[2011] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 68/2010

BEFORE: THE HON. MR JUSTICE MORRISON JA
THE HON. MR JUSTICE DUKHARAN JA
THE HON. MRS JUSTICE McINTOSH JA

BETWEEN	**HON GORDON STEWART OJ**	**APPELLANT**
AND	**SENATOR NOEL SLOLEY SR**	**1ST RESPONDENT**
AND	**NOEL SLOLEY JR**	**2ND RESPONDENT**
AND	**GORDON BROWN**	**3RD RESPONDENT**
A N D	**DEBORAH LEE SHUNG**	**4TH RESPONDENT**
A N D	**JAMAICA TOURS LIMITED**	**5TH RESPONDENT**

Donald Scharschmidt QC, Vincent Chen and Jerome Spencer instructed by Patterson Mair Hamilton for the appellant

Walter Scott and Miss Anna Gracie instructed by Elizabeth Salmon of Rattray Patterson Rattray for the 1st and 2nd respondents

Mrs Nicole Foster-Pusey for the 3rd and 4th respondents

Abraham Dabdoub instructed by Dabdoub, Dabdoub & Co for the 5th respondent

13, 14, 15 December 2010 and 29 July 2011

MORRISON JA

The issues

[1] On 19 May 2010, Anderson J made an order striking out an application by the appellant, pursuant to rule 53.10 of the Civil Procedure Rules 2002 ('the CPR'), for orders punishing the respondents for alleged contempt of court. In this appeal (with the leave of the judge), the primary questions for the court's decision are, firstly, whether the application was properly made by notice of application for court orders or whether it ought properly to have been made by fixed date claim form (as Anderson J found to be the case) (rule 53.10), and, secondly, whether the application in respect of the 1st and 2nd respondents was deficient in that they were not served with an order endorsed with a penal notice (as Anderson J also found to be the case) (rules 53.4 and 53.5). In addition, the appeal raises more general questions relating to the scope and extent of the court's power to interpret and apply the CPR in accordance with the overriding objective of the rules (rule 1.2).

The background

[2] The matter has its genesis in a series of electronic mail ('email') correspondence published between October 2007 and May 2008, under the pseudonyms 'Dr Paulette Robinson' and 'Paulette Robinson', which, the appellant claims, contained material that was defamatory of him in several respects. Since that time, the appellant has by various means sought to discover the identity of and to locate the author of the offending publications.

[3] Early in 2009, the appellant received information that the email account from which the allegedly defamatory material had been published had been created using the internet service provided to the 5th respondent, a body corporate. The 1st and 2nd respondents are directors of the 5th respondent, while the 3rd and 4th respondents are attorneys-at-law and members of the firm of Rattray Patterson Rattray, the 5th respondent's attorneys-at-law.

[4] On 10 March 2009, pursuant to a without notice application made by the appellant, Donald McIntosh J made an order that the 5th respondent, "its Directors, officers, servants and/or agents", should allow a search party led by a supervising attorney-at-law appointed by the court, and consisting of, among others, an attorney-at-law representing the appellant, to enter its premises at 1207 Providence Drive, Rosehall, St James, for the purposes specified in the order. The search party was to be allowed to search the 5th respondent's computers, servers or other data storage devices, wherever located, for computer files and/or documents containing the names "Paulette Robinson" or "Gordon 'Butch' Stewart". The order was made on the appellant's undertakings to comply with any order for damages that the court might make in respect of any losses suffered by the 5th respondent as a result of the carrying out of the order and not, without the leave of the court, to use any information or document obtained as a result of the search "for any purpose other than commencing a claim for defamation against the person or persons going by the names Dr Paulette Robinson or Paulette Robinson". The 5th respondent was required to have a representative in attendance when the search was being carried out and was further

required to give the search party access to all its computers, servers and other data storage devices in order to facilitate the search.

[5] At the foot of this order, the following notice was printed:

> "NOTICE: IF YOU FAIL TO COMPLY WITH THE TERMS OF THIS ORDER YOU WILL BE IN CONTEMPT OF COURT AND MAY BE LIABLE TO HAVE YOUR ASSETS CONFISCATED."

[6] The carrying out of this order duly commenced at the 5th respondent's premises on 12 March 2009. The 1st and 2nd respondents were not served with the order and neither of them was present during this search. However, the 4th respondent was in attendance, in her capacity as attorney-at-law for the 5th respondent. On 13 March 2009, before the search was completed, the 4th respondent, for reasons which are not relevant to this appeal, ordered that the search be terminated and that the search party should leave the 5th respondent's premises. The search ended accordingly.

[7] Shortly thereafter, following discussions between the attorneys-at-law representing the appellant and the 5th respondent respectively, an agreement was arrived at on a formula by which the search would be allowed to resume and proceed to completion. This agreement was embodied in a consent order made *inter partes* by Donald McIntosh J on 7 April 2009 (upon which was endorsed a penal notice in identical terms to that which had been endorsed on the first order). Schedule A of this order recorded that "The Applicant's undertaking to file a claim is hereby extended until May 31, 2009" (although the earlier order had not in fact reflected a similar undertaking). Pursuant to this order, the search, which was to be concluded on or before 6 May 2009, was duly

resumed on 8 April 2009, with the 2nd and 4th respondents in attendance. However, despite considerable further progress having been made, another dispute arose between the parties as a result of the 2nd and 4th respondents' insistence, on behalf of the 5th respondent and in consultation with the 3rd respondent, that the appellant should give a further undertaking as to damages before a particular server would be allowed to be cloned. Upon the appellant refusing to give any such undertaking, the search again ended before it was complete.

[8] No claim was filed by the appellant against the 5th respondent, either by 31 May 2009, in accordance with the undertaking given to the court as a condition of the order made on 7 April 2009, or at all. However, as a result of the abortive searches, the appellant took the position that the exercise had been frustrated because of the disobedience by the respondents, among others, of the two orders made by Donald McIntosh J ('the search orders'). By notice of application for court orders filed on 5 November 2009, the appellant therefore sought the following orders against the respondents:

> "1. The assets of Jamaica Tours Limited be confiscated.
>
> 2. The directors, servants and agents of Jamaica Tours Limited, to wit, the 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown be committed to prison for a period not exceeding two moriths.
>
> 3. Alternatively, the assets of [sic] 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown [sic] Respondents be confiscated.

4. The costs of and consequent on the Orders dated March 10 and April 7, 2009 be paid by Jamaica Tours Limited and the 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown.

5. The Costs of this application to be paid by Jamaica Tours Limited and the 1st - 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown."

