[2024] JMCA Civ 1

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE HARRIS JA

PARISH COURT COA2022PCCV00011

BETWEEN	**DENISE KITSON**	**APPELLANT**
AND	**ROGER PHYNN**	**RESPONDENT**

Allan Wood KC, Kevin Williams, Miss Regina Wong and Miss Rachel Kitson instructed by Grant, Stewart, Phillips & Co for the appellant

Mrs Rita Allen-Brown for the respondent

3, 4, 5 October 2022 and 15 January 2024

Civil contempt – Parish Court – Liquidation of co-operative society – Power of liquidator to order production of documents – Enforcement of order for production of documents against attorneys-at-law – Whether Parish Court has jurisdiction to enforce liquidator's order for production – Whether liquidator was required to initiate arbitration proceedings prior to enforcement of order for production – Whether issuance of liquidator's order breached rules of natural justice and constitutional right to a fair hearing – Solicitor's lien – Whether liquidator's order for production of documents trumped attorney's right to a solicitor's lien over documents for unpaid legal fees – Sections 45, 46, 47, 48 and 49 of the Co-operative Societies Act and section 16(2) of the Constitution of Jamaica

Civil contempt – Appeal from civil contempt proceedings – Stay of execution pending appeal – Whether Parish Court Judge has jurisdiction to grant a stay of execution of committal order pending appeal – Section 34(2) of the Judicature (Appellate Jurisdiction) Act

Civil procedure – Parish Court – Committal proceedings – Application for warrant of attachment – Whether proper procedure followed for warrant of attachment to issue – Application for committal – Committal order – Whether the *actus* reus and *mens rea* of contempt established on the evidence – Order

VII, Rules 9 and 27 and Order XXII, Rules 32, 33 and 34(a) of the Parish Court Rules

MCDONALD-BISHOP JA

[1] This appeal raises what appears to be novel but important questions of law within this jurisdiction concerning the powers of a liquidator and the enforcement of an order made by him for the production of documents as part of his statutory remit. Essentially, the appeal brings into focus and primarily interrogates (a) the power of a liquidator appointed under section 44 of the Co-operative Societies Act (interchangeably, 'the Act') to order the production of documents under section 45 of the Act and the scope of that power; (b) the requirements to be satisfied for the issuance and enforcement of the order for production of documents; (c) the jurisdiction of the Parish Court to enforce such an order; and (d) the legal effect of such an order in circumstances where an attorney-at-law exercises a solicitor's common law lien over the documents that are the subject matter of the order.

[2] The centrally important question for resolution is whether section 45 of the Co-operative Societies Act empowers a liquidator, exercising powers under the Act, to compel the delivery up of documents of a co-operative society, in liquidation, that are in the possession of the society's former lawyer and subject to a solicitor's common law lien for unpaid legal fees.

[3] For context, it is considered fitting to first provide the primary legal framework within which the proceedings leading to the appeal arose, followed by an insight into the events giving rise to the appeal.

The Co-operative Societies Act

[4] At the centre of the controversy between the parties in this appeal are the provisions of the Co-operative Societies Act relating to the liquidation of co-operative societies, and the powers of a liquidator exercising functions under the Act. A brief discussion of the scheme of the relevant provisions of the Act is, therefore, necessary.

[5] Broadly speaking, the Co-operative Societies Act provides for the registration, management and dissolution of co-operative societies. Sections 41 to 49 provide for the dissolution of co-operative societies. The dissolution of a co-operative society is effected initially through an order made by the Registrar of Co-operatives and Friendly Societies ('the Registrar') cancelling the certificate of registration and, where appropriate, appointing a liquidator over the co-operative society (sections 41 – 44).

[6] Where a liquidator is appointed, his main powers are set out in section 45(1) of the Act. Those powers are "subject to the guidance and control of the Registrar and to any limitations imposed by the Registrar by order under section 46". They include the powers "to institute and defend suits and other legal proceedings by and on behalf of the society by his name or office and to appear in court as a litigant in person on behalf of the society" (section 45(1)(a)), "to refer disputes to arbitration" (section 45(1)(b)), "to take possession of the books, documents and assets of the society" (section 45(1)(f)), and "to carry on the business of the society so far as may be necessary for winding it up beneficially" (section 45(1)(l)).

[7] In support of those powers, section 45(2) grants the liquidator the powers of a judge of the Parish Court ('Parish Court Judge') to enable the liquidator to effectively steward certain aspects of the dissolution of a co-operative society. That section provides:

> "(2) A liquidator appointed under this section shall, in so far as such powers are necessary for carrying out the purpose of this section, **have all the powers of a [Parish Court Judge] to compel the attendance and examination of witnesses and the production of documents**." (Emphasis added)

[8] As foreshadowed in para. [6] above, the liquidator's powers are under the general supervision of the Registrar. The powers of supervision granted to the Registrar include the powers to "rescind or vary any order made by the liquidator and make whatever new order is required" (section 46(a)) and to "refer any subject of dispute between a liquidator and any third party to arbitration if that party shall have consented in writing to be bound by the decision of the arbitrator" (section 46(h)).

[9] Section 47 provides for the enforcement of orders made in the course of dissolution. Where a matter has been referred to arbitration by the Registrar, under section 46, the decision of the arbitration on that matter "shall be binding upon the parties, and shall be enforceable in like manner as an order made by the Registrar under that section" (section 47(1)). Further, an order made by a liquidator or the Registrar under section 45 or 46 "shall be enforced in the same manner in all respects as an order made by a [Parish Court Judge]" (section 47(2)).

[10] Section 48 ousts the jurisdiction of the civil courts in respect of any matter concerned with the dissolution of a registered society. Specific consideration will be given to this provision under issue (1) below.

[11] Lastly, section 49 provides for the closure of a liquidation. The kernel of those provisions is section 49(1) which provides that-

> "In the liquidation of a society whose registration has been cancelled, the funds including the reserve funds shall be applied first to the costs of liquidation, then to the discharge of the liabilities of the society, then to the payment of share capital and then, provided the rules of the society permit, to the payment of a dividend."

[12] Fundamentally, the dispute between the parties is connected to the discharge of the liability of a co-operative society in liquidation for unpaid legal fees, with implications for how its funds should be applied during or at the close of the liquidation.

[13] An insight into the facts leading to the dispute between the parties and the proceedings in the court below is crucial.

The factual background

[14] Mrs Denise Kitson, the appellant, is an attorney-at-law and the managing partner of the renowned law firm Grant, Stewart, Phillips & Co ('the firm').

[15] Mr Roger Phynn ('Mr Phynn'), the respondent, is the liquidator of Mount Royal Co-operative Society Limited ('Mount Royal'), an institution to which the Co-operative Societies Act applies.

[16] In October 2019, Mount Royal was placed into voluntary liquidation. Shortly thereafter, Mr Phynn was appointed by the Registrar as Mount Royal's liquidator, pursuant to section 44 of the Co-operative Societies Act.

[17] The firm acted as attorney-at-law for Mount Royal for at least 10 years. Mr Herbert Grant, who is now a retired partner of the firm, had primary conduct of Mount Royal's representation up until 2021 when Ms Regina Wong took conduct of the portfolio. The firm, through Mr Grant, and later Ms Wong, continued to represent Mount Royal while in liquidation.

[18] A series of events led to a breakdown in the relationship between the firm and Mr Phynn. The breakdown in relationship culminated in a series of letters from Mr Phynn in 2022, addressed to the firm, for Mrs Kitson's attention in her capacity as managing partner. In these letters, Mr Phynn directed the firm to hand over all documents relating to its representation of Mount Royal. The two most relevant letters were dated 18 February and 4 March 2022. In those letters, Mr Phynn demanded, from the firm, "the immediate delivery of all splinter certificates of titles [sic], the Parent Certificate of Title Volume 552 Folio 64, the Subdivision Approval, all files and other documents and information in order to facilitate the liquidation of Mount Royal".

[19] In his 4 March 2022 letter, Mr Phynn also advised of his intention to utilise his "power as a Resident Magistrate" to "formally [order]" the delivery of the documents requested. He advised that-

> "…failure/refusal so to do will result in immediate enforcement of same order pursuant [sic] Sections 45(2) and 47(2) of the Co-operative Societies Act of Jamaica, and to seek all the remedies available under any other relevant laws and regulations in order to have your firm comply with said order."

[20] Mrs Kitson replied to Mr Phynn three days later, on 7 March 2022, refusing to comply with his demands. She did so on the basis that the firm had not been paid for work carried out on Mount Royal's behalf between 2016 and 2020, and, therefore, the documents Mr Phynn demanded were subject to a lien by the firm. Mrs Kitson indicated that "once [the outstanding fees] [are] paid or a suitable irrevocable undertaking is provided for the payment of such fees, we are prepared to release as requested, all files and Certificates of Title over which we have a lien".

[21] Obviously dissatisfied with Mrs Kitson's response, Mr Phynn wrote again to the firm on 8 March 2022, questioning the legal basis upon which it could withhold production of Mount Royal's documents. He indicated, among other things, that outstanding fees to be paid by Mount Royal would be classified as a debt to be recovered in the course of the liquidation. He reiterated his previous demand for the documents, and his intention to resort to enforcement proceedings, and other action, if necessary.

[22] On 11 March 2022, Mr Phynn issued a demand letter (dated 8 March 2022) to Mrs Kitson and Mr Herbert Grant, ordering them to immediately produce and deliver up to him several documents belonging to Mount Royal which were in the firm's possession. Mrs Kitson, acting on behalf of the firm, refused to produce the documents as demanded on the basis that the firm was entitled to exercise a solicitor's lien over the documents, due to unpaid attorney's fees owed to the firm by Mount Royal in the sum of $4,243,050.00.

The "Formal Order"

[23] On 22 March 2022, Mr Phynn issued a document which was intituled "Formal Order", and purported to be issued under sections 45 and 47(2) of the Co-operative Societies Act. For the purpose of this judgment, Mr Phynn's 22 March order will be referred to as 'Mr Phynn's Formal Order' or 'the Formal Order'. Of necessity, the contents of that order are now set out, in full:

"

IN THE MATTER of Formal Order by Roger Phynn, liquidator of Mount Royal Co-operative Society Limited (in Liquidation) to produce documents.

AND

IN THE MATTER Sections 45 and 47 (2) OF the Cooperative Societies Act of Jamaica

BY VIRTUE of the letters dated February 18, 2022, March 4, 2022 and March 8, 2022, sent via emailed [sic] to the office of Grant, Stewart Phillips & Company, Attorneys-at-Law (the Law Firm for the attention of **Mrs. Denise Kitson** on February 21, 2022, March 4, 2022 and March 8, 2022, respectively, which were physically served on the Law Firm on March 11, 2022, in which the Liquidator of Mount Royal Co-operative Society Limited (in liquidation) ('Mount Royal'), inter alia, demanded the immediate delivery of all splinter titles, the parent title registered at volume 552 Folio 64 in the Register Book of Titles, the subdivision approval, all files and other documentation (all the documents) belonging to Mount Royal so as to enable the Liquidator to properly informed [sic] himself of all Mount Royal's assets, and to effectively carry out his statutory duties to wind up Mount Royal's affair [sic] and to subsequently pay creditors/the liabilities of Mount Royal in a timely manner.

That Ms. Denise Kitson and/or Mr. Herbert Grant have neglected or refused to deliver up all documents belonging to Mount Royal to the Liquidator in contravention of his demand for her to produce and deliver up said documents within the time specified in said letters.

That Ms. Denise Kitson [sic] refusal to produce and deliver up said documents belonging to Mount Royal has resulted in the Liquidator's inability to perform his statutory duties and to wind up the affairs of Mount Royal.

THEREFORE, ON THE 22ND DAY OF MARCH 2022, BY VIRTUE OF SECTIONS 45(2) AND 47(2) OF THE COOPERATIVE SOCIETIES ACT, IT IS HEREBY ORDERED THAT:

1. Ms. Denise Kitson and Mr. Herbert Grant of the Law Firm of Grant, Stewart and Phillips and Company produce and deliver up **FORTHWITH** all original and copy documents (books, documents, materials, files, plans, subdivision approvals, Duplicate Certificate of Title registered at Volume 552 Folio 64 along with its splinter titles) belonging to Mount Royal Co-operative Society Limited (in liquidation) in their possession and/or in the possession of their agents, employees and/or servants, to the Liquidator, Mr. Roger Phynn, his agent or Attorneys-at-Law.

NOTICE:

Failure to comply with the Order herein will result in enforcement pursuant to Order XXII, Rules 32 and 40 of the Parish Court Rules.

SIGNED BY THE LIQUIDATOR BY VIRTUE OF SECTIONS 45(2) AND 47(2) OF THE COOPERATIVE SOCIETIES ACT:

[SIGNATURE]
Roger Phynn
Liquidator" (Emphasis as in original)

[24] Mr Phynn's Formal Order was delivered to the firm's office for Mrs Kitson's attention, but did not spur Mrs Kitson or the firm into action as Mr Phynn would have anticipated. This left him dissatisfied.

The proceedings in the court below

(i) Mr Phynn's application for warrant of attachment

[25] The refusal of Mrs Kitson to hand over the documents led to Mr Phynn initiating enforcement proceedings in the Kingston and Saint Andrew Parish Court, Civil Division ('the Corporate Area Civil Court') in keeping with the notification in that regard in Mr Phynn's Formal Order.

