REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-01771

IN THE MATTER OF THE ESTATE EDSEL VERNON REID

(DECEASED) AND THE WILLS AND PROBATE ACT

BETWEEN

RENEE ZAMORE

JEROME REID

Claimants

AND

CARMEN DIZON-REID

(as the lawful widow and Legal Personal Representative of the Estate

of Edsel Vernon Reid, deceased who died on 24th February, 2016)

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: June 14, 2021.

Appearances:

First Claimant: Mr. T. Bharath instructed by Mr. S. Sharma

Defendant: Mr. S. Jairam S.C and Ms. S. Lakhan instructed by Ms. S. Jairam.

DECISION ON POINTS IN LIMINE

Introduction

1. A civil contempt hearing is essentially a criminal trial in all but name and the standard of proof is that of beyond reasonable doubt. It is the only civil proceeding that may result in a penalty of imprisonment, and because of this, enforcing this offence is an exceptional power to be used only as last resort[1].

2. It should be noted at the outset that from October 2019, the second claimant has not participated in the present application. As such, the application is only being pursued by the first claimant but for the sake of convenience the first claimant will be referred to as "the claimant". The claimants are siblings and children of the deceased. The defendant was the lawful wife of the deceased.

Background

3. Some background to the litigation is necessary for context. This claim relates to the distribution of the estate of Edsel Vernon Reid ("the deceased") who died intestate. By Fixed Date Claim dated May 17, 2018 the claimants initiated the claim against the defendant as LPR of the Estate of the deceased seeking orders that the estate be administered by the defendant according to law.

4. On February 14, 2019 a consent order was entered the parties having appeared in court on February 3, 2020 and agreed to same. The defendant did not appear but was represented by her Attorneys. It is

[1] Jon Doody, Civil Contempt: A criminal trial in disguise, 2016 36th *Annual Civil Litigation Conference* 10A, 2016.

undisputed that the terms of the consent order were communicated to the defendant by her Attorneys. The said order of February 14, 2019 reads:

> *1. The Defendant do forthwith sell or cause to be sold on the open market or by private treaty the property situated at No. 16 Aruac Road, Valsayn Park South, in the Island of Trinidad ("the said property") for the sum of seven Million Trinidad and Tobago Dollars (TT$7,000,000.00) or at for the sum as agreed between the parties hereto, such agreement to be evidenced by an exchange of emails or letters between the respective Instructing Attorneys-at-Law for the Claimants and for the Defendant.*
>
> *1.1 The Defendant will liquidate all outstanding debts, fees, charges and/or expenses owed to Republic Bank Limited in respect of the existing mortgage related to Jeren Limited on the said property out of the proceeds of sale, before the surplus from the sale of the said property is distributed amongst the Claimants who are entitled to 50% of the proceeds and the sale and the Defendant who is entitled to the remaining 50% of the sale thereof.*
>
> *1.2 In addition to paragraph No. 1.1 above, the Defendant will also liquidate all amounts owing with respect of lands and building taxes, realtor fees/commission and Water and Sewerage Authority bills before distribution of the aforesaid surplus.*
>
> *1.3 All monies received for and in respect of the sale of the assets of the Estate of the Deceased, Edsel Vernon Reid ("the Deceased") shall be deposited in an interest bearing account in any local commercial bank or the Unit Trust Corporation of Trinidad and Tobago in the joint names of Shiv Sharma and Shantal Jairam, the respective instructing Attorneys-at-Law for the Claimants and the Defendant for the payment of the Deceased's Estate debts, expenses or liabilities as agreed between the said Attorneys-at-Law and the distribution of the surplus thereafter to the parties hereto.*
>
> *1.4 The Defendant shall forthwith render a true and correct account to the Attorney at Law for the Claimants of all monies received and/or debts or expenses paid on behalf of the Deceased's Estate and all sums owed to the Deceased's Estate,*

if any, shall be deposited into the joint bank account/account as described in paragraph 1.3 above.

2. The Claimants agree that the Defendant's portion of debt owed by Jeren Limited to the Deceased's Estate amounts to the sum of One Million, Six Hundred and Fifty Thousand Trinidad and Tobago Dollars (TT$1,650,000.00) and the said sum shall be paid by the Jeren Limited directly to the Defendant in full and final settlement and the Estate shall thereby absolve, release and/or discharge Jeren Limited from any liabilities owed to the Deceased's Estate.

2.1 The said sum of One Million, Six Hundred and Fifty Thousand Trinidad and Tobago Dollars (TT$1,650,000.00) shall be paid to Shantal Jairam, Instructing Attorney at Law for the Defendant by Jeren Limited directly from the proceeds of sale of the Jeren Limited shares in Trinidad Aggregate Products Limited ("TAP"), upon receipt thereof.

