

**COMMONWEALTH OF THE BAHAMAS  
IN THE COURT OF APPEAL  
SCCivApp. No. 131 of 2019**

**B E T W E E N**

**JAMES FLECK**

**Appellant**

**AND**

**PITTSTOWN POINT LANDINGS LIMITED**

**Respondent**

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

**APPEARANCES:**   **Mr. V. Alfred Gray for the Appellant  
Mr. N. Leroy Smith with Mr. Jonathan Deal for the Respondent**

**DATES:**           **29 July 2020; 28 October 2020**

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**Civil Appeal – Committal proceedings – Non-compliance with injunction made in Supreme Court civil proceedings – Finding of contempt of court – O. 52 r. 1 R.S.C. 1978 – Discretion to make a committal order in aid of civil proceedings – Section 10 Court of Appeal Act, Ch. 52 – Exercise of Supreme Court power to punish for contempt of court – O. 52 r. 6 – Power to suspend execution of committal order**

On 2 April, 2020, following an appeal, the Court of Appeal quashed a 6 week sentence of imprisonment imposed on the appellant by a judge of the Supreme Court as punishment for his contempt of court on the basis that it was wrong in principle and unreasonably harsh.

In its written Judgment, the Court of Appeal invoked its power under section 10 of the Court of Appeal Act to itself exercise the power, authority and jurisdiction of the Supreme Court under O. 52 of the Rules of the Supreme Court to punish the appellant for his contempt, instead of remitting the matter to the Supreme Court for re-sentencing.

The appellant/contemnor was ordered to file an affidavit setting out the factors, personal to him, which he wished the Court to consider in mitigation of his sentence. Both parties filed written submissions on sentence and thereafter, the Court heard oral submissions before reserving its decision on sentence.

**Held:** The appellant is committed to prison for 4 weeks for his contempt commencing on 3 July 2019 when he was found in contempt of court. With the aim of ensuring the

appellant/contemnor's future compliance with the terms of the injunction order, the order of committal is suspended for a period of 10 years from 3 July 2019. In accordance with O. 52 r. 6(2) of the Rules of the Supreme Court, 1978, PPLL is directed to serve a copy of this order on the appellant/contemnor informing him of the making and terms of the committal order.

The seriousness of Fleck's most recent contempt must be seen against the background of his persistent entry upon PPLL's private runway on two occasions in direct contravention of the injunction order which had been put in place in 2017 following the conclusion of PPLL's civil proceedings. We accordingly reject Fleck's sworn explanation to us in mitigation of sentence that he had acted in the mistaken belief that the order had only prevented him from entering and utilizing the runway as a pilot of his own aircraft.

The law is that where an individual is enjoined by a court's order to do or to refrain from doing a particular act, the prohibition is absolute and the responsibility for obeying the order is thrown on that individual.

The breach which occurred in this case certainly does not fall at the lower end of the scale where it could be said that Fleck was genuinely using his best endeavours to comply with the court's order. On the contrary, we are satisfied that his actions in entering upon PPLL's runway in the course of disembarking from and boarding Frenchie Lasseign's aircraft, was nothing less than a wilful and deliberate act of defiance to the clear terms of the judge's order which, in our view, takes Fleck's contempt decidedly over the threshold for committal.

The justice of this case is best served by the imposition of a punishment which will serve to: (i) vindicate PPLL's private rights, (ii) deter future entry by Fleck on the runway in contravention of the injunction and at the same time, (iii) uphold the authority of our courts.

*A-G v. Times Newspapers Ltd* [1992] 1 AC 19 mentioned

*Aspect Capital Limited v. Hugh Christensen* [2010] EWHC 744 (Ch) mentioned

*Confederation of North, Central America & Caribbean Association Football v. Lisle Austin* SCCivApp. No. 90 of 2011 mentioned

*Crystalmews Ltd v. Metterick and others* [2006] EWHC 3087 (Ch) mentioned

*David Cummings and another v. Sumner Point Properties Limited* SCCivApp No. 170 of 2018 mentioned

*Hadkinson v. Hadkinson* [1952] P 285 considered

*Howitt Transport Ltd and anor v. Transport and General Workers' Union* [1973] ICR 1 applied

