[2020] JMCC. COMM. 36

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU2019CD00482

BETWEEN	**STEWART BROWN INVESTMENTS LIMITED**	**CLAIMANT/1ST ANCILLARY DEFENDANT /APPLICANT**
AND	**ALTON WASHINGTON BROWN**	**2ND ANCILLARY DEFENDANT**
	ERMINE STEWART	**3RD ANCILLARY DEFENDANT**
	NATIONAL EXPORT IMPORT BANK OF JAMAICA LIMITED (T/A) EXIM BANK JAMAICA)	**DEFENDANT/ANCILLARY CLAIMANT/FIRST RESPONDENT**
	MARIA BURKE	**SECOND RESPONDENT**
	FACILITATION ACCESS SERVICE LIMITED	**THIRD RESPONDENT**
	SHAY NEWTON	**FOURTH RESPONDENT**
	GEORGE BROWN	**FIFTH RESPONDENT**
	IAN WILLIAMS	**SIXTH RESPONDENT**

IN OPEN COURT

Mr Stuart Stimpson instructed by Mr Conrad George and Mr Andre Sheckleford of Hart Muirhead Fatta, Attorneys-at-Law for the Applicant

Ms Kashina Moore instructed by Nigel Jones & Co, Attorneys-at-Law for the 1st and 2nd Defendants/Respondents

Heard: 1st and 18th December 2020

Contempt of Court – Factors to be considered - Committal order – Standard of proof - Whether *mens rea* required – Meaning of 'wilful' - Whether there needs to be proof that the party had an intention to act in contempt of Court

Civil Procedure – Whether order of a single Judge of the Court of Appeal can be amended or modified by a notice to parties – Whether such notice can be used as a tool to construe the meaning of an order

LAING, J

The Application

[1] By Notice of Application filed on 2nd September 2020 ("the Application"), the Applicant Stewart Brown Investments Limited ("SBIL") seeks, *inter alia*, a declaration that National Import Bank of Jamaica Limited ("EXIM"), and its officer the 2nd Defendant Ms Maria Burke are in contempt of Court for disobeying an order made in the Court of Appeal by the Honourable Miss Justice Hilary Phillips, JA on the 23rd day of June 2020 ("the Order").

[2] SBIL also seeks an order that the 3rd Defendant, Facilitation Access Services Limited is in contempt of Court for disobeying and/or assisting in the breach of the Order. The 3rd Defendant has not participated in these proceedings, and references to submissions on behalf of the Respondents in this judgment is intended to be a reference to submissions in respect of the 1st and 2nd Respondents only.

[3] The 4th, 5th and 6th Respondents have not been served and the Court was advised that SBIL will not be pursuing an application for contempt proceedings in respect of those Respondents.

The proper procedure for an application for contempt by disobedience of an order of a higher court

[4] Disobedience of an order of the Court to refrain from doing a particular act or breach of an undertaking given to the Court is one of the three main forms of contempt of court. As it relates to civil contempt, the actual procedure on committal is spelled out in the Civil Procedure Rules ("CPR"). A superior Court of record, such as the Court of Appeal of Jamaica, has the power to punish contempt. That power is part of the inherent jurisdiction of the Court.

[5] In the case of **Gordon Stewart v Noel Sloley** [2013] JMCA App 4 at paragraph 39 the Court of Appeal stated as follows:

> *"Section 2 of Part 53 clearly speaks to the court's general power to commit for contempt. As provided for in rule 53.10 (10)(1)(a), where the contempt is committed within the proceedings, an application for contempt can be made by a notice of application for court orders under Part 11 of the CPR as specified…"*

In **Stewart v Sloley** (supra) the Court of Appeal confirmed that by operation of CPR 53.10 where a contempt was allegedly committed within proceedings in the Court, an application under that part for an order finding a party in contempt must be made by a notice of application and in any other case, by a fixed date claim form. In the claim before me, although the order which was allegedly disobeyed, originated in the Court of Appeal, it was within the proceedings which form a part of this claim, and accordingly this Court has the power to punish for contempt of Court if it finds that the allegation has been proved to the requisite standard. In any event, there is no dispute between the parties on these procedural and jurisdictional points.

Security for commercial loan transactions – a brief foray

[6] In order to fully appreciate the context of the Application, it is necessary to take a brief examination of the law governing the underlying commercial transaction between the parties.

[7] Under English law, a secured transaction can be defined as an agreement, which is usually accessory to a credit agreement, which grants the creditor a right relating to property. The purpose of this is to improve the creditor's chance of getting the loan repaid or of ensuring performance of the contract by the borrower. Such security may be possessory where the creditor takes possession of the subject matter of the security, or non-possessory. Secured transactions are therefore contractually based, and contract law principles will determine the validity and enforcement of these transactions. There is therefore good commercial sense, in a lender obtaining security over personalty in addition to a mortgage, by use of a debenture or bill of sale for example, in order to increase its chances of recovering the money which it lends.

[8] In this case, it is noted that the loan facilities approved in favour of SBIL were to facilitate it acquiring trucks and equipment as well as working capital for the execution of a contract it had entered into with a bauxite company. Security for the facilities included personal guarantees supported by mortgages, unlimited guarantees, a debenture and bills of sale over equipment.

[9] On default by a mortgagor the preferred remedy of the mortgagee is normally to obtain possession and then sell the mortgaged property because in most situations it will be the most valuable asset. The mortgagee will then deduct the amount of the mortgage debt due to him, together with any interest, and or costs, from the proceeds of sale and pay over the balance to the mortgagor. Where the lender also has security over personalty, for example plant equipment or motor vehicles, then its options are greater and the decision whether it will enforce the mortgage and/or other security which it holds, will vary depending on a number of circumstances in each case, and what it deems to be the most commercially viable course.

[10] Ordinarily the purpose of an injunction is to preserve the *status quo.* In this case, SBIL was deemed to be in default of its loan agreement with EXIM and EXIM was in the process of attempting to exercise its power of sale under the mortgage. In

such cases, special considerations apply in respect of the grant of an injunction prohibiting the mortgagee from exercising its powers of sale under a mortgage which it holds. This is because the Courts have developed special rules and procedures which govern the limitations to be placed on a mortgagee in such circumstances.

