[2021] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00096

BETWEEN	**NATIONAL EXPORT IMPORT BANK OF JAMAICA LIMITED**	**APPELLANT**
AND	**STEWART BROWN INVESTMENTS LIMITED**	**RESPONDENT**

Written submissions filed by Nigel Jones & Co for the appellant

Written submissions filed by Hart Muirhead Fatta for the respondent

24 September 2021

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

BROOKS P

[1] National Export Import Bank of Jamaica Limited ('the Bank') seeks to set aside an order by a judge of the Supreme Court, made on 18 December 2020, ordering it to pay $250,000.00, as a sanction for contempt of court. According to the Bank, the learned judge was wrong to have found that it had deliberately disobeyed an order of the court, when it took possession of equipment that was pledged to it by Stewart Brown Investments Limited ('SBIL'), under bills of sale.

[2] The Bank contends that the taking was in accordance with a notice issued by this court clarifying an earlier order of a single judge of the court. Two main issues for resolution in this procedural appeal are:

i. whether SBIL is correct in its contention that the single judge's order contained a clear prohibition; and
ii. whether a notice from the court could contradict or narrow the effect of that order.

Background

[3] The genesis of the litigation is SBIL's attempt to prevent the Bank from taking property (realty and personalty) that SBIL had pledged to the Bank as security for a loan. The Bank claimed that SBIL was in arrears in its repayment of the loan. It threatened to exercise its powers of sale contained in a mortgage of the realty, and to take equipment, which was the subject of the bills of sale. SBIL asserted that the Bank's proposed action was in breach of a settlement agreement between the parties. The Bank countered that SBIL had not satisfied the pre-conditions for that agreement.

[4] SBIL's application for an injunction, pending the trial of its claim, was granted by Batts J in the Supreme Court on 20 December 2019. Batts J's orders, however, also had conditions. The condition for restraining the Bank from action in respect of the bills of sale on the equipment was that SBIL should pay $3,500,000.00 monthly on the 30th day of each month commencing on 30 December 2019. The condition ('the Marbella condition') for the restraint order in respect of the realty was that SBIL should pay into court a sum in excess of $170,000,000.00.

[5] SBIL was dissatisfied with those conditions. It initially succeeded in having Batts J grant a variation of the condition concerning the injunction in respect of the personalty. SBIL later applied for a variation of the Marbella condition. Batts J refused that application on 21 May 2020.

[6] On 27 May 2020, SBIL filed an appeal from that refusal. The grounds of appeal were restricted to the issue of the Marbella condition, but one of the orders sought on appeal was, ostensibly, not restricted to the injunction in respect of the realty. SBIL sought "an interim injunction restraining the [Bank] from **enforcing any security with respect to the Loan Facility** until the determination of the proceedings in the court below" (emphasis supplied). SBIL also applied to a single judge of this court to grant an injunction pending the hearing of the appeal. Its application was also, ostensibly, not restricted to the realty.

[7] On 23 June 2020, Phillips JA, after hearing submissions from both sides, granted an injunction in terms that were very similar to those contained in SBIL's application. The injunction restrained the Bank "from taking **any steps pursuant to its purported calling of the loan** and/or exercising its power of sale as mortgagee until the determination of the appeal…" (emphasis supplied). The formal order ('the first order') was perfected by the court's registry.

[8] The Bank, by a formal application for court orders, sought clarification of the first order. It applied for an adjustment of the order to make it clear that the first order only applied to the Bank's exercise of its power of sale contained in the mortgage. In other words, that the first order did not prevent the Bank from collecting on the bills of sale, if it wished to do so. In response to that application, the registrar of this court issued a notice ('the notification') to the parties that Phillips JA had, on 28 July 2020, considered the Bank's application and had directed that the term, "calling of the loan", was not applicable to the "monthly obligation due from [SBIL] in the sum of J$3.5 million". The notification went on to state:

> "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 being [sic] appealed, was not argued before me." (Emphasis supplied)

[9] The next significant event, for these purposes, was that, according to SBIL, on 26 August 2020, a representative of the Bank, along with a bailiff and police officers forcibly entered SBIL's property, drove out one of its trucks and disabled another. The Bank was acting on the advice of its attorneys-at-law that the Notification clarified that the first order did not prevent the enforcement of the bills of sale. The Bank took similar action on 8 September 2020, taking other trucks and equipment.

