[2022] JMSC Civ 74

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**[DIVISION]**

**CLAIM NO. C.L. 1994 D. 130**

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|---|---|---|
| **BETWEEN** | **Alexander Drysdale** | **FIRST CLAIMANT** |
| | **WINSTON CLARKE** | **SECOND CLAIMANT** |
| **AND** | **HERMAN FARQUHARSON**<br>**ENRICH GILMORE ALEXANDER GREEN**<br>(Executor in Estate of Phillip Powell deceased) | **DEFENDANTS** |
| | **ENRICO POWELL**<br>**SEAN ALLISTAIR POWELL**<br>(Appointed as the personal representatives of the deceased Phillip Powell, for the purposes of these proceedings pursuant to Part 21.7 of the CPR and by order of the Hon. Ms Justice Straw dated the 4th February 2008) | **DEFENDANTS** |

**IN OPEN COURT**

Mr Kevin Williams instructed by Messrs Grant, Stewart, Phillips & Co for the claimants.

Mr Herbert Hamilton and Miss Monique McLeod instructed by Lightbourne & Hamilton for Mr Enrico Powell.

April 21, 25 and June 9, 2022

**Application to commit for breach of order - Whether applicants complied with requirements of Part 53 - Whether the application should have been commenced by Fixed Date Claim Form - Whether respondent bound by order of the court - What order is appropriate.**

**PETTIGREW COLLINS J**

## THE APPLICATION

**[1]** The claimants/applicants filed a Notice of Application for Court Orders on the 14th of October 2021 seeking the following orders:

1. That the respondent Enrico Powell having been in breach of order dated the 12th of February 2021 issued by the Honourable Mrs. Justice Henry McKenzie shall be forthwith committed to prison for a period of six weeks or such other period as the court shall think fit until the said Enrico Powell shall purge his contempt and comply with the order of the 12th February 2021.

2. In addition to or in the alternative to paragraph 1 hereof that the respondents Enrico Powell and Sean Allistair Powell do pay a fine for being in breach of the order of the 12th February 2021 such fine to be in the amount of five hundred thousand dollars for each day that the said Enrico Powell and Sean Allistair Powell shall remain in breach of the order of the 12th February 2021, such fine to commence on the day next following the date of the order herein.

3. In the alternative and/or in addition to paragraph 1 and/or 2 hereof that the respondents Enrico Powell and Sean Allistair Powell shall have their assets, including but not limited to their interest in the property registered at volume 806 folio 1, confiscated as a consequence of their breaches of the orders made by the Hon Mrs. Justice Henry McKenzie on 12th February 2021.

4. An order authorizing the claimants and/or their duly appointed representative and/or agent to access the property (including accessing the building or structure on the land) registered at volume 806 folio1 located at 19 Norbrook Drive, Kingston 8 in the parish of St Andrew.

5. An order for the purpose of such access of the property and the building on the property the claimants and/or their representative and /or agent shall:

I. not be considered as having committed a trespass to or upon the said property; and

II. at the claimants' instance be accompanied by such security details, inclusive of a member of the Jamaica Constabulary Force, and no member of such security detail shall be taken to have committed a trespass to or upon the said property.

6. Costs of the application to the applicants to be agreed or taxed.

7. Such further and other orders as this Honourable Court deems just in the circumstances of this case.

**[2]** The grounds relied on are the provisions of Civil Procedure Rules (CPR) 45.4 (2) and 53 and the assertion that the respondents and in particular Enrico Powell, have breached certain orders of the Honourable Mrs Justice Henry McKenzie.

**[3]** The relevant orders of Henry McKenzie J which the applicants are seeking to enforce are as follows:

2. On or before the 31st day of March 2021 the defendants (Enrico Powell and Sean Allistair Powell) shall present to the claimants the Grant of Administration De Bonis Non in the estate of Phillip Powell and the original certificate issued by the Commissioner of Stamp Duty and Transfer Tax showing the payment of all duties on or relative to the estate of Phillip Powell.

7. The defendants shall within thirty days of the order herein deliver up to Grant Stewart Phillips and Co, the claimant's attorneys at law, the certificate of title replacing volume 806 folio 1 of the Register Book of Titles.

9. The defendants or any of them or any other person referenced in paragraph 3 of this order shall deliver up possession of the said property to the claimants' attorneys at law within 90 days of the date of the order

herein or such longer period as expressly agreed in writing by the claimants' attorney at law to facilitate the sale and transfer of the property pursuant to this order.

It appears that Enrico Powell was the only respondent served in respect of the present proceedings. On the morning of the commencement of this hearing, he filed an affidavit but that document was not served on the applicants. Counsel for the applicant indicated that he had no knowledge of the contents of that affidavit. **THE ISSUES**

**[4]** The main issue arising is whether the applicants are in compliance with the requirements of part 53 of the Civil Procedure Rules, so as to enable the court to grant the orders sought or any of them. Each relevant sub rule will be examined to see if there was compliance. The court must also consider whether Enrico Powell is bound by the order of the court.

**THE BACKGROUND/EVIDENCE OF ALEXANDER DRYSDALE**

**[5]** Before setting out the orders which it is alleged have been breached, it is necessary to give a brief history of this matter which has meandered through the courts since 1994, albeit with long intervals of inactivity. That history is taken from the affidavit of Mr Alexander Drysdale filed in support of this application on the 26th of October 2021.

**[6]** Both claimants entered into an Agreement for Sale in 1982 with Mr Phillip Powell for the purchase of 44,885 square feet of land owned by him. Phillip Powell is the father of the respondents. That portion of land is part of the lands comprised in certificate of title registered at volume 806 folio 1 of the Register Book of Titles. The civic address for that property is 19 Norbrook Drive Kingston 8. There is a portion of land consisting of 13, 324 square feet which is included in the said certificate of title and which it is not disputed, remains the property of the estate of Phillip Powell deceased. Phillip Powell died before the transaction was completed. I shall on occasions, out of convenience refer to Phillip Powell, Enrico Powell and Sean Allistair Powell by their first names. No disrespect is meant. The applicants will be referred to as the claimants or the applicants and the respondents as the defendants or the respondents.

