IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV 00133

BETWEEN	**HON. GORDON STEWART, O.J.**	**CLAIMANT**
AND	**SENATOR NOEL SLOLEY, SR.**	**1ST DEFENDANT**
AND	**NOEL SLOLEY, JR.**	**2ND DEFENDANT**
AND	**SHARRON SLOLEY**	**3RD DEFENDANT**

Appearances: Mr. Donald Scharsmidt Q.C, Mr. Vincent Chen and Mr. Jerome Spencer instructed by Patterson Mair Hamilton for the Claimant/Applicant; Mr. Abraham Dabdoub and Mr. Jalil Dabdoub instructed by Dabdoub, Dabdoub & Co. for Jamaica Tours Limited; Mr. Walter Scott and Ms. Elizabeth Salmon, instructed by Rattray Patterson Rattray for the First Defendant, Senator Noel Sloley, Sr.; Mr. Walter Scott and Ms. Anna Gracie instructed by Rattray Patterson Rattray Patterson Rattray for the Second Defendant, Mr. Noel Sloley Jr; Mrs. Nicole Foster-Pusey for Mr. Gordon Brown and Ms. Deborah Lee Shung.

Heard May 17 and 18th 2010

Application to commit for Contempt in relation to alleged breach of Search Order; Order directed to body corporate, its directors, servants and/or agents; Application to commit instituted against defendants in Claim as well as against body corporate and its legal advisors, attorneys-at-law; Preliminary objection that proceeding by way of notice of application for court orders is in breach of CPR 53; That there is no claim and that existence of a claim is condition precedent to issue of search order and so search order is a nullity; that penal notice is fatally flawed as not being directed to particular defendants with their names thereon

CORAM: ANDERSON: J

1. This is an application by Hon. Gordon "Butch" Stewart.O.J., by way of Notice of Application for Court Orders to commit for Contempt of Court the persons listed as defendants in the application, as well as a company, Jamaica Tours Limited ("JTL") and two of its legal advisors, attorneys-at-law Mr. Gordon Brown, and Miss Deborah Lee-Shung, partner and associate respectively, in the Montego Bay office of the law firm, Rattray Patterson Rattray. The background to the

application is the grant of a search order made by His Lordship, the Hon. Justice Donald McIntosh on March 10, 2009 whereby he granted a Search Order against the company, JTL, for the cloning and search of all its computer equipment, hard drives and servers, in its Montego Bay offices at 1207 Providence Drive, Ironshore P.O. Box 227, Montego Bay in the Parish of St. James. The Search Order granted by his lordship, in relevant part, provided as follows:

> "The Respondents allow a Search Party consisting of Miss Carlene Larmond ("the Supervising Attorney-at-Law"), Jerome Spencer, Attorney-at-Law in the firm of Patterson Mair Hamilton (the Applicant's Attorneys-at-Law) and up to five (5) representatives of Credence Corp. Inc to enter the Respondent's premises located at 1207 Providence Drive, Rose Hall, St. James so that they can copy, or clone, all data from the Respondent's computers, servers or other data storage devices wherever located and deliver same into the safekeeping of the Supervising Attorney who shall make available the clone (s) for search to be conducted by Credence Corp Inc. That search is to relate only to documents and files which contain the names Paulette Robinson and Gordon "Butch" Stewart or any combination of the said names or any of the names contained in Exhibit "GS 4" of the Second Affidavit of Gordon Stewart during the periods and times October 16, 2007 at 7.15 p.m. GMT, October 25, 2007 at 1.13 EDT, October 31, 2007 at 15.25 and May 10, 2008 at 10.55 a.m. and within an hour before or after the times specified."

The application and the grounds upon which it is based are set out fully below:

2. The claimant/applicant, Gordon Stewart, a businessman whose address for the purpose of these proceedings is care of 35 Half Way Tree, Road, Kingston 5, seeks the following orders:

1. The assets of Jamaica Tours Limited be confiscated.
2. The directors, servants and agents of Jamaica Tours Limited, to wit, the 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown be committed to prison for a period not exceeding two months.
3. Alternatively, the assets of 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown Respondents be confiscated.

4. The costs of and consequent on the Orders dated March 10, and April 7, 2009 be paid by Jamaica Tours Limited and the 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown.
5. The Costs of this application to be paid by Jamaica Tours Limited and the 1st – 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown.