2.2 Alternatively, if the sale as contemplated in paragraph 2.1 hereof does not materialize, the said sum of One Million, Six Hundred and Fifty Thousand Trinidad and Tobago Dollars (TT$1,650,000.00) will be deducted either from the First Claimant's share of the surplus of the sale of the said property or the First Claimant's share of the proceeds from the sale of the Deceased's shares in "TAP", whichever is earlier.

3. The Defendant shall offer for sale the Deceased's shares in TAP at and for the sum or price of Three Dollars and Fifty Cents ($3.50) per share to ANSA McAl Limited pursuant to the Share Purchase Agreement of which Fifty Cents ($0.50) per share will be deposited by ANSA McAl Limited in an escrow account for a period of approximately one year pending the due diligence and such other terms and conditions as stipulated by ANSA McAl Limited in its offer to the shareholders of TAP and the balance thereof shall be distributed according to the laws of intestacy under the Administration of Estates Act of the laws of Trinidad and Tobago, Chap 9:01. The proceeds of the sale of the said shares shall be deposited into the joint bank account/account as described in paragraph 1.3 above.

4. The Defendant had previously agreed to pay all penalties and interest as levied by the Board of Inland Revenue in respect of the personal income tax liabilities owed by the Deceased's Estate to

the Board of Inland Revenue and the Defendant shall honour that promise by paying the said amounts due to the Board of Inland Revenue.

5. The Defendant shall forthwith hand over Ms. Shantal Jairam Instructing Attorney at Law the following items:

5.1 The Deceased's gold and diamond ring which was a gift.

5.2 Two Boscoe Holder paintings, one being a portrait of the First Claimant and the one is a portrait of a woman.

5.3 The First Claimant's wedding dress.

6. The Defendant as Legal Personal Representative of the Deceased's Estate acknowledges that the debts stated at Account C of the Defendant's affidavit filed herein on November 30, 2018 being more particularly described as:

6.1 One Hundred Thousand Dollars ($100,000.00) due by Chem Clean Limited; and

6.2 Two Million Dollars ($2,000,000.00) due by Jeren Renee Birgit Limited are not owed to the Deceased's Estate.

7. The Defendant as Legal Personal Representative of the Deceased's Estate acknowledges that the one (1) preference share in Jeren Limited described in Account B of the Defendant's affidavit filed herein on November 30, 2018 was redeemed upon the death of the Deceased.

8. The Claimants and the Defendant are to bear their own respective legal costs.

9. Liberty to apply.

5. On June 25, 2019, the claimant filed an application to commit the defendant for contempt of court for refusing to obey the consent order of February 14, 2019. The application was supported by affidavit

evidence of the claimant of June 25, 2019. Affidavits in opposition and in reply were also filed. The parties have tried to settle all of the issues since that time and have been given time so to do with limited success. The application therefore remains to be determined. The said application also seeks alternative relief under the Liberty to Apply provision of the consent order or under Part 44.6 CPR for the claimant or someone appointed by the court to take possession of the property at Valsayn and sell same, that the funds held in the joint account by attorneys for both parties be used to liquidate the debts and expenses of the deceased and that a Certified Chartered Accountant be appointed by the court to compute and pay all taxes owed by the estate.

6. Attorneys for the defendant opposed the application and indicated that they wished to raise certain preliminary points on the application prior to the determination of the application. An order was thus made for the defendant to file submissions on her preliminary points on the application to commit for contempt and consequential orders were given for opposing submission and submission in reply.

7. By email dated April 26, 2021 addressed to the court, Attorney for the claimant objected to new arguments raised in the defendant's reply submissions. On the said day, the claimant proceeded to file submissions in relation to these new arguments and additional cases.

8. In response, by Notice dated April 26, 2021 Senior Counsel for the defendant objected to the claimant's reply submissions on the basis that to allow it would be unfair and an abuse of process.

9. Pursuant to the court's order of January 20, 2021, and its timetable the filing of submissions stops at the reply submissions by the defendant.

The claimant is not entitled to file submissions after the reply without first having obtained the permission of the court and such an order is likely only to be made where the circumstances so warrant both in terms of the case and the application of the overriding objective. In this case no such permission was sought or granted.

10. In that regard the court has observed what it considers to be a creeping practice throughout the court, of attorneys writing letters to the court on the premise that a new matter was raised which they should treat with, in essence making the letters veiled submissions. This is a practice that ought not to be condoned by the courts. There must be a point at which submissions end and that point is prescribed by the court's order unless the court determines otherwise. In that regard both parties cannot have the last say, only one can. There has been no application before this court to extend the ambit of submissions and it is improper for any or all parties to take it upon themselves so to do without approaching the court in proper form. Such actions do not augur well for case management and may quite frankly be unfair both to the court's timetable and to the parties. It is equally clear that new matters ought **not** to be raised in reply submissions and where new matters are so raised the court has the discretion to reject those new matters so as to ensure fairness between the parties. Therefore, this court will not consider any new matters raised by the defendant in her reply submissions as she would have had the opportunity to raise and treat with all matters fully in her original submissions. It follows that the submissions of the claimant in reply to the reply submissions will also not be considered.

