[2013] JMCA App 4

JAMAICA

IN THE COURT APPEAL

SUPREME COURT CIVIL APPEAL NO 68/2010

MOTION NO 15/2011

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**HON GORDON STEWART OJ**	**APPLICANT**
AND	**SENATOR NOEL SLOLEY SR**	**1st RESPONDENT**
AND	**NOEL SLOLEY JR**	**2nd RESPONDENT**
AND	**GORDON BROWN**	**3rd RESPONDENT**
AND	**DEBORAH LEE SHUNG**	**4th RESPONDENT**
AND	**JAMAICA TOURS LIMITED**	**5th RESPONDENT**

Donald Scharschmidt QC and Jerome Spencer instructed by Patterson Mair Hamilton for the applicant

Walter Scott and Miss Anna Gracie instructed by Rattray Patterson Rattray for the 1st and 2nd respondents

Mrs Nicole Foster-Pusey for the 3rd and 4th respondents

Abraham Dabdoub instructed by Dabdoub Dabdoub and Co for the 5th respondent

18, 19 October, 25 November 2011 and 22 March 2013

HARRIS JA

[1] This is a notice of motion by the applicant for conditional leave to appeal to Her

Majesty in Council against the decision of the court delivered on 29 July 2011. On 25 November 2011 the motion was dismissed and costs were awarded to the respondents. We promised to put our reasons in writing. This we now do.

[2] On 10 March 2009, the applicant, by way of a without notice application, sought and obtained an order that the 5th respondent, its "Directors, officers, servants and/or agents" should permit a search, of its computer files and or other data containing the names of Paulette Robinson or Gordon "Butch" Stewart, at its property at 102 Providence Drive, Rosehall, Saint James. The order directed that the search should be conducted by a group of persons, including the 5th respondent's attorney at law led by a supervising attorney appointed by the court. A penal notice, in the following terms, was endorsed at the foot of the order:

> "NOTICE: IF YOU FAIL TO COMPLY WITH THE TERMS OF THIS ORDER YOU WILL BE IN CONTEMPT OF COURT AND MAY BE LIABLE TO HAVE YOUR ASSETS CONFISCATED."

[3] The 1st and 2nd respondents were not served with the order. The search commenced on 12 March 2009 but was terminated on 13 March 2009 by the 4th respondent. Subsequent to this, an agreement was brokered between the attorneys-at-law for the applicant and the 5th respondent, which was formalized by way of a consent order. Included in schedule A of this order was a term that an undertaking by the applicant to file a claim form would be extended to 31 May 2009. A penal notice in identical terms to that, which had been included in the earlier order, was affixed to the later order. On 8 April 2009, the search resumed but was discontinued.

[4] A fixed date claim form was never filed by the applicant in keeping with the term

specified in the consent agreement. However, on 5 November 2009, the applicant commenced committal proceedings by way of notice of application for court orders against the respondents, by which it sought orders, that:

> "1. The assets of Jamaica Tours Limited be confiscated.
>
> 2. The directors, servants and agents of Jamaica Tours Limited, to wit, the 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown be committed to prison for a period not exceeding two months.
>
> 3. Alternatively, the assets of [sic] 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown [sic] Respondents be confiscated.
>
> 4. The costs of and consequent on the Orders dated March 10 and April 7, 2009 be paid by Jamaica Tours Limited and the 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown.
>
> 5. The Costs of this application to be paid by Jamaica Tours Limited and the 1st - 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown."

[5] When the application came on for hearing, preliminary objections raised by the respondents were upheld by Anderson J for the reasons that: (a) it would have been more appropriate for the proceedings to have commenced by fixed date claim form; (b) the 3rd and 4th respondents were not named in the search orders which had been directed to the 5th respondent; and (c) the penal notice was inadequate in relation to the 1st and 2nd respondents. The applicant's application having been refused by Anderson J, he appealed. His appeal was dismissed.

[6] The motion was sought under section 110(2)(a) of the Constitution. The section provides:

"(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases—

(a) where in the opinion of the Court of Appeal, the question involved in the appeal is one that, by reason of its great-general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings;..."

[7] The applicant listed several grounds in support of the motion. In these grounds, the issues identified by the applicant as being of great general or public importance are set out hereunder:

"(1) Are applications to ***commit for breach of court orders*** similarly or differently pursued than ***applications to commit for contempt under*** Part 53 of the CPR? What is the procedure to be adopted in the following situations?

i. If the breach of the court order took place before a claim form was filed and was being pursued *before* a claim was filed?

ii. If the breach of the court order took place before the claim form was filed and was being pursued ***after*** a claim form was filed?