[26] On 4 April 2022, Mr Phynn applied to the clerk of the court at the Corporate Area Civil Court for a warrant of attachment for Mrs Kitson and Mr Grant, pursuant to sections

45(2) and 47(2) of the Co-operative Societies Act and Order XXII, Rule 32 of the Parish Court Rules, to have them both committed to prison for their non-compliance with the Formal Order. He did so, mainly, on the grounds that-

> "3. [Mrs Kitson] admitted in writing to withholding documents belonging to Mount Royal Co-operative Society Limited (in liquidation) in exchange for an irrevocable undertaking from the liquidator, Roger Phynn, to pay the Respondents money owing to it by Mount Royal Co-operative Society Limited (in liquidation).
>
> 4. That on March 25, 2022, Roger Phynn, liquidator of Mount Royal Co-operative Limited (in liquidation), issued and served an order on [Mrs Kitson] and [Mr Grant], compelling both of them to produce and deliver up all documents belonging to Mount Royal Co-operatives Society Limited (in liquidation), with which both Respondents refused to comply."

[27] On the same day, the clerk of the court issued a notice to Mr Grant and Mrs Kitson. The notice was headed "**APPLICATION FOR WARRANT OF ATTACHMENT (ORDER XXII, RULE 32)**" (emphasis as in original), and stated:

> "**TAKE NOTICE**, that unless you obey the directions contained in the order made on March 22, 2022 by Mr. Roger Phynn, the appointed Liquidator pursuant to section 44 of the Co-operative Societies Act, you will be liable to be committed to prison." (Emphasis as in original)

[28] Notwithstanding its heading, the notice was very evidently a penal notice in the form referred to in Order XXII, Rule 32, and it is evident from the oral and written submissions advanced by counsel for the parties that it was understood so to be. As such, the notice will be referred to as 'the clerk's penal notice'. The clerk's penal notice was printed on a single sheet of paper and its exact terms were not reflected in or indorsed on Mr Phynn's Formal Order. Whether or not the penal notice was attached to Mr Phynn's Formal Order will be discussed below. It suffices to say for immediate purposes that both the clerk's notice and the copy Formal Order were indorsed with the Parish Court's seal. The clerk's penal notice and Mr Phynn's copy Formal Order were served on the

receptionist at the firm on 8 April 2022, by a District Constable, but were never served personally on either Mrs Kitson or Mr Grant.

[29] The documents demanded were never delivered to Mr Phynn despite service on the receptionist of the firm.

(ii) Mr Phynn's application for committal

[30] On 24 May 2022, Mr Phynn filed an application, pursuant to Order XXII, Rule 33, for an order for committal in the Corporate Area Civil Court for non-compliance with the Formal Order. Consequently, a second notice, headed "**NOTICE OF APPLICATION FOR COMMITTAL (ORDER XXII, Rule 33)**" (emphasis as in original), was issued by the clerk of the court to Mrs Kitson and Mr Grant in the following terms:

> "**TAKE NOTICE** that the Plaintiff, will on the **10th day of June 2022** apply to this court to be holden at **Sutton Street at 10 am,** for an Order for your committal to prison for having disobeyed the order made on March 22, 2022 by Mr. Roger Phynn, the appointed liquidator pursuant to section 44 of the Co-operative Societies Act and further take notice that you are required to attend Court on the first mentioned day to show cause why an order for your committal should not be made." (Emphasis as in original)

[31] The application for committal was served on the firm on 26 May 2022, but not personally on Mrs Kitson or Mr Grant. For this reason, on 10 June 2022, Mr Phynn sought to regularise his service of the notice of application for committal on Mrs Kitson and Mr Grant, by filing an application for substituted service, on the firm, in lieu of personal service. The order approving substituted service was granted. Acting on that order, Mr Phynn served a number of documents on the firm, including the notice of application for committal filed on 24 May 2022 and the notice of application for warrant of attachment filed on 4 April 2022.

[32] In response to Mr Phynn's application for committal, Mrs Kitson, on 9 June 2022, filed an affidavit sworn to by Ms Regina Wong, refuting the factual allegations made by Mr Phynn.

(iii) The learned judge's decision

[33] The application for the committal order was heard by Her Honour Miss Alicia McIntosh, Senior Parish Court Judge (Ag.) ('the judge' or 'the learned judge'). Before her, counsel for Mrs Kitson and Mr Grant made oral representations, which were supported by speaking notes of considerable length, setting out their opposition to the grant of the committal order. Those arguments have been substantially repeated before this court and, therefore, will not be reproduced at this juncture. It suffices to say that counsel for Mrs Kitson and Mr Grant launched arguments primarily concerning the Parish Court's jurisdiction to hear the matter; breaches of Mrs Kitson and Mr Grant's right to natural justice and constitutional right to a fair hearing before an independent and impartial tribunal established by law, pursuant to section 16 of the Constitution of Jamaica ('the Constitution'), prior to the issuance of Mr Phynn's Formal Order and the institution of court proceedings; and, the procedural and substantive requirements to be met for the grant of a committal order.

[34] Having heard and read the arguments of counsel for the parties, the learned judge delivered her oral decision on 10 June 2022, ordering Mrs Kitson to produce the documents. The order was framed in these terms:

> "The documents are to be produced within 14 days or [Mrs Kitson] is to be committed to prison for 30 days or as soon as the said documents are produced."

[35] Subsequently, the learned judge's reasons for her decision were helpfully reduced to writing and provided to this court. The salient points of her reasoning on which the decision was based are extracted and summarised as follows:

(i) Section 48 of the Co-operative Societies Act ousts the jurisdiction of the Parish Court in determining how a society is to be wound up, but does not oust the court's jurisdiction in relation to the enforcement of orders made by a liquidator appointed under the Act.

(ii) Section 45(2) of the Co-operative Societies Act gives a liquidator all the powers of a Parish Court Judge to compel the production of documents. Order XC, Rule 12 of the Parish Court Rules regulates the power of a Parish Court Judge to compel the production of documents. Therefore, Order XC, Rule 12 guides a judge, and by extension, a liquidator, exercising powers pursuant to section 45(2).

(iii) Mr Phynn purported to exercise his section 45(2) powers by issuing his Formal Order on 22 March 2022. As for claims of constitutionality of Mr Phynn's actions, in as far as they are in keeping with the provisions of the legislation, the presumption of constitutionality applies.

(iv) Mr Grant and Mrs Kitson's rights to natural justice and a fair hearing were assured because it was the court that heard the application for the warrant of attachment and issued the warrant, and not Mr Phynn himself.

(v) A solicitor's lien under common law does not defeat the clear and ordinary meaning of the Co-operative Societies Act and cannot supersede the statutory provisions in determining how the just debts of the former society are to be met by the liquidator. Any undertaking given by the liquidator in such circumstances would be of no use as the liquidator would be bound to follow the legislation.

(vi) There is no real dispute on the evidence that Mr Phynn's Formal Order was made, served and not complied with. Mrs Kitson knowingly and intentionally failed to comply with the order. Her response to Mr Phynn's Formal Order, therefore, satisfies both the *actus reus* and *mens rea* of contempt.

(vii) All relevant procedures stipulated under Order XXII, Rules 32 and 33 of the Parish Court Rules for making an attachment order were complied with, as the relevant orders and notices were duly prepared, issued and sealed by the court, and served in accordance with the Rules. In the circumstances, the procedure having been complied with, Mrs Kitson knowingly and intentionally failed to comply. Accordingly, the requirements for the grant of an attachment order were satisfied.

(viii) No order was made against Mr Grant as he was no longer a part of the firm and, therefore, no longer in possession of the documents in question, having turned them over to Mrs Kitson. Accordingly, it was appropriate to make the attachment order only against Mrs Kitson.

[36] Additionally, the learned judge refused an oral application made by counsel for Mrs Kitson, for a stay of execution of her order, pending the determination of the intended appeal against it. She refused to stay the order on the basis that she did not have jurisdiction under the Judicature (Parish Court) Act ('JPCA'), or the Parish Court Rules to make such an order.

The appeal

[37] Mr Grant was initially named as a party to this appeal. The learned judge's order solely pertained to Mrs Kitson. Therefore, there was no order touching and concerning Mr Grant which he could have reasonably appealed. For this reason, the court ordered, on the first day of the hearing of the appeal, without objection, that Mr Grant be removed as a party to these proceedings. Consequently, Mrs Kitson now stands as the sole appellant.

[38] Mrs Kitson has appealed the judge's order on an array of grounds as detailed in her amended notice of appeal. Given the arguments deployed in support of the grounds of appeal, it is deemed necessary to rehearse them in their entirety. They read:

"(A) The Learned Judge erred in concluding that the provisions of section 48 of the Co-operative Societies Act precluded a civil court from adjudicating on the dispute raised on the affidavits filed by the parties, as the dispute did not touch and concern the dissolution of the co-operative society.

(B) The Learned Judge erred in issuing an Attachment Order in circumstances where the technical requirements necessary to ground the issuing of that order had not been met by [Mr Phynn].

(C) The Learned Judge erred in finding that the order of the Liquidator of March 22, 2022, was effective and capable of being enforced, when no penal notice was indorsed thereon.

(D) The Learned Judge erred in finding that the order of the Liquidator of March 22, 2022, was effective when it had not been personally served on [Mrs Kitson] prior to the making of an order for substituted service nor was it re-served with a penal notice after substituted service of the same was ordered on June 9, 2022 [sic].

(E) The Learned Judge erred in issuing an Attachment Order when the application for warrant of attachment dated April 4, 2022, had not been served after substituted service of the same was ordered on June 10, 2022, by Her Hon. Mrs. Beaumont-Daley.

(F) The Learned Judge erred in not finding that [Mr Phynn] had acted in breach of the Co-operative Societies Act by not initiating arbitration proceedings seeking resolution of the dispute before issuing an order in that regard.

(G) The Learned Judge failed to recognize that even if the Co-operative Societies Act empowered [Mr Phynn] to issue an order as he did, the particular Order issued by [Mr Phynn] on March 22, 2022, was unlawful and/or void, not being consistent with the principles of natural justice and/or in keeping with section 16 of the Charter of Fundamental Rights and Freedoms, in that there had been no hearing of the dispute by an independent and impartial tribunal prior to the issue of his order. Therefore, the hearing and the issue of the warrant of attachment by the Learned Judge ex post facto the Order of Mr Phynn, cannot assure natural justice a fair hearing.

(H) The Learned Judge failed to recognize that [Mrs Kitson] was not contending that the Cooperative Societies Act was unconstitutional but instead had submitted that the specific actions and the manner in which [Mr Phynn] had proceeded were in breach of the rules of natural justice; inconsistent with section 16(2) of the Charter of Fundamental Rights and Freedoms and therefore made the Order of March 22, 2022, issued by Mr Phynn, void and of no effect.

(I) The Learned Judge erred in finding that an Attorney's right at common law to a lien could not exist alongside and was overridden by the provisions of the Co-operative Societies Act as promulgated by Parliament, when there is no express provision in the Cooperative Societies Act which repeals or abolishes the attorney's common law right to a lien. Accordingly, the Learned Judge wrongly found that [Mr Phynn] could by the Order of March 22, 2022 lawfully require [Mrs Kitson] to deliver up possession of the documents to the Respondent which were the subject of an attorney's common law lien to secure payment of outstanding legal fees.

(J) The Learned Judge erred in finding that she had no jurisdiction to grant a stay of proceedings since her order issuing the warrant of attachment was not a judgment."

[39] On the basis of those grounds, Mrs Kitson seeks the following orders:

"1. That the judgment of the Honourable Miss A. McIntosh, Judge issued on the 13th day of July 2022 be set aside and [the] appeal be allowed.

2. That the Warrant of Attachment issued by Her Hon. Miss A. McIntosh on the 13th day of July 2022 against the [appellant] be quashed.

3. A Declaration that section 48 of the Co-operative Societies Act does not preclude a civil court from adjudicating on the dispute between the parties.

4. That [Mrs Kitson] is entitled to exercise a common law Attorney's/solicitor's lien over all documents in her possession belonging to Mount Royal Co-operative Society Limited (in Liquidation) until [the firm's] fees have been paid in full or pending further order of the Court.

5. The costs of the Appeal shall be that of [Mrs Kitson]."

[40] Shortly after filing the appeal, Mrs Kitson applied to this court for a stay of the judge's committal order, pending the determination of the appeal. An interim stay of execution was granted by F Williams JA on 30 August 2022, pending the hearing and determination of the appeal or further order.

The issues on appeal

[41] Having evaluated the 10 grounds of appeal, and the oral and written arguments made in support of them, it is decided that the following determinative issues arise for consideration in this appeal:

(1) Whether the learned judge erred in concluding that section 48 of the Co-operative Societies Act deprived her of jurisdiction to resolve the dispute raised on the parties' affidavits (ground (A));

(2) Whether section 46 of the Co-operative Societies Act required the learned judge to refer the dispute between Mr Phynn, as liquidator, and the firm, to arbitration (ground (F));

(3) Whether the issuance of Mr Phynn's Formal Order and the manner in which he approached the court for enforcement of the Formal Order were in breach of natural justice and/or the right to a fair hearing before an independent and impartial tribunal established by law, under section 16 of the Constitution of Jamaica and, therefore, unlawful, null and void (grounds (G) and (H))

(4) Whether the procedural prerequisites for the issuance of a committal order had been complied with (grounds (B), (C), (D) and (E));

(5) Whether the learned judge was correct to conclude that the liquidator's order pursuant to section 44 of the Co-operative

Societies Act defeated the right of the firm to exercise a solicitor's lien over Mount Royal's documents (ground (I)); and

(6) Whether the learned judge erred in concluding that the *actus reus* and *mens rea* of contempt were established on the evidence (ground (B)).

