COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 170 of 2018

B E T W E E N

DAVID E. CUMMINGS

AND

BRYAN MEYRAN

Appellants

AND

SUMNER POINT PROPERTIES LIMITED

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Roy Jones, JA

APPEARANCES: **Miss Travette Pyfrom for the Appellants**
Mr. Howard Thompson for the Respondent

DATES: **3 July, 2019; 30 July, 2020**

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Civil Appeal – Committal proceedings – Appeal from judge's finding of contempt – Contempt of court in connection with civil proceedings – O. 52 Rules of the Supreme Court – Enforcement of interlocutory injunction requiring defendant to abstain from doing specific acts until after the trial of the action or further order – Application for Committal to enforce Interlocutory Injunction Order – O. 45 r. 5(1)(b) Rules of the Supreme Court – Section 18 Buildings Regulation Act – Whether court's jurisdiction to hear committal proceedings ousted – Burden of proof – Sections 82 and 84 Evidence Act

In 2012, the respondent company commenced a Writ action in the Supreme Court against the first-named appellant for inter alia, wrongful entry upon sections of an area (approximately 15 acre tract of land) which the respondent claims to own on the island of Rum Cay and claimed damages for trespass and a permanent injunction to restrain the first-named appellant, his servants and agents from trespassing on the said tracts of land.

The respondent then obtained an urgent interlocutory injunction when the Writ action issued, against the first-named appellant restraining him, whether by himself, his agents, or howsoever otherwise, until after the trial of the action or further order from: (a) clearing any land or destroying any trees in "Parcel A"; and (b) clearing any land, destroying any trees, altering any roads, blocking or interfering with the normal usage of any roads, 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."

In or about May 2015, with the Injunction Order still in place, the respondent approached the judge by *Ex Parte* Summons seeking leave to commence proceedings for a committal order against both appellants for failing to comply with the Injunction Order. Having obtained leave, the respondent commenced committal proceedings under O 52 r. 2 RSC (1978) against both appellants.

After the hearing the judge found both appellants in contempt of court and subsequently set out her reasons for decision in a written ruling. The appellants now appeal that decision, each seeking an order from this Court setting aside the judge's decision to hold them in contempt of court, and an order requiring the respondent company to pay their costs of the appeal as well as in the court below.

Held: The first appellant's appeal is dismissed with costs to the respondent, to be taxed if not agreed. We remit the matter of his sentencing to the Supreme Court to determine whether the ultimate punishment of committal is warranted for the breaches of the injunction which occurred or alternatively, whether some lesser or alternative punishment should be imposed. The second-named appellant's appeal is allowed and he is awarded costs of his appeal together with his costs in the court below, to be taxed, if not agreed.

The judge's decision to hold the appellants in contempt of court should not be interfered with unless we are satisfied that the judge erred in principle by giving weight to something which she ought not to have taken into account or by failing to give weight to something which she ought to have taken into account; or her decision is plainly wrong.

The appellants both relied on section 18 as a defence in the committal for contempt hearings, however the section does not provide Cummings or Meyran with an answer to SPPL's Motion of 18 May 2015 which sought their committal to prison for contempt of court for having (during the course of proceedings pending before the Supreme Court) disobeyed the terms of the Injunction Order which had been served on both appellants and of which they were both aware.

Having examined the affidavits which were filed respectively by and on behalf of the respondent and the first-appellant (and which were before the learned judge in the court below) we are satisfied that there was more than sufficient evidence before the learned judge from which she could find that Cummings had firstly, been served with the Injunction Order and secondly, had personally operated heavy duty equipment and committed acts in breach the clear terms of the Injunction Order. We agree with the learned judge's finding that Cummings did not deny having assisted the Foundation in demolishing the buildings on Parcel B. Indeed, the several paragraphs of his

affidavit buttressed SPPL's case that Cummings had beyond reasonable doubt and with the necessary *mens rea*, committed the acts complained of in direct contravention of the clear prohibition contained in the Injunction Order.

While the Injunction Order may not have expressly forbidden Cummings from assisting anyone else in doing the acts specified at paragraphs (a) and (b) of the Order, we are satisfied that the inclusion in the Order of the words **"howsoever otherwise"** was wide enough to convey to all concerned that under no circumstances whatsoever was Cummings or anyone else to perform the several acts listed in the Order until after the trial of the action or further Order.

Although he admitted participating in the demolition works on Parcel B, Meyran denied doing so as an employee or agent of Cummings. Additionally, he asserted that the Injunction Order did not apply to him and accordingly, a knowing breach of the Order by him was not proved. As we see it, the contents of Meyran's affidavit made it incumbent upon SPPL to rebut the denials by establishing beyond reasonable doubt that Meyran was either a servant or agent of Cummings and had knowingly acted as an accessory to Cummings in breaching the Court's Order. SPPL filed no affidavit to rebut Meyran's assertions and in this regard, we agree with Ms. Pyfrom that the uncertainty which arose on the evidence as to whether Meyran was Cummings' employee or agent or not ought to have been resolved in his favour.

In the absence of rebuttal evidence from SPPL which would have established beyond doubt that Meyran was in fact Cummings' employee or agent, it is obvious that on the state of the evidence, the learned judge could not have been satisfied beyond reasonable doubt that Meyran was in fact aiding and abetting Cummings in breaching the terms of the injunction. In the circumstances, we are unable to agree with the judge's conclusion that Meyran was in contempt of court for breaching the Injunction Order.

Quite simply, we are satisfied that faced with the contents of Meyran's affidavit, SPPL failed to discharge its burden of proving to the requisite standard that Meyran had acted as Cummings' servant or agent in knowingly breaching the terms of the Injunction Order.

Bahamasair Holdings Ltd v. Messier Dowty Inc [2018] UKPC 25 considered
Birkett v. James [1978] 297 considered
Canadian Metal Co Ltd v. Canadian Broadcasting Corpn (No 2) (1975) 48 DLR (3rd) considered
Campbell v. Alexiou and others [2006] 3 BHS J No. 256 considered
Charles Osenton & Co v. Johnson [1942] AC 130 considered
Confederation of North, Central America & Caribbean Association Football v. Lisle Austin SCCivApp. No. 90 of 2011 considered
Cordiner, Petitioner (1973) JC 16 mentioned
Dean v. Dean [1987] 1 FLR 517 applied
Eastern Trust Co. v. McKenzie [1915] AC 750 distinguished
Hadkinson v. Hadkinson [1952] P 285 applied
Harding v. Tingey (1864) 12 WR 684 considered

Hood v. Lord Advocate [2014] HCJAC 85 mentioned
Re Bramblevale Ltd [1970] 1 Ch. 128 considered
Irtelli v. Squatriti et al (1993) QB 83 considered
Italya Head v. Forte Nassau Beach Hotel [1994] BHS J No. 139 considered
Isaacs v. Robertson [1985] 1 AC 97 mentioned
James Fleck v. Pittstown Point Landings Limited SCCivApp. No. 131 of 2019 mentioned
Peter Nygard v. Point House Corporation SCCivApp No. 214 of 2012 followed
R (on the application of Evans) v. Att. General [2015] UKSC 21 distinguished

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J U D G M E N T

Judgment delivered by The Honourable Madam Justice Crane-Scott, JA:

Introduction

1. This is an appeal from the entirety of an oral ruling made on the 29 June 2018 in committal proceedings in which Bain J. (now retired) found both appellants in contempt of court for having breached an interlocutory injunction which had been put in place until the outcome of a 2012 Writ action which was pending before her. The judge subsequently set out detailed reasons for her decision in a written ruling *("Ruling No. 4 – Committal Order")* dated 16 August, 2018 referenced in the Amended Notice of Appeal filed on 19 June, 2019.

2. The substantive 2012 Writ action is yet to be heard. Since its commencement on 19 October, 2012, it has been bogged down in the parties' numerous interlocutory skirmishes, some of which have been appealed, but which have contributed to the delayed progress of the Writ action to substantive trial in the Supreme Court.

Background to the appeal

3. The following chronology will set the stage for examination of the grounds of appeal.

4. The Writ action involves a claim by the respondent ("SPPL") against the first-named appellant ("Cummings") for, inter alia, wrongful entry upon sections of an approximately 15 acre tract of land ("Parcel B") which SPPL claims to own situate in the Southwestern district of the island of Rum Cay; for injury to SPPL's trees, plants and roadways and for the wrongful destruction of concrete pillars situated at the entrance to the remainder of an 80 acre tract of land ("Parcel A") owned by SPPL in the aforesaid district of Rum Cay.

5. In its Statement of Claim filed on 26 November, 2012, SPPL claimed damages for trespass and a permanent injunction to restrain Cummings, his servants and agents from trespassing on the said tracts of land.

