IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2022/CLE/gen/00618

B E T W E E N:

IAN ROSS

Plaintiff/Applicant

AND

PATRICIA CASH

(As Personal Representative of the Estate of Frederick Ross Sr.)

First Defendant

AND

PATRICIA CASH

Second Defendant

Before:	**The Honorable Madam Justice Carla Card-Stubbs**
Appearances:	Rouschard Martin of Counsel for the Applicant
	Mario Gray of Counsel for the Defendants
Hearing Date:	June 5, 2023

Application to set aside order granting leave to pursue committal proceedings or, in the alternative, to strike out Notice of Motion for order of committal -Whether Defendant failed to give full and frank disclosure –material non-disclosure- Whether court should grant leave to a party also in breach of the court order- Whether lack of penal notice endorsement on order is fatal to committal proceedings -Whether order is clear and unambiguous

The application sought to set aside an order giving leave to the Defendant to pursue committal proceedings against the Plaintiff/Applicant or, in the alternative, to strike out Defendant's Notice of Motion for order of committal on several grounds.

HELD: Application acceded to and the Notice of Motion for order of committal of the Plaintiff/Applicant is struck out. An enforceable order must be clear and unambiguous. Paragraph one of the Order and Paragraph 31 of the

Judgment provide no clear indication of what the Plaintiff/Applicant must do, when he must do it, and how much he is to pay by way of an annuity to each person entitled. More than a safeguard, it is the essence of any enforcement proceeding that the obligation imposed on a party must be clear and unambiguous. In this case, neither the judgment nor order makes it clear as to what the Plaintiff/Applicant must do and when he must do it.

The court found that there was no material non-disclosure sufficient to merit the setting aside of the court's order.

The purpose of a penal notice endorsed on an order is to afford the party at risk of committal an opportunity to know the severity of that possible sanction for non-compliance. The absence of the penal notice is not fatal to the proceedings where a party has such notice.

A court has an interest in having its orders obeyed. The fact that a party seeking an order of committal is also in breach of the order would not bar that party from continuing with the proceedings but that fact could be taken into account in the sanctions phase of the proceedings.

RULING

Card-Stubbs J:

INTRODUCTION

[1.] This ruling concerns an application to set aside an order giving leave to the Defendant to pursue committal proceedings against the Plaintiff/Applicant or, in the alternative, to strike out Defendant's Notice of Motion for order of committal pursuant to Order l8 Rule 19 of the Rules of the Supreme Court (R.S.C. 1978, as amended) ('RSC').

[2.] On June 5, 2025, this court orally delivered its determination and a summary of its reasons to the parties. For the written reasons set out below, the Notice of Motion for an order of committal is struck out.

BACKGROUND

[3.] This matter has its genesis in an action brought by Ian Ross (Plaintiff/Applicant) against his sister, Patricia Cash. Patricia Cash was sued in both her representative capacity (First Defendant) as Personal Representative of the Estate of their deceased father, Frederick Ross Sr and in her personal capacity (Second Defendant). For ease of reference, Patricia Cash will be referred to as the

"Defendant" in this ruling. By judgement of 9th May 2013, Chief Justice Michael Barnett, as he then was, made a ruling in respect of the distribution of the assets of the deceased father to his children, including the parties.

[4.] The learned judge found that the Plaintiff/Applicant had established a proprietary estoppel in relation to disputed property and a business. By paragraph 31 of the judgment, the learned trial judge ruled:

> I propose to give effect to the equity created by the estoppel and hold that Patricia as Executrix of the father's estate hold the property upon trust for Ian and that she must convey the same to Ian. Ian will hold the property subject to an obligation to pay annuities to his sisters as per the terms of the 2006 will. The conveyance of 4th June 2011 is set aside."

[5.] The Judgment was reduced to a Final Order which was approved by the learned trial judge on 19th July 2013 and filed July 24, 2013. That order reads:

> IT IS HEREBY ORDERED as follows:
>
> 1. That the First Defendant as Executrix of the estate of Ian Ross Sr. ("the deceased") holds the property and business situate thereon ('the property") in trust for the Plaintiff subject to the payment of annuities as per the terms of paragraph 4 of the Last Will and Testament of the deceased dated 2006 ("the Last Will and Testament).
> 2. The First Defendant convey the property to the Plaintiff forthwith.
> 3. That the Conveyance dated 4th June, 2011 and made between Fredrick Ross Sr. of the one part and Patricia Cash of the other part is declared void.
> 4. That the First Defendant return, give, and/or convey all golf carts and/or franchise licenses of the Estate of Frederick Ross Sr. to the Plaintiff forthwith.
> 5. That the First Defendant is to pay to the Plaintiff forthwith the cost of these proceedings to be taxed if not agreed.

[6.] It is the Defendant's case that the Plaintiff/Applicant had failed to pay the annuities pursuant to Paragraph 31 of the May 9, 2013 judgment. The matter of the payment of annuities is reflected in paragraph 1 of the order.

[7.] By ex parte summons filed December 2, 2021, the Defendant sought leave to bring committal proceedings against the Plaintiff/Applicant. That application was supported by the requisite statement supporting an application for leave to apply for an order of committal, an affidavit of Patricia Cash filed December 2, 2021 and a supplemental affidavit of Patricia Cash filed 15 December 2021. By Order dated March 2, 2022 and filed April 1, 2022, the Second Defendant was granted leave to commit the Applicant for contempt of court because of the breach of the court order ('First Application'). It is common ground that the Notice of Motion was not

entered within the time frame of Order 52 RSC and the leave lapsed. The Notice of Motion was then struck out on an application by the Plaintiff/Applicant.

[8.] Subsequently, by Ex parte summons filed May 6, 2022 the Defendant again applied for leave to bring committal proceedings against the Plaintiff/Applicant ('Second Application'). That application was supported by the requisite statement supporting an application for leave to apply for an order of committal, an affidavit of Patricia Cash filed May 6, 2022 and a supplemental affidavit of Patricia Cash, filed May 6, 2022.

