

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.O. 2016

CLAIM NO. SKBHCV2011/0320

BETWEEN:

ADAM BILZERIAN

Applicant/Claimant

and

KEVIN HORSTWOOD

Respondent/Defendant

Appearances:-

Mr. Dennis Merchant for the Applicant

Mr. Kevin Horstwood, Respondent, in person

2016: October 13th

REASONS FOR DECISION

[1] **CARTER J.** This was an application for a declaration of contempt filed on 30th September 2013.

[2] The applicant sought against the respondent and another the following:

"(a) A declaration that the first and second respondents having knowingly and intentionally breached the Order of the Court granted on March 2, 2012, a copy of which is attached hereto as Exhibit "AB1" ("Order"), and are in contempt of this Honourable court.

(b) An order: (1) requiring respondents to pay applicant EC\$10,000 for having violated the Order; (2) requiring respondents to pay applicant EC\$1000.00 per day for each day that they continue in breach of the Order hereafter; and (3) for any other such penalty as the Court sees fit.
(c) Costs."

The application for contempt was subsequently discontinued as against the 1st named respondent and this application proceeds only with regard to the application against the 2nd named respondent.

[3] The grounds of the application were as follows:

"(1) The applicant received a Court Order dated March 2, 2012, which states at paragraph 4 that:

Kevin Horstwood is restrained whether by himself his agents or assigns from in any way interfering in the running or the affairs of either Caribbean Building Systems (St. Kitts) Ltd or Lemon Grove Co. Ltd.

(2) Both respondents have received copies of and are well aware of the terms of the Order as the Order is clear and unambiguous.

(3) Notwithstanding the clear terms of the order, the second respondent has instructed the first respondent to represent Caribbean Building Systems (St. Kitts) Ltd. ("CBS") in suit SKBHCV2016/0021 which is clearly in breach of the Order. A copy of the suit is attached and marked "AB2".

(4) Notwithstanding the clear terms of the order, the First Respondent has taken instructions from the First respondent to represent CBS in suit SKBHCV2013/0021 ("FCIB Case") which is clearly in breach of the Order. First respondent has also taken steps to prevent applicant from appointing counsel of his choice to represent CBS in the FCIB Case.

(5) Because of the breaches of the Order by respondents, applicant has been prevented from appointing counsel to represent CBS and has been forced to file two appeals to mitigate the damages from the breaches of the Order by respondents.

(6) The order was entered eighteen months ago and has not been appealed or set aside

(7) There is no factual or legal basis to execute the breaches of the Order by the respondents."

[4] The application was supported by the affidavit of Yolanda Vanterpool. The relevant part of the evidence of Ms. Vanterpool as set out in that affidavit are reproduced here:

"5. That on March 2, 2012 the applicant received a court Order against the second named respondent. A copy of the order is attached herein and marked "AB1" (hereinafter "Order").

6. I have been informed by the applicant's lawyer and verily believe that in suit SKBHCV2013!0021, the second respondent has instructed the first respondent to represent Caribbean Building Systems (St. Kitts) Ltd ("CBS"? A copy of the suit is attached and marked "AB2" (hereinafter "FCIB Case'J. The FCIB Case is a foreclosure case that should be defendant and counterclaims should be filed by CBS against FCIB.

7. I have been informed by the applicant's lawyer and verily believe that both respondents were served with copies of the Order on 9th April, 2013 at a hearing of the said suit.

8. I have been informed by the applicant's lawyer and verily believe that the respondents have disobeyed the terms of the order and have put themselves on record to represent CBS in the FCIB Case. Essentially, the second respondent has appointed a counsel to represent CBS and the First respondent has successfully prevented applicant from appointing counsel to represent CBS notwithstanding the fact that applicant is the sole shareholder of CBS.

9. I have also been informed by the applicant's lawyer and verily believe that the second respondent has held himself out to be a director of CBS in disobedience of the Order. I have also been informed by the Applicant that the second respondent has not been a director of CBS since August 24, 2011, the date on which he resigned and was replaced.

10. I have also been informed by the applicant's lawyer and verily believe that the first respondent represents CBS in the FCIB Case despite having been told by Counsel for the applicant that she is not authorized to represent CBS, in disobedience of the Order."

[5] On the 8th of November 2013 the 2nd respondent filed an affidavit in opposition to the notice of application. On the 6th of December 2013, the 2nd respondent also filed a 2nd affidavit in opposition.

[6] The applicant also filed Supplemental Grounds for Contempt on the 19th of March 2014.

[7] The 2nd respondent filed an affidavit in response to the supplemental grounds for contempt on the 1st of April 2014.

[8] The parties made brief oral submissions to the court and relied also on the various affidavits and submissions filed relating to the application. Having initially been

reserved for decision on the application and after having reviewed further the submissions and affidavits, the court invited the parties to file further submissions specifically on the matter of the *mens rea* necessary to found civil contempt and referred the parties to the case of **Liao Hwang Hsaing**¹ in this regard.