[42] As is evident, there is no issue identified for resolution in the appeal related to Ground (J), which complains that the judge erred in concluding that she had no jurisdiction to grant Mrs Kitson's application for a stay of execution. Whether or not the learned judge was correct to refuse the stay can, in no way, be dispositive of the appeal. The oral application for a stay was made after the committal order, which is the order amenable to an appeal before this court. The refusal to grant a stay was not a determination of the dispute between the parties on which the decision of the court was grounded. The refusal of the stay is of sheer academic interest as it was attendant on the oral notice of appeal given by Mrs Kitson after the appealable order was made. However, given what is obviously a misunderstanding regarding the procedure governing an appeal from contempt proceedings in the Parish Courts, it is deemed useful to summarily dispose of this ground of appeal at this juncture.

[43] It suffices to point out that section 34 of the Judicature (Appellate Jurisdiction) Act ('the JAJA') makes special provision for appeals from contempt proceedings in the Supreme Court and Parish Courts. In summary, it provides that an appeal against an order of imprisonment (or a fine) in contempt proceedings will operate as a stay where the appellant has given notice of an intention to appeal and entered into recognizance with a surety to the satisfaction of the clerk of the court or registrar of this court. By contrast, section 256 of the JPCA, which applies generally to appeals in civil proceedings from judgments, decrees or orders from the Parish Court, sets out its own preconditions before a stay can be granted in an appeal from the Parish Court. Section 256, however, does not apply to appeals from contempt proceedings, such as the instant appeal, and there is no other statutory provision upon which the learned judge could have relied to

grant a stay. Therefore, Mrs Kitson could not have been granted a stay at the time the oral notice of appeal was given because she had not yet entered into the prescribed recognizance for the prosecution of the appeal. Once all the statutory preconditions laid down by section 34 of the JAJA were satisfied for the filing of the appeal, a stay would have automatically arisen by operation of law.

[44] Accordingly, the learned judge was not conferred by statute with any jurisdiction to grant a stay of the committal order in light of section 34 of the JAJA. She was correct when she refused to grant the stay. Ground (J) has no merit.

[45] Having disposed of the preceding ground, only nine of the 10 grounds of appeal filed will be considered as relevant for the disposition of the appeal. It is proposed to examine the six issues, which collectively encapsulate the nine grounds for determination, *seriatim*.

Issue (1) – Whether the learned judge erred in concluding that section 48 of the Co-operative Societies Act deprived her of jurisdiction to resolve the dispute between the parties (Ground (A))

[46] Oral arguments on this issue were not forcefully pursued by Mrs Kitson before this court. However, in written submissions, it was argued that the learned judge found that section 48 ousts the court's jurisdiction but still proceeded to entertain Mr Phynn's committal application and to make an order for committal against Mrs Kitson. Counsel for Mrs Kitson argued that section 48 of the Act purports to oust the jurisdiction of civil courts in relation to matters concerning the dissolution of a co-operative, but does not oust the jurisdiction of the court in relation to the present dispute.

[47] The thrust of counsel's argument is that there is an apparent incongruity between the learned judge's interpretation of section 48 and her subsequent finding that the section ousts the jurisdiction of civil courts in relation to matters connected to liquidation, and her decision to entertain the application for committal and make orders thereon.

Concerned by this alleged incongruity, Mrs Kitson has sought a declaration from this court that the Parish Court's jurisdiction was not ousted by section 48.

[48] However, having regard to both the judge's reasoning and the provisions of the Co-operative Societies Act, I find no merit in this ground of appeal and no basis to grant the declaration sought for reasons which will be briefly outlined. An apt starting point is section 48 of the Act, which reads:

> "Save in so far as is hereinbefore expressly provided, no civil court shall have any jurisdiction in respect of any matter concerned with the dissolution of a registered society under this Act."

[49] The learned judge, in the written reasons for her decision, indicated her views on section 48 and its inapplicability to the proceedings before her in the following way:

> "The said Act provides in Section 48 that no civil court shall have jurisdiction in respect of any matter concerned with the dissolution of a registered society under this Act. Having regard to the Act as a whole and the scheme it provides **this Court is of the view that this section ousts its jurisdiction in determining how a society is to be wound up but not in relation to the enforcement of orders of the liquidator**." (Emphasis added)

[50] Counsel for Mr Phynn submitted that the judge's conclusion was not that section 48 ousted the court's jurisdiction in this case, but that it did not. I accept this submission. It is clear that the judge was of the view that section 48 does not oust the enforcement of a liquidator's orders under the Act, but applies to other issues arising in the course of the winding up of the co-operative. In my view, the provisions of the Act support the judge's conclusion.

[51] Clearly exempted from the limitations imposed on the jurisdiction of the civil courts by section 48 of the Co-operative Societies Act are matters mentioned in preceding provisions of the Act, which expressly confer jurisdiction on the court. The preceding provision pertaining to the dissolution of co-operatives and which expressly provides for the exercise of the court's jurisdiction is section 47(2). It states:

> "An order made by a liquidator or by the Registrar under section 45 or 46 shall be enforced in the same manner in all respects as an order made by a [Parish Court Judge]."

[52] It is well established that the usual mode of enforcement of orders made by Parish Court Judges is by proceedings instituted in the Parish Court pursuant to the JPCA and the Parish Court Rules. Therefore, although section 47(2) of the Co-operative Societies Act does not expressly use the words "jurisdiction of the Parish Courts", on a proper interpretation of that section, it clearly provides for the exercise of the jurisdiction of the Parish Courts in their civil division as a means of enforcing orders made by a liquidator pursuant to sections 45 or 46 of the Act.

[53] Mr Phynn's Formal Order was issued in accordance with his powers as liquidator over Mount Royal under section 45 of the Co-operative Societies Act, to "compel… the production of documents". This power is ancillary to, and essential for, the exercise of his powers under section 45(1) of the Act, which include taking documents of the society into his possession. The proceedings commenced by him in the Corporate Area Civil Court, by way of an application for warrant of attachment and an application for committal, were strictly for the purpose of enforcing his order made pursuant to section 45(2) of the Act. Therefore, the proceedings clearly fell within the ambit of section 47(2) of the Act, and the Parish Court had jurisdiction to entertain Mr Phynn's application.

[54] Accordingly, the learned judge did not conclude that she was deprived of jurisdiction to deal with the dispute between the parties by section 48 of the Co-operative Societies Act. Further, she did not err in determining the issues arising on the application and on the evidence before her on the basis of her conclusion that she had the jurisdiction to enforce Mr Phynn's Formal Order. I find no error in the judge's reasoning regarding her jurisdiction to hear the application for committal. Therefore, ground (A) fails.

Issue (2) – Whether the learned judge erred in not finding that Mr Phynn had acted in breach of the Co-operative Societies Act by not initiating arbitration proceedings before issuing his Formal Order (ground (F))

[55] In ground (F), counsel for Mrs Kitson contended that section 46(h) of the Co-operative Societies Act required Mr Phynn to initiate arbitration proceedings prior to issuing his Formal Order. Therefore, the learned judge erred in allowing the enforcement of Mr Phynn's Formal Order to proceed before her and ought to have referred the matter to arbitration in accordance with the Act.

[56] I am, however, constrained by the wording of sections 45 and 46 of the Act to disagree with the argument regarding Mr Phynn's failure to refer the dispute to arbitration. As earlier mentioned, section 45(1)(b) of the Act empowers the liquidator of a co-operative society to "refer disputes to arbitration". Section 46(h) empowers the Registrar, in supervision of the liquidator's powers, to "refer any subject of dispute between a liquidator and any third party to arbitration proceedings if that party shall have consented in writing to be bound by the decision of the arbitrator". So, in the course of liquidation, both the liquidator and the Registrar have the power to refer disputes arising in the context of the dissolution of the co-operative.

[57] Sections 45(1)(b) and 46(h) of the Act are, however, not drafted in mandatory terms. Neither section requires the Registrar or the liquidator to refer matters to arbitration in any specified circumstances. Those sections, instead, leave it open to them, in their discretion, to do so as they see fit. Furthermore, the Registrar's powers are subject to the consent of the third party, expressed in writing, to be bound by the decision of the arbitrator. There is nothing to indicate that the Registrar was approached by the firm to exercise her discretion to refer the matter to arbitration. Also, there is no evidence on the record of the proceedings of the requisite consent from the firm for the dispute to proceed to arbitration.

[58] If any argument were to be made about an obligation for referral to arbitration before a liquidator's order can be made under section 45, it would have to be based on

sections 50(1) and 50(2), which provide that certain disputes "shall" be referred to arbitration by the Registrar. However, when sections 50(1) and 50(2) are examined against the facts of this case, it is obvious that the dispute between Mr Phynn, as liquidator of Mount Royal and Mrs Kitson, as managing partner of the firm, does not fall within any of the prescribed categories of disputes to which sections 50(1) and 50(2) apply. Therefore, section 50, which is the only section of the Act that speaks to mandatory referrals to arbitration, was inapplicable and could form no basis for counsel's arguments on this issue.

[59] In light of the foregoing analysis, there is no basis for concluding that there was an obligation on Mr Phynn to refer the dispute between himself and the firm to arbitration before making his Formal Order and subsequently instituting court proceedings to enforce it. I am also satisfied that nothing in the Co-operative Societies Act required the learned judge to refer the dispute between Mr Phynn and the firm to arbitration. Therefore, it cannot be said that she was wrong to entertain Mr Phynn's application for committal and in failing to refer the matter to arbitration. Ground (F) also fails.

Issue (3) – Whether the issuance of Mr Phynn's Formal Order and the manner in which Mr Phynn approached the court for enforcement of the Formal Order were in breach of natural justice and/or the right to a fair hearing before an independent and impartial tribunal established by law under section 16 of the Constitution of Jamaica and, therefore, unlawful, null and void (grounds (G) and (H))

[60] Grounds of appeal (G) and (H) have raised three separate and distinct, albeit inter-related, sub-issues of differing weight and import for determination. These sub-issues are (i) whether the manner in which Mr Phynn's Formal Order was issued breached the rules of natural justice and Mrs Kitson's right to a fair hearing before an independent and impartial tribunal established by law under section 16 of the Constitution due to the absence of an opportunity to be heard before its issuance; (ii) whether Mr Phynn's Formal Order was inconsistent with Mrs Kitson's right to a fair hearing under section 16 of the Constitution due to his failure to initiate the enforcement proceedings by an originating

claim; and (iii) whether the judge made an error in raising an issue, not raised by Mrs Kitson, regarding the constitutionality of the Co-operative Societies Act. The sub-issues will be discussed in turn.

(i) Natural justice and the right to a fair hearing

[61] According to Mrs Kitson, there had been no hearing of the dispute by an independent and impartial tribunal prior to the issuance of Mr Phynn's Formal Order. Therefore, the hearing and the issue of the warrant of attachment by the judge "*ex post facto*" Mr Phynn's Formal Order cannot assure natural justice and a fair hearing.

[62] Counsel for Mrs Kitson contended that it is trite that before an order is made against any person under the laws of Jamaica, that person must be given a right to be heard, having been served with the full particulars of the cause which he is asked to answer, especially where like in the present case, the ultimate order made by the court could result in the incarceration of the subject. This is one of the salient tenets of the *audi alteram partem* rule.

[63] Furthermore, no hearing was held by Mr Phynn prior to issuing the Formal Order. Even if it could be "remotely argued that a hearing was, in fact, held which led to [Mr Phynn's Formal Order], that hearing cannot be considered fair and/or impartial in circumstances where [Mr Phynn] was both litigant as well as judge and jury in his own cause". In the circumstances, it cannot be said that Mr Phynn was acting as an independent and impartial tribunal as he had a vested interest in the outcome of what is covered by his Formal Order.

[64] Lastly, nothing in the Co-operative Societies Act makes Mr Phynn a court or vests in him any right to be classified as a court established by law for purposes of section 16 of the Constitution. There is no doubt that the reasonable man, looking on, would say, when advised of the requirements of the rules of natural justice and section 16(2) of the Constitution, that Mr Phynn was biased and/or lacked impartiality in the circumstances which led to his Formal Order. In essence, counsel for Mrs Kitson contended that Mr

Phynn was a judge and litigant in his own cause, in breach of the hallowed principles of natural justice, which militate against bias in decision-making and the right to be heard.

[65] I have only reproduced the salient parts of the submissions of Mrs Kitson relative to these sub-issues for present purposes, but I have had regard to the submissions in their entirety. However, having considered the contention that Mr Phynn's Formal Order breached the rules of natural justice and the constitutional right to a fair hearing, I am not persuaded to accept those submissions when the legislative scheme, within which Mr Phynn exercised his power, and the proceedings that ensued in the court below, are thoroughly evaluated. This position is informed by the following observations and reasoning.

