[2024] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00053

BETWEEN	**DR**	**APPELLANT**
AND	**DM**	**RESPONDENT**

Miss Cecile A Black instructed by Northeastern Legal Aid Society for the appellant

Lorenzo J Eccleston for the respondent

30 January 2023 and 15 November 2024

Civil Law - Breach of court order - Application for committal for contempt of a court order - Committal order - Standard of proof - Application to discharge committal order - Service of application for committal order - Parts 5 and 53 of the Civil Procedure Rules 2002

F WILLIAMS JA

[1] I have read in draft the reasons for judgment of V Harris JA and they accord with my reasons for concurring with the order made by the court as indicated in para. [3] below.

V HARRIS JA

[2] This is an appeal against two decisions made in the Supreme Court by Daye J and Thomas J ('the learned judges') on 2 December 2020 and 25 February 2021, respectively. As a result of the first decision, the appellant, DR, was sentenced to nine months' imprisonment as committal for breach of an order of the court. The second decision

denied the appellant's subsequent application for the order for her committal to be discharged, among other things.

[3] We heard the appeal on 30 January 2023 and made the following orders:

> "1. The appeal is allowed.
>
> 2. The orders of Daye J and Thomas J made on 2 December 2020 and 25 February 2021, respectively, are set aside. Therefore, the order for committal made against the Appellant is hereby discharged.
>
> 3. Costs of the appeal and in the court below in relation to the applications filed on 27 February 2020 and 22 February 2021 to the Appellant to be agreed or taxed."

At that time, we promised to put our reasons in writing at a later date. This is a fulfilment of that promise. The delay in providing these reasons is regretted.

Factual background

[4] The respondent, DM, is the father of a minor child, "MDM", born on 14 December 2011, with whom this matter is concerned. The appellant is the maternal grandmother of MDM.

[5] On 1 August 2018, the appellant travelled with MDM to the United States of America ('the USA') with the written permission of the respondent and MDM's mother, LR. MDM, who is a Jamaican citizen, ordinarily resident in Jamaica with the respondent, travelled to the USA on a visitor's visa. The purpose of the visit was for MDM to spend the month with his mother, LR. Subsequent to their arrival in the USA, LR indicated to the respondent that MDM would return to Jamaica with the appellant on 3 September 2018.

[6] On that day, the appellant returned to Jamaica without MDM. In response to the respondent's enquiries as to the whereabouts of MDM, the appellant merely informed him that MDM was with his mother. The respondent, bereft of any information about MDM's location or a means of contacting him, began his efforts to have MDM returned home, to

no avail. Contrary to the agreed arrangement between the parties and LR, MDM remained in the USA.

[7] While MDM lived in Jamaica, the respondent was his sole caregiver and provider since his mother left the jurisdiction in 2016. So naturally, the respondent was dissatisfied with what transpired. He commenced a claim by fixed date claim form filed on 2 October 2018 with affidavit in support in the matter of the Children (Guardianship and Custody) Act against the appellant and LR (the 1st and 2nd defendants in the court below, respectively). He sought several orders, namely, to be granted sole custody of MDM, for the appellant and LR to return MDM to Jamaica forthwith, and that on the return of MDM to Jamaica, both the appellant and LR would be restrained from removing MDM from this jurisdiction.

[8] On that same day (2 October 2018), the respondent also filed a "NOTICE OF APPLICATION FOR COURT ORDERS FOR RETURN OF MINOR TO THIS JURISDICTION" with affidavit in support, further to which he sought the same orders for sole custody, the return of MDM, and for the appellant and LR to be restrained from removing MDM from the jurisdiction.

[9] Upon hearing his further amended notice of application for court orders (filed on 28 March 2019), on 10 December 2018, Henry-McKenzie J (Ag) (as she then was) granted the application and made an interim order for the respondent to be granted sole custody of MDM until the determination of the claim. That order also required the appellant and LR to return MDM to Jamaica forthwith, and it instructed that they would be restrained from further removing MDM from the jurisdiction upon his return.

