketing Limited v Cash Plus Development Limited*** *(in Provisional Liquidation)*[1].

[10] In ***Ken Sales***, the Appellant, Ken's Sales and Cash Plus had entered into an agreement for sale of certain parcels of land. There was quite a delay in settling the purchase price on the part of Cash Plus which meant that interest accrued on the same. When the sale was completed and the titles handed over, there was no stipulation that Ken's Sales had waived their right to the interest that had accrued during the delay.

[11] Cash Plus was having issues paying the outstanding interest and eventually went into liquidation before it could be settled. To protect themselves, Ken's Sales lodged a caveat to protect their claim to the interest payment due to them. The Liquidator for Cash Plus Development Limited filed a Fixed Date Claim Form to get an order discharging the caveats on the basis that Ken's Sales claim to the sums due as interest was not an "interest in land" and so could not be the subject of a caveat. The Learned Trial Judge ruled that the caveat should be discharged

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[1] [2015] JMCA Civ 14

as the interest payment was, in his view, damages and was not an interest in land and so not protectable by caveat.

[12] On appeal, Ken's Sales argued, amongst other things, that the unpaid interest represented part of the purchase price unpaid and therefore gave rise to a vendor's lien under the principle in ***Lysaught v Edwards***[2]. Accordingly, it was protectable by caveat under s.139 which allows for caveats to be registered to protect interests in land or *charges* **(emphasis mine).**

[13] The Court of Appeal, whose judgment was delivered by Brooks JA (as he then was) held that under ***Lysaught v Edwards*** the vendor of land under an agreement for sale had an equitable lien or charge over the property to secure any unpaid purchase price. As interest on the unpaid purchase price was treated as part of the purchase price, Ken's Sales had, at the very least, an equitable charge on the property (if not an interest) that was protectable by caveat under s. 139 of the **RTA.**

[14] It is true that the charging order is not created by anything that can be described as an "unregistered instrument". It is created by Order of the Court under the power of s. 28D of the **Judicature (Supreme Court) Act**. But it is still a charge on the land. Therefore, in my view, on the authority of ***Ken's Sales and Marketing***, a charging order may be capable of being protected by a caveat under section 139 of the **RTA**.

[15] The effect of a charging order in Jamaica, so far as it concerns real property, is set out in Rule 48.9(1) of the Civil Procedure Rules. It says that no disposition by a judgment debtor of an interest in property **subject to a provisional or final charging order (**[3]*emphasis mine*) is valid against the judgment creditor. This is

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[2] [1876] 2 CH D 499.

[3] I have some observations about this ruling. Firstly, by definition under s. 2 of the RTA, a "charge" is an instrument in writing signed by the proprietor that creates an annuity. So the equitable charge created under the principle in *Lysaught v Edwards* may not be a charge within the meaning of the RTA. This definition argument was never argued before the Court, however. Further, the authority did say "lien or at least a charge", so there is that

different from the position under the UK statute which provides that a charging order has the like effect of an equitable charge created by the debtor under his hand.

[16] According to Mangatal J (as she then was) in the case of ***Air Jamaica Limited v Stuarts Travel Service Limited et al*** a charging order is, "…notice to other parties with whom the owner of the land may want to have dealings, that the recipient of the charging order has an interest which needs to be recognised or cleared off.[4]"

[17] This being the case, the charging order may not have any ranking above the prior equitable beneficial interest given to a purchaser on the execution of a valid and enforceable agreement for sale/transfer of land for valuable consideration.

[18] The charging order may be effected against land. Land, as defined under Rule 48.1(2) of the **CPR** includes any interest in land. One of the requirements to be placed in the Affidavit in Support of an Application for a Provisional Charging Order is a statement from the person making the application that the debtor is beneficially entitled to all or some part of the land. This is under Rule 48.3(2)(h) of the CPR.

[19] It stands to reason then that concerning real property, the charging order should only be made when the debtor is beneficially entitled to all or at least some of the real property. This is implicit, not express. It is made express under the UK's **Charging Orders Act[5].**

[20] Charging orders can take various forms. They can be absolute, or conditional. They can be made in situations where a debtor is ordered to satisfy a judgment

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argument that it more of a lien than a charge. Secondly, another pathway to resolution is that the interest in the land arises by devolution (by operation of law) which is also recognised under s. 139.

[4] (Unreported), Supreme Court, Jamaica, Suit No. 1998/A-18, judgment delivered 24 February 2011 at para 31.

[5] See section 2

debt by instalments. It is really a very useful tool of enforcement that, when properly made, can balance the needs of both the judgment creditor and judgment debtor.

