

THE CASE FOR THE APPELLANT

JCPC/2025/0091

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

From the Court of Appeal of Jamaica

Between:

Denise Kitson

Appellant

and

Roger Phynn

Respondent

(Liquidator for Mount Royal Co-operative Society)

1. This appeal is from an order for committal of the Appellant for breach of an order made on 22nd March 2022 by the Respondent under s. 45 (2) and 47(2) of the Co-operative Societies Act requiring the Appellant to:

p.829-831

“produce and deliver up forthwith all original and copy books, documents, materials, files, plans, subdivision approvals and all other assets and properties of Mount Royal Co-operative Society Limited (in liquidation) in its possession...”

2. The Appellant’s objection to that order, relied on a retaining lien for unpaid fees owing to her Firm. The Appellant’s objection was rejected by Hon. Miss A. McIntosh, Senior Parish Judge (Acting), who on hearing the Respondent’s application for committal of the Appellant on the 13th July 2022, issued a committal order in the following terms:

“The documents are to be produced within 14 days or Mrs. Kitson is to be committed to prison for 30 days or as soon as the said documents are produced.”

p.82

3. On 15 January 2024, the Court of Appeal upheld the order for committal of the Appellant.
4. Following upon the decision of the Court of Appeal, upon the Appellant delivering up the certificates of title and other documents, the committal order was discharged by the Parish Judge on 8th February 2024. The Appellant’s lien was thereby lost.
5. It is not in dispute that the Appellant’s Firm had a retaining lien over certificates of title and documents in its possession for unpaid fees for work done prior to appointment of

the Respondent as liquidator of the Mount Royal Co-operative Society (Mount Royal). Further the sum claimed for unpaid fees has not been disputed by the Respondent: see **Appendix A- Letter dated 29th July 2026 from the Respondent.**

p.57-58

6. The outstanding professional fees in the sum of JMD \$4,243.050.00 that the lien protected has not been paid and the Appellant submits that if this appeal is allowed, the Respondent should be ordered to return all the titles and other documents to the Appellant or failing which to pay the sum of JMD \$4,243.050.00 that was secured by the retaining lien with interest at the judgment rate of 6 per cent per annum.

Issue 1 – On the proper interpretation of s 45(2) of the Co-operative Societies Act, is the Liquidator empowered to order delivery up of documents that are held subject to a solicitor’s retaining lien thereby defeating the retaining lien.

7. The common law solicitor’s lien is preserved in Jamaica and applicable to attorney-at-law. A solicitor has the right to a retaining lien to the client’s property in his possession to secure the payment of the fees due to him for work carried out in a professional capacity. There are of course exceptions whereby the retaining lien can be overridden at common law or by the terms of a statute.
8. The question that arises in this appeal is whether on its proper interpretation, s. 45 (2) of the Co-operative Societies Act permitted the Respondent to make an order to override the Appellant’s lien by compelling the Appellant to forthwith deliver up possession of the documents that were the subject of the retaining lien.
9. To be clear, this appeal does not concern the production for inspection of the documents as supported by the fact that following the appointment of the Respondent, under cover of letter dated 27th April 2020 from the Firm, copies of all the certificates of title that were then held by the Firm were in fact provided to the Registrar of Co-operatives and Friendly Societies, when so requested.¹ Further all bills for work done to prior to the liquidation that remained unpaid were also provided to the Registrar and the Respondent under cover of letter from the Firm dated 8th July 2020.²
10. The Court of Appeal stated that the central question for resolution was:

p.829

“...whether section 45 of the Cooperative Societies Act empowers a liquidator, exercising powers under the Act, to compel the delivery up of documents of a

¹ Core Bundle pg.57

² Core Bundle pg.65

co-operative society, in liquidation, that are in the possession of the society's former lawyer and subject to a solicitor's common law lien for unpaid legal fees." Judgement par. 2

In granting conditional leave to appeal, albeit that it found that the appeal to His Majesty lay as of right under s 110(1)(a) of the Constitution of Jamaica, the Court of Appeal also granted leave under s. 110 (2) (a) that there ought to be submitted to His Majesty in Council as a question of general public importance whether a solicitor's lien over a client's property for unpaid fees can be defeated by the power of the liquidator under the Co-operative Societies Act section 45(2) to compel the attendance and examination of witnesses and the production of documents.