The relevant rules

[9] In order to appreciate how this application proceeded and for the purposes of the appeal itself, it may be helpful to consider briefly the relevant provisions of the CPR. The CPR, as is now well known, was designed to be "a new procedural code with the overriding objective of enabling the court to deal with cases justly" (rule 1.1(1)). Rule 1.2 provides that "The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules" and rule 1.3 mandates the parties "to help the court to further the overriding objective".

[10] Part 11 of the CPR deals with applications for court orders and expressly contemplates that such applications may be made "before, during or after the course of proceedings" (rule 11.1).

[11] Part 17 deals with interim remedies and rule 17.1(1) empowers the court to grant a number of such remedies, including "(h) an order (referred to as a 'search order') requiring a party to admit another party to premises for the purpose of preserving evidence etc.". Rule 17.2(1) provides that such an order may be made at any time, including "...before a claim has been made", but where the court grants an interim remedy before a claim has been issued, "it must require an undertaking from

the claimant to issue and serve a claim form by a specified date". The application may be granted without notice in specified cases (rule 17.3(2) and (3)).

[12] Part 26 sets out the court's general powers of management in furtherance of the overriding objective. Of particular relevance are rules 26.1(8), which provides that "In special circumstances on the application of a party the court may dispense with compliance with any of these Rules", and 26.9(3), which provides that "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".

[13] Part 53, with which the appeal is primarily concerned, deals with the subject of "Committal and Confiscation of Assets", in three sections. Section 1 has to do with "Committal etc for breach of an order", section 2 concerns "Committal for Contempt" and section 3 is a general section, setting out rules common to applications under both sections 1 and 2.

[14] Section 1 of Part 53 deals with the power of the court to commit a person to prison or to make an order confiscating assets for failure to comply with (a) an order requiring that person, or (b) an undertaking by that person to do an act within a specified time, or by a specific date, or not to do an act (rule 53.1). Such an order may not be made unless the relevant order was served on that person and endorsed at the time it was served with a notice in the following terms (rule 53.3(b)):

"'**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, in the case of an order served on a body corporate, 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 have your assets confiscated';"**

[15] Where a committal order or a confiscation of assets order is sought against an officer of a body corporate, the court may not make the order unless (a) "a copy of the order requiring the judgment debtor to do an act within a specified time or not to do an act has been served personally on the officer against whom the order is sought", and (b) "at the time that order was served it was endorsed with a notice in the following terms:

"**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;**'" (rule 53.4)

[16] Section 2 of Part 53 deals with the exercise of the power of the court to punish for contempt and rule 53.10(1) provides as follows:

"An application under this Section must be made –
(a) in the case of contempt committed within proceedings in the court, by application under Part 11; or

(b) in any other case, by a fixed date claim form, setting out the grounds of the application and supported, in each case, by evidence on affidavit."

The hearing before Anderson J

[17] When this application came on for hearing before Anderson J on 17 May 2010, the respondents took preliminary objections to the matter being heard. In the case of the 3rd and 4th respondents, the basis of the objection was that neither of them had been named in the search orders, which had been directed to the 5th respondent, and that the appellant, instead of proceeding by way of an application for court orders, ought to have commenced separate proceedings against them by way of fixed date claim form. The 5th respondent also took the point that the manner in which the application had been brought was flawed. In the case of the 1st and 2nd respondents, the primary basis of the objection was that the penal notice required by the rules to be served on persons against whom orders for committal are sought was defective.

[18] Anderson J accepted these submissions, ruling on 19 May 2010 that "these applications as presently conceived must be struck out as against the respondents". An order for costs was also made in the respondents' favour. In relation to the 3rd and 4th respondents, the judge noted that they were not themselves subject to the search orders and that there was no allegation that they had personally disobeyed the orders. On that basis, he considered that "it would be significantly more appropriate that they be served with a fixed date claim form which would have allowed for a first hearing and a clarification of the issues to be defended at the time of the committal proceedings". Further, even if the alleged acts of contempt were "within proceedings in court", the judge said, he was not satisfied that an application by way of notice of application for court orders "would do justice to the need for an accused contemnor to be clear as to

the allegation which he must face" (para. 27 of his judgment). As regards the 5th respondent, the judge considered that "it would be equally appropriate for the filing of a fixed date claim form...and for the matter to proceed within the terms of that process" (para. 28). And finally, as regards the 1st and 2nd respondents, the judge accepted that "the penal notice, which is acknowledged to be an indispensable part of the process, was defective..." (para. 31).

The grounds of appeal

[19] From this ruling, the appellant filed the following grounds of appeal:

"1. The Learned Judge failed to determine whether the allegations of contempt against the Respondents were committed within proceedings pursuant to Part 53.10(1)(a) of the Civil Procedure Rules.

2. The Learned Judge erred in concluding that even if the alleged contempt were 'within proceedings in the court' the application to commit the 3rd and 4th Respondents for contempt should be commenced by Fixed Date Claim Form.

3. The Learned Judge erred in not finding that the contempt alleged against the Respondents was committed within proceedings.

4. The Learned Judge erred in concluding that commencing the application to commit for contempt by application under Part 11 against the 3rd and 4th Respondents put them at a disadvantage in that they were not '...made aware of the specific allegations relating to interfering with the administration of justice as opposed to personally breaching the order.. .'

5. The Learned Judge failed to properly exercise his discretion under Rules 26.1(8) and 26.9(3) of the CPR.

6. The Learned Judge erred as a matter of law in finding that an application to commit against the 1st and 2nd Respondents could not be pursued because of the absence of properly worded penal notices directed to them being endorsed on the Orders dated March 10 and April 7, 2009.

7. The Learned Judge erred in concluding that the penal notice endorsed on the orders as filed and served was insufficient for the purposes [sic] Rule 53? [sic] of the Civil Procedure Rules."