ISSUE 1 – Was there an Agreement for Transfer Before the Making of the Provisional Charging Order?

[21] The first problem that faces me is that both a provisional and a final charging order have been made over the two properties the subject of this application over the objection of the Defendant. What this means is that, on the face of it, the answer to this question must be no. Much depends on what was the evidence before the Court at the time the provisional charging order was made. I am able to alter or discharge even a final charging order by virtue of Rule 48.10 of the Civil Procedure Rules.

[22] Whether I will now discharge the final charging order and refuse the sale depends on whether or not there is evidence now before the Court that was not before the Court at the time the provisional charging order and then the final charging order were made.

[23] It is a thing most curious, because if I grant the order for the sale of the properties in circumstances where they had already been disposed of prior to the granting of the charging order, this may be an order that is incapable of enforcement.

[24] I will now examine what was before the Court at the time of the granting of the provisional charging order.

The Evidence Before the Court at the Time of the Provisional Charging Order.

[25] The provisional charging order was made on the 28th May 2020. Present at the time was Mr. Craig Carter, Attorney-at-Law for the Claimants and Ms. Annette Henry, Attorney-at-Law, for the Defendant.

[26] The Application for the Provisional Charging Order was filed on November 21, 2019. It was supported by the Affidavit of the Claimants. In response, the Defendant had filed an Affidavit on the 27th May 2020. Paragraph 6 is what is relevant to this issue. I will set it out in full here:

> *"6. That amongst irregularities being pointed out by the Defendant includes that, the properties the Claimants seek to change are already **sold**. The Certificate of Titles and Instrument of Transfer were delivered to that purchaser on February 18, 2019. That purchaser has not yet transferred the properties which is why they still remain in the Defendant's name. **Exhibit "GD 2"**"*

[27] What was in exhibit GD 2? Exhibit GD 2 was an email from the Defendant to his then Attorneys-at-Law Chen Green & Co. attaching an agreement in relation to a property exchange concerning Units 16 and 17 Essex Estate (properties which I now know as registered at Volume 1520 Folio 505 and Volume 1520 Folio 506 respectively in the register book of titles) in return for Unit 3, St. Georges. This email was from well before the imposition of the provisional charging order.

[28] This attached agreement in Exhibit GD 2 was extremely difficult to make out. So I cannot say for certain that it was ever actually presented to the Court at any stage, even now. The Defendant said in his affidavit, at paragraph 6, that the purchaser had **not yet transferred the properties which is why they still remain in the Defendant's name** (*emphasis mine*). By transfer I understand this to mean the formal registration of the instrument of transfer for both properties.

[29] What is curious is that 2 caveats that had been registered on the title lapsed on the 4th April 2019. There is nothing on the face of the titles that were exhibited to the Affidavit of Mr. Orville Palmer in support of the Application for the provisional charging order filed on the 21st November 2019 as to when the lapsed caveats were originally lodged. But it was not disputed by the parties that at the time when the titles were handed over to Mr. Campbell by the Defendant in February 2019, they were unencumbered and no caveats had been lodged against them.

[30] What is also interesting is that by the time of the granting of the provisional order, 2 caveats had been lodged against the titles. One was lodged in June of 2019 and the other in August of 2019. So the Court would have, at the time of the granting of the provisional charging order, notice of two separate interests by two separate entities in the land. Then, at the granting of the final charging order on June 1, 2021, those two caveats were still present on the title and there was no evidence that they had lapsed.

[31] There were no other documents or materials before the Court at the time of making the provisional charging order. Despite the presence of the caveats, the Court then was willing to make the provisional charging order.

[32] So it is plain, based on the evidence before me, that at the time of the making of the provisional charging order, the Court had no notice of the interested party's interest in the property as there was no notice on the title by way of a caveat to protect same.

The Evidence Presently Before the Court

[33] There is now a bit more evidence before the Court concerning the history of these properties.

[34] We have now the evidence of Mrs. Paula Campbell-Minott, a legal clerk formerly employed to the firm Watson & Watson in the employ of the late Huntley Watson, the former Attorney-at-Law for the interested party Mr. Mark Campbell.

[35] In her Affidavit filed on the 26th May 2022, which was unchallenged, Mrs. Campbell-Minott spoke to the fact that in 2013, the Defendant had entered into an agreement for sale with Mr. Mark Campbell for a certain piece of property. The agreement for sale had to be aborted as the Defendant could not transfer title to Mr. Campbell. He did not have the purchase price to refund Mr. Campbell, so it was agreed that the Defendant would transfer two properties to Mr. Campbell as compensation for the failure to return the purchase price. This agreement was

brokered between the Defendant, his then lawyers Chen Green & Co and Mr. Campbell and his lawyers, Watson & Watson.

