[2012] JMSC CIV 160

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010HCV2594

BETWEEN	**MARGARET GARDNER**	**CLAIMANT**
A N D	**RIVINGTON GARDNER**	**DEFENDANT**

Michelle Champagnie, of counsel, for the Claimant.

Karlene McFarlane and Dianne Edwards and Marjorie Shaw, instructed by Dianne Edwards, for the Defendant.

HEARD: July 19 &31, 2012

CORAM: ANDERSON, K. J.

Application for contempt for breach of a Court Order – What must be proven – Burden of proof – Standard of proof – Procedural requirements to be met – Part 53 of Civil Procedure Rules – Actus Reus and Mens Rea of civil contempt – Section 21(1) of Maintenance Act.

[1] This matter has most recently come before this court for determination upon a Notice of Motion for committal for breach of a Court order, pursuant to Part 53 of the Civil Procedure Rules. That Motion was filed by the Claimant/Applicant, on May 3, 2012 is supported by an Affidavit which was deposed to by the Claimant/Applicant and also filed on May 3, 2012.

[2] The Claimant's Application has been made arising from the Defendant's failure to fully comply with this Court's order as was then made by one of my brother's justices, on July 5, 2010. At that stage the Claimant's Claim was then awaiting trial. It should be noted at this juncture, that the parties to this claim are married to each other, but live separate and apart from one another. Their marriage prior to separation was of relatively short duration, that being – four (4) years. This Court has gleaned this information both from the Judgment as rendered by this Court after the conclusion of trial of the Claim, as well as from the Claimant's Affidavit in support of the Fixed Date

Claim Form which she filed, initiating this Claim, which pertains to an application for division of matrimonial property, pursuant to the Family Property (Rights of Spouses) Act. This Court has taken judicial notice of those matters and indeed, of other filed documentation as well as this Court's Judgment upon conclusion of the trial of the Claim for the purpose of enabling consideration of the Claimant's Application, in a complete context.

[3] The Order of this Court which has allegedly not been complied with, has been superseded by later Orders made by Honourable Miss Justice Edwards in her Judgment on the Claim. That Order though, of July 5, 2010, was effective and operative, as an interlocutory Order of this Court, until it was superseded by later Orders as made by this Court. Thus, unless and until that interlocutory Order was set aside or varied by this Court, it ought to have been complied with, this even if the Defendant disagreed with the terms thereof, as had been ordered by this Court. On this point, see: **Isaacs v Robertson (1984) 43 W.I.R. 126 (P.C.).** The Defendant, it should be noted, had applied for a variation of this Court's interlocutory Order on July 5, 2010. That application was however refused, on the ground that the trial of the Claim was then impending and in the circumstances, all of the issues to be addressed by this Court in respect of the Application to vary, could and would also be addressed by this Court, at trial. That this was the reason given by a Judge of this Court for denying the application to vary, is evidence given by the Defendant in his response to this Application for committal, this being evidence which has not been contradicted in the slightest, in any Affidavit evidence on the claimant. Indeed, the Claimant's counsel for the purposes of this Application was very forthright in having informed this Court that she could not say what had transpired at Court leading to the Court having denied the Defendant's Application to vary, as she was not present in Court on the day when that Application was heard and determined. For their part, defence counsel insists that the reason as has been proffered by their client, in paragraph 5 of his Affidavit evidence given in response to the Claimant's Application for committal, is indeed truthful and correct. Be that as it may, this Court is in any event, constrained to accept such as being truthful

insofar as such evidence is not only uncontradicted, but also not of such a character as to be patently and/or inherently lacking in credibility.

[4] In that Application for variation of this Court's Order of July 5, 2010, which was filed on November 25, 2010, (not on December 14, 2010 as deposed to by the Defendant in paragraph 4 of his Affidavit evidence for the purposes of this application) – this therefore having been just four (4) months after that order had been made, the Defendant had set out several grounds for the variation which was then being sought. The majority of those grounds relate to the alleged inability of the Defendant, from a financial standpoint, to comply with the terms of that interlocutory Order. In support of that Application, the Defendant provided sworn evidence by means of Affidavit which was filed on March 8, 2011 and in that Affidavit, has made reference to other earlier Affidavits of his. The essence of that which was deposed to by the Defendant in support of that Application, was that he would be unable to comply with this Court's interlocutory Order arising from his then existing financial commitment to maintain other children of his – these being children that he had had prior to the commencement of his marriage with the Claimant, along with his existing relatively modest personal commitments for someone such as the Defendant, who is, it should be noted, even according to the Claimant's own evidence on this application, an architect, both of considerable experience and good repute in the architectural profession. This is evidence which has been given and indeed supplemented in material respects by the Defendant in one of his earlier Affidavits, that being his Affidavit which was filed on November 25, 2010 and which was referred to in the Defendant's Affidavit which was filed, as aforementioned, on March 8, 2011. In that earlier Affidavit of his (filed November 25, 2010), the Defendant deposed to having financed the purchase of a mercedes benz motor vehicle for the Claimant, by means of a loan which is secured by the Defendant's property at 19 Hill Road, Norbrook Heights, in the parish of St. Andrew and which is paid for, exclusively by the Defendant. That said house is also mortgaged to Bank of Nova Scotia and the mortgage for same was being paid for by the Defendant. The Affidavit as filed by Mr. Gardner specifically in response to the Claimant's application for committal for contempt discloses that the Bank of Nova Scotia

has already indicated to him, their intention to foreclose and have recently attended upon said property to value same. The property though, it is stated by the Defendant in his latest Affidavit, is in a deplorable condition and therefore would not likely yield in terms of sale price, as much as it would, if it had been in a good condition. The Defendant has also deposed, implicitly at least, to his wishing to have said house, which now constitutes his only remaining asset, sold. Thus he has stated in paragraph 17 of his latest Affidavit, that, "my inability to discharge my financial obligations to the claimant/applicant is directly related to my ability to sell my only remaining asset, that is, my house, and the state of disrepair, which, when combined with the downturn in the real estate market, has significantly compromised the value of that asset."

