COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp No. 184 of 2019

BETWEEN

PETER JOHN NYGARD

Appellant

AND

FREDERICK SMITH, QC
(As a Partner of Callenders & Co.)

1st Respondent

AND

THE COALITION TO PROTECT CLIFTON BAY

2nd Respondent

AND

CALLENDERS and Co.
(A Firm)

3rd Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**

The Honourable Mrs. Justice Crane-Scott, JA

The Honourable Mr. Justice Jones, JA

APPEARANCES: **Mr. Carlton Martin with Mr. Keod Smith and Mr. Rouschard Martin, Counsel for the Appellant**

Mr. Julian Malins, QC, with Mr. Ferron Bethell, QC and

Ms. Camille Cleare, Counsel for the Respondents

DATES: 28 July 2020; 1 February 2021

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Civil Appeal - Contempt of Court- Breach of Injunction- Enforcement of Injunction- Committal Proceedings-

On 29 February 2019 an Injunction Order was granted against the appellant restricting him, inter alia, from interacting in any form or fashion with certain correspondence that was said to have been illegally obtained by him. The appellant was later found to be in contempt of this Injunction Order and on 15 November 2019 the Judge ordered the committal of the appellant for 90 days and a fine of $150,000.00. The appellant seeks an extension of time within in which to appeal the Contempt Order of the Court.

Held: Leave to appeal out of time is refused; the appeal is dismissed; the conviction and sentence are affirmed with costs to the respondents; such costs to be taxed if not otherwise agreed, sufficient for two Counsel.

Where the action comprising the contempt is clear and unexplained, the court is entitled to move directly to impose such punishment on the contemnor as the contempt merits. In the premises, there was no need for the Judge to wait before proceeding to impose sentence on the appellant for his failure to appear.

The appellant had been prohibited from using the correspondence by the Thompson injunction and he could not escape its effect, having submitted to the jurisdiction of the Bahamian courts when he entered an unconditional appearance to the proceedings, by publishing the impugned documents outside the jurisdiction.

There is no basis upon which we should interfere with the discretion exercised by the Judge in the circumstances of this case when she found that the appellant had committed a contempt of court. Moreover, the sentence imposed by the Judge is in our view, commensurate with the contempt proved.

AG v MM Brokers Ltd [1996] 50 WIR 462
Attorney-General v Times Newspapers Ltd [1973] 3 WLR 298
Balogh v. St. Albans Crown Court [1975] 1 Q.B. 73
Campbell v Alexiou and Others [2006] 3 BHS J No. 256
Hadkinson v Hadkinson [1952] 2 All ER 567
Italya Head v Forte Nassau Beach Hotel [1997] BHS J No. 139
James Fleck v Pittstown Point Landings Limited SCCivApp. No. 131 of 2019
Knight and Other and Clifton and Another [1971] Ch. 700
Louis M. Bacon v Sherman Brown and Steve McKinney CLE/gen No. 503 of 2012
Mileage Conference Group of the Tyre Manufacturers' Conference Ltd Agreement, Re (1966) LRRP 49

The Crown v Poplar Borough Council (No.2) [1922] 1 KB 95
Thursfield v Thursfield [2013] EWCA Civ 840

J U D G M E N T

Judgment delivered by The Honourable Mr. Justice Isaacs, JA:

1. On 29 February 2019, Mr. Justice Keith Thompson granted an order prohibiting the use or perusal of a number of documents alleged to have been improperly obtained by the appellant. In apparent disobedience to the injunction, the appellant, through his New York, U.S.A. attorneys, sought to use the impugned improperly obtained documents in an action there. The respondents sought and were granted leave to commence committal proceedings against the appellant for contempt.

2. Madam Justice Ruth Bowe-Darville ("the Judge") heard the application; and found the appellant to be in contempt on 11 October 2019, ("the Contempt Order"). On 15 November 2019, the Judge made a number of orders, including the committal of the appellant for 90 days and a fine of $150,000.00 ("the Committal Order"). The appellant attempted unsuccessfully, inter alia, to have the Contempt Order set aside. He now appeals to the Court for relief from its effects.

History

3. The matter presently under appeal relates to allegedly stolen communications that were a part of the records in the office of the first respondent; and the communications' proposed use by the appellant. I have set out below the main protagonists in this skirmish.

4. The first respondent is a co-founder, director, spokesperson and legal counsel to the second respondent. He is the managing partner of the law firm Callenders & Co, the third respondent, and is known for, inter alia, his advocacy as an environmental protection litigator.

5. The second respondent is an association of, inter alios, community leaders, concerned citizens, residents and environmentalists committed to environmental issues in The Bahamas. The second respondent has brought several judicial review proceedings in respect of what it views as unlawful development at the appellant's property, known as Nygard Cay.

6. The third respondent is a long established Bahamian law firm that has acted on behalf of the second respondent in a number of its environmental claims.

7. The appellant is the Canadian founder of a very successful fashion house and company, Nygard International. He resides intermittently at his home on Nygard's Cay in the Lyford Cay enclave at the western end of New Providence. He and a neighbour, Louis Bacon, whose residence is in Lyford Cay have been involved in a highly publicised years' long dispute that has enmeshed many other individuals in it.

8. With that brief introduction of the players, the scene is now set for what is to come.

9. The genesis of the present appeal arose out of an affidavit filed on behalf of the appellant in February 2019 by one of his attorneys, Mr. Keod Smith in Judicial Review Proceedings No.12 of 2013. Exhibited to that affidavit were thirteen pages of e-mail communications between the first respondent and others. The e-mails revealed privileged discussions regarding the legal affairs of the second respondent, for whom the first and third respondents were acting.

