COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2012/CLE/gen/0503

IN THE MATTER OF an application for a 'Norwich Pharmacal' Order pursuant to the inherent jurisdiction of the Supreme Court

AND IN THE MATTER OF Section 15 of the Supreme Court Act 1996

AND IN THE MATTER OF an application by Louis M. Bacon for permission to apply for an Order of Committal against Sherman Brown

BETWEEN

LOUIS M. BACON

Applicant

AND

SHERMAN BROWN

First Respondent

STEVE MCKINNEY

Second Respondent

Before: The Hon. Madam Justice Indra H. Charles

Appearances: Mr. Robert K. Adams of Graham Thompson for the Applicant
Mrs. Krystal D. Rolle of Rolle & Rolle for the First Respondent
Ms. Kayla Greene-Smith for the Attorney General

Hearing Dates: 10, 17 September 2015

Contempt of court – Committal – Proceedings for committal – Applicant bringing proceedings against Respondent for making false statements under oath before deputy registrar - Interference with administration of justice

Evidence – Hearsay –interlocutory proceedings –Whether hearsay evidence in affidavit admissible in support of committal application – Statements produced by computer – Certificate lacking –Admissibility

Substantive defamation action – Overlapping issues - Abuse of process - Timing of contempt application – Sanction –Costs -Indemnity

The Applicant, a hedge fund manager and philanthropist, brought committal proceedings against the First Respondent, who he accused of making false statements under oath in relation to matters contained in a Norwich Pharmacal Order. The Norwich Pharmacal Order had been made to assist the Applicant in discovering the identities of people responsible for publishing defamatory material about him on websites. The Applicant subsequently brought substantive proceedings against the First Respondent for libel and referring to the false statements under oath.

At the hearing, the First Respondent argued that the committal application was an abuse of the court's process because the main issue the court must determine on the application was whether he had lied on oath which was an issue for trial of the substantive proceedings; consequently, it would be more appropriate for the issues raised on the committal application to be determined in the substantive action; and that, if the application proceeded, then there had been no interference with the course of justice.

HELD:

(1) Dismissing the application that the committal application was an abuse of process. It was not an abuse of the court's process to bring and determine contempt proceedings before the same issues have been determined in litigation, ***Daltel Europe Ltd and others v Makki and others*** [2005] EWHC 749 (Ch) applied: [94].

(2) Dismissing the application to have the matter heard at trial. The issue of when it would be appropriate to hear contempt proceedings which raised the same issues to be determined in litigation was a case management decision for the judge exercising his/ her discretion having regard to the need to guard carefully against the risk of allowing vindictive litigants to use committal proceedings to harass persons against whom they have a grievance and where an application would risk impacting adversely upon the ability of the alleged contemnor to give oral evidence at a future point in time: ***Malgar Ltd v RE Leach (Engineering)***

Ltd [2000] C.P Rep 30; ***Kabushiki Kaishi Sony Computer Entertainment and Others v Gaynor David Ball and Others*** [2004] EWHC 1984 (Ch); ***Daltel Europe Ltd and others v Makki and others*** [2005] EWHC 749 (Ch); ***Michael J Prest and Another v Marc Rich and Co Investment AG and others*** [2006] EWHC 927 (Comm); ***KJM Superbikes Ltd v Hinton*** [2009] 1 WLR 2406; ***JSC BTA Bank v Ablyazov (no7)*** [2011] EWCA Civ 1386; ***Talal El Makdessi v Cavenish Square Holdings BV*** [2013] EWCA Civ. 1540; ***International Sports Tours Limited v Mr. Thomas Shorey et al*** [2015] EWHC 2040 (QB) considered. In this case, it was appropriate to hear the committal application at this stage. There was not one iota of evidence that the Applicant was a vindictive litigant and the First Respondent had not filed any evidence on the application. There was therefore no risk of him giving evidence which may conflict or prejudice the position he may choose to take on the substantive action: [112], [115].

(3) Finding that the First Respondent was guilty of thirteen counts of interference with the course of justice by knowingly making false statements under oath. On a committal application of this kind, hearsay evidence is admissible but special care must be taken when assessing the weight to give the evidence: ***Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV and others (No. 2)*** [1988] 1 All ER 975; ***Welsh v Stokes*** [2007] EWCA Civ 796 applied. On each of the thirteen counts, the court was satisfied beyond reasonable doubt that the First Respondent deliberately and knowingly made false statements under oath: [48], [56], [61], [66], [70], [74], [75]. Further, an intention to interfere with the course of justice could be inferred from the First Respondent's decision to evade service of the Norwich Pharmacal Order and the fact that he is an educated man who could be taken to understand that he was required to give truthful evidence on oath: [80. [81], [84]. Accordingly, the First Respondent was in contempt of court.

JUDGMENT

Introduction

[1] This is an extraordinary application. The court is called upon to determine whether the First Respondent, Sherman Brown ("Mr. Brown") should be committed to Her Majesty's Prison (now styled "The Bahamas Department of Correctional Services") on an application by a private litigant for certain false statements which he allegedly made under oath before the Deputy Registrar of the Supreme Court in relation to matters contained in a Norwich Pharmacal Order made on 13 June 2012 ("NP Order").

[2] I start off by echoing the judicious words of Sir Richard Scott, VC in **Malgar Ltd. v RE Leach (Engineering) Ltd** [2000] C.P. Rep. 39 where he said:

> **"Proceedings for contempt are not private law proceedings. They are public law proceedings. They may in appropriate circumstances be brought by private individuals. They can always be brought by the Attorney General, but private individuals may be able to bring them. An injunction granted in an action between two private individuals restraining one from doing some act which is to the prejudice of the interests of the other can be enforced by committal proceedings brought by the party for whose benefit the injunction was granted. Committal proceedings of that character can be brought without permission. But under CPR 32.14 a private individual can only bring committal proceedings with the permission of the court. The reason for that is the nature of the proceedings. These are not proceedings where the alleged contempt consists of the breach of an order obtained by an individual in protection or furtherance of his own private rights. It is a case of an allegation of public wrong, not private wrong. Interference with the course of justice is plainly a public wrong and it is right therefore that there should be a public control over the launching of proceedings for this species of contempt. The Attorney General has a public function which needs no further explanation. The court from which permission is sought will be concerned to see that the case is one in which the public interest requires the committal proceedings to be brought. I repeat that these are not proceedings brought for the furtherance of private interests. They are brought in the public interest and are in some respects like criminal proceedings. Nonetheless they are civil proceedings…."**

Background

[3] From around August 2010, the Applicant, Louis Bacon ("Mr. Bacon"), a hedge fund manager and philanthropist, was the subject of a wide-ranging smear campaign whereby he was a victim of a proliferation of defamatory accusations published in a number of places, including on the *Bahamas Citizen* (http://www.bahamascitizen.com; ("BC") (now defunct) and *Bahamas National* (http://www.bahamasnational.com) "(BN") websites.

[4] On 26 October 2011, Mr. Bacon obtained a Norwich Pharmacal Order against web developers Michael Rolle ("Mr. Rolle") and Jason Graham ("Mr. Graham"), the webmasters of the BC and BN websites. As deposed in the Lightbourne affidavit at para 17, "…*the purpose of the application was in essence to: (a) obtain the identities of the people responsible for publishing defamatory*

statements on the Bahamas Citizen and Bahamas National websites; and (b) identify who provided Messrs. Rolle and Graham with the defamatory context for publication…."