[5] In his earlier Affidavit as was filed on November 25, 2010, the Defendant has deposed to having, 'no source of income apart from his business and his only asset, which is the property at 19 Hill Road, Norbrook Heights in parish of St. Andrew (Paragraph 16). In that same Affidavit, he has also disclosed that he has mortgaged the said property and the money derived from that mortgage was used to finance business which only the Claimant benefits from. This particular mortgage is serviced by that business, which operates under the name – "Fi Wi Brandish" but nonetheless, the Defendant has alleged that on September 28, 2009, he made a sizeable payment towards that particular mortgage, in the sum of $10,000,000, which was derived from his own personal resources. Thus, the undisputed evidence of the Defendant for the purposes of the present Application, when considered along with other Affidavit evidence earlier provided to this court in support of his earlier Application to vary, makes it apparent that the house at 19 Hill Road, Norbrook Heights, in the parish of St. Andrew, has at least three mortgages on it, two of which are to be serviced by the Defendant, but in respect of which he is currently in default, thus resulting in the likelihood of foreclosure by the mortgagee – Bank of Nova Scotia.

[6] Arising from trial of this Claim, a Judgment dividing property between the parties has been delivered. The said Judgment was delivered on May 7, 2012, by the trial judge – Ms. Justice Carol Edwards. It has been stated by the learned trial Judge, that,

“There are five mortgages on the family home. The claimant is not prepared to discharge any of the mortgages on the property.” Be that as it may though, this Court has not, for the purposes of the present Application, been made aware of the details of those five mortgages. There were several Orders made by the trial Court, upon conclusion of the trial of the Claim. It would be useful for the purposes of this Judgment, to herein record what those Orders were: “1) The Defendant is solely entitled to all the legal and beneficial interest in the property known as Hill Road, hitherto described as the family home. 2) The Claimant is entitled to a fifty percent share of the beneficial interest in the property known as Marbella. The property is to be sold by private treaty and the proceeds divided equally between the parties. 3) If the property is not so sold within 6 months of the date hereof, it is to be sold by public auction and the net proceeds of sale divided equally between the parties. 4) The property known as Marbella is to be valued by a reputable valuator agreed by the parties, cost of said valuation to be borne by the Defendant. 5) The Claimant’s attorney is to have carriage of sale. The party in possession of the duplicate certificate of title is to deliver it up to the Claimant’s attorney-at-law within thirty days of the date hereof. 6) Both parties are to bear the cost of sale equally. 7) The Registrar of the Supreme Court is hereby empowered to sign any and all documents required to give effect to the sale of Marbella should either party fail or refuse to do so within fourteen (14) days of being required in writing to do so. 8) The Defendant is Ordered to transfer his fifty percent interest in Fi Wi Brandish to the Claimant within fourteen (14) days of the service of this Order upon him or his attorneys at law. 9) The interim occupation order is hereby discharged. 10) The Defendant is ordered to pay directly to the Claimant or her nominee, the sum of $6,000,000.00 within Sixty (60) days of the date of this order. 11) The Defendant is liable to pay the Claimant as maintenance for herself, a sum of $50,000.00 monthly which becomes due and owing on the 28th day of each month for a period of three (3) years from the date of this Order. 12) The Defendant is liable to pay to the Claimant for the benefit of the Child C, the sum of $100,000.00 per month for maintenance, plus half educational, extra-curricular activities, dental, medical and optical expenses until the child reaches the age of 18 years. 13) Both parties shall have liberty to apply. 14) Each party to bear their own costs.”

[7] Those Orders as mentioned in the paragraph above, were the final Orders made in relation to the substantive Claim. What then were the interlocutory Orders which the Defendant has allegedly breached? It is Order no. 2 as made by Mr. Justice Bertram Morrison on July 5, 2010 and that Order reads as follows:- "Pending the final determination of this matter, without prejudice to the Defendant's right to make submissions at a later date as to Caitlin's biological father, pending the final determination of this matter, the Defendant shall pay to the Claimant or pay as is indicated below in respect of the maintenance for the Claimant and Caitlin Kerr:-

"a. pay for the utilities in respect of the home where Caitlin resides with the Claimant and in particular, the light, water and telephone and cable bills in respect of the said home;

b. pay the educational expenses including extra curricular activities in respect of Caitlin;

c. pay the medical, dental and optical expenses in respect of Caitlin;

d. pay the sum of $200,000.00 per month to be paid on the 1st day of each month in respect of the maintenance of Caitlin and the Claimant."

It should be noted that the name "Caitlin" in the Order above, is used in reference to Caitlin Kerr who is a daughter of the Claimant and, who, according to the Claimant's evidence as filed in support of the present application particular paragraph 2 thereof, has been accepted by the Defendant as a child of the family. Caitlin has pulmonary stenosis, which is a heart condition that she has had since birth and she therefore needs special care.

[8] The interlocutory Order as made by this Court on July 5, 2010, was a consent Order. Be that as it is however, whether that Order was a consent Order or not, the

failure to comply with the same, could, provided that certain conditionalities in respect of that Order and also in respect of the failure to comply were to be proven by the non-defaulting party upon an Application for committal, result in the committal of the defaulting party. As such, whether the Order which has not been complied with, was a consent Order or not, is of no relevance for this Court's determination of the Claimant's present Application for committal. The fact that the Order was a consent Order cannot even assist this Court, at this time, in ascertaining for the purposes of the present Application, as it must, whether the Defendant acted in wilful disobedience of that Court Order, this because, the sums to have been paid, prior to trial of this Claim and pursuant to this Court's interlocutory Order, as maintenance sums and payment of certain expenses related to the Claimant and Caitlin, could very well have been consented to at the material time, not in an effort to deceive, but instead, pursuant to a genuine willingness and also belief in the Defendant's mind at that time, that he would have been able to meet the payments as required, but perhaps, due to then unforeseen circumstances, the Defendant failed to fully comply, or comply in material respects, with this Court's interlocutory Order.

