[2023] JMCA Civ 47

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00032

BETWEEN	**VICTORIA MUTUAL WEALTH MANAGEMENT LIMITED**	**APPELLANT**
AND	**COLANDO HUTCHINSON**	**RESPONDENT**

Mrs Symone Mayhew KC and Ms Ashley Mair instructed by MayhewLaw for the appellant

Conrad E George and Andre K Sheckleford instructed by Hart Muirhead Fatta for the respondent

22 March and 3 November 2023

Contempt of court - principles to be applied where there is a breach of a clear and unambiguous order - whether *mens rea* requires a finding that there was an intention to breach the order

BROOKS P

[1] I have read, in draft, the judgment of Dunbar Green JA. I agree with her reasoning and conclusion.

V HARRIS JA

[2] I, too, have read, in draft, the judgment of Dunbar Green JA and agree with her reasoning and conclusion.

DUNBAR GREEN JA

Introduction

[3] In this appeal, Victoria Mutual Wealth Management Limited ('the Bank'/'the appellant') seeks to set aside a decision by Laing J ('the learned judge'), a judge of the Supreme Court, made on 15 July 2021, by which he found the appellant to be in contempt of a court order, and ordered it to pay $400,000.00. That order was issued by a single judge of this court, Foster-Pusey JA.

[4] The appellant contends that the learned judge erred in finding that it had breached the order when it required the respondent, a former deputy chief executive officer of the appellant, to proceed on paid administrative leave pending the outcome of disciplinary proceedings instituted against him. The appellant also contends that the learned judge made several erroneous findings, of fact and law, in arriving at his ultimate finding of contempt.

Background

Disciplinary proceedings instituted against the respondent

[5] In November 2020, disciplinary charges were brought against the respondent by the appellant. These were by way of charge letters, dated 25 and 27 November 2020, that alleged breaches of the Bank's Code of Ethics and Conduct Policy: firstly, in relation to allegations of a conflict of interest; and secondly, arising from a complaint of sexual harassment. Consequently, the respondent was required to attend two disciplinary hearings set for 2 and 4 December 2020, respectively, and to proceed on remote work pending the completion of the disciplinary proceedings.

Injunctive relief sought by the respondent

[6] On 16 December 2020, the respondent sought an injunction, in the Supreme Court, to restrain those disciplinary proceedings. On 18 December 2020, the learned judge granted an interim injunction, valid until 22 December 2020 ('Laing J injunction'), restraining the appellant from taking any adverse step against the respondent for any

reason connected to the charge letters. The learned judge explained then that he was primarily concerned with maintaining the status quo. An *inter partes* hearing of the application was ordered to follow on 22 December 2020.

[7] At the conclusion of the *inter partes* hearing, on 23 December 2020, the learned judge refused the respondent's application for injunctive relief.

Respondent's appeal against the refusal of injunctive relief

[8] The respondent appealed, to this court, against the learned judge's refusal of the injunction. The respondent also applied for an interim injunction pending the hearing of that appeal.

Interim order in Court of Appeal

[9] On 30 December 2020, the application for the interim injunction came on for hearing before Foster-Pusey JA. She granted an interim injunction in favour of the respondent pending an *inter partes* hearing of the application set for 19 January 2021.

[10] Foster-Pusey JA's order ('the Order'/ 'Foster-Pusey JA's Order') was in terms similar to the Laing J injunction.

[11] Foster-Pusey JA's Order, as far as relevant, provides:

> "1. The matter is adjourned to 19th January 2021 at 2:15pm for inter partes hearing;
>
> 2. Upon the [Respondent] giving the usual undertaking as to damages, it is hereby ordered that; An interim injunction is granted until the inter partes hearing of the application on 19th January 2021 at 2:15 pm restraining the [Appellant] whether by itself, through its agents or otherwise howsoever from taking or causing or permitting to be taken on its behalf any adverse steps against the [Respondent] in connection with employment by the [Appellant], including terminating its contract of employment with the [Respondent], or for any reason connected with the charge letters from the [Appellant] dated 25th and 27th November 2020;

…"

Respondent sent on paid administrative leave

[12] The day following Foster-Pusey JA's Order, Ms Laraine Harrison, the appellant's Group Chief Human Resources Officer, wrote to the respondent as follows:

> "December 31, 2020
>
> Mr Colando Hutchinson
> c/o Victoria Mutual Wealth Management Ltd
> 53 Knutsford Boulevard
> Kingston 5
>
> Dear Colando,
>
> Further to our letter of November 25,2020, wherein we had required **'that you proceed on full remote work, effective immediately until the hearing process is completed.'** This instruction was in the context of the desire to conclude the Disciplinary Hearings in a time frame of four (4) weeks. By virtue of the Court actions which now attend these matters, it is now uncertain if and when the 'Hearing Process will be completed.'
>
> Accordingly, we now place you on paid administrative leave immediately until further notice.
>
> You are not required to work, undertake or participate in any work-related activities." (Emphasis as seen in the original)

[13] On the same day, the respondent was locked out of his work email account, and the attorneys-at-law for the respondent wrote to the appellant's attorneys-at-law, indicating that the appellant's actions of placing the respondent on "paid suspension", publicising the intended suspension, and locking the respondent out of his work email account amounted to a breach of Foster-Pusey JA's Order.

