



[2019] JMSC Civ 233

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV00860

BETWEEN	RS FINANCIAL SERVICES LIMITED	1ST CLAIMANT
AND	WILLY'S INVESTMENT'S LIMITED	2ND CLAIMANT
AND	DENNIS RAPPAPORT	1ST DEFENDANT
AND	ROBERT GRIFFIN	2ND DEFENDANT

IN CHAMBERS

Ms. Carol Davis for the 1st claimant/respondent

Mr. Garth McBean, Q.C. & Ms. Dian Johnson instructed by Garth McBean & Co for the 1st defendant/applicant

November 18 and 26, 2019

ORAL JUDGMENT

D. FRASER J

INTRODUCTION

[1] On November 18, 2019 an application by the 1st defendant/applicant for the confiscation of the assets of the 1st claimant/respondent came before me for hearing. The main ground on which the application is based stems from the contention by the 1st defendant/applicant that:

- a) The first Claimant had failed refused or neglected to comply with order of the Court made on the 13 [sic] day of December 2018, whereby it was ordered that pursuant to Rule 53.3(2) of the Civil Procedures Rule a specific time of fourteen (14) days from the date of this order be set for the

1st Claimant to pay the 1st Defendant/Applicant a sum equivalent to 5% of the sale of such portion of the land as is sold to a third party pursuant to paragraph 8 of the Summary Judgment granted on the 17th June 2016.

THE PRELIMINARY OBJECTIONS

[2] Prior to the hearing of the application, counsel for the 1st claimant/respondent raised three preliminary objections to the application proceeding; objections that relate both to the forum before which the application has been placed and the form of the application.

[3] These objections were as follows:

- a) The application must be heard in open court not in chambers;
- b) The application must be commenced by Fixed Date Claim Form (FDCF); and
- c) The application is too wide. The alleged contemnor should have notice of what the applicant seeks to seize and there is nothing in the application limiting what assets or the value of assets that should be confiscated.

[4] Submissions were made and responded to on each point. I will address each point in turn.

A. The application must be heard in open court not in chambers

[5] Citing rule 53.11 of the Civil Procedure Rules (CPR), counsel for the 1st claimant/respondent submitted that the application must be heard in open court, as an application for confiscation of assets is contempt proceedings and therefore has to be proceeded with under Section 2 of Part 53 which deals with Committal for Contempt and starts at rule 53.9 of the CPR.

[6] Counsel argued that while she was aware that rule 53.7 of the CPR that deals with applications for a committal order or a confiscation of assets order, falls

under Section 1 of Part 53, pursuant to rule 53.3, the Order served on the 1st claimant that grounded the application includes a Notice of Contempt Proceedings, which fortified her submission that proceedings for confiscation of assets are contempt proceedings.

- [7] Counsel cited in support ***Jamaica Edible Oils & Fats Company Ltd v M.S.A. Tire (Jamaica Ltd)*** [2013] JMSC Civ 175. Her concluding submission was therefore that the application cannot proceed in Chambers.
- [8] Counsel for the 1st defendant/applicant submitted that there are two relevant sections in Part 53 of the CPR, sections 1 and 2. He indicated that the 1st defendant/applicant was proceeding under rule 53.3(b) which falls under Section 1.
- [9] He further submitted that if it were intended that matters commenced under Section 1 could only proceed in open court, the rules would have clearly so provided, as it is stated in rule 53.11 in relation to applications commenced under Section 2. He emphasized that there was no similar provision in the rules stating that applications made under Section 1 should be in open court.

Analysis

- [10] The scope of Section 1 of Part 53 of the CPR is outlined in rule 53.1 which provides that:

53.1 This section deals with the power of the court to commit a person to a prison or to make an order confiscating assets for failure to comply with -

(a) an 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.

[11] Therefore Section 1 embraces both applications to commit a person to prison for breach of an order as well as for confiscation of assets.

[12] The Scope of Section 2 is outlined in rule 53.9 which provides as follows:

- 53.9 (1) This section deals with the exercise of the court's power to punish for contempt.
- (2) In addition to the powers set out in rule 53.10, the court may –
- (a) fine the contemnor;
 - (b) take security for good behaviour;
 - (c) make a confiscation of assets order;
 - (d) issue an injunction.
- (3) Nothing in this section affects the power of the Court to make an order of committal of its own initiative against a person guilty of contempt in the face of the court.

[13] Rule 53.9 therefore makes it clear that in addition to the power to commit a person to prison for contempt the court also as other compulsory powers, which it may exercise.