[9] The Claimant has alleged for the purposes of her present Application, in her Affidavit evidence as provided to this Court, in particular paragraph 4 thereof, "that the Respondent has failed and /or refused to pay the maintenance ordered on a regular basis. He became delinquent in relation to the payment of utilities in May of 2011. Since July of 2011 the Respondent had made no payments whatsoever pursuant to the Court Order." That this is in fact so, has not been disputed by the Defendant. Instead, the Defendant, in response, by means of Affidavit evidence, has proffered reasons as to why he has failed to comply. The primary reason as proffered by the Defendant in that regard, has been that he has been unable to pay the sums as required for various reasons. The Defendant though, has also, in his Affidavit evidence in response to the Claimant's Application for committal, contended that as regards the utility expenses which he was required by the Court's interlocutory Order to pay, these are in his sole name and impacts on his contractual obligations to the various utility companies. He has gone on to depose, in paragraph 22 of his Affidavit in response, that – "The

Applicant in making these sums as part of her Claim is being less than forthright and honest, in that she has not demonstrated that she has paid these sums on my behalf, hence the disconnection of supply to the premises."

[10] The Defendant's assertions as made in paragraph 22 of his Affidavit, are entirely irrelevant to any of the issues to be determined by this Court for the purposes of the present Application, because it is not as though the Claimant is, at present, seeking to recover Judgment against the Defendant, for sums unpaid by him pursuant to a Court Order. Thus, it is not for the Claimant to prove that there is a debt owed to her by the Defendant and/or to prove that debt with specificity. Instead, what the Claimant is required to prove for the purposes of the present Application is that the Defendant has acted in contempt of a Court Order, insofar as the circumstances, surrounding the alleged breach by him, of that Court Order are concerned. Even if that breach were to be only in respect of part of this Court's interlocutory Order, nonetheless, in appropriate circumstances, such a breach can result in committal. Thus, whether or not the Claimant actually incurred utility expenses in the sums as she has contended in her Affidavit evidence in support of her present Application, at paragraph 8 thereof, is not the relevant consideration. Provided that there have been light, water, telephone and cable bills, or either such bill, in a home where the Claimant resided with Caitlin up until the date when Judgment in respect of the Claim was rendered, even if that home was/is not the matrimonial home, nonetheless, if the Defendant, after the Court's Order, failed to pay any of the utility bills, that would be a breach of this Court's Order insofar as the payment of utilities in concerned. If such breaches or any breach of any aspect of this Court's interlocutory Order, has been proven to the requisite legal standard and also provided that all of the Rules of court regarding committal for contempt, have been strictly adhered to by the Claimant, then the next issue to be determined by this Court, is whether the Defendant acted with the required guilty mind, in the course of breaching that Order. Provided that such has also been proven to the requisite legal standard, then this Court would be obliged to adjudge the Defendant as being in contempt of this Court's interlocutory Order and impose upon him, an appropriate punishment for same, until that Order as breached, has been complied with.

[11] This then brings this Court to another issue which was addressed to it, by counsel for the Defendant and it is that the Claimant has produced no documentation whatsoever in proof of her contention that expenses for utilities in respect of the home where she was living with Caitlin at the material time, were incurred by her, nor any proof of the sums which she alleges were incurred as school fees for Caitlin. If the alleged breaches of the Court's Order in that regard had perhaps pertained to other matters than alleged non-payment of school fees and utility bills, then perhaps it could have been seriously contended that breaches in that regard, have not been proven to the requisite standard. This Court though, in deciding on whether or not a particular legal issue has been proven, can draw inferences and it seems that it must in the present circumstances, be the only reasonable inference to be drawn, that utility expenses were to have been paid for the home in which the Claimant resided with Caitlin during the relevant time period and also that school fees were to have been paid for Caitlin's schooling during the requisite time period. The Defendant has, in his own Affidavit in response, referred at paragraph 23 thereof, to the high cost of schooling Caitlin at Hillel Academy, this being a high cost which he would rather not have to incur, due to his constrained financial state, this being something which he had previously discussed with the Claimant, albeit to no avail, as the Claimant has flatly refused to move Caitlin to another school – the cost for which would be less expensive than for Hillel Academy. Thus, as there was undoubtedly, a failure by the Defendant to fully comply with the Court's Order as regards payment of utility bills for the home in which Caitlin and the Claimant resided and to fully comply with this Court's Order to pay school fees and extra-curricular costs for Caitlin during the relevant time period and also, to fully comply with this Court's Order to pay maintenance in the sum of $200,000 per month during the relevant time period, there can hardly be any doubt, that there has been a breach or to put it more appropriately, there have been breaches of the Court's Order in those respects.

[12] On an Application for committal for contempt, there can be no doubt that it is now settled law that even though an Application for committal may arise out of civil

proceedings before the Court, nonetheless because the consequence could be as severe as imprisonment, it is the criminal standard of proof that must be met by the Applicant. This therefore means that the standard of proof is that of proof beyond any reasonable doubt. See: ***Yianni v Yianni [1966] 1 W.L.R. 120; Re Bramblevale Ltd., [1970] 1 Ch. 128, esp. at page 137 and Comet Products (U.K.) Ltd.v Hawkex Plastics Ltd. [1971] 2 W.L.R. 361; & Sookraj v Comptroller of Customs & Excise (C.A- Guyana) (1991) 48 W.I.R. 163, at page 169***. This in turn, also means that this Court must feel sure that, not only is the Defendant, in a case such as this, in breach of a Court Order, but also that he is in such breach (which is the actus reus of contempt for breach of a Court Order), whilst at the same time, being in breach as a consequence of a wilful disobedience to, or wilful refusal to obey, that same Court Order which the alleged contemnor is said to be in breach of (which is the mens rea of contempt for breach of a Court Order). The mens rea (guilty mind) in respect of the alleged breach, just as now is the law, in respect of any criminal offence, cannot be presumed. Thus, if on the totality of the evidence presented to the Court hearing the committal Application, there is room for more than one view as to the intent of the alleged contemnor, one view being that he acted with a “guilty mind” and the other view being that he did not act with a “guilty mind”, insofar as the law defines the term “guilty mind” in respect of the acts said to constitute the breach or breaches of the Court’s Order, then the alleged contemnor should not be committed for contempt, since in such a circumstance, the Applicant would have failed to prove to the requisite standard, the necessary mental element. Therefore if the circumstances surrounding the breach, leave the Court uncertain/unsure as to whether, in this case, the Defendant acted in willful disobedience of this Court’s earlier interlocutory Order, as distinct from some other entirely innocent intent, then it means that the Claimant has failed to come up to proof and the Application for committal must fail. Furthermore, whilst foresight of the consequences which it must be proved that the alleged contemnor intended, may constitute evidence of the existence of the requisite intent, such evidence must always be considered and its weight assessed, together with all of the evidence in the case. In essence, what the Claimant must prove to the extent that this Court must feel sure of same, on an Application such as this, insofar as the mental element is concerned, is that it would