AND THE GROUNDS UPON WHICH THIS APPLICATION IS MADE ARE:

1. By Order dated March 10, 2009, this Honourable Court ordered *inter alia* that:

   a. Jamaica Tours Limited, its Directors, officers, servants and/or agents ("its representatives") permit upon service of that Order a named Search Party to immediately enter Jamaica Tours Limited's premises and to copy all data from the Jamaica Tours Limited's computers, servers or other data storage devices and deliver same into the safekeeping of the Supervising Attorney-at-Law;
   b. Jamaica Tours Limited and its representatives must immediately give the Search Party access to its computers, servers and other data storing devices with all necessary passwords; and
   c. Jamaica Tours Limited must allow the Search Party to remain on the premises until the search is complete.

2. Jamaica Tours Limited was served with the Order dated March 10, 2009 on March 12, 2009, while the directors, servants and agents of Jamaica Tours Limited, to wit, the 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown were shortly thereafter notified of the terms of the said Order.

3. The 1st to 3rd Defendants and Lisa Sloley and George Dawkins are Directors of Jamaica Tours Limited. Deborah Lee Shung and Gordon Brown were Jamaica Tours Limited's Attorneys-at-Law at all material times and specifically during the execution of the Order dated March 10, 2009.

4. The execution of the Order dated March 10, 2009 commenced on March 12, 2009 and present were Miss Carlene C. Larmond, the Supervising Attorney-at-Law; Mr. Jerome Spencer, Attorney-at-Law for the Claimant; and two representatives from Credence Corp. Inc., the Court appointed Information Technology Forensic Consultants ("the Search Party"). Miss Deborah Lee Shung of Rattray Patterson Rattray, Attorneys-at-Law for Jamaica Tours Limited was also present. On March 13, 2009 before the Search Party had completed copying all data from Jamaica Tours Limited's computers, servers and/or other data storage devices, Jamaica Tours Limited through its Attorney-at-Law, Deborah Lee Shung, ordered that the Search Party discontinue copying data from its data storage devices and leave the premises of Jamaica Tours Limited as set out in paragraphs 106 – 125 of exhibit "CCL 1" of the Affidavit of Carlene C. Larmond filed and sworn on March 17, 2009 and paragraph 3 of the Third Affidavit of the said Carlene C. Larmond filed and sworn on March 23, 2009.

5. Between March 16 and April 2, 2009, discussions between the Claimant's Attorneys-at-Law, Messrs. Trevor Patterson and Jerome Spencer, and the said Gordon Brown and Deborah Lee Shung of Rattray Patterson Rattray, Attorneys-at-Law for Jamaica Tours Limited, ensued about the completion of the aborted search, and in addition to the terms Order made on March 10, 2009, the following orders were agreed and embodied in a Consent Order dated April 7, 2009:

a. The Supervising Attorney-at-Law shall file and serve on the parties a further written report on or before May 27, 2009.

b. The cloning of all data from the Respondent's computers, servers or other data storage devices wherever located shall be completed on or before April 14, 2009. The clones shall be delivered into the safekeeping of the Supervising Attorney-at-Law who shall make the clones available to Credence Corp. Inc. for the search to be conducted at Credence Corp. Inc.'s laboratory at 3215 NW 10TH Terrace, Suite 210, Ft. Lauderdale, Florida, USA in the presence of an observer from Verasys LLC., the Respondent's Forensic Information Technology Consultant.

c. Credence Corp. Inc. and Verasys LLc. shall agree a written protocol for the search of the clones which shall be conducted Credence Corp. Inc.'s laboratory. This protocol is to be agreed on or before April 14, 2009.

d. This search of the clones shall be completed on or before May 6, 2009.

e. This Order shall terminate on May 6, 2009 unless further extended by Order of the Court.

f. Liberty to apply.

6. The search was resumed on April 8, 2009 at the offices of Jamaica Tours Limited. In attendance were Miss Carlene C. Larmond, the Supervising Attorney-at-Law; Messrs. Jerome Spencer and Cleveland Allen, Attorneys-at-Law for the Claimant; and two representatives from Credence Corp. Inc., the Court appointed Information Technology Forensic Consultants. In addition, Miss Lee Shung and the 2nd Defendant were present on behalf of Jamaica Tours Limited. Between April 9 and 10, 2009, Miss Lee Shung and Gordon Brown, as well as the 2nd Defendant, voiced their opposition to the continuation of the cloning unless the Claimant agreed to give a further undertaking as to damages before a particular server would be allowed to be cloned and stopped the

cloning when the Claimant refused to give this further undertaking. This is set out in paragraphs 4-6 of the Executive Summary and paragraphs 100- 132 of exhibit "CCL 4" of the Fourth Affidavit of Carlene C. Larmond filed on April 27, 2009.

