

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

(CIVIL DIVISION)

SAINT CHRISTOPHER AND NEVIS

NEVHCVAP2025/0010

BETWEEN:

JAMES SIMPSON

Appellant

and

SELECTA INSURANCE AND REINSURANCE COMPANY (CARIBBEAN) LIMITED

Respondent

Before:

The Hon. Mde. Esco Henry

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

The Hon. Mr. Reginald T. A. Armour

Justice of Appeal [Ag.]

Appearances:

Mr. Terence V. Byron for the Appellant

Ms. Edisha Greene for the Respondent

2025: May 21;
October 17.

Interlocutory Appeal – Contempt Order – Committal Order – Rule 53.4 of the Civil Procedure Rules (Revised Edition) 2023 – Section 3(1) and 4 (1) (b) of the Debtors Act – Whether the Committal Order was procedurally unfair and ought not to have been made – Whether the Committal Order was manifestly unfair

This is an appeal from a committal order made by a learned judge of the High Court of Justice in Nevis in the Federation of St. Christopher and Nevis in Claim No. NEVHCV2022/0161 (“the Claim”). The parties in the Claim are the respondent, Selecta Insurance and Reinsurance Company (Caribbean) limited (“Selecta”), as claimant, and Bank of Nevis International Limited (“BONI”), as defendant. The appellant James Simpson, was at all material times the acting chief executive officer of BONI and one of its directors.

By the committal order the judge ordered that the appellant be committed to His Majesty's Prison, Basseterre, St. Kitts for a period of 7 days from the date of the said order for the failure of the BONI to comply with the terms of the order of the court in the said proceedings dated 5th March 2025 that BONI is to pay the sum of US\$3,017,909.88 into court by 12th March 2025 ("the Contempt Order").

On 2nd May 2023 the respondent, Selecta, obtained a judgment in default of defence against BONI in the Claim for damages to be assessed.. The assessment of damages first came before the learned judge on 18th December 2024 who made an order which, in part, recited: *'AND UPON Counsels for the Claimant and the Defendant agreeing that the Defendant [BONI] has acknowledged that it holds the sum of US\$3,017,909.88 on the account held in the name of the Claimant.'* By the said order -it was ordered that BONI shall pay the sum of US\$3,017,909.88 into the Nevis High Court by 3rd January 2025; and the hearing of the assessment of damages was fixed for 3rd February 2025 via zoom ("the 18th December Order").

This position remained unaltered until the assessment of damages came up before the learned judge for hearing on 3rd February 2025, at which hearing BONI made an application for its adjournment. The order made on 3rd February 2025 recited that BONI had not paid the sum of US\$3,017,909.88 into court by 3rd January 2025 as ordered by the court on 18th December 2024. Accordingly, it was ordered that BONI shall pay the said sum into court by 17th February 2025, and the hearing of the assessment of damages fixed for 5th March 2025 ("the 3rd February 2025 Order").

On 3rd March 2025 the respondent, Selecta applied to the High Court for an order pursuant to Rule 53.2 of the Civil Procedure Rules (Revised Edition) 2023 ("CPR") that BONI pay the said sum of US\$3,017,909.88 into court by a specified time and that the said order be endorsed with penal notices against the appellant, James Simpson, and Stephen Agbeyegbe, the chief executive officer and chief operations officer respectively of BONI ("the 3rd March Application"). At the hearing on 5th March 2025 regarding both the assessment of damages and the 3rd March 2025 Application, at which the appellant was not present, the learned judge made certain orders ("the 5th March 2025 Order"). The 5th March 2025 Order recited:

"AND UPON HEARING Counsel for the Defendant indicate that she has received no instructions on the Claimant's application dated 3rd day of March 2025 and or reasons for the Defendant's failure to make the payment of US\$3,017,909.88 into Court in keeping with the order of 3rd February 2025."

By the 5th March 2025 Order, it was ordered: -

- "(1) the Respondent [BONI] is ordered to pay the sum of US\$3,017,909.88 into the Nevis High Court by 4 pm on 12th March 2025.
- (2) This order shall be served personally on James Simpson, the Chief Executive Officer and Steven Agbeyegbe Chief Operation Officer of the Respondent.
- (3) Costs are awarded to the Applicant [the respondent] in the sum of EC\$1,500.00.

(4) The hearing of the Claimant's assessment of damages is fixed for hearing on 18th March 2025 via zoom at 8:20a.m."

The 5th March Order also contained penal notices directed (respectively) to the appellant, James Simpson, and Stephen Agbeyegbe, informing them individually that should BONI fail to comply with the payment in the sum ordered to be paid into court by the 5th March Order they may be liable to be imprisoned or to have an order of sequestration made in respect of their property.

On 10th March 2025 BONI filed an application for the learned judge to recuse himself in the said proceedings ("the Recusal Application"), which application was supported by the affidavit of Temitope Elugsobon. On 20th March 2025, directions were given by the learned judge for BONI to file any further affidavit in support of its Recusal Application; the respondent was ordered to file and serve any Part 53 application on or before 27th March 2025; and these two matters were fixed for hearing by the judge on 2nd April 2025.

The Committal Order arose from an application by the respondent filed on 24th March 2025 ("the 24th March Application") in the Claim seeking –

"(1) A declaration that BONI is in contempt of court having breached the Orders of the court granted on 18th December 2024, 3rd February 2025 and 5th March 2025.

(2) an order that James Simpson, Chief Executive Officer of BONI, be committed to prison for failure to comply with the terms of the Order dated 5th March 2025, that BONI pay the sum of US\$3,017,909.88 into the Nevis High Court by 4 p.m. on 12th March 2025."

The Committal Application was served on the appellant on 25th March 2025. On 1st April 2025 the appellant filed an affidavit in the proceedings below in which he admitted that he is the Chief Executive Officer and a director of BONI, having held these positions, respectively, from November 2021 and September 2020. The appellant also admitted that he had been served with the 5th March Order (with penal notice) on 12th March 2025, that is, the very same day that the said order required BONI to pay the sum of US\$3,017, 909.88 into court by 4:00pm. As it turned out the appellant was actually served with the said order in the afternoon of 12th March 2025 at a time after the banks were closed.

The Committal Application, the Recusal Application and the assessment of damages came before the learned judge on 2nd April 2025. These applications were adjourned to 2nd May 2025. The appellant was present in court on 2nd May 2025. The learned judge first dealt with the Recusal Application which was later dismissed. Next the judge dealt with the Committal Application. At the hearing of the Committal Application the appellant was called as a witness and his affidavit filed on 1st April 2025 tendered as his evidence in chief. He was then cross-examined by counsel for the respondent/claimant. At the conclusion of the proceedings the learned judge made the Committal Order dated 2nd May 2025 against the appellant. Pursuant to the Committal Order, the appellant was imprisoned on 2nd May 2025 for a period of 7 days

The appellant on 6th May 2025 appealed against the making of the Committal Order. In his notice of appeal, the appellant relied on 6 grounds of appeal. However, at the hearing of the appeal learned counsel for the appellant informed the Court that the 6 grounds of appeal

can be summarized or condensed into one ground namely: 'The Committal Order is procedurally unfair and ought not to have been made.'

Held: allowing the appeal, setting aside the Committal Order, and ordering the respondent to pay the appellant's costs of the appeal to be assessed by a judge of the High Court if not agreed by the parties within 21 days that:

1. The expression "judgment debtor" in Rule 53.4(a) and (c) and elsewhere in Part 53, means the person, in this matter BONI, who is the subject of the 5th March Order for payment of the stipulated sum into court by the date and time specified therein. It is BONI which is the person who is liable to enforcement under the said order. Therefore, BONI falls squarely within the definition of "judgment debtor" under Part 53.

Rule 53.4 (a) and (c) of the **Civil Procedure Rules** (Revised Edition) 2023 applied.

2. Rule 53.4(c) applies not to service of the order on the officer of the body corporate, but on the "judgment debtor", that is, the body corporate itself, which is required or obligated to pay the money judgment or to make payment in accordance with an order for payment. It is the body corporate that is mandated to comply with the order to do the act. It is also required pursuant to Rule 53.3(a) that the order endorsed with a penal notice be served personally on the body corporate and, pursuant to Rule 53.4(c), "in sufficient time to give the judgment debtor a reasonable opportunity to do the act" before the expiration of the specified date and time. Once there has been compliance with the mandatory requirements as to service on the judgment debtor and on the named officer of the body corporate, subject to Rule 53.5(2), the court may proceed to find the body corporate and its named officer in contempt, subject to any reasonable explanations or reasons for their non-compliance, and to make in its discretion a committal order against the named officer. It is also a requirement under Part 53 that the order endorsed with penal notice must be served on the officer named in the order and who is the subject of a penal notice directed to him or her pursuant to Rule 53.4(a). Once service has been effected on the body corporate and on the named officer, it is for that officer to see to it or to take such steps as is within the power of the office which he/she holds in the body corporate, to ensure that the body corporate complies with such an order, failing which he or she becomes liable to be committed for contempt.