[14] By letter, dated 6 January 2021, the attorneys-at-law for the respondent, again, wrote to the appellant's attorneys-at-law, alerting them to the continued breach of the Order, and, in particular, that the respondent's client account had been assigned by the appellant to another senior executive.

[15] On 7 January 2021, the appellant's attorneys-at-law responded, indicating that the appellant was not in breach of the Order.

Respondent's contempt proceedings in the Supreme Court

[16] On 13 January 2021, the respondent sought orders and a declaration, in the Supreme Court, that the appellant was in contempt for disobeying Foster-Pusey JA's Order.

[17] On 25 June 2021, the application for contempt came on for hearing before the learned judge. In his decision (handed down on 15 July 2021), he found that the appellant had committed civil contempt by placing the respondent on paid administrative leave, "the imposition of [which] had its genesis in and was clearly connected to the charge letters" (para. [44] of his judgment). Accordingly, he imposed a fine as indicated in para. [3] above.

The decision of the learned judge

[18] The learned judge applied his previous decision in **Stewart Brown Investments Limited and Others v National Export Import Bank Jamaica Limited and Others** [2020] JMCC Comm 36, wherein he had found that it was not necessary to show *mens rea* to establish civil contempt, and applied the strict liability approach. As it turned out, that decision was overturned by this court in **National Export Import Bank of Jamaica Limited v Stewart Brown Investments Limited** [2021] JMCA Civ 40 for reasons I will deal with later.

[19] The following points were central to the learned judge's reasoning in the instant case:

a. the absence of negligence or intention to disobey the Order would not amount to a defence to civil contempt;
b. the appellant had adequate notice of the Order;

c. the certainty of the Order was not in dispute and it was not ambiguous on its face;
d. placing the respondent on paid administrative leave constituted a breach, applying the plain and ordinary meaning to the Order;
e. this was not a case where there were two equally likely possibilities before the court as to whether there was, in fact, a breach of the Order;
f. in the circumstances of the case, sending the respondent on paid administrative leave constituted an adverse step in connection with his employment;
g. it was reasonable to conclude that, as a senior executive, the respondent derived utility from performing his work, not limited to monetary and reputational benefits;
h. reliance by the appellant on the fact that the respondent retained his emoluments and vacation entitlement was not a robust response to the assertion that the paid administrative leave was an adverse step in connection with his employment, for purposes of the Order;
i. the adverse steps which the Order prohibited did not necessarily have to amount to a breach of the appellant's contract of employment with the respondent; and
j. it was immaterial whether the appellant was contractually entitled to place the respondent on administrative leave.

The appeal against the learned judge's finding of contempt

[20] On 11 March 2022, the appellant filed an appeal against the decision of the learned judge, contending that he erred in his assessment of the law and the evidence before him, in arriving at his findings, and that his decision should be set aside. It advanced the following grounds of appeal:

"a) The Learned Judge erred when he found that by placing the Respondent on administrative leave the Appellant had taken an adverse step in connection with his employment based on the plain, natural and ordinary meaning of the order of Foster-Pusey JA and accordingly had breached the order.

b) The Learned Judge erred in his finding that the adverse step in connection with the Respondent's employment consisted of depriving the Respondent of the cerebral involvement and positive fulfilment he obtained by performing the tasks he was hired to do in circumstances where there was no evidence to support such conclusions.

c) The Learned Judge erred when he found that it was immaterial whether the [Appellant] was contractually entitled to place the Respondent on administrative leave in determining if there was a breach of the order of Foster-Pusey JA.

d) The Learned Judge erred in his conclusion that this was not a case where there were two equal possibilities as to whether there was a breach of the order of Foster Pusey-JA.

e) The Learned Judge erred when he found that mens rea was not relevant to determine if contempt has been committed.

f) The Learned Judge erred when he found that matters such as reasons, motives, state of mind of contemnors are not relevant to the issue of whether a contempt has been committed and that these are matters which may be relevant in mitigation and in determining what is an appropriate sanction.

g) The Learned Judge erred when he found that the Appellant had committed an act of civil contempt in circumstances where he found that there was no evidence before him on which he could conclude that there was an intention of by [sic] the Appellant to breach the order."

