IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00400

BETWEEN	**BONUS CAR RENTAL AND SERVICES LIMITED**	**CLAIMANT**
AND	**IAN DUNN**	**DEFENDANT**

Contempt of Court – Breach of order to return items- Party in breach acting on advice of attorney-at-law- Whether a defence- Whether a mitigating factor- Purpose of sanction for "civil" contempt- Appropriate fine- Observations on applicability of authorities from other jurisdictions.

Nigel Jones and Tahir Thompson instructed by Nigel Jones & Co for the Claimant.

Ronald Paris instructed by Paris & Co for the Defendant.

Heard: 29th November 2022, 14th December 2022 and 9th January 2023.

In Open Court

COR: BATTS, J.

[1] The Claimant's application to commit the Defendant to prison, for breach of an order of The Honourable Mrs Justice C. Brown Beckford, was filed on the 17th June 2022. The hearing of that application commenced before me on the 29th November 2022. On that date I was advised that there was no longer any aspect of Justice Brown Beckford's order with which the Defendant had not yet complied. At my urging the parties agreed that the question, of whether or not there had been a contempt of Court, was not in issue. It was also agreed that committal to prison

would no longer be sought. The only question for the Court is therefore what, if any, is an appropriate fine to be imposed on the Defendant. The Defendant's counsel, due largely to this adjusted framework, requested an adjournment so that submissions, and if necessary further affidavits, could be filed. The matter was therefore adjourned to the 14th December 2022.

[2] The affidavit evidence considered consisted of:

i. An affidavit of Robert L Sprague filed on the 18th January 2022

ii. An affidavit of Peta-Shea Dawkins filed on the 24th January 2022

iii. An affidavit of Robert L Sprague filed 17th June 2022
iv. An affidavit of Ian Dunn filed 6th July 2022
v. Second affidavit of Ian Dunn filed 25th July 2022
vi. An affidavit of Aubrey Barr filed on the 7th July 2022
vii. A second affidavit of Aubrey Barr filed on the 7th July 2022
i. An affidavit of Robert L.Sprague filed 12th August 2022
ii. An affidavit of Kashima Moore filed on the 28th November 2022
iii. An affidavit of Ian Dunn filed on the 14th December 2022

Submissions were filed by the Claimant on the 28th November 2022 and the 14th December 2022. The Defendant's written submissions were filed on the 22nd December 2022. No witnesses were cross-examined. Each counsel also made oral submissions.

[3] I am truly indebted to counsel for, their respective efforts and, the professional manner in which a matter of this nature was conducted. They have made my task easier than it might otherwise have been. My failure to reference the full breadth of authorities cited reflects only a desire to shorten this judgement.

[4] The material facts, which were mostly undisputed, must first be stated. The Claimant is a company whose shareholding was equally divided between the Defendant and, his business partner, one Mr Robert L. Sprague. Mr Sprague, an

accountant, was a frequent visitor to Jamaica. The Defendant, when they met was, fully employed as a senior sales representative at Courts Jamaica Ltd and employed part-time as manager of a Villa located in Westgate Hills Montego Bay. In the year 2017 they both decided to go into a car rental business and formed the Claimant company for that purpose. They each held 50% of the shares. Mr Sprague put up the finance and the Defendant did the day to day operations, which included, marketing. Eventually they also formed another company to do auto parts sales. The ventures proved so successful that the Defendant gave up his full time employment in order to dedicate himself totally to these businesses.

[5] Relations however broke down. The reason is not entirely clear. It seems Mr Sprague was unhappy with the way the Defendant was operating the companies. The Defendant maintains that the businesses were profitable, although adversely affected by the Covid 19 pandemic, but that Mr Sprague did not like the movement into auto parts. Whatever the reason for the breakdown however it culminated in a meeting, on or about the 9th December 2020, between the two shareholders. The Defendant says that Mr Sprague there and then asserted that he (the Defendant) owed $5.3 million to the Company and that the Defendant should sign over his shares and "move on" thereby excluding him from the companies. Mr Sprague, on the other hand, says the Defendant resigned from the Claimant company. The reason for, and the manner of, the Defendant's separation from the Claimant company do not fall for my determination and I make no finding one way or the other.

