JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2021APP00051

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE V HARRIS JA

BETWEEN DAISY ELIZABETH RAYMOND APPLICANT

A N D DESMOND WILLIAMS McKENZIE RESPONDENT

Ms Cecile A Black instructed by the Northeastern Legal Aid Society for the applicant

Lorenzo J Eccleston for the respondent

24, 25 March and 7 May 2021

BROOKS P

[1] I have read, in draft, the comprehensive judgment of my learned sister, Edwards JA, and agree that the time to file the notice and grounds of appeal should be extended and that the committal order should be stayed pending the hearing of Ms Raymond's appeal.

EDWARDS JA

Introduction and background

[2] This is an application for an extension of time in which to file an appeal against the orders of Daye J and Thomas J, made 2 December 2020 and 25 February 2021,

respectively, and for a stay of execution pending the determination of the application and the appeal. Daisy Elizabeth Raymond is the applicant. She is a 62-year old retired teacher. She is also a grandmother.

[3] On 25 March 2021, at the adjournment of the hearing of the application, an order for a stay pending the determination of the application, was granted.

[4] The background to the matter is that on 1 August 2018, with the written consent and permission of Mr Desmond McKenzie ('the respondent') and the applicant's daughter (both of whom are the biological parents of the applicant's minor grandchild), the applicant took her grandchild to visit his mother in the United States of America ('USA'). On the date appointed for her return to Jamaica with her grandchild, her daughter refused to send the child back with her. She returned to Jamaica without her grandchild.

[5] At the time the applicant took her grandchild to the USA, the child had been living with the respondent in Jamaica, his mother having migrated to the USA in the year 2016. There was no formal custody arrangement between the mother and father, and no order of a court, either in Jamaica or in the USA, had been made with respect to the child.

[6] The child not having been returned to the respondent's custody, as had been agreed, he applied to the Supreme Court by way of a fixed date claim form filed on 2 October 2018 (Claim No 2018 HCV 03811), seeking several orders against the applicant as the 1st defendant and the child's mother as the 2nd defendant. These included orders that the respondent be granted sole custody care and control of the child, that the child be returned to Jamaica forthwith and that both the applicant and her daughter be

restrained from further removing the child from this jurisdiction, upon his being returned. At the same time, the respondent also filed what he called a 'notice of application for court orders for return of minor to the jurisdiction' in which he asked for the same orders requested in the fixed date claim form. The fixed date claim form and the notice of application for court orders were both supported by an affidavit of the respondent filed on 2 October 2018.

[7] The fixed date claim form and the notice of application for court orders were served on the applicant. There was no personal service on the 2nd defendant. She was served by way of substituted service at the address of the applicant, as well as by way of notice in the 'North American Edition of the Gleaner Newspaper'. That was done pursuant to the orders of Henry-McKenzie J (Ag) (as she then was) made on 29 November 2019.

[8] The respondent's notice of application for court orders was heard by Henry-McKenzie J (Ag) on 10 December 2018, wherein she made interim orders granting sole custody to the respondent, until the determination of the fixed date claim form. The judge also made orders requiring the applicant and her daughter to return the minor child to Jamaica, and an injunction restraining them from removing the child from the jurisdiction following his return.

[9] On 29 November 2019 Henry-McKenzie J (Ag) heard a further amended notice of application for court orders filed by the respondent on 28 March 2019 and made several orders. The relevant ones for our purposes were:

"1. The interim formal order made on December 10, 2018 by the Honourable Mrs. Justice Henry-McKenzie is varied in the following terms:

a. The Claimant, Desmond William McKenzie, is granted sole custody, care and control of the relevant child, [M D M] until the determination of the Fixed Date Claim Form.

b. The first Defendant, Daisy Elizabeth Raymond is required to return the minor child [M D M] to Jamaica within fourteen (14) days of the date of the Order into the custody, care and control of the Claimant.

c. The Second Defendant, Lacy-Ann Sherene Raymond is required to return the minor child, [M D M], to Jamaica within fourteen (14) days of the date of this Order into the custody, care and control of the Claimant.

…"

[10] The judge also ordered that personal service of the fixed date claim form and supporting affidavit on the 2nd defendant be dispensed with and gave permission for service to be effected at the applicant's address as well as by way of advertisement placed twice in the 'North American Edition of the Gleaner Newspaper'.