Issues

[21] The following main issues arise from these grounds:

(i) whether the act of placing the respondent on paid administrative leave amounted to an adverse step in connection with his employment (grounds a-c);

(ii) whether there were two equal possibilities as regards the interpretation of the Order (ground d); and

(iii) was an intention to breach the Order required for proof of contempt in these circumstances and, if so, was it established? (grounds e-g)

Issue 1: whether the act of placing the respondent on paid administrative leave amounted to an adverse step in connection with his employment (grounds a-c)

Appellant's submissions

[22] The appellant's main complaint was that the respondent's employment was neither terminated nor suspended as he continued to receive his full salary and benefits whilst on administrative leave. The action was simply a decision by the employer to relieve the respondent of the requirement to work pending the outcome of the disciplinary matters, which had become protracted because of litigation.

[23] Mrs Mayhew KC, appearing for the appellant, accepted that a change in circumstances had occurred. She submitted that the change was not adverse but neutral. She argued that there was no evidence that the respondent had been denied emoluments, any leave deducted from his entitlements, or any adverse statements made about him. Further, there was no evidence of any sanction arising from the charge letters while the Order was in place. In other words, the respondent was not dismissed, suspended, demoted, reprimanded, or even warned for the offences while the Order was

in place; those being the sanctions/adverse steps which could arise from the disciplinary charges, as set out in the company's disciplinary code, and contemplated in the Order.

[24] It was King's Counsel's further submission that the learned judge erred in considering only the plain and ordinary meaning of the Order. The contextual background was also important, she argued, in appreciating the purpose of the Order, in circumstances where the judge accepted that it was wide. But, even on the "plain meaning interpretation", Mrs Mayhew argued, the learned judge would have erred because the appellant's action was not an adverse step "in connection with [the respondent's] employment".

[25] King's Counsel also argued that the learned judge's finding, that the action of the appellant was connected to the charge letters, was erroneous as the evidence revealed that the impugned decision was taken because of rising tension in the office.

[26] Mrs Mayhew further submitted that, in construing the imposition of administrative leave as an adverse step, the learned judge had ignored the well-established principle in **Turner v Sawdon & Co** [1901] 2 KB 653 that, generally, an employer is not entitled to provide work for an employee as long as his salary is paid.

[27] Briefly, Mr Turner was employed as a salesman for four years. Two years into the employment contract, he was handed a letter by his employers which stated, in part: "We have decided that you shall take a month's holiday, that is to say, that although you will still be in the employ of the firm and at their disposal, you will not after today be required to perform your duties. You will please call for your salary on January 31, when any further instructions will be given to you".

[28] The following day, circulars were issued by the employers to their customers, stating that Mr Turner had no authority to transact any business on their behalf.

[29] Mr Turner commenced a claim for breach of contract on grounds that his employers refused to engage and employ him in accordance with the terms of his

employment contract. The lower court found in the employers' favour, and Mr Turner appealed.

[30] The real question, as stated by the appellate court, was – whether, beyond the question of remuneration, there was a further obligation on the masters, during the extent of the contract, to find continuous or, at least, some work for the employee. The court examined multiple cases, including **Turner v Goldsmith** [1891] 1 QB 544, where the wages were to be paid in the form of a commission, and that fact, impliedly, created a contract to find employment for the servant. It also examined the question of whether there was anything in the employment contract that placed on the employers a wider obligation than which a master ordinarily incurred towards his servant. The court decided that "this was a contract by the master to retain the servant, and during the time covered by the retainer to pay him wages under such a contract. It [was] within the province of the master to say that he will go on paying the wages, but that he [was] under no obligation to provide work".

[31] Mrs Mayhew also submitted that the learned judge's finding of a deprivation of cerebral involvement and positive fulfilment was not supported by any evidence (distinguishing **Potter v Legal Aid Services Commission** [2015] 1 SCR 500, in which the Canadian Supreme Court found that placement of an employee on indefinite paid administrative leave amounted to a constructive dismissal because of, among other reasons, the benefits derived from work).

