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 and Ms. Zia Lewis of Graham Thompson for the Applicant
Mr. Gregory Moss for the First Respondent
Mr. Franklin Williams and Ms. Melissa Wright of the Attorney General as amicus curiae

Hearing Dates: 24 March 2016, 22 April 2016
With leave of the Court, further written submissions of the First Respondent on 3 May 2016

Contempt of court – Committal – Proceedings for committal – Making false statements before court – Civil Contempt – Proceedings criminal in nature – Section 82 of the Penal Code – Section 52 Rule 1of RSC

Costs – Order for costs – Section 30(1) of the Supreme Court Act, Ch. 53 – Order 59(2) of the RSC - Indemnity costs –Discretion – Unreasonable conduct

The Applicant, a hedge fund manager and philanthropist, brought committal proceedings against the First Respondent, whom 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 committal proceedings for making false statements under oath. In the committal proceedings, this Court found that the First Respondent was guilty of contempt of court for deliberately and knowingly making false statements under oath and he knew and intended that, by lying in a court of law, he would impede and interfere with the proper administration of justice. Arising out of this finding, two outstanding issues were left to be determined: sanction (penalty) and costs. This judgment concerns these two issues.

At the hearing, the First Respondent argued that there is no cause of action known to law whereby an allegation of criminal contempt may be made in a civil court based upon allegedly false statements *simpliciter* made under oath in the absence of the First Respondent having defrauded or attempted to defraud someone of property through the making of the false statement. In the absence of a fraudulent claim, such an allegedly false statement would constitute perjury and would found a prosecution by the Attorney General before the criminal court under section 82 of the Penal Code.

The First Respondent further argued that even if the alleged false statements in the absence of a fraudulent claim can be the basis for a charge of criminal contempt, the Judge who hears and grants leave to commence proceedings for criminal contempt should not hear the substantive application; rather, there must be a second trial for the offence of perjury where another judge can hear the indictment.

On the issue of costs, the First Respondent argued against indemnity costs which were sought by the Applicant. Instead, he argued that the Applicant should pay the First Respondent's costs because he was compelled to participate in the NP Proceedings and he is only bound to give information which he possesses. The First Respondent further implored the Court to complete its process by making an order as to indemnity costs in the committal proceedings and the enforcement of any such orders ought to be stayed pending the hearing of an appeal by the Court of Appeal.

HELD:

(1) The First Respondent is liable to be punished by the Court which found him in contempt, rather than being referred to the Attorney General for the offence of perjury under section 82 of the Penal Code. Any referral of the matter to the

Attorney General to prosecute the First Respondent for perjury when another judge can hear the indictment flies in the face of this Court which has already found the First Respondent to be in contempt.

(2) In any event, section 82 of the Penal Code is permissive; not mandatory. It authorizes a judicial officer to direct that a witness be prosecuted for perjury if there appears to be reasonable cause for such prosecution. Section 82 says nothing about what the court must, or should, do following a conviction of contempt. ***Duggan v Duggan*** 1980 WL 612710; and ***Director of Public Prosecution and Humphrys*** [1977] A.C. 1 considered.

(3) The power of the civil court to punish for contempt is nothing new: **See Order 52 Rule 1 of the RSC, Ch. 53.**

(4) The First Respondent repeatedly lied under oath and was guilty of contumacious contempt of court. As a result, the sanction imposed against the First Respondent is a sentence of a fine of $15,000 to be paid by noon on Friday, 8 July 2016 in default of which the First Respondent is to be imprisoned for one month in the Bahamas Department of Corrections.

(5) A court in ordering indemnity costs will have regard to conduct that is so unreasonable during the course of the trial to justify an order for indemnity costs: ***Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd*** [2005] EWHC 2174 applied. Unreasonableness involves conduct that is outside the norm: ***Atlantic Bar & Grill Limited v Posthouse Hotels*** [2000] C.P. Rep. 32 applied. The First Respondent acted unreasonably by refusing to deliver documents that are necessary to properly adjudicate the Applicant's case without any justifiable reason causing the Applicant grave distress. Further, the First Respondent has lied on oath, failed to come with open hands and gave unjustified defences forcing the Applicant to bring committal proceedings against him, wasting judicial time and causing the Applicant unnecessary legal expenses.