[10] On 2 September 2020, SBIL applied to the Supreme Court to have the Bank, and the various parties involved in the incursion of SBIL's property, committed for contempt of court.

[11] Before SBIL's application was heard, the registry of this court, on 10 September 2020, issued a formal order by Phillips JA ('the second order'), in terms very similar to the notification. On 16 October 2020, the Full Court made an order ('the Full Court's order') varying the first order, by restricting the injunction to the exercise of the power of sale of the realty.

[12] The first order, the notification, the second order and the Full Court's order were all before the learned judge when he heard SBIL's application, and made the order that the Bank now seeks to have set aside.

The decision by the learned judge

[13] The learned judge used a structured approach to SBIL's committal application. He found that:

a. Phillips JA had the authority to hear applications that were incidental to SBIL's appeal (see paragraph [26] of the learned judge's judgment);

b. Phillips JA, therefore had the jurisdiction to grant an injunction binding the Bank in relation to its dispute with SBIL;

c. Phillips JA could properly have ordered an injunction "in respect of [the Bank'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" (see paragraph [27] of the learned judge's judgment);

d. the first order "is clear on its face in restricting…the enforcement against realty and personalty" (see paragraph [44] of the learned judge's judgment);

e. orders of the court are to be obeyed until they are set aside and the first order was not set aside up to the time that the Bank entered SBIL's property and interfered with the equipment;

f. the notification issued by the registry of the Court of Appeal did "not have the legal effect of amending or modifying the clear terms of the [first order]" (see paragraph [47] of the learned judge's judgment);

g. disobedience of orders of the court should be treated as strict liability offences and thus "the motive for disobedience is irrelevant for the purposes of establishing a case of contempt" (see paragraph [59] of the learned judge's judgment); and

h. the Bank's actions constituted a contempt of court and deserved a punitive response to demonstrate that orders of the court are to be obeyed.

[14] The learned judge ordered as follows:

> "1. The Court having found that [the Bank] has committed a civil contempt of court by its disobedience of the order of Honourable Ms Justice of

Appeal Phillips made on 23rd June 2020 hereby orders that [the Bank] 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 [SBIL] to be taxed if not agreed.

3. Leave to appeal granted."

The appeal

[15] The Bank contends that the learned judge, erred in his assessment of the method used to clarify this court's order and, accordingly, his order that it had committed a civil contempt should be set aside. The grounds of appeal on which it relies are:

"(a) The Honourable Judge erred when he found that the Honourable Justice of Appeal could not clarify [the first] order.

(b) The Honourable Judge erred insofar as he found that [the Notification] was of no legal effect.

(c) The Honourable Judge erred insofar as he found that the Honourable Justice of Appeal could have made an injunction pending appeal in relation to the personalty (equipment) notwithstanding the subject of appeal was in relation to the realty.

(d) The Honourable Judge erred insofar as he found that the weight of the authorities tip [sic] the scales considerably in favour of a test of strict liability when establishing contempt of Court.

(e) The Honourable Judge erred insofar as the actions of the [Bank] warranted a fine of $250,000.00 being imposed.

(f) The Honourable Judge erred insofar as he found that in understanding the [first order] and/or the Notification to the Parties regard should not be had to the underlying facts or the circumstances in which the [first] order was made.

(g) The Honourable Judge erred insofar as he found that the [first order] of the Honourable Justice of Appeal Phillips was clear and as such the [Bank] was in contempt."

[16] The issues raised by these grounds may be analysed as follows:

a. was Phillips JA entitled to make the first order (ground c);

b. was Phillips JA entitled to adjust the first order (ground a);

c. did the Notification adjust the first order (ground b);

d. was the finding for contempt fair and reasonable (grounds d, f and g); and

e. was the sanction for the contempt fair and reasonable (ground e)

Was Phillips JA entitled to make the first order? (ground c)

[17] The Bank's complaint in this ground is that Phillips JA was not entitled to make an order encompassing both realty and personalty, considering that the appeal and the arguments before her were restricted to the Marbella condition and the injunction concerning the realty.

[18] This ground does not require any detailed analysis. As the learned judge quite properly pointed out in his written judgment, an order of the court is to be obeyed until it is set aside (see **Chuck v Cremer** (1846) 1 Coop T Cott 338 at page [343]; 47 ER 884, **Hadkinson v Hadkinson** [1952] 2 All ER 567 and **Dexter Chin v Money Traders and Investment Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 113/1997, judgment delivered 24 March 1998).