(barring some unforeseen intervention) have been a virtual certainty that this Court's earlier interlocutory Order would have been breached if the alleged contemnor acted as he did in relation to the same and also, that the Defendant appreciated that such would have been the consequence of his actions. In this regard, see the following criminal law cases and text references, as regards proof of specific intent – **Rex v Steane (1947) 1 K.B. 997 & R v Hancock & Shankland [1986] A.C. 455; R v Woollin [1999] 1 A.C. 82 & Archbold 2005, paragraph 17-34 & 17-35.** It must also be recognized that proof of a guilty motive on the part of the alleged contemnor, is not to be equated with proof of intent on the part of that alleged contemnor, although proof of a guilty motive is relevant to proof of a criminal intent. On this point, see: **Williams v R [1986] 84 App. Rep.299 and National Coal Board v Gamble [1959] 1Q.B.11.**

[13] This Court will thus, in due course in this Judgment, have to determine whether the Claimant has proven, beyond any reasonable doubt, that the Defendant has wilfully either refused to comply with or disobeyed, an Order of this Court. Even if this Court were to hereafter conclude that such has indeed been proven to the requisite standard, even at that stage, that will not be the end of the matter. This Court must also be assured that all procedural rules regarding the present Application have been complied with by the Claimant. Those procedural rules have been set out in some detail, in Part 53 of The Civil Procedure Rules. As was stated by Lord Greene M.R. (as he then was), in **Gordon v Gordon [1946] 1All E.R. 247, at page 250** – "**Attachment and committal are very technical matters, and as Orders for committal and attachment affect the liberty of the subject , such rules as exist in relation to them must be strictly obeyed. However disobedient the party against whom the order is directed may be, unless the process of committal and attachment has been carried out strictly in accordance with the rules, he is entitled to his freedom."** In proceedings for contempt or attachment, every rule should be scrupulously observed. See: **Townsend v Townsend (1907) P. 239**. Thus, for example, the failure, by a party seeking to have someone committed for contempt, arising from the alleged violation of a Court Order by another party, to indorse on the Order allegedly later breached, the requisite penal admonition, is in and of itself, a fatal objection to an application for committal. See

Hampden v Wallis (1884) 26 Ch. D. 476. For the sake of convenience only, this Court will address the issue of whether the requisite intent has been proven in respect of the alleged contemnor, in respect of the already determined breach of this Court's interlocutory Order, prior to addressing whether, from a purely procedural standpoint, the Claimant's Application can succeed, even if the other elements have been duly proven.

[14] In two of the three cases that have been referred to this court, for the purposes of the present Application, by counsel for the Defendant, respective Courts have made it clear, both in South Africa, Canada (these being the respective nations from which those two cases have emerged), that in terms of the mental element required to be proven for civil contempt arising from the alleged breach of a court order by a party, what must be proven is that there has been, on the part of the respondent to a contempt application, a wilful and mala fide (in bad faith) refusal or failure to comply with the relevant Court Order – **See: Sparkes v Sparkes (1998) (4) SA 714, at 725 F – G & Zulu v Zulu – In the High Court of South Africa – Case Number 37415/05, esp. at paragraph 6 & Forest v LaCroix Estate – Ontario Supreme Court, – 1999-11-09, esp. at paragraph 15.** The parties to the present Application do not dispute this particular point of law. Interestingly enough though, **Section 21 (1) of the Maintenance Act of Jamaica, provides that- "A person shall not be committed to an Adult Correctional Institution for default in payment under a Maintenance Order unless the Court is satisfied that the default is due to the wilful refusal or culpable neglect of that person."** This is, in one significant respect, a significant departure from the common law, insofar as, in respect of the violation of a maintenance order, as distinct from Court Orders in respect of matters other than maintenance, culpable neglect leading to a default in the payment of maintenance sums ordered by a Court to be paid, is enough to entitle a court to commit the person in default to an adult correctional institution (prison). At common law however, nothing less than a wilful refusal to comply with a Court Order, or the wilful disobedience of a Court Order, will suffice as constituting the requisite guilty mind (mens rea). The distinction between the common law and Section 21 of the Maintenance Act in this regard, was probably

intended by the legislative draftsperson(s) and was so intended because it was intended, by statute in Jamaica, to make it far more difficult to avoid the serious consequence of possibly being committed to prison, if one were to be in breach of an order for maintenance.

[15] This Court must therefore next go on to consider what, in law, constitutes "culpable neglect" and what constitutes "wilful refusal." After that, this Court can properly consider all of the evidence as placed before it, for the purpose of determining whether or not either such has been proven beyond any reasonable doubt. Insofar as the words, "wilful refusal" are concerned, it should be noted that there has been quite a bit of case law in England, over the last few decades, addressing, the question of how the word, "wilful" when used in a statutory context, for example, as regards the offence of wilfully obstructing a police officer in the execution of his duty, is to be interpreted. See in this regard: **Wilmot v Atack (1977) 1 Q.B. 498; and Lewis v Cox (1985) 1 Q.B. 509,** or as regards wilful obstruction of the passage on a highway – **Eaton v Cobb (1950) 1 All E.R. 1016.** The leading case on the interpretation of the word, "wilful" when used in a statutory context pertaining to a criminal offence, is **R v Sheppard & another (1980) 3 All E.R. 899 (H.L.).** As it is a House of Lords Judgment, the reasoning and conclusion of the Court as regards, the definition of the word, "willful" are highly persuasive in this jurisdiction. In **R v Sheppard**, by way of majority Judgment of the House of Lords, it was held that a man, "wilfully"' fails to provide adequate medical attention for a child if he either (a) deliberately does so, knowing that there is some risk that the child's health may suffer unless he receives such attention or (b) does so because he does not care whether the child may be in need of medical treatment or not. See paragraph **17-47of Archbold, 2005**. Thus it seems that wilful refusal consists either in a deliberate refusal, or alternatively, in acting in a careless manner insofar as one's refusal to comply is concerned.