<u>Respondent's submissions</u>

[32] Mr George, appearing for the respondent, also referred us to **Potter v Legal Aid Services Commission**, and particularly the observations of Wagner J at para. 83:

> "Work is now considered to be 'one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being' (Reference re Public Service Employee Relations Act (Alta.),

> [1987] 1 S.C.R. 313, at p. 368. Thus, it is clear that the benefits derived from performing work are not limited to monetary and reputational benefits. Although I accept that employees who receive earnings from commissions or who derive a reputational benefit from the performance of their work are placed at a particular disadvantage should their employee refuse to provide them with work and that this justifies finding that an obligation to provide work is implied in the contract, I would caution against assuming that the converse is also true, namely that workers who are not included in those narrow categories derive no benefit whatsoever from the performance of their work and that their employers therefore have an unfettered discretion to suspend them with pay…"

[33] Also, at para. 85, where Wagner J continued:

> "…The common law exceptions remain useful as indicators that an employer has implied contractual obligations…That being said, no employer is at liberty to withhold work from an employee either in bad faith or without justification. The question is whether, in the circumstances of the particular case, the employee has demonstrated that the administrative suspension of the employee with pay is justified."

[34] In **Potter v Legal Aid Services Commission**, the Canadian court found that Mr Potter was constructively dismissed from his employment as executive director of the New Brunswick Legal Aid Services Commission ('the Commission'). It did so on the bases of the indefinite duration of his paid suspension, the fact that the Commission failed to act in good faith in so far as it withheld reasons from him, the Commission's concealed intention to have his employment terminated, and that the suspension was unauthorized by his employment contract.

[35] Mr Potter had been employed for seven years. In the first half of that term, the relationship with his employers deteriorated, and discussions began to 'buy out' the rest of his employment contract. Mr Potter, however, went on sick leave before the matter was resolved. Before his return, the Commission wrote to the Minister of Justice recommending that Mr Potter's employment be terminated for cause. On the same day, the Commission's lawyer wrote to Mr Potter's lawyer advising that he was not to return

to work until further direction from the Commission. Before the conclusion of his sick leave, the Commission suspended Mr Potter indefinitely with pay and delegated his duties to another person. Mr Potter initiated a claim on the basis that he was constructively dismissed.

[36] In the instant appeal, Mr George drew a parallel between paid administrative leave and paid suspension. He submitted that as paid suspension could amount to constructive dismissal, which was an adverse step, so would paid administrative leave. He also pointed out that the respondent was a deputy chief executive officer whose remuneration included a substantial incentive pay element which was tied to the appellant's performance, and that would take him outside the ratio of **Turner v Sawdon & Co**.

[37] Counsel also referred to **Re Rubel Bronze and Metal Co and Vos** [1918] 1 KB 315, where McCardie J cast doubt on the authority of **Turner v Sawdon & Co** and said it must be confined to cases with substantially identical facts. **William Hill Organisation Ltd v Tucker** [1998] IRLR 313 was also relied on by counsel. In the latter case, Morritt LJ acknowledged that changes in social conditions have resulted in the courts recognising "the importance of work, not just the pay", and advanced a proposition that "the contract of employment [gives an] employee a right to attend normally at his place of work".

[38] These cases, counsel argued, indicate that there is a shift away from the strict application of the principle established in **Turner v Sawdon & Co.**

[39] Counsel further submitted that the meaning of Foster-Pusey JA's Order was clear and unambiguous. On its plain and natural meaning, depriving the respondent of his ability to work, coupled with excluding him from his work email account, amounted to an adverse step connected to his employment.

Analysis

<u>Entitlement to work</u>

[40] The authorities have established different contexts in which an entitlement to work is presumed and an employer's failure to provide employment results in a breach of the employment contract (see for example, **Lumley v Gye** (1853) E & B 216 where it was advanced that the employee's reputation was important to his career and he must work to maintain it; **Devonald v Rosser & Sons** [1906] 2 KB 728 where the employee's remuneration depended on commission or piecework, that in turn, required him to work in order to earn; I**n Re Rubel Bronze and Metal Co and Vos**, where remuneration also depended on commission; and **William Hill Organisation Ltd v Tucker** where the court found that the right to work is a question of construction of the particular contract of employment and the surrounding circumstances).

[41] The more recent authorities seem to suggest that the notion of it being "unique" for a servant to sue a master who was willing to pay his wages because he was not given employment is now outdated. The modern age presumes a value in work which bears some relation to the employee's dignity, and this evolving attitude belies the idea that denial from doing work is ameliorated simply by remunerating 'idleness'. For instance, in **Village Resorts Ltd v The Industrial Disputes Tribunal et al**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 66/1997, judgment delivered 30 June 1998, Rattray P, at page 11, characterised the change of nomenclature from master and servant to employer and employee as "[a] clear indication that the rigidities of the former relationships have been ameliorated by the infusion of a more satisfactory balance between the contributors in the productive process and the creation of wealth in the society".