**[7]** In 1994, the claimants commenced the present claim. It was initially commenced against the executors of the estate of Phillip. The executors, Messrs Farquharson and Green died before the claim came on for trial. On the 4th of February 2008, the Honourable Miss Justice Straw as she was then, made orders pursuant to rule 21.7 of the CPR appointing the respondents, personal representatives of the estate of Phillip for the purposes of the continuation of the claim. They effectively became the defendants in the matter. For some reason unknown, the names of the executors continued to appear in all pleadings and documents subsequently filed in the claim.

**[8]** On the 25th and 27th of January 2010, the matter came before the Honourable Mr Justice Sykes as he was then. On the 27th, he made various detailed orders which if carried out could have disposed of the claim. These orders were made by consent. For reasons that have not been fully explained, the orders of Sykes J were not given effect to.

**[9]** On the 19th of January 2021, an Amended Notice of Application was filed by the claimants. Orders were sought for the sale of the property. The defendants had also filed a Notice of Application for Court Orders on the 26th of January 2021. Pursuant to the defendant's application Henry McKenzie J set aside a transfer that had been signed by the Registrar of the Supreme Court purportedly pursuant to the orders made by Sykes J. Apparently, the condition precedent to the signing of the order based on the orders of Sykes J, had not been fulfilled at the time the Registrar signed the order, hence the basis for the setting aside.

**[10]** On the 12th of February 2021, Henry McKenzie J made a number of orders. Among those orders are the ones in respect of which this application has been brought.

**[11]** Mr Drysdale deponed that the defendants are in breach of the orders of Henry McKenzie J set out above and remain in breach, as at the date of the swearing of his affidavit. He gave viva voce evidence upon being cross examined at the hearing to the effect that they remain in breach.

**[12]** Mr Drysdale deponed and the court observed that the timeline has long passed for compliance with the orders of the court. Mr Drysdale outlined in his affidavit what he described as steps taken in order to find alternative ways to resolve the defendants' non-compliance but stated that he has no alternative method of dealing with the breaches in respect of which he is asking that the committal order be made.

## SUBMISSIONS ON BEHALF OF THE APPLICANTS

**[13]** Mr Williams on behalf of the applicants asked the court to have regard to the fact that the respondent Enrico had full knowledge of the entire proceedings before the court since the beginning of his participation.

**[14]** He referenced the fact that Enrico filed at least three affidavits in the matter: the affidavit in support of the application before Henry McKenzie J, which led to the February 12, 2021 orders, which was filed on the 27th January 2021, his affidavit of February 26,2021 in support of the leave to appeal and that in support of the application for stay of execution filed on the 1$^{st}$ of March 2021.

**[15]** Counsel also directed the court's attention to the relevant provisions of Rule 53 of the Civil Procedure Rules (CPR) as well as to certain passages in the cases of **Margaret Gardener v Rivington Gardener** [2012] JMSC Civ 160 and **Silvera Adjudah v Cherita Lalor** [201] JMCA Civ 52. I will discuss those provisions and cases at an appropriate juncture.

**[16]** It is Mr Williams' submission that the criteria to be satisfied in order for this court to make the orders sought are:

(a) The order itself must be clear and unequivocal and not open to various interpretations;
(b) In order to satisfy the criminal nature of the contempt proceedings, the party disobeying the order must do so in a deliberate and wilful fashion and

(c) In considering the evidence as to whether there has been a deliberate breach of the court order, it must be proven beyond a reasonable doubt.

## RESPONDENT'S SUBMISSIONS

**[17]** Mr Powell's attorneys at law contends that the failure to comply with rule 53.3 (b), that is, to serve an order endorsed with the penal notice is fatal to the proceedings. This is so she says, because the order was not in the circumstances served on the defendant at a time that gave him a reasonable opportunity to do what he was required to do pursuant to the orders as is required by rule 53.3 (c). The defendant emphasizes that the reasonable opportunity to do the acts in compliance with the order must be given so that the acts can be done before the expiration of the time and date by which the defendant is to comply. She relies on **Jamaica Edible Oils & Fats Company Ltd v M.S.A. Tire (Jamaica) Limited** [2013] JMSC 175 paragraphs 8 to 12.

**[18]** The defendant further contends that the contempt alleged against him was not committed within proceedings in the court, as there were no proceedings on March 14 2021, the date when the notice of application to commit the defendant for contempt was filed. She submitted that the phrase "within proceedings in court" in rule 53.10 (1)(a) must be taken to denote the process commenced by the filing of a claim form. She insists that the application ought to have been made by Fixed Date Claim Form pursuant to 53.10 (1)(b). She cited as authority the case of **Stewart v Sloley Sr et al** [2011] JMCA Civ 28.

**[19]** Mr Powell's attorneys also made submissions in this matter that has no place in these proceedings. An example of this is the contention that the defendant was entitled to retain the grant of administration de bonis non in his possession up to May 13 2021, be it noted a date beyond the date by which the order of McKenzie J directed that he should surrender it to the claimants' attorney at law. Counsel also sought to advance by way of written submissions other matters in relation to which evidence was required. The submissions were filed subsequent to the hearing as Miss Mc Leod was not prepared to respond to Mr Williams' submissions on the occasion of the hearing.

**[20]** Counsel further contends that the only evidence presented by the claimants against Enrico is the signing of the affidavits in response to orders of McKenzie J which orders would have permitted the claimants to acquire the defendants' property for J$9,000.00: which is property in relation to which they had a signed agreement to sell for $190,000,00.00. Further, that as an executor of the estate, he had a legal duty to respond to the orders. She further contends that the claimant made no allegations of disobedience or participating in disobedience against Enrico. She asked the court to have regard to what must be proved against a defendant in a case such as this, as was expounded upon by Anderson J in paragraphs 12 and 13 of **Gardner v Gardner** (supra).

**[21]** The court is asked to dismiss the application on the following grounds;

(1) failure of the claimants to comply with the procedural rules –

(a) [not] serving the order with the penal notice before expiry of the orders alleged to have been breached.