[6] At paragraph 21 of his affidavit, filed on the 14th December 2022, the Defendant states:

> *"21. After the meeting of the 9th December 2020 when the 1st Defendant (sic) in my respectful view unlawfully and without justification excluded me from the businesses I sought the advise (sic) of my Attorneys-at-law. Both Companies were both good and profitable investments made by the (sic) Robert Sprague based on*

> *my suggestions, hard work and ideas. On the advice of my Attorneys-at-law I withdrew the sum of $1,451,072.99 as well as $2,202,073.00 from the company accounts and also $2,100.00 in United States currency on or around the 10th December 2020. I also retained in my capacity as Co-Director and equal shareholder with the 1st Defendant (sic) possession and control of 4 company cars in at (sic) my home again on the Advice of my attorneys-at-law."*

[7] The Defendant's address is also the registered office of the Claimant company. The Defendant however also transferred the registration of the vehicles into another company or companies. Those companies were Falcon Auto Parts & Vehicle Accessories Ltd and Global GPS Tracking Ltd, see exhibit KM5 to the affidavit of Kashima Moore filed on the 28th November 2022. In order to purge his contempt, the Defendant, shortly before the commencement of the hearing before me, retransferred the vehicles to the Claimant company. This was orally stated by both counsel on the morning the matter commenced. It is important to note that, in written and oral submissions, the Defendant's counsel admitted that he advised the Defendant to remove the company's assets, see paragraph 8 of submissions filed 22nd December 2022:

> *"8. The Defendant thereafter on the instructions of this Attorneys at law having accepted the breakdown of their business relationship, took possession of 4 of the cars owned by the Claimant Company with their documents of ownership. Those cars had always been garaged at the registered office of the Company being the home of the Defendant at Chichester Hanover and were not moved from their (sic) by the Defendant. The Defendant also withdrew a limited sum of money to facilitate him in continuing to earn a livelihood for himself his wife and their 2 young children."*

[8] Upon the Defendant taking these items correspondence passed between the Claimant's counsel and the Defendant's counsel. A part of this exchange is

exhibited as RS2, to the affidavit of Robert Sprague filed on the 17th June 2022. The Defendant's counsel, by email dated 29th December 2020, suggests that his client had possession of the items by virtue of a claim of right. Mr Robert Sprague thereafter applied for and, on the 21st August 2021, obtained an order granting permission to commence a derivative action against the Defendant. The derivative claim was filed on the 16th September 2021 and is the matter in which the application now before me arises.

[9] The Defendant was served with the derivative claim by an alternate mode of service being on his wife see, affidavit of Peta-Shea Dawkins filed on the 24th January 2022 and, of Vindell Maxwell filed on the 24th January 2022. The Defendant did not file an Acknowledgement of Service or a Defence. By Notice of Application, filed on the 18th January 2022, the Claimant applied for judgment to be entered against the Defendant in default as well as for injunctive orders. In consequence, on the 28th March 2022, the Honourable Mrs. Justice Brown Beckford made the following orders:

> *"1. Application is granted as phrased in terms of paragraphs 1-3 of the Notice of Application filed on the 18th January 2022:*
>
> *I. Judgment is entered against the Defendant.*
>
> *II. An injunction requiring the Defendant to quit and deliver up possession of all the Claimant's property including:*
>
> i. *Motor vehicles:*
>
> a. *Nissan Latio with license plate no. 7520HR and chassis no. N 17000118;*
>
> b. *Toyota Hiace with license plate no. 9219HT and chassis no. KDH2230015222;*
>
> c. *Toyota Vitz with license plate no. 5409HQ and chassis no. NSP1302082247;*

d. *Nissan Sylphy with license plate no.3653HS and chassis no. TB17005956;*

ii. *Keys for said motor vehicles identified at 2(i) above;*

iii. *All documents relating to the ownership and/or control of said motor vehicles but not limited to:*

a. *Vehicle Titles;*

b. *Registration Papers;*

c. *Road Licences;*

III. All other assets of the Claimant that are in the Defendant's possession and/or control;

IV. *All stamps and seals that belong to the Claimant that are in the Defendant's possession and/or control.*

V. *Damages to be assessed.*

2. *The Defendant is to comply with orders 1 and 2 within seven (7) days of the date of service of this order on the Defendant. The Order is to be endorsed with a Penal Notice;*