Rule 53.4(c) of the **Civil Procedure Rules** (Revised Edition) 2023 applied.

3. Under Part 53, there is no specific requirement similar to that at Rule 53.4 (c) for service on the officer of the body corporate within sufficient time to give him or her a reasonable opportunity to ensure that the body corporate does the act within the time specified in the order. However, it would follow that should Rule 53.4 (c) not be satisfied in relation to the body corporate, the court cannot go on to make a finding of contempt against the body corporate and hence, not against the named officer and to commit that officer to prison pursuant to Rule 53.4. Also, where the terms of the order with penal notices was not made in the presence of the officer named

therein and the order itself was not served on the named officer sufficiently timely as to afford him or her sufficient time to take steps to ensure that the body corporate complies with the terms of the said order, this would be an important factor against a court, in the exercise of its discretion, not taking the more drastic step of ordering the imprisonment of the named officer of that body corporate.

Rule 53.4. of the **Civil Procedure Rules** (Revised Edition) 2023 applied.

4. The language in Rule 53.7(3)(a) specifies the requirement for the applicant for a committal order to prove '*service of the order*' which is endorsed with the appropriate penal notice proscribed under either Rule 53.3(b) or Rule 53.4(b). It is the service of the order with the appropriate penal notice which is required by Rule 53.7(3)(a). More importantly, it is pursuant to Rule 53.4 that the respondent applied for the committal order against the appellant as an officer of BONI. Rule 53.4 specifies that the court should not make such an order unless the conditions at (a), (b) and (c) have been satisfied. Furthermore, pursuant to condition (c) unless the order was served in sufficient time to enable reasonable compliance with the order, it ought not to be made by the court.

Rule 53.3 of the **Civil Procedure Rules** (Revised Edition) 2023 applied.

5. In the circumstances of this case, there was a clear prejudice to the appellant as contemnor which required compliance by payment by BONI into court of a large sum of money. This prejudice stems from and is a result of the very late service of the 5th March Order on the appellant, a mere 1.5 hours before the mandatory stipulated time on the said date for its compliance. This was clearly unfair and an injustice to the appellant charged with ensuring BONI's compliance with the said order under peril of his imprisonment for contempt.

Ronson Products Ltd v Ronson Furniture Ltd. (1966) Ch. 603 followed.

6. In light of the non-compliance with Rule 53.4(c), the learned judge ought to have given consideration to exercising his powers under Rule 53.2(1) to make an order specifying another date and time for BONI and the appellant's compliance with the 5th March Order, such new order being endorsed with the prescribed penal notices under Rules 53.3 and 53.4 directed, respectively, to BONI and the appellant, and to adjourning the Committal Application to a date after the new date for compliance. In not doing so, the learned judge erred.

Rule 53.2 (1), Rule 53.3 and Rule 53.4 (c) of the **Civil Procedure Rules** (Revised Edition) 2023 applied.

7. While the judge had made two prior orders for payment (December 2024 and February 2025) against BONI, with respect to which BONI has failed to comply either within the prescribed time or at any time thereafter, these orders are an important part of the chronological procedural history of this matter pointing, as they do, to a history of non-compliance by BONI. However, neither of them could properly

form the legal basis of a committal application against the appellant for his contempt as an officer of BONI pursuant to Rule 53.4, as neither of these two orders were endorsed with the requisite penal notice directed to the appellant. Indeed, these orders were treated by the learned judge as part of the BONI non-compliance landscape, and not as a legal foundational basis for the making of the Committal Order against the appellant as an officer of BONI. Put differently, as a matter of principle, the failures of BONI to comply with the 18th December 2024 and 3rd February 2025 orders for payment in, while of some significance towards establishing a consistent failure or willful refusal by BONI to comply with the said orders, they cannot be used to demonstrate or to establish a failure by the appellant to comply with the subsequent order, the 5th March Order, which is the only order endorsed with a penal notice directed to the appellant to ensure BONI's compliance with the terms thereof. Thus, it was only the 5th March Order endorsed with the penal notice which could be used as the legal basis for a committal application pursuant to Rule 53.4.

Rule 53.4(c) of the **Civil Procedure Rules** (Revised Edition) 2023 applied.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an appeal from an order of a learned judge of the High Court of Justice in Nevis in the Federation of St. Christopher and Nevis made 2nd May 2025 in Claim No. NEVHCV2022/0161 ("the Claim"). By the said order the learned judge ordered that the appellant, James Simpson, be committed from the date of the said order to His Majesty's Prison, Basseterre, St. Kitts for the period of 7 days for the failure of the Defendant, the Bank of Nevis International Limited ("BONI"), to comply with the terms of the order dated 5th March 2025 that the Defendant do pay the sum of US\$3,017,909.88 into Court by 12th March 2025. ("the Contempt Order") The parties in the Claim are the respondent, as claimant, and BONI as defendant. The appellant, James Simpson, was at all material times the Acting Chief Executive Officer of BONI (from November 2021) and one of its directors (since September 2020).¹
- [2] Pursuant to the Committal Order, the appellant was imprisoned on 2nd May 2025 for a period of 7 days. The appellant on 6th May 2025 appealed to this Court against

¹ See Affidavit of appellant filed 1st April 2025.

the Committal Order. In his notice of appeal, the appellant relied on 6 grounds of appeal as set out in full therein. However, at the hearing of the appeal learned counsel, Mr. Terence Byron, for the appellant informed the Court that the 6 grounds can be summarised or condensed into one ground namely:

“The Committal Order is procedurally unfair and ought not to have been made.”

- [3] This approach by counsel for the appellant had been adopted by the appellant and respondent in their respective written submissions filed in the appeal. It is helpful for two principal reasons. The first is that essentially ground 1 in the notice of appeal is the overarching unfairness ground condensed above - that the Committal Order was “manifestly unfair for the reasons set out hereunder”; and grounds 2 to 6 inclusive are the specific points by which the appellant contended that the Committal Order was unfair or manifestly unfair. The second helpful reason is that by approaching the arguing of the appeal in this way, it has resulted in learned counsel for each party focusing more of their arguments and submissions (whether in support and against the appeal) on two broad points. The first is the contention by the appellant that the specific procedural requirements of Rule 53.4 of the Civil Procedure Rules (Revised Edition) 2023 (the “CPR”) dealing the mandatory requirements for a court to make a committal order against an officer of a body corporate, had not been satisfied (“**the CPR 53.4 Point**”); and the second, concerning restrictions on the enforcement of a money judgment under the provisions of the Debtors Act (“**the Debtors Act Point**”).

Procedural Background

- [4] On 2nd May 2023 the respondent, Selecta, obtained a judgment in default of defence against BONI on the Claim for damages to be assessed from Pariagsingh M. The assessment of damages first came before the learned judge on 18th December 2024. The 18th December 2024 Order recited: ‘*AND UPON Counsels for the Claimant and the Defendant agreeing that the Defendant [BONI] has acknowledged that it holds the sum of US\$3,017,909.88 on the account held in the name of the Claimant.*’ It was ordered that BONI shall pay the sum of US\$3,017,909.88 into the Nevis High

Court by 3rd January 2025; and the hearing of the assessment of damages fixed for 3rd February 2025 via zoom.

[5] This position remained unaltered until the assessment of damages came up before the learned judge for hearing on 3rd February 2025, at which hearing BONI made an application for its adjournment. The Order made on 3rd February 2025 recited that BONI had not paid the sum of US\$3,017,909.88 into court by 3rd January 2025 as ordered by the court on 18th December 2024. Accordingly, it was ordered that BONI shall pay the said sum into court by 17th February 2025, and the hearing of the assessment of damages fixed for 5th March 2025.

[6] On 3rd March 2025 Selecta applied to the court below for an order pursuant to **CPR** 53.2 that BONI pay the said sum of US\$3,017,909.88 into court by a specified time and that the said order be endorsed with penal notices against the appellant, James Simpson, and Stephen Agbeyegbe, the Chief Executive Officer and Chief Operations Officer respectively of BONI (“the 3rd March Application”).