[5] Mr. Rolle's evidence illuminated that Mr. Brown provided him with instructions in relation to the set-up and construction of the BC website and other matters: see Lightbourne affidavit at paras 20-44.

[6] As a result of this disclosure, a further NP Order was sought against Mr. Brown and the Second Respondent, Steve McKinney ("Mr. McKinney") (together "the Respondents"). Evans J granted the NP Order on 13 June 2012. It was filed on 21 June 2012. Mr. McKinney was served on 25 June 2012. After some failed attempts to serve the NP Order on Mr. Brown personally, the court, on 11 July 2012, ordered substituted service by leaving it at his home address and by sending a copy of the same to him via e-mail.

[7] The NP Order required Mr. Brown to provide, within seven days, relevant information as set out in the Order. Learned Counsel Mrs. Rolle appearing for Mr. Brown is not happy with the Order. She submitted that Norwich Pharmacal orders are typically sought when legal proceedings for an alleged wrongdoing cannot be brought because the identity of the wrongdoer is not known to the applicant. She asserted that Mr. Bacon already knew the identity of the alleged wrongdoers and therefore, the NP Order was improperly obtained. As a consequence, Mr. Brown's allegedly false answers under oath before the Deputy Registrar should not form the basis of the application. The short answer is it is too late to criticize the NP Order. Significantly, there has been no appeal of that Order. For all intent and purposes, the NP Order is properly made.

[8] The Respondents failed to comply with the NP Order. As a result, on 7 August 2012, Mr. Bacon issued an application for leave to commence contempt proceedings against them. At the hearing on 31 January 2013, Mr. Keod Smith ("Mr. Smith") appearing as Counsel for Mr. Brown challenged service of the NP

Order. Evans J directed that the process servers be cross-examined on this issue.

[9] At the hearing on 26 June 2013, learned Counsel Mr. Smith informed the court that Mr. Brown was not going to take objection to the committal proceedings on the ground that Mr. Brown was not served. Instead, he provided a formal undertaking that Mr. Brown would comply with the terms of the NP Order by 4 July 2013. The learned Judge fixed a mention hearing on 5 July 2013.

[10] Mr. Brown did not comply with the undertaking given by his Counsel at the 26 June 2013 hearing. To make matters worse, Mr. Smith did not show up in court on 5 July 2013. The learned judge scheduled a further mention hearing to 11 July 2013.

[11] On 9 July 2013, Mr. Brown filed an affidavit purporting to comply with the terms of the NP Order. This was served on Counsel for Mr. Bacon on 11 July 2013. Learned Counsel criticized the affidavit as being manifestly deficient.

[12] On 23 August 2013, Mr. Bacon filed a Summons under the inherent jurisdiction of the Court and Order 39 Rule 1 of the Rules of the Supreme Court ("the RSC") directing that Mr. Brown attend before the Registrar of the Supreme Court to be cross-examined under oath in relation to the matters contained in the NP Order. On 10 March 2014, an order to that effect was approved by the court.

[13] On 17 November 2014, Mr. Brown was examined on oath before the Deputy Registrar in relation to matters contained in the NP Order. Mr. Bacon alleged that in the course of that examination, Mr. Brown knowingly and deliberately made certain false statements under oath and thereby impeded and interfered with the proper administration of justice.

[14] On 3 February 2015, Mr. Bacon applied, ex parte, for leave to commence committal proceedings against Mr. Brown. The Summons was supported by an

affidavit sworn to by Michela E. Barnett-Ellis ("the Ellis affidavit") on the same day.

[15] During the intervening period, on 17 February 2015, Mr. Bacon issued a Specially Indorsed Writ of Summons against Mr. Brown for defamation ("the substantive action"). This action is pending.

[16] On 2 March 2015, this court granted permission to bring committal proceedings against Mr. Brown. The court further ordered that the Attorney General be served with all relevant documentation relating to the application for consideration as to whether criminal charges for perjury should be brought against Mr. Brown. The Attorney General was served on 12 March 2015. Mr. Brown was personally served on 14 March 2015. His then Counsel, Mr. Smith was served on 11 March 2015.

[17] On 10 March 2015, Mr. Bacon instituted these committal proceedings ('the committal application") against Mr. Brown. He relied on the Ellis' affidavit which comprehensively sets out at paragraphs 19 to 53 non-exhaustive evidence demonstrating that Mr. Brown knowingly and deliberately misled the court when he made a litany of false statements under oath which are contradicted by his own evidence, the evidence of several other individuals and contemporaneous documentary evidence.

[18] On 4 June 2015, in the presence of his new counsel, Mrs. Rolle, this court ordered, inter alia, that Mr. Brown **shall** file and serve any affidavit evidence upon which he wishes to rely by 30 June 2015. Mr. Brown failed to file any affidavit evidence as ordered by the court.

[19] Also, present at the hearing on 4 June 2015, was learned Counsel for the Attorney General, Ms. Wright. She informed the court that although the Attorney General has no interest in the committal application, she will nevertheless

institute criminal proceedings against Mr. Brown if directed by the court to do so pursuant to section 82 of the Penal Code.

[20] One of the challenges launched by Mr. Brown is that the Attorney General has no interest in the committal application. This is misleading. The Attorney General's position is, although she has no interest in the application, she will institute criminal proceedings against Mr. Brown if directed by the court to do so.

[21] Mr. Brown further opposed the committal application on the following grounds:

(i) The application is an abuse of the court's process;

(ii) It would be "more appropriate" for the issues raised in this application to be determined in the substantive action and;

(iii) There has been no interference with the course of justice.

General law of contempt

[22] The general law of contempt is that actions done by an individual which interfere with the course of justice or which attempt to interfere with the course of justice are capable of constituting contempt of court.

[23] It is common ground that making a false statement knowingly, under oath, amounts to contempt. It plainly impedes and interferes with the proper administration of justice.

[24] Two basic legal principles emerge in proceedings for contempt namely:

- For an allegation of contempt to succeed it must be shown that '....*in addition to knowing that what you are saying is false, you had to have known that what you are saying was likely to interfere with the course of justice*: **Malgar Ltd** [supra]; **Edward Nield v Loveday** [2011] EWHC 2324 (Admin);

- The burden of proof is on the party alleging the contempt who must prove each element beyond reasonable doubt: **Edward Nield v Loveday** (supra).

Hearsay evidence

[25] In circumstances where an application to commit for contempt of court is ancillary to the issues raised in the action and arose out of an order already made in the action or if its true purpose is to enable the final resolution of the issues between the parties, such application is interlocutory in nature. Thus, hearsay evidence is admissible in committal proceedings: **Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV and others (No. 2)** [1988] 1 All ER 975.

[26] Where hearsay evidence has been adduced, the court is required to take special care in assessing the weight to be given to it. The court must have regard to all the circumstances that may affect its reliability. Provided it has been given proper consideration to the relevant factors affecting its weight, the court may rely exclusively on hearsay evidence: **Welsh v Stokes** [2007] EWCA Civ 796. See also **Daltel Europe Ltd and others v Makki and others** [2005] EWHC 749 (Ch) at paras 51-66.

Admissibility of statements produced by computers

[27] Section 61(1) of the Evidence Act deals with the admissibility of statements produced by computers. It states as follows:

> **"In any civil proceedings, a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) are satisfied in relation to the statement and computer in question."**

[28] Subsection (2) lists four conditions to be satisfied for a statement produced by a computer to be admissible as evidence.