[10] On 29 November 2019, Henry-McKenzie J (Ag) varied her previous order to grant sole custody, care, and control of MDM to the respondent until the determination of the claim and to require the appellant and LR to return MDM to this jurisdiction within 14 days of that order ('the interim order'). Additional orders were made for, among other things, the dispensation of personal service of the claim and affidavit on LR and the

respondent was permitted to serve her by alternative means. Those means were serving the appellant at her residential address as well as by substituted service outside the jurisdiction by advertisement of a notice of proceedings and formal order in the North American edition of the Jamaica Gleaner newspaper once per week for two consecutive weeks).

[11] Approximately three months later, MDM still had not returned to Jamaica. As a result, the respondent filed a notice of application for committal on 27 February 2020, requesting that the appellant and LR be made to show cause why an order for contempt pursuant to Part 53 of the Civil Procedure Rules ('CPR') should not be made against them for disobedience of the interim order. That application further contended, among other things, that both the appellant and LR "refused to and/or failed to and/or neglected to return the minor child … to the jurisdiction and into the custody, care and control of [the respondent] in disobedience of the [interim order]".

[12] On 12 March 2020, the appellant filed an amended notice of application for court orders, challenging the interim order and urging the court to remove her as a party. That application was refused by V Smith J (Ag) (as he then was) on 5 November 2020, and the first hearing of the claim was set for 15 June 2021.

[13] The application for committal was subsequently heard by Daye J on 26 November 2020, and on 2 December 2020, he ordered as follows ('the committal order'):

> "1. The First Respondent, Daisy Elizabeth Raymond, is sentenced to nine (9) months imprisonment, as committal for contempt of Order of court dated November 29th 2019 to return the minor child, [MDM], to Jamaica within fourteen (14) days of the date of the Order into the custody, care and control of his father, Desmond William McKenzie.
>
> 2. The execution of the order is suspended for three (3) months from the date hereof.
>
> 3. [The appellant], upon compliance with the order, may apply to the court to purge her contempt by the reduction or discharge of the sentence.

> 4. No order against [LR], who is outside the jurisdiction.
>
> 5. Costs of this Application to [the respondent] to be agreed or taxed."

[14] Following that order, on 22 February 2021, the appellant filed a notice of application to discharge the committal order, or alternatively, for the execution of the committal order to be suspended or stayed pending the determination of the claim, or alternatively, that permission be granted to the appellant to appeal the committal order and other consequential orders. That application came before Thomas J on 25 February 2021, and she ordered:

> "1. Application denied. There is no basis for the discharge.
>
> 2. Application does not fall within Rule 53.18 of the Civil Procedure Rules 2002.
>
> 3. Costs to [the respondent] to be agreed or taxed.
>
> 4. Order to be prepared, filed and served by Respondent's Attorney-at-Law."

[15] Unrelentingly, the appellant turned to this court to pursue her discharge from the committal order. By then, the time within which to file her appeal had expired. So, she filed an application for an extension of time within which to file an appeal against the committal order and/or alternatively the orders made by Thomas J. On 7 May 2021, this court permitted her to file her notice and grounds of appeal from the decisions of the learned judges and stayed the committal order pending the determination of this appeal or further order of the court.

The appeal

[16] In notice and grounds of appeal filed on 26 May 2021, the appellant sought to challenge the orders of the learned judges on seven grounds:

> "(a) The Learned Judges erred when they found that the Appellant wilfully disobeyed the [interim order], thereby acting in contempt of the [interim order].

(b) The Learned Judges erred when they failed to find that the Respondent had not produced sufficient evidence to show that:

(i) The Appellant was in a position to legally comply with the [interim order] and failed to take reasonable steps to comply with it; and/or

(ii) The Appellant had the power or authority to legally and lawfully produce the minor (without the cooperation of the 2nd Respondent in the court below).

(c) The Learned Judges erred when they failed to find that the Appellant was not the proper party to the claim below and that an order of production could not be properly made against the Appellant.

(d) The Learned Judges erred when the [sic] found that the Appellant had the burden to prove that she was unable to comply with the [interim order].

(e) The Learned Judges erred when they failed to find that the Respondent had failed to comply with all the procedural requirements to obtain a Committal Order against the Appellant, in particular rule 53.10(2).

(f) Thomas J erred when she found that rule 53.18 of the Civil Procedure Rules 2002 did not apply to an application to discharge a committal order.