[7] At a hearing on 5th March 2025 regarding both the assessment of damages and the application dated 3 March 2025, the learned judge made certain orders. This Order stated:

‘AND UPON HEARING Counsel for the Defendant indicate[d] that she has received no instructions on the Claimant’s application dated 3rd day of March 2025 and or reasons for the Defendant’s failure to make the payment of US\$3,017,909.88 into Court on keeping with the order of 3rd February 2025.’ (“the 3rd March Order”)

[8] By the 5th March Order, it was ordered: -

“(1) the Respondent [BONI] is ordered to pay the sum of US\$3,017,909.88 into the Nevis High Court by 4 pm on 12th March 2025.

(2) This order shall be served personally on James Simpson, the Chief Executive Officer and Steven Agbeyegbe Chief Operation Officer of the Respondent.

(3) Costs are awarded to the Applicant [the respondent] in the sum of EC\$1,500.00.

(4) The hearing of the Claimant's assessment of damages is fixed for hearing on 18th March 2025 via zoom at 8:20 a.m."

[9] The 5th March Order also contained penal notices directed (respectively) to the appellant, James Simpson, and Stephen Agbeyegbe, informing them individually that should BONI fail to comply with the payment in the order they may be liable to be imprisoned or to have an order of sequestration made in respect of their property .

[10] On 10th March 2025 BONI filed an application for the learned judge to recuse himself in the said proceedings ("the Recusal Application") which application was supported by the affidavit of Temitope Elugsobon. On 20th March 2025 directions were given by the leaned judge for BONI to file any further affidavit in support of its Recusal Application; the respondent was ordered to file and serve any Part 53 application on or before 27th March 2025; and these two matters fixed for hearing by the judge on 2nd April 2025.

[11] The Committal Order arose from an application by the respondent filed on 24th March 2025 ("the 24th March Application") in the Claim seeking –

"(1) A declaration that BONI is in contempt of court having breached the Orders of the court granted on 18th December 2024, 3rd February 2025 and 5th March 2025.

(2) an order that James Simpson, Chief Executive Officer of BONI, be committed to prison for failure to comply with the terms of the Order dated 5th March 2025, that BONI pay the sum of US\$3,017,909.88 into the Nevis High Court by 4 p.m. on 12th March 2025."

[12] The Committal Application was served on the appellant on 25th March 2025. On 1st April 2025 the appellant filed an affidavit in the proceedings below. He admitted that he is the Chief Executive Officer and a director of BONI, having held these positions respectively, from November 2021 and September 2020. The appellant also admitted that he had been served with the 5th March Order (with penal notice) on 12th March 2025, that is, the very same day that the said order required BONI to pay the sum of US\$3,017, 909.88 into court by 4:00pm. As it turned out the appellant was actually served with the said order in the afternoon of 12th March at a time after

the banks were closed. It must also be stated that the appellant was not present in court when the 5th March Order was made by the learned judge.

- [13] However, at paragraph 5 of his affidavit, the appellant admitted that he was aware of the previous orders of the court in the said proceedings made on 18th December 2024 and 3rd February 2025 both of which ordered BONI to pay the said sum into court. The appellant averred that BONI has not refused to pay the said sum into court, that any failure to do so was not intentional, but rather that “BONI has been unable to comply with the Orders to date, despite its efforts to do so.”² This was because (as he asserted) of “its correspondent bank’s rigorous due diligence process”. The appellant also referred in his affidavit to paragraph 3 of the affidavit of Mr. Temitope Elusogbon filed 18th March 2025 in the said proceedings as detailing BONI’s ongoing efforts to transfer the funds “into the jurisdiction.” The appellant confirmed his attendance at the 18th and 20th March 2025 hearings, as directed by the court. Specifically with respect to the respondent’s Part 53 application seeking an order for his committal, the appellant averred: *“I am advised by BONI’s attorneys Stanbrook Prudhoe and verily believe that the application is premature.”*³) Important to the appellant’s appeal is this statement of fact at paragraph 12 of his said affidavit: -

“[12] ... I was not served with the Notice of Application seven (7) clear days before the hearing, as required by Rule 53.8(1). The Applicant/Claimant has not sought an order abridging time for service. I am aware that the issues as around the committal efforts in respect of an outstanding judgment debt are issues of legal argument and as such I leave those to BONI’s attorneys.”

- [14] The Committal Application, the recusal Application and the assessment of damages first came before the learned judge on 2nd April 2025. These applications were adjourned to 2nd May 2025. The appellant was present in court on 2nd May 2025. The learned judge first dealt with the recusal Application which was later dismissed. Next the judge dealt with the Committal Application. At the hearing on 2nd May 2025 the appellant was called as a witness and his affidavit filed on 1st April 2025 tendered

² Paragraph 7 of the appellants affidavit filed on 1st April 2025 in the court below.

³ Ibid at paragraph 11.

as his evidence in chief. He was then cross-examined by Ms. Greene for the respondent/claimant. At the conclusion of the proceedings that learned judge made the Committal Order dated 2nd May 2025 against the appellant. It is against the making of this order that the appellant has appealed.

[15] This leads to an unusual development post the hearing of this appeal on 21st May 2025, which must be considered in this judgment. After the conclusion of the hearing of this appeal during which the panel probed counsel for the parties as to what transpired at the committal hearing before the learned judge on 2nd May 2025, and whether there was any record of the said proceedings which would indicate, not just what transpired at the said hearing, but the judge's decision and reasons therefor. This was against the backdrop that the appeal record before the court did not include a transcript of the said proceedings. No definitive account or explanation was offered by counsel for each of the parties in response to these questions. It was certainly not conveyed to the court that there existed a transcript or any record of a decision of the learned judge on the Committal Application, other than what is set out in the Committal Order itself. Neither was it conveyed that the learned judge had undertaken to provide written reasons for his decision on the Committal Application. This appeal was accordingly progressed and concluded on the basis that what the Court had to consider in determining the appeal were the documents forming the Hearing Bundle and the written and oral submissions of the parties.

[16] It came as much of a surprise for the Court to receive communication from learned counsel for the respondent later that day that it had been brought to her attention after the hearing had concluded that the learned judge had that very day, 21st May 2025, published a written judgment setting out his rulings on both BONI's Recusal Application and the respondent's Committal Application. An unfiled copy of the said judgment with the seal of the High Court in Nevis ("the said judgment") was sent to the Court Office by counsel for the respondent. This judgment bears on the front page the hearing date of "25th April 2025" and delivery date of "2nd May 2025". Neither of these dates can on any basis be correct.

- [17] This unusual development prompted the Court to issue directions by way of an order made on 30th May 2025 requiring counsel for both parties to file and exchange written submissions addressing the said judgment. In compliance with the said order, the appellant filed its additional written submissions on 16th June 2025 and the respondent filed its additional submissions on 17th June 2025. I shall deal with the said judgment and these additional submissions later in this judgment.

The CPR 53.4 Point

- [18] Part 53 of **CPR** deals with the scope, procedure and powers of the court when making committal or sequestration orders. More specifically, rule 53.1 provides –
- “This Part 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.”

- [19] By rule 53.2(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. An application under Rule 53 may be made without notice, but the court may direct that notice be given to the judgment debtor. (53.2(4)). Of some relevance to the instant matter is Rule 53.3 which deals with the making of a committal or sequestration order against the judgment debtor. It must be stressed that BONI was a ‘judgment debtor’ for damages to be assessed as there was entered against BONI a default judgment for damages to be assessed, albeit at the time of the making of the various orders (recited above) for payment into court by BONI of the sum of US\$3,017,909.88 no assessment of the damages had been made by the court, and there was no judgment entered against BONI for or in that sum.

- [20] The Committal Application was grounded on rule 53.4. This rule deals specifically with the making of a committal or sequestration order against the officer of a body corporate. Rule 53.4 provides-

“Subject to rule 53.5, the court may not make a committal order or a sequestration 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 not to do an act has been served personally on the officer against whom the order is sought;

(b) at the time the order was served it was endorsed with a notice in the following terms:

“NOTICE: If [name the body corporate] fails to comply with the terms of this order proceedings may be commenced for contempt of court and you [name the officer] may be liable to be imprisoned or to have an order of sequestration made in respect of your property.

(c) if 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.”

[21] Rule 53.5 states-

“(1) This rule applies where the judgment or order has not been served

(2) If the order requires the judgment debtor not to do an act, the court may make a committal order or sequestration 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 being –

(a) notified of the terms of the order by post, telephone, electronic communication or otherwise; or

(b) present when the order was made.”

