

IN THE SUPREME COURT OF BELIZE, A.D. 2016

CLAIM NO. 758 of 2011

**ESSO STANDARD OIL S.A. LIMITED APPLICANT/JUDGMENT
CREDITOR**

AND

**BEEZ IMPORTS LIMITED RESPONDENT/JUDGMENT
DEBTOR**

BEFORE the Honourable Madam Justice Sonya Young

2016

By written submissions only

Decision

6.6.2016

Mrs. Deshawn Arzu-Torres for the Applicant/Judgment Creditor.

Mr. Philip Zuniga, SC for the Respondent/Judgment Debtor and the Directors,
Jose Aldana and Emily Aldana.

**Keywords: Enforcement of Judgment – Judgment for the payment of a sum
of money – Debt – Committal Proceedings Brought against Directors of
Company in their Fiduciary Capacity – Orders to be made on the oral
Examination of a Judgment Debtor – Debtors Act (The Act)- Supreme Court
Civil Procedure Rules 2005 (The Rules) – Part 44, 45, 52, 53**

DECISION

1. This is a decision done entirely on the written submissions of counsel on both sides filed since November 2012. It is a recently inherited matter which

concerns the enforcement of a default judgment for the payment of a debt against a company.

2. The judgment creditor has applied for the committal of the two directors of that company for the company's contempt in not complying with the order for payment of a sum of money. The original order had previously been varied by the learned Registrar on an application made by the judgment creditor for the oral examination of the judgment debtor in aid of enforcement.
3. It is clear from The Act that no one is to be imprisoned for the non-payment of a debt unless they fall within its legislated exceptions. The judgment creditor says that the directors, as fiduciaries, fall within section 2(1)(c) and therefore they are amenable to committal. That section reads:

“No person shall be arrested or imprisoned for making default in payment of a sum of money, except in the following cases –

(c) default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control”

4. The judgment debtor and its directors strenuously refute this assertion and say section 2(1)(c) cannot ever apply to a company director in this present circumstance. No orders for payment had been made against the directors personally or in their fiduciary capacity, therefore no order could be enforced against them pursuant to the prescribed exception.

Preliminary Issue:

5. Having considered the history of this matter there is a preliminary issue which I am compelled to discuss although it has not been raised. I proceed

if only for the guidance of examiners. Thereafter, we shall attack the meat of this matter.

What orders can be made pursuant to an application for oral examination:

6. An oral examination is in aid of enforcement. Part 44 does not give the examiner any power to make orders for payment whether in instalments or otherwise except with the agreement of the parties - Rule 44.6. This is certainly so because the examiner need not be the Registrar, it may be any officer of the court authorized by the Chief Justice - Part 44.5. Moreover, the purpose of the examination is to record a statement under oath from the examinee as to his financial position. It is an oral inquisition. However, a financial position notice may be served by the judgment creditor on the judgment debtor. That completed document, if it is satisfactory to the judgment creditor, may serve as the judgment debtor's statement.
7. As this is an inquiry only, no one is expected to make any findings or to order any payments except with the agreement of the parties. In the present case an order was made, but it is not stated to have been made with the agreement of the parties or to have been made pursuant to Part 44.6. This causes serious concern.
8. Nonetheless, a judgment or order takes effect from the day it is given or made - Rule 42.8. A party must comply immediately unless the judgment or order specifies some other date for compliance or the court varies the time for compliance including specifying payment by installments – Rule 42.9(a) and (b).

9. Therefore, once made an order remains good and effective unless varied or set aside. The order of the Registrar made on the 17th February, 2012 in this matter remains good and effective and must be complied with. If it is not complied with voluntarily, then it must accordingly be enforced.

Issues:

10. 1. How are orders for the payment of a sum of money enforced.
2. Can the directors of a company be committed for the non- payment of the company's debt.

How are orders for the payment of a sum of money enforced:

11. From their submissions the judgment creditor purports to make their application for committal under Part 53. The fact that they appended a penal notice to the order supports this. Part 53 outlines the procedure for the court to exercise its general power to commit a person to prison for failure to comply with a mandatory or prohibitory order. Although it is true that an order to pay a sum of money within a particular period of time is mandatory, the rules of interpretation must still be applied. Where there is a specific term it overrules the general in application.
12. It has always been the judgment creditor's clear contention that what they seek to enforce is an order for the payment of a sum of money. Enforcement of such orders have been distinguished procedurally through Rule 45.2 which directs that:

"A judgment or order for payment of a sum of money other than an order for payment of money into court may be enforced by –

- (a) an order for the seizure and sale of goods under Part 46;*
- (b) a charging order under Part 48;*
- (c) a garnishee order under Part 50;*
- (d) the appointment of a receiver under Part 51;*

or

(e) (subject to the restrictions of the Debtors Act) a judgment summons under Part 52.”

13. There can be no doubt as to the scope and intent of this particular section. One would immediately appreciate that a money judgment cannot, as it stands, be directly enforced through committal proceedings. This is precisely what the judgment creditor is attempting to do here. The CPR simply does not allow it. Committal is however incorporated under Rule 45.2(e) which directs the reader to Part 52 (Judgment Summons). There is no other route. To understand the committal process for failure to comply with an order for payment of a sum of money (including a debt), Part 52 must be considered in its entirety.

14. We begin with Part 52.1 which reads:

“This Part deals with applications to commit a judgment debtor for non-payment of a debt where this is not prohibited by any relevant enactment.”

15. This is a plain statement, it needs no interpretation. The rule is specific and therefore the general rules for committal stated otherwise cannot apply. So if an Applicant can in fact get around the general prohibition of The Act, (the relevant enactment), then the requirements of Part 52 must be complied with for the committal of a judgment debtor for the contemptuous non-payment of a debt.

