BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHMT2008/0062

VANCE LEWIS

Petitioner

-and-

JOYCE LEWIS

Respondent

Appearances:

Mrs. Susan Demers of Price Demers & Co. for the Petitioner
Mr. William Hare of Forbes Hare for the Respondent

2010: November 12, 15
2010: November 22, 30

Matrimonial proceedings - Divorce – Ancillary Relief –Failure of wife to comply with two orders of court relating to disclosure and payment - Contempt of court – Application by husband for enforcement of orders – Summons for committal - Right of wife to be heard – Committal order remedy of last resort -Order defective - not personally served on contemnor – not endorsed with penal notice

The petitioner and the respondent were husband and wife. Unhappy differences have arisen between the parties. The husband subsequently petitioned for divorce. On 21 April 2010, a decree nisi was pronounced in his favour. The marriage was subsequently dissolved by decree absolute pronounced on 25 June 2010. Shortly after, the husband filed an application for ancillary relief. He sought among other things, (i) a property adjustment order in relation to the matrimonial home, (registered jointly in the name of both parties) requiring either that the wife purchases his interest in the matrimonial home and ownership transferred to her sole name or requiring that the matrimonial home be sold and the proceeds split between them and (ii) he be given access to the matrimonial home to collect his personal belongings.

On 21 June 2010, the wife filed a Notice of Cross-Application wherein she sought an order for maintenance, a property adjustment order in her favour in respect of the former matrimonial home on such terms as may be reasonable and that both parties give full disclosure of their assets.

On 19 July 2010, the court made a Disclosure Order and on 29 July 2010, it made a further order requiring the wife to resume payment of one-half of the monthly mortgage payment to the bank.

The disclosure order was served on 11 August 2010. The Payment Order, made in the absence of Counsel who had conduct of the matter, and the wife, was not served on the wife's Counsel until 11 November 2010. This was due to an administrative error.

On 19 October 2010, the husband filed a Summons for Committal. He sought an order that the wife be committed to prison for failing, neglecting and refusing to disclose all income, assets and resources that she currently has or had during the marriage and .failing, neglecting, or refusing to resume making one-half of the monthly mortgage payment.

The wife challenged both orders. She alleged that she could not comply with the Disclosure Order because her Counsel was unavailable and another Counsel from the same law firm who held papers was unfamiliar with the matter. With respect to the Payment Order, she alleged that it was defective in that (1) it was not personally served on her and (2) it was not endorsed with a Penal Notice.

At the Committal hearing, the husband asserted that the wife should not be heard as she is in contempt of court, and in order for her to be heard, she must first purge her contempt.

HELD:

(1) It is a general rule that no party shall be allowed to take part in active proceedings if in contempt. However, that rule is not universally applied. There have been recognized so-called "exceptions", for example a contemnor might be heard on an application to purge the contempt; or for the purpose of setting aside the order, breach of which had put him in contempt. The question to be asked is whether the interests of justice are best served by hearing or refusing to hear the respondent, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of its order: Hadkinson v Hadkinson [1952] P 265. In light of the nature of these proceedings, the interests of justice would not best be served by debarring the wife from participating until she has completely purged her contempt. The court will permit her to defend herself in the hearing of the Summons for Committal.

(2) It is plain that the wife has not fully complied with the Disclosure Order. This failure is not excused by the fact that she was not represented by her Counsel, but instead, was represented by another counsel "holding papers" for her Counsel. It is an elementary principle of law that a lawyer holding papers stands in the shoes of the other lawyer and may be called upon by the court to proceed with the matter. Therefore, the Counsel "holding papers" must have adequate knowledge of the matter. On the facts, the wife is in contempt of the Disclosure Order.

(3) Attachment and committal are very technical matters, and as orders for committal or attachment affect the liberty of the subject, such rules as exist in relation to them must be strictly obeyed. However, disobedient the party against whom the order is directed may be, unless the process of committal and attachment has been carried out strictly in accordance with the rules he is entitled to his freedom: Gordon v Gordon [1946] P 99.