10. Also in February 2019, the appellant's New York attorneys, Wilson Elser, wrote to the first respondent in relation to "certain documents that appear to be from Fred Smith's files" and which "concern Mr. Smith's representation of Louis Bacon and/or other related entities (such as the Coalition)". The New York action had been brought by the appellant against Mr. Louis Bacon, a neighbour of the appellant, in the upscale enclave of Lyford Cay.

11. Fearing the imminent publication of allegedly purloined documents relating to confidential information, on 12 February 2019, the respondents applied to the Supreme Court for an injunction to prevent such an occurrence. The application came before Mr. Justice Keith Thompson, in Public Law Action No. 00005 of 2019, who granted to the respondents an ex parte injunction ("the Thompson injunction") restraining the appellant and others from dealing with the correspondence described in paragraph 6(i) of the injunction ("the Correspondence") and in the manner therein described, except for the purpose of disclosure to legal advisers instructed in relation to the proceedings in the court below in which the injunction was granted.

12. I set out the pertinent portion of the Thompson injunction below:

> **" INJUNCTION**
>
> **6. Until the final determination of this action or further Order of the Court:**
>
> > **(i) the respondents are restrained (acting directly or through their employees and or officers or agents) from any or any further appropriation, perusal, use,**

> **publication, communication or disclosure through any medium or to any person (other than (i) by way of disclosure to legal advisers instructed in relation to these specific proceedings or (ii) for the purpose of carrying any Order into effect) of the Correspondence or any of it or The Affidavit filed by the second respondent on February 2019 in Judicial Review Proceedings No. 12 of 2013, unless the same is expressly authorized by or on behalf of the applicants; and**
>
> **(ii) the respondents must immediately on service of this Order take steps to remove, take down, delete or withdraw from any court file all or any part of the Correspondence that is in their possession and/or that they have made available to the public or any section of the public on the internet or otherwise."**

13. Importantly, under paragraph 12 of the Thompson injunction, the appellant was at liberty to apply to alter or discharge it.

14. Paragraph 15 of the Thompson injunction extended its effect to persons outside of The Bahamas, including the appellant. Paragraph 16 stated that:

> **"It is contempt of court for any person notified of this Order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned, fined or have their assets seized."**

15. Also, at the hearing on 12 February 2019, the respondents were granted an Order for substituted service as the appellant, by all accounts, had left the jurisdiction for parts abroad. Significantly, the Order for substituted service was not challenged via an application for its discharge or on appeal.

16. Pursuant to the Order for substituted service, Mr. Nygard's then attorneys, the firm of Allen Allen & Co, were served with the documents in the action, as well as with the injunction, on the day the injunction was ordered. Mr. Nygard's local attorneys entered an unconditional notice and memorandum of appearance in the action; and filed a defence on 19 February 2019.

17. Also on 19 February 2019, Barry A. Sawyer, a Counsel and Attorney in the firm of Allen Allen & Co., swore an affidavit which exhibited in it, an affidavit of the appellant denying any knowledge of the Correspondence; and requesting that the injunction be set

aside or discharged as against him on the basis of his assertions in his affidavit. The appellant raised no challenge to the substituted service. On 19 March 2019, the appellant filed his defence which repeated his denial in his affidavit that he had no knowledge of or dealings with the Correspondence.

18. On 24 September 2019, the respondents applied by ex parte summons, to the Court below for leave to commence contempt proceedings against the appellant; and on 24 September 2019, the respondent filed an amended statement against the appellant and in support of their said ex parte summons in the action in the Court below.

19. At paragraph 5.4 of the amended statement it is stated that Wilson Elmer, the attorneys of record for the appellant in the New York Action, wrote to the Judge in that case, a letter dated 6 September 2019, requesting that they be allowed access to, and use of, certain documents in the New York Action.

20. It was alleged that the documents sought to be used in the New York Action fell squarely within the definition of the term "Correspondence" in paragraph 3(a) of the Thompson injunction.

21. The respondents alleged that the appellant breached the injunction. Paragraph 8.1 of the Amended Statement said that the "Nygard Documents" sought to be deployed in the New York Action were either the same documents comprising the subject matter of the respondents' claim in the action in the court below or they fell within the class of documents comprising the subject matter of the respondents' claim in the action in the court below.

22. It was also alleged in the court below that Adam Bialek of Wilson Elmer, the law firm representing the appellant in the New York Action, wrote on 11 February 2019, regarding his possession of certain documents that appear to be from Fred Smith's files.

23. Mr. Louis Bacon's attorneys in the New York Action requested full copies of the documents from the appellant's attorneys; but the request was denied on the basis that the documents contained in the request to the Judge in the New York Action did not fall within the term "Correspondence" in paragraph 3(a) of the Thompson injunction in The Bahamas action.

24. The contempt application was fixed for hearing on 10 October 2019; and on that day, the appellant was not present; but his attorneys at the time, the firm Allen and Allen, was in the person of Mr. Barry Sawyer. However, Mr. Sawyer took no active part in the hearing

by, for example, making submissions on the appellant's behalf. The appellant had filed no written submissions. It is unclear what purpose Mr. Sawyer's presence served as he did not place himself on the record.

25. The Judge found the contempt proved. and said in her ruling, inter alia:

> **"The Court being satisfied that**
>
> > **(i) the application for committal was properly brought;**
> >
> > **(ii) all the relevant documents had been served in accordance With the Order to serve by substituted service (Affidavits of service being produced;**
> >
> > **(iii) the affidavits of Martin Lundy gave full disclosure of the matter and contained the evidence necessary to prove the First Defendant's contempt and the Court accepting the same;**
> >
> > **(iv) the First Defendant has not filed any evidence in his defence of the application;**
> >
> > **(v) the First Defendant's continued breach of the said Order continues;**
> >
> > **(vi) the Plaintiffs have proved the First Defendant's breach of the said Order beyond reasonable doubt**
>
> **Hereby Orders that the First Defendant, Peter Nygard, is guilty of contempt for his breach of Paragraph 6 (1) of the Order of 12 February 2019. The First Defendant is liable for committal to the Bahamas Department of Corrections, Fox Hill, New Providence and a fine. Mr. Nygard shall make representation to the Court within fourteen (14) days to make submissions as to why he should not be given a custodial sentence. Mr. Nygard shall appear in person on 14 November 2019 at 2:30pm"**

26. As indicated above, the Judge adjourned the committal proceedings to enable the appellant to appear and make submissions in mitigation of sentence. She ordered him to attend at the mitigation and sentencing hearing on 14 November 2019; and to file any submissions in mitigation of sentence by 24 October 2019. The appellant was served with the 10 October 2019 Order on 11 October 2019.

