SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2009/002

BETWEEN:

FITZROY WARNER

Appellant

and

HOTEL EQUITY FUND V, LLC
(trading as Four Seasons Resort, Nevis)

Applicant/Respondent

Before:
The Hon. Mde. Ola Mae Edwards — Justice of Appeal

On paper:
Mr. Terence V. Byron for the Appellant/Judgment Debtor
Ms. Midge Morton of Myrna R. Walwyn & Associates Solicitors for the Respondent/Judgment Creditor

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2009: June 8.

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REASONS FOR DECISION

[1] By Notice of appeal filed on 8th April 2009, the appellant in Claim No. NEVHC 2006/0125 appealed the decision of the learned judge in Chambers contained in the order made on 25th February 2009, upon a judgment summons filed on 30th January 2009. The terms of this order are as follows:

> "IT IS HEREBY ORDERED THAT:-
>
> 1. The Judgment Debtor is committed to prison for a term of fourteen (14) days.
>
> 2. The committal is suspended upon payment of the debt by the Judgment Debtor, that is to say, that the Judgment Debtor is to pay $10,000.00 by the 30th day of April, 2009, and thereafter he is to pay the sum of $2,000.00 per month commencing from the 30th day of

May 2009, and continuing thereafter until the judgment debt, interest and all costs orders have been paid in full.

3. The Judgment Debtor is to pay costs to the Judgment Creditor for today in the sum of $750."

[2] The appellant also filed on 8th April 2008, an application for a stay of execution of the order pending appeal.

[3] On 20th April 2009, the respondent/judgment creditor filed a notice of application and submissions to strike out the notice of appeal as a nullity with costs to the applicant and any further relief.

[4] On 30th April 2009, a single judge Creque J.A. granted provisional stay pending the determination of the application to strike out the appeal and adjourned the two (2) applications to 12th May 2009, for the appellant's submissions in response to the application to strike out the appeal.

[5] The order made upon the judgment summons was made pursuant to CPR 52.4 which states:

"52.4 At the hearing of the judgment summons, the court may –
(a) if satisfied that all reasonable efforts have been made to serve the judgment debtor and the –
    (i) judgment debtor is willfully evading service; or
    (ii) summons has to come to the knowledge of the judgment debtor; proceed in the absence of the judgment debtor as if the judgment debtor had been personally served:
(b) receive evidence as to the means of the debtor in any manner that it thinks fit; and
(c) if satisfied that all statutory requirements have been met –
    (i) adjourn the hearing of the summons to a fixed date;
    (ii) commit the judgment debtor for such fixed term as is permitted by law;
    (iii) suspend such committal upon payment of the judgment debt on such dates and by such instalments as the court may order;
    (iv) dismiss the judgment summons; or
    (v) make an order for payment of the judgment debt by a particular date or by specified instalments and adjourn the hearing of the judgment summons to a date to be fixed on the application of the judgment creditor."

[6] CPR 52.5 prescribes that:

> "If the judgment debtor fails to comply with the terms of the judgment summons, the judgment creditor may – (a) … (b) if a suspended committal order has been made – apply to commit the judgment debtor in accordance with the provisions of Part 53 (committal orders); or (c) …"

The Submissions

[7] The judgment creditor's counsel, Ms. Morton, contends that the order made upon the judgment summons is an interlocutory order requiring the leave of the court pursuant to section 31(3)(g) of the Eastern Caribbean Supreme Court (St. Kitts and Nevis) Act ("the Act"); and an appeal from that order would be a procedural appeal because of the definition of a "procedural appeal" under CPR 62.1(2).

[8] Section 31(3)(g)(i) provides that no appeal shall lie under this section without the leave of the judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a judge except where the liberty of the subject is concerned.

[9] The definition of a "procedural appeal" under CPR 62.1(2) states:

> " "procedural appeal" means an appeal from a decision of a judge, master or registrar which does not directly decide the substantive issues in a claim but excludes –
>
> (a) any such decision made during the course of the trial or final hearing of the proceedings;
> (b) an order for committal or sequestration of assets under Part 53;
> (c) an order granting any relief made on an application for judicial review (including an application for leave to make the application) under the relevant Constitution;
> (d) an order granting or refusing an application for the appointment of a receiver; and
> (e) the following orders under part 17 –
>
> (i) a freezing order;
> (ii) an interim declaration or injunction;
> (iii) an order to deliver up goods;
> (iv) any order made before proceedings are commenced or against a non-party; and
> (v) a search order; …"

