[2018] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 102/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**BARDI LIMITED**	**APPELLANT**
AND	**McDONALD MILLINGEN**	**RESPONDENT**

Written submissions filed by Hylton Powell for the appellant

Written submissions filed by Chen, Green & Company for the respondent

20 December 2018

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

PHILLIPS JA

[1] In this matter, Bardi Limited (Bardi) appealed against the decision of Simmons J who on 20 October 2017, refused the application to discharge the *ex parte* provisional charging order and injunction granted on 18 December 2012, by Daye J to the respondent, a firm of attorneys-at-law, McDonald Millingen (MM). The facts were that MM had filed a claim against Mrs Margie Geddes (MG) for fees for work done between

1999 and 2008 on a quantum meruit basis. On 19 April 2011, MM filed a bill of costs, and as no points of dispute were filed, a default costs certificate was issued against MG in the sum of US$1,048,807.19. The provisional charging order had been obtained *ex parte* and attached to the two and only issued ordinary shares in Bardi, both of which were said to be owned by MG, and 84,000,000 ordinary shares in Desnoes & Geddes Limited (D&G) issued and registered in the name of Bardi. MG was restrained from selling or charging the shares held by her in Bardi, and the 84,000,000 shares held by Bardi in D&G, until the hearing of an application for a final charging order.

[2] Further background facts to this appeal are set out in the reasons for judgment of my learned sister P Williams JA which I gratefully adopt and will not repeat here. I also accept, as set out in her reasons for judgment, her summation of the written submissions made respectively on behalf of Bardi and MM. However, regretfully, I cannot agree with her reasons and therefore set out my contrary view in a few words of my own.

[3] In its appeal before us, Bardi contended that the order made by Daye J should be set aside because Simmons J: (i) erred when she found that she had no power to set aside the orders; (ii) erred when she found that there was no basis to pierce the corporate veil, especially since the continuation of the order has caused substantial prejudice to Bardi; (iii) failed to consider that MM gave no undertaking as to damages; and (iv) she considered irrelevant facts such as the pending appeal in arriving at her decision.

[4] In refusing to discharge the provisional charging order granted by Daye J, Simmons J did not say that she did not have the power to do so. Indeed, she had indicated

that the issue as to whether she had jurisdiction to deal with the application had not really been challenged by the parties. Nonetheless, in the exercise of her discretion, she declined to discharge the provisional charging order on two main bases. Firstly, that in her opinion, an application of that nature ought to be made when the application for the final charging order was being placed before the court. Secondly, that at the hearing before her, an application dealing with an *ex parte* order of another judge of the Supreme Court should only be reviewed in certain conditions, namely, where there was a material change of circumstances; where the judge had been misled; or where there was fraud. She indicated that she was guided to that view by the judgment of Dingemans J in **Richard Parr v Tiuta International Limited** [2016] EWHC 2 (QB).

[5] Although Simmons J accepted that there was no information before Daye J that the D&G shares were jointly held by MG and Bardi, she nonetheless found that in the application before her, there was no new material change in circumstances since the grant of the order, and there was no evidence that Daye J was misled. Indeed, she indicated that it had been expressly stated that the D&G shares had been issued to and registered in Bardi's name. She also stated that there was no evidence that Bardi had owed a debt to MM. The work done by MM had been done on MG's behalf. She stated that the provisional charging order had been made in the absence of MG, but not Bardi, as Bardi had only become a party to the action on 23 September 2016, and the provisional charging order had been granted in 2012. She also noted that the application to vary the order had been made before Morrison J in 2016, but the application before her to vary and discharge the order had been made over four years after Daye J made that order.

[6] She referred to Bardi's challenge to the affidavit of MM in support of the application for the provisional charging order, and that it had not complied with rule 48.3(2)(f)(iii) and (iv) of the Civil Procedure Rules 2002 (CPR). She stated that this deficiency had not been referred to in counsel's submissions, and in any event, called on her to override the discretion exercised earlier by a judge of co-ordinate jurisdiction, which she could not do.

[7] With regard to the discharge of the injunction, the learned judge relied on her earlier findings and reiterated that there was no material non-disclosure. She indicated that the only divergence in facts appeared to be that MG may not at the material time, have owned both shares in Bardi. This was so, she stated, as the second share in Bardi may still have been in the name of the estate of Mr Paul Geddes, in respect of which, although a grant of probate had been issued, and MG was the sole beneficiary under the will, the fact that the share may not have been actually transferred to MG, did not amount to a material misstatement.

[8] With regard to the undertaking as to damages on the grant of an injunction, the learned judge found, that as no undertaking as to damages had been ordered by Daye J when the injunction was granted, that was an exercise of his discretion, and she was of the view that as a judge of co-ordinate jurisdiction, she could not entertain any such challenge.

[9] With regard to the issue of whether Bardi was a separate legal personality from MG, Daye J had concluded that the provisional charging order could be granted in respect of the shares owned by MG and those owned by Bardi, and it was not a matter for her

"whether the exercise of the learned judge's discretion was proper or improper... [it] was a matter for the Court of Appeal".

[10] Simmons J was mindful of the fact that in the application to vary that was before Morrison J previously, and the subsequent appeal in relation thereto, Bardi was not a party to that application or the appeal. She was also mindful of all the submissions before her and other judges on the issue of separate ownership of the shares, and Bardi not being connected to the debt. She nonetheless underpinned her decision to decline to order the discharge of the provisional charging order on the basis that if she did so, "the matter before the Court of Appeal would only be one of academic interest as [Bardi] would have obtained the desired result".

[11] The issue in this procedural appeal which cries out for comment from me, is the approach the learned judge took with regard to what was her role on an application before her for the discharge of a provisional charging order. It is in this regard that it appeared to me that she erred.

[12] It seems that the difference between the approach of P Williams JA and the approach I have taken lies in our respective understandings of the status and treatment of *ex parte*/provisional charging orders, and the significance of the provisions of Part 48 of the CPR. My understanding of the status of the *ex parte* orders against the framework of the provisions of Part 48 of the CPR is set out below:

1. Bardi is clearly an 'interested person' for the purpose of these proceedings, namely, a person other than a

judgment creditor and a judgment debtor, and is a person whose stock was to be charged (rule 48.6(2)(b)).