27. By letter dated 16 October 2019, Mr. Carlton Martin of the firm Martin and Martin, wrote to Mrs. Viola Major indicating that his firm had been instructed by the appellant to act on his behalf; and requested that he be supplied with a number of documents. Mrs. Major's response was to the effect that Mr. Martin was not Counsel of record hence she had no instructions to communicate with him. She did intimate that once he was placed on the record, she would gladly assist him. It appears that she did do so on 24 October 2019: See affidavit of paralegal, Miko Pinder, sworn on 13 November 2019.

28. On 22 October 2019 Martin, Martin and Co., filed a notice of change of attorney thereby replacing the firm of Allen and Allen as the appellant's attorneys. 0n 25 October 2019, the appellant filed a summons for **"an extension of time to file and serve affidavits and submissions and change of the date for the Show Cause Hearing so as to allow his new Counsel ample time to prepare."**

29. On 5 November 2019, the appellants' attorney filed a Notice of Motion seeking to strike out the orders made by the Judge in the contempt proceedings.

30. The appellant did not attend the mitigation and sentencing hearing on 14 November 2019, as directed by the Judge, but Mr. Rouschard Martin of the firm Martin and Martin, appeared on his behalf. Mr. Martin made no submissions relating to the mitigation and sentencing exercise during the course of the hearing; nor had any been filed by the appellant.

31. The transcript of the hearing of 14 November 2019, reveals, inter alia, that Mr. Martin attempted to convince the Judge to adjourn the hearing to allow the appellant more time within which to prepare for the sentencing hearing. Further, he wished for the opportunity to have the Motion filed on 5 November 2019, heard. The Judge was not receptive to either request. When she adjourned the matter to the next day it was with the intention of delivering her decision on the sentence; but she also was to consider the disposition of the summons and motions before her.

32. On 15 November 2019, the Judge made the following finding and Order:

> **"1. That the appellant is in contempt of Court and further ordered that he shall within the next seven (7) days:**

(i) make full written apology to the Court giving full and verifiable reasons for his non-appearance; and (ii) shall give written undertaking to Court to discontinue the use of the emails, the subject of the February injunction, in the New York proceedings;

2. The first defendant shall pay fine of five thousand dollars ($5,000.00) for every day the provisions of (i) and (2) are not met.

3. The first defendant is sentenced to ninety (90) days imprisonment at the Bahamas Department of Corrections and is fined one hundred and fifty dollars ($150,000.00) to be paid within the next seven (7) days default of which he is sentenced to an additional thirty (30) days at the Bahamas Department of Corrections and $5,000 for every day the said sum remains unpaid.

4. The first defendant is ordered to pay the full indemnity costs of the committal proceedings on solicitor and own client basis such cost to be paid before the first defendant or any of the other defendants proceed or can be heard on any further applications.

33. The Judge does not appear to have given any decision on the summons and motion that the appellant had argued strenuously should be heard although it may be inferred by paragraph 4, that she had conditionally declined to hear the appellant's summons and notice.

34. The appellant asks that the Court set aside the Judge's decision/order and grant the appellant an order in the terms following

"1) that the appellant has not violated the said February injunction or any part of it; or remitting this appeal to the Supreme Court to be retried by another Judge.

2) That the appellant was entitled to an adjournment of the hearing as sought in the Court below and to be heard on his strike motion prior to the hearing of or dealing with any other matter in the contempt proceedings; and to in any event put forward his defence against the being found in contempt.

3) Further or other relief as the Court may deem appropriate.

4) (sic) **Costs of the contempt proceedings in the Court below and on appeal, to be taxed if not agreed.**

35. The appellant adumbrated the following grounds of appeal:

"1. The learned judge in the Court below erred in law and in fact in finding on the 10 October, 2019, that the appellant is in violation or breach of the said February injunction and in limiting his right to make application as is specified in the sentencing Order made on the 15 November, 2019.

2. The learned judge erred in law and in fact in imposing penalty upon the appellant in the sentencing order for not attending Court on the 14 November, 2019, as ordered by the Court, without first calling on him to show cause why he should not be cited for contempt or allowing him an opportunity to defend himself against claim of contempt and an opportunity to mitigate his contempt, should he be found in contempt of Court.

3. The learned judge erred in law and in fact in using and or relying on facts or evidence in the contempt proceedings which were not admissible in such proceedings or part of the evidence therein.

4. The learned judge erred in law and in fact in failing to grant to the appellant the adjournment sought by him on the 14 of November, 2019, to prepare and advance his defence in the contempt proceedings and to have his strikeout motion heard, on the grounds or basis therein and hereinafter set out, and as preliminary to the hearing of any other matter in the contempt proceeding and in denying him an opportunity to prepare or fully prepare and advance his defence in such proceedings, and the appellant could not and did not as result of such denial advance his defence or full defence.