p.829

11. The Court of Appeal had found the jurisprudence on the effect of a solicitor's lien vis-à-vis a liquidator (or similar officer) to be "not free from difficulty as the authorities are conflicting, confusing and, regrettably, not easily comprehensible, at times." Judgment par. 142

12. The Respondent by order dated 22nd March 2022, stated to be made under s 45 (2) and 47(2) of the Co-operative Societies Act required that the Appellant, not merely to produce the documents, but to forthwith deliver up to him the titles, subdivision plan and documents in her Firm's possession that were the subject of the lien, thereby destroying same.

p.829-831

13. Section 45 (2) of the Co-operative Societies Act provides:

"A liquidator appointed under this section shall, in so far as such powers are necessary for carrying out the purpose of this section, have all the powers of a Resident Magistrate to compel the attendance and examination of witnesses and the production of documents."

p.829

14. Section 47(2) of the Co-operative Societies Act provides:

"An order made by a liquidator or by the Registrar under section 45 or section 46 shall be enforced in the same manner in all respects as an order made by a Resident Magistrate."

p.831

15. The obvious purpose of s. 45(2) is to aid the Liquidator in carrying out his functions by allowing him to obtain information as to the business, dealings, affairs and property of

the Co-operative. It does not by its terms confer a power to compel the delivery up of any property, title documents or papers which are the subject of a retaining lien.

16. The Respondent was not a judge or even a qualified attorney and it would be remarkable to construe a general statutory provision in favour of such an official to order production of documents as also giving the power to order the delivery up of the documents, and more so when the documents were the subject of a retaining lien. That is not supported by decisions that have interpreted similar provisions giving the power to order production to a judge
17. Where it is intended to create a statutory exception to override the right of a retaining lien, that is done by express language such as seen in the Insolvency Act s. 249(7), dealing with liquidation arising from an insolvency, as follows:

p.1006

“No person is, against the trustee, entitled to withhold possession of the books and records belonging to the bankrupt or set up any lien or right of retention on those books and records.”

Mount Royal was not being wound up on the ground that it was insolvent. If it was insolvent then the liquidation should have been brought under the Insolvency Act and a licenced insolvency practitioner appointed to be the liquidator.

18. In court proceedings, an order for production requires a party who is subject to such an order to allow the other party to inspect and examine the documents and to take copies of same. The Court of Appeal and the Magistrate who made the committal order for breach of the Respondent’s order went further than was permitted by s 45(2) to find that in the context of the Cooperative Societies Act, the power to order production requires more than producing the documents for inspection and entirely overrides the attorney’s retaining lien by requiring the attorney to give up the documents thereby putting an end to the lien.

p.829

19. The Court of Appeal’s decision cited English case law that including Re Capital Fire Insurance Association (1883) 26 Ch D 408 which expressly dealt with, and rejected that a liquidator could demand delivery up (as opposed to production) of papers the subject of a solicitor’s lien; similarly Re Toleman ex p Bramble (1880) 13 Ch D 885, and Re Aveling Barford Ltd [1989] 1 WLR 360 where Hoffman J reviewed the relevant authorities and discussed the distinction between production of documents to obtain information in the course of a liquidation as opposed to delivery up of the documents.

p.1040

p.1154-1146

20. In Re Toleman ex p Bramble, the statutory power given by of the Bankruptcy Act [1869] [UK] s. 96 was as follows:

p.1194

*"The Court may, on the application of the trustee, at any time after an order of adjudication has been made against bankrupt, summon before it the bankrupt or his wife, or any person whatever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and **the Court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings or property; and if any person so summoned, after having been tendered reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce such documents, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant addressed as aforesaid, cause such person to be apprehended and brought up for examination.**"* (emphasis added)

Objection was taken to a requirement that documents the subject of a solicitor's retaining lien be produced. The handing over of possession was not being sought. Bacon C.J., at pp. 886-887, stated:

"The solicitor is, no doubt, entitled to his lien, and the objection would have been valid if it had been sought to take this deed out of his possession. But inspection, and not delivery up of the deed, is what is wanted."

