

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

JCPC/2025/0091

From the Court of Appeal of Jamaica

Between:

DENISE KITSON

Appellant

- And –

ROGER PHYNN

(as Liquidator for Mount Royal Co-Operative Society)

Respondent

SUBMISSIONS ON BEHALF OF THE RESPONDENT LIQUIDATOR

Introduction

1. The abbreviations employed in the Statement of Facts and Issues are also employed in these submissions. In the paragraphs below: references to paragraphs in the Statement of Facts bear the pre-fix “SOF”; references to page numbers in round brackets are to pages in the Core Bundle and references to paragraphs in square brackets are to paragraphs in the judgment of the Court of Appeal of Jamaica, reported at [2024] JMCA Civ 1 (at pages 326-388).
2. It is respectfully submitted that the Court of Appeal of Jamaica were correct to dismiss the appeal and were right to confirm (p388) the Committal Order of Her Honour Ms Alicia McIntosh, Senior Parish Judge (acting), made on 13 July 2022 which was that (SOF: 29):

p.145

p.36

*“The documents are to be **produced** within 14 days or [the Appellant] is to be committed to prison for 30 days or as soon as the said documents are produced.”*

p.82

3. On 22 July 2024 (at p400 – at (5)), the Court of Appeal granted conditional leave to the Appellant to appeal as of right pursuant to section 110(1)(a) of the Constitution. The fees claimed of JMD \$4,243,050.00 at the current exchange rate of 1 JMD = 0.0047 GBP equates to £19,942.34. p.74

4. At paragraph (6) of the endorsement read by McDonald-Bishop P (at p400 – at (6)), the Court of Appeal was also of the view that the question raised by the Appellant as to “*whether a solicitor’s right to a lien over a client’s property for unpaid fees can be defeated by the power of a liquidator under Section 45(2) of the Co-operative Societies Act “to compel the attendance and examination of witnesses and the production of documents”*” (“**First Issue**”) was one that, by reason of its great general and public importance, ought to be submitted to His Majesty in Council and therefore also granted the Appellant conditional leave to appeal pursuant to section 110(2)(a) of the Constitution. p.74

5. The First Issue is addressed at paragraphs 10-26 below. The Board should, however, note that determination of the First Issue does not of itself determine whether the Committal Order was properly made (and therefore does not itself determine whether the Appeal should be allowed). As its wording makes clear (“a solicitor”, “a liquidator”), the First Issue is hypothetical.

Was the Committal Order properly made?

6. It appears from their written submissions that the Appellant does not now dispute that the Liquidator was entitled to *production* of the Documents. The Appellant’s argument appears now to rest on an alleged distinction between *production* and *delivery up*.

7. If so, it follows that the Committal Order was properly made because:
 - a. At no time prior to the making of the Committal Order did the Appellant offer to *produce* the Documents to the Liquidator. This is not a submission which was made on behalf of the Appellant in either of the lower courts;
 - b. The Appellant’s position prior to the making of the Committal Order was that (in reliance on an alleged lien), unless the Liquidator either first (i) paid their fees or

(ii) provided a “suitable irrevocable undertaking ... for the payment of the fees” [to be provided by the Liquidator personally], the Firm would continue to exercise a lien over the documents: SOF 13 and 16. The Appellant thus demanded payment, or the Liquidator’s personal undertaking guaranteeing payment, as a pre-condition of producing/delivery up of the Documents;

p.32-33

- c. The Committal Order itself ordered that the Documents be *produced* by a certain time, failing which the Appellant would be committed to prison: SOF 29. Please see also the First Instance Judgment at pp104-106.

p.36

p.80-82

8. It is therefore submitted that the Committal Order was properly made. It is agreed that the Committal Order was not complied with until 23 January 2024, whereupon the Committal Order was discharged: SOF 34.

p.36

9. It follows therefore that the First Issue is, at least substantially, of hypothetical relevance only to the parties.

The First Issue

10. The First Issue is somewhat ambiguously worded, in that it is unclear what would amount to a solicitor’s lien being “defeated” by the exercise of the power to order production under section 45(2) of the Co-Operative Societies Act (“**the Act**”).

p.829

11. If it is now common ground that the Liquidator was entitled to order *production* of the Documents under section 45(2), it follows that the Appellant was not entitled to demand payment (or an undertaking from the Liquidator essentially equivalent to payment) as a condition of *producing* the Documents.