7. The effect of Jamaica Tours Limited, 1st to 3rd Defendants and Lisa Sloley, George Dawkins, Deborah Lee Shung and Gordon Brown disobeying the Orders of the Court dated March 10, and April 7, 2009 is that the search exercise has been frustrated, in that if the search is resumed it would be impossible for the Claimant to determine whether or not Jamaica Tours Limited and the Defendants have tampered with the data on the remaining server.

8. The application is being made pursuant to Rules 53.3, 53.5, 53.7, 53.13 and 53.17 of the Civil Procedure Rules, 2002.

3. On the morning of Monday May 17, 2010, before the hearing of the substantive application could begin, the lawyers for JTL (Mr. A. Dabdoub), for the first and second defendants, (Mr. Walter Scott) and for attorneys-at-law Mr. Gordon Brown and Miss. Lee-Shung, (Mrs. Nicole Foster Pusey), indicated that in respect of the application as it affected and applied to their respective clients, they wished to raise preliminary objections to the matter proceeding, on the basis of which objections, the respective applications against their clients ought at this stage of the proceedings to be struck out. The Court decided that it would be appropriate to hear these applications before embarking upon the substantive application even though, at least in the case of the preliminary objection raised on behalf of Mr. Gordon Brown and Miss Lee-Shung, counsel for the claimant was only being notified on the morning when the committal proceedings should have commenced, of the intention to take a point, in limine.

4. It was determined that the submissions in respect of each of the respondents would be made at first and they would be followed by the response in relation to all the submissions by claimant's counsel.

Submissions for Mr. Gordon Brown and Miss Deborah Lee-Shung

5. It was submitted by Mrs. Foster-Pusey that the claimant had made a fatal error by joining in the application, Mr. Brown and Miss Lee-Shung and that the nature of that error required that the application be stuck as against them. Mrs. Foster-Pusey submitted that neither Mr. Brown nor Miss Lee-Shung were named in the Search Orders which had been made by McIntosh J in March and April of 2009. It is common ground that the Search Order was directed to the company, JTL. Both attorneys-at-law had from time to time provided legal advice to JTL during the course of the search ordered by the Court, but it is also not in dispute that no claim has been issued against either of them.

6. Mrs. Foster-Pusey further submitted that the issue of committal proceedings is dealt with under the Civil Procedure Rules 2002 Part 53. Section 1 of that Rule which encompasses CRP 53.1 to CPR 53.8 deals with "Committal etc. for breach of Order" CPR 53.1 provides as follows:

> This section deals with the power of the court to commit a person to prison or to make an order confiscating assets for failure to comply with –
> (a) an order requiring that person; or
> (b) an undertaking by that person, to do an act-
> (i) within a specified time;
> (ii) by a specified date; or
> not to do an act.

7. It was accordingly submitted that Section 1 by its terms could not cover third parties who were essentially strangers to the order of the Court in relation to which contempt proceedings were being pursued. Section 2 of Rule 53 of the CPR which covers paragraphs 53.9 to 53.11, does appear to be wide enough to deal with the purported contempt by way of acts or omissions of such third parties. In particular, the CPR Part 53.10 provides as follows:

1. An application under this Section must be made-
   (a) in the case of contempt committed within proceedings in the court, by application under Part 11; or
   (b) in any other case, by a fixed date claim form, setting out the grounds of the application and supported, in each case, by evidence on affidavit.
2. The general rule is that the claim form or application, stating the grounds of the application and accompanied by a copy of the affidavit in support of the application, must be served personally on the person sought to be punished.
3. However the court may dispense with service under this rule if it thinks it is just to do so.
4. An application in respect of contempt committed in proceedings in the court or in any inferior court or tribunal may be heard by a judge of the court.