11. The preliminary points at this stage by the defendant are whether the application should be stayed or struck out for the following reasons;

    i. In relation to the application to commit for contempt;

a. Non-compliance with the procedure governing committal proceedings set out in **Part 53.3 of the Civil Proceedings Rules** (service of order and endorsement of Penal Notice) or;

b. Non-enforceability of the order by way of committal because no time has been provided for compliance.

ii. In relation to the application under the liberty to apply provision;

a. Whether the claimant can maintain such an application under the principle of Liberty to Apply.

Issue A - Compliance with requirements of Part 53 CPR

12. Part **53.3** reads:

> Neither a committal order nor a confiscation of assets order may be made unless—
>
> *(a)* 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 judgment debtor;
>
> *(b)* at the time that 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 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."; and

(c) where the order required the judgment debtor or do an act within a specified time or by a specified date, it was served on the judgment debtor in sufficient time to give him a reasonable opportunity to do the act before the expiration of that time or before that date.

13. The elements to be proven in respect of service of the consent order are set out in **Rule 53.8(3):**

(3) The applicant must prove—

(a) service of the order endorsed with the notice under rule 53.3(b) or rule 53.4(b);

(b) if the order required the judgment debtor not to do an act, that the person against whom it is sought to enforce the order had notice of the terms of the order under rule 53.3(b) or……..; or

(c) that it would be just for the court to dispense with service.

14. **Rule 53.6** of the CPR provides for the instance in which the order has not been served. It reads:

53.6 (1) This rule applies where the judgment or order has not been served.

(2) Where the order requires the judgment debtor not to do an act the court may make a committal order or confiscation of assets order if it is satisfied that the person against whom the order is to be enforced has had notice of the terms of the order by—

(a) being present when the order was made; or

(b) being notified of the terms of the order by facsimile transmission or otherwise.

(3) The court may make an order dispensing with service of the judgment or order under rule 53.3 or rule 53.4 if it thinks it just to do so.

Has rule 53.8(3) been satisfied?

The Defendant

15. The defendant contends that she was not personally served with a copy of the consent order with the penal clause endorsed. At the time when the consent order was entered, the defendant was in this jurisdiction and it is undisputed that the consent order was served on the defendant's Attorney Ms. Shantal Jairam. In her affidavit, the defendant detailed that her time out of the jurisdiction was due to family emergencies. The court accepts that the defendant was not present in court when the order was entered and that the order was not served personally on the defendant.

16. The main attack by the defendant was that the procedure in Part 53 of the CPR must be strictly followed. Attorney referred the court to the case of ***Carlene Denise Adams v Milly Ramkissoon***[2], where one of the issues was whether the court's order was served on the defendant. Kokaram J (as he then was), was not satisfied that the application for committal was served on the defendant and opined that the court would insist upon the scrupulous observation of the prescribed steps antecedent to the exercise of this jurisdiction.

[2] CV2012-00884, see para. 24, 25, 32 of the judgement.

17. According to the defendant, there is a clear distinction between an order requiring a positive act and for example an injunction. The court agrees with the defendant that there is no evidence that the defendant has attempted to evade service. Attorney relied on the decision in ***Gordon v Gordon***[3], where Lord Greene MR decided that the court had no sort of inherent power to dispense with compliance with a perfectly clear rule requiring an order to be brought in a particularly formal way to a person's knowledge merely because he knows of the order from a different source *and in my opinion the court has got no dispensing power*.

The Claimant

18. Attorney for the claimant argued that personal service of the consent order is a mere technicality and the court should not be overly concerned with rigid applications. She relied on the case of ***Quantum Tuning Limited v Sam White***[4], where the court imposed a custodial sentence for breach of a court order. The respondent complained about errors in the committal application, however, Warby J opined that an order for committal served the vital purposes of upholding the court's authority, and vindicating the rule of law and dealing with cases justly. Therefore, a rigidly technical approach would be inimical to those imperatives.

