JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 31/2009

APPLICATION NO. 202/2009

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE MORRISON JA
THE HON. MISS JUSTICE PHILLIPS JA

BETWEEN	**GARTH PEARCE**	**APPLICANT**
AND	**MILFORD TRADING COMPANY LIMITED**	**RESPONDENT**

Gavin Goffe instructed by Myers Fletcher & Gordon for the applicant

Oswald James and Leighton Miller instructed by James & Co for the respondent

4 December 2009, 27 January, 12 February 2010 and 15 April 2011

PANTON P

[1] I agree with the reasons for judgment that have been written by my learned brother, Morrison JA, and have nothing to add.

MORRISON JA

[2] On 12 February 2010, the application to strike out the notice of appeal in this matter was refused. The hearing of the application was treated as the hearing of the

appeal, which was dismissed with costs to the applicant (who was the respondent in the appeal), to be agreed or taxed. These are the reasons that were promised at that time for the court's decision, with profuse apologies for the inordinate, albeit inadvertent, delay.

[3] Before the court was an amended application dated 6 November 2009, filed on behalf of the applicant, by which he sought the following orders:

> (i) that the notice of appeal filed by the respondent be struck out;
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> (ii) in the alternative, that the order made by Harris JA on 29 May 2009, staying execution of the judgment of Master Lindo, delivered on 2 February 2009, pending the hearing of respondent's appeal to this court, be discharged; and
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> (iii) that the applicant should have the costs of this application.

[4] For ease of reference, I will refer to the applicant as 'Mr Pearce' and to the respondent as 'Millford'. Reference will also be made to Mr Alton Brown, who is the managing director of Milford.

[5] The background to the matter may be briefly stated as follows. On 9 June 2006, Mr Pearce and Milford entered into an agreement (which was initially made orally, but was subsequently reduced to writing), for the sale by Milford to Mr Pearce of a Honda CRV motor vehicle. Pursuant to this agreement, Mr Pearce duly paid a deposit of $700,000.00 to Milford, on account of the agreed purchase price of $1,650,000.00, on the basis that Milford would be permitted to use this deposit to purchase the vehicle from its suppliers. It was further agreed that, if for any reason the deposit had to be

returned to Mr Pearce, it would be returned without interest within 90 days of the date of the request for its return. On 26 June 2006, having been advised by Milford that it was unable to complete the sale of the vehicle as agreed, Mr Pearce wrote to Milford formally demanding a refund of his deposit. When this was not forthcoming, Mr Pearce commenced an action in the Supreme Court against Milford claiming a declaration that the contract for the sale of the vehicle had been validly rescinded by him and repayment of the sum of $700,000.00, with interest.

[6] In the course, Milford not having acknowledged service of the claim form and particulars of claim, Mr Pearce applied for and was granted judgment in default of acknowledgment of service against Milford on 11 August 2006. Despite various efforts by and on behalf of Mr Pearce, Milford failed to comply with the judgment by returning the deposit with interest to Mr Pearce. There was firstly an application by Mr Pearce for a provisional charging order to charge the vehicle with payment of the amount due to him under the judgment or alternatively for an order for the seizure and sale of the vehicle. This application resulted in a consent order by Straw J on 9 October 2006, whereby Milford agreed to direct the Jamaica Customs Department to sell any motor vehicle to which it was beneficially entitled then under the control of the department in satisfaction of the debt. This order yielded no result, as it appeared from the customs department that it had no vehicles belonging to Milford under its control. Mr Pearce then took out a judgment summons for an order that Milford pay the debt and, on 17 April 2007, Master Lindo made an order (endorsed with a penal notice) requiring Milford to pay the judgment debt by two equal instalments, on 27 April 2007 and 25 May 2007.

Milford failed to comply with this order and on 24 September 2007, Sinclair-Haynes J ordered payment of the judgment debt within seven days. This order, which was also endorsed with a penal notice, was made in the presence of Mr Alton Brown and when it was not complied with in the time stipulated, Mr Brown was committed to prison for a period of six weeks or until the judgment debt was paid. No payment having been made, Mr Brown duly spent six weeks in prison in accordance with the order of the court.

[7] It is against this background that the matter came back before Master Lindo, on a notice of adjourned hearing of the judgment summons, on 2 February 2009. On this occasion, Mr Brown (who had been personally served with notice of the hearing) was absent and the learned Master made the following order:

> "Mr. Alton Brown, Managing Director of Milford Trading Company Limited, be committed to the St Catherine Adult Correctional Centre for a period of six (6) weeks or until he or the Judgment Debtor pays to the Judgment Creditor the sum of $729,243.34 plus interest at 6% pa from August 11, 2006 and costs of $108,000.00."

[8] By notice of appeal dated 12 March 2009, Milford appealed against the Master's order on the following grounds:

> "(i) The learned Judge erred in law and/or in fact in finding that the [sic] Mr Alton Brown is liable for the judgment debt of Milford Trading Company Limited.
>
> (ii) The learned trial Judge erred in law and/or in fact in finding that the [sic] Mr Alton Brown is in contempt of the order of the court."

[9] By notice dated 12 March 2009, Milford applied to a judge of this court for a stay of execution of Master Lindo's order pending the hearing of the appeal and on 28 May 2009, Harris JA made the order staying execution of Master Lindo's order accordingly, hence the current application by Pearce to the court itself to strike out the notice of appeal or, in the alternative, to discharge Harris JA's order. This application is made on the ground that the notice of appeal was not served on Mr Pearce within 42 days of the order appealed from, contrary to rule 1.11(1)(c) of the Court of Appeal Rules ('the CAR'). Milford's answer to this complaint is that a copy of the notice of appeal was included in the record of appeal, which was served on Mr Pearce's attorneys-at-law within time, thus fulfilling the objective of service, which is to make the other side aware of the proceedings.

[10] By virtue of rule 1.11(1)(c) of the CAR, the time for filing and serving a notice of appeal in a case such as the instant one is fixed at 42 days. However, quite apart from its general powers of management (as to which, see rule 1.7(b)), rule 1.11(2) specifically empowers the court to extend the time for filing and serving notice of appeal.

[11] Mr Gavin Goffe, who appeared for Mr Pearce, referred to and relied on the decision of this court in ***National Commercial Bank of Jamaica Ltd and Another v Donovan Foote*** (SCCA No 104/2006, judgment delivered 4 November 2009) in which, in circumstances not entirely dissimilar to those of the instant case, the respondent's application to strike out a notice of appeal on the basis of non-service under rule

1.11(1)(c), was granted. The appellant in that case also relied unsuccessfully on the fact that the notice of appeal was included in the record of appeal, which had been duly served on the respondent. It was held that there had been no proper service of the notice of appeal as required by the rules and that parties who disregard rules of procedure do so at their peril (see the judgment of Panton P, at page 4).

[12] However, it appears to me that the decision in that case is clearly distinguishable on its facts from the instant case, for at least two reasons, perhaps of unequal strength. In the first place, it should be noted for what it is worth that in this case the record of appeal containing the notice of appeal was served on Mr Pearce's attorneys-at law well within the 42 day period, while in ***NCB v Foote*** it was served well outside of that period. But secondly, and in my view more to the point, under rule 1.11(1)(c) time does not begin to run against a prospective appellant until the expiration of "42 days of the date when the order or judgment appealed against was served on the appellant". There was no evidence in the instant case whether, and if so, when, Master Lindo's order was served on Milford and it is therefore not possible to determine when time began to run against it.

[13] It is for these reasons that I considered this a proper case for the exercise of the court's discretion to hear the appeal, either on the basis of an extension of time pursuant to rule 1.11(2), or, alternatively, on the basis that, the order being challenged on appeal not having been served on Milford, the time for serving the notice of appeal

therefore remained at large. The application to strike out the notice of appeal was accordingly refused.

[14] However, the court considered that this was also a proper case, in the exercise of its general powers of management pursuant to rule 1.7(2)(m), to direct that the hearing of the strike out application should be treated as the hearing of the substantive appeal itself and therefore proceeded to consider Milford's appeal on its merits.

[15] On the issue of whether Master Lindo's order committing Mr Brown to prison in respect of Milford's failure to pay the judgment was properly made, Mr James pointed out that the order had not been made in the open court, and therefore submitted, on the strength of rule 53.11 of the Civil Procedure Rules ('CPR'), that this was a "material irregularity". The result of this, Mr James submitted, was that Mr Brown had not been given a fair opportunity to be heard with regard to his ability to pay the judgment debt.

[16] In response to these submissions, Mr Goffe questioned whether Milford had *locus standi* to bring this appeal, given that the order of the Master affected Mr Brown personally, rather than Milford. In any event, Mr Goffe submitted, the order for committal did not amount to a finding that Mr Brown was liable for Milford's judgment debt; it was rather, "a sanction allowed by the [CPR] for the failure of a director to obey an order of the Court". Mr Goffe referred us on this point to CPR rules 53.4 and 52.2. But further, Mr Goffe submitted, Mr Brown was well aware that there was an order compelling payment of the judgment debt by Milford by a particular date, that the

judgment debt remained unsatisfied, and that he could be liable to imprisonment for that failure.

[17] Rule 53.4 permits the making of a committal order against an officer of a body corporate in certain circumstances as follows:

> "Subject to rule 53.5, the court may not make a committal order or a confiscation of assets order against an officer of a body corporate unless –
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> (a) a copy of the order requiring the judgment debtor to do an act within a specified time or to not to do an act has been served personally on the officer against whom the order is sought;
>
> (b) at the time that order was served it was endorsed with a notice in the following terms:
>
> (c) "**NOTICE: If** [name of body corporate] **fails to comply with the terms of this order it will be in contempt of court and you** [name of officer] **may be liable to be imprisoned or have your assets confiscated.**"; and
>
> (d) Where the order required the judgment debtor or [sic] 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."

[18] In this case, there was clear evidence that the order made on the judgment summons by Master Lindo on 17 April 2007 requiring Milford to pay the judgment debt to Mr Pearce by two instalments was served personally on Mr Brown on 5 May 2007. There was also clear evidence that the order served on Mr Brown was endorsed with

the penal notice, as required by rule 53.4(b). In these circumstances, Milford having had far more than a "reasonable opportunity" to comply with the order by payment of the judgment debt, it appears to me that the conditions laid down in rule 53.4 had been fully satisfied and that Master Lindo, was accordingly entitled (subject to rule 53.11) to make the committal order against Mr Brown.

[19] Rule 53.11(1) provides that the general rule is that an application for a committal order must be made in open court. However, rule 53.11(2) provides that "the court may exclude from the hearing of the application any persons other than the parties or their legal representatives where the court considers it necessary to exclude such persons" in the cases listed in sub-paragraphs (a) to (e) (none of which is applicable to the instant case). Rule 53.11(3) goes on to provide that –

> "Where the court hears an application in private under paragraph (2) and decides to make an order for committal, it must state in open court -
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> (a) the name of the person committed;
>
> (b) the general terms of the nature of contempt of court in respect of which the order has been made; and
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> (c) the term for which that person has been committed."

[20] None of the circumstances contemplated by rule 53.11(2) having arisen in this case, it seems to me that this is clearly a case in which the application to commit Mr Brown should have been made in open court. This not having been done, the question

is therefore whether this failure amounted to, as Mr James submitted, a material irregularity.

[21] In this regard, we were very helpfully referred by Mr Goffe to the case of **Re C (Procedural Error)** [1989] 1 FCR 648 (a decision of the English Court of Appeal). That was a case in which the court considered that, the judge in the court below having determined that the application for committal for breach of a court order ought to be heard in private (pursuant to Ord 52 r 6(1), from which rule 53.11(2) clearly derives), she had fallen into error by not having thereafter complied with the requirement of Ord 52 r 6(2) (which is equivalent to rule 53.11(3)), by making a statement in open court as to the general nature of the contempt for which the committal order was being made and the period for which the contemnor was being committed. The contemnor's appeal, which had been brought on the ground of the judge's error, was nevertheless dismissed, Lord Donaldson of Lymington MR, with whom the other members of the court agreed, saying this (at pages 649-50):

> "I cannot, for my part, see that any injustice has been suffered by the appellant and, therefore, I can see no grounds for setting it aside. It is said that we ought to do so in order to emphasize the importance of justice being administered in public. I do not deny - indeed, I affirm - the importance of that, but I think that we can uphold that principle by re-stating it in this court just as well as by setting aside the committal. I think that to set aside the committal would in fact be an act of injustice, not only to the appellant whose sentence was well deserved but also to the public whose interest lies in ensuring that court orders are obeyed.
>
> There have been many cases in which the importance of strict compliance with the rules in relation to committal has been emphasized and nothing that I say should be taken as in any

> way modifying the traditional views of the court. But it is not every error in procedure which justifies setting aside an order for committal. If there is any doubt about that it was made clear by this court in ***Wright v Jess*** [1987] 1 WLR 1076 at p 1082, following an earlier decision of this court in ***Linnett v Coles*** [1987] QB 555.
>
> In my judgment, we should now remedy the defect in the proceedings by making a statement in accordance with Ord 52 r 6(2), saying that the person committed for contempt was Barbara Carl; that the nature of the contempt was that, having been ordered by the court to refrain from going to or entering or attempting to enter particular premises in London and from approaching or communicating with two people (who were in fact the foster parents of the ward), on 4 November Barbara Carl went to those premises and approached and communicated with the two named people; and that in consequence of that conduct she has been committed to prison for six months."

[22] In coming to this conclusion, the court applied Ord 2 r 1, which provided that a failure to comply with any procedural requirements ("whether in respect of time, place, manner, form or context or in any other respect") should be treated as an irregularity and would not nullify the proceedings or any steps taken in it. CPR rule 26.9, which applies "where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order" (rule 26.9(1)), is, as Mr Goffe pointed out, in similar, if not identical, terms:

> "(2) An error of procedure or failure to comply with a rule practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

> (4) The court may make such an order on or without an application by a party."

[23] In my view, rule 26.9(2) is equally applicable to validate the learned Master's committal order in this case, notwithstanding her not having pronounced it in open court. While this is not a case to which rule 53.11(3) strictly speaking applies (this not having been a case in which the judge had a discretion to hear the application in private), I nevertheless consider that the Master's lapse can and ought to be put right by a statement by this court in conformity with that rule. It seems to me that by adopting this course, this court will adequately satisfy the important principle that justice should generally speaking be administered in public, without spawning what I would consider to be the greater injustice of setting aside the committal order, which, given the history of this matter and the equally important principle that orders of the court should be obeyed, the learned Master was in my view fully justified in making.

[24] These are my reasons for concurring with the order dismissing this appeal with costs to the respondent, as well as the following additional statement pronounced by the court in disposing of the matter: the order of Master Lindo made on 2 February 2009 is affirmed, that is, that Mr Alton Brown, managing director of Milford Trading Company Ltd, be committed to the St Catherine Correctional Centre for a period of six weeks or until he or the judgment debtor pays to the judgment creditor the sum of $729,243.34 plus interest at the rate of 6% per annum from 11 August 2006 until payment plus costs of $108,000.00, whichever is sooner. This order of committal is made, pursuant to rule 53.4 and 53.7 – 53.11 of the Civil Procedure Rules, for the

failure of the judgment debtor Milford Trading Company Ltd to pay the judgment debt to the judgment creditor in accordance with the order of the Master (Ag) made on 17 April 2007.

PHILLIPS JA

[25] I too agree with the reasoning of my brother Morrison JA and have nothing to add.