[36] This gives context to the email in Exhibit GD 2 mentioned earlier. There are also many other bits of evidence presented and before this Court. These are:

(a) A lien document from the Defendant to Mr. Mark Campbell as evidence of the negotiated position between them.
(b) A letter from the Defendant to his Attorneys-at-Law instructing them to surrender the titles for the properties registered at Volume 1520 Folio 505 and 1520 Folio 506 to Mr. Huntley Watson in exchange for the return of his other title and a discharge of the mortgage.
(c) Correspondence from Chen Green & Co to Watson & Watson officially handing over the titles and correspondence from Watson & Watson acknowledging receipt of the titles.
(d) An Instrument of Transfer, dated the 19th February 2020, executed by the Defendant in favour of a third party for the transfer of the property at Volume 1520 Folio 505 to that third party and correspondence as well as proof of payment of transfer tax and the submission of the documents to the Registrar of Titles for Registration. This third party was the nominee of Mr. Mark Campbell.
(e) An Instrument of Transfer executed by the Defendant and Mark Campbell for the transfer of the property at Volume 1520 Folio 506 from the Defendant to Mark Campbell dated the 19th February 2020.
(f) Emails evidencing the original sale agreement between the Defendant's company and Mr. Campbell.
(g) A receipt evidencing payment of a sum of money by Mr. Campbell to the Defendant's company.

[37] Taken together, this is far more evidence of the context in which the Defendant would have said to the Court as composed on the 28th May 2020 that the property had been sold from 2019.

[38] For example, the lien document was executed from 2017. The correspondence between the lawyers concerning the exchange of title was between the 14th February 2019 to the 21st February 2019. So as far as the Defendant was concerned, his interest in the properties registered at Volume 1520 Folio 505 and Folio 506 had ended. Then there are the instruments of transfer for the respective

properties both executed on the 19th February 2020. This would have, at least it was submitted by the Defendant and Counsel for the interested party, confirmed the transaction and represented the final act required by the Defendant to give effect to the agreement between himself and Mr. Campbell.

[39] Based on all that I have seen, I am satisfied that it is more likely than not that there was an agreement between the Defendant and Mark Campbell for the Defendant to transfer to Mr. Campbell properties at Volume 1520 Folio 505 and Volume 1520 Folio 506 as compensation for the failure of the Defendant to refund Mr. Campbell the purchase price from their failed agreement for sale entered into in 2013.

[40] I am also satisfied that this agreement was clearly evidenced in writing through:

(i) the lien document signed by the Defendant;
(ii) the correspondence of both sets of Counsel evidencing the handing over and receipt of the titles from the Defendant to Mr. Campbell; and
(iii) the signing of the instruments of transfer by the Defendant and Mr. Campbell's nominee (in relation to the property at Volume 1520 Folio 505) and the Defendant and Mr. Campbell (in relation to the property at Volume 1520 Folio 506).

[41] In my view, the above acts would more than satisfy the requirements of the Statute of Frauds.

[42] All of these things would have taken place before the granting of the provisional charging order on the 28th May 2020. Based on what is now before the Court, I am satisfied that it is more likely than not that the Defendant and the third party had entered into and concluded an agreement for the transfer of the properties the subjects of this final charging order from the Defendant to the third party from February 2019.

ISSUE 2 – Was the transfer of the Defendant's interest in those properties to the interested party effected prior to the making of the provisional charging order?

[43] The answer to this question is hotly contested but I find that the answer should be yes.

[44] The Claimants contend that no such transfer took place in law as the Instruments of Transfer were not registered as required by section 63 of the **RTA**. I will set it out here:

> *"63. When land has been brought under the operation of this Act**, no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge**; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature…"*

[45] Section 88 then provides as to what happens when the Instrument of Transfer is registered. It is set out below:

> ***"88.** The proprietor of land, or of a lease, mortgage or charge, or of any estate, right or interest, therein respectively, may transfer the same, by transfer in one of the **Forms** A, B or C in the Fourth Schedule hereto…. **Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof,** (emphasis mine) and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have **been** subject and liable if he had been the former proprietor, **of** the original lessee, mortgagee or annuitant."*

[46] It is common ground between the parties that the executed Instruments of Transfer, for whatever reasons, were not registered. They remain unregistered (not for want of effort on the part of counsel for the interested party in respect of Volume

1520 Folio 505). In those circumstances, the Claimants argue, at the time of the making of the provisional and final charging orders, the Defendant was still the registered proprietor of both properties and therefore, the provisional and final charging orders were properly made against both properties.