[9.] Chief Justice Brian Moree, as he then was, on May 20, 2022, granted leave "under Order 52 Rule 2 of the Rules of the Supreme Court for Ms. Patricia Cash to commence committal proceedings against the Plaintiff IAN ROSS".

[10.] On May 23, 2022, the Second Defendant filed a Notice of Motion to Commit. The breach is described in that filed Notice of Motion as "the Plaintiff … Ian Ross …. has willfully disobeyed the Court and has failed refused or neglected to pay the Annual Annuities or any part thereof to Applicant and her sisters in accordance with Paragraph 31 of the Judgment of then Chief Justice Sir Michael Barnett dated 9th May 2013 and a subsequent order by the said Chief Justice…"

[11.] The Applicant now seeks to set aside the Order of May 20, 2022 granting leave to the Respondent or, in the alternative, to strike out the Notice of Motion for an order of committal.

The Application

[12.] The Applicant makes its application by Notice of Motion dated June 30, 2022 and filed on July 1 2022. The application is made "pursuant principally to Order 45 and 52 of the Rules of the Supreme Court (RSC Rules) and other rules mentioned herein and the inherent jurisdiction of the Court for an order setting aside the First Defendant's order for leave granted on the 20th May, 2022 and/or striking out or dismissing the First Defendant's Notice of Motion for committal filed on the 23rd May, 2022, with costs to be paid by the Defendants to the Plaintiff to be taxed if not agreed".

[13.] The grounds of the Application are set out as:

> (1). The Defendant, by way of an ex parte application, was granted leave without providing the Court with full and frank disclosure of the following fundamental matters:

1.1. The Defendant failed to disclose to the Court the fact that she previously applied for leave and was granted leave and that such leave lapsed with the purported Notice of Motion for committal being subsequently struck out with costs to the Plaintiff by the Honourable Mr. Justice Neil Brathwaite on the 4th May, 2022;

1.2. The Defendant failed to disclose to the Court the fact that she did not mention anything about her being terminally or seriously ill in any of her documents filed in support of her first application for leave or her first committal application;

1.3. The Defendant failed to inform the Court of the fact that she has disobeyed the order of the Court by failing to execute a conveyance to the Plaintiff forthwith when ordered by the Court to do so on the 9th May, 2013. Further, the Plaintiff raised this point as a defence to the first committal application by stating that the Defendant and her sisters waived or abandoned (pursuant to Order 45, rule 10) their benefit that flowed from the judgment or order of the Court in this matter;

1.4. The Defendant failed to indicate to the Court the fact that the Plaintiff has a potential partial or full defence of Limitation due to the judgment (dated 9th May, 2013) becoming enforceable more than 6 years ago.

(2). There is no notice or penal notice on the 9th May, 2013 order (filed 24th July, 2013) in accordance with Order 45 rule 7 (4) (a) which is a mandatory prerequisite to invoke enforcement based on committal proceedings under Order 45 rule 5 (1) (b) (iii) and Order 52 of the RSC Rules.

(3). In line with 1.3 above, the Defendant failed to fulfill the condition to transfer the property to the Plaintiff and therefore the Defendant and her two sisters (Cathleen Major and Elizabeth Pinder) have waived or abandoned the benefit of the order of the 9th May, 2013 according to Order 45, rule 10 of the RSC Rules. On the 17th December, 2013, the Registrar of the Supreme Court (Donna Newton) had to execute the conveyance of the property on behalf of the Defendant due to the Defendant failing to fulfill the condition by obeying an order of the Court.

(4). The Defendant's committal application is frivolous, vexatious and an abuse of the process of the Court pursuant to Order 18, rule 19 of the Rules of the Supreme Court for the following reasons:

4.1. The Defendant made a committal application on the 4th May, 2022 and she had the opportunity to advance the matters she is now advancing and which she previously advanced;

4.2. The Defendant waited 8 years to commence committal proceedings which is offensive to section 5 (3) of the Limitations Act 1995 and which creates injustice and prejudice for the Plaintiff;

4.3. The Defendant was non-complaint with the very same 9th May, 2013 order she is alleging the Plaintiff is non-compliant with and thus her application is illegitimate, frivolous, vexatious and an abuse of the process of the Court.

4.4. The fraudulent conveyance (dated 4th June, 2011) by Defendant which was declared void by the Court challenged the terms of the subject Will, estopped the Defendant from benefitting from such Will and effectively her actions caused her to be self-disinherited.

(5). The order of the 9th May, 2013 does not specifically order the Plaintiff to pay annuities to his three sisters after the property has been conveyed to him and further the Defendant was ordered to convey the property to the Plaintiff forthwith without any condition to pay annuities according to paragraph 2 of the order.

(6). The deed which conveyed the property to the Plaintiff on the 17th December, 2013 made no recitals of a condition that required the Plaintiff to pay annuities to his sisters. The property was conveyed to the Plaintiff free and clear of any such conditions or restrictions.

(7). The Defendant cannot act on behalf of her two sisters to enforce the order of the 9th May, 2013.

(8). The Defendant is in contempt of Court. The Defendant must purge her contempt otherwise she should not be heard on this or any other application due to her habitual contempt of Court in the following instances:

8.1. The Defendant failed to execute the conveyance of the property to the Plaintiff forthwith (pursuant to paragraph 2 of the 9th May, 2013 order) and as a result of her disobedience such conveyance had to be executed by a Registrar of the Supreme Court on the 17th December, 2013 based on a further order of the Court made on the 11th December, 2013.

8.2. The Defendant failed to return, give and/or convey all 18 golf carts and licence plates to the Plaintiff forthwith. Presently she has failed to return two golf carts and their licence plates.

[14.] The Application is supported by the Affidavits of Ian Ross filed on April 27, 2022 and on 15 July 2022.

ISSUE

[15.] The issue which the Court must determine is whether the Court should exercise its discretion to either (1) set aside the order granting leave to bring committal proceedings or, (2) in the alternative, to strike out the Second Defendant's Notice of Motion for an Order of Committal.

[16.] While Counsel for the Applicant in oral submissions sought to address both limbs of the application and distinguish the submissions, Counsel contended that the submissions on the application to set aside the order could also constitute

submissions and support for the grounds to strike out the Notice of Motion. Therefore, this court will treat the submissions together.