[11] The general rule is that the Court ought not to interfere with a mortgagee's right to exercise his power of sale except where the sums claimed to be due are paid into court. In this jurisdiction, this general rule is commonly referred to as the "Marbella principle" and the requirement for payment imposed by the Court is referred to as "the Marbella Condition". The reference to **Marbella** is derived from the case of **SSI (Cayman) Limited et al v International Marbella Club SA** (unreported), Court of Appeal, Jamaica, SCCA No 57/1986, judgment delivered 6 February 1987, which is the case considered to have settled the applicable principles and some exceptions. As a general rule, there is usually no such condition attached to the granting of an injunction which prohibits the holder of security under a bill of sale, from enforcing pursuant to the bill of sale.

[12] In the case of **National Commercial Bank Jamaica Limited & Another v Toushane Green** [2014] JMCA Civ 19. At paragraph 34 the Court of Appeal found as follows:

> *There is no dispute that a bill of sale transfers property and chattels from the grantor to the grantee. In **Johnson v Diprose** [[1893] 1 QB 512] Lord Esher MR stated that "a bill of sale" is a document given with respect to the transfer of chattels where possession is not intended to be given. The learned Master of the Rolls stated further that the bill of sale in that case, which had been executed in the form contained in the scheduled to the English Bills of Sale Act 1887 would give to the grantee an absolute right to the property in the goods assigned and a right to possession of them. However, the right to possession of them in that instance was circumscribed by certain conditions, which it is not necessary to mention here. Lord Bowen in that case stated that, as an ordinary rule, on a mortgage of chattels, the property passes to the mortgagee. Likewise, in **Small Businesses Loan Board**, [(1964) 7 WIR 287] after a careful review of some of the relevant authorities Lewis JA, stated that though bills of sale may provide that possession is to accompany the transfer of ownership, in practice they are used where it is intended that position is to remain with*

> *the debtor. Implicit in this statement is a recognition that a bill of sale transfers ownership.*

[13] There is no challenge to the validity of the bills of sale in this case, which were duly stamped and registered/recorded. **Johnson v Diprose** and **Small Businesses Loan Board v Reid** both assert the right of immediate possession to goods which are the subject of a bill of sale.

[14] EXIM formed the opinion that it was entitled to enforce its bills of sale as SBIL was in default of its loan obligations insofar as it had failed to make payments as required by the loan agreement and the bills of sale. EXIM asserted further, that SBIL had also failed to keep insured the vehicles and other security in which EXIM had an interest. Therefore, if there were these breaches, unless restrained, EXIM would have been fully entitled to take possession of the trucks and other equipment which were the subject of the Bills of Sale wherever it found them.

[15] It was against this background, that SBIL sought to prohibit EXIM from enforcing not only the mortgage but also the other security such as the bills of sale which it held.

Background to the making of the Order- The injunction in the Commercial Court

[16] By Notice of Application filed on 5th December 2019, the Claimant Stewart Brown Investments Limited (SBIL") sought the following relief:

> a. *An interim injunction restraining the defendant from taking any steps pursuant to its purported calling of the loan with respect to the loan facility provided to the Claimant by the Defendant and initially governed by the Claimant's commitment letter of the 14th November 2017 and subsequently amended ("the Loan Facility") until the determination of proceedings.*
>
> b. *An interim injunction restraining the Defendant from enforcing any security with respect to the Loan Facility until the determination of the proceedings herein.*
>
> c. *Any further relief as this Honourable Court may deem fit.*

[17] By his written judgment in **Stewart Brown Investments Limited the National Export Import Bank of Jamaica Limited (T/A Exim Bank Jamaica)** [2019] JMCC Comm 39, Batts J decided that the usual condition which ought to apply when a mortgagee is being restrained from exercising its power of sale (the "Marbella Condition"), ought to be imposed on the Claimant SBIL. Paragraph 18 of the judgment of Batts J is instructive and is in the following terms:

> *[18] In this case however the Defendant is not only being restrained as mortgagee. Under threat of enforcement are other things, such as debentures over fixed and floating assets and bills of sale over industrial and other equipment, being the working assets of the Claimant, see generally exhibit AB1 to the affidavit of Alton Brown filed on the 5th December, 2019. It would be inappropriate to apply Marbella conditions to the restraint of those securities. A fair result, and one which is consistent with established legal principles, is an order which will allow the Claimant to honor its Noranda contract, and make payments in accordance with the alleged new payment terms, until the trial of the action. I therefore propose to restrain the Defendant unconditionally in respect of the non-real estate assets, that is, those not the subject of a mortgage.*

[18] Accordingly, based on the reasons as summarised in paragraph 18, the learned Judge made the following orders:

> 1. *Upon the Claimant, through its counsel, giving the usual undertaking as to damages the Defendant is restrained until the trial of this action, or further order of the Court, whether by itself its servants and/or agents or otherwise howsoever from taking any steps, other than the exercise of its powers of sale as mortgagee, to recover any amounts due or allegedly due with respect to the loan facility governed by the commitment letter of 14th November 2017 and subsequently amended.*
>
> 2. *Upon the Claimant, through its counsel, giving the usual undertaking as to damages the Defendant is restrained, until the trial of this action or further order of the Court, whether by itself its servants and/or agents or otherwise howsoever from exercising its powers of sale as mortgagee, on condition that the Claimant pays into court the amount of $170,262,983.90 on or before the 31st day of March, 2020.*
>
> 3. *Paragraph number one is conditional on, and shall remain effective only so long as, the Claimant pays to the Defendant $3,500,000.00 on or before the 30th day of each month commencing on the 30th day of December 2019 and continuing*

> *monthly thereafter until the trial of this matter or further order of the Court…."*

[19] It is therefore patently clear and beyond any dispute that the order of Batts J restrained EXIM in respect of its enforcement of the mortgage against the realty and also restrained EXIM in respect of its enforcement against the equipment/personalty. The sum of One Hundred And Seventy Million, Two Hundred And Sixty-Two Thousand, Nine Hundred And Eighty-Three Dollars And Ninety Cents ($170,262,983.90) was the amount that EXIM was asserting that it was owed by SBIL and the sum of Three Million, Five Hundred Thousand Dollars ($3,500,000.00 was the amount that SBIL was asserting was the monthly payment obligation (although this figure was disputed by EXIM).