(6) The First Respondent shall pay the Applicant a full indemnity for his costs of the committal proceedings and the proceedings relating to the Norwich Pharmacal Order (which to date, he has failed to comply with) on a solicitor and own client basis. The court has power in contentious proceedings to order the unsuccessful party to pay to the successful party's costs on bases other than party and common fund basis, including on the indemnity basis and on the solicitor and own client basis: ***EMI Records v Ian Wallace Ltd*** (1983) 1 Ch 59; ***Levine v Callenders & Co*** 1998 BHS J, No 75 (2-3) applied.

JUDGMENT

Introduction

[1] On 17 December 2015, I found the First Respondent, Sherman Brown ("Mr. Brown") to be in contumacious contempt of court. I was 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. Consequent upon this finding, the issues of penalty (sanction) and costs needed to be addressed. On 21 January 2016, I gave some directions and set the hearing for 25 February 2016. It was subsequently heard on 24 March and 22 April 2016 respectively.

Submissions on Sanction for Contempt of Court

[2] Learned Counsel Mr. Moss who appeared for Mr. Brown, submitted that there is no cause of action known to law whereby an allegation of criminal contempt may be made in a civil court based upon allegedly false statements simpliciter made under oath in the absence of a fraudulent "claim" (meaning having defrauded or attempted to defraud someone of property through the making of a false statement). According to him, such an allegedly false statement, in the absence of a fraudulent "claim", would constitute perjury and would found a prosecution by the Attorney General before the criminal court under section 82 of the Penal Code.

[3] Mr. Moss further submitted that the new jurisdiction of the English courts under CPR 32.14 to find a person guilty of contempt of court for making false statements was devised as a means of "policing statements of truth" which have been filed to verify 'statements of case" under the Rules and it has no counterpart under the laws of the Bahamas.

[4] Counsel argued that under Bahamian law, the charge of criminal contempt, as in the present case, is misconceived since there is no allegation that Mr. Brown

defrauded or attempted to defraud someone of property through the making of any allegedly false statements. Counsel says “what is being alleged is that Mr. Brown perjured himself.” He insisted that such allegation would be justiciable under the Penal Code rather than Order 52 of the Rules of the Supreme Court (“RSC”).

[5] Mr. Moss further submitted that even if the alleged false statements in the absence of a fraudulent claim can be the basis for a charge of criminal contempt (which is denied), the Judge who hears and grants the leave to commence proceedings for criminal contempt should not hear the substantive committal application. He cited the cases of **Bush v Green** [1985] 3 All ER 721, CA; **Re Lonrho Plc** [1989] 2 All ER 1100, HL and **Reg v Gough** [1993] 2 All ER 724, HL. In my considered opinion, these cases are most unhelpful.

[6] Counsel urged the Court to adopt the submissions of the Attorney General that having found Mr. Brown guilty of contempt in civil proceedings, there needs to be a second trial for the offence of perjury where another judge can hear the indictment against Mr. Brown. He cited the cases of **Serret v Attorney General** [2013] 3 LRC 199, Court of Appeal of the Seychelles; **DPP v Channel Four Television Co. Ltd** [1993] 2 All ER 517 and **R v Schot and Barclay** (1997) 2 Cr. App R 383. Briefly put, these cases deal with contempt committed ‘in connection with criminal proceedings’, so dissimilar from the present application before the Court.

[7] If I understand Learned Counsel well, his challenges are two-fold in nature namely (i) this Court, having found that Mr. Brown knowingly and deliberately made false statements before the Deputy Registrar, that would constitute perjury and would ground a prosecution by the Attorney General before the criminal court under section 82 of the Penal Code (“section 82”) and (ii) there needs to be a second trial for the offence of perjury where another judge can hear the indictment against Mr. Brown.

