

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 1998/A-018

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| BETWEEN | AIR JAMAICA LIMITED | CLAIMANT/ JUDGMENTCREDITOR |
| AND | STUART'S TRAVEL SERVICE LIMITED | 1ST DEFENDANT/ JUDGMENT DEBTOR |
| AND | J.F.STUART | 2ND DEFENDANT/ JUDGMENT DEBTOR |
| AND | PAULINE STUART | 3RD DEFENDANT/ JUDGMENT DEBTOR |

Mr. John Graham and Ms. Peta-Gaye Manderson instructed by John G. Graham & Company for the Claimant/ Judgment Creditor.

Mrs. M. Champagnie for the 2nd Defendant.

Heard : 8th December 2010, 24th February 2011.

**APPLICATION TO MAKE PROVISIONAL CHARGING ORDER FINAL-
PRINCIPLES INVOLVED- WHETHER CHARGING ORDER IN
RELATION TO LAND MUST INEVITABLY LEAD TO WRIT OF
EXECUTION IN THE FORM OF ORDER FOR SALE OF LAND-
WHETHER JUDGMENT CREDITOR MUST SEEK THE COURT'S
PERMISSION TO APPLY FOR PROVISIONAL CHARGING ORDER
WHEN OVER SIX YEARS HAVE PASSED SINCE ENTRY OF JUDGMENT
-WHAT COMPRISES JUDGMENT DEBT**

Mangatal J:

1. This is an application for a provisional charging order made on the 20th of January 2010 to be made final.
2. The grounds upon which the order was made are stated to be that the Claimant/Judgment Creditor Air Jamaica Limited "Air Jamaica" obtained a judgment against all three Defendants on the 16th of

December 1999 in the sum of \$1,254,595.05 with interest at the rate of 25 % per annum from the 20th day of April 1997 to the 16th day of December 1999. This judgment remains wholly unsatisfied.

3. That further, the Second Defendant J.F.Stuart "Mr. Stuart" is the registered owner of all that parcel of land part of Stony Hill Heights in the Parish of Saint Andrew being Lot numbered 13A registered at Volume 1068 Folio 418 of the Register Book of Titles. It is in respect of this property and Mr. Stuart's interest that the provisional charging order was made charging the property with payment of the sum of \$4,118,471.18 plus interest at the rate of 6 percent per annum and which it is stated continues to accrue at the daily rate of \$343.25 until the date of payment.
4. The application to make the provisional charging order final is being opposed by Mr. Stuart and he has filed an Affidavit sworn to on the 11th November 2010 in which he states that he resides at 13 Panton Road, Old Stony Hill Road, Kingston 9. He states that he is now 75 years old and is a retired Vice President of Jamaica Telephone Company Limited, now Cable & Wireless Jamaica Limited.
5. Mr. Stuart goes on to state that his name, address and telephone number are listed in the telephone directory and always have been and that he has lived at 13 Panton Road for the last 40 years. Further, that his wife of about 47 years, (who is the 3rd Defendant), owns this property beneficially with him.
6. Mr. Stuart was previously represented by Attorney-at-Law Priya Levers who gave up practice in Jamaica sometime in 2001. He claims that he was not contacted by Air Jamaica until he received a package at his home on November 30 2010, which package he was shocked to receive.
7. Mr. Stuart claims that he would suffer severe hardship if the provisional charging order is not discharged and is made final "as the title which is the subject of the Provisional Charging Order has

encroachments from my matrimonial home on it and is therefore held by me and my wife as one holding. I am no longer working and I rely on pension and would not be able to purchase another home”.

8. Mrs. Champagnie, who has just recently assumed conduct of the matter on behalf of Mr. Stuart, has argued against the charging order being made final on a number of bases. She stated that Air Jamaica took no steps to enforce the judgment until September 8, 2009, some 9 years and 9 months later. At the time when the final judgment was obtained the Civil Procedure Rules, 2002 “the C.P.R.” were not yet in force since they came into force on January 1, 2003. This suit comes under the category of “old proceedings” within the meaning of Part 73 of the CPR. However, Part 73 did not make any express provision as to which Rules would apply to old proceedings in which a final judgment was already entered.
9. Until the Judicature (Civil Procedure Code) Law “the CPC” was repealed, the instant judgment continued to be governed by the CPC, Mrs. Champagnie submits, as it did not fall under Part 73 of the CPR.
10. The CPC was repealed by Act No. 4 of 2003 dated March 26, 2003. However, Mrs. Champagnie referred me to provisions of the CPC, rightly I think, to see what the rights of the parties were when the judgment was entered and for some years after that.
11. I agree with Mrs. Champagnie that although Part 73 did not state that the CPR would apply to old proceedings in which a final judgment had been obtained prior to January 1, 2003, they must of necessity apply, since after the repeal of the CPC there would be no other rules applicable to the current situation.
12. Sections 593 and 594 of the CPC provided as follows:
 593. *As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.*

594. Where six years have elapsed since judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled or liable to execution may apply to the court for leave to issue execution accordingly.