(g) Thomas J erred in law and fact when she found that there was no basis to discharge the Committal Order."

[17] In the appellant's written skeleton arguments, the grounds were conveniently condensed under three rubrics: (i) wilful disobedience (grounds (a) (b) (d)), (ii) proper party (ground (c)), and (iii) procedural defects (grounds (e) (f) (g)), which we will adopt, as did the respondent in his submissions.

[18] If successful, the appellant asked this court to set aside the decisions of the learned judges, discharge the committal order, and order the respondent to pay her costs both here and in the court below for the relevant applications.

Discussion

[19] The committal order and subsequent order refusing to discharge the committal order arose out of an interlocutory order for the custody and return of MDM. Those decisions resulted from the exercise of the learned judges' discretion. Consequently, this court is aptly guided by the principles set out in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1. In the latter case, Morrison JA (as he then was) made the following observation:

> "[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference – that particular facts existed or did not exist – which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[20] Regrettably, there are no written reasons for the decision made by Daye J. Concerning Thomas J's decision, the reasons that can be gleaned from the notes of evidence are terse and seemingly focused on what she deemed to be procedural irregularities. Nevertheless, from the material provided, this court has sought to ascertain whether the decisions of the learned judges were demonstrably wrong.

[21] The grounds of appeal, as condensed, will now be addressed in turn.

<u>Wilful disobedience (grounds (a), (b) and (d))</u>

[22] The substantive issue posed in this appeal is whether the learned judges erroneously found that the appellant wilfully disobeyed the interim order by not returning MDM to Jamaica. Where a judgment or order requires a person to do an act within a specified time or by a specified date or to abstain from doing an act, it may be enforced by an order for committal to prison under Part 53 of the CPR (rule 45.6 of the CPR). Section 1 of Part 53 deals with committal for breach of an order. Once satisfied that the notice of application for the committal order has been duly served, the court may, among

other things, either make a committal order for a fixed term against the individual or a suspended committal order, or order the confiscation of assets on such terms as the court considers just, or make such order as to costs as it considers just (rule 53.13 of the CPR).

Submissions on behalf of the appellant

[23] Counsel for the appellant, Miss Cecile Black, contended that the learned judges erred when they found that the appellant wilfully disobeyed the interim order. It was submitted that even though an application for committal can arise out of civil proceedings, the criminal standard of proof (beyond a reasonable doubt) must be met because the consequences could be as severe as imprisonment. The cases of **Margaret Gardner v Rivington Gardner** [2012] JMSC Civ 160, **Re Bramblevale Ltd** [1970] 1 Ch 128 and **Horton v Horton** [1947] 2 All ER 871 were cited in support of this point. Accordingly, the position taken by Miss Black was that the committal order should not have been granted by Daye J or, alternatively, should have been discharged by Thomas J because the respondent failed to prove beyond a reasonable doubt that the appellant "wilfully disobeyed" or "wilfully refused to obey" the interim order.

[24] To this end, counsel submitted that the respondent was required to prove beyond reasonable doubt that the appellant was in a position to legally comply with the interim order and failed to take reasonable steps to comply and/or that the appellant had the power or authority to legally and lawfully produce MDM. She argued that, as per the appellant's affidavit and *viva voce* evidence, the appellant was unable to comply with the interim order since she did not have any means of contacting LR and, in any event, she could not travel with a minor without the parents' consent or the "necessary legal documents". For those reasons, in relation to her failure to comply with the interim order, the appellant lacked the necessary *mens rea* to constitute contempt since it was not satisfactorily proved that she deliberately refused to comply with the interim order.

Submissions on behalf of the respondent

[25] On behalf of the respondent, counsel Mr Lorenzo Eccleston also acknowledged that contempt proceedings are quasi-criminal, so the burden of proof is beyond a

reasonable doubt. Several cases were cited in support, such as **Jamaica Edible Oils & Fats Company Ltd** [2013] JMSC Civ 175; **JSC BTA Bank v Roman Vladimirovich Solodchenko and others** [2011] EWCA Civ 1241 and **Ramdat Sookraj v Comptroller of Customs and Excise** (1992) 48 WIR 163.