[66] Section 45(2) of the Co-operative Societies Act, which confers the power on Mr Phynn to issue an order compelling a person to produce documents to him does not expressly or impliedly provide for a hearing to be given before the order is made. In other words, neither section 45(2) nor the provisions of the Act, which concern the conduct of liquidation, including the liquidator's powers, contemplate that a hearing is to take place before an order for the production of documents is made by the liquidator. I must say, tangentially, that by hearing, I do not mean an oral hearing, but, at least, an opportunity to make some form of representation, even in writing. The principles of natural justice or the constitutional right to a fair hearing would, therefore, not have been engaged at that point.

[67] Opportunities to make representations and be heard in relation to an order by a liquidator arise from other provisions in the Act. For instance, section 46(2) of the Act empowers the Registrar to vary or rescind an order made by a liquidator. By that provision, the Act leaves it open to an aggrieved party to make representations to the Registrar to invoke his or her section 46(2) powers. This avenue was open to Mrs Kitson to have the Mr Phynn's actions reviewed and his order varied or rescinded before enforcement proceedings were initiated in the court. No attempt was made to seek audience with the Registrar.

[68] Furthermore, section 47(2) of the Act makes provision for judicial enforcement proceedings to ensue in the Parish Court if an order made by a liquidator pursuant to section 45 is disobeyed. This judicial mechanism was invoked by Mr Phynn following the failure of Mrs Kitson to obey the Formal Order. The rules of natural justice would be engaged within those enforcement proceedings, as would the right to a fair hearing before an independent and impartial tribunal established by law, in keeping with section 16(2) of the Constitution.

[69] By taking the matter to court, Mr Phynn would have satisfied the requirements of natural justice and the constitutional right to a fair hearing, by giving Mrs Kitson the right to be heard before an independent and impartial tribunal established by law.

[70] I have arrived at the conclusion that there was no breach of the rules of natural justice and, by extension, the constitutional right to a fair hearing after a consideration of the relevant authorities, the foremost of which is **Rees v Crane** [1994] 2 AC 173 and the authorities cited in it. In that case, the Judicial Committee of the Privy Council undertook an in-depth examination of the law relating to breach of natural justice. Their Lordships considered numerous cases and judicial pronouncements dealing with the circumstances in which the need to observe the rules of natural justice may arise and when it may not. Their Lordships then observed from their study of those authorities:

> "It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complainants later, that the making of the enquiry without observing the audi alteram partem maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage."

[71] Their Lordships then opined:

> "But in their Lordships' opinion there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As Professor de Smith puts it (see Judicial Review of Administrative Action (4th Edition) at page 199):-
>
> > 'Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will generally decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage.'
>
> In considering whether this general principle should be followed, the courts should not be bound by rigid rules. It is necessary, as was made clear by Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All E. R. 109,118 …, to have regard to all the circumstances of the case." (Emphasis as in original)

[72] In **Russell v Duke of Norfolk** [1949] 1 All E R 109, Tucker LJ made these points, which for convenience (and with due regard to his Lordship's formulation), have been summarised in point form:

(a) There are no words of universal application to every kind of inquiry and every kind of domestic tribunal.

(b) The requirements of natural justice must depend on, among other things-

(i) the circumstances of the case;

(ii) the nature of the enquiry;

(iii) the rules under which the tribunal is acting; and

(iv) the subject matter that is being dealt with.

> (c) Whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity to present his case.

[73] I have examined the circumstances of the case, the nature of Mr Phynn's statutory duties and power to demand the production of documents, the legislative scheme within which he operated, including the enforcement provisions of the JPCA, and the subject matter being dealt with. Having considered these matters, I conclude that there was no enquiry being conducted by Mr Phynn with a view to a final decision adverse to Mrs Kitson to be made at that preliminary stage of the proceedings that would have conferred a right on Mrs Kitson to be heard prior to the issuance of Mr Phynn's Formal Order.

[74] In any event, even if the rules of natural justice were engaged, it cannot be said that Mrs Kitson was not given an opportunity to make representations regarding Mr Phynn's request for the documents in question. He had been involved in discussions with Mrs Kitson, herself, regarding the documents, and she made her position known. She categorically stated that she had a right to hold on to the documents by virtue of the common law lien the firm was exercising over the documents for unpaid legal fees. She went further to indicate that she would only comply with Mr Phynn's request for the documents upon payment of the outstanding fees or an undertaking given by Mr Phynn for the firm to be paid. Having been alerted to Mrs Kitson's position, Mr Phynn then requested, in writing, the legal basis for that position. Mrs Kitson was given the opportunity to defend her position in law. It was after all that discourse between them that Mr Phynn's Formal Order was issued and court proceedings later initiated.

[75] Mrs Kitson was, therefore, accorded an opportunity to make representations regarding Mr Phynn's request for production of the documents. Mr Phynn did not take on the role of judge and jury regarding her disobedience of his Formal Order and the retention of the documents. He took it to the proper forum – the court – which was the independent and impartial tribunal established by law to determine their respective rights

and obligations in the light of the excuse or justification raised by Mrs Kitson. This was ultimately done.

[76] The learned judge's input at the stage of the hearing of the application for committal would have satisfied the rules of natural justice and section 16(2) of the Constitution. Accordingly, Mr Phynn cannot reasonably be said to have acted as litigant, judge and jury in the issuance of the Formal Order to raise issues of partiality, bias, breach of natural justice and the constitutional right to a fair hearing sufficient to impugn the proceedings in the court below.

(ii) Absence of an originating process

[77] In another sense, Mrs Kitson attributes the breach of natural justice by Mr Phynn to defects in the manner in which the enforcement proceedings were commenced. Relying on the decision of Morrison JA (as he then was) in **Stewart v Sloley and Others** [2011] JMCA Civ 28 ('**Stewart v Sloley'**), counsel for Mrs Kitson contended that there was a requirement that the contempt, which constitutes the basis of a committal order, must arise in extant court proceedings. Therefore, Mr Phynn was not permitted to issue his Formal Order, and thereafter move for enforcement of it by way of committal, without commencing proceedings by filing an originating document, such as a plaint. Without any such originating process needed to commence an action in the Parish Court, there were no extant proceedings in which a finding of contempt, and, consequently, an order for committal, could have been made.

[78] Citing several provisions of the JPCA, counsel for Mrs Kitson argued that there is no provision of the JPCA and/or the Parish Court Rules that permits a Parish Court Judge to make an order on his or her own motion, and on his or her own behalf. Mr Phynn was required to follow sections 156 and 160 of the JPCA, which provide for a summons to be issued to witnesses for the production of documents at the instance of parties to proceedings. Therefore, the manner in which Mr Phynn proceeded was not grounded in the JPCA or the Parish Court Rules. His failure to abide by the correct procedure before the making of the Formal Order made him both the judge (as the official who issued the

order) and the litigant (as the person enforcing the order in the Parish Court), thus denying Mrs Kitson a right to be heard before an independent and unbiased tribunal.

[79] In considering the merits of the submissions, my first point of departure is that Mr Phynn's Formal Order was issued and its enforcement pursued in accordance with sections 45(2) and 47(2) of the Co-operative Societies Act, respectively. By way of reminder, section 45(2) confers on a liquidator, appointed under the Act, the powers of a Parish Court Judge to compel the production of documents in so far as is necessary to carry out his statutory functions. Section 47(2) provides that any order made by the liquidator is enforceable in the same manner and in all respects as the order of a Parish Court Judge.

[80] On a plain reading of sections 45(2) and 47(2), the liquidator is endowed with the powers of a Parish Court Judge to take steps to progress the liquidation of a co-operative society, without the need for recourse to the Parish Courts, except for the purpose of enforcement. As counsel for Mr Phynn correctly pointed out, the power given to the liquidator is a summary remedy available against any person, so far as it is necessary to carry out the liquidator's duties under section 45 of the Act. Section 45(2) does not indicate how the powers are to be exercised and, critically, does not subject the liquidator's powers to the supervision of the Parish Court, save for the purposes of enforcement pursuant to section 47(2).

[81] By way of contrast, in section 236 of the UK Insolvency Act 1986 (cited in **Re Aveling Barford Ltd and Others** [1988] 3 All ER 1019 ('**Re Aveling**') at para. 363), the choice was made by the UK Parliament to subject the right of access to documents required by the liquidator to judicial supervision by requiring the liquidator to apply to the court for a production order to be made. No such election was made by the framers of the Co-operative Societies Act. Instead, the Act vests the power in the liquidator, in his own discretion, to make such orders and to subsequently move for enforcement under section 47(2), utilizing the statutory mechanisms for the enforcement of orders made by a Parish Court Judge. This is seen as a deliberate choice on the part of Parliament to give

the liquidator some wide ancillary powers necessary for effectively carrying out his core functions.

[82] To impose a requirement for the liquidator to engage the processes of the court, as a litigant, in order to exercise the powers conferred on him by section 45(2), would be contrary to the clear intention of Parliament that the liquidator be vested with powers akin to that of a Parish Court Judge for the purposes specified. In the absence of any words or provisions to that effect, there is no basis for arguing that section 45(2) would require some other procedure as a pre-requisite to the making of an order for production and for taking steps to enforce the order than that which was employed by Mr Phynn.

[83] Reliance has been placed on the decision of Morrison JA in **Stewart v Sloley** to ground the argument that Mr Phynn was required to bring himself within the jurisdiction of the Parish Court for the enforcement of his order by commencing proceedings with an originating process, such as a plaint, pursuant to section 143. **Stewart v Sloley,** however, was concerned with an application for committal made pursuant to Part 53 of the Supreme Court of Judicature Civil Procedure Rules, 2002 ('CPR'). As Morrison JA pointed out at para. [16] of the judgment, rule 53.10(1) of the CPR requires that an application for committal must be made, in the case of a contempt committed, "within proceedings in court", by an application under Part 11 or, in any other case, "by a fixed date claim form". The court determined that the application for committal was filed neither "within proceedings" nor by fixed date claim form, and was, therefore, procedurally irregular for the purposes of rule 53.10(1): see para. [44] of the judgment. This reasoning and conclusion in **Stewart v Sloley**, while undoubtedly applicable to proceedings emanating from the Supreme Court pursuant to Part 53 of the CPR, has no relevance to these proceedings, which are not underpinned by a rule or statutory provision to the same effect.

[84] Contrary to counsel's submission, sections 156 and 160 of the JPCA do not provide an answer to the issue under consideration as those sections do not apply to the orders for production made by a Parish Court Judge at the request of a party to the proceedings.

Mr Phynn was not exercising any power under those sections. Neither was he bringing a claim on any cause of action within the jurisdiction of the Parish Court to proceed under section 143 of the JPCA. His power was clearly derived from section 45(2) of the Co-operative Societies Act which empowered him to summarily make an order to compel the production of documents belonging to the society in liquidation. His order has the force of an order issued by a Parish Court Judge. As the learned judge recorded in her oral decision, "[t]he lack of clear provisions under the Cooperative [sic] Societies Act as to how the orders of a Liquidator are to be enforced by the Court is regretted". There is, therefore, no express procedure laid out in the Co-operative Societies Act to guide Mr Phynn in how he should have approached the court. It seems reasonable to opine that guidance would have had to be sought from the law that lays down the procedure for the enforcement of a production order of a Parish Court Judge.

[85] Therefore, once Mr Phynn's Order was issued and disobeyed, Mr Phynn's statutory right was to approach the court for enforcement proceedings, as if it was the order of a Parish Court Judge that had been breached by a party to proceedings before the court. He was not approaching the court for it to decide on the merits of any cause of action arising within the jurisdiction of the court. In this regard, Order XXII, Rule 32 provides for an application to be made for an order of attachment for breach of an order, and where the non-compliance persists, then, an application may be made for the committal of the recalcitrant defaulting party under Order XXII, Rule 33. The form these applications should take, and their terms are prescribed by Parish Court Rules. Nothing in these provisions is in terms of documents required for initiating a plaint in the Parish Courts.

[86] It follows from this that at the stage of the application for the order of attachment, Mr Phynn's concern would be for Mrs Kitson to be penalised for disobedience of his order if the default continued. Therefore, in keeping with the applicable statutory provisions regarding civil contempt proceedings, the purpose of the hearing before the court, on the application for committal, was for Mrs Kitson to show cause why she should not be penalised by the court for disobedience of the lawfully issued order. It was at that stage

that she would be expected to state her justification or excuse for disobeying the order. Therefore, it was for the judge, and not Mr Phynn, to determine whether sufficient cause was shown for the disobedience of Mr Phynn's Formal Order. It was at that stage, that the rules of natural justice and the right to a fair hearing before an independent and impartial tribunal established by law would have operated and had to be observed.

[87] In fine, there is nothing in the manner Mr Phynn approached the court for enforcement of the Formal Order that would qualify as a breach of the rules of natural justice or the constitutional right to a fair hearing. Regardless of how Mr Phynn approached the court, Mrs Kitson had the opportunity to be heard and was heard before the order for committal was made. The committal order cannot properly be impugned on the basis that a wrong initiating or originating procedure was utilised for the commencement of enforcement proceedings in the Corporate Area Civil Court. Accordingly, this aspect of Mrs Kitson's appeal fails.

(iii) Misapprehension of the learned judge regarding the constitutionality of Mr Phynn's actions

[88] The final contention relative to the issue of natural justice and the constitutional right to a fair hearing is that the learned judge failed to recognise that Mrs Kitson was not contending that the Co-operative Societies Act was unconstitutional. According to her, the argument presented that the learned judge failed to appreciate, was that the specific actions and the manner in which Mr Phynn had proceeded, were in breach of the rules of natural justice and inconsistent with section 16(2) of the Constitution. Therefore, Mr Phynn's Formal Order was null and void and of no effect.