[11] On 12 March 2020, the applicant filed an amended notice of application for court orders to set aside orders 1(b) and 3 of the orders of Henry-McKenzie J (Ag) made on 29 November 2019 directing her to return the child to the jurisdiction and permitting substituted service on the 2nd defendant to be made at her address, respectively. She also sought an order to remove her name as a defendant in the matter. This application was supported by the affidavit evidence of the applicant filed on 12 December 2019. In that affidavit the applicant outlined the circumstances under which she had taken the

child to the USA and why she had returned without him. She indicated the practical impossibility of her being able to carry out the court order to return the child, as she had no legal right to the child or to travel with the child. She also pointed out that at the time of travel there was no court order in place, she had travelled with consent of both parents and that her daughter, of her own volition, decided not to send the child back to Jamaica. The applicant indicated that she now had no knowledge of the whereabouts of her daughter and had no contact with her. She also indicated that she was not a proper party to the claim and asked that the orders against her be set aside. In the application she asked that she be removed as a party to the claim.

[12] The respondent filed his affidavit in response, opposing this application. In that affidavit he averred, amongst other things, that he had knowledge that the applicant was in constant communication with her daughter and the child.

[13] The application was heard by V Smith J (Ag) on 5 November 2020 and was refused. On that day V Smith J (Ag) set a date for the first hearing of the fixed date claim form for 15 June 2021.

[14] By that time, the respondent had already applied on 27 February 2020, for committal proceedings to be taken against the applicant, she having failed to comply with order 1(b) of the orders of Henry-McKenzie J (Ag). That application, which was supported by an affidavit of urgency filed on 27 February 2020, was heard by Daye J, in open court, on 26 November and 2 December 2020. Having heard the application in the absence of the applicant but with her attorney being present, Daye J made the following orders:

1. "The First Respondent Daisy Elizabeth Raymond, is sentenced to nine (9) months imprisonment, as committal for contempt of Order of court dated November 29, 2019 to return the minor child, [M D M], to Jamaica within fourteen (14) days of the date of the Order into the custody, care and control of his father, Desmond William McKenzie,

2. The execution of the order is suspended for three (3) months from the date hereof.

3. The First Respondent, upon compliance with the order, may apply to the court to purge her contempt by the reduction or discharge of the sentence.

4. No order against the 2nd Respondent, who is outside the jurisdiction.

5. Costs of the Application to the Applicant to be agreed or taxed."

[15] On 22 February 2021, the applicant filed an application for, amongst other things, the committal order to be discharged and for leave to appeal the orders of Daye J, made on 2 December 2020. The application was supported by the affidavit of the applicant filed on 22 February 2021. In it, she alleged that she had made all reasonable efforts to contact the 2nd defendant but had been unable to do so and that she did not now know where she resided with the minor nor how to locate them. The applicant also pointed out that she was not the legal guardian of the child and had no custody or access to the child.

[16] She also alleged that she had been unable to comply with the orders, as a result, and had not wilfully disobeyed them. She also asserted that in breach of rule 53.10(2) of the Civil Procedure Rules ('the CPR') she had not been personally served with the

formal order dated 29 November 2019 and the application for the committal order, and that no order had been made dispensing with that service.

[17] That application was heard in open court by Thomas J on 25 February 2021. She dismissed the application and made the following orders:

> 1. **"Application denied. There is no basis for the discharge.**
> 2. **Application does not fall within rule 53.18 of the Civil Procedure Rules 2002.**
> 3. Costs to the Respondent to be agreed or taxed
> 4. Order to be prepared, file and served by Respondent's Attorney-at-Law."
>
> (Emphasis added)

[18] On 8 March 2021, the respondent filed an application for enforcement of the suspended committal order made by Daye J, supported by an affidavit of urgency. It was heard on 18 March 2021 by Nembhard J, who made an order for the committal order to be enforced forthwith.

[19] It is to be noted that the order upon which the committal was made was an interim order made on a notice of application for interim court orders, and the hearing of the fixed date claim form and a final determination on the claim is yet to be made.

[20] Several affidavits were filed in these proceedings, both in this court and in the court below. I will list the ones I consider relevant to these proceedings. The applicant filed four affidavits. These were filed on; 16 January 2019 (in response to the respondent's affidavit in support of the fixed date claim form and his notice of application

for the return of the child); 12 December 2019 (in support of her notice of application for court orders); 22 February 2021 (in support of her application to discharge the committal order); and 19 March 2021 (in support of her application before this court).