(4) The Matrimonial Proceedings Rules 1997 which govern applications for committal in matrimonial proceedings are silent on service and endorsement accordingly the law, practice and procedure administered for the time being in the High Court of Justice of England is to be applied: Section 11 Eastern Caribbean Supreme Court (Virgin Islands) Order, Cap 80. Both the English Rules of practice and the case law support the requirement for an order which is sought to be enforced by way of committal to be endorsed with a Penal Notice as to the consequences of disobedience: Iberian Trust Limited v Founders Trust and Investment Company Limited [1932] 2 KB 87. The endorsement must form part of the document but need not necessarily appear on its back: Cammell Laird Shipbuilders v Trotter [1985] CA Transcript 361. Where an order requiring an act to be done does not bear the endorsement, process will not be issued to enforce it: Hampden v Wallis (1884) 26 Ch D 746. Normally, no order will be issued for committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt.

(5) The Payment Order was not endorsed with a Penal Notice. It was made in the absence of the wife and it was not personally served on her. Accordingly, this Summons for Committal is premature.

JUDGMENT

1. HARIPRASHAD-CHARLES J: On 19 October 2010, Vance Lewis ("Mr. Lewis") issued a Summons against his estranged wife, Joyce Lewis ("Mrs. Lewis") seeking an order that she be committed to prison for "failing, neglecting and refusing to comply" with two orders of the court dated 19 July and 29 July 2010 respectively.

Procedural History

2. On 1 December 2000, Mr. Lewis married Mrs. Lewis at Jacksonville, Florida, United States of America. Unhappy differences have arisen between the parties. As a result, on 10 December 2008, Mr. Lewis filed a Petition for Divorce on the ground that the marriage has broken down irretrievably due to the unreasonable behaviour of Mrs. Lewis. An Answer to the Petition was filed on 29 January 2009. To put it briefly, on 16 February 2010, Mr. Lewis filed an Amended Petition alleging that the marriage has broken down irretrievably in that the parties have lived separate and apart for a continuous period of at least two years immediately preceding the presentation of the Petition and Mrs. Lewis consents to the grant of the decree. A decree nisi was pronounced on 21 April 2010. The parties now live separate and apart; their marriage having been dissolved by decree absolute pronounced on 25 June 2010.

3. On 30 April 2010, Mr. Lewis filed a Notice of Intention to proceed with Application for Ancillary Relief. It was supported by an affidavit of even date ("first affidavit"). Mr. Lewis sought: (1) a property adjustment order in relation to the matrimonial home, (registered jointly in the name of both parties) requiring either that Mrs. Lewis purchase his interest in the matrimonial home and ownership transferred to her sole name, or, requiring that the matrimonial home be sold and the proceeds split between them; (2) that he be given access to the matrimonial home to collect his personal belongings; and (3) that he be granted such other and further relief that this court thinks just and proper.

4. The Application for Ancillary Relief was scheduled to be heard on 31 May 2010. On that day, learned Counsel for Mr. Lewis, Mrs. Demers and learned Counsel for Mrs. Lewis, Mr. Hare were present. The court ordered that: (1) Mrs. Lewis shall file and serve an affidavit in response to the Application for Ancillary Relief and a Cross-Application, if any, on or before 21 June 2010; (2) Mr. Lewis shall file and serve any affidavit in response on or before 9 July 2010 and (3) the matter shall be listed for hearing on a date to be fixed by the Registrar. The order did not reflect whether the respective parties were present although the notes of the clerk stated that Mr. Lewis was present.

