



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO: 121 OF 2016 (IKJ)**

**IN THE MATTER OF SECTION 29 JUDICATURE ACT & GCR Ord. 50**

**AND IN THE MATTER OF THE POULTON FAMILY TRUST**

**BETWEEN:**

- (1) MICHELE ALEXIA CANHAM**
- (2) JAMES ALEXANDER POULTON**
- (3) NICHOLAS JAMES POULTON**
- (4) JAMES MICHAEL POULTON**
- (5) DAISY ELIZABETH HOUGHTON-POULTON**

**Plaintiffs**

**AND:**

- (1) CUTTY SARK LAND COMPANY**
- (2) DEBORAH MCMULLAN POULTON**
- (3) WILSON MALCOLM MCMULLAN**
- (4) CHRISTINE JANE MCMULLAN**
- (5) CAYMAN NATIONAL TRUST CO. LTD.**
- (6) CNT NOMINEES LTD**

**Defendants**

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**IN COURT**

**Before:** The Hon. Justice Kawaley

**Appearances:** Mr Neil McLarnon, Travers Thorp Alberga, for the Plaintiffs

**Heard:** On the papers

**Draft Ruling circulated:** 5 July 2024

**Ruling delivered:** 16 July 2024

*Charging Order-interest in a trust-Judicature Act (2021 Revision) section 29, Schedule 3 paragraph 2-Grand Court Rules (2023 Revision) Order 50*

**RULING ON EX PARTE APPLICATION FOR ORDER NISI****Introductory**

1. There appear to be no published decisions on the approach this Court should take to an *ex parte* application for a Charging Order under section 29 of the Judicature Act (2021 Revision) (the “Act”), as read with Order 50 of the Grand Court Rules (2023 Revision) (“GCR”). The Plaintiffs’ *Ex Parte* Notice of Motion dated 7<sup>th</sup> June 2024 was supported by:
  - (a) the 5<sup>th</sup> Affidavit of Michele Poulton sworn on 5 June 2024; and
  - (b) short Legal Submissions which relied on the governing statutory provisions and the evidence supporting the application.
  
2. The property which it was sought to attach was D2’s interest in the Poulton Family Trust (the “Trust”). The pivotal submission which was made was the following:

*“6.The Court’s costs order against Deborah has now been assessed in the amount of US\$3,558,720.83. Deborah has not made any payment towards either the interim payment*

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*order nor the assessed costs. She has not made any attempt to agree payment towards the costs orders nor has she engaged substantively with the Plaintiffs' without prejudice correspondence.*

*7. The Plaintiffs, therefore, request the Court to exercise its power to make a charging order nisi in respect of Deborah's beneficial interest in the Poulton Family Trust."*

3. I considered it appropriate to deal with the application on the papers to save costs and it appeared that the Plaintiffs' counsel had rightly prepared a straightforward application in a suitably economical way. Nonetheless, bearing in mind that the 2<sup>nd</sup> Defendant ("D2") against whom the Order Nisi was sought is unrepresented, it seemed necessary to ensure that an application with significant consequences was not dealt with in an unduly summary manner.

### **Charging Orders: governing legal principles**

#### **The statutory provisions**

4. Section 50 of the Act provides as follows:

*"Schedule 3 shall have effect with respect to the imposition of charges to secure payment of money due or to become due under judgments or orders of the court; and the Schedule has effect to make provision for restraining and prohibiting dealings with, and the making of payments in respect of, certain securities."*

5. Schedule 3 to the Act, so far as is material, provides as follows:

*"1. (1) 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.*

*(2) 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. Property which may be charged*

2. (1) *Subject to subparagraph (3), a charge may be imposed by a charging order only on*

*(a) any interest held by the debtor beneficially in any asset of a kind mentioned in subparagraph (2), or any interest held by the debtor beneficially under any trust;*  
*or*

*(b) any interest held by a person as trustee of a trust (“the trust”), if the interest is in an asset of a kind mentioned in subparagraph (2), or is an interest under another trust, and —*

*(i) the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust;*

*(ii) the whole beneficial interest under the trust is held by the debtor unencumbered and for the debtor’s own benefit; or*

*(iii) in a case where there are two or more debtors all of whom are liable to the creditor for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit.*

*(2) The assets referred to in subparagraph (1) are —*

*(a) land;*

*(b) securities of any of the following kinds —*

*(i) any description of security issued by or on behalf of the Government of the Islands;*

*(ii) stock of any body incorporated within the Islands; and*

*(iii) shares in any mutual fund; or*

*(c) funds in court.*

*(3) In any case where a charge is imposed by a charging order on any interest in an asset of a kind mentioned in subparagraph (2)(b) or (c), the court may provide for the charge to extend to any interest or dividend payable in respect of the asset...*

***Provisions supplementing paragraphs 1 and 2***

*3. (1) A charging order may be made absolutely or subject to conditions as to notifying the debtor or as to the time when the charge is to become enforceable, or as to other matters..."*  
[Emphasis added]

6. The Act confers a very broad discretion to make a Charging Order. GCR Order 50 provides:

***"Order imposing a charge on a beneficial interest (O.50, r.1).***

*(1) The power to make a charging order under paragraph 1 of the Law shall be exercisable by the Court.*