12. In so far as a solicitor’s lien would otherwise have entitled the Appellant to refuse to do anything unless and until the Firm was paid, the Appellant had no such right once the Liquidator had made the Formal Order. The solicitor’s lien was to that extent “defeated” and the Appellant could not properly demand payment/ an undertaking as a condition of production. The answer to the First Issue is, therefore, that (as now appears to be common ground), a solicitor’s right to a lien is, at least to some extent, defeated by an order made pursuant to section 45(2): a solicitor is obliged to *produce* documents

subject to the lien (and to produce those documents whether or not this renders the lien valueless).

13. The First Issue may raise a further, larger issue, which is whether a solicitor's right to a lien can be defeated *for all purposes* by exercise of the power under section 45(2) ("**Further Issue**").

p.829

14. The Further Issue, whether a liquidator can by an order under section 45(2) defeat all rights of a solicitor under a lien is, for the reasons stated above, essentially hypothetical for the purposes of this Appeal because (a) the Appellant refused to produce the Documents save on payment/ undertaking and (b) the Committal Order ordered production, not delivery up.

15. The Appellant's Submissions draw a distinction between (i) production; and (ii) delivery up, of documents. However, it is not clear what is contended by the Appellant to be the precise meaning and content of (i) and (ii), nor what is said to be the difference between the two.

16. It is submitted that the words "production"/ "delivery up" are of limited import of themselves. For example, if a liquidator made an order for delivery up which was made expressly on the basis that it was without prejudice to the rights of a solicitor under its lien, it is submitted that a solicitor would have no proper ground for objection to that order because the lien would be preserved.

17. The Further Issue may have some practical relevance concerning the use to which the Liquidator may put the Documents (or some of them, such as the documents of title) and also, whether the Appellant has any residual rights under, or arising from, the lien.

18. The Further Issue therefore appears to be whether and to what extent a liquidator can by order under section 45(2) override or eliminate the rights of a solicitor under or consequential upon its lien.

19. It is submitted that the resolution of the Further Issue is an issue of statutory interpretation which depends on the wording of section 45 in the context of the Act as a whole.

20. The case law cited by the Appellant is of limited assistance because it concerns the interpretation of various provisions of English insolvency statutes whereas the Act (in particular sections 41 to 49) is sui generis, in a class of its own, and in very different terms from any of the English statutes.

**p.893
- 895**

21. The dissolution and winding up of a Registered Society is governed by sections 41-49 of the Act, considered at [138]-[140] (at pp373-374):

**p.130
- 131**

- a. Under section 44, it is the Registrar who appoints the liquidator, who is subject to the Registrar's direction and control (see also section 46);
- b. Under section 45(1), and subject to the Registrar's guidance and control and any limitations imposed by the Registrar, the liquidator is given wide powers;
- c. Those powers include the power under section 45(1)(d) "to investigate all claims against the society and subject to the provision of this Act to decide questions of priority arising between claimants", under section 45(1)(f) "to take possession of the books, documents and assets of the society" and under section 45(1)(j) "to sell the property of the society";
- d. Under section 45(2), in so far as necessary for carrying out the purpose of section 45, the liquidator has "all the powers" of a Resident Magistrate (now Parish Court Judge) to compel inter alia the production of documents;
- e. Under section 47(2), an order made a liquidator under section 45 (or by the Registrar under section 46) shall be enforced in the same manner in all respects as an order made by a Parish Court Judge;
- f. Under section 48, except as expressly provided in prior sections, no civil court has any jurisdiction in respect of any matter concerned with the dissolution of a society.