> **"(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;**

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities."

[29] Subsection (4) requires a certificate. It states as follows:

> **"In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate, doing any of the following things, that is to say –**
>
> **(a) identifying the document containing the statement and describing the manner in which it was produced;**
>
> **(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;**
>
> **(c) dealing with any of the matters to which the conditions mentioned in subsection (2) relate**
>
> **….shall be evidence of any matter stated in the certificate…."**

[30] Section 62 deals with provisions supplementary to sections 58, 60 and 61. Subsection (2) states:

> **"For the purposes of deciding whether or not a statement is admissible in evidence by virtue of section 58, 60 or 61, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document, the form and contents of the document."**

[31] Subsection (3) speaks to the weight if any, to be attached to a statement admissible in evidence.

[32] Section 64 deals with Rules of Court. Subsection 3 confers on the court in any civil proceedings a discretion to allow a statement falling within …subsection (1) of section 61 to be given in evidence notwithstanding that any requirement of the rules affecting the admissibility of the statement has not been complied with.

[33] Although section 61(4) stipulates the necessity for a certificate, it seems to me that the absence of such certificate may not be fatal: see section 64(3). It is within the discretion of the court to determine whether or not to admit such statement. A party should not be punished too harshly for a mere procedural irregularity like the present one. My view accords with Lord Collins' reasoning in **Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 where, in his introductory remarks, he stated *"It has often been said that, in the pursuit of justice, procedure is a servant and not a master.* The court will decide what weight, if any, is to be attached to the numerous email messages attached to various affidavits in this application.

The alleged contempts

[34] Before turning to each of the allegations sequentially, I make one significant observation. Whilst the onus is on Mr. Bacon to satisfy this court beyond reasonable doubt that Mr. Brown knew what he said was false and he knew that what was being said was likely to interfere with the course of justice, it is striking that Mr. Brown has not filed any evidence at all in these proceedings despite an order of the court. Mr. Brown is a journalist and an author. Unquestionably, he is a man of some ilk. It is indeed telling that not one golden word has fallen from his lips in the midst of uncompromising allegations that he knowingly and deliberately made false statements in a court of law. He had a further opportunity to narrate his account because he could have requested to give oral testimony at this hearing.

[35] Mrs. Rolle appearing for Mr. Brown argued that it is incorrect to say that Mr. Brown remained silent because he had sworn several affidavits in response to

the NP Order. She insinuated that the Ellis' Affidavit merely exhibits other affidavits which have not been tested under oath and therefore, it is hearsay evidence. She next submitted that since there was no cross-examination of witnesses, the ability of the court to make factual findings is grossly constrained.

[36] Despite the dynamism of Mrs. Rolle and to cut a long story short, Mr. Brown did not file any affidavit evidence in response to the Ellis affidavit. Therefore, there was no evidence for him to be cross-examined upon. An alleged contemnor is not a compellable witness but if he gives evidence, he can be cross-examined on it in relation to the alleged contempt: **Crest Homes plc v Marks** [1987] AC 829 at 858. As for Mrs. Ellis, she was available for cross-examination if Counsel was so inclined to do.

[37] At the end of the day, the facts contained in the Ellis affidavit are not in issue and are deemed to be admitted. Support for this proposition is to be found in the Trinidadian case of **Attorney General v M.M. Brokers Ltd. (1996) 50 WIR 462 at pages 475-476.** Ibrahim JA had this to say:

> **"…With respect to that part of the judgment that deals with *Re Mungroo's Application* (unreported), I am unable to agree with the opinion expressed by the Chief Justice where he expressed his disagreement with the proposition that:**
>
> > **"where there were no pleadings in a case, the affidavits took the place of pleadings, and in such a case the rules applicable to pleadings (including Order 18, rule 13 [of the Rules of the Supreme Court 1975], which provides that any allegation in a statement of claim that is not denied is taken as admitted) are equally applicable to affidavits."**
>
> **Whilst the pleadings contain the facts of the claim, defence or reply, as the case may be, and no reference is made therein to facts that are provable by individual witnesses and affidavits contain the evidence of particular witnesses as they are able of their personal knowledge to establish, nevertheless, the proceedings that require affidavits in support of the claim made are different from proceedings that require pleadings. The Rules of the Supreme Court contain provisions relating to pleadings with no corresponding provisions relating to affidavits where there is no denial of the facts in reply.**

> **Since, however, the main object and purpose of Order 18, rule 13, is to bring the parties by their pleadings to an issue and to narrow them down to definite issues, and so diminish expense and delay ….so too it is that that is the main object and purpose of affidavits in reply where there are no pleadings. In my opinion, the respondent in reply must deal with the facts alleged in the affidavit and his failure to do so will result in those facts not being in issue since they are deemed to be admitted*…"*** (Emphasis added)

[38] Notwithstanding, the burden lies on Mr. Bacon to establish that each alleged contempt was committed by Mr. Brown and this must be established to the criminal standard so that the court is sure that the alleged contempt (s) was/were committed.

[39] The court may rely exclusively on hearsay evidence provided that the relevant factors affecting its weight are given proper consideration. The email messages generated from a computer are also admissible despite certain procedural irregularities which I earlier alluded to. The weight to be given to the email messages is a matter for the court having considered all of the circumstances.

[40] Succinctly, Mr. Bacon's case for the committal application is that Mr. Brown deliberately and knowingly made false statements under oath before the Deputy Registrar on 17 November 2014 and thereby impeded and interfered with the proper administration of justice.

[41] The allegations that Mr. Brown made false statements under oath are helpfully set out as thirteen counts in the skeleton argument and authorities bundle in support of this committal application. As stated earlier, I shall deal with each count in turn.

Counts 1, 2, 3 and 4

[42] With respect to counts 1 to 4, it is alleged that Mr. Brown made false statements regarding Mr. Rolle and the BC website: see statement at paragraph 5(1). The evidence in support of these counts is contained at paragraphs 19 to 29 of the

Ellis affidavit and pages 149 -151 and 198 of the Transcript of Examination of Exhibit MEE-1 to the Ellis affidavit.

[43] In relation to count 1, Mr. Brown was asked whether he had sent an email message to a Mr. Michael Rolle with the subject '*Louis Bacon's secret cronies*'. He emphatically replied '*No, sir'.* In relation to count 2, Mr. Brown was asked whether he knows Mr. Michael Rolle. He answered *'no, sir'*. In relation to count 3, he was questioned as to whether he had sent an email message which forwarded an article from Mr. Stephen Gay requesting that Mr. Michael Rolle upload the article to the BC website. Mr. Brown answered *'No, I don't recognise any of these emails that is sent, or supposedly that is stated that I sent to him'.* In relation to count 4, when asked *'Are you familiar with the Bahamascitizen.com website'?* Mr. Brown said *'No sir. I don't know of it, never see it, never use it, been on it'*. Mr. Bacon alleged that Mr. Brown knew his answers to be false.