8. According to Mrs. Foster-Pusey, the import of Rule 53.10 is that where the contempt is being alleged "within proceedings in the court" application may properly be made as has been done here, by way of a Notice of Applications for Court Orders under Part 11. If it were not "within proceedings in the court" then the person seeking committal must proceed by filing a Fixed Date Claim Form. It was her submission that where proceedings concern the acts or omissions of third parties, that is, persons who are not persons within proceedings in the court (interpreted to mean "parties to the action"), then it was mandatory that a Fixed Date Claim Form must first be issued or the matter cannot proceed. She asked the question rhetorically: "Otherwise, on what basis would the court be exercising jurisdiction over a non-party"? She found support for this proposition in the decision of the England and Wales Court of Appeal in the **ATTORNEY GENERAL V PUNCH** (2001) EWCA Civ 403. In that case, a claim form was issued in contempt proceedings against Punch Limited and a Mr. Steen, the Editor of the magazine "Punch". The magazine had published an article by a Mr. Shayler. There had previously been an order prohibiting Mr. Shayler from publishing certain information which had come to him by virtue of his having been employed in the Secret Service of the United Kingdom government. Notwithstanding the extant order against Mr. Shayler, Mr. Steen and Punch published the offending information and in proceedings instituted against them,

both the Editor and the magazine were fined by the judge at first instance for contempt of court. The alleged contempt in that case was said to be interference with the administration of justice, that is, circumventing or making nugatory, the previously issued order of the Court enjoining Mr. Shayler from publication of the relevant information. It was counsel's submission that here, as in that case, the claimant should have proceeded by way of a fixed date claim form. Having failed to do so, the contempt application against Brown and Lee Shung who were not parties to the application in which the search order had been obtained, should be struck out as, pursuant to CPR Part 53, the Court had no jurisdiction to determine such an issue in relation to these third parties on a mere notice of application under Part 11.

9. Finally she submitted that the Singapore case of **Pertamina Energy Trading Limited v Karaha Bodas Company LLC and Others** (2007) SGCA 10, (March 1, 2007) provided a basis for the proposition that attorneys-at-law, even in the case where they were acting for a party, should properly be regarded as third parties.

Submissions for Jamaica Tours Limited

10. In his submissions on behalf of JTL, Mr. Dabdoub adopted the submissions of Mrs. Foster-Pusey made on behalf of Brown and Lee Shung. He noted the previous separate applications which had hitherto been made against Cable and Wireless Jamaica Ltd. for "Disclosure" and against JTL for a "Search order". Mr. Dabdoub noted that although no undertaking to file a claim had been given by the claimant/applicant in the applications for search or disclosure orders, the Consent Order by virtue of which the time for the search was extended to April 14, 2009, purported to "extend" the undertaking to file a claim by May 31, 2009. No claim was filed by that date although the claimant purported to file a claim in libel against the 1st and 2nd defendants to this application on July 24, 2009.

11. It was further submitted by counsel for JTL that the jurisdiction to grant a search order was set out in CPR Part 17 which deals with "Interim Remedies" and that in relation to one such remedy, under CPR 17.1 (1) (h), the Court could grant "an order (referred to as a "search order") requiring a party to admit another party to premises for the purpose of preserving evidence etc". It was submitted that CPR 17.1(2) defines "relevant property" as being "property which is the subject of a claim or as to which any question may arise on a claim". I should point out, *en passant*, that this is not a correct characterization of the sub-rule. What the referenced paragraph says is that "in paragraph (1) (c) and (g), relevant property means…..". Rule 17.1 (1) (c) and (g) are paragraphs which deal with specific kinds of orders which do not relate to "search orders" in paragraph 17.1 (1) (h). Counsel submitted that: "The clear meaning of Rule 17.1 (2) is that there must be a claim. In order to grant an Order under Rule 17.1 (i), (sic) the court must have a claim before it in order to decide whether or not to grant an order for the detention, custody or preservation of property". He continued: "In the instant case there was no claim before the Court. There was not even an allegation that JTL did anything which would give rise to a claim". I regret that I do not agree that this is the interpretation to be derived from the relevant paragraphs of Part 17 of the CPR.

11. It was further submitted by counsel for JTL that where an interim remedy under Part 17 is given, the Court must "require an undertaking from the claimant to issue and serve a claim form by a specified date" This is provided for in Rule 17.2 (3). It was averred that no such undertaking had been required from the claimant and that the grant of the search order by McIntosh J was probably thereby, a nullity. It should however be noted that CPR 17.2 (4) provides as follows:

Where no claim has been issued, the application must be made in accordance with the general rules about applications contained in Part 11.