The submissions

[20] Detailed skeleton arguments were submitted on behalf of all the parties to the appeal and these were supplemented by expert oral submissions by counsel on all sides. Taking the grounds relating to the 3rd – 5th respondents together, Mr Scharschmidt QC for the appellant submitted on grounds one and two that the application to commit these respondents having been made pursuant to rule 53.10(1), Anderson J was required to determine in the first place whether or not the allegations against them were in respect of acts committed "within proceedings in the court". The judge had failed to do this, erroneously concluding that, even if the contempt had been committed within proceedings in the court, the overriding objective of the rules nevertheless empowered him to disregard the clear, unambiguous wording of rule 53.10(1) and to require that the application in this case ought to have been commenced by way of fixed date claim form. But in any event, Mr Scharschmidt submitted on ground three, the judge had erred in not concluding that the application for contempt in this case had been made "within proceedings". He pointed out that the rules themselves permit a litigant to seek an interim remedy even before a claim is made (as, for instance, the application for search orders in the instant case, which had been made pursuant to rules 17.1(1)(h) and 17.2 of the CPR) and submitted that "once a litigant seeks to invoke the powers of the Court proceedings are in being", it being desirable that the word 'proceedings' be generously interpreted. Further, it was

submitted on ground four that the judge had erred in concluding that, by the application having been brought otherwise than by fixed date claim form, these respondents had been placed at a disadvantage by not having been made aware of the specific allegations being made against them, since the notice of application for court orders had itself contained sufficient detail to enable the respondents to know what it was that was being alleged against them. And finally, as regards the 3rd – 5th respondents, Mr Scharschmidt submitted that the judge had failed to apply his discretion properly in accordance with rules 26.1(8) and 26.9(3) of the CPR, which permitted him to dispense with compliance or to make orders correcting non-compliance with the rules. On this point, Mr Scharschmidt observed that the court was not shackled by procedure and was accordingly empowered to put things right where no injustice has been done.

[21] As regards grounds six and seven, which relate to the 1st and 2nd respondents only, Mr Scharschmidt submitted that the judge had erred in his conclusion that they were not liable to orders for contempt by reason of the fact that appropriate penal notices had not been served on them. The search orders had been properly directed against the 5th respondent (with the appropriate penal notice endorsed) and the 1st and 2nd respondents, as persons who had aided and abetted the breaches of them by the 5th respondent, were themselves liable for contempt. They had not been brought before the court in their capacity as directors of the 5th respondent, but as "third parties that have interfered with the due administration of justice". In this case, so the submission went, the judge had confused the penal notice required to be endorsed

when it is intended to fix the officers of the company with the obligation to see to it that an order is obeyed by the company (rule 53.4), with the penal notice simply requiring that company to obey the order (rule 53.3). This was a point which Mr Chen, who appeared with Mr Scharschmidt for the appellant, pursued further in a brief, but very helpful analysis of the provisions of Part 53.

[22] In support of these submissions, Mr Scharschmidt referred us to a number of authorities, prominent among which was ***Seaward v Paterson*** [1897] 1 Ch. 545. That was a decision of the Court of Appeal, on appeal from a decision of North J on a motion to commit for contempt the defendant, as well as two other persons, who were neither named in an order granting an injunction nor were parties to the action, for disobedience of the injunction. North J found on the facts that the defendant was liable to committal on the basis of his own breach of the injunction and that the two other persons were also liable to committal, on the basis that they had aided and abetted the defendant in breaching the injunction.

[23] On the appeal of one of the aiders and abettors, the issue was whether the judge had been correct to assume the jurisdiction to make an order against him, notwithstanding the fact that there was no injunction against him. The court was unanimously of the view that it had an undoubted jurisdiction to commit for contempt a person not included in an injunction or a party to the action who, knowing of the injunction, aids and abets a defendant in committing a breach of it. This is how Lindley LJ stated the basis of this jurisdiction (at page 554):

> "There is no injunction against him – he is no more bound by the injunction granted against [the defendant] than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this – not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the Court at defiance, and deliberately treating the order of the Court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction, which has a technical meaning."

[24] Thus, in the instant case, Mr Scharschmidt submitted, the application against the 1st, 2nd, 3rd and 4th respondents fell within the principle enunciated by Lindley LJ in the foregoing paragraph. To make the same point, Mr Scharschmidt also referred us to ***Attorney General v Newspaper Publishing plc and others*** [1987] 3 All ER 276, 302, in which Sir John Donaldson MR distinguished between "the category of contempt which consists of disobeying or assisting in the disobedience of an order [and] the general category of contempt, namely interfering with the due administration of justice". The test of contempt or no contempt in this category, the Master of the Rolls went on to observe, is "simply whether the alleged contemnor knowingly interfered with the due administration of justice by the court". None of the traditional safeguards, such as "personal service of the order, the indorsement of a penal notice on the order and the care which is taken to ensure that the conduct complained of constitutes a breach of the express terms of the order...has ever been applied, or could apply, in [this] category".

[25] Mr Scharschmidt also referred us to ***Hannigan v Hannigan*** [2000] 2 FCR 650, which was a case in which, a claim having been started using the wrong form and containing several errors in other documentation, an application to strike it out was made by the defendant. The Court of Appeal refused the application, Brooke LJ pointing out (at para. 36) that, "CPR 1.3 provides that the parties are required to help the court to further the overriding objective, and the overriding objective is not furthered by arid squabbles about technicalities such as have disfigured this litigation and eaten into the quite slender resources available to the parties". Similar sentiments are to be found in ***Hertsmere Primary Trust and Ors v The Estate of Rabindra-Anandh and anor*** [2005] EWHC 320, ***Medical and Immuniodiagnostic Laboratory Ltd v Dorett O'Meally Nelson*** [2010] JMCA Civ 42 (per Phillips JA at para. [43]), and O'Hare and Browne, Civil Litigation (12th edn, para. 1.011), to all of which we were also referred by Mr Scharschmidt. Thus in the instant case, it was submitted, the judge had erred by failing to take into account the overriding objective in several respects, such as, whether the respondents would have been in any way prejudiced by the use of a notice of application instead of a fixed date claim form; the considerable amount of time, expense and the court's resources that had been allocated to the matter; the need to hear and determine applications such as the instant one expeditiously; and the fact that the respondents had waited until the morning of the hearing before taking their preliminary objections.

[26] In their written submissions, counsel for the appellant had also made reference

to ***Vinos v Marks & Spencer plc*** [2001] 3 All ER 784, although Mr Scharschmidt did not refer to it while he was on his feet. That was a case in which, faced with a rule the meaning of which was plain, May LJ observed (at para. 20) that "Interpretation to achieve the overriding objective does not enable the court to say that provisions which are quite plain mean what they do not mean, nor that the plain meaning should be ignored". Thus, it was submitted, Anderson J had no power in the instant case to "defeat the clear meaning of rule 53.10(1)" by ruling that the application against the respondents should have been brought by way of fixed date claim form on the basis that, even if the contempt alleged was within proceedings in the court, he did not consider that an application under Part 11 would do justice to the respondents.

