IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 3034 OF 2009

BETWEEN	**PETER KRYGGER**	**1ST CLAIMANT**
AND	**GARRIE DON**	**2ND CLAIMANT**
AND	**BRADLEY JOHNS**	**3RD CLAIMANT**
AND	**F1 INVESTMENTS INC.**	**1ST DEFENDANT**
AND	**STEVE PALMER**	**2ND DEFENDANT**
AND	**PAUL ATKINSON**	**3RD DEFENDANT**
AND	**CHRISTOPHER KELLY**	**4TH DEFENDANT**
AND	**PATRICE PALMER**	**5TH DEFENDANT**

Mr. Michael Hylton Q.C., Kevin Powell and Mrs. Nicole Foster-Pusey instructed by Michael Hylton and Associates for the Claimants and Mr. Paul Beswick and Mr. Franz Jobson for the Defendants.

> **Part 53 of the CPR; Civil Contempt Proceedings; Quasi-Criminal nature thereof; standard of proof required to establish contempt; Whether proceedings are Interlocutory; Part 30 of CPR; admissibility and weight of evidence if hearsay; submission to jurisdiction by Party.**

Heard November 25 and 30, 2010

CORAM: ANDERSON J.

1. In making this ruling, I do not propose to elaborate any further upon the application by counsel for the Defendants made orally before me on the morning of the hearing, for the deponent to

the affidavit for and on behalf of the Claimants to be cross examined, or that the time for making an application to cross examine the deponent be abridged and an order granting such an application be made. That application was without merit and was denied.

2. In relation to the substantive matter, by way of a Notice of Application for Court Orders, the claimants in this action seek the following:

    1. A declaration that the 1st Defendant, F1 Investments Inc and the 2nd Defendant, Steve Palmer, are in contempt of court.
    2. An order that the 2nd Defendant be committed to prison for contempt of court for such period as the court deems just.
    3. An order that the assets of the 1st and 2nd Defendants, F1 Inc and Steve Palmer, be confiscated.
    4. In the alternative, to paragraph (3) an order that the 1st and 2nd Defendants, F1 Investments Inc., and Steve Palmer, each pay a fine in such amount and on such terms as the court deems fit.
    5. An order that the 1st and 2nd Defendants, F1 Investments Inc and Steve Palmer, pay the costs of this application and order on a full indemnity basis.
    6. Such further or other relief as the court shall deem just.

3. The Order of this Court in respect of which the orders are sought was made by his Lordship, Sykes J, on the 29th day of September 2009. In relevant part the order states:

> "The defendants and each of them, whether by themselves or by their servants or agents or otherwise howsoever, are restrained from transferring, charging, diminishing or in any way howsoever dealing with their assets or assets in their names wheresoever situate and from withdrawing or transferring any funds from their accounts or accounts in

their name wheresoever held, save in so far as the value of such assets exceeds the sum of US$8,145,441.20".

4. Among the grounds set out as providing the basis for the grant of the application is the following:

The 1st and 2nd Defendants have acted in contempt of court in that they have:

a) Failed to comply with this Honourable Court's Order restraining the Defendants from transferring or dealing with their assets wheresoever situate;
b) Repeatedly and deliberately breached the order by selling and transferring the assets of the 1st Defendant contrary to the terms of the order.

5. In particular, it is alleged that the Defendants, having received eight (8) properties in the name of the 1st Defendant have transferred the said properties to third parties in breach of the order. The addresses of the properties so received and transferred are listed by the Claimants in the grounds for the grant of the application.

6. In support of the Motion to commit the 2nd Defendant, the Claimants rely upon the affidavit of Kevin Powell filed herein on July 2, 2010. That affidavit purports to provide by way of exhibits thereto, the evidence to show that the 1st and 2nd defendants have breached the terms of the Order referred to above. The affidavit states that the affiant is in possession of information received from some of the claimants herein, such information relating the transfer of properties in Florida, The

United States of America, to the 1st Defendant and the transfer by that entity to third parties of the said properties.

7. It is accepted common ground that the Court has power pursuant to Civil Procedure Rules (2002) ("CPR") Rule 53 and in particular CPR 53.1, 53.5, 53.9, 53.10 and 53.13 to punish a person for contempt of court by committal to prison, sequestration of assets or fines.

