IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO: C.L. 2001 C-247

BETWEEN	**CANJAM TRADING LIMITED**	**PLAINTIFF**
AND	**AD & M ENTERPRISES LIMITED**	**1st DEFENDANT**
AND	**ALFRED MATHIE**	**2nd DEFENDANT**
AND	**NADINE MATHIE**	**3rd DEFENDANT**
AND	**TRIPLE "M" DISTRIBUTORS LIMITED**	**INTENDED 4th DEFENDANT**
AND	**SUPREME CASH AND CARRY LIMITED**	**INTENDED 5TH DEFENDANT**

Heard on November 4 and 20, 2002

Mr. Conrad George, instructed by Hart, Muirhead, Fatta for Plaintiff; Mrs. Pamela Benka-Coker, Q.C. and Mrs. Debra McDonald instructed by Debra E. McDonald for Defendants and Intended Defendants.

ANDERSON, J.

This matter came on for hearing pursuant to a Summons issued by the plaintiff in which the following order was being sought:

1) A Writ of attachment be issued for Alfred Matthie and Nadine Matthie for the purpose of compelling each of them to comply with the Order of Mr. Justice Anderson herein made on 21st August, to the effect that they should "within 3 days each make and serve on the Plaintiff's Attorneys and file with the Court an Affidavit setting out all assets legally or beneficially owned by them, whether held in their own name, by a nominee or otherwise, whether held jointly, or otherwise", and for the purpose of preventing any further breaches;

2) A Writ of sequestration be issued against the assets of AD & M Enterprise Limited for the purpose of compelling each of them to comply with the Order of Mr. Justice Anderson herein made on 21st August, to the effect that it should "within 3 days each make and serve on the Plaintiff's Attorneys and file with the Court an Affidavit setting out all assets legally or beneficially owned by [it], whether held in [its] own name, by a nominee or otherwise, whether held jointly, or otherwise", and for the purpose of preventing any further breaches;

3) The orders of Mr. Justice Reid herein dated 28th August 2002 be discharged on the grounds that:

a. the Defendants and Intended Defendants were all in breach of the Order of Mr. Justice Anderson of 21st August 2002 requiring that they should "...within 3 days each make and serve on the Plaintiff's Attorneys and file with the Court an Affidavit setting out all assets legally or beneficially owned by them, whether held in their own name, by a nominee or otherwise, whether held jointly, or otherwise", and they were each in contempt of such Order and precluded by such contempt from seeking and indulgence from the Court in equity;

b. the fact of such contempt was highly material to any application by the defendants or Intended Defendants or each or either of them, and such material fact was not drawn to the attention of the Court in breach of the duty to give full and frank disclosure of all material facts in an *ex-parte* application;

c. the relief sought by the Defendants which resulted in the Orders of Mr. Justice Reid dated 28th August 2002 was neither urgent (the Summonses seeking the Orders which were granted 28th August 2002 were filed on 26th August 2002, but never served on the Plaintiff's Attorneys), nor secret requiring the element of surprise, and were not, therefore, susceptible to being heard *ex-parte*, thereby rendering the applications irregular and the resulting Orders liable to be set aside.

d. It is just and equitable that the said Orders should be set aside;

4) There be liberty to apply to vary or discharge this Order.

5) Costs be reserved

As will have been noted from the summons and the previous order from this court quoted therein, the application was based upon an allegation that the defendant had disobeyed the order of the court to do certain things within three (3) days, to wit, "...within 3 days each (to) make and serve on the Plaintiff's Attorneys and file with the Court an Affidavit setting out all assets legally or beneficially owned by them, whether held in their own name, by a nominee or otherwise, whether held jointly, or otherwise". Upon the matter commencing, Mr. George for the plaintiff/applicant advised the court that he was not proceeding with the application with respect to the second defendant. Before he continued his submissions in support of his summons, however, Mrs. Benka-Coker advised the court that she wished to make some preliminary submissions in support of a proposition that the matter ought not to be proceeded with.

She submitted that this was a matter which involved the liberty of the subject and as such, it ought to be by way of motion in open court, and not by way of summons returnable in Chambers.

