[2014] JMSC Civ.101

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA CIVIL DIVISION

CLAIM NO. 2011 HCV 04943 & CLAIM NO. 2011 HCV 04669

BETWEEN	**JENNIFER MESSADO AND COMPANY**	**CLAIMANT/JUDGMENT CREDITOR**
AND	**NORTH AMERICA HOLDINGS COMPANY LIMITED**	**DEFENDANT/JUDGMENT DEBTOR**

Ms. Carol Davis and Mr. Seyon T. Hanson instructed by Seyon T. Hanson and Company for the claimant/judgment creditor.

Mr. Keith Bishop instructed by Bishop and Partners for the defendant/judgment debtor.

Mr. Kevin Powell instructed by Hylton Powell for the National Commercial Bank – interested party.

Ms. Gillian Burgess for the Real Estate Board – interested party.

Heard: 30th April and 20th June, 2014

Provisional charging order – Whether Registrar has jurisdiction to grant – Judicature (Supreme Court) Act Sections 11, 12, 13 and 28D - Judicature (Supreme Court) Additional Powers of Registrar Act - Civil Procedure Rules 2002 rule 48

IN CHAMBERS

EVAN BROWN, J.

Introduction

[1] The claimant/judgment creditor obtained judgment against the defendant/judgment debtor upon two bills of costs. The Deputy Registrar of the

Supreme Court signed the first Default Costs Certificate in favour of the claimant on the 30th August, 2012 for the sum of $14,877,408.00 in Claim No. 2011 HCV 04943 and the second in Claim No. 2012 HCV 04669 on the 20th February, 2013 for the sum of $6,955,403.62. Upon the judgment debtor's failure to pay the judgment debt, *ex parte* applications were made before the Registrar of the Supreme Court for the property of the judgment debtor to be charged. On the 30th November, 2012 and the 19th November, 2013 the Registrar granted a separate Provisional Charging Order (PCO) in the respective Claims, charging the interest of the judgement debtor in eight lots on the property at Barbican known as 24 Paddington Terrace in the parish of St. Andrew with the payment of the judgment debts.

[2] In accordance with the ***Civil Procedure Rules 2002 (CPR)***, both PCO were set down for hearing before a Judge to be made final. *Ad interim*, the interested parties were served with the PCO and the affidavit of the judgment creditor. National Commercial Bank Jamaica Limited (NCB) and the Real Estate Board are two of those interested parties. Through their Attorneys-at-Law, notices of objection to the PCO being made final were filed. Both interested parties wish to take a preliminary point. In simple language, both have challenged the validity of the PCO on the basis that the Registrar of the Supreme Court had no jurisdiction to sign them.

Submissions on behalf of NCB

[3] On behalf of the NCB, learned counsel, Mr Kevin Powell, submitted that the Court's power to make PCO is conferred by section 28D of the ***Judicature (Supreme Court) Act*** **(the *Act*)**. Before the enactment of section 28D there was no power to create a charging order. ***Beverley Levy v Ken Sales & Marketing Ltd*** Privy Council Appeal 87/2006 delivered 24th January, 2008 was cited. Their Lordships observed:

> *"There appears to have been no statutory power for courts in Jamaica to make charging orders until the recent enactment of legislation enabling courts to do....The Civil Procedure Rules 2002 ... containing Rules relating to the making of charging orders but while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction."*

The submission continued, the recent enactment of legislation was a reference to the ***Judicature (Supreme Court) (Amendment) Act***. That section was inserted in the principal Act following the passage of the ***Judicature (Supreme Court) (Amendment) Act*** through the Parliament.

[4] Mr Powell quoted section 28D:

> *"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."*

Learned counsel next made reference to ***CPR*** 48 which sets out the procedure for application and grant of charging orders. Specifically, attention was drawn to ***CPR*** 48.5 (1) which provides:

> *"In the first instance the court must deal with an application for a charging order without a hearing and may make a provisional charging order."*

[5] Learned counsel continued, it is the ***Act*** which provides for "the Court" to make a charging order and that language is repeated in ***CPR* 48.5**. While ***the Act*** does not define "the Court", it was counsel's submission that "it must also mean "the Supreme Court". Learned counsel then cited the marginal note to section 5 of ***the Act*** which reads, "composition of the Supreme Court" and submitted that this refers only to the judges of the Supreme Court, including the Chief Justice and the Senior Puisne Judge.

[6] Counsel then adverted the attention of the court to the duties of the Registrar of the Supreme Court. Those duties, it was submitted, do not extend to the granting of a charging order, provisional or otherwise. Counsel urged that there is no provision in the ***Judicature (Supreme Court) Additional Powers of Registrar Act (Registrar Act)*** which allows the Registrar to grant a PCO. Counsel further argued that although it may be said that section 13 of ***the Act*** is wide enough to allow the Registrar to make the PCO, it does not assist the judgment creditor.

[7] Section 13 appears hereunder:

"Upon proof of urgency the Registrar, being a barrister or solicitor, may, in the absence of the Supreme Court Judges, make orders which can be made by a Judge in Chambers. An appeal shall lie from any such order to a Judge in Chambers on two days' notice."

After having cited the section, counsel then submitted that there was no proof of urgency for the grant of the PCO. This absence of urgency can be seen both in the affidavit and the terms of the order itself.

[8] Mr Powell then submitted that the rules cannot confer jurisdiction on the Registrar to do something which she has no statutory power to perform. Noting that rule 2.4 defines "court" as "the Supreme Court", learned counsel said that the claimant may seek to rely on ***Civil Procedure Rules*** 2.5(1). Rule 2.5(1) declares:

"Except where any enactment, rule or practice direction provides otherwise the functions of the court may be exercised in accordance with these Rules and any direction made by the Chief Justice by –

(a) a single judge of the court;

(b) a master; or

(c) a registrar."

Counsel concluded that since ***the Act*** provides otherwise the registrar has no power to sign a charging order.

[9] Learned counsel Mr Powell submitted that the Rules themselves make a distinction between a Judge and the Registrar. To demonstrate this, reference was made to rules 26.4 (3), 42.4 (2), 44.3 (1) – (4), 46.3 (2) -- (4) and 50.3 (1) – (2). Counsel submitted that where the Registrar is so empowered the Rules clearly indicate. Rule 48 only makes reference to the court and not the Registrar. For ease of reference the Rules being relied on by Mr Powell are set out below.