[19] Therefore, even if Phillips JA had no jurisdiction to make the first order, the order, once made, had to be obeyed, until and unless it was set aside. In that regard this complaint is without merit.

Was Phillips JA entitled to adjust the first order? (Ground a)

[20] The issue raised by this ground turns on the principle that a court or judge is not entitled to have second thoughts in respect of a judgment once the decision has been given and the order has been perfected.

[21] The learned judge found that the first order was clear and unambiguous. Therefore, he found that Phillips JA was precluded from having second thoughts about the order and adjusting it (paragraph [44] of the judgment).

[22] The Bank asserts that Phillips JA was entitled to clarify the first order and that the learned judge erred in finding otherwise.

[23] Learned counsel for the Bank also submitted that it was not open to the learned judge to find as he did. They argued that, being a judge of a lower court, it was beyond the learned judge's authority to question a ruling of a superior court's judge. Learned counsel relied on **Cassell & Company Limited v Broome and Another** [1972] 2 WLR 645 ('**Cassell v Broome**') as authority for the latter submission.

[24] SBIL supported the learned judge's decision on the issue of the restriction placed on Phillips JA. It insists that, having given her decision, Phillips JA's jurisdiction to adjudicate on the application, had expired. She, therefore, it argues, had no authority to make any further order, and certainly had no basis to seek to clarify the unambiguous first order.

[25] Learned counsel for SBIL, did not, however, make any submission concerning the learned judge's authority to question a decision of a judge of this court.

[26] **Sarah Brown v Alfred Chambers** [2011] JMCA App 16 ('**Brown v Chambers**') is authority, not only for the principle restricting second thoughts by a court, but also for stating that there is one exception to that principle. A court may change an order where there has been an obvious slip. Usually such changes are restricted to clerical errors or omissions. A court or judge may, however, make a

supplemental order directing additional relief. This, however, is allowable only where the supplemental order is grounded on facts that were not available at the time when the original order was made, and where it did not alter the original order (see **Re Scowby, Scowby v Scowby** [1897] 1 Ch 741). A decision to make a supplemental order is based on the inherent power of a court to control its process. In **Re Scowby**, A L Smith LJ explained the circumstances under which a supplementary order may be made. He said, in part, at pages 754-755:

> "…My brother Kekewich, on December 17, 1896, made the order, the effect of which was, that the new trustees were not to pay the old trustees, who were in default, any more costs out of this estate, which had already been mulcted to the extent to which I have already alluded.
>
> Now, first of all, had the learned judge jurisdiction to make this order of December 17, 1896? He did not touch the previous orders of February 4 and December 23, 1892, nor had he any jurisdiction to do so. **What he did was to make a supplemental order**, to the effect that the two orders of February 4 and December 23, 1892, are not to be further acted upon until... That he had jurisdiction appears to me to be clear from the judgment of the Lord Chancellor in *Preston Banking Co. v. William Allsup & Sons* [[1895] 1 Ch 141], to which I was a party, and which is to the effect **that there is jurisdiction to make a supplemental order upon new facts, although there is no jurisdiction to alter an order when once it has been drawn up and entered**. That being so, I think that my brother Kekewich no doubt had jurisdiction to make the order now appealed against." (Emphasis supplied)

[27] This court's decision in **Dalfel Weir v Beverly Tree** [2016] JMCA App 6 ('**Weir v Tree'**), is authority for asserting that the court is empowered to clarify its orders so as to give effect to its intentions. Morrison P (Ag), as he was then, after assessing some of the relevant authorities on the point, condensed, at paragraph [17] of his judgment, the principles governing the correction of errors in court orders. He said:

> "These cases appear to suggest at least the following. **This court has the power to correct errors in an order**

> **previously made by it arising from accidental slips or omissions, so as to bring the order as drawn into conformity with that which the court meant to pronounce**. In considering whether to exercise this power, the court will be guided by what appears to be the intention of the court which made the original order. In order to determine what was the intention of the court which made the original order, the court must have regard to the language of the order, taken in its context and against the background of all the relevant circumstances, including (but not limited to) (i) the issues which the court which made the original order was called upon to resolve; and (ii) the court's reasons for making the original order. While ambiguity will often be the ground upon which the court is asked to amend or clarify its previous order (as in this case), the real issue for the court's consideration is whether there is anything to suggest that the actual language of the original order is open to question." (Emphasis supplied)

In **Weir v Tree**, the court, by a majority (Morrison P (Ag) and Phillips JA), adjusted its order to give an option to purchase property after an event had occurred, rather than within a specified time period. The court did so on the basis that the original order was ambiguous, and that it wished to give effect to the intention of the original order.