5. The learned judge erred in law and in fact in granting leave to the respondents to commence impeachment proceedings against the appellant and in finding the appellant in contempt of Court in his absence and in making the Order on 10 October, 2019, there having been no legal basis for the making of such orders, reasons being inclusive as hereinafter set out:

a) the Court lacked the jurisdiction to make such order, the alleged offence or violation of the order of the Court referred to in the respondents' Notice of Motion, if in fact there was such commission of an offence against or violation of such order, not having been committed within the jurisdiction of the Court; and in any event

b) the appellant, nor anyone on his behalf or authorized by him, did not violate the injunction or order of the Court as alleged by the respondents or at all;

c) there has been no establishment of mens rea and proof beyond reasonable doubt;

d) the appellant was not personally or otherwise served with the Notice of Motion under which the contempt order was made, and such Notice of Motion never came to his knowledge;

e) the appellant nor anyone on his behalf was ever served or properly served with any contempt proceedings document nor was he personally aware prior to the making of the contempt order of any contempt proceedings; and

f) the appellant is and has at all material times been resident outside of the jurisdiction of the Court;

g) the Court was wrong in ordering the appellant to participate in mitigation and sentencing hearing and in failing to call on or upon the appellant, as prerequisite to finding of contempt and such hearing, to show cause as is required by law and requiring him to file affidavits in the course of showing cause.

5. The learned judge erred in law and in fact in failing to consider the fact that she was not seized of the action and in acting in respect of the contempt proceedings.

6. The learned judge erred in law and in fact in failing to take into consideration the provision of the said February injunction which says that the injunction has no application

to person or thing outside of the Bahamas expresses (sic) **terms to such effect.**

7. The learned judge erred in law and in fact, in any event and without prejudice to the other grounds herein, by imposing the excessive terms set out in the sentencing order of 15 November, 2019, some of which are also unclear and requires construction or interpretation.

8. The learned judge erred in denying the appellant an opportunity to set aside the ex parte injunction made against him on the ground that he never dealt with the documents or correspondence referred to in the said February injunction or any part of them and should have an opportunity to view the same and, if permitted in law, to consider the use of such documents or any part of them in his defence in this or any other action; and that the evidence did not disclose the true facts and were misleading."

36. Before we entered upon the substantive appeal we had to dispose of a preliminary objection raised by the respondents to matters the appellant wished to appeal, for example, the Order for substituted service made on 24 September 2019 and the interlocutory decision to dismiss the extension of time and adjournment application filed on 25 October 2019. The respondent posited that these were interlocutory decisions and, pursuant to section 11(f) of the Court of Appeal Act, the appellant needed leave to appeal; and he had not secured such leave. Having heard the submissions, Madam Justice of Appeal Crane-Scott, delivered Court's the decision as follows:

"The objection, as we see it, had merit. And as we have heard, <u>Mr. Martin himself appears to have accepted that he would be proceeding with the appeal on the basis of the two orders made by the judge</u> and not deal with issues such as whether the order for substituted service was correct or not, whether the interlocutory decision to dismiss the extension of time and adjournment application of 25th October was correct or not, and any other interlocutory matters which were never appealed and for which the appellant would have required leave to appeal from the Supreme Court.

That being so, this court basically allows the preliminary objection and declares that it will in no way entertain any arguments in respect of those other matters and will concern itself only with the issue of, firstly, the correctness of the contempt finding made on 10th October and the sentencing order made on 15th November, 2019.

That is the order of the court." (Emphasis added)

[pages 65-66 of the transcript of 28 July 2020]

37. We have highlighted that portion of the decision above because although Mr. Martin had stated earlier at page 32 of the transcript that:

> **"MR. C. MARTIN: Yes, I am guided by your -- by the position taken by her Ladyship and I agree that that is the position. The appeal is against the two orders, one made on 10th October and the other made on 15 November 2019. Deal with very simply -- really, we were not appealing a refusal of the judge to [inaudible] the matter.**
>
> **CRANE-SCOTT, JA: What? You are not appealing the what?**
>
> **MR. C. MARTIN: We are not appealing the refusal of the judge to hear the notice of motion. We were only mentioning by the way."**

38. He seems to have resiled from that position when he said at page 40 of the transcript:

> **"I want to be certain, my Lords. My Lords, before I proceed further, I want to make it clear for the record that I did not actually agree with the objections, but -- the court made its ruling on it -- but I want the record to reflect that I did not agree with the preliminary objection. I made my -- put forward my reasons for not agreeing. But I agreed with her Ladyship to move ahead on the notice of appeal with respect to those two."**

39. We wish to make it very clear that Mr. Martin's assertion that he did not agree with the preliminary objection is not correct. His concession in the face of the position put to him by Crane-Scott, JA was predicated on the fact that the appellant's notice of appeal challenged **"decisions or orders given on 10th October. What is that? That is the finding of contempt order as well as the sentence that was imposed on 15th November."**

40. Her Ladyship continued at page 31 of the transcript:

> **" .. if we focus on the notice of appeal and what he is actually appealing from, it is fixed in time as to what happened on 10th October, her decision of 10th October. That is the finding of contempt and the sentence imposed. That was the point I think Mr. Malins made. So that, really, what this court is being asked to do, based on the notice of appeal motion, is to determine whether the judge was correct in making a finding**

> **of contempt against Mr. Nygard, and, secondly, having done so, whether when she sentenced him, that sentence was unduly severe, to use the terminology."**

41. The apparent duplicity of Counsel has necessitated our entering into this issue more deeply than we should have had to do. Ultimately, however, we limit the breadth of this appeal to the two issues identified in the notice of appeal and in the ruling of Crane-Scott, JA, to wit, "**the correctness of the contempt finding made on 10th October and the sentencing order made on 15th November, 2019**".

42. We proceed therefore, to address Grounds 1, 2, 3, 5 (a), (b) and (c),6 and 7.

Ground 1 - The learned judge in the Court below erred in law and in fact in finding on the 10 October, 2019, that the appellant is in violation or breach of the said February injunction and in limiting his right to make application as is specified in the sentencing Order made on the 15 November, 2019.