[10] Part 26 is headed, "Case Management – The Court's Powers." Rule 26.4 (3) falls under the sub-heading, "Court's general power to strike out statement of case" and is in the following terms:

26.4 (1) .....

(2) .....

(3) *"The registry must refer any such application immediately to a judge, master or registrar who may –*

(a) grant the application;

(b) seek the views of the other party; or

(c) *direct that an appointment be fixed to consider the application*."

The application referred to in this rule is one for an "unless order" where a party has either failed to comply with the Rules or any court order for which no sanction for non-compliance has been imposed: rule 26.4 (1).

[11] Part 42 is concerned with Judgments and Orders made by the court. Rule 42.4 (2) appears under the sub-heading, "Standard requirements." Rule 42.4 (2) reads:

42.4 (1) .....

(2) *"Every judgment or order must –*

(a) be signed by the registrar or by the judge or master who made it;

(b) be sealed by the court; and

(c) *bear the date on which it was given or made*."

[12] Part 44 is headed "Oral Examination in Aid of Enforcement" and deals with the oral examination of a judgment debtor on the application of a judgment creditor. The aim of this examination is to obtain information about the judgment debtor's property or means and receivables, to assist in the enforcement of a judgment. Rule 44.3 is sub-headed, "Procedure to obtain order for oral examination". Rule 44.3 is in the following terms:

44.3 *"(1) An application for an order that a person attend an oral examination may be made without notice.*

(2) Where permission is required to enforce the judgment a copy of the permission must be attached to the application.

(3) Where the order for the application is against an officer of a body corporate the application must be supported by evidence on affidavit showing that the person to be orally examined is such an officer.

(4) An application under this rule may be considered by the registrar."

[13] The heading of Part 46 is "General Rules about Writs of Execution." Rules 46.3 (2), 46.3 (3) and 46.3 (4) are found under the sub-heading "Application for permission to enforce." Rule 46.3 (2) is abridged while the other rules are quoted in full.

"*46.3 (1) .....*

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

(3) An application under this rule may be considered by the registrar.

(4) Any permission given by the court or registrar shall have effect for one year only."

[14] Part 50 is entitled "Attachment of debts." Herein lies the procedure by which a judgment creditor can obtain payment of all or a part of a judgment debt from a person within the jurisdiction who is indebted to the judgment debtor. Rule 50.3 is subtitled "Procedure – making of provisional order," and is quoted in part hereunder:

50.3 (1) ....

(2) Where the court or the registrar considers that on the evidence submitted the judgment creditor is entitled to an attachment of debt order, it must make a provisional order.

(3) .....

(4) .....

(5) An application under this rule may be considered by the registrar.

Submissions on behalf of the Real Estate Board

[15] The submissions of learned counsel for the Real Estate Board travelled along the same path as those of Mr Powell then diverged onto a constitutional track. Miss Burgess attacked the claimant's reliance on rule 2.5 (1) and section 13 of the ***Judicature (Supreme Court) Act.*** Particular attention was drawn to paragraph 15 of the claimant's submissions:

"in order for the interested parties to establish that the Registrar/Deputy

Registrar was not empowered to sign the provisional charging order they would have to establish that some enactment, rule or practice direction provides otherwise, and/or prohibits the Registrar from exercising the functions of the Court ... based on the nature and gravity of the objection ought (sic) to be a very high burden based on the implications it will have for the administration of the Court."

[16] After asserting that the question is one of jurisdiction, Ms Burgess then spoke to section 2 of the Constitution which declares the Constitution the supreme law and all laws repugnant to it void. According to learned counsel, the relevant enactments are ***the Act***, the ***Registrar Act*** and the ***Civil Procedure Rules 2002***. Learned counsel then submitted the duties of the Registrar adumbrated in section 12 of ***the Act*** are administrative. Counsel's submission in respect of section 13 ***the Act*** was similar to that of Mr Powell. In addition to the administrative duties under the ***Act***, the ***Registrar Act*** purports to confer judicial powers on the Registrar, counsel submitted. Those powers relate to procedural matters in respect of matters before the court, it was said.

[17] Learned counsel then submitted that it is a general, well known and basic principle of constitutional law that the powers and functions of the Judges of the Supreme Court cannot be assigned to persons who do not enjoy the mechanism of appointment and protection afforded to Judges of the Supreme Court. In particular, the Registrar of the Supreme Court cannot be conferred with the jurisdiction of the court by virtue of a practice direction, Rules of Court or ordinary legislation.

[18] Counsel sought to bolster this submission by a reference to the now celebrated decision on the separation of powers coming out of the Privy Council ***Hinds v R*** (1975) 24 W.I.R. 326. The following passage from Lord Diplock's judgment was quoted:

"What, however, is implicit in the very structure of a constitution on the Westminster model is that judicial power, however it is distributed from time to time between various courts, is to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the Judicature, even though this is not expressly stated in the Constitution."

[19] The submission continued, Chapter VII of the Constitution was held to deal with two categories of judicial officers: (i) the higher judiciary consisting of Judges of the Supreme Court and Judges of the Court of Appeal and (ii) the lower judiciary consisting of Resident Magistrates, Judges of the Traffic Court, Registrar of the Supreme Court, Registrar of the Court of Appeal and others. The distinction between the two categories was held to be the greater security of tenure granted to the higher judiciary. Accordingly, the Privy Council held that the Full Court comprising three Resident Magistrates was void on the ground that it gave members of the lower judiciary jurisdiction to try cases which properly fell within the jurisdiction of the higher judiciary.

[20] Learned counsel submitted that the basic premise is that the powers of the higher judiciary cannot be vested in persons who are not appointed in the like manner or who do not enjoy security of tenure. Counsel cited a trilogy of recent decisions to fortify her submission. First, in the ***DPP v Kurt Mollison*** [2003] 2 W.L.R. 923, the Privy Council held that the provisions which provided for a sentence at the Governor General's pleasure was unconstitutional because it gave the sentencing powers of the Judge to the Governor General – a member of the executive.

[21] Secondly, in ***The Independent Jamaica Council for Human Rights (1998) Ltd v The Hon Syringa Marshall Burnett and others*** [2005] 2 W.L.R. 1160, the Privy Council declared unconstitutional three Bills which purported to give appellate powers to judges in the Caribbean Court of Justice in circumstances where the security of tenure of the judges were not entrenched in the Constitution of Jamaica. Lastly, in ***William Clarke v The Bank of Nova Scotia*** [2013] JMCA App 9 the Court of Appeal declared unconstitutional the provision in the Court of Appeal Rules which permitted a single judge of the Court of Appeal to hear and determine procedural appeals. Counsel opined that it is worthy of note that the single Judge of Appeal enjoys the protection of the Constitution and the matters which were considered in procedural appeals were not substantive matters.