5. Ensuing from the directions of the learned judge on 31 May 2010, Mrs. Lewis filed an affidavit on 21 June 2010 with exhibits. The following day, she filed a Notice of Cross-Application. In her Cross-Application, Mrs. Lewis sought an order that (1) Mr. Lewis makes financial provision for her in the form of periodical payments and/or a lump sum in such sum as may be reasonable; (2) there be a property adjustment order in her favour in respect of the former matrimonial home on such terms as may be reasonable; and (3) such further or alternative relief as may appear to the court to be appropriate. In her affidavit, Mrs. Lewis made a number of allegations about Mr. Lewis' conduct leading to the break-up of the marriage. She also asked the court for an order that both parties give full disclosure of their assets. On 9 July 2010, Mr. Lewis filed his second affidavit in response to the Cross-Application. In that affidavit, he responded to Mrs. Lewis' allegations and indicated his willingness to comply with any disclosure order made by the court, but also

stated that he thought that disclosure was unnecessary as the sole item of property which required division was the matrimonial home.

6. On 19 July 2010, in the presence of Mrs. Demers and Mr. Glenroy Forbes (learned Counsel holding papers for Mr. Hare), the court ordered full disclosure of the parties ("the Disclosure Order"). For present purposes, it is unnecessary for me to recite the full order. Suffice it to say, Mr. Hare was unavoidably absent as he was in the United Kingdom due to the death of his father.

7. On 21 July 2010, Mr. Lewis filed an Application for Interim Ancillary Relief, supported by an affidavit of even date. The application sought an order that Mrs. Lewis (1) pays one-half of the total monthly mortgage payments in respect of the matrimonial home pending the hearing and determination of the proceedings; (2) reimburses him for one half of the mortgage payments made from January 2008 to date; and (3) he be granted such other and further relief as the court thinks just and proper.

8. On 29 July 2010, the court ordered that: (1) the respondent, Joyce Lewis shall resume making one-half of the monthly mortgage payment of US$4,839.84 to First Bank (Virgin Islands) Limited commencing on 1 September 2010 and continuing until further order of this court ("the Payment Order").

9. In the Disclosure Order of 19 July 2010, Mr. Lewis was granted leave to amend his Application for Ancillary Relief on or before 16 August 2010. He did so by filing another Application for Additional Ancillary Relief which was slated to be heard on 18 October 2010. It was supported by an affidavit from Mr. Lewis ("the third Affidavit") and two bundles of documents in response to the Disclosure Order. Mrs. Lewis did not file or serve any response, as ordered by the court.

10. Although this Application for Additional Ancillary Relief is not wholly germane to the present Summons for Committal, it is important in so far as it reflected the chronology of events which may have led to the Summons for Committal.

11. At the hearing of this application, Mrs. Lewis was represented by Mr. Forbes. Mrs. Demers and Mr. Lewis were present. Mr. Forbes sought another adjournment on two discrete grounds namely: (1) Mr. Hare was out of the Territory and (2) Mrs. Lewis has expressly indicated that she did not wish him [Mr. Forbes] to be her Counsel. Mrs. Lewis was not present.

12. In light of the failure of Mrs. Lewis to file and serve any response to the Disclosure Order on or before 16 August 2010, I excused the failure of Mr. Lewis to serve his third affidavit and bundles of documents on Mr. Hare. I also directed that those documents be kept under seal until further order of the court. The application was adjourned to 11 November 2010 and some further directions were given.

Summons for Committal

13. On 19 October 2010, Mr. Lewis issued the present Summons for Committal seeking that:

    1. Mrs. Lewis be committed to prison for her contempt of the order of the court of 19 July 2010 as follows:

        (i) failing, neglecting and refusing to disclose all income, assets and resources that she currently has or had during the marriage.

        (ii) failing, neglecting and refusing to file and serve affidavits and supporting documents providing the said information on or before 16 August 2010.

    2. That the respondent be precluded from submitting any further documentary evidence in support of her application for ancillary relief or in response to the petitioner's applications for ancillary relief and additional ancillary relief.

    3. And for such other order as may seem just to the court for her contempt of the order of 29 July 2010 as failing, neglecting, or refusing to resume making one-half of the monthly mortgage payment of US$4,839.84 to First Bank (Virgin Islands) Limited commencing on 1 September 2010 and continuing until further order of this court; and

    4. That costs of and occasioned by this summons be paid by the respondent.

14. The Summons for Committal, supported by another affidavit of Mr. Lewis and accompanying exhibits, and an affidavit of Lesley-Ann Theodore and accompanying exhibits, was filed on 19 October 2010. These documents were personally served on Mrs.