21. Re Toleman ex p Bramble was applied by Hoffman J in Re Aveling Barford Ltd [1989] 1 WLR 360 in respect of an application for production made by administrative receivers who sought an order for production and inspection under s 236(2) and (3) of the Insolvency Act (UK) which provided that :

(2) The court may, on the application of the office-holder, summon to appear before it . . . (b) any person known or suspected to have in his possession any property of the company . . . , or (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company. (3) The court may require any such person as is mentioned in subsection (2)(a) to (c) to submit an affidavit to the court

p.1146
footnote

containing an account of his dealings with the company or to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned in paragraph (c) of the subsection.
(emphasis added)

22. In construing the ambit of that provision, Hoffman J contrasted s 236 with s 246 of the Insolvency Act (UK) which rendered a lien over "any of the books, papers or other records of the company" unenforceable to the extent that its enforcement would deny possession of those documents to an administrator, liquidator or provisional liquidator. Hoffman J distinguished the two provisions as follows:

“In my judgment sections 236 and 246 are dealing with different concepts and the one throws no light on the construction of the other. Section 236 is concerned with obtaining information while section 246 deals with rights of property to documents. An office-holder who is able to assert the company's proprietary right to a document under section 246 will have no need to obtain an order for its production under section 236...

**p.1150 H
-1151 E**

Thus the reasoning of Bacon C.J. in Ex parte Bramble, 13 Ch.D 885, still applies to the powers conferred by section 236, whether invoked at the instance of a liquidator, an administrator or an administrative receiver. There is nothing surprising in Parliament having given the administrative receiver greater powers to obtain information from the company's unpaid solicitor than the company itself. Although the administrative receiver is an agent of the company, that agency is little more than an administrative convenience to enable the receiver better to discharge his primary duty to the debenture holder and his duties to other creditors. The explanation which Lord Hatherley gave for Parliament having conferred third party status on the liquidator can be applied with equal plausibility to the administrative receiver. It follows that in my judgment the lien is no answer to the order for production made by Mr. Registrar Buckley in this case.”

23. The power to require production of documents is to be distinguished from the power to require delivery up of the documents. It is submitted that section s 45(2) of the Co-Operative Societies Act, confers no power to override the solicitor's retaining lien by ordering the delivery up of the documents that are the subject of the retaining lien.

p.829

24. In its reasoning, the Court of Appeal found at pars 156 -162 that the Respondent as liquidator stands in the position of a third party relying on the decision of Re Hawkes, Ackerman v Lockhart (1898) 2 Ch 1, (Re Hawkes), and was therefore entitled to override the lien by the order that required delivery up of the documents forthwith. That case is distinguishable and in any event does not support the Court of Appeal's conclusion for the following reasons:

p.1210

i. Re Hawkes was dealing with the inherent summary jurisdiction of the court exercised over solicitors to order production in an administration action. It was not a decision that turned on a statutory power in terms of s 45 (2) of the Co-operative Societies Act to order production in the course of a liquidation. The Respondent had no inherent jurisdiction.

p.829

ii. Re Hawkes did not involve a claim for production by a liquidator, but rather it concerned an order for production made in the administration action. The decision concerned the inherent summary jurisdiction of the Court over solicitors to order production of papers the subject of a retaining a lien in the course of such litigation; it was not a decision turning on a statutory provision such as section 45(2).

iv. Most importantly the Court in that case was not considering an order for the delivery up of the papers that were the subject of the lien. Rather, as seen at pgs. 2-3 of the report, what was ordered was that the solicitor “*should upon forty-eight hours notice, at all reasonable times, produce at his office to the applicant's solicitors for their perusal the said documents and any other documents in his possession an inspection of which was necessary to enable the case to be prepared...*” Decisions such as Ley v Barlow (1848) 1 Ex 800, Hope v Liddell (1855) 7 D G M & G 331, 44 E.R. 129, Hunter v Leathley (1830) 10 B & C 858, 109 E.R. 667 cited by Lindley M.R. at pg. 7 laid down that the solicitor having a lien was compellable under a subpoena duces tecum to produce for inspection the documents in the course of an action by a third party where the solicitor's client would have been compelled to produce the document. Those cases did not compel delivery up of possession and accordingly the solicitor was not deprived of the lien. The Court in Re Hawkes did not order the delivery up of the papers to destroy the lien.