6. On the same day as it filed its Writ, SPPL obtained urgent relief ("the Injunction Order") against Cummings in the form of an interlocutory injunction issued 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 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 Rum Cay and currently owned by the Plaintiff/Applicant, within the area described as "Parcel A" on the survey plan recorded as "Plan Number 11 Rum Cay", and connected buildings thereon.**
>
> **(b) Clearing any land, destroying any trees, altering any roads, blocking or interfering with the use of any 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/Applicant and himself dated 10th October, 2001 and recorded in the Registry of Records at 8327, Pages 42 to 53."** [Emphasis ours]

7. In October, 2012, Cummings applied to have the Injunction Order set aside. However, in a written decision ("Ruling No. 1") dated 30 September, 2014, the learned judge ruled that the status quo should remain and ordered the injunction to stay in place until the substantive hearing of the Writ action. Ruling No. 1 was never appealed.

8. On or about 6 May 2015, with the Injunction Order still in place, SPPL approached the judge by Ex Parte Summons seeking leave to commence proceedings for a committal order against both appellants for failing to comply with the Injunction Order. On 6 May, 2015, SPPL also filed the necessary Statement setting out, inter alia, the names, descriptions and addresses of the appellants as the persons who SPPL sought to have committed for contempt, together with the specific grounds on which the committal order was sought. The Statement was

supported (as required) by the affidavits of Robert Little Jr. and Benjamin Martin respectively, both filed on 6 May, 2015. An affidavit of K. Michael Bacon was subsequently filed on May 8, 2015; and a second affidavit of Robert Little Jr. on 11 August 2015.

9. Having obtained leave, SPPL commenced committal proceedings under O 52 r. 2 RSC (1978) against both appellants by way of its Notice of Motion filed 18 May 2015.

10. On 21 July, 2015, the appellants filed, inter alia, affidavits sworn by the first and second appellants respectively, each denying that they had breached the Injunction Order as alleged. Cummings deposed that save for the area which he occupied, he had no interest in the parcels of land which were the subject of the Writ action. In particular, he stated that he had no interest whatsoever in the 15-acre tract which he understood to be Crown land. Between paragraphs 15 through 29 of his affidavit, Cummings stated that he was aware that the Wahoo Foundation had been actively pursuing a Crown grant of the 15-acre tract and had been given the go ahead by the Ministry of Works to carry out specific work on the 15-acre tract.

11. At paragraphs 22 through 29 of his affidavit Cummings made the following sworn averments and admissions:

> **"22. The heavy equipment on the island is under my control. The Foundation trustees discussed how the clearing of the land was to take place and it was decided that *(sic)* most inexpensive way to accomplish this was by use of my equipment.**
>
> **23. <u>The request was then made for my assistance with clearing the land and preparing it for development</u>. This request was not an unusual one. I have over the past 12 years assisted with island clean up, clearing away debris, if I am on the island during hurricane, assisting with removal of potentially dangerous loose pieces of useless items. If it needed to get done and I was able to help, I offered my assistance.**
>
> **24. Before deciding to offer my assistance <u>I reviewed the injunction</u>.**
>
> **25. I was informed by the Foundation that the directive to demolish the building came from the Ministry of Works who according to the Foundation could in the circumstances legally give those instructions.**
>
> **26. <u>By offering my assistance I knew that the Ministry of Works was responsible for building control which included giving of instructions to the Foundation to demolish buildings on private and Crown land</u>.**
>
> **27. My involvement with the demolition of the buildings had nothing to do with me acting in my personal capacity. I did not employ any of the persons who assisted with the demolition. <u>I was of the belief that because the instructions to demolish came from the appropriate</u>**

government authority, the directive was a valid directive which could be acted upon.

28. I offered my assistance solely on the basis that the government could give the instructions it gave with respect to the land which I am advised is Crown land.

29. I did not and do not understand my assistance in carrying out a directive given by and on behalf of the Government of The Bahamas to be an act which was capable of placing me in breach of the terms of the injunction." [Emphasis ours]

12. In his affidavit, the second-named appellant ("Meyran") made the following sworn admissions:

> **"7. In 2013 I was dredging on the 15-acre tract when Bobby approached me and handed me a document which I looked at briefly and saw that it was an action between Sumner Point and Dave. Because I was not a party to the action I paid little attention to it. It had nothing to do with me. I was assisting the Wahoo Foundation. I spoke to Dave about the document and he told me that Sumner Point had gotten an injunction against him.**
>
> **8. I continued dredging on the 15-acre tract well into 2013. I had no reason to go on to the 80-acres tract nor did I go onto the 80-acre tract. In 2013 I heard no more from Bobby after he handed me the document.**
>
> **9. I arrived in Rum Cay in January 2015. I left for a week in February and have been on the island ever since.**
>
> **10. In January I was again involved in dredging work on the 15-acre tract using Dave's heavy equipment.**
>
> **11. Some of the work necessitated the removal of part of the original dock which was built by SPPL.**
>
> **12. On the 24 May 2015 I was served with the documents and the Affidavits by which Sumner Point seeks an order to commit me to prison for contempt.**
>
> **13. I am not an employee or agent of Dave nor has he employed me to carry out any work on the 15-acre tract nor do I represent or act for him in any other way.** [Emphasis ours]

13. The appellants also relied on an affidavit in reply sworn by Everett Hart who purported to be the President of the Wahoo Resort Foundation ("the Foundation".) The affidavit outlined the

Foundation's efforts since 2009 to obtain a Crown grant of a 15-acre tract of land at Sumner Point which Everett Hart understood to be the subject of SPPL's Writ action. The affidavit asserted that the 15-acre tract is Crown land and the Foundation had been given authority by the Minister of Works and Department of Works and Urban Development to enter upon, demolish and remove a dilapidated marina and other structures which had been erected on the tract.

14. In his affidavit, Everett Hart, also deposed that he became aware of the injunction when he enlisted Cummings' assistance in completing some of the said demolition works. Prior to approaching Cummings for assistance, Everett Hart said he had personally contacted Cummings' attorneys to inquire as to the status of the injunction which he believed had been issued against Cummings. According to Mr. Hart, Cummings' attorneys informed him that the action was to be settled and that the injunction would fall away.

15. At paragraphs 33 and 34 of his affidavit, Mr. Hart swore that when he enlisted Cummings' assistance on behalf of the Foundation in connection with the demolition works, he was unaware that there had in fact been two injunctions issued against Cummings in two separate actions relating to the same subject matter. He explained that in the belief that the injunction against Cummings had been discharged, the Foundation moved to have the demolition works carried out with Cummings' assistance and his expertise with heavy equipment.

16. The Hart affidavit sought firstly, to buttress Cummings' Defence in the Writ action that the disputed 15-acre tract of land the subject of the action (and to which the Injunction Order applied) was not the property of SPPL, but was rather Crown land; and secondly, to explain Cummings' role in the demolition of the marina and other structures as an agent of the Foundation which had received Ministerial authority to perform the works.

17. In short, the appellants' defence to SPPL's committal application was that it was the Wahoo Foundation which was responsible for demolishing the structures on the land in question. Furthermore, they claim they did not contravene the terms of the Injunction Order because the assistance which they each provided to the Foundation in connection with the demolition works on the 15-acre tract had been carried out for the Foundation pursuant to a valid directive given to the Foundation by the Government of The Bahamas.

18. In Meyran's case, he admits that the injunction was served on him, but says that the Order had nothing to do with him as he was assisting the Wahoo Foundation. Furthermore, he was not employed by Cummings to carry out any work on the 15-acre tract and did not act for him in any way.

19. The committal hearing came on for hearing on 2 September, 2015. At the outset, counsel for Cummings applied under the inherent jurisdiction of the court to discharge the Injunction Order on the basis of alleged material non-disclosure on the part of SPPL. The learned judge

deferred hearing of the Motion for committal and considered the application to discharge the injunction as a preliminary issue. Following a contested hearing on 2 and 3 September, 2015, the learned judge, in her written ruling ("Ruling No. 2") handed down on 26 October, 2015, dismissed the application to discharge the Injunction Order and gave directions for the continued hearing of SPPL's Motion for committal.

20. On 4 November 2015, Cummings applied to the judge by Summons supported by an affidavit of Edward Patrick Toothe filed on 6 November 2015 for leave to appeal Ruling No. 2. Following a contested hearing held on 23 November 2015, the learned judge handed down a written Ruling ("Ruling No. 3") dated 8th December, 2015 refusing leave to appeal for the reasons stated.