2. The regime or the application for a grant of a provisional order is one that is "without notice" (rule 48.5(1)).

3. The application for the provisional charging order, although it does not have to be served, must be supported by evidence on affidavit, and if the charging order is relating to stock, may include a request for sale of the same (rule 48.2).

4. The order once obtained must be served (rule 48.7).

5. Details are provided with regard to what must be included in the affidavit, which must include information relating to any person other than the judgment debtor who is believed to have an interest in the shares whether as a joint owner, a trustee, or a beneficiary, and if so, the names of those persons, their addresses and the details of their interest should be provided (rule 48.3).

6. Part 48 recognises that objections can be filed to a provisional charging order by a judgment creditor, debtor, or any interested person (rule 48.8(2)).

7. There is no provision that the discharge of the provisional charging order must only be made at the time of the application for the final charging order.

8. There is provision for "the hearing" (rule 48.8(3)).

9. Any objections to the provisional charging order may be made by *inter alia* any interested person by filing its objection at least 14 days before the hearing (rule 48.8(3).

10. If the court is satisfied at the hearing that the provisional charging order has been served, the court has the power to:

    (i) make a final charging order (rule 48.8(4)(a);

    (ii) discharge the provisional charging order (rule 48.8(4)(b)); and

    (iii) give directions for the resolution of any objections that cannot be fairly resolved summarily (rule 48.8(4)(c)).

11. If the court makes an order under rule 48.8(4)(c), any injunction previously made under rule 48.5 may be

continued until seven days after the application is finally determined.

12. Charging orders once made (whether provisional or final) must be served (rule 48.8(6)) and the effect of the provisional and final charging order is set out in detail (rule 48.9).

13. No disposition of goods charged can be made; and any such disposition would not be valid against the judgment creditor (rule 48.9).

14. Final charging orders can be discharged (rule 48.10). Provisional charging orders can also be discharged, as previously indicated, (rule 48.8(4)(b)).

[13] It is clear, in my view, that Part 48 of the CPR envisages a two step approach, namely, (i) that the application for the provisional charging order must first be obtained, which when obtained must state the date, time, and place when the court will consider making a final charging order; and (ii) then subsequently, there is the making of the final charging order. Rule 48.8 of the CPR permits the discharge of the provisional charging order at the application for the making of the final charging order, once the objections to the same have been filed not less than 14 days before the hearing of the application. In my view, as there are no restrictions in the rule, an interested person can make an application to discharge the provisional charging order, otherwise than at the hearing for

the making of the final charging order, particularly as the provisional charging order is obtained on an application made without notice.

[14] I have set out all of this to say that a 'provisional' charging order means as the word 'provisional' indicates "arranged or existing for the present, possibly to be changed later" (Concise Oxford Dictionary, 11th Edition, Revised). So it is, as the word suggests, preliminary only.

[15] The provisional charging order was obtained as stated without notice or *ex parte*. The rule dictates this (rule 48.2 of the CPR). Halsbury's Laws of England, 5th Edition, Volume 77, 2016, paragraph 331 states:

> "A charge imposed by a charging order has the like effect as an equitable charge. [See the [United Kingdom] Charging Orders Act 1979 s 3(4); and para 220; and Civil Procedure Vol 12A (2015) para 1475]. The court by which a charging order is made may at any time, on the application of the debtor or any person interested in any property to which the order relates, make an order discharging or varying the charging order. [See the Charging Orders Act 1979 s3(5); and Civil Procedure Vol 12A (2015) para 1479]."

[16] In Jamaica, section 28(D) of the Judicature (Supreme Court) Act, which is an amendment passed in 2003 dealing with charging orders, states:

> "The Court may, on application of the person prosecuting a judgment or order for the payment of money, make a charging order in accordance with the Civil Procedure Rules, 2002 in relation to the enforcement of judgments."

[17] So, the power to obtain the order is set out in the above legislation, and the procedure to do so and also to discharge the same is set out in the CPR as the legislation states and as I have indicated. So the next question is what is the role of the judge in the implementation of this regime?

[18] In the Privy Council decision on appeal from this court in **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd and Another** [1991] 4 All ER 65, Clarke J had granted an *ex parte* order to stay the implementation of the allocation of motor cars made by the Minister in relation to the year 1988-1989. Subsequently, Clarke J, not being available, the application to set aside that order made *ex parte* granting the stay was heard in chambers by Ellis J. After hearing the parties he set aside that part of Clarke J's order which granted the stay but gave leave to appeal. The Court of Appeal dealt with other matters but allowed the appeal and restored the stay on the principle that Ellis J had no jurisdiction in the circumstances to discharge an *ex parte* order made by another judge. Leave to appeal to Her Majesty in Council was granted on the bases of four certified questions, the relevant one of which for these purposes was "3. [w]hether or in what circumstances a High Court judge can review and set aside the *ex parte* order of another High Court Judge made on an application for leave to issue a prerogative order".

[19] Lord Oliver of Aylmerton, who delivered the speech of the Board, indicated that the Law Lords held an entirely contrary view to that taken by the Court of Appeal, and that all three members of the court, although unanimous in their conclusion on the point, took different routes to get there. The judges of the Court of Appeal were all of the

opinion that an *ex parte* interim order by a judge was reviewable and may be varied or discharged by a judge who made the order, or in an appropriate case by another judge. However, Rowe P found that with regard to leave for prerogative orders, the method of revoking or varying an *ex parte* order was by way of appeal to the Court of Appeal, unless the order itself gave liberty to apply to vary or discharge it. Carey JA, with whom Forte JA, agreed indicated that the inherent jurisdiction that a Supreme Court judge had to set aside or vary an order made *ex parte* or even to revoke the same applied only where new matters were brought to his attention either with respect to the facts or to the law. In his view, Ellis J had no material which enabled him to exercise that jurisdiction.

[20] The Law Lords held that an *ex parte* order is in its nature provisional only and Carey J was right in following and adopting what was said to this effect by Sir John Donaldson MR in **WEA Records Ltd v Visions Channel 4 Ltd and Others** [1983] 2 All ER 589. The Law Lords noted that neither the Civil Procedure Code (the Code) nor the Rules (which existed at that time) contained any express provisions relating to the discharge of *ex parte* orders. They referred to the English Rules of Supreme Court, Order 32, rule 6 which stated that "[t]he Court may set aside an order made *ex parte*" (which rule at that time was embraced in the Code, pursuant to section 686).

