

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO: GDAHCV2021/0021

BETWEEN:

[1] HICKLYN NYACK

(Executor and Trustee of the Estate of the Late Randolph Forrester
of Paraclete, St Andrew)

[2] STEPHANIE PETERS

(Administratrix of the Estate of the late John Douglas Forrester
(a.k.a as Johnny Forrester of Blaize, St. Andrew)

Claimants

and

[1] PETER ALEXANDER

[2] BENEDICT CHARLES

[3] AILLEROS CHARLES

[4] LENNOX CHARLES

Defendants

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

VIA ZOOM

Appearances:

Mr. Ian Sandy for Ms. Sandina Date for the Claimants

Ms. Karen Samuel with Ms. Carah St. Paul for the 2nd, 3rd & 4th Defendants/
Applicants

2021: October 28;

RULING

[1] **ACTIE, J:** This application before the court seeks an order to commit the legal practitioner for the claimants to prison pursuant to CPR 53.

- [2] By notice of application filed on 24th September 2021, the law firm of Samuel Phillips & Associates, Legal Practitioners for the 2nd, 3rd and 4th defendants, seeks an order to commit the legal practitioner for the claimants, Ms. Sandina Date, to Her Majesty's Prisons, Richmond Hill, for breach of her undertaking and failure to comply with clause 2 of the order of the court made on 6th May 2021.

Background

- [3] The claimants in a fixed date claim against the defendants filed on January 18, 2021 seek (i) a declaration of ownership of freehold property; (ii) an injunction restraining the defendants/agents/servants from trespassing and entering on the disputed land and cutting down economic trees, such as cocoa, nutmeg, bananas, and citrus; and (iii) to refrain the defendants from using threatening language towards the claimants/agents/servants. The matter came on for hearing on 6th May 2021 whereby both counsel for the claimants and defendants gave undertakings on behalf of their respective clients that the status quo would be maintained until further order.
- [4] The applicants in their affidavit in support of the application for committal deposed that they noticed agents and/or servants of the claimants reaping produce from the disputed property. An email from Samuel Phillips Chambers to Grenlaw Chambers mentioned further breaches by the claimants by the putative son of John Douglas Forrester known as "Breedy". In a letter dated 23rd June 2021, in response, Ms. Sandina Date of Grenlaw Chambers indicated that the claimants had been advised on the consequences of continued breaches. The letter also asserted that the claimants stated that they would continue to refrain from dealing with the disputed parcel of land. The applicants contend that the acts complained continued despite the averments made in the letter from Ms. Date, thereby constituting a breach of Ms. Sandina Date's undertaking.
- [5] Ms. Sandina Date, in her filed affidavit in response deposed that the claimants were present in court when the order of the court was made on 6th May 2021. Ms. Date

further deposed that the undertaking was essentially a representation to the court through counsel that the claimants would not go onto the disputed land. Ms. Date avers that her email correspondence to Ms. Samuel made it clear that the claimants were advised on the consequences of continued breaches of the order. Ms. Date said the letter further reaffirmed that the claimants had not trespassed and expressed their intention not to do so in the future until the matter was disposed. Ms. Date further deposed that the “Breedy” referred to in the defendant’s affidavit was not a servant or agent of the claimants and had not been instructed or authorized by the claimants to enter the disputed land.

Procedural impropriety

- [6] It is the evidence that the order served on Ms. Date for her committal was endorsed with a penal clause. Ms. Date contends that she as legal practitioner for the claimants was given carriage of the order. She avers that the order filed and sealed by the registrar was not endorsed with a penal clause.
- [7] Ms. Melissa Garraway, the Deputy Registrar (Ag) in an affidavit filed on 26th October 2021 deposed and asserts that a penal clause was not endorsed on the sealed and perfected order of the court dated 6th October 2021. Ms. Garraway further deposed that upon enquiry, Ms. Karen Samuel, legal practitioner for the defendants, confirmed that the endorsement was done at the instance of the firm of Samuel Phillip & Associates, based on counsel’s believed entitlement to do so under the Civil Procedure Rules.
- [8] Ms. Karen Samuel at the hearing contends that she had the authority to endorse the penal clause on the order pursuant to CPR 53.3. Ms. Samuel further contends that Rule 53 only requires service of the order endorsed with a penal clause and relies on the decision in **Joseph v Joseph**¹ where of Thom J.at paragraph 15 said:

“Part 53.3 provides in effect that the Court may not make a Committal Order unless the order requiring the judgment debtor to do an act has been served personally, and the order must be endorsed with a penal notice. Where the

¹ SVGHCV claim 335 of 1997

order requires the Judgment debtor to do an act within a specified time or by a specified date it must be served in sufficient time to give the judgment debtor a reasonable opportunity to do the act before the expiration of the time. While Part 53.5 provides in effect that the Court may dispense with service under Part 53.3, if it thinks it just to do so.”

[9] The court accepts that the pronouncement made by Thom J is a clear exposition of the requirements of Part 53.3 requiring the order served on the contemnor must be endorsed with a penal clause for an application for committal or sequestration.

[10] However, Rule 53.5 cannot be read in isolation. **CPR 53.1** deals with the power of the court to commit a person to prison or to make a sequestration order for failure to comply with an – (a) order requiring that person to do; or (b) undertaking by that person to do an act within a specified time or by a specified date or not to do an act.

[11] **CPR 53.2** deals with the order specifying time for act to be done: (i) if a judgment or order specifies the time or date by which an act must be done the court may by order specify another time or date by which the act must be done. (2) if a judgment or order does not specify the time or date by which an act must be done, the court may by order specify a time or date by which it must be done; (3) the time by which the act must be done may be specified by reference to the day on which the order is served on the judgment debtor. **Rule 53.2** (5) requires that the application for committal or sequestration may be made without notice unless the court otherwise directs, however any order made must be served in the manner specified under rule 53.3.