[10] Part 53 of Civil Procedure Rules 2000 deals with the power of the court to commit a person to prison for failure to comply with an order requiring that person

to do an act within a specified time or by a specified date. More particularly, CPR 53.9 provides that:

> "If satisfied that the notice of application [for committal] has been duly served, the court may –
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> (a) accept an undertaking from the judgment debtor… who is present in court and adjourn the application generally;
> (b) adjourn the hearing of the application to a fixed date;
> (c) dismiss the application and make such order as to assessed costs under rule 65.11 as it considers just;
> (d) make a committal order against a judgment debtor who is an individual;
> (e) – (g) …
> (h) make a suspended committal order… on such terms as the court considers just."

[11] CPR 53.11(1) states:

> "If the court has imposed terms under rule 53.9(h) and the judgment creditor alleges that the judgment creditor has failed to comply with the terms imposed, the judgment creditor may apply for the suspended order to be enforced."

[12] Ms. Morton submitted that this interlocutory order was not an automatic committal order; but one made under CPR 52.4(c)(iii) requiring the respondent to make a further application to the court under Part 53 to commit the appellant/judgment debtor. As such the interlocutory order neither concerned the liberty of the appellant nor qualified as a committal order under Part 53, counsel Ms. Morton argued; and was therefore not within the exception under section 31(3)(g) of the Act or the CPR 62.1(2)(b) exception for procedural appeals.

[13] Learned counsel for the applicant finds support for her submissions in Birchfield Osbourne v Carol Galloway[1] where the learned judge Mitchell J observed:

> "[8] Section 4 of the Debtors Act 1888 of the Leeward Islands specifically saved the power of a Judge in proceedings in open court to commit a judgment debtor to prison, for a period not exceeding 6 weeks. The revolutionary provision was in the proviso section 4(1) which provided: That such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in

[1] Unreported judgment of Mitchell J in claim No. ANUHCV 193/0307 delivered 22nd March, 2002 at paragraphs 8 and 9

respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

The subsequent subsections of section 4 contain further provision for the making of an order on a judgment summons. Subsection (2) provided that proof of the means of the person making default could be given in such manner as to the court seems just; and that the purpose of such proof, the debtor and any witnesses might be summoned and examined on oath. Subsection (3) provided that the evidence could be taken by the Judge sitting in Chambers. Subsection (4) permitted the court to direct the debt to be paid by instalments. The significant, it has been called revolutionary; reform brought about this Act is well known to all lawyers. It required that the judgment creditor prove that the judgment debtor had been both (1) refusing or neglecting to pay the debt and that (2) he had or had had since the date of the judgment the means to pay. The burden of proving the means of the judgment debtor was placed squarely on the judgment creditor, and the judgment debtor had nothing to prove. The result was that after 1888, the only way that a judgment debtor in civil proceedings in the High Court could be committed to prison for failure to pay his debt was if the Judge had been satisfied in a hearing in Chambers of a Judgment Summons issued under the Debtors Act as to the means of the judgment debtor, and the Judge had as a result made an order for periodic or other payment by the judgment debtor, and that order had been served personally on the judgment debtor and a affidavit of service filed, and the judgment creditor had subsequently in open court proved to the Judge in committal proceedings that the judgment debtor having had the means to pay had neglected or refused to pay the amount so ordered. An oral examination, by contrast, is not a proceeding under the Debtors Act. It is not even a method of enforcement of a judgment; it is merely a provision for making enquiries prior to taking a step in enforcement. It is designed to give the judgment creditor information on the means of the judgment debtor so as to assist the judgment creditor in selecting a method of enforcement."

[9] Nothing in the old procedure has changed significantly under the new Judgment Summons provisions in CPR 2000. These provisions are found at Part 52. The form of the summons is found at Form 21. Summonses have generally been abolished by CPR 2000, but this old form of application is still, under Part 52, exceptionally called a summons, no doubt out of deference to the provisions of the Debtors Act. This summons is required by Part 52 to be served on the judgment debtor, giving him the details of the debt and of any payments made, and the date, time, and place to appear. It contains the necessary penal notice warning him that if he does not appear he can be arrested. The procedure for the Court to follow on the hearing of the summons is set out at Rule 52.4, and need not be recited here. The provision for enforcement of any order made at the Judgment Summons hearing is found at Rule

> 52.5. It is the usual provision for an application to be made in open court for the debtor to be committed to prison in accordance with Part 53, ie, for contempt of court."

