Judgment Both.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M. 128 OF 1993

BETWEEN	AIR JAMAICA LIMITED	PLAINTIFF/RESPONDENT
A N D	MIKE FENNELL	
A N D	THE BUSTAMANTE INDUSTRIAL TRADE UNION	DEFENDANT/APPLICANT

Frank Phipps, Q.C., and Miss Dawn Satterswaite instructed by Miss Kathryn Phipps for Applicant.

Dennis Goffe, Q.C. and Steve Shelton, instructed by Myers, Fletcher & Gordon for Mike Fennell.

Dr. Lloyd Barnett & Mrs. Priya Levers for Air Jamaica.

Heard: 2nd, 3rd and 6th December, 1993

Harrison, J

A preliminary objection has been raised to these two motions each dated the 29th day of November, 1993. The Bustamante Industrial Trade Union ("The Union") seeks by the first motion an order to issue writs of sequestration against the property of Air Jamaica Limited ("The Company") and the property of Mike Fennell, a director of the said Company, and by the second motion, an order of committal against the said Mike Fennell, for contempt of court.

This alleged contempt arises from a complaint that the Company committed a breach of an undertaking given to the Court on the 12th day of November, 1993.

The Order of the Court read:

> "It is hereby ordered by consent that the summons dated 2nd November, and 11th November, 1993 be adjourned sine die:
>
> 1. On Air Jamaica Limited by its Counsel giving an undertaking that it will not by itself, its officers, its servants and/or its agents employ any flight attendants on a temporary or permanent basis until the 29th day of November, 1993.
>
> 2. And the Bustamante Industrial Trade Union by its Counsel and the flight attendants represented by the said Union and each of them take any steps to enforce the Award dated the 26th August, 1993 of the Industrial Disputes Tribunal until the 29th day of November, 1993."

The allegation is that the Company subsequently employed twenty (20) persons, in breach of the said undertaking given to the Court.

Mr. Goffe, Q.C. for Mike Fennell, argued in limine, that in Jamaica an application for an order of committal for contempt of court is governed by section 651 of the Judicature Civil Procedure Code Act ("The Code") and the only remedy is attachment and not committal proceedings, and that one must proceed by means of motion to the Full Court, in the instant case because the undertaking is to be treated in the same way as the breach of an order of the court. He relied on the judgment of Smith, C.J. in Halse Hall Ltd et al. as Martina Robinson et al. (1977) 15 J.L.R. 131, Biba Ltd. vs. Stratford Investments Ltd. [1977] 3 ALL ER 1041, Gandolfo vs. Gandolfo [1981] 1 Q.B. 359, and section 564 of the Code. He stated further that leave had been granted to the Company to apply to the Full Court for an order of certiorari and therefore the said section 564 applied and consequently no application may be made to a judge in Chambers for enforcement of a breach of the undertaking. He maintained that a writ of sequestration cannot issue against Mike Fennell, because no prior writ of attachment was issued as is required by section 652 of the Code, nor may one resort to the procedure and practice of the Supreme Court of Judicature of England, in this regard, as provided by Section 686 of the Code because the remedy of sequestration is dealt with in the said Code. Continuing, he said that where the Code deals with a particular procedural matter, even if a procedural problem arises, such as the 'imprisonment of a company," that does not reasonably permit the adoption of the provisions of Order 45 Rule 5 of the English Rules, vide Lopez vs. Geddes Refrigeration Ltd. [1968] 10 JLR 558, and Supreme Court Civil Appeal NO. 79/87 JMM Atlantic Line Ltd. vs. Metal Box P.L.C. dated 1.12.88. He concluded that this Court had no jurisdiction to hear the motions.

Mrs. Levers for the Company argued that Air Jamaica is a person in law and therefore subject to proceedings by attachment as contemplated under Section 651 of the said Code and not by way of sequestration. She took the view that the process of sequestration against a company required the existence of a prior money judgment as recited by the limiting provisions of section 643, 644 and 647 of the Code or in circumstances under section 652, none of which applied in the instant case - the court therefore had no jurisdiction. She cited in support, the case of Ward Theatre Co. vs. Lindo (1951) 6 JLR 11.