Lewis on 30 October 2010, as set out in the affidavit of service of Glenn Callwood, sworn to and filed on 2 November 2010 and served on Mr. Hare at his Chambers on 1 November 2010. It was given a hearing date of 11 November but re-listed for 12 November 2010 by the court on its own motion.

15. In passing, I observe that Mrs. Lewis did not file and serve any additional applications in this matter on or before 1 November 2010 as ordered by the court on 18 October 2010.

16. At this hearing, Mr. Hare admitted that Mrs. Lewis has not resumed making payment of the mortgage. On the face of it and without more, it appears to be a breach of the court's order of 29 July 2010. Mr. Hare then made an oral application for Mrs. Lewis to be heard relying on the seminal case of Hadkinson v Hadkinson.[1] Mrs. Demers opposed the application and submitted that Mrs. Lewis should not be heard until such time that she purges her contempt.

The law

17. In Hadkinson v Hadkinson, the mother of a child of a marriage on a petition for dissolution of marriage was directed that the child should remain in her custody and that he should not be removed out of the jurisdiction without the sanction of the court. On grant of the decree absolute, the mother took the child to Australia without first seeking the permission of the court. The father filed a summons for an order directing the mother to return the child to the jurisdiction. The court granted the order. The mother appealed against the order and the father objected on the ground that she was not entitled to be heard as she was in contempt. At page 568, Romer LJ stated:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it be irregular or even void."

[1] [1952] P 265

18. His Lordship quoted with approval several passages from the judgment of Chuck v Cremer[2] wherein Lord Cotterham stated that:

> "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular."
>
> "That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null and irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

19. Romer LJ later stated that two consequences flow from the nature of the breach of a court's order, the first being that anyone who disobeys an order of the court is in contempt and may be punished by committal or attachment or otherwise while the second consequence is that no application to the court by such person will be entertained until he has purged himself of his contempt.

20. In Hadkinson, Denning LJ (as he then was) took another approach. He held that it is rare for the court to refuse to hear counsel for an appellant. He referred to a litany of cases and held that they seem to point the way to the modern rule. He then stated (at pages 574-575:

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance…. I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

21. Denning LJ found that Hadkinson was a good example of a case where the disobedience of the party impedes the course of justice, so long as the boy remains in Australia, as it is

[2] (1846) 1 Coop temp Cott. 205, 47 ER 820.

impossible for this court to enforce its orders in respect of him and additionally, no good reason has been shown why he should not be returned to the jurisdiction of the court. He also held, as did Romer LJ, that the boy should be returned before counsel is heard on the merits of his application and until he was returned the court would decline to hear the mother's appeal.

22. In Bastion Holdings Limited v Jorril Financial Inc. (Jamaica)[3], Lord Scott of Foscote referring to the judgment of Denning LJ in Hadkinson stated:

> "These passages from Denning LJ's judgment in *Hadkinson* seem to their Lordships to fit this case. Mr Whittaker's contempt, in refusing to allow himself to be cross-examined on his affidavit and on the documents he had produced pursuant to the court's discovery order, impeded McIntosh J's endeavours to ascertain the truth about the Agreement. The allegation made against Mr Whittaker and Mrs Geddes, was a grave one. It was an allegation that they had conspired to put forward a falsely dated document in an endeavour to frustrate the purpose of the Mareva injunction that had been granted on 8 November 1999. Mr Whittaker may have been well advised not to present himself to be cross-examined but, whether that is so or not, his refusal to do so unquestionably made it more difficult for the judge to decide whether or not the allegation was made out. She was obliged to rely on inferences from documents instead of hearing the oral evidence of one of the parties to the alleged conspiracy. In their Lordships' judgment McIntosh J's decision to decline to hear submissions from Mr Manning was a decision that, in her discretion, she was entitled to take. Their Lordships agree with the Court of Appeal's rejection of Bastion's appeal on this point."

