



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00449

BETWEEN	CAVELL PALMER	CLAIMANT
AND	MAUVELLETTE DAYES	DEFENDANT

Contempt of Court – Rule 53.10 - Whether Defendant served with Order bearing penal notice – Whether Defendant was present when injunctive order made- Whether Defendant in breach of order -Costs- Whether court’s displeasure with Defendant’s conduct may be reflected in an order for costs.

Leonard Green instructed by Chen Green & Co. for Claimant

Emily Shields, Maria Brady & Marissa Wright instructed by Gifford Thompson & Bright for Defendant

Heard: 2nd February 2021

IN OPEN COURT

COR: BATTIS J.

[1] On the 23rd day of December 2020 this court made an interlocutory order giving injunctive relief to the Claimant. Before me is an application, filed on the 6th January 2021 by the Claimant, for an “Urgent Notice of Application for Committal Order” pursuant to Rule 53.10 of the Civil Procedure Rules. Having considered the evidence, and the submissions of counsel, I dismissed the application. However, the conduct of the Defendant was such, and her explanation so

unsatisfactory, that I awarded the costs of the matter to the Claimant. Leave to appeal was granted.

- [2] This judgment contains the reasons for my decisions aforesaid.
- [3] The injunctive order, made on the 23rd December 2020, was long and detailed and is to be found at ***Cavell Palmer v Mauvelette Dayes [2020] JMCC Comm 38 (unreported judgment 23 December 2020)***. The order restrained the Defendant from, among other things; *“interfering with the Claimant and or the staff of the hotel while engaged in the day to day operations and running of the Kibo Hotel until the trial of this action or further order of the court.”*
- [4] The order also mandated that all income form the hotel would be deposited in an account controlled by the Defendant. All payments and/or disbursements with respect to the operation of the hotel, including the Claimant’s salary and a reasonable cash float, were to be paid by the Defendant after first being approved by an accountant agreed upon by the parties. That accountant was to set up a system of accounts and report monthly, to the court and the parties, about the operation of the hotel as it relates to income earned and expenses incurred.
- [5] The order was not arrived at in a vacuum. In fact, it represented a refinement of an order made ex parte on the 3rd November 2020 after an opposed “ex parte” hearing. Both parties were present and represented at that “ZOOM” hearing. They also attended, in similar fashion on the 26th November 2020, when the initial order was varied and again on the 17th December, 2020 when the inter partes injunctive hearing was further adjourned to the 22nd December 2020. They were similarly present on the 22nd December 2020 when I heard full argument on the matter.
- [6] The Defendant asserts, and there is no objective evidence to contradict her, that she was not present when I made the order in question on the 23rd December 2020. Her counsel was however present. I, at that time, stated my orders and

promised to make my reasons available in writing at a later date. Those reasons were issued on or about the 12th January 2021.

[7] Notwithstanding the Defendant's absence, when I gave my decision on the 23rd December 2020, I have no doubt that herself and the Claimant fully understood the purpose and the intendment of the order. This is because it was really an improved continuation of the system which had been mandated by this court since the order of the 3rd November 2020. The Defendant was at all times ably and well represented by counsel. The person to serve as the independent accountant had been agreed upon and, the role he was to play understood, since then.

[8] In these circumstances I should be pardoned for expressing surprise that either party would fail to comply, with the Orders made on the 23rd December 2020, due to a misunderstanding of its terms.

[9] The Claimant's "Urgent Application for Committal of the Defendant" was first listed before me in open court on the 25th January 2020. On that date Mr. Leonard Green appeared for the Claimant and indicated that Mr. Lambert Johnson, the Defendant's attorney, indicated he was unaware that the matter was listed for hearing. The matter was therefore adjourned to the 27th January 2021 at 2 pm. I directed that a notice of hearing was to be served.

[10] On the 27th January 2021 Mrs. Emily Shields appeared for the Defendant. She indicated that her firm had come on the record only that morning and that:

- a) she wished the application dismissed for various procedural breaches.
- b) She wished time to respond to the Claimant's affidavits
- c) She was unsure of the breaches of which complaint was made.

I indicated to counsel that, if I commenced the matter and heard and dismissed the preliminary points, I would not be part hearing it to allow affidavits to be filed.

Counsel thereafter wisely applied to have the matter adjourned. I directed Mr. Green to state in open court the orders which he alleged were breached and adjourned the application to the 2nd February 2021 at 10:00 a.m. for hearing in open court. Mr. Green stated that paragraphs (3) and (4) of the Order dated 23rd December 2020 had been breached.

[11] It is now appropriate to set out in full the Claimant's "Urgent Notice of Application for Committal Order" filed on the 6th January 2021. It reads:

"The Applicant/Claimant Cavell Palmer, Hotelier of 28 Lewis Street, Savanna-la-Mar P.O. in the parish of Westmoreland, seeks the following orders pursuant to Part 52.10 of the Civil Procedure Rules 2002.

