



[2023] JMCC Comm 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00030

BETWEEN	DINSDALE WILLIAMS	APPLICANT/CLAIMANT/ ANCILLARY DEFENDANT
AND	OPAL WALLACE	1ST RESPONDENT/DEFENDANT/ ANCILLARY CLAIMANT
AND	CENTURY SALES 2020 LIMITED	2ND RESPONDENT
AND	KB SITROF FINANCIAL SERVICES LIMITED	3RD RESPONDENT
AND	DANYIELLE DONALDSON	4TH RESPONDENT

Lemar Neale and Chris-Ann Campbell instructed by NEA|LEX, Attorneys-at-law for the Applicant.

Harrington McDermott instructed by Annmarie C. Jordan, Attorney-at-law for the 1st Respondent.

IN CHAMBERS

Heard: 31st January, 9th February and 31st March 2023

Civil Procedure - Part 53 of the Civil Procedure Rules.

Rule 53.10 - Whether contempt alleged to be committed after the grant of summary judgment is contempt committed within proceedings in the court and therefore properly commenced by application under Part 11 of the CPR.

Whether persons who are not parties to a claim may be joined as respondents in contempt proceedings commenced by application under Part 11 of the CPR.

Whether the service of court order endorsed with penal notice may be dispensed with in respect of a person against whom an application for committal for contempt is made and the person is not a party to the claim.

C. BARNABY, J

Introduction and Summary Conclusion

[1] On the 31st January 2023 an Amended Notice of Application for Court Orders filed on 17th August 2022 (the Application) came on for hearing before me and was part heard to 9th February 2023 to enable counsel to conclude submissions on the preliminary objections raised by Mr. McDermott in opposition to the Application for committal and other relief for contempt, and to endeavour to file and exchange written submissions and authorities in respect of the objections raised. Although no written submissions were filed and exchanged, Counsel were permitted to make oral arguments and the delivery of a decision on the preliminary objections reserved for on or before 31st March 2023.

[2] Among other things which are not immediately relevant, the Applicant seeks a declaration that the Respondents are in contempt of court for breaching the order of Laing J, orders for the committal to prison of the 1st and 4th Respondents, confiscation of the assets of the Respondents or in the alternative that the pay a fine, on the grounds reproduced below.

1. *Rules 53.5, 53.7, 53.9 and 53.13 of the Civil Procedure Rules, 2002 (as amended) empower the Court to punish for contempt.*

2. *The Respondents have breached the order of the Honourable Mr. Justice Laing made on August 13, 2021 which states as follows:*

“ ... The orders at paragraphs 1 - 4 are subject to:

i. The Defendant closing and not continuing to operate in any manner whatsoever the business which is the origin of the dispute between the parties in the claim, and securing the stock and equipment related thereto until the appeal is determined.

ii. ...”

3. *The 1st Respondent was present at court when the order was made.*
4. *The 1st Respondent, since the order was made, operated the business of the 2nd Respondent by selling the stock through the 2nd and 3^d Respondents.*
5. *The 1st Respondent is a director and shareholder of the 2nd and 3^d Respondents all of whom are taken to have knowledge of the order.*
6. *The 4th Respondent is a director and shareholder of the 2nd Respondent and has knowledge of the order through service on the 2nd Respondent.*
7. *The Respondents' breach of the order of the court is intentional, deliberate and contumacious.*

- [3]** The Applicant is the claimant/ancillary defendant and the 1st Respondent is the defendant/ancillary claimant in the substantive and ancillary claims respectively. The substantive and ancillary claims are for damages for breach of contract in respect of the sale of the Applicant's business to the 1st Respondent.
- [4]** The evidence of the Applicant is that the 2nd Respondent, an incorporated company, is engaged in the business of selling the assets and stocks sold to the 1st Respondent pursuant to the agreement for sale of the Applicant's business. The 1st and 4th Respondents are directors of the 2nd Respondent. The Application against the 3rd Respondent was withdrawn on 16th November 2022. Neither the 2nd or 4th Respondents are parties to the substantive or ancillary claims.
- [5]** The gist of Mr. McDermott's submissions - which will be addressed more fully later in these reasons for judgment - is that the Application should properly have commenced by fixed date claim form; and that safeguards which exist for a person enjoined by the order of the court are equally applicable to a third party who is sought to be punished by orders for committal and confiscation of assets.
- [6]** Although I found Mr. McDermott's submissions intriguing, I cannot agree with them. For reasons set out below I find that the contempt alleged to have been committed is within proceedings in the court and the Application properly commenced under Part 11 of the CPR. I also find that there is no requirement for a third party to be served with the order which the contempt

proceedings are brought to enforce with a penal notice endorsed, when the order for contempt is pursued under section 2 of Part 53 of the CPR. In the result I order as follows.