23. The Learned Authors of Arlidge, Eady and Smith on Contempt state:

> "An effective sanction (deriving from canon law) was the practice that one who was in contempt might not be heard further in the same litigation, for his own benefit, unless and until he purged his contempt. In the words of Lord Brougham: "It is a general rule of all Courts that no party shall be allowed to take active proceedings, if in contempt." This was clearly a practice primarily coercive in nature rather than punitive. It was by no means universally applied. There have also been recognized so-called "exceptions", that for example a contemptor might be heard on an application to purge the contempt; or for the purpose of setting aside the order breach of which had put him in contempt; or of appealing against the order of committal for lack of jurisdiction; also, he was not precluded from defending himself in the action itself. So too, it has been held that a defendant in

[3] 2007 UKPC 60 Judgment delivered on 8 November 2007

> breach of the terms of an Anton Pillar (now known as a "search and seizure") order might seek to have the order set aside, although he could still be punished for contempt."

Analysis of the Law

24. In this area of the law, there is the rigid test that was taken by the Lord Justices (other than Denning LJ) in Hadkinson and the "more tempered" approach of Lord Denning, which was referred to and applied by the Privy Council in Bastion Holdings Limited v Jorril Financial Inc. (Jamaica).

25. However, it is beyond dispute that a court may refuse to hear a party who has been found to be in contempt and who has made no effort to purge that contempt: see Hadkinson and Astro Exito Navegacion SA v Southland Enterprise Co Ltd [The Messiniaki Tolmi].[4] But there are some established exceptions. The approach which the court should adopt is now found in the judgment of Lord Bingham in Arab Monetary Fund v Hashim and others[5] where he said:

> "From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders."

26. The question to be asked is whether the interests of justice are best served by hearing or refusing to hear the respondent, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of its order.

27. Given the nature of these proceedings, I do not think that the interests of justice will best be served by debarring Mrs. Lewis from having her oral application heard or waiting until she has completely purged her contempt. In fact, as the Learned Authors of Arlidge, Eady

[4] [1981] 2 Lloyd's Rep 595.
[5] 21 March 1997 [unreported]

and Smith on Contempt said, quoting Lord Brougham, that it is a general rule of all courts that no party shall be allowed to take active proceedings, if in contempt. However, that rule is not universally applied. There have been recognised so-called "exceptions", for example a contemptor might be heard on an application to purge the contempt; or for the purpose of setting aside the order breach of which had put him in contempt.

28. In light of the foregoing, I permitted Mr. Hare to participate in the hearing of the Summons for Committal.

Disclosure Order

29. On 19 July 2010, the court made a Disclosure Order requiring the parties to disclose all income, assets and resources that the parties currently have or had during the marriage, together with supporting documents, such information and documents to be filed and served on or before 16 August 2010. A copy of the formal order was served on the Chambers of Forbes Hare on 9 August 2010.

30. At 10.35 a.m. on 9 November 2010, Mrs. Lewis filed a second affidavit together with a bundle of documents. These documents were served on Mrs. Demers on or about noon on 11 November 2010. At 4.25 p.m. on 11 November 2010, Mrs. Lewis filed a third affidavit together with a bundle of documents. At 4.30 p.m. on 11 November 2010, Mrs. Lewis filed a Notice of Application for a stay or variation of the Court's Order of 29 July 2010. At 4.39 p.m. on 11 November 2010, these documents were served on the Chambers of Price & Demers.

31. At 9.00 a.m., on 12 November 2010, an affidavit of Glenroy Forbes was filed with the court. A copy of this affidavit was provided to Mrs. Demers during the course of the hearing of the Summons for Committal on 12 November 2010. The filed copy was handed to the court at approximately 3.30 p.m. on the same day. The gist of this affidavit was that Mr. Forbes does not have conduct of these proceedings, he had no background of the case and his presence at court was merely to hold papers for Mr. Hare.