LAW AND DISCUSSION

[17.] It is not in issue that the Rules of the Supreme Court (R.S.C. 1978, as amended) ('RSC') applies to the current proceedings.

The Court's jurisdiction to strike out pleadings and to set aside orders

[18.] The Court derives its jurisdiction to strike out pleadings pursuant to Order 18 Rule 19 (1) of the RSC which provides:

> "19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[19.] The Court also has the power to set aside an order on procedural or substantive grounds. For example, a court may set aside an order if it is satisfied that the way in which the order was obtained was an abuse of process. By way of other examples, a court has power to set aside any proceeding, including judgments or orders, for non-compliance with the rules: Order 2 RSC and a court may set aside an order made ex parte: Order 32, rule 6 RSC.

[20.] The application for leave to commit the Plaintiff/Applicant was made and granted pursuant to Order 52 rule 2 RSC which provides:

> 2. (1) No application to the Supreme Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.
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> (2) An application for such leave must be made ex parte to the Supreme Court, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be

committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

[21.] The procedure after leave is granted is set out in Order 52 rule 3 RSC. Notably, a court may dispense with the service of the notice of motion:

> 3. (1) When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to the Supreme Court and, unless the Court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.
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> (2) Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.
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> (3) Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.
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> (4) Without prejudice to the powers of the Court or judge under Order 65, rule 4, the judge may dispense with service of the notice of motion under this rule if he thinks it just to do so.

[22.] The court's power to make an order of committal of its own motion is captured in Order 52, rule 4 RSC:

> 4. Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the Supreme Court to make an order of committal of its own motion against a person guilty of contempt of court.

The Exparte Application

[23.] The Applicant contends that the Defendant sought and obtained leave in an ex parte hearing and that the Applicant did not have an opportunity to be heard.

[24.] The Defendant submits that the relevant rule, namely Order 52 rule 2(2), provides for making an application for leave which is by an ex parte application, that the procedure was complied with and that leave was granted.

[25.] This point may be dispensed with in brief. Order 52, rule 2(2) specifically provides that the leave is sought and obtained on an ex parte application. Once leave is obtained, the party alleged to be in breach is served with the Notice of Motion for the hearing. At that hearing, the party will have an opportunity to be heard and to present his case.

The Duty of Frank and Full Disclosure on an ex parte application

[26.] It is particularly important that a party who moves the Court on an *ex-parte* basis, discloses to the court all material facts relevant to the application before it. The court hears the application in the absence of another party. The requirement for full and frank disclosure serves to enable a court to make a fair and just determination on the matter before it notwithstanding the absence of another party. It also minimizes the likelihood of the ex parte order being challenged or set aside on the basis of a party's failure to disclose material facts. Full and frank disclosure saves judicial time.

[27.] Relying on the case of **Ednol Farquharson v. Karin Hamilton** 2018/CLE/gen/01046, Counsel for the Plaintiff/Applicant submits that the Defendant failed to make full and frank disclosure to the court on material facts, namely (a) that the Defendant had previously sought and been granted leave and that the leave lapsed resulting in the Notice of Motion for committal being subsequently struck out with costs to the Plaintiff; (b) that she had disobeyed the Court Order by failing to execute a conveyance to the Plaintiff (c) the Plaintiff has a potential partial or full defence of Limitation due to the judgment and (d) that she had not mentioned anything about her being terminally or seriously ill in her first application.

[28.] Counsel for the Defendant submits that the points raised in objection to leave being granted are points to be raised on the substantive application for committal or were points dealt with at the trial. Counsel for the Defendant conceded that while the first application for leave to bring committal proceedings ought to have been disclosed, it is to be borne in mind that it was dismissed on a technicality and not on a substantive hearing.

[29.] In the case of **Ednol Ferguson v Karen Hamilton** 2018/CLE/gen/1046, the court set aside an eviction order because the court found that the Applicant in that case had failed to comply with the rules of procedure and had failed to disclose relevant material facts. In coming to his determination, Justice Thompson considered the case of **Wesley International Limited and others vs. Artis Consumer Grooming Products Ltd** [2018] 1 BHS No. 1(paragraph 20):

> [20) In the case of WESLEY INTERNATIONAL LIMITED and others vs. ARTIS CONSUMER GROOMING PRODUCTS Ltd. [2018) 1 BHS J. No. 1 Winder J. stated at paragraphs 13 - 14:
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> 13. "There is little dispute between the parties as to the law relative to non-disclosure/failure to be full and frank on an ex parte application. I need only refer to the oft cited dicta of *Ralph Gibson LLJ in the case of Brink's Mat*

Ltd. v Elcombe [1998} 1 WLR 1350 at 1356.

In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.

(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, *per* Scrutton L.J.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners,* per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see *per* Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92–93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:" see *per* Donaldson L.J. in *Bank Mellat v. Nikpour,* at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners'* case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

> (7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" *per* Lord Denning M.R. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms
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> "when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" *per* Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.,* ante, pp. 1343H–1344A.
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> 14. In this jurisdiction, the decision in *Brinks Mat Ltd. v. Elcombe* was confirmed by the Privy Council in the decision of Walsh v. Deloitte and Touche Inc. 59 WIR 30.

[30.] Based on those principles, it is clear that the relevant non-disclosure must be of facts of "sufficient materiality to justify or require immediate discharge of the order without examination of the merits". This requires an assessment of the nature of the non-disclosure and the importance of the non-disclosed facts to the determination of the application. Material facts go to the essence of the issues to be decided.

[31.] Not all non-disclosure is material such as to merit the setting aside of an order. Even if a court were to find that the non-disclosure was material, a court still has a discretion to maintain the order if it finds that the order could have been properly granted had the material facts been disclosed at the time of the making of the order.

[32.] In this case it must be determined whether any non-disclosure by the Defendant was material to the decision of the court in granting leave on the Defendant's application and, if so, whether the disclosure would likely have caused a different outcome on the application.