[22] Learned counsel was of the view that section 12 of ***the Act*** demonstrates that there was no intention to give the Registrar power to exercise the functions of the higher

judiciary. To underline the point counsel relied on the definition of ministerial rendered by ***Webster's New World College Dictionary***. That work defines ministerial as:

(i) of ministry, a minister or ministers collectively

(ii) serving as a minister, or agent; subordinate

(iii) (a) having the nature of or characteristic of the administrative function of government; (b) designating or of an administrative act carried out in a prescribed manner not allowing for personal discretion

(iv) being a cause; instrumental.

[23] This is how counsel ended her submissions, the Rules are enacted pursuant to the ***Judicature (Rules of Court) Act*** which confers the power to regulate the procedure of the Court. Consequently it has no power to confer jurisdiction of Court on the Registrar. Reliance was placed on ***William Clarke v The bank of Nova Scotia***, *supra* and ***Attorney General of Jamaica v John McKay*** [2011] JMCA 26. In the latter case it was held that the Rules of the Court of Appeal could not confer jurisdiction on a single judge.

[24] Miss Burgess contended that a matter which goes to jurisdiction cannot be classified as something which goes to procedure. The PCO is not merely procedural but clothes the court with jurisdiction to make a final charging order. Miss Burgess continued, if the claimant is correct the Registrar could go on to make a final charging order, as having the power to do one would contemplate the power to do the other.

Submission on behalf of the defendant/judgment debtor

[25] Counsel for the judgment debtor, Mr Bishop, was content to adopt the submissions made on behalf of the objectors.

Submissions on behalf of the claimant/judgment creditor

[26] Miss Carol Davis in her submission agreed that the power to make the charging order emanates from section 28D of ***the Act.*** She said section 28D of the enabling ***Act*** empowers the rules as a matter of original jurisdiction. Counsel drew the court's attention to Rule 45.2 (b), which I quote:

45.2 A judgment or order for the payment of a sum of money other than

the payment of money into court may be enforced by –

(a) ....

(b) a charging order under Part 48.

The submission continued, therefore we have to look to the Rules to see whether or not the charging order has been made in accordance with the ***Act***.

[27] Counsel then cited rule 48.1 and 48.2. The former Rule deals with the scope of Part 48 and definitions thereunder. Rule 48.1 reads "This Part deals with the enforcement of a judgment debt by charging (a) land." Rule 48.2 is sub titled, "How to apply for charging order" and appears below:

48.2 (1) The application is to be made without notice but must be supported by evidence on affidavit.

(2) An application for a charging order relating to stock may incorporate an application for sale of such stock under rule 48.11.

Learned counsel then submitted that the claimant has complied with the rules.

[28] Counsel for the claimant/judgment creditor next turned her attention to the procedure set out under rule 48.5. Appropriately, this rule is subtitled "Procedure for making provisional charging order" and is quoted below:

48.5 (1) In the first instance the court must deal with an application for a charging order without a hearing and may make a provisional charging order.

(2) On the application of the judgement 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).

(4) The provisional charging order must state the date, time and place when the court will consider making a final charging order.

[29] Citing rule 2.5(1), *supra* paragraph 8, counsel submitted that the interested parties have failed to establish that there is any enactment, rule or practice direction which prohibits the Registrar from making a PCO, which is a 'function of the court'. The submission went on, the fact that rule 2.5(1) is exclusionary is worthy of note as it places an obligation on the party seeking to challenge the application of the rule to show any enactment, rule or practice direction which provides otherwise in order for any act purportedly done in keeping with it to be defeated. Since that is the case, and the making of a PCO being a procedural step to the making of a final charging order, it is within the remit of the Registrar and, or Deputy Registrar to make the PCO as no enactment, rule or practice direction prohibits it. In any event, the Registrar is clothed with a wide scope of powers which permits her so to do, counsel argued.

[30] Counsel cited section 11 of ***the Act*** which says, among other things, that there shall be attached to the Supreme Court one or more Registrars and one or more Deputy Registrars as officers of the Court. Section 12 of ***the Act*** which set out the qualifications and duties of the Registrar was next cited, in particular the following portions:

> *make such investigations and take such accounts in relation to proceedings in the Supreme Court as the Court may direct, and shall have power for the above purposes to issue advertisements, summon witnesses, and take examinations viva voce, or upon interrogatories, and the Court shall have power to enforce his orders as if they were those of a Judge;*
>
> *transact all such ministerial business of the Supreme Court, and such other duties of a like kind, as are assigned to him by rules of court.*

Counsel then submitted that the powers above are wide enough to include the power to grant a PCO, particularly where the ***CPR*** provides in rule 2.5(1) that "the functions of the court may be exercised in accordance with these Rules and any direction made by the Chief Justice by ... a registrar."

[31] Learned counsel next made reference to section 13 of ***the Act***, *supra* paragraph 7. It was counsel's submission that in the circumstances this section is applicable as an

application for a charging order by its very nature is an urgent application which the Rules dictate should be made *ex parte*. Since that is the manner in which the **CPR** treats with the application, it is unnecessary to make a literal reference to the urgency in the affidavit supporting the application, counsel argued. It was learned counsel's contention that an application for a charging order is analogous to most serious types of interlocutory injunctions such **as a freezing orders** where giving notice would enable steps to be taken to defeat the injunction. Against the background of the ***National Commercial Bank v Olint Corpn Ltd*** [2009] 1W.L.R. 1405 **(NCB v Olint)** confining *ex parte* applications for injunctions to the very "rare" category of cases such as the freezing injunction and search order, which are by their very nature urgent applications, in compelling the application of a PCO to be made ex parte, the ***CPR*** has preserved the presumed urgency of PCO applications, counsel contended.

[32] In **NCB v Olint**, Lord Hoffmann said the chief issue in the appeal was whether a bank, "by merely giving reasonable notice", can lawfully close an account that is not in debit, where there was no evidence that the account was being operated unlawfully. The appellant gave the respondent notice that it would close its account within thirty-two days. That period was extended upon the request of the respondent. During the life of the extension, the respondent obtained an *ex parte* injunction to prevent the respondent from carrying out its intended action. That injunction was dismissed at the inter partes hearing but restored by the Court of Appeal.