(b) commencing the application under Part 11 instead of a Fixed Date Claim Form.

Enrico Powell as a representative appointed by the court pursuant to part 21.7 is not bound by the decisions made by the court or subject to contempt proceedings since he is not a party to the proceedings.

(2) The obligation to perform the orders specified in paragraphs 2, 7 and 9 [of the order of Mc Kenzie J] are far from clear and unequivocal given the conflict of timelines when considered in the context of the option grant[ed] to the defendants.

(3) There is no evidence that Enrico acted in any way which can be characterized as deliberate and wilful in respect of the orders specified. Any delay in complying would be due to his attorneys at law and not Enrico

(4) There is no evidence before the court on which it could reasonably conclude that there was a deliberate breach of the orders beyond a reasonable doubt.

## THE LAW

**[22]** Rule 45.4(2) of the CPR provides that:

> ***"An order for confiscation of assets or committal under paragraph 1(b) or (c) may only be made only [sic] if possession has not been given within the time or by the date specified in the judgment or order**.*

Paragraph 1(b) speaks to a confiscation of assets order under Part 53 and 1(c), to an order for committal to prison also under Part 53.

**[23]** Rule 53.1 of the CPR empowers the court to commit a person to prison or to make an order confiscating assets for the failure to comply with an order requiring that person to do an act, whether within a specified time or by a specified date.

**[24]** Rule 53.2 (5) provides that any order made under this rule must be served in the manner required by rule 53.3 (in the case of an individual judgment creditor).

**[25]** Rule 53.3 states that:

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

**[26]** This last mentioned provision necessarily envisages the serving of the order on the judgment debtor with the penal notice endorsed thereon, prior to the time and date on which he is required to comply. In other words, he must be served with the order at a time that gives the judgment debtor sufficient time to do whatever he is required to do based on the terms of the court order.

**[27]** Rule 53.5 deals with the making of a committal order or confiscation of assets order where the judgment or order was not served. Rule 53.5(2) and (3) state:

> ***(2) "Where the order requires the judgment debtor not to do an act, the court may make a committal order or confiscation of assets order only if it is satisfied that the person against whom the order is to be enforced has had notice of the terms of the order by:***
>
> ***(a) being present when the order was made; or***
>
> ***(b) being notified of the terms of the order by post, telephone, fax or otherwise***
>
> ***(3) The court may make an order dispensing with service of the judgment or order under rules 53.3 or 53. 4 if it thinks it just to do so."***

**[28]** In this case, the defendants were required to do certain acts. Therefore, the provisions of Rule 53.5 (2) which deals with a situation where the judgment debtor is directed **not** to do an act seems clearly not to be applicable in this instance.

**[29]** Rule 53.7 requires the applicant to set out the precise terms of the order which it is alleged were not obeyed and the exact nature of the alleged breach. Further, the application must be verified by affidavit. The applicant is also required to prove service of the order endorsed with the penal notice. Where the applicant is asking the court to dispense with service, he must show that it would be just for the court to dispense with service.

**[30]** By virtue of Rule 53.7:

> (1) ***the application must specify –***
>
> ***(a) the precise term of the order or undertaking which it is alleged that the judgment debtor has disobeyed or broken; and***
>
> ***(b) the exact nature of the alleged breach or breaches of the order or undertaking by the judgment debtor.***
>
> ***(2) The application must be verified by affidavit.***
>
> ***(3) The applicant must prove –***

> (a) ***service of the order endorsed with the notice under Rule 53.3(b) or Rule 53.4(b);***
>
> (b) ***if the order required the judgment debtor not to do an act, that the person against whom it is sought to enforce the order had notice of the terms of the order under Rule 53.5; or***
>
> (c) ***that it would be just for the court to dispense with service***

**[31]** Rule 53.8 provides

> ***(3) The judgment creditor must serve on the judgment debtor or, in the case of a body corporate, the officer against whom it is sought to make a committal order or confiscation of property order notice of the application for the committal order not less than 7 days before the date fixed for hearing.***
>
> ***(4) Where the notice of application is served on the judgment debtor less than 7 days before the hearing the court may direct that in all the circumstances of the case, sufficient notice has been given and may accordingly deal with the application.***
>
> ***(5) The notice of application must be served in accordance with Part 5.***
>
> ***(6) A copy of the evidence in support must be served with the notice of application.***
>
> ***(7) The registry must fix a hearing of the application.***
>
> ***(8) The notice of hearing must be served on the judgment debtor or the officer of a body corporate personally not less than 3 days before the adjourned hearing.***

**[32]** Rule 53.13 sets out the orders that may be made. It states:

> ***Where satisfied that the notice of application has been duly served, the court may-***
>
> ***a) make a committal order for a fixed term against a judgment debtor who is an individual;***
>
> ***b) make a confiscation of assets order against a judgment debtor who is an individual or a body corporate;***

> ***c) make committal order for a fixed term against an officer of a judgment debtor which is a body corporate;***
>
> ***d) make a confiscation of assets order against an officer of a judgment debtor which is a body corporate;***
>
> ***e) adjourn the hearing of the application to a fixed date;***
>
> ***f) accept an undertaking from the judgment debtor or an officer of a body corporate who is present in court and adjourn the application generally;***
>
> ***g) make a suspended committal order or confiscation of assets order on such terms as the court considers just; or***
>
> ***h) dismiss the application,***
>
> ***and may make such order as to costs as it considers to be just.***

**[33]** Section 2 of Part 53 deals with the more general power of the court to commit for contempt. In this case, the relevant provisions seem to be contained in parts 1 and 3.

**[34]** In the case of **Silvera Adjudah**, F Williams JA set out a number of authorities summarizing the relevant law when dealing with committal for breach of a court order. In that case, the appellant's case was dismissed by the Court of Appeal for the primary reason that there was deficiency in the procedure followed in bringing the application for committal. There was no proof of service of the order on the respondent, there was no order with a penal notice endorsed seen among the documents on record. The order to be served was to be so endorsed. The court emphasized the need for strict compliance with the procedural requirements. The court however observed that proof of service of the order and notice will not be necessary where the party said to be in breach appears either in person or by his solicitor based on the proviso to Rule 34 of the then Judicature Resident Magistrates Court Rules and the discretion invested in the Magistrate by virtue of the same proviso to dispense with the need for service if the circumstances so warrant.