[89] I have given this argument the attention it deserves but found that it does not require any in-depth scrutiny. In as much as the learned judge was of the view that the presumption of constitutionality applied, it is clear that she applied the presumption to conclude that Mr Phynn's actions were lawful. Even if the reasoning of the judge was not an accurate statement of the law regarding the applicability of the presumption of constitutionality, she did not address the constitutionality of the Act. Furthermore, and

in any event, even if the judge misapprehended counsel's arguments, she made no decision based on anything regarding the constitutionality of the Co-operative Societies Act. Accordingly, nothing of value to Mrs Kitson's appeal turns on this complaint as it provides no rational basis for the court to disturb the decision of the learned judge.

[90] In the premises, grounds (G) and (H) cannot succeed.

Issue (4) – Whether the procedural prerequisites for the issuance of a committal order had been complied with (grounds B, C, D and E)

[91] Another major contention of Mrs Kitson, as framed broadly in ground (B), is that the learned judge erred in issuing the committal order in circumstances where the procedural prerequisites for a committal order had not been satisfied. More specifically, she complained in ground (C), that Mr Phynn's Formal Order was ineffective and incapable of being enforced because no penal notice was indorsed on it at the time he issued it. Additionally, in grounds (D) and (E), together, she asserts that Mr Phynn's Formal Order and the clerk's penal notice were not properly served when they were purportedly served on the receptionist at the firm, and had not been re-served after substituted service "of the same" was ordered on 10 June 2022.

[92] The relevant procedural requirements that the learned judge considered and which form the basis of counsel's submissions before this court are contained in Order XXII, Rules 32 and 33 of the Parish Court Rules. These rules provide, respectively, as follows:

> "32— Where a breach has been committed of an order in the nature of an injunction or of any order, interlocutory or otherwise, within the competence of the Court which could in the Supreme Court be enforced by attachment of the person or committal, **the party entitled to the benefit of the order shall, if desirous of obtaining an order of attachment, make application to the Clerk. The Clerk shall thereupon prepare and issue for service a copy of the order sought to be enforced, sealed with the Seal of the Court and indorsed with a notice according to the Form in the Appendix A.** and the Clerk may, if the party by whom the order was obtained so desire, order the copy so indorsed to be served by the applicant or his Solicitor upon

> the party to be bound thereby, and in default of such order the said copy shall be issued to the Bailiff for service. In either case **the copy shall be served in the same manner in which service of summonses may be effected**.
>
> 33— **If the person bound by the order fails to obey it, the Clerk on the application of the party entitled to the benefit of the order,** shall not less than three days after the service of the copy indorsed, as provided by the last preceding Rule, **issue for service a notice under the Seal of the Court requiring the person who has failed to obey the order to appear at a Court to be held on the day and at the place to be named in such notice to show cause why he should not be committed for his contempt in neglecting to obey such order. The notice shall be issued for service and served personally, or it may be otherwise served if, after failure to serve personally, the Judge shall so allow.** By leave of the Judge the notice may be issued and served at an earlier period than is prescribed above." (Emphases added)

[93] Counsel for Mrs Kitson argued that Order XXII, Rule 32 required Mrs Kitson to be personally served with a copy of Mr Phynn's Formal Order, duly indorsed with a penal notice in the form of Appendix A of the Parish Court Rules. This was not done. It was submitted that this was not merely a technical breach, but a fatal omission which undermined the learned judge's committal order. Reliance was placed on **Adjudah v Cherietha Lalor** [2016] JMCA Civ 52 ('**Silvera Adjudah**') and **Stewart v Sloley**.

[94] The procedural challenges launched by Mrs Kitson will be addressed under two separate heads: (i) the absence of a penal notice indorsed on the face of Mr Phynn's Formal Order; and (ii) the failure to effect personal service of the copy of Mr Phynn's Formal Order, duly indorsed with a penal notice, on Mrs Kitson. I now turn to consider the arguments advanced in relation to the absence of a penal notice on the face of Mr Phynn's Formal Order.

(i) <u>The absence of the penal notice on the Formal Order</u>

[95] There is no provision in the Parish Court Rules or the Co-operative Societies Act which provides that Mr Phynn should have indorsed his order with a penal notice at the

time he issued it. Mr Phynn, however, had indicated on the face of his order that there are consequences that could flow from disobedience by referring to his right to initiate enforcement measures pursuant to specific rules of the Parish Court Rules. He specifically highlighted the provisions relating to orders for attachment and commitment for disobedience of the order. Mrs Kitson, being an experienced lawyer, would have understood what those entailed. It would be clear to her that penal consequences could flow from disobedience even if not stated in those explicit words. I think it fair to say that she was put on notice by Mr Phynn's Formal Order that imprisonment was a possible consequence of non-compliance. In any event, in my view, Mr Phynn was not required to endorse on his Formal Order the penal notices prescribed by the Parish Court Rules, or any at all.

[96] In this regard, it is worth reiterating that the obligation to indorse a copy of the order sought to be enforced with a penal notice, in the form of Appendix A of the Parish Court Rules, arises from Order XXII, Rule 32. It does not arise from the Co-operative Societies Act under which Mr Phynn acted. Therefore, it is for that reason that the clerk's penal notice that accompanied Mr Phynn's copy Formal Order is worded in terms that satisfy the requirements of Order XXII, Rule 32 in the circumstances of this case. I am not persuaded to the viewpoint contended for by Mrs Kitson that a penal notice should have been indorsed on Mr Phynn's Formal Order when he issued it.

(ii) <u>The absence of the clerk's penal notice on Mr Phynn's Formal Order</u>

[97] Counsel for Mrs Kitson submitted further that Order XXII, Rule 32 required the words contained in the clerk's penal notice to be indorsed on the face of the copy of Mr Phynn's Formal Order that was served on Mrs Kitson and does not contemplate the penal notice being placed on a separate sheet of paper as it was. Furthermore, there is a specific wording for a penal notice for an order in the nature of an injunction (Form 202 of the Appendix A to the Rules), which was not indorsed on the Formal Order. Therefore, the copy of Mr Phynn's Formal Order was not indorsed within the dictates of Order XXII, Rule 32. It was also argued that, in any event, it is unclear whether the clerk's penal notice

was attached to Mr Phynn's Formal Order when it was served on the firm. Having considered this complaint regarding the endorsement of the copy Formal Order with the clerk's penal notice, within the context of the applicable rules of court, I am driven to reject it as unmeritorious for reasons outlined below.

[98] Counsel for Mrs Kitson correctly acknowledged the applicable principles of law emanating from this court that the procedural requirements set out in Order XXII, Rules 32 and 33 for the issuance of a committal order are to be strictly enforced. This principle, and several other general principles, which regulate the exercise of the court's power to order committal, were discussed in detail by Morrison JA in **Stewart v Sloley** and F Williams JA in **Adjudah Silvera**. For present purposes, it is necessary to expressly highlight only two salient pronouncements in the two cases. In **Adjudah Silvera**, F Williams JA observed that "the authorities show that the courts have taken a largely conservative and cautious approach to committing or attaching persons". In that context, Morrison JA, in **Stewart v Solely**, stated at para. [37](iv) that procedural rules requiring the service of an order with a penal notice indorsed thereon, as a precondition to the grant of a committal order, "are not to be regarded as wholly technical and must be strictly complied with".

[99] The practical upshot of these statements of principle is that non-compliance with the stipulated procedural requirements is not treated lightly, and "the alleged contemnor is entitled to take advantage of any procedural irregularities that may be available to him in order to avoid [a committal order against him]" (see **Adjudah Silvera** at para. [17] quoting **Ramdat Sookrat v Comptroller of Customs and Excise** (1992) 48 WIR at page 169). Thus, in **Adjudah Silvera**, the absence of proof of service of an order, duly indorsed with a penal notice in keeping with the dictates of Order XXII, Rule 32, for which enforcement was sought by way of committal, was treated as fatal to an application for a committal order.

[100] I agree with counsel for Mr Phynn that it would be an overly technical and literalistic construction of the rules to invalidate a committal order on the basis that the

penal notice was on a separate sheet of paper from the order sought to be enforced albeit that the penal notice and the Formal Order were attached to each other and the penal notice referenced the order to be enforced as the one to be obeyed. The requirement for an indorsement of a penal notice in Order XXII, Rule 32 is aimed at ensuring that a notice accompanies the order which is being enforced so that the person required to comply with the order is made aware of both the contents of the order, and the penal consequences of non-compliance. In **Iberian Trust Ltd v Founders Trust and Investment Co Ltd** [1932] All ER Rep 176 (**'Iberian Trust'**), the court stated that "[t]he object of the indorsement is plain - namely, to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences".

[101] To take the point that the penal notice, in this case, ought to have been inscribed on the same page or document as Mr Phynn's Formal Order, is an attempt to utilise a minute technicality to frustrate the jurisdiction of the court to enforce a lawfully issued order. No case law, or good reason, has been advanced to suggest that an indorsement contained on a separate sheet of paper, which refers to the order for which compliance is sought, and which (as will be discussed below) was attached to the order for which compliance was sought, could be rendered null and void.

[102] Even if Mr Phynn's indorsement on the Formal Order that disobedience would lead to enforcement in the court cannot be accepted as a penal notice, and the clerk's penal notice was not attached to the copy Formal Order as contended, all the documents taken together would, nevertheless, have been sufficient and effectual in bringing home to Mrs Kitson the possibility of penal consequences if she continued to disobey the Formal Order. From day one, she was put on notice of Mr Phynn's intention to pursue enforcement of his order. Even if what is indorsed on the Formal Order may not have brought home to the legally untrained litigant the threat of committal to prison, the same cannot be said of Mrs Kitson being an experienced attorney-at-law. She is expected to have understood

that disobedience of the Formal Order, without good cause, could be visited with an order for committal.

[103] I am satisfied that there is no basis to impugn the judge's committal order on the sole basis of the submission that the clerk's penal notice was on a separate sheet of paper from Mr Phynn's Formal Order.

[104] The question then remains: is Mrs Kitson correct in saying that there was no indication that the clerk's penal notice was, in fact, attached to Mr Phynn's Formal Order, thereby rendering it ineffectual in grounding the committal order. It must be noted that there is no record that the question regarding the attachment of the Formal Order to the clerk's notice was ever raised before the learned judge. As counsel for Mr Phynn correctly pointed out, this submission is now being raised for the first time. There is no apparent reason for the failure to raise this challenge in the court below and so the argument ought properly to be disallowed. I have chosen to dispose of it, however, notwithstanding the breach of procedure, based on observations which will be briefly discussed below, and the fact that Mr Phynn would not be prejudiced by the disposal of it.

[105] In disposing of the argument, I will simply point out that there is evidence pointing to the conclusion that the documents were attached to each other when they were served on the firm and brought to the attention of Mrs Kitson. The indisputable bit of evidence pointing to the attachment of both documents together when they were served by the process server is found in para. 4i of the affidavit of Denise Kitson filed in this court on 21 July 2022 in support of the notice of application for a stay of execution. In that affidavit, Mrs Kitson deposed that on or about 4 April 2022, the firm received "**a document entitled 'Application for a Warrant of Attachment' but which was a penal notice signed by the Clerk of the Parish Court and to which was attached [Mr Phynn's Formal Order] of March 22, 2022**" (emphasis supplied). Therefore, on her own evidence, Mrs Kitson has acknowledged that the clerk's penal notice was, in fact, attached to Mr Phynn's Formal Order. It was not only attached but expressly referred to

the Formal Order as the one to be obeyed and if not obeyed, then penal consequences could flow.

[106] Accordingly, I accept that the attachment of the clerk's penal notice to (rather than indorsement on) Mr Phynn's Formal Order was sufficient to satisfy the requirements of Order XXII, Rule 32, which required the Formal Order to be duly indorsed with a penal notice in the form in Appendix A of the Parish Court Rules. For this reason, the arguments advanced on behalf of Mrs Kitson that Mr Phynn's Formal Order was not indorsed with a penal notice in accordance with the law, and, therefore, invalid and ineffectual for the purposes of the committal order, cannot be accepted.

[107] I turn now to the arguments advanced on the issue of the service of the Formal Order and the clerk's penal notice on Mrs Kitson.

(iii) Service

[108] The crux of the grounds of appeal and supporting submissions on the issue of service, as far as I understand it, is that the failure to personally serve Mrs Kitson with Mr Phynn's Formal Order and as well as the duly indorsed copy of the order with the penal notice indorsed on it, or to re-serve those documents after Mr Phynn's application for substituted service was granted, is fatal to the learned judge's committal order. The resolution of this issue requires the court to determine whether the relevant provisions of the Parish Court Rules require personal service of Mr Phynn's Formal Order as well as the indorsed copy of the Formal Order; and, consequently, whether the failure to personally serve Mrs Kitson invalidates the order for committal made by the learned judge.

[109] As it relates to the Formal Order served by Mr Phynn on someone at the firm, there is nothing in law to say that it ought to have been served personally on Mrs Kitson for it to be valid and effectual.