21. Cummings then applied to the Court of Appeal on file SCCivApp No. 284 of 2015 seeking the necessary leave to appeal Ruling No. 2. Based on our review of that file, the Motion for leave to appeal Ruling No. 2 was dismissed on 20 January, 2017 for non-compliance with the Registrar's Order made on 7/3/2016 and the relevant file closed. In the light of the dismissal of Cummings' leave to appeal application, we are satisfied that the Injunction Order which formed the basis of the Committal Order of 29 June 2018 and on which the judge's written ruling (Ruling No. 4) is based, was in full force and effect on 16 August, 2018 when the judge found both appellants in contempt of court.

22. Having refused leave to appeal Ruling No. 2, the learned judge resumed hearing of SPPL's Motion for committal on diverse dates until 29 June, 2018, when, as we noted, she found both appellants in contempt of court and subsequently set out her reasons for decision in her written ruling (Ruling No. 4) which is the subject of this appeal.

23. Between paragraphs 56 through 60 of Ruling No. 4 the learned judge summarized her conclusions and set out her findings as follows:

> **"(56) The court finds that the 1st Respondent and the 2nd Respondent cannot rely on the fact that they were assisting the Foundation in doing works that contravened the injunction or the fact that the Foundation was purportedly requested to demolish the buildings by the Minister of Works and Urban Development. The 1st Respondent was specifically enjoined whether by himself or his servants or agents from doing specific acts.**
>
> **(57) Evidence has been led to prove that the 1st Defendant breached the injunction. The 1st Respondent who used as a defence that he was assisting the Foundation and that the Foundation was authorized by the Minister to demolish the building and to clear the land did not deny these breaches.**

(58) The 2nd Defendant denied that he was the servant or agent of the 1st Respondent. The 2nd Defendant admitted that he was served with a copy of the injunction, but after noting that the injunction was between Sumner Point and the 1st Respondent he ignored the terms of the injunction.

(59) The court finds the 1st Respondent guilty of breaching the terms of the injunction and is in contempt of the court.

(60) The court finds the 2nd Respondent guilty of breaching the terms of the injunction and is in contempt of the court."

24. The appeal was listed on the Court's Cause List for substantive hearing on 3rd July, 2019. However, on 27 June, 2019 (some 5 days before the hearing) the appellants applied pursuant to rule 24(2) of the Court of Appeal Rules, 2005 by Summons for leave to adduce further evidence at the hearing of the appeal. The application was supported by an Affidavit-in-support of Virginia T. Bullard ("the Bullard affidavit") filed on the same day.

25. The further evidence which the appellants sought to place before us at the hearing consists of two legal documents related to an Adverse Claim filed on 26 January, 2018 in Supreme Court Quieting Action [2016/CLE/qui/01564] by the Prime Minister of the Commonwealth of The Bahamas in his capacity of Minister of Crown Lands. According to the Bullard affidavit, both documents contain evidence, which was not available at the committal hearing.

26. The first of the documents was a copy of the aforesaid Adverse Claim in which the Honourable Minister asserts his right on the Crown's behalf, to the beneficial ownership in fee simple of 5 lots of land the subject of a quieting Petition filed by Scott E. Findeisen and Brandon S. Findeisen, which lots, are said to form part of a larger tract of Crown land comprising 16.2 acres situated at "Signal Point" also called "Sumner Point" on the Island of Rum Cay, one of the islands of the Commonwealth of The Bahamas.

27. The second document which the appellant sought to put before us was the Affidavit of Thomas Ferguson, the Acting Surveyor-General of the Commonwealth of The Bahamas ("the Ferguson affidavit") filed on 18 February, 2019 in support of the Crown's Adverse Claim in the Quieting action. In the said affidavit, Thomas Ferguson, asserts the Crown's ownership of a 16.2 acre tract to the west of a larger tract of land, containing approximately 80 acres and more particularly shown on a plan MP 50 certified the 8 July 1806 which became vested in William Sumner under and by virtue of a Crown Grant K-90 dated 27 March, 1806.

28. At paragraphs 15 and 16 of the Ferguson affidavit, the Acting Surveyor-General refers to two more recent survey plans of Rum Cay supporting the Crown's claim that 3 of the 5 lots of land (the subject of the Quieting Action) (viz: lots 5, 9 and 10) are partially within the Crown Grant and partially within the 16.2 acres of Crown land; while the other 2 lots (viz: lots 2 and 3) are completely within the 16.2 acres of Crown land. The Ferguson affidavit also states that the Crown has been exercising every right as the owner over the 5 lots of land (the subject of the Quieting Action) and further, that the Crown had issued a licence to an entity, the Wahoo Resort Foundation.

29. We made no decision at the hearing in relation to the appellants' application to adduce further evidence, and deferred our decision on the matter until after we had heard the appeal.

30. Before we commence consideration of the various grounds of appeal, we remind ourselves that the ownership of the parcels of land described in the Injunction Order and the substantive issues which are in dispute in the 2012 Writ action (which is yet to be heard in the court below) are not issues before us. Rather, on this appeal, we are simply called upon to review the exercise of the learned judge's discretion in committal proceedings under O 52 r. 2 RSC (1978) to find the appellants in contempt of court.

31. As an appellate court we are not entitled to substitute our own decision for that of the judge merely because we would have exercised the discretion differently. Our function is primarily one of review. The judge's decision to hold the appellants in contempt of court should not be interfered with unless we are satisfied that the judge erred in principle by giving weight to something which she ought not to have taken into account or by failing to give weight to something which she ought to have taken into account; or her decision is plainly wrong. [See for example **Charles Osenton & Co v. Johnson [1942] AC 130**, 138 per Viscount Simon LC; and **Birkett v. James [1978] 297**, 317 per Lord Diplock. Further guidance may also be found in the recent Privy Council decision from this jurisdiction in **Bahamasair Holdings Ltd v. Messier Dowty Inc [2018] UKPC 25**.]

32. Against the foregoing background, we turn to examine the appellants' various grounds.

The Appeal

33. In their Amended Notice of Appeal filed on 19 June, 2019, the appellants each seek an order from this Court setting aside the judge's decision to hold them in contempt of court. They further seek an order requiring SPPL to pay their costs of the appeal as well as in the court below.

34. The appellants raise six (6) complaints about the learned judge's Ruling. Though lengthy we reproduce them below:

"1. The learned judge erred and misdirected herself in fact and law when she found that the Respondent's evidence satisfied the standard of proof required for contempt; proof beyond reasonable doubt. The learned judge ought to have found that the admission by the Wahoo Resort Foundation ("the Foundation") that it was given express authority by the Ministry of Works to remove the structure and that it took full responsibility for the removal of the derelict structures disproved both the *mens rea* and *actus reus* required to satisfy a charge of contempt.

2. On the evidence before the learned judge the Wahoo Resort Foundation was given express authority to carry out the relevant acts. The Foundation swore an Affidavit accepting liability for the removal of the structure and providing proof that it acted on the instructions of the Building Control Officer. The learned judge ought to have found that pursuant to section 18 of the Buildings Regulation Act Ch. 200 of the Statute Laws of the Bahamas the jurisdiction of the Court was ousted so that in the absence of proof of negligence the Appellants were protected from suit by virtue of the statutory protection against suit contained in the Act.

3. The learned judge's finding was against the weight of the evidence. The Appellants evidence established that there were several other persons employed by the Foundation who took part in the removal of the derelict structures. The Respondent called no evidence to rebut the Appellants' evidence that they acted as agents of the Foundation. At the close of the Respondent's case the question of who was responsible remained unanswered. The learned judge ought to have found that the nature of contempt charge required the guilt of the Appellants to be proved with such strictness of proof as is consistent with the test of beyond reasonable doubt in accord with the decision in *Re Bramblevale Ltd [1970] 1 Ch 128***.**

4. The learned judge failed to give proper or adequate consideration to the presumption contained in Section 81 of the Evidence Act.

5. The entirety of the Appellants' evidence was unchallenged. The learned judge in finding as she did preferred the Respondent's Affidavit evidence which is in direct contradiction with the principle of law that disputed questions of fact cannot be resolved on Affidavit evidence. The learned judge erred in law, fact and procedure in deciding as she did in circumstances where the facts remained in dispute at the close of the parties' case.

6. The learned judge at paragraph 28 of her judgment found *"that as the facts in the Affidavits…were not specifically denied or controverted, the facts are deemed to be admitted."* **Having found the facts admitted by both parties the learned judge ought to have dismissed the application against the Appellants. It is perverse to accept the Appellants' evidence as containing facts admitted by the Respondent but find against the unchallenged accepted facts."**

Discussion

35. As we see it the six grounds of appeal may conveniently be distilled and considered under the following broad headings: (i) The ouster of jurisdiction point – (ground 2); and (ii) errors in the judge's exercise of the Supreme Court's contempt of court jurisdiction; including evidential errors leading to an erroneous finding of guilt against each appellant – (grounds 1, 3, 4, 5, 6).