2) Is an application to commit a non-party who has aided and abetted the breach of a court order by a party pursued under Part 53 of the CPR? What is the procedure to be adopted in the following situations?

i. If the breach of the court order, and the assistance provided by the non-party, occurred before a claim form was filed and was being pursued ***before*** a claim form was filed?

ii. If the breach of the court order, and the assistance provided by the non-party, occurred before a claim form was filed but was being pursued ***after*** ´a claim form was filed?

3) In circumstances where an application to commit for breach of court orders is being pursued against a party and the party's breach was aided and abetted by a non-party, how are the applications to be pursued?

4) Do the provisions of Rule 53.10 of the CPR apply to an application for committal for breach of a court order?

5) What is the meaning of "proceedings" within the expression "committed within proceedings" under Rule 53.10 of the CPR? Does it contemplate that a claim form or fixed date claim form must necessarily have been filed?

6) What is the nature of the liability of an officer of a company for committal or confiscation of assets in circumstances where the company is enjoined by an order of the court?

7) Is an officer of a company in a different legal position if he aids and abets a company enjoined by an order of the court to breach the said court order from someone who acts similarly but is not an officer of the company enjoined?

8) How does the absence of a penal notice under Rule 53.4 of the CPR affect an application to commit an officer of a company in the following situations?

   i. If the application to commit is being pursued on the basis that the officer failed to ensure the company enjoined by order of the court obeyed same? And

   ii If the application to commit is being pursued on the basis that the officer aided and abetted the disobedience of the court order by the company enjoined?

9) In what situations is the court entitled to rely on or apply Rule 26.9 of the CPR?

10) In the event that a party uses the incorrect procedure for applying to commit an individual for contempt under Part 53 of the CPR, do the provisions of Rule 26.9 of the CPR relate thereto or apply?"

[8] It is now necessary to make reference to the relevant principles by which the court is guided in its approach to section 110(2)(a) of the Constitution. Phillips JA, in ***Georgette Scott v the General Legal Council*** in SCCA No 118/2008 Motion 15/2009, delivered 18 December 2009, in interpreting the section,

outlined the relevant principles as follows:

> "In construing this section there are three steps. Firstly, there must be the identification of the question(s) involved: the question identified must arise from the judgment of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue(s) which require(s) debate before Her Majesty in Council. Thirdly, it is for the applicant to persuade the Court that that question is of great general or public importance or otherwise. Obviously, if the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance."

[9] As can be observed, before granting leave to appeal to Her Majesty in Council, the court must satisfy itself that the proposed appeal raises real disputable issues arising from the judgment of the court, the answers to which are determinative of the substantive issue or issues, on the merits of the appeal. Therefore, the focus of the court must be that the questions to be answered in the proposed appeal, are in the nature of great general or public importance to justify them being worthy of consideration by Her Majesty in Council.

[10] There is a plethora of authorities which support the proposition that to be successful in an application for conditional leave to appeal to Her Majesty in Council under section 110(2)(a) of the Constitution, an applicant must show that the issue to be resolved by Her Majesty in Council is an important question of law. In ***Vicks, Chemical Company v Cecil DeCordova and Ors*** (1948) 5 JLR 106 at 109, McGregor J, in considering a motion for leave to appeal to the

Privy Council as to whether an issue involved a question of great public general importance said:

> "The principles which should guide the Court have been set out in a number of cases the latest of which is ***Khan Chinna v Makanda Kothan and Another*** [1921] W.N. 353 Lord Bushmaster delivering the judgment of the Board said:
>
> > 'It was not enough that a difficult question of law arose, it must be an important question of law. Further, the question must be one not merely affecting the rights of the particular litigants, but one the decision of which would guide and bind others in their commercial and domestic relations'."

[11] In ***Verne Granburg v Inglis*** (1990) 27 JLR 55 at page 55 Rowe P, having found that no great conflict of law arose to warrant the court granting an applicant leave to appeal to Her Majesty in Council, said:

> "We do not think that merely to take a matter to the Privy Council to see if it is going to agree with us, is a matter on which the Court ought to grant leave."

[12] In ***Stokes and the Gleaner Company v Abrahams*** (1992) 29 JLR 79 it was held that:

> "The principle which guides the Court in deciding whether to grant leave is that it is not enough that a difficult question of law arose, it must be an important question of law; further, the question must be one not merely affecting the rights of the particular litigants, but a decision which would guide and bind others in their commercial and domestic relations."

