2009 N0. 25/M DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

1. DENNIS PERSAUD
2. DEVI TOTARAM

Applicants

-and-

FAZIL RAMZAN also known as FAZIL

Respondent

Mr. A. Nandlall for the Applicant
Mr. J. Harmon for the Respondent

DECISION:

In this action contempt proceedings were filed by the applicants for breach of an undertaking given in court by the respondent. Counsel for the respondent raised several preliminary points as follows:-

(1) that strict procedural requirements with regards to the undertaking were not followed

(2) that there was no service of the order with a penal notice

(3) that from his recollection the undertaking given by the respondent was not the same as that stated in the order

(4) that there was no time limit given within which the undertaking was to be complied with

(5) that Order 35 Rule 5 of the High Court Rules, Cap 3:02 had not been complied with.

The first issue that arose was whether an undertaking had the same force as an injunction, so that its breach can result in committal to prison as punishment for the breach. The second issue was whether Order 35 Rule 5 applies to an undertaking.

In **Borrie & Lowe, The law of Contempt**, 3rd edition, page 578 states that "an undertaking has exactly the same force as an order made by the Court, and a breach of an undertaking amounts to a contempt in the same way as a breach of an injunction."

Threrefore, this means that a defendant who breaches an undertaking is liable to the same penalty as a person who breaches an injunction, that is, committal to prison for his contempt (Plowman J, **Hallman –v- Hallman** (1961) Times.)

In **Isaacs -v- Robertson**, 28 WIR 86, an injunction was granted in an action that was deemed abandoned and the Privy Council held that:
"Despite the fact that the interlocutory injunction ought not to have been made it was not open to the defendant to disobey the terms of the court order without taking steps to have it discharged and his willful disregard of the order amounted to a breach of the terms of the injunction."

Borrie & Lowe (supra), Chapter 14 'Civil Contempt" page 554, supports and refers to the same case **Isaacs and Robertson**, and went further to say that "it is contempt to break an undertaking given to the court, on the faith of which the court sanctions a particular course of action or inaction, and undertakings formally given to the court should be honoured unless and until they are set aside."

"The proper course, if it is sought to challenge the order or undertaking is to apply to have it set aside".

Romer LJ in Hadkinson v Hadkinson (1952) P, page 285 at 288 stated:
"The uncomprising nature of this obligation is shown by the fact that it extends to cases where the person affected by an order believes it to be irregular or even void". Therefore we see that the same principle that applies

to injunctions as mentioned in **Isaacs v Robertson** (supra) applies to undertakings. Thus the uncomprising nature of the obligation is unqualified.

Lord Donaldson MR in Johnson v Walton, 1990 1 FLR 350 at 352 said: "It cannot be too clearly stated that when an injunction order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself".

In **Borrie & Lowe** (supra) it is stated that "to establish a case of contempt for a breach of an undertaking, as in the case of proving a breach of an injunction, it must be shown :

(1) that the terms of the undertaking are themselves clear and unambiguous

(2) that the defendant has had proper notice of the terms and

(3) the breach by the defendant is clearly established.

As regards point (1) the defendant was present when the undertaking was given, which was given by the defendant himself and which he admits in paragraph nine (9) of his Affidavit, so I have no doubt that he knew that the undertaking was not to interfere with the plaintiff's property. The terms of the undertaking were "<u>not to bulldoze any of the plaintiff's structures on the land in dispute until the outcome of these proceedings</u>". Nothing could be clearer than that.

The respondent says he thought those words meant to "preserve the status quo". In my opinion that is exactly what the undertaking given to the Honourable Justice Patterson means, so the respondent cannot now claim that he did not understand the terms of the undertaking or that they were ambiguous. An interpretation of either of these two statements clearly means that the respondent was prohibited from interfering with any of the plaintiff's property until the outcome of the proceedings.

With regard to point (2) the respondent claims that he should be served with a copy of the undertaking and that there must be incorporated a penal notice in compliance with **Order 35 Rule 5 of the High Court Rules, Cap. 3:02**, which states 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:

> "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 purpose of compelling you to obey the same judgment (or order)."

The salient points to note in this section are the words underlined above "requiring any person to do an act" and "shall state the time within which the act is to be done".

In **Borrie & Lowe** (supra) at page 326 it is stated that since an undertaking is to be treated as being equivalent to a court order, the rules of the Supreme Court should also be considered applicable to undertakings. That being so, the normal rule will be that a copy of the order containing the undertaking should be personally served on the defendant. "However, it is established that where the undertaking is of a **negative character**, there is no need for an order to be personally served upon the person who gave the undertaking, provided of course he has notice of the undertaking."

In this case the defendant was present and admits he had notice of the undertaking, so there would be no need to serve an order upon him.

As Cozens-Hardy J said in **D.V.A. & C0** (1900) 1 ch. 484 at 487

> "It would be highly dangerous to hold that the defendant who had given an undertaking could disregard it unless and until the order was served."

Personal service however will be required where the undertaking is of a positive nature. This is when Order 35 Rule 5 becomes applicable, where the Rule speaks of requiring any person to do an act and the order shall state the time within which the act is to be done. Order 35 Rule 5 does not apply where the undertaking is of a negative character.

Therefore, since there is no need to serve the order, then there would be no need for the requirement of having a penal notice endorsed since there is no order to make the endorsement on.

But even with regard to injunctions in **City London Magistrates Court and another, exparte Green v Staples**, (1997) 3 AER 558, where the question of whether the defendant had proper notice, it was stated "Ordinarily a copy of the order must be served personally on the person required to do or refrain from doing a specified act. However, by Order 45 rule 7 (6), where an order is prohibitory (as opposed to mandatory) actual notice of the injunction may be sufficient and it is not obligatory to back the order with a penal notice.

Borrie & Lowe, 3rd edition, Chapter 14 states: "The court has a discretion to dispense with the failure to incorporate a penal notice in a prohibitory but not a mandatory order."

Thus where the order is prohibitory, the court has a discretion to dispense with the failure to endorse the order with the penal notice, where such an order has actually been served on the defendant.

Counsel for the respondent also stated that time must be stated in the order within which the respondent must perform the act ordered. For the reasons given herein time cannot be stated since this is only referrable to positive acts to do something within a specific time, but where, as in this case, the undertaking is negative, that is, not to do something until the hearing and determination of the proceedings, then there cannot be a specific time stated in such an undertaking.

As regards point three (3) (supra), the defendant admits that he broke down the plaintiff's fence in breach of the undertaking. Liability for breaking a court order is strict. **Sachs LJ, in Knight v Clifton** (1971) 2 AER 378 at 393 stated: "when an injunction prohibits an act, the prohibition is absolute and it is not to be related to intent unless otherwise stated on the face of the order."

Lawton J, in Watson & Sons v Garber (1962) 106 So Jo 631 stated as follows:

> "before the courts would exercise its very special jurisdiction to punish for breach of an order, it was essential that proper proof of a breach be given."

The proof is that applicable to criminal cases …… so that the breach must be proved beyond reasonable doubt. There will therefore have to be a hearing on this aspect and evidence adduced.

For the reasons given herein the court hereby overrules the preliminary points raised by the respondent and finds that the respondent had sufficient notice of the undertaking, and that he was bound to honour the undertaking given in court before the Honourable Justice Patterson. The matter will hereafter be set down for hearing on the alleged breach of the undertaking.

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Diana F. Insanally

Puisne Judge

Dated this 10th day of November 2009.