[14] Ms. Morton buttressed her submissions by concluding on this point that it is trite law that a Judge in Chambers cannot commit a person to prison for failure to comply and can only do so in open court. Since the hearing of the judgment summons filed on 30th January 2009, took place in Chambers on 25th February 2009, when the interlocutory order in question was made, she argued, the appellant/judgment debtor's liberty was not at stake.

[15] Ms. Morton submitted further that even if the interlocutory order is found to be concerned with the liberty of the appellant, the notice of appeal should have been filed within 7 days from 25th February 2009, pursuant to CPR 62(10)(1) as it is obviously a procedural appeal. Since the notice of appeal was filed on 8th April 2009, without any application for extension of time and relief from sanctions; then on the authority of Oliver McDonna v Benjamin Wilson Richardson[2] the appeal is a nullity and should be struck out, Ms. Morton submitted.

[16] Learned counsel, Mr. Byron, submitted that it was axiomatic that an order committing a person to prison for 14 days, even if that order is suspended, is an order where the liberty of the subject is concerned.

[17] I recently ruled that there was no need to apply for leave to appeal against a suspended committal order made on a judgment summons under CPR 54(c)(ii) and (iii).[3] At that time, having not had the benefit of submissions similar to the very helpful and ample submissions of learned counsel Ms. Morton, I then took the view canvassed by learned counsel, Mr. Byron. Having reflected on the arguments of Ms. Morton I now consider my previous ruling to be wrong for the following reasons.

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[2] Civil Appeal No. 3 of 2005 (Anguilla) delivered 29th June 2007

[3] Civ App No. 9 of 2009 (St Lucia) Eagle Construction & Maintenance Services and Godfrey Cox v Bob Baksh and Ruth Baksh (12/5/2009)

[18] Lord Denning MR in Re W.(B) (an infant)[4] considered the nature and effect of a similar type of order in my view, although it was an injunctive order stating that a school teacher Mr. Savill, "do stand committed to Brixton Prison for a period of six months as to his contempt. But the operation of the order is hereby suspended so long as the respondent Joseph Savill complies with the injunctions hereafter contained." On an application before Megarry J for Mr. Savill's breach of the injunction he held that once the breach of the injunction was proved he had no discretion but to send Mr. Savill to prison for 6 months. On appeal Lord Denning MR stated the court's view of the nature of the order in the following manner: "We are all of the opinion that Megarry, J., had a discretion in the matter. The sentence of 6 months did not come into operation at once and automatically on a breach being proved. The court has a discretion analgous to a suspended sentence in the criminal courts. Imprisonment is not the inevitable consequence of a breach. The court has a discretion to do what is just in all the circumstances. It can reduce the length of the sentence or can impose a fine instead. It may indeed not punish at all."

[19] It seems quite clear from CPR 52.5(b) that the punishment of 14 days does not come into operation at once, or automatically on the occurrence of the judgments/debtor's default in paying the instalment by the date specified in the order.

[20] The power of the court to make the committal order under CPR 53.9 is not mandatory but discretionary. That power is triggered upon the judgment creditor satisfying the criteria for the application under CPR 53.7 and 53.8 which include – that the judgment debtor has been served with the order to be enforced or has had notice of the terms of the order. Thereafter, the court has a discretion to exercise in accordance with CPR 53.9 and may decide not to punish the judgment debtor at all. It appears therefore that it is only where a committal order has been made under CPR 52.4 (c)(ii) or CPR 53.9 (d) and (e) that the order may be said to affect or involve the liberty of the judgment debtor in my view.

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[4] [1969] 1 All E.R. 594 at page 296 A to D

[21] In the instant case the suspended committal order was not concerned with the liberty of the appellant and an appeal against the interlocutory order made on 25th February 2009, could not be brought without leave. The notice of appeal filed on 18th April 2009, without leave must be struck out as a nullity and the application for stay dismissed with costs.

[22] Learned counsel, Mr. Byron has conceded that an appeal against the order in question would be a procedural appeal since it is not excepted from the definition of "procedural appeal" in CPR 62.1(2)(b) and would be out of time were it a valid procedural appeal.

[23] The order therefore is as follows:

(i) The notice of appeal filed on 18th April 2009, is struck out.

(ii) The Application for a stay of execution is dismissed.

(iii) Costs assessed at $1, 200.00 to be paid to the respondent.

Ola Mae Edwards
Justice of Appeal
8th June 2009