[13] In the case of ***Paget DeFreitas and Others v Enoch Karl Blythe*** [2010] JMCA App 18 Panton P in refusing a motion for leave to appeal to Her Majesty in

Council on an application under section 110(2) of the Constitution held that:

> "The fact that we view the matter as procedural was not the only reason for our refusal of the application. We are clear in our view that the questions posed did not qualify for submission for the consideration of Her Majesty in Council as there was absolutely nothing of great general or public importance in any of them. The matters are really peculiar to the parties involved in the litigation, and there is nothing to suggest that the interpretation of the rule in question will have a draconian effect."

Submissions

[14] Mr Spencer argued that the alleged contempt was committed within the proceedings of the court but if it is found that it was not, the application for committal ought not to be invalidated in light of rule 26.1(8) of the Civil Procedure Rules ("CPR"), which seeks to address an application for contempt which was not committed within the proceedings and was not commenced by fixed date claim form. In the alternative, he argued, where an applicant proceeds under Part 11, rule 53.10(1) does not specify the consequence if that applicant fails to proceed by way of a fixed date claim form, in such circumstances, rule 26.9 becomes applicable.

[15] In written submissions, Mr Spencer submitted that the learned judge failed to have properly exercised his discretion in that, he should have dispensed with the requirement for compliance with certain provisions of the CPR or ought to have made orders. It was his further submission that the act of a litigant in seeking to invoke the powers of the court brings the application for contempt within the scope of the proceedings.

[16] Counsel also submitted, in the written submissions, that although an issue involves the applicability or construction of procedural rules this does not prevent

the issue from being one of great public or general importance, citing ***Vehicles and Supplies Limited v The Minister of Foreign Affairs, Trade and Industry*** (1989) 26 JLR 390 and ***Bernard v Seebalack*** [2010] UKPC 15, in support of this submission. The issues in the motion relate exclusively to the proper construction of rules 53 and 26 of the CPR, it was submitted. Additionally, citing ***Jennison v Baker*** [1972] 1 All ER 997, counsel submitted that the construction of Part 53 of the rules is of interest not only to all litigants but also to members of the public and in sanctioning contempt, the correct procedure to be adopted is of great general and public importance. McGregor J's obiter dictum in ***Vicks Chemical Company Limited v Cecil DeCordova and Another***, he submitted, suggests that a question of great general or public importance is one which does not simply affect particular litigants but would give guidance to others in their commercial and domestic relations.

[17] Mr Scharschmidt QC argued that the appeal concerns the relationship between the various clauses of the CPR for achieving a just conclusion within the context of the overriding objective and parties ought not to be punished for failure to comply with the rules unless such non compliance would result in prejudice to the other party. He submitted that the matter which was before the court below and the Court of Appeal was with reference to the construction of several clauses of the CPR and their applicability to the issues raised in this motion. It is important, he argued, that the manner in which these rules interplay, be determined and rules 26.8 and 26.9 are applicable to the issues contended for by the applicant and ought to be decided by the Privy Council.

[18] Counsel further submitted that this case falls within either ambit of section 110 (2)(a) of the Constitution. In dealing with the words "or otherwise", within the phrase "great general or public importance or otherwise", he made reference to the definition of the word "otherwise" as stated in Butterworths Words and Phrases at page 52 which reads:

> "The question was considered by this Court in the recent case of ***Doyle v. McIntosh*** (1917), 17 S. R. N. S. W. 402], and at p.417 Mr. Justice Pring referred to these words in the Order in Council. He said: 'then further, is it one which ought otherwise to be submitted to His Majesty in Council?' Those are wide words, but they seem only to apply to cases where a decision may have some far-reaching-consequences to the parties, or may possibly affect persons other than the immediate litigants, and therefore ought to be submitted to His Majesty in Council. I do not read that as containing an exhaustive definition of the word 'otherwise', because there may be other reasons that would need to be taken into consideration in future cases, but it certainly is a pronouncement against the narrow interpretation which is contended for here by the respondents [i.e. that the words should be read strictly ejusdem generis]' ***New Redhead Estate & Coal Co. v Scottish Australian Mining Co.*** (No. 2) (1918) 18 S. R.N.S.W. 390 per Cullen CJ, at pp 391,392."