[14] Rule 53.3 provides that:

- 53.3 Subject to rule 53.5, the court may not make a committal order or a confiscation of assets order unless:-
- (a) the order requiring the judgment debtor to do an act within a specified time or not to do an act has been served personally on the judgment debtor;
 - (b) at time that order was served it was endorsed with a notice in the following terms:

“NOTICE: If you fail to comply with the terms of this order you will be in contempt of court and may be liable to be imprisoned or to have your assets confiscated,” or, in the case of an order served on a body corporate, in the following terms:

“NOTICE: If you fail to comply with the terms of this order you will be in contempt of court and may be liable to have your assets confiscated.”; and

- (c) where the order requires the judgment debtor to do an act within a specified time or by a specified date, it was served in sufficient time to give the judgment debtor a reasonable opportunity to do the act before the expiration of that time or before that date.

[15] The terms of this rule are such that a court may not make an order for confiscation of assets unless the order requiring the judgment debtor to do an act within a certain time or not to do an act has been served personally on the judgment debtor and it was endorsed with the “contempt notice”. In this case the second formulation of the notice is the relevant one as the 1st claimant/respondent is a body corporate.

[16] While the rules under Part 53 do appear to harbour some internal ambiguities, I am persuaded by the submission of counsel for the 1st defendant that if it was intended that applications brought under Section 1 could only be entertained in open court, it would have been so indicated in the rules as so indicated in rule 53.11 which relates to Section 2 applications. As pointed out by counsel for the 1st defendant/applicant, there is no such similar provision in Section 1.

[17] I am fortified in this view by rule 53.12 which resides in Section 3 of Part 53, which outlines the scope of that Section as setting out rules common to applications under both Sections 1 and 2 of Part 53. Therefore, if it was intended that all applications for confiscation of assets should be heard in open court, that requirement should have been stated in both Sections 1 and 2 or stated in Section 3 which governs both Sections 1 and 2.

[18] Therefore I find that the general rule stated in rule 53.11 (1) “that the application must be heard in open court” is only applicable to applications commenced under Section 2. Accordingly it appears that the scheme of Part 53 is that depending on the application and the circumstances in a particular case an order for confiscation of assets may either be made under Section one in chambers or in open court under Section 2.

B. The application must be commenced by Fixed Date Claim Form

[19] Further to her submission that an application for confiscation of assets must be pursued under section 2 of Part 53, pursuant to rule 53.10 (1) (b) counsel for the 1st claimant/respondent also argued that the application must be commenced by a fixed date claim form where the contempt was not committed within proceedings in the court (i.e. in the course of a hearing).

[20] She also submitted that in England there is a special provision which does not exist in the Jamaica context which governs the ways in which an application for contempt should be made. See **A Practical Approach to Civil Procedure** Fifteenth Edition by Professor Stuart Sime at para 44.53.

[21] In response, Counsel for the 1st defendant/applicant indicated that the application was made under rule 53.3(b) and that this type of application can be made by Notice Of Application in the existing suit. He submitted this was made clear by the provisions of rule 53.8 (2) and (3) and that if counsel for the 1st claimant/respondent was correct the reference in 53.8 to a Notice of Application would be redundant and never apply. He also pointed out that rule 53.8 also refers to service of the application under Part 5.

[22] Responding to the authority cited by the counsel for the 1st claimant/respondent he submitted the court in that matter never considered rule 53.8 and that the case was already being heard in open court.

[23] His concluding submission on this point was that the framers of the CPR made a distinction between committal for contempt (Section 2) and committal or other sanction for breach of order (Section 1) where a Notice of Application can be used to pursue those sanctions.

Analysis

[24] It is in my view manifest that the framers of the CPR contemplated, as is clear by rule 53.8 that in ongoing proceedings an application for confiscation of assets for breach of an order made within those proceedings, may be made by Notice of Application. That makes eminent sense in the view of this court. It is convenient and there is no logical necessity for a FDCF to be filed, simply to enforce an order that has been breached in ongoing proceedings.

[25] Rule 53.10 (1) relied on by counsel for the 1st claimant/respondent provides as follows:

- 53.10 (1) 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.

[26] My reading of rule 53.10 (1) in Section 2 of Part 53, is that the phrase “within proceedings” means there are ongoing proceedings which are live before the court, in that they have not been finally determined. I do not understand that phrase to mean that the contempt must have occurred in the course of a hearing. Therefore my understanding of the rule is that a Notice of Application under Part 11 should also be used in matters where the proceedings have been conducted in open court, once there are ongoing proceedings and not just where an application for confiscation of assets has been commenced in chambers.