**[35]** The relevant principles to be considered were summarized by F Williams JA by reference to a number of decided cases. The summary was as follows:

*12 The authorities show that the courts have taken a largely conservative and cautious approach to committing or attaching persons in this type of proceeding. A summary of a few of the authorities and the principles stated therein will be sufficient to demonstrate this:*

*a) Iberian Trust Ltd v Founders Trust and Investment Co Ltd. [1932] All ER 176 A penal notice is required to be endorsed on an order that is to be served on a respondent in committal proceedings.*

*b) Gordon v Gordon [1946] 1 All ER 247 Since orders for committal and attachment affected the liberty of the subject, proceedings for contempt for disobedience of an order to do something outside the court could only be enforce if the rules relating to the process of committal or attachment had been strictly complied with.*

*c) In Re Bramblevale Ltd. [1970] Ch 128 …where a person was charged with contempt of court, which was n offence of a criminal nature involving the liberty of the subject, his guilt must be prove beyond reasonable doubt … (Per Lord Denning MR i. "Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence [of contempt]is proved beyond reasonable doubt" page 137 D-F ii 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…It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him.*

*d) Stewart v Sloley and Others [2011] JMCA Civ. 28 per Morrison JA (as he then was) at paragraph 37*

> *[37] It seems to me that, from the material provided to the court, the following propositions are uncontroversial:*
>
> *(i) The court's jurisdiction to punish for contempt of court is long established, a "a punitive jurisdiction founded upon this, that is for the good not of the [parties] to the action, but of the public, that the orders of the court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of court" per Rigby LJ in Seaward v Patterson at page 558);*
>
> *(ii) conduct alleged to be in contempt of court may be classified as (a) conduct which involves a breach, or assisting in the breach, of a court and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or*

***more generally either as a continuing process" (Per Sir John Donaldson in Attorney General v Newspaper Publishing page 294);***

***(iv) rules of court requiring the service of an order with a penal notice endorsed thereon in certain specified circumstances, as a precondition to committal or confiscation of assets as the punishment for breach of the order also have a long history, are not to be regarded as wholly technical and must be strictly complied with. (Iberian Trust, Benabo…"***

***e) Dodington v Hudson (1824), Bing 410 – Per Gifford CJ: "All the authorities shew that before an attachment can be enforced, the party proceeded against must be proved to have committed a wilful disobedience of the order of the court…"***

**[36]** In **Margaret Gardener v Rivington Gardener,** Anderson J reiterated the need to establish that the breach has been wilful and that both the actus reus and the mens rea of the contempt must be established to the criminal standard of proof. At paragraph 12 of the judgment, he said the following:

> ***"Therefore, if the circumstances surrounding the breach leave the court uncertain/unsure as to whether in this case the defendant acted in wilful disobedience of this court's earlier interlocutory order, as distinct from some entirely innocent intent, then it means that the claimant has failed to come up to proof and the application for committal must fail."***

At paragraph 13, he continued:

> ***"This court will … have to determine whether the claimant has proven, beyond any reasonable doubt, that the defendant has wilfully either refused to comply with or disobeyed an order of this court."***

**[37]** Later at paragraph 14 he relied in part on the definition of wilful as used in the case of R v Sheppard & another (1980) 3 All ER 899 (H.L.) He observed that in that case, a majority of the House of Lords held that one

> ***"wilfully fails to provide adequate medical attention for a child if he either (a) deliberately does so, knowing that there is some risk that the child's health may suffer unless he receives such attention or (b) does so because he does not care whether the child may be in need of medical treatment or not. See paragraph 17 – 47 of Archbold, 2005. "***

**[38]** The other point of importance is that a defendant has no burden of proof in an application of this kind. He is not required to disprove anything. He must be afforded the benefit of any reasonable doubt.

**ANALYSIS**

**[39]** The relevant rules require that the defendant be personally served with the order requiring him to do or not to do an act (53.3(a)). The defendant's attorneys at law contend that the application and the order were personally served on the defendant for the first time on the $2^{nd}$ of March 2022, when the hearing was fixed for the $7^{th}$ of March 2022. It will be recalled that the defendant was required to comply with the various orders on different dates. He was required to present the grant of administration de bonis non and the original certificate issued by the Commissioner of Stamp Duty on or before the $31^{st}$ of March 2021. He was required to deliver up the certificate of title replacing that registered at volume 806 folio 1 of the Register Book of Title within 30 days of the court order. The deadline for compliance was therefore the $14^{th}$ of March 2021. The delivery up of the property was to take place within 90 days of the court order. The deadline for compliance was therefore the $13^{th}$ of May 2021.

**WHETHER THE CLAIMANT COMPLIED WITH THE PROCEDURE SET OUT IN RULE 53.**

**Was the order with a penal notice endorsed served in accordance with Rule 53.3.**

**[40]** The claimants' attorney at law maintains that the defendant was served with an order with the penal notice endorsed thereon. He asked the court to have regard to the affidavit of Mr Lennox Rose. Mr Rose's evidence is that Enrico Powell was served with the order with the penal notice endorsed. As Mr Williams pointed out, this evidence is not contradicted. It is fully acknowledged that there was no cross examination of Mr Rose. The onus was on the respondent or his attorneys at law to indicate the need for Mr Rose to be present for the purposes of being cross examined if issue was being taken with his affidavit evidence.

**[41]** What cannot be disputed however, is that Enrico was not served with the order prior to the dates or time stipulated for compliance. He was served long after the time for compliance had passed. Mr Williams attempted to urge on the court that the real issue is whether the defendant was personally served with an order with the penal notice endorsed seven days prior to the hearing. The question of whether the respondent was served 7 days prior to the date of hearing and whether he was served with the penal notice within a reasonable time so as to allow him to comply with the orders before the expiration of the time for compliance are separate issues. The former issue will be addressed later.