[19] Counsel also cited the cases of ***Olasemo v Barnett Ltd*** (1995) 32 JLR 470 placing reliance on paragraph 2 of page 476 of the judgment of Wolfe JA, in support of his submission, which states:

> "Is the question involved in this appeal one of great general or public importance or *otherwise?* The matter of a contract between private citizens cannot be regarded as one of great general or public importance. If the applicant is to bring himself within the ambit of the section [110(2)(a)] he must therefore do so under the rubric 'or otherwise'. Clearly, the addition of the phrase 'or otherwise' was included by the legislature to enlarge the discretion of the Court to include matters which are not necessarily of great general or public importance, but which in the

> opinion of the Court may require some definitive statement of the law from the highest judicial authority of the land. The phrase 'Or otherwise' does not *per se* refer to interlocutory matters. Or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to Their Lordships' Board for guidance on the law. The matter requiring the guidance of Their Lordships' Board may be of an interlocutory nature, but it does not follow that every interlocutory matter will come within the rubric 'or otherwise'."

[20] Mr Scott submitted that the applicant, not being entitled to an appeal to the Privy Council as of right, must advance questions which are of great general or public importance for determination by the Privy Council. Questions six, seven and eight posed in respect of the 1st and 2nd respondents, he submitted, do not raise matters of great general or public importance or otherwise, and for the applicant to succeed on a legitimate procedural question, such question must be exceptional. Citing ***Bank of America v Chai Yen (Married Woman)*** PCA 39/1978, delivered 3 December 1979 and ***Grafton Isaacs v Emery*** [1984] 3 WLR 705, he argued that matters of procedure are for the local courts and not the Privy Council.

[21] It was his further submission that Part 53 of the rules is clear, so is the case law. All three questions advanced by the applicant, in respect of the 1st and 2nd respondents are hypothetical and academic, additionally, question eight relates to factual issues, he argued. None of these questions are amenable for review or are worthy of debate before Her Majesty in Council, he contended.

[22] In dealing with the term "or otherwise" counsel submitted that as stated in ***Olasemo***, the question should be one which raises a difficult question of law. Counsel submitted that the dictum in the dissenting judgment of Wolfe JA in

Olasemo, on which the applicant relied, is inapplicable to the present case as questions six, seven and eight do not require any definitive statement of law nor do they require guidance from the Privy Council. This court, he argued, said that section 1 of Part 53 is with reference to the commission of contempt of court in breach of a court order while section 2 deals with contempt relating to the interference with the administration of justice.

[23] In written submissions, Mr Scott submitted that Morrison JA considered the relevant authorities and highlighted the differences between a person enjoined in an order such as a director and a third party. It follows that the authorities and the CPR show that a party is required to meet two different standards if proceeding to an order for contempt as against interference with the administration of justice.

[24] Referring to rule 53.10, Mrs Foster Pusey submitted that the rule speaks to whether the alleged contempt was committed "within proceedings in the court" and this court has made it clear that proceedings commence with the filing of a claim form. No claim form had been issued against any of the respondents, therefore there is no basis for a hearing before Her Majesty in Council as the alleged contempt was not committed within the proceedings in the court, she argued. At the time of the filing and the hearing of the application for contempt no claim form was filed against the 3rd, 4th or 5th respondents against whom the committal order was directed to show when the alleged breach was committed. In keeping with the rules, contempt is committed when the claim form is filed showing that proceedings are in place and no proceedings were in place, she argued.

[25] Counsel also submitted that although Anderson J stated that the rules speak to the fact that an application could proceed by notice of application, he could have concluded by way of his discretion, that a fixed date claim form would be more appropriate, although this court found that he had no discretion to have made such a finding.

[26] The 3rd and 4th respondents, she argued, are affected by questions two, three, five, nine and 10 and questions two and three are hypothetical, theoretical and vague. It was her further submission that question 10 is general in nature and this court having stated that the rules are plain, there is no need to rely on rule 26. 9. Questions three to five were answered by this court and questions nine and 10 are inappropriate, as the issues raised therein would be dependent on factual circumstances, she argued. None of the questions raise any far reaching consequences which would warrant referral to the Privy Council under the rubric "or otherwise", she submitted.

[27] It was further argued by her that some of the matters raised in question three are general in nature and are issues to be decided by the local courts while others are vague and ambiguous.

[28] Mrs Foster Pusey also submitted that the court has a discretionary power to rectify a procedural error by virtue of rule 26.9, but this rule is inapplicable in the circumstances of the case. The questions posed are too general and vague and would not require the exercise of the court's discretion, she contended. She further submitted that it would be inappropriate for question 10 to be submitted to Her Majesty in Council, the question being theoretical and that, in any event, this court had

in fact addressed the issue.