19. The claimant also relied on the local case of ***Joe-Ann Glanville and David Walcott v Heller Security Services 1996 Limited***[5] wherein the defendant breached the court's interim order (mandatory injunction) within the time specified for same. Rampersad J stated the following:

[3] [1946] 1 All ER 247, see p.253 of the judgment.
[4] [2019] EWHC 1376 (QB), see para. 32, 33 of the judgment.
[5] CV2013-03429

20. In relation to notice it was once thought that notice could only be waived in relation to probative orders as provided for by rule 53.6(2). As such, when it came to mandatory orders, such that exists in this matter, merely showing that the defendant had notice by being present in court at the time of the order was previously held not to be sufficient. However, the Court of Appeal of the United Kingdom has since moved away from that position after examining past authorities and the rules in relation to the requirement for service. Thus, in Davy International Ltd v Tazzyman [1997] 1 WLR 1256 the Court of Appeal held that the discretion conferred on the High Court by R.S.C., Ord. 45, r. 7(7) to dispense with service of a copy of an order is exercisable in respect of a mandatory order not only prospectively, but also retrospectively. That rule is similar to rule 53.6(3) of the CPR. In that case the order was served on the defendant after the date for completion of the order.

21. Davy International v Tazzyman was cited with approval in the case of Benson v Richards [2002] EWCA Civ 1402 and applied in the case of Hydropool Hot Tubs Ltd v Roberjot and a company [2011] EWHC 121. In Hydropool the Chancery Judge held it just to dispense with service because the defendants were well aware of the contents of the order and had legal representation.

Issue i(a): Non-compliance with rules of service and endorsement of Penal Notice

20. In the defendant's affidavit, she deposed that she had knowledge of the terms of the order although she was not present in court on February 14, 2019. The claimant's evidence is that her Attorneys wrote to the defendant on three occasions to take steps to comply with the consent order. On May 7, 2019 the claimant again wrote to the

defendant requiring her to sell the Valsayn property and to disclose all written arrangements taken to sell the said property. In that letter the claimant indicated that she would issue contempt proceedings if the defendant did not act immediately.

21. In the court's view, while the law in relation to contempt may have evolved in other jurisdictions, Part 53.6(2) of the CPR speaks to an exclusion to the general rule set out at 53.3(a) that requires personal service of the order. The exclusion is limited in scope to orders which require the Judgment Debtor not to do an act. In other words, the exclusion applies only to orders that are prohibitory in nature.

22. But this is not the only exclusion set out by the rules. There is also what this court has chosen to refer to as the umbrella exclusion which is set out at 53.6 (3) and which stands separate and apart from the provisions of 53.6(2). In that regard sub rule (3) of 53.6 is readily assimilated when read together with sub rule (1) of 53.6 so that the rule prescribes that where a judgment or order has not been served the court may make an order dispensing with service of the judgment or order under rule 53.3 if it thinks it just to do so. It follows that the CPR is pellucid in terms of the court's powers in that regard and the court need not have recourse to other sources of the power.

23. To determine whether it is just so to do a court will have to examine all of the circumstances and weigh them in the balance together with the considerations set out in the overriding objectives of the CPR.

The objective of serving the order

24. The purpose for personal service of the order is several. Firstly, personal service ensures that the Judgment Debtor receives the

contents of the order not from a second hand source but from the precise terms set out within the walls of the order. This is so as errors can be made in communicating the terms of an order even when relayed by attorney to client.

25. Secondly, so long as the terms of the order are clear, personal service ensures that the Judgment Debtor has a fulsome understanding of what his obligations are under the terms of the order by virtue of his personal knowledge of the precise terms set out therein.

26. Thirdly, personal service of the order also ensures that the Judgment Debtor understands that the order is issued by a superior court of record and carries with it the force of law and the compulsion that he obeys the terms of the order. Hence the addition of the Penal Notice so that the Judgment Debtor also knows the consequence of not obeying the terms of the order.

The effect on the present case

27. In this case the order under consideration is one that was made by consent. Therefore, it is a reasonable inference to be drawn that the defendant's Attorney would have provided the relevant instructions to her client which would have resulted in agreement on the consent order. In fact the defendant has admitted that she was kept abreast of the negotiations in relation to arriving at a consent position and was fully aware of the terms of the consent order when it was entered into[6].

28. Additionally the letters set out at paragraphs 12, 13, 15, 16 and 17 of the affidavit in support by the claimant have been admitted by the

[6] See paragraph 9 of the affidavit of the Defendant filed September 20, 2019.

defendant[7]. In the court's view the correspondence is capable of demonstrating that the defendant was aware of the terms of the order. In that regard there is a clear inference to be had from the reply sent by attorney for the defendant to attorney for the claimant by letter of May 20, 2019[8]. In the court's view that letter seems to suggest that the defendant was taking steps to comply with the order so that she was well aware of the terms of that with which she was to comply.

29. The court is however of the view that Part 53.6 when taken in context speaks to the following. Firstly, the entire rule only applies in the case where the order is not served, which is the case here. Secondly, where such an order requires the Judgment Debtor not to do an act, the court may nonetheless make the order if it is satisfied that the Judgment Debtor was present in court at the time the order was made or he was notified of the terms of the order by the prescribed method. In such a case, the court can dispense with service under 53.6(3). The court therefore finds that the dispensation of service provided at 53.6(3) relates specifically to the case where the order is one requiring the Judgment Debtor not to do an act or put another way to stop doing something he may have been doing. When it comes to compulsion to do a specific act however, the rule is salient on the matter and by its silence excludes orders requiring acts to be done. It means in the court's view that where the order is one which compels that an act be done, the Judgment Debtor must have been given notice of not only the order but also the consequences of not doing that act by way of the Penal Notice.