43. The appellant makes two complaints under this ground: a) there was no breach of the Thompson injunction and the Judge was wrong to so find; and b) the Judge erred by circumscribing the appellant's ability to approach the court with his applications.

44. Before embarking on the merits or otherwise on this ground of appeal, I think a few words pertaining to the law of contempt by way of explanation may be illuminating.

45. In the textbook "The Law of Contempt" by Anthony Arlidge and David Eady published in 1982, the authors state at page 30:

> **"The common law definition of contempt of court is an act or omission calculated to interfere with the due administration of justice. This covers criminal contempt (that is acts which so threaten the administrating of justice that they require punishment) and civil contempt (disobedience to an order made in a civil cause)."**

46. Borrie & Lowe, ***"The Law of Contempt"*** 3rd ed., reiterates that contempt can be divided into two broad categories, contempt by interference and contempt by disobedience. They write:

> **"The former category comprises a wide range of matters such as disrupting the court process itself (contempt in the face of the court), publications or other acts which risk prejudicing or interfering with particular legal proceedings or other acts which interfere with the course of justice as a continuing process (for example, publications which "scandalize" the court and retaliation against witnesses for having given evidence in proceedings which are concluded). The second category comprises disobeying court orders and breaking undertakings given to the court."**

47. The learned authors go on to observe that it is essential that the law provides sanctions for the enforcement of the process and orders of a court and provide, as a rationale for this approach, the words uttered by Chief Justice McKean of the United States when that judge was dealing with a litigant who refused to answer interrogatories in 1778:

> **"Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case."**

48. In **Attorney-General v Times Newspapers Ltd** [1973] 3 WLR 298 the House of Lords was there concerned with large and fatal issues related to, inter alia, the limits of freedom of speech. Lord Diplock while speaking to "the mere disobedience by a party to a civil action of a specific order of the court made on him in that action", said at page 316 as follows:

> **"The order is made at the request and for the sole benefit of the other party to the civil action. There is an element of public policy in punishing civil contempt since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity."**

49. With that brief introduction to the law of civil contempt, I proceed to address the submission that the Judge erred when she found the appellant breached the Thompson injunction.

Ground 1(a)

50. On 6 February 2019, Mr. Keod Smith, the second respondent in the court below and not a party in the present appeal - in a judicial review proceeding (No. 12 of 2013) which involved parties common to the present appeal, inclusive of the appellant, filed an affidavit ("the K. Smith affidavit") in which he claimed that the appellant was his client. Exhibited to the K. Smith affidavit were thirteen pages of e-mail communications between the first respondent and others associated with the second and third respondents. Mr. Keod Smith claimed to have received the e-mails through "deep analytical searches". The respondents allege that the e-mails were not provided with their consent.

51. Consequently, after it became apparent that documents unlawfully obtained from the respondents' records may be used in the New York action, an application for an injunction was made before Mr. Justice Keith Thompson who granted the injunction by which the appellant now finds himself clamped.

52. There was ample material disclosed in the fifth affidavit of Martin Lundy filed in the court below on 24 September 2019, ("the Lundy affidavit) that the appellant had acted in breach of the Thompson injunction. I do not reproduce that material herein in full but paragraph 43 of the Lundy affidavit the following appears:

> **"43. Moreover, Nygard's attorneys (Wilson Elser) state in Nygard's Document Request that a declaration from their colleague Adam Bialek, which Nygard is prepared to file in the New York Action will explain that Nygard was contacted by an attorney for an investigative service who had come into possession of the Documents. The name of the attorney is not disclosed in Nygard's Document Request and is therefore referred to hereinafter as "Attorney X."**

53. This paragraph reflects what is contained in a letter dated 6 September 2019 ("the Letter"), written by Cynthia S. Butera of the law firm Wilson Elser Moskowitz Edelrnan Dicker LLP ("Wilson Eisner") - who declare in the first paragraph of the letter to be counsel for the appellant - to Lorna G. Schofield, the judge in the New York action; and provides cogent evidence that the appellant was contacted about the documents.

54. The letter goes on to narrate that Bialek and an Ethicist, Roy Simon, had viewed a sample of the documents; and that a comparison exercise had been carried out which resulted in a determination that the documents to be used in the document request application did not fall within the ambit of the injunction, to wit, paragraph 6(i).

55. It may be inferred, therefore, that the documents came into the possession of the appellant himself and were given to Wilson Esner or Bialek by the appellant, or that he instructed Attorney X to do so. In either event, the appellant would have fallen afoul of the terms of the injunction. Paragraph 13 of the injunction enjoins the appellant and others in the following terms: **"others acting on his behalf or on his instructions or with his encouragement"**.

56. In **Italya Head v Forte Nassau Beach Hotel** [1997] BHS J No. 139, Osadebay, J (Acting) (as he then was) stated:

> **"9. ... I wish to state that compliance with orders of the Supreme Court shall not be a matter of choice. Every order is valid until set aside."**

57. In **Campbell v Alexiou and Others** [2006] 3 BHS J No. 256, Allen J (as she then was) while dealing with an application for committal for non-payment of money, stated at paragraph 25:

> **"25. The effective administration of justice is dependent, in part, upon the enforcement of its orders. It is a contempt of court to disobey an order to do a specified act within a specific time and as Romer LJ said in Hadkinson v Hadkinson 1952 P 285 at 288. "It is the plain and unqualified obligation of every person again or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of the**

obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

58. The evidence placed before the Judge disclosed the efforts made by the appellant's New York Attorneys to use communications that the appellant had been injuncted from using. The injunction imposed by Thompson, J was still in place as it had not been discharged by him or on appeal by an appellate court. The appellant was deemed to have notice of the Thompson injunction as it had been served not only on his Bahamian lawyers but his Canadian and United States lawyers pursuant to an order for substituted service.