[8] As a result of these novel submissions, at the hearing on 24 March 2016, the Court requested the Attorney General to assist on the interpretation of section 82. I should state that the Attorney General acted as amicus curiae throughout these proceedings and maintained a neutral stance.

Section 82 of the Penal Code

[9] Ms. Melissa Wright, appearing as lead Counsel for the Attorney General, submitted that the finding of the Court that Mr. Brown lied under oath before the Deputy Registrar was derived from the initial trial that unveiled the false statements and consequently, there needs to be a second trial for the offence of perjury where another judge can hear the indictment for perjury against Mr. Brown.

[10] She next submitted that the finding of the Court was only to cement or satisfy itself of Mr. Brown's guilt and now that the court is so satisfied, the Court **may** direct the Attorney General to prosecute Mr. Brown for perjury.

[11] Section 82 states:

> **"It shall be lawful for any judicial officer and for any person presiding at a tribunal sitting for the hearing, trial and determination of any judicial proceeding, in case it shall appear that any witness has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer or other proceeding so made or taken, to direct such witness to be prosecuted for perjury, in case there shall appear reasonable cause for such prosecution, and to commit such witness until the next criminal sessions unless such witness shall enter into a recognisance with one or more sufficient surety or sureties conditioned for his appearance at such next sessions, and that he will then surrender and take his trial, and not depart the court without leave; and to require any party needed for such prosecution to enter into a recognisance conditioned to prosecute, or give evidence against such witness, and to give the party so bound a certificate of the prosecution having been directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid: Provided that no such direction or certificate shall be given in evidence upon any trial to be had against any witness upon a prosecution so directed as aforesaid."**

[12] The genesis of section 82 is derived from section 9 of the Perjury Act, 1911 [U.K.] ("the UK Act"). They are strikingly similar. Section 9(1) provides as follows:

> "**Where any of the following authorities, namely, a judge of, or person presiding in, a court of record, or a petty sessional court, or any justice of the peace sitting in special sessions, or any sheriff or his lawful deputy before whom a writ of injury or a writ of trial is executed, is of opinion that any person has, in the course of a proceeding before that authority, been guilty of perjury, the authority may order the prosecution of that person for such perjury, in case there shall appear to be reasonable cause for such prosecution, and may commit him, or admit him to bail, to take his trial at proper court and may require any person to enter into a recognizance to prosecute or give evidence against the person whose prosecution is so ordered, and may give the person so bound to prosecution is so ordered, and may give evidence against the person whose prosecution is so ordered, and may give the person so bound to prosecute certificate no charge shall be made.**
>
> **(2) An order made or a certificate shall be given in evidence for the purpose or in the course of any trial of a prosecution resulting therefrom."**

[13] Ms. Wright alluded to two English authorities. The first, **Duggan v Duggan** 1980 WL 612710, is a divorce case. In the case, Lord Justice Bridge explained the meaning of section 9 of the UK Act. At page 2, he stated:

> **"The accusations of perjury were specifically made before him [the trial judge] in relation to a number of matters and indeed reference was made to S. 9 of the Perjury Act 1911 <u>which authorises a judge in civil proceedings who is satisfied that perjury has been committed in the course of those proceedings to commit the perjurer for trial</u>."**[Emphasis added]

[14] Ms. Wright also referred to the case of **Director of Public Prosecution and Humphrys** [1977] A.C. 1**.** This is a traffic case. The major contention in this case was that Mr. Humphrys lied in the first trial about driving his motor cycle. He was acquitted. The prosecution brought a second charge on indictment for perjury and Mr. Humphrys' attorneys argued double jeopardy, asserting that he was being tried twice for the same offence. At page 7 of the Judgment, the Court stated:

> **"The issue in a trial for perjury is not the same as the issue in the trial in which the perjury was committed. It was not in this case. The issue in the first trial was whether the respondent was driving a motor cycle on the**

relevant date, and in the second it was whether he lied on oath when answering the question "did you do any driving of vehicles in 1972?"