It seems to me that, at least with respect to the original application for the search order, the grant thereof is not, by virtue of Part 17, invalidated by the failure to file a claim form or to secure the undertaking.

12. Finally, it was submitted that the only claim filed so far is the one against the Sloleys, senior and junior, for damages for libel. Accordingly, JTL was not a party 'within the proceedings" in the terms previously submitted upon by Mrs. Foster-Pusey and the appropriate methodology for pursuing an application for committal against it, would be to start with a fixed date claim form. In that regard the submissions of Mrs. Foster Pusey were adopted and reliance was also placed upon the case of the **Attorney General v Punch Ltd.** (*op cit*)

Submissions on behalf of Senator Noel Sloley Sr. and Noel Sloley Jr. by Mr. Scott

13. The essential submission by Mr. Scott on behalf of the Sloleys was that the penal notice, which was the basis upon which the application for committal or sequestration of assets was sought, was incurably defective. He pointed to the provision at Part 53 which sets out the wording which is to be included in a penal notice. In that regard it was his submission that in relation to the Sloleys CPR 53.4 sets out the condition precedent necessary for the making of a committal order. CPR 53.4 which is stated to be subject to Rule 53.5 is in the following terms:

Subject to rule 53.5, the court may not make a committal order or a confiscation of assets order against an officer of a body corporate unless –

(a) a copy of the order requiring the judgment debtor to do an act within a specific time or to not to do an act has been served personally on the officer against whom the order is sought;
(b) at the time that order was served it was endorsed with a notice in the following terms:
NOTICE: If [name of body corporate] fails to comply with the terms of this order it will be in contempt of court and you [name of officer] may be liable to be imprisoned or have your assets confiscated."; and

(c) where the order required the judgment debtor (to) do an act within a specified time or by 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.

14. Although no affidavit of service proving service on the persons sought to be committed has been exhibited, it does not appear that any issue as to service is being taken. I note that in the grounds supporting the application, it was stated that certain persons were "notified" of the search order. Mr. Scott takes issue with the penal notice in two respects. He said in the first place, the penal notice was not addressed to any director or person in particular in circumstances where the then heading of the claim was between Gordon Stewart and JTL. Secondly, he submits that the notice does not give any indication that the failure on the part of the person himself to comply with the notice could lead to a term of imprisonment. Citing the report of the supervising attorney, he points out that there is no indication in that report of any of the representatives of JTL at the time of the service of the March 10, 2009 Search Order or the April 7, 2009 Search Order having been advised of the potential for personal consequences, e.g. imprisonment, in relation to any breach of the order.

15. It was his submission that the fact that the penal notice had omitted to identify specifically the individuals now at risk of committal made that notice defective. Indeed, it was his submission that the penal notice should have read as follows:

> If Jamaica Tours Limited fails to comply with the terms of this order it will be in contempt of the court and you Noel Sloley Sr. and/or Noel Sloley Jr. and/or Sharron Sloley may be liable to be imprisoned or have your assets confiscated.

16. He finds support for this proposition in the cases of **IBERIAN TRUST LIMITED V FOUNDER'S TRUST & INVESTMENT CO. LTD.** {1932} 2 KB 87 and **BENABO V WILLIAM JAY AND PARTNERS LIMITED** {1941} 1 Ch 52. In those cases dicta from Luxemoore J and Morton J suggested that in dealing with writs of attachments whilst the point taken may be a technical one,

the rules in relation to the endorsement of a notice must be strictly complied with. He said that this view found further support in the decision of Chadwick J (as he then was) in the case of **MOERMAN-LENGLET V HENSHAW** reported in the Times Newspaper of 23rd November 1993. There, the learned judge had stated that "there had to be prominently displayed on the front of the copy of that order served upon that individual, a warning that disobedience would be contempt of court punishable by imprisonment." He found further support for this proposition in the case of **DEMPSTER V DEMPSTER** also reported in the Times of the 16th November 1990 which demonstrated that unlike the position in Jamaica the English Court now had a discretion to dispense with the penal notice. In these circumstances the notices attached to the orders were incurably defective and this application against the Sloleys' must be struck out at this stage.