22. The Liquidator submits, on the true construction of the Act, that a liquidator can by order under section 45(2) defeat a solicitor's lien essentially for the reasons stated in the Court of Appeal's judgment in particular at [138]-[140] and [158]-[164] (at pp373-374 and pp380-382 respectively). In particular:

**p.130
- 131**

**p.137-
139**

- a. A liquidator is given very broad powers under section 45(1), subject to guidance and control of the Registrar. Those powers must be exercised for the purposes of the winding up (including investigation of claims – such as the Appellant’s claim to payment – and the realisation of a society’s assets, such as land referred to in documents of title);
- b. Those powers include the power under section 45(1)(f) “to take **possession** of the books, **documents and assets** of the society” (emphasis added);
- c. A solicitor’s lien is a right to retain ie retain possession of documents;
- d. A solicitor’s right to retain possession (under the lien) is inconsistent with a liquidator’s power under section 45(1)(f) to take possession of the documents and assets of the society;
- e. Therefore, since a solicitor’s lien depends and is founded on possession of documents, section 45(1)(f) provides that the lien may be overridden because it empowers a liquidator to take possession of those documents. Please see at [159] as a whole, including: “*Section 45(1) empowers Mr Phynn, as liquidator, to investigate claims against the society and to determine their priority. In addition, he is not merely given the authority to seek production of documents for inspection he is given the wider power to take possession of them.*”
- f. Section 45(2) gives the Liquidator all of the powers of a Parish Court Judge to compel the production of the Documents, so far as is necessary to carry out the purpose of section 45(1) to, amongst other things, take possession of the Documents. The reference in section 45(2) to the “production of documents” must therefore mean not merely a narrow right to demand production for the purpose (solely) of inspection, but the transfer of possession of the documents and thus “delivery up” (as the Appellant seems to use those words in their submissions). Please see again judgment at [159]: “[*The Liquidator’s*] power to compel (not merely seek) the production of the documents in the possession of the firm, as a Parish Court Judge would, is not an end in itself but a means to an end. It is a power given for him in the carrying out of his duties, which include taking documents for the co-operative society into his possession, to enable him to effectively carry out his role as liquidator”; also at [160];
- g. This conclusion at (f) above is supported by the wording of the rule concerning the Parish Court Judge’s power to order production of documents. The concluding

p.828
- 829

p.137

p.138

words of Order XV Rule 12 provide that the Judge “may deal with such documents, when produced, in such manner as may be just”. This therefore makes clear that the exercise of the powers of a Parish Court Judge are not confined to an order for production solely for inspection. Those same powers are vested in the Liquidator under section 45(2) of the Act.

23. The Liquidator therefore submits that the answer to the Further Issue is that, in the face of a solicitor purporting to exercise a solicitor’s lien over the Documents, a liquidator is empowered to defeat the solicitor’s lien by exercising his powers as a Parish Court Judge under section 45(2) and Order XV Rule 12 to order the production of the documents and then dealing with the documents so as to eliminate the lien, if that is just.

p.829

p.1473(b)

24. The Liquidator therefore submits that the answer to the First Issue (read in its broadest possible sense) is yes: a solicitor’s right to a lien can be defeated by exercise of the liquidator’s powers under section 45.

25. As stated above, the Further Issue is hypothetical. The Liquidator submits that the answer to the Further Issue does not determine the actual issue between the parties, namely whether the Committal Order was properly made. Please see at Paragraphs 6-9 above.

Further reason why the First Issue is hypothetical

26. Even if the Appellant is right on the First Issue in its broad sense, the First Issue is hypothetical and therefore does not determine the outcome of this appeal as between the parties because, irrespective of whether the Formal Order was properly made, the Appellant was bound to obey it unless and until it was set aside or discharged: *Isaacs v Robertson* [1985] AC 97, applying the dictum of Romer LJ in *Hadkinson v Hadkinson* [1952] P 285, at 288.

p.1493

27. It is respectfully submitted that the Jamaican Court’s sole role was restricted to the enforcement of the Formal Order pursuant to sections 47(2) and 48 of the Act, not to examine whether the Formal Order was properly made.