[29] Mr Dabdoub submitting that questions one, four, five, nine and 10 apply to the 5th respondent, adopted Mrs Foster Pusey's submissions in respect of questions nine and 10. He argued that the main issue, at all times, is the applicability of rule 53.10 as, from the outset, that rule had been the applicant's focus. The applicant, he submitted, opted to use rule 53.4 to commit the 5th respondent and this brings into the fore the question of the interpretation of rule 53.10(1) (a), which requires an examination of the scheme of the rules. The rules, he argued, must be given their ordinary and plain meaning. There is nothing arising in any of the questions, he submitted, which would require determination by the Privy Council, as none rank as amounting to general or public importance or falling within the meaning of the term "or otherwise," and the rules of court are best interpreted by the judges of our court. Rule 8.2, he argued, specifies the means by which proceedings are commenced.

[30] Citing ***Bernard v Seebalack***, he argued that rule 26.9 is inapplicable in addressing the question before the court since it does not relate to a jurisdictional point. Rule 26.9 would only be applicable to matters in which proceedings exist and in the present case there were no proceedings before the court, he submitted.

[31] As shown by the authorities, Mr Dabdoub argued, once the matter does not give rise to any substantial debatable issue, it cannot be treated as falling within the ambit of section 110(2)(a) of the Constitution and therefore cannot be countenanced as conveying great general or public importance or otherwise.

The relevant rules

[32] Part 53 of the CPR governs the procedure for committal for breach of an order of the court and for contempt. Rule 53.1 sets out the circumstances under which the court can make an order for the committal of a person to prison or for confiscation of assets. The rule reads:

> "53.1 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."

[33] Under rule 53.3, a committal order or an order for the confiscation of assets may not be made unless certain conditions are satisfied. The rule states:

> "Subject to rule 53.5, the court may not make a committal order or a confiscation of assets order unless –
>
> (a) the order requiring the judgment debtor to do an act within a specified time or not to do an act has been served personally on the judgment debtor;
>
> (b) at the time that order was served it was endorsed with a notice in the following terms.
>
> '**NOTICE**: **If you fail to comply with the terms of this order you** will be in contempt of court and may be liable to be imprisoned **or to have your assets confiscated**.',
> or, in the case of an order served on a body corporate, in the following terms:
> **NOTICE**: **If you fail to comply with the terms of this order you will be in contempt of court and may be liable to have your assets**

confiscated.' and…"

[34] Rule 53.4 deals with the circumstances under which a committal order or confiscation of assets order may be made against an officer of a body corporate. It provides as follows:

> "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**…'."

[35] Rule 53.5 provides for an order for committal or confiscation of assets to be made in the absence of service of the judgment or order upon which the committal or the confiscation order is grounded. It reads:

> "(1) This rule applies where the judgment or order has not been served.
>
> (2) Where the order required the judgment debtor not to do an act, the court may make a committal order or confiscation of assets order only if it is satisfied that the person against whom the order is to be enforced has had notice of the terms of the order by –
>
> (a) being present when the order was made; or
>
> (b) being notified of the terms of the

order by post, telephone, FAX or otherwise.

(3) The court may make an order dispensing with service of the judgment or order under rules 53.3 or 53.4 if it thinks it just to do so."

[36] Rule 53.6 requires that an undertaking must be given, a copy of which must be endorsed with a notice in accordance with rules 53.3(b) or 53.4(b) and must be served on the person giving the undertaking.

[37] Section 2 of Part 53 governs contempt proceedings. Rule 53.9 states:

"(1) This Section deals with the exercise of the power of the court to punish for contempt.

(2) In addition to the powers set out in rule 53.10, the court may –

(a) fine the contemnor;

(b) take security for good behaviour;

(c) make a confiscation of assets order;

(d) issue an injunction.

(3) Nothing in this Section affects the power of the Court to make an order of committal of its own initiative against a person guilty of contempt in the face of the court."

Rule 53.10 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."

Rule 26 permits the court to dispense with compliance with the rules in special circumstances of Rule 26.1(8) states:

"In special circumstances on the application of a party the court may dispense with compliance with any of these Rules."

Rule 26.9 provides:

"(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party."

Analysis

Question one

Whether applications to commit for breach of court order similarly or differently pursued from applications to commit for contempt. Procedure – breach occurred before filing of claim and pursued before the filing of the claim breach occurred before claim and pursued after the filing of the claim

[38] A breach of an order of the court may give rise to an order for committal or confiscation of assets, the procedure for which, is clearly outlined in rules 53.3, 53.4, 53.5 and 53.7. Where, under rule 53.3, a person is required by an order of the court to do an act or refrain from doing an act, and he fails to obey the orders, in the case of an individual, that person must be served personally with the order with a penal notice endorsed thereon in obedience to the rule. If the order for committal or for the confiscation of assets is sought against a body corporate, as prescribed by rule 53.4, the order must bear an endorsement of the penal notice and must be served personally on the officer against whom it is sought. Service under rule 53.3 and 53.4 may be dispensed with by the court. Under rule 53.7, an application for a committal order or confiscation order must be supported by an affidavit in verification thereof.

