



[2013] JMSC Civ 175

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 02013

BETWEEN

**JAMAICA EDIBLE OILS
& FATS COMPANY LTD.**

CLAIMANT

A N D

**M.S.A. TIRE (JAMAICA)
LIMITED**

DEFENDANT

**Kwame Gordon and Yana Samuels, instructed by Samuda and Johnson for the
Claimant**

Douglas Thompson, of counsel, for the Defendant

Heard: September 26, October 10 & 15, 2013.

**APPLICATION FOR COMMittal FOR CONTEMPT OF COURT – SERVICE OF COURT ORDERS
ALLEGEDLY BREACHED – FAILURE TO COMPLY WITH RULE 53.3 OF THE C.P.R. – EFFECT OF
FAILURE TO COMPLY WITH RULE 53.3 OF THE C.P.R. – NEED TO PROVE INTENTIONAL OR
WILFUL DISOBEDIENCE OF A COURT ORDER – WHAT CONSTITUTES INTENTIONAL OR WILFUL
DISOBEDIENCE OF A COURT ORDER**

Anderson, K., J.

In Open Court

[1] This matter concerns an application for declaratory reliefs, seeking this court's declaration that the defendant is in contempt of court and seeking committal for contempt as against Michael Shill Snr. and Michael Shill Jr. and/or any or all of the directors of the defendant, amongst other reliefs.

[2] The application is centred around the alleged and eventually, admitted failure of the defendant to comply in all respects, with the order of Mr. Justice Raymund King which was made on February 25, 2013.

[3] It has been alleged that the defendant failed to provide information on the value and location of all the relevant property, inclusive of all the equipment and machinery and any other assets including bank accounts, held by the defendant in the jurisdiction, up to the value of US\$176,000.00 on or before March 18, 2013 and that the defendant has failed to respond to the affidavits of Major Alva Anthony Young as respectively filed on April 10 and December 12, 2012, by March 18, 2013.

[4] Two affidavits in support of application have been filed, along with an affidavit of service. In response, the defendant has filed one affidavit, that being the affidavit of Michael Shill Snr. This court has carefully considered and taken all of these affidavits into account.

[5] Court accepts that the defendant has been properly served, as a matter of law, with the order of Mr. Justice King, which was allegedly breached by them and that such order, when served on April 26, 2013, contained within it, the requisite penal notice, in accordance with **rule 53.3 of the C.P.R.**

[6] The relevant order of Mr. Justice King, was made on February 25, 2013. Subsequently, that order was perfected and filed on February 28, 2013. That order was, as things transpired, served on the defendant, via its attorney- at-law on record, namely, Mr. Douglas Thompson, on March 1, 2013. Evidence of such service and the order so served is attached as Exhibit, 'MGA 2', which has been deposited to in support of applicant's application, by Marilyn Golding-Anderson, who is the claimant's company secretary. What is also clear though, from that particular exhibit, is that there was no penal notice attached to that order of Mr. Justice King, when the same was first served on the defendant. The failure to have attached the requisite penal notice to that order, when it was first served, whilst affecting the validity of any application for either

committal or confiscation of assets order to be made for against the defendant, would by no means, preclude this court from declaring that the defendant has acted in contempt of court and imposing on them, alternate orders, than either committal or confiscation of assets. The applicant has filed a separate affidavit, which has been described in its heading as – ‘Affidavit of Service Of Order.’ That affidavit has been deposed to by Colleen Chin, who was, at the date when she deposed to that affidavit, a legal secretary employed to the law firm of the claimant’s attorneys – Messrs. Samuda and Johnson, attorneys-at-Law. In that affidavit, Ms. Chin has deposed to having, on April 26, 2013 attached a penal notice to the directors of the defendant, to the order of Mr. Justice King, which has been attached as an exhibit to her affidavit. She further had deposed therein, to having handed a copy of the said order to a legal clerk employed to Samuda and Johnson, for the purpose of enabling his service of same. The same was so served and Exhibit ‘C.C.2’ as attached to Ms. Chin’s affidavit, shows that the defendant’s attorney – Mr. Thompson, was served with same, on April 26, 2013.