[47] Ms. Lawrence, for the interested party, and Mr. Duncan make a different argument. Mr. Duncan argues that he had already disposed of his interest in the properties to Mr. Campbell from before the making of the provisional charging order insofar as he had done all that he needed to do in order to accomplish this.

[48] Ms. Lawrence relied on the principle in ***Lysaght v Edwards***[6] to argue that the Defendant had, in equity, passed his beneficial interest in the property to the third party at the moment of entering into the agreement for the exchange of the properties for the purchase money. Sir George Jessel MR said as follows at page 506:

> ***"...the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser****, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without a beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money."*

[49] By her argument, she contends that the moment the Defendant and Mr. Campbell entered into their agreement for the exchange of the properties at Volume 1520 Folio 505 and Volume 1520 Folio 506 for the purchase price of their failed agreement for sale, **the beneficial ownership** (*emphasis mine*) of those

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[6] [1876] 2 CH D 499.

properties passed from the Defendant to Mr. Campbell with the result that the Defendant would have had no **beneficial interest** (*emphasis mine*) in the properties capable of being charged.

[50] It is now quite settled that despite the *Torrens System* being present in Jamaica, the principle as established in ***Lysaught v Edwards*** still applies in Jamaica. This Court acknowledges what is set out in section 2 of the **Registration of Titles Act**. It says,

> *"All laws and practice whatsoever, relating to freehold and other interests in land, so far as is inconsistent with the provisions of this Act, are hereby repealed, as far as regards their application to land under the provisions of this Act, or the bringing of land under the operation of this Act."*

[51] However, from as far back as the case of ***Barry v Heider et al***[7], the Courts have held that the principles of equity are still applicable and were not altered by the statute. In that case, the High Court of Australia, on appeal from the Supreme Court of New South Wales, decided that notwithstanding the provisions of sections 2(4) and 41 of the **Real Property Act 1900**, (section 2 is materially similar to section 2 of our **Registration of Titles Act**) an unregistered transfer of land confers upon the transferee an equitable claim or right to the land which is assignable by any appropriate means and it also operates as a representation, addressed to any person into whose hands it may lawfully come without notice of any right of the transferor to have it set aside, that the transferee has such an assignable interest.

[52] ***Barry v Heider et al*** concerned a proprietor of land (Barry) that had executed a transfer of it to S (not a party to the action), which was not registered and which was voidable by him (Barry) on the ground of fraud on the part of the transferee (S). S, **to whom the transfer had been delivered** (*emphasis mine*), applied to H

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[7] (1914) 19 CLR p 197.

(The first respondent Heider), who had no notice of the fraud, for a loan on the security of the land. He produced to H the transfer, which purported to be duly executed and attested, together with an order from the transferor to the Registrar General to deliver to H's solicitors the certificate of title which was lying in the Registrar-General's office. On the faith of those documents, and of an instrument of mortgage executed by S, H made the loan.

[53] Subsequent to this a caveat was then lodged by a solicitor on behalf of the Barry (but after Heider had already made the loan) stating that the purchase money had not been paid. Whilst negotiations were proceeding for a second mortgage by the transferee to G (the second respondent), the solicitor withdrew the caveat even though the purchase price was not paid. G then lent money on a second mortgage of the land even though he was aware of the caveat and had notice of same.

[54] Barry argued that he was not bound by the mortgage in favour of Heider as the transfer to S had not been registered and so S had no power to mortgage the property. It was held on appeal that Heider was entitled, as against Barry, to a charge on the land in terms of the mortgage. It was further held that G's mortgage should be postponed to the proprietor's lien for the unpaid purchase money as G had notice of Barry's interest in the purchase price through Barry's caveat.

[55] The main argument before the High Court on behalf of the Appellant Barry (the proprietor) was that on a proper construction of the **Real Property Act**, the transfer was inoperative for any purpose until registration so that no claim could be founded upon it of any kind, except, perhaps, a personal right of action by S (the transferee) himself.

[56] The learned Chief Justice Griffith, in delivering the judgment of the Court, said,

> *"In my opinion, the only relevant words of sec. 2, "All laws…rules…practice," are not of themselves sufficient to embrace the body of law recognized and administered by Courts of Equity in respect of equitable claims to land arising out of contract or personal confidence. But it is said that the words of sec. 41 [the equivalent of*

> *our section 63 of the **RTA**] "No instrument until registered…shall be effectual to pass any estate or interest in any land under the provisions of this Act" have that effect.*
>
> *It is now more than a half a century since the Australian Colonies and New Zealand adopted, in substantially the same form but with some important variations, the system, sometimes called the "Torrens" system, which is now in New South Wales embodied in the **Real Property Act** 1900. With the exception of one decision in South Australia, soon afterwards overruled, the contention of the Appellant has never been accepted in any of them.[8]"*

[57] The Chief Justice then went on, at pages 205-208 of the judgment, to cite examples and illustrations from the **Real Property Act** and other cases as to why it is that equity survived the **Real Property Act** notwithstanding the statements in sections 2(4) and 41.