And the Court may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in action may be tried.

And in either case the Court may impose such terms, as to costs or otherwise, as seems just.

13. It is Counsel's submission that under the CPC regime:
 - a. *Air Jamaica as of right could have issued execution at any time within six years of December 16, 1999, i.e. until December 15 2005.*
 - b. *As of December 16, 2005, Air Jamaica would have had to apply to the Court for leave to issue execution.*
 - c. *In considering whether to grant leave to issue execution, the Court would have considered what was the reason for the delay, and whether any reason has been provided to cause it not to apply the general rule that execution will not be allowed to issue after six years has elapsed from the date of judgment.*
14. By virtue of section 621 of the CPC, a judgment creditor who wished to enforce a judgment for the payment of money by sale of real property had to apply for a writ of sale of the land of the judgment debtor.
15. Mrs. Champagne submits that the provisional charging order did not exist under the CPC and it is the first step under the CPR to obtain a charging order against land. It is her further submission that in order to enforce any charging order obtained an application will then have to be made for an order for sale of land. She submitted that under the CPR the judgment creditor can apply for a charging order under Part

48 and does not necessarily have to apply directly for an order for sale of land under Part 55. However the fact of the matter is that, she continues, a charging order under Part 48 will eventually lead to an application for an order for sale under Part 55 as it is only by the sale of the land that the charging order will result in the Judgment Creditor collecting its debt.

16. Under Rule 46.1 of the CPR, an order for the sale of land falls into the category of a writ of execution. It states:

In these Rules a "writ of execution" means any of the following:

.....

(c) an order for the sale of land

17. Rule 46.2 (1) states that

A writ of execution may not be issued without permission where-

(a) Six years have elapsed since the judgment was entered...

18. Rule 46.3 provides that:

(1) An application for permission to issue a writ of execution may be made without notice unless the court otherwise directs but must be supported by evidence on Affidavit

(2) On an application for permission the applicant must satisfy the court that it is entitled to proceed to enforce the judgment or order and in particular-

a. Where the judgment is a money judgment , as to-

i. The amount originally due; and

ii. The amount due and the amount of interest due at the date of the application.

d. Where rule 46.2(a) applies, the reason for the delay.....

19. Mrs. Champagne, among other matters, submitted that as Air Jamaica has provided no reason for the delay they should not be permitted to enforce the judgment, nearly ten years after it was granted.

20. She further submitted that since there was no satisfactory reason for the delay which can take it out of the general rule that a writ of execution will not be permitted to be issued after six years unless there is a satisfactory explanation of the delay, that the court would be acting in vain if it were to issue a final charging order since Air Jamaica is not entitled to obtain an order for sale, and without an order for sale a charging order cannot be enforced.
21. She cited the case of Patel v. Singh [2002] EWCA Civ 1938, where the English Court of Appeal considered rule 46.2(1) of the English Rules which is in the same terms as our Rule 46.2(1).
22. Mrs. Champagnie submitted that in the event that the Court does not see it fit to discharge the charging order and is minded to make it final, she had submissions on the issue of quantum, which she provided, as she submitted that the calculations put forward by Air Jamaica in support of its application are inaccurate.
23. In response, Mr. Graham referred to Mr. Stuart's Affidavit, and indicated that there has been no attempt to set aside the judgment and that whilst the Affidavit speaks about hardship, no real basis is identified. Mr. Stuart has given no evidence of his income, simply states that he is retired. Mr. Graham submitted that hardship is not a factor for the Court's consideration when considering whether to make a provisional charging order final. He submitted that arguments about Mr. Stuart being seventy-five years old, a pensioner, or encumbrances do not arise.
24. Mr. Graham further submitted that a charging order is not the same thing as an order for the sale of land and that a charging order is what it is, whether or not a judgment creditor proceeds to get an order for sale or land or not. One can choose whether or not to proceed to get an order for the sale of land or not. A charging order is to give the Claimant protection so that if an owner of land were ever to try to sell it, or to encumber it, the charging order is notice

to the whole world that the Claimant has this priority which needs to be cleared off or recognised. A charging order is not a Writ of Execution, and if it was, it would have appeared in Rule 46.1.

