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TRINIDAD AND TOBAGO

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IN THE HIGH COURT OF JUSTICE

No. 5291 of 1996

BETWEEN

INTERSERV LIMITED

Respondent/Plaintiff

AND

LENNARD KONG

Applicant/Defendant

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Before The Hon. Justice S. Ventour

Appearances:

Mr. Trevor Lee S.C for the Applicant/Defendant,
Mr. Poonwassie with him.

Mr. Gregory Delzin for the Respondent/Plaintiff

DECISION

By Notice of Motion filed on the 6th February, 1997, the Applicant/Defendant sought the following orders of the Court:

(i) that the Respondent/Plaintiff herein by its officers PAUL PEREIRA and ORAL MOHAN be committed to prison for its contempt of the order of the Honourable Justice Ivol Blackman dated the 5th December, 1996 in that the Respondent/Plaintiff, INTERSERV LIMITED, in excess of the powers or authority given to it under

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and by virtue of the said order accessed the hard drive of the computer taken into the Respondent/Plaintiff Attorney's possession from the Applicant/Defendant's home at 57 Petra Street, Woodbrook and in breach of the said order added to and printed and/or caused to be printed and/or copied therefrom certain files and/or programs therefrom contrary to paragraph 5 thereof;

(ii) that all further proceedings or steps in this action be stayed until the hearing and determination of this motion;

(iii) that all further proceedings or steps in this action be stayed until the Plaintiff's contempt of court is purged;

(iv) that the said Respondent/Plaintiff do pay to LENNARD KONG his costs of and incidental to this application and the order to be made thereon;

(v) that such further or other order may be made as to the Court shall seem proper.

The grounds upon which the reliefs are sought are as follows:-

(i) Under and by virtue of an order of the Honourable Justice Ivol Blackman dated 5th December, 1996 the Respondent/Plaintiff by its attorney and servants or agents, including Paul Pereira and Oral Mohan, entered upon property situate at 57 Petra Street, Woodbrook and removed therefrom inter alia, the Applicant/Defendant's computer.

(ii) On divers occasions on the 5th,6th,9th and 10th December, 1996, while the said computer was in the custody of the

> Respondent/Plaintiff's attorney and in excess of the power or authority given to the Respondent/Plaintiff under and by virtue of the said order the Respondent/Plaintiff assessed the hard drive of the said computer and in breach of the said order added to and printed and/or caused to be printed certain files or programs therefrom contrary to paragraph 5.

In support of the said Motion an affidavit was filed on the 7th February, 1997 by the Applicant/Defendant. No affidavit was filed in response by or on behalf of the Respondent/Plaintiff.

On the hearing of the Motion Attorney at Law for the Respondent/Plaintiff took a preliminary point. He contended that the Motion is misconceived on the following grounds:

(a) if in fact the Respondent/Plaintiff did act in excess of its powers given under the order of the Court, liability for contempt does not arise as a result; and

(b) that in any event the affidavit evidence fails to disclose what software packages, if any, are alleged to have been taken and/or accessed so as to amount to a breach of the order of the Court leading to contempt.

Attorney at Law for the Respondent/Plaintiff referred the Court to the learning in Chapter 11, pages 314 to 323 in the book entitled the "Law of Contempt" by Borrie & Lowe. In particular at page 315, where the learned authors laid down four (4) pre-requisites leading to contempt proceedings. The writers state:

> **"Thus although persons are under a duty to comply strictly with the terms of an injunction, the Courts will only punish a person for contempt upon adequate proof of the following points. First, it must be established that the terms of the injunction are clear and unambiguous; secondly, it must be shown that the defendant has had proper notice of such terms; and thirdly, there must be clear proof that the terms have been broken by the defendant. There is also a fourth issue, namely, the mens rea as required in such cases".**

Counsel also referred the Court to two authorities in support of his submissions. Firstly, he referred to the case of **P.A. Thomas & Co. and others -v- Mould and others [1968] 1 A.E.R 963** where it was held that in order to maintain committal proceedings for contempt there must be clear evidence highlighting the breach of the order of the Court. As a consequence he argued that since the Applicant/Defendant had failed to disclose in his affidavit what software packages had been accessed the action must fail. Secondly, he relied on the Court of Appeal decision in the case of **Danchevsky -v- Danchevsky [1974] 3 A.E.R 934** in support of his proposition that a party cannot initiate contempt proceedings where other methods of reliefs are available.

On a careful examination of the ratio in the latter case I do not agree that the principle enumerated therein in any way lends support to Counsel's very wide proposition. The case is an authority for the proposition that where there is a reasonable alternative available rather than sending the person guilty of contempt to prison in order to purge the contempt the Court should adopt that alternative procedure. The case pre-supposes that a contempt has been committed.

It is my view therefore that **Danchevsky -v- Danchevsky** has no application to the instant case.

Senior Counsel arguing on behalf of the Applicant/Defendant says that the application before the Court is maintainable on the basis that the Respondent/Plaintiff by acting in excess of its authority under the terms of the order of the Court has impliedly breach the said order. In addition senior counsel further submits that the Applicant/Defendant has produced the evidence in paragraphs 4 and 5 of his affidavit to establish that the Respondent/Plaintiff did access the hard drive of the Applicant/Defendant's computer and removed certain software packages.

He did not agree that the Motion before the Court was misconceived.