[58] Separate and apart from the argument in equity, the Judges of the High Court all agreed that the effect of Barry signing the Instrument of Transfer, whatever the effect of it not being registered under the Act, is that, "…it is a statement by Barry importing that Schmidt (the transferee) was entitled to all his (Barry's) estate and interest in the land, and that not as a volunteer but as a purchaser for £1,200 and that Barry had not further claim or lien on the land because the whole consideration had been paid. That is equivalent to a declaration that Schmidt was the full equitable owner of the land. And everyone must be taken to know that, armed with such a document, Schmidt if the statements were true could sell or mortgage the property it represented, the registration **being a mere formality**...[9]"

[59] This decision has been applied by the Privy Council in the cases of ***Abigail v Lapin et al***[10] and ***Great West Permanent Loan Co. v Friesen***[11]. Our Court of Appeal in

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[8] Id at pp 205-206

[9] Id at p 218 per Isaacs J. See also p. 208 per Griffith CJ.

[10] [1934] AC 491 at p 500 per Lord Wright (who delivered the Judgment of the Court).

[11] [1925] AC 208 at p 223

the case of ***Ken's Sales and Marketing Limited v Cash Plus Development Limited*** (In Provisional Liquidation)[12] made the very same point.

[60] So what this means is that in Jamaica, on the execution of an agreement for sale of land that is enforceable, the purchaser becomes, in equity, the owner of the beneficial interest in the property and the vendor's interest is converted to an interest in the proceeds of the sale of the property with a lien or at the least, a charge on the property to secure the money. This principle is not affected by the operation of ss. 2, 63 and 88 of the **RTA**.

[61] On the evidence that I had accepted earlier, it is pellucid that the Defendant had done all that he needed to do to transfer his beneficial interest in the properties in question to the third parties prior to the imposition of the provisional and final charging orders. Thus Mr. Campbell became, in equity, the owner of the beneficial interests in the properties at Volume 1520 Folio 505 and Volume 1520 Folio 506 from February 2019.

[62] Indeed, relying on the authorities of ***Barry v Heider*** and **Abigail v Lapin et al,** the very fact of the Defendant executing the Instruments of Transfer to the third parties and delivering the titles, is more than sufficient to represent to the world that those third parties were now the true owners of the properties and the registration would simply be a formality.

[63] It is my finding that in this case, it is more likely than not that the beneficial interest in the properties in question had passed, in equity, to Mr. Campbell (the Interested Party) prior to the making of the provisional and final charging orders. The Defendant's beneficial interest in both properties would have passed from the moment the agreement was entered into and was confirmed from the delivery of the titles.

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[12] [2015] JMCA Civ 14 at para 23 per Brooks JA (as he then was).

ISSUE 3 - If it was so transferred, can the sale be ordered and should the final charging orders be discharged?

[64] In my view, the application for the sale has to be refused and the final charging orders discharged (even without a written application) in relation to both properties. The parties had conceded that the final charging order could be discharged in relation to the property at Volume 1520, Folio 505. It was now a contest over whether the final charging order and consequent sale should remain in relation to the property at Volume 1520, Folio 506.

[65] Rules 48.1(2) and 48.3(2)(h) make it clear that the charging order for land can only attach to the beneficial interest in the land. So where a Defendant has no beneficial interest in the property to be made the subject of a charging order, then no charging order can be made in respect of that property.

[66] In light of my findings above, it is now evident that the Defendant had divested himself of the beneficial interest in both properties from before the imposition of the provisional and final charging orders.

[67] In the circumstances therefore the application for the sale of the properties will have to be refused and the charging orders discharged.

DISPOSITION

1 Orders 1-11 in the Application filed by the Claimants on the 17th September 2021 are all refused.

2 The Final Charging order made on June 1, 2020, against the properties registered at Volume 1520 Folio 505 and Volume 1520 Folio 506 of the Register Book of Titles, is hereby discharged.

3 Costs to the Defendant on this application to be taxed if not agreed.

4 Leave to appeal granted.

5 Claimant's Attorneys-at-Law to prepare, file and serve this Order.