p.831

28. The Appellant had the right to ask the Registrar to rescind or vary the Formal Order under section 46 if the Appellant disagreed with it. At no time did the Appellant exercise or seek to exercise that right. It is common ground that at no time did the Appellant ask the Registrar to rescind or vary the Formal Order, nor make any approach to him. There was no response to the Registrar's invitation to resolve matters amicably (at p719, para 10-11).

p.829

Issue 2: Was the Order for Committal of the Appellant properly made notwithstanding that the Appellant had not been personally served with the application

29. It is noted that the Appellant has not reproduced the agreed wording for Issue 2.

30. It is common ground between the parties that the applicable rules were Order XXII Rules 32-34 as reproduced at paragraph 39 of the Appellant's submission.

p.1477
- 1478

31. It is contended on behalf of the Appellant at paragraph 37 that the Committal Order ought to have been set aside on the ground that there had been no attempt to effect personal service on the Appellant of the Liquidator's order and of the application for committal. However, the Appellant does not set out any grounds on which it is contended that the decision at paragraphs [113] to [122] is wrong.

p.123
- 125

32. It is submitted that the Court of Appeal correctly ruled that the applicable rule was Order VII, Rule 9, which did not require personal service. It is not disputed by the Appellant that service was effected in accordance with Order VII, Rule 9.

p. 1472
- 1473

33. Moreover, the Appellant does not set out any grounds on which the decision at [129] was wrong. At [129] it was held that by virtue of Order XXII Rule 34(a), any procedural failures or defects in the service of the Liquidator's Formal Order with the Clerk's Penal Notice under Order XXII Rule 32 were waived through the Appellant's appearance through her Counsel before the Parish Court Judge.

p. 1478

p.1477

34. At Paragraph 41, the Appellant now seeks to challenge the exercise of discretion by HH Mrs Beaumont Daley on 10 June 2022 who made an order for substituted service of the Rule 33 Notice, which it is common ground was complied with. There has not been any

appeal against the order of 10 June 2022. This is not how appellate litigation should be conducted.

The Liquidator's response to the remainder of the Appellant's written submissions:

35. At Paragraph 5, the Appellant has sought to introduce new evidence, in the form of the Liquidator's letter to the Firm dated 29th July 2026. It is inappropriate for the Appellant to seek to introduce new evidence and it is not agreed that it should be considered by the Board on the substance of the appeal.

36. The submissions for the Liquidator before the Parish Court Judge and the Court of Appeal were put on the basis that the Appellant's contention that the Firm had a lien did not entitle the Appellant to refuse to comply with the Liquidator's Order. Although it was correctly noted at [134] that it was not disputed that the Firm had a right to a retaining lien, it was not accepted by the Liquidator that the Firm was entitled to a lien.

p.129

37. Mr Herbert Grant was the solicitor retained by the Liquidator on the instructions of the Registrar to act on Mount Royal's behalf. The Liquidator's evidence (at p13, para 7) is that the reason for the termination of the retainer was that it had come to the Liquidator's attention from an article in the Daily Gleaner (at pp706-708) that Mr Grant had been charged with fraud and when the Liquidator subsequently conducted a search of the General Legal Council's list of practising Attorneys-at Law in Jamaica on 3 January 2022, he discovered that Mr Grant was not listed on the Roll of Practising Attorneys-at-Law in Jamaica. Although it is not disputed by the Appellant that Mr Grant had been charged with fraud and was not on the Roll as at 3 January 2022, the Appellant contends that the retainer was terminated by the Liquidator. The dispute of fact between the parties as to the reason for the termination of the retainer was not determined by the Liquidator or the Registrar or in either of the lower courts.

p.158

**p.783
- 785**

38. As to whether or not the sums claimed by the Appellant's firm were disputed, the Liquidator's evidence (at p248, para 27) was that without access to the relevant files which formed part of the Documents he was unable to investigate and verify the amount claimed by the Firm. This was corroborated by the Affidavit of the Registrar (at pp716-719 paras 5-9).

p.393

**p.793
- 796**

39. The Appellant has provided no basis for the contention at Paragraph 6.

40. For the reasons already set out, the issue which the Appellant seeks to address at Paragraph 8 is the hypothetical Further Issue which, even if determined in the Appellant's favour, would not lead to the appeal succeeding because the Order made on 13 July 2022 was that the Appellant should produce the documents, not deliver them up.

