

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 31/2009

APPLICATION NO. 46/09

BETWEEN MILFORD TRADING COMPANY LIMITED APPLICANT
AND GARTH PEARCE RESPONDENT

Oswald James, instructed by James & Company for the Applicant

IN CHAMBERS

PROCEDURAL APPEAL

MAY 28, 2009

HARRIS, J.A.

1. This is an application for a stay of execution of an order of the Master committing the Managing Director of the applicant company to prison for contempt of court.

2. On or about June 9 2006, by an oral agreement between the applicant and the respondent, the applicant acting through its Managing Director Alton Brown agreed to sell the respondent a Honda motor car for the sum of one million six hundred and fifty thousand dollars (**\$1,650,000.00**). The respondent paid the sum of seven hundred and fifty thousand dollars (**\$750,000.00**) as a

deposit towards the purchase price of the vehicle. A written agreement was also entered into between the parties, which, among other things, granted the applicant permission to use the deposit to purchase the vehicle from its suppliers on condition that in the event that it became necessary for the deposit to be returned to the respondent, this should be done within ninety days, without interest.

3. The respondent, having not received the vehicle nor a refund of his deposit, on July 24, 2008, by way of a claim form, brought an action against the applicant claiming the following:

- "1. A declaration that an agreement made on June 9, 2006 between the Claimant and the Defendant for the purchase of a Honda CRV motor vehicle chassis number RD41100549 and the supplemental agreement in respect of the deposit paid by the Claimant have been properly rescinded by the Claimant for failure on the part of the Defendant to comply with conditions precedent.
2. An order against the Defendant for the immediate return of Seven Hundred Thousand Dollars (J\$700,000) paid pursuant to the said agreement.
3. Interest on the sum of Seven Hundred Thousand Dollars (J\$700,000) from the 9th of June 2006 until judgment.
4. Further or in the alternative, damages for breach of contract.
5. Interest on damages pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) Act.

6. Such further and other relief as this Honourable Court sees fit.
7. Costs."

	\$
Amount claimed	\$700,000.00
Together with interest from 10 th June 2006 to date (Daily rate since today = \$230.13 per day)	\$10,355.85
Court Fees	2,000.00
Attorney's Fixed Costs on issue	8,000.00
Total Amount claimed	\$720,355.85

Particulars of claim were also filed.

4. No acknowledgement of service of the claim form and particulars of claim was filed. Judgment in default of acknowledgement of service was entered on August 11, 2006 whereby it was adjudged that the respondent should recover from the applicant, the sum of \$729,249.34.

5. On September 27, 2006, the respondent made an application for a provisional charging order to charge a Honda Motor car to satisfy the judgment debt. On October 9, 2006 a consent order was entered in the following terms:

- "1. The Defendant, Milford Trading Company Limited, instruct and authorize the Jamaica Customs Department to sell any motor vehicle present at the Jamaica Customs Department and or Kingston Wharf that is legally or beneficially owned by the Defendant by public auction or private treaty anytime after two weeks of the date hereof unless the Defendant pays to the Claimant's Attorneys-at-Law the

sum of **\$729,249.34** within two weeks of the date of this Order.

2. The proceeds of sale of any such motor vehicle(s) shall be applied as follows:

FIRSTLY, in settlement of all amounts owing to the supplier of said vehicle noted on the Import Entry Form.

SECONDLY, towards settlement of all customs duties, storage and other amounts owing to the Jamaica Customs Department and or the Government of Jamaica.

THIRDLY, in settlement of the sum of \$729,249.34 owing to the Claimant.

FOURTHLY, any surplus to the Defendant.

3. The Notice of Application for Court Orders filed by the Defendant on the 26th of September, 2006 be adjourned to a date to be set by the Registrar.
4. The Notice of Application for an order for Final Attachment filed by the Claimant on the 22nd of September, 2006 be adjourned to a date to be set by the Registrar.
5. In the event that the matter is settled, the parties shall file a Joint Notice of Discontinuance.
6. Costs to be costs in the claim."

The notice of application for court orders filed by the applicant on September 26, 2006 was not submitted to this court.

6. The judgment debt of \$729,249.34 remained unsatisfied. On November 24, 2006, by notice of application for court orders, the respondent sought an

order requiring Alton Brown the Managing Director of the applicant company to show cause why he should not be committed to prison for contempt of court. This was supported by an affidavit of Gavin Goffe. On March 26, 2008, a Judgment Summons under Rule 52.2 (1) of the Civil Procedure Rules 2002 was filed by the respondent, but there is no proof of service on the applicant. The hearing of the application for court orders scheduled to be heard on November 11, 2008, was adjourned to February 2, 2009. Notice of the adjourned hearing was served on Mr. Brown on December 9, 2008.