[21] The respondent filed eight affidavits; the first two were filed on 2 October 2018 (in support of his fixed date claim form and notice of application for court orders). The others were filed on 2 April 2019 (in response to the affidavit of the applicant filed on 16 January 2019); 12 March 2019; 27 February 2020; 5 October 2020 (in opposition to the application of the applicant to have her name removed as defendant, and to vary the orders of Henry-McKenzie J (Ag)); 8 March 2021; and 25 March 2021 (in opposition to the applicant's application for extension of time to file appeal).

[22] In the case of both parties, by and large, with few exceptions, all their affidavits repeated the same information.

The application at the Court of Appeal

[23] By way of notice of application for court orders, filed on 19 March 2021, the applicant applied for an extension of time within which to file a notice and grounds of appeal against the orders of Daye J and or alternatively, the orders of Thomas J, as well as for a stay of execution of the committal order pending determination of the application for the extension of time and of the appeal. Extension of time to file notice and grounds of appeal is required because they were not filed within the 14 days permitted by rule 1.11(1)(a) of the Court of Appeal Rules ('CAR'). That extension can be granted pursuant to rule 1.7(2)(b) of CAR which empowers this court to extend or shorten time to comply

with any rule or practice direction, order or direction of the court, except where there is a rule which provides otherwise.

[24] The application was supported by the affidavit of the applicant filed on 19 March 2021, and was opposed by the respondent who filed the affidavit in opposition on 25 March 2021. As counsel for the applicant, Ms Black, correctly pointed out, this matter being an interlocutory matter concerning the liberty of the subject and custody of a minor, then pursuant to section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act no leave to appeal is required. Therefore, the only issue for this court to consider, is whether the applicant should be granted the orders as prayed.

Discussion

1. The application for extension of time

[25] The principles upon which this court will act in deciding whether to grant an application to extend time to file an appeal are well known. I will, therefore, only state them briefly. The general principle is that the timetable set by the court must be obeyed. However, where there has been a non-compliance with the timetable set, the court may exercise its discretion to extend that time. In exercise of its discretion whether or not to extend the time, the court will consider the following:

i) the length of the delay;

ii) the reasons for the delay;

iii) whether there is an arguable case for an appeal and;

iv) the degree of prejudice to the other parties if time is extended.

[26] Even if no good reason for the delay is shown, the court is not bound to reject the application on that basis alone, as the overriding principle is that justice must be done (see the principles set out in in **Leymon Strachan v The Gleaner Company Ltd and Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999, at page 20 and more recently applied in the case of **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al** [2017] JMCA App 2 at paragraph [56]).

(a) The length of and reason for the delay

[27] The order of Daye J was made on 2 December 2020. The order of Thomas J was made on 25 February 2021. The time to file an appeal against the order of Daye J would have expired on 16 December 2020, and for Thomas J, on 11 March 2021. There has been a delay in appealing both orders, however, the attorney for the applicant in this matter, Ms Black, maintains that the delay was not inordinate. The delay has been approximately three months in the first instance and eight days in the second. I agree with counsel that eight days is not inordinate and, although three months is a much longer period, it too cannot be classified as inordinate, in the circumstances of this case.

[28] Ms Black also maintained that the delay was not intentional and that the applicant's explanation for the delay was a good one. In her affidavit filed in support of this application, the applicant contended that the reason for the delay in appealing Daye J's order was the fact that instructions were given to her then attorney to challenge the

order, but he failed to carry out these instructions. She said she recently retained new counsel who was then able to carry out her instructions to file notice and grounds of appeal challenging the committal order. She gave no explanation in her affidavit for the delay in filing the appeal against the orders of Thomas J. However, in the grounds for the application for extension of time to file appeal it states that she had been awaiting the court's decision on the respondent's application for permission to execute the committal order before filing notice and grounds of appeal challenging the order of Thomas J.

[29] Ms Black relied on the decision in **Sylvester Dennis v Lana Dennis** [2014] JMCA App 11 and contended that the applicant's explanation for the delay was a good one. Relying on the decision in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, at 866 (per Lord Denning) she also proposed that the applicant should not be made to suffer prejudice in not pursuing a claim due to the fault of counsel.