[20] By Notice of Application filed on the 17th March 2020 SBIL sought a stay of order number 3 of the Order of Batts J made on 20th December 2019 and on 26th March 2020, Batts J made the following order:

> 1. *Unless the Claimant on or before 10th April 2020 pays to the Defendant the amount of J$10.5 million paragraph one of the order made on the 20 December 2019 will be discharged.*
>
> 2. *Payments in accordance with paragraph three of the order dated the 20th December 2019 shall resume on or before 30th April 2020 and continuing monthly thereafter until the trial of this action or further order of the court.*

[21] By Notice of Application filed 15th May 2020, SBIL sought to remove the Marbella Condition imposed by paragraph 2 of the order of Batts J made on the 20th December 2019, or to postpone its operation due to exceptional circumstances as well as the alleged "inequitable unfair and improper" conduct of EXIM. By order dated the 21st May 2020, Batts J dismissed the Notice of Application filed by SBIL on the 15th May 2020.

Proceedings in the Court of Appeal – Injunction by Phillips JA

[22] By Notice of Appeal filed 27th May 2020 SBIL appealed against the decision of Batts J by which he refused to remove or postpone the Marbella Condition. SBIL

also applied for an injunction pending appeal, since not having complied with the Marbella Condition, the injunction imposed by Batts J had lapsed by operation of his order of 26th March 2020. On the 23rd day of June 2020 the Hon. Justice of Appeal Phillips made the Order, granting an injunction in the following terms:

> *"1. Upon the applicant giving the usual undertaking as to damages, the Respondent (EXIM Bank) is restrained by itself, its servants and/or agents or otherwise howsoever and/or exercising its power of sale as mortgagee until the determination of the appeal, should be viewed for hearing in the week of the 13 July 2020".*

[23] In SBIL's submissions, it asserted that before the Court of Appeal it sought an interim injunction restraining the Defendant from enforcing any security with respect to the loan facility until the determination of the proceedings in the Court below. The application has not been exhibited to this court. Ms Moore's position was that SBIL did seek an injunction in broad terms in the Court of Appeal and although on its face the Order could be interpreted as extending to personalty, this interpretation would not be correct as it was not an order that the Court of Appeal could make having regard to the order being appealed by way of the Notice of Appeal filed 27th May 2020. It was submitted by Ms. Moore that this is because there was no appeal in respect of Justice Batts' decision to restrain the enforcement in relation to EXIM exercising its power of sale under the bills of sale against personalty.

[24] EXIM in its written notice of appeal, submitted that it was clear from the record that the appeal before Phillips JA concerned only real property and the learned Judge was clear about that issue and so indicated in paragraph 2 of her decision. Paragraph 5 of EXIM's notice of appeal reflects EXIM's view of error in the Order (which is consistent with its position before this Court) and expresses it in the following terms:

> *"5. That there is an error in the wording of the order as the order made restrains the Respondent in relation to the calling of the loan which would affect the enforcement of other security outside of the real property referred to and contained in the mortgage instruments. Moreover, no issue has*

> *been raised in the appeal about the other security held by the Respondent and the enforcement of the same."*

[25] As it relates to Ms Moore's submission that Phillips JA could not have made the Order in the broad terms as expressed, it is fitting to consider **Hadmoor Productions Ltd and Others v Hamilton and Others** [1983] 1 AC 191, at page 220 where Lord Diplock made the following observations, which, although lengthy, are quite appropriate in this case:

> *"Before adverting to the evidence that was before the learned judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it.* ***It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own****."(emphasis supplied)*

[26] However, whereas at first blush **Hadmoor Productions** (supra) may appear to assist the submissions of Ms Moore as it relates to the scope of the original jurisdiction of the Court of Appeal, such assistance is insufficient. This is because it is settled law in Jamaica that the Court of Appeal has the jurisdiction to hear an

application which is ancillary to the appeal, (and it is not in dispute that the Claimant did apply for a freezing order covering realty and personalty). Authority for this proposition, if necessary, can be found in the case of **Phyllis Mitchell v Abraham Dabdoub and Others** Court of Appeal, SSCA No. 95/2001, judgment delivered 25th October 2001 where Forte, P at page 5 of the judgment stated as follows:

> *The power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations 1958 in so far as is relevant to this issue is to be found in Section 8(2):*
>
> > *"For the purposes of this section, there shall be vested in the Court of Appeal all jurisdiction and powers formally vested in the Supreme Court, or Full Court, when exercising appellate jurisdiction, and for all the purposes of and incidental to the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made the error on the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court or Full Court."*
>
> *This section in my view makes it very clear that the Court of Appeal has the jurisdiction to hear matters which are incidental to the hearing of an appeal. In my judgment, the question whether the mere filing of an appeal amounts to an automatic stay, particularly given the history and circumstances of this case, is a question of law incidental to the hearing of the appeal. Section 10 of the Judicature (Appellate Jurisdiction) Act speaks to such matters and I would therefore conclude that by virtue of that section this Court has the jurisdiction to hear the Motion.*

[27] It is therefore patently clear, that there was a proper basis in law for an injunction to be granted in respect of EXIM's enforcement against the equipment, notwithstanding the fact that that element of the injunction as granted by Batts J was not the subject of an appeal.

[28] On the 13th and 14th July 2020 a full panel of the Court of Appeal heard arguments on the appeal. During the course of the hearing, Counsel for SBIL asserted that the order of Phillips JA is a restraint on EXIM both in respect of realty and personalty. It appears that this may have triggered a response by EXIM and on 16th July 2020 EXIM filed in the Court of Appeal an application seeking the correction of the Order of Phillips JA made on 23rd, June 2020 to read in the following terms:

> *"Upon the 1st Applicant (Stewart Brown Investments Limited) giving the usual undertaking as to damages, the respondent (Exim Bank) is restrained by itself, its servants and/or agents or otherwise however from exercising its power of sale as mortgagee in relation to real estate held as security being held by the Respondent until the determination of the appeal, scheduled for hearing in the week of 13 July 2020."*

[29] There was no hearing before the Court of Appeal, however, the Registrar of the Court of Appeal delivered a notification to the parties and an amended version was issued on 12th day of October 2020. The amendments are not material for purposes of this application. The original notification (hereafter referred to as "the Notice") was in the following terms:

> *"**TAKE NOTICE** that this matter was considered by the Honourable Miss Justice Phillips, JA who on the 28th day of July, 2020 made the following direction(s):*
>
> *I have been asked to clarify the order made by me on 23rd June 2020 and say as follows:*
>
> 1. *The restraint imposed on the purported calling of the LOAN and/or to exercise of the powers of sale of the mortgage was not applicable to the monthly obligation due from the appellant in the sum of J$3.5 million is to be paid on or before the 30th day of each month, which commence on 30th December 2019.*
>
> 2. *For the avoidance of doubt, the restraint of the calling of the loan and taking steps to exercise the powers of sale of the mortgage did not restrain payment of the monthly sum due in the amount of J$3.5 million, as to condition of payment, or non-payment of the J$3.5 million, and the consequences thereof not having been appealed, was not argued before me.*
>
> *Please inform the parties accordingly."*
>
> *……..*
>
> *Registrar*

[30] Messrs Nigel Jones & Co, the Attorneys-at-Law representing EXIM, formed the view that the Notice meant that the Order did not apply to personalty and on 11th August 2020, EXIM's Attorneys wrote a letter addressed to EXIM stating:

> *"Reference is made to the captioned matter.*

> *As you are aware, we filed an application to correct/clarify the error in the order of the Hon. Ms. Justice of Appeal Phillips restraining the Respondent until the determination of the appeal. We have since received the order in relation to the said application and enclose same along with judgment dated June 23, 2020. For further clarification in relation to the amounts and dates referred to in the recent order, please refer to the initial decision of Mr. Justice Batts made on December 20, 2019 which is also enclosed.*
>
> *In light of the above, please be advised that you may enforce the Bills of Sale".*

Evidence of the breach of the Order

[31] In his affidavit sworn to on the 2nd September 2020, Alton Brown, a director of the Claimant averred that on 26th August 2020, men attended upon a site in the parish of St. Ann at which SBIL was carrying out mining operations. The three men identified themselves to him as Mr. Shea Newton, Mr. George Brown, and Mr. Ian Williams who was a bailiff. He asserted that the men forcibly entered a gate area by cutting off the lock to the gate. This was an area SBIL used for storage and they drove out a truck that was stored there. They further dismantled another truck and he confronted them asking them to produce a court order. He said Mr. Newton produced a copy of a letter by Nigel Jones & Company dated 11 August 2020. It is being advanced by SBIL, that the seizure of a truck and the dismantling of another truck were done in breach of the Order of Phillips JA dated 23rd June 2020.

Was there a valid Order which could have been breached?

[32] Whether the Order was in the terms intended by Phillips JA or not, the fact remains that the Order was not set aside up to the time that there was an interference with the trucks owned by SBIL which amounted to enforcement steps. The Order remained a valid order of the Court and compliance with it was required. Counsel for SBIL has very helpfully provided a number of cases which demonstrate that this point is well settled. In **Hadkison v Hadkison** [1952] 2 All ER 567 at 596, Romer LJ stated as follows:

> *"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.

(Per Lord Cottenham L.C. in ***Chuck v Cremer****.*

> *"A party who knows of an order, whether null and valid, regular or irregular, cannot be permitted to disobey it.... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: That the course of a party knowing of an order which was null and irregular, and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.*

[33] **Hadkison v Hadkison** (supra) was cited with approval by the Privy Council in **Isaacs v Robertson** [1984] 43 WIR 126, which was a case on appeal from the Court of Appeal of the Eastern Caribbean States, the headnote of which reads:

> *"An order made by a court of unlimited jurisdiction (in this case, the High Court of St. Vincent and the Grenadines) must be obeyed unless and until it has been set aside by the court. Any attempt to distinguish in such a context between 'void' and 'voidable' orders of the court would be misleading."*

At page 130 Lord Diplock made the following statement:

> *The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular, it can be set aside by the court that made it upon application to that court; if it is regular, it can only be set aside by an appellate court upon appeal (if there is one to which an appeal lies).*

[34] By restraining EXIM, its servants and or/or agents or otherwise howsoever from "*taking any steps pursuant to its purported calling of the loan…*" the Order when strictly construed does expressly restrict EXIM from enforcing its security in respect of personalty. This is so because any such enforcement would arise as a result of EXIM's calling of the loan. This was conceded by Ms Moore in her oral submissions to the Court. What Ms Moore submitted was that the interpretation of an order must be made in the context of the notice of application which resulted in that order, the

underlying facts, the powers of the court making the order and in particular the Court's clarification by its Notice. The effect of the Notice is therefore of critical importance in this matter.

The legal effect of the Notice – SBIL's submissions

[35] It is the position of SBIL, that the Order, having been perfected, and served on the Respondent's Attorneys-at-Law on 10th July 2020, rendered the single Judge of the Court of Appeal *functus officio*, and the Order could not have been varied by a single Judge of Appeal.

[36] It was submitted that where a Judge delivers judgment he or she cannot, except by consent or after a new trial or hearing, alter a judgment which he or she has formally given. Reliance was placed on the case of **In the Matter of a Plaint of Irving v Askew** [1870] LR 5 Q B 208. It was further submitted, that whereas there has been some relaxation of this principle a judge is only entitled to alter his or her judgment or order before the order has been drawn up, registered or perfected.

[37] The essence of SBIL's submissions on this point is that the Notice of Phillips JA could not have altered the Order, not as a matter of substance, nor is it possible as a matter of law. Mr Stimpson submitted that in any event the Notice could not have been sufficient clarification because it was not clear on its face, in other words it did not speak for itself. It purported to offer an explanation of the intention of the Judge which could only be discerned by cross referencing other information relating to the procedural history of the Claim.