36. Ground 2 will be examined ahead of the other five grounds as it involves a challenge to the judge's jurisdiction and requires a determination of whether (as the appellants contend) section 18 of the Buildings Regulation Act, Ch. 200 ousted the jurisdiction of the Supreme Court to exercise its contempt jurisdiction.

Ground 2 – The ouster of jurisdiction point

37. The thrust of the appellants' complaint on ground 2 is that the judge failed to have regard to section 18 of the Buildings Regulation Act, Ch. 200 which, in Miss Pyfrom's view, operated to oust the jurisdiction of the Supreme Court to find the appellants in contempt of court.

38. Section 18 of the Buildings Regulation Act provides:

> **"18. No action shall lie against the Crown, the Minister, the Building Control Officer or any person acting under the authority of the Minister in respect of any loss or damage whatsoever suffered by any person through the exercise in good faith, by the Minister, the Building Control Officer or by such person of the powers conferred upon them by this Act, save only in respect of any loss or damage which arises directly from the negligence of the Minister, the Building Control Officer or of any such person as aforesaid in the carrying out of any operation in the exercise of these powers."** [Emphasis ours]

39. Miss Pyfrom submitted that the judge had before her affidavit evidence filed by the appellants opposing the Motion for committal which established that the Wahoo Resort Foundation had been issued with an authority under the Buildings Regulation Act to carry out specific demolition works on the 15-acre tract ("Parcel B") over which SPPL claimed ownership and that the Foundation had acted on the instructions of the Building Control Officer in performing the works. In the face of that evidence, she contended, the learned judge ought to have found that her jurisdiction had been ousted and that in the absence of proof of negligence, the appellants were protected from suit by virtue of the statutory defence contained in section 18 of the Act.

40. In response, Counsel for the respondent, Mr. Thompson, submitted that section 18 could not be interpreted as having ousted the contempt of court jurisdiction of the Supreme Court in

circumstances such as these. He contended that it was Cummings (not the Foundation) who had been expressly restrained by the broad terms of the Injunction Order from doing certain acts pending the substantive trial of the Writ action or until further order. Furthermore, both appellants had been served with a copy of the Injunction Order and bore responsibility for the role they had played in disobeying the clear terms of a Supreme Court order of which they were both aware.

41. As for the appellants' claim that they could not be held in contempt because they had acted under an authority issued by the Ministry of Works under the Buildings Regulation Act which authorized the Foundation to carry out specific demolition works on the 15-acre tract, Mr. Thompson submitted that to construe section 18 as having ousted the contempt jurisdiction of the Supreme Court, would effectively permit the Ministry of Works to set at nought an order of the Supreme Court. Such a result would, in his view, undermine the rule of law and the separation of powers which underpinned the foundations of our constitutional democracy. He relied on the authority of **Eastern Trust Co. v. McKenzie** [1915] AC 750 and **R (on the application of Evans) v. Att. General** [2015] UKSC 21.

42. We have considered the contending submissions in relation to the alleged statutory ouster of the court's jurisdiction. The first point to be made is that upon an ordinary reading of section 18, the section is very obviously intended to create (save for loss or damage arising directly from negligence) a statutory defence to any "action" instituted by a person in respect of any "loss or damage" against a person who has acted pursuant to an authority issued in good faith, inter alia, by the Minister responsible for Building Regulation in the exercise of powers conferred by the Act. Section 18 operates to give, as it were, statutory cover or protection (save for loss or damage arising directly from negligence) to anyone who has acted pursuant to an authority lawfully issued under the Buildings Regulation Act.

43. As noted, SPPL's Writ action was instituted against Cummings for wrongful entry upon sections of an approximately 15-acre tract of land ("Parcel B") and for damages in trespass for injury to SPPL's trees, plants and roadways and the wrongful destruction of concrete pillars situated at the entrance to the remainder of an 80 acre tract of land ("Parcel A") in the aforesaid district of Rum Cay.

44. At the committal proceedings, Miss Pyfrom (as she did at the hearing before us) relied on evidence of an exchange of letters between the Wahoo Resort Foundation and the Department of Works exhibited with the affidavits of Everett Hart, in an effort to establish that Cummings was not liable for the "loss and damage" suffered by the SPPL inasmuch as permission to remove the dilapidated structures situated on the 15-acre tract at Sumner Point Marina ("Parcel B") had been given to the Wahoo Resort Foundation in accordance with the Act.

45. With respect, Miss Pyfrom's submission on this ground is somewhat of a red herring.

46. Section 18 (as it clearly states) is a defence to a substantive "action" involving a claim for loss or damage suffered as a result of actions taken pursuant to a permission issued in good faith pursuant to powers conferred under the Buildings Regulation Act. The section is not intended, and cannot operate to prevent a judge from exercising the inherent power of the Supreme Court in committal proceedings under O. 52 r. 1 to punish persons for contempt of court committed in connection with civil proceedings pending before the Court.

47. As we see it, whenever SPPL's Writ action ultimately comes on for substantive trial, the fact that governmental authority for the demolition of dilapidated structures on the 15-acre tract ("Parcel B") had been given to the Wahoo Resort Foundation under the Buildings Regulation Act, may well provide Cummings with the opportunity to invoke section 18 as a defence to SPPL's claim. However, the section does not provide Cummings or Meyran with an answer to SPPL's Motion of 18 May 2015 which sought their committal to prison for contempt of court for having (during the course of proceedings pending before the Supreme Court) disobeyed the terms of the Injunction Order which had been served on both appellants and of which they were both aware.

48. Between paragraphs 38 through 51 of her Ruling, the learned judge set out the reasons for her ultimate finding (at paragraph 51) that section 18 of the Buildings Regulation Act did not oust her jurisdiction to hear the committal application. She referred to section 10 of the Act and founded her jurisdiction to hear the Motion for committal upon her being satisfied that inasmuch as the Building Control Officer and/or the Minister had failed to comply with section 10, the appellants could not rely on the statutory defence in section 18.

49. In our view, it was unnecessary for the learned judge to assume jurisdiction to hear SPPL's committal application by such a circuitous route. All that was required of her was to interpret the clear words of section 18 of the Act to determine whether what was before her was an "action" to recover "loss and damage" within the meaning of the section or was (as the Motion itself states) an interlocutory application in civil proceedings for committal under O 52 RSC 1978.

50. The power of the Supreme Court to punish for contempt of court by way of an order of committal is located within O 52 RSC 1978. Insofar as is relevant to this appeal, O 52 r. 1 provides:

> **"1. (1) The power of the Supreme Court to punish for contempt of court may be exercised by an order of committal.**
> **(2) <u>Where contempt of court</u> -**
> **(a) <u>is committed in connection with</u> -**
> **i) <u>any proceedings before the Supreme Court</u>; 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 of committal may be made by the Supreme Court.**
>
> **(3) <u>Where contempt of court is committed in connection with any proceedings in the Supreme Court</u>, then, subject to paragraph (2), an order of committal may be made by <u>a single judge of the Supreme Court</u>.**
>
> **(4) Where by virtue of any enactment the Supreme Court has power to punish or take steps for the punishment of any person charged with having done anything in relation to a court, tribunal or person which would, if it had been done in relation to the Supreme Court, have been a contempt of that Court, an order of committal may be made by a single judge of the Court.** [Emphasis ours]

51. Although we do not agree with the route which the learned judge took to assume jurisdiction to hear the Motion for committal, she undoubtedly reached the right conclusion and was correct to find (as she did) that section 18 did not oust her jurisdiction to hear the committal application.

52. We pause here to observe that the inherent power of the Supreme Court to punish for contempt of court in The Bahamas is still largely derived from the common law inasmuch as there is, as yet in this jurisdiction, no equivalent to the English Contempt of Court Act, 1981. As just noted, O 52 r. 1 RSC (1978) expressly provides that the power of the Supreme Court to punish a person for contempt of court may be exercised **"by an order of committal"**.

53. In England, the power has been described as ***"an inherent and necessary one, to vindicate the authority of the court and to preserve the due and impartial administration of justice."*** It has relatively recently, also been described as ***"an essential tool for the discouragement of attempts to pervert the course of justice."*** [See **Cordiner, Petitioner** (1973) JC 16 at p. 18; and **Hood v. Lord Advocate** [2014] HCJAC 85 at para 6.]