*James Fleck v. Pittstown Point Landings Limited* SCCiv App. No. 131 of 2019 mentioned

*Knight v. Clifton* [1971] Ch. 700 mentioned

*Phonographic Performance Limited v. Fletcher* [2015] EWHC 2562 mentioned

*Stancomb v. Trowbridge UDC* [1910] 2 Ch 190 considered

*Vaysman v. Deckers Outdoor Corporation Inc* [2011] FCAFC 17 applied

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## SENTENCING DECISION

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

#### **Background**

1. On 2 April 2020 we allowed the appellant's ("Fleck's") appeal from that portion of the oral Ruling of Hilton J., handed down on 3 July, 2019 in which he summarily committed Fleck to prison 6 weeks for contempt of court. In our written judgment, we, *inter alia*, quashed the 6 week sentence on the basis that it was wrong in principle and unreasonably harsh.
2. Instead of remitting the matter to the Supreme Court for re-sentencing, we determined that we would invoke the power under section 10 of the Court of Appeal Act, Ch. 52 to ourselves exercise the jurisdiction of the Supreme Court under O. 52 of the Rules of the Supreme Court ("RSC") to punish Fleck for his contempt.
3. Section 10 of the Court of Appeal Act provides:

**"Subject to the provisions of this Part of this Act and to the rules of court, the court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court given or made in civil proceedings, and for all purposes of and incidental to the hearing and determination of any such appeal and the amendment, execution and enforcement of any judgment or order made thereon, the court shall, subject as aforesaid, have all the powers authority and jurisdiction of the Supreme Court."** [Emphasis ours]

4. In order to assist us in properly exercising the power of the Supreme Court to punish Fleck for the contempt, Fleck was ordered to file an affidavit setting out any factors personal to him which he wished us to consider in mitigation of his sentence. See generally the discussion between paragraphs [37] through [62] of our decision in **James Fleck v. Pittstown Point Landings Limited** SCCiv App. No. 131 of 2019 (hereinafter referred to as ("the Judgment")).
5. On 9 April 2020 Fleck filed an affidavit in mitigation of sentence which contained the following sworn averments:

**"1. I am James Fleck the Appellant in this case.**

**2. I have read the judgment of this Honourable court and I am grateful to this court for the opportunity to file this Affidavit setting out a few personal facts which I hope may be considered by this court in MITIGATION on my behalf when**

it considers what sentence may be appropriate in the circumstances of your findings and as set out below.

**3. I sincerely apologize to this court and to the Honourable Justice Hilton for my breach of the court order made on the 27th October 2017.**

**4. I was under the mistaken view that the order specifically prevented me from flying in my own aircraft and utilizing the runway personally. Had I known that it meant me being on the runway in ANY circumstance, I would not have taken a ride with my friend Mr. Frenchie Lasseign as I did. I know that he has the right to use the runway, along with any guests he chooses. I wrongly thought that since I was a "guest of his" it would not be "ME" interfering with his usage. For this I truly apologize.**

**5. I respect without question the court system in The Bahamas and the authority which it carries. I would do nothing intentionally to show otherwise.**

**6. When the present case under appeal came before Justice Hilton in 2019, I was, at the time, consumed by a bitter and painful divorce and by the failings of my business ventures overseas. I was on the verge of personal and financial ruin. This realization forced me to spend most of my time dealing with my business issues in hopes of fending off financial disaster. Unfortunately, my dealings and business took me out of the country to China and other far overseas areas quite extensively. These travels made it difficult to maintain communication with my attorneys.**

**7. I had simply lost focus on this case with everything going on at the time. I was overwhelmed.**

**8. My personal, business and financial life are still taking a great deal of time and effort to rebuild. Now with this world wide epidemic, I am not sure if my businesses will ever financially recover, but I keep working diligently in hopes that they will.**

**9. I therefore pray that this court accepts my plea in mitigation and extends the grace of a suspended reasonable fine in the circumstances. I promise never to act in breach of a court order again as I am now very clear on the interpretation and terms of the order.**