[33.] In this case, the Applicant submits that the Defendant failed to inform the Court that leave had previously been granted and had lapsed and that the subsequent Notice of Motion was struck out. It seems to me that this is a relevant fact that ought to have been disclosed. Counsel for the Defendant conceded same. However, I note that the Notice of Motion was struck out as a result of the Defendant's procedural misstep and not after a hearing on the merits. Had the non-disclosure concern an application heard on the merits and dismissed, then that is a fact that could have estopped the Defendant from obtaining a second order. That is not the case here. The Defendant's application was never heard. The Defendant

has since regularized her position. In my opinion, that is not a material fact that would cause a court to refuse to grant leave to pursue committal proceedings when the breach alleged in the first application was said to have persisted at the time of the second application.

[34.] The Applicant further averred that the Defendant failed to disclose that she was terminally or seriously ill in her first application for leave to commence Committal proceedings. This representation is inaccurate. By supplemental affidavit filed 15 December 2021 in support of the First Application, the Defendant at paragraph 3 stated, *"I am very sick which may end terminally, and I would like to receive what my father left for me as ordered by the court before I die."* The Defendant exhibited a letter dated 16 November 2021 from Bahamas Wellness as evidence in support of that statement.

[35.] The Applicant further contends that the Defendant failed to disclose to the court that the Applicant has a potential partial or full limitation defence given the attempted enforcement of a judgment "more than 6 years old". To my mind, this is a misconstruction of the duty to disclose material facts. It is not for the Defendant to consider and advance possible defences of a party alleged to be in breach of a court order unless such a defence is a matter of record coming to the knowledge of the Defendant.

[36.] A defence at law is not a factual disclosure. Counsel for the Defendant refutes that there is any limitation bar on enforcement and submits that the order relates to the payment of annuities which is a yearly obligation. He submits that in such an instance there is no available limitation defence to be disclosed. This rebuttal by counsel for the Defendant illustrates the dangerous ground that would be tread if a court were to require an Applicant to advance possible defences for the other party's noncompliance with a judgment or court order. In any event, in the application for leave to pursue committal proceedings, a party must necessarily show the date of the judgment or order alleged to have been breached. If the Applicant has a defence to any enforcement proceedings, that defence may be given by way of answer to the allegation of a failure to comply with a court order at a substantive hearing in the committal proceedings.

[37.] The Applicant further submits that the Defendant failed to inform the Court of that she was in contempt by failing to execute the conveyance to the Plaintiff/Applicant as per the court order. The Defendant submits that the "Plaintiff never took out any contempt proceedings against the Defendant and it is only the Court that can find a party in contempt." The Defendant submit that the use of the term "is intentionally misleading."

[38.] The May 9, 2013 judgment provided that the First Defendant "must convey" the property to the Applicant and the order provides that the First Defendant "convey the property to the Plaintiff forthwith". It is in evidence, and is not disputed, that the First Defendant failed to convey the conveyance. On application by the Applicant, the Registrar of the Supreme Court effected the conveyance. The Defendant in her affidavit evidence refers only to failure of the Plaintiff to make the annuity payments pursuant to the judgment and the court order. The Defendant's makes no mention of any non-compliance on her part. The failure by the Defendant to execute the conveyance is not refuted. The court's record reflects the execution of the conveyance was done by the Registrar pursuant to a Court order.

[39.] The question is whether a court being seized of that fact, could properly grant to a person in breach of the court order, leave to commit another party who is said to be in breach of the dame court order. In other words, should a court grant aid to a party who, admittedly, did not comply with the terms of the very order she now wishes to enforce?

[40.] It is an attractive proposition that the court ought not to aid a party in breach of a court order. However, it seems to me that the correct position is to be derived from the principle and purpose of the processes of enforcement of judgments and orders. While an order is made in favour of one party, the order is the order of the court. A court has an interest in having its orders obeyed. Enforcement proceedings exist in the face of the reality that not all persons will give effect to a court resolution. It is up to a party to pursue enforcement proceedings. It seems to me that when a court is made aware of the non-compliance with its judgment or order, it is in the interest of administration of justice that the court's judgment or order is enforced. It cannot aid the party in breach to say that the other party is also in breach. The person in breach has the same recourse as the person seeking leave to commit. If failure to comply with a court order disentitled a person from asking for the same order to be enforced, then parties could collude to undermine the administration of justice by the willful disregard of the court's order. I note that a court may initiate contempt proceedings on its own motion. This power makes it clear that the court ought to, and can, robustly encourage compliance with its judgments and orders.

[41.] This is an appropriate place to note that in committal proceedings, a court has many options in addition to committal that are open to it. Leave to bring committal proceedings is not *de facto* committal. That the party obtaining leave to purse committal proceedings is also in breach of the court's judgment or order may be relevant to the determination of an appropriate sentence for the contemnor if a court finds the allegation of contempt made out. It is also an attractive proposition

that the principle that "he who seeks equity must do equity" could work to bar a person in breach of the order from obtaining leave to enforce a judgment. However, that principle can be carried out to full effect at the sentencing stage. It serves the purpose of the rule of law that persons who disobey court orders ought to be sanctioned. The nature of that sanction can take many different forms. Matters a court may take into account in determining an appropriate sanction include the conduct of the contemnor and the conduct of the other party whose own breach is not refuted.

[42.] In this case, it is my determination that while the Defendant's own breach was a material fact, the disclosure of same was not of sufficient weight to prevent a court from granting leave to pursue committal proceedings against another party that is in breach of its order. It is my opinion that that it is even more so here where the breach of the Defendant had been "cured" by the Registrar's execution of the Conveyance, with costs to the Applicant.

[43.] The application for leave to commit concerned whether there was a judgment or order of this court and whether there was a breach of the order. In the circumstances, I find that there was no material non-disclosure sufficient to have the May 20, 2022 order granting leave to pursue committal proceedings set aside.

[44.] I agree with the submission of counsel for the Defendant that the several matters raised are matters that may be raised in a substantive committal hearing. I would also add to that grouping the legal submission of the Applicant that the Defendant failed to execute a conveyance and thus had "abandoned the benefit of receiving annuities" due to her noncompliance. Such matters serve as explanations of the non-payment of the annuities and are to be considered on a substantive hearing and not on a pre-emptive application such as this.