**[42]** Whilst not specifically saying so, based on the factors relied on, Mr Williams places reliance on Rule 53.5. Rules 53.3 and 53.4 are subject to Rule 53.5. Rule 53.5 (2) governs a scenario where the order required the judgment debtor **not** to do an act. In those circumstances, if the court is satisfied that the person against whom the order is to be enforced has had notice of the terms of the order, then the court may proceed to make a committal order even though the judgment or order has not been served. A number of observations may be made from the foregoing provisions. Firstly, it is only where a defendant is directed by an order to **not** do an act that service may be dispensed with by virtue of the provisions of rule 53.5 (2). The preconditions for being able to make the order

for committal based on rule 53.5(2) are that the person against whom the order is to be enforced has had notice of the order by (a), being present when the order was made or by (b), being notified of the terms of the order by post fax, telephone or otherwise.

**[43]** Secondly, rule 53.5 (3) seems to be free standing and independent of 53.5(2). In other words, the precondition in 53.2 that the order in question must be one requiring the defendant **not** to do an act is not applicable to the provision which follows. It seems to me therefore that by virtue of rule 53.5(3), whether the judgment or order requires the defendant to do an act or not to do an act, then the court may make an order dispensing with service.

**[44]** The situation with which we are faced in this case, is not one where there was no service of the order with the penal notice. Rather, the issue is one of service outside of the time period that would give the judgment debtor (a term which covers the respondent in this case), a reasonable opportunity to do the acts required of him before the expiration of the time set for compliance in accordance with Rule 53.3(c).

**[45]** Mr Williams commended to the court a number of reasons why it should exercise its discretion to dispense with service of the order endorsed with a penal notice in as required by rule 53.3(c).

**[46]** He directed the court's attention to the fact that Enrico had actual knowledge of, and actively participated in the hearing of the application which led to the making of the orders in respect of which the order for committal is being sought. Further, over a ten years' period, he filed multiple affidavits in the matter before the court and specifically referred to those mentioned at paragraph 15 above. Mr Williams also pointed to the evidence that Enrico was present via zoom during the hearing before Henry Mc Kenzie J on the 27th of January 2021, during a hearing before Barnaby J on the 7th of April 2021, as well as during the hearing before the court of appeal on the 19th of April 2021. It is also relevant to state as Mr Drysdale deponed, that there was no stay of execution of the decision of Henry McKenzie J at any point in time since the application for stay was refused by her as well as by the court of appeal.

**[47]** It is the evidence of Mr Drysdale that the defendants pursued an appeal against the orders of McKenzie J. The affiant to the affidavit in support of the appeal was also Enrico. That appeal was unsuccessful in the Court of appeal. A copy of the judgment of the court of Appeal was exhibited to Mr Drysdale's affidavit.

**[48]** In **Hon Gordon Stewart OJ**, Morrison JA after a survey of a number of case said at paragraph 54:

> ***"It therefore seems to me to be clear that, although it is the duty of the court (as is mandated by rule 1.2) to seek to give effect to the overriding objective when interpreting the rules or exercising any powers, under the rules, the court is nevertheless bound, in cases in which the language of a particular rule is sufficiently "clear and jussive" to give effect to its plain meaning, irrespective of the court's view of what the justice of the case might otherwise require."***

**[49]** Rule 53.5 (3) does not stipulate the factors to be taken into consideration when deciding if service in accordance with rule 53.3(c) should be dispensed with. There is no reason why those listed in 53.5 (2) (a) and (b) may not be considered. The rationale of any rule directing that service of an order endorsed with the penal notice be effected on a defendant in sufficient time to permit him to comply with the order must be to alert the defendant of the fact of the order, the time frame within which he is required to comply, as well as the very serious possible consequence of not complying with the order. In this instance, it is not disputed that the first time that an order with the penal notice endorsed was served on Enrico was the second of March 2022. If this court were to say that since the defendant had never been served with an order endorsed with the penal notice in good time for compliance before the arrival of the dates for compliance set by Henry Mc Kenzie J, then the orders cannot be enforced, what it would mean is that the applicants could never again enforce compliance of those particular orders. What it would mean is that a defendant could avoid having to comply with orders of the court by applying for a stay of execution of the order and or file an appeal against the order. Any service upon the defendants of the order with the penal notice would have been futile in the sense that compliance could not have been expected in the face of an application for stay of execution. Being mindful of the application for stay of execution and of the appeal that were pursued, such an interpretation would be impractical. The applicants in this matter

could not have expected compliance during the process of application for stay of execution and while the appeal was pending. The respondents have in effect, received an extension of time within which to comply with the orders.

**[50]** The hearing was fixed for March 7 and then adjourned as indicated, to April 21. Given what the defendants were required to do, the time frame between March 2 and April 21 was relatively short. However, this is where the matters deposed to by Mr Drysdale and emphasized by Mr Williams in his submissions regarding Enrico's knowledge and participation in the process leading up to the making of the orders and the subsequent developments culminating in the dismissal of the appeal become of critical importance. I believe that those are factors that may be taken into consideration in deciding whether to dispense with service strictly as required by rule 53.3 (c), as I am permitted to do based on rule 53.5 (3). Those factors are also relevant in deciding whether the time frame between March 2, 2022 and April 21, 2022 was enough time that gave the defendant a reasonable opportunity after service of the order endorsed with the penal notice, to do what he was required to do.

**[51]** I find that Mr. Enrico Powell, based on his presence during the hearing when the order was made and his active participation in seeking to have execution of the orders stayed, his involvement in appealing the decision of McKenzie J, the fact that the appeal was dismissed, which is a matter I find that he had knowledge of, was totally alert to the developments in the case and was therefore fully aware of the need to comply with the orders of the court. The defendant had full knowledge of the terms of the orders that he was required to comply with. I am fully alert to the fact that the cases speak to the mandatory requirement for service of the order endorsed with the penal notice and in situations where the order requires the judgment debtor to do an act, for service in sufficient time to allow for the doing of the act. I am also alert to the reasons proffered for the need for strict compliance with the rules. See for example paragraph 9 of **Jamaica Edible Oils & Fats Company Ltd. V M.S.A. Tire (Jamaica) Limited**.