41. If and insofar as it is sought to suggest at Paragraph 9 of the Appellant's submissions that the Appellant did produce the Documents for inspection and thereby comply with the Liquidator's Order to that extent, this is not true. There is no record that it was submitted on behalf of the Appellant to either of the Courts below that the Documents had been produced for inspection by the Appellant. The speaking notes for the Appellant in opposition to the application for committal at pages 74-97. The written submissions for the Appellant submitted to the Court of Appeal are at pages 404-471.

p.219
- 241

p. 481
- 548

42. It is inaccurate for it to be stated on behalf of the Appellant at Paragraph 18 that the Parish Court Judge who made the Committal Order found that the power to order production required the Documents to be given up thereby putting an end to the lien: The order made by the Parish Court Judge was that the Documents be produced. There is no reference in the judgment (at pp104-106) to a requirement that the Documents be given up thereby putting an end to the lien.

p. 80
- 82

43. The orders sought by the Appellant before the Court of Appeal were noted at [39]. The Appeal was disposed of by the Court of Appeal at [174]. At (V), the Court of Appeal held that "*The learned judge was correct to conclude that the solicitor's lien on which [the Appellant] relies does not defeat the clear and ordinary meaning of [the Act] which conferred the power on [the Liquidator] to issue his order compelling the production of documents in the hands of the firm subject to the lien. The learned judge was correct to conclude that the actus reus and mens rea of civil contempt were established on the part of [the Appellant] who failed to show sufficient cause for disobeying [the Liquidator's] Formal Order. Grounds (B) (in part) and (I) fail*". Ground (I) was identified at [41] as follows: "Whether the Judge was correct to conclude that the

p. 143

p. 98

liquidator's order pursuant to section [45] of [the Act] defeated the right of the firm to exercise a solicitor's lien over Mount Royal's documents."

44. Paragraph 24 is also inaccurate. The Court of Appeal did not find at [156]-[162] that the Liquidator stands in the position of a third party for the purposes of a solicitor's lien solely by relying on the decision in *Re Hawkes*. The reason why the Liquidator was regarded as standing in the position of a third party, as stated at [161], was that *"applying the principles taken from the passage cited in Halsbury's Laws of England, Hawkes and some of the cases referred to therein"*, the Court of Appeal regarded it as *"unquestionable that [the Liquidator] was not called upon to act for Mount Royal but on behalf of third parties upon the appointment of the Registrar to whom he was obliged to report. From the scheme of the Act it was incontrovertible that he answers only to the Registrar and no one else. He was therefore, not someone claiming through Mount Royal or having no greater right than Mount Royal to the documents subject to the retaining lien."*

p. 136
- 138

p. 131

p. 137

45. The Court of Appeal decided at [140], [158] and [160]-[163] that when exercising his powers under section 45 of the Act, specifically the power to order production under section 45(1)(f) and 45(2), the Liquidator was performing his statutory role not only for the society but for third parties, ie for others who have interests in the society or may claim against it (eg creditors).

p. 138- 139

46. Insofar as the Liquidator exercised powers for third parties (rather than as agent of the society), no lien could be asserted by the Appellant because the Liquidator did not represent the client of the Appellant (ie its client, the society). The case law and texts cited and relied on by the Court of Appeal establish that a solicitor may assert the lien only as against the client and persons claiming through the client and having no better right than the client: it may not be asserted against third parties (such as creditors) or those acting in their interest: at [133] and [152]-[157].

p.129

p. 135-137

47. The Appellant appears to concede that, for the purposes of an order for production and inspection only, but not for delivery up, the Liquidator is considered as representing the interests of creditors, and thus treated as a third party: with the result that the Appellant cannot assert a lien to refuse mere production.