[15] Continuing the court stated at page 23:

> **"I regret I cannot agree that a prosecution for perjury alleged to have been committed at a trial at which the accused has been found not guilty of another offence places the accused in double jeopardy, and while I agree that a successful prosecution for perjury may well indicate, as it has in this case, that the accused should not have been acquitted, I do not share my noble and learned friend's view that such a prosecution should on that account be stopped. I regard perjury as a serious offence and in my view where it can be proved to have occurred, it cannot ordinarily be said to be oppressive or vexatious or an abuse of process for a prosecution to be instituted. The proper course, if it be thought that such prosecutions are too frequent, is to impose a fetter on their institution. The Vexatious Indictments Act 1859 did so for, save in certain circumstances, it provided that the consent of a judge of the superior courts at Westminster or of the Attorney-General or Solicitor-General was required for the preferment of an indictment for perjury and kindred offences."**

[16] On the basis of these two authorities, Ms. Wright asserted that there is the necessity for a second trial for the offence of perjury where another judge can hear the indictment against Mr. Brown.

[17] Learned Counsel Mr. Adams who appeared for Mr. Bacon vehemently argued that the submissions advanced on behalf of the Attorney General is plainly wrong. He submitted that section 82 is permissive; not mandatory.

[18] In my considered opinion, section 82 is permissive. It is not mandatory. The section provides that "it shall be lawful" for any judicial officer to direct that a witness be prosecuted for perjury if there appears to be reasonable cause for such prosecution. Section 82 says nothing about what the Court must, or should, do following a conviction of contempt.

[19] In fact, both **Duggan** and **Humphrys** elucidated and explained the permissive power of S. 9 (1) of the UK Act (equivalent to section 82) which enables a judicial officer who, in the course of civil or criminal proceedings, is of the opinion that a witness has committed perjury in those proceedings, to direct that the witness be

prosecuted. Mr. Adams summed it up neatly. He said that section 82 has two functions. It enables the judicial officer to continue the main proceedings without being sidetracked into a separate investigation into allegations of perjury. It also avoids the need for the police and/or the Attorney General to mount a separate investigation into any such alleged perjury, as the judicial officer has already found there are reasonable grounds to prosecute.

[20] In the present case, this Court has already satisfied itself beyond reasonable doubt that Mr. Brown knowingly and deliberately made false statements before the Deputy Registrar. He is in contempt of court and ought to be sentenced. The difference between civil contempt and criminal contempt is well established. A criminal contempt is one which takes place in the face of the court. A civil contempt is starkly different. A typical case is disobedience of an order made by the court in a civil action or making false statements in affidavits or before a judicial officer. Although this is a civil contempt, it partakes of the nature of a criminal charge: see **Hydropool Hot Tubs Limited v Roberjot & Paramount Hot Tubs Limited** [2001] EWHC 121(Ch) at [59] and [62] (referred to at paragraphs 18 to 25] of the Supplemental Written Submissions on behalf of the Applicant dated 21 April 2016 and **Order 52 Rule1 of the RSC** which states as follows:

> **"(1) The power of the Supreme Court to punish for contempt of court may be exercised by an order of committal.**
> **(2) Where contempt of court –**
> **(a) is committed in connection with –**
> **(i) any proceedings before the Supreme Court; or**
> **(ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court; or**
> **(b) is committed otherwise than in connection with any proceedings;**
> **Then, subject to paragraph (4), an order for committal may be made by the Supreme Court."**

[21] Paragraph 4 is not material.

[22] It follows that this Court has an unfettered discretion to punish Mr. Brown because it is this Court that found him to be in contempt. In fact, this was routinely done in civil matters long before the advent of the Civil Procedure Rules [UK]. In other words, Part 32:14 of the CPR [UK] has introduced nothing new. It merely reinforced what was always there that if you make false statements in affidavits or before a judicial officer, you may be guilty of contempt of court: see also Order 52 Rule 1 [supra].

[23] It is my firm view that any referral of this matter to the Attorney General so that she may prosecute Mr. Brown for perjury where another judge can hear the indictment flies in the face of this Court which has already found Mr. Brown to be in contempt. This will also be a mockery of the judicial system and needless to say, a colossal waste of precious judicial time.