I have carefully considered the submissions made by Attorneys at Law for and on behalf of the Respondent/Plaintiff and the Applicant/Defendant. Both counsel agree and indorsed the general rule that it is the duty of those so enjoined to strictly observe the terms of an injunction. As Kindersley, V.C. said as early as 1864 in the case of **Harding & Tingey 12 WR 684** that it is of the **"greatest importance that either an order for an injunction or an interim order should be implicitly observed, and every diligence exercised to observe it".**

While it is true that the Courts are prepared to jealously guard their orders and to punish those who, for one reason or the other, choose to disobey such orders the Courts do equally recognise the well-established principle laid down by Lord Denning, M.R. in the case of **Mc Ilraith -v- Grady [1968] 1 QB 468** where he said at page 477 that:

> **"No man's liberty is to be taken away unless every requirement of the law has been complied with".**

It is important therefore to establish quite clearly exactly what are the terms of the order of the Court alleged to have been breached, whether

expressly or impliedly, by the Respondent/Plaintiff that have given rise to these proceedings for committal. By his Motion the Applicant/Defendant alleges that the Respondent/Plaintiff acted contrary to paragraph 5 of the order of the Honourable Justice Ivol Blackman dated 5th December, 1996 when it acted in excess of the powers or authority given to it under and by virtue of the said order accessed the hard drive of the Applicant/Defendant's computer and in breach thereof added to and printed and/or caused to be printed and/or copied therefrom certain files and/or programs.

Paragraph 5 of the said order states:

5. That the Defendant whether by himself or by any persons appearing to be in charge of the premises hereinafter specified do at any hour between 7 o'clock in the morning and 12 o'clock in the night permit the person who shall serve this Order upon him together with such persons not being more than 5 in number as may be duly authorised by the Plaintiff's Attorney, to enter the premises known as 57 Petra Street, Woodbrook and any other premises disclosed to the plaintiff pursuant to the last proceeding paragraph of this Order and any outhouse or any other building which forms a part of the said premises and/or motor vehicles owned or used by the Defendant and for the purpose of inspecting, photographing and looking for and removing into the Plaintiff Attorney's custody:

   (i) any computer hardware

   (ii) any computer storage devices magnetic or otherwise

   (iii) all or any documents relating

in any way to any of the
aforesaid items in (i) and (ii)
of this paragraph.

Clearly the terms of the order are in the form of an Anton Piller. It is a mandatory injunction made in personam. Waller, L.J's definition of the Anton Piller order in the case of **Ex. p Island Records Ltd. [1978] Ch. 122 at page 145** is in my view simple and striking:

> **"I should add that in some respects the making of an Anton Piller order resembles the granting of a search warrant. There are however safeguards in that the consent of the defendant is required before any search is conducted."**

While in substance the order is made against the Applicant/Defendant there are embodied in the said order several undertakings given by the Respondent/Plaintiff a breach of which may very well lead to contempt proceedings against the said Respondent/Plaintiff.

In paragraph 5 of the order, there is no undertaking given by the Respondent/Plaintiff. My understanding of paragraph 5 is that the Applicant/Defendant was ordered to allow the Respondent/Plaintiff to enter his premises for specific purposes of inspecting, photographing and looking for and removing into the Plaintiff Attorney's custody the following:

(i) any computer hardware

(ii) any computer storage devices magnetic or otherwise

(iii) all or any documents relating in any way to any of the aforesaid items in (i) and (ii) of this paragraph.

No doubt if the Applicant/Defendant fails and/or refuses to allow the Respondent/Plaintiff entry unto his premises for the purpose specified in the order then he may be guilty of contempt of Court. As Lord Denning M.R.

said at page 61 in the case of **Anton Piller KG v Manufacturing Processes Ltd. [1976] Ch. 55**:

> **"It (the order) serves to tell the defendants that, on the evidence put before it, the court is of the opinion that they ought to permit inspection - nay it orders them to permit - and that they refuse at their peril. It puts them in peril not only of proceedings for contempt but also of adverse inferences being drawn against them; so much so that their own solicitor may often advise them to comply."**

Could it be argued that if the Respondent/Plaintiff had refused to take away from the Applicant/Defendant's premises all the items that the order authorises it to take, the Respondent/Plaintiff would have been in contempt of Court. The answer must be in the negative.

Let us now look at the other side of that argument. If the Plaintiff exceeds its authority by taking away more than that authorised by the order of the Court will such an act amount to a contempt of Court? I think not. In this regard the order simply renders lawful what would otherwise be unlawful; that is the taking away of the Defendant's property. If therefore the Plaintiff takes away what it is not authorised or empowered to take away it thereby exposes itself to an action in law for damages for trespass to goods or damages for infringement of intellectual property rights or any such cause of action. The Plaintiff's action clearly, in my view, would not amount to a breach of the order of the Court as there is no "order" permitting the Plaintiff to take away evidence for the purpose of the trial. Consequently, if the Plaintiff exceeds the authority given to it by paragraph 5 of the order of Justice Blackman made on 5th December, 1996, this does not in my view amount to a breach of the order. I therefore hold that in the circumstances contempt proceedings against the Plaintiff are inappropriate

and the Motion filed on the 6th February, 1997 by the Applicant/Defendant is therefore misconceived.

The Motion is therefore dismissed with cost certified fit for advocate attorney.

DATED this 13th day of March, 1997.

Sebastian Ventour
Judge