[22] The 5th March Order endorsed with the penal notices required BONI to pay the sum specified into court by 4:00p.m. on 12th March 2025. This order, the subject of the Contempt Application and proceedings, required BONI to do an act. It did not require BONI to refrain from doing an act. Accordingly, the provisions of Rule 53.5(2) dealing with where there has been a failure to serve the judgment or order (with the penal notice) do not apply. Instead, the provisions of rules 53.3 and 53.4 are applicable in circumstances where, as here, BONI (a body corporate) is the subject of the payment order and the appellant is, admittedly, an officer of BONI.

Appellant's Submissions

[23] The appellant's submissions in support of the appeal made several attacks on the procedure adopted or not by the learned judge when making the Committal Order. It was argued that each of these procedural defects and non-compliance with the requirements of Rule 53.4 rendered the entire process a miscarriage of justice and, accordingly, the Committal Order ought to be set aside for these reasons. It was also submitted that civil proceedings for contempt of court are not ordinary civil proceedings, but a common law misdemeanor, making the civil contempt proceedings a quasi-criminal matter involving, potentially, the liberty of the contemnor. To buttress the important significance of these proceedings, the appellant cited this passage from the judgment of Lord Denning in **Re Bramblevale**.⁴—

“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 a reasonable doubt.”

[24] The appellant therefore contended that it is of importance in such proceedings for the court to ensure that there has been full compliance with the procedural safeguards and mandatory requirements specified in Part 53 and more especially those at rules 53.3 and 53.4. Further, to the extent, as the appellant has submitted, that the procedure adopted by the judge was not in accordance with the requirements of these rules, a miscarriage of justice has occurred and the Committal Order ought to be set aside.

[25] The appellant argued that in matters concerning the liberty of the subject where a judge is taking the ‘unusual’ step of committing a man to prison, especially one who is not personally legally obligated or required to pay the sum ordered into court or not indebted for the sum of US\$3,017,909.88, the judge should ensure that the order as drafted is approved by him and is indeed the order which he made. However, while there is a duty on a judge dealing with a civil committal application to ensure compliance by the applicant with the procedural and other requirements under **CPR**

⁴ (1970) CH. 128.

Part 53 and that the order as drafted accurately reflects the bases and terms of the decision made by the judge, the real issue in the instant matter if not the latter, is whether to the extent that certain requirements of the rules has not been complied with, does that render the Committal Order invalid, erroneous or a miscarriage of justice such that this Court ought to set it aside.

[26] The appellant's first technical point is that an essential predicate to making an order for committal of an officer of a body corporate is a finding that the body corporate is in contempt of court for failure to comply with the order endorsed with the requisite penal notice addressed to that body corporate. It is submitted that in the instant matter the learned judge made no positive finding that BONI was in contempt of the 5th March Order or, for that matter, that BONI had breached the prior orders made on 18th December 2024 and 3rd February 2025, which finding was sought by the respondent in its 3rd March Application. Accordingly, the appellant submitted, this failure by the judge is fatal to the Committal Order, which ought to be set aside by this Court.

[27] As a corollary to this first point, the appellant's second point is that, in any event, the 5th March Order was not endorsed with a penal notice directed to BONI in the event of its failure to comply by not paying the sum ordered into court by the time specified. There is merit in this second point. Indeed, an examination of the 5th March Order raises certain procedural issues with regard to the penal notices and hence its efficacy as a basis for making, subsequently, a committal order. The 5th March Order contains two penal notices, one pertaining to the appellant (the Chief Executive Officer) and the other to Mr. Stephen Agbeyegbe (the Chief Operations Officer) of BONI. These penal notices conform correctly with the form of penal notice at Rule 53.4(b) applicable to officers of a body corporate. However, it is BONI which has been ordered by the 5th March Order to pay the money into court, but the said order is not endorsed with a penal notice directed specifically to BONI as judgment debtor, and certainly none which conforms with the specific language of the second penal notice at Rule 53.3 applicable to bodies corporate.

- [28] The simple point here is that where it is sought to make a committal order against an officer of a body corporate, not as the judgment debtor or as a person ordered to do an act under a judgment or an order of a court of competent jurisdiction, but solely in his/her capacity as an officer of the body corporate to whom the payment order is directed for compliance, the said order must be endorsed with a penal notice directed to the body corporate specified in Rule 53.3, in addition to the penal notice directed to its named officer specified at Rule 53.4.
- [29] The appellant's third point was that Rule 53.4(3) specified as a mandatory condition that no order for committal can be made unless the court is satisfied that the order endorsed with the penal notice 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.' It was argued that since the 5th March Order was only served on the "*appellant*" on the very last day for its compliance,⁵ (the requirement of Rule 53.4(3) above was not met and thus no committal order against the appellant could or ought to have been made. Accordingly, argued the appellant, it is plain that service on the *appellant* was in default or non-compliance with Rule 53.4(c) since service of the order endorsed with the penal notice was not effected on him before the date specified in the 5th March Order for doing the act. Based on this line of reasoning, the appellant submitted that the learned judge was barred by the applicable rule from making the Commitment Order on that ground and the imprisonment of the appellant was a miscarriage of justice and should be set aside.
- [30] With respect, the appellant's reasoning on this last point is misguided. It completely misses the obvious point that Rule 53.4(c) applies not to service of the order on the officer of the body corporate, but on the "judgment debtor", that is, the body corporate itself, required or obligated to pay the money judgment or to make payment in accordance with an order for payment. It is the body corporate that is mandated to comply with the order to do the act. It is also required pursuant to Rule

⁵ See paragraph. 9 of the affidavit of Leticia Nisbett-Dore filed on 24th March 2025.

53.3(a) that the order endorsed with a penal notice be served personally on the body corporate and, pursuant to Rule 53.4(c), “in sufficient time to give **the judgment debtor** a reasonable opportunity to do the act” before the expiration of the specified time or before that date. Once there has been compliance with these mandatory requirements as to service on the judgment debtor, subject to Rule 53.5(2) the court may proceed to find the body corporate and the officer in contempt, subject to any reasonable explanations or reasons for their respective non-compliance and make the committal order against the officer. It is also a requirement that the order with penal notice must also be served on the officer named in the order and who is the subject of a penal notice directed to him or her (Rule 53.4(a)). Once service has been effected on the body corporate and on the named officer, it is for that officer to see to it or to take such steps as is within the power of the office which he/she holds in the body corporate, to ensure that the body corporate complies with such an order, failing which he or she becomes liable to be committed for contempt.

[31] There is no requirement similar to that at Rule 53.4(c), for service on the officer of the body corporate within sufficient time to give him or her a reasonable opportunity to ensure that the body corporate does the act within the time specified in the order. However, it would follow that should Rule 53.4(c) not be satisfied in relation to the body corporate, the court cannot go on to make a finding of contempt against the body corporate and hence not against the named officer and to commit the officer to prison pursuant to Rule 53.4. Also, where the terms of the order with penal notices was not made in the presence of the officer named therein and the order itself is not served on the named officer sufficiently promptly as to afford him or her sufficient time to take steps to ensure that the body corporate complies with the terms of the said order, this would be an important factor against a court, in the exercise of its discretion, not taking the more drastic step of ordering the imprisonment of the named officer of that body corporate.

[32] This leaves for consideration the appellant’s fourth point made by his counsel during oral submissions. It is that the 5th March Order is not a money judgment, BONI is

therefore not a judgment debtor, Part 53 is predicated on the existence of a money judgment and the existence of a “judgment debtor”. Accordingly, it is submitted, that the entire foundational basis for making an order pursuant to Part 53 did not exist and the committal order against the appellant was entirely misplaced and ought to be set aside.

- [33] Respectfully, this submission entirely misses the mark and is devoid of merit. In Rule 2.4 the term “judgment debtor” has the meaning given in rule 43.1. Rule 43.1 defines that term as follows: -

“**judgment debtor** means the person who is liable to enforcement under the judgment or order, even though the judgment or order is not a money judgment.”

- [34] It is patently clear from this definition that the expression “judgment debtor” used in rule 53.4(a) and (c) and elsewhere in Part 53, means the person, in this matter BONI, who is the subject of the 5th March Order for payment of the stipulated sum into court and by the date and time specified therein. It is BONI which is the person who is liable to enforcement under the said order. Therefore, BONI falls, in this instant, squarely within the definition of “judgment debtor” under Part 53.