p.1211-1212

p.1216

25. As to delivery up of documents which are subject to a lien, in Re Hawkes at pg. 15, Rigby LJ nevertheless considered the circumstances in which a court would order delivery up and noted that delivery up could be enforced by a redemption action citing Christian v Field (1842) 2 Hare 177, 67 ER 74 where to give effect to an order for sale of the debtor's real estate in a creditor's suit, the Vice-Chancellor, Sir James Wigram, had made an order for delivery up of the title deeds the subject of a solicitor's retaining lien on payment of the costs due to the solicitor (exclusive of sums disallowed). The other methods discussed by Rigby LJ and Lindley M.R. were by a subpoena duces tecum in the trial of an action where the client could have been compelled to produce the documents or an order to produce or deliver up documents in an action where the solicitor had represented a party and the documents came into his possession in the course of the proceedings. Thus in an administration action, where the papers which were the subject of a solicitor's retaining lien were required in order to progress the action, delivery up to the new solicitor was ordered of such papers as were necessary to pursue the action, the papers to be retained by the applicant's solicitor without prejudice to any retaining lien and to be returned if a judge in chambers should so direct: Re Boughton (1883) 23 Ch d 169.

p.1251

26. Further, as explained in the judgment of Vaughn Williams LJ in Re Hawkes at pgs. 23-27 it was important in examining the authorities to note the distinction between orders for delivery up of papers and an order for production of papers; and again the distinction between an order for the production of papers by a solicitor who by words or conduct has discharged himself and an order for production by a solicitor who has been discharged without misconduct on his part by the client. The general rule is that a solicitor who is discharged by the client was under no obligation to deliver up or even to produce the papers the subject of a lien: Re Faithfull (1868) LR 6 Eq 325; further that administration actions were an exception to the general rule and that there was a distinction to be made in any event between papers received by the solicitor for the purpose of litigation as opposed to other papers over which a retaining lien is held.

p.1256

p.1232-1236

27. In referencing Re Hawkes supra, Cordery on Solicitor's 8th Ed at pg. 240 and 246 states:

p.1259

Pg 240 "There are distinctions between an order for delivery up of papers and an order for production of papers, and between liability to produce at the trial, e.g., in answer to a subpoena duces tecum, and liability to produce before the

p.1265

trial. A mere stranger is not liable to produce documents on which he has a lien otherwise than at trial in obedience to a subpoena.”

Pg 246 “Discharge by client

p.1271

Where the client discharges the solicitor with or without just cause, the solicitor is under no obligation to deliver, or to produce or to allow inspection of, the papers for the benefit of the client, and is entitled to hold the papers until his bill of costs has been paid.

‘The discharged solicitor ought to be able to make use of the non- production of the papers in order to get at what is due to him.’

There are exceptions to the generality of this rule, such as where a solicitor acts in proceedings of a representative character. In such a case the solicitor may be ordered (subject to his lien) to deliver up documents which has come into his hands for the purpose of the proceedings regardless of whether he has discharged himself or has been discharged by the client. The principle is that the solicitor cannot acquire a greater right than that of the client and the client's rights may be overridden by other parties interested in the proceedings. It makes no difference whether the executors or trustees are plaintiffs or defendants, or who is entitled to the conduct of the action. The same exception covers the case where a representative plaintiff is removed and another substituted, who then employs a different solicitor as in an administration action by a creditor or debenture holder. In special circumstances it has also been extended to the case where a plaintiff or defendant suing or being sued in his own right becomes a bankrupt, and the trustee thereupon employs another solicitor. Delivery will be ordered to an officer of the court, though where production is sufficient and not inconvenient that will be ordered instead.”