[16] **What is culpable neglect**? This Court, it should be known, is not of the view that the term "culpable neglect" either can or should be equated to the words "wilful neglect". There is a well- known principle of statutory interpretation that where different words are

used in the same statute it is to be taken that those different words, although perhaps capable of bearing the same meaning, should not, for the purposes of statutory interpretation, be given the same meaning. **See Bennion- Statutory Interpretation, 2nd ed., at page 808**. In other words, if the legislative draftsperson had intended for the "neglect" to be "willful" in nature as distinct from "culpable", then just as he or she used the word "wilful" to qualify the "refusal" then he or she would also have used the word "willful" to qualify the subsequent word "neglect." "Culpable neglect" to my mind, is not therefore to be equated with "wilful neglect" - this being the phraseology which was interpreted in the **R v Sheppard case (op.cit.).** This Court is of the view that "culpable neglect" means- blameworthy carelessness. Whether carelessness is blameworthy in a criminal law context, must, of necessity, require that the relevant party has been careless to a grave degree, or grossly careless, or in other words, equivalent to one being reckless as to the consequences of one's action or inaction. In that regard, a person's indifference to an obvious risk, or a recognition by a person of an obvious risk, coupled with a determination to run that risk nonetheless, would be tantamount to "recklessness," which is how "carelessness to a grave degree," or "gross negligence" are to be interpreted. See **R.v Adomako (1995) 1 A.C. 171 (H.L.);& Andrews v D.P.P. [1937] A.C. 576 (H.L.); & R v Stone & Dobinson [1977] Q.B. 354.**

[17] Applying the law as aforementioned to the evidence as provided to this Court by the respective parties in the matter at hand, what conclusion should this Court come to? In drawing a conclusion in this regard, this Court has carefully borne in mind that the Defendant bears no burden of proving or disproving anything and also that the Defendant is to be afforded the benefit of any reasonable doubt that may exist on any legal issue which the Claimant is required to prove beyond any reasonable doubt (this being every legal issue falling to be determined by this Court in respect of this committal application). This Court has also carefully borne in mind all of the evidence led both in support of the Application for committal, as well as in response to that Application. It has been noted by this Court in that regard, that although no objection was made during oral arguments to the consideration by this Court, to any aspect of the Defendant's evidence on Affidavit, nonetheless, in the Claimant's counsel's skeletal submissions,

this Court was urged not to consider the Defendant's Affidavit as it was filed late, insofar as the Defendant was served with the Claimant's Application on June 11, whereas the Defendant did not file that Affidavit until July 17. This Court will not take that approach as there suggested, since although it was filed late, if the Claimant had wished to have either filed another Affidavit arising therefrom, or to have cross-examined the Defendant upon his Affidavit, then Application could have been made to this Court for either of same to be permitted. There was however, no such Application made. Instead, the Claimant took the position that the Defendant's Affidavit evidence did not assist the Defendant at all. Considered in that context, this Court should consider that Affidavit evidence of the Defendant, as there hardly could be any prejudice ensuing to the Claimant, arising from this Court so doing.

[18] The Claimant's evidence suggests that the Defendant has failed and/or refused to pay the maintenance ordered on a regular basis and became delinquent in relation to the payment of utilities, in May of 2011. Since July of 2011 the Respondent has made no payments whatsoever, pursuant to the Court Order. Interestingly enough, the trial of the Claim occurred over three days – July 20-22, 2011. Judgment on the Claim was delivered on May 7, 2012. This would therefore mean that the Defendant was completely in default of compliance with the interlocutory maintenance Order as was made by this Court, for a period of over nine (9) months and seemingly coincidentally, such complete default commenced at a time which is the same as the time when the trial of the Claim was concluded. The Defendant though, has sought, at least to some extent, to proffer a credible explanation as to why no payment towards the maintenance of the Claimant was made between July 2011, and May, 2012, albeit that he has only done so in a very indirect manner. Thus he has stated in paragraph 25 of his Affidavit, that, "the wait between July and May 2012, involuntarily resulted in an increase in my indebtedness and consequent breach of the consent Order." This explanation entirely lacks credibility, since it is difficult to understand why the Defendant would have had to have become further indebted during that period of time, this notwithstanding that he was not paying anything whatsoever towards the maintenance of either his wife or the child of the family – Caitlin, during that period of time. Additionally, he has deposed in

his Affidavit to having withdrawn both of his children from school overseas and that he was forced to take this action even though he had already secured several loans to pay for their tuition and living expenses and those loans remain due and payable by him. (Paragraph 11e). This Court has no reason to believe that this latter – mentioned assertion is not true, but in that context, would it not also be the case that some of the monies borrowed for the schooling of those children could either have been repaid, thereby reducing the debt owed, or alternatively, that insofar as the costs of schooling of those children would thereafter have been less, then some of that earlier borrowed money used to pay for that high cost schooling, could have been used to pay at least some more towards the Claimant's maintenance between July, 2011 and May, 2012? Added to that, the Defendant has asserted that he found the family home to be in deplorable condition at the time when he sought to move back in there after the trial Court had ordered that he was solely entitled to the legal and beneficial interest in that property. Rather than seeking to clear and perhaps even fix up the place as best he could over time however, instead, not only did the Defendant then decide to leave that home uninhabited, which apparently led to the home having been in the 'deplorable condition' in which he found it, but also, he decided to no doubt incur what would have been an unnecessary additional expense associated with obtaining a valuation of what it would cost to bring the house and its accompanying accoutrements such as the pool and electronic gate, back to good condition. Why then, couldn't the money used to pay that additional expense, have been placed towards paying a sum or sums towards the Claimant and Caitlin's maintenance, between July, 2011 and May 2012? Isn't this then clearly, a matter of misplaced priorities?

