IN THE SUPREME COURT OF BELIZE A.D. 2016
(CIVIL)

CLAIM NO. 276 of 2016
BETWEEN

Thomas Johnson — **Claimant/Judgment Creditor**

AND

Touch Management Ltd. — **Defendant/Judgment Debtor**

AND

The Proprietors Strata Plan No. 64 — **Garnishee/Applicant**

Before: **The Hon. Madame Justice Griffith**
Date of Hearing: **9th May, 2017.**
Appearances: **Ms. Pricilla Banner, Courtenay Coye LLP for the Applicant/Garnishee; Mr. Estevan Perera, Estevan Perera & Co. for the Claimant/Judgment Creditor; and no appearance by or on behalf of the Defendant/Judgment Debtor**.

Attachment of Debts - Civil Procedure Rules, 2005 Part 50 - Final attachment of debt order – Non-appearance of Garnishee at hearing for final order – Application by Garnishee to set aside final order – Jurisdiction of Court to set aside final order – Existence of debt versus right of damages under contract.

DECISION

Introduction

1. Thomas Johnson is the Claimant/Judgment Creditor in this matter having on the 6th June, 2016, obtained a default judgment in the sum of $26,322.50 plus interest, against Defendant Touch Management Ltd. On 28th June, 2016, the Judgment Creditor applied pursuant to Rule 50.3 of CPR 2005, for a provisional attachment of debts order against the Proprietors of Strata Plan 64 ('the Garnishee').

The order targeted funds allegedly due from the Garnishee to the Defendant under a contract of services. On the 6th July, 2016 a provisional order was granted (this order was perfected and filed on the 13th July, 2016) for any sums held in favour of the Defendant by the Garnishee to be retained until final order of the Court. A hearing for determination of the provisional order was fixed for 28th July, 2016. On the 28th July, 2016, there was no appearance by the Garnishee and the provisional order for attachment was made final. The order was perfected and filed on the 29th July, 2016.

2. The defendant thereafter applied to have the default judgment set aside as well as the execution of the judgment stayed. Neither of these applications was successful but those failed applications are not germane to the issue before the Court. The Court's long vacation ensued from the 1st August, 2016 and on the 13th September, 2016 the Garnishee filed an affidavit explaining that it was unable to comply with the final order of attachment and the reasons why. The Garnishee claimed that it could not comply with the final order as it did not owe any funds to the Defendant as a result of what was in effect a change in contractual circumstances which occurred between the two of them.
3. The Claimant sought to enforce the final attachment order and the Garnishee applied to the Court for what it termed 'interim declarations', including that it held no funds for the Defendant and as such a declaration that the final order could not be enforced. Following the intervention of the Court in streamlining the issues which arose, the Garnishee amended its claim for declarations into an application for the final attachment of debt order to be set aside. The judgment debtor did not attend or participate in the proceedings in any way. The issues for determination upon the application to set aside are as follows:-

Issues

4. The issues which arise on application to set aside the final attachment of debts order are as follows:-

   (i) Whether the court has jurisdiction to set aside the final attachment of debts order; and

   (ii) If so, whether and on what basis should the order be set aside?

The Evidence and Submissions

5. An examination of the evidence filed in support of the application to set aside the final order is a useful start to the Court's consideration.

   Garnishee's evidence

   (i) By affidavit filed the 13th September, 2016, the Garnishee, by its representative gave an outline of the facts leading up to their receipt of the provisional order. It was deposed that they had contracted with the Defendant for the latter to manage their condominium development for a fee of $40,000 monthly. That fee was payable in advance at the 1st of every month. At the end of April, 2016 the Garnishee says they terminated their relationship with the Defendant by giving 2 months' notice, with the result that the relationship was to have ended at the end of July, 2016. The affidavit further deposed that the fee was paid for May and June, 2016 but that prior to July, 2016, the Garnishee informed the Defendant that it would not pay the full fee on the 1st of the month but in 4 installments of $10,000.

   (ii) The Garnishee says they paid two installments of $10,000 each on the 6th and 12th July respectively, but before making any further payments they were served with the provisional order for attachment of debts in the sum of the $26,322.00.

Having been served with the provisional order, the Garnishee says they declined to make any further payments to the Defendant and advised them of this fact. Having been apprised of that fact, the Defendant is said to have quit the jurisdiction without completing the last period of the management contract which was due to terminate at the end of July.