28. In relying on the Re Hawkes line of authorities, the Court of Appeal also regarded the Respondent as being in the position of a third party. However, it is well established that in the liquidation of a company, in absence of statutory provisions to the contrary, and notwithstanding that a liquidator carries out statutory functions, the liquidator is an agent of the company being wound up: see Re Anglo Moravian Hungarian Junction Railway Co [1875] 1 Ch D 130 see particularly Mellish LJ at p 134; Re Farrow's Bank Ltd [1921] All ER Rep 511. The property of the Co-operative Society does not vest in

p.1276

p.1280

the liquidator nor was this an insolvent winding up where the express provisions of the Insolvency Act s 249(7) would possibly have applied to override any claim to a lien.

p.1006

29. There is nothing in the Co-operative Societies Act to displace the principle that the liquidator who continues to carry on the business remains an agent of the Society that is being wound up. The Co-operative Society which is being wound up does not cease to exist; to the contrary s 43 preserves its corporate existence for the limited purpose of winding up until the closure of the liquidation as provided at s 49.

p. 828-831

30. However, the question of whether the Respondent, as liquidator, was a third party or an agent of Mount Royal is simply irrelevant to the question of whether s 45(2) of the Act empowered him to order the Appellant to forthwith deliver up to him the documents that were the subject of her Firm's lien. In our respectful submission, s.45(2) gave him no such power. The power to require production of documents does not confer the power deprive the holder of the lien of possession of the documents to thereby destroy the retaining lien entirely without payment of the sums that the lien secured.

31. Further by way of analogy to a company in liquidation, in Re South Essex Estuary and Reclamation Co (1869) 4 Ch 415 the provision in the then Companies Act [1862] (UK) s115 to make orders in the course of the winding up of a company to compel production of documents was construed as permitting production to provide information but otherwise without prejudice to any lien. Again that was not dealing with delivery up and that decision was so explained by Hoffman J in Re Aveling Barford Ltd (supra). Section 115 was worded in similar terms to the Bankruptcy Act s 96 considered in Re Toleman ex p Bramble (supra) as follows:

p.1296

p.1085

The Court may, after it has made an Order for winding up the Company, summon before it any Officer of the Company or Person known or suspected to have in his Possession any of the Estate or Effects of the Company, or supposed to be indebted to the Company, or any Person whom the Court may deem capable of giving Information concerning the Trade, Dealings, Estate, or Effects of the Company; and the Court may require any such Officer or Person to produce any Books, Papers, Deeds, Writings, or other Documents in his Custody or Power relating to the Company and if any Person so summoned, after being tendered reasonable Sum for his Expenses, refuses to come before the Court at the Time appointed, having no lawful Impediment (made known to

p.1149
E-F

the Court at the Time of its sitting, and allowed by it), the Court may cause such Person to be apprehended, and brought before the Court for Examination; nevertheless, in Cases where any Person claims any Lien on Papers, Deeds, or Writings or Documents produced by him, such Production shall be without Prejudice to such Lien, and the Court shall have Jurisdiction in the Winding-up to determine all Questions relating to such Lien.

32. In Re Capital Fire Insurance Association (1883) 26 Ch D 408 the Court of Appeal held that, with the exception of statutory registers and books that the Act prescribed had to be kept at the company's registered office so that no lien could be created over such books, the winding up of a company does not defeat a solicitor's retaining lien created prior to the winding up so that delivery up cannot be compelled. However the Companies Act [1862] UK s 115 enabled the liquidator to get production as necessary for the purpose of the liquidation.

p.1040

p.1085

33. The later decision of Re Rapid Road Transit Co.[1909] 1 Ch 96 also held that in an action by a liquidator against directors, the liquidator was not entitled to an order for delivery up of documents over which a retaining lien was created prior to the winding up of the company in favour of the solicitor who did not discharge himself. The principle that was applied was the same as that stated in respect of a claim by a trustee in bankruptcy in Re Toleman ex p Bramble (supra). See Daniell's Chancery Practice 8th Ed Vol II pgs. 1668-1669 which summarises the legal position as follows:

p.1485

p.1300-1301

The solicitor to an official liquidator has no lien for his costs on the file of proceedings in the winding-up and the documents relating thereto ; nor on books of the company, which ought to be kept at the registered office; but a lien validly acquired is not defeated by a winding-up. Under s. 174 of the Companies Act, 1908, the solicitor of a company may be compelled, on summons by the official liquidator, to produce documents belonging to the company without prejudice to their lien.

