**[2023] JMCC Comm 54**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. SU2019CD00013**

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| **BETWEEN** | **PHENEE ANTHONY PLUMMER** | **1ST CLAIMANT** |
| | **SEAN FRASER** | **2ND CLAIMANT** |
| | **DENBIGH FARMS LIMITED** | **3RD CLAIMANT/JUDGMENT CREDITOR** |
| **AND** | **JOHN GLENMORE PLUMMER** | **1ST DEFENDANT/JUDGMENT DEBTOR** |
| | **BRIAN PLUMMER** | **2ND DEFENDANT/JUDGMENT DEBTOR** |

**Judgment Summons – Summons to Examine – Enforcement of Money Judgment – Burden of Proof – Whether judgment debtors had means or ability to pay - Observations on the Debtors Act, Part 52 of the Civil Procedure Rules 2002 and, the jurisdiction to commit persons for non-payment of judgment debts-**

**Tamara Francis Riley-Dunn and Kadian Davidson instructed by Nelson-Brown Guy & Francis for the 3rd Claimant/Judgment Creditor.**

**Keith Bishop instructed by Bishop & Partners for the 1st and 2nd Defendants/Judgment Debtors**

**Heard: 6th and 24th October, and 18th and 20th December 2023.**

**IN OPEN COURT**

**CORAM: BATTS J.**

[1] By a document entitled “Judgment Summons”, filed on the 21st day of April 2022 the third Claimant applied for an order that the Defendants be committed to prison for non-payment of the debt which they were obliged to pay pursuant to a judgment delivered on the 8th day of April 2020. The particulars of the judgment sum and amounts due are as follows:

| | $ |
|---|---|
| Amount of judgment | 32,433,120.00 |
| Payments made to date (as at April 14, 2022) | 5,000,000.00 |
| Amount of interest being claimed to date (April 8, 2020 to October 15, 2021 = 555 days @5,331.47 per diem) | 2,958,965.85 |
| **Balance outstanding on judgment debt** | **30,392,085.85** |

[2] This application effectively replaced a Notice of Application for Committal which was filed on the 16th day of February 2022. The Judgement Debtor Summons was fixed for hearing on the 1st day of June 2022. On that date it had not been served. Therefore, an application for substituted service was applied for. However, the Defendants were eventually served after several efforts to do so, see affidavits of Carlynton Davies filed on the 21st day of February 2023 and 26 January 2023. By order of the Honourable Mrs. Justice Stephanie Jackson Haisley, made on the 26th day of April 2023, the Judgment Summons was fixed for the 6th day of July 2023 and the Defendants required to attend for cross examination. On the 6th day of July 2023 an order for substituted service was made with respect to the 2nd Defendant. The Defendants were given further time to file affidavits. The matter was adjourned to the 6th day of October 2023. On that date the matter commenced but was part heard to the 24th day of October 2023 and orders were made to produce bank accounts, the 2nd Defendant’s eight most recent pay slips and, the source of the payment of five million dollars ($5,000,000.00). On the 24th of October the matter was further adjourned to the 18th day of December 2023 into open court. Although the 2nd Defendant attended in person and was cross examined, the 1st Defendant was absent. Both Defendants were, and have at all material times been,

represented by Bishop & Partners, attorneys-at-Law. On the 24th October 2023 I made the orders outlined in paragraph 21 below.

[3] I have outlined the somewhat torturous history of this application to demonstrate that the Defendants were less than willing participants. The 1st Defendant, Mr. John Plummer, did not attend. The court was informed that he was ill, and unable to be present, although no satisfactory medical evidence has been presented to the court. The matter proceeded accordingly in his absence further to an order made on the 24th October 2023. Before me, in this application, were the affidavits of Jenifer Plummer Barret, filed on the 16th day of February 2022 and the 10th of July 2023, John Glenmore Plummer, filed on the 21st day of February 2023 and, Brian Plummer, filed on the 8th of October 2023. Mr. Brian Plummer and Mrs. Jenifer Plummer Barrett attended and were cross examined. As previously indicated, Mr. John Plummer was absent without adequate explanation.

[4] After all the evidence was in, each counsel made oral submissions. I will reference same, and the evidence, only to the extent necessary to explain my decision. It is however first necessary to say something about the jurisdiction of the court which is now being exercised and about which there appears, in the profession generally, to be some confusion.

