

IN THE GRAND COURT OF THE CAYMAN ISLANDS

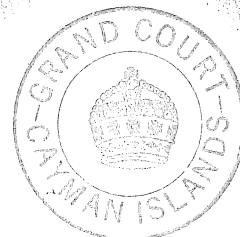
CAUSE NO. FSD 40 OF 2015 ASCJ

IN THE MATTER OF THE ARBITRATION LAW 2012

AND THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW (1997 REVISION)

BETWEEN

- (1) RICHARD VENTO
- (2) LANA VENTO
- (3) GAIL VENTO
- (4) RENEE VENTO
- (5) NICOLE MOLLISON
- (6) MUCH LOVE INTERNATIONAL DYNASTY TRUST
- (7) VITA INTERNATIONAL DYNASTY TRUST
- (8) LOKI INTERNATIONAL DYNASTY TRUST
- (9) FOUNDERS INTERNATIONAL DV DYNASTY TRUST
- (10) RVLP, LLC
- (11) NVLP, LLC
- (12) GVLP, LLC
- (13) DVLP, LLC
- (14) TOTAL TRUST SERVICES, LLC
- (15) FOUNDERS NEVIS, LLC



PLAINTIFFS

AND

WESTMINSTER, HOPE & TURNBERRY, LTD

DEFENDANT

IN CHAMBERS

BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

THE 23<sup>rd</sup> October 2015 and 25<sup>th</sup> DAY OF NOVEMBER, 2015

APPEARANCES: Mr. Christopher Harlowe and Mr. Louis Mooney from Mourant Ozannes for the Plaintiffs

The Defendant was unrepresented

REASONS FOR GRANT OF CHARGING ORDER

1. I made a charging order absolute in this matter on 23 October 2015. I asked Counsel to prepare a note of the issues given the rarity of an application for a charging order over shares, as opposed to immovable property. I then considered that for the sake of clarification, I should provide reasons for the decision to grant the order. Having been provided with Counsel's helpful note of the issues, I now do so.

## Factual background

2. In summary, earlier this year the Plaintiffs obtained leave to enforce and have entered as a Cayman judgment, three foreign arbitral awards against Westminster, Hope & Turnberry Ltd, the defendant company. This order was obtained under the applicable provisions of the *Arbitration Law 2012* and the *Foreign Arbitral Awards Enforcement Law (1997 Revision)* (**the Enforcement Order**). The defendant is a Nevisian company with assets in the form of certain shares (**the Shares**) and the proceeds attributable thereto, held in Cayman on its behalf by Concord Capital SPC Fund (**Concord**). The Plaintiffs had previously on 1 May 2015, obtained a *Mareva* injunction in relation to the Shares and the proceeds up to the value of the arbitral awards of USD9.7 million (**the Injunction**). The Plaintiff's concerns about the likely dissipation of assets with a view to defeating the enforcement of the judgment, informed the grant of the Injunction as they informed the grant of the Charging Order.
3. On 1 October 2015, the plaintiffs applied ex parte for, and were granted, a charging order *nisi* in accordance with the provisions of Order 50 of the Grand Court Rules (**the GCR**) and section 29 and the Third Schedule of the *Judicature Law (2013 Revision)* (**the Law**). Following that, the next hearing was this, the *inter partes* hearing at which I considered whether the charging order *nisi* should be made absolute.

## **The power to impose a charging order**

4. GCR Order 50 vests in the Grand Court power to make a charging order over a judgment debtor's property for the purpose of enforcing a judgment or order of the Court. In addition to the procedures set out in Order 50, section 29 and the Third Schedule to the Law both govern the making of charging orders. The power to make charging orders, which is brought into effect by section 29 of the Law, is set out in paragraph 1 of the Third Schedule to the Law as follows:

*Where, under a judgment or order of the Grand Court or a summary court, a person (the "debtor") is required to pay a sum of money to another person (the "creditor") then, for the purpose of enforcing that judgment or order, the Court may make an order (a "charging order") in accordance with this Schedule imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.*

5. Order 50 sets out the required procedure, whereby the applicant will apply initially *ex parte* for an order *nisi* (or provisional order), with the Court subsequently being asked to finalise (or make absolute) the order at an *inter partes* hearing.
6. While the typical application for a charging order before this Court will concern immovable property, the class of assets which can properly be the subject of a charging order and which is set out in paragraph 2 of the Third Schedule to the Law, is extensive. They include interests held by the debtor beneficially in land, securities such as CI government stock, stock of any body incorporated within the Cayman Islands, shares in a mutual fund and funds in court. "Stock" is defined in paragraph 5(1) as including "*shares, debentures, and any securities of the body concerned*". Paragraph 2(3) specifies

that in relation to securities, the court may also provide for the charge to extend to any interest or dividend payable in respect of the asset.