*(2) An application by a judgment creditor for a charging order in respect of a judgment debtor's beneficial interest in any property may be made by an ex parte originating motion, and any order made on such an application shall in the first instance be an order, made in Form No. 33 of the Grand Court Rules – Volume II, to show cause, specifying the time and place for further consideration of the matter and imposing the charge in any event until that time.*

*(3) The application shall be supported by an affidavit —*

*(a) identifying the judgment or order to be enforced and stating the amount unpaid at the date of the application;*

*(b) stating the name of the judgment debtor and of any creditor of whom the applicant can identify;*

*(c) giving full particulars of the subject matter of the intended charge, including*  
—

*(i) in the case of securities other than securities in Court, the full title of the securities, their amount and the name in which they stand;*

*(ii) and, in the case of funds in Court, the number of the account;*

*(iii) in the case of land, the registration details.*

*(d) verifying that the interest to be charged is owned beneficially by the judgment debtor. Order imposing a charge on an interest held by a trustee (O.50, r.4) 4. (1) Save as provided by this rule, the provisions of rules 1, 2 and 3 shall apply to an order charging an interest held by a trustee as they apply to an order charging the*

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*judgment debtor's beneficial interest. (2) Instead of verifying the judgment debtor's beneficial ownership of the interest to be charged, the affidavit required by rule 1(3) shall state the ground on which the application is based and shall verify the material facts.*

*(3) On making the order to show cause, the Court shall give directions for copies of the order, and of the affidavit in support, to be served on such of the trustees and beneficiaries, if any, as may be appropriate.*

*(4) Rules 5, 6 and 7 shall apply to an order charging an interest held by a trustee as they apply to an order charging the judgment debtor's beneficial interest, except that, where the order is made under subsection (ii) or (iii) of paragraph 2(1)(b) of the Law references in those rules to 'the judgment debtor' shall be references to the trustee.*

*(5) Form Nos. 33 and 34 of Appendix 1 shall be modified so as to indicate that the interest is held by the debtor as trustee or, as the case may be, that it is held by a trustee (to be named in the order) on trust for the debtor beneficially.” [Emphasis added]*

7. The Rules accordingly on their face prescribe an initial *ex parte* application which requires the judgment creditor to make out a *prima facie* case that they have an unsatisfied judgment and have identified a qualifying asset belonging to the judgment debtor against which the judgment can potentially be enforced.

#### **Relevant case law**

8. No local case law on the approach to the initial *ex parte* application was identified by counsel or by my own superficial researches. However valuable guidance as to the approach to charging orders generally is afforded by a decision of this Court in which an order absolute was made in relation to shares, which was described as being “a rarity”. In *Vento Ltd. et al-v- Westminster, Hope & Turnberry Ltd* Smellie CJ (as he then was) opined as follows:

*“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 any Cayman authority precisely on point, the following classic statement of Lord Brandon at page 690 of 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 precisely the same as 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*

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*Charging Orders' in Atkins Court Forms: Civil Procedure Rules 1998 (2015). Lord Brandon's dicta are as follows:*

*I do not propose to examine individually these various authorities cited to us, the outcome of which necessarily depended in the end on the particular facts of each particular case. I shall rather try to distil from those authorities the principles of law which they appear to me collectively to establish. 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.”*

9. The normal rule, absent insolvency of the judgment debtor and the risk of prejudice to other unsecured creditors, is accordingly that a provisional order will be made absolute and the burden lies on the judgment debtor to demonstrate why this should not occur. This confirms the initial view suggested by a straightforward reading of the relevant statutory provisions, that at the *ex parte* stage it ordinarily suffice to show that a judgment debt is outstanding and that the judgment creditor has identified an asset belonging to the judgment debtor against which a Charging Order can validly be made.

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10. *Vento* was recently applied by Doyle J in making an order nisi absolute against shares in *Concorde Healthcare Limited-v-Hang Chuan-Cheng and Brilliant Apex International Limited*, FSD 194/2023 (DDJ), Judgment dated 26 February 2024 (unreported).

**Findings: merits of application for provisional Charging Order**

11. Applying the above legal principles to the evidence placed before the Court by the Plaintiff, it is clear that a sufficient case has been made out for the granting of the provisional Charging Order the Plaintiffs seek at this *ex parte* stage. D2 has a fixed interest in the Trust and is not merely the object of a discretionary power.
12. However, at the inter partes hearing the burden will be on D2 to show cause as to why the Order should not be made absolute. Subject to fixing a return date, the Plaintiffs are entitled to an Order in the following substantive terms:

*“1. Unless sufficient cause to the contrary be shown at a hearing before the Grand Court on the day of 2024 at a.m./p.m. that the interest of the Second Defendant, Deborah McMullan Poulton in the Poulton Family Trust and any distribution therefrom shall, and it is ordered that in the meantime it do so, stand charged with the payment of US\$3,558,720.83 together with costs and interest accruing at the prevailing rate together with the costs of this application.”*



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**THE HONOURABLE JUSTICE IAN RC KAWALEY  
JUDGE OF THE GRAND COURT**