[42] In a similar vein, Brooks JA (as he then was) observed, at para. [21] in **Edward Gabbidon v Sagicor Bank Jamaica Limited** [2020] JMCA Civ 9, that the change in nomenclature, as mentioned above, "is one of the consequences of the change in the attitude of the law and society toward the importance of a person's employment". Brooks

JA cited the decision of **Johnson v Unisys Ltd** [2001] UKHL 13 where at paras. 35 and 36, Lord Hoffman said there had been an "employment revolution", and went on to describe how the common law had regarded the contract of employment in the past and the transformation which led to the recognition that "a person's employment is usually one asof the most important things in his or her life". Lord Hoffman explained that the law had changed to recognise the social reality that "[a person's employment] gives not only a livelihood but an occupation, an identity and a sense of self-esteem".

[43] These authorities confirm my own view that the intangible elements of "identity" and "self-esteem" exist alongside remuneration as important measures of the value of work. It was, therefore, not a stretch; but a well-founded supposition for the learned judge to conclude, without any specific evidence, that indefinite leave deprived the respondent, a senior executive, of "positive fulfilment" and "cerebral involvement" in his work. This was a reasonable conclusion as to the consequence of failure to comply with Foster-Pusey JA's Order, not proof of any breach *per se*.

Was any adverse step taken by the appellant?

[44] It is true, as Mrs Mayhew submitted, that there are clear differences between **Potter v Legal Aid Services Commission** and the instant case, for example, unlike the instant case, the paid leave in **Potter v Legal Aid Services Commission** was indefinite, and the employee was not given a reason for it. In determining whether the appellant had breached the Order, the learned judge did not focus on whether the employer was under a duty to provide work for the respondent or whether he had been constructively dismissed. His decision hinged on whether, by sending the respondent on paid administrative leave, the appellant had taken an adverse step against his employment or in connection with the charge letters. There should, therefore, be no need for this court to consider whether the appellant's action amounted to constructive dismissal or whether the respondent fell in the class of workers who received a commission since the learned judge made no findings in relation to those matters.

[45] There was evidence that, at the date of the Order, the respondent worked remotely and was doing his normal duties; but that changed when he was placed on paid administrative leave. He was, thereafter, not required to work.

[46] A change from remote work to no work at all was a substantial modification of the employment arrangement, in my view. Mrs Mayhew's characterisation of this change as neutral is unconvincing. Neither the contents of the letter from the human resources officer to the respondent nor the affidavit of the chief executive officer of the appellant, Mr Rezworth Burchenson, supports King's Counsel's contention.

[47] Paras. 14 and 15 of Mr Buschenson's affidavit state:

> "14. Pending the determination of the disciplinary charges the [respondent] was previously advised in the charge letters that he would proceed on full remote work arrangements. This arrangement still required the [respondent] to work …
>
> 15. The disciplinary hearing being protracted as a result of the court proceedings and in particular the interim injunction in the Court of Appeal, it was decided that it was in the best interest of the parties that the [respondent] not be required to work in the interim in an effort to minimise or reduce rising tensions."

[48] The scheme of this excerpt reveals not only that the appellant had notice of the injunction, which is legally required to found contempt (see **Husson v Husson** [1962]1WLR 1434,1435), but that its action, in placing the respondent on paid administrative leave, was connected to the charge letters (the subject of the litigation) and his employment, and was further to the Order.

[49] The appellant's twin action, of placing the respondent on paid administrative leave and excluding him from his work email account, deprived the respondent of his ability to work. That was a significant change in his employment status from that which obtained between the time the charge letters were issued and the Order being made. This result was expressly prohibited by the Order. The learned judge was, therefore, not plainly

wrong when he found that the appellant's action amounted to an adverse step in connection with the respondent's employment.

[50] For these reasons, grounds a to c fail.

Issue 2: whether there were there two equal possibilities as regards the interpretation of the Order (Ground d)

[51] Mrs Mayhew referred to **Re Bramblevale Ltd** [1969] 3 WLR 699 as authority for the proposition that, faced with two likely possibilities, it was not correct for the learned judge to have found that contempt was proven beyond a reasonable doubt.

[52] King's Counsel submitted that the Order was capable of a wide and narrow interpretation, creating two equal possibilities. The result is an unclear and ambiguous order. She referred to **Donald Fettes et al v Culligan Canada Limited and Watergroup Companies Inc** 2010 SKCA 151 in which the court stated that an order was unclear on one of these possible bases: (a) where it was missing an essential detail as to where, when, or to whom it applied; (b) if it incorporates overly broad or unclear language; or (c) where external circumstances have obscured its meaning.

[53] Mrs Mayhew argued in favour of a narrow interpretation of the Order. She pointed to how the matter proceeded through the courts and asserted that because the Order specifically referred to the termination of the respondent's employment, this implied a limit on the interpretation of "adverse steps" to those sanctions which could flow from disciplinary proceedings (ie termination of employment, suspension without pay or reprimand). For this point, reliance was placed on **Bourne (Inspector of Taxes) v Norwich Crematorium Ltd** [1967] 1 WLR 691.