[30] Counsel for the respondent, Mr Eccleston, argued, however, that there was no reasonable explanation for the delay and that, throughout the proceedings, the applicant was well represented by counsel.

[31] In my view, the reason for the delay which was given is not a perfectly good reason, however, I agree with counsel for the applicant that the litigant should not be made to suffer for the failure of counsel to act or the inability of counsel, who she has instructed to act on her behalf, to make good decisions. The issue of the merits of the proposed appeal will, therefore, be very important.

(b) Is there an arguable case on appeal?

[32] Ms Black argued that the applicant had more than an arguable case on appeal. She submitted that the applicant had a real prospect of successfully appealing the order because, in summary:

> (1) Both judges erred in finding that the applicant wilfully disobeyed the order in circumstances where:
>
> (a) she made all reasonable efforts to locate the minor and his mother but has been unable to do so;
>
> (b) she did not wilfully disobey the order of Henry-McKenzie J (Ag) but was unable to comply with it;
>
> (c) she is not the legal guardian of the minor and has no custody, control or access to him.
>
> (2) She is not a proper party to the claim and the respondent would not be able to succeed in his claim against the applicant for custody under the Children (Guardianship and Custody) Act.

[33] She further submitted that Daye J made the committal order based on a misunderstanding of the law and the evidence before him. Thomas J, she said, fell into the same error. Counsel pointed out that a committal order should only be granted if the applicant proves beyond a reasonable doubt that the person against whom the committal order is being sought acted in wilful disobedience of the court order. She submitted that

both judges erred. She argued that the applicant had no *mens rea* for contempt. Counsel argued further that there was no proof beyond a reasonable doubt of wilful disobedience or a wilful refusal to act placed before either of the judges.

[34] Ms Black also contended that both the judges erred in failing to find that the applicant was not a proper party to the claim and therefore the order to produce the child should not have properly been made against her. She submitted that the respondent had no prospect of success in his claim against the applicant as she was not in physical possession of the minor, nor did she have any legal right, custody or guardianship of the minor for the court to deprive her of, in favour of the respondent.

[35] Mr Eccleston submitted that the applicant had no prospect of success in the appeal, as the proposed grounds were a "backdoor" attempt to challenge the orders of Henry-McKenzie J (Ag), as it was too late for the applicant to appeal against them. Counsel argued that the application was "misconceived" and that the applicant had taken the wrong approach. Counsel pointed to the intended grounds of appeal which he said indicated that the applicant's major attack was against the orders of Henry-McKenzie J (Ag), the challenge to which was refused by V Smith J (Ag). He pointed out that neither decision was appealed and that there was no application for extension of time to appeal those decisions.

[36] Mr Eccleston further submitted that the issue before Daye J was the applicant's obedience to the orders of Henry-McKenzie J (Ag). Counsel noted that the only substance to the applicant's submissions before Daye J was that she was only the grandmother and

had no contact with the child or the mother. He claimed that this was the first time she was taking that position, as her previous affidavits did not so indicate.

[37] Counsel outlined the approach taken by Daye J at the committal hearing. He submitted that Daye J took the correct approach having established his jurisdiction to hear and determine the application in open court. He said the judge asked himself the correct question, which was, can the order of the court be carried out by the 1st respondent? He said that the judge also satisfied himself, on the evidence, that the relevant procedural rules were followed, citing the case of **Silvera Adjudah v Cherietha Lalor** [2016] JMCA Civ 52. Mr Eccleston also maintained that Daye J looked at the question of the applicant's inaction and relied on the case of a father who took no action to carry out the orders of the court whilst serving time in prison but a committal order was nevertheless made against him.

[38] Mr Eccleston claimed that there was substantial evidence of wilful disobedience by the applicant of the order to produce the child. Counsel maintained that when the judge considered the conduct of the applicant, it was clear to him that she had failed to comply. Counsel argued that the order of the court was a command to the applicant to go and take the child back to the jurisdiction and she should have obeyed the order and done so. Counsel suggested that steps the applicant could have taken included calling the United States Embassy or going back to New Jersey to collect the child. Counsel relied on the case of **Tanya Louise Borg v Mohammed Said Masoud El Zubaidy** [2018] EWHC 432 (Fam), and the first instance decision of Baker J in **Devon County Council v MM and TK** [2016] EWCOP 45.

[39] Counsel argued that based on the intended grounds there is no likely prospect of success and no merit in appeal.