59. The Thompson injunction provided for its discharge on an application made for that purpose. Instead of availing himself of that opportunity, the appellant initiated an action in a foreign jurisdiction and sought to employ a legal maneuver intended to circumvent the prohibition against the use of the Communications.

60. In **James Fleck v Pittstown Point Landings Limited** SCCivApp. No. 131 of 2019, Crane-Scott, JA discussed the need for the contempt to be disclosed on the evidence adduced; and said at paragraph 33:

33. We can do no better than reproduce with our approval the following paragraph taken from Borrie & Lowe: The Law of Contempt, 3rd Edition at page 560 where the applicable principles are summarized:

"Courts will not lightly hold that a contempt has been committed…Thus, although persons are under a duty to comply strictly with the terms of an injunction, the courts will only punish a person for contempt upon adequate proof of the following points. First, it must be established that the terms of the injunction are clear and unambiguous; secondly, it must be shown that the defendant has had proper notice of such terms; and thirdly, there must be clear proof that the terms have been broken by the defendant…"

61. It is evident that all of the conditions alluded to by the learned authors are present in the appellant's case, to wit, the Thompson injunction prohibited use of the Communications except in the proceedings in which it was granted or in Judicial Review Proceedings No. 12 of 2013 or unless the same was expressly authorised by the Applicants; substituted service was proven the appellant directly or through the agency of others supplied his New York lawyers with the Correspondence.

62. Suffice it to say, we are satisfied that the Judge did not fall into error when she found that the appellant breached paragraph 6(i) of the injunction.

Ground 1(b)

63. The Judge did not err when she made the hearing of further applications of the appellant conditional upon the payment of the respondents' costs in the committal proceedings. In my view, a party ought not to be subjected to the expense of repeated applications brought in proceedings where the issue sought to be litigated, in the main, has already been decided. However, if the court indulges the proposed applicant and is prepared to hear the future applications, it is an entirely proper exercise of the court's discretion to require the proposed applicant to pay for that privilege. This would be so whether it was on an application for security for costs or under the inherent discretion of the court to do justice to the parties.

64. It must be borne in mind that the summons was seeking an extension of time to prepare a plea in mitigation and submissions on sentencing when the appellant had already been granted almost a month to do so. He offered no reasonable explanation for his failure to prepare. Further, the motion sought to impugn proceedings that were completed for all intents and purposes.

65. We find that there is no merit in this ground; and, insofar as the appeal depends upon it for its success, it fails.

Ground 2 - The learned judge erred in law and in fact in imposing penalty upon the appellant in the sentencing order for not attending Court on the 14 November, 2019, as ordered by the Court, without first calling on him to show cause why he should not be cited for contempt or allowing him an opportunity to defend himself against claim of contempt and an opportunity to mitigate his contempt, should he be found in contempt of Court.

66. This ground faults the Judge for apparently punishing the appellant for a default not connected with a breach of the Thompson injunction. It does appear that by her inclusion of the following terms in her order:

> "**(i) make full written apology to the Court giving full and verifiable reasons <u>for his non-appearance</u>; and (ii) shall give written undertaking to Court to discontinue the use of the emails, the subject of the February injunction, in the New York proceedings;**
>
> **2. The first defendant <u>shall pay fine of five thousand dollars ($5,000.00) for every day the provisions of (i)</u> and (2) are not met."** (Emphasis added)

that the Judge punished the appellant for his non-appearance at the sentencing hearing on 14 November 2019.

67. The respondents contend that the Judge made no finding of contempt at the hearing on 14 November 2019. In the face of the Judge's order, we cannot agree with that contention.

68. It must be noted however, that the Judge had included in her 10 October 2019 order that the appellant was to be present on the adjourned date. He did not appear as ordered nor was any excuse for his absence provided to the Judge. This was a sufficient basis for the Judge to treat the appellant's non-appearance as a contempt committed in the face of the court and to punish him there and then for the contempt.

69. In **Balogh v. St. Albans Crown Court,** [1975] 1 Q.B. 73 at page 84, Lord Denning opined on the concept of a contempt "committed in the face of the court":

> **"It has never been defined. Its meaning is, I think, to be ascertained from the practice of the judges over the centuries. It was never confined to conduct which a judge saw with his own eyes. It covered all contempts for which a judge of his own motion could punish a man on the spot. So "contempt in the face of the court" is the same thing as "contempt which the court can punish of its own motion". It really means "contempt in the cognisance of the court"."** (Emphasis added)

70. Order 52, r 4 of the Rules of the Supreme Court expressly notices and preserves what Lawton, L.J., in **Balogh** described as "the common law right of a judge to make an order for committal of his own motion against a person guilty of contempt". O.52, r 4 reads:

> **"Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the Supreme Court to make an order of committal of its own motion against a person guilty of contempt of court."**

71. We appreciate that the jurisprudence suggests a move away from summary punishment of a person for a contempt in the face of the court so as to allow the contemnor an opportunity to prepare a plea in mitigation, but we are satisfied that where the action comprising the contempt is clear and unexplained, the court is entitled to move directly to impose such punishment on the contemnor as the contempt merits.

72. In the premises, there was no need for the Judge to wait before proceeding to impose sentence on the appellant for his failure to appear. Thus, we find no merit in this ground.

Ground 3 - The learned judge erred in law and in fact in using and or relying on facts or evidence in the contempt proceedings which were not admissible in such proceedings or part of the evidence therein.

73. The appellant posed the question: "Was the Judge in the Court below wrong in relying on facts or evidence not before the Court, such matters relating to her reference to pending cases where she claimed that the appellant was giving the excuse of being ill as a way of getting around attending Court or words to this effect?"

74. The court's attention was drawn to the appellant's history of apparently breaching court orders to attend at court. He failed to attend court on the following occasions: 30 October 2017; 28 September 2018; 21 January 2019; 28 January 2019; and 14 March 2019 (see the 7th affidavit of Martin Lundy, II).