ANALYSIS OF CONTEMPT

8. In **Attorney General v Punch Ltd.** [2002] UKHL 50, Lord Nichols of Birkenhead said:

> "Contempt of court is the established, if unfortunate, name given to the species of wrongful conduct which consists of interference with the administration of justice. It is an essential adjunct of the rule of law. Interference with the administration of justice can take many forms. In civil proceedings one obvious form is a wilful failure by a party to the proceedings to comply with a court order made against him. By such a breach a party may frustrate, to greater or lesser extent, the purpose the court sought to achieve in making the order against him".

In essence, this is the nature of the allegation being made here by the Claimants against the Defendants.

9. As was said in another jurisdiction (Cayman Islands) in an unreported case (**Ahmad Hamad Algosaibi and Brothers (AHAB) v Al Sanea and Others** Grand Court Cause No: 359 of 2009):

> It seems to me that any discussion of the law relating to contempt in general, and whether the contempt has been made out in this case, in particular, must start with

the proposition of law, trite in the extreme, that validly made orders of a court of competent jurisdiction must be obeyed by persons to whom those orders are directed. It may also be accepted that because of the particular severity of the sanctions which may be available against a person found to have breached an order of the court, the standard of proof required to ground a finding of contempt is the higher criminal standard of beyond a reasonable doubt and the burden of proof is on the applicant. In **Great Future International Limited and Others v Sealand Housing Corporation and Others** [2004] EWHC 124 (Ch) Lewison J said:

> "The burden of proof is, of course, on the applicant. The standard of proof is a criminal standard--that is proof beyond reasonable doubt".

That this requires that each element of the allegation amounting to contempt must be proven to the appropriate standard is axiomatic. (See **Gulf Azov Shipping Co. Ltd. v. Idisi** [2001] EWCA Civ 21) In similar vein, in **Segoes Services Ltd (In Liquidation) v Kaweske and Fontanetta** [2006] CILR N 34, Smellie CJ had held that, before committing a defendant for contempt of court for breach of a freezing injunction, the court must be satisfied according to the criminal standard of proof.

10. If, the above represents the proper approach to determining whether a defendant is in contempt in relation to an order of this Honourable Court, and I would assert that it does, then the issue becomes, in the instant trial, whether the fact of the Defendants' disobedience of the order has been established. If it is so established the Defendants are in contempt and the Court may impose such sanctions as to imprisonment or forfeiture as it thinks is appropriate. En passant, it may be

noted that it is not necessary for the breach to be contumacious. (See for example **Stancombe v Trowbridge Urban District Council** [1910] 2 Ch. 190 approved in the United Kingdom House of Lords in **Director General of Fair Trading v Pioneer Concrete (U.K.) Ltd.** [1995] 1 A.C. 456.

11. In further response to the submission that the 2nd Defendant may be protected because he followed the instructions of the directors of the 1st Defendant or that somehow the 1st Defendant may not be held liable because it operates outside the jurisdiction, I make two observations. Firstly, in so far as the 1st Defendant is concerned, he may be able to plead those instructions in mitigation of his breach of the order but they do not constitute a defence. With respect to the second, I make two points. I have noted elsewhere in this decision the fact that the 1st Defendant has clearly submitted to the jurisdiction of this Honourable court. There has been no challenge to jurisdiction raised. No issue of jurisdiction arises. But secondly, in so far as liability of a company for contempt is concerned, I would adopt the words of the learned law lord, Lord Templeman in the **Director General of Fair Trading** case cited above at page 465 where he said: "An employee who acts for the company within the scope of his employment is the company. Directors may give instructions, top management may exhort, middle management may question and workers may listen attentively. But if a worker makes a defective product or a lower manager accepts or rejects an order, he is the company.