[28] Both judges in the majority relied on the fact that it was Phillips JA who wrote the judgment giving rise to the original order (the other members of the panel agreed with the original order, without more), and that her intention was important to the issue of clarification. Phillips JA, in supporting the adjustment, relied, in part, on **Mainteck Services Pty Limited v Stein Heurtey SA and Stein Heurey Australia Pty Limited** [2013] NSWSC 1563 for that principle. In that case, Sackar J, in the Supreme Court of New South Wales, in correcting a costs order that he had made, said in part at page 1563:

> "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 say 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."

It is to be noted that Mainteck Services appealed against the decision of Sackar J, in respect of the substantive issue, but its appeal was dismissed (see **Mainteck Services Pty Ltd v Stein Heurtey SA** [2014] NSWCA 184 (6 June 2014)).

[29] In this case, it must be said that the reasoning of the learned judge below, on this issue, is surprising. As mentioned above, he not only had the Notification before him, but also the Full Court's order embodying and clarifying the terms of the notification. It was, indeed, beyond his authority to challenge an order of a judge of this court. As he had correctly stated as part of his reasoning, an order of the court must be respected until it is set aside. The learned judge had no authority to pronounce on the integrity of an order of this court. Their Lordships in **Cassell v Broome** faced a similar challenge, when a decision of theirs was questioned by the Court of Appeal of England. Their Lordships took the view that the stance by the Court of Appeal was untenable. In this regard, Lord Hailsham of Marylebone LC stated, in part, at pages 652 – 653:

> "But the Court of Appeal did not stop at dismissing the appeal on these grounds. Whether or not they were encouraged by the zeal of plaintiffs' counsel, they put in the forefront of their judgments the view that *Rookes v. Barnard* [1964] A.C. 1129 was wrongly decided by the House of Lords and was not binding even on the Court of Appeal….
>
> If the Court of Appeal felt, as they were well entitled to do, that in the light of the Australian and other Commonwealth decisions *Rookes v. Barnard* ought to be looked at again by the House of Lords…they were perfectly at liberty to say so….
>
> …it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable….But, much worse than this, litigants would not have known where they stood....

> The fact is, and I hope it will never be necessary to say so again, that, **in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers**…." (Emphasis supplied)

[30] The finding that the learned judge erred on this aspect does not necessarily condemn his decision. His interpretation of the effect of the notification shall next be considered.

Did the notification adjust the first order? (ground b)

[31] The learned judge not only found that Phillips JA was precluded from adjusting the first order, he also found that the Notification that was intended to carry out the adjustment, was itself, unclear, and did not affect the first order. On the point of clarity, he said, in part, at paragraphs [44] and [45]:

> "If what her Ladyship Phillips JA sought to communicate by [the notification] was that the Order…
>
> I said 'if' because it is not immediately clear from the face of [the notification] what is being communicated. The point was validly made by [counsel for SBIL] that [the Notification] is not a document which expressly stated that it was not intended for the [first order] to apply to personalty. Nor did [the notification] correct the wording of [the first order] by offering language which clearly limited the extent of the application of the injunction granted by the [first order] to realty only…."

[32] On the point of effect, he said at paragraph [47] of his judgment:

> "In my respectful opinion, [the notification] at its highest, is evidence that Phillips JA was indicating that the [first 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 [first order]."

[33] Learned counsel for the Bank submitted that the learned judge erred in treating with the notification in that way. Learned counsel essentially argued that the learned judge ought to have treated the notification as an order of a superior court, and considered it when interpreting the first order.

[34] The criticism, however, does not address the learned judge's approach to the Notification. He was attempting to determine its meaning. He was entitled to do so.

[35] In **Sans Souci Ltd v VRL Services Ltd** [2012] UKPC 6, Lord Sumption gave guidance on the interpretation of court orders. He said at paragraph 13:

> "…the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."

[36] In reviewing the notification, the learned judge mused that one interpretation of the notification was that Phillips JA was communicating that the first order was wider than she had intended it to be. His statement in that regard is recorded at paragraph [47] of his judgment, which has already been quoted above.

