THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 215 OF 2004

BETWEEN:

ERSIE JOHN
ANDREA JOHN

Applicants

v

MARIA CUPID

Respondent

Appearances: Mr. Emery Robertson for the Applicant
Mr. Carlyle Dougan Q.C. and Mr. Grant Connell for the Respondent

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2005: November 8 & 17
2006: November 23
2007: March 19

RULING

[1] **THOM, J**: This is an application to strike out an application for a committal order.

[2] By Order of the Court made on the 25th day of July 2005, the Respondent was ordered inter alia to reduce the height of a fence on her property situate at Clare Valley, Saint Vincent and the Grenadines by August 15, 2005.

[3] The Applicants allege that the Respondent has failed to comply with the said Order.

[4] At the commencement of the hearing of the application Learned Queen's Counsel for the Respondent submitted that:

(a) The Court should strike out the Claimant's/Applicant's statement of claim. The statement of claim was not served with the Claim Form. The Claimants/Applicants were in breach of an undertaking given on April 6, 2004 to file the Claim Form within seven days and referred the Court to Part 26.3 of CPR 2000.

(b) The application for contempt should be dismissed on the following grounds:

(i) The order of the Court made on the 25th day of July 2005 was entered on the 20th October 2005, that is 14 days after the application was filed. The order ought to have been filed within seven days from the date direction was given to file same pursuant to Part 42.5 of CPR 200.

(ii) The application is made on behalf of the Claimants/Applicants and since there is no representative order or Power of Attorney made and/or filed the application is flawed.

(iii) Paragraph 2 of the motion makes no legal sense.

(iv) The order ought to have been served personally on the judgment debtor pursuant to Part 53.3.

[5] In relation to the first submission that the Claimant's/Applicant's Statement of Claim should be struck out pursuant to Part 26.3 of CPR 2000 there has been no application made by the Respondent pursuant to Part 26.3 of CPR 2000 supported by evidence on affidavit. On an application for committal for contempt for non-compliance with an order of the Court, the Court is concerned with whether the order was complied with – **Isaac v Robertson**. The issue whether the statement of claim should be struck out does not arise for determination.

[6] In relation to the submission that the application was made on behalf of the Applicants, an examination of the application shows that the application is made by the Claimants/Applicants and not on behalf of the Claimants/Applicants as submitted by Learned Queen's Counsel. The affidavit in support of the application is made by the Second Applicant. I find that this submission has no merit.

[7] I agree with Learned Queen's Counsel that paragraph 2 of the Application makes no sense, however, this is due to a typographical error. I find that this does not make the entire application bad in law.

[8] I will deal with the submission that the Order ought to have been filed within seven days and that the order was not personally served together.

[9] Part 42.5(2) provides for a draft of the order to be filed within seven days from the date the direction was given. While Part 42.5(3) provides where a party fails to file an order within seven days then any other party may draw and file the order.

[10] Part 53.3 provides in effect that subject to Part 53.5 the Court may not make a committal order unless the order requiring the judgment debtor to do an act has been served personally and the order must be endorsed with a penal notice. Where the order requires the judgment debtor to do an act within a specified time or by a specified date it must be served in sufficient time to give the judgment debtor a reasonable opportunity to do the act before the expiration of the time. While Part 53.5 empowers the Court to dispense with service under Part 53.3 if it thinks it just to do so.

[11] The exercise of the Court's discretion to dispense with service of the Order was discussed in **Benson v Richards** (2002) 3 AER p. 160 and **Davy International Ltd v Tazzyman** [1997] 1 WLR p. 1256.

[12] In **Benson v Richards** the Court of Appeal of England in considering how the discretion of the Court to dispose with service of an order should be exercised, approved the following statement by Judge Alton at paragraph 29:

> "However in deciding whether to exercise that discretion the Court would need to be satisfied that the purpose of the requirements had been achieved … the Court would have to be satisfied beyond all reasonable doubt that the defendant knew the terms of the Orders relied on, that she was well aware of the consequences of disobedience and that she was aware of the grounds relied on as a breach with sufficient particularity to be able to answer the charge."

[13] The following principles emerge from the above mentioned case:

(a) Before exercising the discretion the Court must be satisfied beyond all reasonable doubt that

(i) The defendant knew the terms of the order.

(ii) The defendant knew the consequences of disobedience of the order.

(iii) The defendant was aware of the grounds relied on as a breach of the order with sufficient particularity to be able to answer the charge.

(b) Where prejudice or unfairness could be caused then the discretion should not be exercised.

[14] I will now apply these principles to the present case.

[15] Was the Respondent aware of the terms of the order? It is not disputed that the Order was not served personally on the Defendant until after the expiration of the time specified in the order that the fence should be removed. Mr. Lauraine Samuel, a Bailiff of the High Court, in paragraph 1 of his affidavit dated the 7th day of November 2005 deposed that the order was served on the Respondent on the 25th day of October 2005. The second Claimant Andrea John at paragraph 2 of her affidavit dated 7th day of November 2005 deposed that the Respondent was present in Court with her Counsel Mr. Grant Connell when the Order was made by the Court. This fact is not disputed. I find that the Respondent was fully aware of the terms of the order of July 25, 2005.

[16] Was the Respondent aware of the consequences of disobedience of the Order? The affidavit of Andrea John the second Applicant at paragraph 2 referred to earlier states in effect that when the order was made it was explained to the Respondent. This is not contradicted. I find that the Respondent was fully aware of the consequence of disobedience of the order.

[17] Was the defendant aware of the grounds relied on as breach of the Order with sufficient particularity to be able to answer the charge? As stated earlier the affidavit of Lauraine

Samuel shows that the Order was served on the 25th day of October 2005. The Respondent filed her affidavit in response to the Application for a committal order on the 1st November 2005. In that said affidavit the Respondent deposed at paragraphs 5 and 6 as follows:

> "(5) That since the Court Order dated 25th July 2005, I have removed 8 6" blocks which I had paved at the extreme end of this said wall in order to place a roof over my garage.
>
> (6) The mason removed the said blocks on the very date of the Court Order."

I am satisfied that the Respondent was in receipt of the Order of Court before she filed her response to the application for committal and she was fully aware of the grounds of breach of the order that were relied on by the Applicants.

[18] Would there be any prejudice or unfairness to the Respondent if the discretion is exercised to dispose with personal service? The Respondent has not alleged any prejudice in her affidavit dated 1st November 2005. Also no submissions were made by Learned Queen's Counsel that the Respondent would be prejudiced.

In **Bell v Tuohy** [2002] EWCA Civ. 423 where the procedural requirement of the penal notice was not complied with the Court of Appeal held:

> "Although one should be taken to ensure that committal proceedings complied with the rules and CCRPD29, a person who was in contempt of court and should otherwise be committed to prison could not expect to avoid being committed simply because of some defect in the procedure that had not prejudiced him. Even where there were many defects, the proper approach was to consider each of the defects relied on and to decide whether they had caused any prejudice or unfairness to the defendant taken separately or together."

[19] I find that there would be no prejudice to the Respondent if the Court exercises its discretion to dispose with personal service.

[20] In **Davy International Limited and others** the Court of Appeal of England held that the discretion to dispose with service could be exercised retrospectively. Having found that the Respondent was aware of the terms of the Order and she knew the consequences of disobedience of the order, she was aware of the grounds of breach of the order relied on

and she would not be prejudiced, I find that it would be just for the court to exercise its discretion and dispense with service of the Order and I so do.

[21] I find that the submissions made on behalf of the Respondent are without merit. The Application to strike out the application for a committal order is hereby dismissed.

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Gertel Thom
HIGH COURT JUDGE