[27] In ***Harkness v Bell's Asbestos and Engineering Ltd*** [1966] 3 All ER 843, which was cited by the appellant in respect of the meaning of 'proceedings' in rule 53.10(1)(a), the issue was whether an application made to the court by way of affidavit before a writ had been issued could be considered to be a 'proceeding'. In response to a submission that it could not be so considered, Lord Denning MR observed (at page 845) that "Any application to the court, however informal, is a 'proceeding'". (This dictum was also cited with approval by Brooke LJ in ***Harkness v Harkness***, at para. 28.)

[28] Mr Scott for the 1st and 2nd respondents addressed the grounds which affected his clients, which were grounds one, three, six and seven. On ground one, he reminded us that rule 1.1(1) of the CPR states explicitly that "These Rules are a new

procedural code with the overriding objective of enabling the court to deal with cases justly", submitting that the word 'code' was specifically chosen by the framers of the rules to make it clear that the court "needed only to look to the rules (unless ambiguous) to determine how procedures within the civil court needed to be conducted". On this basis, Mr Scott referred us to various provisions of the rules from which, he submitted, it was clear that Anderson J had been correct "in coming to the decision, though not expressly stated, that there were no proceedings before the court and by extension that the Appellant was therefore required to comply with CPR 53.10(1)(b) and file a fixed date claim form". As regards the related ground three, Mr Scott pointed out that even where the court is empowered to grant interim relief under rule 17.1, it can only do so in exceptional circumstances (rule 17.2(2)(b)) and submitted that it is clear from rule 17.2(3), which requires an undertaking from the claimant to issue and serve a claim form by a specified date in all cases in which the court grants an interim remedy before a claim has been issued, that no proceedings come into existence before that has been done. The appellant having been in breach of two undertakings to the court to file a claim, the court would not likely exercise its discretion under rules 26.1(8) or 26.9 in its favour.

[29] On grounds six and seven, Mr Scott referred us to rule 53.4 and submitted that the penal notices in the instant case were not in strict compliance with the rule and that the court has no discretion under the CPR to dispense with the requirement for service on the alleged contemnor of an order appropriately endorsed with a penal notice. It was further submitted that the search orders in the instant case were directed to the 5th

respondent only and that, to the extent that a company can only act through its directors or officers, the directors in this case (the 1st and 2nd respondents) could not be regarded as third parties.

[30] Mr Scott also made the general point that an interference with the due administration of justice was a criminal contempt that would ordinarily be raised, as Sir John Donaldson MR observed in ***Attorney General v Newspaper Publishing*** (at page 294), by the Attorney General as the "guardian of the public interest in the due administration of justice". In Jamaica, it was submitted, this was a matter for the Director of Public Prosecutions who, as Lord Diplock said in ***Grant v Director of Public Prosecutions*** (1980) 30 WIR 246, 306 (endorsing a recommendation of this court), should institute "proceedings for contempt *ex officio* wherever in his discretion he thinks that such a course is necessary to keep the springs of justice undefiled". However, as Mr Spencer pointed out in his reply on behalf of the appellant, ***Chokolingo v Law Society of Trinidad & Tobago*** (1978) 30 WIR 372, to which Mr Scott also referred in this context, provides support for the proposition that, "except where otherwise provided by statute, the right exists in a private individual to enforce criminal law without the consent of the Attorney-General or those authorities whose duty it is to prosecute offenders against criminal law" – per Corbin JA at page 392. Hence, Mr Spencer observed, in both ***Seaward v Paterson*** and ***Lord Wellesley v Earl of Mornington*** (1848) 50 ER 786, contempt proceedings "were pursued by the party in whose favour the order was originally made".

[31] Mr Scott also referred to the cases of ***Iberian Trust Ltd v Founders Trust and Investment Co. Ltd*** [1932] 2 KB 87 and ***Benabo v William Jay & Partners Ltd*** [1941] 1 Ch 52. In the former case, Luxmoore J said (at page 97) that the object of the requirement that a penal notice be endorsed on an order requiring a person to do an act on pain of imprisonment, "is plain – namely, to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences", while in the latter case Morton J said (at page 56) that in an application for leave to issue a writ of attachment "the rules must be strictly complied with". However, Mr Spencer in reply sought to distinguish both these cases, ***Iberian Trust*** primarily on the ground that the basis of the alleged liability of the directors in that case was the company's failure to do what it was required by order to do, and not because they were accused of interfering with the administration of justice, as was alleged against the 1st and 2nd respondents in the instant case; and ***Benabo*** on the basis that, because the order against the company did not have a penal notice directed to the company, a writ of attachment should not have been issued against the directors. ***Moerman-Lenglet and Another v Henshaw*** (The Times, 23 November 1993) and ***Dempster v Dempster*** (The Times, 16 November 1990), which Mr Scott also cited, were distinguished by Mr Spencer on the ground that those cases had nothing to do with the liability of third parties for contempt.

[32] Mrs Foster-Pusey for the 3rd and 4th respondents prefaced her submissions with the reminder that the 3rd and 4th respondents, who were not named in the search orders, which were in any event not directed to them, had provided legal advice to the

5th respondent throughout the search of its premises. Further, that no claim form had been issued in the matter at the time the search orders were made.

[33] Taking grounds one and three together, Mrs Foster-Pusey submitted that they were misconceived, as Anderson J had stated clearly that he accepted her submission before him, which had been that the alleged contempt by the 3rd and 4th respondents was not committed "within proceedings" pursuant to rule 53.10(1)(a). She renewed that submission before us and maintained that the judge had been right in his conclusion on this point. She submitted further that, in the light of the fact that the 3rd and 4th respondents were not parties to the proceedings at the material time and that no order had been directed to them, "their alleged contempt cannot be seen as being and does not fall within the proceedings". In these circumstances, the claim against them ought to have been commenced by way of fixed date claim form and this was therefore a jurisdictional issue and not a technicality. Further, as regards ground two, Mrs Foster-Pusey submitted that the judge had been entirely correct in his conclusion that, even if the alleged contempt had been committed "within proceedings", the application to commit these respondents ought to have been brought by way of fixed date claim form, given the nature of the contempt being alleged against them.

[34] On ground four, which challenged the judge's conclusion that the 3rd and 4th respondents would be put at a disadvantage by the commencement of contempt proceedings by way of notice of application for court orders rather than by fixed date claim form, Mrs Foster-Pusey submitted that the judge had been correct. In seeking to

prove contempt, it was not sufficient merely to allege commission of an act: the act alleged had to be of a certain quality, with the specific intention and with the effect of interfering with the administration of justice and use of a notice of application in these circumstances "did not facilitate the full use of the court's case management powers to weed out cases that should not proceed for various reasons including bad faith and abuse of the process of the court". And finally, on ground five, Mrs Foster-Pusey submitted that the judge had correctly exercised his discretion in the matter and that no basis had been shown to disturb his conclusion that a fixed date claim form was the appropriate method by which to commence the application against the 3rd and 4th respondents in the instant case.