25. Counsel referred to the amendment to section 28D of the Judicature (Supreme Court) Act which states that the Court may on the application of a person prosecuting a judgment or order for payment of money, make a charging order in accordance with the CPR in relation to the enforcement of judgments. Mr. Graham submitted that the Court has no discretion in the sense described by Mrs. Champagne, but that if it does, it is a discretion circumscribed by Rule 48.4.(4). This Rule deals with for example, priorities, and not the type of hardship put forward by Mr. Stuart. Mr. Graham also points out that the availability of a charging order did not arise until four to five years into the life of the judgment.
26. Mr. Graham was permitted to provide authorities relating to his submissions regarding the time period within which a charging order may be applied for. He cited authorities, including **Lowsley and Another Respondents v. Forbes (Trading as L.E.Design Services) Appellants** [1998] 3 W.L.R. 501, a decision of the House of Lords, and **Yorkshire Bank Finance Ltd. v. Mulhall** [2008] EWCA Civ 1156. Mrs. Champagne was permitted to file a written response to those authorities and she did so.
27. I agree with Mr. Graham that since the definition of “writ of execution” in Rule 46.1 of the CPR does not include charging orders, then the six year period after which permission must be sought to issue a writ of execution spelt out in Rule 46.2, does not apply to charging orders. There is also is no such six year period referred to in Part 48 of the CPR which deals with charging orders. The case of **Lowsley v. Forbes** in my view supports Mr. Graham’s arguments in that that case appears to acknowledge that what may be regarded as a writ of execution has to be defined and indeed,

can, and has changed from time to time- see pages 10-12 of the copy of the judgment handed up by Mr. Graham(pages 339-341of the judgment). For example, it is pointed out that in England a warrant for possession was not included in the relevant English definition of writs of execution for the purposes of their order 46 until 1966. In that case it appears to have been accepted that charging orders were not covered in the definition of a “writ of execution”.

28. I also agree with Mr. Graham that a charging order in relation to land does not necessarily or inexorably lead to an application for an order for sale of land, which order is included in the definition of a writ of execution. A charging order is a separate proceeding and/or alternatively, it has its own utility, as a form of execution not covered under the definition of writ of execution. At page 11, Lord Lloyd of Berbick, who gave the lead judgment, referred to paragraphs of the **Final Report of the Law Reform Committee on Limitation of Actions (1977) (Cmnd. 6923)**, which had during the arguments before the House been referred to by Lord Hoffman. Paragraph 14.14 states:

4.14 The authorities show that section 2(4) has caused difficulties in practice, because it has been apt to bar certain (though not all) forms of execution. We think that the law of limitation of actions ought not to interfere with the rules in relation to execution, which currently provide for a period for issue of a writ of execution of six years, which may be extended with the leave of the court. We think that provisions of this kind are the appropriate method of dealing with execution and that they could, if necessary, be extended to cover those methods of execution which, because they are not covered by the current rules, are subject to the 12-year period.

29. In my judgment there was therefore no need for Air Jamaica to have sought the Court’s leave in order to issue the provisional charging order, or indeed, in order to apply to make the provisional

charging order final, on the basis that more than six years have elapsed since the judgment was entered.

30. I think therefore that the really crucial issue is whether the Court would be acting in vain if it were to issue a final charging order when a writ of execution will not be permitted to be issued after six years without the Court's leave in the absence of a satisfactory explanation for the delay, there being none proffered here.
31. I agree with Mr. Graham that a charging order does not necessarily lead to the issue of an order for the sale of land, and a charging order has a utility of its own. It has the effect of being 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. In my judgment, it follows from this that the Court ought not to refuse to make a charging order final on the basis that over six years have passed since the judgment was entered. If at the end of the day, the Judgment Creditor then decides that it wants to apply for an order for the sale of land, then that is the stage at which the Court will have to consider whether there is or is not a proper basis for granting permission for a writ of execution in the form of an order for the sale of land to be issued out of time.
32. In my judgment it is appropriate in this case for the provisional charging order to be made final. Mrs. Champagnie had gone on to submit that in that event, she would wish to be heard on the issue of the calculation of the judgment.
33. In support of the application for the provisional charging order Air Jamaica filed two Affidavits, the Affidavit of J. Khara East, sworn to on the 8th of September 2009, and the Affidavit of Nerine Small, sworn to on the 25th of September 2009. The provisional charging order was on the 20th of January 2010 made in respect of the sum of four million, one hundred and eighteen thousand four hundred and

seventy one dollars and eighteen cents. This sum was made up as follows according to the Affidavits:

- a. A principal sum of two million, eighty eight thousand, One hundred and Twenty six dollars and ninety seven cents (\$2,088,126.97);
 - b. Interest on the principal sum at the rate of 12% per annum (pursuant to The Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 1999 to the 12th June 2006, One Million, Six Hundred and Twenty Four Thousand, Nine Hundred and Sixty One Dollars and Eighty Eight Cents (\$1,624,961.88);
 - c. Interest on the principal sum at the rate of 6% per annum (pursuant to the Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006) from the 13th June 2006 to the 7th September 2009 amounting to Four Hundred and Five Thousand, Three Hundred and Eighty Two Dollars and Thirty three cents (\$405,382.33).
 - d. Interest it was indicated continues to accrue on the principal sum at the daily rate of Three Hundred and Forty Three Dollars and Twenty Five cents (\$343.25) until the date of payment.
34. In her written submission, Mrs. Champagne states:

.....the Provisional Charging Order erroneously refers to the Judgment being in the sum of \$1,254,595.05 and not \$1,141,385.16.

As at September 8, 2009 the amount due under the judgment would have been \$3,009,407 arrived at as follows:

| | |
|---|-------------------------------|
| <i>Judgment amount</i> | <i>\$1,141,385.16</i> |
| <i>Interest on \$1,141,385.16 @25%</i> | <i>\$ 757,470.55</i> |
| <i>From April 1997 to December 16, 1999</i> | |
| <i>=</i> | <i>\$285,346.29 per year</i> |
| | <i>\$ 23,778.85 per month</i> |

\$ 781.77 per day.

For

2 years \$570,692.58

7 months \$166,451.95

26 days \$ 20,326.02

\$757,470.55

Interest on \$1,141,385.16 @ 12% from \$888,997.99

December 17,1999 to June 12, 2006

= \$136,966.21 per year

\$ 11,413.85 per month

\$ 375.24 per day

For

6 years \$821,797.26

5 months \$ 57,069.25

27 days \$ 10,131.48

\$888,997.99

Interest on \$1,141,385.16 @ 6% from \$221,553.64

June 13, 2006 to September 7, 2009

Amount due as at September 7, 2009 \$3,009,407.34

Interest continues to accrue @ \$187.62 per day

From September 8, 2009 onwards

35. Whilst Mrs. Champagne is correct that the Provisional Charging Order states the judgment sum to be \$1,254,595.05, and not the correct sum of \$1,141,385.16, I think that there is a fundamental difference in principle between Air Jamaica's calculations and Mr. Stuart's calculations. Whereas Air Jamaica appear to have included the interest rate of 25% awarded in the judgment on the sum of \$1,141,385.16 from April 20 1997 to December 16 1999, Mrs.

Champagne has made all of her judgment debt interest calculations solely on the sum of \$1,141,385.16. I think that Air Jamaica is correct, as it has always been my understanding that the Judgment Debt includes the interest awarded up to the date of judgment, so that the principal sum and the interest are to be taken together and become one sum which constitutes the judgment debt. In the **English Civil Procedure, 2007 White Book, Volume 1**, in discussing Rule 40.8 of the English Civil Procedure Rules as to the time from which interest begins to run, it is stated at paragraph 40.8.1 *Effect of Rule:*

40.8.1 Rule 40.8 is concerned with the payment of interest on judgment debts. When the court gives a claimant judgment for a money sum, generally, that award will include interest from the date when the cause of action arose until the date of the court's judgment. The cause of action including the claim for interest merges with the judgment, and interest on the principal sum ceases to run. The Claimant is left with his judgment debt. As he will remain out-of-pocket until the judgment debt is satisfied, not unreasonably the law provides, by a combination of provisions in primary legislation and rules of court, that interest should run on the judgment debt. Rule 40.8 is concerned with the determination of the date from which interest on judgment debts should run in proceedings to which the CPR apply.

This paragraph certainly appears to support my view and I think that is the legal position here in Jamaica .

36. I am going to ask the parties to simply try to agree on the correct sum or alternatively let me have their written or oral submissions so that I can identify the correct sum in respect of which to make the final charging order.