[7] Of course, as of April 26, 2013, the orders of Mr. Justice King, requiring that the defendant provide information on the location and value of all the relevant property inclusive of all the equipment and machinery ad any other assets including bank accounts, held by the defendant in the jurisdiction up to the value of US\$176,000.00, **on or before March 18, 2013**; and that time is extended to March 18, 2013, for the defendant to file affidavits in response to the affidavits of Major Alva Anthony Young filed on April 10 and December 12, 2012, would have expired insofar as the proposed committal and/or declaration of contempt, arising from the alleged failure to comply therewith, are concerned. This must be so, since, by the time when that order was served, with the penal notice attached to it, the time for compliance therewith, in either of those specific respects, that is, two of the orders therein, which the claimant now seeks to have the defendant found in contempt for a breach of, had already expired.

[8] This is why **rule 53.3(c) of the C.P.R.** makes it clear that not only can this court not make either a committal order, or a confiscation of assets order unless the order was, when served, not only endorsed with the requisite penal notice, as per **rule 53.3**

(b) of the C.P.R., but also, that where, as in the case at hand, the order required the ‘judgment debtor’ – this being a term which is defined in **rule 53.12(2)** as including a defendant or respondent to an application under **rule 53.10** (which this application is), to do an act within a specified time or by a specified date, it was served in sufficient time to give the judgment debtor a reasonable opportunity to do the act, before the expiration of that time, or before that date. In that regard, it inexorably follows, that since an order seeking either committal or confiscation of assets, cannot be made unless the requisite order was not only personally served on the ‘judgment debtor,’ but was also, an order which, when served then had endorsed on it, the requisite penal notice, it is that order so endorsed and properly so served, which must have been served in sufficient time, to have enabled the ‘judgment debtor’ to have had a reasonable opportunity to do the act, before the expiration of the relevant date, which, in the case at hand, was: March 18, 2013.

[9] In committal proceedings before this court, procedural requirements must be strictly complied with. This not only though, holds true, for committal proceedings, but also where a confiscation of assets order is sought, arising from a finding that a party such as the defendant therein, is in contempt of court. In that regard, this court equates a confiscation of assets order and a committal order, in terms of the severity of those orders, with an attachment order, such that this court concludes that strict compliance with the rules of the court applicable to the making of any such order, must be strictly complied with, if this court is to be in a position to make either a committal or confiscation of assets order. See: **Townsend v. Townsend** – [1907] P. 239; and **Hampden v. Wallis** – [1884] 26 Ch. D. 476; and **Gordon v. Gordon** – [1946] 1All E.R. 247, esp. at p. 250. per Ld. Greene, M.R. (as he then was). If it were not so, then why would there have been the need to have enacted as law, **rule 53.3 of the C.P.R.**, which imposes special conditionalities, not simply upon a person or entity who/which has been determined by this court, as having been in contempt of court, but in a situation wherein it is sought to have this court make either a committal, or a confiscation of assets order. This must be so, since if a person is declared by this court, as being in contempt of court, this court would then be empowered to make various orders, only two of which

would be, the making of either a committal order, or a confiscation of assets order. As such, it is clear that **rule 53.3 of the C.P.R.** requires even more to be done than would otherwise be required in respect of contempt proceedings, if it is that the applicant is seeking that this court make either a committal, or confiscation of assets, order.

[10] In addition to the powers as set out in **rule 53.10 f the C.P.R.**, if a person or party is determined by this court as being in contempt of court, this court has the power to fine the contemnor, take security for good behaviour, or issue an injunction. Accordingly, it is this court's considered opinion, firstly, that the failure to comply with **rule 53.3 of the C.P.R.** will not render futile, an application for declaration that a person or party is in contempt of court, nor will such failure, in and of itself, prevent this court, if it has determined that a person or party is in contempt of court, from making orders other than a committal, or confiscation of assets order.

[11] This court has noted that a representative of the defendant was present when the relevant court order was made. This though, notwithstanding, does not exempt the applicant from their need to comply with **rule 53.3 of the C.P.R.** if they wish this court to either make a committal, or a confiscation of assets order. This must be so, since the primary purpose of **rule 53.3 of the C.P.R.**, is not merely to ensure that the defendant in a case such as the present, knows of the orders made, requiring that they do certain things by a specified date and also that such defendant knows of same in a timely way and equally importantly, that such defendant knows in a timely way, that if there is failure to comply with that court order within the requisite specified time-frame, then that defendant may be liable to be imprisoned, or have his/her/their assets confiscated. In respect of the matter at hand **rule 53.3 of the C.P.R.** was not complied with by the applicant and therefore, this court is unable to either commit the defendant for contempt of court (if the defendant were, to be determined as being 'guilty' of such), or to make an order confiscating the defendant's assets (this even if, the defendant is in contempt of court).