Mr. Phipps for the applicant Union, submitted that Mike Fennel was joined, only as a director of the Company, that there was a distinction between a person who gives an undertaking and the undertaking given by a company, that one cannot institute attachment proceedings against a company, because it cannot be lodged in prison, and that attachment is not the proper remedy for disobedience of a negative undertaking as in the instant case, in contrast to a positive undertaking. He submitted further that the Halse Hall case does not apply because that case involved a positive act to be done, and by an individual, as distinct from a company, that Section 651 of the Code permits proceedings for attachment against an individual only for contempt of court and that there are no specific provisions in the Code for enforcement of disobedience of orders in the nature of contempt as it relates to a company. Consequently, applying the provisions of Section 686 of Code, one has to resort to the procedure and practice of the Supreme Court of England. He relied on Order 45 Rule 5/3 which recites that an undertaking given to the court is equivalent to an injunction and its breach is punishable as the breach of an injunction, on Halsbury's Laws of England, 3rd Edtn. Vol. 8, paragraph 47 and on Order 45 Rule 5/4 which permits a judgment or order against a corporate body to be enforceable by several remedies, namely, (1) by writ of sequestration and (2) by writ of sequestration against the personal property of any director or other officer of that body. He stated further that an undertaking by a company cannot be enforced by attachment of the directors since it is not their undertaking, that the Union has not sought to institute attachment proceedings and therefore the provisions of the section 564 U of the Code does not apply. He relied on the case of D. vs. A & Co. (1990) 1 CR 484 to support his contention that the breach of an undertaking must be enforced by committal and not by attachment. Mr. Phipps concluded that the Court should dismiss the objection and proceed on the merits of the case.

Title 46 of the Code, entitled "Judgment and Execution" and comprising sections 579 to 655, provides a comprehensive treatment of the procedure of enforcement of orders and judgment in the Supreme Court. Sections 604 to 647 deal with the enforcement of judgments or orders for the payment of money, by inter alia, the seizure and sale of personal and real property, the examination

and permissible imprisonment of judgment debtor (section 618), by attachment of debts - (section 624) - Garnishee proceedings or by the attachment of person (section 647) or by sequestration, (sections 643 to 647). Sections 648 to 553 deal with the enforcement of judgments or orders other than for payment of money, by means of, inter alia, writs of possession of land, specific performance of contract, execution of deeds or instrument and by attachment and sequestration.

Section 651 reads:

> "A judgment or order requiring any person to do any act other than the payment of money, or abstain from doing any act, may be enforced by attachment."

The scope and effect of this latter section was considered and explained in a very detailed and helpful judgment of Smith, C.J. in the Halse Hall case, supra, tracing the historical evolvement of this section, its departure from a comparable procedure that prevailed in the Supreme Court of England, and he said at page 14 of the said report:

> " .....in my opinion ..... The result is that when the provisions of section 651 of the Code were introduced in 1903 disobedience of orders of the court with which the section deals could thereafter, only be enforced, as a contempt of Court by attachment." The learned C.J. continued,
>
> "It is quite clear that the draftsman of the rules which, in 1903, amended the Code deliberately selected attachment as the sole procedure to the exclusion of the procedure by way of committal ....." and he explained the reason why this was done.

The learned Chief Justice explained at p. 134, that

> " .....in the United Kingdom, writs of attachment were executed by the sheriff and warrants of commitment for disobedience of orders by a tipstaff, an official of the court. We had no similar official in 1903, whereas our bailiff corresponded to their sheriff."

He further pointed out that,

> ".....by 1903 in the United Kingdom ...either process was available for both positive and negative acts of disobedience ..... Sir George, Jessel the famous master of the Polls, is reported as having said in 1878 that the distinction between committal for contempt and attachment for contempt was practically abolished, that the difference between them seems mainly to be in the more summary process

> of the former and in the degree of inconvenience and expense attending it (see Harvey vs. Harvey (1844) 26 Ch.D. of P. 654. In Re Bell's Estate, Foster vs. Bell (1870) L. R. 9 Eq. of p.174), as compared with committal, an attachment was referred to as 'the simplest and least expensive process' ....."

Here in Jamaica we still have no such official alike the English tipstaff, who is described as,

> "an official in the nature of a constable, attached to the Supreme Court, ...the functions of the tipstaves have been confined to arresting persons guilty of contempt of court." [Osbourn's Concise Law Dictionary, 5th Edition, page 314.]

In Halsbury's Laws of England, Volume 8, 3rd Edition, at paragraph 75, page 43, it was observed that,

> "In the absence of the tipstaff, the court appoints the usher to act in his place, and not the sherriff."

The usher in the Supreme Court in Jamaica has no such similar powers of apprehension and detention.

Committal to prison was not totally abandoned by our Code. Section 618 enables a judgment creditor "whose judgment or order remains wholly unsatisfied.... To apply and a court may commit defaulter to prison .... as it thinks fit," albeit a less elaborate form of committal. In addition, as previously pointed out, sequestration is well known to our law, and within the context of the contempt of court procedure - section 651 & 653, but not as an initiating process without attachment, as employed by the English Rules of Court.