7. Here, the Shares held by Concord are issued by a company incorporated in the Cayman Islands, and so, along with their proceeds, are properly the subject of the Law.
8. Paragraph 1(2) of the Third Schedule provides the court with guidance in exercising its discretion as to whether to make a charging order. It states:

*In deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to-*

*(a) the personal circumstances of the debtor; and*

*(b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.*

9. The applicable principles in exercising the Court's discretion in granting a charging order are well-settled. Whilst there does not appear to be Cayman authority precisely on point, the following classic statement of Lord Brandon at page 690 in *Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation)* [1982] 1 All ER 685, was cited in both the 1999 *Supreme Court Practice* at page 859 in relation to wording identical to the GCR; and in relation to the updated wording as applicable in England and Wales in their Civil Procedure Rules, as noted in the *White Book 2015* at paragraph 73.4.5, and in the commentary on "Part 73 Charging Orders" in *Atkins Court Forms: Civil Procedure Rules 1998 (2015)*. Lord Brandon's *dicta* are as follows:

*In cases where a charging order being made absolute is not precluded by a winding-up order, those principles can, in my view, be summarised as follows:*

*(1) The question whether a charging order nisi should be made absolute is one for the discretion of the court.*

*(2) The burden of showing cause why a charging order nisi should not be made absolute is on the judgment debtor.*

*(3) For the purpose of the exercise of the court's discretion there is, in general at any rate, no material difference between the making absolute of a charging order nisi on the one hand and a garnishee order nisi on the other.*

*(4) In exercising its discretion the court has both the right and the duty to take into account all the circumstances of any particular case, whether such circumstances arose before or after the making of the order nisi.*

*(5) The court should so exercise its discretion as to do equity, so far as possible, to all the various parties involved, that is to say the judgment creditor, the judgment debtor, and all other unsecured creditors.*

*(6) The following combination of circumstances, if proved to the satisfaction of the court, will generally justify the court in exercising its discretion by refusing to make the order absolute: (i) the fact that the judgment debtor is insolvent; and (ii) the fact that a scheme of arrangement has been set on foot by the main body of creditors and has a reasonable prospect of succeeding.*

*(7) In the absence of the combination of circumstances referred to in (6) above, the court will generally be justified in exercising its discretion by making the order absolute.*

10. On the instant facts, the Defendant (and judgment debtor), despite being duly served in accordance with the substituted service order, has failed to appear. Thus, and bearing in mind points 2, 4 and 5 of the above guidance, it has failed to demonstrate, or even suggest, that the interest it holds in the Shares is not its beneficial interest, or that any other party has any interest in the Shares.
11. As regards point 6 in Lord Brandon's guidance, no evidence suggesting insolvency of the Defendant judgment debtor was adduced. Therefore, in the absence of any persuasive evidence or arguments to the contrary, by point 7 this would incline the court towards making the order *nisi* absolute.
12. In conclusion, in considering all of the circumstances of the case, including the absence of evidence formally before the Court of any other party having an interest in the Shares and no issues arising on insolvency, I was satisfied that I had power to make the charging order final (absolute).
13. For completeness, I note that the Plaintiffs brought to my attention that in separate proceedings in New York, the Defendant submitted an affidavit, purported to be sworn by an external accountant of the Defendant, which stated that the Defendant merely held many of the Shares as nominee. However, that evidence is not sworn, filed or otherwise formally before this Court. As such, without more, this Court has no ability or obligation to consider it. To the extent that the Court would have considered the affidavit it was submitted by the Plaintiffs that little weight should attach to it given the bare and unsupported nature of the assertions contained therein, and the failure by the Defendant to put the deponent forward, and/or advance the affidavit as evidence, or indeed any evidence or submissions at all. I agreed and so disregarded the affidavit.

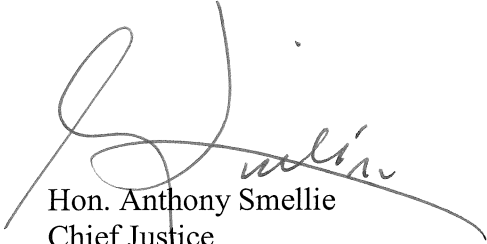
#### **The stop notice and stop order**

14. At present by operation of the Injunction, Concord and the Defendant are prohibited from dealing with the Shares or their proceeds. In addition, as at the time of the granting of the order *nisi*; by GCR O. 50, r. 5(1), no subsequent purported disposition by the judgment debtor may be held as valid as against the judgment creditor, so long as the order remains in force. Furthermore, by O. 50, r. 5(2), upon service upon Concord, Concord was prohibited from permitting any transfer of the Shares or proceeds attributable thereto (except with the authority of the Court), until the order was discharged or made absolute.
15. O. 50, r. 3(2), states that where the order *nisi* is made absolute, it shall be made in Form no. 34 of appendix 1. This prescribed form contains a "stop notice" directed at the third party/transfer agent (here, Concord) requiring that it must not register any transfer or make any payment without notice to the plaintiffs/judgment creditors. Although not clear from the face of the form, such notice has a practical effect akin to a 14 day freezing

order, restraining any transfer until 14 days after notice to the judgment creditor is sent. GCR O. 50, r. 12, states:

*“Where a stop notice has been served in accordance with rule 11 [which applies to “Securities not in court”], then, so long as the stop notice is in force, the person or body on which it is served shall not register a transfer of the securities or take any other steps restrained by the stop notice until 14 days after sending notice thereof, by post, to the person on whose behalf the stop notice was filed, but shall not by reason only of that notice refuse to register a transfer, or to take any other step, after the expiry of that period.”*

16. That provision offers some comfort to the Plaintiffs/judgment creditors against unwarranted dissipation of assets. For clarity it seemed to me that it may be useful that explicit reference to this provision is made in the order absolute and I so directed. The overarching Injunction will expire on its own terms by 26 November 2015, although the Plaintiffs say they will apply to have it extended as necessary to facilitate enforcement.



Hon. Anthony Smellie  
Chief Justice  
November 25, 2015