- [27] I have come to this conclusion both by textual analysis and by considering the logical process the rules must be expected to promote. In terms of textual analysis, the use of the definite article in the phrase, “contempt committed within proceedings in **the** court”, rather than “contempt committed within proceedings in court” is significant, as the words used make it clear that the reference is to a live matter that is still ongoing and under the consideration and jurisdiction of the court and is not a reference to the fact that the contempt must occur during the course of a hearing.
- [28] I also find it is logical for that approach to be adopted, because if the contempt were in the face of the court in the course of a hearing there would not be the need for any application as the court has the power to deal with such contempt. That power is expressly reserved in rule 53.9 which outlines the scope of Section 2 in paragraph (3) which as outlined earlier provides that, *“Nothing in this section affects the power of the Court to make an order of committal of its own initiative against a person guilty of contempt in the face of the court.”*
- [29] In what circumstances then would a FDCF be required? In my view the FDCF will need to be utilised, for example, where proceedings in a matter have ended, but some order made in those proceedings has been breached and the matter needs to be brought back to open court for contempt proceedings to ensue. A FDCF could also be utilised if there is contempt that occurs in the precincts but not in the face of the court. In those circumstances, a FDCF would clearly be apposite.
- [30] Without being familiar with the documents referred to in the extract it seems this is in fact the approach taken in England as revealed in **A Practical Approach to Civil Procedure** Fifteenth Edition by Professor Stuart Sime where under the headings, “Contempt of Court” and sub-headings “Committal for breach of an order” and “Procedure on application” at paragraph 44.53 it reads *“Applications to commit a contemner to prison are made by Part 8 claim form or, if made in an existing proceedings, by application notice (PDRSC, ord 52, paras 2.1, 2.2)”*

- [31] Without being familiar with the forms used in the English jurisdiction, it would seem to me that on the face of it, the approach in England, seems to mirror that which I have just outline as being appropriate.
- [32] I do not find the authority of ***Jamaica Edible Oils & Fats Company Ltd v M.S.A. Tire (Jamaica Ltd)*** relied on by counsel for the 1st claimant/respondent helpful in relation to either of the two objections addressed so far. It outlines among other things that where proceedings for committal or confiscation of assets are concerned there should be strict compliance with the necessary procedures e.g. personal service of the relevant order with the appropriate penal notice, service periods that must be observed and reasonable time must be given for the alleged contemnor to fulfil the duty in respect of which he is alleged to be in breach.
- [33] However, in that case proceedings were for an application for committal for contempt, not primarily for confiscation of assets though that was also one of the orders sort. Given that there was an application for committal for contempt, that obviously necessitated the matter being heard in open court. Interestingly, though it was not stated in the judgment, when recourse was had to the court file in the matter, it was disclosed that the application was actually commenced by Notice of Application even though the application proceeded in open court. On the point of the manner in which the application should be commenced the case actually supports the 1st defendant/applicant and not the 1st claimant/respondent.
- [34] I therefore do not find that the ***Jamaica Edible Oils & Fats Company Ltd*** case supports the contentions advanced by counsel for the 1st claimant/ respondent that applications for confiscation of assets should be in open court or that such applications should be commenced by FDCF.

C. The Application is too wide and non specific

[35] Counsel for the 1st claimant/respondent submitted that the alleged contemnor should have notice of what the applicant seeks to confiscate. Further that there was nothing in the application limiting what assets or the value of assets which should be so confiscated.

[36] Counsel for the 1st defendant/applicant in response, invited the court to consider 53.4(b), which outlines the wording of the required Notice on the Order that is to be served which states:

“Notice: If [name of body corporate] fails to comply with terms of this order it will be in contempt of court and you [name of officer] may be liable to be imprisoned or have your assets confiscated.”

[37] Counsel submitted that the application complies with the required notice as specified and that while the particular assets have not been identified he relied on the general order sought in his application which empowers the court to grant “such other or further relief”, by which the court could limit the assets confiscated to satisfy what is outstanding. He argued that an important context that had to be borne in mind was that when making the application, the applicant would not necessarily know which assets are available for confiscation.

[38] The submissions of the 1st defendant/applicant on this point I find entirely persuasive.

Disposition

[39] In light of the foregoing I make the following order:

- a) All preliminary objections made have failed.
- b) The matter may proceed as filed.
- c) Costs of the application to the 1st defendant/applicant to be agreed or taxed.