- i. The Amended Notice of Application for Court Orders filed on 17th August 2022 is one which has been properly commenced and is to proceed to a hearing on its merits on 15th June 2023 at 11:00 am for two (2) hours in open court.
- ii. Costs of the 31st January, 9th February and 31st March 2023 are to be costs in the Application.
- iii. Claimant/Applicant's Attorneys-at-law are to prepare, file and serve this order.

Reasons

The Scope of Part 53 of the CPR

- [7] Part 53 of the CPR under which the Application is made sets out the procedure for enforcing orders and judgments of the court by way of committal and confiscation of assets. It comprises three sections. Section 1 makes provision for the committal and confiscation of assets for breach of the court's order, section 2 for committal for contempt and section 3 which sets out rules common to applications under sections 1 and 2.
- [8] A number of authorities were cited by Mr. McDermott which he admirably conceded does not assist the submissions which he advanced. While all authorities submitted by both Counsel were considered, I did not find that the citation of each of them is necessary to the disposition of the preliminary objections raised. I nevertheless thank Counsel for their industry in this regard.
- [9] Very useful among the authorities is the decision of Morrison JA (as he then was) in **Stewart v Sloley and ors** [2011] JMCA Civ. 28, where some of the material distinctions between proceedings under sections 1 and 2 of Part 53 were summarized at paragraphs 57 to 61 thus.

[57] Section 1 of Part 53 deals with the power of the court to commit a person to prison or make an order confiscating his assets for failure to comply with (a) an order requiring that person, or (b) an undertaking by

that person, to do an act within a specified time or by a specific date, or not to do an act. **It is clear that section 1 is referable to the punishment by committal or confiscation of assets of persons who have themselves been enjoined by an order of the court to do or to refrain from doing something.** Where that person is an individual, then rule 53.3 provides that the court cannot make an order for committal or confiscation against him or her unless (a) the order has been served personally on him or her, and (b) at the time of service of the order, it was endorsed with a penal notice in the prescribed form, that is to say, that “If you fail to comply with the terms of this order you will be in contempt of court and may be liable to be imprisoned or to have your assets confiscated.” Where an order for confiscation of assets for contempt is sought against a body corporate, the order served on that body must also have been endorsed with a penal notice in the prescribed form, that is to say, that “ If you fail to comply with the terms of this order you will be in contempt of court and may be liable to have your assets confiscated” (rule 53.3(b)) Where a committal order or confiscation of assets order is sought against an officer of the body corporate, rule 53.4 provides that (a) a copy of the order requiring the body corporate to do or to refrain from doing something must have been served personally on the officer against whom the order is sought, and (b) at the time when it was served it must have been endorsed with a penal notice in the prescribed form, that is to say, “If [name of body corporate] fails to comply with the terms of this order it will be in contempt of court and you [name of officer] may be liable to be imprisoned or have your assets confiscated”.

[Where the judgment or order has not been served however, rule 53.5 permits the court to make an order dispensing with service of the judgment or order under rules 53.3 or 53.4 if it thinks it just to do so. Further, where the order required the judgment debtor not to act but the judgment or order has not been served, the court may nevertheless make a committal or confiscation of assets order where it is satisfied that the person against whom the order is to be enforced has had notice of the terms of the order on account of being present when the order was made or being notified of the terms of the order by telephone, post, FAX or otherwise. (rule 53.5)]

[58] Section 2 of Part 53 on the other hand deals with the more general power of the court to commit for contempt. The only precondition to the

bringing of an application for an order to commit for contempt under this section (leaving aside for the moment the issue of whether the contempt alleged was committed within proceedings or not) is that the claim form or the application, stating the grounds of the application and accompanied by a copy of affidavit in support, must be served personally on the person sought to be punished (rule 53.10(2)). However, the court is empowered to dispense with service if it thinks it just to do so (rule 53.10(3)). Specifically, there is no requirement in section 2 of Part 53 for service of an order, whether endorsed with a penal notice or otherwise, on the person sought to be punished.

[59] The effect of the separate and distinct requirements of sections 1 and 2 of Part 53 of the CPR therefore seems to me to be to preserve the clear distinction made by Lindley LJ in the following passage from his judgment in Seaward v Paterson (at pages 555-6):

“A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice is another and totally different thing. The difference is very marked. In one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the Court for the benefit of the person who got it. In the other case the Court will not allow its process to be set at naught and treat with contempt.”

[60] ...