12. Defendants' counsel opposed the grant of the declarations and the other reliefs sought on essentially two (2) bases: lack of

jurisdiction, (at least in relation to the 1st Defendant), and secondly, that the evidence contained in the affidavit of Mr. Powell was hearsay and in some cases, hearsay upon hearsay. The challenge to jurisdiction is without merit for it seems clear that the 1st Defendant has already submitted to the jurisdiction of this court and the 2nd Defendant in his pleadings has averred that he is the person who controls manages and directs the affairs of the 1st Defendant and has accepted service of process on its behalf.

13. With respect to the issue of hearsay, the Claimants' attorneys respond that since these proceedings are interlocutory, hearsay evidence is permissible within the terms of CPR Rule 30.3 (2). There it is stated:

> An affidavit may contain statements of information and belief-
> a) Where any of these Rules so allows; and
> b) Where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided the affidavit indicates-
> i. Which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
> ii. The source of any matters of information and belief.

12. The Defendants' counsel says that the proceedings are not interlocutory but final as the end result could be the restriction on the liberty of the subject. Accordingly, the permission given in Rule 30.3 (2) is not applicable.

13. While it may not be absolutely necessary to the decision arrived at herein, I would wish to briefly comment on the difference between whether a matter is interlocutory or final. In considering

the admissibility of information in an affidavit stated to be "on information and belief" in relation to an application under then Rules of the Supreme Court, (RSC) Order 14 or 14A, Halsbury's Third Edition at paragraph 845 states:

"For the purpose of this Rule, those applications only are considered interlocutory, which do not decide the rights of the parties, but are made for the purpose of keeping things *in statu quo* till the rights can be decided, or for the purpose of obtaining some direction of the Court as to the conduct of the cause". (See **Re Anthony Birrell, Pearce & Co., Doig v Anthony Birrell, Pearce & Co., Re Anthony Birrell, Pearce & Co., Groos v Anthony Birrell, Pearce & Co.,** [1899] 2 Ch 50, where evidence founded on statements of an informant who might have been subpoenaed was not allowed.

In that case, Kekewich J said:

> "Seeing the extreme importance of this matter to the Plaintiff Groos, I fail to understand why Johnstone was not subpoenaed. Had I been told that he declined to make an affidavit in support of his statements, I should have had no hesitation in directing him to be subpoenaed. That has not been done, and I am asked to admit the affidavit as it stands. In declining to do so I am perhaps going beyond what has been the practice of the Court hitherto, but certainly am following that practice in its substance, and am merely expunging one of the excrescences which have become only too common. The rules of evidence are the same in all branches of the High Court, and on the trial of an action what is inadmissible in one branch is inadmissible in another. For the purpose, however, of interlocutory applications, an exception to the strictness of those rules has been introduced in order to make such applications, especially motions for injunctions to restrain injury, effectual. The Court does not admit as evidence that which is not

> evidence, but, in order to prevent irremediable injury, keep matters *in statu quo*, and do justice on an interlocutory application, the Court will act on information and recently declined to listen to an affidavit based on information and belief, but not stating the source and grounds thereof. I invariably reject such an affidavit if it is challenged. Where, however, the source of information is stated, the practice- though possibly a somewhat loose practice – has been to act on the affidavit in order to restrain irremediable injury and to make such order as may be necessary to keep matters in statu quo.

13. "Interlocutory proceedings" have also been defined as "Proceedings taken during the course of, and incidental to a trial; a housekeeping order, one that relates to process of the trial as opposed to the substance of the pleadings". (Duhaime's Law Dictionary). In at least one Commonwealth Civil Procedure Code (India) "interlocutory application" is defined to mean "an application to the Court in any suit, appeal or proceeding already instituted in such Court other than an application for execution of a decree or order or for review of judgment or for leave to appeal".

14. It would seem, based on the above which I accept as a true statement of the law, that the instant application is indeed an "interlocutory application" for purposes of Part 30 of the CPR. The hearsay nature of the evidence is not therefore, *per se*, a reason for excluding the evidence and I would so hold.

15. Having said that, however, I must now return to the issue of the nature of civil contempt proceedings and the quality of the

evidence which it is necessary to adduce, for a finding that a Respondent is "guilty" of contempt.