[35] Mrs Foster-Pusey referred us to ***Attorney General v Punch Ltd and Another*** [2001] QB 1028, in which Lord Phillips of Worth Matravers MR made the point (at para. 20) that on a charge of common law contempt, which was a criminal contempt, "Both the actus reus and the mens rea must be demonstrated if the offence is to be made out". Mrs Foster-Pusey also referred us to ***Petramina Energy Trading Ltd v Karaha Bodas Co LLC and Others*** [2007] SGCA 10, a decision of the Court of Appeal of Singapore, in which the solicitors for one of the parties were treated as third parties for the purpose of contempt proceedings, with the result that their liability for contempt rested on different bases from that of an actual party to the action (a proposition with which Mr Spencer in reply for the appellant was happy to agree, pointing out further that the case also supports the appellant's position that "lawyers acting on instructions may be liable for interfering with the administration of justice").

[36] In his skeleton submissions, Mr Dabdoub for the 5th respondent was content to adopt much of what both Mr Scott and Mrs Foster-Pusey had already submitted. However, in his oral submissions before us, he stressed that no claim had ever been filed against the 5th respondent, despite the fact that rule 17.2(3) specifically required the beneficiary of an interim remedy before the issue of a claim to undertake to issue and serve a claim form by a specified date. No such undertaking had been given in the first search order which had been made on 10 March 2009, despite the statement in the second order made on 7 April 2009 that the appellant's undertaking to file a claim was extended to 31 May 2009.

Discussion and analysis

General

[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, as "a punitive jurisdiction founded upon this, that it 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 Paterson***, 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 order and (b) any other conduct which involves an interference with the due administration of

justice, either in a particular case or more generally as a continuing process" (per Sir John Donaldson MR, in ***Attorney General v Newspaper Publishing,*** page 294);

(iii) liability for conduct falling into category (b) arises out of the duty of all members of the public "not to interfere with, and not to obstruct, the course of justice" (per Lindley LJ in ***Seaward v Paterson***, at page 554); such conduct amounts to criminal contempt and "Both the actus reus and the mens rea must be demonstrated if the offence is to be made out" (per Lord Phillips MR in ***Attorney General v Punch***, at para. 20 and see also Balcombe LJ in ***Attorney General v Newspaper Publishing***, at page 313);

(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***);

(v) any interference with the due administration of justice is a criminal contempt, proceedings in respect of which should ordinarily be issued by the Director of Public Prosecutions *ex officio* whenever in her discretion she thinks it necessary to do so; but generally, except where otherwise provided by statute, a private individual may institute such proceedings of his own motion without the consent of the Director of Public Prosecutions;

(vi) in civil proceedings, the court's undoubted jurisdiction to punish for contempt is now to be invoked in accordance with the provisions of Part 53 of the CPR.

[38] Against this background, I now come to the grounds of appeal themselves.

Grounds one, two, three and four

[39] It will be convenient to take these grounds together. The complaint in ground one is that Anderson J failed to determine whether the acts of contempt alleged against the respondents were committed "within proceedings", pursuant to rule 53.10(1)(a) of the CPR. That rule provides, it will be recalled, that the application under section 2 of Part 53 must be made by notice of application for court orders in the case of contempt committed "within proceedings in the court". This is what Anderson J said on this aspect of the matter (at para. 27):

> "With respect to the respondents Brown and Lee-Shung, it is not at all clear to me that they have been made aware of the specific allegations relating to interfering with the administration of justice as opposed to personally breaching the order, if Mr Chen's formulation concerning aiding and abetting is to be accepted. They were not the subject of the search order and there is no averment that they personally disobeyed the order. In those circumstances, it would be significantly more appropriate that they be served with a fixed date claim form which would have allowed for a first hearing and a clarification of the issues to be defended at the time of the committal proceedings. I accordingly accept that for these purposes, Mrs. Foster Pusey's submissions in relation to Rule 53.10 (1) are correct. In this case, even if there were [sic] "within proceedings in the court" I am not satisfied that an application under part 11 would do justice to the need for an accused contemnor to be clear as to the allegation which he must face. I would accordingly hold that the application as against Brown and Lee-Shung must be struck out."

[40] While I accept that the judge's findings on this point were not explicit (as they might reasonably have been expected to be, given that this was certainly the burden of the submissions that had been made to him on behalf of the 3rd and 4th respondents), it nevertheless seems to me that, in saying that he accepted Mrs Foster-Pusey's submissions "in relation to Rule 53.10(1)", the judge was indicating his finding that the contempt alleged against them by the appellant was not committed "within proceedings in the court", as required by the rule. On this basis alone, it therefore appears to me, ground one must necessarily fail.

[41] But the more important question, which is at the heart of the appeal, is therefore whether the judge was correct in concluding that the alleged contempt was not within proceedings, which is the question raised by ground three. It is perhaps an unsatisfactory feature of the CPR that, despite several references to 'proceedings', the term is not defined in the rules themselves (nor is it defined in the Interpretation Act). In seeking to discover the meaning of the word as it is used in the CPR, I naturally accept that past pronouncements by judges, particularly one as eminent as Lord Denning MR (albeit it in the context of different rules), are entitled to the greatest of respect and, where possible, unquestioning obedience. That very learned judge considered, it will be recalled, that any application to the court, however informal, was a 'proceeding' (see ***Harkness v Bell's Asbestos***, para. [28] above). However, it nevertheless seems to me that what is required in every case is careful consideration of the word in the context of the particular enactment in general and, in this case, of rule 53.10(1) in particular.

[42] The word makes its first appearance in the CPR in rule 2.2(1), which states that the CPR applies to "all civil proceedings in the court". Rule 2.2(2) goes on to confirm that civil proceedings include judicial review and applications under the Constitution, but rule 2.2(3) specifically excludes from the ambit of the rules, insolvency proceedings, proceedings when the court acts as a Prize Court, and any other proceedings instituted under any enactment, to the extent that those proceedings are regulated by rules made under that enactment.