30. Were it otherwise, the rule would have made no distinction between an order that mandates that an act not be done and one that mandates the doing of an act. In the case of the latter, there must be service of

[7] See paragraph 10 9 of the affidavit of the Defendant filed September 20, 2019.
[8] See paragraph 17 of the affidavit of the claimant filed June 25, 2019 and exhibit RZ16.

the order and the Penal Clause must be appended thereto so as to inform the Judgment Debtor that he is required both to perform the particular act and that the consequence of not so doing is in fact contempt.

31. In this case, the consent order was not endorsed with the Penal Clause as required under Rule 53.3(b). This notice is important as it informs the Judgment Debtor of the consequences of non-compliance. To be enforceable by committal under Part 53, the notice must be set out clearly on the order (usually in red). However, should a court dispense with service, it must necessarily mean that the requirement for the Penal Notice is also dispensed with as its finds its home on the very order, the service of which has been dispensed with. To suggest otherwise would be to create a rule that requires a Penal Notice to be given to the Judgment Debtor in the case where the order is not served, as a basis for proceeding with the committal in the case where service is dispensed with. This would be contrary to the ordinary meaning to be given to the words used in Part 53.3 (b) when taken together with 53.6(3). Put another way, when effecting service for the purpose of committal proceedings, service of the order is not a complete fulfilment of the requirements under 53.3 unless the Penal Notice is endorsed thereon. Service of the order without such a Penal Notice would ordinarily result in a bar against the making of a committal order by the court. Where however, the court dispenses with service of the order under Part 53.6, such dispensation applies equally to the requirement to endorse the Penal Notice on the order or to serve any such Penal Notice on the Judgment Debtor by any other means as it does to the order itself. The object of service of the Penal Notice is however wholly different to that of service of the order itself. That Penal Notice tells of the specific consequences of committal for contempt of court for not obeying the order.

32. There is no evidence before the court that there was service of the order on the defendant and it is therefore axiomatic that no Penal Notice was endorsed on an order served on the defendant. The court is of the view that in this case it would be manifestly unfair to the Judgment Debtor to dispense with service of the order as she was not present when the order was made, the order requires her to do an act and there is no evidence either directly or otherwise that she was informed or made aware in proper form of the consequences of non-compliance with the order, namely committal for contempt. The fact that her lawyers may have informed her of the terms of the order when they were negotiating is insufficient to assuage the non-service of the Penal Notice in the court's view. The requirement that the Judgment Debtor is informed of the consequences of not obeying the order is a fundamental one in the court's view as contempt touches and concerns the liberty of the subject. The court is therefore not satisfied that the defendant was fully informed of the consequences of non- compliance in the form of committal for contempt.

33. By virtue of the overriding objective, the court must in exercising a discretion conferred by the CPR give effect to the decision that treats with the parties justly. The court finds therefore that to dispense with service in this case would be to put the defendant on an unequal footing with the claimant in the application and would do an injustice to the defendant. The court would therefore decline the invitation to dispense with service of the order under Part 53.6 (3) CPR. It means that the claimant has not met at the least the requirements of service of the order and the Penal Notice and so is not permitted to proceed with the application for contempt.

34. For completeness, although not binding on this court, an examination of the consultation paper by the Civil Procedure Rules Committee (CPRC) in determining whether to amend the Rules on contempt

applications in the UK sets out the basis in the view of the Committee for the rationale behind service of the order[9]. It is the very rationale applied by this court together with the application of the principles of the Overriding Objective. The following is taken from the said paper, the proposed rule being set out before the commentary;

Rule 81.5

81.5- Service of a contempt application

(1) Unless the court directs otherwise and except as provided in (2) below, a contempt application and evidence in support must be served on the defendant personally.

(2) Where a legal representative for the defendant is on the record in the proceedings in which, or in connection with which, an alleged contempt is committed:

(a) the contempt application and evidence in support may be served on the representative for the defendant unless the representative objects in writing within seven days of receipt of the application and evidence in support;

(b) if the representative does not object in writing, they must at once provide to the defendant a copy of the contempt application and the evidence supporting it and take all reasonable steps to ensure the defendant understands them;

(c) if the representative objects in writing, the issue of service shall be referred to a judge of the court dealing with the contempt application; and the judge shall consider written representations from the parties and determine the issue on the papers, without (unless the judge directs otherwise) an oral hearing.