Submissions on behalf of the Claimants

17. On behalf of the claimant, it was submitted that there was no need to commence the proceedings for contempt by way of a fixed date claim form and that the application was accordingly proper. Alternatively it was submitted that the court in exercising its case management powers under Rule 26 could dispense with the need to comply with rule 53.10 (1)(b) and allow the application to proceed. Alternatively the court could treat the notice of application to commit as if it had been filed as a fixed date claim form. Counsel cited the case of **HARKNESS V BELL'S ASBESTOS & ENGINEERING LTD.**, (1966) 3All ER 843 which was cited with approval by the English Court of Appeal in **HANNIGAN V HANNIGAN** (2000) All ER (D) 693. In the former case, Lord Denning had suggested that not withstanding the fact that no Writ had been issued it could still be considered that there were "proceedings". He said:

> First, it is said that at the time of the Registrar's order there were no "proceedings" because no writ had been issued. So the rule, it was said, did not apply. I think that this is far too narrow an interpretation. This rule should be construed widely and generously to give effect to its manifest intentions. Any application to the court, however informal is a "proceeding". There were "proceedings" in being at the very moment that

the plaintiff made his affidavit and his solicitor lodged it with the registrar."

18. It was, accordingly, the submission for the claimant, that once the powers of the court were being invoked, there were "proceedings" and that the contempt alleged against the respondents to this application were accordingly committed within "proceedings" so as to enable an application pursuant to Part 11 of the CPR. It was further submitted that the court, in honouring its obligation to act justly as between the parties, would be well within its powers pursuant to the overriding objective of Rule 1, to allow the application to proceed. Citing **O'Hare and Brown, Civil Litigation** 12th Edition at page 5, the claimant's counsel sought to advance the submission that the "overriding objective" could be called in aid by the court in allowing the matter to proceed. In any event it was claimed that no injustice or prejudice would result to the respondents and that the fact that the court had the power to dispense with service of the claim form or the application required under Rule 53.10 (1) would seem to suggest that it should have an equal power to hear the application to commit where only the application has been served and not a fixed date claim form.

19. With respect to the submission that the penal notice was defective, it was submitted by the claimant, that the order was properly endorsed with the penal notice. This was because the orders obtained by the claimant were made against JTL and not the first and second defendants and accordingly there was no need to name them specifically, as suggested in Mr. Scott's submissions. In that regard counsel, Mr. Chen, submitted that the procedural safeguards in relation to service of the order and the indorsement of penal notice, were not applicable in the cases where the allegation was one of interfering with the due administration of justice, as opposed to "disobedience of an order of the court". Counsel also cited **SEAWARD V PATERSON** (1897) 1Ch 545 where Lindley LJ dealt with

contempt by a third party. His Lordship may be understood to have said that it is clear that where there is an interference with the administration of justice it did not matter that the party alleged to be in contempt was not one within the proceedings. As he said then "it has always been familiar doctrine ....that the orders of the court ought to be obeyed and could not be set at naught and violated by any member of the public, either by interfering with the officers of the court or by assisting those who were bound by its orders". Mr. Chen therefore, sought to suggest that the persons now before the court were here by virtue of their aiding and abetting of the breach of the order which had been directed at JTL.

The Issues

20. The issues for determination by this court are with respect as follows:

a) Whether these proceedings should now be terminated by striking out the application against the directors and the other parties named in the application because of a procedural defect or whether such defect may be cured. (The defects being alleged relate to the failure to start this application by way of a fixed date claim form (the application in relation to Brown, Lee-Shung and JTL); the absence of a claim filed within the time purportedly given in the undertaking to file by May 31, 2009 (JTL) and the defect in the penal notice in relation to the Sloleys.

b) Whether the penal notices on the orders were incurably defective as not in compliance with Part 53 of the CPR, and so the applications should be struck out against Senator Noel Sloley Sr. and Noel Sloley, Jr.

The Law

21. In the House of Lords in the case of **ATTORNEY GENERAL V PUNCH LTD & ANOR**. (2002) UKHL 50, Lord Nichols of Birkenhead stated the following:

> "Contempt of Court is the established, if unfortunate, name given to the species of wrongful conduct which consist 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 willful 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".