**[52]** The respondent had an extended period of time within which to comply with the orders. The claimants are not just seeking to have the defendant committed for not doing

the various acts by the dates stipulated in the order of McKenzie J. The claimants are seeking to have the defendant presently before the court committed for failing to comply as at the date of the filing of the application. I do not believe that I am in violation of the observations of Morrison JA as he was then in **Hon Gordon Stewart OJ v Senator Noel Sloley Snr et al** (supra) when I say that this is one of those instances when the court should seek to give effect to the overriding objective when interpreting the rules or exercising its powers under the rules.

**Whether Rule 53.7 has been complied with**

**[53]** From a perusal of the application, the claimants have specified the precise terms of the orders in relation to which the order of committal is being sought as required by Rule 53.7(1)(a). The nature of the breaches has in my view been sufficiently stated (53.7(1)(b). The application is supported by affidavit evidence (53.7(2)). Service of the order endorsed with the penal notice has been proven 53.7(3)(a). The complaint is with regard to the timing of the service, a matter which has already been addressed. It is not contended that the defendant did not have notice of the terms of the order.

**Whether the defendant was served in accordance with rule 53.8**

**[54]** Rule 53.8(3) directs that the notice of application must be served in accordance with Part V. As far as an individual is concerned, service is to be personal. See Rule 5.1(1) and 5.3. The exceptions to personal service is either compliance with rule 5.13 or 5.14 which respectively explains how alternative service or service by a specified method is to be dealt with. The claimants do not contend that they are relying on Rule 5.13 or 5.14. Rule 5.6 allows for service on a party's attorney at law where the attorney is authorized to accept service on behalf of a party. It does not appear to me that Rule 53. 7 contemplates service on an attorney at law in circumstances where failure to act attracts a sanction such as a committal order. Therefore, service in good time on the defendant's attorney at law was not proper service for the purposes of Rule 53 .8.

**[55]** It is not disputed that Mr Enrico Powell was personally served for the first time with notice of the application before the court, on the 2$^{rd}$ of March 2022. His attorneys at law

had been served previously. The matter was fixed for hearing on the 7th of March 2022. Rule 53.8 (1) directs that the judgment debtor **must** be served with notice of the application for committal not less than 7 days before the date fixed for hearing. It is evident that the defendant was short served in respect to a hearing fixed for March 7, 2022. The minute of order reveals that Miss McLeod was present and represented the defendant on the 7th of March 2022. The matter was adjourned then until the 21st of April 2022. The defendant appeared at the hearing on the 21st of April 2022, on which date, the application was heard. The purpose of the adjournment was apparently to cure the short service. I am of the view that a postponement of the hearing for a period longer than the 7 days rectified the initial short service. Even if I were to be wrong that the adjourned cured the short service, by virtue of the provision of Rule 58.8(2) this court would be quite prepared in the circumstances of this case to say that sufficient notice of the hearing was given.

**Whether the application should have been commenced by Fixed Date Claim Form**

**[56]** Rule 53.10(1)(a) provides that in the case of contempt committed within proceedings in court, the application must be made under part 11, that is, by Notice of Application but in any other case, it must be commenced by Fixed Date Claim Form.

**[57]** The defendant's attorneys at law allege that when this application was commenced, there were no proceedings in the court. The history of this matter makes nonsense of such assertion. Mr Drysdale set out much of the history of the case in his affidavit and Mr Williams gave a useful chronology of the events in this matter. The claim was commenced in 1994.The defendants Sean Allistair Powell and Enrico Powell were made parties to the matter on February 4, 2008. Sykes J made several orders in the matter in 2010. Two applications came on for hearing before Henry McKenzie J in January of 2021. There were applications for stay of execution of those orders as well as an appeal, all of which were unsuccessful. The orders of the court were not obeyed. The claimants are now seeking to have the defendant Enrico committed for disobeying the orders. The defendant's attorney at law seems to be treating the filing of the claimant's amended Notice of Application filed on the 19th of January 2021 as the commencement of the matter. If that is the case, this position is simply and plainly erroneous.

**[58]** The same issue of whether the matter was properly commenced by notice of application arose in the case of **Hon Gordon Stewart v Senator Noel Sloley Sr et al** (supra). Morrison JA as he then was, in addressing the question of what was meant by proceedings, observed at paragraph 41 of the judgment that "***what is required in every case, is careful consideration of the word in the context of the particular enactment in general***" and in that instance, having regard to rule 53.10(1). The Learned Judge of Appeal conducted a brief survey of the various references to "proceedings" in the CPR and referred also to certain provisions in Rule 17.1 and 17.2 and concluded that "proceedings" did not come into being until and unless a claim form had been filed and so in that particular case, the contempt application should have been commenced by FDCF, since there were no proceedings which had been commenced.

**[59]** It is plain that in the instant case, proceedings had commenced and had not been finalized despite the many years that elapsed between the date of the filing of the claim against the executors in 1994 and the filing of the Notice of Application seeking the order for committal.

**[60]** At paragraph 26 of **R's Financial Services Limited and Willy's Investment's Limited V Dennis Rappaport and Robert Griffin** [2019] JMSC Civ. 233, the learned judge said that:

> ***My reading of rule 53.10 (1) in Section 2 of Part 53, is that the phrase "within proceedings" means there are ongoing proceedings which are live before the court, in that they have not been finally determined. I do not understand that phrase to mean that the contempt must have occurred in the course of a hearing. Therefore my understanding of the rule is that a Notice of Application under Part 11 should also be used in matters where the proceedings have been conducted in open court, once there are ongoing proceedings and not just where an application for confiscation of assets has been commenced in chambers.***

At paragraph 29, he made the following observation:

> ***In what circumstances then would a FDCF be required? In my view the FDCF will need to be utilised, for example, where proceedings in a matter have ended, but some order made in those proceedings has been breached and the matter needs to be brought back to open court for contempt proceedings to ensue. A FDCF could also be utilised if***

***there is contempt that occurs in the precincts but not in the face of the court. In those circumstances, a FDCF would clearly be apposite.***

**[61]** It seems to me also that this is an application pursuant to section 1 and not section 2 of Part 53 and there is nothing to indicate that the requirement to proceed by way of FDCF would be applicable to these proceedings, as section 53.10 falls under Section 2. Section 2 seems to be applicable even in cases where the order does not necessarily bind the respondent to the application but where such respondent is a third party who interferes with the due administration of justice. This view that rule 53.10 is applicable in cases where the order does not necessarily bind the respondent to the application is reinforced by the words of Morrison JA in paragraph 61 of **Hon Gordon Stewart OJ v Senator Noel Sloley Sr et al. He said:**

> ***"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."***

That wider general category of contempt can very clearly involve someone not a party to the proceedings in question or a party to any proceedings at all. It is therefore easy to see why an application under part 2 which for example did not involve a party before the court would necessarily have to be brought by way of a Fixed Date Claim Form.