[44] Learned Counsel Mr. Adams submitted that Mr. Brown's evidence under oath that he does not know Mr. Rolle and he does not know of the BC website is contradicted by his own evidence and the evidence of a number of individuals. Mr. Adams contended that both statements are untrue and are in direct contradiction with the sworn affidavit evidence of Mr. Rolle in the Norwich Pharmacal proceedings which Mr. Bacon brought against Mr. Rolle *(Bacon v Rolle and Graham 2011/Com/gen/00825)*. In his affidavit, Mr. Rolle averred and provided emails and documents showing that between July or August 2010 and early 2011, Mr. Brown instructed him to create and publish matters about Mr. Bacon on the BC website, continued to provide detailed instructions via email in relation to the BC website, paid him in person between $1,500 to $2,000 for work done on the BC website and met him at diverse locations in New Providence including gas stations, business establishments and restaurants.

[45] Mr. Adams next submitted that the fact that Mr. Rolle was working for Mr. Brown is further demonstrated by the sworn affidavit filed on 4 March 2013 by Mr.

Graham in *Bacon v Rolle and Graham* which shows innumerable emails from 2010 onwards containing detailed correspondences with Mr. Brown and others in relation to the administration and editing of the BN website. Mr. Adams submitted that Mr. Brown admitted in examination that he uploaded content to the BN website and that he had worked with Mr. Graham on the website and paid Mr. Graham for the website. I see no evidence to that effect in the Transcript of Examination. However, there is a superfluity of email correspondence which Mr. Graham exhibited to his affidavit: see paragraphs 2-3 of Graham's affidavit at pages 12-13 of Exhibit MEE-1. Upon scrutiny, the email correspondence and invoices demonstrate that Mr. Brown provided detailed instructions via email in relation to the BN website and he also paid Mr. Graham for the website.

[46] Learned Counsel next asserted that when Mr. Brown stated, on oath, that he does not know Mr. Rolle, it contradicted his own subsequent admissions in cross examination. When asked *'why do you say Mike Rolle hacked the email address, shemanbrown242@yahoo.com'?* Mr. Brown proceeded to give a detailed history of communications he actually had with Mr. Rolle by telephone dialogues and in person. He testified thus: '*Let me tell you about Mike Rolle. This Mike Rolle that you are talking about…this Mike Rolle called me on my phone some time ago saying who he was. I don't know who he was. I don't know where he got my number from or anything like that, just like how you got my number….'* and he narrated a long-drawn out account of his ensuing encounters, by telephone and in person, with Mr. Rolle: see paragraph 26 of the Ellis affidavit.

[47] I find the arguments advanced by Mr. Adams on counts 1 to 4 to be very compelling and I agree with them. I find it implausible that, in the face of overwhelming evidence including his own admissions, Mr. Brown still attempts to dissociate himself from Mr. Rolle.

[48] In relation to each of these counts, I am satisfied beyond reasonable doubt that Mr. Brown deliberately and knowingly made false statements under oath when

he proffered false answers to the questions posed by learned Counsel Mr. Adams.

Counts 5, 6 and 7

[49] Counts 5, 6 and 7 concern false statements regarding meeting Mr. Rolle and Mr. McKinney: see statement at paragraph 5(2). The evidence in support of these counts is contained at paragraphs 30 to 35 of the Ellis affidavit and pages 174 of the Transcript of Examination of Exhibit MEE-1 to the Ellis affidavit.

[50] In relation to count 5, Mr. Brown was asked whether he met Mr. Rolle on 21 January 2011 to which he answered *'No sir'.* In relation to count 6, Mr. Brown answered *'That's the first time I see this'* to a question whether it was his position that an email message dated 18 January 2011 from shermanbrown242@yahoo.com to Mr. Rolle arranging a meeting with Mr. Rolle and Mr. McKinney on that date was not sent by him. In relation to count 7, Mr. Brown was asked whether he met Mr. McKinney on 21 January 2011 to which he answered '*No I don't remember meeting him. We meet, but I didn't meet him on that date'.* Mr. Bacon alleged that Mr. Brown knew that his answers were false.

[51] Learned Counsel Mr. Adams pointed out that Mr. Brown's statements under oath are contradicted by the sworn affidavit evidence of Mr. Rolle in *Bacon v Rolle and Graham* which appends an email correspondence from Mr. Brown's email address shermanbrown242@yahoo.com to Mr. Rolle's email address making arrangements for a meeting between them at a Chinese restaurant at Caves Village, Nassau on 21 January 2011. The message reads thus: *'Hey Michael we are on for 7pm after Steve's Hard Copy show. We will meet at Chinese restaurant out west by the Caves in the shopping plaza.'* Mr. Rolle responded '*Ok will be there'* and *'Headed that way now.'*

[52] Mr. Adams next submitted that the fact that the meeting between Mr. Brown and Mr. Rolle took place at the time, date and place stipulated in the email correspondence is corroborated by the evidence of Mr. McKinney whom Mr.

Brown called his "best friend". In a letter dated 28 June 2013 from Mr. McKinney's Counsel, Wayne Munroe QC to Mr. Bacon's Counsel, it states:

> *"Our client [Mr. McKinney] does not admit to planning or participating in a meeting with Michael Rolle or Sherman Brown on [sic] January 2011. He does admit to having dinner at the Chinese restaurant in the Cave Plaza as he usually does when he was approached by two men. One of them he knew as Mr. Sherman Brown and the other gentleman was introduced by Mr. Brown as Mr. Michael Rolle."*

[53] This is also confirmed in an affidavit sworn to by Mr. McKinney on 11 September 2015 wherein he stated "*I swear this affidavit to confirm that I adopt the contents [of a letter dated 28 June 2013 from my Counsel, Wayne R. Munroe QC to Robert Adams, Counsel for the Applicant]."*

[54] According to the sworn affidavit evidence of Mr. Rolle, the following day, he received an email from Mr. Brown's email address with the subject *'email adredd [sic] of BN web master Pastor Jason Graham'* following up on the meeting. It reads:

> *"Good morning Michael. Good meeting you last night and I believe the relationship will be a great one."*
> *"Here is the email for our web master [sic] of BN Pastor Jason Graham. I have emailed him already alerting him that you will be emailing him to set a time when you guys could get to gether [sic] to show you BN so you could get in and start your work."*

[55] Mr. Adams submitted that following the meeting between Mr. Brown and Mr. Rolle and subsequent email exchange regarding the BN website, there is email correspondence showing that Mr. Rolle and Mr. Graham received multiple emails from Mr. Brown regarding their work (Rolle/Graham) on the BN website, including emails copying in Mr. McKinney.

[56] These are indeed very forceful arguments made by Mr. Adams. I find that Mr. Brown was evasive in answering the questions put to him during cross-examination. Ultimately, I am satisfied beyond reasonable doubt that Mr. Brown

deliberately and knowingly misled the court when he made these false statements.

Count 8

[57] Count 8 concerns false statement regarding Mr. Brown's relationship with Mr. Peter Nygard: see statement at paragraph 5(3). The evidence in support of this count is contained at paragraphs 36 to 43 of the Ellis affidavit and page 166 of the Transcript of Examination of Exhibit MEE-1 to the Ellis affidavit.