[21] Rule 11.16(1) of the CPR now reads:

> "(1) A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again."

The application by the respondent must be made within a specific time frame. Additionally, of note, the document containing the order made on the application in respect of which notice was not given must state that the respondent has the right to make an application to set aside or vary that order. A respondent includes a person against whom the order is sought (rules 2.4 and 11.2) which in the instant case, would include Bardi. It is also to be noted that rule 11.18(1) of the CPR states that "a party who was not present when an order was made may apply to set aside that order". This application must also be made within a specific time frame and must be supported by evidence giving a good reason for the absence from the hearing and that it is likely that a different order may have been made had the applicant been in attendance.

[22] These two rules are different in their application to the extent that rule 11.16 of the CPR speaks to circumstances where one is not served, and in certain circumstances, any action taken could be set aside *ex debito justitiae* (for example rule 13.2 in respect of default judgments). That would not however be applicable in a "without notice" regime such as the application for a provisional charging order. So the principles relating to the giving of notice with regard to other urgent applications emanating out of the Privy Council case of **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16 would therefore be inapplicable. Equally, one would not have to revert to or rely on rule 11.18 of the CPR which embraces certain circumstances in which one may have been served, but was absent, and therefore had to explain that absence, and the fact that a different order may have been made if the party had been present.

[23] Lord Oliver of Aylmerton in **Vehicles and Supplies** indicated that their Lordships entertained "no doubt that Ellis J was acting within his jurisdiction in making the order which he made on the appellant's application, and they have difficulty in understanding Carey JA's [view] that the judge had before him no new material justifying his exercise of the jurisdiction". They declared that Ellis J was entitled in his discretion to vary or revoke Clarke J's order. Lord Oliver set out the new material which was before Ellis J but did not state that the order obtained *ex parte* could only be revoked varied or set aside if new material was placed before the judge who heard the application. Indeed, the Board said that there was every ground for challenging Clarke J's order as a matter of law as it had been based upon a fundamental misunderstanding of the nature of the stay of proceedings.

[24] In **WEA Records Ltd**, the facts were (as taken from the headnote) that the plaintiffs who were members of a trade association, and owners of copyright in tape recordings and video cassettes, suspected the defendants of infringing their copyright by making and selling copies of their films and video tapes. They therefore made an *ex parte* application to a High Court judge for an Anton Pillar order requiring the defendants to *inter alia* disclose the identity of suppliers of or customers for the infringing tapes and for the plaintiffs' solicitors to enter the defendants' premises to search for the infringing tapes and materials used to make them. Information was given to the court which was so sensitive and confidential that they did not think could have been communicated to the defendants even at a later stage. The defendants applied to the court to set aside the *ex parte* order. The issue arose as to whether the application should have been adjourned

and sent to the Court of Appeal for its determination. Sir John Donaldson MR made his seminal statement at page 593:

> "In terms of jurisdiction, there can be no doubt that this court can hear an appeal from an order made by the High Court on an ex parte application. This jurisdiction is conferred by s 16(1) of the Supreme Court Act 1981. Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte and is reflected in RSC Ord 32, r 6. Whilst on the subject of jurisdiction, it should also be said that there is no power enabling a judge of the High Court to adjourn a dispute to the Court of Appeal which, in effect, is what Peter Gibson J seems to have done. The Court of Appeal hears appeals from orders and judgments. Apart from the jurisdiction (under RSC Ord 59, r 14(3)) to entertain a renewed ex parte application, it does not hear original applications save to the extent that they are ancillary to an appeal.
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> As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.
>
> This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision."

[25] The Master of the Rolls therefore acknowledged and reiterated that an order made on an *ex parte* application can be reviewed by another judge and varied and or discharged. He said that jurisdiction is inherent in the provisional nature of any order made *ex parte*.

[26] In the instant case therefore, in my view, in spite of the fact that the information before Daye J was in the main accurate, that did not prevent Simmons J from reviewing the same on argument from the attorneys-at-law representing Bardi, and revoking the order if satisfied to do so. In this case, the default costs certificate relating to the costs against the judgment debtor MG, formed the basis of the charging order against her shares in Bardi. But that certificate also formed the basis of the charge on the assets of Bardi, a limited liability company. Prima facie, that appeared to be wrong in law, as it appeared to be on the basis of a complete misunderstanding of the law relating to the ownership of assets of incorporated bodies. The shareholder does not own the assets of a company. If the shareholder is the beneficial owner of all the shares in a company, the shareholder is still not beneficially entitled per se to the assets of the company. Daye J gave no reasons for this aspect of the provisional charging order. In my opinion the order can be reviewed.

[27] Simmons J, having found that the information before Daye J could not have misled him, or that any material non disclosure had taken place, did not appear to think that she ought to consider any argument from Bardi on the ownership point, and so appeared therefore not to do so. Additionally, she used the same approach to say that she did not think that it was necessary to make any finding as to whether MG and Bardi were one

and the same, namely that MG was merely the alter ego of the company, and or for her to assess whether, in the circumstances of this case, there ought to have been a piercing of the company's veil in order to ascertain if that were the case. The learned judge also did not appear to have considered the effect, if any, of the failure of MM to provide in the affidavit evidence in support of the application for the provisional order that Bardi was an entity not before the court, which may have had an interest in the D&G shares, which were registered in its name, and which were the subject of the provisional charging order. I am also not sure of the extent of the information placed before Daye J in order to obtain the provisional charging order.

[28] In any event, there was new material it seems to me (as was the case in **Vehicles and Supplies**), before Simmons J that was not before Daye J. By then Heineken Sweden AB had made an offer to purchase the D&G shares owned by Bardi, and the charging order had affected the disposition of those shares owned by Bardi in D&G, so there was prejudice to Bardi which continued. However, even if that information had been disclosed in the application before Morrison J, it was not before Daye J, and would therefore have been "new material" before Simmons J, particularly from the standpoint of prejudice to Bardi, which in my view, deserved consideration anew.

[29] As a consequence, there does not seem to have been a proper review by another judge of a previous order made on an *ex parte* application.

[30] I am fortified in this analysis as in the Halsbury's Laws of England, Volume 11, 2015, paragraph 32 on the topic "Decisions of co-ordinate courts", the learned authors had this to say:

> "There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong. Where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if reached after full consideration of earlier decisions."

