

IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS

BETWEEN

JEAN-FRANCOIS PLANTE

Plaintiff

-and-

B.P. DEVELOPMENT LTD.

Defendant

-and

JEAN-CHARLES BENOIT

Intervenor



BEFORE the Chief Justice, the Hon. Mme. Justice Margaret Ramsay-Hale
Ms. Karen Savory instructed by Savory & Co. for the Plaintiff
No appearance for the Defendant
Mr. Anthony Gruchot for the Intervenor
Heard on 14 February 2019

JUDGMENT

1. As rehearsed in an earlier decision of this Court, the Defendant Company, B.P Development Ltd., is the owner of land in Long Bay ("the Land") which the Plaintiff, Mr. Plante and Mr. Benoit, the Intervenor, agreed to develop into a house, guest house, pool and pool house. They are each 50% shareholders and the only directors of the Company which was incorporated for the purpose of the development and hold their shares under and in accordance with a Shareholder's Agreement executed on 5 August 2014. They are also brothers-in-law.
2. It is Mr Plante's case that, when they acquired the property, they agreed that he would oversee the day to day development of the project and the Company would reimburse him for time spent and expenses incurred in that regard. Mr. Plante alleges that he started work on the project and invoiced the Company but the invoice was not paid. As a consequence, he stopped work on the project in March 2016 and commenced proceedings for breach of contract claiming the sum of \$74,574.43 as well as interest and costs against the Company. Judgment in default of appearance was entered on his behalf on 30 July 2018.

3. Mr. Plante seeks to enforce the judgment by way of a charging order over the Land. A charging order *nisi* was granted on 19 October 2018. On the Return Day, Mr. Benoit, appearing by Mr. Gruchot, objected to the Charging Order being made absolute. The matter was adjourned to permit Mr. Benoit to put in evidence to establish his standing and to show cause why the Order should not be made absolute.
4. In addition to putting in evidence in opposition to the application to make the order *nisi*, absolute, Mr. Benoit has also petitioned this Court to wind up the Company on the just and equitable ground.
5. Mr. Gruchot who appears on Mr. Benoit's behalf, submits that the Company does dispute the debt alleged by Mr. Plante in his claim but, because of the Shareholders' Agreement, the Company was unable to instruct attorneys to defend the claim as, under that Agreement, the Company is able to act only if both Directors/Shareholders agree. Mr. Plante took the default judgment fully aware that the Company could not act as he and Mr. Benoit had not agreed that the Company should defend his claim.
6. It is also plain, given the evidence that there was a meeting at the offices of F Chambers which resulted in KPMG being instructed to determine the contributions made by each shareholder by way of loan to the Company, and in Mr. Plante's case, salary foregone because the Company was insufficiently capitalized, that Mr. Plante knew the debt he claimed in his Writ was disputed. The whole purpose of the meeting and the instructions given to KPMG was to value the contribution each shareholder had made to the capital of the company. That process was not complete and no agreement was reached when Mr. Plante filed suit.
7. It is disingenuous for Mr. Plante to say to this Court, in opposition to Mr. Benoit's application to discharge the order *nisi*, that the Company did not enter an appearance to the proceedings or dispute the debt in the circumstances where he knew that the Company could only dispute the debt if he had agreed with Mr. Benoit to dispute the debt and he had not so agreed.
8. I don't know how to describe the assertion Mr. Plante makes in his affidavit in support of the application for a charging order *nisi*, that he "**was informed by [his] Attorneys that the defendant had not taken any step to set the judgment aside**" given that **he** knew he had not agreed with the other shareholder that the Company should take any steps. [emphasis mine]
9. '*Disingenuous*' doesn't seem to meet the case.

10. Mr. Gruchot submits that it is plain from the evidence before the Court that the Company is deadlocked and submits further, that it would have been more appropriate for Mr. Plante to have proceeded by way of an application to wind up the Company during which proceedings the issue of how much each shareholder had put into the Company could be determined. I agree.
11. Mr. Gruchot has now presented a petition on behalf of Mr. Benoit to wind up the Company on the just and equitable ground. Counsel submits that, as a matter of principle, the Court should discharge the order *nisi*, as it should not allow one creditor to have preferred status over another, particularly in these circumstances where the judgment creditor was aware that the Company against whom he won the judgment was unable to defend his claim for the reasons set out above.
12. Mr. Gruchot relies on the learning at p 858 of the White Book which 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 or debtor would be likely to be unduly prejudiced by the making of the order.”*
13. Ms. Savory challenges the notion that Mr. Benoit is a creditor but Mr. Gruchot submits, and I accept, that Mr. Benoit, having made capital contributions to the Company is a creditor of the Company and will be a creditor in the liquidation.
14. Mr. Savory QC, who also made submissions on behalf of Ms. Plante, submitted that the Court should make the Charging Order absolute as the valuation obtained by Mr. Plante suggests that, even if Mr. Plante were made a secured creditor thereby, the monies realised by the sale of the Company's sole asset - the Land - would easily exceed its debt due to Mr. Plante and Mr. Benoit would suffer no prejudice.
15. There are two considerations that weigh with the Court. The first is that the valuation exhibited by Mr. Plante is not accepted by Mr. Benoit. On the earlier valuation obtained by Mr. Benoit, there is every possibility that he would not be able to recover the monies he advanced as a shareholder to the Company as a loan if Mr. Plante's disputed claim was paid out of the Company's assets in priority to his claim. This is disapproved by the authorities: see note 50/9A/25 **White Book** and *Rainbow v Moorgate Properties* [1975]2 All ER 821 (CA).

16. The second consideration is that Mr. Plante obtained his default judgment in the certain knowledge that the claim would not be defended. I take the view that he should not, for that reason, be permitted to benefit from his status as a judgment creditor
17. Having considered the matter in the round, I say it would not be a proper exercise of the Court's discretion to make the Charging Order absolute. The application is dismissed and the Charging Order *nisi* is discharged.
18. Costs follow the event and Mr. Plante shall pay the Mr. Benoit's costs of and associated with Mr. Benoit's opposing the application.

DATED THE 7TH MARCH 2019


CHIEF JUSTICE