[54] King's Counsel submitted further that the Order was stated too broadly, and that resulted in it being unclear. Consequently, the appellant was left in a situation where it did not know or could not appreciate what conduct was being restrained by the Order. Mrs Mayhew argued that given the factual background and the purpose for granting the Order, in the first place, it was not an unreasonable interpretation, by the appellant that

placing the respondent on administrative leave was not an adverse step. In the context of the Order being unclear and ambiguous, she argued, there ought not to have been a finding of contempt by the learned judge.

Respondent's submissions

[55] Mr George's retort, essentially, was that the Order was clear and open to only one interpretation, given the plain words that were used. He acknowledged that the learned judge had stated that the Order was wide but said the learned judge had, nevertheless, found no uncertainty or ambiguity.

[56] Counsel further argued that the appellant's submission that its action was not a step connected to the disciplinary proceedings was at variance with the evidence contained in the letter from the human resources officer to the respondent, advising him of its decision to send him on administrative leave.

Analysis

[57] It is unnecessary to belabour the well-established general principle that an order of a court must be unambiguous, and no sanction will be imposed for failing to comply with one which is too wide or otherwise lacking in specificity (see, for instance, **Iberian Trust Limited v Founders Trust and Investment Company Ltd** [1932] 2 KB 87, at page 95, per Luxmoore J – "if the court is to punish anyone for not carrying out its order the order must in unambiguous terms direct what is to be done"; and **Attorney General v Punch Limited and another** [2002] UKHL 50, para. 35 per Lord Nicholls of Birkenhead – "a person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute").

[58] I also adopt, as accurate, the principle enunciated in **Re Bramblevale Ltd** that if there are two equally likely possibilities before the court as to whether a breach of an order had occurred, it is not correct to hold that there was a contempt of court.

[59] However, those principles are inapplicable to the instant case, as, to my mind, there is no ambiguity in the Order.

[60] There is also no inconsistency between this court's position and the principles stated in **Bourne (Inspector of Taxes) v Norwich Crematorium Ltd**. In that case, the question was whether a furnace chamber and chimney tower, used as a crematorium, was an industrial building within the definition: "…Subject to the provisions of this section…' industrial building or structure' means a building or structure in use…(c) for the purposes of a trade which consists in the manufacture of goods or materials or the subjection of goods or materials to any process". The related issues were whether human remains were "goods or materials"; and cremation, the "subjection of goods or materials to any process".

[61] Stamp J concluded, at page 695, that it would be a distortion of the English language to characterise "the living or the dead as goods or materials", and made the following further observations, at page 696, with which I concur:

> "English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which one has assigned to them as separate words so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language."

[62] **Donald Fettes and others v Culligan Canada Ltd and Watergroup Companies Inc**, a decision from the court of appeal of Saskatchewan, Canada, concerned consolidated appeals from two judgments (contempt judgments nos 1 and 2). The background facts are that the plaintiffs, Culligan and its subsidiary Watergroup, applied for interlocutory relief against individual defendants and their newly formed company, Novo, alleging that the latter had breached covenants not to compete with Watergroup, or to disclose its confidential information. Donald Fettes was also joined in the application in relation to other matters.

[63] Ball J granted two interim injunctions, the second of which involved Novo. Before the order was issued, Novo applied for an order clarifying the scope of the terms of the injunctions, and Ball J issued a corrigendum to his judgment indicating that there was an ambiguity in a clause which required clarification. Novo appealed the decision of Ball J, and the court of appeal made a further modification to the injunction.

[64] While the appeal was pending, Watergroup made three successive applications to the Court of Queen's Bench, for orders finding Nova in contempt, in relation to acts of contempt which it alleged had occurred between 1 September 2009 and 26 November 2009. The judgments in the first and third applications were the subject of the appeal before the Saskatchewan appellate court. The primary issue on appeal was whether the order pertinent to the activities of Novo was sufficiently clear during this period.

[65] The appellate court's analysis of the clarity of the order required a consideration of which of the two orders governed the relevant activities: the order of Ball J or the order of the court of appeal, which further modified the judge's order. That proved not to be entirely straightforward since the order had undergone multiple modifications.