In Jamaica, section 6(1) of Judicature (Supreme Court) Act provides that "Judges of the Supreme Court shall have in all respects, save as in this Act otherwise provided, equal power, authority and jurisdiction". Rule 26.1(7) of the CPR provides that the "power of the court under these Rules to make an order includes a power to vary or revoke that order".

[31] A judge of first instance will therefore usually follow the decision of another judge of first instance, judicial comity demands that. But the *ex parte* jurisdiction is in my view completely different, and demands a different approach. The decision must be reviewed against the background of a different argument, maybe different parties' interests, with different perspectives, perhaps facing different urgencies, losses and expectations. Additionally, in any event, the order made *ex parte* is provisional in nature, and therefore

subject to change, having been made on the basis of submissions from one side only. This does not in any way take away, but actually underscores the requirement for full and frank disclosure, and for candour to the court, and no party must mislead the court either intentionally, or negligently in a without notice hearing. But it does not only require a material change in circumstances, a misleading of the court or fraud for the court to review vary or discharge an order made *ex parte*.

[32] I do not think that Dingemans J had that interpretation in **Parr**, when he stated, referring to the obvious potential difficulties judges experienced when setting aside or varying orders made by judges of co-ordinate jurisdiction, that the 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" (emphasis added). It was clear that his use of the word "include" in this context, meant that this was not an exhaustive list, and was not a pre-requirement for the exercise of the discretion of the judge in the making or reviewing of provisional or final charging orders. It was not, in any event, a statement made exclusively in relation to an *ex parte* jurisdiction. At any rate, the rules provide, as indicated, that any order made by the court can be varied or revoked by the court.

[33] I am not of the view, therefore, that the issue whether any substantial prejudice had been caused by the order of Daye J had been fully considered by Simmons J.

[34] I am also not of the view, as appeared to have been argued by counsel for MM below, that there was any application before Simmons J for the postponement of the

application for the final charging order. I do not agree that in any event that could only be done if this court or the court below had ordered a stay of execution of the judgment. As indicated, the provisional charging order is a result of a without notice regime, and the judge making the order is not inhibited from revoking or discharging the order (see **DYC Fishing Limited v Perla Del Caribe Inc** [2012] JMCA App 18).

[35] I have some sympathy for the learned judge's treatment of the other applications which had taken place since Daye J's order. At the time of her deliberations, the appeal from the order of Morrison J was pending, and dealt with much of the same subject matter, save and except, that Bardi was not a party to that application, and was not before the Court of Appeal. The statement by Simmons J that an order to discharge the provisional charging order would make the matter before the Court of Appeal of academic interest only, was therefore of some significance.

[36] Indeed, the decision of this court in that appeal, cited at [2018] JMCA Civ 11, has influenced my approach to the determination of this appeal.

[37] In that appeal, MG had taken the position that the shares owned by Bardi were under her control. Although there was mention of the difference in ownership of her shares in Bardi and the D&G shares owned by Bardi, there was no difference in the approach by MG to the relief prayed for in that application/appeal. As a consequence, the order made by this court was firstly, that Morrison J ought to have assumed jurisdiction to deal with the application to vary or discharge the provisional charging order, which he had declined to do; and secondly, the order was varied, so that at the end of the day,

MG's two shares in Bardi remained subject to the provisional charging order. In lieu of the provisional order charging 84,000,000 D&G shares owned by and registered in the name of Bardi, the order was adjusted so that the shares charged were reduced to an amount of 7,500,000 shares (and dividends arising therefrom) which represented an equivalent value to the amount claimed on the default costs certificate (the judgment debt). MG was restrained from selling or charging her shares in Bardi and from causing the disposition of the 7,500,000 shares held by Bardi in D&G until the hearing of the application for the final charging order.

[38] As a consequence, although the matter before Simmons J related to an application by Bardi to discharge the *ex parte* provisional charging order in relation to the 84,000,000 D&G shares and dividends arising therefrom, registered in its name, that order has now already been varied by this court on 23 March 2018.

[39] In the light of all that I have said, I am therefore minded to allow the appeal as in my view, Simmons J erred, as there remain issues which still have not yet been determined definitively by a judge of the Supreme Court, and which ought to have been decided in the hearing of the application to discharge the *ex parte* provisional charging order which was before her. Those issues relate to *inter alia*, the ownership of the assets registered in the name of Bardi; whether MG and Bardi should be considered separate legal entities; or whether MG was acting in all material times as the alter ego of Bardi; and whether in the circumstances of this case, one ought to have pierced the corporate veil. The restraint against the disposition of 7,500,000 D&G shares, in the registered name of Bardi, remains in place, and should now be resolved in the hearing of an

application to discharge the provisional charging order pursuant to rule 48.8(4) of the CPR, and based on the fact that the order was provisional in character, made *ex parte*, and can therefore be reviewed. The issue of whether the provisional charging order should be discharged has not been determined as the application, in my view, has not really been heard. The application to discharge the same can be relisted and heard by a different judge, and MG should be served with the reissued application.

[40] Once Bardi files such an application, in my view, it would be permissible, on an application if filed by MG, for a judge of the Supreme Court to declare, pursuant **Paul Chen-Young and Others v Eagle Merchant Bank Jamaica Limited and Others** [2018] JMCA App 7, a decision of this court, that the hearing to set aside the default costs certificate is null and void, as the judge of the Supreme Court who heard the application and failed to deliver a judgment, having now reached the retirement age and vacated his office, cannot now deliver the judgment. The matter must therefore begin anew. It would therefore perhaps be prudent for the application to set aside the default costs certificate on behalf of MG, and the application for the final charging order on behalf of MM to be reissued, and that all the applications be placed before the court, so that the court could finally dispose of all the issues in controversy between the parties.

[41] I would therefore, as indicated, allow the appeal, and direct that the application to discharge the provisional charging order made by Daye J be remitted to the Supreme Court for the issues in controversy between the parties to be resolved. MG should be served with that reissued application. A case management conference should therefore

be scheduled forthwith for all the applications dealing with the issues in controversy between the parties to be dealt with.

[42] I agree with the position taken by my learned sister P Williams JA with regard to the issue of costs and would also reserve the question of costs, and order that written submissions be made by the parties within 21 days of the order of this court.

F WILLIAMS JA

[43] I have had the benefit of reading in draft the well-reasoned judgments of both my learned sisters, Phillips and P Williams JJA. They each make out a persuasive case for their respective conclusions.