[43] The rubric to Part 8 of the CPR is "How to Start Proceedings". Rule 8.1(1) provides that "a claimant who wishes to start proceedings must file in the registry of the court...(a) the claim form...", and rule 8.1(2) provides, importantly, that "Proceedings are started when the claim form is filed". Rule 8.1(5) provides that a person who seeks a remedy "(a) before proceedings have been started; or (b) in relation to proceedings which are taking place, or will take place, in another jurisdiction, must seek that remedy by an application under Part 11". Part 17, with which this appeal is in large part concerned, deals with 'Interim Remedies'. Among the interim remedies which the court is empowered to give is "an order (referred to as a 'search order') requiring a party to admit another party to premises for the purpose of preserving evidence etc." (rule 17.1(1)(h)). The search orders made by Donald McIntosh J were in fact made pursuant to this rule. Rule 17.2(1) provides that an order for an interim remedy may be made at any time, "including – (a) before a claim has been made", and rule 17.2(3) provides that "Where the court grants an interim remedy

before a claim has been issued, it must require an undertaking from the claimant to issue and serve a claim form by a specified date".

[44] This limited and purely indicative sample of the rules seems to me to confirm that, under the rules, 'proceedings' do not come into existence until and unless a claim form has been filed and that, whatever label may be attached to the process by which a party is permitted to seek and obtain interim relief pursuant to Part 17, that process does not form part of any 'proceedings' within the meaning of the rules. It therefore follows from this, I think, that the phrase "within proceedings in the court" in rule 53.10(1)(a) must be taken to refer to proceedings in the sense in which the word is used in the rules generally, that is, to denote the process commenced by the filing of a claim form. It must follow further, in my view, that in the instant case, no such process having been commenced as at 5 November 2009, which is the date on which the notice of application to commit the respondents for contempt was filed, the contempt alleged against them was not committed within proceedings in the court and that it was therefore not appropriate for the application, which ought properly to have been made by way of fixed date claim form pursuant to rule 53.10(1)(b), to have been brought by that means. Anderson J was, in my view, entirely correct to have so found and ground three must fail accordingly.

[45] Ground two takes issue with the judge's finding that, "even if there were 'within proceedings in court' [sic] I am not satisfied that an application under Part 11 would do justice to the need for an accused contemnor to be clear as to the allegation which he

must face". In the light of my conclusion on ground three that the application in this case ought to have been made by fixed date claim form, the point raised by this ground is now purely academic. However, it seems to me, for what it is worth, that the appellant is clearly correct on this point. The learned judge obviously approached this aspect of the matter on the footing that the rules empowered him to determine, as a matter of discretion, the appropriate method of bringing a contempt application in a particular case. Rule 53.10(1), which states that an application "must be made" by either one or the other of the two stated methods, depending on the circumstances, does not, in my view, confer any such discretion on the court. In my view, as the appellant submitted, the court has no discretion "to say that provisions which are quite plain mean what they do not mean" (per May LJ in ***Vinos v Marks & Spencer plc***, at para. [27] above), in pursuance of the overriding objective or the court's view of what would best do justice to one or other or both of the parties in a particular case. (This point is more fully explored in my consideration of ground five, at paras [47] – [55] below.)

[46] Ground four, in which the appellant complains that the judge erred in concluding that the application under Part 11 put the 3rd and 4th respondents at a disadvantage in that they were not "...made aware of the specific allegations relating to interfering with the administration of justice as opposed to personally breaching the order", attracts, it seems to me, a similar response. If by this, the judge was intending to convey no more than that this was an additional factor which tended to confirm that an application by way of fixed date claim form was more appropriate than one made by way of notice of

application under Part 11, then the statement is essentially innocuous. However, if what he was suggesting was that this was an additional reason for his decision to that effect, then I would adhere to the view expressed above, that rule 53.10(1) does not invest the judge with discretionary powers in this regard.

Ground five

[47] By this ground, the appellant complains that in upholding the respondents' preliminary objections and striking out the contempt application, Anderson J failed to consider the overriding objective and to apply rules 26.1(8) and 26.9(3) of the CPR. Rule 26.1(8), it will be recalled, provides that in special circumstances the court may dispense with compliance with any of the rules of the CPR, while rule 26.9(3) provides that the court may "put matters right", where there has been any error of procedure or failure to comply with a rule, practice direction or even a court order. I naturally accept, as the rules themselves state and as the authorities relied on by the appellant confirm, that it is the duty of the court to seek to give effect to the overriding objective when interpreting the rules or exercising any powers under the rules. Indeed, as the learned authors of O'Hare and Browne's Civil Litigation (12th edn, page 5) put it, the court is required "to use the overriding objective as the touchstone by reference to which the New Rules are to be interpreted".

[48] ***Hannigan*** and ***Hertsmere Primary Trust*** both provide arresting examples of the kinds of situation that the rules were explicitly designed to mitigate. In *Hannigan*, solicitors were instructed on behalf of a widow to issue a claim against her late

husband's estate to secure a reasonable financial provision. The solicitors were advised by counsel to issue the claim using a 'CPR Part 8 Claim Form (N208)', but they erroneously issued it using the former county court form N208, which was no longer applicable. Consequent upon that error, there were a number of minor procedural errors in the documentation which was filed and served on behalf of the widow, including that the statement of case was not verified by a certificate of truth; there was a failure to include the Royal Coat of Arms; the widow's witness statement was signed in the name of the solicitors' firm rather than by her personally or in her legal representative's own name; and no acknowledgment of service was served. The documentation did, however, set out in full the widow's case and the evidence upon which she relied.

[49] The defendants' successful application to strike out the claim on the basis of these defects was reversed by the Court of Appeal, which considered itself obliged to make an order directing the correction of the solicitors' errors, as to do otherwise would be "the antithesis of justice" (per Brooke LJ, at para. 38). Brooke LJ, who delivered the leading judgment, said this (at para. 36):

> "But one must not lose sight of the fact that the overriding objective of the new procedural code is to enable the court to deal with cases justly, and this means the achievement of justice as between the litigants whose dispute it is the court's duty to resolve. In taking into account the interests of the administration of justice, the factor which appears to me to be of paramount importance in this case is that the defendants and their solicitors knew exactly what was being claimed and why it was being claimed when the quirky petition was served on them. The interests of the administration of justice would have been much better

> served if the defendants' solicitors had simply pointed out all the mistakes that had been made in these very early days of the new rules and Mrs Hannigan's solicitor had corrected them all quickly and agreed to indemnify both parties for all the expense unnecessarily caused by his incompetence. CPR 1.3 provides that the parties are required to help the court to further the overriding objective, and the overriding objective is not furthered by arid squabbles about technicalities such as have disfigured this litigation and eaten into the quite slender resources available to the parties."