[33] Lord Hoffmann, speaking for the Privy Council, summed up the court's attitude towards without notice applications for injunction at paragraph 13. Paragraph 13 appears in full below:

> *"First, there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although in the end the matter is in the end one for the discretion of the judge, audi alteram partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless either giving notice would enable*

the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Piller order) or there has been Literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Supreme Court of Jamaica Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a phone call. Any notice is better than no notice.

[34] Learned counsel asked the court to treat the signing of the PCO as a procedural irregularity as envisioned by rule 26.9, in the event of a ruling in favour of the objectors. Rule 26.9 is subtitled "General power of the court to rectify matters where there has been a procedural error" and is quoted below:

26.9 (1) "This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party."

Counsel then went on to submit that the Registrar was exercising a procedural function. In the event that there was an irregularity in the Registrar's exercise of that function, Rule 26.9(2) prevents the actions from being invalidated. Rule 26.9(3) enables the court to make an order to put matters right. Therefore, counsel urged, the court has two options to put matters right in the instant case. First, the court can discharge the PCO

and reinstate a PCO made afresh by a Judge. Secondly, the court can validate the existing PCO.

[35] The dictum of Lord Diplock in ***Bremer Vulcan Schiffbau and Maschinenfabrik v South India Shipping Corporation Ltd*** [1981] AC 909 was commended to the court for guidance in exercising its powers under rule 26.9. At page 977 Lord Diplock said the High Court has:

> *"a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power in inherent in its constitution as a court of justice ... it would stultify the the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute."*

In learned counsel's opinion, that subsisting inherent jurisdiction is bolstered by Rule 26.9. Counsel continued, in circumstances where there has been an error in procedure courts have rectified the defective performance in keeping with the interests of justice. In this regard ***Phillips v Symes (No. 3)*** [2008] UKHL 1; [2008] 1WLR 180 and ***Fawdry and Co. v Murfitt*** [2003] QB 104 **(Fawdry v Murfitt)** were cited.

[36] **Phillips v Symes**, *supra,* is a decision of the House of Lords. The case concerned which court, the English or Swiss, was first seised of jurisdiction to determine a civil matter. According to Lord Brown of Eaton-Under-Heywood, the question for the House was whether, in light of the Swiss proceedings, the English court was obliged to decline jurisdiction and impose a stay in relation to its proceedings. The resolution of that issue depended on the answer to the predicate question, which of the two courts was first seised of proceedings under article 21 of the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 ("the Lugo Convention").

[37] Under the Lugo Convention a court is first seised if the requirements for the proceedings to become definitively pending are fulfilled. The fulfilment of these requirements is determined by national law. Under English law proceedings become "definitively pending" when they are served on the defendant. On the other hand, under

Swiss law proceedings are “definitively pending” once they are issued. The difficulty arose in the case when the claim form which was issued out of the English court for service by the Swiss was removed from the package of documents by either the Swiss judge or his clerk. The claim form had been erroneously stamped “Not for service outside the jurisdiction.”

[38] Before it came to the notice of the claimant that the claim form had not been served, a number of the Swiss defendants caused proceedings to be issued out of the court in Zurich. The situation having come to the knowledge of the claimants, they sought orders in the English court to ensure priority over the Swiss proceedings. The claimants relied on the English equivalent of CPR 26.9 (see paragraph 34). The relevant question for their Lordships’ consideration was whether the court had power under the rules to determine that the documents served upon the defendant was sufficient service for the purposes of seisin. The defendants having been served with an equivalent document, the service effected without the English language claim form was held to be good service.

[39] The English version of CPR 26.9 was also considered in ***Fawdry v Murfitt***. The challenge was to the transfer of the case from one court of the Queen’s Bench Division of the High Court to another in breach of the rules. Although there was a challenge to the authority of the judge who heard the case, the resolution of the appeal ultimately turned on an application of the rules. It was held that the failure to comply with the rules was not so fundamental that it could not be described as “an error of procedure” and by virtue of the English equivalent of CPR 26.9, that failure did not operate to vitiate the transfer unless the Court of Appeal so ordered.

Reply to the claimant/judgment creditor’s submission

[40] In response to Ms Davis Mr Powell submitted that the case of **NCB v Olint,** *supra*, is distinguishable. The Privy Council was considering an appeal against an order granting an injunction until trial. The Privy Council in commenting on ***CPR*** 17.4(4) observed that the rule provides two alternative conditions for applications under Part 17. The case did not consider applications for charging orders or any provisions under Part

48. Accordingly, the submission continued, whether an application for a charging order is by its nature urgent was not before the Privy Council.

[41] In respect of rule 26.9 Mr Powell said it does not apply as it applies to cases of "error of procedure" or a failure to comply with a rule, practice direction or court order. The instant case does not concern any of these situations. The granting of an order where the Registrar has no substantive power to do so goes to the issue of jurisdiction and is not a procedural error remediable under rule 26.9, Mr Powell argued. In this vein, reliance on **Bremer Vulkan**, *supra*, is misconceived as it concerned whether injunctive relief was available against a party seeking resolution of a dispute through arbitration and whether an arbitrator had a power to dismiss an action for want of prosecution similar to that flowing from the court's inherent jurisdiction.

[42] Turning his attention to **Phillips v Symes,** *supra*, Mr Powell submitted that it is distinguishable on the facts. There the English court was concerned with whether it was seised of proceedings for the purpose of the **Lugo Convention** when a claim form is issued or when the court first makes an order against the defendant in connection with them. The error in procedure was the omission of an English language form from a package of documents served on a defendant in Switzerland. Mr Powell went on, the court considered that the procedure was the service of the claim form. He reiterated that the issue before this court is not procedural but jurisdictional.

[43] In Mr Powell's submission **Fawdry & Co v Murfitt,** *supra*, was equally unhelpful to the claimant/judgment creditor. On the contrary, it assists the objectors. Learned counsel submitted, in that case a judge exercised his statutory power to transfer a case to another division of the High Court, though not in accordance with the relevant practice direction. The issue was whether his failure to comply with the practice direction rendered the transfer and subsequent trial void. Counsel said the court recognized that a failure to exercise the jurisdiction of the High Court in accordance with the relevant legislation was more than an "error of procedure."