**10. The contents of this Affidavit are true and correct."**

6. Both counsel filed their respective written submissions; and on 29 July 2020, we heard oral submissions on sentence and reserved our decision.
7. Having determined to ourselves exercise the power under O.52 to punish Fleck for the contempt committed in connection with PPLL’s civil proceedings in the court below, the task which remains for us on this appeal is to determine (having regard to the nature and seriousness of the contempt, the harm done, any prior misconduct by Fleck as the contemnor, as well as any physical, mental and other personal circumstances which have been placed before us) whether no sentence other than the ultimate sanction of committal is, in all the circumstances, appropriate. See generally the approach taken in **Vaysman v. Deckers Outdoor Corporation Inc** [2011] FCAFC 17 at para 174; **Crystalmews Ltd v. Metterick and others** [2006] EWHC 3087 (Ch); **Aspect Capital Limited v. Hugh Christensen** [2010] EWHC 744 (Ch); and **Phonographic Performance Limited v. Fletcher** [2015] EWHC 2562.
8. The dictum of Sir John Donaldson in **Howitt Transport Ltd and anor v. Transport and General Workers’ Union** [1973] ICR 11 may also usefully be recalled:

**“Non-compliance with a court order can have a wide range of qualities. It may, at the top end of the scale, consist of flat defiance of the court’s authority. Going down the scale, it may not amount to flat defiance, but rather to a passive ignoring of the court’s order. Going down the scale still further, it may amount to a half-hearted or, perhaps, colourful attempt to comply with the court’s order. And, at the bottom end of the scale, there may have been a genuine, whole-hearted use of the best endeavours to comply with the order, which nevertheless has been unsuccessful. In each case there has been breach of the court’s order. In each case, to use the technicalities of the law, there is a “contempt of court.” But the quality of the non-compliance varies over an enormous range. The penalties which will be imposed...for contempt will equally vary over an enormous range and will reflect the quality of the non-compliance. They will in fact, reflect faithfully the court’s view of the seriousness of the conduct of the person to whom the order was addressed.”** [Emphasis ours]

9. We have also adverted to the established principle of sentencing in committal proceedings succinctly expressed in the dictum of Gray J in **Vaysman** (*above*) as follows:

**“54. ... In any sentencing process, imprisonment is to be regarded as the penalty of last resort. Any period of deprivation of liberty is a drastic imposition on anyone. The value the law places on liberty is very high. It is incumbent on**

**a sentencing judge to determine first whether any alternative to imprisonment would be appropriate...It is always possible, and sometimes appropriate, to impose a fine with a term of imprisonment in default of payment of it...Before settling on imprisonment, the primary judge ought to have directed his attention to whether some other form of punishment was appropriate...** [Emphasis ours]

10. We turn to consider the seriousness of Fleck's contempt and to identify the actual harm occasioned to PPLL by Fleck's most recent acts of disobedience to the relevant injunction order and its implications for the authority of the Supreme Court.
11. As we noted in the Judgment, the injunction order in question was put in place in 2017 following a contested hearing of a civil action which PPLL had instituted in the Supreme Court to vindicate its right as owner to prevent the entry upon and use of its private runway by Fleck and his co-defendant who had refused to agree to the stipulations which PPLL had put in place to regulate such entry and use.
12. On 27 September 2017, following a contested trial, PPLL was declared to be the owner of the runway. In his written Decision, the learned judge accepted, *inter alia*, that PPLL had expressly barred the defendants from entering onto or using its runway unless and until they signed an "Indemnity" form agreeing to indemnify PPLL against any claims or damages that might arise as a result of their use of the runway, and further agreeing to abide by PPLL's reasonable rules and regulations regarding the use of the runway.
13. Having rejected the Defence and found both defendants to be trespassers, the learned judge then issued a perpetual injunction, *inter alia*, expressly restraining Fleck whether by himself or his servants, agents "*or otherwise howsoever*" from entering upon PPLL's runway. Fleck was then duly served with a copy of the judge's order bearing the required penal notice.
14. Within months of the judge's Decision, Fleck repeatedly landed his private aircraft on the runway in direct breach of the clear and unambiguous terms of the injunction. Committal proceedings were instituted by PPLL and on 4 May, 2018, Fleck was found in contempt of court and fined \$10,000.00 which he duly paid.
15. Notwithstanding his having previously been punished for contempt of court, Fleck again entered PPLL's runway aboard Frenchie Lasseign's aircraft once again in breach of the injunction. This latest breach resulted in PPLL instituting fresh committal proceedings to have Fleck punished for contempt of court for a second time.