[61] Section 1 of Part 53 is therefore concerned with contempt of court allegedly committed by parties to the order of the court which is said to have been breached, while section 2 is concerned with the wider, general category of contempt which is said to interfere with the due administration of justice. In my view, a careful reading of Part 53 makes it clear that the requirement of service of the order which the contempt proceedings are brought to enforce, with a penal notice endorsed, is applicable to cases falling within section 1, but not those falling within section 2. This the

category of contempt which in respect of which Lord Donaldson MR had observed (in Attorney General v Newspaper Publishing) [[1987] 3 All ER 276], page 302, that none of the “traditional safeguards”, such as “personal service of the order, the indorsement of a penal notice on the order and the care which is taken to ensure that the conduct complained of constitutes a breach of the express terms of the order... has ever been applied, or could apply...”. It seems to me that, in any event, by its very nature, the kinds of contempt which might be said to interfere with the due administration of justice (such as disruption of court proceedings, for example) would ordinarily not be amenable to the kind of procedure prescribed in section 1 of Part 53.

The propriety of commencing the Application under Part 11 of the CPR

[10] On 17th June 2021 Laing J granted summary judgment to the Claimant on the substantive claim and on the 25th June 2021 judgment for the Claimant was entered in the sum of \$108,700,000.00 together with interest at 10% from the 17th June 2023 until the judgement is satisfied. From all indications, the ancillary claim remains extant.

[11] Subsequently on 13th August 2021, Laing J pursuant to paragraphs 1 to 4 of orders made on that day, extended the time for leave to appeal the orders of 17th and 25th June 2021; gave leave to the Defendant/1st Respondent to appeal those orders; ordered a stay of execution of the 17th and 25th June orders; and stayed the provisional attachment of debt and charging orders made by Batts J on 7th July 2021 until the appeal was heard. Those orders of Laing J

... are subject to:

- i. The Defendant closing and not continuing to operate in any manner whatsoever the business which is the origin of the dispute between the parties in the claim, and securing the stock and equipment related thereto until the appeal is determined; ...*

[12] The above order is the concern of the Application.

[13] On behalf of the 1st Respondent, and in reliance on rule 15.6(1)(a) of the CPR, Mr. McDermott contends that proceedings are at an end, summary judgment having been entered in favour of the Applicant against her on the substantive

claim. In consequence says Mr. McDermott, the commencement of proceedings against the 1st Respondent for contempt by an application under Part 11 of the CPR is improper. He argues that the application is to be made by fixed date claim form, pursuant to rule 53.10(1)(a). The submission is without merit.

[14] In the first instance, the 1st Respondent was the person who was enjoined by the order of Laing J to close and not continue to operate the business which is the origin of the dispute between the parties to the substantive claim. Accordingly, proceedings for committal and confiscation of assets is properly commenced under section 1 of Part 53. 53.2 (1). There is no requirement for applications under that section to be commenced by fixed date claim form. In fact, on a reading of rules 53.7 and 53.8, it is evident that applications made under section 1 are by way of notice of application.

[15] Under Part 53, the requirement to commence an application by fixed date claim form only appears in respect of proceedings which are pursued under section 2 which is concerned with the more general power reserved to the court to commit for contempt, and under which allegations of contempt by third parties is determined. In that regard, and so far as is relevant, rule 53.10 (1) provides that:

An application under this Section [2] must be made -

*(a) in the case of contempt committed **within proceedings in the court**, by application under Part 11; or*

(b) in any other case, by a fixed date claim form, setting out the grounds of the application and supported, in each case, by evidence on affidavit.

[Emphasis added]

[16] Rule 15.6(1)(a) empowers the court on the hearing of an application for summary judgment to “*give summary judgment on any issue of fact or law whether or not such judgment will bring proceedings to an end*”. While there is recognition in the rule that summary judgment on an issue of fact or law has the potential to bring proceedings to end, it does not assist in construing the term “*within proceedings in the court*” in rule 53.10(1)(a).

[17] Rule 8.1(2) having prescribed that proceedings are started when a claim form is filed, whether or not contempt is committed within court proceedings is dependent on the existence of a filed claim form commencing a claim at the time the of the alleged contempt. Support for this view can be found in the dictum of Morrison JA in **Stewart v Sloley and ors.** In that appeal Morrison JA determined that Anderson J was correct in striking out the application for committal for contempt which commenced by application under Part 11 of the CPR in circumstances where Stewart had obtained interim search orders which he alleged that the third party respondents had breached in contempt of the orders of the court, when a claim form had not yet been filed to commence proceedings. It was found that the contempt which was alleged against the respondents was not committed within proceedings in the court and ought properly to have been made by way of fixed date claim form pursuant to rule 53.10(1)(b).