Law and analysis

[44] The Registrar is an officer attached to the Supreme Court (section 11 of the ***Act***). An officer of the court is a person who is charged with upholding the law and administering the judicial system: ***Black's Law Dictionary*** 8th edition. The holder of that office must come to it with both legal education and training (section 12(1)). To adopt the language of section 13 of ***the Act*** which harks back to the ante fusion era, the Registrar must be either a barrister or solicitor. The duties of the Registrar are such as are listed in section 12(1) of ***the Act*** and may be compendiously described as administrative. Other duties may be assigned to the Registrar by rules of court. However, the other duties assigned under the rules are described in the same section as "duties of a like kind", the kind being "ministerial business" of the Supreme Court.

[45] The Registrar performs these functions either of her own motion or as directed by the Court. In particular, the Registrar is empowered to, among other things, "make such investigations and take such accounts in relation to proceedings" before the Supreme Court as the Court may direct. For the purposes of making investigation and taking accounts the Registrar may summon parties and witnesses and conduct examinations either *viva voce* or upon interrogatories.

[46] It is worthwhile to look closely at the concluding omnibus sentence of section 12(1) of ***the Act.*** The Registrar is duty bound to "transact all such ministerial business of the Supreme Court ... and perform such other duties as are assigned to him by rules of court." What is meant by the use of the phrase 'ministerial business'? ***Black's Law Dictionary***, *supra,* provides this meaning, "of or relating to an act that involves obedience to instructions or laws instead of discretion, judgment or skill, the court clerk's duties include recording judgments on the docket." The first point to note is that this sentence appears at the end of a long list of duties the Registrar shall perform. That is, it caps the genus of the Registrar's functions and duties and is not meant to extend those functions and duties outside of those boundaries.

[47] Therefore, when ***the Act*** speaks to the capacity of the Registrar to make investigations, summon parties and witnesses it means that the Registrar can do so within the confines of acting ministerial. That is to say, I do not understand the intent of

the draftsman to have been to include in the Registrar's functions and duties matters which require the exercise of 'discretion, judgment or skill'. So, unless counsel for the claimant/judgement creditor meant to say the making of PCO is a ministerial act when she made reference to these particular duties, then her reference to these powers of the Registrar may not avail her. The reference may only avail the claimant/judgment creditor if the making of a PCO is held to be a ministerial act which she had been given the power to perform. To that I shall shortly come below.

[48] In addition to these administrative powers the Registrar has, what may conveniently be called emergency powers under section 13 of ***the Act*** (see paragraph 7). Under this section the Registrar has the competence of a Judge in Chambers upon the satisfaction of two conditions precedent. First, there must be proof of urgency and secondly, the Judges of the Supreme Court must be absent. Having the competence of a Judge in Chambers appears to mean that even if something arose which impinge on the liberty of the subject as a matter of urgency, the Registrar would be incompetent to consider it. That is so for two reasons. In the first place, such matters are dealt with in open court. Secondly, unless specifically authorised to do so the Registrar cannot sit in open court. Accordingly, the Registrar may sit in open court in bankruptcy matters where she has jurisdiction and the proceedings are required to be held in open court either under the ***Bankruptcy Act*** or rules of court relating to bankruptcy. Otherwise, the Registrar sits in Chambers and the nature of her duties seems to require no more.

[49] I do not think it is an over statement to say that the jurisdiction of the Registrar to deal with matters touching and concerning the business of the Supreme Court is a much circumscribed one. If that is not already obvious, the language of sections 3 and 4 of the ***Registrar Act*** amply demonstrates this. Section 3 provides:

> "3. *(1) The Chief justice may by order published in the Gazette empower the Registrar to exercise, as from such date as shall be specified in such order, jurisdiction in relation to all the matters specified in the Schedule or in relation to such of such matters as may be specified in such order.*
> *(2) The Chief Justice may by order amend or revoke any order*

made under subsection (1), and any such amending or revoking order shall specify the date on which it shall take effect.

(3) Where under any amending or revoking order made under subsection (2) the Registrar ceases to have jurisdiction in relation `to any matter, then, in relation to any such matter pending before the Registrar on the date specified in such amending or revoking order, the following provisions shall have effect, that is to say—

(a) where the matter has not yet been heard by the Registrar, then such matter shall be deemed to be pending before a Judge;

(b) where the matter has been part heard by the Registrar, then the Registrar shall continue to have and exercise jurisdiction in relation to such matter and may make an order thereon as if such amending or revoking order had not been made, but thereafter the Registrar shall cease to have and exercise jurisdiction in relation thereto."

[50] Section 4 of the ***Registrar Act*** is quoted below:

"4. – (1) Where under this Act the Registrar has jurisdiction in relation to any matter, then, subject to this Act, the Registrar shall have and may exercise in relation to the matter all the powers of the Court or a Judge, including the power of making an order in such matter, which order may include provision for costs, certificate for counsel or other consequential matters; and any such order so made by the Registrar shall, subject to this Act, have the same \ effect as it had been made by the Court or a Judge.

(2) Where under this Act the Registrar exercises jurisdiction in relation to any matter, then ---

(a) in relation to such matter, the Registrar shall have all the the rights, powers, immunities and privileges of a Judge;

(b) any party to the proceedings may, if he so desires, appear by counsel or solicitor."

[51] It appears to me that when it comes to hearing applications and making orders, the Registrar is less like the Resident Magistrate who has been described as a creature of statute and more a spawn of the Chief Justice. That is to say, although the matters which come within the purview of the Registrar have their genesis in statute, the clothing of the Registrar with that jurisdiction is not coterminous with the passage of the ***Registrar Act.*** Ultimately the jurisdiction to deal with any matter is that which is conferred upon the Registrar by the Chief Justice.

[52] Under the ***Registrar Act*** the Parliament sets out the broad parameters of the competence of the Registrar. Initially the limits are laid down in the Schedule to the ***Registrar Act***. The Schedule may be amended by "adding to, altering or removing therefrom, the duties and powers" given to the Registrar. The power to so amend the Schedule resides in the Minister and he does so by order published in the Gazette: ***Registrar Act***, section 9. It then becomes a decision for the Chief Justice whether to confer jurisdiction upon the Registrar in relation to all or some of the matters appearing in the Schedule (see section 3(1) of the ***Registrar Act***). This conferral of jurisdiction upon the Registrar by the Chief Justice is noticed to the public by way of an order published in the Gazette. Publication in the Gazette is an absolute necessity as the Registrar enjoys jurisdiction in these matters at the pleasure of the Chief Justice. In other words, the Chief Justice is at liberty to amend or revoke the jurisdiction previously granted to the Registrar.

