



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2019CD00219

BETWEEN	Phoenix Printery Limited	Claimant
And	Ashcar Printing Solutions Limited	Defendant

Civil Practice – Application to vacate committal order - Defendant company judgment debtor - Order for payment made against company - No enquiry into assets of company or its ability to pay – Whether jurisdiction to make committal order against director.

Mathew Royale instructed by Myers Fletcher & Gordon for Claimant

Zoya Edwards instructed by Zara Lewis & Co. for the Defendant

Heard: 28th July 2022.

In Open Court

COR: BATTS, J.

[1] On the 28th July 2022, having heard submissions, I made the following orders:

- a. *The order for committal made on the 22nd March 2022 is set aside*
- b. *Application for judgment summons to enquire into the assets and means of the Defendant Company is fixed for the 29th September 2022 at 10:00 a.m. for two hours*
- c. *Mr. Ashbourne Wynter (a director) is to file and serve an affidavit of means and assets of the Defendant on or before the 30th August, 2022.*
- d. *Leave to Appeal granted.*
- e. *No order as to costs.*

- [2] The reasons for the aforesaid orders may be shortly stated. Before doing so however a brief chronology of the main events in this litigation is appropriate.
- [3] This claim was filed on the 11th June 2019. The Defendant's then attorneys entered an acknowledgement of service on the 12th June, 2019. A Defence and a Counterclaim were filed on the 23rd June 2019. An Amended Claim and Particulars were filed on the 27th February 2020. Case Management Conference Orders were made on the 30th June 2020. A Further Amended Defence and Counter Claim was filed on the 16th July, 2020. The case was tried on the 22nd, 23rd and 26th March 2021 before the Honourable Mr. Justice Laing, as he then was. He delivered a written judgment in the Claimant's favour in the amount of \$5,810,828.40 with interest at 6% per annum from the 27th November, 2018 until payment in full.
- [4] On the 17th June 2021 a judgment summons was filed returnable on the 30th September 2021. It was addressed to Messrs Ashbourne Wynter and/or Karl Francis directors of the Defendant company. On the 30th September 2021 the judgment summons was part heard and adjourned to the 25th November, 2021. The minute of order, signed by the Hon. Mrs Justice Lisa Palmer Hamilton, stated "*Mr. Ashbourne Wynter to be examined by the court.*" It was ordered that an affidavit of means be filed and served by the judgment debtor on or before October 29, 2021, see the formal order filed on the 19th October 2021. On the 16th November 2021 an Amended Judgment Summons was filed and made returnable on the 25th November 2021. However, the matter appears to have been listed earlier and therefore, on the 23rd November 2021, the following orders were made:
1. *Amended Judgment Summons dated and filed November 16, 2021 is granted in the sum of total debt being \$11,6880.99. interest continues to accrue until date of final payment.*
 2. *The judgment debtor is to pay to the attorneys at law on record for the Judgment Creditor the sum of \$5,000,000 within 30 days of the date of this Order.*

3. *The judgment debtor is to pay to the attorneys-at-law on record for the judgment creditor the sum of \$1,000,000 on or before the 26th day of each month, beginning on the 26th January, 2022 until the full and final judgment debt inclusive of interest is satisfied.*
4. *Costs to the judgment creditor summarily assessed at \$280,000 to be paid within 14 days of the date of this Order.*
5. *Judgment Creditor's attorneys at law to prepare file and serve the Orders made herein. Service on the directors of the judgment debtor via email is permissible at email address ashcorprint@gmail.com.*

These orders were formalised and filed on the 24th November, 2021. The formal order has a penal notice erroneously placed above, instead of below, the Registrar's signature.

- [5] On the 23rd November 2021 the court also made an order for removal of the Defendant's attorneys-at-law from the record. This was pursuant to an application the Defendant's attorneys filed on the 13th July 2021. It means, and this was stated to me by Mr. Ashbourne Wynter, that on the 23rd November 2021 neither he nor the Defendant was legally represented.
- [6] By Notice of Application filed on the 26th January, 2022 the Claimant sought to have the Defendant's directors committed to prison. The grounds of the application were the Defendant's failure to comply with the order for payment made on the 23rd November 2022. On the 22nd March 2022 the Hon. Mrs. C. Brown Beckford ordered that Messrs. Ashbourne Wynter and Karl Francis be committed to prison for a term of 6 weeks or until the sum of \$7,280,000 is paid. The terms of the Order were suspended for 7 days "*upon Ashbourne Wynter and Karl Francis each entering into a bond in the amount of \$500,000.*"
- [7] Mr. Karl Francis retained an attorney-at-law who, by notice of application filed on the 4th April 2022, applied to have the committal order set aside. That application

was adjourned to the 29th September, 2022 and the execution of the Order for Committal against him stayed until then.

