



THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO.: 335 OF 1997

BETWEEN:

JOAN CORDELIA GENEVA JOSEPH

Applicant

V

CARL JOSEPH

Respondent

Appearances:

Mr. Sylvester Raymond Cadette for the Applicant

Mr. Arthur Williams and Mr. Richard Williams for the Respondent

2005: October 4

2006: February 8

JUDGMENT

- [1] **THOM, J:** This is an application for an Order of Committal for contempt of court.
- [2] The Applicant and the Defendant were husband and wife. A decree absolute was granted on the 14th day of December 1997 thereby dissolving the marriage.
- [3] On the 20th March 1998 by consent it was ordered inter alia that:
- “(a) The Respondent shall build at his own expense for the benefit of the petitioner on the parcel of land referred to in 1 above a furnished dwelling house of concrete blocks, galvanized roof and other suitable material and consisting of three bedrooms, kitchen, living room, dining room, bathroom, toilet, verandah and study to a reasonable acceptable standard.

- (b) The said dwelling house is to be completed within nine months of the execution of these presents with such grace period as may be warranted provided that the same is completed and fit for occupation within eleven months hereof
 - (c) The Respondent shall pay to the Petitioner Eleven hundred dollars (\$1,100.00) monthly for the maintenance and upkeep of the children of the family and which said sum shall be paid on the last working day of each month to the Petitioner's account number 102,0560 at CIBC Caribbean Ltd in the name of Joan Huggins. Payment of the said \$1,100.00 will commence forthwith and cease when the Petitioner moves into and occupies the said furnished dwelling house. Thereafter the Respondent shall pay to the Petitioner six hundred dollars (\$600.00) monthly for the maintenance and upkeep as aforesaid with liberty to apply "
- [4] The Applicant alleges that the Respondent failed to comply with the above mentioned paragraphs of the Order of Court and seeks an Order of Committal against the Respondent.
- [5] At the commencement of the hearing of the application Learned Counsel for the Respondent submitted that the application should be dismissed on the following grounds:
- (a) Expiration of Time
 - (b) Defective Application
 - (c) Waiver
 - (d) Validity of the Order
- [6] The Court heard arguments on grounds (a) and (b).
- [7] Learned Counsel for the Respondent submitted that the application was out of time and referred the Court to Section 19 of the Civil Procedure Code Chapter 81 which reads as follows:
- "As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment."

- [8] Learned Counsel submitted that since the Judgment was obtained on the 31st day of March 1998 execution could only have taken place on or before the 31st day of March 2004. The application for enforcement by way of committal is therefore out of time.

DEFECTIVE APPLICATION

[9] **Personal Service**

Learned Counsel submitted that the Applicant did not comply with the requirements of CPR 2000 specifically Part 53.5 and 53.7. The affidavit of the Applicant does not disclose that personal service of the Order was made on the Respondent or that the Order was served before the expiration of the period within which he was required to build the house.

- [10] Learned Counsel referred the Court to Halsbury Laws of England Volume 12 paragraph 467 which reads:

"As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the action in question. In the case of an order requiring a person to do an act the copy must be so served before the expiration of the time within which he was required to do the act."

[11] **Endorsement of Penal Notice**

Learned Counsel submitted that the order was not endorsed with the Penal Notice. Part 53.3 requires that the Penal Notice must be endorsed on the Order. No application was made to dispense with the notice.

- [12] Learned Counsel referred the Court to Halsbury Laws of England 4th Edition paragraph 468 which reads:

"There must be prominently displayed on the front of the Order a warning to the person on whom the copy is served that disobedience to the Order would be a contempt of Court punishable by imprisonment..."

- [13] Learned Counsel for the Applicant in response submitted that Section 19 of the Civil Procedure Code does not apply. The application was not for execution of the judgment which is barred, but for contempt for disobedience of the Court Order. An application for

contempt is not subject to any limitation period. It was an application for equitable relief. The Order has to be obeyed until steps are taken to set it aside.