- [35] The appellant also submitted that the provisions of Part 53 which empowers a court to commit a person for contempt for failure to pay or to see to the payment by a judgment debtor of a money judgment are “in conflict with section 3(1) and 4 (1) (b) of the **Debtors Act**⁶, and Part II headed ‘*Abolition of Imprisonment for Debt*’: Section 3(1) provides –

“With the exceptions hereafter mentioned, no person shall after the commencement of the Act (*31st December 1888*) be arrested or imprisoned for making default in payment of a sum of money.” *[Emphasis added]*

Section 4 (1) (b) states –

“(b) such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in

⁶ Cap 5.07 of the Laws of Saint Christopher and Nevis.

respect of which he or she has made default, and had refused or neglected, or refuses or neglects, to pay the same.”

[36] It was the appellant’s submissions that it cannot be the law that had the appellant personally been liable to pay under a judgment or order the sum of US\$3 million he could not be imprisoned for having defaulted in making payment pursuant to the abolition of such actions by section 3(1) and the provisions of section 4 of the **Debtors Act**, but because he is an officer of a company liable to make such payment it does not have to be proved that the company, BONI, has the means to pay before the appellant can be sent to prison for BONI’s default. This point raised an interesting question for consideration.

[37] In the appellant’s additional written submissions filed on 16th June 2025 addressing the written judgment of the learned judge dated, purportedly, 2nd May 2025 (“the said judgment”), it was submitted that the judge’s reasoning therein was incorrect in several particulars and just as wrong and fallacious as his decision to commit the appellant by order made on 2nd May 2025. It was also submitted that in several respects the purported reasons or reasoning and analysis of the learned judge set out in the said judgment, was indicative of the fallacious decision he made, confirmatory of certain of the appellant’s technical and substantive points in the appeal, and of the extent to which the appellant had been prejudiced by the procedure adopted by the judge when making the Committal Order.

[38] First, the appellant pointed out that the two dates on the first page of the said judgment (mentioned above) were wrong and conveys the false impression that the hearing took place on 25th April 2025 when in fact it had taken place on 2nd May 2025, and that the judgment had been delivered on 2nd May 2025 when in fact on said date no written judgment was delivered by the learned judge on either the Recusal Application or the Committal Application, but only the judge’s oral decision dismissing both applications. In the case of the dismissal of the Committal Application this was the subject of the Committal Order dated and entered on 2nd May 2025, a copy of which was included in the appeal hearing bundle. Thus, the

said written judgment was not published on 2nd May 2025 and not until 21st May 2025, after the conclusion of the appeal hearing in this matter.

[39] The appellant also pointed to the inaccuracy of what was stated by the learned judge at paragraphs 34 and 46 of the said judgment.⁷ Without going into the details, neither of these inaccuracies can be rebutted. More directly, the appellant posited that the said judgment was confirmatory of the condensed ground of appeal that the Committal Order was manifestly procedurally unfair. The appellant argued that the said judgment does not get around the procedural prohibition against committal in Rule 53.4 whereby the learned judge did not have the jurisdiction to commit the appellant to prison for the failure of BONI to comply with the terms of the 5th March Order, since the 5th March Order was not endorsed with a penal notice directed to BONI.

[40] Likewise, it had not been disputed in the said judgment that the appellant had not been served with the 5th March 2025 Order until after business hours on 12th March 2025, a mere 1.5 hours before the expiration of the date and time for BONI's compliance with the 5th March Order to make the payment into court. Accordingly, there was in reality no time, or insufficient time, afforded by the respondent for BONI to have a reasonable opportunity to pay the stipulated sum into court. This being pellucid the learned judge ought to have exercised his powers under Rule 53.2(1) to extent or to stipulate a new date for compliance with the terms of the said order. Instead, he hastily and contrary to the rules of natural justice and fairness, proceeded without more to make the Committal Order for the imprisonment of the appellant and deprivation of his liberty.

[41] This is what the appellant has referred to in his additional submissions as '**The Big Fallacy in the Judgment**'. This is a reference to the failure by the judge to avert rule 53.2(1) which states:

'If a judgment or order specifies the time or date by which an act must be done, the Court may be order specify another time or date by which the act must be done.'

⁷ See paragraphs 5 and 6 of the appellant's additional skeleton.

- [42] It was submitted that the learned judge misdirected himself at paragraphs 42 and 62 of the said judgment when he commented to the effect that there was no evidence of any efforts by BONI or the appellant to attempt to comply with the order for payment between 25th April and 2nd May 2025. Not only did BONI and the appellant not have sufficient time within which to comply with the 5th March Order it having been served on the appellant late on 12th March, a mere 1.5 hours before the deadline imposed for compliance, but the learned judge failed in those circumstances, to exercise his powers and discretion to set a new date for compliance and not to proceed to impose a custodial sentence on the appellant for BONI's non-compliance with the terms of the said order. Thus, the essential judicial safeguards imposed by Rule 53.4(c) and 53.2(1) were not observed by the learned judge. Also, it was submitted, it was fallacious for the learned judge to speak of or to accept the submission that BONI and the appellant had extra time after 12th March 2025 to comply with the 5th March Order, the judge having not considered the exercise of his powers under Rule 53.2(1) to extend the time for their compliance in all the circumstances.
- [43] The appellant also submitted that from the said judgment the appellant's personal liability for BONI's non-compliance with the 5th March Order was assumed by the learned judge who did not make any proper inquiry into the discharge by the applicant/respondent of its burden of proof or direct his mind to any of his powers alternative to the ultimate power of committal, which should not be involved as a first but as a last resort after most other remedies to ensure compliance had been first utilised.
- [44] The appellant also submitted that the said judgment does nothing to address or to offset the various technical defects that vitiate the Committal Order. These are: (i) the absence of any finding in the Committal Order of contempt of court, either by BONI or the appellant; (ii) the want of jurisdiction to consider committing the

appellant; and (iii) the absence of any finding to satisfy the three conditions precedent to an order for committal contained in rule 53.4(a), (b) and (c).

[45] The appellant in his additional skeleton argument at paragraph 16, alluded to what he describes as a “very disturbing view”. This relates to or concerns what transpired with the learned judge regarding the filing of the Committal Application. In this regard, reference is made to what the learned judge stated at paragraph 17 of the said judgment, viz: ‘*Selecta were also ordered to file and serve any committal and/or sequestration application (“Part 53 applications”) by March 27, 2025 as well.*’ The appellant sought to give life to this point by stressing that at the time of the 20th March 2025 hearing referenced at paragraph 17, Selecta had not filed an application for committal, but it was the judge who ordered Selecta to file and serve such an application, leading to the Committal Application filed on 24th March 2025. It is the respondent’s position that “*one cannot shake the feeling that the learned judge told learned Counsel for the Respondent TO FILE an application for committal and/or sequestration, and to do it within 7 days.*”

[46] This latter position of the appellant is most unfortunate, and at best a stretch of what is said at paragraph 17. It is a position fueled perhaps by the very oddity of the timing of the issuance of the learned judge’s said judgment, coming out, as it did, on the very day of and at a time after the appeal hearing had been concluded. More importantly, what is stated in paragraph 17 (which must be read as a whole) is of the tenor of directions orders made by the learned judge and directed one to each of the two parties and in relation to, respectively, the appellant’s Recusal Application and the respondent’s proposed committal application pursuant to Part 53. Nothing more need be said about this.

[47] The appellant also submitted that the learned judge had an incorrect understanding of the two cases cited and relied on at paragraphs 50 and 64 of the said judgment as authority for reaching his decision to make the committal order. On the contrary, according to the appellant, both cases are powerful authorities against the course

which the judge has undertaken in making the said order. The first case is **Re Brambevale Ltd** on the burden of proof in contempt proceedings. However, the judge appeared to have incorrectly placed the burden of proof not on the respondent as the applicant for committal, but on BONI and the appellant.