[37] The effect of the notification is that the first order did not affect Batts J's order for SBIL to make monthly payments in respect of the personalty, and, importantly, "the consequences thereof". The learned judge having found that the notification could be interpreted, as stated above, he ought to have found that that was what Phillips JA intended and give effect to it, in the absence of any other reasonable interpretation. He, therefore, erred in finding that the notification was unclear and was incapable of amending or modifying the first order.

Was the finding for contempt fair and reasonable (grounds d, f and g)?

[38] As has been indicated above, the learned judge found that:

a. the first order was clear;

b. the notification could not affect it;

c. there was a strict obligation to obey orders of the court; and

d. there was no basis for examining the underlying bases for the first order,

accordingly, the Bank was in contempt of court in disobeying the first order.

[39] The above reasoning and conclusion that the learned judge erred in respect of the notification, undermines an important aspect of the learned judge's reasoning. Without it, his conclusion that the Bank was in contempt, founders.

[40] There is, however, another basis for finding that the learned judge erred in finding that the Bank was in contempt. In addition to the notification, the learned judge did not give sufficient credence to the effect that the notification would have on the issue of whether the Bank had an intention to disobey the first order (the *mens rea*).

[41] The learned judge found that *mens rea* was not relevant to determine if contempt has been committed. He stated, in part, at paragraph [75] of his judgment, that "the reasons, motives and state of mind of contemnors are not relevant to the issue of whether a contempt has been committed". In applying that principle to this case, the learned judge found that there had been disobedience of the first order and that the motive for the disobedience "is irrelevant for the purposes of establishing a case of contempt" (paragraph [59] of the judgment). Indeed, the learned judge, in considering an appropriate sanction found that the Bank did not intend to breach the first order. He said, in part, at paragraph [74] of his judgment:

> "I therefore find that although [the Bank] 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 [the Bank] to enforce against the equipment in breach of the Order'."

[42] He held that the Bank's attorneys-at-law, in advising the Bank as to its rights in respect of the bills of sale, "ought not to have derived such a high level of comfort from [the notification], and to have concluded thereby that because [the Notification] may [support] Counsel's construction of the [first order], that it conclusively settled the issue of what the [first order] restrained" (see paragraph [63] of the judgment.

[43] For there to be contempt of court, the order should clearly specify the behaviour that must, or must not, be done. Any ambiguity in the order must be resolved in favour of the person charged with contempt. Contempt of court, at common law, requires not only an act or an omission (the *actus reus*), but it also requires a mental element (the *mens rea*). Lord Nicholls of Birkenhead, in the decision of the House of Lords case in **Her Majesty's Attorney General v Punch Limited and Another** [2002] UKHL 50 said, in part, at paragraph 20 of his judgment:

> "For the defendant company or Mr Steen to be guilty of contempt of court, the Attorney General must prove that they did the relevant act (actus reus) with the necessary intent (mens rea)."

[44] The learned judge therefore erred when he found that the *mens rea* was not relevant to determine if contempt has been committed. The learned judge found that the Bank did not intend to breach the order, but still found that it was in contempt. He said, in part, at paragraph [74] of his judgment:

> "I therefore find that although [the Bank] breached the [first 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 [first order]'."

[45] The difficulty with the learned judge's reasoning is that there is an inconsistency between his statement that the Bank's interpretation of the notification suggests that

there was no intention to disobey the first order and his conclusion that there was contempt. If the Bank had no intention to disobey the first order, then the *mens rea* had not been established and there should have been no finding of contempt of court. The learned judge's application of a principle of strict liability was not appropriate for this case.

[46] The cases on which the learned judge relied, in applying a strict liability approach to this case, included, **Stancomb v Trowbridge UDC** [1910] 2 Ch 190, **Director General of Fair Trading v Pioneer Concrete (UK) Limited and another** [1995] 1 AC 456 ('**Fair Trading v Pioneer Concrete'**), and **Knight v Clifton and Others** [1971] Ch 700.

[47] In **Stancomb v Trowbridge UDC**, the district council breached an injunction, which both prevented it from polluting a stream and obliged it to clean the stream of the remnants of previous acts of pollution. In answer to a motion for a sanction to be imposed, it was argued, firstly, that the applicant had failed to prove that the breach was wilful, in the sense of being contumacious, and secondly that the council members should not be held liable for the unauthorised actions of its employees.