A bankrupt cannot give a lien after the commencement of the bankruptcy; but a lien created before the receiving order is protected if the solicitor had no notice of an available act of bankruptcy.

As a general rule, where the solicitor has once acquired a lien upon the papers of his client, possession may be kept of them until they are redeemed by the full

payment to the solicitor himself of the sum in respect of which the lien exists, and this notwithstanding the fact that the claim may be barred by the Statute of Limitations. He may, however, it seems, be ordered to deliver them up upon the amount of his demand being paid into Court .

p.829

34. In the circumstances it is submitted that the power conferred on a liquidator by s. 45 (2) of the Co-operative Societies Act to order production of documents is limited to production for the purpose of inspection to enable the Liquidator to obtain information as to the business, dealings, affairs and property of the Co-operative Society and does not confer power to order delivery up of the documents that are the subject of a retaining lien without payment of the sum owed. The decision of the Court of Appeal to the contrary is wrong.
35. The certificates of title and the files of documents that were the subject of the retaining lien were delivered up to the Respondent on 8th February 2024 in order to have the warrant for the committal of the Appellant to prison discharged. In the circumstances, it is submitted that the appropriate order that should be made in this appeal is to allow the appeal with costs and further to order the Respondent to return the titles and documents to the Appellant or failing to pay the outstanding fees of JMD \$4,243.050.00 with interest thereon at the judgment rate of 6 percent per annum from 8th February 2024.
36. In answer to the question certified by the Court of Appeal of Jamaica, it is submitted that a solicitor's right to a lien over a client's property for unpaid fees is not defeated by the power of the Liquidator under s. 45(2) of the Co-operative Societies Act "to compel the attendance and examination of witnesses and the production of documents."

Issue 2 Procedural Irregularity – Whether the Order for committal of the Appellant was properly made notwithstanding that she had not been personally served with the application, and in circumstances where no effort whatsoever had been made to effect personal service on her, and there was no suggestion that she was evading personal service.

37. There is also the question of whether personal service of an application in the Parish Court for committal for breach of an order can properly be dispensed with or is to be regarded as unnecessary when the alleged contemnor appears notwithstanding that there is no waiver of the requirement to effect personal service. It is respectfully submitted that the making of the order for the committal of the Appellant was procedurally irregular and ought to have been set aside on the ground that there had

been no attempt to effect personal service on the Appellant of the order said to be breached and of the application for committal. The Appellant's affidavit was unchallenged that no attempt was made to serve her or to bring the application to her attention and that the process server had admitted that to the Liquidator's attorney.³

38. The Rules of the Resident Magistrates Court then in force was enacted in 1934. It prescribed varying modes for service of a plaintiff summons that commences a civil claim in the Parish Court at Order VII r 9, which, in addition to personal service on a defendant, could include leaving the plaintiff summons with someone not being less than 16 years old at the home or business of the defendant. However in respect of a witness summons Order XVI r 2 specified personal service on the witness. It is to be noted that Ord. XVI r 4 deals with orders for production of documents in the possession of a witness where the witness fails to obey a summons by a witness, and the form for service on the witness requires personal service: Form No. 86 at pg. 158 .

p.1472

p.1475

p.1482

39. The procedure for attachment or committal for breach of an order is set out at Order XXII r 32- 34:

p. 1477
-1478

32 *Where a breach has been committed of an order in the nature of an injunction or of any other order, interlocutory or otherwise, **within the competence of the Court which could in the Supreme Court be enforced by attachment of the person or committal**, the party entitled to the benefit of the order shall, if desirous of obtaining an order of attachment, make application to the Clerk. The Clerk shall thereupon prepare and issue for service a copy of the order sought to be enforced, sealed with the Seal of the Court and indorsed with a Notice according to the Form in the Appendix A. and the Clerk may, if the party by whom the order was obtained so desire, order the copy so indorsed to be served by the Applicant or his solicitor upon the party to be bound thereby, and in default of such order the said copy shall be issued to the Bailiff for service. In either case the copy shall be served in the same manner in which service of summonses may be effected.*