[50] In ***Hertsmere Primary Trust***, the claimants wrote a settlement proposal letter to the defendant, but the letter failed to comply with certain formalities required by Part 36 of the CPR. The defendant was aware of the defects but did not provide any details when asked by the claimants' solicitors to do so, until it sought to rely on the defects at trial, counsel on its behalf submitting that it was perfectly proper to withhold the information and to take advantage of the non-compliance at a later date. The court held that, pursuant to rule 1.3, the defendant had been duty bound to assist the court in furthering the overriding objective by cooperating with the claimants and the defendant would not at this stage be allowed to take advantage of what was a pure technicality.

[51] In ***Medical and Immuniodiagnostic Ltd***, a recent decision of this court, the court did not feel able on the facts of the case to intervene on the basis of rule 26.9 of the CPR. However, Phillips JA, who delivered the leading judgment, referred with obvious approval to both ***Hannigan*** and ***Hertsmere Primary Trust***, stating (at para.

[43]) that "The CPR must not be used as an avenue for difficult stances to be taken and a means to increase litigation".

[52] These cases must, of course, be compared with cases like ***Vinos v Marks & Spencer plc*** (to which I have already referred, at paras [27] and [47] above), in which it was held that, although the court must seek to give effect to the overriding objective when interpreting the rules or exercising any power under the rules, the court has no power to interpret specific provisions of the rules otherwise than in accordance with their plain meaning. In his concurring judgment in that case, Peter Gibson LJ put the matter in this way (at para. 26):

> "The construction of the CPR, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the CPR, unlike their predecessors, spell out in Pt 1 the overriding objective of the new procedural code. The court must seek to give effect to that objective when it exercises any power given to it by the rules or interprets any rule. But the use in r 1.1(2) of the word 'seek' acknowledges that the court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischiefs which the CPR were intended to counter were excessive costs and delays. Justice to the defendant and to the interests of other litigants may require that a claimant who ignores time limits prescribed by the rules forfeits the right to have his claim tried."

[53] In the subsequent case of ***Totty v Snowden*** [2001] 4 All ER 577 (in which Peter Gibson LJ was also a member of the court), Kay LJ pointed out (at para. 18) that ***Vinos v Marks & Spencer plc*** had been followed in a number of other decisions in

the Court of Appeal, and observed that, although "[t]he absence of a discretion in such matters can lead to very harsh consequences for those who act for claimants and make relatively small mistakes in this regard in the conduct of the litigation...the cases clearly establish that the court has no discretion to alleviate any such harshness, which in any event arises from a failure to follow the rules". However, in ***Totty v Snowden*** itself, it was held that, in the absence of any express words in the CPR to the contrary, the court had a discretion under the equivalent of rule 26.9(3) to extend the time for service of particulars of claim.

[54] On the basis of these cases, it therefore seems to me to be clear that, although it is the duty of the court (as it is mandated to do 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.

[55] So the question which naturally arises in the instant case is on which side of the line does the requirement in rule 53.10(1)(b) fall? It appears to me that, by the use of the word 'must', the framers of the rules intended to prescribe a mandatory requirement, which it is not open to the court to evade by reference to the overriding objective of the CPR. In other words, the court cannot sanction something which the rule plainly does not permit, by allowing an application for committal for contempt to be made by notice of application under Part 11, otherwise than as permitted by the

express terms of rule 53.10(1)(b). ***Hannigan***, on the other hand, was a case in which the errors made by the widow's solicitors were not only minor and superficial and easily correctible, but were also made in the "very early days of the new rules". In ***Hertsmere Primary Trust***, the errors were of a similar nature and were compounded by the court's obvious disapproval of the conduct of the defendant's solicitors. Both cases are, in my view, distinguishable from the instant case, in which not only is the applicable rule couched in mandatory terms, but it also speaks, as Mrs Foster-Pusey pointed out, to the issue of the court's jurisdiction. I would therefore conclude that ground five cannot succeed.

Grounds six and seven

[56] The appellant's complaint in these grounds is that the judge erred in holding that, in order to commit the 1st and 2nd respondents, a proper penal notice directed at them was required to be served, the submission being that what was being sought by the application was that these respondents be committed to prison for interfering with the due administration of justice by having aided and abetted the 5th respondent to breach the search orders. In these circumstances, it was submitted, they were liable to committal and confiscation of their assets as third parties, who were as such not entitled to the same procedural safeguards, such as service on them of the orders with a penal notice endorsed, as the 5th respondent was, as the actual party enjoined by the order.

[57] Section 1 of Part 53 deals with the power of the court to commit a person to prison or make an order confiscating his assets for failure to comply with (a) an order requiring that person, or (b) an undertaking by that person, to do an act within a specified time or by a specific date, or not to do an act. It is clear that section 1 is referable to the punishment by committal or confiscation of assets of persons who have themselves been enjoined by an order of the court to do or to refrain from doing something. Where that person is an individual, then rule 53.3 provides that the court cannot make an order for committal or confiscation against him or her unless (a) the order has been served personally on him or her, and (b) at the time of service of the order, it was endorsed with a penal notice in the prescribed form, that is to say, that "**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**". Where an order for confiscation of assets for contempt is sought against a body corporate, the order served on that body must also have been endorsed with a penal notice in the prescribed form, that is to say, that "**If you fail to comply with the terms of this order you will be in contempt of court and may be liable to have your assets confiscated**" (rule 53.3(b)). Where a committal order or confiscation of assets order is sought against an officer of the body corporate, rule 53.4 provides that (a) a copy of the order requiring the body corporate to do or to refrain from doing something must have been served personally on the officer against who the order is sought, and (b) at the time when it was served it must have been endorsed with a penal notice in the prescribed form, that is to say, "**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**".

[58] Section 2 of Part 53 on the other hand deals with the more general power of the court to commit for contempt. The only precondition to the bringing of an application for an order to commit for contempt under this section (leaving aside for the moment the issue of whether the contempt alleged was committed within proceedings or not) is that the claim form or the application, stating the grounds of the application and accompanied by a copy of the affidavit in support, must be served personally on the person sought to be punished (rule 53.10(2)). However, the court is empowered to dispense with service if it thinks it just to do so (rule 53.10(3)). Specifically, there is no requirement in section 2 of Part 53 for service of an order, whether endorsed with a penal notice or otherwise, on the person sought to be punished.

[59] The effect of the separate and distinct requirements of sections 1 and 2 of Part 53 of the CPR therefore seems to me to be to preserve the clear distinction made by Lindley LJ in the following passage from his judgment in ***Seaward v Paterson*** (at pages 555 -6):

> "A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the Court for the benefit of the person who got

it. In the other case the Court will not allow its process to be set at naught and treated with contempt."