16. The evidence adduced in the affidavit of Kevin Powell in important particulars, is stated to be on information and belief. With respect to the specific issue of the receipt and transfer of real property in Florida, it relies upon a report to Mr. Powell by one of the claimants, a Markus Schwegler. In the relevant part of his affidavit, Mr. Powell states:

"I have been informed by Mr. Schwegler and verily believe that the Claimants and in particular Mr. Schwegler and Brad Goosen:

i. In June 2010 began to conduct investigations into ATA using public access data bases. One of these data bases, **www.brbpub.com** allowed them access to information on properties in Florida.

ii. Using these data bases they discovered that several properties in Venice Florida had been transferred to F1 Investments Inc., by ATA.

iii. F1 Investments Inc. then in turn sold the properties to various third parties.

Copies of public records of the various properties were sent to my office and are included in the bundle of documents exhibited and marked Exhibit "KP-5" for identification.

I have examined these records and note the following":

17. Thereafter follows a description of eight (8) specific properties and the purported dates of their transfers by the 1st Defendant to various third parties.

18. Taken at face value this would represent damning evidence of the breach of the Order of Sykes J referred to above. However, it is to be noted, as duly pointed out by counsel for the Defendants, that at least some of the specific documents which are exhibited and which represent the product of the web search each contains an important disclaimer to the following effect:

> "The information appearing on this website was extracted from the records of the Sarasota County Property Appraiser's Office. Our goal is to provide the most accurate information available. However, no warranties, expressed or implied, are provided for the data, its use or interpretation. The property values relate to the last valuation date. The data is subject to change. Copyright @ 2001-2010 Sarasota County Property Appraiser. All rights reserved".

19. There are indeed copies of some documents which purport to be copies of extracts "Recorded in Official Records" such as Quit Claim Deeds, Warranty Deeds, allegedly signed by the 2nd Defendant as Chief Operating Officer, for and on behalf of the 1st Defendant. In most of the cases where the copy indicates that it has been notarized, the Notary is in Florida, but in some cases the Notary is in Texas. In either case it seems to me that the provision contained in section 6 of the Probate of Deeds Act has not been complied with. That section, in a proviso requires that "where any deed purports to have been proved or acknowledged before any Notary Public in a foreign state or country there be annexed to such a deed a certificate, under the hand and seal of

the appropriate officer of such foreign state or country, to the effect that the person before whom such deed is proved is a Notary Public duly commissioned and practicing in such foreign state or country or some portion thereof, and that full faith and credit can be given to his acts"

20. As far as I have been able to ascertain, none of the documents purportedly notarized by a duly authorized officer has attached to it, the certificate referred to in the proviso in section 6 of the Probate of Deeds Act. The situation therefore, as I see it, is in summary that the information upon which reliance is placed by Mr. Powell in his affidavit, is from individuals who searched the Internet, got copies of documents which by their own terms ought not to be relied upon for accuracy and such documents, even if they were originals did not have the certification required by the Probate of Deeds Act.

21. I do not need to pay any more than short shrift (but mention it only because it was submitted on by counsel for the Defendants), to the proposition that the Claimants had not established that the F1 Investments Inc., and the "Steve Palmer" referred to in the documents exhibited to the affidavit of Mr. Powell, were in fact the 1st and 2nd Defendants before the Court. I hope I need say no more than that the Defendants acknowledged service and have appeared in Court in response to the relevant notices and there has been no controverting of the proposition that they are who they are said to be.

22. Nevertheless, given the fact that in these proceedings the applicant must prove his case to the criminal standard, (that is beyond a reasonable doubt), the Court must still make a determination as to whether the weight to be accorded to the evidence rises to the appropriate level.

23. Given what I have said above about the nature and the quality of the evidence upon which the averments in the affidavit are founded, it will be apparent that I do not believe that it would safe to conclude that the Defendants have breached the injunction by transferring the properties as alleged. I am strengthened in this view by my conviction that, based upon what has been provided before me, it would have been possible to have secured appropriate evidence with proper records and documentation, duly certified.

24. In the result, the application for the declaration and for the other reliefs sought by the Claimants/Applicants, is hereby denied, with costs to the Defendants to be taxed if not agreed.

25. Leave to appeal granted.

ROY K. ANDERSON
PUISNE JUDGE
NOVEMBER 30, 2010