Her second submission was that a plaintiff seeking a writ of attachment against a particular defendant must prove by way of a duly executed affidavit of service, that a copy of the order which, it is alleged, he disobeyed, was served upon the defendant within the three (3) day period given in the order. The standard of proof concerning service was "beyond a reasonable doubt".

The third submission was that the copy of the order served on the defendant must have endorsed thereon the words set out in section 452 of the Judicature (Civil Procedure Code) Law, in the following terms:

> "If you, the within-named A.B., neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order)".

In support of this submission, she cited "Oswald's Contempt of Court, Commital, Attachment and Arrest Upon Civil Process", Third Edition, by George Stuart Robertson, and page 201 thereof. There it is stated that: "Upon the copy of the judgment or order served must be endorsed the following memorandum". Thereafter follow the words of section 452 (the so-called penal clause). On page 202 of the said text it is asserted that "the affidavit of service must prove that the memorandum was endorsed".

In further support, she cited the Annual Practice 1960 Volume 1, page 955, (the "White Book") where it deals with Order 41 Rule 5. There it is stated, in relation to the memorandum, that:- "This must be endorsed on the copy for service of all orders which are required to be served, whether personally or not, e.g. an order for discovery (of which service on the solicitor is sufficient), (***Hampden v Wallis [1884] 26 Ch.D. 746***), and this rule applies even where the "defendant" is a limited liability company".

In Hampden v Wallis (supra) there was an appeal from an order for attachment issued against the Defendant for not obeying an order of the 22nd of March 1884, directing him to file an affidavit of documents. The order was served upon the Defendant's solicitor, and the Defendant being in default, the order for attachment was made on the 16th of May. Baggallay L.J. at page 751-752 said:

> "The objection raised against the Order is that there is no indorsement on it as directed by Order XLI Rule 5, warning the person required to obey it, of the consequences of disobeying it. Order XXXI Rule 21, says, "that if any party fails to comply with any order to answer interrogatories or for discovery, or inspection of documents, he shall be liable to attachment". And rule 22 of the same Order goes on to provide that service of any order for interrogatories, or discovery, or inspection, made against a party on his solicitor, shall be sufficient service to found an application for an attachment for disobedience to the order. The order in the present case was served on the solicitor, but it is said that the service was not sufficient, because the copy served did not bear the indorsement required by Order XLI. rule 5. Mr. Justice *Chitty* held that this order did not apply to the present case, because the service was not personal service on the Defendant.
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> With every respect for the learned Judge's opinion, I cannot take the same view of the construction of the rule. The order relates to all judgments, and rule 5 is perfectly general in its tone. There is nothing in it limiting it to any particular kind of orders. It is suggested that it was intended to be confined to process of contempt. I can see no ground for confining it in that way".

The decision was approved in the later case of ***Shurrock v Lillee, Times Law Reports Vol IV (1987-88) 355.*** It was held in that case that the omission of the penal notice required by Order XLI Rule 5, was fatal to the validity of the order for attachment.

Counsel for the defendant also cited "In Re Holt (an infant)", Law Reports. (Ch. Div.) Vol. XL [1879] page 168, but I confess, I do not get much assistance from this case. She concluded by submitting that procedural defeats in the service of the order meant that the matter should be dismissed.

Mr. George, for the applicant, submitted that the summons for attachment should be dealt with not under Section 452 of the Judicature (Civil Procedure Code) Law, but under section 651 of the statute.

Section 651 is in the following terms:

> A judgment or order requiring any person to do any act other than the payment of money, or to abstain from doing any act, may be enforced by attachment.
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> The application may be either for a writ of attachment, or for an order on the person disobeying the judgment or order to show cause why he should not be attached.
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> The court may, in its discretion, issue the writ at once, or, in the first instance, make such order to show cause as aforesaid.
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> Where a writ of attachment is granted without an order to show cause as aforesaid, a certified copy of the order for leave to issue such writ of attachment, indorsed with a copy of the judgment or order which has been disobeyed, shall be personally served on the person attached at the time of his arrest.
>
> Where an order to show cause is made aforesaid, a certified copy of such order to show cause, indorsed with a copy of the judgment or order which has been disobeyed, shall be personally served on the party proceeded against.
>
> The Court may from time to time enlarge the time for the return to the order to show cause.
>
> On the return day, or any adjournment thereof, if the party against whom the order to show cause is made fails to show cause to the satisfaction of the Court why he should not be attached, the Court may direct that a writ of attachment issue against him.
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> In ordering a writ of attachment, the Court shall appoint such convenient prison (to be named in the writ), as it thinks fit, for the imprisonment under the writ.
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> A person imprisoned under a writ of attachment may apply for his discharge by a summons directed to the party at whose instance the writ was obtained; and, on the hearing of such summons, the Court or a Judge may discharge him, either unconditionally, or upon such terms as to his