[66] The Saskatchewan appellate court, ultimately, allowed the appeal from contempt judgment no 1 (which had found Novo in contempt), but dismissed the appeal from contempt judgment no 2, on the basis that the appellant had failed to prove contempt beyond a reasonable doubt. The appellate court stated, among other things, that the fundamental basis for its decision was that a finding of contempt could not be sustained because the court order sought to be enforced by the contempt applications, incorporated "overly broad and unclear language", and "external circumstances exacerbated the order's lack of clarity". The court's reasoning was that the order was sufficiently ambiguous to preclude a finding of contempt for three principal reasons: (i) the ongoing need to provide clarifying comments with respect to the order; (ii) the established history of confusion and contention between the parties regarding the meaning of the order; and (iii) the ambiguity of the order made its application to the facts problematic.

[67] That case, although relied on heavily by the appellant, proved to be of little assistance, given the vast factual differences between it and the instant case.

[68] The plain meaning of the Order, in the instant case, was that the status quo should be preserved pending a hearing of the substantive matter. In my view, the Order lent itself to no other reasonable interpretation. The focus of the activities enjoined was "adverse steps….in connection with [the respondent's] employment…or for any reason connected with the charge letters". It was, therefore, sufficiently clear what activities were prohibited. So, when the appellant acted to prevent the respondent from functioning in his role, as it existed at the time when the Order was made, it fell within the scope of what the Order prohibited. I have heard no cogent argument to convince me otherwise, or that the meaning of "adverse steps" or "for any reason connected with the charge letters" was limited to those sanctions which could be applied under the respondent's disciplinary code. Although the terms of the Order specifically included a prohibition against termination of the respondent's employment, they were not confined to any such eventuality.

[69] It should also be said that the learned judge's reason for granting a similar order in the court below was not relevant to the construction of the Order which was subsequently made in this court by Foster-Pusey JA. This is so, having regard to the plain and ordinary meaning of the language used in the Order, and the absence of any similar context having been expressed by Foster-Pusey JA.

[70] Further, the learned judge's observation that the Order was very wide does not suggest that it was unspecific or ambiguous. Rather, the learned judge seemed to have been saying that the terms of the Order were very wide in the sense that they covered "any" adverse step against the respondent in his capacity as an employee or for "any" reason connected to the charge letters. On that interpretation, the only question open to him was whether the appellant's action was of a form covered by the Order, that is, an adverse step connected to the respondent's employment or pertaining to the charge letters.

[71] For those reasons, ground d fails.

Issue 3: whether an intention to breach the order is required to prove contempt, where the order is clear and unambiguous, and, if so, was it established (grounds e, f and g)

[72] I turn next to grounds e, f and g, which overlap and are, therefore, dealt with together as one issue for convenience.

Appellant's submissions

[73] Mrs Mayhew referred to the **National Export Import Bank Jamaica Limited v Stewart Brown Investments Limited** to support her submission that a charge for contempt of court must be resolved in favour of the alleged contemnor if the order is unclear and ambiguous.

[74] King's Counsel pointed to the **Attorney General v Punch Limited and another** for the principle that for contempt to be found where an order is unclear, it must be proved that the contemnor wilfully or deliberately breached the order of the court. Both the *mens rea* and *actus reus* must be established. Therefore, the learned judge fell into grave error when he took the position that it was unnecessary to establish *mens rea,* and that the strict liability test applied. She also contended that it was an inconsistent finding, by the learned judge, that the appellant had no intention to disobey the Order yet it was found to be in contempt.

[75] King's Counsel submitted that **Stancomb v Trowbridge UDC** [1910] 2 Ch 190, **Director General of Fair Trading v Pioneer Concrete (UK) Limited and another** [1995] 1 AC 456, and **Knight and another v Clifton and others** [1971] Ch 700, which adopted the strict liability approach, should not have been applied by the learned judge as they involved disobedience of a clear order.

[76] King's Counsel argued further that the learned judge, having found that there was no intention by the appellant to breach the Order, meant that the respondent did not discharge the requisite burden of proof for contempt, that is, beyond a reasonable doubt.

Respondent's submissions

[77] Mr George submitted that the Order was unambiguous and clear, and there was no need to establish that the appellant intended to breach it. Counsel cited **Navigator Equities Limited and another v Oleg Deripaska** ('**Navigator Equities**') [2021] EWCA Civ 1799; **Stancomb v Trowbridge UDC**; and **Director General of Fair Trading v Pioneer Concrete (UK) Limited and another**, in support of his argument that for the appellant to be found liable for contempt of a clear and unambiguous order, it was not required that it intended to breach the order; but rather that it intended to do the act which constituted a breach.

[78] Counsel's position, in summary, was that the respondent needed only prove the breach beyond all reasonable doubt and that the appellant had the intention to do the act that caused the breach. These elements, he argued, were made out on the evidence.

Analysis

[79] Mrs Mayhew's contention, regarding *mens rea,* derives from her position that the Order was unclear and ambiguous. I have already indicated my concurrence with the learned judge's finding that the Order was unambiguous, so proceeding further on that point would be purely academic.