[44] Having read the draft judgments, I find myself to be somewhere between the two conclusions; or, perhaps more on the side of the final result arrived at by Phillips JA.

[45] To my mind, in the normal course of things, a party taking out enforcement proceedings pursuant to rule 48 of the Civil Procedure Rules 2002 would be expected to follow the procedure outlined in that rule, that is, on the obtaining and serving of the order for the provisional charging order, any objections or challenges to making the provisional charging order final, would be dealt with at the hearing for making the said provisional charging order final. That would, in my view, be the general rule or the course to be followed in the normal course of things. In this regard, I concur with the views expressed by P Williams JA.

[46] It is my further view, however, that if after the making of a provisional charging order, an apparent error leading to the making of that order is discovered, or some new information comes to light, an interested party or adversely-affected litigant ought not to have to await the hearing of the application to make the provisional charging order final (whenever that might be). Rather, that party ought to be able, immediately on the discovery of an apparent error or of some other fact that has led to that party being aggrieved, to file an application seeking the speedy discharge of the provisional order. I concur with the view of Phillips JA that the affected litigant is in fact permitted to challenge such an order and not await the final hearing, primarily on the basis that the provisional charging order is an order made *ex parte*, and is provisional only, and so subject to review, either (preferably) by the judge who made the original order, or, in his or her absence or unavailability, by another judge of co-ordinate jurisdiction.

[47] I too take the view that on a proper reading of the dictum of Dingemans J in **Richard Parr v Tiuta International Limited** [2016] EWHC 2 (QB), the categories of circumstances in which a judge may review an order of another judge of co-ordinate jurisdiction, are not closed. This, to my mind, is indicated in the said dictum as follows:

> "[T]he 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."

[48] The charging of the shares held by Bardi Limited, a limited liability company, in Desnoes & Geddes Limited (D&G), when the debt is not owed by Bardi Limited; and which

led to the issuing of the default costs certificate is, on the face of it, questionable, having regard to the principles of company law. That fact, coupled with the fact of the offer by Heineken Sweden AB to purchase, at a premium, shares in D&G owned by Bardi Limited, the sale of such shares was being prevented by the charging order, formed a sufficient basis for the charging order affecting those shares to have been reversed.

[49] I am therefore in agreement with the proposed orders and route to a full resolution of all the issues existing among the parties, put forward by Phillips JA in paragraphs [39] to [41] of this judgment.

[50] In relation to the issue of costs, I am *ad idem* with both my learned sisters.

P WILLIAMS JA (DISSENTING IN PART)

[51] This procedural appeal is brought by Bardi Limited ("Bardi") against the decision of Simmons J, who refused its application to set aside an *ex parte* provisional charging order and injunction. The order had been granted in respect of 84,000,000 ordinary shares (and dividends arising therefrom) in Desnoes & Geddes Limited ("D&G") issued to and registered in the name of Bardi.

Background

[52] The respondent, McDonald Millingen, is a firm of attorneys-at-law who in 2011 filed a claim against Mrs Margie Geddes, a former client, for work done, for which it had never been paid. On 19 April 2011, the respondent filed a bill of costs. A default costs

certificate was subsequently issued against Mrs Geddes when she failed to file and serve points of dispute. The certificate was issued for US$1,048,807.19.

[53] The respondent subsequently sought to enforce this judgment debt by applying for a charging order. On 18 December 2012, Daye J granted an *ex parte* provisional charging order and an injunction in the following terms:

> "1 A Charging Order is hereby 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.
>
> 2. The defendant, Margie Geddes is hereby restrained 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.
>
> 3. The Application for a Final Charging Order is set for hearing by a Judge in Chambers on the *24th* day of April 2013 at 2:00 pm for 1 hour."

[54] On 5 April 2013, the respondent filed a notice of application for a final charging order. On 11 April 2013, Mrs Geddes filed an application seeking several orders including orders striking out the claim and setting aside the default cost certificate.

[55] On 23 October 2013, these applications came on for hearing before King J. The application for the setting aside of the default cost certificate was heard first. On 21 March 2014, the learned judge reserved judgment.

[56] On 12 July 2016, Bardi filed an application to be added as a party and an application to discharge the *ex parte* charging order and injunction. On 23 September 2016, Bardi was successful in its application to be added as an interested party. The application to set aside the orders made by Daye J on 18 December 2012 was heard by Simmons J who gave her decision on 10 October 2017. Her decision is now the subject of the appeal. The learned judge, in her written judgment delivered on that date, refused the application to discharge the charging order and set aside the injunction and granted leave to appeal.

The appeal

[57] These are the grounds on which Bardi has brought its appeal:

> "(a) The Learned Judge erred when she found that she had no power to set aside the Orders.
>
> (b) The Learned Judge erred when she failed to set aside the Orders in circumstances where their continuation causes substantial prejudice to [Bardi] and in light of her correct finding that there is no basis to pierce the corporate veil.
>
> (c) The Learned Judge took into account irrelevant facts in coming to her decision in that she took into consideration that the Defendant in the court below has a pending appeal to vary the Orders."

[58] The following finds of fact and law are challenged:

"(a) There is no new information that has come to light since the granting of the Orders which could allow the court to set aside the Orders.

(b) There was no material non-disclosure and Mr Justice Daye exercised his discretion to grant the Orders with all relevant material before him.

(c) Being a judge of a concurrent jurisdiction and there being no new information or material non-disclosure the court had no power to set aside or vary the Orders.

(d) Although [Bardi] is a separate legal personality from its shareholder which is the defendant/judgment debtor in the claim in the court below and there was no basis to pierce the corporate veil, the court had no power to set aside the order charging shares owned by [Bardi] to secure its shareholder's debt."

Orders being sought on appeal

[59] Bardi now seeks the following orders from the court:-

"(a) The order made on October 20, 2017 is set aside.

(b) The ex *parte* provisional charging order and the injunction granted on December 18, 2012 are discharged.

(c) The Respondent pay the costs of this appeal and in the court below on an indemnity basis."

The submissions

For Bardi

[60] Counsel for Bardi, in their written submissions, commenced by considering the question of whether the court has power to set aside the orders. It was submitted that the court had such a power on various bases. Counsel referred to rules 48.6(2), 48.8(2), (3) and (4) of the Civil Procedure Rules 2002 (CPR) and concluded, that since Bardi owns

the D&G shares which are the subject of the charging order, it is plainly an 'interested person' for the purposes of Part 48 of the CPR, and therefore can apply to the court to discharge it.

