

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division

2012/CLE/gen/1399

BETWEEN

SUMNER POINT PROPERTIES LIMITED

Applicant

-AND-

DAVID E. CUMMINGS

1st Respondent

-AND-

BRYAN MEYRAN

2nd Respondent

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Howard Thompson for the Applicant
Ms. Travette Pyfrom of Pyfrom Farrington Chambers for the Respondents

Hearing Dates: 19 February, 28 February, 1 August 2019

Civil – Contempt of Court – Proceedings criminal in nature – Sentencing – Committal – Object of penalty - Mitigation – Costs – Indemnity costs – Damages to be assessed

The Applicant brought committal proceedings against the 1st and 2nd Respondents (collectively “the Respondents”) for alleged breaches of an Injunctive Order made on 19 October 2012. The Injunction was sought and granted to restrain the 1st Respondent, his servants and/or agents from trespassing on two tracts of land located on the Island of Rum Cay, The Bahamas.

On 16 August 2018, Bain J. (retired) found, among other things, that the Respondents were guilty of breaching the terms of the Injunctive Order and were in contempt of court.

Consequent upon her retirement, Bain J referred the matter to me for sentencing. The sentencing of the Respondents was subsequently adjourned to give them an opportunity to make submissions in mitigation.

HELD:

1. The power of the civil court to punish for contempt is nothing new: See **Order 52 Rule 1 of the RSC, Ch. 53**.
2. As a result of the 1st Respondent being found guilty of contempt, the sanction imposed is a sentence of a fine of \$25,000 to be paid by noon on Wednesday, 18 March 2020; in default of which the 1st Respondent will be incarcerated for three months at the Bahamas Department of Corrections.
3. As a result of the 2nd Respondent being found guilty of contempt, the sanction imposed is a sentence of a fine of \$25,000 to be paid by noon on Wednesday, 18 March 2020; in default of which the 2nd Respondent will be incarcerated for three months at the Bahamas Department of Corrections.
4. As the subject to which the Injunctive Order was meant to protect has been completely destroyed by the Respondents, an assessment of damages for the destruction is to undertaken and the Respondents will pay to the Applicant the full restitution.
5. On the issue of whether the Applicant is entitled to indemnity costs, the parties will submit written submissions by 31 March 2020.
6. The sanction, assessment of damages and costs are stayed pending the decision of the Court of Appeal.

JUDGMENT ON SENTENCING

Charles J:

Introduction

- [1] On 16 August 2018, Bain J (now retired), held, among other things, that the 1st and 2nd Respondents (together “the Respondents”) were in contempt of court for breaching the terms of an Injunctive Order made on 19 October 2012 (“the Contempt Ruling”).
- [2] The Contempt Ruling came after a reported seven non-consecutive days of court hearings (21 August 2015, 2 September 2015, 22 January 2016, 1 February 2016, 3 February 2016, 31 March 2016 and 19 May 2016).

- [3] The sentencing of the Respondents was adjourned by Bain J to 27 September, 2018 so as to give the Respondents an opportunity to make submissions in mitigation before a sentence was imposed. Consequent upon the retirement of Bain J, the matter was assigned to me to conduct the mitigation hearing and, in turn, to impose an appropriate sanction on the Respondents.
- [4] The Court heard oral submissions from both Counsel on 19 February, 28 February and 1 August 2019 respectively which were supplemented by written submissions.
- [5] In light of the findings of Bain J as set out in the Contempt Ruling, the only outstanding issues left to be determined are sanction (penalty), assessment of damages and costs. This Judgment on Sentencing concerns those issues.

Background

- [6] The Respondents are American citizens presently residing in the United States. At some point in time, both Respondents resided on the island of Rum Cay.
- [7] On 19 October 2012, the Applicant brought an action against Mr. David E. Cummings (“the 1st Respondent”), claiming, among other things, damages for wrongful entry upon a 15-acre tract of land on Rum Cay, damages for the destruction of the Applicant’s trees, plants and roadways and for the wrongful destruction of the concrete pillars at the entrance of an 80-acre tract adjacent to the 15-acre tract.
- [8] On 19 October 2012, the Applicant obtained an ex parte injunction against the 1st Respondent in the following terms:
- “(1) That David E. Cummings, the Defendant named herein, be restrained and an injunction is hereby granted restraining him, whether by himself his servants or agents, or howsoever otherwise, until after the trial of this action or further Order from:**
- (a) Clearing any land or destroying any trees upon the remainder of an approximately 80 acre tract of land situate in the southwestern district of the Island of Rum Cay and currently owned by the Plaintiff within the area described as “Parcel A”**

on the survey plan recorded as “Plan Number 11 Rum Cay”, and the house and connected buildings thereon; and