[53] So, the jurisdiction of the Registrar to hear applications and make orders is to be gathered, in the first instance from statute namely, ***the Act*** and the Schedule of the ***Registrar Act*** and secondly from the orders published in the Gazette. Any other claim to jurisdiction for the Registrar must find expression in her ministerial powers. How then is this to be squared with rule 2.5(1), on which the claimant/judgment creditor relies? Under this rule, the Registrar may exercise the "functions of the court in accordance with these Rules and any directions made by the Chief Justice." That the Registrar may do provided the exercise of the function is consonant with any other "enactment, rule or practice direction".

[54] There is nothing profound in the recitation of this rule. The rule merely lists the classes of persons who may perform the functions of the court. But these classes of persons are not all created equal. For example, a Master 'shall exercise such authority and jurisdiction of a Judge in Chambers': section 8 of ***the Act***. A reading of section 9 of **the Act** makes it pellucid that a Master does not have the general subject-matter jurisdiction of a Judge. In my opinion rule 2.5 (1) cannot be read as conferring jurisdiction on the classes of persons therein referred to. So the rule cannot, for example, make lawful the exercise of a function of the court by the Master which is outside the authority and jurisdiction of a Judge in Chambers, even if the Master were to exercise that function in accordance with the dictates of the rules or directions of the Chief Justice.

[55] The question is from whence did the Registrar derive the power to hear the application to grant the PCO when she purported to exercise a jurisdiction to do so? Was the Registrar there exercising a ministerial or judicial function? During the submissions it was disclosed that the practice has developed, and apparently is of some antiquity, for the Registrar to entertain such applications. This practice is not universal in its observance as similar applications are placed before a Judge in Chambers. There seemed to be consensus at the Bar that the Registrar could not go on to make a PCO final. It was accordingly disputed as to whether the making of a PCO is procedural or jurisdictional. Consequently, it may be useful to examine the procedure for application of a PCO and the nature of a charging order.

[56] As was said above (paragraph 28), the application must be made *ex parte*, and in this jurisdiction the Supreme Court is the only competent forum. The application must be supported by an affidavit, under rule 48.3, stating the name and address of the judgment debtor; identify the judgment or order to be enforced; state that the applicant is entitled to enforce the judgment; certify the amount remaining due under the judgment; where the application relates to land, identify that land. There are also requirements to be satisfied where the application relates to stock. In the case of any other personal property the deponent must identify that property and say whether any

other person is believed to have an interest in the property. Finally, the deponent must state to the best of the deponent's information and belief that the debtor is beneficially entitled to all or some part of the land, stock or personal property as the case maybe.

[57] A charging order is granted by the Court to secure payment of money pursuant to a judgment or order. Although the charging order has been described as a form of compulsory mortgage**,** it differs from a mortgage. The differences are, it passes no property (notionally or actually) to the judgment creditor, no right of possession or foreclosure but only a right of realisation by the judicial procedure created under rule 48.11. The charging order is therefore a security for a judgment debt and is imposed on property in which the judgment debtor is beneficially entitled (see rule 48.3 (2) (h))**.** A charging order extends to cover the judgment debt, interest and costs even without being expressly so stated: ***Ezekiel v Orakpo*** **[1971]** 1 WLR 340**.**

[58] Under rule 48.9 there is no difference between the effect of a PCO and a final charging order. This rule is entitled, "Effect of a provisional or final charging order" and appears immediately below:

> *48.9 (1) No disposition by a judgment debtor of an interest in property subject to a provisional or final charging order is valid against the judgment creditor.*
>
> *(2) No person or body on whom an order was served under rule 48.6(2)(c) or (d) may permit the transfer of any stock specified in the order or pay any interest or dividend payable out of the stock to any person while the order remains in force.*
>
> *(3) Where after service of the order the person or body listed in rule 48.6(2)(c) or (d) makes a transfer or payment prohibited by paragraph (2), that person is liable to pay the judgment creditor an amount equivalent to the value of the stock transferred or payment made or as much of it as is necessary to satisfy the judgment debt and costs.*

The charging order may be enforced by an order for sale of the charged property by virtue of rule 48.11.

[59] So, the charging order is a court imposed equitable charge for securing a money judgment or order. While it does not divest the judgment creditor of his proprietary rights, its interference with those rights is reflected in the judgment debtor's inability to dispose of the charged property to the detriment of the judgment creditor. Although the right to dispose of the charged property is part of the bundle of rights the owner of property enjoys, any disposal of the judgment debtor's interest therein is invalid against the judgment creditor. Therefore, in as much as the making of a PCO represents an interference with property rights, I hold that its making sounds in the vein of jurisdiction rather than in procedure.

[60] Perhaps now is a good time to segue into a consideration of the procedure for the grant of a charging order. The most profound observation is that the judgment creditor is not entitled to a PCO as of right. The language of section 28D of ***the Act*** as well as rule 48.5 is directory. That is, both say the court 'may' make, in the former 'a charging order' and in the latter, 'a provisional charging order'. It is therefore clear that the court has a discretion whether or not to make a charging order, be it final or provisional. In other words, at either the *ex parte* hearing for the PCO or the hearing to make the PCO final, the court has to consider whether in all the circumstances the charging order should be granted and if it is to be granted, what its reach should be.

[61] What, then, may be some of the matters meet for the court's consideration in the exercise of its discretion whether to make a charging order? Under the **UK's *Charging Orders Act 1979 (COA 1979),*** the court is required to consider matters such as the personal circumstances of the debtor and whether any of his other creditors would likely be unduly prejudiced. Although these requirements have not been the subject of a statutory command to a Jamaican court, any court which is anxious to do justice would take them into consideration as a matter of course. In any event, the court has at least to consider all the circumstances before deciding to grant the charging order.

[62] Since the making of a charging order is a two stage process, the question is, at what stage would the above considerations be best ventilated? Be it remembered that in the first instance the application is made *ex parte*. Therefore, only the bare minimum required to be evidenced in the affidavit would be before the court. For example, although the property to be charged may far exceed in value the sum due under the judgment, that disproportion may not be apparent for want of a valuation which is not required at this stage as the land has only to be identified.