[61] Counsel submitted that a further basis to set aside the order is that rule 11.16 of the CPR provides that a respondent, to whom notice of application was not given, may apply to the court to set aside and vary any order made on the application. Thus, counsel contended that since these orders were made on an *ex parte* application, the court may set them aside at an *inter partes* hearing.

[62] Further, counsel noted that rule 26.1(7) of the CPR provides that a power of the court under the CPR to make an order includes a power to vary or revoke that order.

[63] Counsel noted that Bardi had objected to the orders on several bases, including that it is the sole owner of the shares and it owes no debt to the respondent. Counsel referred to **First Global Bank Limited v Rohan Rose** [2016] JMCC Comm 19 where it was found that a provisional charging order granted in respect of property owned by the defendant and his wife had to be varied to exclude property solely owned by the wife.

[64] Counsel submitted that the learned judge had erred in her approach as to the basis on which she could vary or discharge the charging order. It was contended that since the CPR does not indicate the basis on which a provisional charging order could be set aside on the application of an interested party, the judge has a wide discretion in the circumstances.

[65] It was submitted that there need not be any material non-disclosure or change in circumstances for a judge to set aside the provisional charging order. It was further submitted that it is sufficient for the judge to consider whether it was wrongly granted in the first place.

[66] Counsel pointed to the fact that the learned judge had rejected the argument that Bardi was the alter ego of Mrs Geddes, and accepted Bardi's submissions that it was a separate legal personality. It was, however, submitted that the learned judge's failure to set aside an *ex parte* provisional order over Bardi's shares to secure a debt owed by its shareholder, who does not jointly own the shares, was inconsistent with this finding.

[67] Counsel contended that the learned judge had failed to take into account the fact that the orders made by Daye J were made without the benefit of hearing all the parties. There was no evidence that Daye J was alerted to or even considered whether a charging order could be properly granted in circumstances where Bardi was the sole owner of the D&G shares and owed no debt to the respondent.

[68] Although not specifically identified as a ground of appeal, counsel for Bardi submitted that the learned judge had failed to take into account or give proper regard to the fact that the respondent gave no undertaking as to damages. It was contended that this was in clear breach of rule 17.4(2) of the CPR. Further counsel contended that the respondent had also failed to provide evidence of an ability to satisfy the undertaking.

[69] Thus, it was submitted that since the respondent had failed to give the undertaking, and provided no evidence that it could pay any damages that might be

caused by the injunction, the injunction should be discharged. Counsel relied on **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16 and **TPL Limited v Thermo-Plastics (Jamaica) Limited** [2014] JMCA Civ 50 in support of this submission.

[70] Counsel complained that in addition to failing to properly take into account relevant factors, the learned judge also considered irrelevant factors. They noted that the learned judge had stated that she considered the fact that there was an application made by Mrs Geddes to set aside the default judgment and the fact that Mrs Geddes had made an application to vary the orders of Daye J which was then before this court. It was their submission that in light of the learned judge's findings that Bardi was not the alter ego of Mrs Geddes, and that there was no reason to pierce the corporate veil, the learned judge should not have taken into account the two previous applications made by Mrs Geddes. Further, counsel contended that as the owner of the shares, Bardi has an entirely different basis for seeking to discharge the orders, and hence, Mrs Geddes' applications are irrelevant to the merits of its application.

For the respondent

[71] Counsel for the respondent submitted that the learned judge had correctly ruled that since there was a related matter which was before this court, it would therefore be inappropriate for her to make a ruling in this application which would impact upon that appeal.

[72] Counsel identified the main issues in this appeal as the power to set aside the provisional charging order in circumstances where an application to make it absolute is pending, and the true meaning and effect of Part 48 of the CPR dealing with enforcement. Counsel conceded that the court had the jurisdiction to hear an application by brought by an 'interested person' under rule 48.6(2), and to set aside the provisional charging order pursuant to rule 48.8(4). However, counsel submitted that the learned judge ought to have dealt with the matter of piercing the veil of incorporation. Ultimately, it was counsel's contention that Bardi is the alter ego and a mere trustee for the real beneficial owner of the shares, Mrs Geddes.

[73] Counsel contended that in relation to the injunction, there was no requirement for an undertaking in damages. It was their submission that the injunction issued pursuant to rule 48.5(2) of the CPR is not an interim injunction but is issued to secure the provisional charging order in enforcement proceedings. In these proceedings no undertaking in damages is required, hence none was given.

Discussion

[74] Bardi, in seeking to discharge the charging order and injunction, is relying primarily on rules 48.6(2) and 48.8(2), (3) and (4) of the CPR. In the alternative, they relied on rules 11.16 and 26. 1(7) of the CPR.

[75] Rule 48.6(2) of the CPR provides the category of persons who have an interest in the charging order proceedings, as well as the judgment creditor and judgment debtor, and are referred to in Part 48 as the "interested person". Bardi maintains that as the

owner of the stocks to be charged, it was an interested person for the purposes of this part (see rule 48.6(2) (b)). There is no real dispute to this assertion.

[76] Rule 48.8 deals with the making of the final charging order, and rules 48.8(2), (3) and (4) provide that:

> "(2) The following persons may file objections to a provisional charging order-
>
> (a) the judgment creditor;
>
> (b) the judgment debtor; and
>
> (c) any interested person.
>
> (3) The objection must be filed not less than 14 days before the hearing under paragraph (4).
>
> (4) At the hearing, if satisfied that the provisional charging order has been served on the judgment debtor, the court has power to-
>
> (a) make a final charging order;
>
> (b) discharge the provisional charging order; or
>
> (c) give directions for the resolution of any objections that cannot be fairly resolved summarily."

[77] On the date set for the hearing to make the final charging order, the application to discharge the default costs certificate was heard. Although the parties involved in that matter are not agreed as to what, if any, agreement was reached, it is accepted that the application to make the final charging order was not determined in order to permit the application to discharge the default costs certificate to proceed first. One can readily

appreciate the logic to such a course as if the default costs certificate was to be discharged, the provisional charging order would have to be set aside. Regrettably, a decision on that application has not yet been delivered.