The legal effect of the Notice –Submissions of the Respondents

[38] Ms Moore submitted that the learned Judge Phillips JA, had the power to clarify the Order and that is what she did by the Notice on 28th July 2020. In support of this submission reliance was placed on the case of **Dalfel Weir v Beverly Tree** [2016] JMCA App 6. Counsel referred the Court to the judgment of Phillips JA at paragraph 62 which provides as follows:

> *[62] I found the decision of Sackar J in the Supreme Court of New South Wales in* ***Mainteck Services Pty Limited v Stein Heurtey SA and Stein Heurey Australia Pty Limited*** *[2013] NSWSC 1563, interesting and applicable to the issues before us. In that case, the court had incorrectly carved out of the costs order sums in relation to certain "Variation Claims". Sackar J firstly set out the error, the way in which he recognized that the law provided for the correction of it, pointing out the distinction that he discerned between errors made in the judgment and the court having a different view on the subject of the litigation...*
>
> *He referred to* ***Hatton v Harris*** *with particular reference to what he termed the hypothetical inquiry, namely whether if the supposedly error had been drawn to the attention of the court or the parties at the relevant time it would have been corrected as a matter of course, which she answered in the affirmative. He gave his view on the process as follows:*
>
> > *"In my opinion, I have power to correct the mistake made by me in entering judgment due to my misunderstanding of the position taken by counsel for the defendant. Apart from anything else, how would a Court of Appeal be able to see whether or not I acted under a mistaken impression? Surely it is the person whose mind was afflicted by the mistake who is the one to identify it and correct it."*
>
> *I find these comments to be straightforward and applicable.* ***The ambiguity in the order was made by the court and it must be so stated and dealt with, so that the intention of the court is preserved and protected.*** (Emphasis supplied)

[39] Ms. Moore submitted that EXIM was relying on the clarification offered by the Notice to support her submission that context should be used in construing the Order. Counsel argued that the Notice indicates how the Order is to be read and understood. In these circumstances, Counsel argued, the Notice modifies the plain and ordinary meaning of the Order and expresses the intention of the Court. Accordingly, it must be read with the Order. Furthermore, although the Notice was not an order of the Court it had the force of an order. Counsel conceded that although it was not an order of the Court, it was clarification provided by the Court which, to use Counsel's words, "*travelled with the Order*".

[40] Ms Moore also relied on the affidavit of Matthew Gabbidon filed 29th October 2020, in which he responds to the affidavit of Alton Brown filed 22nd October 2020, and in particular paragraph 10 where Mr Gabbidon states as follows:

> *10. In further response to paragraph six of the affidavit the Court of Appeal indicated in its brief reasons for granting the application for variation stated that it, amongst other things, considered the clarification provided by Phillips JA.*

[41] Counsel further argued, that EXIM would not have been in breach of the Order when the enforcement steps were taken on 26th August 2020 because by then the Order had already been clarified by the Notice. It was this clarification which formed the basis of the 11th August 2020 letter from Nigel Jones & Co to EXIM, advising that it was free to enforce the bills of sale.

The Court's analysis of the effect of the Notice

[42] In the English Court of Appeal case of **Paulin v Paulin and Another** [2009] EWCA Civ 221, the Court examined in great detail the law relating to the amendment of a judgment or order by a Judge. Their Lordships summarised the authorities at paragraph 30 and considered examples of the application of the jurisdiction to reverse a decision prior to the order being sealed. I have not reproduced those portions because of their limited applicability to this case. It appears that the Court considered as settled, the law relating to the situation where the order has been perfected by being sealed as is reflected in the quote below:

> *"30. Study of the many authorities cited to us on this first issue leads me to attempt to summarise the law in relation to it as follows:*
>
> *(a) A judge's reversal of his decision is to be distinguished from his amplification of the reasons which he has given for it. Where the reasons for his decision are allegedly inadequate, a party should generally invite him to consider whether to amplify them before complaining about their inadequacy in this court and he has an untrammelled jurisdiction to amplify them at any time prior to the sealing of his order:* ***Re T (Contact: Alienation: Permission to Appeal)*** *[2002] EWCA Civ 1736, [2003] 1 FLR 531, per Arden LJ at [41], being a case in which the inadequate reasons were my own.*
>
> *(b) A judge has jurisdiction to reverse his decision at any time until his order is perfected but not afterwards:* ***In Re Suffield and Watts*** *(1888) 20 QBD 693. Nowadays an order is perfected by being sealed pursuant to CPR 40.2(2)(b)."*

[43] I fully accept that in an appropriate case a Court does have the authority to correct an error in an order or judgment. I accept the authorities which state that this correction is only permissible before the order is sealed. On the issue of timing specifically, I therefore accept the submissions on behalf of SBIL that because the Order had been sealed, Phillips JA could not have amended the Order by the Notice.

[44] However, there are other reasons which have led me to conclude that the Notice could not have amended the Order. An important point to note in this analysis is the fact that the Order is clear on its face in restricting EXIM, its servants and/or agents "*from taking any steps to pursuant to its purported calling of the loan".* This restricted the enforcement against realty and personalty. There was therefore no ambiguity in the Order. If what her Ladyship Phillips JA sought to communicate by the Notice was that the Order should be read as applying to realty only, then that would amount to an amendment of the Order and a limited reversal of the Order, insofar as the Order was wider in scope than intended and erroneously related to personalty.

[45] I said "if" because it is not immediately clear from the face of the Notice what is being communicated. The point was validly made by Mr Stimpson that the Notice is not a document which expressly stated that it was not intended for the Order to apply to personalty. Nor did the Notice correct the wording of the Order by offering language which clearly limited the extent of the application of the injunction granted by the Order to realty only. The focus of the Notice centered on the payment of the monthly sum due in the amount of J$3.5 million. Mr Stimpson further submitted that in order to arrive at the meaning of the Notice which Ms. Moore submitted should be attributed to it, one has to embark on a process of deduction. One has to determine whether the consequences of the payment or non-payment of the J$3.5 million not having been appealed and therefore not having been argued, means that the Order should not be interpreted to relate to or include personalty (despite the clear wording of the Order that it does include personalty).

[46] There is merit in Mr Stimpson's submissions in this regard. I do appreciate that the condition imposed for the payment of $3.5 million monthly was seen by Batts J to be aimed at achieving a fair result in order to permit SBL to continue to make payments in accordance with the alleged new payment terms. It was not a Marbella Condition and the issue of the grant of the injunction by Batts J restraining enforcement against personalty was not being appealed. Consequently, it was not argued. Viewed against this background, one inference which may be drawn from the Notice is that Phillips JA did not intend to impose a restriction in respect of personalty. However, the underlying facts which could lead one to this conclusion would not be known to a person who was viewing the Notice in isolation or even viewing it in conjunction with the Order only. The reader therefore would not have had all the tools necessary to arrive at the interpretation which Ms Moore urges should be placed on the Notice.

[47] In my respectful opinion, the Notice at its highest, is evidence that Phillips JA was indicating that the Order was wider than she had intended, but in all the circumstances it does not have the legal effect of amending or modifying the clear terms of the Order.