[14] Learned Counsel for the Applicant further submitted that the Order indicated that both parties were present when the Order was made.

[15] 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 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.

[16] The exercise of the Court's discretion to dispense with service of the order and the requirement of the endorsement of the penal notice was discussed in Benson v Richards [2002] 3 AER p. 160; Bell v Tuohy [2002] 3 AER p. 975; Davy International Ltd v Tazzyman [1997] 1 WLR p. 1256; and Nicholls v Nicholls [1997] 2 AER p. 97.

[17] In Nicholls v Nicholls Lord Wolf MR stated at p. 108:

"Like any other discretion, the discretion provided by the statutory provisions must be exercised in a way which in all the circumstances best reflects the requirements of justice. In determining this, the court must not only take into account the interests of the contemnor but also the interests of the other parties and the interests of upholding the reputation of civil justice in general. Today it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor. The court itself has a very substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely technical grounds which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice."

[18] In Benson v Richards [2002] EWCA p. 1402 at paragraph 29 the Court of Appeal in referring to Judge Alton's decision on how the discretion should be exercised stated:

"However, in deciding whether to exercise that discretion, the court would need to be satisfied that the purposes of the requirements had been achieved...the Court would have to be satisfied "beyond all reasonable doubt" that the defendant knew the terms of the orders relied on, that she was well aware of the consequences of disobedience, and that she was aware of the grounds relied on as a breach with sufficient particularity to be able to answer the charge."

[19] The Respondent in his affidavit sworn on the 27th day of September 2005 at paragraphs 2 and 3 stated:

"2. The marriage referred to in this application was finally dissolved and settled by Order dated 31st March 1998 under 1997 No. 335.

3. I complied with the Order until some time in 1998 after the General Elections in June of that year when the Petitioner told me, "Carl, I don't want your money. Look after the children." Indeed I had been doing just that all along."

[20] The Respondent clearly acknowledges that he was fully aware of the terms of the Order. I note that the Respondent is an Attorney-at-Law admitted to practice law in this jurisdiction and that the Respondent is presently serving as a Magistrate in this jurisdiction.

[21] The standard of proof required in contempt proceedings is the same as in criminal matters – see Lord Denning MR in R v Bramblevale Ltd [1969] 3 AER 1062 at 1063. I have no doubt that the Respondent who is a lawyer and who is serving as a Magistrate was at all material times aware of the consequences of disobedience of an order of the Court.

[22] I note that the wording of Rule 53.5 refers to dispensing of service only. However, a similar provision in the UK Rules CCR 29 was considered in Jolly v Staines County Court Circuit Judge and Others [2000] AER p. 49 where the Court held:

Although CCR 29 rule 1(3) required that an order enforceable by committal should be endorsed with or incorporate a penal notice Order 29 rule 1(7) conferred on the Court the power to dispense with service of a copy of any order where it thought just. Given the power to dispense with service of the Order, it followed that as a matter of discretion the Court was similarly empowered to dispense with the requirement of a penal notice."

- [23] No arguments were submitted to the Court that the Respondent would be prejudiced in any way and I find that he would not be prejudiced if the Court exercised its discretion under Part 53.5.
- [24] In Yvonne Raymond v Vasilka Hull High Court Claim No. 240 of 2005 this court relying on Davy International Ltd and Others [1997] 3 AER p. 183 held that the discretion to dispense with service could be exercised retrospectively. Having found that the Respondent was aware of the terms of the Order and he knew the consequences of disobedience of the Order of Court and he would not be prejudiced, I find that it would be just for the Court to exercise its discretion and dispense with service of the Order and endorsement of the penal notice.

