In the Supreme Court

In Chambers

Suit No. C.L. 1976/H 022

Between	Halse Hall Ltd. and Hall Gardens Investment Co. Ltd.	Plaintiffs
And	Martina Robinson and H. Boothe	Defendants

Enos Grant for plaintiffs

E.C.L. Parkinson, Q.C., for first defendant.

1977 - May 31, June 1 and 2

Smith, C.J.,

In this action the plaintiffs claimed, inter alia, the recovery of possession of land situate in the parish of Clarendon from the defendants. On April 27, 1976, the plaintiffs entered judgment against the first defendant, in default of defence. The terms of the judgment were that "the plaintiffs do recover against the first defendant possession of the land mentioned in the amended writ of summons and amended statement of claim accompanying the said amended writ of summons, that is to say, land known as 'Dirty Pit' being 65 acres, 30.1 perches, part of Halse Hall in the parish of Clarendon .... "

On January 4, 1977 the plaintiffs took out a summons applying for an order that the first defendant be committed to prison for contempt of court in failing to deliver possession of the land known as 'Dirty Pit' to the plaintiffs notwithstanding the judgment of April 27, 1976. The summons asked, in the alternative, for an

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order that the plaintiffs have leave to issue a writ or writs of attachment against the said defendant for her said contempt. The summons came on for hearing before Wright, J. on March 16, 1977. There was evidence before the learned judge, on affidavit, that on October 13, 1976 the bailiff executed a writ of possession "on the 1st defendant, Martina Robinson, by reading it to her and handed over the land" to the plaintiffs. There was an affidavit by the first defendant dated March 1, 1977 in which she denied that the bailiff put the plaintiffs into possession and said that she was then in possession. At the hearing of the summons the first defendant did not appear and was not represented. An order for the first defendant's committal was made in terms of the summons. On March 29, 1977 a summons was taken out on behalf of the first defendant to set aside Wright, J's order of March 16. This summons came on for hearing before me.

The question that arose for decision at the hearing was whether Wright, J. had jurisdiction to make an order of committal, as distinct from an order of attachment. If he did not, his order was a nullity, the first defendant was entitled, ex debito justitiae, to have it set aside and she could ask the Court which made the order to set it aside in its inherent jurisdiction (see Craig v Kanseen, (1943) 1 All E.R. 108).

There is no express power in the Judicature (Civil Procedure Code) Law (Cap. 177 - 1953 Revised Edition) to order committal for contempt of court resulting from disobedience of an order of the court in its civil jurisdiction. Before 1965, in the United Kingdom R.S.C. Order 42 r. 7 provided as follows :

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> "A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal. "

By R.S.C. Order 42 r. 24 an order of a court could be enforced in the same manner as a judgment under Order 42 r. 7. S. 651 of the Judicature (Civil Procedure Code) Law (hereafter "the Code") is under the heading "Further Proceedings to Enforce Judgments or Orders other than for Payment of Money" and provides as follows :

> "A judgment or order requiring any person to do any act other than the payment of money, or to abstain from doing any act, may be enforced by attachment. "

The section goes on to provide that an application may be either for a writ of attachment or for an order on the person disobeying to show cause why he should not be attached and it lays down the procedure to be followed in each case.

It will be seen that apart from the omission of the words "or by committal" the provisions of s. 651 of the Code set out above are, in all material respects, identical to those of R.S.C. Order 42 rr.7 &24. The alternative application before Wright, J. was made by virtue of the provisions of s. 651. When asked to justify the order of Wright, J., learned counsel for the plaintiffs relied at first on the current (U.K.) R.S.C. Order 52 by way of s. 686 of the Code. He then referred to s. 655 of the Code and relied, in the alternative, either on the inherent power of the court to commit for contempt or on the provisions of Order 42 r. 7 which, it was contended, were in force in Jamaica prior to June 1, 1889, when the provisions of the Code took effect. S. 655 provides as follows :

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> " Nothing hereinbefore contained shall take away or curtail any right existing before the passing of this Law to enforce or give effect to any judgment or order in any manner, or against any person or property whatsoever. "

The current R.S.C. Order 52 appeared first in 1965 and provides for committal only for all cases of contempt of court. It replaced the pre-1965 Order 44, which dealt with proceedings for attachment or committal. The pre-1965 Order 42 r. 7 was replaced by Order 45 r. 5 and the provisions for attachment have been dropped from this rule.

The submissions on behalf of the plaintiffs call for an examination of the history of the Code and, in particular, of s. 651. Prior to the (U.K.) Judicature Act of 1873, which consolidated the several superior courts to constitute one Supreme Court of Judicature, the common law courts and the Chancery courts punished disobedience to their orders and other contempts either by attachment or committal - committal was usually ordered for prohibited acts or breach of an undertaking while attachment was for failure to do an act ordered by the court. Rules of Court made in 1875 and again in 1883 expressly made either process available for a negative or a positive act of disobedience, though for breach of an undertaking committal was still considered to be the appropriate process. The matter is fully set out in the note to <u>In re Evans, Evans v Noton,</u> (1893) 1 Ch. 252. In the words of Mr. Registrar Lavie, at p. 260: "The difference between attachment and committal before the Judicature Act was well established. A man was committed for doing what he ought not to do, and attached for not doing what he was ordered to do. This distinction is, to a great extent, done away with by Order XLII, rule 7, under which a judgment which includes an order (see Order XLII., rule 24),

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requiring a person to do an act other than payment of money, or to abstain from doing anything, may be enforced by attachment or committal." The reference to Order 42 rr. 7 and 24 is a reference to the 1883 rules, which remained in force until 1964. In the 1875 rules the provisions were contained in Order 42 rr. 5 and 20.

The Judicature Law, 1879 did for the superior courts in Jamaica what the Judicature Act of 1873 did for them in the United Kingdom. Following on the Law of 1879 a series of codes were enacted in the same year, viz: the Criminal Code, the Criminal Procedure Code and the Civil Procedure Code. The preamble to the Civil Procedure Code read as follows :

> " WHEREAS it is expedient to provide a complete system of procedure at Common Law and in Equity, to be observed in the Supreme Court of Judicature of Jamaica, as established by the Judicature Law 1879; "

This, obviously, was the first time a code was being enacted here in this form. This Code was repealed by Law 40 of 1888, the Civil Procedure Code, 1888. The new code was, no doubt, enacted because of the new (U.K.) Rules of 1883. It is the Code of 1888 which is still in force today, with the numerous amendments which have been made over the years.

The Code of 1888 was modelled on the (U.K.) R.S.C. of 1883. In most cases the provisions of the rules were repeated verbatim in the Code, save for modifications to fit local circumstances. In some cases two rules of an Order were combined in one section of the Code and in other cases the rules were not followed at all. The section of the Code of 1888, as enacted, which corresponds to s. 651 of the Code in its present form is s. 631. It provided as follows :

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> " Where the Decree is one directing the act to be done in a limited time, and the person directed to do the act refuses or neglects to do it according to the exigency of the Decree, the Decree Holder may apply to the Court for a Writ of Attachment, or for an Order on the person disobeying such Decree to show cause why he should not be attached. "

These provisions, like those of s. 651, were followed in the section by provisions laying down the procedure to be followed on an application. S. 631 was a re-enactment of s. 334 of the Code of 1879. No provision of the Code of 1888, or its predecessor, corresponded exactly with the provisions of the (U.K.) R.S.C. Order 42 r. 7. Indeed, save for ss. 570 to 575 of the Code of 1888, as enacted, which are, in all material respects, in identical terms to Order 42 rr. 20 to 23, 26 and 27, the provisions in the Code, as enacted, relating to execution and, generally, to the enforcement of judgments and orders, were differently framed from the provisions of Order 42 and other provisions of the (U.K.) Rules. This assumes that, like Order 42 r. 7, the provisions of the Rules of 1883 were in the same terms as they appear in the Annual Practice of 1948, which is the earliest set of the (U.K.) Rules that I have been able to find.

By s. 36 of the Judicature Law, 1879 the Chief Justice with the concurrence of the Puisne Judges, was empowered to make Rules of Court insofar as provision was not expressly made by that Law, or by the Civil Procedure Code, or by the Laws regulating criminal procedure. By s. 1 of Law 22 of 1902 the power given by s. 36 of the Law of 1879 was extended to include a power to revoke or amend the provisions of the Code of 1888 (see s. 43(g) of the Judicature (Supreme Court) Law, Cap. 180 - 1953 Revised Edition - omitted from the current Act because of the provisions of Judicature (Rules of Court) Act). By rules made and published

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in the Jamaica Gazette of February 19, 1903, s. 631 of the Code, as enacted, was revoked and, in lieu thereof, the provisions now contained in s. 651 of the Code were substituted. A new form of writ of attachment was also prescribed in the schedule of forms. Whereas the form prescribed in the schedule to the Code, when enacted, required the bailiff to take the person attached before a judge of the Supreme Court to answer "touching his contempt", the new form commanded the bailiff to arrest and apprehend the person named in the writ and take him to the prison named where he was to be received and kept until the further order of the court.

In my opinion, the answer to the submissions made on behalf of the plaintiffs depends on the effect, if any, of the amendment made to the Code in 1903 on the power of the Court to commit for contempt of court where the contempt alleged is the disobedience of an order of the Court made in its civil jurisdiction. The provisions of s. 655 of the Code, quoted above, appeared as s. 635 of the Code as enacted in 1888 and as s. 338 of the Code of 1879 and are, in all material respects, identical to the provisions of (U.K.) R.S.C. Order 42 r. 28. The Code of 1879 was contained in Law 39 of 1879. S. 4 of that Code provided as follows :

> " This Law shall regulate the practice and procedure of the Supreme Court of Judicature in Suits and Proceedings at Common Law and in Equity, <u>in relation to all matters to which it extends</u>. " (The underlining is mine.)

S. 20 of the Judicature Law, 1879 set out the jurisdiction of the newly established Supreme Court of Judicature and s. 21 provided as follows :

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> "Such jurisdiction shall be exercised, so far as regards procedure and practice, in manner provided by this Law, and the Civil Procedure Code, and the Laws regulating Criminal Procedure, and by such Rules and Orders of Court as may be made under this Law; and where no special provision is contained in this Law, or in such Code or Laws, or in such Rules or Orders of Court, with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective Courts from which it is transferred, or by any of such Courts or Judges, or by the Governor as Chancellor or Ordinary. "

The provisions of the two sections just quoted, particularly the latter, show the context in which s. 338 of the Code of 1879 was enacted. They show clearly, in my opinion, that the provisions of the section were only intended to apply to matters not expressly dealt with in the Code of 1879.

S. 4 of the Code of 1879 was not repeated in the Code of 1888 but s. 21 of the Judicature Law, 1879 was in force when the latter code was enacted and, in fact, its provisions are still in force as s. 28 of the Judicature (Supreme Court) Act. So, in my opinion, the provisions of s. 635 of the Code as enacted, and now s. 655, do not apply to matters expressly dealt with in the Code. The result is that when the provisions of s. 651 of the Code were introduced in 1903 disobedience of orders of the court with which the section deals could, thereafter, only be enforced, as a contempt of court, by attachment.

It is quite clear that the draftsman of the rules which, in 1903, amended the Code deliberately selected attachment as the sole procedure to the exclusion of the procedure by way of committal. This is not surprising, for at least two reasons. First of all, in the United Kingdom, writs of attachment were executed by the sheriff and warrants of commitment for disobedience of orders by a tipstaff, an official of the court. We had no similar official in 1903, whereas

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our bailiff corresponded to their sheriff. Secondly, and more importantly, by 1903 in the United Kingdom, as I have said above, either process was available for both positive and negative acts of disobedience as a result of R.S.C. Order 42 rr. 7 and 24. Sir George Jessel, that famous Master of the Rolls, is reported as having said in 1878 that the distinction between committal for contempt and attachment for contempt was practically abolished; that the difference between them seems mainly to be in the more summary process of the former and in the degree of inconvenience and expense attending it (see Harvey v Harvey, (1884) 26 Ch. D. 644 at 654). In Re Bell's Estate, Foster v Bell, (1870) L.R. 9 Eq. 172 at 174, as compared with committal, an attachment was referred to as "the simplest and least expensive process." The departure from the United Kingdom procedure is emphasized by the fact that the form of writ was changed in 1903. The old form was modelled on the form prescribed in the schedule to the (U.K.) R.S.C., which was the form used in the United Kingdom up to 1964. The new form had the same effect as a warrant of commitment then issued in the United Kingdom except that the period of imprisonment was not stated.

The submission based on s. 686 of the Code could not succeed in view of the express provisions of s. 651. Nor could the submission based either on the inherent jurisdiction of the court or on R.S.C. Order 42 r. 7 (assuming it applied in 1889, there being no proof that it did) because of the effect which, in my opinion, the amendment of the Code in 1903 had on the existing law and procedure. It is for these reasons that I granted the first defendant's application and set aside Wright, J's order of March 16.