[9] Subsequent submissions were filed and on the 13th day of November 2015 the court gave its findings on the application for contempt.

[10] An applicant seeking to prove contempt by another party must show to the criminal standard of proof that the alleged contemnor is in breach of an unambiguous order. There must be shown such proof as will satisfy a court beyond a reasonable doubt that the relevant breach has been committed. Proof of a breach of a court order in and of itself is not sufficient however to equate to civil contempt. For contempt to be established an applicant must also prove that the contemnor had the requisite *mens rea*.

[11] *"In order to establish that someone is in contempt it is necessary to show that (i) that he knew of the terms of the order; (ii) that he acted (or failed to act) in a manner which involved a breach of the order; and (iii) that he knew of the facts which made his conduct a breach: **Marketmaker Technology (Beijing) Co Ltd v Obair Group International Corporation & Ors**².*

[12] Importantly in relation to this application was the caveat recognized by Ellis J in **Liao Hwang Hsaing** that *"It follows therefore that provided she knew of the terms of the order, and that she acted or failed to act in a manner which breached the order and knew of the facts which made his conduct a breach, the contempt will be proved. However the Court also accepts that if after considering all of the evidence it concludes that there is more than one inference to be drawn from the facts and*

¹ BVIHCV2011/222 - Liao Hwang Hsaing v Liao Chen Toh et al

² [2009] EWHC 1445 (QB).

at least one of such inference is inconsistent with a finding of contempt then the application must fail."

[13] Did the respondent know the terms of the order?

There is no doubt that the 2nd Respondent knew the terms of the Order. The 2nd Respondent in his affidavit of the 1st April 2014 that "irrespective of the declaration made in his absence [the Court's Order] that he was the rightful founder, CEO and shareholder of CBS (St. Kitts) Ltd". He was well aware of the order.

[14] Did the respondent act or fail to act in a manner which involved a breach of the order?

The acts complained of by the applicant were the alleged interference with in the affairs of Caribbean Building Systems by the appointment of David Hammer to act as Secretary for CBS and also that the 2nd Respondent with Mr. Hammer directed counsel to represent CBS in litigation in another matter Suit SKBHCV2013/0021. The allegation is also that the 2nd Respondent has held himself out as a shareholder and director of CBS even after the order was made. The Respondent has not denied these allegations.

[15] Did the respondent know of the facts which made his conduct in breach?

The matters set out at paragraph 13 above point to the fact that the 2nd Respondent was well aware of the facts which made his conduct in breach.

[16] Did the alleged contemnor have a choice as to whether to commit the relevant act or omission?³

The 2nd Respondent has maintained that without legal representation that he was being served with Court Papers in matters relating to CBS and that he was obligated to accept these services as he wished to protect CBS and also that he was obligated to attend the hearing as served upon him when taken to do so by

³ Seetorguard Pie. v Dienne Pie. [2009] EWHC 2693(Ch)

the prison authorities. He also points to the fact that his presence has been objected to by the applicants in other proceedings but that in those proceedings the Learned Master had ruled that he be present to represent CBS.⁴

[17] Has the contempt been proved? The respondent knew of the terms of the order, he knew what conduct could constitute a breach of that order. It may well be that the respondent could have chosen not to participate in the proceedings although he was brought to court and although the court did not object to his presence on behalf of Caribbean Building Systems. However he did so participate and therefore the finding of this court is that the contempt was proved.

[18] The court is mindful of the standard of proof required in contempt proceedings and of the caveat as expressed at paragraph 12 above which is clearly meant to act as a further step in a court's consideration of issues which form the basis of the application before the court. On one interpretation of the facts the Respondent deliberately interposed himself in the proceedings in defiance of the court order. However, there is another inference that can be drawn from those facts. The Court clearly considered and concluded that the Respondent should be served and brought to court and should remain in court in the capacity of the last registered Director of the company whilst proceedings continued with the various matters in which he was involved. This did not involve a deliberate act on the part of the 2nd Respondent.

[19] Having considered all of the evidence and submissions put before the court by both parties this court is unable to make a finding of contempt against the 2nd Respondent. This court is not satisfied to the requisite standard of beyond a reasonable doubt that the 2nd Respondent had the requisite *mens rea* to commit the contempt sought on this application. This is not a case in which an injunction had been granted specifically directing the respondent to do or not do some specified action. It was clear to the court that this was a complicated issue given

⁴ See paragraphs 34-38 of the affidavit of 2nd Respondent filed on the 1st April 2014.

the number of matters in which the respondent and the applicant appeared before this court and before the Master, and that the respondent had appeared in varying capacities in these matters. The appearance of the 2nd Respondent was further complicated by reason of his incarceration during the relevant period and his lack of legal representation at a crucial time in relation to this application.

[20] For these reasons the application was dismissed.

Marlene I. Carter
Resident Judge