(iii) As a result of the Defendant failing to complete the contract, the Garnishee says they immediately employed a new manager and made their first payment to that new manager on the 20th July, 2016. According to the Garnishee, given the fact that in their view they no longer had any financial obligation towards the Defendant, they did not attend the hearing for the provisional order to be made final. After the provisional order was made final the Garnishee filed their affidavit on the 13th September, 2016 explaining their position that as they held no further monies for the Defendant, they were not obliged to satisfy the final order. The Claimant took steps thereafter to enforce the final order by filing an application for an oral examination.

(iv) As a whole, the Garnishee's position is that it declined to attend the final hearing because by that time there was no longer any relationship with the Defendant and they owed the company no money. With respect to the length of time elapsed between the final order and their affidavit and subsequent application resisting enforcement of the final order, the Garnishee's only explanation was that the Court's long vacation had ensued after the final order had been issued.

Claimant/Judgment Creditor's evidence

(v) The Judgment Creditor's position is that the Garnishee was being untruthful about the circumstances surrounding its last month's payment to the Defendant. The Judgment Creditor contends that the $40,000 fee to the Defendant was contractually due and payable as of 1st July, 2016; that the Garnishee acknowledged this position (by their affidavit filed in September, 2016), but that the Garnishee belatedly asserted the variation to the contract in order to avoid payment on the final attachment of debts order.

(vi) The Judgment Creditor states that they notified the Garnishee (by email) of their intended application to attach the monies payable to the Defendant; notified them by email of the grant of the provisional order, but that the Garnishee nonetheless paid out monies to the Defendant in bad faith. Additionally, it was contended by reference to emails exchanged between the attorneys for the parties, that after the issue of the final order, the Garnishee had ample opportunity to deny their obligation to honour the final order or to assert that the Defendant was no longer in their employ after service of the provisional order, but they failed to do so.

The Court's findings on the evidence

(vii) The pertinent facts which are to inform the Court's consideration are those operative from the time of the notice given to the Garnishee of the provisional order. In accordance with Rule 50.8, this date is from the 13th July, 2016 when the Garnishee was served with the provisional order. The two payments made prior to the 13th July, 2016 were therefore not in contravention of the Court's order.

It is accepted that the contract between the Garnishee and the Defendant provided for payment of the contracted fee of $40,000 monthly in advance, on the 1st of each month. It is also accepted that there was no valid contractual variation effected with respect to the final month of July, 2016.

(viii) The Garnishee's actions in altering the payment terms were unilateral and amounted to a breach of the contract. It is accepted that the Defendant quit the contract (that period remaining after the notice of termination) as a result of the refusal of further payment by the Garnishee. It is also accepted that the Garnishee failed to attend the hearing for the grant of the final order and that was a choice freely exercised. The communications between the attorney's parties which the Judgment Creditor asserts as evidence of the absence of bona fides of the Garnishee' contentions in defence of non-payment are not taken into consideration. The Court will not have regard to such communications which arise amongst attorneys within the course of pending litigation.

(ix) The operative facts which the Court considers relevant to the issue for determination, arise from the situation which existed between the Garnishee and the Defendant at the time the provisional and subsequent final orders were made. On the affidavit evidence presented, before the onset of proceedings, the Garnishee had already given notice of termination of the contract effective the 31st July, 2016. Prior to the expiry of the notice, the Garnishee breached the contract (in respect of the period remaining until the expiry of the notice) by refusing to pay the Defendant's full management fee on the 1st of the month.

The Defendant accepted that breach and repudiated the contract when it refused to perform its obligations for the remaining period of the contract.

Submissions of Counsel

6. The Garnishee's position is that the final order ought to be set aside notwithstanding that they failed to appear at the hearing on the 28th July, 2016. Their position at that time was that as the provisional order stated that they were to pay out of such monies which were owing to the Defendant, it was unnecessary to attend the proceedings as they had no monies owing. This was so as the Defendant had failed to honour its obligations remaining under the contract. This situation was likened to the principle long determined in **Hall et anor. v Pritchett & The Corporation of Huddersfield (Garnishees)**.[1]The principle in ***Hall***[2] is that the future salary of an employee cannot be attached as the salary is unearned and thus the debt is not actually due. Counsel for the Garnishee also cited **Merchant International Co. Ltd v Natsionalna Aktsinerna Kompaniia Naftogaz Ukrainy**[3] to further illustrate that a debt not yet accrued cannot properly be made the subject of an attachment order.
7. The orders under consideration in that case were interim orders, however it was found that the court lacked jurisdiction to make the interim orders as there was upon the circumstances of the case, no debt in existence between the 3rd party and the judgment debtor therein. The interim orders were therefore set aside. Notwithstanding the fact that the case (**Merchant International**) concerned interim as opposed to final orders, Counsel for the Garnishee contended that the application of the principle would be the same in relation to a final order.