[48] The second case is **JSC BTA Bank v Solodchenko**⁸. The appellant submitted that the learned judge's understanding of the salient feature of this decision as set out at paragraph 64 of his said judgment was incorrect. It was argued that what was said by Briggs J (later Lord Briggs) at paragraph 16 of his judgment in that case, was in complete contrast to what the learned judge in the instant matter said at paragraph 64. The passage from the judgment of Briggs J at paragraph 16 is quoted in full at paragraph 22 of the appellant's additional skeleton argument. I do not intend to set it out here. Suffice it to be said that Briggs J opined that in a case where a serious contempt had been proven in circumstances where the contemnor was absent (he was in Cyprus and did not attend the hearing), the court would appropriately pause before proceeding to impose a custodial sentence, and to afford the contemnor the opportunity to attend and to purge his/her contempt and to mitigate any likely sentence, meaning that an immediate sentence of imprisonment could cause, or at least risk, injustice or unfairness: *'... it is, in my judgment, appropriate for the court to pause before proceeding immediately to sentence and to consider whether the matter should, in the alternative, be adjourned.'*

[49] Briggs J also was of the opinion that where the court informs the contemnor that there is a real likelihood of him being imprisoned for his proven contempt, this *'may serve the beneficial purpose of bringing him to his senses and ensuring compliance.'* The appellant's point is that in the instant matter he had not ignored the court and absented himself from the contempt proceedings but had attended and participated in the hearing on 2nd May 2025. This ought to have persuaded the learned judge that some other step or order, other than committal to prison, would have been proportionate and fair in all the relevant circumstances. These dicta notwithstanding,

⁸ (2011) EWHC 2163 (Ch).

the learned judge, rather than follow the guidance in *JSC BTA Bank* and pause before imposing a custodial sentence, proceeded immediately to make the Committal Order. At paragraph 65 of his said judgment, the learned judge states: -

‘In those circumstances, I was satisfied that it is necessary to commit Mr. Simpson to HM Prison for 7 days for Boni’s noncompliance with the order for payment in.’

- [50] The appellant also took issue with what the learned judge stated at paragraph 46 of his said judgment about what learned counsel Ms. Greene for Selecta had submitted to the effect that there was no procedural bar to Mr. Simpson being committed to prison. The gravamen of the appellant’s complaint was that by so stating the learned judge is being “facetious”, and appears to be “*abdicating his responsibility of adjudication to Ms. Greene*”. Instead, it was for the judge himself to make such a finding of no procedural bar, which finding he did not make before imposing the harsh punishment on the appellant by depriving him of his liberty by imposing a custodial sentence. It was submitted that the judge’s recount of Ms. Greene’s submission on there being no procedural bar to the committal of the appellant, is not in step with what is set out at ground 1 of the respondent’s Committal Application itself as signed by Ms. Greene on behalf of Selecta. There she correctly stated that the court will not make a committal order unless the conditions imposed by **CPR** 53.4 (a),(b) and (c) are satisfied. It not having been shown that condition (c) had been met as the 5th March Order was not served on the appellant until 2:34 pm on 12th March 2025 making it impossible for there to have been sufficient time for BONI to comply by 4:00 pm on the said 12th March 2025, the learned judge erred in making the Committal Order and had no jurisdiction to do so.

Respondent’s Submissions

- [51] The respondent submitted that the Committal Order ought not to be set aside purely on technical grounds, as this would be contrary to the interest of justice and there has been no prejudice to the appellant. It is asserted that in all the circumstances of

this matter the learned judge was correct to have proceeded with the Committal Application and to make the Committal Order against the appellant on 2nd May 2025.

[52] In support of this overarching submission, the respondent makes certain points. These may be summarised as follows: -

- a) BONI has disobeyed the court's orders of 18th December 2024, 3rd February 2025 and 5th March 2025 each of which required BONI to pay the sum of US\$3,017,909.88 into court by various specified dates of 3rd January, 17th February and 12th March 2025. Thus, BONI was well-aware of its obligation to make the payment and that it has in each instance failed to comply with the orders of the court man dating it to do so.
- b) This continued disobedience entitled the respondent to utilise the enforcement mechanism under rule 45.3(1)(a) and to apply pursuant to part 53 for a committal order.
- c) The respondent has complied with the requirements of rule 53.7 in relation to an application for a committal order. These are that such an application must specify the following: (i) the exact nature of the breach or breaches of the order; and (ii) the precise term or terms of the order which it is alleged that the judgment debtor has disobeyed. Additionally, the application must be verified by affidavit; and, as applicable, the applicant must prove service of the order endorsed with the appropriate penal notice under rule 53.3(b) or rule 53.4(b), and that the person against whom it is sought to enforce the order had notice of the terms of the order under rule 53.5 if the order required the judgment debtor not to do an act, or that it would be just for the court to dispense with service.
- d) The Committal Application having been served on the appellant on 25th March 2025, the court was empowered to exercise any of its

powers under rule 53.9. This range of powers include making a committal order against a judgment debtor which is a body corporate; and making such order against an officer of a judgment debtor which is a body corporate.

[53] In responding to the specific procedural defects under rule 53.4 relied on by the appellant, the respondent submitted that the current state of the law is that once a procedural defect does not prejudice or in some way cause an injustice to the contemnor, such technicalities will not result in the setting aside of the committal order. In support of this point, the respondent cites this passage from the judgment of Lord MR in **Nicholls v Nicholls**⁹ –

“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. As long as the order made by the judge was a valid order, the approach of this court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so.”

[54] As to the essential procedural requirements of an application for committal for contempt, the respondent cites this passage from the judgment of the English Court of Appeal in **Attorney General of Tuvalu and another v Philatelic Distribution Corp Ltd and others**¹⁰ -

⁹ [1997] 2 All ER 97 at page 108.

¹⁰ [1990] 2 All ER 216 at 221.

“... while compliance with RSC Ord. 52, r4(2) would be strictly insisted on since the liberty of the subject was at stake, the nature or background of the case was important, and what was essential was that the alleged contemnor should be given sufficient particulars of what it was alleged constituted contempt of court to enable him to defend himself. On the facts, although the notice of motion could have been more artfully drafted, it could not have left the appellant in any reasonable doubt as to the thrust of the case against him. The court accordingly rejected that ground of appeal.”

[55] It is submitted by the respondent that taking into account the procedural history of this matter, the appellant has suffered no prejudice by being served with the 5th March Order on 12th March 2025. These factors include compliance by the respondent with the various rules of court applicable to applications for committal; the endorsement of a penal notice on the 5th March Order directed to the appellant; that BONI's last annual return showed him as one of two directors residing in the Federation of St. Christopher and Nevis; the appellant having been personally served with the 5th March Order and with the Application for his Committal; having responded thereto by affidavit filed on 1st April 2025; having confirmed in said affidavit his awareness of the orders of 18th December 2024 and 3rd February 2025; and having attended various hearings on 18th and 20th March 2025 via zoom and the hearing on 2nd May 2025 at which he was cross-examined and the Committal Order made by the learned judge. In any event, BONI itself (of which the appellant is the Chief Executive Officer and a director) was well aware of the orders of 18th December 2024, 3rd February 2025 and 5th March 2025 requiring it to pay the sum of US\$3,017,909.88 into court by specified dates. Also, considering that the Committal Application was not filed until 24th March 2025 and not heard until 2nd May 2025, the appellant was afforded additional time to ensure BONI's compliance with these orders. Accordingly, the learned judge was correct to find the appellant in contempt and to make the Committal Order sought in the Committal Application. For these reasons it would be an injustice to set aside the Committal Order.

[56] The respondent also submitted that there was no prejudice to the appellant by the Committal Order not expressly stating that the BONI was found in contempt of court. What was essential is that BONI and the appellant were given in the Contempt

Application sufficient particulars of what it was alleged constituted the contempt of court by BONI. The stated contempt was simply BONI's failure and continued failure to comply with the various orders of the court, including the 5th March 2025 Order endorsed with penal notice, each of which orders required BONI to pay the stated sum into court by specified dates. Indeed, the appellant himself acknowledged or admitted in his affidavit filed in response to the Contempt Application, BONI's failure to pay the said sum as ordered, and sought to explain why BONI had not done so or could not have complied, while asserting that the Contempt Application was premature.

[57] In its additional submissions filed on 17th June 2025 addressing the written judgment of the learned judge published after the conclusion of the hearing of this appeal on 21st May 2025, the respondent, instead of directly addressing the said judgment as required by the Court's order dated 30th May 2025, seized upon the opportunity to regurgitate or to reargue certain of the submissions made in its first skeleton argument in the appeal filed on 15th May 2025, including its reliance on the dicta of Lord Woolf MR in **Nicholls v Nicholls** and the decision in **Hoss Holdings Limited v Energy Concepts International Limited and another**.¹¹ It was also submitted that the term "*may not*" in CPR 53.4 confer upon the court a discretion which no rule of practice can take away¹² and the judge properly considered the requirements of rules 53.4, 53.7 and 53.8 in exercising his discretion to make the Committal Order against the respondent.