[8] By Notice of Application filed on the 24th May 2022 the Defendant applied to have the Committal Order made on the 22nd March, 2022 discharged and/or suspended for 5 years. A Warrant of Committal, issued pursuant to the Order of 22nd March 2022, was executed on Mr. Ashbourne Wynter. Mr. Royale informed me that for unexplained reasons the superintendent in charge of the institution, where he was incarcerated, released him prior to the 6-week period. The Claimants have nevertheless applied by Notice of Application filed on the 20th July 2022 for a further order for committal. It is that application, and the application to discharge, which came before me on the 25th July 2022. On that date I directed that a subpoena be issued to the superintendent, for his attendance on the 28th July, to account for the detention and alleged release of Mr. Ashbourne Wynter.

[9] On the 28th July it transpired that the subpoena had not been served. However, the events which unfolded made further enquiry in that regard unnecessary. The following uncontracted evidence was placed before me, see paragraphs 4 – 7 of the affidavit of Mr. Ashbourne Wynter filed on the 24 May 2022:

“4. That at a hearing on November 2021 I was asked by the Court to submit an affidavit of means. I was not represented by counsel in the matter but had asked Michelle Parker to assist me with same, however this was not done or submitted as she had not been officially retained.

5. I had later spoken to an attorney who initially told me that he would not be able to make it on the date but would have sent someone. The day before the matter I was told that he would have been there, however he did not show up at court.

6. *I was not aware that the affidavit had not been done until I was at court. The Judge decided to proceed with the matter on the insistence of counsel for the Claimant and as such Orders were made against me.*

7. *Due to my current financial position and the impending cost of litigation, I was unable to retain counsel further since my previous attorney had given me short notice of discontinuance in the matter. I have exhibited a copy of my bank statement marked "AW1."*

[10] I asked Mr. Wynter if when he was before the court on the 23rd November 2021 the judge or anyone had asked him about the means or assets of the Defendant company. He said he was not asked. The Claimant's counsel confirmed the accuracy of this information. I therefore asked counsel on what basis had the court determined that the Defendant was able to pay the judgment debt in the instalments ordered. He was unable to say. Counsel was more focussed on explaining that Mr. Wynter had had ample time to file the affidavit of means. He urged me to refuse the application to discharge the Committal Order.

[11] I have no hesitation in saying that an injustice has occurred. There is a distinction to be drawn, in law and fact, between a company with limited liability and its directors and shareholders. The debt of the Company is not the debt of its officers, ***Aron Salomon (a Pauper) v A. Salomon & Company Limited*** [1897] AC 22 is still good law. The Civil Procedure Rules cannot create a jurisdiction or give the court a power it does not otherwise have. Furthermore debtor's jail, or gaol as it appeared in older statutes, has long been abolished, see the Debtors Act sections 2 and 3(3). The purpose of a judgment summons is to examine the officers of the Defendant company on oath as to the assets and means of the company. It does not render the directors liable for the debt of the company.

- [12] On the 23rd November 2021 therefore, even if he attended without having filed an affidavit, the director ought to have been examined on oath as to the means and assets of the company. This was not a director who absented himself and failed to attend in response to a summons. His failure to file the affidavit, as ordered, may have been punishable however, before doing so, an enquiry into why he failed would first be necessary (in this regard see the rules concerning contempt). The committal order was however unrelated to that failure but was a direct result of the company's failure to make payment as ordered. These orders were however not based on any information about the company's ability to pay.
- [13] In these circumstances I have no doubt that the order for committal must be set aside. The order made on the 23rd November 2022, on which the committal order is premised, was irregular as it was made without an enquiry into the means of the company or its ability to pay. It is wrong to commit a director of a company unless the court is satisfied that the company has the means to pay but refuses, through its directors, so to do. The position is compounded by the fact that the director was unrepresented at the material time. Ordinarily applications to set aside or vary the order of a judge of equal jurisdiction would be referred to the judge who made the order. However, as the matter involves the liberty of the subject which is a fundamental right, I decided to act and to exercise this court's inherent power to correct its own errors.
- [14] The way to do this is to, even at this late stage, examine the director or directors as to the Defendant company's means. It is for this reason that I set aside the committal order, and after consultation with the registrar fixed the 29th September 2022 for this to be done and, ordered that an affidavit of means be filed.

David Batts
Puisne Judge