[9] See: https://consult.justice.gov.uk/digital-communications/rule-changes-relating-contempt-of-court-cpr-81/supporting_documents/cprcrule8.1consultation.pdf

Note on 81.5:

Rule 81.5(1) brings into play the rules in Part 6 of the CPR on personal service and dispensing with service. We see no need for the 85.1(1) to say more. The judge would only dispense with personal service if sure the defendant is evading service or already aware of and fully informed about the contempt proceedings.

Rule 81.5(2) is introduced to deal with a specific problem identified by the Attorney General's office. They say that the personal service requirement is often unnecessary where solicitors are on the record and causes the expense and delay of applying to the court for an order dispensing with personal service. We agree, subject to safeguards to ensure the defendant is properly and fully informed about the contempt proceedings.

35. Finally, the court does not accept the argument that the dispensation of service requires a stand-alone application from the claimant prior to the institution of the contempt proceedings. This approach is likely to create a separate application where none was intended and where the convenience of the proceedings on committal readily admits of one application bearing in mind several factors including that of the interpretation of Part 53.6 (3), the importance of the issue and efficiency of the proceedings for contempt. This is not to say that this court is of the view that a litigant is prevented from so doing. The consequence of not so doing is however not fatal to the application.

Issue i(b): Absence of time for compliance and its effect on the contempt proceedings

36. **Parts 53.2 and 53.3 (c)** CPR reads;

Order specifying time for act to be done

53.2 (1) Where a judgment or order specifies the time or date by which an act must be done the court may by order specify another time or date by which the act must be done.

(2) Where a judgment or order does not specify the time or date by which an act must be done the court may by order specify a time or date by which the act must be done.

(3) The time by which the act must be done may be specified by reference to the time that the order is served on the judgment debtor.

(4) An application for an order under this rule may be made without notice but the court may direct that notice be given to the judgment debtor.

(5) Any order made under this rule must be served in the manner required by rule 53.3 (in the case of an individual judgment creditor) or rule 53.4 (enforcement against an officer of a body corporate).

53.3(c);

where the order required the judgment debtor or do an act within a specified time or by a specified date, it was served on the judgment debtor in sufficient time to give him a reasonable opportunity to do the act before the expiration of that time or before that date.

37. The defendant submits that in this regard the contempt proceeding is a non-starter as no time was set in the order for compliance. That in the circumstances where no time for compliance is set out in an order, to be enforceable by committal the claimant must at first apply to set a date and time for compliance. That it is only in the circumstances where such a time has been set and the time has elapsed without

compliance can the Judgment Creditor apply for or be successful on the grant of a committal order. That this was not done in this case and so the failure so to do is fatal to the application.

38. Pursuant to the terms of the consent order, the defendant was obligated to sell the property forthwith for a specific sum and to account to the estate for all assets and liabilities. The complaint is that this was not done. No time for compliance was specified in the order. It should be noted that the claimant has not addressed the issue of time for compliance with the order. However, in her submissions the claimant argues that generally speaking, these are technical issues with which the court ought not to be concerned. That these procedural deficiencies pale in comparison to the greater context of the administration of justice which requires that the defendant be sanctioned for her failure to adhere to the terms of the consent order.

39. In so submitting, the claimant relied on the decision in ***Quantum Tuning Limited v Sam White***[10] , a case in which one of the issues was whether the procedural requirements for committal applications had been complied with. Mr. Justice Warby was of the opinion that an order for committal served the vital purposes of upholding the court's authority, and vindicating the rule of law. In so doing he stated the following:

> 33. It has, however, long been recognised that this does not require slavish adherence to the technicalities, regardless of the justice of the case. It must not be forgotten that an order for committal serves the vital purposes of upholding the Court's authority, and vindicating the rule of law. Dealing with a case justly includes "enforcing compliance with … orders": CPR

[10] [2019] EWHC 1376 (QB), see para. 32, 33 of the judgment.

1.1(2)(f). A rigidly technical approach would be inimical to these imperatives. In Nicholls v Nicholls [1997] 1 WLR 314, 326, where the Court was dealing with an appeal against committal, Lord Woolf MR put it this way:

> "While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice. As long as the order made by the judge was a valid order, the approach of this court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so."

34. Naturally, the same approach applies when the judge at first instance is considering whether to insist on strict compliance with the procedural requirements laid down in the rules. This principle is now embodied in paragraph 16.2 of the Part 81 Practice Direction, which provides that: -

> "the court may waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect."

40. According to the claimant, the defendant is a persistent offender and was aware of the terms of the order. By letter dated May 7, 2019 the claimant called upon the defendant to forthwith comply with clause one of the order and it is inferred that the defendant had knowledge of the said letter. Importantly, as administrator of the estate of the

deceased, the defendant held a statutory duty to complete the administration of the estate since November 2016[11] .