[12] In their application, the applicant not only wishes this court to declare that the defendant is in contempt of court, but also to make an order confiscating the defendant's assets up to a value of US\$176,000.00; and/or to make an order of committal against any and/or all of the defendant's directors. These orders of confiscation and/or committal, for reasons already provided herein, cannot and will not be made by this court.

[13] It should be noted that somewhat understandably, the applicant has sought to, dispense with 'personal service' of the order of Mr. Justice King on the defendant. The applicant has no doubt sought this, because the relevant order was served on the respondent/defendant, via its attorney-at-law on record – Mr. Thompson. Suffice it to state though, that having so served that order that is equated with 'personal service', at least for the purposes of Jamaica's rules of court. This is so, because **rule 6.2 (a) of the C.P.R.** provides that – '*Where these Rules require a document other than a claim form to be served on any person, it may be served by any of the following methods – a) any means of service in accordance with Part 5....*' **Part 5 of the C.P.R.** when read along with **Part 6 of the C.P.R.**, allows for service of a document on a party via that party's attorney-at-law on record and provided that the party to be served personally, is served via his attorney on record and that attorney certifies that he or she accepts service on the defendant's behalf, then service is to be taken as having been duly effected, 'personally'. As such, this court need make and will make no order dispensing with personal service of the order of Mr. Justice King, as was made on February 25, 2013.

[14] Whilst his court has, as aforementioned, the power to make various orders, by no means limited to commitment or confiscation of assets orders, in respect of a party or person found as being in contempt of court, it must be noted that, in respect of the application now under consideration, the only other orders sought, which could properly arise and be made by this court, if the defendant were to be determined as being in contempt of court, would be the order designated as number 6 in the notice of application for court orders. That order reads as follows:-

It should be noted that another order sought by the applicant, is for costs of this claim to be awarded to it. As the claim has not yet been determined and this is not either an application by the claimant, for summary judgment to be awarded in its favour, nor for the defendant's statement of case to be struck out, this court is not lawfully empowered to, and will not, at this stage, make any order awarding the costs of this claim to the claimant. Such costs will follow the event, once a judgment on this claim has been duly rendered by this court. The outcome, in terms of that judgment, must therefore be awaited, so that an order as to the costs of this claim can therefore be made in favour of the appropriate party.

[15] There still remains to be considered also, the claimant's application for an order that the defendant provide an account of the machinery and equipment belonging to it, wheresoever situate, on or before May 29, 2013. This court is of the view that it can make such an order, which would be tantamount to an order extending time, or alternately, perhaps would more appropriately be considered as being a fresh order of this court, in similar terms as the previous order made by Mr. Justice King, of this court, the only difference between that order as was previously made by Mr. Justice King and this order, being the date by which compliance with same, is to take effect.

[16] Although an affidavit in that respect can be ordered as part and parcel of this court's general powers of case management, without there being the need for this court to first find the defendant as being in contempt of court, in order to make such an order, nonetheless, this court will not make that order. That order will not be made, since it would be pointless to now do so. It would be pointless because, although it has been provided very late and certainly well beyond the prescribed time, the defendant had, on October 9, 2013, filed an affidavit, which has been deposed to by one of its directors, namely, Michael Shill Snr. and in that affidavit, he has deposed to the location of the defendant's machinery and equipment at present. In addition, he has deponed to the defendant owning no other assets, apart from the equipment and machinery which were, as was deposed to in an affidavit filed by the defendant and which was deposed to by another of the defendant's directors, namely: Michael Shill Jr., then stored at Lot 7

Naggo Head, Industrial Estate, in the parish of St. Catherine. Since then, as specified in the defendant's latest affidavit, by Michael Shill Snr., those assets were removed to Wally's Garage at 435 Spanish Town Road and presently, remain stored there. In addition, it seems that the defendant's directors – Michael Shill Snr. and Jr., have drawn a distinction between 'assets' and any sums held by the defendant in any bank account(s). Notwithstanding so though, it has been deponed to, in the defendant's latest affidavit, by Michael Shill Snr., that all bank accounts owned and/or operated by the defendant in Jamaica, were disclosed in the affidavit of Michael Shill Jr. as filed on February 22, 2013. As such, there would be no usefulness to this court essentially repeating its earlier order as regards disclosure by the defendant of information as regards those bank accounts and machinery and equipment, bearing in mind that at least as of now, that order has been complied with, albeit, undoubtedly far later than as was required by the order of Mr. Justice King.