22. It is now trite law that contempt of court proceedings even within the civil jurisdiction of the court is of a quasi-criminal nature. The effect of this is that the burden of proof must be to the criminal standard of beyond a reasonable doubt rather than the civil standard being on a balance of probabilities. (**RE BRAMBLEVALE** [1970] Ch 128, 137 per Lord Denning MR; p 137 per Winn LJ)

23. It seems to me that certain consequences follow from this treatment of contempt proceedings and I remind myself that I am not trying the actual contempt but rather considering whether the applications before me ought to be struck out against the respective respondents.

24. Let me deal firstly with the question of the absence of a claim which was advanced by Mr. Dabdoub. I have formed the view that the fact that no claim has been filed is not a bar to contempt proceedings. If that were the case, a freezing order which was granted before the filing of a claim form could not give rise to contempt proceedings if the person subject to that order, and with knowledge thereof, disposed of his assets before the claim was filed. That must be the conclusion to which one must arrive in light of dictum of Lord Denning referred to in **HANNIGAN V HANNIGAN** above. Indeed, it is also clear, in response to another submission of Mr. Dabdoub as to whether the search order was a nullity, that such a conclusion would be immaterial. It should be noted that it is very well established that an order of the court must be obeyed unless or until it is set aside. A failure to comply in the meantime amounts to contempt. In that regard I refer to the case of **HADKINSON V HADKINSON** (1952) P 285 at 288 where Romer LJ quoting Lord Cottenham LC in **CHUCK V CREMER** (1846) Cooper temp. Cott 205, 338 said:

> "A party who knows of an order, whether null and void, 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 and void – 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.

25. Having dealt with the issue of the relevance of the existence of a claim and purported nullity of the search order, I turn to consider the other issues which relate to the provisions in Rule 53 of the CPR concerning the proper way to start an application for contempt and the appropriateness of the penal notice.

26. The staring point is, as I have indicated above, the peculiar nature of contempt proceedings as quasi-criminal. In that regard, I am of the view that as in criminal proceedings, the alleged contemnor must be given the benefit of any doubts. I accept the respondents' submissions in relation to CPR Rule 53.10 as I have formed the view that given the nature of these proceedings and the possible consequences to the individuals, the allegations and the consequences should be specifically brought to the attention of the alleged contemnors.

27. With respect to the respondents Brown and Lee-Shung, it is not at all clear to me that they have been made aware of the specific allegations relating to interfering with the administration of justice as opposed to personally breaching the order, if Mr. Chen's formulation concerning aiding and abetting is to be accepted. They were not the subject of the search order and there is no averment that they personally disobeyed the order. In those circumstances, it would be significantly more appropriate that they be served with a fixed date claim form which would have allowed for a first hearing and a clarification of the issues to be defended at the time of the committal proceedings. I accordingly accept that for these purposes, Mrs. Foster-Pusey's submissions in relation to Rule 53.10 (1) are correct. In this case, even if they were "within proceedings in the court" I am not

satisfied that an application under part 11 would do justice to the need for an accused contemnor to be clear as to the allegation which he must face. I would accordingly hold that the application as against Brown and Lee-Shung must be struck out.

28. I have already dealt with Mr. Dabdoub's submissions about the non-existence of a claim or the possible nullity of the order with respect to JTL. It will however be recalled that he had submitted that JTL was, in reality, a third party in relation to the claims made against Noel Sloley Sr. and Noel Sloley Jr. for libel. While that may very well be the case, it would not automatically exclude proceedings against that company where it could be demonstrated that it had breached the order directed to it. Notwithstanding that conclusion however, I return to the proposition that the special nature of contempt proceedings and the potential for draconian remedies put this application into a unique position. In looking at the overriding objective I believe that it would be equally appropriate for the filing of a fixed date claim form against JTL and for the matter to proceed within the terms of that process. I accordingly find that the application as it affects JTL should also be struck out against that respondent.

29. Finally, there is the question of the application against the first and second defendants, Noel Sloley Sr. and Noel Sloley Jr. It is submitted in the application that they, as Directors and/or servants and/or agents of JTL, ought to be found to be in contempt. The only allegation of disobedience set out in the grounds upon which the application is made is that Miss Lee-Shung and Mr. Brown as well as the second defendant Noel Sloley Jr. "voiced their opposition to the continuation of the cloning unless the claimant agreed to give a further undertaking as to damages before a particular server would be allowed to be cloned and stopped the cloning when the claimant refused to give this further undertaking". I also believe that, since lawyers are creatures of their instructions, there would have to be particular averments showing how the attorneys themselves fomented or procured any breach of the order, if there was such, by their own instructions. I have in any

event, dealt with Miss Lee-Shung and Mr. Brown's position under Rule 53.10, above.