41. The claimant also relied on the case of ***Nicholls v Nicholls***[12] which set out that the court has the discretion to dispense with a procedural requirement in the appropriate circumstances and an interest in seeing its orders upheld. Lord Woolf MR noted that over time the courts moved away from the strict adherence to rules' approach to technical issues. At 108 Lord Woolf stated:

> "Like any other discretion, the discretion provided by the statutory provisions must be exercised in a way which in all the circumstances best reflects the requirements of justice. In determining this the court must not only take into account the interests of the contemnor but also the interests of the other parties and the interests of upholding the reputation of civil justice in general. Today it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor. The court itself has a very substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely technical grounds which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice."

[11] See the Succession Act Chap. 9:02, secs 68 and 72.
[12] [1997] 2 ER 97

42. In essence, the claimant is saying that the courts have moved away from the strict adherence to the rules required over time and has somewhat changed its rigid stance on technical issues in favour of a more contextual approach with the overarching principle of doing justice.

43. The claimant also pointed out that there is no evidence of prejudice against the defendant but it is the claimant who has been deprived of her legal entitlement to distribution of the estate. Further, the defendant did not exercise the option to file an application to vary the order or extend the time to comply with the order. In support of this, the claimant relied on the decision of ***Andre Mc Donald v Hevron Heights Towers Limited***. In this case it was held that a party must comply with an order immediately unless the order specifies some other date for compliance and no application is made to the court to extend the time for compliance with the order or any approach is made under liberty to apply implied in such an order[13].

Discussion

44. As seen above, the claimant has relied on English authorities that were decided prior to the coming into force of the new UK CPR Part 81 in 2014 (having been first introduced in 2012), when all procedural steps taken in committal proceedings were governed by the former Part 81. The new provisions simplified the process (see CPR 81.4 (2) UK) by removal of rules in relation to categorization of different types of contempt and the requirement for leave for some categories. Contrary to argument, what it did not do was change the requirements for service and a Penal Notice. So that in so far as the principles set out in the cases are concerned the general approach of the courts in relation to the issue of procedural irregularity remains good law.

[13] See Rule 43.9 of the CPR and paras. 4-6 of the judgment in CV2012-00999

45. In the court's view it is not an absolute rule that a time for compliance be specified in every order which gives rise to committal proceedings. Where a time is not specified, the terms of the order take effect immediately. It was incumbent on the Judgment Debtor should she have been unable to comply with the order, to apply to the court to have the order varied or to have a time set for compliance. It was also within the purview of the claimant to apply to the court to have a time set for compliance if she so chose to do. But the claimant is not prevented from applying for an order of committal in the instance where no time is set as in such a case the time for compliance with the terms of the order is immediate.

46. Further, it appears to the court that it is for this reason that the words of Part 53.2 (1) and (2) appear to be permissive in nature. So that the rules permit the court to set a time for compliance where none was set or set another time for compliance, essentially extending the period for compliance. The rule also permits the making of an application by a party for such an order but does not prohibit the court from acting *ex proprio motu* to meet the justice of the case.

47. In so saying the court is also of the view that the days of slavish adherence to procedural matters on contempt applications as obtained under the Rules of the Supreme Court are well beyond us. It is well known that at the prevailing time that a defendant was entitled to take every technical point at contempt hearings. The ethos of the proceedings has changed in that regard with the primary objective being that of doing justice between the parties. The safeguards that weigh to the benefit of the Judgment Debtor nonetheless remain and this approach does not derogate therefrom. In that regard a court must also be ever aware that the proceedings involve the liberty of the individual and the standard of proof remains that of proof beyond

reasonable doubt. So that a suitable balance must always be struck when considering opposing factors.

48. The court finds that the absence of a specified time for compliance in the order is not fatal to the proceedings. However, in the interests of justice, the court is vested with the discretion to set a date for compliance if it thinks it just so to do. By way of example, in the case of ***Yetunde, T. Ade-John v Walker, Mark S.B Walker and Druker Development Company Limited***[14] the court was not satisfied that all the procedural safeguards were scrupulously observed before the grant of the committal order. Mohammed J stated the following at paragraph 17:

> "It is therefore apparent that the Judgment in Default did not specify a time by which the Defendants were required to pay the Judgment Sum to the Claimant. Thus, prior to making an order for the confiscation of assets under Part 53.3 or 53.4, the Court must specify a time or date by which the Judgment debtors are to pay the Judgment Sum to the Claimant (Part 53.2(2)).
>
> Given the fact that default judgment had been rendered since the beginning of this year and that, to date, no attempts had been made by the Defendants to pay or to communicate Page 7 of 14 their intention to pay the debt, the Court is inclined to make an order requiring payment of the entire Judgment Sum inclusive of interest (to be calculated) by the 31st January 2018.