3. *Pre-Trial Review for Assessment of Damages is fixed for the 20th September 2022 at 11:00 a.m. for 1 hour;*

4. *Cost of the Claim and this Application to the Claimant to be agreed or taxed.*

5. *The Claimant's Attorneys-at-Law are to prepare, file and serve a copy of this order."*

[10] That order, dated 28th March 2022, was served on the Defendant personally on the 23rd April 2022, see affidavit of service of Aubrey Barr filed 7th July 2022. The Claimant, on the 17th June 2022, filed an application to commit the Defendant to prison for failure to obey the order. By Notice of Application filed on the 6th July

2022, and supported by an affidavit filed on the same date, the Defendant applied to set aside the judgment entered in on the 28th March 2022.

[11] On the 12th July 2022 the application to commit was adjourned to the 28th October 2022. The Defendant's application to set judgment aside was listed for hearing on the 25th July 2022 and, on that date, it was adjourned to the 27th September 2022. The pre-trial review, with respect to the assessment of damages on the default judgment, was also adjourned to that date. On the 27th September 2022 I refused the Defendant's application to set aside the default judgment. It is important to note that in an affidavit, filed on the 25th July 2022 in support of that application, the Defendant admitted receiving the package containing the claim which had been served on his wife. He said he took the package to his lawyer but did not open it. This evidence fully justified the decision, by the judge who entered judgment in default, to accept the alternate method of service. The evidence of the Defendant disclosed no defence with any real prospect of success. There was no denial that the items taken were the Claimant's property and therefore, upon demand being made, they ought to have been returned. They ought not to have been taken away, transferred to another entity or, used for any business other than the business of the Claimant. This is because a company has a separate legal identity to its shareholders, see **Aron Salomon (a Pauper) v A. Salomon & Company Limited [1897]AC 22** and **Phoenix Printery Limited v Ashcar Printing Solutions Limited [2022] JMCC Comm 25 (unreported judgment 28th July 2022).**

[12] It was only after the failure of his application to set aside default judgment that the Claimant was able to retrieve its property. I put it that way because the Claimant had to enlist the services of a bailiff, see paragraphs 7 to 13 of the affidavit of Kashima Moore filed on the 28th November 2022.

[13] It is in these circumstances that the parties, as I indicated at paragraph 1 above, agreed that the Defendant acted in breach of the order of 28th March 2022 when he failed to return the items taken. It has been urged upon me by the Defendant's counsel that, insofar as he acted on legal advice, any fine should be minimal.

Counsel suggested that in all the circumstances of the case, and in particular the manner in which the Defendant was evicted and/or excluded from the company of which he is joint owner in equal shares, little or no consequences should flow. The Claimant's counsel, as is to be expected, had quite a different perspective. The breach, he submitted, was deliberate and showed scant regard for the order of the court. He argued that a fine of no less than J$5 million was appropriate.

[14] It is necessary to remind myself of the purpose of the jurisdiction I am being called upon to exercise. A court has an inherent power to protect its integrity and the integrity of its processes. This may involve corrective action for conduct which impedes or obstructs the course of a trial or proceeding, see **R v Eric Frater SCCA 255/77 (unreported judgment dated 12th October 1979) (**upheld on appeal at **[1981] 1 WLR1468)**. In that context the court often acts in a summary way. The court is required then to call upon the person accused to "*show cause*" why he or she ought not to be punished for "*contempt of court*". A fair hearing is required, see **Maharaj v The Attorney General of Trinidad & Tobago [1977] 1 Aller 412** and **Maharaj v The Attorney General of Trinidad & Tobago # 2 [1978] 2 Aller 670.** The category of conduct, which may amount to contempt, is not closed as almost anything which obstructs the course of justice can be so punished, see **Balogh v Crown Court at St Albans [1974] 3 Aller 283** per Lawton JA at 295c. This is generally referred to as "*criminal contempt"*. It is punishable as a crime, often summarily and, very often by the judge whose court has been adversely affected.