(b) Clearing any land, destroying any trees, altering any roads, blocking or interfering with the use of any roads, depositing sand or other material upon such roads so as to impede normal usage, blocking or interfering with the use of the marina so as to impede normal usage, or destroying any buildings or structures within the property shown as “Parcel B” on the said survey plan recorded as “Plan Number 11 Rum Cay”, and specifically, the marina complex, the gas station and related facilities, the building that houses the restaurant known as “Out of the Blue”, the four beach cottages along the western coastline, and the building known as “The Kalik House” within the said property; save that such injunction shall not prevent the Defendant from carrying out such activities as are lawfully permitted upon the property referred to in the Conveyance between the Plaintiff and himself dated 10th October, 2001 and recorded in the Registry of Records at 8327, Pages 42 to 53;

(2) That there be liberty to apply to discharge or vary this Order upon the Defendant providing the Plaintiff with at least four (4) clear days notice of such application;

(3) That the costs of this application be reserved.”

[9] On 23 October 2012, the 1st Respondent applied to discharge the injunction and, on 30 September 2014, the Court held “...*that in order to preserve the status quo the injunction should remain in place until the hearing of this matter.*”

[10] On 15 May 2015, the Applicant commenced Committal Proceedings against the Respondents for alleged breach of the injunction. At the hearing, the Respondents again challenged the injunction and sought to have it set aside. On 26 October 2015, the Court dismissed that application.

[11] In the Contempt Ruling, Bain J found, among other things, that the Respondents breached the injunction by: *parking and leaving a number of large tractors along the roadway within Parcel A and Parcel B thereby preventing other vehicles from driving along the roadway; carried out extensive land clearing on Parcel B; and used heavy equipment to widened the roadway, pull down and destroy dockage, remove and destroy large rock sculptures, destroy the buildings known as “Out of*

the Blue Restaurant”, “the Kalik House” and four beach cottages; and destroyed large stone oven, pavilions, walkways, rock walls, power-lines, water-lines, septic and leach fields, feedings-docks and shade huts.

Submissions on mitigation

- [12] During the mitigation hearing, learned Counsel for the Respondents, Ms. Pyfrom, went to great lengths to address the Court on issues regarding the nature of Wahoo Resort Foundation, its relationship to the Respondents and its purported permission from the Ministry of Works to carry out the demolition notwithstanding the fact that an injunction was in place to preserve the status quo on both tracts of land. Additionally, Counsel raised the issue of there being “*ongoing disputes regarding title to both tracts of land*”. The submissions and other points raised by the Respondents at the mitigation hearing were, in my view, already comprehensively addressed by Bain J in the Contempt Hearing. I cannot alter the findings of Bain J. That is for another Court. I am merely tasked with sentencing the Respondents.
- [13] From the Contempt Ruling, it is plain that Bain J had already satisfied herself that the Respondents were in contempt of court and ought to be sentenced for their breach of the Injunction.
- [14] At the end of the third day of the Mitigation hearing (1 August 2019) and after learned Counsel for the Applicant, Mr. Thompson, highlighted that the Respondents have yet to issue an apology, Ms. Pyfrom sought leave to allow the Respondents to individually take the stand to offer their apologies. Leave was granted and, in my opinion, qualified apologies were given by both Respondents. It is also worthy of noting that the apologies came at the eleventh hour and, as such, I cannot help but question their sincerity.
- [15] Ms. Pyfrom also furnished the Court with several character-reference letters relative to the Respondents and indicated that they have unblemished criminal records.

Submission on Sanction for Contempt of Court

[16] Learned Counsel Mr. Thompson submitted that a custodial sentence was appropriate in this case as he deemed the severity of the breaches as being “*off the chart*” and “*the worse of the worst*”. Counsel referred to the judgment of Lawrence Collins J in **Crystal Mews Limited v Metterick and others** [2006] EWHC 3087 which sets out the matters that the court ought to consider when deciding on whether or not a party should be committed for contempt of court. Paragraph [13] of **Crystal Mews** states:

“The matters which I may take into account include these. First, whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy. Second, the extent to which the contemnor has acted under pressure. Third, whether the breach of the order was deliberate or unintentional. Fourth, the degree of culpability. Fifth, whether the contemnor has been placed in breach of the order by reason of the conduct of others. Sixth, whether the contemnor appreciates the seriousness of the deliberate breach. Seventh, whether the contemnor has co-operated.”

[17] In addition to committal, Mr. Thompson suggested that the Respondents be ordered to pay full restitution to the Applicant for the destruction and that costs be paid by the Respondents on an indemnity basis since the very subject matter that the injunction was meant to protect was completely destroyed by the actions of the Respondents.