75. Section 80 of the Evidence Act allows a court to take judicial notice of any matter it deems notorious.

> **"80. (1) The court shall take judicial notice of the following facts - (j) all notorious facts;"**

76. The failure of the appellant to attend court on previous occasions without a reasonable excuse for his absence in the court's opinion may form the basis for a more severe penalty. This is as true for civil punishments as it is for criminal punishments: see section 125 of the Penal Code.

Ground 4 - The learned judge erred in law and in fact in failing to grant to the appellant the adjournment sought by him on the 14 November, 2019, to prepare and advance his defence in the contempt proceedings and to have his strikeout motion heard, on the grounds or basis therein and hereinafter set out, and as preliminary to the hearing of any other matter in the contempt proceeding and in denying him an opportunity to prepare or fully prepare and advance his defence in such proceedings, and the appellant could not and did not as result of such denial advance his defence or full defence.

77. In accordance with the Court's ruling of 29 July 2020, this issue does not fall within the contemplation of the notice of appeal's grounds. Thus, it is dismissed.

Ground 5 a) - the Court lacked the jurisdiction to make such order, the alleged offence or violation of the order of the Court referred to in the respondents' Notice of Motion, if in fact there was such commission of an offence against or violation of such order, not having been committed within the jurisdiction of the Court

78. The evidence led before the Judge indicated that the Communications were between the respondents most, if not all, of whom are resident locally. There is no mention how or where Mr. Nygard, Attorney X or the lawyers for Mr. Nygard in the New York action came into possession of the e-mails. The Judge was entitled to infer that in the circumstances, the breach complained about, occurred within the jurisdiction. Moreover, the appellant had been prohibited from using the Correspondence by the Thompson injunction and he could not escape its effect, having submitted to the jurisdiction of the Bahamian courts when he entered an unconditional appearance to the proceedings, by publishing the impugned documents outside the jurisdiction.

79. Although the appellant may have held the view that Thompson, J lacked the jurisdiction to make the order that he did, it was incumbent on the appellant to obey it. As Romer LJ said in **Hadkinson v Hadkinson** [1952] 2 All ER 567 at page 569:

> **"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."**

80. The wording of the injunction was clear and precluded the appellant by paragraph 15(2)(a) from breaching the injunction even if the appellant was outside the jurisdiction.

Ground 5 b) - the appellant, nor anyone on his behalf or authorized by him, did not violate the injunction or order of the Court as alleged by the respondents or at all;

81. The fifth affidavit of Martin Lundy II disclosed sufficient evidence of the appellant's breach of the injunction. The appellant chose not to respond to the averments in that affidavit by filing an affidavit in response.

82. Facts contained in an affidavit are deemed to be admitted if no evidence is led by the other side to controvert them: **Louis M. Bacon v Sherman Brown and Steve McKinney** CLE/gen No. 503 of 2012; and **AG v MM Brokers Ltd** [1996] 50 WIR 462.

83. In **MM Brokers**, Ibrahim, JA opined at page 476 of his judgment that:

> **"In my opinion, the respondent in reply must deal with the facts alleged in the affidavit and his failure so to do will result in those facts not being in issue since they are deemed to be admitted."**

84. It is of note that Ibrahim, JA's judgment was a minority judgment.

85. In **Louis M. Bacon** (Supra) Madam Justice Charles was considering the timing of contempt proceedings, that is, whether they should occur before or after the substantive hearing and any possible prejudice that may arise in the hearing of the contempt issue before the substantive issue; and said at paragraph 115:

> **"[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."**

86. Charles, J had said earlier at paragraph 37:

> **"At the end of the day, the facts contained in the Ellis Affidavit are not in issue and are deemed to be admitted."**

87. Charles, J cited Ibrahim, JA's minority decision in **MM Brokers** as authority for this proposition.

88. We are satisfied that the evidence led before the Judge provided a very strong circumstantial case against the appellant and was of sufficient cogency to lead the Judge to make a finding of guilt based on the criminal standard of proof beyond a reasonable doubt.

89. Thus, there is no merit in this ground.

Ground 5 (c) - there has been no establishment of mens rea and proof beyond reasonable doubt

90. Motive is of no moment in an action for contempt nor is there any requirement to prove beyond a reasonable doubt or at all any mens rea on the part of the contemnor where the facts disclose that he has actually breached the terms of an injunction prohibiting an act : **Knight and Other and Clifton and Another** [1971] Ch. 700.

91. The facts in **Knight** are set out in the head note of the case and are, inter alia, as follows:

> **"In 1969 an interlocutory injunction was obtained by the plaintiffs restraining the defendants from, inter alia, doing any act which hindered or obstructed the plaintiffs in the free use of their alleged right of way over the defendants' field. After the third defendant in May 1970 ploughed up a stretch of the right of way the plaintiffs sought by notice of motion to commit him for contempt of the order. The third defendant denied that his actions had hindered the plaintiffs in their use of the way, or that he had intended deliberately to break the injunction, and after reading the affidavits and hearing the oral evidence of the third defendant Foster J. made no order save that the third defendant should pay to the plaintiffs their costs of the motion taxed on the common fund basis, and he stated that he did not find a contempt proved."**

92. The defendant appealed the award of costs to the plaintiffs despite his successful resistance to the contempt application; and the plaintiffs appealed against the judge's finding that no contempt had been proved. The appeal was allowed, and the cross appeal was dismissed. Still, Russell, LJ observed at page 721:

> **"Thus he had not had the benefit of the citation of the conflicting authorities touching on the willfulness question as regards which, in company with Russell L.J., I prefer those (for example, the *Mileage Conference case* (1966) L.R. 6 R.P.**

> **49) which hold that contumacity need not be proved. (In other words, <u>it is my view that when an injunction prohibits an act, that prohibition is absolute and is not to be related to intent unless otherwise stated on the face of the order</u>.)"** (Emphasis added)

93. In **Mileage Conference Group of the Tyre Manufacturers' Conference Ltd Agreement, Re (**1966) LRRP 49, a case involving, inter alia, the breach of an undertaking, it was held that a contempt had been established even though the acts were "**done reasonably and despite all due care and attention, in the belief based on legal advice, that they were not breaches**" (per Megaw, P at page 262).