[18] In the course of his judgment, after referencing Part 8 of the CPR “How to Start Proceedings” and the impact of applications for interim relief before the filing of a claim form, which is indicative of the start of proceedings, in a statement with which I agree entirely, Morrison JA stated:

*[44] ... ‘proceedings’ do not come into existence until and unless a claim form has been filed and that, whatever label may be attached to the process by which a party is permitted to seek and obtain interim relief pursuant to Part 17, that process does not form part of any “proceedings” within the meaning of the rules. It therefore follows from this, I think, that **the phrase “within proceedings in the court” in rule 53.10 (1)(a) must be taken to refer to proceedings in the sense in which the word is used in the rules generally, that is, to denote the process commenced by the filing of a claim form...***

[Emphasis added]

[19] The order of Laing J on 13th August having been made in a matter commenced by the filing of a claim form on 8th February 2021, and in respect of which contempt against the Respondents is alleged, the Application has its concern a case of contempt committed within proceedings in the court and is within the parameter of rule 53.10(1)(a). Accordingly, I find that the Application was

properly commenced by notice under Part 11 of the CPR. In any event, the ancillary claim which has been filed in the proceedings commenced by claim form is yet to be determined.

[20] This brings me to the submissions of Mr. McDermott which were made *amicus* in respect of the 4th Respondent, who is not a party to the substantive claim and would not have been enjoined by the order of Laing J which the Applicant now seeks to enforce.

[21] While Mr. McDermott does not appear on record for the 4th Respondent, he was nevertheless permitted to make the following contributions in the capacity earlier stated.

- i. Contempt proceedings against a person who is not a party to the substantive claim is improperly commenced by application under Part 11 of the CPR. Accordingly, the application for contempt must be by way of fixed date claim form and must be personally served on the 4th Respondent.
- ii. An order requiring a judgment debtor not to do an act must be served personally on a person who is not a party to the substantive claim where the judgment creditor brings committal proceedings for contempt, which service cannot be dispensed with.
- iii. The service of the court order not to do an act, endorsed with the relevant penal notice cannot be dispensed with where a judgment creditor brings contempt proceedings against a person who is not a party to the substantive claim.

[22] In light of my finding that the Application was properly commenced by notice under Part 11, there is no merit in the first of the above contributions by Mr. McDermott.

[23] For reasons which I will endeavor to show subsequently, I also find the second and third contributions to be without merit. Section 2 of Part 53 under which contempt applications against third parties is pursued does not require the service of the court order which enjoined a party or of a penal notice. The pursuit of the Application against the 4th Respondent in the absence of their service does not prevent the court making an order under section 2 of Part 55.

In these regards I share in the observation of Morrison JA at para. [61] of **Stewart v Sloley and ors** which was earlier reproduced but which bears repetition here.

*... a careful reading of Part 53 makes it clear that the requirement of service of the order which the contempt proceedings are brought to enforce, with a penal notice endorsed, is applicable to cases falling within section 1, but not those falling within section 2. This the category of contempt in respect of which Lord Donaldson MR had observed (in **Attorney General v Newspaper Publishing**) [[1987] 3 All ER 276], page 302, that none of the “traditional safeguards”, such as “personal service of the order, the indorsement of a penal notice on the order and the care which is taken to ensure that the conduct complained of constitutes a breach of the express terms of the order... has ever been applied, or could apply...”. It seems to me that, in any event, by its very nature, the kinds of contempt which might be said to interfere with the due administration of justice (such as disruption of court proceedings, for example) would ordinarily not be amenable to the kind of procedure prescribed in section 1 of Part 53.*

[24] When the dictum of Lord Donaldson MR in **Attorney General v Newspaper Publishing** on which Morrison JA relies is read, the rationale for the departure from the traditional safeguards when the complaint is third party contempt and therefore interference with the due administration of justice is evident. The following appears at page 302 of the dictum of the learned MR.

.... None of these procedural safeguards has ever been applied, or could apply... The test of contempt or no contempt in that category is not inconsistency with the purpose of the court's order, it is in every case, and whether or not there is an order, simply whether the alleged contemnor knowingly interfered with the due administration of justice by the court. In almost all cases, given the facts the answer is obvious to anyone... I can see nothing in the result which offends the basic principles of natural justice.

[25] I agree with the above conclusion of Lord Donaldson MR that the absence of the safeguards for third party contempt do not offend the basic principles of natural justice. This is so particularly because it is the general rule that an application against a third party under section 2 of Part 53 which states the grounds on which the application is made, accompanied by the affidavit evidence in support are to be served personally on the third party sought to be punished as prescribed by rule 53.10(2). This gives an alleged contemnor the opportunity to be heard. While service under the referenced rule may be dispensed with by the court pursuant to rule 53.10(3), the power is to be exercised only if it is just to do so.

[26] It is in all the foregoing premises that I make the order at paragraph 6.

.....
Carole Barnaby
Puisne Judge