[78] A strict interpretation of rule 48.8 clearly suggests that it is only at the hearing of the application to make the final charging order that objections to the provisional charging order can be entertained. Indeed, the accepted usual procedure for applying for a charging order involves two stages. The first would be the without notice application followed by a subsequent hearing on notice. An interested party such as Bardi could then advance submissions to convince the court, in exercising its discretion, to find that the provisional charging order should not be made final.

[79] The learned judge appreciated this fact when, at paragraphs [108] to [110] of her reasons for judgment, she had this to say:

> "[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 [Margie Geddes] 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 [Bardi] 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."

[80] Bardi's succinctly stated ground of appeal that the learned judge erred when she found that she has no power to set aside the orders does not, to my mind, reflect totally what the learned judge in fact found. She noted that the parties had taken no issue regarding her jurisdiction to hear the application. She therefore accepted that she had the power to set aside the orders. She however demonstrated her appreciation that the power to set aside the orders was limited to particular circumstances.

[81] It is noted that at paragraph [122] of her reasons the learned judge stated:-

> "[122] I am also mindful of the guidelines set out by Brooks JA **In the matter of** [a claim by] **Sharon Allen** [2017] JMCA [Civ], 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 Another*** *[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'."

[82] In the submissions made on behalf of Bardi, what seems to me to be the real basis on which the learned judge refused to set aside the charging order is recognised. It is acknowledged that she refused to set aside the charging order on the basis that there was no material non-disclosure or change in circumstances that warranted setting aside the order, but it is submitted that the learned judge erred in her approach.

[83] It is correctly noted that the CPR does not indicate the basis on which the court should set aside a provisional charging order on the application of an interested party. It however is to be recognised that the rule itself permits the interested party to be heard when the court is considering if the provisional charging order should be made final. It seems to me, that to suggest that the judge has a wide discretion in these circumstances to consider whether the order should be set aside, would mean departing from the established principles applicable to the setting aside of any *ex parte* and provisional order.

[84] It is to be noted that this court in **Margie Geddes v McDonald Millingen** [2018] JMCA Civ 11 has decided that "[a]ll other relevant provisions necessary to give effect to the procedure for applying for a charging order as the method of enforcing a judgment are applicable to Part 48" (see paragraph [34]). This finding buttressed the conclusion that a judge who had declined from considering such an application on the ground that he had no jurisdiction to do so, had erred.

[85] In **WEA Records Ltd v Visions Channel 4 Ltd and Others** [1983] 2 All ER 589 Sir John Donaldson MR stated at page 593:

> "As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order."

[86] In **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd and Another** [1994] 4 All ER 65 Lord Oliver of Aylmerton, in delivering the judgment of the Board, in effect endorsed this pronouncement of Sir John Donaldson MR when he observed that Carey JA had been plainly right in following and adopting what Sir John Donaldson MR had said. Lord Oliver had noted what Carey JA had said in following terms: -

> "Carey JA, with whom Forte JA agreed, accepted that a judge of the Supreme Court has an inherent jurisdiction to set aside or vary an order made ex parte and to revoke leave given ex parte, but that this only applied where 'new matters are brought to his attention either with respect to the facts or the law'."

[87] It seems to me, therefore, that the application before the learned judge was to be dealt with in a manner similar to any other one made to set aside or vary an *ex parte*

order. The learned judge ought not to be faulted for finding that she did not have a wide discretion in exercising her power to set aside or discharge the provisional charging order, it having been granted *ex parte*. This is especially so since at the hearing as to whether to make the provisional order final, Bardi would have the opportunity to advance arguments which could then be viewed as demonstrating that it would be unduly prejudiced by the making of the final order. To my mind, at that hearing, Bardi could then challenge the material that had been used to secure the provisional charging order in its absence in order to secure a discharge of that order.

[88] The learned judge's approach as to how to exercise her power to discharge the charging order was guided by **Richard Parr v Tiuta International Limited** [2016] EWHC 2 (QB). At paragraphs [111] and [112] of her decision, the learned judge stated:

> "[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 [Bardi] and Mrs Geddes and that it was only she who was indebted to the respondent/claimant."

[89] The learned judge then conducted a careful examination of the material that had been before Daye J who had granted the provisional charging order. She correctly observed that the *ex parte* notice of application for the charging order had indicated quite clearly that the 84,000, 000 ordinary shares in D&G were issued to and registered in the name of Bardi. She noted that the application stated that Mrs Geddes has a beneficial interest in the assets of Bardi, and that in the affidavit filed in support of the application, it was stated that Mrs Geddes is the holder of one ordinary share in Bardi, while the other is held by the estate of Paul Geddes, with Mrs Geddes being the sole executrix and sole beneficiary of the estate. She concluded that there was no information before Daye J that Mrs Geddes and Bardi held the shares jointly.

[90] The learned judge was satisfied that it was evident on the evidence before Daye J that the shares in D&G were issued to Bardi and registered in its name. She stated at paragraph [145];

> "...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."

[91] Further, she was satisfied that the *ex parte* application filed by the respondent and the affidavit in support did not assert that Bardi owed a debt to the respondent. She noted that the affidavit of Mr McDonald disclosed that the claim stems from work done on Mrs Geddes' behalf (see paragraph [131] of her decision).

[92] The learned judge to my mind, having recognised that she was at liberty to review the material presented to her and that had been presented to Daye J, also recognised that she could only have discharged the provisional charging order if there were any new matters in fact or law.

[93] Although Bardi challenged the learned judge's finding of fact that there was no new information that had come to light since the granting of the order of Daye J and that there was no material non-disclosure, to my mind there is no indication before this court as to what new information there was. Further, there is no indication of what material non-disclosure there had been.

[94] This court in **Venus Investments Limited v Wayne Ann Holdings Limited** [2015] JMCA App 24 recognised the need for full disclosure in *ex parte* applications. At paragraph [25], Morrison JA (as he then was) had this to say:-

> "There is therefore an unbroken line of authority in support of the proposition that, on a without notice application, the applicant is obliged to act in good faith by disclosing all material facts to the court, including those prejudicial to its case, and that failure to do so may lead to an injunction being discharged. The duty of disclosure extends not only to material facts known to the applicant, but also to any additional facts which he would have known had he made proper enquiries. Material facts are those which it is material

> for the judge hearing the without notice application to know and the issue of materiality is to be decided by the court, and not by the assessment of the applicant or his legal advisers. Nevertheless, there is a discretion reserved to the court to make a fresh order on terms, notwithstanding proof of material non-disclosure."