[60] Lord Phillips MR adverted to the same distinction in ***Attorney General v Punch***, when he observed (at para. 87) that, in cases falling within the latter category, "The contempt is committed not because the third party is in breach of the order - the order does not bind the third party. The contempt is committed because the purpose of the judge in making the order is intentionally frustrated with the consequence that the conduct of the trial is disrupted". This is also, in my view, the distinction which Sir John Donaldson MR sought to make in ***Attorney General v Newspaper Publishing*** (at page 302) between "the category of contempt which consists of disobeying or assisting in the disobedience of an order… [and]…the general category of contempt, namely interfering with the due administration of justice".

[61] Section I 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. In my view, a careful reading of Part 53 makes it clear that the requirement of service of the order which the contempt proceedings are brought to enforce, with a penal notice endorsed, is applicable to the cases falling within section 1, but not to those falling within section 2. This is the category of contempt in respect of which Lord Donaldson MR had observed (in ***Attorney General v Newspaper Publishing***, page 302 – para. [24] above), that none of the "traditional safeguards", such as "personal service of the order, the

indorsement of a penal notice on the order and the care which is taken to ensure that the conduct complained of constitutes a breach of the express terms of the order…has ever been applied, or could apply…". It seems to me that, in any event, by its very nature, the kinds of contempt which might be said to interfere with the due administration of justice (such as disruption of court proceedings, for example) would ordinarily not be amenable to the kind of procedure prescribed in section 1 of Part 53.

[62] So the question which remains is whether the instant case is a case falling within section 1 or section 2 of Part 53. If, as they contend, the application against the 1st and 2nd respondents was brought against them in their capacity as officers of the company, to enforce the 5th respondent's obligation, then service of an order with a penal notice endorsed in the terms prescribed by rule 53.4(b) (see para. [15] above) would have been an essential pre-requisite to the application. But if, as the appellant contends, the application was brought against them as third parties who have interfered with the due administration of justice, then the rules prescribe no similar requirement.

[63] In my view, in the face of the clear terms of the application to commit for failure to comply with court orders which was filed in this matter on 5 November 2009, the appellant's contention that the application was brought against the 1st and 2nd respondents otherwise than in their capacity as officers of the 5th respondent is plainly unsustainable. I am referring in particular to paragraph 8 of the application, which states specifically that "The application is being made pursuant to Rules 53.3, 53.5,

53.7, 53.13 and 53.17" of the CPR, thus specifically excluding the rules falling within section 2 of Part 53 (53.9 – 11), which, as I have attempted to demonstrate, is the section under which allegations of contempt by third parties fall to be determined.

[64] In his judgment, Anderson J had observed (at para. 29) that the only allegation made in the application filed on 5 November 2009 of disobedience of the search orders by either the 1st or 2nd respondent was that the 2nd respondent, together with Miss Lee-Shung and Mr Brown, "voiced their opposition to the continuation of the cloning unless the claimant agreed to give a further undertaking as to damages before a particular server would be allowed to be served [sic] and stopped the cloning when the claimant refused to give this further undertaking" (para. 6 of the application). The single affidavit filed in support of the application by Mr Jerome Spencer on 5 November 2009, does little to improve the position. In the first place, hardly surprisingly, it makes no allegation, as Anderson J observed (at para. 30), "of disobedience or participating in disobedience" against the 1st respondent who, it is common ground, was not present at any time during the attempts to carry out either of the search orders. But secondly, as regards the 2nd respondent (who, it is also common ground, was not present during the search on 12 – 13 March 2009), the only reference to him or to any conduct even remotely attributable to him is to be found in the final two paragraphs of the affidavit (paras 9 and 10), as follows:

> "The search resumed on April 8, 2009 but was again brought to a premature halt this time on April 9 - 10, 2009 by Jamaica Tours Limited, through its servant and agent the 2nd Defendant, as well as its Attorneys-at-Law, Gordon Brown and

> Deborah Lee Shung. This time Jamaica Tours Limited refused to allow the Search Party to clone the server referred [sic] in the [sic] Miss Larmond's report as the Nitix Server without the Claimant signing a written acknowledgment as to the possible losses which could flow if the server were damaged. Miss Larmond again tried to suggest that Jamaica Tours Limited, through the 2nd Defendant and Gordon Brown and Deborah Lee Shung, reconsider its position but it refused.
>
> In the circumstances, I do verily [sic] that the [sic] Jamaica Tours Limited has willfully disobeyed the Orders of the Court and is therefore in contempt. Further, the [sic] Jamaica Tours Limited's conduct has been at every stage been [sic] aided and abetted by the 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown and they too are equally in contempt."

[65] If the application was in fact intended to be made against the 1st and 2nd respondents pursuant to section 2 of Part 53, I would have expected it to have been supported by affidavit evidence (as provided for by rule 53.10(1)) setting out the nature of the conduct alleged against them, bearing in mind that, as Lord Phillips MR pointed out in ***Attorney General v Punch*** (at para. 20), "Both the actus reus and the mens rea must be demonstrated if the offence is to be made out". In the light of the clear statement in the application of the basis upon which it was being made and the absence from Mr Spencer's affidavit of anything to suggest otherwise, it appears to me that Anderson J was fully entitled to conclude that the application in respect of the 1st and 2nd respondents was in fact made against them, pursuant to section 1 of Part 53, *qua* directors and officers of the 5th respondent, as a consequence of the alleged breaches by the company of the search orders. In that event, it was a necessary precondition to the application that they be served with the orders duly endorsed with

the requisite penal notice (rule 53.4(b)). The omission to do so in this case must necessarily be, in my view, as in ***Iberian Trust*** **and** ***Benabo,*** which were both cases in which the copy of the order served on the directors was not endorsed with a penal notice in proper form, fatal to the contempt proceedings against them.

Disposal of the appeal

[66] In the result, although the appellant may be technically correct as regards grounds two and four (see paras [45] and [46] above), I would conclude that he has not made good his challenge to the substance of Anderson J's obviously carefully considered judgment in the court below. In my view, the appeal must accordingly be dismissed, which is the order I propose. I would also order that the appellant is to pay the respondents' costs of the appeal, to be taxed if not sooner agreed.

DUKHARAN JA

[67] I have read in draft the judgment of my brother Morrison JA and agree with his reasoning and conclusion. There is nothing further that I wish to add.

McINTOSH JA

[68] I am in full agreement with the reasoning and conclusion in the judgment of my brother Morrison JA, which I have read in draft. I accordingly have nothing to add.

MORRISON JA

ORDER

Appeal dismissed. Costs to the respondents to be taxed if not agreed.