54. Similar sentiments have been expressed in this jurisdiction by courts at different levels and all underscore the crucial importance of strict obedience to the lawful orders of the court. In **Italya Head v. Forte Nassau Beach Hotel** [1994] BHS J No. 139 for example, while not made in the course of committal proceedings, Osadebay J (ag) (as he then was) issued a stern reminder to litigants upon it being brought to his attention that an interlocutory injunction which he had earlier issued may not have been complied with. The learned judge warned:

> **"9. Let me state that Counsel for the Plaintiff has brought to my attention the non-compliance by the Defendants with this Court's Order. I wish to state that <u>compliance with Orders of the Supreme Court should not be a matter of choice. Every Order is valid and must be obeyed until set aside.</u> The sanction which non-compliance carries**

may be drastic. I say no more on that (See *Isaacs v. Robertson* cited above).” [Emphasis ours]

55. In similar vein, in **Campbell v. Alexiou and others** [2006] 3 BHS J No. 256, Supreme Court Justice, Allen J (as she then was) declared:

> **“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 specified time and as Romer LJ said in *Hadkinson v. Hadkinson* [1952] P 285 at 289-**
>
> > **“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.”** [Emphasis added]

56. At the appellate level, in **Confederation of North, Central America & Caribbean Association Football v. Lisle Austin** SCCivApp. No. 90 of 2011 this Court (differently constituted) unanimously underscored the pernicious effect of contempt of court on the administration of justice and the rule of law. Writing for the Court, John and Conteh, JJA observed:

> **“79. …It is unarguable that contempt of court is insidious and ultimately destructive of the rule of law, pernicious of the due process of law and a very grave threat to the proper administration of justice. It is a phenomenon courts are familiar with, and it takes many forms and manifestations….**
>
> **80. Because of the effect of contempt of court on the administration of justice generally, superior courts have for a long time been imbued with the power to deal with it, sometimes peremptorily. This power is inherent in the jurisdiction of superior courts and by virtue of this jurisdiction they have the widest power to deal with contempt of court, and to administer condign punishment as the circumstances warrant. This may range from fines, imprisonment, and sequestration of assets, and in appropriate cases, a refusal of audience to a contemnor, especially one who seeks some benefit or relief from the court while in contempt.”** [Emphasis ours]

57. The *Ex parte* Order of 15 May, 2015 which granted SPPL leave to commence committal proceedings clearly stated that SPPL was granted leave pursuant to Order 52, r.2 (2) to make an application to the Supreme Court for an Order of Committal to Her Majesty’s Prison of

the first and second appellants, **"for failing to comply with an Order of the Supreme Court dated 19 October, 2012 and filed in the action herein on 22 October, 2012."**

58. SPPL's Motion for committal is clearly not an ***"action"*** to recover ***"loss and damage"*** which would fall within the statutory prohibition envisaged by section 18. The Motion is, rather, an application under O. 52, r. 2 (2) seeking an order for committal and invoking the inherent jurisdiction of the Supreme Court to punish the appellants for contempt of court, more specifically, for breaches of the Injunction Order alleged to have been committed by the appellants in connection with the pending Supreme Court proceedings.

59. We therefore agree with counsel for the respondent, Mr. Thompson, that inasmuch as SPPL's Motion was on its face filed in accordance with O 52, r. 2(2) to enforce the terms of the Injunction Order issued in extant proceeding before the Supreme Court, section 18 does not apply; and more importantly, could not oust the jurisdiction of the Supreme Court to hear the Motion.

60. Before leaving this ground, we should say that we did not find the England and Wales Court of Appeal decision in **Evans** *(above)* cited by Mr. Thompson particularly helpful to us as it is obviously distinguishable both on the facts and on the law from the circumstances of the case before us. The Privy Council decision in **Eastern Trust Company** *(above)* is also distinguishable inasmuch as it involved the construction of a proviso in a written contract as opposed to the interpretation of a statutory provision.

61. That said, we nonetheless found the decision in **Eastern Trust** useful in the light of the Board's views concerning the jurisdiction which courts have historically exercised over parties to litigation to grant interim relief in the form of an injunction to preserve the subject matter of the action until the rights of the parties can be finally determined. Additionally, the Board's views regarding the liability of a party to litigation to be found in contempt of court for breaching the terms of an interim injunction were most instructive. Delivering the Board's decision, Sir George Farwell had this to say:

> **"…<u>the injunction was, of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged</u>, and although it could not bind the Government not to pay or make the Government responsible for that obedience to the law which the Court was entitled to expect, <u>the man who received in breach of the order was guilty of contempt in no way cured by the payment by the Government</u>…their Lordships are of opinion that the order to attach Hervey for contempt was rightly and properly made. <u>An injunction, although subsequently discharged because the plaintiff's case failed, must be obeyed while it lasts</u>; it is clear that if a claimant to an inalienable Government pension succeeded in persuading the Court in this country that he had a prima facie claim to it, and obtained an interim injunction, the true owner of the pension could be committed for contempt if he received his money in defiance of the order,**

> **although the Crown was no party to the litigation, and paid in disregard or ignorance of the order."**[Emphasis added]

62. In the end, we are satisfied that there is no merit in ground 2 which is dismissed.

Grounds 1, 3, 4, 5, 6 - Miscellaneous errors in judge's exercise of the Supreme Court contempt of court jurisdiction; and evidential errors leading to an erroneous finding of guilt

63. These five grounds systematically attack the judge's finding of contempt against both appellants and suggest ways in which the learned judge had, in the appellants' view, erred in the exercise of the power of the Supreme Court to find them in contempt of court.

64. There was obvious overlap between the grounds, particularly as they related to: (i) the standard of proof required for a finding of contempt; (ii) the *mens rea* and *actus reus* required to satisfy a charge of contempt and (iii) the evidence on which the judge relied to sustain her finding of contempt against each of the appellants.

65. The thrust of Miss Pyfrom's submission on ground 1 was that at the committal hearing there were affidavits before the learned judge which established that the Wahoo Foundation had taken full responsibility for entering the 15-acre tract at Sumner Point ("Parcel B") and demolishing and removing the structures under the authority of the Minister of Works. Both Cummings and Meyron also admitted that they had assisted the Foundation in performing the works. In the face of these admissions, Miss Pyfrom contended that the judge's finding that that the appellants had breached the Injunction Order and were in contempt of court was erroneous in law and in fact since the Foundation's involvement in the demolition works disproved both the *mens rea* and *actus reus* of the alleged contempt.

66. The complaint on ground 1 also overlapped with grounds 3, 4, 5 and 6, all of which questioned the standard of proof which the judge employed and the evidential basis on which she arrived at her decision that the appellants (rather than the Foundation) had breached the injunction and were in contempt. In the face of the admissions by the Wahoo Resort Foundation that it had taken full responsibility for the acts complained of, Miss Pyfrom contended that the learned judge could not have been satisfied beyond reasonable doubt that either of the appellants had committed the *actus reus* with the requisite *mens rea* to justify her finding that they were both in contempt.

67. In relation to ground 4, Miss. Pyfrom submitted that the learned judge had failed to give proper or adequate consideration to section 81 of the Evidence Act, Ch. 65. She submitted that SPPL had neither refuted the appellants' affidavit evidence that they had acted as agents of the Wahoo Foundation in assisting in the demolition works, nor the evidence of Everett Hart who claimed that the demolition work had been performed by the Foundation under an authority lawfully issued by the Minister under the Buildings Regulation Act.

68. Additionally, Miss Pyfrom submitted that as there had been no cross-examination on any of the parties' filed affidavits, it was not possible for the judge to determine beyond reasonable doubt whether a contempt of court had occurred. In support, she cited the cases of R**e Bramblevale Ltd** [1970] 1 Ch. 128; **Confederation of North, Central America & Caribbean Association Football v. Lisle Austin,** SCCivApp No. 90 of 2011; **Peter Nygard v. Point House Corporation** SCCivApp No. 214 of 2012; and **Irtelli v. Squatriti et al** (1993) QB 83.

69. For his part, counsel for SPPL, Mr. Thompson submitted that the substantive dispute as to the ownership of the 15-acre tract was precisely why the judge had in 2012 issued the interlocutory Injunction Order, namely, to preserve the *status quo* until the substantive trial and determination of the Writ action. Furthermore, he contended, the evidence was that with full knowledge of the terms of the Injunction Order, Cummings had supplied the heavy duty machines and equipment that were used to destroy the marina and, even more egregiously, operated the equipment on the 15-acre tract in direct contravention of the injunction of which he was aware.

70. Cummings, he said, could not rely on the assertion in his affidavit that he was not acting in his personal capacity, but rather as an agent of the Wahoo Foundation in order to thwart the court's processes and shield him from liability for the part he had played in flagrantly breaching the clear terms of the Injunction. He cited in support the cases of **Italya Head v. Forte Nassau Beach Hotel** [1994] BHS J No. 139 and **Isaacs v. Robertson** [1985] 1 AC 97.