[58] In support of this submission that respondent relied on what was said by the learned judge at paragraphs 32,33,34,35, and 46 of the said judgment. It is also submitted that considering that the court had made two previous orders for payment of the specified sum into court by BONI at hearings on 28th December 2024, 3rd February and 5th March 2025 at which BONI was represented by legal counsel, the learned judge in the exercise of his discretion was permitted to find that the provisions of

¹¹ BVIHC(COM) 2023/0051 (delivered 19 September 2024, unreported).

¹² Halsbury's Laws of England Vol. 12 (2020), Rules of Court para 497.

Rules 53.7 and 53.8 were satisfied and to make the Committal Order against the appellant. Moreover, even if the requirement of Rule 53.4(c) had not been satisfied, this was a procedural irregularity which, on its own, ought not to result in the Committal Order being set aside by this Court where the interest of justice requires that orders of the courts be obeyed.

[59] The respondent submitted that pursuant to Rule 53.7(3)(a) it is Rule 53.4(b), and not Rule 53.4(c) as asserted by the appellant, which an applicant for a committal order must comply with. This point is devoid of merit. The language referenced in Rule 53.7(3)(a) specifies the requirement for the applicant for a committal order to prove '*service of the order*' which is endorsed with the appropriate penal notice proscribed under either Rule 53.3(b) or Rule 53.4(b). It is the service of the order with the appropriate penal notice which is required by Rule 53.7(3)(a). More importantly, it is pursuant to Rule 53.4 that the respondent applied for the committal order against the appellant as an officer of BONI. Rule 53.4 specifies that the court should not make such an order unless the conditions at (a), (b) and (c) have been satisfied. Furthermore, pursuant to condition (c) unless the order was served in sufficient time to enable reasonable compliance with the order, it ought not to be made by the court.

[60] In response to the appellant's submission that the learned judge did not consider the efforts made by BONI to comply with the court's orders for payment into court of the specified sum as outlined in the affidavit of Mr. Temitope Elusogbon, the respondent submitted that in his judgment the judge examined the evidence and made a determination on whether BONI was found in contempt, and whether the appellant willfully failed to take reasonable steps to comply with the 5th March Order which required BONI to pay the stipulated sum into court by 4:00 pm on 12th March 2025 by examining his affidavit evidence filed on 1st April 2025, the affidavits of Mr. Elusogbon, and evidence revealed through the cross-examination of the appellant at the 2nd May 2025 hearing of the Committal Application. To buttress this submission, the respondent pointed to the judge's analysis of these affidavits and

evidence at paragraphs 35, 40 to 48, 51, 52, and 53 of the said judgment. (respondent's additional submissions at para. 17) The question from the evidence adduced of what steps the appellant had taken to ensure compliance with these orders by BONI, was assessed by the learned judge at paragraphs [51], [52] and [58] of the said judgment. At paragraph [58] the learned judge was not satisfied that he was a witness of truth. *"He appeared evasive on matters that were straight forward and oddly combative on other matters. He did not strike me as a witness who was doing all he could to ensure that this court's order would be complied with."*

- [61] The question of whether BONI had failed to comply with the several orders of the court requiring it to pay the stipulated sum into court by various dates was considered and certain findings made by the learned judge at paragraphs [52] to [57] of the said judgment. At paragraph 54, the learned judge found that BONI was guilty of contempt. Paragraph 54 states-

"To my mind, if you are ordered to comply and fail to comply for several months and do not adduce any or any sufficient documents of your efforts to comply then one inescapable inference is that you are willfully refusing to comply. Disobedience means a refusal or neglect to obey. BONI has neglected to comply with the orders for payment in and has not adduced any evidence that would satisfy me to the requisite standard that they are unable to comply."

- [62] The respondent also relies on the statement of principles in the decision of the English High Court in **Kea Investments Ltd v Watson and others**¹³ to the effect that an obligation to use one's "*best endeavours*" is equated with an obligation to take all reasonable steps. Paragraph 43 in the judgment in **Kea** states (in part): -

"....A failure even to try to comply honestly and bona fide with the obligation must be a breach of it; but given the accepted equation of a best endeavours obligation with an obligation to take all reasonable steps, I agree that a person who bona fide tries to comply, but does not in fact take all steps which it would be reasonable for him to do, is also in breach. That is not to say of course that whether or not there had been a genuine but insufficient attempt to comply might not be very relevant to the way in which the Court ought to dispose of the application to commit, but it would not in my view prevent there being a breach."

¹³ [2020] EWHC 2599.

[63] In summary on this point, the respondent submitted at paragraph 18 of its additional skeleton argument:

“...the learned judge was not bound to find that the alleged efforts outlined in the affidavits of Mr. Elusogbon amounted to genuine and sufficient attempts to comply by BONI. Considering the consistent non-compliance with the court’s orders and lack of evidence to support any genuine efforts to comply, we submit that the learned judge was correct in his finding that BONI was liable for contempt as it did not take all reasonable steps to comply with the Court’s orders.”

[64] The respondent submitted that the test to be applied by the court in determining whether the director of a body corporate may be held liable for the company’s default in compliance with an order or judgment requiring the company to pay a certain sum, is whether such director is aware of the terms of the order and willfully fails to take reasonable steps to ensure the company’s compliance with the order. (**Hoss Holdings**; and **Tuvalu**) The principle is “... *if there has been a failure by the director to investigate or willful blindness on the part of a director of a company his conduct can be regarded as being willful.*’

[65] As to the appellant’s evidence of his attempts or efforts to comply with the 5th March Order, the respondent, relying on **Tuvalu**, accepts that the test is that the learned judge was required to consider whether he was ‘*aware of the terms of an order and willfully fails to take reasonable steps to ensure the company’s compliance.*’ It was submitted that the findings of the judge in relation to the appellant’s evidence in general and his efforts in particular to comply with the court’s orders clearly established to the requisite standard that –

“...the [appellant] was aware of the terms of the 5th March Order and willfully failed to take reasonable steps to ensure BONI’s compliance. The only steps [the appellant] took was informing the Chairman of BONI’s Board that he was served with the order. While [the appellant] claims that he had no sole authority to issue the payment into court under **Tuvalu**, he had the duty [to] supervise or investigate the matter to ensure compliance by BONI. The learned judge could not conclude that [the appellant] reasonably believed that another director was taking the required steps to comply with the court’s order when there was no evidence that he was so informed. In all the circumstances, we respectfully submit that the learned judge was correct in

his decision to proceed with making a committal order against [the appellant].”¹⁴

[66] It was therefore the submission of the respondent that in the said judgment the learned judge examined and properly analysed the relevant evidence before him, made the appropriate findings of contempt against BONI and separately against the appellant, and did not err in the exercise of his discretion in making the Committal Order against the appellant. Accordingly, there is no basis upon which this Court ought to set aside the Committal Order and to the extent that this Court may find that there has been some technical breach of non-observance of a provision in **CPR** Part 53, that does not provide a proper legal basis upon which to set aside the committal Order as the appellant had not been prejudiced or treated unfairly in any way and it is in the interest of justice that orders of the court must be complied with. Further, and in any event, the appellant was well aware of the court’s orders from December 2024 to March 2025 requiring BONI to comply and to pay the stipulated sum into court and of BONI’s consistent failures to comply, and his affidavit and oral evidence as assessed by the learned judge in the said judgment demonstrate that he was aware of the 5th March Order and failed to take any reasonable steps to ensure BONI’s compliance therewith and that the evidence led to the reasonable conclusion that his failures to do so were willful, warranting the making of the Committal Order against him.

Analysis and conclusion

[67] It is clear that certain of the technical issues raised by the appellant in his appeal against the making of the Committal Order have some merit. The 5th March Order, while correctly endorsed with the prescribed penal notices directed to the appellant and to Mr. Agbeyegbe, the CEO of BONI as prescribed by **CPR** 53.4, was not endorsed with a penal notice directed to the judgment debtor, BONI, as prescribed

¹⁴ See paragraph 19 of the Respondent’s further skeleton arguments filed on 17th June 2025.

by Rule 53.3. However, BONI was represented by its legal counsel at the 2nd May 2025 hearing of the Committal Application.