[1] (1877) 3 QBD 215
[2] Ibid per Cockburn CJ following Jones v Thompson 27 LJ (QB) 234.
[3] 2014 EWHC 391 (Comm)

The parallel commended to the Court in this case, is that before the final order herein was made, there was no longer any debt in existence between the Garnishee and the Defendant under their management contract of services.

8. Counsel for the Garnishee also advanced an argument that the final order had been made by mistake as the Court was not aware of the situation between the Garnishee and the Defendant at the time it made either the provisional and final orders. The authority of **Coastal Diving Services Ltd v Petro-Ind Engineering Services Ltd & Trinmar Ltd (Garnishee)**[4] was cited in support of the power of the Court to set aside a final order on the basis of mistake or fraud. This case further referred to the case of **Moore v Peachey: The Charing Cross Bank**[5] in which case there was a mistake in the identity of the defendant and eventual judgment debtor and this mistake served as the basis upon which the court set aside the garnishee order absolute. Similarly, in ***Coastal Diving***, the court found that there had been a mistake on the part of the garnishee bank that funds were due to the defendant/judgment debtor, but in fact the funds had been assigned to another bank. The court set aside the Garnishee order on the ground of mistake also.
9. Counsel for the judgment creditor however, very strongly submitted in the first instance that the appropriate time for the Garnishee to have challenged the provisional order was at the time set for hearing which the Garnishee of its own volition chose not to attend. As a result, the judgment creditor says that it is too late for the Garnishee to attempt to assert the position that it does not owe or was entitled to set off the monies owed to the Defendant[6].

[4] No. 3312 of 1995, Trinidad & Tobago High Court
[5] (1892) 66 LT 198
[6] The Garnishee in its affidavit of 13th September, 2016 raised an irregularity in accounting which the Defendant failed to reconcile.

This position is based upon the existence of the procedure prescribed in CPR Part 50 for the Garnishee to attend and be heard at the hearing to make the provisional order final.

10. Additionally, Counsel for the judgment creditor submits that the Garnishee's actions in unilaterally varying the payment terms for the last month of the contract with the Defendant could not validly vary the contractual obligation to pay the Defendant the full fee at the first of the month. In that circumstance it was submitted, that as of the 1st July, 2016, the Garnishee was indebted to the Defendant for the full $40,000. As such, the balance of the fee in the sum $20,000 was a debt owing to the Defendant and this debt was properly attached by the provisional and subsequent final order. The submission was therefore that the authorities cited with respect to the inability to attach a debt not yet due or accruing at the time of the provisional order, did not apply.
11. With respect to the other authorities cited, counsel for the judgment creditor also contended that the instant case was not one of mistake of fact, thus the ***Coastal Diving*** case and the authorities cited therein on mistake were inapplicable. It was stated that the material fact of the matter – the obligation under the contract to pay the $40,000 fee to the Defendant in advance on the 1st July, 2017 - remained the same, particularly as there was no valid variation of the contract terms. Further, even if the Garnishee's actions could be accepted as a change in circumstances, there was still no mistake of fact thus the bases of fraud or mistake, as identified by the authorities upon which a court could set aside a garnishee order absolute, did not arise in the present case.

The Court's consideration

12. Rule 50.13 speaks to the circumstances of discharge of a garnishee's debt to a judgment debtor and sub-rule (3) therein states that the Rule has effect even where the court later sets aside the attachment of debt order or the original judgment or order. In addition to being implied by Rule 50.13(3), the authorities cited[7] by counsel for the Garnishee establish that the Court has jurisdiction to set aside a final garnishee (now attachment of debt) order. The relevant question must be, in what circumstances would the Court be entitled to or justified in setting aside the final order. Given the prerequisite for notification to and the procedure established for attendance by a Garnishee before a provisional attachment of debts order can be made final, and given the absence in the Rules of any specified power and procedure for setting aside an attachment order, the Court considers that the power to set aside falls within its inherent jurisdiction.

13. Additionally, the Court considers that the process of enforcement, (with which the Court is herein concerned), being ancillary to the already determined final rights of the substantive parties, is as such that its jurisdiction is still alive for purposes of setting aside any order made on enforcement. Once it is the inherent jurisdiction of the Court that is invoked, the basis upon which the Court would choose to exercise this jurisdiction must be for the purpose of preventing some abuse of its process or preserving its authority as a Court of law. It is usually the case that the most obvious of circumstance where the Court's process or authority is safeguarded from abuse is where an order has been obtained by fraud or mistake.