[5] The "Judgment Summons" makes no specific reference to the Rule of Court pursuant to which it was filed. Neither indeed did the Summons to Commit earlier filed. Mrs. Francis Riley-Dunn, who appeared for the 3rd Claimant/Judgment Creditor, stated that the application was pursuant to Part 52.4 of the Civil Procedure Rules (2002). Part 52 is entitled "Judgment Summons". Rule 52.1 is very clear:

> "*This Part deals with applications to commit a judgment debtor for non-payment of a debt <u>where this is not prohibited by the Debtors Act</u>*." (emphasis mine)

In parenthesis the Rule states:

> *"(Section 2 of the Debtors Act lists the circumstances in which committal for debt is still possible. Committal is dependent on the court being satisfied that the judgment debtor has since the date of the judgment had the means to pay the judgment debt but has refused or neglected to do so.)"*

That parenthesis is a rather inexact summary of the provisions of the **Debtors Act**, a statute which in 1872 ended the common law practice of imprisonment or arrest of persons who owed monetary debts. Section 3 of the Debtors Act provides:

> *"3. Subject to the provisions hereinafter mentioned, any court having civil jurisdiction may commit to prison with or without hard labour, for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court:*

*Provided-*

> *(1) that the jurisdiction by this section given of committing a person to prison shall, when exercised by a Resident Magistrate's Court, be exercised subject to the following restrictions, that is to say-*
>
> *a. by an order made by the Judge himself in open court, and showing on its face the ground on which it is issued;*
>
> *b. as respects a judgment of a superior court of law or equity only when such judgment does not exceed one hundred dollars, exclusive of costs;*

*(2) that the jurisdiction given by this section shall be exercised as respects a judgment of a Resident Magistrate's Court only by a Resident Magistrate's Court;*

*(3) that such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had, since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, refuses or neglects to pay the same.*

*Proof of the means of the person making default may be given in such manner as the court thinks just; and, for the purposes of such proof, the debtor, and any witnesses may be summoned and examined on oath, according to the prescribed rules.*

*Any jurisdiction by this section given to the superior courts may be exercised by a Judge sitting in Chambers, or otherwise, according to the prescribed rules.*

*For the purposes of this section, any court having civil jurisdiction may direct any debt due from any person, in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order.*

*Persons committed under this section shall, unless otherwise prescribed, be committed to such convenient prison as the court which commits them thinks expedient.*

*This section, so far as it relates to any Resident Magistrate's Court shall be deemed to extend to orders made by the Resident Magistrate's Court with respect to sums due in pursuance of any order or judgment of any court other than a Resident Magistrate's Court.*

*No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt, or demand, or cause of action, nor deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned in the same manner as if such imprisonment had not taken place.*

*Any person imprisoned under this section shall be discharged out of custody upon a certificate, signed according to the prescribed rules, to the effect that he has satisfied the debt or instalment of a debt, in respect of which he was imprisoned, together with the prescribed costs (if any)."*

Section 2 of the Debtors Act lists, among the six exceptions to the prohibition for arrest for default in payment of a sum of money, the

*"Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made:*

*Provided first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money."*

[6] It is clear from a reading of these sections of substantive, not procedural, law that no one is to be committed to prison for the failure to pay a judgment debt unless it is proved that since the judgment that person had the means to pay but has refused or neglected, or refuses or neglects, to pay the same. It is clear also that the burden in this regard lies with the judgment creditor who seeks an order for committal. It is a burden not easily satisfied and, as it is akin to proceedings for contempt, the standard of proof ought to be beyond reasonable doubt. See ***Mubarak v Mubarak*** [2001] FLR 698 and the White Book (2004) Vol. 1 CC 28.0.2.The **Debtors Act**

therefore provides for an order to be made, on the application to commit, for a payment by instalments. It also allows for proof of the means, of the person making default, by the debtor and any witnesses being summoned and examined on oath.

[7] This is the legal backdrop against which the procedure, set out in Part 52 of the Civil Procedure Rules, is to be understood. It has always been the practice for a Judgment Debtor Summons to contain two applications. First a Summons to Examine and secondly a Summons to Commit. If the Judgment Creditor has evidence that the Judgment Debtor had, from the date of the judgment, funds sufficient to pay and has refused or neglected to pay, that evidence must be put before the court. The Judgment Debtor is entitled to challenge said evidence. The **Debtors Act** specifically allows for this to be done by a judge in chambers of the Supreme Court. It is however a good idea for the judge, before ordering committal, to adjourn the matter to open court so that the public can know the reasons for incarceration. The difficulty of proving willful default is perhaps why the law allows for an alternate order for payment by instalments. The court may do this having heard evidence of the Judgment Debtor's means and ability to pay. It has been my experience, during many years of practice at the bar, that committal orders for non-payment of debt are most often made for breach of the order to pay by instalments. It is for this reason, I believe, why in practice a Summons to Examine always precedes or accompanies the Summons to Commit. My final observation on the rules is that the Form 22 referred to in Part 52 does not properly capture the nature of the application which should be to examine the Judgment Debtor and commit for contempt.