48. In *Re Aveling Barford* at p363B-G, Hoffman J as he then was clearly set out the 2 principles that (1) the right to refuse to produce the documents cannot be asserted against a third party who would be entitled to production as against the client: *In re Hawkes, Ackerman v Lockhart* [1898] 2 Ch 1 and (2) for this purpose a liquidator is in the same position as a third party: *In re South Essex Estuary and Reclamation Co. ex parte Paine and Layton* (1869) LR 4 Ch App 215. This is the position of both liquidators and receivers under the English statutory scheme. p. 1149
49. The Court of Appeal decided that in seeking delivery up of the Documents, the Liquidator was also acting in the capacity of a third party with the result that the Appellant could not validly assert its lien to defeat an order for delivery up: please see at [158]-[164]. The Liquidator submits that the Court of Appeal was right so to conclude. This is for two main reasons. p. 1210
- 1236
50. First, in exercising the relevant powers seeking delivery up, the Liquidator was not acting as agent of the society. The key features of the Act and rules are referred to above. As explained by the Court of Appeal, in exercising the power to order the transfer of possession of the Documents to him, the Liquidator acts not as agent of the society, but as a liquidator appointed by the Registrar to effect and fulfil the purpose of the statutory scheme set out at section 45(1) for the benefit of third parties interested in the society: judgment at [140], [159]-[163]. p. 1296
- 1298
51. Secondly, if the Liquidator is acting as agent in exercising the relevant powers under section 45 of the Act, he does so as agent of the Registrar, not the society. It is clear from sections 44, 45(1) (opening words) and 46 that a liquidator is appointed by the Registrar and that the liquidator is “subject to the Registrar’s direction and control” (section 46), “subject to the guidance and control of the registrar and to any limitation imposed by the Registrar” (section 45(1)) and “shall exercise his powers subject to the control and revision of the Registrar” (section 46). As the judgment correctly states at [161], “... *it is incontrovertible that [the liquidator] answers only to the Registrar and no-one else. He was, therefore, not someone claiming through [the society] or having no greater right than [the society] to the documents subject to the retaining lien.*” p. 137
- 139
- p. 131
p. 137
- 139
- p. 828
- 830
- p. 138

52. The Appellant is therefore unable to assert the lien against the Liquidator, who is exercising the relevant powers in the position of a third party and does not act on behalf of the Appellant's client.

53. As to Paragraph 26, the dispute between the parties as to the reason for the termination of the retainer has not been determined. Please see Paragraph 37 above.

54. The Appellant's submissions at Paragraphs 28 and 31-33 cite English case law which is of limited assistance. Whatever the position under the English statutory scheme, the position is different in this case which concerns the exercise of relevant powers under the Act.

55. The Board's attention is drawn to the Affidavit of the Registrar (please see p714-726), sworn in August 2022 in opposition to the stay of execution sought by the Appellant, in which, amongst other matters, the Registrar stated that:

**p. 791
- 803**

- a. there was a current lack of liquidity within the estate;
- b. that the withholding of over 100 certificates of land title by the Appellant was unlawful and was not only impeding the dissolution of Mount Royal and the Liquidator's ability to investigate the Firm's claim and other claims but had also exposed the Liquidator to several lawsuits for failure to perform his obligations under several contracts;
- c. the withholding of Mount Royal's files and certificates of title had not only caused significant delay and expenses but had also placed members and shareholders of Mount Royal at risk of losing their investments, assets/returns due to the increased risk of dissipation of their assets which were being taken over and sold by squatters and unauthorised persons.

56. Whilst this is not a matter that concerns the Board, for the avoidance of doubt it is not accepted by the Liquidator that the entirety of the Documents previously in the possession of the Firm were delivered up on 8 February 2024. Some of the certificates of title appear to be missing.

Conclusion

57. It is respectfully submitted that the Appeal should be dismissed.

58. If funds in the liquidation permit, subject to the costs of the appeal, having verified the sums claimed by the Firm and having sought the guidance of the Registrar, the Liquidator stands ready to make a payment in good faith to the Appellant's firm.

BIRGITTA MEYER
RITA ALLEN-BROWN
31 August 2026