[39] Section 2 of Part 53 clearly speaks to the court's general power to commit for contempt. As provided for in rule 53.10(1)(a), where the contempt is committed within the proceedings, an application for contempt can be made by a notice of application for court orders under Part 11 of the CPR as specified. However, where the application is not made within the proceedings, it must commence by way of a fixed date claim form by virtue of rule 53.10(1) (b).

[40] The rules, being very clear and unambiguous, do not require interpretation by Her Majesty in Council.

[41] The other questions posed as to the circumstances where a breach of a court order was in existence prior to the filing of the claim and pursued before the claim was filed, or in which the breach of the court order existed before the filing of the claim form and was pursued thereafter are clearly theoretical and do not give rise to a cause for interpretation. These are not questions falling within the ambit of section 110(2) (a) of the Constitution, which would warrant the Board's consideration.

Question two

Whether application to commit non party aiding and abetting breach of third party pursued under rule 53. Procedure - breach by non-party occurring prior to claim filed and pursued before claim filed - breach occurring before claim filed and pursued after

[42] The question as to whether a court has jurisdiction to commit for contempt a person who is not included in an order of the court which has been breached, or who is not a party to a suit, but aids and abets the commission of a breach of an order, has undoubtedly been properly dealt with by this court. This court, in its judgment, acknowledged the fact that the court has jurisdiction to punish for contempt, that the court derives its powers to do so from Part 53 and that in certain circumstances the service of an order for confiscation of asset or contempt with a penal notice endorsed thereon is mandatory. In paragraphs [37] (iv) and [37] (vi) of his judgment Morrison JA said:

> "(iv) rules of court requiring the service of an order with a penal notice endorsed thereon in certain specified circumstances, as a precondition to

committal or confiscation of assets as the punishment for breach of the order also have a long history, are not to be regarded as wholly technical and must be strictly complied with (***Iberian Trust, Benabo***);

…

(vi) in civil proceedings, the court's undoubted jurisdiction to punish for contempt is now to be invoked in accordance with the provisions of Part 53 of the CPR."

[43] The subsidiary questions as to the effect of the breach of the court order, by a non party who has aided and abetted, in which the breach took place before the claim was filed and pursued before the claim was filed, or, occurred prior to the filing of the claim form and pursued after the claim form was filed, are highly academic. These are not questions of law which are exceptional and require interpretation by Her Majesty in Council.

Question three

Where party's breach aided by third party how application to be pursued

[44] This question is surely not one which is worthy of forming the subject matter for a contest before Her Majesty in Council. It is apparent that, by this question, the applicant's quest is to have the Privy Council inform him how he should proceed with the application for contempt. The rules are clear. It is for the applicant, in adhering to the relevant rules, in particular rule 53.10(1)(b), to guide himself accordingly, advise himself and adopt and implement the proper procedure.

Question four

Do the provisions of Rule 53.10 of the CPR apply to an application for committal for breach of a court order?

[45] It is without doubt that this court had correctly answered this question. The court said that section 1 of Part 53 is with reference to the commission of contempt of court in breach of a court order while section 2 deals with contempt relating to the interference with the administration of justice**.** The necessity for any further interpretation does not arise.

Question five

The meaning of "proceedings" and "committed within proceedings" - rule 53.10

[46] A response to this question, in which this court has interpreted the relevant rules, has been given when Morrison JA, at paragraph [44] of the judgment, said:

> "… under the rules, 'proceedings' do not come into existence until and unless a claim form has been filed and that, whatever label may be attached to the process by which a party is permitted to seek and obtain interim relief pursuant to Part 17, that process does not form part of any 'proceedings' within the meaning of the rules. It therefore follows from this, I think, that the phrase 'within proceedings in the court' in rule 53.10(1)(a) must be taken to refer to proceedings in the sense in which the word is used in the rules generally, that is, to denote the process commenced by the filing of a claim form. It must follow further, in my view, that in the instant case, no such process having been commenced as at 5 November 2009, which is the date on which the notice of application to commit the respondents for contempt was filed, the contempt alleged against them was not committed within proceedings in the court and that it was therefore not appropriate for the application, which ought properly to have been made by way of fixed date claim form pursuant to rule 53.10(1)(b), to have been brought by that means.