30. It is the law that a director is liable for contempt if he knowingly participates in the breach of the order or willfully takes steps to ensure non-compliance. See **DIRECTOR GENERAL OF FAIR TRADING V BUCKLAND** (1990) 1 WLR 920; **RE GALVANIZED TANG MANUFACTURES ASSOCIATION AGREEMENT** (1965) 1 WLR 1074 at page 1092. In that regard the procedure by which the second defendant/director should have been brought as I have found by way of a fixed date claim form would have provided a more appropriate opportunity for him to explain before the trial of the contempt. It should be noted that there is no averment of disobedience or participating in disobedience by the first defendant.

31. I accept that the penal notice, which is acknowledged to be an indispensable part of the process, was defective in so far as notice to the Sloleys was concerned. The suggestion by Mr. Scott as to the appropriate wording would not in my view have been adequate to correct the deficiency for it would have left out the important consideration that the named individual would himself, had to have caused or contributed to the disobedience of the order or the undermining of the administration of justice. I make this last comment since it was being proffered that it was in aiding and abetting the disobedience that the respondents had committed contempt. As the cases show, third party contempt really deals with the question of undermining of the administration of justice.

32. But, notwithstanding my view of the inadequacy of the wording suggested by counsel, Mr. Scott, I would also wish to note, *a fortiori*, as it affects the text of the penal notice that the *substance* of the order must have been drawn to the attention of the respondent, so that *he was fully aware of its terms at the time of committing the breach of that order*: (See **Ronson Products Ltd. v Ronson Furniture Ltd.** *(1966) Ch 603* at p. 617 per Stamp J). As Smellie CJ held in the Cayman Islands

case of **TELESYSTEM INTERNATIONAL WIRELESS INC. V T.I.W DO BRASIL LIMITADA** [2002] CILR 96 at [45]

> "...the law is settled that it is only when an order of the court has been made clear and unambiguous in its terms and actually brought to the attention of the person bound, so that he can determine with precision what he can or cannot do, that the order can be relied on for the purpose of a committal motion for contempt".

I believe that there are some general comments which I should make which are relevant to the decision at which I have arrived.

33. While I am mindful that this is not the hearing of the contempt, I believe that there are some matters which may impact upon the Court's approach in deciding the outcome of this application. For example, there are issues of the Court's case management powers as well as questions of the extent of compliance with any orders which the court has made. In **SECTORGUARD V. DIENNE PLC** [2009] EWHC 2693 (Ch) at [45] Briggs J held (at [47] :

> "*Committal proceedings are an appropriate way, albeit as a last resort, of seeking to obtain the compliance by a party with the court's order (including undertakings contained in orders), and they are also an appropriate means of bringing to the court's attention serious rather than technical, still less involuntary, breaches of them. In my judgment the court should, in the exercise of its case management powers be astute to detect cases in which contempt proceedings are not being pursued for those legitimate ends.*"

The court therefore has a role in being astute to ascertain as early as possible in contempt proceedings what is the true nature of such proceedings and this would be facilitated by the use of the Fixed Date Claim Form to commence the process.

34. Similarly, there is authority for the proposition that where there has not been, according to the allegations, less than full compliance with the court's order as is the case urged here, a key consideration on a committal application is the *extent* of the respondent's compliance with the order. Such compliance may be a very weighty factor to take into account when deciding the appropriate course to take: **OYSTERTEC PLC V. DAVIDSON (NO. 3)** [2004] EWHC 2563 (Ch), [2005]

BPIR 401 at [21] per David Richards J. But in my view, using the procedure of a claim form would also facilitate an early determination as to whether the application is being appropriately pursued and not for collateral purposes.

35. Given my findings above I have come to the conclusion that these applications as presently conceived must be struck out as against the respondents. In any event the applications are so interrelated that it would be inappropriate, even had I decided that the applications could stand against some of the respondents, to allow it to proceed at this time. I so hold and I award costs to each of the respondents against the claimant. Certificate for additional counsel granted to the respondents, Senator Noel Sloley Sr. and Noel Sloley Jr.

ROY K. ANDERSON
PUISNE JUDGE
MAY 19, 2010