IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC (FSD) 72

FSD 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

-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

IN CHAMBERS

Before:	The Hon. Justice Kawaley
Appearances:	Mr Tom Lowe KC of counsel with Neil McLarnon of Travers Thorp Alberga, for the Plaintiffs
	The Second Defendant ("D2") in person
Heard:	On the papers
Date of Judgment:	25 July 2025

Charging Order- inter partes hearing for defendant to show cause why order nisi should not be made absolute-whether hearing should be on the papers or orally -Judicature Act (2021 Revision) section 29, Schedule 3 paragraph 2 Grand Court Rules (2023 Revision) Order 50-FSD Users' Guide section B1.1

JUDGMENT

Background

1. By an *Ex Parte* Notice of Motion dated 7 June 2024, the Plaintiff applied for a Charging Order over D2's beneficial interest in the Trust by way of enforcement of a costs payable by her and assessed in the amount of US$3,558,720.83. A 'Ruling on *Ex Parte* Application for Order Nisi' was delivered on 16 July 2024 following a hearing on the papers and published on the Judicial website. An Order Nisi and was granted on 31 July 2024.

2. The parties agreed a stay to attempt to resolve the matter, but on or about 8 April 2025 the Plaintiff's attorneys requested a listing of the *inter partes* hearing. D2 emailed by way of response:

> "*I would like to take this opportunity to reiterate my previous request to the Court that this application is considered on the papers instead of an oral hearing. The Judge did previously confirm, on August 28, 2024, that he would deal with the application on the papers as the parties have agreed.*"

3. On or about 11 April 2025, the Plaintiff's attorneys emailed the Court as follows:

> "*The Plaintiffs do have concerns about limiting the consideration of the matter to the papers. It may be that his Lordship also has his own provisional views on whether the application is suitable for determination on the papers alone. If his Lordship's provisional view is that the matter is not suitable for determination on the papers, we would not seek to displace that provisional view*."

Appropriate mode of hearing

4. On 10 June 2025, for the reasons set out in a Case Management Ruling of that date, I gave the following case management directions:

(1) D2 shall file her evidence and/or submissions in opposition to the Plaintiff's application for a Charging Order against her beneficial interest in the Trust within 14 days of the date of this Ruling;

(2) as soon as practicable after D2's response is filed, the Court will consider whether the Plaintiffs need to reply and, if so, direct the filing of a reply within not less than seven (7) days from the date of the direction;

(3) as soon as practicable after the later of the Court directing that no reply from the Plaintiffs is required or the filing of the Plaintiffs' reply, an oral hearing will be held (with an estimated length of 1 hour) which D may attend remotely at the conclusion of which the Court will finally dispose of the Plaintiffs' application;

(4) the parties shall within seven days of the date of the present Ruling provide their dates to avoid for a 1-hour hearing.

5. An oral hearing was fixed for 24 July 2025.

Appropriate mode of hearing

6. On 11 July 2025, D2 emailed the Court in the following significant terms:

"*Attached to this email are two letters from my medical providers concerning my health and inability to attend the previously scheduled hearing before His Lordship on 24 July 2025 at 9AM.*

…. Given the unique circumstances of my medical situation, I once again reiterate my request that His Lordship deliver his ruling on the papers since I am not medically cleared to attend a hearing, or to do anything that produces stress.

Since it is I who bears the burden of establishing that the Order Absolute should not be made and given that the Plaintiffs have not articulated to the Court how they would be prejudiced by being deprived of an oral hearing, at this time I do not know what reasons the Plaintiffs have for objecting to a decision being made on the papers. In contrast, my reasons are clear…

1. I am at high risk of a stroke and/or death… That risk is heightened if I am under any form of stress. Court may not be stressful for a trained lawyer, but it most certainly is for me. I am not exaggerating when I say that I would be risking my life attending a court hearing at this time. While this may not mean anything to the Plaintiffs or their lawyers, who I anticipate will respond in their usual derisive manner, it means something to me and to those who care for me…"

7. The FSD Users Guide Section B1.1 provides in material part as follows:

"*B1.1 APPLICATIONS —ON THE PAPERS*

…

B1.1(d) <u>Only in the most exceptional cases will the Court dispose of an application on the papers in the absence of the consent of the defendant/respondent (if any) to the Court doing so</u>. If an application is or is likely to be opposed the Court will usually require an oral hearing, in which case the applicant should file and serve a summons in the usual way…

B1.1(f) Any application for an interim injunction or similar remedy will normally require an oral hearing." [Emphasis added]

8. I initially listed a short oral hearing at the Plaintiffs' request, because of the significance of the relief sought. But in light of the compelling medical grounds for D2 seeking to avoid even remote participation in a short oral hearing, I feel bound to accede to her request that I deal with the application against her on the papers. Moreover it is clear from her recent email that she appreciates that she bears the burden of showing why the Order Nisi should not be made absolute.