[26] Counsel submitted that if a party fails to take reasonable steps or make best efforts to ensure compliance, his inaction could be regarded as contempt of a court order. Reliance was placed on the cases of **Tanya Louise Borg v Mohammed Said Masoud El Zubaidy** [2018] EWHC 432 (Fam), **Sectorguard Plc v Dienne Plc** [2009] EWHC 2693 (Ch) and **Crystal Mews Ltd v Metterick and others** [2006] EWHC 3087 (Ch) in support of this point. He further contended that the appellant had ample time between the interim order and the committal order to take reasonable steps or make best efforts to comply. Notwithstanding that, she failed to show any reasonable steps taken by her or any best efforts made on her part to return MDM into the custody, care, and control of the respondent. It was emphasised that before Daye J, the appellant stated that she would not disclose any information, but before Thomas J, she declared that she did not know the whereabouts of MDM and LR.

[27] Ultimately, Mr Eccleston argued, it was clear to the learned judges that the appellant wilfully and deliberately failed to comply with the interim order. Therefore, Daye J correctly concluded that the appellant had the requisite *mens rea* for contempt, and Thomas J correctly saw no basis to discharge the committal order. In all the circumstances, counsel submitted, the learned judges had to consider the court's inherent right as *parens patriae* to enquire into the whereabouts, custody, care and control, and welfare of a Jamaican minor resident (**B v C** [2016] JMCA Civ 48).

Law and analysis

[28] It is undisputed that the appellant did not comply with the interim order since she did not return MDM to this jurisdiction. Upon considering the application for committal, Daye J found in the respondent's favour and committed the appellant to serve nine months' imprisonment, suspended for three months, presumably to allow her time to

comply with the interim order. As already established, the appellant was prompted by the committal order to apply pursuant to rule 53.18 of the CPR to have that order discharged. Thomas J's decision to deny that application was premised on the fact that there was, in her view, no basis to discharge the committal order. In this appeal, the appellant urged the court to find that the learned judges both erroneously found that her non-compliance with the interim order was due to her wilful disobedience.

[29] It was recognised that, due to the nature of an application for committal, despite its genesis in a civil matter, the standard of proof is beyond a reasonable doubt, and the burden of so proving is on the party seeking the order (see **Re Bramblevale Ltd**). The divergent accounts of the parties were, on the one hand, that the appellant's non-compliance with the interim order is deliberate, as asserted by the respondent, and on the other hand, the appellant has maintained that she is unable to comply with the order because she has no means of contacting MDM and/or LR and has no right to forcefully remove MDM from his mother and bring him to Jamaica.

[30] These circumstances brought to mind Lord Denning MR's guidance in **Re Bramblevale Ltd**, where he stated:

> "Where there are two equally likely possibilities before the court, it is not right to hold that the offence of contempt is proved beyond reasonable doubt."

[31] That case concerned a committal order made against the former managing director of a company ('Mr Hamilton') that was being voluntarily wound up. The liquidator requested the company's books and accounts from Mr Hamilton, and he received some of them, except the main account books. A few months later, Mr Hamilton was involved in an accident, and the back of his motor vehicle was damaged. When he appeared before the registrar, he explained that the main account books were in the trunk of the motor vehicle at the time of the accident and, as a result, became soaked in petrol and were inadvertently thrown away. The judge, at first instance, did not accept that explanation and found that Mr Hamilton still had the relevant books up to the date he was ordered to

produce them. As such, Mr Hamilton was committed to prison. His subsequent application before the same judge to be released was unsuccessful on the basis that there were two possibilities: either Mr Hamilton still had the books, or he did not, whether by reason of loss, destruction, transfer to someone else, or otherwise.

[32] On a successful appeal, Mr Hamilton was immediately released. Their Lordships considered Mr Hamilton's evidence that he could not comply with the court's order to produce certain books related to the company. They held that there was no evidence proving beyond reasonable doubt that Mr Hamilton still had the books when he was ordered to produce them and failed to do so.

[33] Similarly, there were two equally likely possibilities before Daye J. Either the appellant deliberately refused to comply with the interim order, or she simply was incapable of complying with it. The interim order granted the respondent custody, care, and control of MDM until the claim was determined. There was no order granting any type of guardianship or access to the appellant with respect to MDM. Even if the respondent's case were to be accepted, that is, that the appellant knew the whereabouts of MDM and had contact with LR, for the reasons advanced by her (the legal restrictions attending the movement of a minor by someone not his parent), it is doubtful that she could lawfully retrieve him from his mother and return him to this jurisdiction.