[15] There is another category of contempt of court. It, is usually referred to as *"civil contempt"* and, also has its origin in the court's inherent power to protect its process. It concerns primarily the power of the court to enforce orders it has made and undertakings it has received. This jurisdiction differs from "criminal contempt" in that the offending act, is not usually in the face of the court and, may not directly impact the conduct of a trial or proceeding. However, in an extended sense, disobedience to an order of the court adversely impacts the court's integrity and represents a challenge to its authority. A system of justice is meaningless if a court's order can be ignored, or an undertaking given to it breached, with impunity.

The procedure to obtain redress, in such circumstances, is set out in great detail in Part 53 of the Civil Procedure Rules (2002). The rules distinguish between the breach by the person to whom the order is directed and breach by others who may, although not served with the order, knowingly facilitate that breach, see paragraph 37 of the judgment of Morrison JA (as he then was) in the case of **Hon Gordon Stewart OJ v Senator Noel Sloley Sr. et al [2011] JMCA Civ. 28 (unreported judgment dated 29th July 2011)**. Importantly Rule 53.9 expressly distinguishes the procedure required for civil contempt from, the summary process utilised, where the act of contempt occurs in the face of the court.

[16] It is well established that the standard of proof required before punishment, for either "civil" or "criminal" contempt, is that applicable to criminal proceedings that is proof beyond reasonable doubt. The purpose of criminal contempt is primarily to punish the offender for obstructing the court or its processes and to ensure that the trial or proceeding can continue uninterrupted. Civil contempt is established where it is proved beyond reasonable doubt that:

a) The order of the court was clear and unequivocal and,

b) The party in breach acted deliberately,
see **Boily et al v Carleton Condominium Corporation et al 121 O.R. (3d) 670, CA of Ontario, decided 6 August 2014.**

There is no requirement to prove either, a subjective intent to defy the court or, any improper motive. It is sufficient that the person knowingly acted in breach of the order (or undertaking), see **National Export Import Bank of Jamaica Ltd (t/a Exim Bank Jamaica v Stewart Brown Investments Limited [2021] JMCA Civ 40 (unreported judgment dated 24th September 2021)** in which the Court of Appeal, although overturning Laing J's holding that strict liability applied and his finding of contempt, affirmed the principle, see paragraphs 48 to 52 of its judgment. See also Laing J's decision in **Colando Hutchinson v Burchensen et al [2021] JMCC Comm 19 (unreported judgment 15th July 2021).** These cases establish

that, provided the order of the court is clear and the Defendant's act which breached it was deliberate (in the sense of not involuntary and with knowledge of the order), it is no defence to say that the act was done for some noble purpose. The decisions also demonstrate that the purpose of the court's jurisdiction, in civil contempt, is to secure obedience and to deter others. In other words, it is primarily coercive and not punitive.

[17] In the matter before me the Defendant admits being in breach of the order of the 28th March 2023. That order had endorsed on it the penal notice required by Rule 53.3(b), see exhibit KS9 to the affidavit of Robert L Sprague filed on the 17th June 2022. There is no doubt that the appropriate notice, of these proceedings for contempt, was given pursuant to Rule 53.10(1)(a) and 11.11(1)(b). In any event the application for committal first came before the court on the 12th July 2022. It was adjourned to the 28th October 2022 and/ or 29 November 2022 and 14th December 2022. On each occasion the Defendant was present or represented. Orders were made to facilitate the filing of affidavits and submissions and these were filed in due course. Procedurally therefore these proceedings are in order.

[18] It is not usually sufficient for a Defendant to say, having breached the order, I have now complied. That may go to mitigation of the punishment but it is not a defence. The defences to the charge may be procedural, such as, I was unaware of the order or, may be substantive, such as, I did not breach the order. Neither a procedural nor substantive defence has been or could, on the facts of this case, be advanced before me. There has been an admission of breach of the court's order and the only question before me is what is the appropriate punishment.