[48] The legal characterisation and effect of the Notice is uncertain. The Court of Appeal has conclusively ruled that it is not an order of the Court. Ms Moore has submitted that although it is not an order it has the force of an order. Counsel has submitted no authority in support of this assertion and I do not accept this submission. The force of an order is derived from its historically recognized legal nature, character and effect. There is no legal basis to support ascribing order-like characteristics to a document which is not an order and which identifies itself to be a mere notice.

[49] Ms Moore further submitted that the Notice indicates how the Order is to be read and understood. Counsel posited that in these circumstances, the Notice modifies the plain and ordinary meaning of the Order. It expresses the intention of the Court and must be read with it. It was clarification which, to use Counsel's words,

"*travelled with the Order*". I also do not accept these submissions because the Order on its face was clear and unambiguous. If the clear terms of the Order were to be amended they would have to be amended by a proper method accepted by the Court and there is no legal authority which suggests that the Notice was such a proper method.

[50] Ms Moore also contended that in the absence of a clear mechanism as to how a judge in the Court of Appeal should make corrections as was needed in this case, the Notice was not prohibited and should be allowed. I am of the view that the need for there to be a correction of an error in an order is not novel and there are appropriate and recognized tools of which a litigant can avail itself, as in this case, where EXIM subsequently made a successful application to amend the Order to limit its operation to realty only.

[51] Furthermore, if the effect of the Notice is as clear Ms Moore has submitted, one would have expected that on 16th October 2020, when the Court of Appeal made an order on the application of EXIM varying the Order so as to narrow its scope to realty only, rather than simply considering the Notice as a factor influencing its decision (as Ms Moore asserted), the Court would have expressly declared that the Notice did have the effect of modifying the Order. On that basis, the Court of Appeal, might have had a good reason to have declined to grant the amendment on the ground that it was wholly unnecessary (having regard to the legal effect of the Notice).

Mens Rea- the Respondent's submissions

[52] Ms. Moore submitted that in order for the Respondent's to be found liable for contempt, it must be established that the requisite mental element was present. Counsel submitted that there was no such evidence in this case, and where any element is missing the application must be refused.

[53] Ms Moore relied on the case of **Attorney General v Punch Limited and Another (Respondents),** [2002] UKHL 50 in which Lord Nicholls of Birkenhead at paragraph 2 stated as follows:

> *"2. 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…"*

The Court's analysis

[54] The Court has to consider whether it is necessary to show *mens rea* on the part of the Respondents before a finding of contempt of Court for breach of the Order, that is, whether there must be an intention to do the prohibited act in breach of the order.

[55] In relation to the issue of *mens rea* in respect of the breach of injunctions, in **Stancomb v Trowbridge UDC** [1910] 2 Ch 190 at pages 193-194, Warrington J made what has been described as a classic exposition of the law on this issue where he said:

> *"It is contended on the part of the defendants that the acts to which I shall presently refer do not amount to "wilful disobedience,' and I may at the outset state what, in my opinion, is the meaning of "wilful disobedience" in rule 31 of Order XLII. In my judgment if a person or corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order. I think the expression "wilfully" in Ord. XLII, r.31 is intended to exclude only such casual or accidental and unintentional acts as are referred to in* ***Fairclough v Manchester Ship Canal Co.*** *[1897] W.N.7…"*

This formulation was approved by the House of Lords relatively in the modern era in the case of **Director General of Fair Trading v Pioneer Concrete (U.K.) Limited and Another** [1995]1 AC 456. The Court held that **Stancomb's** case was still good law and should be followed. Accordingly, the Court found that liability for

contempt does not require any direct intention on the part of the employer to disobey an order. It extended the principle to find that there was nothing to prevent an employing company from being found to have disobeyed an order by its servant, as a result of a deliberate act by the servant on behalf of the employer.

[56] These cases appear to go no further in assisting EXIM than to demonstrate that an act which is accidental or unintentional will not amount to a breach of an injunction. However, there is at least one decision of the English Court of Appeal **Irtelli v Squatriti** [1992] 3 All ER 294 which has held that *mens rea*, manifested in the form of an intention to act in contempt of court is required. In that case, the appellants had by an injunction in the usual terms "*by themselves or their servants and agents from selling disposing or otherwise dealing with*.." certain assets. In breach of this injunction they executed a further charge over the properties in favour of the mortgagees and were sentenced to imprisonment for contempt. On appeal they led fresh evidence and asserted that the terms of the injunction had not been fully explained to them and in particular there was a letter sent to them by their solicitor which explained that the injunction prevented them from "selling" their property without mentioning that it also prohibited them from charging their property. In the course of the judgment Farquharson LJ said at page 299 of the judgment:

> *"the question for us is whether the evidence now available establishes beyond a reasonable doubt that they did intend to act in contempt of the court's authority".*

He was concerned that the absence of the plaintiff put the court "in some difficulty" in considering the fresh evidence before the court. Nevertheless, he found that "*for my part I would find it impossible to say that I was convinced that the appellants had the necessary intention to act in contempt of court*."

[57] Sir Donald Nicholls VC in the concluding paragraph on page 302 of the judgment stated as follows:

> *"I agree that, on the basis of the new evidence, the judge's order committing these two defendants to prison should be set aside. The affidavit evidence of the defendants is to the effect that they did not understand that executing a further charge was prohibited by the order. Like Taylor and Farquharson LJJ I do not find that evidence in all respects convincing. It raises almost as many questions as it provides answers, but it has not been challenged before us. Accordingly, the conclusion has to be that knowing breach of the order by these defendants has not been proved."*

[58] It should be noted that the House of Lords in the **Pioneer Concrete** case (supra) did not expressly overrule **Irtelli v Squatriti** (supra), however, the Court of appeal in the **Irtelli** case similarly did not refer to the earlier line of authority represented by **Stancomb's** case, and that has caused **Irtelli** to be considered to be of questionable authority.