7. On February 2, 2009, the matter was heard by the learned Master who ordered that:

“Mr. Alton Brown, Managing Director of Milford Trading Company Limited be committed to the St Catherine Adult Correctional Centre for a period of six weeks or until he or the Judgment Debtor pays to the Judgment Creditor the sum of \$729,243.34 plus interest at 6% pa from August 11, 2006 and costs of \$108,000.00.”

8. In an affidavit in support of the application for the stay of execution in paragraphs 8 – 13, Mr. Brown stated as follows:

- “8. That the Defendant/Appellant has never been adjudged to be a bankrupt; neither has any winding-up order been made against it.
9. That I have never been adjudged in any proceedings in the Supreme Court to be one- and the same person as the Defendant/ Appellant.

10. That there has never been a judicial inquiry into my ability to pay the judgment debt of the Defendant/Appellant.
11. That I have never been adjudged to be responsible or liable for payment of the judgment debt herein.
12. That I have never been served with notice of any proceedings in this matter warning me for committal for any default of the Defendant/Appellant.
13. That by virtue of the abovementioned order for my committal, I am presently in jeopardy of losing my liberty pursuant to proceedings to which I am not a party, and, in relation to a debt for which I am not, nor have ever been adjudged to be, liable."

9. Rule 2. 14 of the Court of Appeal Rules 2002 confers on the court the power to entertain an application for a stay of execution. The conferral of the power grants the court unfettered authority to grant or refuse a stay. A party who seeks a stay of the execution of an order or judgment must satisfy the court that two criteria have been met. The first is that it must be shown that there is good chance of success of the applicant's appeal. The second is that it must be demonstrated that he would be ruined if the stay is refused. **Linotype-Hill Finance Ltd v. Baker** [1992] 4 All ER 887; **Jamaica Flour Mills Ltd. v. West Indies Alliance Co. Ltd & Ors** (1997) 34 JLR 244.

10. On an application for a stay of execution, a court, in the pursuit of its discretion, is required to engage itself in a balancing exercise. As to whether the

court will grant a stay is dependent on all the circumstances of the case. The critical question however, is whether there is a risk of injustice to either party or both parties in the granting or the refusal of the stay. See **Hammond Studdard Solicitors v. Agrichem International Holdings Ltd.** [2002] EWCA 2065.

11. Mr. James submitted that the Learned Master exceeded her jurisdiction as Part 52 of the Civil Procedure Rules 2002 makes no provision for the committal of an officer of a corporate body which is a judgment debtor. A judgment Summons having been issued against the appellant, he submitted, the Learned Master purportedly and incorrectly adopted a judgment summons procedure. It was his further submission that the procedure outlined in Part 53 ought to have been pursued.

12. The first issue to be determined is whether the applicant has a good chance of successfully pursuing the appeal. Parts 43, to 55 of the Civil Procedure Rules 2002 govern the procedure by which a judgment can be enforced. I am of the view that for the purpose of this application, it would only be necessary to outline Rules 45.6, and 45.7, 52.2, 52.3, 52.4, 52.6, 53.1 53.4, 53.7,53.9 and 53.10.

"45.6 - A judgment or order which requires a person-

- (a) to do an act within a specified time or by a specified date; or
- (b) to abstain from doing an act,
May be enforced by an order –

- (i) for committal to prison; or
 - (ii) for confiscation of assets, under part 53.”
13. “45.7 - (1) Where the Court –
- (a) gives a judgment or makes an order such as is mentioned in rule 45.6; and
 - (b) the judgment or order requires a body corporate to do or abstain from that act, it may make an order under Part 53 –
 - (i) for the committal to prison or for confiscation of assets against an appropriate person; or
 - (ii) for confiscation of assets to the body corporate.
- (2) In this rule “**appropriate person**” means a director or other officer of the corporate body.”
14. Rule 52.2 states:
- “(1) An application to commit a judgment debtor for failing to pay all or part of the judgment debt must be made by way of judgment summons in form 22 and must state –
- (a) the date and details of the judgment or order requiring payment of the debt;
 - (b) what payments have been made by the judgment debtor; and

- (c) the amount of interest claimed to the date of the application and the daily rate thereafter.
- (2) The registry must
 - (a) fix a date for hearing of the judgment summons;
 - (b) seal the judgment summons; and
 - (c) return the judgment summons to the judgment creditor for service."