[110] As it relates to the indorsed copy of Mr Phynn's Formal Order (which the learned judge referred to as 'the Rule 32 document') and the notice issued by the clerk under Order XXII, Rule 33, indicating the date and time of the hearing of the application for committal (which the learned judge referred to as 'the Rule 33 document'), the learned judge concluded that both sets of documents were properly served in a manner contemplated by the Parish Court Rules. She reasoned:

> "…the Rule 32 document must be served in the same manner as a summons… . In the instant case the Rule 32 document was not served personally but was served pursuant to Order VII Rule 25 and an application for substituted service was made on June 9, 2022 for service of the Rule 33 document. This was the same date the application was set for. The application for substituted service of the Rule 33 document was granted and the application was set for hearing on July 4, 2022. The Rule 33 document was served according to the order of the court."

[111] It is necessary to point out, as the learned judge did, that the application for substituted service made by Mr Phynn did not concern the duly indorsed copy of Mr Phynn's Formal Order, and only concerned the notice issued by the clerk pursuant to Order XXII, Rule 33 (the Rule 33 document). There is, therefore, no need to discuss the aspects of grounds (D) and (E) and the submissions of counsel in support of them, which contend that Mr Phynn was required to re-serve the duly indorsed copy of the Formal Order (the Rule 32 document) after the application for substituted service was granted. There will be specific focus on the grounds and arguments, to the extent that they challenge the failure to personally serve Mrs Kitson with the duly indorsed copy of Mr Phynn's Formal Order (the Rule 32 document).

[112] It is also necessary to point out that although, in ground (B), issue was taken broadly with the learned judge's conclusion that the procedural requirements for the issue of a committal order had been satisfied, no submissions were made in relation to the service of the notice issued by the clerk pursuant to Order XXII, Rule 33 (the Rule 33 document). Therefore, nothing relating to the service of the documents pertaining to the

application for committal (Rule 33 document) will be explored as it is unnecessary to do so.

[113] Counsel for Mrs Kitson contended that personal service of the indorsed copy Formal Order was required in light of the nature of the proceedings, which may result in enforcement by committal of a person to prison. Reliance was placed on Order XXII, Rule 33, and Order XVI, Rule 2. The latter rule states that "[i]t shall be sufficient if a summons to a witness is served at a reasonable time before the hearing, such service to be personal". It was also contended that Order VII, which deals solely with the issuance and service of plaints, is not applicable.

[114] These submissions cannot be accepted for three primary reasons. Firstly, as the learned judge correctly appreciated, the starting point is Order XXII, Rule 32, which provides that a sealed, duly indorsed copy of Mr Phynn's Formal Order ought to be served "in the same manner in which service of summonses may be effected". By these words, Order XXII, Rule 32 requires recourse to be had to the procedural rules applicable to the service of summonses. Therefore, Order XXII, Rule 33 is of no assistance, as it does not address the manner in which service of such summonses may be effected.

[115] Contrary to counsel's submission, the relevant rules are set out in Order VII, which is entitled "Plaint Note **and Summons**" (emphasis added). When read in its entirety, Order VII sets out the procedural requirements for the filing of plaints, plaint notes and the issue of summonses in proceedings commenced under, what was then, section 148 of the Resident Magistrates Law. Although the rules pertaining to summonses under Order VII are, admittedly, applicable to summonses in section 148 proceedings; however, Order VII, Rule 27 provides that those rules apply, generally, "**to the mode of service of all summonses whatsoever, except where otherwise directed by the Law, or by these Rules**" (emphasis added).

[116] Order VII, Rule 9 prescribes the general rule applicable to service of summonses, and provides, in part, as follows:

> "Service of a summons under Section 148 of the Law may be effected by delivering the same to the defendant personally, or to some person, apparently not less than 16 years old at the house or place of dwelling, or place of business of the defendant, or by service in the manner prescribed by Rules 10 to 24 (both inclusive) of this order, or under an order for substituted service as prescribed by Section 166 of Law 39 of 1927; Provided that a 'Place of Business' for the purposes of this Rule shall not be deemed to be the place of business of the defendant unless he shall be the master or one of the masters thereof… ."

[117] Order VII, Rules 10 to 24 make further provision for the service of summonses in certain specified circumstances. The factual circumstances required to engage those specific rules are not present in this case. It suffices to say, for present purposes, that in as much as those rules are concerned with service on individuals, they, nevertheless, permit a summons to be served in a variety of ways, other than personally, depending on the circumstances. Therefore, the general rule applicable to service of a summons under Order VII, Rule 9 would apply to this case.

[118] Order VII, Rule 9 is clear that while a summons may be served personally on a defendant, it may also be properly served on some other person (who appears to be not less than 16 years old) at the defendant's house, place of dwelling or place of business. No other provision in Order VII, applicable to the circumstances of this case, creates a general obligation to effect personal service of a summons.

[119] The conclusion which reasonably follows from the above is that there was no requirement for personal service of Mr Phynn's Formal Order and the clerk's penal notice, as no such requirement is imposed on the service of a summons by Order VII. On a plain reading of the relevant rules, therefore, the argument that the failure to personally serve Mrs Kitson with Mr Phynn's Formal Order invalidates the judge's committal order cannot reasonably be accepted. There is no such mandatory requirement for personal service of that order imposed by the Parish Court Rules.

[120] Secondly, and relatedly, it is clear that service on the firm of the copy of Mr Phynn's Formal Order, along with the clerk's penal notice attached, amounted to service on Mrs

Kitson's place of business, in satisfaction of Order VII, Rule 9. As earlier indicated, service on the firm was evidenced by the affidavit of District Constable Suzette Henriques, the relevant process server. There was no challenge to this affidavit in the court below, and no assertion before the learned judge that the documents served by District Constable Henriques were not the documents contemplated by Order XXII, Rule 32. There is also no dispute that they were served on someone who was apparently over 16 years old.

[121] The effect of Order VII, Rule 9 is that the firm will be regarded as Mrs Kitson's place of business for the purpose of the rule, if she is "the master or one of the masters" of the firm. As managing partner of the firm, Mrs Kitson obviously falls within that definition vis-à-vis the firm. Therefore, service on the firm (or someone over 16 at the firm, which is not in issue) was within the contemplation of Order VII, Rule 9 and was effective for the purposes of Order XXII, Rule 32.

[122] Accordingly, the learned judge was correct in her conclusion that service of the sealed, indorsed copy of Mr Phynn's Formal Order on the firm was effective service on Mrs Kitson, notwithstanding the failure to effect personal service on her.

[123] Before leaving this issue, it is necessary to point out that the judge erroneously grounded her correct conclusion on Order VII, Rule 25. Order VII, Rule 25 provides as follows:

> "**Where the summons has not been served personally but has been delivered to some person apparently not less than sixteen years old at the** house or place of dwelling **or place of business of the defendan**t, **and he does not appear in person or by his Solicitor or agent, at the Return Day**, **the action may proceed if the Court is satisfied on the evidence before it, that the service has come to the knowledge of the defendant before the Return Day**, but no such evidence shall be necessary in the cases specially mentioned in the Rules 16, 17, 18, 19, 20, 21, 22, 23, 24 of this Order." (Emphasis added)

[124] Order VII, Rule 25 applies where the person served does not appear in person or by his solicitor or agent, on the Return Day. Therefore, for Order VII, Rule 25 to have been engaged, Mrs Kitson must have failed to appear in person or by her legal representative or agent. Mrs Kitson was represented in the proceedings before the learned judge. So, this is not a case where the defendant did not appear in person or by her solicitor. The factual circumstances required to engage Order VII, Rule 25 were, therefore, not present in this case for the learned judge to have applied that Rule. Notwithstanding the erroneous basis of the learned judge's conclusion, she was, nevertheless, correct to conclude that service on the firm in this case was not irregular. Mrs Kitson was, therefore, properly served.

[125] The third and final reason for not agreeing with Mrs Kitson's position on the service point is found in the proviso to Order XXII, Rule 34(a). That rule provides, in part, as follows:

> "On the day named in the notice mentioned in the last preceding Rule, the Judge on proof of service of the copy of the order duly indorsed as provided by Rule 32 and of the above notice as provided by Rule 33 of this Order, and of the continued disobedience of the person in default, may order a warrant of attachment to issue either unconditionally, or on such terms as shall be just and may make such order as to costs as he may think fit:
>
> **Provided that if the party in default appears either in person or by his Solicitor, proof of service of the copy of the order and notice shall not be necessary, unless the Judge shall otherwise order**:… ." (Emphasis added)

[126] Order XXII, Rule 34(a) instructs that the court may make an order of attachment in terms that are just, if satisfied, *inter alia*, that the sealed, duly indorsed copy of the order sought to be enforced is served as prescribed by Order XXII, Rule 32. The effect, however, of the proviso to the rule is that the requirements for proof of service of the sealed, duly indorsed copy order are dispensed with if the party in default, or his attorney, appears in court before the order is made.

[127] The wording employed by the proviso to Order XXII, Rule 34(a) means that upon the appearance of the party in default or his counsel, the requirements for proof of service are automatically dispensed with, that is, without the need for a judge to make an order to that end. This, therefore, means that if the requirements for proof of service have been dispensed with, and no order has been made by a judge re-engaging those requirements, a failure to provide proof of service of the duly indorsed order could not have the effect of invalidating a judge's order.

[128] The rationale behind the proviso to Order XXII, Rule 34(a) is obvious. Although strict compliance with the requirements for service under the rules is ideal, the court's power to enforce orders through committal, ought not to be defeated by non-compliance with the rules relating to service, in circumstances where the party, who is to be served, had full knowledge of the order with which compliance was being enforced, the pendency of enforcement proceedings against them, and the potential adverse impact of the proceedings on their liberty. The position was similar under the laws of England (see **Ronson Products Ltd v Ronson Furniture Ltd** [1966] 2 All ER 38 endorsing the much older decision of **United Telephone Co v Dale** (1884) 25 Ch D at page 787). These cases establish, as a matter of principle, that a committal order could be made even if the party in default had not been served, if he was aware of the order's dictates and the penal consequences of non-compliance with the order.

[129] It is beyond dispute that Mrs Kitson's attorneys-at-law attended the hearing in the court below on her behalf. She appeared in court through her counsel and filed evidence to resist the making of the committal order. Accordingly, the proviso to Order XXII, Rule 34(a) was engaged in the circumstances of this case, and so the procedural requirements for service required by Order XXII, Rule 32 would have been dispensed with, automatically. The learned judge did not make an order re-engaging those procedural requirements. Thus, any procedural failures or defects in the service of Mr Phynn's Formal Order, along with the clerk's penal notice, were waived by Mrs Kitson's appearance through her counsel. The failure to serve her personally with those documents required

to be served under Order XXII Rule 32 cannot be treated as fatal to the learned judge's committal order.

[130] For the foregoing reasons, grounds (B), (C), (D) and (E) cannot succeed.

Issue (5) – Whether the learned judge erred in concluding that Mr Phynn's Formal Order defeated the right of the firm to exercise a solicitor's lien over Mount Royal's documents (ground I)

[131] The final significant complaint of Mrs Kitson, as detailed in ground (I) is that the learned judge erred in her finding that "an Attorney's right at common law to a lien could not exist alongside and was overridden by the provisions of the Co-operative Societies Act as promulgated by Parliament". Mr Phynn's counsel stated that this is not a true statement of the learned judge's reasoning. Mrs Kitson has not presented anything to demonstrate that the learned judge had reduced the wrong reasons to writing in this regard. Therefore, the court will act on the learned judge's conclusion as recorded in her oral decision furnished to the court in writing. She stated:

> "The Court will add that a solicitor's lien under common law does not defeat the clear and ordinary meaning of the Co-operative Societies Act and cannot supersede the statute in determining how the just debts of the former society are to be met by the liquidator. Any undertaking given by the liquidator in such circumstances would be of no use as the liquidator would be bound to follow the legislation. Further ignoring the order of the liquidator to produce documents satisfies both the mens rea and actus reus of contempt."

[132] Halsbury's Laws of England, 5th Edition, Vol. 44(1) at para. 244 explains that at common law, a solicitor has two rights termed liens. The first is a right to retain property already in his possession until he is paid costs due to him in his professional capacity (solicitor's retaining lien). The second is the right to ask the court to direct that personal property recovered under a judgment obtained by his exertions stand as security for his costs of such recovery (equitable lien).

[133] In this case, Mrs Kitson has raised the existence of a solicitor's retaining lien in her firm's favour arising from unpaid legal fees. This, she strongly believes, is a complete response to Mr Phynn's production order. It is, therefore, imperative to consider the nature of the right and against whom it is available. Halsbury's Laws of England, 5th Edition, Vol. 66 at para. 771 speaks, in part, to the nature of the right and against whom it is available, thus:

> "… A solicitor having a retaining lien over property in his possession is entitled to retain the property as against the client and all persons claiming through him and having no better right than the client until the full amount of the solicitor's assessed costs payable by the client is paid. The client has no right to inspect the documents or to take copies of them, but delivery of documents which the client requires will be ordered upon payment into court, or delivery may be ordered to enable the property to which the documents relate to be preserved." (Emphasis added)

[134] There is no dispute between the parties that the documents in the possession of the firm are amenable to the retaining lien. It is also not disputed that the firm has a right to a retaining lien over the documents. The question for determination in this appeal revolves around the law regarding against whom the lien is available. From the passage in Halsbury's Laws of England quoted above, it is clear that the lien is available against the client and persons claiming through him and having no better right than him. So, the crucial question is whether the retaining lien is available against Mr Phynn.