[12] **CPR 53.3 (b)** is subject to Rule 53.5 and provides that the court may not make a committal order or sequestration or the terms of the penal clause unless the order requiring the judgment debtor (my emphasis) to do an act within a specified time or not to do an act has been served personally on the judgment debtor. The rule requires that at the time the 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, proceedings may be commenced against you for contempt of court and you may be liable to be imprisoned.”; 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, proceedings may be commenced against you for contempt of court.”

[13] Firstly, neither Ms. Sandina Date nor Ms. Karen Samuel, as legal practitioners, were made parties to the claim. Secondly, the penal clause inserted by the firm of Samuel Phillip & Associates naming the legal practitioner for the claimants was not sanctioned by the court and is not in keeping with the express terms outlined in CPR 53.3(b). The penal clause endorsed by the firm of Samuel Phillip & Associates reads as follows:

“NOTICE: If you The Legal Practitioner for the claimants and the claimants fail to comply with the terms of this order, proceedings may be commenced against you for contempt of court, and you may be liable to be imprisoned”

[14] The penal notice endorsed by Samuel Phillip & Associates speaks to the legal practitioner for the claimants when both counsel for the claimants and the defendants gave undertakings in the order made on 6th May 2021. Clause 2 of the order read “the Counsel for the parties gives an undertaking that the parties shall refrain from entering and interfering with the area in dispute until further order”. The penal notice did not mention the legal practitioner for the defendants.

[15] The general purpose of endorsing an order with a penal notice was expressed by Luxmore J in the case of **Iberian Trust Ltd v Founders Trust and Investment Co Ltd**², where he 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 consequences³”. It is clear that the purpose of endorsing an order with a penal notice is to enable a party against whom a certain

² [1932] 2 K.B. 87

³ Ibid at page 97

type of order is made to protect himself from exposure to the court's committal jurisdiction⁴.

[16] **Rule 53.6** provides that an undertaking given to the court must, if practicable, be given in writing in the appropriate practice form and a copy of this form endorsed with a notice in accordance with rule 53.3(b) or 53.4 (b) must, if practicable, be served on the person giving the undertaking.

[17] Neither counsel for the claimants or defendants gave such an undertaking as required by the rule. As indicated by Ms. Sandina Date, the undertakings given by counsel were not personal undertakings but represented the obligations undertaken by their clients. In the court's view, this is customary practice which does not bind the legal practitioners personally unless it can be established that the breach was of such nature in which the legal practitioner had control, such as depositing of funds held in escrow or the like. The claimants' claim is for the prohibition of trespass and reaping produce from the land in dispute. It would be incongruous to impose a personal obligation on the legal practitioners to physically restrain their clients from the acts complained unless it can be proved that the breach was at the instance of the legal practitioner.

[18] Further, the affidavit in support of the committal order speaks to breaches committed by one "Breedy" an alleged agent of the claimant. It is perplexing to say the most that counsel would pursue such a draconian step in seeking the committal of Ms. Date as legal practitioner instead of the alleged contemnor.

[19] The purpose, for which committal proceedings are initiated, is to ensure compliance with the court orders, and to punish the contemnor for his/her disrespect in challenging the court's order. There must be wilful disobedience of an order of the Court, and a measure of boldness on the part of the contemnor. The court will not commit a person for civil contempt unless the allegations of contempt are proved

⁴ Jonathan David Lesfloris and Glenda Dale Lesfloris (Nee Henry)

beyond a reasonable doubt. Lord Denning in **Re BrambleVale Ltd** ⁵ stated the standard of proof as follows:

“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved to use the time-honoured phrase; it must be proved beyond reasonable doubt⁶.”

[20] **CPR 53** clearly contemplates the procedure in obtaining the order for committal and the wording of the endorsement. The court did not order a penal notice to be endorsed on the order neither was permission given to endorse the court order with a penal clause which is at variance to the wording of CPR 53.3 (b). Ms. Sandina Date is not a judgment debtor as envisioned by Rule 53.3 (a). The undertakings given by counsel were merely out of courtesy as officers of the court speaking on behalf of their clients.

[21] Counsel, Ms. Karen Samuel, is totally misguided in her assertion that it was within her power to insert a penal clause on the perfected order after the registrar's signature in the circumstances. It is also contrary to Ms. Karen Samuel's assumption that as legal practitioner for the defendants she had the authority and could unilaterally endorse a penal notice, in a changed format, without an application and order of the court. As indicated above, Ms. Sandina Date was not a party to the claim neither was she a judgment debtor.

[22] A court order is inviolable and can only be varied or corrected by the court. The administration of justice would be seriously undermined if an order of a Court of law is altered with impunity.

[23] There is no material on record to establish that Ms. Sandina Date, Legal Practitioner for the claimants, has in anyway wilfully violated the order of this court dated 6th May 2021. Accordingly, the application for committal stands dismissed.

⁵ [1969] 3 AER 1062

⁶ Ibid at page 1063

[24] In closing, the court is of the view that this egregious action by the law firm of Samuel Phillip & Associates against a colleague, who is not a party to the claim and having regard to the facts of this case, is totally inappropriate and does not comport well with the collegiality expected among legal practitioners.

Order

[25] For the foregoing reasons, it is hereby ordered and directed as follows:

- (1) The application by the Law firm of Samuel Phillip & Associates to commit Ms. Sandina Date, Legal Practitioner for the claimants, to Her Majesty's Prisons stands dismissed.
- (2) The Law firm of Samuel Phillip & Associates shall pay costs to Ms. Sandina Date in the sum of \$1,000.00 within twenty-one (21) days from today's date.

Agnes Actie
High Court Judge

By the Court

Registrar