16. Fleck's defence to PPLL's second committal application was that the injunction had not expressly prevented him from entering the runway as a passenger on an aircraft owned and operated by someone else.
17. As we expressly found at paragraphs 34 and 35 of the Judgment, based on the evidence before him (including the admissions contained in Fleck's affidavits) the learned judge was entitled to find that Fleck had once again entered upon PPLL's runway in breach of the wide terms of the injunction and that his lame excuse of being a mere passenger aboard Frenchie Lasseign's aircraft was not a viable defence.
18. As for the harm which was done by Fleck's most recent contempt, it is undeniable that the extent of Fleck's contempt was merely that he had briefly crossed over PPLL's runway to and from Frenchie Lasseign's aircraft on which he had been a passenger. While the actual harm to PPLL might appear to some to be deceptively minimal, viewed against the background of PPLL's action which had resulted in the grant of a perpetual injunction, it clearly represented a deliberate challenge to PPLL's proprietary right as owner to dictate who could enter its runway and on what conditions. Additionally, the wider implications of Fleck's wilful contempt for the rule of law and the authority of the Bahamian courts cannot be overlooked.
19. In his sworn affidavit filed in mitigation of sentence (*extracted earlier*), Fleck offered his profuse apologies to the Court for his most recent contempt. He also urged us to accept that he had only entered PPLL's runway because he had been labouring under the mistaken belief that the injunction did not expressly prevent him from entering PPLL's runway in any circumstance whatsoever. He sought to assure us of his respect for the Bahamian court system and said he would not have entered the runway *as a guest* of Mr. Lasseign, had he understood that the injunction had prevented him from entering the runway.
20. Fleck's sworn explanation as to why he had entered the runway despite the injunction, was previously advanced in the court below as his defence to the contempt proceedings. As we have found, Fleck's defence (such as it was) was rightly rejected by the learned judge. Repeating that excuse once again before us cannot, in our view, assist him in mitigating the seriousness of the contempt for sentencing purposes.
21. The seriousness of Fleck's most recent contempt must be seen against the background of his persistent entry upon PPLL's private runway on two occasions in direct contravention of the injunction order which had been put in place in 2017 following the conclusion of PPLL's civil proceedings. We accordingly reject Fleck's sworn explanation to us in mitigation of sentence that he had acted in the mistaken belief that the order had only prevented him from entering and utilizing the runway as a pilot of his own aircraft.

22. The law is that where an individual is enjoined by a court's order to do or to refrain from doing a particular act, the prohibition is absolute and the responsibility for obeying the order is thrown on that individual. See generally pages 567-569 *Borrie & Lowe, The Law of Contempt, 3<sup>rd</sup> Edition*; **Knight v. Clifton** [1971] Ch. 700 per Sachs LJ and **A-G v. Times Newspapers Ltd** [1992] 1 AC 191 per Lord Oliver.
23. In **David Cummings and another v. Sumner Point Properties Limited** SCCivApp No. 170 of 2018 this Court (similarly constituted) recently had occasion to review the rationale underlying the power of the Supreme Court to punish for contempt. Between paragraphs 53 through 56 of that decision we reviewed several authorities and highlighted the following dictum of Romer LJ in **Hadkinson v. Hadkinson** [1952] P 285 at 289 which bears repetition once again:

**“It is the plain and unqualified obligation of every person against whom 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 ours]

24. Similar sentiments are expressed in **Stancomb v. Trowbridge** UDC [1910] 2 Ch 190 at 194, where Warrington J described the responsibility of a person who is bound by the terms of an injunction in the following terms:

**“if a person...is restrained by injunction from doing a particular act, that person...commits a breach of the injunction, and is liable for process for contempt, if he...in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order.”** [Emphasis ours]