15. Rule 52.3 reads:

- "(1) The judgment creditor must serve the judgment debtor with the judgment summons in accordance with Part 5 not less than 7 days before the date fixed for the hearing of the application to commit.
- (2) The judgment creditor must file an affidavit of service not less than 3 days before the hearing."

16. Rule 52.4 reads: -

"At the hearing of the judgment summons, the court may-

- (a) ...
- (b) ...
- (c) if satisfied that the judgment debtor has had, since the making of the judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay the same.

- (i) commit the judgment debtor to a prison for a term not exceeding six weeks or until the judgment or order is sooner satisfied;
- (ii) ...
- (iii) ...
- (iv) ...
- (v) ...”

17. “52.6 (1) The judgment creditor must –
- (a) serve the notice of the restored hearing of a judgment summons in accordance with part 5 not less than 7 days before the date fixed for hearing; and
 - (b) file an affidavit of service not less than 3 days before the hearing;
- (2) ...”

18. Rule 53.1(section 1) provides:-

“This Section deals with the power of the court to commit a person to prison or to make an order confiscating assets for failure to comply with –

- (a) an order requiring that person; or
- (b) an undertaking by that person, to do an act –
 - (i) within a specified time;
 - (ii) by a specific date;
 or not to do an act.”

19. Rule 53.4 (section 1) reads

“Subject to rule 53.5, the court may not make a committal order or a confiscation of assets

order against an officer of a body corporate unless –

- (a) a copy of the order requiring the judgment debtor to do an act within a specified time or to not to do an act has been served personally on the officer against whom the order is sought;
- (b) at the time that order was served it was endorsed with a notice in the following terms:
 - “Notice: If [name of body corporate] fails to comply with the terms of this order it will be in contempt of court and you [name of officer] may be liable to be imprisoned or have your assets confiscated.”; and**
- (c) Where the order required the judgment debtor to do an act within a specified time or by a specified date, it was served in sufficient time to give the judgment debtor a reasonable opportunity to do the act before the expiration of that time or before that date.”

20. Rule 53.7 (section 1) reads:

- “(1) “The application must specify –
 - (a) the precise term of the order or undertaking which it is alleged that the judgment debtor has disobeyed or broken; and
 - (b) the exact nature of the alleged breach or breaches of the order or undertaking by the judgment debtor.

- (2) The application must be verified by affidavit
- (3) ..."

21. 53.9 (1) (section 2) states:

- "(1) This section deals with the exercise of the power of the court to punish for contempt.
- (2) ...
- (3) Nothing in this Section affects the power of the Court to make an order of committal of its own initiative against a person guilty of contempt in the face of the court."

22. Rule 53.10 (section 2) reads:

- "(1) An application under this Section must be made-
 - (a) in the case of contempt committed within proceedings in the court, by application under Part 11; or
 - (b) in any other case, by a fixed date claim form, setting out the grounds of the application and supported, in each case, by evidence on affidavit.
- (2) The general rule is that the claim form or application, stating the grounds of the application and accompanied by a copy of the affidavit in support of the application, must be served personally on the person sought to be punished.

- (3) However the court may dispense with service under this rule if it thinks it just to do so.
- (4) An application in respect of contempt committed in proceedings in the court or in any inferior court or tribunal may be heard by a judge of the court."

23. In this case, I think it apt to proceed by first making brief reference to the procedure in obtaining a committal order against a director or officer of a body corporate, as regulated by Part 53 of the rules. Under Rule 53.1 the court is empowered to make a committal order against a person who fails to obey an order to do an act within a specific time or by a specific date, or not to do an act. Rule 53.4 deals with requirements which must be satisfied before a committal order can be made against an officer of a corporate body where such body fails to obey an order to do an act within a specific time or abstains from doing such act. Rule 53.7 outlines the requisite criteria for the making of an application for a committal order. By Rule 53.9 the court is empowered to punish for contempt. Rule 53.10 sets out the procedure for the making of an application for contempt. Under Rule 53.11, as a general rule, the hearing of the contempt proceedings must be in open court but certain exceptions to the rule are outlined. None of the exceptions are applicable to this case.