[135] Mrs Kitson's position is that the retaining lien is available against Mr Phynn despite the provision of the Co-operative Societies Act because, according to her, nothing in the statute negates the imposition of the solicitor's lien. Counsel on her behalf highlighted that the relevant sections of the Co-operative Societies Act are silent as to the operations of a solicitor's lien when documents are demanded by the liquidator. They rely on what they termed as trite the principle or rule that "Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication": **R v Secretary of State for Home Department, ex parte Pierson** [1998] AC 539.

[136] Having directed the court's attention to section 249(7) of the Jamaican Insolvency Act as a contrasting provision, counsel argued that whereas it is expressly stated in the Insolvency Act that the lien is not available against the Trustee in Bankruptcy, that is not the case in the Co-operative Societies Act. Therefore, in the absence of an express language in section 45(2) of the Act, excluding the retaining lien as in section 249(7) of the Insolvency Act, the general principles of statutory interpretation apply. In support of this argument, they cited, among other things, Halsbury's Laws of England, 4th Edition, Vol 44(1) paras. 1438 and 1464.

[137] At para. 1438 in the edition of Halsbury's cited above, it is stated that it is a principle of legal policy that Acts should not be taken to limit common law rights, or otherwise alter the common law, unless they do so clearly and unambiguously. However, if the language is clear, there is no reason why such Acts should be construed differently from others. Para. 1464 that later follows states, in essence, that it is a principle of legal policy that property and other economic interests of a person should be respected, and so an Act should not be construed so as to interfere with or prejudice established private rights under contract or the title to property unless it is clearly intended to do so. The primary contention of Mrs Kitson, therefore, is that the statutory scheme under which Mr Phynn purported to act in demanding the documents cannot override the common law retaining lien that vests private rights in favour of the firm for the unpaid fees.

[138] This now brings attention to section 45(1) of the Co-operative Societies Act under which Mr Phynn purportedly acted. It seems necessary to highlight the relevant portions of this provision, which states that a liquidator appointed under section 44 "shall, subject to the guidance and control of the Registrar and to any limitations imposed by the Registrar by order under section 46", have power to investigate all claims against the society and subject to the provisions of the Act to decide questions of priority arising between claimants (section 45(1)(d)); to take possession of the books, documents and assets of the co-operative society (section 45(1)(f)); and to sell the property of the Cooperative Society (section 45(2)(j)).

[139] Section 45(2) then states:

> "A liquidator appointed under this section shall, in so far as such powers are necessary for carrying out the purpose of the section, have all the powers of a [Parish Court Judge] to compel the attendance and examination of witnesses and the production of documents."

[140] It is clear that the statute has given crucial powers to Mr Phynn, subject to the oversight of the Registrar, to perform his statutory role not only for Mount Royal but for others who have interests in it or may claim against it. Part of this power is akin to that of a Parish Court Judge to compel the production of documents which would be necessary for carrying out the purposes of section 45(1), which include, for immediate purposes, taking books, documents and assets belonging to Mount Royal into his possession and selling property belonging to Mount Royal. The section also speaks to the power given to the liquidator to enforce his orders in all respects as a Parish Court Judge. Of course, the Act makes no express provision regarding documents subject to a retaining lien.

[141] The question now is: should the lien claimed by the firm give way to the statutory right of Mr Phynn to receive the documents demanded in the absence of express words to that effect in the Act? If the policies as to statutory interpretation laid out above are applied, then it would follow that the statute having not expressly ousted the operation of the retaining lien, one would have to ascertain whether it has done so by necessary implication. For this reason, there must be a consideration of the nature and effect of the lien juxtaposed against the provisions of the statute to determine which right should give way to the other. To conduct this inquiry regarding the nature and legal standing of the lien, assistance is also sought from the relevant case law cited by both sides given that the solicitor's retaining lien is a creature of the common law.

[142] In presenting their respective views regarding the resolution of this question, both sides presented several cases for the court's consideration. Having examined all those authorities and others cited within them, I could find none that stands on all fours with the case at bar. There is, therefore, no perfect precedent from which guidance may be

derived. Indeed, the jurisprudence surrounding the effect of a solicitor's lien vis-à-vis a liquidator (or similar officer) is not free from difficulty as the authorities are conflicting, confusing and, regrettably, not easily comprehensible, at times. Indeed, a similar observation was made and expressed by the English Court of Appeal in **Re Hawkes; Ackerman v Lockhart** ('**Hawkes**') [1898] 2 Ch 1. The question in that case was whether the judge could order production of documents on which the plaintiff's solicitor had a lien without his lien being satisfied. After a review of dozens of authorities, Lindley MR stated:

> "…yet, having regard to the numerous cases cited before us in arguments and to a certain amount of confusion and apparent conflict between them, I think it better to discuss the present case on principle supported by some authorities which cannot be questioned."

[143] Therefore, in the absence of any authority that has been brought to the court's attention that is binding on it, I have adopted the approach of Lindley MR in **Hawkes**, and have resolved the instant case on some relevant authorities, which I find to be uncontroversial, of unquestionable authority and, therefore, of high persuasive value.

[144] In determining the question whether the learned judge erred in her conclusion that the lien must give way to the statutory powers of Mr Phynn, I have considered all the cases cited by the parties, even if I should fail to discuss them all in-depth. I will only review the major ones, for present purposes, in an effort to keep the already detailed judgment within reasonable limits.

[145] Mrs Kitson drew support from the case of **Re Toleman and England, Ex parte Bramble** (1880) 13 Ch D 885 ('**Toleman**'), in which section 96 of the Bankruptcy Act, 1869 (UK) was in issue. The statute empowered the court to order production of documents relating to the bankruptcy. The Act was silent as to the solicitor's lien. The court drew a distinction between production for inspection and delivery up of the documents which were the subject of the lien. The court held that the solicitor was obliged to produce the documents to the trustee in bankruptcy for inspection, where it was not

being sought to take them out of the solicitor's possession. It reasoned that the order for production to allow inspection was permissible while an order for delivery of the documents would not have been. Bacon CJ stated:

> "I have listened to an argument in support of the lien of a solicitor, which is not disputed by any one. The question is not whether the solicitor is entitled to a lien, but whether he is bound to produce for inspection by the trustee to enable him, as an officer of the Court, to administer the bankrupt's estate, documents of the bankrupt which are in his possession from having been the bankrupt's solicitor. **The solicitor is, no doubt, entitled to his lien, and the objection would have been valid if it been sought to take this deed out of his possession. But inspection, and not deliver up of the deed, is what is wanted**… ." (Emphasis added)

[146] Mrs Kitson also prayed in aid **Re Aveling**, which endorsed **Toleman**. In issue in **Re Aveling** was a provision which allowed the court to, among other things, order production of books, papers or records in a person's possession or under his control relating to the company or other matters mentioned in the subsection. A production order was sought by an administrative receiver for the purpose of inspecting the documents without taking them from the solicitor's possession. Hoffman J held that the statutory power in that case permitted the liquidator to require production for the purpose of inspecting the documents which were subject to the solicitor's lien but the power did not permit the documents to be removed from the attorney's possession, so as to destroy the lien. The order for production was granted to allow the documents to be inspected without requiring the solicitor to surrender possession.

[147] Mrs Kitson has also relied on **Re Capital Fire Insurance Association** (1883) 24 Ch D 408, in which the court, among other things, drew the same distinction between production that sought information subject to the lien for inspection as opposed to delivery up of possession.

[148] On the strength of these authorities, Mrs Kitson's contention is that Mr Phynn had no right to the production of the documents to take them in his possession as he had

ordered, but if anything only for inspection. The delivery up of possession would destroy the lien, thereby rendering it valueless to the firm. For that reason, the lien is available against Mr Phynn.

[149] The position of Mrs Kitson, as far as I understand it, therefore, is that Mr Phynn's Formal Order, by demanding production not limited to inspection, but for him to take possession of the documents subject to the lien, is not permissible by section 45(2) of the Co-operative Societies Act given the absence of express provisions that the lien should be overridden. In other words, the lien should not be destroyed in the absence of expressed and unambiguous provisions in the statute or by necessary implication, neither of which exists in this case.

[150] Mr Phynn's position, in response, is that having regard to the relevant authorities, statutory duties and powers of an appointed liquidator of a co-operative society (in liquidation) it is settled law that a solicitor's retaining lien operates subject to statutory requirements and are not enforceable against third parties such as a liquidator representing other creditors, shareholders, members and other interest groups of a society. He relies on the cases of **Hawkes**; **DTC (CNC) Ltd v Gary Sargeant (a firm)** [1996] 2 All ER 369, **Tadgh O'Conaill & Plumbing Ltd (in Voluntary liquidation) v Galvin & Co Solicitors** [2012] IEHC 52 as well as **Re Aveling** as being instructive on the point.

[151] I find **Hawkes** to be quite instructive on the subject as it reviewed various relevant authorities. It is not cited for the facts, which are not on all fours with this case, but for the principles that emanated from it. In that case, it was held, as depicted in the head note, that a solicitor having a lien on documents belonging to his client may not embarrass proceedings taken in the action by a third-party by refusing to produce the documents if wanted by that third party for the purpose of his proceedings even though the documents may have come into the solicitors position before the commencement of the action. It was held by the Court of Appeal that notwithstanding his lien, the solicitor was bound to

produce to the creditor all the documents in his possession to enable the creditor to take steps for getting in a mortgage debt due to the estate of the solicitor's deceased client.

[152] The court, through Lindley MR, stated that:

> "A solicitor's lien is simply a right to retain his client's documents as against the client and persons representing him. As between the solicitor and third parties, the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if he had the documents in his own possession. This principle is as applicable to law as it is in equity. Accordingly, it has been long settled that if a solicitor is required by his client to produce documents under a subpoena duces tecum, the solicitor can refuse to do so if he has a lien on them; but that lien is no answer to a demand for their production by a third party: *Hope v Liddell* 7. D.M. & G 331; *Hunter v Leathley*. This doctrine is not confined to production under the exigency of a subpoena duces tecum. The same principle applies to other applications for production by solicitors who are acting for their clients in litigation and in equity." (Emphasis added)

[153] The court also made reference to the case of **Furlong v Howard** (1804) 2 Sch & Lef 115 and rehearsed Lord Redesdale's seminal pronouncement that –

> "a solicitor may have a lien on a deed for his costs, yet if his client is bound to produce it for the benefit of a third person, so also must the solicitor. The common opinion that the solicitor may withhold it from all parties in such a case is erroneous. The right is only as between his client and him." (Emphasis added)

According to the court:

> "It is on this principle that Courts of Equity order solicitors acting for clients who are parties to actions, to produce documents on which the solicitors have a lien if their production is necessary for the purpose of doing justice for other persons besides their respective clients. Administrative actions are the most familiar instances of such actions. But the principle is not confined to them. As, however, we are dealing with an administrative action, I will refer only to such actions." (Emphasis added)

It then opined:

> "The clear statement of the limit to the right of a solicitor to refuse production of documents on which he has a lien, enunciated by Lord Redesdale in *Furlong v Howard* may be and has been rested on the very general rule that **no one can give greater rights to another than he has himself. The owner of a document who would himself be obliged to produce it for the purposes of justice cannot give to his solicitor a right to refuse production**." (Emphasis added)

The court described the statement of principle of Lord Redesdale as "obviously just" that it does not think "it requires any further support on authority".

[154] Finally, the court referenced **Re Capital Fire Insurance Association** in which Cotton LJ said that a solicitor can claim no greater lien than the person who puts the documents into his hand is capable of creating and then concluded:

> "These authorities make it clear that the principle enunciated by Lord Redesdale in *Furlong v Howard* has never been modified and **any detail or any decisions if there be any which are contrary to that principle must be wrong.**" (Emphasis added)

[155] The rule that a solicitor may not enforce a lien against a third party was also considered in **re South Essex Estuary and Reclamation Co, Ex parte Paine and Layton** (1869) L R 4 Ch App 215. The question arose in that case whether a liquidator, seeking an order for production of documents against a solicitor, was for the purposes of the solicitor's lien, the solicitor's client or a third party. Lord Hatherly decided that the liquidator was a third party, stating that:

> "The official liquidator had therefore now to act for the benefit of the creditors as well as of the shareholders, and therefore the legislature might well have considered it right to give him this power. His Lordship could not, in fact, read the section in any way except as saying that production might be ordered, but must be without prejudice to any lien; though in many instances, of course, this would render the lien valueless."

[156] In **Hawkes**, reference was made to **re South Essex Estuary and Reclamation** as an "expressed decision" of Lord Hatherley that a creditor is not a person who claims through or under the client so as to be in the same position with him but is a person

claiming hostilely to him so as to be entitled to the full benefit of Lord Redesdale's statement of the law in **Furlong v Howard**.

[157] Lord Hatherly's reasoning was again indorsed in the more recent case of **Re Aveling**, where Hoffman J concluded that for the purpose of an order to produce documents, a liquidator was a third party to the solicitor. Therefore, a solicitor could not assert a lien over company documents ordered to be produced upon the application of the company's liquidator.