[59] Nevertheless, although a defendant who fails to comply with an injunction is not necessarily absolutely liable, the weight of the authorities tip the scales considerably in favour of a test of strict liability in the sense that the absence of negligence or intention to disobey will not amount to a defence. Because orders are meant by the Court to be obeyed, the motive for disobedience is irrelevant for the purposes of establishing a case of contempt. In **Knight v Clifton and Others** [1971] Ch 700 at 721, Sachs LJ commented that:

> *"…when an injunction prohibits an act, that prohibition is absolute, and is not to be related to intent unless otherwise stated on the face of the order…"*

[60] Ms. Moore relied on the judgment of my learned brother Anderson J in the case of **Margaret Gardner v Rivingon Gardner** [2012] JMSC Civ 160 in which he discussed the standard of proof that had to be met by an applicant asking the Court to commit a defendant for civil contempt. Counsel referred to paragraph 14 of the judgment in which his Lordship stated the following:

> *[14] In two of the three cases that have been referred to this court, for the purposes of the present Application, by counsel for the Defendant, respective Courts have made it clear, both in South Africa, Canada (these being the respective nations from which those two cases have emerged), that in terms of the mental element required to be proven for civil contempt arising from the alleged breach of a court order by a party, what must be*

> *proven is that there has been, on the part of the respondent to a contempt application, a willful and mala fide (in bad faith)refusal or failure to comply with the relevant Court Order-* ***See Sparkes v Sparkes (1988) (4) SA 714, at 725 F-G & Zulu v Zulu-In the High Court of South Africa-Case number 37415/05, esp. at paragraph 6 & Forest v LaCroix Estate - Ontario Supreme Court, - 1999-11-09 esp. At paragraph 15****…. At common law however, nothing less than a wilful refusal to comply with a Court Order, will suffice as constituting the requisite guilty mind (mens rea).*

[61] In **Forest v LaCroix** Valin J of the Ontario Supreme Court of Justice at paragraph 15 cited with approval Chadwick J in **884772 Ontario Ltd v SHL Systemhouse Inc.,** [1993] O.J. No 1488 (Gen. Div.) that in order for the test relating to contempt of court to be satisfied, the following requirements must be met:

> *(a) the order itself must be clear and unequivocal and not open to various interpretations;*
>
> *(c) in order to satisfy the criminal nature of the contempt proceedings, the party disobeying the order must do so in a deliberate and wilful fashion; and*
>
> *(c) in considering the evidence as to whether there has been a deliberate breach of the court order, it must be proven beyond a reasonable doubt.*

The approach in this case is therefore in keeping with the line of authority which I have accepted as accurately reflecting the law relating to the mental element to be applied to contempt proceedings. To the extent that it may be suggested that the African cases to which my learned brother Anderson J referred have imported a requirement that the failure to comply with the order must have been done in bad faith for there to be contempt, I do not accept that position, these cases being merely persuasive in any event.

[62] Certainty of the Order is not in dispute and it is not ambiguous on its face. There is no ambiguity or vagueness which can avail EXIM to justify the use of the Notice in construing its terms. I have earlier in this judgment explained why the argument that the Order is too wide given the background of the proceedings is not accepted by the Court. However, I appreciate that the Order as framed in the context of the

proceedings up to that point, may have initially led EXIM and its Counsel to have adopted a position which was misconceived in law.

[63] Counsel ought not to have derived such a high level of comfort from the Notice issued by Phillips JA., and to have concluded thereby that because the Notice may supported of Counsel's construction of the Order, that it conclusively settled the issue of what the Order restrained. The Notice did not expressly and in clear language address the issue of whether a prohibition against the enforcement over personalty was a deliberate and intended consequence of the Order, (which was the issue of concern to EXIM). Ms Moore indicated that the real reason for the application to amend the Order following the issuing of the Notice, was the Claimant's continued insistence that the Order remained valid in its original terms. However, the making of that application to amend (which was successful) suggests that Counsel appreciated that the Notice, as a matter of law and procedure, might not have provided the cure that was needed in clarifying the Order.

[64] It is also settled law that the breach of an order, to constitute a contempt, has to be proved beyond a reasonable doubt. The Courts have repeatedly stated this, see for example the English Court of Appeal case of **Re Bramblevale Ltd.** [1969] 3 WLR 699 in which the Court held that a contempt of court is an offence of a criminal nature involving the liberty of the subject and therefore having regard to the gravity of the charge, guilt must be proved beyond reasonable doubt. Lord Denning M.R. also stated that where there are two equally likely possibilities before the court, it is not right to hold that the offence of contempt is proved beyond reasonable doubt.

Conclusion on the issue of whether there has been a contempt of Court arising from the breach of the Order

[65] The finding of this Court is that applying the plain and ordinary meaning to the Order it is clear (as EXIM acknowledged) that it "*…restrains the Respondent in relation to the calling of the loan which would affect the enforcement of other*

security outside of the real property referred to and contained in the mortgage instruments". By removing the truck that was in the possession of the Claimant and otherwise interfering with another, I find beyond a reasonable doubt that these acts were steps pursuant to enforcement of the security EXIM had over these personalty and that these actions constituted a contempt of court.

The position as against the 2nd Respondent

[66] The Court was not presented with any evidence on which it could find beyond a reasonable doubt that the 2nd Respondent was responsible for the instructions to take the enforcement measures against SBIL's personalty. Consequently, there is no basis for an order holding the 2nd Respondent in contempt of court.

Position against the 3rd Respondent

[67] The reasonable inference is that the actions in relation to the trucks if performed by the 3rd Respondent was performed by it as an agent of EXIM. However, it is trite law that in contempt proceedings the defendant must be shown to have had notice of the terms of the order which it is being asserted that he has breached. In **Husson v Husson** [1962] 1 WLR 1434 Lyell J accurately and succinctly stated the law when he said at page 1435:

> *"A person cannot be held guilty of contempt in infringing an order of the court of which he knows nothing."*

The Court has not been satisfied that the 3rd Defendant had adequate notice of the Order and accordingly, I am unable to find beyond a reasonable doubt that that the 3rd Defendant is in contempt of Court.

The absence of a penal notice

[68] Ms. Moore has submitted that SBIL has not established that it personally served the persons it is seeking to have committed and/or their assets confiscated with a copy of the order with the penal notice endorsed on same. CPR 53.3 provides as follows:

> ***When committal order or confiscation of assets order may be made***
>
> *53.3 Subject to rule 53.5, the court may not make a committal order or confiscation of assets order unless-*
>
> *(a) the order requiring the judgment debtor to do an act within a specified time or not to do an act has been served personally on the judgment debtor;*
>
> *(b) at the time that order was served it was endorsed with a notice in the following terms:*
>
> *"**NOTICE: If you fail to comply with the terms of this order** you will be in contempt of court and may be liable to be imprisoned **or to have your assets confiscated.**",*
>
> *or, in the case of an order served on a body corporate, in the following terms:*
>
> *"**NOTICE**: **If you fail to comply with the terms of this order you will be in contempt of court and may be liable to have your assets confiscated."**; and*
>
> *(c) where the order requires the judgment debtor to do an act within a specified time or a specified date, it was served in sufficient time to give the judgment debtor a reasonable opportunity to do the act before the expiration of that time or before that date.*

CPR 53.4 addresses the situation in respect of a committal order or confiscation of assets order against an officer of a body corporate and is in similar albeit not exact terms.