[63] Even if the title is exhibited and shows the value of a mortgage endorsed thereon that endorsement may only give an imperfect indication of the value of the property. To require the court to consider the disproportion in the value of the land *viz-a-viz* the outstanding judgment debt for which the application is being made at the *ex parte* hearing would consequently be impractical. The same impracticality attaches to a consideration of the personal circumstances of the debtor and the impact of the likely undue prejudice upon other creditors of the debtor.

[64] This impracticality may very well have been the underlining yet unspoken rationale behind the consensus that the Registrar cannot go on to make a final charging order. I am therefore of the view that these considerations should be left for the second stage of the process of granting a charging order, that is, at the date set for consideration to make the PCO final. If that is the appropriate procedure, and the grant of the PCO remains a discretionary act, what is the discretion that is being exercised at the hearing for the PCO? To answer this question a brief excursus on the subject of discretion may prove instructive.

[65] Discretion, it has been said, is an area left open by a surrounding belt of restriction: Ronald Dworkin ***Taking Rights Seriously*** page 31. In discussing the positivist use of the concept of discretion, Dworkin identified three relevant senses in which the word is used. First, where one has a non-reviewable power to make a decision such as inheres a final appellate court. Secondly, to use judgement when making a decision as in the circumstance where for some reason the standards an official must apply cannot be applied mechanically. Thirdly, to those instances of

decision-making in which there are no applicable standards. Dworkin classified the first two as 'weak' senses and the third as strong, *ibid*.

[66] Broadly, judicial discretion has been defined as:

> *"the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."* (***Black's Law Dictionary*** 8th edition)

For the purposes of argument I will classify the first meaning given by ***Black's Law Dictionary*** as strong and the second as weak. The second or weak meaning rendered by ***Black's Law Dictionary*** appears to square with Dworkin's second weak sense of the word. It is clear, as Dworkin said that discretion is a relative concept. So, whenever discretion is claimed to exists it is imperative to ask discretion according to which standard or what authority. To relate it to the legal question before me, in what sense is the court exercising its discretion when it hears an application for a PCO?

[67] At this stage all the court is duty bound to do is to be assured of the sufficiency of the affidavit required by rule 48.3. In my opinion this is no more than a mechanical act of checking to see that the affidavit contains the several pieces of information itemised in the rule. If rule 48.3 represents the standard the court is to apply in deciding whether to make a PCO, then it is apparent that the discretion being exercised is not judicial in the strong sense articulated by Dworkin or rendered by ***Black's Law Dictionary***. No reflection is required by the court as the act of ensuring the sufficiency of the requisite affidavit is no more than a box ticking exercise. There is therefore accord with the definition of ministerial rendered as "obedience to instructions ... instead of discretion, judgment or skill". There is accord if the use of discretion here is understood in the weak sense. If that is correct, then the discretion being exercised here is in the weak sense, that is, either to act or not to act. In other words, the discretion being exercised is either to grant or not to grant the PCO, for example if the applicant failed to include one of the requisites of rule 48.3.

[68] There is nothing inconsistent in the foregoing and the power to make a charging order appearing under the part of ***the Act*** sub-headed, "Jurisdiction of Supreme Court of Judicature". Herein is the pertinence of the observation of Their Lordships in ***Beverley Levy v Ken Sales & Marketing Ltd***, *supra*. Here, of course, the Privy Council was addressing itself to the original jurisdiction of the court to make the charging order, saying what has become conventional wisdom that the Rules cannot invest the Court with jurisdiction. The jurisdictional question is therefore a dichotomous one. The first part of the question has been settled by the enactment of section 28D, *supra*, that is, whether the Court has the power to make a charging order. As an aside, the passage of the amending legislation to insert section 28D post dates the promulgation of the ***Civil Procedure Rules 2002***.

[69] The second and thorny part of the jurisdictional question is who has authority to grant a charging order? Put another way, when the legislature says in section 28D that the "Court ... may make a charging order" what is its intendment? Unto whom has the jurisdiction of the Supreme Court to grant charging orders been given? The question may be approached by analogy to what obtains in the United Kingdom (UK) which has a statute dedicated to the subject, the ***COA 1979***.

[70] The ***COA 1979*** gives power to the High Court or a county court to make a charging order in the similar circumstances as obtain locally: section1(1). The ***COA 1979*** also makes provision for the forum in which the application is to be made. I think it best to quote section 1(2):

> *"The appropriate court is-*
>
> *(a) in the case where the property to be charged is a fund in court, the court in which that fund is lodged;*
>
> *(b) in a case where paragraph (a) above does not apply and the order to be enforced is a maintenance order of the High Court, the High Court or a county court;*
>
> *(c) in a case where neither paragraph (a) nor paragraph (b) applies and the judgment or order to be enforced is a judgment or order of the High Court for a sum exceeding the county court limit, the High Court or a*

county court; and

(d) in any other case, a county court.

In this section 'county court limit' mean the county court limit for the time being specified in an Order in Council under section 145 of the County Court Act 1984, as the county court limit for the purposes of this section and 'maintenance order' has the same meaning as in section 2 (a) of the Attachment of Earnings Act 1971."

[71] The ***COA 1979*** goes on to stipulate, in section 2, what property may be charged. Section 3 makes provisions to supplement the two preceding sections. This section lays down, among other things, that a charging order may be made either absolutely or subject to conditions such as notifying the debtor, that a charge imposed by a charging order has the same effect as an equitable charge under the hand of the debtor and variation and discharge of the charging order. Under section 5 provisions are made for a stop orders and notices. These are the substantive provisions of the COA1979. From this overview of this short statute it is patent that the matter of which personnel may entertain an application in the respective fora competent to grant a charging order. That was left for the rules of court.

[72] Under the English rules order 50/1-9/8 "the power of the High Court to impose a charging order may be exercised by the Judge or Master, Admiralty Registrar, or District Judge" (***The Supreme Court Practice 1993*** volume 1). Leaving aside the County Court since no inferior court in Jamaica may grant a charging order, in the UK High Court the Master and Admiralty Registrar enjoy concurrent jurisdiction with the Judge to grant a charging order. Interestingly, there appears to be no further circumscription of the jurisdiction that is, confining the Master and Admiralty Registrar to conditional charging orders, for example. Therefore, although it is by substantive legislation that the English High Court and County Court are invested with the jurisdiction to grant a charging order, it is through subsidiary legislation that the authority is conferred. From this it may be concluded that it is the court which must be seized with the subject matter jurisdiction to be conferred by substantive legislation but the conferral of jurisdiction upon the court's

personnel to treat with those applications may be given under subsidiary legislation such as rules of court.