[19] The Defendant has said that he acted on legal advice when he breached the order of the Court. The first question for my determination is whether or not that can be a mitigating factor. I hold that it can. In the Canadian decision of **Boily (cited at paragraph 16 above)** the court used as a factor, weighing against the party in breach, the failure to consult an attorney, see paragraph 104 of that judgment. If therefore a failure to consult weighs against the litigant then the act, of consulting

attorneys very early in the process, should weigh in his favour. In this case the Defendant was advised by his attorney to, when separating from the company, take and withhold certain assets which were the property of the company. There was no order of the court in place at that time and therefore no contempt of court. Correspondence ensued between the attorneys but the Defendant's lawyer maintained his client's claim of right. Unfortunately, resort was not had, at that early stage, to the established legal methods by which shareholders and directors vindicate their rights. These methods do not include converting property belonging to the company.

[20] The Defendant, although legally represented, continued to withhold the company's property even after the order to return them was served on the 23rd day of April 2022. He explains that, as he had a pending application to set aside the default judgment, he was awaiting its outcome. The application to set judgment aside was refused on the 27th September 2022 but he still did not return the vehicles or the relevant papers. He explains this on the basis that, as the vehicles were always at his home and, as his home was the Claimants registered address there was no failure to return them. This argument is defeated by the unchallenged evidence that the Defendant transferred (by registration) the ownership of some of the items to another company's name, see paragraph 7 above. So that, even after repossessing them, the Claimant had to take steps to retransfer the vehicles. The Defendant facilitated this process and, by the date this hearing commenced before me, all vehicles were again registered in the Claimant's name.

[21] No two cases are ever identical however, Laing J's decision on quantum at first instance in, the matter of **Stewart Brown Investments Limited et al v National Export Import Bank of Jamaica Ltd (t/a Exim Bank Jamaica [2020] JMCC Comm 36** (the Court of Appeal's decision is cited above at paragraph 16), is a useful guide. In that case a Court of Appeal Judge in chambers made an injunctive order which was broader in scope than intended. The judge of appeal issued a "notice" which Laing J found had not amended the previous order. Upon proceedings for contempt being brought one of the arguments advanced was that

the lawyers had misunderstood the order of the judge of appeal and the effect of the notice subsequently issued. In that context Laing J stated:

> *"[79] …..I have had regard to the somewhat unusual facts of this case, which I have identified earlier I have also considered, inter alia, the conduct of EXIM in attempting to have the issue of the scope of the Order resolved and the question surrounding the nature and effect of the Notice. I find that there are significant mitigating factors in this case. Accordingly, I am of the opinion that a fine will serve the interests of justice especially since there is no need to coerce EXIM in order to have it comply with any extant orders of the Court. The breach which the Court has found is historical and there is no evidence to suggest that EXIM would be inclined to breach another of the Court's orders. In the premises, the Court is of the opinion that a fine of Two Hundred and Fifty Thousand Dollars ($250,000.00) is appropriate."*

[22] Although overturning Laing J's finding of contempt (because the applicable order was either unclear or had been varied) the Court of Appeal made no adverse comment on the quantum of the fine. In the matter at bar the Defendant, although acting on legal advice initially, failed to comply with the court's order even after the legal advice was demonstrated to be erroneous. This occurred when the court refused to set aside the judgment in default. The Claimant had to use the services of the bailiff, and thereby incur expense, to recover possession of the items some of which had to be retransferred. These are aggravating factors. I also bear in mind, and concur with, the approach of the Court of Appeal of Ontario Canada in the ***Boily case*** (cited at paragraph 16) above:

> *[108] The Individual Appellants correctly point out in their factum that, in general, awards for civil contempt in Canada range between $1,500 and $5,000. In* ***Chiang (Trustee of) v. Chiang,*** *[2007] O.J. No. 1409; partially rev'd on other grounds 2009, 93 OR*

(3d) 483, [2009] OJ No 41, 2009 ONCA 3, at para. 20, this court observed that custodial sentences are rare and that Canadian courts tend to be lenient in their contempt sentences. Even in cases where contempt has involved the loss or misuse of substantial amounts of money, the fines imposed on individuals have remained low. See, for example ***Chicago Blower Co. v. 141209 Canada Ltd*** *[1987] MJ No. 32, 44 Mon R (2d) 241 (CA);* ***Baxter Travenol Laboratories of Canada Ltd v Cutter (Canada) Ltd*** *1987 FCJ No 205, [1987] 2FC 557 (CA).*