[17] The next question which must be answered by this court at this time therefore, is as follows: **Is the defendant in contempt of the court order which was made by Mr. Justice King on February 25, 2013?** In answering this question, this court must first carefully consider which order as made by Mr. Justice King, the defendant has allegedly breached. It is alleged that they breached orders nos. 2, 3 & 5 of same. Interestingly enough, the applicant has not, in its grounds for this application, not even in a manner whereby it could reasonably be inferred, put it forward as a ground for the application, that the defendant acted in breach of order no. 3 of the order of Mr. Justice R. King. On the other hand, in their grounds for this application, it has specifically been averred that the defendant has failed to comply with the very essence of orders Nos. 2 & 5 of Mr. Justice King's 'order'. Nonetheless, although for the first time, orally or otherwise declared as a ground in oral arguments advanced before this court, in support of this application, by counsel for the applicant, this court will address it mind to it, very briefly, since in this court's view, it will not and cannot constitute a ground upon which the claimant's present application can properly succeed. That is so because that order (no.3), restrained the defendants from disposing of, or transferring, charging or diminishing the value of, or in any way dealing with assets in its name, wheresoever

they may be situate in the jurisdiction up to the value of US\$176,000.00 until June 11, 2013, or until further ordered. Whilst the claimant has provided evidence that the defendant has attempted, subsequent to the making of Mr. Justice King's order to dispose of its assets in terms of its machinery and equipment, there is no evidence that any such machinery or equipment has either been actually dealt with, or disposed of, or transferred, or charged, or the value thereof, diminished. The order no. 3 as made by Mr. Justice King, did not preclude the making of an attempt to dispose of that machinery and equipment. Whilst therefore, this court may be willing to accept that the defendant has breached, 'the spirit' of Mr. Justice King's order no. 3 as made on February 25, 2013, nonetheless, in order for this court to properly declare a person or party as being in contempt of court, this court must first find that such person or party, has been in default of compliance with an order of the court, this as distinct from said person or, party having breached 'the spirit' of the relevant court order, but moreover, that said person or party, has acted in wilful, or in other words, intentional disobedience of the relevant court order. See in that regard, my earlier judgment – **Margaret Gardener and Rivington Gardener** – [2012] JMSC Civ 160. There has not been, as yet and hopefully, there never will be, any disobedience of order no. 3 of the order of Mr. Justice R. King.

[18] The order granting an extension of time to file affidavit evidence in response (order no.5), has not been breached. This was a permissive order, as distinct from a mandatory one. The defendant is being afforded time to file affidavit evidence in response to that which is to be taken as equivalent to the claimant's particulars of claim. Affidavit evidence is the means by which, the claimant has been afforded the opportunity to set out its particulars of claim. See **rule 8.1(b) (ii) of the C.P.R.** in this regard. **Rule 10.2(2)(b) of the C.P.R.** permits the defendant, if they wish to defend the claim, to do so by means of filing a defence by means of affidavit evidence. If the defendant chooses not to defend the claim by means of filing any affidavit evidence, as a defence to same, or to file any acknowledgment of service, then, upon the first hearing of the fixed date claim form, this court can treat same as the trial of the claim

and therefore, may at that first hearing, award judgment in respect of the claim. See **rule 27.2(8) of the C.P.R.** in this regard.

[19] To this court's mind, the failure of a person or party to do something which he or they is/are permitted to do by means of a court order, cannot properly enable this court to determine/declare that person or entity as being in contempt of court. The situation would be different, if that order was a mandatory one and there had been a wilful disobedience of same. In the case at hand, order no. 5 as made by Mr. Justice King, is merely a permissive order.