[58] In relation to count 8, whilst giving evidence under oath, learned Counsel Mr. Adams asked Mr. Brown whether he knows Mr. Peter Nygard to which he answered that he *"knows of* [Mr. Peter Nygard]". It is alleged that Mr. Brown falsely stated that he had no relationship with Mr. Nygard by:

i. answering '*Never'* to a question from Counsel for the Applicant *'In 2010, August 2010, did you have a business relationship with Mr. Peter Nygard?'* knowing his answer to be false;

ii. answering '*No kind of business with him to be of business. A relationship is a relationship whether it is, you know'* to the question from Counsel for the Applicant *'Did you have a relationship with Mr. Peter Nygard that may not have been business?'* knowing his answer to be false;

iii. answering *'No, not a friend'* to a question from Counsel for the Applicant *'Is he [Mr. Peter Nygard] a friend of yours?'* knowing his answer to be false;

iv. answering *'No'* to a question from Counsel for the Applicant whether Mr. Peter Nygard was an *'acquaintance'* of the First Respondent knowing his answer to be false.

[59] Learned Counsel Mr. Adams contended that Mr. Brown's bold averment not to have a business relationship, friendship or acquaintanceship with Mr. Nygard is contradicted by emails adduced by Mr. Rolle in his sworn affidavit which include emails directly from Mr. Nygard to Mr. Brown which in turn was forwarded by Mr. Brown to Mr. Rolle for action.

[60] Some examples of a relationship between Mr. Nygard and Mr. Brown are found at paragraphs 39 to 43 of the Ellis affidavit. Therefore, when Mr. Brown testified under oath that he '*knows of [Mr. Peter Nygard]*, this is wholly misleading. In addition, there are email messages between Mr. Nygard and Mr. Brown demonstrating some sort of relationship between the two; be it business, friendship or acquaintanceship. In my judgment, Mr. Brown had not been sincere when he testified before the Deputy Registrar.

[61] With respect to count 8, I am satisfied beyond reasonable doubt that Mr. Brown deliberately and knowingly made false statements to the court.

Counts 9, 10 and 11

[62] Counts 9, 10 and 11 concern false statements regarding hacking of Mr. Brown's email account: see statement at paragraph 5(4). The evidence in support of these counts is contained at paragraphs 44 to 49 of the Ellis affidavit and pages 149 and 152 of Transcript of Examination of Exhibit MEE -1 to the Ellis affidavit.

[63] In relation to count 9, Mr. Brown was asked by learned Counsel Mr. Adams whether his email address is shermanbrown242@yahoo.com to which he answered '*in 2010? No it was hacked'* and *'I think there might be some confusion there. In 2010 I would have had shermanbrown and that was hacked. But I have an email Shermanbrown'.* In relation to count 10, Mr. Brown answered "*Well, it was in 2010 and it was during this same period. Maybe it was before August it was hacked; earlier before this period, alright? Not just, you know, what is stated here. It was hacked before that….Since I have this…over the last period, my Blackberry, I cannot receive an email to shermanbrown, or send an email to shermanbrown. Everything off this, whoever owns it, it has now been cleaned'* to a question posed by Counsel seeking to clarify when Mr. Brown realized that his email address shermanbrown242@yahoo.com had been hacked. In relation to count 11, Mr. Brown answered '*Yes I can't receive anything to send* [from my Blackberry]' to a question from learned Counsel drawing attention to an earlier

statement made by Mr. Brown that he could not send email from the shermanbrown@yahoo.com address.

[64] Learned Counsel Mr. Adams submitted that this evidence is contradicted by Mr. Rolle's emails which demonstrate that on 4 September 2010, Mr. Smith sent an email from his account keod_smith@yahoo.com forwarding a defamatory article from the UK's Daily Mail newspaper about Mr. Bacon to Mr. Brown and Mr. Nygard. On 5 September 2010, the article which Mr. Smith forwarded to Mr. Brown and Mr. Nygard was then forwarded from Mr. Brown's email address to Mr. Rolle and was published on the BC website: see paragraphs 41-42 of the Ellis affidavit. Also, pages 72, 290-299 of exhibit MEE-1 for the email forwarding the article and screenshots of the article and the text as published on the BC website.

[65] Mr. Adams next submitted that, as detailed at paragraph 42, Mr. Rolle, by way of sworn affidavit in *Bacon v Rolle and Graham* provided an email from Mr. Brown's email account forwarding the following message to Mr. Rolle on the same day stating *"Hey Mike big breaking news on Louis Bacon. Let's get it out urgently. I am presently in Ft. Lauderdale with my family will be back Sunday morning. Please call me on my cell if you must."* On 5 September 2010, the article was published on the BC website. Succinctly put, I agree with these submissions advanced by Mr. Adams that Mr. Brown made false statements under oath.

[66] In relation to these three counts, I am satisfied beyond reasonable doubt that Mr. Brown deliberately and knowingly misled the court when he made these false statements.

Count 12

[67] Count 12 concerns false statement regarding Jason Graham's invoices relating to the Bahamas National ("BN") website: see statement at paragraph 5(5). The evidence in support of this count is contained at paragraphs 50-51 of the Ellis

affidavit and page 200 of Transcript of Examination of Exhibit MEE -1 to the Ellis affidavit.

[68] In relation to this count, it is alleged that whilst giving evidence under oath, Mr. Brown answered *'Unequivocally never. Never seen a bill from Mr. Graham'* to a question from Mr. Adams whether he had seen certain invoices from Mr. Graham.

[69] Learned Counsel Mr. Adams submitted that this evidence is diametrically opposed to that given by Mr. Graham who, by way of sworn affidavit in *Bacon v Rolle and Graham*, produced eighteen invoices for the period 12 January 2010 to 26 November 2012 addressed to "Bahamas National" and Mr. Brown. Mr. Graham deposed that these invoices were sent to Mr. Brown. These invoices contained descriptions of what appeared to be Mr. Graham's work on the BN website: see pages 7, 16-31 and 51 of Exhibit MEE-1.

[70] In relation to this count, I am satisfied beyond reasonable doubt that Mr. Brown deliberately and knowingly misled the court when he made this false statement that he has never seen a bill from Mr. Graham.

Count 13

[71] Count 13 concerns false statement regarding the smear campaign against Mr. Bacon: see statement at paragraph 5(6). The evidence in support of this count is contained at paragraphs 52-53 of the Ellis affidavit and page 212 of Transcript of Examination of Exhibit MEE-1 to the Ellis affidavit.

[72] With respect to this count, it is alleged that whilst giving evidence under oath, Mr. Brown stated *'I just want to categorically state and deny that I, Sherman Brown, in my thirty years never have been a part of any conspiracy upon anyone, any company or against your client, Louis Bacon. And I don't know anybody who is involved in doing so'* knowing his answer to be false.

[73] Learned Counsel Mr. Adams correctly submitted that this evidence is contradicted by documentary evidence specifically emails of Mr. Rolle and Mr. Graham adduced by way of sworn affidavit in *Bacon v Rolle and Graham* which plainly demonstrate that Mr. Brown, in concert with a number of other individuals including Mr. Peter Nygard, Mr. Smith and Mr. McKinney orchestrated the anonymous publication of numerous defamatory articles and other material about Mr. Bacon.

[74] With respect to this count, I am satisfied beyond reasonable doubt that Mr. Brown deliberately and knowingly misled the court when he emphatically stated that he was not a part of a conspiracy to smear Mr. Bacon. On the contrary, the evidence shows that Mr. Brown was an active and willing participant in the campaign to smear Mr. Bacon.

Falsity and Knowledge

[75] In my judgment, I am satisfied beyond reasonable doubt that Mr. Brown made all of the false statements under oath before the Deputy Registrar. I am also satisfied beyond reasonable doubt that Mr. Brown knew that each of the statements was false. In those circumstances, he deliberately and knowingly gave false statements to the court.