Non-compliance with the rules and no Penal Notice

[45.] The Applicant further submitted that there was non-compliance with the rules and that if strict compliance was not observed, there would be serious injustice and prejudice to the Applicant per the case of **Adjudah v. Lalor** [2016] JMCA Civ 52.

[46.] The Applicant also submitted that no Penal Notice was endorsed on the court order in accordance with Order 45 rule 7 (4) (a) and that such endorsement is mandatory in order to invoke enforcement by committal proceedings under Order 45 rule 5 (1) (b) (iii) and Order 52 of the RSC Rules: **Iberian Trust, Ltd v Founders Trust and Investment Co Ltd** [1932] All ER Rep. 176.

[47.] The Defendant seeks to distinguish orders made as a result of a judgment from orders made following an interlocutory application. The Defendant submitted that the relevant order was an order created as a result of a judgment and not as a result of an interlocutory application. The submission is that the penal notice under Order 45 rule 7(4)(a) would not be necessary for an order "which was only reflecting the judgment in a substantive hearing." Counsel for the Defendant also points out that the order would have been settled by the attorneys for the parties at that time.

[48.] The Defendant also submitted that Order 45 is not relevant as the Defendant is not seeking enforcement to pay the annuities but instead asking the Court to find that the Applicant is in breach of the order and to be found in contempt of Court. The Applicant submits that therefore no penal notice is required.

[49.] Order 45 deals with the enforcement of judgments. Order 45, rule 7(4)(a), RSC provides for the endorsement of a notice on the order being enforced that a person in breach is liable to a process of execution, i.e. committal. Order 45, rule 7 provides:

> (1) In this rule references to an order shall be construed as including references to a judgment.
>
> (2) Subject to Order 24, rule 16(3), Order 26, rule 6(3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless —
>
> (a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and
>
> (b) in the case or an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.
>
> (3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(ii) or (iii) unless —
>
> (a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of sequestration or against whom an order of committal is sought; and
>
> (b) in the case of an order requiring the body corporate to do an act, a copy has been so served before the expiration of the time within which the body was required to do the act.
>
> (4) There must be indorsed on the copy of an order served under this rule a notice informing the person on whom the copy is served —

(a) in the case or service under paragraph (2), that if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the Order, he is liable to process of execution to compel him to obey it; and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

(5) With the copy of an order required to be served under this rule, being an order requiring a person to do an act, there must also be served a copy of any order made under Order 3, rule 4, extending or abridging the time for doing the act and, where the first-mentioned order was made under rule 5(3) or 6 of this Order, a copy of the previous order requiring the act to be done.

(6) An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either —

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

(b) by being notified of the terms of the order,

(c) whether by telephone, telegram or otherwise.

(7) Without prejudice to its powers under Order 61, rule 4, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

[50.] Order 45 rule 5 provides for enforcement by committal:

5. (1) Where —

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time, or, as the case may be, within that time as extended or abridged under Order 3, rule 4; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act;

then, subject to the provisions of these Rules, the judgment or order may be enforced by one or more of the following means, that is to say —

(i) with the leave of the Court, a writ of sequestration against the

property of that person;

(ii) where that person is a body corporate, with the leave of the Court, a writ of sequestration against the property of any director or other officer of the body;

(iii) subject to the provisions of the Debtors Act an order of committal against that person or, where that person is a body corporate, against any such officer.

(2) Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under rule 6 requiring the act to be done within some other time, references in paragraph (1) of this rule to a judgment or order shall be construed as references to that order made under rule 6.

(3) Where under any judgment or order requiring the delivery of any goods the person liable to execution has the alternative of paying the assessed value of the goods, the judgment or order shall not be enforceable by order of committal under paragraph (1), but the Court may, on the application of the person entitled to enforce the judgment or order, make an order requiring the first mentioned person to deliver the goods to the applicant within a time specified in that order, and that order may be so enforced.

6. (1) Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the Court, shall, without prejudice to Order 3, rule 4, have power to make an order requiring the act to be done within another time, being such time after service of that order, or such other time, as may be specified therein.

(2) Where, notwithstanding Order 42, rule 2(1), or by reason of Order 42, rule 2(2), a judgment or order requiring a person to do an act does not specify a time within which the act is to be done, the Court shall have power subsequently to make an order requiring the act to be done within such time after service of that order, or such other time, as may be specified therein.

(3) An application for an order under this rule must be made by summons and the summons must, notwithstanding anything in Order 61, rule 9, be served on the person required to do the act in question.

[51.] Enforcement of a judgment by committal of a person interferes with the liberty of a person in breach of an order obtained in civil proceedings. The purpose is to secure compliance with the court's order. Given the severe consequence of committal, there are certain safeguards in the rules. Procedural requirements are to be strictly observed given that a party's liberty is at risk. Some of the procedural safe guards are notice of the court order and a penal notice warning of the consequences of non-compliance. It is a golden principle of justice that a party must not be subject to committal proceedings without knowledge of the terms of the order that he is said to be in breach of and without knowledge of the possibility of an order of committal if he fails to comply with the order. The golden principle is not defeated by non-compliance with the strict terms of Order 45 rule 5 where

the principle itself is served. So, for example, Order 45 rule 7 provides that a court may "dispense with service of a copy of an order under this rule if it thinks it is just to do so." In a case where the parties settled the order that followed a judgment rendered in the matter between the parties, it is apparent that the parties, being architects of the order, would be aware of its terms. In such a case, a court may well "dispense with service of a copy of an order" it being "just to do so."