[40] It is important to note, that despite these submissions from Mr Eccleston, no written reasons from Daye J were provided to this court.

[41] Rule 45.6 of the CPR states:

> "A judgment or order which requires a person —
>
> (a) to do an act within a specified time or by a specified date; or
>
> (b) to abstain from doing an act, may be enforced by an order –
>
> (i) for committal to prison, or
> (ii) for confiscation of assets,
>
> under Part 53."

[42] Part 53 of the CPR deals with the power of the court to commit a person to prison or to make a confiscation order for failure to comply with an order or undertaking to do an act within a specified time or by a specified date, or not to do an act. The committal order cannot properly be made unless rule 53.3 has been complied with, that is, the order requiring the person to do an act or not to do an act was personally served on that person; the order served was endorsed with the prescribed notice as to what the penalty will be if there is a failure to comply; and where an act is required to be done within a specified date, the order was served in sufficient time to give the person a reasonable opportunity to comply.

[43] The court has the power to make a committal order for a fixed term (rule 53.13(a)). The court must also hear oral evidence from the person sought to be committed, if that person is desirous of giving such evidence (see rule 53.11(5)).

[44] Proceedings for contempt of court are criminal in nature and the criminal standard of proof is to be applied even though it originates from civil proceedings (see **Re Bramblevale Ltd** [1970] 1 Ch 128). The applicant for the committal order, therefore, has to prove beyond a reasonable doubt that the person against whom the order is sought has wilfully refused to obey the order of the court.

[45] In this case, although, as correctly submitted by Ms Black, the burden of proof lay on the respondent who had sought the committal order, to show that the applicant was in a position to comply with the order of the court and had wilfully refused to do so, it seems to me that the applicant could successfully argue that both Daye J and Thomas J placed the burden on her to show that she did not wilfully refuse to comply. It could also be successfully argued that both judges seemed to have found merely that the applicant had failed to comply, rather than that the contempt was wilful in the sense of acting in bad faith by deliberately refusing to comply, without good reason.

[46] The Oxford English dictionary, eleventh edition, defines wilful as "of a bad act, deliberate, stubborn and determined". So for example, the term 'wilful refusal' used in the context of matrimonial proceedings has been described as a "settled and definite decision come to without just excuse" (see Lord Jowitt LC in **Horton v Horton** [1947] 2 All ER 871 at 874, speaking in the context of a wilful refusal to consummate.) Therefore,

in the context of contempt proceedings which requires proof of a wilful refusal to comply before a committal order can properly be made, there ought to be proof of a deliberate and determined refusal to comply or at the very least, proof of bad faith, in the sense of not caring whether or not the order is complied with. This is on the basic assumption that there is the ability to comply.

[47] In this case there is no evidence of any action that the applicant was in a position to take in order to lawfully comply with the order of the court, and which she deliberately failed to take, or which, in bad faith she was careless in not taking.

[48] The applicant's affidavit evidence before both Daye J and Thomas J, as well as her oral evidence before Thomas J, was that she had no lawful control over the minor, nor was she in contact with the mother of the minor or know where she was located. No evidence to the contrary was led by the respondent at either hearing. In fact, in his affidavit filed on 2 October 2018, the respondent exhibited a 'WhatsApp' message from the minor's mother which indicated her insistence in not explaining her actions and which confirmed that the child was not allowed to give out his home address, or that of his school, when speaking to his relatives. In his affidavit filed on 12 March 2019, the respondent indicated his own efforts to locate the applicant's daughter and the minor since obtaining the first interim order for sole custody on 10 December 2018. Those efforts included an application to the Superior Court of New Jersey, against the applicant's daughter, which had proved futile as she failed to appear before that court. He also deponed in his affidavit before Daye J filed on 27 February 2020 that he was aware that the applicant had personal knowledge of the whereabouts of his child's mother but failed

to state how he came by that knowledge. He relied on the affidavit of the applicant filed on 16 January 2019 in which she said she had had occasion to speak to the child. However, nowhere in that affidavit did she admit to knowing the whereabouts of the child. Speaking to the child does not equate to knowledge of his whereabouts and the respondent himself admitted that he and his family were earlier able to speak with the child, but that the child did not disclose his whereabouts.

[49] The applicant's evidence in her affidavits, and apparently in her oral evidence before Thomas J, was that she had no lawful authority to take the child from the mother without her consent nor the necessary legal documents to take the child outside of the jurisdiction of the USA. The respondent led no evidence as to how this could have been lawfully achieved, and how the applicant had failed to carry out this lawful action.

[50] The respondent claimed, in his affidavit before this court filed on 25 March 2021, that the applicant was her daughter's friend on the online social media platform 'Facebook'. Whilst I take note of that claim by the respondent, it seems to me that to the extent that Facebook friendships are conducted online, it cannot be taken as evidence that the applicant knows where her daughter actually resides. Neither could this fact alone put her in a position to get physical custody of the child in order to take him back to Jamaica. Furthermore, the respondent did not indicate in any of his affidavits placed before either of the judges, how he came by the knowledge that the applicant is friends with her daughter on Facebook. Neither did he provide any evidence of any conversation or Facebook post shared between the applicant and her daughter from which it could be gleaned that the applicant knew where her daughter lived.

[51] Mr Eccleston submitted that the applicant had a court order which was a command from the Supreme Court of Jamaica, which she should have used to travel to the USA and take action on. He also maintained that she could have called the United States Embassy. I have considered those propositions and would only say firstly that, there is no indication before us that those propositions were made before either of the judges for those possibilities to be assessed. Secondly, I note that the respondent who was in possession of an order of the Supreme Court of Jamaica for sole custody of his biological child, did travel to the USA, did file a report and a claim in the New Jersey court but was unsuccessful in locating the child's mother or the child. He did not state how the applicant, with a court order to produce a child over whom she possessed no bundle of rights, was in a better position to have achieved greater success with the authorities in New Jersey than he did. He simply claimed that she should have done it. His affidavit filed on 27 February 2020 in support of the application for committal indicates, at paragraph 18, his unsuccessful attempts to locate the mother of the minor. It was he who had to prove, beyond a reasonable doubt, to Daye J, that the applicant could have achieved what he could not, but wilfully refused to do so.

[52] Mr Eccleston maintained that the applicant could have called the United States Embassy and reported her daughter, based on the command to produce emanating from the Supreme Court. However, the respondent himself had a custody order emanating from that court, and, it seems to me, that if it were a plausible proposition that a call, by the applicant to the United States Embassy, could have successfully resulted in the production of the child, a similarly plausible supposition could be made with respect to a

call by the respondent on the strength of his order for custody. No evidence was given as to why the applicant would have achieved greater success from such a call than he could have as the father of the child.

[53] I am of the view that when an order, such as the one made against the applicant, is made by the court, it is expected that the person to whom the order is addressed is in a position to take an action which has at least a possibility, and at most the probability, of success. It is not a requirement that useless and futile actions have to be taken, in obedience to the order.

[54] Mr Eccleston cited the two cases from which, he said, the principles relied on by Daye J in making his orders may be extracted. I need only refer to the submissions in reply to those authorities by Ms Black, with which I entirely agree. Ms Black argued that those cases were distinguishable from the present one. She pointed out that the case of **Tanya Louise Borg** involved a dispute between two parents. The order for committal had been made against the father who had taken the children, with the mother's agreement, but who then refused to return them as ordered by the court. He was imprisoned for disobeying the order of the court to return the children but still failed to obey. He gave no explanation or reason to the court for his failure or inability to return the children but on one occasion he claimed that his mother had moved with them and he was unable to contact her, as his phone had been taken away by the authorities. The court found that he had an unnatural lack of concern for the fate of his own children and that inaction was part of his policy to deprive the mother of contact with her children.

[55] Ms Black pointed out that the difference in this case was that the applicant was a grandmother who was not the guardian of the child and who had neither custody nor possession of the child. I would only add that no finding of a similar nature to that found with regard to the father in **Tanya Louise Borg**, had been made in relation to the applicant.

[56] Counsel also pointed out that the facts in **Re MM**, **Devon County Council v MM and TK** were also distinguishable. In that case, Mrs Kirk, the person to whom the orders were directed, had the legal care and control of the patient and was, in law, the legal guardian over his affairs, health and welfare. As the legal guardian, she was in a position to carry out the orders of the court and to instruct third parties who recognised her authority over MM. The applicant in this case had no such authority over the minor.

[57] That case traversed the England and Wales Court of Appeal over several hearings and applications. The relevant citations for our purposes are **Devon County Council v Kirk** [2016] EWCA Civ 1221 (full Court of Appeal granting partial permission to appeal and staying the order of Baker J) and **Re MM (a patient), Kirk v Devon County Council and another** [2017] EWCA Civ 34 (the appeal against the order of Baker J). In the former, partial permission was granted to Mrs Kirk to appeal the order for committal.

[58] In that case the appeal court also considered that in making the mandatory penal order with the potential for committal proceedings, consideration ought to have been given as to how the movement of MM from Portugal to Devon in England would have been achieved. Although that question was asked in the context of the welfare of MM, I

believe it is equally relevant in this case. Where the return of the minor child would have occasioned the threat of imprisonment of the applicant, consideration ought to have been given as to how the movement of the minor child from the USA to Jamaica would have been achieved. That consideration ought to have been made both by Daye J and Thomas J in determining whether there had been a wilful refusal to comply by the applicant. The appeal court in **Devon County Council v Kirk** also noted that no thought had been given by the judge who made the committal order as to what alternative means existed to achieve MM's repatriation to England. This, was considered even though Mrs Kirk had the legal authority over MM. That was a consideration which ought to have been made in this case, more so because the applicant had no such legal authority.

[59] In the latter case of **Re MM (A Patient)**, the appellate court, at paragraphs 13 and 14, reiterated the long established principle that the orders of the court are to be obeyed. That principle being the starting point, the question of whether it is impossible to comply with an order once it is made, is for the determination of the court. It also recognised that courts are "not in the business of making futile orders". Although that recognition was made in the context of Mrs Kirks' continuing wilful disobedience, despite being imprisoned on several occasions, in my view this is always a relevant consideration.

[60] In this case, Daye J and, indeed, Thomas J, although not required to look behind the circumstances of the grant of the order made by Henry-McKenzie J (Ag), in determining whether a committal order ought to have been made or discharged, were duty bound to consider the question of whether it was possible to comply with the order which had been made.

[61] No oral evidence was taken in open court from the respondent before Daye J, and none was taken from him in open court by Thomas J, although evidence was taken from the applicant. Neither judge had any information before them emanating from the respondent which indicated that the applicant was able to carry out the order of the court in one way or the other but had wilfully refused to do. It is clear that both judges were of the erroneous view that the burden of proof rested on the applicant.

[62] Further, in my view, the orders seem to be predicated on the assumption, not that the applicant had any control, care or custody of the minor so that she was in a position to produce him, but on a supposition that she had control over her adult daughter and her behaviour. That is no basis upon which to make a committal order for wilfully refusing to produce a child against a grandmother. The fact that the applicant is the one who took the child out of the jurisdiction with the written signed consent of both biological parents is also not a basis upon which to commit her to prison for wilfully refusing to take him back into the jurisdiction. Inherent in the command to produce is the expectation that the act of production will be legal. There was no indication by the respondent before the court, of any way in which the applicant could legally produce the child without the co-operation of her adult daughter, who is the mother of the child.

[63] For an order to produce a child, not to be an order made in vain, it must be made against someone who has the power or authority to carry out the order. No evidence was given by the respondent, in any affidavit, which pointed to any power or authority residing in the applicant, solely or jointly with anyone else, to legally and lawfully produce the minor child, as she was commanded to do.

[64] In the absence of any evidence to suggest that consideration had been given to these factors by Daye J or Thomas J, the applicant has an arguable case on appeal against the order of committal and the refusal to discharge.

[65] With respect to the applicant's complaint that she was never personally served with the order dated 29 November 2019 or the application for the committal order, rule 53.3(a) of the CPR requires that the court not make a committal order unless the order requiring the party to do an act within a specified time is personally served. It must also contain the penal notice (53.3(b)). Rule 53.10(2) also requires that the claim form or application stating the grounds of the application, along with the affidavit in support, be served personally on the person to be punished. Rule 53.8(3) requires that the application for a committal order be served in accordance with Part 5, that is, it must be personally served and rule 53.8(4) requires that a copy of the evidence in support must be served with the notice of application. A failure to comply with those rules is fatal to the committal order being made unless the court makes an order dispensing with service of the order or the application. The applicant contended that no order dispensing with personal service had been made.

[66] Before making the committal order, Daye J was obliged to ensure that the procedural rules were followed to the letter. Mr Eccleston maintained that he had done so. In the respondent's affidavit filed on 27 February 2020, he deponed at paragraphs 23 and 24 that the order of 29 November 2019 was personally served on the applicant and on her attorneys-at-law and that the order was endorsed with the requisite penal notice. He exhibited thereto the affidavit of service of the process server filed on 6 January 2020

which indicated that she had served the applicant personally with the fixed date claim form filed on 2 October 2018, and the affidavit in support of it, as well as the formal order dated 29 November 2019 and notice of proceedings filed on 5 December 2019. However, there is no affidavit of service which indicated service of the application for committal filed on 27 February 2020 or the affidavit in support of that application, as required by rule 53.10(2). No order dispensing with the service of those document was shown to this court and it appears that none was before Daye J nor Thomas J. It is clear, therefore, that the applicant has a reasonable chance of successfully appealing the order for committal made by Daye J as well as the refusal to discharge the committal order by Thomas J, on that basis.

[67] In light of the application before her, and the grounds of the application as outlined, Thomas J too was required, along with determining whether there had been a wilful refusal to comply, to determine whether the rules had been followed to the letter. Unless the process had been strictly followed, the applicant would have been entitled to have the order discharged (see **Gordon v Gordon** [1946] 1 All ER 247 at 250 and **Iberian Trust Ltd v Founders Trust and Investment Co Ltd** [1932] All ER 176, both referred to with approval by this court in **Silvera Adjudah v Cherietha Lalor** at paragraph [12]).

[68] It is also unclear what Thomas J meant at number 2 of her orders that "[t]he application does not fall within rule 53.18 of the CPR". Rule 53.18 deals with the discharge of a person committed to prison. Rule 53.18(1) states as follows:

> "The court may, on the application of any person committed to prison under this Part, discharge him or her."

[69] This empowers the court to hear and determine the application to discharge the order committing the applicant to prison. If Thomas J refused the application to discharge on the basis that the rule did not apply to the application made by the applicant before her, the applicant has an arguable case on appeal on the ground that Thomas J had fallen into serious error.

[70] I have concluded, therefore, that for those reasons the applicant has more than a real prospect of success on appeal.

(c) Prejudice

[71] Ms Black contended that the applicant would be severely prejudiced if the extension is not granted, because she would have to spend nine months in prison. Mr Eccleston maintained, however, that the prejudice to the respondent would be far greater as he has had no access to his child.

[72] It seems to me, that the applicant would suffer far greater prejudice if she were to have to spend nine months in prison. The committal order was granted based on an interim order for custody. Furthermore, for the reasons already stated, it is arguable whether any order for custody could be properly made against her. It means, therefore, that the applicant, who has a reasonable prospect of successfully defending the claim, would be made to suffer the injustice of serving nine months' imprisonment based on an interim order made in a claim in which she may very well be adjudged the successful party. That is highly prejudicial (see Halsbury Laws of England/Children and Young

Persons, Volume 9 [2017], para 150 (Parental responsibility under the Children Act 1989), and footnote 5). See also and **F v B** (unreported), Supreme Court, Jamaica, Claim No. 2010 HCV 2702, judgment delivered 16 September 2011, at paragraph [33], citing **Hewer v Bryant** [1969] 3 All ER 578.

Disposal

[73] I would, therefore, grant the extension of time to appeal the orders of Daye J and Thomas J.

2. Stay of execution

[74] It is clear that the applicant has already passed the first hurdle for a stay to be granted, that is, there is some prospect of success on appeal. It is also clear that she has also crossed the second hurdle, that is, that the risk of injustice to her is greater if the stay is not granted (see **Seaton Campbell v Donna Rose** [2016] JMCA App 35). I would, therefore, grant a stay of execution of the order of Daye J pending determination of the appeal.

V HARRIS JA

[75] I have had the opportunity of reading, in draft, the judgment of my sister Edwards JA. I agree with her reasoning and conclusion and have nothing useful to add.

BROOKS P

ORDER

1. The application for the extension of time for the filing of the notice and grounds of appeal from the order of Daye J, made herein on 2 December 2020, and or

alternatively the order of Thomas J, made herein on 25 February 2021, is hereby granted.

2. The notice and grounds of appeal in respect of each order shall be filed on or before 28 May 2021.

3. The execution of the committal order, made herein on 29 November 2019, against the applicant, is further stayed pending the determination of the appeal, or until further order of the court.

4. Costs of the application shall be costs in the appeal.