Interference

[76] As Sir Richard Scott VC noted in **Malgar Ltd**, in order for an allegation of contempt to succeed, it must be shown that 'in addition to knowing that what you are saying is false, **you had to have known that what you are saying was likely to interfere with the course of justice**: see also **Edward Nield v Loveday** [2011] EWHC 2324 (Admin) (Emphasis added).

[77] Another challenge advanced by Mr. Brown in opposition to the committal application is that the course of justice had not been impeded or interfered with. Mrs. Rolle submitted that Mr. Bacon must prove a specific intention, not mere

recklessness on the part of Mr. Brown to impede the course of justice. She next submitted that there is no evidence at all in the Ellis affidavit which actually demonstrates that the administration of justice has been impeded or interfered with.

[78] In the realm of criminal law, juries are routinely cautioned that “intention” is not capable of positive proof meaning you cannot go into a man’s heart or burst open his brain to find out what he intends. You infer intention by looking at all of the facts and surrounding circumstances. The same principle is applicable here.

[79] Mr. Bacon has to satisfy the court beyond reasonable doubt that, in addition to knowing that what Mr. Brown said was false, he also knew that what he was saying was likely to interfere with the course of justice.

[80] As I chronicle the events which led to the present committal application, it became clear that Mr. Brown was an elusive person. He evaded service of the NP Order resulting in substituted service being ordered by the court. Having been served and having eventually relinquished his opposition to the NP Order, Mr. Brown tried to avoid being examined under oath. A reasonable inference that can be drawn is that he did not want to provide the information sought in the NP Order. Having already evaded service and answering questions, he failed to tell the truth under oath before the Deputy Registrar, a finding that I have already made.

[81] Before he was cross-examined before the Deputy Registrar, he took an oath to tell the truth and nothing but the truth. It must be taken that, as a journalist and author, no doubt a well-read man, he understood the oath. Undeniably, the words of the oath are straightforward. As learned Counsel, Mr. Adams correctly contended, the making of false statements under oath was an attempt to frustrate the NP Order. The effect was clearly to avoid compliance with the NP Order and as such, to interfere with the course of justice.

[82] Knowingly making false statements under oath must interfere and impede with the course of justice. In **Summers v Fairclough Homes Ltd** (2012) UKSC 26, Lord Clarke of Stone-cum-Ebony shed some light on this issue. At para 57, he had this to say:

> **"However, the case [*South Wales Fire and Rescue Service v Smith [2011] EWHC 1749 (Admin)*] is of some importance because it set out the general approach of the courts to this type of case. In giving judgment, with which Dobbs J agreed, Moses LJ said this at paras 2-7:**
>
> > **"2. For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those who are injured as a result of the fault of their employer or a defendant can receive just compensation.**
> >
> > **3. They undermine that system in a number of serious ways. They impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are justified and those claims which are unjustified. They impose a burden upon honest claimants and honest claims, when in response to those claims, understandably those who are liable are required to discern those which are deserving and those which are not.**
> >
> > **4. Quite apart from that effect on those involved in such litigation is the effect upon the court. <u>Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty.</u> The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability. (Emphasis added)**
> >
> > **5. Those who make such false claims if caught should expect to go to prison. There is no other way to underline the gravity of the conduct. There is no other way to deter those who may be tempted to make such claims, and there is no other way to improve the administration of justice."**

[83] A witness who knowingly makes a false statement in the course of giving evidence orally or in an affidavit does not expose himself to an action for damages at the suit of anyone injured as a result, **but he does expose himself to the risk of prosecution for perjury and as such is publicly accountable**

for his attempt to interfere with the course of justice: see **KJM Superbikes Ltd v Hinton** [2009] 1 WLR 2406. (Emphasis added)

[84] In my judgment, Mr. Brown knowingly and deliberately made the false statements under oath and knew that in doing so, he was likely to impede and interfere with the proper course of justice.

Challenges raised by Mr. Brown

[85] Mr. Brown launched two main challenges to the committal application namely:

(i) The application is an abuse of the court's process and

(ii) It would be "more appropriate" for the issues raised in this application to be determined in the substantive action and;

Abuse of process

[86] Learned Counsel Mrs. Rolle contended that the committal application is an abuse of the court's process by reason of the substantive action which seeks a determination of the same and related facts and issues. The pleaded facts in the substantive action include the following:

> **At paragraph 5:**
>
> *"The Defendant is a journalist and author, based in The Commonwealth of The Bahamas, and the publisher of an ostensibly anonymous website known as "Bahamas National" which was created on or around 14th October 2010…."*
>
> **At paragraph 13:**
>
> *"In support of his claim for general and aggravated damages, the Plaintiff will rely on the following facts and matters. Until discovery and interrogatories, these are the best particulars that the Plaintiff can provide:*
>
> ***(f) (vi) Lying under oath in Norwich Pharmacal proceedings brought by the Plaintiff (2012/CLE/gen/0503) against the Defendant in order to uncover inter alia who was behind the anonymous Bahamas National and Bahamas Citizen websites…."*** (Emphasis added)

[87] Mrs. Rolle next submitted that after discovery and interrogatories, Mr. Bacon will be seeking to prove the aforesaid specific pleaded facts and the court will have to make a determination on the facts after considering the pleaded response of Mr. Brown and the evidence by the parties adduced at the trial.

[88] According to Mrs. Rolle, the pleaded facts in the substantive action include the very facts in issue in this application specifically:

(i) Mr. Brown's alleged involvement in the Bahamas National and Bahamas Citizen websites. ***In this regard, she referred to paragraph 7 of the Ellis Af*fidavit which states: "*The present Norwich Pharmacal proceedings were commenced by the Applicant on 13th April 2012 to obtain information and documents identifying who was responsible for publishing anonymous defamatory articles about the Applicant on the websites Bahamas Citizen … and the Bahamas National…."***

(ii) Mr. Brown's alleged involvement in a long standing smear campaign against Mr. Bacon by the publication of defamatory articles on those websites.

[89] Mrs. Rolle submitted that the court in making a determination in the substantive action will of necessity have to determine, as a fact (1) the nature of Mr. Brown's involvement in the two websites (if any) and (2) whether Mr. Brown is involved in the smear campaign against Mr. Bacon. In similar vein, says Mrs. Rolle, when one has regard to the specific alleged false statements in the application, in order to make a determination on whether the statements are false, the court will have to find as a fact that Mr. Brown was involved in the websites and in the smear campaign.

[90] Secondly and significantly, says Mrs. Rolle, the pleaded facts in the substantive action also include an assertion by Mr. Bacon that Mr. Brown ***"lied under oath" "in Norwich Pharmacal proceedings brought by the Plaintiff" (2012/CLE/gen/0503)"***.

[91] Mrs. Rolle submitted that the main issue which the court must determine in the committal application, namely, whether Mr. Brown lied on oath, is an issue for the court to determine in the substantive action which is pending and predated this application. Mrs. Rolle submitted that it must be an abuse of the court's process to invite this court to make the same findings of facts as between the same parties which Mr. Bacon has already raised in the substantive action.