32. From the affidavit, it is plain that Mr. Forbes was holding papers for Mr. Hare when the Disclosure Order was made. In fact, it was at his behest that the court ordered both parties

to give full disclosure of their assets. Further, on two subsequent occasions, namely on 29 July and 18 October 2010 respectively, Mr. Forbes attended court holding papers for Mr. Hare and sought adjournments.

33. Perhaps, it is a convenient time to remind lawyers of the roles and responsibilities of lawyers when "holding papers" for another lawyer. It is an elementary principle of law that that lawyer stands in the shoes of the other lawyer and may be called upon by the court to proceed with the matter. Therefore, he must have adequate knowledge of the matter that he is holding.

34. Returning to the Disclosure Order. As I scrutinize Mrs. Lewis' affidavit and exhibits, it is plain that she has not fully complied with the order. Mrs. Demers has identified the many defects in Mrs. Lewis' disclosure. There is no need for me to restate them. In any event, Mrs. Demers has helpfully consented to reduce those defects to writing and provide Mr. Hare with a copy.

35. All things considered, I find that Mrs. Lewis is in contempt of the Disclosure Order I will order that she fully comply with that Order by 15 December 2010, failing which she be precluded from submitting any further documentary evidence in support of her application for ancillary relief or in response to the applications for ancillary relief and additional ancillary relief filed and served by Mr. Lewis.

Payment Order

36. As previously mentioned, on 21 July 2010, Mr. Lewis filed an Application for Interim Ancillary Relief, supported by his third affidavit. The application sought among other things, an order that Mrs. Lewis pays one-half of the total monthly mortgage payments in respect of the matrimonial home pending the hearing and determination of the proceedings.

37. This application was given a hearing date of 29 July 2010. On 23 July, Forbes Hare wrote to the Registrar confirming that they were served with the application on 22 July 2010. They sought an adjournment of the hearing on the grounds that Counsel who had conduct of the matter, Mr. Hare, was detained in the United Kingdom owing to the death of his

father and other counsel who could have held papers for him were scheduled to be away at that time.

38. On 28 July 2010, the Registrar responded that a formal application to the court was necessary since Mrs. Demers did not consent to an adjournment. The application for adjournment was filed on 29 July 2010.

39. On 29 July 2010, Mr. Forbes appeared at court. Mrs. Lewis was absent. He made the formal application for adjournment. Mrs. Demers and Mr. Lewis were present. Notwithstanding an application for adjournment, the court proceeded with the application and ordered that: the respondent, Joyce Lewis shall resume making one-half of the monthly mortgage payment of US$4,839.84 to First Bank (Virgin Islands) Limited commencing on 1 September 2010 and continuing until further order of this court.

40. A draft order was duly approved by the learned judge on 5 August 2010. For what appears to be administrative deficiencies, the formal written order was not entered by the Registrar until 1 November 2010. It was served on Forbes Hare on 11 November 2010 as set out in the affidavit of Lesley-Ann Theodore sworn to and filed on 11 November 2010.

41. On 12 November 2010, at the hearing of the Summons for Committal, Mr. Hare admitted to the court that Mrs. Lewis has not resumed making payment of the mortgage repayments.

Committal proceedings: the powers of the court

42. It is a well established principle that the jurisdiction of the court in contempt proceedings arises out of its inherent jurisdiction to enforce its own orders. The chief instance of civil contempt is disobedience to an order of the court by a party to the proceedings.

43. It is also a well established principle that a court has the power to enforce its own orders, including the power to make an order of committal on its own motion in respect of a person guilty of contempt of court. Pursuant to section 4(1) of the Contempt of Court Act[6], all

[6] Cap. 14 of the Laws of the Virgin Islands, 1997.

contempts of courts other than those committed in the presence and hearing of the court when sitting shall be dealt with and determined only by means of a rule of the court.