[73] This puts in doubt the submission of learned counsel for the Real Estate Board that the Registrar cannot be conferred with the jurisdiction of the Court by Rules of Court or ordinary legislation. First, analogically, that is how the matter is treated in the UK which has an entire Act of Parliament dealing with the subject. Secondly, as has been shown above in the consideration of the ***Registrar Act***, jurisdiction is conferred on the Registrar initially by ordinary legislation and ultimately by an order of the Chief Justice published in the Gazette. Thirdly, the Registrar has the power of Judge in Chambers (in prescribed circumstances but the power nevertheless), which is also given by ordinary legislation. Fourthly, section 12 of ***the Act*** empowers the Registrar to "transact all such ministerial business of the Supreme Court ... as are assigned to him by rules of court."

[74] Since the making of a charging order is cognisable before a Judge in Chambers and the Registrar can exercise the power of a Judge in Chambers it is arguable that the specific authority to hear and determine an application for a charging order can be given to the Registrar under the **CPR**. It is therefore convenient at this point to consider the other submissions made by Miss Burgess on this issue. The distinction between **Hinds v R,** *supra* **and DPP v Kurt Mollison,** *supra*, is that there is no transfer of the Court's function or removal of its jurisdiction to another arm of government, namely another judicial forum or the executive, respectively. The question before me is who of the Court's personnel can exercise the Court's power to make a charging order. If that power can be jointly exercised by judicial or quasi-judicial officers of the same Court, as it is in the UK, then the concurrent exercise of the jurisdiction to do so does not weaken the constitutional position of the Judge. Fundamentally, if I am correct that the making of a PCO is ministerial, then its grant is not an exclusively or intrinsically judicial act. Accordingly, to confer that jurisdiction upon the Registrar by rules of court would not be an interference with the jurisdiction of the Judges of the Supreme Court.

[75] To say that the power to entertain an application for a PCO may be given to the Registrar is not to assert in the same breath that it has been in fact so conferred. While

both the **CPR** and ***the* Act** speak to what the 'court' may do in respect of a charging order, neither gives any helpful guidance as to what is meant by 'court'. Under the rules "court" means the Supreme Court. However, ***the Act*** gives no meaning for the word. The ***Interpretation Act*** is equally unhelpful it merely says "court means any court of Jamaica of competent jurisdiction." It cannot therefore be said, without more, that 'court' includes the Registrar by a consideration of what the word 'court' means. The matter is further shrouded in doubt by the policy of the rules (ably addressed in the submissions of Mr Powell) to identify and distinguish when a function is to be exercised by the Registrar either separately or concurrently with a Judge. Significantly, the rules use 'court' in contradistinction to 'registrar' (see paragraph 13).

[76] Consequently, it would be something of a leap to say that 'court' includes 'registrar'. And if 'court' does not include 'registrar' then the Registrar has not been specifically conferred with the jurisdiction to hear applications for PCOs. This conclusion finds further support in the treatment of the Registrar as the spawn of the Chief Justice under the ***Registrar Act***. It is the transparently clear legislative policy to treat with meticulous care and surgical particularity the matters which fall within the competence of the Registrar, and then to require notification to the public by way of publication in the Gazette. So that the abundantly clear and inescapable conclusion is whatever jurisdiction is given to the Registrar is discoverable in the Gazetted order.

[77] I would venture to say that the same applies to the rules. Consequently, although I have decided that the granting of the PCO is nothing more than ministerial, even the grant of ministerial powers must be evidenced in the Rules. The Registrar, being a quasi-judicial officer, is in no stronger position than an inferior court. In that vein, the following quotation is rather apposite, "nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged" (***Peacock v Bell***, 1 Saund, 74, cited ***London v Cox***, L.R. 2 H.L. 259). As is evident from the position in the UK, the conferral of this jurisdiction upon the Registrar is not a matter to be left to speculation. It must be unequivocally and expressly given. I conclude therefore that the Registrar has not been invested with the requisite authority to entertain an application for the grant of PCO.

[78] The upshot of this is that I am not persuaded by the attempt by learned counsel for the judgment creditor to invoke the emergency powers of the Registrar under section 13 of ***the Act***. Even if I were to equate the application for the PCO with the freezing and search orders, and I am not persuaded that I should, the preconditions entitling the Registrar to act under this section would still have been left a begging on the material before me. It appears section 13 was included in **the Act** to provide for the colonial practice of the Supreme Court Judges making full use of their leave passage. Those days are gone and with a judiciary largely home grown, the efficacy of section 13 is nigh if not absolutely nugatory.

[79] Having found that the Registrar had no jurisdiction to grant the PCO, can the signing of the PCO be treated as a procedural irregularity remediable under the court's case management powers given by rule 26.9? In order to have resort to this rule a predicate finding would have to be made that in granting the PCO the Registrar was exercising a procedural function, as was submitted by learned counsel for the claimant/judgment creditor. While it is true that the grant of a charging order is a two stage process and the first stage is no more than ministerial, I have endeavoured to show that even at this stage the PCO interferes with substantive rights with the consequences identified (see paragraphs 58-59).

[80] In my opinion, in so far as is relevant to the grant of a PCO, what rule 26.9 contemplates are things such as, for example, a failure to particularise the affidavit as required by the rules or inadequate service either of the documents required to be served or the number of days before the hearing. The competence to entertain the application is outside the contemplation of the rule. I am consequently in agreement with counsel for the interested parties that rule 26.9 have no application in this case and therefore the decisions in ***Bremer Vulcan Schiffbau and Maschinenfabrik v South India Shipping Corporation Ltd, Phillips v Symes (No. 3), and Fawdry v Murfitt*** *supra*, are inapposite. Having granted the PCO without the substantive power or authority to do, that act of the Registrar is void and of no effect. Having so declared the grant of the PCO by the Registrar, it is as if the Registrar never acted, so there is nothing to put right.

[781] I hold that the PCO which the Registrar purported to grant on the 30th November, 2012 and 19th November, 2013, charging the property in which the judgment debtor has a beneficial interest with the judgment debts of $14,877,404.00 and $6,955,403.62 respectively, to be null and void. Further, the Registrar of Titles is ordered to forthwith remove from the respective registered titles the endorsement of the PCOs purportedly made by the Registrar. An award of costs is made to the interested parties against the claimant/judgment creditor, to be taxed if not agreed.