25. As we see it, on the scale of seriousness, the breach which occurred in this case certainly does not fall at the lower end of the scale where it could be said that Fleck was genuinely using his best endeavours to comply with the court's order. On the contrary, we are satisfied that his actions in entering upon PPLL's runway in the course of disembarking from and boarding Frenchie Lasseign's aircraft, was nothing less than a wilful and deliberate act of defiance to the clear terms of the judge's order which, in our view, takes Fleck's contempt decidedly over the threshold for committal.
26. As for the wider implications of Fleck's contempt, we can do no better than adopt with our approval the observations of this Court (differently constituted) in **Confederation of North, Central America & Caribbean Association Football v. Lisle Austin** SCCivApp. No. 90 of 2011 as follows:

**“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...”**

27. The implications of Fleck’s most recent contempt are rendered all the more egregious by the fact that rather than accepting the judge’s decision which upheld PPLL’s proprietary rights over the runway, Fleck has repeatedly continued to enter upon the runway in direct contravention of the order. It is impossible to ignore the fact that Fleck’s actions in entering the runway have since forced PPLL on two separate occasions to institute committal proceedings to vindicate its private rights as well as to uphold the rule of law and the authority of our courts.
28. Having satisfied ourselves that the threshold for committal has been crossed, we have examined Fleck’s affidavit setting out his personal circumstances. In an obvious attempt to explain why he had lost touch with his legal representatives when the committal proceedings had been ongoing in the court below, Fleck says that his personal life as well as his financial and business ventures had been in a state of turmoil and he had lost focus. Unfortunately, these circumstances do nothing to mitigate or reduce the seriousness of the acts of trespass for which he has been held in contempt.
29. Fleck urges us not to consider a term of imprisonment, but to instead impose a suspended fine, having regard to the fact that his personal, business and financial life are still taking a great deal of time and effort to rebuild; and because, due to the current global pandemic, he is unsure whether his businesses will ever financially recover. We have accordingly taken due note of his inability to pay a fine.
30. We have considered the possibility of a fine. However, in view of Fleck’s uncertain financial situation, we do not consider that the imposition of a fine (even in an increased amount) will meet the justice of the case. The record discloses that Fleck has already been fined once in relation to his first contempt. Increasing the amount of the fine as a punishment, will therefore be futile as a deterrent to future misconduct given his financial circumstances.
31. The record shows that since this dispute started, PPLL has been forced to resort to legal proceedings on three occasions thus far to vindicate its proprietary rights over its runway. As we have already stated, Fleck’s second contempt though seemingly harmless to PPLL, threatens the proper administration of justice in the Bahamas and is so serious that the threshold for imprisonment has been crossed.
32. Despite his apology (which doubtless is sincere) we are satisfied that Fleck has already demonstrated a propensity to wilfully defy the orders of Bahamian courts. We consider that the justice of this case is best served by the imposition of a punishment which will serve to:

(i) vindicate PPLL's private rights, (ii) deter future entry by Fleck on the runway in contravention of the injunction and at the same time, (iii) uphold the authority of our courts.

33. Having considered the matter we find that the interests of justice in this case can best be achieved by the imposition of a term of imprisonment of 4 weeks for Fleck's contempt commencing on the 3 July, 2019 (being the date he was found in contempt of court). The term of imprisonment shall be suspended in accordance with O. 52 r. 6(1) for a period of 10 years from the 3 July, 2019. We consider that the 10 year period of suspension of the committal order is long enough to ensure Fleck's future compliance with the perpetual injunction which was put in place on 27 September, 2017 in the Supreme Court and by which Fleck is bound.

#### **Disposition and Order**

34. In the result, Fleck is committed to prison for 4 weeks for his contempt with effect from 3 July, 2019. With a view to ensuring his future compliance with the terms of the injunction, the committal order is suspended for a period of 10 years from the 3 July, 2019.

35. In accordance with O. 52 r. 6(2) of the Rules of the Supreme Court, 1978, PPLL is directed to serve a copy of this order on Fleck, as the appellant/contemnor, informing him of the making and terms of the committal order. As Fleck resides overseas, PPLL is at liberty to serve the committal order on Fleck by serving a copy of same on him at the offices of his attorney-at-law of record, Mr. V. Alfred Gray.

36. This is the order of the Court.

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**The Honourable Madam Justice Crane-Scott, JA**

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

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**The Honourable Mr. Justice Jones, JA**