> furnishings security for the performance of the judgment or order, or otherwise as the Court or a Judge shall think fit :
>
> Provided that nothing herein contained shall prevent the Court or a Judge from ordering the discharge at any time of the person imprisoned.
>
> A writ of attachment shall be in the Form contained in Schedule VII hereto with such variations as circumstances may require.

He submitted that section 651 did not indicate a ***requirement*** that the matter proceed by way of motion rather than by way of summons. By way of contrast, he referred to section 564U which specifically required that any writ of attachment under that Title (44A) had to be ordered by the Full Court. He submitted that the English rules, as suggested by the section of the White Book quoted, had no application in Jamaica. It should be noted however, that the application of that section is specifically confined to matters under Title 44A and otherwise has no relevance here.

Mr. George also suggested that there was evidence of the service of the appropriate notice with the section 452 clause endorsed thereon. That evidence he said, was contained in his own affidavit which stated upon information and belief that the relevant service had been effected by a process server who had told him of having effected service. To this submission, Mrs. Benka-Coker objected, saying that this would be hearsay and not admissible under section 408 of the Judicature (Civil Procedure Code) Law. Mr. George, however, submitted that he had a copy of the order on which the appropriate memorandum had been inscribed. Further, the defendant had in an affidavit in support of an application to, inter alia, discharge a Mareva Injunction and discharge the appointment of a receiver, sought to explain why he had failed to comply with the order. In doing so, he attached as an exhibit, a copy of the Order withg the memorandum inscribed thereon. He submitted that there was sufficient evidence of service, as well as the existence of the appropriate memorandum.

Mr. George said that he did not disagree with the authorities cited by Mrs. Benka-Coker, insofar as they made the requirement for service with the notice mandatory. He

submitted, however, that in the event that the court did not agree with his submissions on section 651 he would ask that the matter be adjourned for open court.

In response, Mrs. Benka-Coker again pointed out that there had been no evidence produced that the order with the proper penal notice had been served on the Defendant, Alfred Mathie, and as such the application should be dismissed.

It is perfectly clear from the authorities, that there is a requirement for both the service of the order, the disobedience to which founds the application, as well as the memorandum being endorsed hereon. The usual way for such proof to be provided, is by an appropriate affidavit of service. However, it is not my view that this is the only way. In the instant case, the affidavit of the 2nd Defendant clearly shows what he received. A copy of the order with the endorsement *is an exhibit* to the 2nd Defendant's affidavit of September 5, 2002. Clearly, there was service. Is this the end of the matter? I think not. What we know is that the defendant was served. Given the fact that there was a limitation period for complying with the order, it would also be necessary to show that the order had been served in a timely manner. Mr. George's affidavit that depones, on information and belief, as to the service, in my view, does not cure the defect in so far as the need to establish time is concerned.

I would accordingly hold that proper, i.e. timely, service has not been established. Even if I am wrong on this however, I would still have to come to the view that on a proper construction of the provisions of section 651, the appropriate course would have been by way of motion in open court. In this regard, it should be noted that all the paragraphs of section 651, save for the last three dealing with applications for *the discharge of a person imprisoned pursuant to the issue of a writ of attachment* speak of "the Court". In these last three paragraphs, there are specific references to the "Court or Judge"; i.e. open court or judge in chambers. All the preceding references in the section are to actions by the "Court". I am, accordingly, of the view that this means open court, and the matter should have been brought by way of motion.

Given what I have stated above, I also do not believe that I could properly adjourn the matter to open court, as suggested by Mr. George. I would suggest that if counsel wishes to proceed, the appropriate affidavit should be served and the application be made by way of motion.

Finally, if it is thought that the time for complying with the order may now be uncertain, there may be an application under liberty to apply for any clarification needed.
I make no Order as to costs.