[52.] Order 45, rule 7, applies to both judgments and orders. Order 45, rule 7(1) provides that in "this rule references to an order shall be construed as including references to a judgment". In this jurisdiction, it is unusual for a judgment to be endorsed with a penal notice. Such endorsements are usually found on orders. The purpose of a penal notice endorsed on an order is to afford the party at risk of committal an opportunity to know the severity of that possible sanction for non-compliance. The absence of the penal notice is not fatal to the proceedings where a party has such notice. It is the law in this jurisdiction that "the omission of the penal notice is not fatal to enforcement by committal proceedings once the person who is sought to be committed was well aware of the consequences of disobedience: **Sheila Narine v The Representative of The Estate of the Late Terry Fernander** 2016/CLE/gen/0607

[53.] In this case, I am satisfied that, having faced, and challenged, the first application for committal, that the Applicant was well aware that committal was a real and possible sanction for failure to comply with the May 2013 judgment and the order that flowed therefrom. The lack of an endorsement of a penal notice in this case would not be fatal to the launched committal proceedings.

[54.] In **Iberian Trust, Ltd v Founders Trust and Investment Co Ltd**, the plaintiff company, Iberian Trust Ltd, obtained an order against the Defendant company, Founders Trust Investment Co Ltd, for the return of shares. The shares were not transferred and the plaintiff company sought writs of attachment against the directors. The application was dismissed. The court found that the order which read "that the plaintiffs do have a return of the … shares within fourteen days from the date hereof" was ambiguous and did not require the Defendant to do anything. Further, the order was not served on the directors within the set time limit and there was no penal notice on the order. In relation to the penal notice, the court per Luxmoore J opined at page 179 – 180:

> But the matter does not end there; there is a further objection with which I think I must deal, because it raises a question of some importance. The order when it was served on the defendant company and on the directors had no endorsement on it such as is required by Order 41, r 5. That rule is as follows:

> "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be endorsed a memorandum in the words or to the effect following, viz: 'If you, the within named A B, neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purposes of compelling you to obey the same judgment (or order).'"
>
> It is to be noticed that the form of the memorandum is not in any sense a rigid form. It may be altered so long as the effect is in substantial accord with the form. This must give such latitude as is necessary to meet the facts of the particular case. The object of the endorsement is plain, namely, to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences. In the present case it is admitted that no steps can be taken to sequestrate the property of the company because the order served on it was not endorsed as required by Order 41, r 5. It is admitted that service on the defendant company is necessary as a preliminary to enforcement of the order by sequestration. It is argued, however, that Order 41, r 5, does not apply to a director of a defendant company who is himself not a defendant to the action. The orders of the Supreme Court do not, in fact, require service of a copy of the judgment or order on a person who is not required by the order to do a particular act. But in practice the courts have always required that the order to be enforced should be personally served on the director before it would be enforced against him by attachment. As an authority for this proposition I refer to the decision of NORTH, J, in *McKeown v Joint Stock Institute* (2). In my judgment, the order so served should, as a preliminary to its enforcement against the directors, be endorsed with a notice to the effect of the memorandum proscribed by Order 41, r 5, including in it the name of the particular director served. So far as my experience goes, this has been the practice in the Chancery Division.

[55.] The case of **Iberian Trust, Ltd v Founders Trust and Investment Co Ltd** is distinguishable where the enforcement attempt was against the directors of a company who had not been made parties to the proceedings and so notice of the proceedings were imperative. The court therefore determined that the practice of the endorsement of a penal notice on the order ought to be followed in that instance. The court also found that where enforcement proceedings could only be pursued against the directors as an alternative remedy, such proceedings could not lie where they could not be pursued against the Defendant company.

Whether the order is a clear and unambiguous order

[56.] The Applicant submits that any order on which committal proceedings are to be based must be "clear and unambiguous ". It is the Applicant's contention that the Order is ambiguous and that the Order does not specifically order the Applicant to pay annuities.

[57.] One of the grounds for the strike out application reads, "The order of the 9th May, 2013 does not specifically order the Plaintiff to pay annuities to his three sisters after the property has been conveyed to him and further the Defendant was ordered to convey the property to the Plaintiff forthwith without any condition to pay annuities according to paragraph 2 of the order.

[58.] Counsel for the Defendant submitted that the judgment of the court was clear as to what each party "was expected to do as a result of the court's ruling. However, the order which was drafted, presented to the court, and eventually signed stated otherwise." Counsel for the Defendant also contended that the final order was not "reflective of the judgment pronounced by the learned Chief Justice (former)".

[59.] It is useful to set out some of the Defendant's submissions:

> Whilst we accept that it is sometimes necessary to add words to an order that are not expressed in a ruling or judgment in order to give the order clear and definitive positions. It is another thing to add words that change the overall affect and meaning of the judgment or ruling to the extent that the order does not reflect the judgment it is supposed to. There is much case law on the point and such examples are the cases of Thevarajah v Riordan [2015] EWCA Civ 41 as well as the case of The Attorney General v Johnathan Reid SCCiv App 127 of 2019. Some of these cases have stressed the importance of an order reflecting a judgment, by stating that the parties to litigation are bound by the judgment and not the order if the order is not reflective of the judgment. This was the case as the said order my [sic] be deemed a nullity.
>
> …..
>
> Having stated the above, we submit that, even if the court is not minded to follow the judgment of the court and follow the order as written as it is at this time, paragraph 1 of the Order is still very clear in its reference to paragraph 4 of the 2006 Will. The said paragraph 4 of the will lays out very clearly what is expected of the plaintiff. Therefore, we submit that in considering the will as the order requires, the order is clear and unambiguous. There is only one interpretation of the will as referenced.

[60.] The Defendant's application for leave was made, and granted, pursuant to Order 52, rule 2. Order 45 rule 5 RSC is applicable to an order that requires a party to do an act within a specified time or to abstain from doing an act. In certain circumstances, a court may vary the timeframe for the doing of the act. The Defendant's application was made on the basis of the breach of Paragraph 31 of the judgment, and supported by affidavit evidence which referred to both the judgment and the order.

[61.] The breach identified in the Defendant's affidavit in support is set out in paragraph 3 of the Affidavit filed May 6, 2022:

> The Plaintiff Ian Ross has not obeyed Paragraph 31 of the said judgment in whole or in part and as. Result the Applicants continue to wait for the payment of annuities ordered in the amount of Ten Thousand ($10,000.00) Dollars per year for each of the Applicants herein being myself Patricia Cash, Cathleen Major and Elizabeth Pinder which now amounts to Eighty Thousand ($80,000) Dollars each or Two Hundred and Forty Thousand ($240,000) Dollars in total.