[34] In the absence of reasons for Daye J's decision, we did not know if due consideration was given to those two equally likely possibilities, in particular the appellant's limitations in having MDM returned to the jurisdiction in compliance with the interim order. Furthermore, the respondent would have had to prove beyond reasonable doubt that the appellant not only had the means to comply with the interim order but that she deliberately disobeyed it. This court was not aware of any evidence presented to support his assertion.

[35] One of the purposes of a contempt order for breach of a court order is to ensure future compliance with that order. If, as in the circumstances of this case, the person

against whom the committal order is made is unable to legally comply with the court's order, then it is futile. The irrefutable evidence before the court is that MDM was in his mother's custody. The appellant, being neither a parent nor guardian, would, therefore, be in breach of the interim order by reason of the conduct of another (LR). I formed the view that the decision to commit the appellant to prison for breach of the interim order was inappropriate and demonstrably wrong.

[36] The refusal of the application to discharge the committal order is likewise not on sound footing. Having considered that application, Thomas J had this to say when she delivered her decision (taken from the notes of evidence):

> "Application is denied. Applicant does not come within **Rule 53.18**. There is no basis for discharge. Proper procedure should have been followed with [sic] the order of Hon. Justice Daye should have been appealed. The Applicant having already been sentenced. Sentence was suspended on the basis that specified conditions in the Order be fulfilled and permission given for an Application to be made for discharge only on the basis that those conditions be fulfilled. The Applicant having not satisfied these conditions is not entitled to Discharge under the Rule."

[37] In her affidavit in support, the appellant averred that she had made several unsuccessful attempts to contact LR. Furthermore, she did not know where LR and MDM reside or how to locate them. If this was accepted as true, then, because she did not have access to or custody of MDM and could not locate or contact him, she could not comply with the interim order.

[38] It was open to Thomas J to consider that evidence and determine whether the committal order should be discharged. She was not bound by Daye J's order stipulating that the appellant could apply to the court to purge her contempt by the reduction or discharge of the sentence upon complying with the interim order. Being a judge of concurrent jurisdiction, she was not bound or restricted as another judge considering that application, by the orders of Daye J (see **Strachan v The Gleaner Company Limited & Another** [2005] 1 WLR 3204 and section 6(1) of the Judicature (Supreme Court) Act).

[39] I believed that Thomas J was plainly wrong in her approach to the application before her, and given the circumstances, the decision to deny the application to discharge the committal order was unsustainable.

[40] The decision on this issue disposed of the appeal. However, the two remaining issues were also briefly considered.

Proper party (ground (c))

[41] The issue of whether the appellant was a proper party to the claim was first raised in the court below prior to the decisions of the learned judges. By way of amended notice of application for court orders filed on 12 March 2020, the appellant sought orders to set aside certain paragraphs of the interim order and to be removed as a defendant in the matter. That application was refused.

[42] When the hearing of the application for committal came on before Daye J, the suspended committal order was made only in respect of the appellant. Subsequently, she applied to discharge the committal order against her, and she once again asserted that she was not a proper party to the claim. That application was also refused.

[43] In this appeal, the appellant asked the court to revisit the question of whether she was a proper party to the claim in our determination of the sustainability of the orders of the learned judges.

Submissions on behalf of the appellant

[44] The stance also taken by the appellant in this appeal is that the learned judges both erred in their respective decisions since, ultimately, the respondent had no reasonable prospect of succeeding in his claim against her and of obtaining a final order requiring her to return MDM to this jurisdiction. This was because she is not a parent or guardian of MDM, so a claim against her for custody cannot be sustained under sections 7 and 9 of the Children (Guardianship and Custody) Act . Additionally, it was submitted that since, the appellant does not have the legal right to physical possession of MDM nor

a right to remove him from another jurisdiction, she was not a proper party capable of complying with the court's orders. Reliance was placed on the case of **F v B** (unreported), Supreme Court, Jamaica, Claim No 2010 HCV 2702, judgment delivered 16 September 2011, to support this submission.

Submissions on behalf of the respondent

[45] Conversely, the respondent's position was that the appellant was a party to the agreement made on 30 July 2018, further to which she was handed temporary custody of MDM to travel to the USA. On her return without him, she was "the best and only person" to be brought before the court to give an account of the minor's welfare and whereabouts. Sections 3 and 4 of the Children (Guardianship and Custody) Act , which empower the court to grant guardianship of a minor to an applicant, were cited in support of that contention. Reliance was also placed on section 12 of the Children (Adoption of) Act and the cases of **B v C** and **Re: Application for Guardianship of a Minor Child F** [2016] JMSC Civ 193.

[46] Moreover, Mr Eccleston submitted, this point was raised before on the appellant's amended application for court orders filed on 12 March 2020, and it was dismissed by V Smith J (Ag), who ruled that she was a proper party to the claim. Counsel noted that there has been no appeal of that order. The case of **Hon Gordon Stewart OJ and others v Independent Radio Company Limited and Wilmot Perkins** [2012] JMCA Civ 2 was cited on this point.

Law and analysis

[47] I will begin my analysis by noting that the sections of the Children (Guardianship and Custody) Act relied on by the parties are not relevant to this issue or the decisions being challenged in this appeal. Section 3 speaks to the rights of the surviving parent to guardianship of the child, and section 4 provides for the appointment of a guardian after the death of either or both parents. Section 7 refers to the court's power to make orders as to custody, and section 9 addresses the court's power to make orders regarding disputes between joint guardians. Section 12 of the Children (Adoption of) Act relates to

interim adoption orders. Suffice to say, the respective cases relied on by counsel for the parties are also unhelpful.

[48] By virtue of rule 19.2(4) of the CPR, the court can make an order removing a person as a party if it considers that it is not desirable for that person to be a party to the proceedings. The grounds argued by the appellant in her application to be removed as a party were that she could not fulfil the order since she did not have possession of MDM, was not aware of his location, and was not in contact with her daughter to notify her of the proceedings. Furthermore, she reiterated that she could be criminally charged for forcibly removing MDM from the possession of any of his parents. Notwithstanding, V Smith J (Ag) refused the appellant's application, and she remained a defendant in the matter.

[49] In her application to discharge the committal order, the appellant again asserted, among other things, that she was not a proper party to the claim and could not comply with the interim order since she was not the legal guardian of MDM and did not have custody or access to him.

[50] Whether the appellant is a proper party to the claim is a matter that was raised before the court below and duly adjudicated. The contentions she has relied on in advancing this issue on appeal are identical to her applications in the court below. To my mind, in the absence of an appeal of V Smith J's (Ag) order, the determination of that question for the purposes of this appeal is conclusive between the parties.

[51] While this court is not precluded from reconsidering the suitability of her involvement in the proceedings, given the condensed material before us and, as previously indicated, the first issue being dispositive of the appeal, this question did not detain the court. Therefore, I was content to dispose of it in this manner.

Procedural defects

[52] An order made under Part 53 of the CPR (dealing with committal orders) must be served personally on the party against whom it is made (rules 53.2(5) and 53.3(a)) not

less than seven days before the date fixed for hearing (rule 53.8(1) and 53.8(3)) along with a copy of the evidence in support (rule 53.8(4)). Additionally, the committal order cannot be made unless the relevant court order (that required the party to act within a specified time or not to do an act) was endorsed with a notice in the stipulated terms at the time of service (rule 53.3(b)). The party applying for the committal order must prove service of the relevant order endorsed with the notice (rule 53.7(3)).

Submissions on behalf of the appellant

[53] Miss Black contended that the rules for committal proceedings should be strictly obeyed (citing **Margaret Gardner v Rivington Gardner**, **Gordon v Gordon** [1946] 1 All ER 247 and **Iberian Trust Ltd v Founders Trust and Investment Co Ltd** [1932] All ER 176). In this case, she submitted, , the appellant was not personally served with the application for the committal order, and there was no order from the court dispensing with personal service of the application, in breach of rules 53.10(2) and (3) of the CPR. Since the respondent failed to comply with the requirements of the CPR, she argued that the committal order was wrongly granted and should have been discharged by Thomas J.