[68] The judge's consideration of the Committal Application begins from paragraph [32] of his said judgment. At paragraph [35] the judge summarizes the affidavit evidence of the appellant filed on 1st April 2025; and at paragraphs [37] to [39] his evidence given in cross-examination at the 2nd May 2025 hearing. At paragraphs [40] to [42] the judge also summarised Mr. Elusogbon's affidavit evidence of which there were several during the course of the proceedings and describes each of them as being '*remarkably brief*'. At paragraphs [49] to [58] of the said judgment, the learned judge set out in brief the principles of law applicable to civil contempt, and his analysis of and findings in relation to the evidence of the appellant and Mr. Elusogbon.

[69] Also, it is not correct to say, as the appellant submitted, that the Committal Order does not demonstrate that the learned judge made a finding that BONI had breached the 5th March Order. First, the Committal Order itself was expressly made by the learned judge on the basis of the 'failure' by BONI to comply with the terms of the 5th March Order to pay the stipulated sum into court. (para.1) This is a clear finding by the learned judge that BONI had not complied with the 5th March Order. Moreover, the finding as to BONI's noncompliance with the court's orders for payment into court of the prescribed sum, including the 5th March Order, is made consistently by the learned judge at paragraphs [52] to [55] of his said written judgment.

[70] At paragraphs [52] to [55] the judge sets out in some detail his analysis of the evidence from BONI, whether from the appellant or Mr. Elusogbon, and BONI's "default" or non-compliance with the orders of 18th December 2024, 3rd February 2025 and 5th March 2025. In these paragraphs, the learned judge makes the following critical findings and conclusions in relation to BONI: "[t]he default is Boni's"; "no email was put in evidence by BONI evidencing their attempts to comply with the order for payment in during that time " – a clear reference to the three payment in orders between December 2024 and March 2025; "[t]he

lack of documentary evidence (sic) of their [Boni's] efforts to comply between December 2024 and May 2, 2025 is telling"; "...then one inescapable inference is that you are willfully refusing to comply"; "disobedience means a refusal or neglect to obey"; "BONI has neglected to comply with the orders for payment in and has not adduced any evidence that would satisfy me to the requisite legal standard that they are unable to comply"; "[t]here was no detail of any attempt by BONI to comply with the order for payment in or details of how exactly BONI was prevented from complying."

[71] The terms of the Committal Order does not on its face demonstrate that the learned judge made a positive finding of fact that the appellant, an officer of BONI, had failed to take any steps or sufficient steps to ensure compliance by BONI with the 5th March Order by payment of the sum ordered into court, and with respect to which the appellant was under notice of the peril of imprisonment by the penal notice directed to him. However, such a finding was made by the judge in his said judgment.

[72] In relation to the appellant, the Chief Executive Officer of BONI and only officer/director resident on the island of Montserrat, the judge characterised his evidence as to the steps he took to ensure BONI's compliance with the 5th March Order for payment in as "*extremely meagre*"; and that "*he simply spoke to the Chairman who told him about the Recusal Application and that was all he did.*"¹⁵ He considered that while the default under the 5th March Order was of BONI, the consequences of such default "redounded" to the appellant.¹⁶ He also considered that it was open to both BONI and the appellant "*to ramp up their efforts to comply and to file affidavits (as they are wanting to do) of those efforts immediately proximate to the committal hearing.*" Neither BONI or the appellant had done so. The learned judge also was not satisfied that the appellant was a witness of truth at the committal hearing during which he had been cross-examined.¹⁷ He found him as a witness to be "*evasive*" and "*oddly combative*"; that he was not a witness "*who*

¹⁵ Paragraph 51 of the Judgment in NEVHCV2022/0161.

¹⁶ Ibid at paragraph 52.

¹⁷ Ibid at paragraph 58.

was doing all he could to ensure that the court's order would be complied with"; and it seemed to the judge that the appellant had "formed the view that compliance with the orders for payment in were not matters for him".

[73] The judge considered his latter conclusion to be "unfortunate". His reason for so concluding is "*since he [the appellant] had been served with an order indicating that Selecta would seek his committal to HM Prison if BONI did not comply. If you take no steps or at least no real steps with full awareness of the likely consequences, then it seems to me that you do not intend to comply.*"¹⁸

[74] This presumptively was a clear reference to the 5th March Order. However, the learned judge's statement and conclusion at paragraph [58] have been roundly criticised by the appellant in its submissions. The simple point being made is that it omitted any consideration and analysis of the requirements of Rule 53.4(c) and the service of the 5th March Order endorsed with penal notice on the appellant of 12th March 2025, a mere 1.5 hours before the 4:00p.m. deadline stipulated in the said order for compliance by BONI by payment of the prescribed sum into court; and after the closure on that day at 3:00pm of the commercial banks in the Federation. Tellingly, it also lacked any analysis of the sufficiency of the period or time left for compliance when looked at in practical and realistic terms, and the reasonableness of the opportunity afforded to BONI to comply and for the appellant, the subject of a penal notice threatening his committal to prison, to take steps to ensure BONI's compliance with the terms of the said order.

[75] In my view, this is a telling point. It is not a mere technical procedural point but one which goes directly to the fairness and justice of the process and the making of an order for committal. It goes to the sufficiency and reasonableness in practical terms of the ability of the contemnor and the company to comply with the said order, failing which they will be held in contempt. In my opinion, this point made by the appellant is one which cannot be over-come or surmounted on the basis of the court's

¹⁸ Ibid.

discretionary power under Rule 53.4 by the use therein of the word “*may*” as submitted by the respondent.

- [76] Likewise, this difficulty cannot be surmounted or explained away by the application of the principle in **Nicholls v Nicholls** relied on by the respondent that the modern approach of the court is not to set aside a committal order on purely technical grounds which have nothing to do with the justice of the case. The simple answer to this submission is that, in these circumstances, there was a clear prejudice to both the appellant as contemnor and to BONI as the judgment debtor charged by the 5th March Order with compliance by payment into court of a large sum of money. This prejudice stems from and is a result of the very late service on the appellant of the 5th March Order on the appellant, a mere 1.5 hours before the mandatory stipulated time on said date for its compliance. This was clearly unfair and an injustice to BONI and to the appellant charged with ensuring BONI’s compliance under the peril of his personal imprisonment for contempt. My conclusion on this point is well-supported by this extract from the judgment of Stamp J in **Ronson Products Ltd v Ronson Furniture Ltd**¹⁹—

‘It would be an **injustice** to make a director liable for a failure of a company to do the required act within 21 days service of the order upon it if the director only became aware of the Order on the eighteenth day.’**[Emphasis added]**

- [77] In my considered view, in light of the non-compliance with rule 53.4(c) the learned judge ought to have given consideration to exercising his powers under rule 53.2(1) to make an order specifying another date and time for BONI and the appellant’s compliance with the 5th March Order, such new order endorsed with the prescribed penal notices under rules 53.3 and 53.4 directed respectively to both BONI and the appellant, and adjourned the Committal Application to a date after the new date for compliance. In not doing so the learned judge erred.

¹⁹ 1966) Ch. 603.

[78] The legal consequences of these points are not diminished by the fact that the judge had made two prior orders for payment (December 2024 and February 2025) against BONI, with respect to which BONI has failed to comply either within the prescribed time or at any time thereafter. While these earlier orders are an important part of the chronological procedural history of this matter pointing, as they do, to a history of non-compliance by BONI, neither of them could properly form the legal basis of a committal application against the appellant for his contempt as an officer of BONI pursuant to Rule 53.4, as neither of these two orders were endorsed with the requisite penal notice directed to the appellant. Indeed, these orders were treated by the learned judge in his said judgment as part of the BONI non-compliance landscape, and not as a foundational basis for the making of the Committal Order against the appellant as an officer of BONI. Put differently, as a matter of principle, the failures of BONI to comply with the 18th December 2024 and 3rd February 2025 orders for payment in, while of some significance towards establishing a consistent failure or willful refusal by BONI to comply with the said orders, they cannot be used to demonstrate or to establish a failure by the appellant to comply with the subsequent order, the 5th March Order, which is the only order endorsed with a penal notice directed to the appellant to ensure BONI's compliance with the terms of the latter order. It is only the 5th March Order endorsed with the penal notice which can be used as the legal basis for a committal application pursuant to Rule 53.4.

[79] In my view, these points are dispositive of the appeal which, accordingly, ought to be allowed and the Committal Order set aside.

Disposition

[80] For the reasons set out above, I would allow the appeal, set aside the Committal Order, and order the respondent to pay the appellant's costs of the appeal to be assessed by a judge of the High Court if not agreed by the parties within 21 days.

I concur.

Esco Henry
Justice of Appeal

I concur.

Reginald T. A. Armour
Justice of Appeal [Ag.]

By the Court

Chief Registrar