9. On 22 July 2025 D2 responded affirmatively to my request for confirmation that she had no further materials to place before the Court other than those already in the Hearing Bundle prepared by the Plaintiffs' attorneys. The following day I notified the parties that I would deal with the application on the papers.

Governing legal principles

10. The governing legal principles on charging orders under section 29 of the Judicature Act (2021 Revision) (the "Act"), as read with Order 50 of the Grand Court Rules (2023 Revision) ("GCR") were recorded in my 16 July 2024 Ruling on the Ex Parte application for an Order Nisi (paragraphs 4-10).

11. Section 29 of the Act (erroneously referred to in paragraph 4 of the 16 July 20224 Ruling as section "50") provides that Schedule 3 governs charging orders. Paragraph 2 (1) (a) expressly confers jurisdiction to make a charging order in relation to "*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*". GCR Order 50 prescribes the procedure for obtaining a charging order over such beneficial interests. The governing principles on the granting of charging order relief are set out in paragraph 1 of Schedule 3 as follows:

> "*(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.*"

12. In *Vento Ltd. et al-v- Westminster, Hope &Turnberry Ltd* Smellie CJ (as he then was), after reviewing various English authorities, opined as follows:

> "*9. ....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."

13. *Vento* is authority for the proposition that although the Court should seek "*to do equity, so far as possible*" to all parties, unless (1) the judgment debtor is insolvent and (2) a viable scheme of arrangement with all their creditors is "*on foot*", the Court will "*generally be justified in exercising its discretion by making the order absolute*".

Merits of present application

14. In the present case the only question is whether the Court should refuse to make the Ex *parte* Order absolute by reason of the financial hardship it would cause D2. Legal policy in this area of the law heavily leans in favour of the judgment creditor because the civil justice system would fall into disrepute if judgments could not be enforced merely on the grounds of the difficulties enforcement will cause to the judgment debtor. Enforcement steps are only usually necessary in relation to money judgments where judgments debtors are unable to pay the relevant judgment debt.

15. Here, the Plaintiffs fairly claim that their rights would be trampled on if they were not able to recover their costs of successfully pursuing the present litigation, which was commenced 9 years ago none of which have been paid. On 23 March 2023, D2 was ordered to pay US$1 million as an interim payment on account of costs. The certificates of taxation for the Plaintiffs' costs were issued on 13 March 2024. In a nutshell, all they need to demonstrate to justify the charging order being made absolute is that they remain unpaid and there is no reasonable prospect of their being paid. Neither of these matters is disputed by D2.

16. D2's 6 September Affidavit entitled '*REPLY TO PLAINTIFFS' EX PARTE MOTION FOR CHARGING ORDER*' made the following averments:

- the *ex parte* hearing was legally unjustified (as explained in the *Ex Parte* Ruling, the Rules expressly provide for an initial e*x parte* application);

- D2 has other creditors in the Cayman Islands who provided legal services in connection with the present proceedings (the position of other creditors is a relevant consideration);

- the Plaintiffs are wrong to complain that she has not engaged with their without prejudice correspondence and/or was the sole party who acted unreasonably in the course of the litigation. As D2 has previously told the Plaintiffs in correspondence, she is effectively bankrupt, "*indigent with creditors in tow*". Her "*husband's efforts to see that I would have a living income, should not be absent due consideration*" (these are more powerful moral arguments than legal considerations, but are relevant to some extent);

- the new Trustee should be appointed as soon as possible and until this occurs a charging order is premature (this falls beyond the scope of the present application and has no clear connection to the merits of whether the order should be made absolute in legal terms);

- D2 proposes that because she is entitled to 40% of the Trust income, an independent trustee should be appointed to allow her to receive sufficient distributions to pay her debts. Absent that she is concerned about the lack of independent management of the underlying Trust assets controlled by the Plaintiff. Seemingly based on historic distributions, she contends it would take 50 years to repay the costs awards to the Plaintiffs in full (these are matters which are potentially relevant to the exercise of the Court's discretion in general terms);

- the Court should not make the Order Nisi absolute having regard to all the circumstances including the Settlor's desire that she be maintained by income generated by the Trust.