[54] Counsel also argued that Thomas J erred when she found that rule 53.18 of the CPR did not apply to an application to discharge a committal order. She submitted that the natural and ordinary meaning of that rule provides that a judge is empowered to hear and determine an application to discharge a committal order.

Submissions on behalf of the respondent

[55] Mr Eccleston, on the other hand, advanced that there was strict compliance with rules 53.10(2) and (3) of the CPR. He submitted that the court was provided with unchallenged evidence that the appellant was personally served with the committal order on 18 January 2020, and her attorneys were served on 7 December 2020 (no submission was made in relation to the service of the application for the committal order). Nevertheless, he argued that in the absence of any prejudice to the appellant, a committal order would not be set aside by reason of any defect where she had a fair trial and there

were valid grounds to make the committal order (relying on the case of **Nicholls v Nicholls** [1997] 2 All ER 97).

[56] Counsel also contended that Thomas J did not err when she ruled that rule 53.18 was inapplicable since there was no evidence that a confiscation order was issued to enforce the interim order. A point, he said, was agreed upon in cross-examination.

Law and analysis

[57] It is beyond question that Part 53 of the CPR is relevant to both the application for the committal order as well as the application to discharge the committal order. That Part is, however, divided into three sections, namely "Section 1 *Committal etc for breach of order*", "Section 2 *Committal for Contempt*", and "Section 3 *General*".

[58] In **Hon Gordon Stewart OJ v Senator Noel Sloley Sr and others** [2011] JMCA Civ 28, Morrison JA (as he then was) examined the difference between a committal order stemming from the breach of a court order and a committal for contempt (sections 1 and 2 of Part 53 of the CPR, respectively). The requirements of sections 1 and 2 were observed to be separate and distinct. He explained:

> "[61] Section [1] of Part 53 is therefore concerned with contempt of court allegedly committed by parties to the order of the court which is said to have been breached, while section 2 is concerned with the wider, general category of contempt which is said to interfere with the due administration of justice."

[59] The committal order made by Daye J was to enforce the court's interim order, which corresponds with section 1 of Part 53 (rules 53.1 to 53.8). In view of this, rules 53.10(2) and (3) of the CPR, which counsel for the parties have referred to in their submissions, fall within section 2, and so, they are not relevant to the present case. The material rule pertaining to service of the application for committal is rule 53.8, which stipulates that notice of the application must be served in accordance with Part 5 of the CPR. Part 5 of the CPR mandates personal service (see rules 5.1, 5.3, 5.4), which can be proved by an affidavit sworn by the server (rule 5.5(1)).

[60] This court was provided with a copy of the affidavit of service deponed by Ms Dianne Small and filed on 23 July 2020 that indicated that, on 14 July 2020, the appellant was personally served at her residential address with the notice of application for committal (filed on 27 February 2020) along with the affidavit of urgency and affidavit of the respondent in support of the notice of application for committal (filed on 27 February 2020) as well as the notice of adjourned hearing filed on 1 April 2020. To my knowledge, that affidavit of service has not been challenged, so there is no basis on which I could find that the application for committal was not properly served on the appellant.

[61] The other purported procedural irregularity asserted by Miss Black is Thomas J's conclusion that rule 53.18 of the CPR was inapplicable to the appellant's case. Rule 53.18, titled "Discharge of person committed", falls under the general scope of section 3 of Part 53. The scope of section 3 is set out in rule 53.12 which clearly establishes that "[t]his Section sets out rules common to applications under Sections 1 and 2 of this Part". Rule 53.18(1) then provides:

> "53.18 (1) The court may, on the application of any person committed to prison under this Part, discharge him or her."

[62] Further to that rule, the appellant sought to have the committal order discharged. Accordingly, based on the general wording of rule 53.18(1), I saw no reason why the appellant could properly have been precluded from utilising the rule to discharge the committal order. Thomas J's contrary finding in this regard can certainly be impugned.

Conclusion

[63] In light of the foregoing, I found that the learned judges had erred in their respective decisions. Following the court's invitation to counsel for the parties to submit on costs, I concurred in the decision of the court that the orders set out at para. [3] above should be made.

LAING JA (AG)

[64] I, too, have read the draft reasons for judgment of V Harris JA and agree.