[158] Having considered the pronouncements from the preceding authorities against the background of the Co-operative Societies Act under which Mr Phynn purportedly acted, I am driven to accept the submissions of counsel for Mr Phynn that Mrs Kitson does not stand on good ground in stating that the solicitor's lien must override Mr Phynn's statutory right to compel production and delivery up of the documents. This would not only be inconsistent with the letter and spirit of the Co-operative Societies Act but with the incontrovertible principles of law from **Furlong v Howard** which have been endorsed in cases like **Hawkes** and **Re Capital Fire Insurance Association** regarding third party interests in the liquidator's function in the affairs of the society in liquidation.

[159] Section 45(1) empowers Mr Phynn, as liquidator, to investigate claims against the society and to determine their priorities. In addition, he is not merely given the authority to seek production of documents for inspection he is given the wider power to take possession of them. It is to this end, and for these purposes (among others not expressly specified for present purposes), that Mr Phynn is authorised to compel, among other things, production of documents without any resort to the court unlike in the English cases cited by the parties. So, Mr Phynn's power to compel (not merely seek) the production of the documents in the possession of the firm, as a Parish Court Judge would, is not an end in itself but a means to an end. It is a power given for him in the carrying out of his duties, which include taking documents for the co-operative society into his possession, to enable him to effectively carry out his role as liquidator.

[160] The express power given to Mr Phynn to make an enforceable order for the production of documents, akin to that of a Parish Court Judge, speaks volumes to the intention of Parliament regarding the duties and functions of the liquidator. This is because Parliament did not intend for him to be the representative of the society in liquidation, but subject to the direction of the Registrar, must carry out his functions for the benefit of third parties who would have an interest in or claims against the society.

[161] Applying the principles taken from the passage cited in Halsbury's Laws of England, **Hawkes** and some of the cases referred to therein, it is unquestionable that Mr Phynn was not called upon to act for Mount Royal but on behalf of third parties upon the appointment of the Registrar to whom he was obliged to report. From the scheme of the Act, it is incontrovertible that he answers only to the Registrar and no one else. He was, therefore, not someone claiming through Mount Royal or having no greater right than Mount Royal to the documents subject to the retaining lien. In fact, in the Formal Order, Mr Phynn expressly stated that he wanted the documents so as to enable him to properly inform himself "of all Mount Royal's assets, and to effectively carry out his statutory duties to wind up Mount Royal's affair [sic] and to subsequently pay creditors/the liabilities of Mount Royal in a timely manner".

[162] In the circumstances, Mount Royal itself would have been obliged by the statute to produce and deliver up to Mr Phynn the documents in the hands of the firm for him to perform his statutory duties on behalf of third parties who have an interest in the liquidation. If the society would have been obliged to deliver up those documents in the firm's possession to Mr Phynn, then the firm is equally obliged to do so. As made clear in **Furlong v Howard**, "…if his client is bound to produce it for the benefit of a third person, so also must the solicitor", and as Lindley MR in **Hawkes** so attractively framed, what he said to be, "the very general rule" –

> "no one can give greater rights to another than he has himself. The owner of a document who would himself be obliged to produce it for the purposes of justice cannot give to his solicitor a right to refuse production."

[163] I have no reservation to conclude on the guidance given by the authorities that Mount Royal would itself be obliged to produce the documents demanded by Mr Phynn, who stands as a third party acting for the benefit of third parties, who are strangers to the attorney-client relationship within which the lien emanated. This view is consonant with the interests of justice and fair play. This has to be so even if the lien would be destroyed or rendered valueless.

[164] Furthermore, in acting as the liquidator, in the interests of Mount Royal's creditors, or to satisfy the liabilities of Mount Royal, Mr Phynn was bound to strictly adhere to the provisions of section 49 of the Co-operative Societies Act, which prescribe how the funds of a society should be applied during the liquidation process. Mr Phynn could not have ignored section 49, or taken any step to satisfy the liability to the firm on the mere basis of the existence of the common law lien without, first, carrying out his functions under section 45, which include investigating claims, deciding questions of priority arising between claimants and to take possession of books, documents and assets of the society. The learned judge was, therefore, correct to conclude that "the solicitor's lien cannot supersede the statute in determining how the just debts of [Mount Royal] are to be met by the liquidator".

[165] I am propelled to the conclusion that the learned judge cannot be faulted in her conclusion that the firm's retaining lien cannot override the statutory powers of Mr Phynn. His order for production and delivery up of the documents in the firm's possession is lawful and valid and must be obeyed, despite the lien.

[166] It seems in all the circumstances that Mrs Kitson does not have any lawful justification or excuse for non-compliance with Mr Phynn's Formal Order and so as long as the default continues, she stands in civil contempt and is liable to face penal consequences.

[167] Accordingly, ground of appeal (I) fails.

Issue (6) – Whether the Parish Court Judge erred in concluding that the *actus reus* and *mens rea* of contempt were established on the evidence (ground (B))

[168] Finally, Mrs Kitson, through her counsel, contended that the learned judge was wrong to conclude that the *actus reus* and *mens rea* of contempt were satisfied. According to them, Mrs Kitson did not deliberately breach Mr Phynn's Formal Order as she had nothing to do with the matters personally. She communicated with Mr Phynn in her capacity as managing partner of the firm. The evidence does not show what act was done by her after the order was served on the firm. There is, therefore, no evidence that she deliberately breached any order properly served, which could result in a committal. Accordingly, there was no proper basis to issue a committal order against her.

[169] It is observed that no ground of appeal specifically challenges the learned judge's findings in this regard. However, in their submissions, counsel for Mrs Kitson sought to challenge the judge's findings in this regard under the broader umbrella of compliance with the technical requirements for the grant of a committal order. For that reason, it is considered necessary, for completeness, to dispose of the submission as a part of ground (B) and connected to ground (I).

[170] In so far as is immediately relevant, it is to be noted that it is a civil contempt of court to refuse or neglect to do an act required by a judgment or order of the court within the time specified in the judgment or order or within the time as extended or abridged under the rules of court. Although contempt may be committed in the absence of wilful disobedience, committal will not be ordered unless the contempt involves a degree of fault or misconduct (see Halsbury's Laws of England, 5th Edition, Civil Contempt, paras. 52 and 53; **Attorney General v Punch Limited and Another** [2002] UKHL 50 at para. 2, **Stewart v Sloley** at para. [37]).

[171] The record of proceedings in this case supports the learned judge's findings and conclusion that there was, in fact, wilful disobedience of Mr Phynn's Formal Order by Mrs Kitson. Mr Phynn's Formal Order was directed to both Mr Grant and Mrs Kitson. Mrs Kitson, being one of the persons to whom Mr Phynn's Formal Order was directed, issued

a written response refusing to produce the documents requested, on the basis that the firm was entitled to a lien over them, arising from unpaid legal fees. She went further to demand an undertaking from Mr Phynn for the firm to be paid. Her refusal to comply with the order continued up to the end of the committal hearing before the learned judge.

[172] That, however, would not have been the end of the matter. The learned judge had a duty to investigate whether Mrs Kitson, in knowingly and intentionally disobeying the order, was at fault. In other words, she had to be satisfied that Mrs Kitson had shown no sufficient cause or lawful excuse for such disobedience. The learned judge concluded that she had no justification for not obeying the Formal Order because the lien must give way to the statute which overrides it. Her finding in this regard meant that there was fault on the part of Mrs Kitson in intentionally disobeying the order. This would have established the existence of the requisite *actus reus* and *mens rea* for contempt; hence the order for committal.

[173] In the face of the pertinent facts regarding Mrs Kitson's role and conduct in the stand-off between Mr Phynn and the firm, there is simply no reasonable construction of the evidence that could lead to any conclusion other than the one to which the learned judge had arrived. It seems fair to conclude then that the learned judge cannot be faulted for finding that the necessary *actus reus* and *mens rea* for contempt were proven.

Conclusion

[174] Having examined the grounds of appeal and the issues to which they have given rise against the background of the applicable law and the submissions of counsel on both sides, I would dispose of the appeal as follows:

(I) Section 48 of the Co-operative Societies Act does not oust the jurisdiction of the Parish Court to enforce orders for production of documents made by a liquidator in the liquidation of a co-operative society. The learned judge, therefore, did not err in concluding that

she had jurisdiction to resolve the dispute raised on the parties' affidavits. **Ground (A) fails**.

(II) Section 46 of the Co-operative Societies Act did not require Mr Phynn or the learned judge to refer the dispute to arbitration. **Ground (F) fails**.

(III) The issuance of Mr Phynn's Formal Order and the manner he approached the court to enforce it were not in breach of the rules of natural justice and/or the right to a fair hearing before an independent and impartial tribunal established by law, pursuant to section 16 of the Constitution of Jamaica and, therefore, unlawful, null and void. The rules of natural justice and the right to a fair hearing were not engaged at the stage Mr Phynn issued the Formal Order. The hearing before the learned judge sufficiently satisfied the requirements of natural justice and the constitutional right to a fair hearing. **Grounds (G) and (H) fail**.

(IV) The procedural prerequisites for the issuance of a committal order, pursuant to Order XXII, Rules 32 and 33 of the Parish Court Rules, had been complied with. More specifically, Mrs Kitson was properly served with a copy of Mr Phynn's Formal Order, duly indorsed with the clerk of the court's penal notice as required by Order XXII, Rules 32 read in conjunction with Order VII, Rules 9 and 27 of the Parish Court Rules. There was no requirement for the Formal Order issued by Mr Phynn to be indorsed with a penal notice at the time he first served the firm and there was no requirement for his order to be served personally on Mrs Kitson. In any event, even if these documents were not properly served, the defect in service would not have been fatal to the committal order by virtue of the proviso to Order XXII Rule 34(a) because Mrs Kitson, through her counsel,

appeared before the court and took active part in the committal proceedings and the learned judge made no order regarding re-service of the documents not personally served. **Grounds (B) (in part), (C), (D) and (E) fail**.

(V) The learned judge was correct to conclude that the solicitor's lien on which Mrs Kitson relies does not defeat the clear and ordinary meaning of the Co-operative Societies Act which conferred the power on Mr Phynn to issue his order compelling the production of documents in the hands of the firm subject to the lien. The learned judge was correct to conclude that the *actus reus* and *mens rea* of civil contempt were established on the part of Mrs Kitson who failed to show sufficient cause for disobeying Mr Phynn's Formal Order. **Grounds (B) (in part) and (I) fail**.

(VI) The complaint regarding the learned judge's refusal of the oral application for a stay of execution at the end of the hearing is not a ground dispositive of the appeal as it was not an order determining the dispute between the parties and as such amenable to an appeal. However, bearing in mind section 34(2) of the JAJA, which lays out the specific procedure to be followed by an appellant in contempt proceedings and which provides that the compliance with the preconditions for the filing of an appeal in those proceedings, to the satisfaction of the clerk of the court or registrar of this court, operates as a stay. Accordingly, the learned judge did not err when she concluded that she had no jurisdiction to grant a stay of the committal order pending appeal. **Ground (J) fails**.

Disposal of the appeal

[175] In the light of my findings detailed above, it is inevitable that the appeal be dismissed as it fails on all grounds.

[176] Section 34(3) of the JAJA provides that upon determining an appeal from a fine or order for imprisonment in contempt proceedings, the Court of Appeal shall "either confirm the order or vary or quash such order". Section 34(4) further states that where the court confirms or varies the order, the judge in the court below "**shall proceed to carry out and enforce his order as confirmed or varied in the same manner as if there had been no appeal against the same**". (Emphasis added)

[177] Bearing in mind my findings and conclusions on the grounds of appeal, and the provisions of sections 34(3) and (4) of the JAJA, it follows that the order of committal made by the learned judge should be confirmed, and the matter be returned to the Parish Court for the learned judge to carry out her order as if there had been no appeal against it. I would so order.

Costs of the appeal

[178] As it relates to the question of costs of the appeal, there is nothing to suggest that the general rule that costs follow the event should not apply. Mrs Kitson having failed on all grounds of appeal, I can see no reason to deprive Mr Phynn, being the successful party, of his costs.

[179] Given that the appeal is from the Parish Court, in respect of which the costs of appeal are fixed, I would propose in the light of the complexity of the case, that the maximum allowable costs in the sum of $100,000.00 be awarded to Mr Phynn. I would rule accordingly.

[180] Finally, I sincerely apologise on behalf of the court for the delay in the disposal of this appeal. I would refrain from providing an explanation or excuse as nothing I say may amount to sufficient justification.

STRAW JA

[181] I have read, in draft, the judgment of my learned sister McDonald-Bishop JA. I agree with her reasoning, conclusion and proposed orders and there is nothing I could usefully add.

HARRIS JA

[182] I, too, have read in draft, the comprehensive judgment of my learned sister McDonald-Bishop JA. I agree entirely with her reasoning, conclusion, and proposed orders and have nothing useful to add.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. The order of Her Honour Ms Alicia McIntosh, Senior Parish Court Judge (Acting), made on 10 June 2022, in the Kingston and Saint Andrew Parish Court (Civil Division), is confirmed.

3. Pursuant to section 34(4) of the Judicature (Appellate Jurisdiction) Act, the matter is remitted to the Kingston and Saint Andrew Parish Court (Civil Division) and the learned judge shall proceed to carry out and enforce this order made on 10 June 2022, in the same manner as if there had been no appeal against same.

4. Costs of the appeal in the sum of $100,000.00 to the respondent, Mr Roger Phynn.

5. The stay of execution granted by F Williams JA on 30 August 2022, pending the hearing and determination of the appeal, is discharged.