[19] The Claimant has contended in her Affidavit evidence that the Defendant is a well known and successful architect and can well afford to pay the arrears and the current maintenance (paragraph 9). This is the context in which the Defendant has in essence responded in his own Affidavit evidence, wherein he has suggested that he has been unable to pay and he has sought to explain why. The question which this Court must now answer, has the Claimant proven beyond any reasonable doubt, that the Defendant was either deliberately refusing to pay, or alternatively, entirely uncaring

as to whether he paid or not, or alternatively also, careless to a grave degree, in the sense that he recognized the risk that he might be unable to comply with the Court's interlocutory Order if he took certain financial actions, in relation to his and his children's financial expenses, but nonetheless, he decided to take that risk anyway.

[20] The Defendant has also contended in his response, in his Affidavit evidence, at paragraph 24 thereof, that after the Court had earlier refused to vary the interlocutory Order as made by Morrison J., since trial of the Claim was then imminent, he never came back before the Court to once again seek a variation, since as he has termed it, "…as a result of the fact that I had anticipated an early resolution, I had not renewed my application for a variation of the consent order." If indeed this is true, why then, even after it would have become clear, certainly by the end of 2011, that it would take several months for Judgment on the Claim to be delivered, did the Defendant not apply during the first four months of 2012, for a variation of this Court's earlier interlocutory Order? It strongly appears as though the Defendant simply decided that he would not pay to the Claimant for the maintenance of either her or Caitlin, the required sums and that instead, he would use whatever little money he may then have had, to pay for other expenses which to his mind, were then of greater importance and perhaps, even greater personal value to him. The assertions as made by the Defendant in paragraphs 16, 21, and 22 of his Affidavit, strongly support this conclusion, rather than casting any doubt as to it. The evidence as given by the Defendant in those three paragraphs makes it clear that the Defendant now views the Claimant as being dishonest and motivated, in terms of whatever steps she may take concerning him, by malice and spite. It is also clear that the Defendant is of the view that the Claimant needs no money from him, to maintain herself, as she is a highly educated individual and as far as he is aware, no doubt unlike him, in good health. In addition, she receives child support from the father of two of her children's and is also the owner of a Mercedes Benz motor vehicle which has been fully paid for by him through a loan which is secured against the family home – this being the same home which he now has sole legal and beneficial ownership of, but which is likely to be foreclosed upon, as a consequence of his inability to pay the mortgage. The Defendant though, it must be stated at this juncture, does not seem to

fully realize or understand either the importance of complying with Court Orders, or the importance of maintaining a child whom he has accepted familial responsibility for, this being Caitlin. The interlocutory maintenance Order of this Court related, to a great extent, to the maintenance of Caitlin, just as it did also, to the maintenance of the Claimant. Why then couldn't the Defendant have at least paid something to the Claimant, during the period of July 2011- May, 2012, arising from the interlocutory Order of this Court? This Court has no doubt that for whatever reason – whether it be due to ignorance of the law, or due to ill-will on his part, towards the Claimant, or due to gross carelessness about compliance, in either event, the Defendant has no valid excuse for having failed to comply. It is, this Court reiterates, a matter of priorities. The Defendant has clearly misplaced his priorities. Thus for example, in paragraph 11 of his Affidavit evidence, the Defendant has set out as one of his reasons for being, 'totally unable to find the funds…" that, "two of his natural children manifested psychological/mental disorders requiring medical care at considerable cost. Some obligations had to be sacrificed to attend to these emergencies." Clearly therefore, one of the obligations then deliberately sacrificed, was the Defendant's obligation to pay monies to the Claimant and pay for certain expenses incurred by the Claimant in relation to both herself and Caitlin, in accordance with this Court's interlocutory maintenance Order. Again though, this evidences misplaced priorities on the Defendant's part, insofar as Caitlin also has an accepted physical illness which affects the functioning of her heart, this being pulmonary stenosis. Why then was nothing at all paid towards the maintenance of the Claimant and Caitlin pursuant to this Court's interlocutory Order, since July 2011? Is it because the Defendant has placed his two biological children as priorities, ahead of Caitlin, who is not his biological child, but who has been accepted by him as a child of the family whom he is now required to maintain? To this Court, this clearly seems to be what the Defendant has, for some time now, decided to do.

[21] The Defendant has also asserted in his Affidavit evidence that he has only one remaining asset, this being "his home" (the family home). This though is not correct. The Defendant is the joint owner, along with the Claimant, of a parcel of land in the parish of St. Thomas, known as "Marbella." The trial Court has ordered that the same

be sold and the proceeds divided equally between the parties. Also, the Defendant has contended, in paragraph 27 of his Affidavit evidence in response to the Claimant's Application that he continues to service the loan that he borrowed from Scotia Bank to finance a business which is now owned and operated exclusively by the Claimant and which, if it is profitable, benefits only the Claimant. That business is, "Fi Wi Brandish!" That this loan is serviced by the Defendant though, as he has asserted in this latest Affidavit of his, is in grave doubt, at least in this Court's mind at this time, on the basis of the Affidavit evidence filed by the Defendant on November 25, 2010, in support of his Application to vary the consent Order. In that particular Affidavit, the Defendant had asserted, in paragraph 21 thereof, that that same loan was being serviced by "Fi Wi Brandish Limited." Which of these two assertions is correct?