[62.] The submission of the Applicant is that the order is ambiguous and unclear. The submission of the Defendant is that (1) firstly, they rely on paragraph 31 of the judgment and (2) secondly, the order is a mere finalization of the judgement and that the judgment and order (paragraph 1) are made clear by reference to the terms of the Will. However, and, significantly, the Defendant concedes that the order had words not found in the judgment.

[63.] Now, it is not unusual for an order to be framed in terms that give effect to a judgment, even though it does not reproduce the judgment verbatim. I accept defendant counsel's submission that, as a principle of law, any addition of terms ought not to change the nature of the judgment.

[64.] I also agree with the applicant's submission that the principle of law is that the order must be clear. In other words, any obligation imposed on the party must be clear. This is a safeguard for both parties and importantly, it is a safeguard for the party said to be in breach. It is also more than a safeguard and a procedural requirement. For the person who is subject to enforcement proceedings, in this case committal proceedings, what must be clear from any order is (1) what he must do AND the timeframe within which he must do it or (2) what he must refrain from doing.

[65.] The Applicant relied on the case of **Equality and Human Rights v Griffin and Others [2010] EWHC 3343 (Admin).** That case concerned an application by the Commission for Equality and Human Rights ("the Commission") for the committal to prison of the three defendants, representatives of the British National Party ("BNP"). In that case, the parties disagreed on the interpretation of parts of the court order that the Plaintiff contended the defendants were in breach of. In that case, the court found that the order was capable of more than one interpretation. Lord Justice Moore-Bick opined:

> 22. The Commission and the BNP differ on the meaning of paragraphs 1 and 2 of the order. … In such cases it is vital that those to whom the order is addressed are able to understand clearly what they are and are not to do and if there is any uncertainty in its meaning the order should be construed in a manner that is less, rather than more, onerous to them. In *Redwing Ltd v Redwing Forest Products Ltd* (1947) 64 R.P.C. 67 the court was

> concerned with an alleged breach of an undertaking given by the defendant not to advertise or offer for sale any products as 'Redwing' products so as to be liable to lead to the belief that they were the plaintiff's. Jenkins J. held that there was no breach of the undertaking unless the manner of the advertising or offer were such as to lead to such a belief. He said at page 71:
>
> " . . . a defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken his undertaking. For the purposes of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question."
>
> In such cases it is vital that those to whom the order is addressed are able to understand clearly what they are and are not to do and if there is any uncertainty in its meaning the order should be construed in a manner that is less, rather than more, onerous to them.
>
> 23. ….
>
> 24. The meaning of the phrase "conditions of membership" could reasonably be construed as having either of the two meanings which are contended for by the Commission and the BNP in this case. ….In such a case, as Jenkins J. said in *Redwing*, it would be wrong for a person to be committed for contempt on the basis that, on one of two possible meanings, he has breached the terms of the injunction.
>
> 25. For that reason alone we do not consider that the application to commit for breach of paragraphs 1 or 2 of the order can succeed….

[66.] The case of **Iberian Trust, Ltd v Founders Trust and Investment Co Ltd** is also useful on the principle of a clear and unambiguous order. In that case**,** the plaintiff company obtained for the return of shares as against the defendant company. The relevant term of the order read "that the plaintiffs do have a return of the … shares within fourteen days from the date hereof." Justice Luxmoore found that the order did not impose an obligation on the defendant company (or its directors) and was not enforceable in the current form. Luxmoore J held at pages 178-179:

> The form of the order is a little unfortunate, because, although one may understand what is intended by it, it certainly does not define the precise steps which are to be taken to bring about the transfer of the legal title to the shares in question from the defendant company to the plaintiff company. I think that the proper form of order would have been for a declaration that so many shares standing in the name of the defendant company are the property of the plaintiff company, followed by an order to the defendant company to execute a proper transfer of those shares to the plaintiff company, or as it should direct, such transfer to be settled by

the judge in case the parties disagree. There has, in fact, been no transfer of shares by the defendant company, although the plaintiff company appear to have pressed for the transfer of the shares.

…From this it appears that in order to constitute a contempt of court for which the directors may be punished there must be wilful disobedience either by the company or its servants or directors to do something which it has been ordered to do. Now, turning back to ROWLATT, J's order, what is it that the defendant company have been ordered to do which the company and its directors have failed to do? **In terms, the order does not direct the defendant company to do anything; it says "that the plaintiffs do have a return of the said shares within fourteen days." Am I to spell out of that an order on the defendant company to do something? I think not. If the court is to punish anyone for not carrying out its order, the order must in unambiguous terms clearly direct what is to be done.** In saying this I (to not intend to say anything which would be contrary to what was said by CHITTY, J, in *A-G v Walthamstow Urban District Council* (3) which was relied on by counsel for the plaintiff company in his argument that it was the duty of the defendants to find out the proper means of obeying the order. Of course, there is such a duty on a defendant where the order either prohibits or orders the doing of a specific act. In the case mentioned the order restrained the defendant council from discharging sewage into a particular brook so as to create a nuisance. That was definite enough in its terms. The defendant council were, as I gather, unable to prevent discharge of sewage into the brook so long as the existing system of drainage or sewage disposal was used by them. The defendant council admitted that they were trying to find a solution of the difficulty while still retaining the existing system.

Here the order does not even provide that the defendant company shall return the shares. What it says is "that the plaintiffs do have a return of the said shares within fourteen days." Personally I do not think that even an order on the defendant company to return the shares would be sufficiently definite to be enforced by penal proceedings. **But the actual order is far more ambiguous than that; the order is no more an order to do an act than an order that the plaintiff is to recover something from the defendant is an order upon the defendant to do an act.** It was hold by the Court of Appeal in *Re Oddy*, *Major v Harness* (4) that an order to recover money is not an order on the defendants to do anything, and therefore that such order could not be enforced either by a supplementary order for the payment of the money within a fixed time or by attachment.