[7] Coastal Diving Services Ltd v Petro-Ind Engineering Services Ltd supra; Moore et anor v Peachey: The Charing Cross Bank supra

This is particularly so, where the party affected has no other recourse available to set right the effects of such fraud or mistake.

14. In **Marshall v James**[8], a case of a garnishee order made absolute where the debt thought to be payable to the judgment debtor personally, was in fact owed to a company of which the judgment debtor was an officer, Joyce J stated of the garnishee order absolute (emphasis mine)-

> *"On the authority of* Moore v. Peachey *(1) and on general principles I have come to the conclusion that I must do what I can to remedy the injustice done by the garnishee order. In my opinion, there is no particular sanctity about a garnishee order, although it may have been made absolute and is so termed."*

Additionally Joyce J. in his final word in the judgment, added that he entirely dissented from the notion that a garnishee order absolute could not be set aside. In the circumstances, the Court commences its consideration of the law by finding that a final attachment of debts order can be set aside as same is implied in Rule 50.13(3). However, in the absence of any specified power or procedure for so doing, it is pursuant to the Court's inherent jurisdiction that the final order would have to be set aside.

15. In going on to consider whether the Court should set aside the final order in this case, as Counsel for the Judgment Creditor noted, the authorities have referred to incidents of fraud or mistake as the bases upon which a final order would be set aside. Counsel for the Garnishee countered by submitting that the cases from which the applications to set aside arose happened to be cases of mistake but that did not mean that there could not be other circumstances in which it would be appropriate for the Court to set aside a final order.

[8] [1905] 1 Ch. 432 @ 433

I would agree in some measure with the submissions of both counsel. In the first case, it is agreed that there must be an exceptional circumstance, preferably one in which the party seeking to set aside holds no blame, (usually on account of fraud or mistake), in order for the Court to exercise its jurisdiction to set aside an order such as the final attachment of debt order.

16. On the other hand, it is also accepted that outside of fraud or mistake, there could arise an exceptional case in which it is appropriate for the court to exercise its jurisdiction to set aside such a final order of attachment. Upon close examination, the facts found in relation to this case are that the Garnishee breached its contract with the Defendant when it altered the terms of payment in the final month of July, 2016. This occurred before the making of the provisional order by the Court and the service of that order on the Garnishee – respectively the 6th and 13th of July, 2016. The Defendant responded to the breach by refusing to complete performance of its obligations under the contract so that the contract between the Garnishee and Defendant was effectively at an earlier than intended end. This contractual situation occurred after the provisional order but before the final order. The reason or true motivation behind the Garnishee's breach of the contract is considered irrelevant. The Defendant accepted the breach and discharged itself from performance of the period remaining under the contract.

17. This contractual position was available to be put and ought to have been put before the Court by the Garnishee at the hearing to make the provisional order final. The Garnishee to its own detriment, failed to avail itself of that right and appears to have considered (incorrectly so), that because in their estimation there were no funds owing to the Defendant, there was nothing for the court to attach and no need for them to attend the hearing.

The Court agrees with Counsel for the Judgment Creditor that there was no mistake as to any fact in any real sense of an error of fact. Thus far therefore, the Garnishee is not factually in very good standing so as to seek the exercise of the Court's inherent jurisdiction. However, notwithstanding that it is found that the Garnishee's position arises from its own inaction, the notion of an abuse of the Court's process must also be considered with reference to the law and the fulfillment by the Court of its purpose in applying the law.

18. The instant case concerns the enforcement process of attachment of debts. In **Ferrera v Hardy**[9] the Court of Appeal of England considered an appeal from an order setting aside (in part) a final third party debt order on the basis that the debt was not owed to the judgment debtor in his personal capacity, but as trustee. The appeal was dismissed on the basis that the debt was not one which was due or accruing at the time of the provision order (or due or accrued at the time of final order), to the judgment debtor. Lord Justice Floyd had this to say[10] (emphasis mine):-

> *"Although the argument in the courts below seems to have focused exclusively on the question of whether a trust was to be imposed on the relationship between the landlords and Mr Ferrera, there seems to me to be a logically prior question: namely whether the money held by the Council can be said, using the words of CPR 72.1(1) to be money which the Council owes to the judgment debtor, or using the words of 72.2(1)(a) whether there is a debt due or accruing due to the judgment debtor from the third party. If the Council does not owe Mr Ferrera the money, or there is no debt as between the Council and Mr Ferrera then there is no debt which falls within the rule and which the third party debt order can attach. In this context the rules must, as it seems to me, be referring to a civil debt enforceable by the judgment debtor."*

[9] [2015] EWCA Civ 1202
[10] Ferrera v Hardy supra @ paras 12-13.