[20] There is no doubt that there has been a failure of the defendant to comply with order no. 2 of Mr. Justice King's order made on February 25, 2013. That failure occurred insofar as such disclosure, by means of affidavit evidence, although very recently provided, by means of affidavit evidence which was filed on October 9, 2013, was provided long outside of the time period which was ordered by Mr. Justice King, of this court, on February 25, 2013, this being March 18, 2013.

[21] The defendant has contended, in response to this application, that whilst said breach is admitted, it is by no means accepted that such breach should result in a declaration that the defendant is in contempt of court. It is further contended by them, that there has been no proof by the applicant, that on the defendant's part, there was any wilful disobedience of that particular order (order no. 2). Furthermore, the defendant has asserted that not only is proof beyond any reasonable doubt required if the defendant is to be declared as being in contempt of court, but also, that the claimant/applicant has failed to meet and discharge that burden, in respect of its present application.

[22] This court accepts that in respect of an application such as this, although it arises out of a civil claim, it is the criminal standard of proof which is applicable. See: **Yianni v Yianni** – [1966] 1W.L.R. 120 and **Sookraj v Comptroller of Customers and Exercise** (C.A. – Guyana) – [1991] 48 W.I.R. 163, at p.169.

[23] The defendant has asserted that whilst they were in breach of the relevant court order, they essentially did not view it as necessary to provide the required information, when and how required by virtue of this court's order, or at all, since, accordingly to them, the claimant already know about the bank accounts, as well as the whereabouts of the relevant machinery and equipment.

[24] With all due respect to the defendant and to his counsel, this court must categorically state that this is, far from being a 'defence' to this application, which weakens the strength of same, it actually, further strengthens it. When a court makes an order, it is not for a person or party who is expected to be in compliance with same, to decide on whether and/or in what circumstances, he or they should be in compliance with same. Persons/parties in relation to whom court orders are made, must always comply with those orders, whether he/they agree with same or not, or whether he or they believe that such order(s) will be of assistance or use to anyone, or not. If it were to be otherwise, we would be operating in this country, by rule of man, rather than by rule of law. An order of a court, even if irregular, must be obeyed, unless and/or until it is set aside. See: **Isaacs v Robertson** – [1984] 3 W.L.R. 705.

[25] This court accepts that casual or unintentional disobedience of a court order will not constitute contempt. If though, in respect of the matter at hand, this court concludes that it has been proven beyond any reasonable doubt, that the defendant's conduct in failing to comply, was intentional, it is not necessary to prove that they appreciated that their conduct was a breach of the court's order, provided of course, as this court has found also proven beyond any reasonable doubt, the defendant knew all of the facts which made his intentional conduct, a breach of the court's order. See: **Spectravest Inc. v Aperknit Ltd.** – [1988] F.S.R. 161, as referred to in **The White Book, Vol. 1 [2000]**. In the matter at hand, the defendant, for their own reasons, simply chose not to comply with this court's order as made by Mr. Justice King. That the defendant may not have realized that he would have been in breach for having failed to do so, is perhaps a matter that can better be considered by this court, for the purpose of deciding what

order should be made arising from the defendant being in contempt of court, but it does not negate or result in a failure by the claimant to prove that the defendant is indeed in contempt of court arising from their failure to comply with order no.2 of Mr. Justice King's orders as made on February 25, 2013. The claimant was not required to prove to any extent whatsoever, that the defendant knew that his conduct would be viewed by this court as being in breach of this court's order, but instead, that the defendant knew that there was in place, the requisite court order and, for whatever reason, deliberately did not comply with same.

[26] This court does not believe that order no. 6 as sought by the claimant in this application, would be an appropriate order to make, arising from this court's declaration that the defendant is in contempt of court arising from the failure to comply with order no. 2 of the order of Mr. Justice King as made on February 25, 2013. That proposed order would be far too harsh, in the circumstances. Bearing in mind that no other order has been applied for, other than 'such further or other relief as may be just,' this court will, make an order granting other relief and instead, make an order requiring the defendant to pay into court, as security for good behaviour, the sum of \$100,000.00. Said sum shall be paid via the Accountant General's Office and shall be so paid, by or before October 31, 2013. That sum shall, if warranted, be returned to the defendant, upon the conclusion of this claim, if the defendant has demonstrably been of 'good behaviour' between now and then, this particularly insofar as compliance with any presently active or future court orders are concerned.

[27] The claimant shall file and serve the required order.

Hon. Kirk Anderson, J.