In my judgment, before this order becomes enforceable against the defendant company or its directors it is necessary for the plaintiff company to obtain a supplementary order requiring the defendant company and its directors and secretary, within a limited time, to execute a proper transfer of the shares to the plaintiff company. The supplementary order should provide that the transfer should be settled by the judge in case the parties differ.

[Emphasis supplied]

[67.] In this case, the determination of the learned trial judge is captured in paragraph 31 of the judgment as:

> I propose to give effect to the equity created by the estoppel and hold that Patricia as Executrix of the father's estate hold the property upon trust for Ian and that she must convey the same to Ian. Ian will hold the property subject to an obligation to pay annuities to his sisters as per the terms of the 2006 will. The conveyance of 4th June 2011 is set aside."

[68.] The Final Order which flowed therefrom reads at paragraph 1:

> That the First Defendant as Executrix of the estate of Ian Ross Sr. ("the deceased") holds the property and business situate thereon ('the property") in trust for the Plaintiff subject to the payment of annuities as per the terms of paragraph 4 of the Last Will and Testament of the deceased dated 2006 ("the Last Will and Testament).

[69.] The clear intention of paragraph 31 of the judgment in relation to the Defendant and her sisters, is an entitlement to an annuity. This is reflected in paragraph 1 of the order. Not surprisingly, counsel for the Defendant argues that paragraph 1 is clear and ambiguous - despite any additional word that might accompany the rest of the order or which might have been injected in the remainder of the order. It is the submission of the Applicant that the Order suggests that annuities were not to be paid until the property was conveyed to the Plaintiff/Applicant by the Defendant and that the payment of annuities was conditional on the conveyance of the property by the Defendant, which was not done. A conveyance was effected by the Registrar. The Applicant also submitted that since the Defendant failed to convey the property as ordered, the benefit of the annuities was abandoned.

[70.] Upon review of the order as drafted, it becomes apparent that it does not place a positive obligation the Plaintiff/Applicant to pay annuities to the Defendant. Nor does Paragraph 31 of the judgment, to my mind. There is no time specified within which the applicant must comply with the order. This has several consequences. Undoubtedly the intention that the Defendant ought to benefit from the payment of annuities is clear, but intention is not enough. If this matter were to proceed to contempt hearings, where contempt must be proved beyond reasonable doubt, a court must be satisfied so that it feels sure of several things. In this case: (1) What is it that the Plaintiff/Applicant is required to do and (2) when must he do it? "When" is an important element because, a court, in determining whether there is a breach, must consider whether the Plaintiff/Applicant still has time to comply.

[71.] The alleged breach is said to be a breach because of the Plaintiff/Applicant's failure to pay annuities. A court must also be satisfied as to a third factor which is

(3) how the annuity is to be calculated. The Notice of Motion shows the sum of Eighty Thousand dollars outstanding. How does the Defendant propose to show that the applicant had an obligation to pay a particular amount per year? That term is not in the order nor is it in the judgment nor is it before this court. The judgment makes reference to giving effect to the terms of the 2006 will. The order makes reference to Paragraph 4 of the 2006 of will. That term of the Will is not appended to the Order. The relevant paragraphs are not produced in the judgment as reference, notwithstanding that his Lordship reproduced a portion of the paragraph of the Will that is to be given effect in terms of the intention of the deceased father that his daughters receive an annuity.

[72.] In this scenario, if this matter were to proceed to a hearing and if the Plaintiff/Applicant were to be found guilty of contempt, what would be the terms of reference if the Plaintiff/Applicant sought to purge his contempt. Again, the question is what is the obligation of the Plaintiff/Applicant under the May 9, 2013 judgment as reflected in the order?

[73.] More than a safeguard, it is the essence of any enforcement proceeding that the obligation imposed on a party must be clear and unambiguous. In this case, the order must be clear as to what the Plaintiff/Applicant must do and when he must do it. To my mind, notwithstanding the clear intention of the judgment, what the Plaintiff/Applicant must do and when he must do it is not apparent from the wording of the order or the judgment. The lack of a clear obligation on the Plaintiff/Applicant is even more stark when contrasted with the other terms of the judgment such as "she [Patrice] must convey the same to Ian" and of the order such as "The First Defendant convey the property forthwith".

[74.] I am constrained to find that it would be unsafe and improper to allow the Defendant to proceed to committal proceedings in the absence of a clear obligation imposed by order on the Plaintiff/Applicant. This is a situation that can be remedied as noted in the **Iberian Trust, Ltd v Founders Trust and Investment Co Ltd** . However, at the time of this ruling, paragraph one of the Order and paragraph 31 of the judgment provide no clear indication of what the Plaintiff/Applicant must do, when he must do it, and how much he is to pay by way of an annuity to each person entitled. How much may be a fixed sum or by a reference to a formula. No such quantification of an amount is discernible on the order or in the judgment.

[75.] For this reason, this court accedes to the application to strike out the notice of motion for committal.

[76.] Given the foregoing, it becomes unnecessary to address the few remaining submissions of the Applicant.

COSTS

[77.] The Plaintiff/Applicant has prevailed in his application on a substantive point derived from a formal and technical failure. A costs order lies in the discretion of the court and this court can have regard to the history of this matter and the conduct of the parties. This matter concerns a judgment delivered in 2013. The Plaintiff/Applicant has had the benefit of this court's judgment. The Plaintiff/Applicant has, admittedly, made no attempt to comply with or clarify the order, despite the clear pronouncements of the trial judge in the May 2013 judgment which marked the determination of the court suit brought by the Plaintiff/Applicant. This matter has been marked with disregard for the May 2013 judgment on both sides.

[78.] In this case, each party will bear its own costs.

ORDER

[79.] For the foregoing reasons, the order and directions of this Court are as follows.

IT IS HEREBY ORDERED THAT:

1. The application to strike out is acceded to and the Defendant's Notice of Motion for an order of committal filed May 23, 2022 is hereby struck out.

2. Each party shall bear their own cost.

Dated this 10th day of June 2025

Carla D. Card-Stubbs

Justice