What then is the procedure:

16. Rule 52.4 states:

“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 –

(i) the summons has come to the knowledge of the judgment debtor;

or

- (ii) *that the judgment debtor is wilfully evading service, proceed in the absence of the judgment debtor as if he 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) *commit the judgment debtor for such fixed term as is permitted by law;*
 - (ii) *suspend such committal upon payment of the judgment debt on such dates and by such instalments as the court may order;*
 - (iii) *make an order for payment of the judgment debts 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;*
 - (iv) *adjourn the hearing of the summons to a fixed date; or*
 - (v) *dismiss the judgment summons.”*

Rule 52.5 goes on:

“If the judgment debtor fails to comply with the terms of the judgment summons the judgment creditor may –

- (a) *where a suspended committal order has been made, apply to commit the judgment debtor in accordance with the provisions of Part 53 (committal orders) ...”*

(All emphasis mine)

17. This is the only way a judgment creditor, in attempting to enforce a judgment for a debt, can utilize the procedures of Part 53. In the case at bar there has been no judgment summons filed, served or dealt with by the court far less the making of a suspended committal order. As the Claimant insisted at paragraph 15 of its submissions:

“The rules of the court are clear and must therefore be strictly complied with.”

18. The application inevitably fails outright. The court may end inquiry here but perhaps the real issue ought to be settled less it rears its head in the guise of another application somewhere down the road.

Can the directors of a company be committed for the contemptuous non- payment of a sum of money due from the company:

19. The directors say they ought not to be committed for the contempt of the company (if it exists) pursuant to section 2(1) of The Act and I agree.
20. There can be no doubt that a company director is a fiduciary. ***Regal (Hastings) v Guillver [1942] 1 All ER 378, 395 f*** - “Directors, no doubt are not trustees but they occupy a fiduciary position towards the company whose board they form.”
21. There is no doubt that a director could in certain circumstances be punished in contempt for breaches to orders or undertakings by the company on whose board he sits.
22. ***Attorney General for Tuvalu v Philatelic Distribution Corporation Ltd [1990] WLR 926*** Woolf LJ stated:

“In our view where a company is ordered not to do certain acts or gives an undertaking to like effect and a director of that company is aware of the order or undertaking he is under a duty to take reasonable steps to ensure that the order or undertaking is obeyed, and if he wilfully fails to take those steps and the order or undertaking is breached he can be punished for contempt. We use the word ‘wilful’ to distinguish the situation where the director can reasonably believe some other director or officer is taking steps.”
23. In ***Sectorguard PLC v Diene PLC [2009] EWHC 2673 (ch)*** Briggs J stated:

“I consider that the effect of the Tuvalu case is that an applicant for the committal of a company director who relies upon a breach by the company of an order or an undertaking must disclose in the committal application a case for the establishment of responsibility on the part of the Director, either on the grounds of aiding or abetting or wilful failure to take reasonable steps to ensure that the order or undertaking is obeyed.”

24. But for section 2(1)(c) of The Act to be applicable, it is not enough to prove that there has been a default in payment. The conjunctive ‘and’ is used. Therefore there must be a default by a person acting in a fiduciary capacity ‘and’ that fiduciary must have been directly ordered by the court to pay some sum in his possession or under his control. It goes without saying that the fiduciary relationship must exist between the judgment debtor and the judgment creditor. The default must be of a sum for which the judgment debtor was ordered in his fiduciary capacity to pay.
25. A director stands in a fiduciary capacity to the company and the company alone. There is no duty owed by a director to creditors. The author of **Commonwealth Caribbean Company Law** stated at page 233:
- “The rule that directors owe their fiduciary duties to the company and the company alone means also that the directors do not owe any fiduciary duty to the company’s creditors.” This position was stated by Dillon LJ in the English Court of Appeal case of Multinational Gas and Petrochemical Vo v Multinational Gas Services Ltd. ([1983] Ch 258, 299) where he said: “The directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders.”*
26. In any event the order that has been presented to this court is for the judgment debtor, Beez Imports Limited, to pay a certain sum. The directors were not in a fiduciary capacity qua the claim in which that order was made. The exception is therefore not attracted.
27. The use of section 2(1) (c) in this manner is provocative and attractive but one with which I cannot agree. By way of example, one could see the applicability of this section in matters where a fiduciary is offered and accepts a bribe in breach of duty. A court of equity will not order that the

bribe money be returned to the provider as he has committed a criminal offence. The fiduciary cannot keep it and thus be enriched by his own bad behaviour. The court will order that he account for it to the person to whom he owes that duty. Such an order to pay over that sum of money will be captured by the exception given in section 2(1)(c).

28. I find security in the specialness of all the exceptions outlined in subsection (1). It speaks to default in payment of penalties, small sums recoverable in summary courts, attorneys costs for misconduct or pursuant to a court order in his character as an officer of the court, and payments authorized by The Act. A fiduciary bound by certain duties to his principal falls comfortably there. Ordering a company to pay its debts is no differing to ordering any other person in his personal capacity to pay his or her debts. There is nothing special.
29. Having found that the procedure followed in bringing this application was wrong and that the directors of a company do not fall within the exception outlined in section 2(1)(c) of the Act, there is no need to discuss whether or not a wilful contempt has been made out. So I rest. What is obvious, however, is that the debt remains outstanding and this court is not minded to order costs to the judgment debtor or its directors.
30. For all these reasons it is ordered:
 1. Application dismissed.
 2. Each party shall bear its own costs.

SONYA YOUNG
JUDGE OF THE SUPREME COURT