44. Mr. Hare submitted that the Payment Order suffers from two fundamental defects namely (1) it was not served on Mrs. Lewis and/or her Counsel until 11 November 2010 and (2) it was not endorsed with a Penal Notice. He referred to Part 53 of the Civil Procedure Rules 2000 ("CPR 2000") which deals with the power of the court to commit a person to prison for failure to comply with an order of the court. Mrs. Demers strenuously objected to any reference to CPR 2000 because it cannot be disputed that CPR 2000 has no applicability to family matters.

45. Rule 72 of the Matrimonial Proceedings Rules, 1997 governs applications for committal in matrimonial proceedings. It provides that such application shall be made by summons. It says nothing on service and endorsement. Where, as in this case, our rules are silent, we turn to section 11 of the West Indies Associated States Supreme Court (Virgin Islands) Act[7] for guidance. That section provides that "*the jurisdiction vested in the High Court in civil proceedings, and in probate, divorce and matrimonial causes, shall be exercised in accordance with the provisions of this Act … and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice of England*."

46. Accordingly, I will apply the law and practice administered for the time being in the High Court of Justice of England where there is a lacuna in our law.

Personal service necessary

47. When a person is required by an order of the court to do an act whether to pay money within a specified time, and refuses or neglects to do it within that time, the order may be enforced by an order for committal of that person for contempt of court. A person who is found to be in contempt may be fined or imprisoned. Orders of the court must be obeyed

[7] Cap. 80 of the Laws of the Virgin Islands 1997.

until they are revoked, so it matters not whether the order should have been made or the undertaking accepted in the first place.[8]

48. A committal order in family cases should be a remedy of last resort and should be made only where every other effort to bring the situation under control has failed or was likely to fail.[9] But each case will turn upon its own facts.

49. Generally speaking, no order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt [emphasis added]. The court may dispense of personal service where the respondent is evading service.

50. Failure to comply with the proper procedure, such as personal service, is not necessarily fatal to the lawfulness of a contempt order. The court has complete discretion to perfect an invalid committal order in a contempt case, but the power should only be used in exceptional cases and should be dictated by the need to do justice having regard to the interests of the contemnor, the victim of the contempt and other court users. Where the contemnor has not suffered any injustice by the failure to follow the proper procedures (such as service) the committal order could stand subject to variation to take account of any technical or procedural defects.

51. An alleged contemnor is entitled to know, before the hearing of the committal application, of what he is accused and the supporting evidence. Thus, where he had not been served with the notice of motion to commit him, and did not know until the day of the hearing (save indirectly) what was alleged against him, the judge erred in refusing an adjournment for service of the relevant documents. Even where an alleged contemnor is legally represented, he must nevertheless be given the opportunity to mitigate the proposed penalty, where the judge has the intention of imposing a term of imprisonment.[10]

[8] Johnson v Walton [1990] 1 FLR 350, CA.
[9] See **Ansah v Ansah** [1977] Fam. 138 at 144; [1977] 2 All ER 638 at 643.
[10] Taylor v Persico (1992) The Times, February 12, CA.

52. In the present Summons for Committal, it is common ground that the Payment Order was not served on Mr. Hare until 11 November 2010. It was never personally served on Mrs. Lewis. Where a new or adjourned date is fixed for the hearing of the notice of motion, personal service ought also to be effected of notification of the date.[11] No adjourned date was given for the hearing of the Summons for Committal. When that new date is given, all of the relevant documents must be personally served on Mrs. Lewis. But this is not the end of the matter.

The Penal Notice

53. Learned Counsel Mr. Hare submitted that the order is also defective because it was not endorsed with a Penal Notice. It is trite that subject to the requirement of proper service of the order with a penal notice, a very wide range of orders made in family proceedings are enforceable by committal, such as orders for discovery and orders to file evidence of means on an application for ancillary relief.