[8] In the matter before me there was no evidence from the 3rd Claimant/Judgment Creditor to satisfy the court, (either on a balance of probabilities or beyond reasonable doubt), that the Judgment Debtors had, since the date of the judgment (being the 8th of April 2020), the means of paying the judgment debt. The 3rd Claimant relied, in the affidavit of Jenifer Plummer Barrett filed on the 16th February 2022, on the fact that the 1st Defendant is a shareholder "*in an active company*

*known as Earlston Limited*" and that both defendants are businessmen. In her affidavit filed on the 10th day of July 2023 she asserts that Earlston Limited has two mining licenses and owns land of considerable value. She references also their shareholdings in other companies. She asserts also that Plummers Aggregates Limited and the third Claimant entered a joint venture agreement "*on the strength of a lucrative mining contract with China Harbour Construction Company".* None of this, however demonstrates that the judgment debtors were able to pay the debt. Owning valuable property, or valuable shares in a company does not, on a balance of probabilities or at all, prove willful or negligent failure to pay.

[9] The evidence of the judgment debtors, to the contrary, is of efforts to settle the debt. In this regard evidence was given of an unsigned Deed of Understanding, exhibit JP1 to the affidavit of John Glenmore Plummer filed on the 21st February 2023. By that agreement Denbigh Farms Limited permitted the Defendants to settle the judgment debt, of $32,433,120.00, as follows:

> *"a) By way of monthly instalments of Seven Million Dollars ($7,000,000.00) commencing May 1, 2020;*
>
> *b) All monthly payments are due on the 1st day of each month;*
>
> *c) If a monthly payment isn't received by the 15th day of the month, on the 16th day a late payment of $500,000.00 becomes due and payable;*
>
> *d) If the entire judgment sum and late fee, if applicable, isn't paid by September 30, 2020 then interest will accrue on the balance judgment debt at the rate of 10% p.a. commencing October 1, 2020 until the debt is repaid in full."*

[10] The affidavit of the 2nd Defendant states, at paragraph 7, that himself and the 1st Defendant acted in good faith when they entered into that agreement to repay the debt, but that repayment was rendered impossible when the Commissioner of Mines declined and/or refused to issue a Mining License to him. This is consistent with the evidence provided in cross examination, and is supported by correspondence, that he had been unable to do any form of mining since 2018, see letters dated the 20th of February 2020 and the 22nd of June 2020 (exhibits JP2 to the affidavit of John Glen Plummer and BP100 to affidavit of Brian Plummer filed 8th December 2023). In his said affidavit the 2nd Defendant also deponed that he has been advised and verily believes that his father wishes to sell all his shares in Denbigh Farms Limited to pay any debt owed to the 3rd Claimant, and that he also wants to do the same. He further states that to the best of his knowledge, information, and belief the volume of shares combined should be sufficient to clear the debt owed to the 3rd Claimant. The 1st Defendant, however, does not state in his affidavit an intent to sell shares but asserts only that he is broke and unable to pay.

[11] The 2nd Defendant gave evidence that he earned by salary Four Million Dollars ($4,000,000.00) annually. He asserted his responsibility for the well-being of one child and both his parents—the 1st Defendant and his mother. However, counsel for the Claimant in cross-examination got the 2nd Defendant to admit that the 1st Defendant is a shareholder in Earlston Limited and Preserve Farms Limited, which are in the business of mining and cane farming respectively. This revelation casts doubt on, and prompts a re-evaluation of, the asserted familial caregiving responsibilities. Cross-examination also revealed that, in or about January 2023, the 2nd Defendant proposed a payment plan for the settlement of the debt by monthly payments of One Million, Eight Hundred Thousand Dollars ($1,800,000.00). A proposal the 3rd Claimant did not accept. He also gave evidence of an amount loaned to him by one Mr. Coleman but which he was not now servicing. The witness said the income, reflected in the bank statements exhibited, was from his job at Preserve Farms Limited.

[12] I asked the 2nd Defendant whether he could still pay $1.8 million monthly. In response, he expressed the need to check his documents. I permitted him to do so, and upon his return, he affirmed his capacity to commit to a monthly payment ranging between Three Hundred and Forty Thousand Dollars ($340,000.00) and Five Hundred Thousand Dollars ($500,000.00). The 2nd Defendant at all times maintained that it was his inability to get the mining license renewed which frustrated his efforts to settle the debt.

[13] When cross-examined the 3rd Claimant's witness, Mrs. Jenifer Plummer-Barrett, admitted that they would be prepared to consider, subject to valuations, accepting a transfer of shares in part payment of the debt. She based her assertion of the Defendants' ability to pay on their interest in companies and their previous mining activities.

[14] It is worth noting that the 2nd Defendant was directed to furnish the court with pay slips, related to his purported employment, a directive that remains unfulfilled. His counsel candidly admitted this was a result of his own oversight. Regrettably the matter was not pursued when the 2nd Defendant was cross-examined nor were questions asked about the source of the $5 million payment. I cannot make my decision based upon evidence not before me. Nor can I come to a decision because of my disquiet with the Defendants' clear reluctance to cooperate with the process. I must have regard only to the evidence.