[92] It is a well-recognized principle that where there appears to be an abuse of the process of the court, the court has the inherent jurisdiction to prevent the misuse of its procedure: see **Hunter v Chief Constable of West Midlands Police [1982] A.C. 529** per Lord Diplock. The kind of circumstances in which the court has a duty to exercise the salutary power is not exhaustive: see **Harris and others v Society of Lloyd's; Adams v Society of Lloyd's** [2008] EWHC 1433.

[93] Mrs. Rolle submitted that the non-exhaustive list of circumstances must include this application in which Mr. Bacon seeks to re-litigate the very facts and issues which he has previously raised and is seeking to have determined by the court in the substantive action. She referred to the case of **Daltel Europe Ltd and others v Makki and others** [2005] EWHC 749 (Ch) to augment her submission.

[94] Learned Counsel Mr. Adams appearing for Mr. Bacon correctly asserted that the argument that there is an abuse of the court's process is woefully misconceived and **Daltel** is not supportive of that proposition. On the contrary, **Daltel** reinforces that it is not an abuse of process to bring contempt proceedings before the same issues have been determined in litigation. In **Daltel**, Mann J. gave permission to commence contempt proceedings and, as the trial judge, David Richards said in para 78:

> **"Mann J was however equally alert to the dangers associated with carving out issues ahead of the trial of an action and seeking to establish to the criminal standard of proof, the deliberate falsity of certain statements in a defence or other statement of case."**

[95] David Richards J observed that Mann J had concerns when he gave permission to institute contempt proceedings but despite those concerns, he nevertheless opined that it was an appropriate case for permission to be given. One of the underlying reasons for giving permission was that the issues in the contempt proceedings were central to the issues in litigation and therefore, *"findings against Mr. Makki could well bring the proceedings to an earlier conclusion."*

[96] **Daltel** is helpful because it stressed that, where the relevant statements were central to the defence, if they were deliberately false, they would comprise a flagrant breach of the obligation to provide a statement of truth. David Richards J went on to say that, in a fair number of cases, allegations of deliberately false statements were well founded and that the court had to be careful to ensure that the usual process of litigation was not disrupted by parties thinking they could gain an advantage by singling out false statements and making them the subject of a committal application. He said that the proper time for determining the truth or falsity of the statements was at trial.

[97] Also, in **JSC BTA Bank v Ablyazov (No. 7)** [2011] EWCA Civ. 1386, Teare J gave permission to bring committal proceedings following allegations of breaches of freezing orders and the making of false statements. The Court of Appeal dismissed the appeal. It held that there was a strong public interest in ensuring that a worldwide freezing order together with its ancillary and related provisions, was appropriately enforced and thus made effective; that it was of paramount importance for the court to do and to be seen to be doing all it could do to ensure the efficacy of the order; and that accordingly, where an alleged contempt was said to relate to breach of a freezing order the public interest was likely to weigh heavily in the balance in the exercise of judicial discretion when making case management decisions. Gross LJ observed that there was overlap between some of the material relevant to the contempt proceedings and the issues in the underlying trial but he noted at para 42 that overlap, of itself and without more, does not necessitate postponing the determination of a contempt application until

the trial. It is, instead, a factor to be taken into consideration, the weight to be attached to it and the pointer, if any, it gives to the decision to be taken –must depend on the facts of the individual case. The risk of satellite litigation was also something which the judge had properly bore in mind but he was entitled to conclude that the application should be allowed.

[98] The thrust of Mr. Rolle's argument is that it is an abuse of process for Mr. Bacon to seek to re-litigate in the committal application the very facts and issues which he has previously raised in the substantive action. There is a question of overlapping. But overlapping cannot amount to an abuse of the court's procedures. It is a case management issue and affects the timing of the committal application. Overlapping without more may not be a good reason for adjourning the application.

[99] Learned Counsel next submitted that this court must consider the real motive of Mr. Bacon in commencing the committal application against Mr. Brown. If I understand learned Counsel well, she is asking this court to ruminate the motive of Mr. Bacon since there was not an iota of evidence coming from Mr. Brown as to Mr. Bacon's motive. This is a bare allegation unsubstantiated by evidence.

[100] In the premises, I find that the committal application is not an abuse of the process of the court and the submissions advanced by Mrs. Rolle are misconceived and must fail.

Timing of the committal application

[101] Mrs. Rolle submitted that it would be more appropriate for the issues raised in this application to be determined within the substantive action where there will be a full trial involving cross-examination of the Respondents. Michael Rolle, Jason Graham and other individuals who Mr. Bacon asserts are the conspirators of Mr. Brown.

[102] Learned Counsel next submitted that it is most inappropriate for the court to endeavour to make factual findings such as Mr. Brown's alleged involvement with the two websites, his alleged involvement in the smear campaign to defame Mr. Bacon and whether he lied on oath on the basis of the hearsay evidence contained in the Ellis affidavit in circumstances where these very issues must be determined at the trial where invariably, there will be cross-examination. Concisely, hearsay evidence is admissible in contempt proceedings. The court determines what weight, if any, is to be attached to it.

[103] Mrs. Rolle asserted that this very point was emphasized in several judicial authorities including **Daltel** and **Malgar Ltd**. In **Daltel**, David Richards J, in considering "satellite contempt proceedings" in the context of pending substantive litigation, said at para 80:

> **"…One thing which has particularly concerned me is the extent to which there should be allowed to be satellite litigation, particularly at this stage of the proceedings, and particularly where that satellite litigation relates to matters which are serious issues in the proceedings and in the context of which those issues will be dealt with and considered at something short of a full trial. It is inherently undesirable to have satellite litigation which is time consuming and distracting when it comes to pursuing proceedings to a full trial, and it is capable of occupying and using up an inordinate amount of court resources sometimes to no particular purpose. I must be particularly alert to ensure that that factor does not come into play so as to make the proceedings inappropriate, at least at this stage. It seems to me that in a large number of instances where the point might be taken, if not in the majority of instances where points might be taken about statements in pleadings at an early stage, it is inherently undesirable that they be taken in contempt proceedings. They will be dealt with in due course in the course of the proceedings and no doubt a trial judge will find for or against the relevant party in relation to the allegations. If the trial judge decides for the party in relation to the allegations, then there never was anything in the contempt claim. If he or she decides against that party at a trial, then a decision can be taken in the light of those findings as to the extent to which it is necessary and appropriate to take the matter further and to raise the matter again in contempt proceedings. That would seem to me to be the normal and more usual course.'"**

[104] He continued at para 80:

> **"…Allegations that statements of case and witness statements contain deliberately false statements are by no means uncommon and, in a fair**

> **number of cases, the allegations are well-founded. If parties thought that they could gain an advantage by singling out these statements and making them the subject of a committal application, the usual process of litigation would be seriously disrupted. In general the proper time for determining the truth or falsity of these statements is at trial, when all the relevant issues of fact are before the court and the statements can be considered against the totality of the evidence. Further, the court will then decide all the issues according to the civil standard of proof and will not be applying the criminal standard to isolated issues, as must happen on an application under CPR Part 32.14. It is quite feasible that such an application would fail because the evidence was not sufficient to remove a reasonable doubt, but on the same evidence the statements could be found at trial on the balance of probabilities to be deliberately false. This presents no conceptual difficulty to lawyers but as well as being wasteful, it is liable to confuse the parties and a wider public."** (Emphasis added)

[105] Mrs. Rolle correctly submitted that the similar point was addressed in **Malgar Ltd.** Sir Richard Scott, VC had this to say:

> "**Moreover, there are still substantial proceedings on foot between these two parties. There will have to be case management directions given for the cases to come to trial and what the end result of that will be I have not any idea. That there remain substantial issues between the parties that warrant a trial seems to have been accepted by the parties in agreeing to the consent order under which, bar the copyright claims I have mentioned, the summary judgment application was dismissed. Mr. Eric Leach and Mr. Mills are likely to be leading witnesses for the Defendant. I think it highly undesirable that at the same time as those proceedings are being prosecuted there should be outstanding a committal application against Mr. Eric Leach and Mr. Mills. If there had been a strong case for believing that the sanctity of the administration of justice needed protecting the case might be otherwise. But given the, as I have already described it, somewhat tenuous nature of the proposition that these two individuals, even if their statements were false, need to be proceeded against for contempt, the committal application would constitute an undesirable and unnecessary interference in those proceedings. It would obstruct the sensible disposal of what remains outstanding between these parties. That is an additional reason why, in my judgment, permission should not be granted."**

[106] Mrs. Rolle contended that the circumstances described in **Daltel** and **Malgar Ltd** are wholly consistent with the facts and circumstances of the instant case where these satellite committal proceedings co-exist with the substantive action and both deal with the same and related issues – in which case it would be wholly inappropriate to allow the committal application to continue in circumstances

where the court, on hearing the substantive action may determine that Mr. Brown did not lie on oath and that there was no criminal contempt at all. Learned Counsel tangentially suggested that this is a proper reason to dismiss the committal application.

[107] In neither of these two cases did the court dismiss the application for contempt proceedings. In **Daltel**, the defendant Makki was found to be in contempt of court on the ground that the defences which he filed in the action contained false statements which were verified by Mr. Makki without an honest belief as to its truth. David Richards J concluded that Mr. Makki knew that the statements were false when he signed the certificate of truth verifying them and he knew and intended that by raising false defences he would interfere with the administration of justice. In **Malgar Ltd**, Sir Richard Scott, VC declined to give permission to institute proceedings against the alleged contemnors because the falsity of the statements in question could not be clearly established without trespassing on the issues in the trial and because in any event the statements themselves had not been persisted in to the point at which they were likely to affect the outcome of the proceedings.

[108] There is a plethora of judicial authorities demonstrating a wide range of timing considerations. For example, in **Kabushiki Kaishi Sony Computer Entertainment and Others v Gaynor David Ball and Others** [2004] EWHC 1984 (Ch), the application for committal was made before trial but heard at some later stage when the defendant no longer contested the principal allegations against him. In **Michael J Prest and Another v Marc Rich and Co Investment AG and others** [2006] EWHC 927 (Comm.), Gloster J (as she then was) gave permission to bring proceedings at the interlocutory stage but, having found that the decision as to when the contempt proceedings occurred was a matter for the court's discretion, exercised that discretion in favour of having the contempt proceedings take place after the trial. A similar approach was adopted in **Talal El Makdessi v Cavenish Square Holdings BV** [2013] EWCA Civ. 1540.

[109] In **KJM Superbikes Ltd v Hinton** [2009] 1 WLR 2406, the Court of Appeal addressed the issue of satellite litigation. Moore-Bick LJ, delivering the leading judgment, said at paras 18 and 19:

> **"18. It is important not to allow satellite litigation of this kind to disrupt the progress of the substantive proceedings and it may not be possible to assess the strength of the complaint until those proceedings have concluded. This danger was well described by David Richards J. in *Daltel Europe Ltd v Makki* as follows:**
>
> > **"Allegations that statements of case and witness statements contain deliberately false statements are by no means uncommon and, in a fair number of cases, the allegations are well-founded. If parties thought that they could gain an advantage by singling out these statements and making them the subject of a committal application, the usual process of litigation would be seriously disrupted. In general the proper time for determining the truth or falsity of these statements is at trial, when all the relevant issues of fact are before the court and the statements can be considered against the totality of the evidence. Further, the court will then decide all the issues according to the civil standard of proof and will not be applying the criminal standard to isolated issues, as must happen on an application under CPR Part 32.14."**
>
> **19. In some cases, of which this is an example, it may be possible to deal with an application of this kind at a much earlier stage, especially if the alleged contempt relates to a statement made for a limited purpose which has passed and has no continuing relevance to the proceedings. Although we did not hear argument on this point, I think that in general a party who considers that a witness may have committed a contempt of this kind should warn him of that fact at the earliest opportunity (as the appellant did in this case) and that a failure to do so is a matter that the court may take into account if and when it is asked to give permission for proceedings to be brought. However, it is important not to impose any improper pressure on a witness who may later be called to give oral evidence. In particular, if the alleged contemnor is to be called as a witness, an application under rule 32.24 should not be made, and if made should not be entertained by the court, until he has finished giving his evidence."**

[110] In **Prest**, even though Gloster J declined to allow the contempt hearing to take place before trial, she recognized, at paragraph 19, that "*it may be appropriate in particular circumstances, in order to promote the overriding objective and achieve the just and expeditious disposal of cases, to hear contempt applications and consequent strike-out applications in the interlocutory stages of a case*."

[111] Recently, in **International Sports Tours Limited v Mr. Thomas Shorey et al** [2015] EWHC 2040 (QB), the defendant submitted that his breaches which were the subject of the contempt application went to the core of the outstanding issues in the main action. The English High Court held that although it should be wary of entertaining applications for committal if there is a risk that a finding of contempt would have an adverse effect on the fairness of future proceedings; it was not an absolute rule and that the court must consider carefully all the relevant surrounding circumstances: paras 29 to 36.

[112] It follows from these authorities that there is no clear cut approach to the timing of committal applications. It is a case management decision for the judge exercising his/her unfettered discretion. However, there are two factors that the court should bear in mind. First, there is the obvious need to guard carefully against the risk of allowing vindictive litigants to use committal proceedings to harass persons against whom they had a grievance. There is not an iota of evidence to show that Mr. Bacon was a vindictive litigant.

[113] Secondly, the court should be circumspect of entertaining committal applications if this would risk impacting adversely upon the fairness of future proceedings, and in particular upon the ability of the alleged contemnor to give oral evidence at a future point in time: see **International Sports Tours Limited** [supra].

[114] In the present case, I have decided that it is apposite to address the contempt now for two principal reasons.

[115] First and more importantly, Mr. Brown has not filed any evidence in this application. He was not cross-examined. There is no risk, therefore, of him giving evidence which may conflict or prejudice the position he may choose to take in the substantive action.

[116] Secondly, there is no significant overlapping of issues. Overlapping is not, on its own, a reason to adjourn this application pending the outcome between the

parties. In my judgment, the committal application does not go to the heart of the substantive action. The issues here are straightforward whereas the substantive action addresses many more issues including the truth or otherwise of the statements published and it may well be as was said in **Daltel** that findings here may well bring the substantive action to an earlier conclusion.

Conclusion

[117] In conclusion, I am satisfied beyond reasonable doubt that Mr. Brown knowingly and deliberately made false statements before the Deputy Registrar and he knew and intended that, by lying in a court of law, he would impede and interfere with the proper administration of justice. Consequently, I find Mr. Brown to be in contumacious contempt of court.

[118] Two issues remain outstanding – that of sanction and costs. I shall hear Counsel at a date convenient to all parties.

Dated this 17th day of December 2015.

Indra H. Charles
Supreme Court Justice