54. Learned Counsel Mrs. Demers contended that the court has consistently committed persons for persons when the order is not endorsed with a Penal Notice. That may be so. But, it appears that both the English Rules of practice and case law support the requirement for the order to be endorsed with a Penal Notice. Although our CPR 2000 does not apply to family proceedings, the court takes judicial notice of CPR53.3 (b) which states that it may not make a committal order unless (b) at the time the order was served it was endorsed with a notice in the following terms:

> "NOTICE: If you fail to comply with the terms of this order, proceedings may be commenced against you for contempt of court and you may be liable to be imprisoned."

55. And it appears that it should be endorsed in bold letters also.

[11] Phonographic Performance Ltd v Tsang (1985) 82 L.S. Gaz. 2331, CA.

56. The Penal Notice as to the consequences of disobedience need not be in the exact wording of the above notice but it is sufficient if it is to the same effect: Treherne v Dale[12] and Iberian Trust Limited v Founders Trust and Investment Company Limited[13]

57. In Iberian Trust Limited, it was held that the order could not be enforced by attachment of the directors of the defendant company, because they had not been served with a copy of the order endorsed with a memorandum as to the penal consequences of disobedience.

58. In Gordon v Gordon,[14] it was stated per curiam that "Where an order requires a person to do a specific act it is important that the place as well as the time of performance should be precisely stated, so that the person required to obey the order may be in no doubt as to what he is required to do. At page 101 of the judgment, Lynskey J stated:

> "It is well established that if an order requiring the doing of an act by a certain time is not served before that time has expired, committal or attachment cannot be given for disobedience . ..The only exception is where the person required to obey the order is evading service. It is not enough that he may have been aware of the order, or even that he was present in court when it was made."

59. His Lordship went on to state, at page 102, that "one thing stands out in this case with utter clearness. The petitioner made up his mind deliberately and with full knowledge of the possible consequences to defy the orders of the court…I only mention that in order to show that this petitioner has throughout been entirely contumacious and put himself in a position where, on the merits, the orders of the court called out loudly as in any case I have ever known for enforcement by the appropriate process."

60. But his Lordship stated at page 103:

> "Attachment and committal are very technical matters, and as orders for committal or attachment affect the liberty of the subject, such rules as exist in relation to them must be strictly obeyed. However disobedient the party against whom the order is directed may be, unless the process of committal and attachment has been carried out strictly in accordance with the rules he is entitled to his freedom."

[12] (1884) 27 Ch. D. 66, C.A.;
[13] [1932] 2 K.B. 87.
[14] [1946] P. 99.

61. In the instant case, the order was not endorsed with a Penal Notice. Where an order requiring an act to be done does not bear the endorsement, process will not be issued to enforce it: Hampden v Wallis.[15] The endorsement must form part of the document but need not necessarily appear on its back: Cammell Laird Shipbuilders v Trotter.[16]

62. Thus, to bring this order in conformity with the law, I will first order that a Penal Notice be inserted to the 29 July 2010 order. Thereafter, it should be served personally on Mrs. Lewis and the Chambers of Forbes Hare. Mrs. Demers submits that the sum due and owing on the 29 July 2010 order is US$7,259.75 and that the court should order Mrs. Lewis to pay that lump sum amount and to resume making the one-half payment commencing on 1 December 2010. This is premature. Mrs. Demers also seeks an order that the court should decline to entertain any further applications from Mrs. Lewis until she has brought herself into full compliance with the order. In my opinion, the perfected order should firstly be served on Mrs. Lewis and her Counsel and if Mrs. Lewis fails, refuses and/or neglects to comply with the order, the court may then entertain the Summons for Contempt.

63. An inexorable consequence is costs which follow the event. I will order that costs be reserved to the hearing of the applications for ancillary relief.

64. It is my fervent desire that these parties will proceed with expedition to have the applications for ancillary relief heard as soon as practicable instead of troubling the court with excessive interlocutory applications. This will be the best way forward in order to save time and unnecessary expense.

Indra Hariprashad-Charles
High Court Judge

[15] (1884) 26 Ch. D. 746. See also Iberian Trust Limited.
[16] [1985] CA Transcript 361.