[47] The court has without doubt, adequately addressed this question. Obviously, no further interpretation of the rules would be required. This is not a case of contempt committed within the proceedings in the court in which rule 53.10(1) (a) would apply. It follows therefore that, in this case, rule 53.10(1) (b) must be the operative rule. That rule clearly indicates that there must be proceedings in progress commenced by fixed date claim form in order to facilitate an application for contempt. The language of the rules 53.10(1) (a) and 53.10(1) (b) is very clear. While proceedings are in progress, the application for contempt should be made under Part 11, that is, by way of a notice of application. However, where no proceedings are pending, rule 53.10(1)(b) must be employed. The rule undoubtedly prescribes that, in such circumstance, proceedings for contempt must be initiated by the filing of a fixed date claim form. This rule is plain and has been correctly interpreted by this court in its judgment. Accordingly, there would be no necessity for further consideration to be given by the Privy Council as to the effect of the rule.

Question six

The nature of the liability of an officer of a company for committal where company enjoined by court order

[48] The applicant appears to have overlooked the fact that the decision of the court emanated from an order made on a preliminary point by the respondents and not from a final decision of the court in respect of the liability of any officer of the 5th respondent. Neither this court nor the court below, had heard and determined the application by the applicant with respect to the alleged breach of the order by the 1st and 2nd respondents, of which the applicant complains. By rule 53.4 (b), where the committal order is against an officer of a body corporate, the order, bearing the penal

notice, should be personally served on the officer. The applicant sought to obtain relief under section 1 of rule 53 when in fact the application had not been brought against the 1st and 2nd respondents in the capacity of officers of the 5th respondent. Despite this, it is clear that although the 1st and 2nd respondents were directors of the 5th respondent, a penal notice was not endorsed on the consent order as required by rule 53.4 and was not served on them.

[49] This court, in its judgment, dealt adequately with this question and held that service of the order bearing the endorsement of a penal notice in which the contempt proceedings is sought to be enforced is an absolute necessity.

Question seven

Whether an officer of a company who aids and abets the breach of an order is in a different legal position from a third party

[50] In drawing a distinction as to the requirements of section 1 and 2 of Part 53, this court reviewed several authorities and stated that section 1 relates to contempt of court committed by the breach of an order but section 2 is with reference to a wider, general category of contempt which is said to interfere with the due administration of justice. The court went on to say that service of the order with a penal notice endorsed is a pre-requisite in respect of cases under section 1 but would not be applicable to those in section 2. The court further stipulated that rules 53.9 – 53.11 of section 2 of Part 53 are the relevant rules for the determination of contempt proceedings against a third party.

[51] This court, therefore, having carried out an analytical assessment of sections 1 and 2 of Part 53, the necessity would not arise for any guidance from Her Majesty in

Council.

Question eight

How does the absence of the penal notice under rule 53.4 affect an application to commit an officer where the officer failed to ensure the order was obeyed - where officer aids and abets disobedience of order?

[52] This question does not give rise to an interpretation of rule 53.4. Where an application for the committal order is made under that rule, the service of the order with the endorsement of the penal notice is a mandatory prerequisite. Service of the order without the prescribed notice endorsed thereon renders the service ineffective. Therefore, questions as to the effect of the failure of an officer of the company to ensure the obedience of the order or, his or her aiding and abetting the disobedience of the order would not be pertinent issues for consideration by the Privy Council.

Question nine

In what situations is the court entitled to rely on rule 26.9?

[53] This court dealt with the effect of rule 26.9 within the scope of the overriding objective laid down in rule 1.1. Morrison JA, after reviewing several authorities as to the court's powers with regard to the efficacy of the overriding objective in the interpretation of the rules, said:

> "On the basis of these cases, it therefore seems to me to be clear that, although it is the duty of the court (as it is mandated to do by rule 1.2) to seek to give effect to the overriding objective when interpreting the rules or exercising any powers under the rules, the court is nevertheless bound, in cases in which the language of a particular rule is sufficiently 'clear and jussive,' to give effect to its plain meaning, irrespective of the court's view of what the justice of the case might otherwise require. So the question which naturally arises in the instant case is on which side of the line does the requirement in rule

> 53.10(1) (b) fall? It appears to me that, by the use of the word 'must', the framers of the rules intended to prescribe a mandatory requirement, which it is not open to the court to evade by reference to the overriding objective of the CPR. In other words, the court cannot sanction something which the rule plainly does not permit, by allowing an application for committal for contempt to be made by notice of application under Part 11, otherwise than as permitted by the express terms of rule 53.10(1) (b)."