[95] The terms of the provisional charging order seem to support the view of the learned judge that Daye J had granted it on material before him that disclosed that the shares being charged were registered in Bardi's name, and that Mrs Geddes was the owner of a single share in Bardi and was the beneficial owner of the other. The order was accordingly in respect of the two ordinary shares held by Mrs Geddes in Bardi and of the shares in D&G issued and registered in the name of Bardi.

[96] In these circumstances, the learned judge demonstrated no misunderstanding of the law or the evidence adduced, and cannot be shown to be plainly wrong in her approach to exercising her discretion to discharge the provisional charging order. This court has in several decisions stated that it will not lightly disturb a judge's judicial exercise of discretion unless there is this demonstration of a misunderstanding of the law or the evidence before him or that his decision was so aberrant that no judge regardful of his duty would have reached it (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

[97] In relation to the discharging of the injunction, once again the learned judge did not find that she had no power to do so. The basis on which she had been asked to discharge the injunction was that the respondent had failed to give any undertaking as

to damages, which may flow from the imposition of the injunction. The learned judge agreed with the position by Sykes J (as he then was) in **Gordon Stewart OJ v Noel Sloley Snr and Others** [2016] JMSC Civ 50.

[98] At paragraph [89] Sykes J stated:-

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

[99] Rule 48.5(2) and (3) provides:

> "(2) On the application of the judgment creditor the court may grant an injunction to secure the provisional charging order.
>
> (3) An application for an injunction may be made without notice and may remain in force until 7 days after the making of an order under rule 48.8(4)."

[100] The respondent in its submissions correctly noted that this provision does not call for the giving of any undertaking. It is further correctly observed that this injunction is not properly to be considered an interim injunction and, in any event, rules governing interim injunctions would be inapplicable to enforcement proceedings. Rule 17.4(2) of the CPR provides:

> "Unless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order."

[101] In **Gordon Stewart OJ v Noel Sloley Snr** Sykes J, in his usual comprehensive and thoughtful manner, considered the nature of the injunction that is secured along with the charging order. Sykes J correctly noted that the injunction is to "ensure that the receiving party has something of value which can be sold to recover his costs". He equated this type of injunction to a freezing order.

[102] Following his careful analysis of various authorities, Sykes J concluded at paragraph [82] that:

> "...It is my view that once the first judge has jurisdiction and has [exercised] his discretion then it is not for another first instance judge to say that this discretion was not properly exercised. That is an appellate issue..."

[103] Simmons J cannot be faulted for having taken the position she did in reliance of the dictum of Sykes J. As both herself and Daye J are judges of co-ordinate jurisdiction, she had no power discharge the provisional charging order on the basis requested by Bardi (see **Leymon Strachan v The Gleaner Company Limited and Another** [2005] UKPC 33).

[104] In the circumstances, I find that the challenge to the learned judge's refusal to set aside the injunction is without merit.

Whether the learned judge erred when she failed to set aside the order in circumstances where their continuation causes substantial prejudice to Bardi and in light of her correct finding that there is no basis to pierce the corporate veil.

[105] The learned judge found that Mrs Geddes had a beneficial interest in Bardi and therefore a beneficial interest in the shares that were charged. It was on that basis that she did not seek to pierce the corporate veil. Once the learned judge was satisfied that she could not discharge the order on any of the bases that she identified, I do not think that she could have done so due to any issues of prejudice to Bardi.

[106] In any event, there were no submissions advanced that brings this complaint into one of those limbs that would entitle this court to set aside the orders which was made. It cannot be said that the orders made were "palpably wrong".

Whether the learned judge took irrelevant facts into account in coming to her decision

[107] The learned judge, in addressing the issue of the matter then pending before this court, did so at a time and in a manner that can be viewed as being in response to the assertions that had been made in submissions. It had been contended by the respondent, that the application was premature and should not be heard until this court had considered the appeal from Morrison J's refusal to vary the provisional order.

[108] It was towards the conclusion of her judgment that the learned judge addressed the matter. This was clearly after she had refused to discharge the provisional charging order on the ground that she had no proper basis to do so, and refused to discharge the injunction on the finding that she had no power to do so. It cannot be said that her

consideration of the matter before this court significantly influenced her ultimate refusal to grant the application to discharge the order.

[109] The learned judge at paragraphs [153] and [154] stated: -

> "[153] Despite the fact that [Bardi] 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 [Bardi].
>
> [154] In addition, it is my view that if I were to accede to [Bardi's] request to discharge the provisional charging order the matter before the Court of Appeal would only be one of academic interest as [Bardi] would have obtained the desired result."

[110] These observations of the learned judge did not, to my mind, form the basis on which she arrived at her ultimate decision. There is also no doubt that what she described as her view in paragraph [154] cannot be said to have impacted her decision in such a way that would urge this court to substantially disturb the orders she made.

[111] I have had the privilege of reading in draft the judgments of my learned sister Phillips JA and the comments of my learned brother F Williams JA. I am not convinced that another judge of concurrent jurisdiction should now review the decision of Daye J, in these circumstances. I am satisfied that Simmons J exercised her discretion in a manner which was appropriate and therefore ought not to be disturbed. I would therefore dismiss this appeal.

[112] I am however in general agreement with the observations and recommendations of Phillips JA in paragraph [40] of her reasons for judgment as to the way forward. In my view, however, the application for the final charging order ought to be heard and at that time Bardi can file its objections. I would strongly encourage all the parties to bring about a final disposal of the matter by pursuing that course.

[113] On the question of costs, it is noted that both parties have asked for costs on an indemnity basis. The respondent relied on submissions made in court below to make the request. Bardi did not in their submissions respond to that request. It is therefore perhaps best to afford the parties an opportunity to make submissions on this issue. I would therefore reserve the question of costs and order that written submissions be made by the parties within 21 days of the date hereof.

PHILLIPS JA

ORDER

By majority (P Williams JA dissenting in part)

1. Appeal allowed.
2. Order made by Simmons J made on 20 October 2017 is set aside.
3. The applicant can re-list the application to discharge the provisional charging order made by Daye J to be heard by another judge. MG should be served with that application.

4. A case management conference should be scheduled to deal with all the applications relative to the issues in controversy between the parties.

5. Written submissions to be filed by the parties within 21 days of this order on the question of costs.