- 1. An Order that the Defendant be committed for failure to comply with the order of the court made by the Honourable Mr. Justice Batts made (sic) on December 23, 2020.*
- 2. An order that the service of the formal order and affidavit on the Defendant be dispensed with as it is just to do so pursuant to R53.10 (3) of the CPR since the Defendant/Respondent was present and in attendance at the time the order was made and would have been aware of the need to comply with the terms stated in court.*
- 3. Such further and/other relief that this honourable court deem fit and appropriate*
- 4. Costs.*

The grounds on which the Applicant is seeking the orders are as follows:

- a) The Defendant/Respondent had failed to comply with the terms of the Order and has not sought to ensure that float money is made available to the Applicant/Claimant to allow her to conduct the affairs of the hotel in a manner that can facilitate the seamless continuation of the Kibo Hotel business.*
- b) The actions of the Defendant/Respondent in depriving the applicant of any reasonable float has caused the Claimant/Applicant not to provide basic facilities for hygiene breakfast or other services for the guests presently residing at the hotel, some of whom have indicated that they will be leaving the property.*
- c) The actions of the Defendant/Respondent are aimed at frustrating the efforts of the Claimant/Applicant to conduct a viable operation that existed prior to the death of the deceased Wessell Dayes as part of a deliberate scheme to deprive the Claimant/Applicant to that portion of the Kibo Hotel property devised to her by the deceased Wessell Dayes.”*

[12] The application was supported by an affidavit sworn to by the Claimant and filed on the 26th January 2021. She asserted that the Defendant has been sending packaged meals to members of the Jamaica Constabulary Force who are contracted guests of the hotel. That the Defendant has failed to make payments to allow for the adequate running of the hotel. That the only such disbursement was \$40,000 on the 31st December 2020 and that, (paragraph 12 of her affidavit):

“... I told Mr. Perry that this could not possibly meet the expenses and and he, Mr. Perry told me and I do verily believe, that he told Mrs. Dayes that that money could not do. ...”

[13] The Claimant further stated, with documentary proof, that on or about the 29th December, 2020 and the 21st December 2020 she had, pursuant to the Order of the 23 December 2020, deposited amounts of \$352,150.00 and \$471,000.00, (see exhibits CP1 to the affidavit of the Claimant filed 27th January 2020). The Claimant made several other allegations such as (a.) that the Defendant buys products for the hotel and leaves them at the farm store for the accountant to collect, (b) has refused funding to insure the hotel's sole vehicle (c) had engaged security “operatives” for the hotel who do not take instructions from the Defendant (d) has refused to pay the Claimant's salary or the hotel's security, night receptionist, and chef and the other receptionist Ayesha Smith. There were also other allegations not directly relevant to the order made on the 23rd December 2020.

[14] The Defendant filed an affidavit in answer on the 29th January 2021. In that affidavit the Defendant –

- a) denies she was ever presented with a document approved by Mr. Richard Perry in writing related to expenses of the Kibo Hotel.
- b) she states that she, notwithstanding Mr. Perry's omission, “has covered all the bills that I could pay and made available all necessary funds for the operation of the Kibo Hotel”.
- c) She says that Mr. Perry requested \$40,0000 to buy some food for the pantry. Mr. Perry said he would advance it and she could refund him. This she did.

- d) Since October 2020 she has been paying all the hotel's expenses and she attaches a number of bills as exhibits.
- e) She asserts she has also been paying the salaries of a number of people at the hotel.
- f) She says some invoices were sent to her but had no signature for Mr. Perry approving same (exhibit MD1 and MB2 of her affidavit). These she did not pay.
- g) She says she was not present on the 23rd December when the Order was made.
- h) In paragraph 19 of her affidavit she sets out some legal/procedural allegations:
 - i. The Notice of Application did not state clearly the order she was alleged to have breached.
 - ii. The order did not have a penal notice when served upon her
 - iii. Neither The Notice of Application nor the Affidavit in Support had been served personally on her
 - iv. The application when served on her attorney was not accompanied by the affidavit which was served later.
- i) The Defendant denied that paragraph 4 of the Order has been complied with in that Mr. Perry has not been agreed upon as the accountant to be employed. She

however attaches Mr. Perry's letter of 13th January 2021 indicating the services requested of him.

[15] At the commencement of the matter I enquired of counsel whether the affiants were to be cross-examined. Mrs Shields stated she had no desire to cross-examine the Claimant. Mr Green, on the other hand, indicated that he wished to cross-examine the Defendant. It was agreed that the accountant, a Mr. Perry who was present in court, would give sworn evidence.