71. Before we examine the correctness (or otherwise) of the judge's findings, it is useful to advert to some broad principles governing the contempt of court jurisdiction. The general rule is that any person who is enjoined by an order of the Supreme Court which expressly requires him to do a specific act, or to refrain from doing a particular act, must strictly observe the terms of the injunction. In **Harding v. Tingey** (1864) 12 WR 684, Kindersley V-C expressed the rule in the following terms:

> **"…it is of the greatest importance that either an order for an injunction or an interim order should be implicitly observed, and every diligence exercised to observe it."**

72. Notwithstanding the general rule, the courts will not lightly hold that a contempt has been committed and will only punish a person for breaching the terms of an injunction, where the breach has been established by clear evidence beyond reasonable doubt. In the **CONCACAF v. Lisle Austin** appeal referred to above, this Court (differently constituted) unanimously stated:

> **"44. Contempt of Court is a grave matter with serious consequences for the contemnor, but the law requires that proof of it be established**

> **by clear evidence beyond reasonable doubt. Other than a manifest and clear contempt in the face of the Court, contempt of Court is not to be inferred or assumed. <u>It must be established by clear evidence so as to make the court feel sure that there has been an irrefutable disobedience of its Orders</u>."** [Emphasis ours]

73. In **Peter Nygard v. Point House Corporation** *(above)* this Court (differently constituted) unreservedly approved the following dictum of Stephen Brown LJ in **Dean v. Dean [1987] 1 FLR 517** who said:

> **"It is clear that the principle that a contempt must be proved beyond reasonable doubt is settled law…<u>a contempt must be established to a degree of conviction appropriate to an offence of a criminal character</u>."** [Emphasis ours]

74. Committal proceedings for contempt of court are undoubtedly very serious; they essentially involve the exercise of the power of the Supreme Court to commit persons to prison, thereby depriving them of their property or liberty. At pages 557 and 558 of their text *Borrie & Lowe, The Law of Contempt*, 3rd Edition, published in 1996, the learned authors had this to say:

> **"The contempt remedy is a drastic one (those adjudged to have committed civil contempt can be imprisoned, fined or have their property sequestered) and it should not be readily resorted to as a means of enforcing court orders…At best contempt is a blunt weapon by which to enforce obedience and those wishing or having to maintain a relationship after the court hearing, for example members of a family or those in an industrial relationship should think hard before invoking the contempt process….Civil contempt provides the means by which an individual can, in his own interests and if he chooses to, seek to enforce a court order made in his favour. <u>In many ways, therefore, this branch of contempt law exists to protect the private interests of litigants, and its prime function is coercive rather than punitive</u>. However, <u>the underlying object of this aspect of contempt law</u>, even when invoked in the normal context of a private dispute between two litigants who hope and intend never to cross each other's paths again, <u>is to protect the public interest, namely that every court must have the means of enforcing its own orders</u>."** [Emphasis ours]

75. In the Ontario authority of **Canadian Metal Co Ltd v. Canadian Broadcasting Corpn (No 2)** (1975) 48 DLR (3rd) 641 at 669 O'Leary J made the following observations about the rationale underlying the power of court to punish for contempt with which we unreservedly agree:

> **"To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn…<u>If the remedies that the courts grant to correct…wrongs can be ignored,</u>**

> **then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result in the destruction of our society."** [Emphasis ours]

76. Over time, common law courts have developed a number of considerations to guide to how the jurisdiction to commit for contempt is to be exercised. Where the contempt relates to a breach of injunction, five matters ought to be established before a finding of contempt is made. In *Borrie & Lowe, The Law of Contempt, (above)* page 560 the applicable principles are identified as follows: (i) the terms of the injunction must be clear and unambiguous; (ii) The defendant must have proper notice of the terms of the injunction; (iii) The breach must be proved beyond all reasonable doubt; (iv) What *mens rea* is required?; and (v) who is responsible for the breach?

77. We turn to consider each of these matters *vis-à-vis* each of the appellants.

David Cummings

78. In our view, there is absolutely no doubt as to the scope of the injunction which was clear and unambiguous and expressed in very broad terms. As the Injunction Order reproduced at paragraph 6 above clearly states, Cummings, was expressly restrained whether by himself, his agents **"or howsoever otherwise"**, from doing the specific acts identified at sub-paragraphs (a) and (b) of the order **"until after the trial of this action or further order".**

79. There is also no doubt that Cummings, was aware of the fact that an injunction in the foregoing terms had been issued by a judge of the Supreme Court and was in place. According to the affidavit of Robert Little Jr, Cummings was personally served with a copy of the order on 21 October 2012 by Police officer Charles Edun of Rum Cay. Cummings' knowledge of the injunction and its terms is confirmed in his affidavit of 19 August 2015, the relevant portions of which were extracted in the learned judge's Ruling as well as at paragraph 11 above.

80. Additionally, as appears from the correspondence which ensued between the parties' legal representatives in May 2013 (referred to in, and exhibited to Robert Little Jr's affidavit of May 6, 2015) Cummings was not only aware of the terms of the injunction, but as his legal representatives stated in their letter of 15th May, 2013, he was of the opinion that the Injunction Order was unlawful inasmuch as it was his view that SPPL was not the owner of the 15-acre tract (Parcel "B").

81. We turn next to consider whether the affidavit evidence before the court was such that the learned judge could, to the requisite standard, feel sure that Cummings had irrefutably disobeyed the terms of the Injunction Order which she had put in place in 2012.

82. The affidavits of Robert Little Jr filed on 19 October, 2012 and 6 May, 2015 contained evidence which alleged that Cummings and a team of men led by him had been seen in the early days of October 2012 operating a tractor and heavy equipment to clear large sections of Parcel B in direct contravention of paragraph (b) of the Injunction Order. In particular, Mr. Little stated that he had personally seen Cummings operating a tractor and destroying a line of trees on areas situated within Parcel B.

83. Numerous photographs exhibited with Robert Little's October affidavit also confirmed the presence of heavy machinery and sand blocking and impeding normal access to SPPL's marina situated on Parcel B in direct contravention of paragraph (b) of the injunction.

84. The learned judge also had before her an affidavit filed on 8 May 2015 sworn by one K. Michael Bacon in support of SPPL's application. The affidavit contained between paragraphs 5 through 11, eye-witness evidence of Cummings' participation between January 2015 through May 2015 in the demolition of trees as well as the Marina complex and cottages situated on Parcel B, again in direct contravention of paragraph (b) of the Injunction Order.

85. We extract paragraphs 7 through 10 of the Bacon affidavit which largely corroborate Robert Little's allegations and speak for themselves:

> **"7. I left Rum Cay on or about 2nd February, 2015 but returned on 27th March, 2015 this year. At the time, the Restaurant was still intact. Shortly after I arrived, I saw Mr. Cummings and a group of men I believe to be his workers carrying out more activities at the Marina Complex. On or about 9th April 2015, from the cockpit of my boat, I saw two locals dismantling the wood covers for two seating areas on the southern dock across from the Restaurant. My boat at the time was roughly 70 feet from the area where the work was being done. Mr. Cummings was nearby, sitting on his small trackhoe moving sand material and at times watching this ongoing operation.**
>
> **8. On or about 25th April, 2015, while walking into town, I observed Mr. Cummings and several locals begin demolishing the small cottage closest to the "Kalik House" using the smaller trackhoe. By the end of that day all the cottages had been torn down. Although I did not personally see Mr. Cummings demolish the other three cottages, I assume he continues with the activities I had witnessed earlier in the day.**
>
> **9. On 25th April, 2015 I heard a loud noise while inside my boat, came up from below and I personally observed Mr. Cummings, operating the large trackhoe demolish the Restaurant, I had a clear view of what was taking place from the cockpit of my boat at the Marina Complex; this work being no more than 70 feet away.**
>
> **10. At the beginning of this week I observed Mr. Cummings operating the small trackhoe attempting to tear up the foundation of the**

Restaurant. I also saw Mr. Cummings using heavy equipment to uproot electrical cables from the small electrical building bay side north of the docks…"

86. Further evidence of interference by both Cummings (and Meyran) with SPPL's access to the marina complex as well as evidence of the complete destruction of the marina complex on Parcel B in direct contravention of the Injunction Order is found in paragraphs 29 and 30 of Robert Little Jr.'s affidavit of 6 May 2015 which stated, *inter alia*, as follows:

> **"29. As indicated earlier, during the last ten days or so, Mr. Cummings, with the help of Meyran and his other workers, has torn down:**
>
> **29.1 "Out of the Blue Restaurant" and the living quarters upstairs and storage area;**
> **29.2 the remaining dockage on the west of the Marina office;**
> **29.3 the four fully furnished beach cottages;**
> **29.4 the fully furnished "Kalik House";**
> **29.5 the unfinished two-storey structure behind "Kalik House";**
> **29.6 the fire pit at the Marina Complex containing a large stone oven; and**
> **29.7 the pavilions and related facilities, such as power lines, water lines, feeding docks and shade huts.**
>
> **30. The Marina Complex has been completely decimated. Almost nothing remains. All of the buildings my father constructed and which Mr. Cummings (sic) expressly prevented from damaging by the Order, are now gone. Mr. Cummings has now taken full control of the area, which is unrecognisable from the Marina Complex that existed only a few months ago."**

87. Between paragraphs 21 through 29 of his affidavit-in-response filed on 19 August, 2015 Cummings admitted dredging the harbour and removing sand build-up to the entrance to the marina in accordance with a permit issued by the Department of Physical Planning as he had been doing every year since 2011. Cummings stated that his activities on the 15-acre tract were limited to dredging of the harbour and removal of sand and that those activities were not covered within the terms of the Injunction Order.