49. The learned authors of *Halsbury's* provided the following in relation to the meaning of reasonable time:

[14] CV2016-04358

> Where anything is limited to be done within a 'reasonable time' or at a 'reasonable hour', the question what is a reasonable time or reasonable hour must necessarily depend on the circumstances, and is therefore a question of fact. If a contract is silent as to time for performance of an act, the law implies that it is to be done within a reasonable time, and what period is reasonable is a question of fact[15].

50. In relation to meaning of 'immediately' and 'forthwith', the learned authors state:

> There appears to be no material difference between the terms 'immediately' and 'forthwith'. A provision to the effect that a thing must be done 'forthwith' or 'immediately' means that it must be done as soon as possible in the circumstances, the nature of the act to be done being taken into account[16].

51. So that the effect of the order in the present case was that the defendant would proceed to make immediate arrangements for the sale of the property or within a reasonable time having regard to the circumstances of the case. The court therefore finds on the second issue that the absence of an order setting a time for compliance in this case does not vitiate the application.

Issue ii(a): Liberty to apply

52. The defendant submitted that the effect of the grant of those parts of the order sought by the claimant in relation to removal of the onus of sale, payment of the debts and distribution of the assets amounts to substantive variation in the terms of the order made by consent. The

[15] Halsbury's Laws of England, (Volume 97 (2015), para. 349
[16] Halsbury's Laws of England, (Volume 97 (2015), para. 352

claimant however countered that her application is made pursuant to Part 44.6 CPR or under the liberty to apply provision of the order.

53. The law on the liberty to apply provision is clear and well settled. An order pursuant to a liberty to apply provision (which is implied in all final orders) in so far as it is given to work out or for implementing or giving effect to the main provisions of an order or judgment, must not vary the terms of the original order. Even if the order amounts to a variation, it is allowed if it does nothing more than to succour the terms of the original order[17]. In recognition of this, the claimant has conceded the point made by the defendant on the liberty to apply provision in her written submissions.

54. However, the claimant maintains her rebuttal on the issue of **Part 44.6 CPR** which reads;

> 44.6 (1) If—
>
> (a) the court orders a party to do an act; but
>
> (b) he does not do it, the party who obtained the order may apply for an order—
>
> (i) that he may do the act; or
>
> (ii) that some person appointed by the court may do it.
>
> (2) The court may order the person who failed to do the act to pay the costs and expenses of the person who does it.
>
> (3) If it does so, it must assess the costs under rule 67.12.

[17]Halsbury's Laws of England, 4th Edition, Reissue, Volume 37, 2001, para 1230; Chia Chew Gek v Tan Boon Hiang [1997] 2 SLR 209.

(Part 53 deals with enforcement by committal or confiscation of assets)

55. In her original submissions on the points *in limine*, the defendant raised only the issue of the use of the liberty to apply provision. In her submissions in reply however, the defendant attempted for the first time to treat with the issue of Part 44.6 CPR. To do so is procedurally improper as it was not an issue raised *in limine* by the defendant who had the opportunity to set out in full their objections. This simply was an objection that they did not raise although it was obvious on the face of the Application of June 25, 2019 that the application of the claimant was brought under Part 44.6 CPR. To permit the defendant to now raise the argument for the first time in reply submissions would be unfair to the claimant.

56. For the avoidance of doubt it must be made clear that this decision treats with objections made by the defendant and it is in that context the claimant responded by simply indicating that her application was also based on Part 44.6 and that the defendant took no objection thereon. It is not that the claimant raised a new issue of law or fact in relation to 44.6 in its response that required the defendant to argue against the application of Part 44.6 CPR. This is something that the defendant had the opportunity to take issue with and failed so to do. In fact, a perusal of paragraph 4 at page 3 of the original submissions *in limine* by the defendant demonstrates that the defendant was aware that the application was also brought under Part 44.6 CPR. The court will therefore not consider the submissions of the defendant on same at this stage. Additionally, they are submissions in respect of which the claimant has not had the benefit of a reply by virtue of an order of the court.

57. It follows that the contempt of court application shall be dismissed but the applications under Part 44.6 CPR shall be heard. The parties are of course free to treat with the applicability of Part 44.6 CPR in their general submissions on the application.

58. The order is as follows:

    a. The claimant's application for relief set out at paragraphs A, B, C and D of the Notice of Application of June 25, 2019 in relation to committal for contempt is dismissed.
    b. The claimant shall file and serve submissions on the application for relief pursuant to Part 44.6 CPR by July 5, 2021.
    c. The defendant shall file and serve submissions in opposition by July 26, 2021.
    d. The claimant shall file and serve submissions in reply on new matters raised only by August 9, 2021.
    e. The decision of the court on the application is thereafter reserved to be delivered by electronic issue.
    f. The costs of the proceedings on the points *in limine* are reserved.

Ricky N. Rahim

Judge.