94. In **The Crown v Poplar Borough Council (No.2)** [1922] 1 KB 95**,** various orders had been made against the Council and its Officers. Lord Sterndale, MR said at page 103:

> **"These are appeals from two orders of the Divisional Court, directing writs of attachment to issue against the metropolitan borough of Poplar and also against individual members of that council. In one sense, there is no substance in the appeals. But in other sense, there is considerable substance. The reason I say that in one sense there is no substance in them is that there is no question whatever that the individual members against whom the writs of attachment were issued, have not obeyed and have no intention of obeying the orders of the Court. The learned Lord Chief Justice has said that the individuals concerned have taken up the position they have from conscientious motives. have no wish in any way to differ from that statement, but think it is necessary to point out that that fact is quite immaterial. Unless and until the time comes when the law of this country is that person may disobey an order of the Court or the laws as much as he likes, if he does it conscientiously, the question of motive is immaterial. That is not the law at present."**

95. We find no merit in this ground.

6. The learned judge erred in law and in fact in failing to take into consideration the provision of the said February injunction which says that the injunction has no application to person or thing outside of the Bahamas expresses *(sic)* ***terms to such effect.***

96. This ground has no application to the appellant inasmuch as he entered an unconditional appearance in the proceedings in the court below and it was, he who was the target of the injunction. The appellant has submitted to the jurisdiction of the Bahamian courts. All

that was needed to be proved, therefore, was that he had disobeyed the terms of the injunction for him to be caught within its net.

7. The learned judge erred in law and in fact, in any event and without prejudice to the other grounds herein, by imposing the excessive terms set out in the sentencing order of 15 November, 2019, some of which are also unclear and requires construction or interpretation.

97. The sentence imposed by the Judge is a measured response to the contempt exposed by the facts of this case as revealed in the multiple affidavits of Mr. Martin Lundy II, particularly his fifth and sixth affidavits. The terms of the Judge's order are clear and brook no room for uncertainty.

98. In the case of **Thursfield v Thursfield** [2013] EWCA Civ 840 the Court of Appeal upheld the judge's approach, in treating the respondent's second failure to attend as an aggravating factor, observing that it was:

> **"repugnant to the proper administration of justice that a contemnor can flout orders of the court, then absent himself from the committal hearing, then avoid serving whatever prison sentence is imposed and then finally avail himself of the procedures of the Court of Appeal, whilst enjoying the shelter of some safe haven overseas"**.
>
> **8. The Learned Judge erred in denying the Appellant an opportunity to set aside the Ex parte injunction made against him on the ground that he never dealt with the documents or correspondence referred to in the said February injunction or any part of them and should have an opportunity to view the same and, if permitted in law, to consider the use of such documents or any part of them in his defence in this or any other action; and that the evidence did not disclose the true facts and were misleading.**

99. There is no merit to this ground.

100. In accordance with the Court's ruling of 29 July 2020, this issue does not fall within the contemplation of the notice of appeal's grounds. Thus, it is dismissed.

Conclusion

101. Notwithstanding the plethora of grounds crafted by the appellant, having read the transcripts, submissions, affidavits and authorities filed by the parties, we are satisfied that there is no basis upon which we should interfere with the discretion exercised by the

Judge in the circumstances of this case when she found that the appellant had committed a contempt of court. Moreover, the sentence imposed by the Judge is in our view, commensurate with the contempt proved. Keeping in mind the nature of the contempt (egregious and continuing) and the circumstances surrounding the contemnor, a wealthy man, for whom a hefty monetary penalty could not be regarded as inappropriate.

102. No complaint may be made that the Judge failed to afford the appellant an opportunity to make submissions in mitigation of any sentence she was minded to impose. The matter had been adjourned for a period of almost a month for that purpose. The appellant failed to avail himself of that opportunity but instead invested his time in an effort to dislodge There is no merit in this ground. applied for and were granted leave to serve the appellant by substituted service. Notices of the proposed committal proceedings were served on his local attorneys, his Canadian attorneys and his New York attorneys. There was no basis therefore for the allegation that the appellant had not been properly served with notice of the committal proceedings or with the notice of the sentencing and mitigation hearing.

103. In relation to the sentencing stage of the proceedings, no complaint of a lack of notice may be raised since Mr. Barry Sawyer was present albeit not participating in the committal hearing before the Judge, and his firm was on the record as the attorneys for the appellant at that time. Additionally, the appellant was deemed to have been served pursuant to the leave given the terms for substituted service and the fact that his lawyers in The Bahamas, Canada and the United States had been given notice.

104. In the premises, we find that the appellant is not entitled to the Orders he seeks, to wit:

> **"1) that the appellant has not violated the said February injunction or any part of it; or remitting this appeal to the Supreme Court to be retried by another Judge.**
>
> **2) That the appellant was entitled to an adjournment of the hearing as sought in the Court below and to be heard on his strike motion prior to the hearing of or dealing with any other matter in the contempt proceedings; and to in any event put forward his defence against the being found in contempt.**
>
> **3) Further or other relief as the Court may deem appropriate.**
>
> **4)** (sic) **Costs of the contempt proceedings in the Court below and on appeal, to be taxed if not agreed.**

105. Thus, the appeal is dismissed with costs to the respondents; such costs to be taxed if not otherwise agreed, sufficient for two Counsel.

The Honourable Mr. Justice Issacs, JA

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Jones, JA