88. However, in answer to SPPL's allegations that Cummings had personally operated the tractors and performed much of the demolition works himself with full knowledge of the terms of the Injunction Order, Cummings stated that the injunction had not prohibited

dredging. He further denied that he had breached the terms of the Injunction Order as he understood it and made the following averments:

> **"21. The Foundation was advised that there was no injunction restraining me, my servants and agents from carrying out certain activities on the 15-acre tract.**
>
> **22. The heavy equipment on the island is under my control. The Foundation trustees discussed how the clearing of the land was to take place and it was decided that the most inexpensive way to accomplish this was by use of my equipment.**
>
> **23. The request was then made for my assistance with clearing the land and preparing it for development. The request was not an unusual one. I have over the past 12 years assisted the island during hurricane, assisting with removing of potentially loose piece of useless items. If it needed to get done and I was able to help I offered my assistance.**
>
> **24. Before deciding to offer my assistance <u>I reviewed the injunction</u>.**
>
> **25. I was informed by the Foundation that the directive to demolish the building came from the Ministry of Works who according to the Foundation could in the circumstances legally give those instructions.**
>
> **26. By offering my assistance I knew that the Ministry of Works was responsible for building control which included giving of instructions to the Foundation to demolish buildings on private and Crown land.**
>
> **27. <u>My involvement with the demolition of the buildings had nothing to do with me acting in my personal capacity. I did not employ any of the persons who assisted with the demolition</u>. I was of the belief that because the instructions to demolish came from the appropriate government authority, the directive was a valid directive which could be acted upon.**
>
> **28. I offered my assistance solely on the basis that the government could give the instructions it gave with respect to land which I am advised is Crown land.**
>
> **29. <u>I did not and do not understand the order to prohibit me from assisting anyone with work being carried out on Crown land. I did not understand my assistance in carrying out a directive given by and on behalf of the Government of the Bahamas to be an act which was capable of placing me in breach of the terms of the injunction</u>…"**
> [Emphasis ours]

89. In short, Cummings' defence to SPPL's allegations was that having been served with the injunction which he read, and having been approached by the Wahoo Foundation for assistance in carrying out the demolition works on Parcel B, he was entitled to assist the

Wahoo Foundation because the Foundation was in possession of a directive to demolish the buildings issued by the Ministry of Works; and furthermore, the land in question was Crown land. In essence, he says he did not breach the injunction because in undertaking the demolition works, he was not acting in his personal capacity, but as an agent of the Foundation which had permission from the Crown as the true owner of the land to demolish the buildings and structures.

90. At paragraph (15) of her Ruling, the learned judge noted that the first appellant had in his affidavit-in-response of 19 August, 2015 denied the several breaches of the Injunction Order mentioned in the affidavit of Robert Little Jr, and had further denied that the 2nd appellant, Meyran was employed by him. However, it was evident from paragraphs 8 through 29 of Cummings' affidavit (which the learned judge extracted) that he had provided assistance to the Wahoo Resort Foundation in the full knowledge that an injunction was in place prohibiting him "**whether by himself, his agents, or <u>howsoever otherwise</u>"** from doing the acts proscribed by the Injunction Order.

91. At paragraphs (57) and (59) the learned judge made the following findings in relation to the first appellant (Cummings):

> **"(57) Evidence had been led to prove that the 1st Defendant (now the first appellant) breached the injunction. <u>The 1st Defendant</u> who used as a defence that he was assisting the Foundation and that the Foundation was authorized by the Minister to demolish the buildings and to clear the land <u>did not deny these breaches</u>.**
> **…**
> **(59) The court finds the 1st Respondent guilty of breaching the terms of the Injunction and is in contempt of court. "** [Emphasis ours]

92. Having examined the affidavits which were filed respectively by and on behalf of the respondent and the first-appellant (and which were before the learned judge in the court below) we are satisfied that there was more than sufficient evidence before the learned judge from which she could find that Cummings had firstly, been served with the Injunction Order and secondly, had personally operated heavy duty equipment and committed acts in breach the clear terms of the Injunction Order. Neither party wished to cross-examine any of the deponents on the evidence and, as we see it, cross-examination was unnecessary as the breaches of the Injunction Order were obvious from the affidavits themselves. We agree with the learned judge's finding that Cummings did not deny having assisted the Foundation in demolishing the buildings on Parcel B. Indeed, the several paragraphs of his affidavit (extracted earlier) buttressed SPPL's case that Cummings had beyond reasonable doubt and with the necessary *mens rea*, committed the acts complained of in direct contravention of the clear prohibition contained in the Injunction Order.

93. While the Injunction Order may not have expressly forbidden Cummings from assisting anyone else in doing the acts specified at paragraphs (a) and (b) of the Order, we are satisfied that the inclusion in the Order of the words **"howsoever otherwise"** was wide enough to convey to all concerned that under no circumstances whatsoever was Cummings or anyone else to perform the several acts listed in the Order until after the trial of the action or further Order.

94. There is no merit in Miss Pyfrom's submission on ground 4 that SPPL had neither filed an affidavit refuting Cummings' evidence that he had acted on behalf of the Wahoo Foundation; nor an affidavit to rebut the evidence of the President of the Wahoo Foundation, Everett Hart, who claimed that the demolition works had been carried out by the Foundation under an authority lawfully issued by the Minister of Works under the Buildings Regulation Act.

95. Despite the Supreme Court injunction which was served on him, the terms of which he was well aware, Cummings by his own admission chose to assist the Foundation in destroying the buildings on Parcel B. As the learned judge correctly found, at the committal proceedings he used as a defence that he was assisting the Wahoo Foundation which had been authorized by the Minister of Works to demolish the buildings and to clear the land. Essentially, while admitting his role in assisting in the demolition works, Cummings contended in his defence that it was the Wahoo Foundation (not him) who should bear responsibility for the acts complained of.

96. As we have already found in our consideration of ground 2, the statutory defence in section 18 of the Buildings Regulations Act, will only apply when the Supreme Court comes to hear SPPL's substantive **"action"** for the recovery of **"loss and damage"** against Cummings. At the trial, Cummings and anyone who has acted pursuant to an authority lawfully issued under the Buildings Regulation Act may well have the benefit of the defence. The section does not operate to prevent a judge from exercising the inherent power of the Supreme Court in committal proceedings to punish persons for a contempt of court found to have been committed in connection with civil proceedings pending before the Court.

97. In concluding, we can do no better than to reiterate what Romer LJ said in **Hadkinson v. Hadkinson** [1952] P 285 at 289

> **"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."**

98. In short, court orders must be respected and obeyed until discharged. As the Injunction Order expressly states, Cummings was bound by its terms until after the trial of SPPL's Writ action or until further order. Even if he believed that the Injunction Order was unlawful because the 15-acre tract was Crown land and was of the further view that his statutory defence under

section 18 of the Buildings Development Act would ultimately succeed, he remained bound to obey the Order until it was formally discharged.

99. In this regard, we now dismiss the appellants' Summons for leave to adduce further evidence, being the two documents more particularly described at paragraphs 25 through 29 above. We are satisfied that the documents cannot assist us in resolving the very narrow issue which confronts us on this appeal, namely, whether the judge erred in holding the appellants in contempt of court. It appears to us that such evidence might be more appropriately deployed in Cummings' defence at the substantive trial of the Writ action in the court below where SPPL's claim to ownership of the 15-acre tract (Parcel B) is directly in issue. The further evidence cannot assist him on this appeal.

100. In the result, we are satisfied that on the evidence before her the learned judge was correct to find that Cummings was in breach of her Order. We accordingly, affirm the judge's finding of contempt in relation to him.