[18] Learned Counsel Ms. Pyfrom submitted, quite correctly, that the Court is not obliged to commit the Respondents to prison as it has a wide discretion to do what is just in all the circumstances. She cited the case of **Re W(B) (An Infant)** [1969] 2 Ch. 50 where, at page 56, Lord Denning MR stated:

“Imprisonment is not the inevitable consequence of a breach. The court has a discretion to do what is just in all the circumstances. It can reduce the length of the sentence or can impose a fine instead. It may indeed not punish at all. It all depends on how serious the breach, how long has the man behaved himself and so forth”.

[19] Ms. Pyfrom next submitted that imprisonment is not to be regarded as the automatic consequence of the breach and the Court will only order a custodial

sentence if it is justified. She then submitted that if the Court is minded to impose a sentence, that sentence ought to be in the realm of an order for costs.

Analysis and appropriate sentence

[20] A contempt of court in civil matters 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].

[21] The court's jurisdiction to punish for contempt of court is to be found in **Order 52 Rule 1 of the RSC** which provides 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.”

[22] The Court has an unfettered discretion to punish both Respondents for contempt of court. The object of the penalty is both to punish conduct in defiance of the Court's order as well as serving a coercive function by holding out the threat of future punishment as a means of securing the protection which the injunction is primarily there to do: **Lightfoot v Lightfoot** [1989] 1 FCR 305 at 308 and **Robinson v Robinson** [2001] EWCA Civ 2098 at paragraph [11].

[23] The most serious penalty for contempt is committal to prison. The Court may also impose a fine. As a general rule, the Court should bear in mind the desirability of

keeping offenders, in particular first time offenders, out of prison: **Templeton Insurance Limited v Thomas and anor** (2013) EWCA Civ 35, 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 a serious, contumacious, and flouting of orders of the court’*: **Gulf Azov Shipping v Idisi** [2001] EWCA 21 at 72.

[24] In the present case and applying the principles enunciated in **Crystal Mews**, I found the following:

(i) Whether the Applicant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy

[25] Sumner Point Properties Limited (SPPL’s) buildings, infrastructure and the surrounding environment have been completely destroyed. Decades of work have been destroyed.

(ii) The extent to which the contemnor has acted under pressure & whether contemnor has been placed in breach of order by reason of the conduct of others

[26] There is no evidence of any pressure or coercion nor was it suggested that the Respondents have been placed in breach of the Order by reason of the conduct of others. The Respondents knew of the Order. They both asserted that the decision to carry out the acts were their own. Neither of the Respondents has expressed that they were forced by Mr. Hart, the Foundation or anyone from the Ministry of Works to do the acts. In fact, they overtly stated that they “volunteered” their services.

(iii) The degree of culpability

[27] Both Respondents are culpable. Neither denied committing the acts complained of.

(iv) Seriousness of breach

[28] The action was commenced to halt the very acts complained of from happening.

- [29] The Court subsequently made an order to preserve the status quo until the dispute between the parties are determined and, more importantly, to prevent the very acts carried out by the Respondents from taking place. Moreover, the 1st Respondent had even vigorously argued for the discharge of the Order in previous proceedings.
- [30] The Applicant's Attorneys had also written to the Respondents' Attorneys to advise them not to act so as to be in breach of the Court's Order and advised that any such breach would lead to a contempt of court.
- [31] The Second Respondent was even served with the contempt papers which ought to have brought home to him the seriousness of the matter. He nonetheless continued with the destruction.
- [32] It seems to me that it does not lie in the mouths of the Respondents to say that they were unaware of the seriousness of the breach and the consequential implications that would ensue.

(v) Breach deliberate and intentional

- [33] When one looks at all of the circumstances that led to the Contempt Application, it is plain that both Respondents intended to breach the Order.

(vi) Whether the contemnors cooperated?

- [34] The Respondents have plainly not cooperated. They offered qualified apologies at the eleventh hour and having looked at their demeanour in the witness stand, I can hardly say that their respective apology was sincere.

The sanction

- [35] Both Respondents were found guilty of contempt of court. Applying the principles relating to the sentencing of a contemnor, each Respondent is sentenced to a fine of \$25,000 to be paid by noon on Wednesday, 18 March, 2020; in default of which each Respondent will be incarcerated for three months at the Bahamas Department of Corrections.

Assessment of damages

[36] The Respondents are also ordered to pay full restitution to the Applicant for the destruction which were caused by their actions. An assessment of damages will be carried out on a date to be mutually agreed by the parties. The Applicant will seek that date from the Court.

Costs

[37] In addition, the Applicant seeks indemnity costs. I will therefore ask Counsel to present written submissions to the Court by 31 March 2020. I will hear Counsel on costs on 1 April 2020 at 2.30 p.m.

Postscript

[38] I am informed that the appeal against the decision of Bain J. was heard by the Court of Appeal and a decision is imminent. In those circumstances and with the approval of Counsel, I will stay this Ruling until the decision of the Court of Appeal is delivered.

Dated this 12th day of March, A.D., 2020

**Indra H. Charles
Justice**