17. D2 has raised an unusual constellation of personal circumstances in support of her plea that the Court should decline to make the Order Nisi absolute. Most significantly:

    (a) she is bankrupt, not legally, but in financial terms;

(b) it would be contrary to the intent underpinning the Trust the continued validity of which the Plaintiffs' litigation was designed to vindicate if she were to derive no net benefit from the Trust assets;

(c) if the Plaintiffs' costs judgments are to be fully satisfied, she would likely receive no further net benefit from the Trust; and

(d) it is unsatisfactory that a new independent Trustee has not been appointed because the Plaintiffs presently control the underlying operating companies.

18. None of these points individually or collectively justifies refusing the Plaintiffs' application altogether. Dealing with these points briefly:

(a) D2's personal insolvency is relevant to how the charge should be enforced, but not whether it should be made absolute at all. The Ex Parte Ruling has been published on the Judicial website for over a year, and no other creditors have contacted the Plaintiffs' attorneys insisting on a right to be heard at the *inter partes* hearing;

(b) it would be morally repugnant if the Plaintiffs through enforcing their strict legal and commercial rights were to leave D2 in a condition their late father, the Settlor, would be horrified by. This does not justify refusing to the Plaintiffs in the position to fully enforce their rights as the dominant legal policy in this area requires;

(c) if D2's likely entitlement from the Trust is insufficient to pay the judgment debts in less than 50 years, this means the Plaintiffs will suffer corresponding prejudice through not being promptly paid. At best this consideration, if financially accurate, suggests the need for some form of compromise, but carries no weight in terms of making a case for refusing the Plaintiffs' application;

(d) it would be contrary to basis legal principle if the Plaintiffs were allowed to enforce their security free from any independent oversight out of assets ultimately owned by the Trust. D2 has no practical ability to monitor the way in which dividends are declared and the Court should not indirectly facilitate conflict of interest and self-dealing while acceding to the Plaintiffs' legitimate rights as creditors. This consideration justifies imposing some conditions on enforcing the charge, not declining to make it absolute.

19. Having reached these provisional conclusions, on 25 July 2025 I asked the Plaintiffs' attorneys if they wished to advance any submissions as to why, if the Order Absolute was granted, enforcement of it should not be stayed until such time as an independent Trustee was appointed. The Plaintiffs' attorneys forwarded an email dated 24 Marcg 20225 to D2 confirming that "*ITA Global Trust Limited of Unit 3-107A Governors Square, George Town, Grand Cayman, Cayman Islands have been appointed Trustee of the Poulton Family Trust*". Accordingly, it appeared that one of the most serious concerns raised by D2 in her initial response to the *Ex Parte* Ruling had been addressed.

20. The fact that a new independent Trustee is in place also creates the possibility that an objective analysis of what the underlying Trust assets are likely to generate in the immediate future can be carried out. This could conceivably open the door to a compromise which I would again encourage the parties to explore. The obvious elements of that compromise would include:

(a) D2 receiving a lump sum in return for her existing fixed interest in the Trust; and

(b) the Plaintiffs foregoing recovery of 100% of the amounts secured by the Charging Order to which they are legally entitled.

21. It is not properly open to me to compel the Plaintiffs to forgo their strict legal rights. But I would encourage them to do so in the strongest possible terms. The emotional, moral and psychological benefits for the Plaintiffs and their family legacy will far outweigh whatever they may be required to give up in monetary terms, if they are able to find the strength to bring this sorry litigation story to an honourable and decent end. As Shakespeare's Portia famously argued:

> "*The quality of mercy is not strain'd.*
> *It droppeth as the gentle rain from heaven*
> *Upon the place beneath. It is twice blest:*
> *It blesseth him that gives and him that takes*."

22. The Plaintiffs are entitled to a Charging Order Absolute.

Conclusion

23. For the above reasons, the Plaintiffs are an entitled to have the 31 July 2024 Charging Order Nisi made absolute. Unless any party applies to be heard as to costs by letter to the Court within 14 days, I would reserve the costs of the present application in the hope that they can be resolved as part of a narrow or wider settlement.

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THE HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT