

IN THE HIGH COURT OF BELIZE

CLAIM No. Civ 414 of 2023

BETWEEN

PAUL WING FAI KEE

Judgment Creditor/Claimant

AND

BRIAN ALBERT ESPAT

Judgment debtor/defendant

Appearances:

Estevan Perera of Estevan Perera and Company LLP for the judgment creditor

11 December 2024

JUDGMENT

Law and Procedure – Judgment summons - Debtors Act, Cap 168 and Part 52 of the Civil Procedures – Judgment creditor must aver in Form 21 or in a supporting affidavit that (a) the judgment creditor possesses a judgment debt (b) the judgment debt has not been discharged (c) the judgment debtor has the means, but has refused or neglected, to pay the judgment debt – Judgment debtor committal proceedings are contempt proceedings - The judgment creditor bears the onus of proof – Two stages to judgment debtor committal proceedings – Stage 1: issuance of a judgment summons – Stage 2 - adversarial hearing of the dispute with the court issuing its decision drawing on the respective parties' pleas and evidence.

- [1] **HONDORA, J.:** This matter raises an issue of general importance, which is whether this court may issue a judgment summons in which there is no averment by the judgment creditor that the judgment debtor has the means but in contempt of the judgment or order refuses or neglects to discharge the judgment debt.

[2] In my view, a court may not issue a judgment summons in which a judgment creditor has not asserted that the judgment debtor has the means but refuses or has neglected to discharge the judgment debt. Following the adoption of the Debtors Act, there cannot be any lingering doubt that judgment debtors are not imprisoned for their inability to pay a judgment debt but rather for refusing or neglecting to pay despite having the means to do so. The latter being characterised as contempt of court.

Context

[3] Mr Kee issued a claim form and statement of claim on **3 July 2023** in which he claimed payment of **\$262,852.57** arising from a promissory note signed by Mr Brian Albert Espat (the defendant). Mr Espat did not file an acknowledgement of service. Thereafter Mr Kee sought and secured default judgment in the said amount and other consequential remedies. It appears that Mr Espat attempted unsuccessfully to have the default judgment set aside. Thereafter, Mr Kee issued an application for oral examination pursuant to Civil Procedure Rule (CPR) 44. An order was issued mandating Mr Espat to appear before an Examiner on **20 September 2024**. It is unclear if Mr Espat attended that oral examination. Regrettably, Mr Kee's judgment summons application makes no reference to the outcome of the Civil Procedure Rule 44 oral examination proceedings.

[4] On **8 October 2024**, Mr Kee filed an application to commit Mr Espat to prison using the prescribed Form 21.

[5] This matter (i.e., judgment debtor committal application) was placed on my docket on **17 October 2024**. On **22 October 2024**, I issued case management orders directing the judgment creditor's attorney to file written submissions no later than 1 November 2024 addressing why the judgment summons should not be struck out for failure to comply with the guidance and principles set out by this court in the case of *Scotiabank (Belize) Ltd v Rosa Alamina*, Claim No. Civ 624 of 2014 (***Alamina case***).¹

[6] I issued the above order pursuant to this court's inherent power to control its proceedings and as part of case management.

Key principles on judgment summons applications and proceedings

[7] The key principles I outlined in my decision in the ***Alamina case***, which are relevant to Mr Kee's judgment debtor committal application bear restating.

(a) Part 52 of the CPR deals with "*deals with applications to commit a judgment debtor for non-payment of a debt where this is not prohibited*" by the Debtors Act or any other enactment. This requires Part 52 of the CPR to be read together with the Debtors Act. It is important to reiterate this principle because of the practice, which I have noticed, of judgment creditors using the judgment summons

¹ For completeness, I also addressed the same issues that arose in the ***Alamina case*** in the case of *Scotiabank (Belize) Ltd v Brian Walker*, Claim No. Civ 31 of 2015 (No. 2).

procedure to undertake oral examinations of judgment debtors' means (see the ***Alamina case***) and to secure agreement for payment of the judgment debts by instalments leveraging the judgment debtor's fear, and exposure to the risk, of imprisonment following service of a judgment summons.

- (b) CPR 52.2(1) sets out some but not all of the essential requirements for a judgment summons application. Not contained in CPR 52.2(1) but stated in section 4(1)(b) of the Debtors Act is the requirement that a judgment summons application must demonstrate (and at the very least aver) that the judgment debtor has the means, but has refused or neglected, to pay the judgment debt (see para. 9-10 of the ***Alamina case***).
- (c) The judgment creditor bears the onus of demonstrating its entitlement to the issuance of a judgment summons, which will be issued and a return date inserted if the judgement creditor provides information and/or evidence affirming on the face of the judgment debtor committal application:
 - (i) that there exists a judgment or an order sounding in money issued by a court of competent jurisdiction;
 - (ii) that the judgment debtor has not paid or discharged the relevant judgment or order;
 - (iii) how much of the judgment or order the judgment debtor has paid as of the date of the judgment summons application, if that be the case, and how much of the amount paid has been used to pay the capital and/or interest and in what order of priority;
 - (iv) the capital and interest due and payable as of the date of the judgment debtor committal application – with the interest component itemised; and
 - (v) that the judgment debtor has the means, but has refused or neglected, to pay the judgment debt.
- (d) Conditions precedent to triggering the court's judgment debtor committal jurisdiction, which includes the judgment summons-issuing procedure, are the averments that (a) there is a judgment or order sounding in money; (b) the judgment debt remains due and payable; and (c) the judgment debtor has the means, but has refused or neglected, to discharge the same (***see para. 45 of the Alamina case***).
- (e) There is not any principle of law that provides that in judgment debtor committal proceedings all what a judgment creditor needs to do is to issue a Form 21 after which the judgment debtor will be summoned and examined without the judgment creditor providing any information or evidence whatsoever in support of their application and request for the committal of the judgment debtor.
- (f) The judgment summons procedure is adversarial in nature and:
 - (i) the judgment creditor is required to demonstrate to the appropriate standard that there exists a valid but unpaid judgment or order and that the judgment debtor has the means, but has refused or neglected, to pay it;
 - (ii) the judgment debtor may, if they are so disposed, defend the matter; and
 - (iii) the court will determine whether, and if so, the conditions to attach either to a committal order

or to judgment debt payment terms subject to the restrictions imposed by section 4 of the Debtors Act.

- [8] Counsel for the judgment creditor, Mr Estevan Perera, filed his written submissions with his usual commendable expedition and which submissions I have taken into consideration. However, I am disinclined to issue the judgment summons filed of record for the reasons set out below

Reasons

- [9] Section 4(1)(b) of the Debtors Act, which outlines court's judgment debtor committal jurisdiction bears restating:

“...any court may commit to prison...any person who makes default in payment of any debt...due from him in pursuance of any order or judgment...**provided such jurisdiction shall only be exercised** where it is proved to the satisfaction of the court that the person making default has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected to, or refuses or neglects to pay it.” (Emphasis added)

- [10] There are two stages to a judgment summons procedure. The first relates to the issuance of a judgment summons by the court office. In practice, the judgment summons is placed before a judge who determines and inserts a return date. In my view, at this stage of the proceedings, it is incumbent on a judgment creditor to demonstrate in Form 21 and any accompanying affidavit its entitlement to the issuance of a judgment summons. The second stage relates to the hearing of the parties, i.e., the judgment creditor and the judgment debtor with the court resolving the matter drawing on the information and evidence presented by the parties. This case concerns the first stage of the judgment summons process, i.e., the issuance of a judgment summons.

- [11] In a judgment summons application, a judgment creditor invokes this court's jurisdiction and power to commit a judgment debtor to prison for his or her contempt of a court order or judgment requiring them to pay a sum of money. In view of the fact that a judgment debtor is liable to committal not for failure to pay a judgment debt per se but for his or her failure to do so despite having the means to pay the judgment debt either in whole or in instalments, it follows that as a judgment creditor must demonstrate a prima facie case that justifies the institution of criminal proceedings for contempt.

- [12] In view of this, the judgment summons application must, on its face, demonstrate a reasonable belief (or to use the civil standard, a prima facie case) that:

- (a) the court issued a judgment order sounding in money in favour of A (a judgment creditor) against B (a judgment debtor);
- (b) the judgment debtor has not paid the judgment debt as stipulated in the judgment order;
- (c) the judgment debtor is able to pay the judgment debt but has refused or neglected to do so in contempt/disregard of the order of the court.

- [13] This raises the question: it is proper for this court to issue a judgment summons and commence committal

proceedings based only on the fact that a judgment debtor has asserted in prescribed Form 21 that the judgment debt remains unpaid. I hold that Part 52 of the CPR should be read consistently with the Debtors Act, which outlaws the exercise of judgment debtor committal proceedings on the basis only that a debtor has not paid a judgment debt.

- [14] As a matter of law, this court's judgment debtor committal jurisdiction can only be properly invoked and is to be exercised in the context only of a judgment debtor that has the means, but is refusing or neglecting, to pay. It follows that the judgment creditor must state either in Form 21 or an accompanying affidavit, that the judgment debtor has the means, but is refusing or neglecting, to pay the judgment debt. This is another way of saying, a judgment creditor must demonstrate a prima facie case, which justifies the issuance of what is in effect a criminal summons i.e., the judgment summons.
- [15] In the absence of relevant and material averments in the judgments summons application as set out in **para. 13 above**, the summons will (and should) not be issued and given a return date.
- [16] It cannot be the case that there is an exceptional genre of criminal summons, which does not require person A who is seeking the committal to prison of person B to demonstrate on the face of their application for the issuance by a court of law of a criminal summons that they are of the reasonable belief that person B is in contempt of court.
- [17] There ought to be strict safeguards imposed on the use of criminal process not least in the context of civil disputes. In relation to the issuance of a judgment summons, a judgment creditor must demonstrate the prima facie existence of an act that constitutes contempt of the court. In my view, the mere statement, often unsupported by any statement of truth and often not on affidavit, that a judgment debt remains unpaid is not sufficient to engage this courts judgment debtor committal jurisdiction in the absence of an assertion that the judgment debtor is in contempt because they have the means but are refusing or neglecting to pay a judgment debt.
- [18] It is not in dispute that the law changed with the introduction of the Debtors Act. Unlike in the past, judgment debtors are not any more imprisoned solely for failing to pay a debt. This is the context within which the provisions of the Debtors Act and Part 52 of the CPR should be read and applied. A judgment summons ought not be issued simply on the bare assertion that a judgment debt remains due and owing. As noted above, the appropriate trigger for this court's judgment debtor committal jurisdiction for contempt under Part 52 is the assertion that the judgment debtor has the means, but is refusing or neglecting, to pay the judgment debt issued by a court of competent jurisdiction.
- [19] On the return date specified in a judgment summons, two key issues arise for determination, i.e.: (a) does the judgment creditor possess an unpaid and validly issued judgment debt; and (b) does the judgment debtor have the means, but is refusing or neglecting, to effect payment. To demonstrate contempt, a judgment creditor must either in Form 21 or an affidavit that the judgment debtor has the means, but is refusing or neglecting, to pay its dues. If that be the case, it will result in the proper and lawful exercise

by this court of its jurisdiction over the judgment debtor in committal proceedings.

- [20] Put simply and I repeat for emphasis, if a judgment creditor is to properly invoke this court's jurisdiction through an application for the committal of a judgment debtor, the judgment creditor must at a minimum aver that the judgment debtor has the means but is refusing or neglecting to pay. In the absence of this assertion, which is key to engaging this court's jurisdiction, a judgment summons application will either not be issued or if issued it may be struck out. It may also result in an adverse costs order against the judgment creditor if the procedure used is one that occasions unnecessary delay and/or a multiplicity of proceedings in the resolution of the matter.
- [21] I have gathered from similar-type matters that there exists a general view among some practitioners that a judgment summons application procedure is inquisitorial. This is to say that all that a judgment creditor needs to do is to cause a judgment summons to be issued and that during the hearing the judge is expected to facilitate or oversee an enquiry into the judgment debtor's means and if satisfied the court will order either the judgment debtor's committal for a defined period or order that the judgment debtor pay the sum due either in whole or instalments.
- [22] In my view this understanding is, with respect, mistaken. Belize's justice system is adversarial, and it has not been altered by any of the provisions of the Debtors Act or the CPR. While it is correct that judgment debtors are required to pay judgment debts, it does not follow that the court will play any role that is anything other than adjudicatory in judgment debtor committal proceedings with the parties responsible for prosecuting their respective cases. In this regard, judgment debtor committal proceedings must be distinguished from the oral examination procedure set out in Part 44 of the CPR. My attention has not been drawn to any authority that justifies or would justify the court taking any other position other than that of a fair, impartial and objective adjudicator in Part 52 judgment debtor committal proceedings.
- [23] It is for a judgment creditor to prove its case that the judgment debtor is in contempt of the order of the court sounding in money because s/he has the means, but is refusing or neglecting, to pay it. Relatedly, it is for the judgment debtor to put forward a defence if it so chooses. I remain to be persuaded that a judgment debtor can or should be compelled to make statements or give evidence, even those that are potentially incriminating, in relation to the contempt proceedings. In these types of proceedings, the role of the court is to decide whether the judgment creditor has proven its case or whether the judgment debtor has demonstrated adequate grounds that disproves the claim/plea that they are in contempt. The proceedings may also result in the court issuing an order directing the judgment debtor to effect payment under set terms.
- [24] There is a dearth of authority in this jurisdiction on whether the standard of proof that is required to be discharged by a judgment creditor in judgment debtor committal proceedings is on a balance of probabilities (the civil standard) or beyond a reasonable doubt (criminal standard). It is my view that since there is inherent in the judgment summons procedure a real risk of imprisonment, the standard of proof in contempt proceedings for refusal or neglect to pay judgment debt despite having the means must be

demonstrated to the criminal standard, i.e., beyond a reasonable doubt. That said, I need (may) not rule definitively on this point without hearing substantive argument in an adversarial context.

[25] I raise the above simply to emphasise that a judgment creditor must demonstrate on the face of their judgment summons application that the judgment debtor has a case to answer, i.e., they have the means, but are refusing or neglecting, to pay the judgment debt.

[26] There is not, in my view, any place for the odious practice of times past that permitted the imprisoning of debtors on account only of their inability to pay judgment debts. The rules set out in Part 52 of the CPR should be interpreted in the context of the purpose of the regulating law, i.e., the Debtors Act. To the extent that there is a lacuna in Part 52 of the CPR, i.e., in relation to the need to aver that the judgment debtor has the means but refuses to pay, that must be addressed through case law to ensure the appropriate invocation and application of this court's judgment debtor committal jurisdiction. This also promotes the overriding objective of the just resolution of disputes.

Summary

[27] In summary, I hold that this court may not exercise jurisdiction and issue legal process for the committal to prison of a judgment debtor in the absence of necessary averments and/or proof by the judgment creditor in its Form 21 application that the judgment debtor is in contempt. Key to securing the exercise by this court of its judgment debtor committal jurisdiction is the averment/plea that the judgment debtor has the means, but has refused or neglected, to pay a judgment debt.

[28] It is, of course not uncommon for a judgment creditor not to know if a judgment debtor has the means to pay a judgment debt. Part 44 of the CPR addresses such situations, which it appears the judgment creditor attempted to use in these proceedings. The Part 44 oral examination procedure enables a judgment creditor to secure information upon which they can base their assertion that a judgment debtor has the means but is refusing or neglecting to pay a judgment debt. And so too the use of "*a financial position notice in Form 16 requiring a judgment debtor to complete a statement of their financial position ...and serve it on the judgment creditor within 14 days of service*" (see CPR 44.7(1)).

[29] If an oral examination or a financial position notice demonstrates that the judgment debtor is a person without means, that saves a judgment creditor the unnecessary expense and inconvenience of a trial arising from a judgment summons procedure. On the other hand, if it demonstrates that the judgment debtor is a person of means, it narrows down the issues for trial during a judgment summons application and enables the court to make a decision that is just in the circumstances of the case, which may include committal to prison or an order for payment in relevant instalments. Relatedly, the information gathered from an oral examination, or the responses provided to a financial position notice will constitute evidence on which the judgment creditor may rely in its application and on which the court may base its decision in response to the judgment debtor committal proceedings.

[30] It is worth reaffirming that judgment creditors that opt to not make use of the Part 44 oral examination

and/or financial position notice procedures may find the court reluctant to proceed with a hearing in a matter in which there is no information or evidence tendered by the judgment creditor on the judgment debtor's means and ability to pay the judgment debt. Instead, there is every likelihood that the parties will be referred to Part 44 of the CPR and be directed to first exhaust that process to avoid unnecessarily lengthy judgment debtor committal hearing proceedings.

Orders

[31] In the circumstances, I declare, and rule, as follows:

1. Paul Wing Fai Kee's judgment summons application does not exhibit a prima facie case necessary for the exercise by this court of its judgment debtor committal jurisdiction and as a consequence will not be issued in the absence of steps to cure the defects inherent in the application filed of record.
2. In the amendment to the Form 21 filed on 8 October 2024 and/or the supporting affidavit, Paul Wing Fai Kee is required to affirm:
 - (a) whether he is of the reasonable belief that Brian Albert Espat is in contempt of court in that he has the means but has refused and/or neglected to pay a judgment debt; and
 - (b) the basis for his (Paul Wing Fai Kee's) belief that the judgment debtor has the means to pay the judgment debt but has refused and/or neglected to pay the same;
3. Paul Wing Fai Kee shall file his amended Form 21 and/or affidavit no later than **31 January 2025**.
4. If Paul Wing Fai Kee fails to either amend or file an affidavit addressing the issues referenced in para. 2 and 3 above, the judgment summons application will be struck off without notice for lack of compliance with the guidance laid out by this court in the ***Alamina case*** and for the reasons set out in this judgment.
5. Paul Wing Fai Kee is encouraged to make use of the Part 44 oral examination procedure and/or the financial position notice procedure as part of his efforts to satisfy the judgment debt.

**HHJ Hondora
Judge
High Court of Belize
Civil Division**