

EASTERN CARIBBEAN SUPREME COURT
VIDEOCONFERENCE

ANGUILLA
23rd and 24th April 2020, and 7th May 2020

APPLICATION

Case Name: **Gavin Scott Hapgood**
v
[1] Commissioner of Police
[2] His Honour, Magistrate Keithly Benjamin
[AXAHCVP2020/0003]

Date: **Thursday, 23rd, Friday, 24th April 2020, and Thursday 7th May 2020**

Coram: **The Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal**

Appearances:

Appellant/ Applicant:	Mr. Michael Fay, QC with Ms. Lavan Hoyoung
Respondents:	Mr. Terrence Williams and Ms. Erica Edwards, Senior Crown Counsel, for the First Respondent Mr. Navine Flemming for the Second Respondent

Issues: **Civil appeal – Application for stay of execution and stay of appellant’s preliminary enquiry pending determination of appeal and pending abatement of COVID-19 pandemic – Application for Hadkinson order to prevent Commissioner of Police from being heard on application for a stay despite failure to comply with order in the court below to file and serve judicial review claim and accompanying documents on the appellants – Case management directions – Preliminary objection to jurisdiction by first respondent**

Type of Order: **Oral Decision**

**Result / Order
and Reasons:**

IT IS HEREBY ORDERED THAT:

1. The appellant's application for a Hadkinson order is refused.
2. The following matters shall be listed for hearing before the Full Court at a time convenient to the Court and parties:
 - (i) any further application for a Hadkinson order filed by the appellant;
 - (ii) the Amended Application for a Stay filed by the appellant on 7th April 2020; and
 - (iii) the preliminary point on jurisdiction raised by the first respondent's Notice of Opposition.
3. The first respondent shall file written submissions with authorities and affidavit evidence in response, in relation to the above matters, on or before 14th May 2020.
4. The appellant is at liberty to file written submissions with authorities and affidavit evidence, in reply, if necessary, on or before 18th May 2020

Reason:

Reasons for decision on application for Hadkinson order:

The Court stated that the applicable law pertaining to hearing or not hearing a contemnor is not in dispute. The fact of a party being in contempt of court is not, in itself, a bar to that party being heard. A Hadkinson order is draconian in effect, as it goes directly to a litigant's right of access to the court. It is an exceptional remedy and should be deployed judiciously, sparingly and proportionally. One essentially has to ask whether, in the circumstances of a particular case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, bearing in mind the paramount importance which the court attaches to the prompt and unquestionable observance of its orders.

The Court emphasized that refusing to hear a contemnor is draconian in effect – it is a step the court ought only take where the contempt, itself, impedes the course of justice by making it more difficult to ascertain the truth or enforce orders which it may make. Accordingly, the court would have to consider the circumstances of the case before it, including the nature of the proceedings and the consequences to the parties to the proceedings, one way or the other.

The Court noted that it, in fact, has a discretion in the matter, contrary to the proposition advanced by Mr. Fay, QC who submitted that there is no discretion in the circumstance where a party is found to be abusing the court's process by virtue of their contempt.

The Court noted that the conditions necessary for the making of a Hadkinson order were recently been summarized in the case of De Gafforj v De Gafforj [2018] EWCA Civ 2070, as follows:

1. The respondent is in contempt;
2. The contempt is deliberate and continuing;
3. As a result there is an impediment to the course of justice;
4. There is no other realistic and effective remedy;
5. The order is proportionate to the problem and goes no further than necessary to remedy it.

With respect to the first condition, the application to bar the Commissioner of Police from taking part in the proceedings was predicated on the Commissioner of Police having not served various documents on the appellant relative to the application for judicial review, as an intended party to the judicial review proceedings in the court below. There was no doubt that the Commissioner did not comply with the judge's order requiring service on the appellant's legal representative. The Court therefore considered the first consideration that was advocated in terms of the De Gafforj conditions, to be satisfied; that is, the Commissioner of Police is in contempt.

The second condition requires that the contempt is deliberate and continuing. Mr. Williams, for the Commissioner of Police, contended that the matter of the Commissioner's non-compliance with the orders for service in the court below arose before the judge, who dealt with the matter fairly. Mr. Fay, on the other hand, said that the matter was not dealt with fairly and, in fact, was dealt with in an arbitrary manner. Mr. Fay argued that the Commissioner's contempt, in the circumstances, continues and remains unpurged. Mr. Fay submitted that the conduct of the Commissioner was an abuse of the court's process and, in essence, inhibited the appellant's ability to put his case at the hearing of the judicial review proceedings. Mr. Williams contended that the Commissioner of Police is not, now, in

contempt because the breach was addressed by the trial judge. Submissions were made before the trial judge and dealt with in his written judgment. Mr. Williams also invoked CPR 26.9 as a complete answer to this issue, contending the judge in essence exercised his powers in accordance with rule, which allows the court to make orders to put matters right.

While it is true that the documents were not served on the appellant or his counsel, and therefore, in that context, there is said to be a deliberate and continuing breach of the order, the court was obliged to consider all the circumstances of the case, including the nature of the instant proceedings – an application for a stay of the preliminary inquiry pending the determination of the appeal and the abatement of the COVID-19 pandemic – and the consequences for both parties one way or another. If a stay were to be granted, the consequences would be obvious. If it were not granted, there would be no impediment to continuing the preliminary inquiry. In this connection, the Court also noted that the first respondent filed a preliminary objection by which he challenged the appeal on jurisdictional grounds.

Having regard to the nature of the application (an application for a stay), the Court did not consider that the non-compliance with the judge's order with respect to service of the documents on the appellant could be said to result in an impediment to the course of justice within the understanding of the expression, in the sense that the failure to effect service, at this stage, does not make it difficult for the Court to ascertain the truth, or make or to enforce its orders. In fact, the application for a stay does not, and cannot engage the issue of ascertaining the truth in the stay application. Further, there is also no issue arising as to the enforcement of the orders which this Court may make, hence the difficulty with enforcement does not arise – the court may simply either grant or refuse the stay.

The Court, however, emphasised that its orders must be obeyed, no matter whose orders they may be, and that it takes a dim view when its orders are not obeyed. That notwithstanding, in the Court's view, in all the circumstances, a Hadkinson order, which itself is an exceptional remedy, would be a disproportionate sanction in this matter. Having regard to the applicable legal principles, and the nature of the application before the Court, the Court in the exercise of its discretion, refused the

application for the Hadkinson order to bar the Commissioner of Police from the hearing in the application of the stay.

Reasons for Case Management Directions

Following the court's disposal of the application for a Hadkinson order, the appellant indicated a desire to file an application to have that order varied/discharged/revoked by the Full Court pursuant to CPR 62.16A. On the basis of that indication, the court adjourned the hearing of the appellant's application for a stay of proceedings. The appellant filed the application to vary/discharge/revoke on 6th May 2020, along with consolidated skeleton arguments and affidavit evidence on the matters to be dealt with by the court on that application. The first respondent was granted leave, upon an agreed timeline, to file skeleton arguments and affidavit evidence in response. The time for the appellant to file documents in reply, if necessary, was also agreed upon by counsel.