[15] On the evidence, it appears implausible that the Defendants are able to engage in any mining or quarrying endeavor. This prevents the 2nd Defendant augmenting his financial resources. The restrictions in the letters from the Commissioner of Mines prohibit extraction and processing of quarry materials on the specified site and limit the 2nd Defendant's operations to the restoration of disturbed lands. It is crucial to acknowledge that the authorization granted is contingent upon strict adherence to these prescribed conditions, and any deviation from the outlined constraints could jeopardize the continuation of this permission. In essence, the

regulatory framework unequivocally circumscribes the scope of the 2nd Defendant's activities.

[16] As regards the evidence that the 2nd Defendant had been assisting the 1st Defendant with cane farming since 2012 (on land leased from the Sugar Company of Jamaica Holdings Limited), and that the 1st Defendant had been cultivating cane for more than four decades, the Court has yet to receive any elucidation on the regular financial returns derived from this agricultural pursuit. The deposits, to the accounts exhibited, were neither substantial nor regular. I bear in mind the submission by the 3rd Claimant's counsel that one does not commit to pay sums that they cannot source. I was therefore urged to make an order for the Defendants to pay a combined sum of no less than One Million, Three Hundred Thousand Dollars ($1,300,000.00) each to the total of Three Million, Six Hundred Thousand Dollars ($3,600,000.00) per month until the debt is repaid. However, there is no basis on the evidence for me to so order. I accept that the prior proposal for settlement was made at a time when the Defendants hoped (or expected) that the relevant mining license would be renewed. The failure to obtain renewal has significantly affected the Defendants' ability to pay.

[17] Counsel for the Defendants relied upon Rule 52.4(c)(iii) of the Civil Procedure Rules and asked the Court to:

a. make an order for payment of the judgment debt by a particular date or by specified instalments; and,
b. adjourn the hearing of the judgment summons to a date 3 to 6 months hence.

The purpose of the adjournment being to allow the parties to engage in discussions about a sale or transfer of shares in order to settle the debt.

[18] In considering the respective positions there is no explanation provided for the reduction in the sum proposed in January 2023 of One Million, Eight Hundred

Thousand Dollars ($1,800,000.00) per month to the range of Three Hundred and Forty Thousand Dollars ($340,000.00) to Five Hundred Thousand Dollars ($500,000.00) now proposed. The witness, however, was not asked to explain this shift. Whereas the Deed of Understanding (made presumably in or about the year 2020) may be explained by the hope of a mining license, the proposal of January 2023 cannot credibly be so explained.

[19] Counsel for the Defendants asserted that the 3rd Claimant failed to furnish compelling evidence supporting the notion that the 2nd Defendant can contribute beyond his stated capacity of Five Hundred Thousand Dollars ($500,000.00) per month. Contrary to this stance I maintain the perspective, given the evidence that in January 2023 the 2nd Defendant offered to pay $1.8 million monthly, that the onus lies with the 2nd Defendant to prove that his capability aligns with the amount now proffered. This the 1st and 2nd Defendants have failed to do. There is no evidence to explain the change in the Defendants' position or income between January 2023, when the offer was made, and the date of this hearing.

[20] I find as a fact that neither the 1st and 2nd Defendants nor either of them had the means, at any time after judgment was delivered on the 8th day of April 2020, to settle the judgment debt, interest and costs in full. There is therefore no basis for an order being made pursuant to Rule 52.4 (c) (i) - (v). This court is however empowered, by section 3 of the **Debtors Act,** to make an order for payment by way of instalments on the Judgment Summons. It is a power which is also inherent in the power of the court to enforce its own orders. In this regard those responsible for drafting our rules may want to review the wisdom of making orders, for instalment payments, conditional on a court finding that the debtor,

> "…*has had, since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, refuses or neglects to pay the same."* see Rule 52.4(c)

[21] Having considered the evidence, oral and by affidavit, I am satisfied that an appropriate order and one the Defendants can abide is as follows:

1. The 1st and 2nd Defendants are to pay the balance due and owing on the judgment debt, interest and costs, by monthly instalments of One Million Dollars ($1,000,000.00) commencing on the 31st day of December 2023 and continuing monthly thereafter until payment in full of the said judgment debt, interest and costs.
2. Costs to the 3rd Claimant against the 1st and 2nd Defendants to be taxed if not agreed.
3. This Order on judgment summons does not prevent or preclude any other application by way of recovery proceedings nor indeed does it preclude the parties negotiating a sale and/or transfer of shares in settlement.

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**David Batts**
**Puisne Judge**