[48] Warrington J rejected those submissions. He was satisfied that there was a wilful breach of the injunction, and that, as a corporate body must act through its servants or agents, the council members were liable. He said, in part at page 194:

> "In my judgment, if a person or a 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 the 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 Order 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*. …" (Emphasis supplied)

[49] Warrington J's reasoning was approved by the House of Lords in **Fair Trading v Pioneer Concrete**. In that case, the issue was whether a company could be held liable for the deliberate acts of its employees, who had participated in proscribed agreements. Lord Nolan, in approving **Stancomb v Trowbridge UDC**, only addressed the issue of the vicarious liability of the employer for the impugned acts of the employee. He said, in part, at page 481:

> "Given that liability for contempt does not require any direct intention on the part of the employer to disobey the order, there is 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 its behalf. In my judgment the decision in *Stancomb's case* is good law, and should be followed in the present case. The employees of the respondents have, by their deliberate conduct, made their employers liable for disobeying the orders of 14 March 1978 and 29 March 1979. The respondents are therefore guilty of contempt of court."

[50] No issue can be taken with either of the relevant principles applied in those two cases. They, with respect, do not address the issue of a breach of an ambiguous or qualified order. In both cases the actions or omissions did constitute disobedience of an unambiguous existing order. In this case the first order, although clear in its terms, was qualified by the notification. The notification, at its highest, did not prohibit the Bank's action. On an interpretation most favourable to SBIL, it blurred the clarity of the first order.

[51] In **Knight v Clifton**, the court's order restrained the defendants from, among other things, doing any act which interfered with the plaintiffs' free use of an alleged right of way. After the third defendant ploughed up a stretch of the right of way the plaintiffs sought to commit him for contempt of the order. The third defendant conditionally apologised to the court, saying that he had not intended any deliberate breach of the injunction, and that he would not have ploughed if he had thought that there would be "any real risk" of a breach of the injunction. His solicitor, who had

advised the third defendant to plough, with a warning as to the track, said that his advice to the third defendant may have been misunderstood.

[52] The judge who heard the motion to commit found that there had been no contempt but ordered the third defendant to pay the plaintiff's costs. The third defendant appealed from that decision, asserting that the judge erred on the issue of costs. In his judgment on the appeal, Sachs LJ, at page 721, referred to "the conflicting authorities touching on the willfulness [sic] question". He said that he preferred:

> "…those (for example, the *Mileage Conference case* (1966) L.R. 6 R.P. 49) which hold that contumacity need not be proved. (In other words, it is my view 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.)"

[53] Again, the issue in **Knight v Clifton** dealt with the clear language of an injunction and did not address a situation where the order had been qualified or modified.

[54] Those cases are, therefore, distinguishable from the present case, on those bases.

Was the sanction for the contempt fair and reasonable (ground e)?

[55] In light of the view that the learned judge erred in finding that there had been a contempt of court, there is no need to consider whether the sanction for contempt was fair and reasonable in these circumstances.

Conclusion

[56] For the reasons indicated above, it is concluded that the learned judge erred in finding that:

a. Phillips JA lacked the jurisdiction to clarify the first order;

b. the notification failed to clarify the first order; and

c. the absence of an intention to disobey the first order was immaterial.

Accordingly, the finding by the learned judge that the Bank was guilty of contempt was made in error, the appeal should be allowed and the decision and orders should be set aside.

Costs

[57] The costs of the appeal and of the contempt proceedings in the court below should be awarded to the Bank. The costs are to be taxed or agreed. The Bank has succeeded on every major issue. Accordingly, the general rule should apply that the unsuccessful party should pay the costs of the successful party.

EDWARDS JA

[58] I have read, in draft, the judgment of Brooks P and I agree that the learned judge erred in finding National Export Import Bank of Jamaica Limited guilty of contempt. Therefore, I also agree that the appeal ought to be allowed and the decision and orders of the learned judge set aside.

BROWN BECKFORD JA (AG)

[59] I too have read the draft judgment of my brother Brooks P. I agree and have nothing to add.

BROOKS P

ORDER

1. The appeal from the decision of the Supreme Court, handed down, herein, on 18 December 2020, is allowed.
2. The decision and orders of the learned judge are set aside.
3. Any sums paid in obedience to the sanction imposed by the learned judge are to be refunded to the Bank.

4. The costs of the appeal and of the contempt proceedings in the court below are awarded to the Bank, such costs to be agreed or taxed.