Appropriate Sanction

[24] It is now apposite to consider penalty and sanction. The most serious penalty for contempt is committal to prison. Committal may serve two distinct purposes: (a) punishment of past contempt and (b) securing compliance. The Court may also impose a fine. If a fine is an appropriate punishment it is wrong to impose a custodial sentence because the contemnor could not pay the fine: **Re M (Contact Order)** [2005] EWCA Civ 615. As a general rule, the Court should bear in mind the desirability of keeping offenders, in particular, first time-offenders, out of prison: (see **Templeton Insurance v Thomas**, referring to **R v Kefford** [2002] Cr App R (S) 106 and **R v Seed and Stark** [2007] 2 Cr App R (S) 69). Imprisonment is '*only appropriate where there is serious, contumacious, flouting of orders of the court*': **Gulf Azov Shipping v Idisi** [2001] EWCA 21 at [72].

[25] In **Otkritie International Investment Management Ltd & others v Gersamia & another** [2015] EWHC 821 (Comm), Eder J at [5] approved the principles to apply on a contempt application and the matters to consider on sentencing set out in Note from Leading Counsel, which he attached to the judgment: see [6] to [8] and Appendix 1 at [13] and [14].

[26] Mr. Adams correctly submitted that in considering the sentence to pass the court must have regard to the gravity of making false statements in the course of court proceedings. The making of false statements in litigation is not just a matter between the parties; proceedings for contempt are public law proceedings: **Malgar Ltd. v RE Leach (Engineering) Ltd** [2000] C.P. Rep. 39 per Sir Richard Scott VC (as he then was). False statements have consequences for the administration of justice as a whole. In **Aziz v Ali** [2014] EWHC 4003 (QB), Lewis J at [14] [15] had this to say:

> "**14. The making of false statements as part of legal proceedings undermines the administration of justice. Courts have repeatedly emphasised the gravity of such conduct and have emphasised that those who make false claims should expect to be sent to prison: see, by way of example, *South Wales Fire and Rescue Service [2011] EWHC 1749 and Liverpool Victoria Insurance Company v Bashir and others [2012] EWHC 895 (Admin)*. The reasons why such conduct is treated seriously are these.**
> **15. First, the system of justice in this country requires and depends upon people who bring claims and make statements in court proceedings acting truthfully and honestly. The dishonest making of false statements undermines the system of justice. It undermines public confidence in the justice system. It strikes at the heart of the fair administration of justice."**

[27] So, for this reason, the courts have made it clear that those who are proved to have made false statements in litigation should expect to be sent to prison: **South Wales Fire and Rescue Service v Smith** [2011] EWHC 1749 (Admin) at [5]**-** per Moses LJ; **Liverpool Victoria Insurance Co v Bashir** [2012] EWHC 895 (Admin) at [16], [18] [21] - per Sir John Thomas P and Silber J; and ***Otkritie*** [supra] at Appendix 1, [13](a); **Lloyds TSB v Shanley** [2013] EWHC 4603 (Ch.), a sentence of 3 months was imposed (it would have been longer but for mitigation) and in **Nield v Loveday** [2011] EWHC 2324 (Admin), [2011] 4 Costs LO 470, a sentence of 9 months was imposed in a personal injury case.

[28] The Guidelines identified relevant aggravating factors as: (i) how prolonged and extensive the contempt was; (ii) the motive and (iii) the extent or risk of harm (bearing in mind that there is always harm to the public interest in such cases). The relevant mitigating factors include: (a) whether, and if so when, a respondent

has admitted the contempt; (b) whether a respondent has expressed remorse; although even remorse will not necessarily result in a non-custodial sentence: see **Aziz v Ali** [supra]; (c) whether a respondent has, so far as he is able to, complied with the order or otherwise made amends for the wrong and (d) the respondent's character and antecedents.

[29] In relation to non-compliance with disclosure orders, Mr. Adams submitted, on the authority of **JSC Bank v Soldochenko (No. 2)** [2011] EWCA Civ 1241, at [55], such breaches alongside other breaches of freezing injunctions indicating that '*condign punishment normally means a prison sentence*', and that in cases of continuing failure to disclose relevant information '*the court should consider imposing a long sentence, possibly even the maximum of two years, in order to encourage future co-operation by the contemnor'*.

[30] Relevant factors as expounded in the Guidelines must include: (i) the extent of the failure to disclose; (ii) how long it has lasted; (iii) how far it has caused or might have caused harm; (iv) whether it was deliberate and the reasons for it; and lastly, (v) whether it has been accompanied by positively misleading disclosure (e.g. pretence that disclosure has been given).

[31] Learned Counsel Mr. Moss argued that the cases of **Aziz v Ali** and **Liverpool Victoria Insurance Co v Bashir** [supra], which are heavily relied upon by Mr. Adams, are inapplicable and misconceived as both cases deal with "false and lying claims" which were made to the court and not to false statements simpliciter.

[32] Mr. Moss next argued that this may be a proper case for adjudication pursuant to RSC Order 52 rather than section 82.

[33] This is very confusing. The application was brought pursuant to Order 52. It is my firm view that learned Counsel Mr. Moss has misconstrued the issue to be decided as well as the applicable legal and guiding principles.

Analysis

[34] I found, beyond reasonable doubt, that Mr. Brown repeatedly lied under oath before the Deputy Registrar and he was guilty of contumacious contempt of court. His true motive, as correctly submitted by learned Counsel, Mr. Adams, could only be that he was lying to avoid having to admit that he and other co-conspirators were actively engaged in a conspiracy to injure Mr. Bacon. This can be the only logical explanation for not only his action but his inaction and to come clean.

[35] Mr. Bacon has clearly been harmed and prejudiced by Mr. Brown's contemptuous conduct. Mr. Bacon requires the information which Mr. Brown was ordered to provide by the Norwich Pharmacal Order ("the NP Order") in order to assert his rights. The false statements frustrate both the administration of justice and Mr. Bacon's attempts to assert his rights.

[36] It is troubling that, to date, Mr. Brown has failed/refused to comply with the NP Order made by Evans J. Nor has he provided the Court with any plausible reason for his failure/ refusal to do so. This alone warrants sanction. To add insult to injury, Mr. Brown has lied under oath on various occasions before the Deputy Registrar; on many occasions contradicting himself in the same statement. For example, he was asked whether he knew Mr. Michael Rolle. He said no and then proceeded to give a long-drawn out account of how he did know of Mr. Rolle. This is one of many examples.

[37] There is no evidence that Mr. Brown is under any coercion or duress from anyone to make false statements. This appears to have been his own decision. Therefore, the making of false statements was deliberate due to the fact that Mr. Brown had advance notice of the questions that he was going to be asked during cross-examination. He deliberately chose to make false statements.

[38] Mr. Brown has not admitted his actions and he has shown no remorse. He has not co-operated. As Mr. Adams correctly stated, at every opportunity, Mr. Brown

has sought to obfuscate, make false statements and frustrate the purpose of the NP Order.

[39] In addition, by making false statements, Mr. Brown has cast aspersions on the honesty of at least three persons who would have to have lied to the Court and to Counsel for Mr. Bacon for Mr. Brown's evidence in cross-examination to be true.

[40] By making the false statement that Mr. Michael Rolle hacked his email account, Mr. Brown has falsely maligned an innocent third party.

[41] To my mind, there could be no reason why a man who is so well-respected and holds a decent job as a journalist would jeopardize his career and reputation by conducting himself in such a manner. Every good citizen obeys court orders until and unless they are set aside by a superior court.

[42] Mr. Adams highlighted the case of **Aziz v Ali** [supra], where the claimants had made false statements. All of them admitted their contempt. The court imposed penalties of between 12 weeks suspended (for a contemnor who admitted making false statements early and showed genuine remorse), and 8 months imprisonment (for a contemnor who the court found showed no genuine remorse).

[43] Learned Counsel also cited the case of **Liverpool Victoria Insurance Co v Bashir** [supra]. In this case, the court imposed a suspended sentence of 6 weeks imprisonment respectively.

[44] During and after my judgment on 17 December 2016, Mr. Brown showed no remorse for his actions. In fact, to date, he has shown no remorse.

[45] I am tempted to impose a custodial sentence on Mr. Brown but I will give him another opportunity to obey the Order of Evans J. In the interim, Mr. Brown cannot go scot-free. He was found to be in contumacious contempt of court. He

is fined $15,000 to be paid by noon on Friday, 8 July 2016 in default, one month's incarceration at the Bahamas Department of Corrections.

Costs

[46] On the issue of costs, Learned Counsel Mr. Adams seeks an order that Mr. Brown give Mr. Bacon a full indemnity for his costs of the committal proceedings and the proceedings relating to the NP Order made on 13 June 2013 on a solicitor and own client basis.

[47] Mr. Adams referred to the case of **EMI Records v Ian Wallace Ltd** (1983) 1 Ch 59 [9] where it was held that the court has power in committal proceedings to order the unsuccessful party to pay the successful party's costs on bases other than party and party and common fund basis. Those other bases included orders on the indemnity basis as well as on the solicitor and own client basis. **EMI Records** was cited with approval by Sawyer CJ in **Levine v Callenders & Co** 1998 BHS J. No 75 (2-3). She said at [10]:

> **"As I understand that decision, the Vice Chancellor held, among other things, that the wide discretion set out in section 50 of the Supreme Court of Judicature (Consolidation) Act 1925, (England) which was continued under s.51 of the 1981 Act gives the High Court of that country, the power to make an order for costs on "an indemnity" basis in inter parties litigation, <u>particularly in cases involving contempt of court proceedings.</u> In addition, he equated such an order to an order for costs on solicitor and own client basis under Order 62, r 29(1) of the English Rules of the Supreme Court."** (Emphasis added)

[48] Learned Counsel Mr. Adams correctly submitted that Order 59 Rule 3 of the RSC gives the court a wide discretion on costs.

[49] When considering an application for costs to be awarded on a full indemnity basis, Rattee J in **Atlantic Bar & Grill Limited v Posthouse Hotels Ltd** [2000] C.P. Rep. 32 [11] adopted the dicta of Knox J; the observations of Knox J in **Bowen-Jones v Bowen-Jones** [1986] 3 All ER 163, [12]:

"The circumstances in which an order for indemnity costs can be made, while an open ended discretion so far as the rules are concerned, is obviously one which must be exercised on judicial principles.'

Having then cited various authorities His Lordship went on to say:

> **'In summary, the position appears to be that, where there are circumstances of a party behaving in litigation in a way which can be properly categorized as disgraceful, or deserving of moral condemnation, in such cases an order for indemnity costs may be appropriate.'**

Newman J went on to say this:

> **'There may be cases otherwise, falling short of such behaviour in which the Court considers it appropriate to order indemnity costs. The threshold of qualification which a party would appear to have to establish is that there has been, on the party to be impugned by such an order, some conduct which can be properly categorized as unreasonable, and I would add to that it can be categorized as exceptional. There are varying ways in which the course of litigation, parties to it could be categorized as having behaved unreasonable, but one would not, simply as a result of that, decide that they should pay costs on an indemnity basis.'**

[50] Learned Counsel Mr. Adams submitted that based on the above authorities and in particular, in light of the aggravating factors as elaborated above, the Court ought to exercise its discretion to make an order that Mr. Brown pays to Mr. Bacon costs of this application and the proceedings relating to the NP Order made on 13 June 2013 on a solicitor own client basis.

[51] Learned Counsel Mr. Moss approved the reasoning in **EMI Records v Ian Wallace Ltd** [supra] as to the scope of the court's jurisdiction to order costs on a solicitor and own client basis in respect of the committal proceedings. However, Mr. Moss objected to Mr. Bacon's claim for costs in the NP proceedings. He correctly submitted that the usual order for costs in NP proceedings are that an applicant pays all reasonable expenses incurred by the party who might have been innocently mixed up. He further argued that Mr. Brown was compelled to participate in those proceedings which he did. Surely, had he comply with the Court's Order, he would have been entitled to reasonable costs.