33. **Failure to obey Order after service of copy thereof.**

*If the person bound by the order fails to obey it, the Clerk on the application of the party entitled to the benefit of the order, shall not less than three days after the service of the copy indorsed, as provided by the last preceding Rule, issue for service a notice under the Seal of the Court requiring the person who has failed to obey the order to appear at a Court to be held on the day and at the place to be named in such notice to show cause why he should not be committed for his contempt in neglecting to obey such order. **The notice shall be issued for service and served personally, or it may be otherwise served if, after failure***

³ Core Bundle pg. 727-728

to serve personally, the Judge shall so allow. By leave of the Judge the notice may be issued and served at an earlier period than is above prescribed.

34. **Order of Attachment.**

(a) *On the day named in the notice mentioned in the last preceding Rule, **the Judge on proof of service of the copy of the order duly indorsed as provided by Rule 32** and of the above notice as provided by Rule 33 of this Order; and of the continued disobedience of the person in default, may order a warrant of attachment to issue either unconditionally, or on such terms as shall be just and may make such order as to costs as he may think fit:*

Provided that if the party in default appears either in person or by his Solicitor, proof of service of the copy of the order and notice shall not be necessary, unless the Judge shall otherwise order: Provided also that the warrant shall issue and may be executed forthwith without notice or service of the order authorizing its issue, unless the Judge shall otherwise order.

(b) *The order of the Judge authorizing the issue of the warrant shall be drawn up and a sealed copy thereof shall be served on the person in default either before or at the time of the execution of the warrant, unless the Judge otherwise orders.*

40. R. 32 specifies that a copy of the order said to be breached endorsed with a penal notice “shall be served in the same manner in which service of summonses may be effected.”

It is submitted that having regard to the consequence that the application for committal could result in an order affecting a person’s liberty, the service on the person should as a general rule be effected by personal service in keeping with the requirement for service of a witness summons. In any event following upon service of the order, r. 33 specifies the process to be followed where there is continued disobedience which is for the Clerk to issue for service a notice requiring the person to appear before the Court. R. 33 expressly requires personal service of the application for committal unless the Court should otherwise order; see also Form No. 205 at pg. 216.

p.1484

41. It is submitted that the discretion of the Court to dispense with personal service should be based upon some good reason after an attempt has been made to effect personal service without success such as where the person to be served has evaded personal service. There was no basis for the exercise of the discretion to dispense with personal service in this case as no attempt was ever made to effect personal service on the Appellant, or Mr. Grant, who by that time had retired and was made a co-respondent to the application.

42. The Court of Appeal relied on the proviso to r.34(a) which dispenses with the need to prove personal service of the order and notice where the person in default appears. The

p.1478

proviso is dealing with the requirement of the applicant for the committal order to tender proof of service which is a separate issue from the one raised which is whether there was any justification to dispense with personal service when that issue is raised by the person who is the subject of the application: Adjudah v Lalor [2016] JMCA Civ 52 at par. 18. In the Appellant's respectful submission there was no justification to dispense with personal service and the order for her committal should be set aside for this additional reason.

p.1455

Conclusion

43. It is respectfully submitted that for these reasons the judgment and order of the Court of Appeal and the order of the Parish Judge for the committal of the Appellant should be set with costs to the Appellant and the Respondent ordered to return the titles and documents to the Appellant or failing which to pay to the Appellant the sum of JMD \$4,243.050.00, being fees that were secured by the retaining lien with interest at the judgment rate of 6 per cent per annum for the following amongst other –

REASONS

- a) On its proper interpretation, The Co-operative Societies Act s. 45 (2) does not permit the Respondent to order the Appellant to deliver up possession of the documents that were the subject of a retaining lien; p.829
- b) The Co-operative Societies Act s. 45 (2) confers power to require production of documents for inspection, which is to be distinguished from the power to require delivery up of the documents; p.829
- c) The Respondent as liquidator of the Mount Royal Co-operative Society has no power under the Co-operative Societies Act to make an order to override the Appellant's lien for unpaid fees;
- d) The order for committal of the Appellant was in any event procedurally irregular and ought to be set aside for the failure to effect personal service of the application on the Appellant.

Allan S Wood K.C.

Kevin Williams