EXPIRATION OF TIME

- [25] Learned Counsel for the Applicant contended that the application was not an action for enforcement of the judgment but was an application for contempt and thus there was no time limit within which the application must be made.
- [26] The time within which legal rights must be enforced is dealt with in the Civil Procedure Code, the Limitation Act and the Civil Procedure Rules 2000.
- [27] Part 45 of CPR 2000 sets out the manner in which judgments and orders of the Court may be enforced.
- [28] Part 45.2 sets out the manner in which money judgments may be enforced and reads:
- "A judgment or order for payment of a sum of money other than an order for payment of money into court may be enforced by –
- (a) a charging order under Part 48;
 - (b) a garnishee order under Part 50;
 - (c) (subject to the restrictions of any relevant Debtors Act) a Judgment Summons under Part 52;
 - (d) an order for the seizure and sale of goods under Part 46; or
 - (e) the appointment of a receiver under Part 51."

- [29] Part 45.6 sets out the manner in which a judgment or order requiring a person to do an action within a specified time or not to do an act. It reads:

"A judgment or order which requires a person to
(a) abstain from doing an act; or
(b) do an Act within a specified time or by a specified date;
maybe enforced by an order under Part 53 for –
(i) committal; or
(ii) sequestration of assets."

- [30] Section 19 of the Civil Procedure Code Cap. 81 reads as follows:

"As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment."

- [31] Section 26 of the Limitation Act Ch. 90 reads as follows:

"An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable."

- [32] In Morrison Knudson International Inc v The Consultant Ltd and Barclays Bank PLC Civil Appeal No. 15 of 2002 the Court of Appeal in a judgment delivered by His Lordship Chief Justice Byron considered the distinction between the issue of an execution of a judgment, and an action to enforce a judgment. In paragraphs 11 and 15 Chief Justice Byron stated:

11. Halsbury Laws of England 4th Ed. Vol 28 paragraph 815 refers to the distinction between the issue of an execution to enforce a judgment and an action to enforce a judgment. It states:

"Actions. The Limitation Act 1980 applies to all actions of the class for which a period of limitation is laid down by the Act, except actions for which a special period of limitation is provided by some other enactment. Action includes any proceedings in a court of law including an ecclesiastical court. This definition is wide enough to cover a set off or counterclaim, any form of initiating process (including a creditor's petition to wind up a company), and an application in the course of a winding up for a declaration that a director of a company is to make a contribution to a company's assets. It also comprise some proceedings for example an application for a distress warrant for arrears of rates which are not actions in the ordinary sense of the word. It does not however cover the issue of an execution on a judgment as distinct from an action to enforce a judgment, nor does it cover most criminal proceedings."

15. It would seem to me that there is a clear distinction between the two situations. A writ of execution is issued at the point where there is a judgment to be enforced and a proceeding is initiated to enforce it, for example by obtaining an order for sale of land charged with the judgment debt. On the other hand fresh proceedings are issued where the judgment is not being directly enforced, but the proceedings based on the judgment create a new basis for enforcement.

[33] In National Westminster Bank PLC v Powney and Others [1990] 2 AER p. 416 Slade LJ described an issue of execution at p. 426 as follows:

"Execution is essentially a matter of procedure – machinery which the court can subject to the rules from time to time to enforce, operate for the purpose of enforcing its judgments or orders."

[34] Having regard to the above I am of the opinion that an application for committal for failure to obey an order of court to do an act within a specified time is a manner of enforcing the order of the court. While an application for sequestration of assets is defined in Part 46.1 as a writ of execution and therefore the Court has a discretion under Part 46.2 to extend the six year period in appropriate circumstances, an application for committal is not included in the definition of writ of execution. The application must therefore be made within six (6) years as required by Section 19 of the Civil Procedure Code. I do not agree that an application for committal for failure to do an act within a specified time can be made at any time that the applicant chooses to do so after the expiration of the specified time. The time for enforcement of the order of 31st March 1998 has expired.

[35] In the event that I am wrong and an application to commit for contempt for failing to do an act within a specified time is an action within the Limitation Act, the application would be out of time by virtue of Section 26 of the Limitation Act.

[36] I find that this application is out of time. The application is dismissed. There shall be no order as to costs.


Geriel Thom
HIGH COURT JUDGE