[52] Learned Counsel Mr. Moss next submitted that it is settled law that Mr. Brown has the right to contest a NP Order and he is only bound to give information which he possesses. This is true. However, Mr. Brown's right to appeal has long past. Mr. Moss insisted that Mr. Bacon must pay costs to Mr. Brown even if Mr. Brown did not contest the order and even if Mr. Bacon was dissatisfied with the quality of the evidence which Mr. Brown tendered

[53] Mr. Moss further submitted that the court should complete its process by making orders as to sanction and costs and that the enforcement of any such orders ought to be stayed pending the hearing of an appeal by the Court of Appeal.

[54] In order to determine whether indemnity costs ought to be ordered against a losing party, I am guided by the general principle in the Bahamian courts that, at the conclusion of a trial or application; a hearing of costs follows the event. This inevitably results in the successful party being awarded his costs of the proceedings unless the court is satisfied that there are special reasons which militate against the usual order being made.

[55] In determining whether indemnity costs ought to be ordered, I glean my authority and wide discretion from the Supreme Court Act, Ch. 53. Section 30(1) states:

> **"Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid."**

[56] A parallel discretion is provided for in Order 59 Rule 2 of the RSC which states:

> **"The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order."**

[57] A court, in making an order for indemnity costs, will have regard to conduct which is so unreasonable during the course of the trial to justify an order for indemnity costs. In this regard, I am guided by the dictum of Judge Peter Coulson QC in **Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd** [2005] EWHC 2174. At [14], his Lordship stated:

> **"I do not believe that unnecessary or unreasonable pursuit of litigation must involve an ulterior purpose in order to trigger the court's discretion to order indemnity costs. I consider that to maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs."**

[58] I found it useful to adopt the approach offered in the treatise **Cook on Costs 2015** at [24.9] under the heading **"Culpability and abuse of process"**. The learned author said:

> **"Traditionally costs on the indemnity basis have been awarded only where there has been some culpability or abuse of process such as:**
>
> **(a) deceit or underhandedness by a party;**
> **(b) abuse of the courts procedure;**
> **(c) failure to come to court with open hands;**
> **(d) the making of tenuous claims;**
> **(e) reliance on utterly unjustified defences;**
> **(f) the introduction and reliance upon voluminous and unnecessary evidence; or**
> **(g) extraneous motives for litigation.**
>
> **What is clear is that the exercise of the court's discretion is best considered by reference to specific examples of where the court has made indemnity costs orders. It is one of those situations where it is hard to pinpoint specific conduct, but one knows it when one sees it!"**

[59] In my opinion, the concept of unreasonableness in **Atlantic Bar & Grill Limited v Posthouse Hotels** [supra] involves conduct which is outside the norm. This concept coupled with the list enumerated by **Cook on Costs** illustrates examples of circumstances where the court may make an award of costs on an indemnity basis.

[60] In the present case, when one considers the evidence and the surrounding circumstances, Mr. Brown has acted unreasonably by failing and/or refusing to deliver documents which are necessary for the proper adjudication of Mr. Bacon's defamation action without any justifiable reason. This has caused much distress to Mr. Bacon. Additionally, Mr. Brown has lied on oath. He has also failed to come with open hands. Consequently, Mr. Bacon was impelled to bring committal proceedings against Mr. Brown. Undoubtedly, precious judicial time has been exhausted and Mr. Bacon has incurred unnecessary legal expenses.

[61] It is plain that indemnity costs are not only awarded because a party has won and the other has lost but that the successful litigant has incurred costs and the unsuccessful party has exhibited conduct that the court disapproves.

[62] In the circumstances, I will make an order for costs on an indemnity basis against Mr. Brown.

Dated the 4th day of July, AD, 2016.

Indra H. Charles

Justice