[16] Having seen and heard the Defendant's evidence I am satisfied she was not being candid with this court. In the first place when asked "*When did you become aware of that order?*". Her answer was "*On Tuesday*". The question was repeated. The answer: "*It was served to me at my home*". Of course she later admitted that she knew an order had been made on the 23rd December 2020 and that she had asked Mr Lambert Johnson about it. It is clear that the Defendant became aware of the order long before "*last Tuesday*". Then there was the effort to deny a conversation with Mr Perry. She eventually admitted that she spoke to him in a three-way telephone conversation involving her lawyer. The witness went on to deny, among other things, knowing what the court's order was intended to achieve. or "*what it was about*". She even denied asking her lawyers what it was intended to achieve. The Defendant stated she is a trained educator having studied at St Joseph's Teachers College. I find it incredible to believe that she was in such ignorance of the Order or what it meant. This incredulity is underscored by the fact that nowhere in her affidavit did she deny knowing or understanding the terms of the Order.

[17] In contrast, to my impression of the Defendant, I found Mr Richard Perry refreshingly honest. His evidence was lead in chief by the Claimant's attorney and he was cross-examined by the Defendant's attorney. Mr Perry stated, and I accept, that he had several conversations with the Defendant and her lawyer. He also communicated by Watts App to the attorney. He said he had recommended establishment of an "imprest" system. In order to get it started \$80,000 was

required. When asked about the Defendant's response to that request, Mr Perry said:

"...As I said last time that request was made she did say she would work with me on that. But I was not getting anywhere before that. I kept having to explain how it works. Sums would be spent and within reason over a certain amount. But we were going to fine tune. I have been waiting for initial set up of \$80,000. It was never paid."

[18] There is no need, for present purposes, to detail the other aspects of Mr Perry's evidence. Suffice it to say that he had never been provided with a copy of the court's order of 23rd December 2020. He was therefore unaware that his approvals of expenses were to be in writing. The omission to provide him with a copy of the order is a sad reflection on the attorneys appearing in the matter. After all, Mr Perry is the independent third party, agreed upon by both sides, who is to mediate the revenue collected and spent until the trial. It should have been obvious that it was most important that he of all people fully understood the terms of the Order. In the result it is clear, from Mr Perry's evidence, that he had given no written approval of any payment. It had all been oral or by Whats App. Mr Perry indicated his willingness to continue work as the hotel's accountant in accordance with paragraph 4 of the Order.

[19] On this evidence therefore the application, to commit for contempt of court, has to be dismissed. The complaint about the Defendant not making payments, and in particular float money, authorised by Mr Perry must fail. Such authorisation pursuant to paragraph three of the Order ought to have been in writing.

[20] Mrs Shields also submitted that the application ought to be dismissed as the Order, served on the Defendant, did not have a penal notice attached as is required by Rule 53.3(b) of the Civil Procedure Rules. The Claimant's response, that the Order with the notice was served on her attorney, is inadequate. The exception, stated

in Rule 53.5(2), does not apply as the Defendant has sworn she was absent when the Order was made and there is no satisfactory evidence to contradict her. I was asked to dispense with service (pursuant to rule 53.5 (3) and, might have been inclined to do so, but for my finding and decision at paragraph 19 above.

[21] The Defendant therefore succeeds and will not be, on this occasion, punished for disobedience to the Order of this court. On the question of costs however I bear in mind my discretion, notwithstanding the general rule of costs following the event, to make such award as is just having regard among other things to the conduct of the parties, see Rule 64.6 (3) and (4). There is no doubt in my mind that the Defendant, who at all material times has been ably represented, was well aware of the terms, purpose and intendment of the Order made on the 23rd December 2020. She is, no doubt for reasons of a real and personal nature, disinclined to abide the Order of the court. I accept Mr Perry as truthful when he says that in telephone conversations he made what was required clear to the Defendant. It is important to note that neither the Defendant nor her attorney, at that time, requested Mr Perry's instruction in writing. Failure to put the request in writing was not advanced as a reason not to pay. The Defendant has also admitted making unapproved expenditures, on her own volition, some of it to security officers who the Claimant complains will not take her instructions. That must cease as the Defendant may in that way be "*interfering*" with the Claimant and her staff in the running of the hotel. It is the Defendant's unwillingness to give effect to the Order of this court which prompted the Claimant's application for committal. In all the circumstances the application was not unreasonably made. The Defendant succeeds on a technicality but this court will express its dissatisfaction with her conduct by ordering her to pay the costs of the application.

[22] I considered varying my injunctive order to give the Claimant full power to control both income and expenditure until trial. However, the Defendant, and her new counsel, assured me that going forward she will abide the Order as, they say, she now understands it. I, on that assurance, left the order in place and unamended.

The Defendant sought leave to appeal and it was granted. My Orders, made on the 4th January 2021, were therefore as follows:

- 1) Application to commit refused
- 2) Costs of the Application to the Claimant to be taxed if not agreed
- 3) Permission to appeal granted.

David Batts
Puisne Judge.