**Whether the defendant is bound by the decision of the court.**

**[62]** The respondent's attorneys at law contend that the respondent was made a party to the proceedings by virtue of the provisions of Rule 21.7 of the CPR. They therefore cite the provision of rule 21.7(5) to say that it is the estate that is bound. Rule 21.3 curiously was also quoted.

Rule 21.3(1) states that where there is a representative claimant or defendant, a judgment or order of the court binds everyone whom that party represents. Sub rules 2 and 3 speak to enforcement against a person not a party to the proceedings.

> ***1) Where there is a representative claimant or defendant, a judgment or order of the court binds everyone whom that party represents.***

> ***2) It may not however be enforced against a person not a party to the proceedings unless the person wishing to enforce it obtains permission from the court.***
>
> ***3) An application for permission must be supported by evidence on affidavit and must be served on each person against whom it is wished to enforce the judgment.***
>
> ***4) ...***

Rule 21.7 deals with the appointment of a representative for an estate.

> ***(1) Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.***
>
> ***(2) A person may be appointed as a representative if that person –***
>
> ***(a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and***
>
> ***(b) has no interest adverse to that of the estate of the deceased person.***
>
> ***(3) ...***
>
> ***(4)…***
>
> ***(5) a decision in proceedings in which the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's estate.***

**[63]** Ultimately, an estate can only act through someone. If there is an order of the court requiring some action, that action can only take place through someone who represents the estate. That someone in this case, is one of two duly appointed representative of the estate. The defendant Enrico is one of two individuals appointed by the court as representative of the estate. There is nothing that I have discerned in these rules which admits of the interpretation that the respondent's attorneys at law contend for. More importantly, the order of McKenzie J at order 2 named Enrico Powell as one of two individuals who was required to comply with the order of the court. At order numbers 7

and 9, it was stated that the defendants should act. It could only be understood in the context that Enrico and Sean Allistair were being directed to act.

**[64]** According to the defendant's attorneys at law, the claimant made no allegation of disobedience against Enrico Powell.

**[65]** It was said further that the obligation to perform the orders in respect of which this application was brought is far from clear and unequivocal. There can be no basis for this assertion. Compliance with the orders required the doing of certain acts by dates which have been stipulated. Order number 2 required the defendant and his brother Allistair Powell to present to the claimant the grant of administration de bonis non in the estate of their father. They were also required to present the original certificate issued by the Commissioner of Stamp Duty and Transfer Tax which reflects the payment of duties relative to the estate of their father. These are documents which were either in their physical possession or in the physical possession of their attorneys at law.

**[66]** The defendant has not offered any information by way of admissible evidence as to why he has not turned over the documents to the claimants or their attorneys at law. In a criminal matter, intent may be inferred from conduct. In circumstances where one is required to do an act such as handing over documents, if the documents are not handed over despite repeated requests and no explanation as to why the documents are not forthcoming is offered, then it may be inferred from that failure to act that the conduct is wilful. I do not in any way seek to detract from the position that it is the claimant who is required to prove the case in order to make this court feel sure that the defendant was in a position to comply with the order but failed to do so, but a claimant cannot in circumstances such as this, be required to explain matters, knowledge of which resides uniquely with the defendant.

**[67]** In this instance, there is evidence from Mr Drysdale that attempts to communicate with the defendant's attorneys at law regarding other aspects of the order such as agreeing on a valuator was met with no response. The claimants utilized other means to achieve the result. The Registrar of the Supreme Court was empowered by the order to

select one of two valuators whose names should have been submitted to her by the parties and so the claimants proceeded in that manner.

**[68]** Order 7 required the defendants to deliver up the certificate of title to the claimants' attorney at law within 30 days of the order. I will address the matter of the delivery up of the certificate of title separately. It is also the evidence that the defendants' attorneys at law were written to on the 23rd of April 2021 regarding the handing over of the certificate of title, the Grant de bonis non, and the original receipts/certificate evidencing payment of estate duties and taxes in relation to the estate of Phillip. Mr Drysdale asserted that he has been advised by his attorneys at law that there was no response to the letter.

**[69]** The defendant's attorneys at law have attempted to put before this court information via submissions which would if accepted as true, adequately explain the absence of the replacement title. That information was not put before the court in an acceptable format. An affidavit was filed on behalf of the defendant on the morning of the hearing but had not been served on the claimant. I have therefore not had sight of the contents. In light of the history of the matter which was outlined to the court on the morning of the hearing and in face of the claimant's opposition to the adjournment I declined to adjourn the hearing of the application. Miss McLeod sought to cross examine Mr Drysdale in an attempt to establish why the orders have not been complied with.

**[70]** In any event, the applicants have not proven beyond reasonable doubt that the respondent was in a position to provide a certificate of title which replaced that bearing volume 806, folio 1. The fact that the order of the court made reference to a replacement for the certificate of title registered at volume 806, folio 1 of the Register Book of Titles, is a clear indication that it was divulged at some point during the proceedings that the certificate bearing volume 806 folio 1 was not then available. Without further evidence I am not able to say that there was a wilful refusal to produce by the date stipulated in the order. Much time has since elapsed and the respondent will now be given further time to produce the duplicate certificate of title.