This Court holds, therefore, following, the dictum of Smith, C.J. in the Halse Hall case, that the only procedure for contempt of court envisaged by section 651 is that by way of attachment.

The further question arises whether, as the Union argued, the contempt of a company is not enforceable under section 651, due to the recital ...,"any person" which relates to an individual only.

The Interpretation Act provides that,

> "'Person' includes any corporation either aggregate or sole, and any club, society, association or other body of one or more persons."

"Any person" in section 651, therefore embraces the Company and it was therefore not necessary for the draftsman of the Code to have made any specific reference to companies as distinct from individuals under section 651. The draftsman was not unmindful of the necessity to do so in certain instances, as one sees in section 610 which concerns appearance and examination of a defaulting judgment debtor. It reads,

> "or in the case of a corporation any officer thereof"

The truism that a company cannot be attached does not give rise to any difficulty or mischief in the law. Where a director or other officer of the company gives an undertaking on behalf of a company it is the undertaking of the company. Such a director or officer is an organ of the company. It is therefore an over-simplification to make the sweeping statement, without more, that a company cannot be attached.

The author Gower, in Gower's, Principles of Modern Company Law, 4th Edition, at page 205, said,

> "In general the wide doctrines of agency and vicarious liability developed by English Law enable a company to be held withstanding that it is an artificial person that can act only through its human agents and servants. But there are some circumstances, ...where a person is not held liable unless he himself is personally at fault. If applied strictly to corporate bodies, this would mean that in such circumstances they would never be held liable. To avoid this consequence the courts have developed a doctrine that the acts and thoughts of certain agencies of a company may be regarded as those of the company itself. In effect those agencies are treated as organic parts of the companies."

He said further, at page 209,

> "Recent years have seen a further development whereby the rule that the acts of directors are treated as those of the company is, in effect, applied in reverse, so that the acts of the company are treated as those of its directors."

The case of Biba vs. Stratford Investment, Ltd., supra, was referred to in this reasoning. In the latter case, an undertaking given by a director of

a company, was deemed to be equivalent to an order of injunction, and on its breach by the company the said director was punishable for contempt of court.

It therefore seems that the above observations of the author and the Biba case re-inforce the view that the attachment process of section 651 is in no way deficient to deal with any proven disobedience of a company, namely, the breach of an undertaking by the company given to the Court. There is therefore no need to have recourse to section 686 of the Code and as a consequence the English rules of procedure attracting the process of committal and sequestration. Vide Lopez vs. Geddes Refrigeration Ltd., and JMM Atlantic Line Ltd. vs. Metal Box P.L.C., supra.

Any undertaking given to a Court and embodied in an order, as in the instant case, must be respected and scrupulously obeyed. Any breach of such an undertaking is punishable as a contempt of court.

If the applicant union contends, in the instant case, that a particular director or officer of the Company gave the said undertaking or that the hierachical management structure of the Company is such that that undertaking was delegated or authorized by him or breached by him or any other officer of the Company, section 651 in its form and content is sufficient and appropriate to punish him and the Company for the breach of such an undertaking by the process of attachment. The author Gower, in discussing the acts of the company said, at p. 209,

> "If need be, the courts will conduct a factual analysis of the workings of the company's management to discover who the 'responsible officers' are."

Sequestration against the Company is a valid process but may only arise from a prior initiating proceeding by way of attachment, see sections 652 and 653 of the Code. The procedure for attachment in certiorari proceedings is provided for in section 564u(1) which falls within "Title 44A - Full Courts."

Section 564A reads:

"(1) The following proceedings.....shall be heard by a Full Court:-

(a) Application for an Order of Mandamus, an order of Prohibition or an order of Certiorari:

(b) .....

(c) Proceedings for attachment for contempt of court in the cases specified hereafter in this Title;"

The proviso to section 564u (1) reads, inter alia:

"(a) The issue of a writ of attachment shall not be ordered by a judge in Chambers, but only by the Full Court .....

Section 564u(2) reads:

"This Rule applies to cases where the contempt is committed:-

(a) In connection with proceedings to which this Title relates;

(b) In connection with .... any proceedings ... otherwise in the High Court, except where the contempt ... consists of disobedience to an order of the Court ....."

In the instant case after leave to apply to the Full Court for an order of certiorari was granted, the undertaking in question was given by the Company to the Court - a judge in Chambers. The said undertaking, having been considered to have been given in certiorari proceedings, this Court has no jurisdiction to embark on these proceedings.

For the above reasons, this Court holds that the point in limine succeeds, both motions as framed are misconceived and each is accordingly dismissed, with costs to the respondent Company and Mike Fennell, respectively.