[54] As can be readily perceived, there can be little doubt that the mandatory prescription of rule 53.10(1)(b) does not permit the court to give assent to the overriding objective in order to import into that rule, the provisions of rule 26.9. The rules are clear. It follows therefore, that this court having considered and properly construed the rules, there is nothing arising from the question posed which would make it amenable for interpretation by Her Majesty in Council.

Question 10

If a party uses incorrect procedure for application to commit individual under rule 53 whether rule 26.9 relates thereto

[55] This question is general in nature, the answer to which does not require guidance from Her Majesty in Council. It would not arise out of the issues in this case. This court had given due consideration to the effect of rule 26.9. Where a party fails to serve a committal order with the endorsement of the notice thereon as specified by rules 53.3 or 53.4, the court has no discretion under rule 26.9 to correct the failure of the party so to do. This court has adjudicated on the question of the inapplicability of rule 26.9 to rule 53.10(1) (b). The applicant ought to have paid due regard to the latter rule in pursuing his application.

[56] None of the cases cited by the applicant is of any assistance to him. In ***Vehicles and Supplies Limited***, this court was for the first time interpreting section 564(B)(4) of the Civil Procedure Code which was considered a very important question of law for submission for interpretation by the Privy Council. This does not apply in the present case. The procedure to be adopted in applying Part 53 and rule 26.9 are set out with clarity. Sections 1 and 2 of Part 53 and rule 26.9 have been correctly interpreted and acted upon in several cases in our courts. It is without doubt that rule 26.9 is only applicable where there are pending proceedings before the court. It cannot be employed where there are no proceedings under which the court can act.

[57] The case of ***Jennison v Baker*** does not assist the applicant. That case turned on a jurisdictional point as to whether a county court judge had the power to order committal for past disobedience of an injunction which was no longer in force. No jurisdictional point has been raised by the questions posed in the present case.

[58] ***Bernard v Seebalack*** is also unhelpful to the applicant. Although, in that case the question before the Privy Council related to the interpretation of several rules of the CPR of Trinidad and Tobago, the Board expressly stated that for it to construe the rules "would undermine the attempts made by the Rules Committee (supported by the Court of Appeal) to improve the efficiency of civil litigation in Trinidad and Tobago".

[59] In ***Olasemo,*** Mr Olasemo brought an action against Barnett Ltd for specific performance of a contract for the sale of thirty two plots of land. Mr Olasemo sought

and obtained an interlocutory injunction restraining the Registrar of Titles from registering any transfer of the lands. This court, holding that there was no binding contract between the parties discharged the injunction. On an application by Mr Olasemo for leave to appeal to the Privy Council, the court ruled that the order made by the court was final within the purview of section 110(1) (a) of the Constitution granting a right of appeal and that the phrase "or otherwise" in section 110(2) (a) enlarged the category of appeals to embrace interlocutory orders which "are conclusive of the litigation".

[60] That case is distinguishable from the case under review. ***Olasemo*** turned on the trial of the case on a preliminary point of law in which the decision in the case was considered a "final hearing split in two parts". Although in this case the appeal before this court had its genesis in a preliminary point of law, it having been founded upon an interlocutory application, the order made on the procedural point was not conclusive of the litigation and therefore not one which would fall within the nomenclature of "or otherwise" to qualify for guidance by Her Majesty in Council.

[61] The language of Part 53 of the CPR is very clear, so too is rule 26.9. This court, in its judgment, has in detailed analysis of the rules, paid due regard to the strictures of the canons of construction. It is clear that the questions posed by the applicant are not difficult questions of law nor are they of great public importance. They are merely procedural matters which ought properly to be left for our courts' consideration. This proposition has been recognized by the Privy Council in ***Grafton Isaacs v Emery*** cited by Mr Scott and Mrs Foster-Pusey, in which Lord Diplock, in making reference to issues as to practice and procedure, at page 709, said:

> "They are best left to be developed by the courts of the country concerned, with whose decisions as to the operation of the rule the Board would be reluctant to interfere."

[62] In ***Bank of America v Chai Yen (Married Woman)*** the Privy Council commented that matters of procedure ought to be decided by the local court.

Conclusion

[63] The questions posed by the applicant arise from an interlocutory order, which order did not finally determine the issues between the parties. The rules have made provision as to how they should be employed and our courts have, on many occasions, given effect to these rules. None of the questions posed raises any issue which could be classified as being of great general or public importance or otherwise which would be worthy for referral to Her Majesty in Council for consideration.

[64] The foregoing are our reasons for dismissing the motion.