[22] As regards the Defendant's assertion in his latest Affidavit, which pertains to this specific Application, that his business is in overdraft, this assertion cannot by itself, be sufficient to cast any reasonable doubt as to whether the Defendant could have complied with this Court's interlocutory Order. This is so because, all that has been shown to this Court in that regard, by the Defendant, is a bank statement in the name of Rivi Gardner and Associates Limited for June, 2012. June, 2012 though, is not the relevant date. The relevant date period insofar as the alleged non-compliance by the Defendant with this Court's interlocutory Order is concerned, is the period between July, 2011 and May, 2012 and perhaps even before July, 2011, in an effort to cast doubt by making it apparent that, as the Defendant has alleged, his business was not been doing as well financially, since 2010, as it was before then. The Defendant's evidence on this particular point has served to cast no doubt in either such respect. Additionally the alleged statement from Alliance Investment Management Limited in proof of the Defendant's alleged indebtedness to that business entity, has not been attached as an exhibit to the Defendant's Affidavit as filed in response to this Application. This Court therefore does not know either the extent of that indebtedness, or when that particular indebtedness commenced.

[23] This Court has, in this Judgment, spent considerable time in addressing the issues which have arisen from the Affidavit evidence as provided to this Court by the Defendant in response to the Claimant's Application. This is not because this Court has taken the view that the Defendant has anything to prove, but simply because, insofar as the Defendant has chosen to give evidence, this Court is entitled to take the same into account. If it is that the Defendant's evidence as given, helps to strengthen the Claimant's case, then so be it. The Claimant's evidence as given by Affidavit, for the purposes of this Application, is very minimalist in detail and in the circumstances, has not required nearly as much detailed analysis as has the Defendant's Affidavit evidence. Having carefully considered the relevant law as regards what needs to be proven, in terms of the guilty acts (actus reus) and the guilty mind (mens rea), in terms of an Application for committal for contempt arising from a breach of a Court Order, this Court has no doubt whatsoever, that the Defendant committed the guilty act of having defaulted in compliance with this Court's interlocutory Order and did so with the requisite guilty mind (mens rea). That is not however, the end of the matter and will not necessarily result in a Judgment upon this Application, in the Claimant's favour, since this Court must also, of necessity, consider whether all of the required procedural rules governing Applications such as this, have been complied with, by the Applicant. This Court will therefore address in this Judgment, certain important procedural matters, in the next few paragraphs.

[24] **Rule 53.1 of the Civil Procedure Rules provides that, "This Section deals with the power of the Court to commit a person to prison or to make an order confiscating assets for failure to comply with (a) on order requiring that person, or (b) an undertaking by that person, to do an act – (i) within a specified time; (ii) by a specific date or not to do an act."** What does this rule require? To this Court's mind, it requires that a Court Order, if it is to be framed in such a way as to be able to result in the Court committing a person to prison arising from non-compliance therewith, must either specify that that person shall not do an act (which is inapplicable to the present Application), or shall specify the time or the date within which a person is to do an act.

[25] Is that the way in which the relevant interlocutory Order in this particular Claim was framed? The simple answer to this question is 'No' and this is so in all respects. This is because, as regards that interlocutory maintenance Order, no precise time frame or date frame, within which the required payments were to be made, was specified. In that regard, it is not the assumed intent of the Court in making the interlocutory Order, which is of primary importance. Instead, it is the actual manner in which the Order was framed, that is of primary importance. This is in order to ensure that the Defendant can have no doubt whatsoever as to exactly what is that he is being required by Court Order to do and the time/date period within which such is to be done. Even as regards this Court's interlocutory Order for the sum of $200,000.00 per month to be paid by the Defendant to the Claimant on, "the 1st day of each month," such Order having not precisely scheduled a commencement date for such payments to be made, is not an Order which can bring to bear on someone who has failed to comply therewith, this Court's coercive powers. Such details as to time, are absolutely necessary in circumstances wherein a failure to comply, may lead to penal consequences being imposed by this Court. Of course, Rule 53. 2 (2) of the Civil Procedure Rules does provide that – **"where a Judgment or Order does not specify the time or date by which an act must be done, the Court may by order, specify a time or date by which it must be done."** This Rule has been inserted in order to ensure that a Court can specify a date for compliance, if none has previously been specified in the relevant Order. Such a provision serves to highlight the importance of setting a date for compliance. This Court cannot, at this stage, set a date for compliance with that earlier interlocutory Order. This is because that earlier interlocutory Order is no longer extant. The final Orders as made after trial of this Claim, have replaced the earlier interlocutory Orders which were only in force and effect until Judgment on the Claim was rendered. (See paragraph 26 further below).

[26] It is to be noted that it is not to be taken as arising from the fact that this Court's earlier interlocutory Order failed to specify a date or dates when the requite payments were to have been made by the Defendant to the Claimant, that such Order was either

irregular, or that the Defendant was not, as this Court has already concluded, in breach thereof. Rule 42.8 of the Civil Procedure Rules provides that – **'A judgment or order takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date.'** In any event though, even if that Order is irregular, as it is an Order made by a Court of unlimited jurisdiction, it must be obeyed unless and until it is set aside. The Privy Council so determined in the oft – cited case- **Isaacs v Robertson (op. cit.)** The English Rules of Court at present, as to the circumstances wherein the High Court's coercive powers can be applied arising from a failure to comply with a Court Order or Judgment, are, insofar as, there is concerned, the requirement that there be specified in such Order or Judgment requiring a person to do a positive act, a date for compliance therewith, the same as **Jamaica's Civil Procedure Rules – Rules 53. 1 and 53. 2**. In the renowned **"White Book" text – Civil Procedure, Volume 1, Spring 2000, at page 815**, the learned authors have stated as follows, in reference to wording which is ipassima verba with **Rules 53.1 and 53. 2 of Jamaica's Civil Procedure Rules**, insofar as the requirement for the specification of time within which a positive act is to be done by someone, is concerned. **"This rule governs the methods for enforcement by the Court of its judgments or orders in circumstances amounting to a contempt of court. It applies to both positive and negative Judgments or orders, that is, those which require a party to do an act as well as those which require a party to abstain from doing an act, subject, however, to this important qualification, that the coercive methods of enforcement under this rule cannot be employed to enforce a Judgment or order to do an act unless that act is required to be done, but is not done, within a specified time which has been fixed either by the original judgment or order, or by a subsequent order extending or abridging such time under Civil Procedure Rules, 4. 3.1(2) (a) or fixing such time under r.6 … The effect of the qualification is, that a judgment or order to pay money to some other person or to give possession of land or to deliver goods which need not, and will not as a general rule, specify the time within which such act is to be done will not come within this rule, and so will not be enforceable by writ of sequestration or order of committal, unless and until time is specified for the doing of that act."**

