



[2015] JMSC CIV. 227

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2012 HCVO4532**

<b>BETWEEN</b>	<b>FIRST GLOBAL BANK</b>	<b>CLAIMANT/ JUDGMENT CREDITOR</b>
<b>AND</b>	<b>DWIGHT MCDONALD</b>	<b>DEFENDANT/ JUDGMENT DEBTOR</b>
<b>AND</b>	<b>SANDRA TAYLOR-MCDONALD</b>	<b>1<sup>ST</sup> INTERVENER</b>
<b>AND</b>	<b>ELAINE MCDONALD</b>	<b>2<sup>ND</sup> INTERVENER</b>

**Daniele Chai instructed by Samuda & Johnson for Claimant/Judgment Creditor**

**Alicia Rhoden-Jones instructed by Stewart-Harrisingh Williams and Rhoden for  
2<sup>nd</sup> Intervener**

**Gillian Mullings and Keisha Grant instructed by Naylor & Mullings for the  
Defendant/Judgment Debtor and the 1<sup>st</sup> Intervener.**

**Application for Charging Order – Whether jointly owned land can be charged –  
whether unity of interest a bar - Rule 48.6 (2) (a) of Civil Procedure Rules**

**In Chambers**

**9<sup>th</sup> November 2015 and 20<sup>th</sup> November 2015**

**Coram: Batts, J.**

- [1] Three applications were listed before me. Two of the applications were for leave to intervene by Elaine McDonald and Sandra Taylor McDonald. They were the daughter and wife respectively of the Defendant/Judgment Debtor. Each claimed an interest in the property. I therefore granted permission to intervene.
- [2] The third application, which was the first in time filed, was for an Order to make the Provisional Charging Orders final. It had been adjourned to the 9<sup>th</sup> November 2015 by the order of Mrs. Justice Shelly Williams made on the 28<sup>th</sup> April, 2015. It is to be noted that applications to vary an Order for service became unnecessary as the persons to be served applied to intervene and sought to set aside the provisional charging order. They also opposed the application to make that order final.
- [3] The material facts are not in dispute and can be shortly stated. The Defendant judgment debtor and the 1<sup>st</sup> and 2<sup>nd</sup> interveners are registered joint owners of the property which has been provisionally charged with the judgment debt. The interveners were both unaware of the unsecured debt, which had been incurred by the Defendant judgment debtor for purchase of a motor vehicle. He had been dismissed from his employ with the Claimant and had since been unable to pay the debt. He is stricken with cancer and unable to earn an income to pay the debt. As a result a suit has been initiated by the Claimant resulting in the judgment debt against the Defendant.
- [4] In support of her application for the provisional orders to be made final Miss Chai submitted that a Charging Order is not an Order for Sale. Counsel relied **upon *Air Jamaica Ltd. v Stuarts Travel service Ltd. et al*** Claim No. 1998/A-018, an unreported judgment of Mangatal J dated 24<sup>th</sup> February 2011, to demonstrate the importance of that distinction. She further submitted, relying on that authority as well as ***Morrell v Workers Savings & Loan Bank*** Claim No. 1996/M105, unreported Judgment of Campbell J. delivered 5<sup>th</sup> June, 2009, that property jointly held is not exempt from being charged. A charge she submits has its own utility, serving as it does to notify the world of the Judgment creditor's claim to an

interest. She urged the court to make the Charging Orders final as no law prevented this. The matters of hardship relied upon were best dealt with if and when an Order of Sale was to be applied for.

[5] Miss Gillian Mullings for the 1<sup>st</sup> Intervener relied on Written and Oral Submissions. The points made in these submissions may be summarised thus:

- a) Property owned by joint tenants cannot be charged unless all joint tenants were party to the loan (or incumbrance) giving rise to the charge.
- b) The effect of granting or making the charge is to grant a mortgage.
- c) In the event of the death of the Defendant Judgment debtor the remaining joint owners would find their property charged with a debt for which they were not responsible.
- d) The effect would be to destroy or end the unity of title of a joint tenancy, in effect creating severance where there was none.
- e) It would interrupt the *jus accrescendi* and be unfair to, for example, wives who stood to lose because their husband did not repay personal unsecured loans.

[6] Miss Mullings relied upon ***Liam Irwin v Thomas Derby*** [2011] 2 1 R 752; ***Gill v Lewis*** [1956] 1 All ER 844; ***Royes v Campbell*** E1995/E349 and ***Carl Wyndham v Terrilonge*** CL 1994 W124 unreported judgment of Brooks J dated 27<sup>th</sup> May 2005. In the latter case Brooks J referred to the other cases and stated,

***“I find however that, in light of her claim to sole beneficial ownership of the realty, the likelihood is that the learned judge would not have ordered that half of the net proceeds of sale be paid to Mrs. Davis – Terrilonge without at least making or ordering to be made, an enquiry as to the nature of the beneficial interest of each joint tenant.”***

The learned Judge then set aside an Order for Sale that had been earlier made. It is to be noted that the applicant was claiming sole beneficial ownership of the premises.