**[71]** Order number 9 required the defendants or any of them or any person in possession of the property in question to deliver up possession of the property to the

claimant's attorney at law. The evidence regarding the property coming from Mr Drysdale is that it is occupied by tenants. Mr Drysdale also deponed that himself with another as well as a valuator from Allison Pitter & Co attended upon the property for the purposes of carrying out the valuation pursuant to the Feb 12, 2021 order but the tenant seen and spoken to advised that he had been instructed not to allow them access to the property. This information was communicated to Mr Drysdale and the persons accompanying him to the premises after the tenant had advised that he would communicate with the respondents.

**[72]** In cross examination, Mr Drysdale said that the tenant had said that it was Sean who advised him not to give access to the property. When asked who he was saying had committed a deliberate and contumelious breach designed to frustrate the court's order and hinder the sale of the property (at paragraph 28 of his affidavit) his response was that it was Sean. That statement was made with reference to the reported instructions of Sean to the tenant not to allow the team access to the property on the occasion of the visit.

**[73]** The evidence presented reveals that Sean resides outside of the jurisdiction. From previous affidavits given by Enrico in the matter, it was garnered that he resides within the jurisdiction. The orders and certainly that regarding delivering up the property to the claimants was directed at both the defendants as well as at persons who were not before the court to the extent that tenants occupied the property. The onus was on both defendants to act in accordance with the order of the court. It is not enough that the information relayed is that Sean instructed the tenants not to allow access to the property, whether it was only on that particular day or otherwise.

**[74]** Enrico as a representative of the estate is authorized to act in relation to the property. He has done nothing to comply with the order of the court in relation to the delivery up of the disputed property. It is important to note that the order of the court did not as far as the respondents are concerned, dictate that they were to give vacant possession. Again, the only reasonable inference to draw in the absence of some acceptable explanation having regard to the claimant's evidence is that the failure to act is wilful.

**[75]** There is sufficient evidence from the claimants which meet the criminal standard of proof to show that compliance with two of the three orders of the court which the claimants seek to enforce was possible. This does not of course mean that the claimant must show the particular means by which the orders were to be complied with. It is sometimes difficult to establish one's reason for not doing an act. What the claimants have to show therefore, is that the documents in question were available to the defendants and that they failed to hand them over and in the case of possession of the property, that there were no lawful reasons why it could not have been delivered up to them.

**[76]** I believe that the evidence has established to the requisite criminal standard that the failure to act in accordance with the orders of the court except as it relates to the production of the certificate of title, is wilful. That is, there has been a wilful refusal to act. The circumstances of this case do not admit of any other view than that the disobedience is wilful other than in relation to the production of the certificate of title. When one is required to do an act in compliance with an order of the court and offers no explanation for failing to do what he was directed to do then it is a matter of inferences to be drawn from noncompliance. The non - response to request for the documents over time is one fact from which such inference maybe drawn.

**What order is appropriate?**

**[77]** The parties did not at all address this issue. Mr Williams merely indicated the options open to the court. In deciding on an appropriate penalty, I am mindful that the disposal of the matter must be proportionate to the seriousness of the noncompliance complained of. In this instance, the matter has languished before the court for almost three decades. It began with what appeared to be a simple contract for the sale of land. The full details as to why the matter has remained before the court for this long have not been explored in this hearing and is not particularly material. What seems clear enough is that the deliberate failure of the defendant and his brother who is not involved in these proceedings and against whom no order can be made have acted in a manner that has frustrated the claimants' efforts to conclude the matter.

**[78]** The failure to comply with the court's order has deprived the claimants of the benefit of property in relation to which they entered into an agreement for sale well over thirty years ago. Notwithstanding the sale price agreed over 30 years ago, property of very significant value is involved. Decisions from outside of the jurisdiction tend to suggest that that incarceration emanating from civil proceedings ought to be an order of last resort. There is no principle that a penalty of imprisonment cannot be imposed. I think however that an order imposing a penalty involving a fine is equally appropriate. The option chosen should serve to mark the court's disapproval of the disobedience to its order and it should also seek to secure compliance with the order in the future. In all the circumstances, I make the following orders:

**CONCLUSION**

**[79]** The claimants have complied with the relevant provisions of rule 53.7 and 8. The court thinks it prudent that service strictly in accordance with rule 53.3 (c) be dispenses with as is allowed by rule 53.5 (3). The application for committal was properly brought by way of a Notice of Application for Court Orders. It was not required that a Fixed Date Claim Form be filed. The defendant Enrico is bound by the orders of Henry Mc Kenzie J. The court is satisfied beyond reasonable doubt that the respondent Enrico has wilfully breached order numbers 2 an 9 of the orders of McKenzie J made on the 12th of February 2021. The imposition of a fine is a sufficient remedy in the circumstances. An order fixing a new deadline for compliance with order number 7 will be made.

1. Enrico Powell is in breach of order numbers 2 and 9 of the Honourable Mrs Justice Henry McKenzie made on the 12th February 2021.

2. The respondent Enrico Powell shall pay a fine for being in breach of order numbers 2 and 9 of the Honourable Mrs Justice Henry McKenzie of the 12th February 2021, such fine to be in the amount of one million dollars for each fortnight that the said Enrico Powell shall remain in breach of the said orders of the 12th February 2021, such fine to commence on the 10th day of June 2022.

3. The defendant Enrico Powell shall on or before the 30th day of June 2022, deliver up to Grant Stewart Phillips and Co, the applicants' attorneys at law, the certificate of title replacing that registered at volume 806 folio 1 of the Register Book of Titles. If he is unable to deliver up the said certificate of title by or before the 30th day of June 2022, he shall produce to the claimants' attorneys at law, a receipt indicating the instrument number confirming that the lost title application was lodged with the National Land Agency.

4. An order authorizing the claimants and/or their duly appointed representative and/or agent to access the property (including accessing the building or structure on the land) registered at volume 806 folio1 located at 19 Norbrook Drive, Kingston 8 in the parish of St Andrew.

5. Costs of this application to the applicants to be taxed if not sooner agreed.

…………………………..
**A. Pettigrew-Collins**
**Puisne Judge**