[27] That then would be sufficient to enable a proper conclusion to be drawn by this Court as to how the Claimant's contempt Application should be determined, but for the sake of completeness, this Court will now address a few other procedural matters. There is no dispute that the Court's earlier interlocutory Order was properly served and that it was, at that time, endorsed with the required penal notice. Additionally, the Claimant's Application for committal for contempt, along with her Affidavit in support, were duly served, personally, on the Defendant, as is required by Rule 53.10 (2). As things are though, Rule 53.10 (1) has not been complied with by the Claimant. Rule 53.10 (1) falls within the ambit of Section 2 of Part 53 of the Civil Procedure Rules. That Section, as stated in Rule 53.9 (1), **"deals with the exercise of the power of the Court to punish for contempt."** In that regard, Rule 53.10(1) provides that **– 'an application under this section 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.**' The Claimant's Application for committal as made, was made by means of Notice of Motion and in that format, as is not surprising, the precise grounds for the Order for committal being sought, were not specifically listed or set out. That Notice of Motion procedure is the procedure that was certainly utilized in both Jamaica and England, in respect of committal proceedings, prior to the introduction into both countries, of the Civil Procedure Rules. Insofar as Jamaica is concerned, **Section 618 of the Civil Procedure Code read along with Section 484 of the Civil Procedure Code**, would have required an Application for committal for contempt arising from a breach of a Court Order, to have been made to this Court by means of Notice of Motion. The Civil Procedure Code was, however, repealed in Jamaica in 2002, by the Judicature (Rules of Court) Act. It was then replaced, insofar as Rules of Court governing Civil Procedure in the Supreme Court and Court of Appeal of Jamaica are concerned, by the Civil Procedure Rules, 2002. By virtue of the Civil Procedure Rules, [2002], as aforementioned, an Application such as this, can only be properly placed before this Court for consideration, by one of two means and the choice as to which of these two means is to be used in that regard, is dependent on whether or not the alleged

contempt took place in, “proceedings in the Court.” In this case, as the Claimant’s counsel has correctly accepted, the alleged contempt did in fact take place in proceedings in this Court, since, it is alleged that prior to trial, an interlocutory Order was made by this Court, which Order has not been fully, nor even in large measure, complied with by the Defendant. As such, the Application for committal in this particular case ought to have been brought before this Court by means of Application for Court Orders. A Notice of Motion Procedure is entirely inapposite insofar as an Application such as this is concerned. Finally on this point and just for the sake of completeness, it is to be noted that that Application for Court Orders must, in a situation such as this, specify the grounds of the application. There must also be filed in support of that Application, evidence on Affidavit. The grounds for the Application should not be ascertainable solely from the evidence led in support of the Application. Instead, those grounds “must” be set out in the Application itself and also be supported by Affidavit evidence. See Rule 53.10(1) of the Civil Procedure Rules in that regard. This Rule was, insofar as the making of the Application by Notice of Motion is concerned and the failure in that Notice of Motion, to set out the grounds of the Application, largely not complied with by the Claimant herein. It should also be pointed out, solely for purposes of future reference, that even though an Application for Court Orders under Part 11 of the Civil Procedure Rules is heard in Chambers, it is as specifically provided for in Rule 53.11(1) of the Civil Procedure Rules that it is the general rule that the Application must be heard in open Court. This would be so because, no doubt, where penal consequences may result, an Application such as this should generally be heard openly and thereby subjected to wider public scrutiny, as this best helps to maintain the purity of the stream of justice.

[28] What then is the legal effect of the failure by the Claimant to make her Application for committal in the required form, that being an Application for Court Orders as per **Part 11 of the Civil Procedure Rules?** Does this Court have a discretion to waive the Claimant’s non-compliance with **Rule 53.10(1) of the Civil Procedure Rules?** The simple answer to this question is “No.” This is because that Rule has been expressed in mandatory terms through the use of the word, “must.” **Rule 26.9 of the**

Civil Procedure Rules cannot avail the Claimant in a circumstance such as this. Albeit that this Court of Appeal case was addressing a specific procedural defect which is not relevant to this matter, nonetheless, in the case – **Dorothy Vendryes v Richard Keane and Karene Keane – Supr. Ct. Civil Appeal No. 101 of 2009,** Jamaica's Court of Appeal made it very clear, that the failure to comply with a mandatorily expressed Rule of Court, renders invalid, any step(s) taken in non-compliance therewith and also held that this Court would have no discretion under Rule 26.9 to waive that non-compliance and simply make, an Order, "to put matters right," as is allowed for under Rule 26.9(3). See paragraphs 12, 27, 31 and 34 of that Court of Appeal Judgment, in that regard.

[28] In the final analysis therefore, the Claimant's Application for committal for breach of a Court Order, must fail. Whilst Court Orders must be obeyed, as the failure to do so would lead to the rule of mankind, over and above the rule of law, which is the foundation on which this nation's well-established democratic traditions must rest, nonetheless, the liberty of the subject is an equally important and well-established corollary of the rule of the law. **As stated by du Parcq L.J in Gordon v Gordon (op.cit.) at p. 253** – **"I fully realize that no Court must** never **forget the importance of the liberty of the subject and the importance of the principle that in this country people are not to be imprisoned without good cause, cause shown according to law. Liberty would never be preserved if the Court were to have one measure for people whom they think to be deserving and another measure for people whom they think undeserving. The law must be applied strictly so far as the liberty of the subject is concerned. I am quite satisfied that on the facts of this case it would be impossible for us to do anything but allow this appeal."** This Court now, wholly accepts the applicability of that dicta to the matter at hand. This Court therefore Orders as follows:- The Claimant's Application for committal for contempt, is denied .

The Court, having heard from counsel for the Defendant, that the Defendant will not, in the circumstances of this case, be seeking an Order as to costs, makes no Order as to costs.