- [7] Ms. Alicia Rhoden-Jones for the 2<sup>nd</sup> Intervener adopted the submissions made by Miss Mullings. The interveners she submitted were both innocent parties and the bank's interest ought not to outweigh theirs. The Charging Orders would serve to diminish the value of the property. She says that the Defendant judgment debtor had applied to pay the debt by instalments and the bank should be restricted to other methods of enforcement.
- [8] In her reply, Miss Chai pointed to Order 48(6) (2) (a) which contemplates a charging order on jointly owned land. There was no legal bar to the Order sought and the intervener's submissions were best made at the hearing of an application for sale. The purpose of a Charging Order was to prevent the premises being sold without the Defendant Judgment debtor's share being applied towards his debt.
- [9] I have carefully considered the respective submissions. I have also reviewed my own decision in *First Global v Doyen Williams Claim No. 2010 HCV 05157,unreported judgment 6<sup>th</sup> February 2015 [2015]JMSC CIVIL 11*, to which Ms. Mullings had adverted in her submissions.
- [10] The classic statement of principle as regards a joint tenancy is to be found in **Megarry & Wade Law of Real Property** at page 391, I rely on the 4<sup>th</sup> Edition,

**“A gift of lands to two or more persons in joint tenancy- is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. The intimate nature of joint tenancy is shown by its two principal features, the right of survivorship and the four unities.”**

The learned authors state at page 393,

**“The right of survivorship does not mean that a joint tenant cannot dispose of an interest in the land independently. He has full power of alienation *inter vivos*, through it, for example he conveys his interest,**

**he destroys the joint tenancy by severance and turns his interest into a tenancy in common. But he must act in his lifetime, for a joint tenancy cannot be severed by will."**

[11] One joint tenant can in equity effect a severance and make his interest subject to a tenancy in common if, for example, he were to contract to sell his interest (p. 406 **Megarry & Wade**). The discussion demonstrates that equity leaned against the joint tenancy or its effect, so as to bind the joint tenant and protect the innocent party with whom he might have contracted.

[12] A court exercising the power to make charging orders over property owned by a judgment debtor is seeking to protect the interest of the judgment creditor. So long as the judgment debtor remains alive there really is no reason in principle, why a court ought not to bind his conscience, by giving notice to all the world that he has an outstanding liability which that property now secures. If the property should be sold, or if he should formally sever his interest, then the charge imposed by the court of equity, would ensure that the judgment creditor was able to recover some part of, if not all the sums owed. If, as has been seen, the joint tenant could divest his joint share and therefore sever in equity, I see no reason why a court imbued with a power to charge interests in land ought not also to be able to do the same for an interest in land held by a joint tenant.

[13] Order 48.6(2)(a), is perhaps recognising this position when stating,

"The interested persons are –any person who owns the land, stock or assets to be charged jointly with the judgment debtor;"

[14] As regards Miss Mullings' dark forebodings, I do not see it quite that way. In the first place unlike a mortgage, a Charging Order gives no right or power to sell. An application to court is required. Surely in exercising its discretion a court will bear in mind (a) the concerns of the occupants of the premises (b) the interest of other joint owners (c) the value of the property relative to the value of the land and the respective value of the judgment debtor and his co=owners' interest in

the property (d) whether other modes of recovery are available and whether reasonable payment arrangements have been made, as well as any other material circumstance.

[15] Secondly, and as regards the *jus accrescendi*, a Charging Order would ultimately take effect only on the judgment debtor's interest. It may be expressed to apply only during his lifetime and hence on death disappear, or it may effect a severance by Order of the court. The remaining owners would continue to be joint tenants and the judgment debtor become their tenant in common. His interest would then remain charged after his death.

[16] In the final analysis, I hold the court has jurisdiction to make the Provisional Charging Orders final. I bear in mind that the Claimant was the judgment debtor's former employer. They as a financial institution might well have, and perhaps ought to have, had properly executed security documentation for the loan. I consider also the innocence of the mother and daughter who were not privy to the loan.

[17] I therefore Order as follows:

- a) The Provisional Charging Orders made herein on the 12<sup>th</sup> January, 2015 and 28<sup>th</sup> April 2015 be made final for the life of the judgment debtor.
- b) The said Final Charging Orders debt shall expire on the death of the Defendant Judgment/Debtor and will not have effect to sever the joint tenancy.
- c) If an Order for Sale is applied for, the interested parties are also to be served with Notice of the Application.
- d) Costs to the Claimant to be taxed if not agreed.

**David Batts**  
**Puisne Judge**