Brian Meyran

101. Although Brian Meyran was not a party to SPPL's Writ action, leave was nevertheless granted to SPPL to serve him with a copy of the Injunction Order and to include him as an alleged contemnor in the committal proceedings. This was doubtless due to his alleged participation *as an accessory* with Cummings and others in assisting with the demolition works on the 15-acres tract (Parcel B) contrary to the broad terms of the Order of which he was aware and which he admitted receiving in May, 2015.

102. At paragraphs 10 of his affidavit of 6 May, 2015, Mr. Little alleged on SPPL's behalf that the primary individuals carrying out and leading the works in breach of the Order were Cummings and Meyran. In an effort to establish the nature of the relationship between Cummings and Meyran as well as Meyran's role in aiding and abetting Cummings in breaching the Order in the period October 2012 through May 2015, Mr. Little made the following assertions located at paragraphs 12, 13 and 14 of his May affidavit. We extract the relevant assertions below:

> **"12. <u>About a month after the Order was made</u> I was staying at Tom Freeman's house, located on the other side of the harbour from the Marina Complex, to keep a closer eye on the surrounding property on Parcel B. I was awoken almost every morning by the sound of heavy equipment. I would then go outside to see who was carrying out the work and <u>it would be Meyran and other Rum Cay locals</u>. At the time they were mainly dredging the harbour area. At the start of each day, prior to the work beginning, <u>I would see Mr. Cummings, Meyran and other worker (sic) meet at his house,</u> which is located across the harbour from the Marina Complex, reviewing what appears to be plans. Afterwards the men would start up their work.**

> **13. This activity stopped and there were long periods of inactivity where no work was being done. Since January of this year, however, Mr. Cummings, Meyran and the other men started again. Meyran is known to me as I used to employ him myself at the Marina Complex. I eventually terminated his services, however, after which he became a close associate of Mr. Cummings. It is widely known that Meyran works for Mr. Cummings. Evidence of the relationship between the two of them was also provided by Mr. Cummings in his affidavit filed on 27th November, 2012 in the Action, in which he referred to an application for investment approval on behalf of the Wahoo Foundation ("the Foundation"). The affidavit indicated that the Foundation had plans to build a development on Parcel B, which is exactly what Mr. Cummings and Meyran appear to be starting. The Foundation is said to consist of a group of foreign nationals led by Mr. Cummings and also includes Meyran, who is described as "a heavy equipment operator, mechanic, carpenter and welder, leading and supervising the day to day activities".**
>
> **14. From my understanding of the Order, not only was Mr. Cummings personally restrained from carrying out the acts prohibited by the Order, but also any other servant agent or employee of Mr. Cummings..."** [Emphasis ours]

103. Meyran's participation in the demolition works which took place on Parcel B in May 2015 is described in Robert Little Jr's affidavits of 6 May, 2012 and 11 August, 2015 filed in support of SPPL's committal application. The acts complained of included, *inter alia*, the following:

> **"1. Using heavy equipment (which he drove himself) to take out the last remaining pathway on Parcel B. This pathway was approximately 800 feet long and ran along the entire inner edge of the marina before it was removed by Mr. Meyran.**
>
> **2. Using heavy equipment (which he drove himself) to remove a large number of massive boulders which were used by SPPL as a retaining wall for the marina's inner edge.**
>
> **3. Using heavy equipment (which he drove himself) to finish destroying the last remaining structures on Parcel B; namely, a small dive-shed which contained scuba and fishing equipment, and a small building which housed electrical meters and breakers.**
>
> **4. He used heavy equipment to start digging out and widening the inside of the marina."**

104. Meyran's defence to the contempt allegations against him is set out in his affidavit-in-response filed on 20 August, 2015. The relevant paragraphs are set out below:

> **"13. I am <u>not an employee or agent for Dave nor has he employed me to carry out any work on the 15-acre tract, nor do I represent or act for him in any other way</u>.**
>
> **14. We used his equipment to carry out the dredging work and to clear the land but his equipment is the only equipment on the island.**
>
> **…**
>
> **18. <u>I was working on the 15-acre tract when the cottages and other buildings were demolished</u>. <u>I along with other locals took part in the demo works. But I did not think that in doing so I was in breach of any order because I was not aware that there was an order against me.</u>**
>
> **19. The Order that Bobby gave me as I understood it was between Bobby and Dave. But as I was not working for Dave I did not think that it had anything to do with me.**
>
> **…**
>
> **23. My responsibilities were confined to the 15-acre tract and to the dredging work being carried out on what I now know to be Crown land…"** [Emphasis ours]

105. In essence, although he admitted participating in the demolition works on Parcel B, Meyran denied doing so as an employee or agent of Cummings. Additionally, he asserted that the Injunction Order did not apply to him and accordingly, a knowing breach of the Order by him was not proved. As we see it, the contents of Meyran's affidavit made it incumbent upon SPPL to rebut the denials by establishing beyond reasonable doubt that Meyran was either a servant or agent of Cummings and had knowingly acted as an accessory to Cummings in breaching the Court's Order. SPPL filed no affidavit to rebut Meyran's assertions and in this regard, we agree with Ms. Pyfrom that the uncertainty which arose on the evidence as to whether Meyran was Cummings' employee or agent or not ought to have been resolved in his favour. See **CONCACAF v. Lisle Austin** and **Irtelli v. Squatriti** *(above).*

106. Between paragraphs (35) through (37) of her Ruling, the learned judge addressed Meyran's liability to be committed for contempt as an accessory (being a person who in full knowledge of the Injunction Order) had either aided and abetted Cummings in breaching the court's order or had otherwise done acts which obstructed or frustrated the object of a Supreme Court Order of which he was aware. At paragraph (37) the learned judge outlined the specific acts which Meyran was alleged to have performed with knowledge of the Injunction Order before ultimately, at paragraphs (58) and (60) making the following findings in relation to Meyran:

> **"(58) The 2nd Defendant denied that he was the servant of *(sic)* agent of the 1st Respondent. The 2nd Defendant admitted that he was served with a copy of the injunction but after noting that the injunction was between Sumner Point and the 1st Respondent he ignored the terms of the injunction.**

…
(60) The court finds the 2nd Respondent guilty of breaching the terms of the Injunction and is in contempt of court. ”

107. As we see it, SPPL's case against Meyran in the committal proceedings was premised on Mr. Little's assertion that it was a notorious fact that Meyran worked for Cummings, coupled with his assertions at paragraph 13 of his May 6 affidavit *(above)* that that both Cummings and Meyran appeared to be acting in furtherance of an investment proposal submitted to the relevant authority on behalf of the Wahoo Foundation in which both Cummings and Meyran were said to have an interest.

108. As we have already said, in the absence of rebuttal evidence from SPPL which would have established beyond doubt that Meyran was in fact Cummings' employee or agent, it is obvious that on the state of the evidence, the learned judge could not have been satisfied beyond reasonable doubt that Meyran was in fact aiding and abetting Cummings in breaching the terms of the injunction. In the circumstances, we are unable to agree with the judge's conclusion that Meyran was in contempt of court for breaching the Injunction Order.

109. Quite simply, we are satisfied that faced with the contents of Meyran's affidavit, SPPL failed to discharge its burden of proving to the requisite standard that Meyran had acted as Cummings' servant or agent in knowingly breaching the terms of the Injunction Order. In this regard, see in particular sections 82 and 84 of the Evidence Act, Ch. 65 governing the burden of proof.

110. In the result, we allow Meyran's appeal on ground 6 as we are satisfied that the learned judge's finding of contempt in relation to Meyran is plainly wrong and cannot be permitted to stand. Meyran's appeal against the judge's finding must accordingly be allowed.

Disposition

111. For all the foregoing reasons we dismiss Cummings appeal and affirm the learned judge's decision to hold him in contempt of court. We award costs of Cummings' appeal to the respondent (SPPL) to be taxed if not agreed. As we have affirmed the learned judge's decision to find Cummings in contempt of court, we remit the matter of his sentencing to the Supreme Court to determine whether the ultimate punishment of committal is warranted for the breaches of the injunction which occurred or alternatively, whether some lesser or alternative punishment should be imposed. In this regard, attention is drawn to the guidance which this Court (differently constituted) offered at paragraphs 43 through 61 of the recent decision in **James Fleck v. Pittstown Point Landings Limited** SCCivApp. No. 131 of 2019.

112. Additionally, and for all the foregoing reasons we allow Meyran's appeal and quash the learned judge's decision to hold him in contempt of court. Meyran is awarded costs of his appeal together with his costs in the court below, to be taxed, if not agreed.

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Isaacs, JA

The Honourable Mr. Justice Jones, JA