*[109] The few instances in which fines have been imposed at $100,000 or higher have been against unions with large membership ... or against large corporations in egregious circumstances (**Apotex Fermentation v. Novopharm**). It should be noted that in Apotex, the corporate entity of Novopharm had its fine reduced to $100,000 on appeal and no individual contemnor (the officers of the corporation) was fined more than $10,000.*

[110] Significant fines have been imposed only in particularly egregious cases and/or where the contemptuous conduct was motivated by personal gain (See, for example: ***Imax Corp. v. Trotum Systems Inc.****, [2013] OJ No 446, 2013 ONSC 743 at paragraphs 12-14 (fine of $50,000).)*

[111] However, I also note the observation of Brown J. in ***Mercedes-Benz Financial v. Kovacevic****, [2009] O.J. No. 888, 74 CPC (6th) 326 (SCJ) that some recent decisions in this province have shown a willingness to impose more substantial penalties for contempt, particularly in cases in which there has been a lengthy course of disobedience and where the contemnors have not purged their contempt.*

[112] In the end the sentence imposed must be reasonable"

[23] In the ***Boily case*** the fine imposed was C$7,500 on each director which was to be paid to "*the credit of CCC*". Before me the Claimant's counsel urged that this case was, unlike ***Boily***, one of an egregious sustained and deliberate breach. It was more akin, he said, to the **Imax Corp v Trotum Systems (2013) OJ No. 446** (an authority cited in ***Boily***) in which C$50,000 was imposed. Mr Jones submitted further that, C$50,000 converts to J$5,154,639.18 and, I should therefore impose a fine of J$5 million.

[24] I respectfully disagree. In the first place an award, whether of damages or a penalty, cannot be directly transposed from one jurisdiction to another. The applicable rate of exchange of currency is only a small part of the relevant equation. Comparable standards of living and of per capita income will have to be considered. The cultural and social differences also impact what is or may be considered reasonable or appropriate to deter, or compensate, in such cases. It is also worthy of note that in the **Imax case**, cited by the Claimant, there were no mitigating factors. Up to the date of judgment the contempt had not been purged and the court found,

> *"11. As noted, Tsui and Trotum are in contempt of the aforementioned Orders. The contempt is serious. I agree with Counsel for IMAX that there are no mitigating factors. The contempt is also deliberate and part of an ongoing pattern of defiance and disregard for the processes of this Court. This includes wilful attempts to avoid the consequences of the injunction, including the destruction of evidence. As a result, I agree with counsel for Imax that a sanction on the high end of the spectrum is required to end or deter such behaviour, and to attempt to remedy the harm done to IMAX."*

[25] In the **Colando Hutchinson case** (cited at paragraph 16 above) the fine imposed was $400,000 in circumstances where the breach of the order was, unlike in the case before me, not directly intended, see paragraphs 53 to 55 of that judgment. Therefore, and in the circumstances of the case at bar, I will impose a fine of $500,000.00. This is the minimum required to demonstrate that the court will not tolerate a breach of its orders and deter the Defendant and others from similar conduct. The penalty would have been higher but for the fact that he had legal advice, that he was no longer in breach and, that the dismissal of his application to set judgment aside occurred only on the 27th September 2022. Costs related to these proceedings will go to the Claimant. I contemplated making an award of a compensatory nature, however, the substantive assessment of damages consequent to the judgment in default is yet to occur. It is therefore unnecessary, and perhaps inappropriate, for me to do so now. If no date has been fixed for a pre-trial conference, relative to the assessment of damages, I will fix one.

[26] In the final analysis therefore, and for the reasons stated, my orders are as follows:

(1) The Defendant having committed a civil contempt of court by his disobedience of the order of the Honourable Mrs Justice C. Brown Beckford made on the 28th March 2022 is hereby ORDERED to pay a fine of $500,000 to the accountant general of Jamaica on or before the 9th day of April 2023.

(2) In the event the Defendant fails to comply with Order 1 above a Warrant of Committal shall be issued for his incarceration for a period of 30 days.

(3) The costs of this application will go to the Claimant to be taxed if not agreed on a full indemnity basis.

(4) The Formal Order is to be prepared filed and served by the Claimant's attorneys at law.

David Batts
Puisne Judge