24. Rule 45.2, in making provision for the enforcement of a judgment or order with respect to the payment of a sum of money, specifically prescribes the methods by which the judgment or order may be enforced, one of which is

by way of a judgment debtor summons under part 52. Under Rule 52. 2 (1) the judgment summons must contain details of the judgment or order requiring payment of the debt, the payments made by the debtor and the interest claimed. The judgment summons filed by the respondent was in full compliance with the requirements of this rule. There is nothing in the rules which prohibits the use of a judgment summons as the originating process in ultimately seeking an order for the committal of an officer of a body corporate to prison under part 53. However, where the judgment summons is utilized as a catalyst for imprisonment of such an officer, an order of committal can only be made in circumstances where an order is in place compelling the body corporate to do an act or refrain from so doing .

25. Service of a judgment summons on a judgment debtor is a prerequisite to the hearing of the summons. Where the hearing of the summons is adjourned, a notice of the adjourned hearing must be served. There is no evidence that either the judgment summons or a notice of an adjourned hearing of the judgment summons was served on the applicant. A notice of application for an order, for the applicant to show cause why it should not be committed to prison for contempt, filed on November 6, 2008, was fixed for hearing on November 24, 2008. This application was adjourned to February 2, 2009. A copy of the notice of the adjourned hearing was served on Mr. Brown on December 6, 2008.

26. Under Rule 45.6, the committal of a person to prison may be made for disobedience of an order to do an act or to refrain from doing an act. Where a body corporate disobeys an order of the court to do an act or to abstain from doing an act within a specified period, Rule 45.7, in incorporating Rule 45.6, permits the imposition of an order of committal to prison of a director or other officer of that body corporate, by proceeding under Part 53 of the rules. It follows therefore, that where the committal process is initiated by a judgment summons some order must first be made under Rule 52.4, so that the procedure under Part 53 might be put in motion.

27. The entry of judgment against the applicant does not require it to do an act. It demands that it pays a sum of money to the respondent. Neither Parts 45 nor 52 make provision for the committal to prison of a director or other officer of a corporate body, where such body fails to pay a judgment debt. However, Part 45.7 shows that the imprisonment of a director or other officer of a corporation which is a judgment debtor, is considered within the parameters of Rules 53. Any order of committal against a relevant officer of the corporation must be preceded by an order of the court which has been disobeyed. In the instant case, no order has been made against applicant arising out of the judgment debt.

28. The procedure to be adopted in making a committal order of a judgment debtor, which is a corporation, for disobedience of an order, may either be by

way of a notice of application for committal or by a Fixed Date Claim Form for contempt. Where an application is made for the committal of the officer of a corporate body to prison, Rule 53.7 requires the applicant to state the terms of the order with which the judgment debtor has failed to comply, as well as the nature of the breach of that order. The application must be supported by an affidavit. The order which has been breached must bear an endorsement of a notice in such terms as prescribed by Rule 53.4 (b). That order must be served personally on the officer against whom the committal order is sought. The respondent failed to comply with all of these requirements.

29. Where it is being sought to commit for contempt, as in the present case, the Fixed Date Claim Form must set out the grounds which must be supported by evidence on affidavit. The Fixed Date Claim Form together with a copy of the affidavit must be personally served on the proposed contemnor. The proceedings must be heard in open court, save and except, where, as provided by Rule 53.11. The hearing may be carried out by the court in private. The requisite procedure was not followed in this case.

30. It appears to me that although the respondent had made an application for committal of Mr. Brown for contempt, had the respondent faithfully adhered to the provisions of the requisite rules under Parts 45, 52 as well as the relevant rules of section 1 of Part 53, on an application for court orders for committal, the Learned Master would have been empowered to make a committal order. The

applicant is likely to succeed on appeal. It could be argued that the Learned Master had erred in making the order for the committal of Mr. Brown in the absence of the hearing of the judgment summons, without an order under the summons mandating the applicant to do an act within a specified time, or on a specific date and without being seized of an application in compliance with Rule 53. 7.

31. A further issue to be addressed is whether the applicant has established that it would be ruined if a stay is refused. It has not done so. No evidence has been advanced by it to show that a refusal of the stay would result in its insolvency or it being wound up. This notwithstanding, the consequence of the order of committal places Mr. Brown's liberty in jeopardy. To deprive him of his liberty, in circumstances in which he had not been given the opportunity to be heard on a judgment summons and under which no order had been made for the applicant to perform any act, would be inequitable. These are exceptional circumstances which clearly warrant deferment of the Learned Master's order. The justice of this case demands that a stay be imposed pending the hearing of the appeal.

32. Accordingly, the application for a stay of execution of the order of the Learned Master is granted.