"A further point made in the White Book commentary at 72.2.1 is that a judgment creditor cannot by means of a third party debt order stand in a better position as regards the third party than did the judgment debtor. Again, this seems to me to self-evidently correct. A useful test must be whether the judgment debtor would be in a position to sue the third party for recovery of a debt."

19. In considering this dictum, the reasoning which in the Court's view is of fundamental application, is that *the judgment creditor – cannot by means of a third party debt – stand in a better position as regards the third party – than did the judgment debtor*. In applying these words to the instant case, it is irrelevant, what machinations or inaction the Garnishee can be accused of prior to its receipt of service of the provisional and after the grant of the final garnishee orders. The relevant question is, whether as of the date of the provisional and final orders, there was a debt owed or accruing, by the Garnishee to the Defendant/Judgment Debtor. The answer to that question arises from the contractual position between those parties. That contractual position, is that from the Garnishee's failure to pay the $40,000 on the 1st July, 2016, there was a breach of contract (that part remaining in any event), but the contract still existed when the provisional order was made by the Court on the 6th July, 2016 and when the Garnishee was served on the 13th July, 2016.
20. However, upon being told that no more funds were going to be paid to it by the Garnishee, the Defendant chose to bring the contract to an end ahead of its scheduled termination by declining to perform its remaining services. It is clear, according to the general law of contract, that the Defendant would have had a right to sue for damages as the Garnishee was the party guilty at that time of a breach of contract. It is considered, that at the time the contract prematurely came to its end, there was no debt arising from the contract.

What existed was and still is, a right of action on the part of the Defendant, to sue the Garnishee for damages consequent upon the breach of contract.

21. That right to sue for damages upon breach of contract, is quite distinct from the right to sue for a debt owed for goods or services provided under a contract. This is illustrated by **White & Carter (Councils) Ltd v McGregor**[11] in which the House of Lords, in the midst of considering the options available to an innocent party upon breach of contract, distinguished between an action for a debt under a contract performed, as opposed to a suit for damages upon breach of the contract. In that case, the appellant (plaintiff), appealed against dismissal of his suit for payment of the contract price for services already performed under a contract with the respondent. The respondent (defendant) had the same day of the contract, notified the appellants that the contract (a renewal), had been made in error and sought to cancel.

22. The Appellants refused to accept the repudiation, went ahead and performed the services and upon refusal of the respondent to pay for the services which they'd indicated from the outset that they did not want, sued for the full contract price. The issue before the House of Lords was the entitlement of the appellant to have refused to accept the repudiation by the respondent and persisted in the performance of the contract without any attempts to mitigate in any way. The majority decision upheld the general right of an innocent party to elect upon a course of action when faced with a breach of contract, but not in circumstances where it would be unreasonable for the innocent party to insist upon upholding the contract. Of relevance to the case at bar however, was the following statement by Lord Keith of Avonholm[12]

[11] [1962] AC 413 per Lord
[12] White & Carter (Council) Ltd v supra @ 436

> *"If I understand aright, counsel for the appellants would read time of performance as time of performance by the defender after the appellants had discharged their part of performance under the contract. Their claim then becomes a claim, not for damages for breach of contract, but for a debt due by the defender under the contract."*

23. In this case, the Defendant did not perform its services remaining under the contract but rather elected to treat the contract as at an end. The monies outstanding were therefore not earned via performance of their obligations under the contract and as such could not be termed a debt. The right of the Defendant therefore, was to sue for damages for breach of contract (that portion of the contract which remained) and not to sue for a debt. The judgment creditor as a stranger to the contract could stand in no better position than the defendant, thus in the absence of what could be classified a debt, there could be no attachment. The court is satisfied that the breach of the contract and accrual of a right for damages rather than a debt arose prior to the grant of the final attachment of debt order.
24. In the circumstances, there was no proper debt for the court to attach. The final order is therefore to be set aside. The Court also finds however, that having been possessed of the knowledge and information regarding the state of the contract, the Garnishee was obliged to have attended the hearing and made the position regarding the contract known to the Court. Despite its success in having the order set aside, the Garnishee must as a result of its inaction, bear the judgment creditor's costs in having to answer to the application to set aside and its attempts to enforce the final order as it was at that time, perfectly entitled to do.

Disposition

25. The Garnishee's application is disposed of as follows:-

    (i) The final attachment of debts order granted in favour of the judgment creditor on the 28th July, 2016 is set aside;

    (ii) Costs are awarded to the judgment creditor upon the application and its earlier application to enforce the final order in the sum of **$3,000**.

Dated the 1st day of June, 2017.

Shona O. Griffith
Supreme Court Judge.