[69] Ms Moore conceded that by virtue of CPR 53.5 the Court can make a committal order or confiscation of assets order where the order was not served. However, it was submitted that SBIL has not sought an order in this regard.

[70] It was submitted on behalf of SBIL that the breach of an order may be enforced in the absence of a penal notice. The English Court of Appeal case of **Sofroniou v Szgetti** [1991] FCR 332 was relied on in support of this position. The Court found that the appellants knew of the orders restraining them and gave short shrift to the point that there was no penal notice attached to the relevant order. In **Petros v Murray** [2016] JMCC Comm. 9 a decision of this Court in respect of which only the

reasons were provided for the Court of Appeal on appeal, this Court also found that the requirement for a penal notice pursuant to CPR 53.3(b) was not absolute, although in that case the Court was influenced by the fact that the relevant order was made by consent.

[71] In **Husson v Husson** (supra), Lyell J commented on a note to R.S.C., Ord. 42 r. 7 in the annual practice, [1962], p 1004, which indicates that a distinction is to be drawn between the effect of notice in the case of mandatory and prohibitory injunctions. He stated that:

> *" An order requiring a person to do an act must be served upon him. If it is not served committal proceedings for breach of the order do not lie. If, however, the order is to restrain the doing of an act, the person restrained may be committed for breach of it if he in fact has notice of it, either by his presence in court when it is made, or by being served with it, or notified of it by telegram or in any other way."*

What is an appropriate punishment?

[72] This case is the result of a series of unusual, and for EXIM, unfortunate events. In the first place there was the Order which was wider in scope than it appears the learned Judge intended it to have been. There was the Notice which, despite the intention of the learned Judge in issuing it, I have found did not have the legal effect of amending, modifying or otherwise affecting the plain meaning of the Order. There was the opinion of Counsel, (which I have found to be misconceived), that the Notice had the effect of modifying or altering the plain and ordinary meaning of the Order. Finally, there was the written advice of a prominent firm of Attorneys-at-Law to EXIM, based on the erroneous conclusion reached, that it was permissible for EXIM to enforce against the personalty.

[73] The authorities generally seem to agree that the primary purpose of civil contempt proceedings is coercive whereas for criminal contempt the primary purpose is punitive. I have also taken into consideration the fact that that the Notice was born out of the effort of EXIM to clear, in advance, its intended enforcement against the personalty. This attempt was manifestly sensible in the circumstances.

[74] I therefore find that although EXIM breached the Order and is in contempt of court there was no evidence before me which could lead me to conclude that there was "*an intention by EXIM to enforce against the equipment in breach of the Order".* The facts in this case are similar to those in **Irtelli v Squatriti** (supra), however, the adage "tough cases make bad law" is apropos, and I am required to apply the law strictly. I have already expressed my opinion and finding that **Irtelli v Squatriti** is of dubious authority and does not accurately reflect the law in this jurisdiction. It therefore does not assist EXIM.

[75] Nevertheless, although the reasons, motives and state of mind of contemnors are not relevant to the issue of whether a contempt has been committed, they are relevant factors in mitigation and in determining what is an appropriate sanction.

Developments since the filing of the Notice of Application herein

[76] On 16th October 2020, the Court of Appeal also made an order on the application of EXIM varying the Order so as to narrow its scope to realty only ("the Amended Order"). Following the Amended Order EXIM seized another truck belonging to SBIL. This seizure was quite proper given the form of the Amended Order but the earlier seizure was clearly premature and constituted a contempt of court.

[77] By notice of application filed on 3rd November 2020, SBIL sought orders that, *inter alia*, EXIM be ordered to return all equipment, machinery, vehicles and/or other property belonging to it which were seized on 26th August 2020. This portion of the application may very well be largely academic in light of the Court of Appeal's Amended Order.

[78] In the circumstances, there is no need to satisfy the primary purpose of contempt proceedings, which is coercive in nature. Nevertheless, the Court is constrained to impose a punishment which serves to protect the Court process. In the case of **Nicholls v Nicholls** [1997] 1 WLR 314 at 326 B-C Lord Woolf M.R. observed as follows:

> *"Today it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor. The court itself has a very substantial interest in seeing that it's orders are upheld…"*

[79] Section 2 of Part 53 of the CPR governs contempt proceedings. CPR 53.9 states as follows:

> *(1) This Section deals with the exercise of the power of the court to punish for contempt.*
>
> *(2) In addition to the powers set out in rule 53.10, the court may-*
>
> *(a) fine the contemnor;*
>
> *(b) take security for good behavior;*
>
> *(c) make a confiscation of assets order;*
>
> *(d) issue an injunction.*
>
> *(3) Nothing in this Section affects the power of the Court to make an order of committal of its own initiative against a person guilty of contempt in the face of the court.*

I have had regard to the somewhat unusual facts of this case, which I have identified earlier. I have also considered, *inter alia*, the conduct of EXIM in attempting to have the issue of the scope of the Order resolved and the question surrounding the nature and effect of the Notice. I find that there are significant mitigating factors in this case. Accordingly, I am of the opinion that a fine will serve the interests of justice especially since there is no need to coerce EXIM in order to have it comply with any extant orders of the Court. The breach which the Court has found is historical and there is no evidence to suggest that EXIM would be inclined to breach another of the Court's orders. In the premises, the Court is of the opinion that a fine of Two Hundred and Fifty Thousand Dollars ($250,000.00) is appropriate.

[80] It is hereby ordered that:

1. The Court having found that the 1st Respondent has committed a civil contempt of court by its disobedience of the order of Hon.

Justice of Appeal Phillips made on 23rd June 2020 hereby orders that the 1st Respondent pays a fine of Two Hundred and Fifty Thousand Dollars ($250,000.00) within 7 days of this order.

2. Costs of this application are awarded to the Claimant to be taxed if not agreed.

3. Leave to appeal is granted.

4. The application for a stay of execution is refused.