[80] Contempt must be proved beyond reasonable doubt. Lord Denning explained this at pages 704-705 of **Re Bramblevale Ltd**, thus:

> "A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies.
>
> There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence."

[81] The reasoning in **Re Bramblevale Ltd** was adopted and applied in **Knight and another v Clifton and others** [1971] 2 All ER 378. Russell LJ said at page 381:

> "Contempt of court, even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent."

[82] These authorities confirm that contempt proceedings are quasi-criminal, and as such, the standard of proof is to the level required for criminal offences; not that of civil proceedings generally.

[83] The position is not as clear when it comes to the contemnor's state of mind or the mental element. The authorities have pointed in two directions. On one hand, there are decisions like **Stancomb v Trowbridge UDC**; **Director General of Fair Trading v Pioneer Concrete (UK) Limited and another**; and **Navigator Equities**, which concern court orders with terms that are clear, for which there is no requirement to prove that the contemnor intended to breach the order (*mens rea* in the classic sense).

[84] The learned authors of Arlidge, Eady and Smith on Contempt, 5th Edition, 2017 at paras. 12-93 – 12-95 stated the position in this way:

> "12-93 Warrington J. expressed the principle in *Stancomb v Trowbridge UDC:*
>
> > **'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.'**
>
> That this expresses the true position has since been confirmed by the Court of Appeal and also by the House of Lords in *Heatons Transport (St Helens) Ltd TGWU* and in *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* and in *M:*

M v. Home Office, Re. Motive is immaterial to the question of liability.

12-94 What was traditionally required was to demonstrate that the alleged contemnor's conduct was intentional (in the sense that what he actually did or omitted to do was not accidental); and secondly that he knew the facts which rendered it a breach of the relevant order or undertaking. He must normally be shown at least in the case of a mandatory order to have been notified of its existence.

12-95 **Yet there is no need to go so far as to show that the respondent realised that his conduct would constitute a breach, or even that he had read the order. This means that liability for civil contempt has been treated as though it were strict; that is to say, not depending upon establishing any specific intention either to breach the terms of the order or to subvert the administration of justice in general.** *"* (Emphasis added)

[85] In **Navigator Equities**, at para. 82, the Court of Appeal of England and Wales reinforced the latter point by stating, as a general proposition, that:

> "… vii) In order to establish contempt, it need not be demonstrated that the contemnor intended to breach an order or undertaking and/or believed that the conduct in question constituted a breach. **Rather it must be shown that the contemnor deliberately intended to commit the act or omission in question. Motive is irrelevant**;" **(Emphasis added)**
>
> ix)… For a breach of order or undertaking to be established, it must be shown that the terms of the order or undertaking are clear and unambiguous; that the respondent had proper notice; and that the breach is clear (by reference to the terms of the order or undertaking)."

[86] There is a second set of cases, including this court's decision in **National Export Import Bank of Jamaica Limited v Stewart Brown Investments Limited**, that suggests that the contemnor's state of mind must be proved to the criminal standard - as having the intent to breach the order. There is also the decision in **Irtelli v Squatriti** [1993] QB 83, where classic *mens rea* was required.

[87] At para. [43] of **National Export Import Bank of Jamaica Limited v Stewart Brown Investments Limited**, Brooks P confirmed this court's position as follows:

> "[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 and Another** [2002] UKHL 50 said, in part, at paragraph 20 of his judgment:
>
> > 'For the defendant company of 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).'"

[88] The distinction between the two lines of cases was apparent in the mind of Brooks P when he made the further observation at para. [50] in **National Export Import Bank of Jamaica Limited v Stewart Brown Investments Limited**, that there was no issue with the principles applied in **Stancomb v Trowbridge UDC** and **Director General of Fair Trading v Pioneer Concrete (UK) Limited and another**, because in those cases, "the actions or omissions did constitute disobedience of an unambiguous existing order". At para. [53] Brooks P also pointed out that **Knight and another v Clifton and others** "dealt with the clear language of an injunction and did not address a situation where the order had been qualified or modified".

[89] It is significant to the outcome in **National Export Import Bank of Jamaica Limited v Stewart Brown Investments Limited** that the first order required qualification.

[90] In **Kevin Sudeall v Joyce Ramdeen-Sudeall and Others** [2023] JMCA Civ 3 ('**Kevin Sudeall**'), a more recent decision of this court, the appellants appealed the decision of Wint-Blair J, by which she found Mr Sudeall guilty of contempt and ordered him to pay a fine. The grounds of appeal included that the judge had erred in law and/or

fact when she misdirected herself that the test for contempt was one of strict liability. This court observed that there was no assertion by Mr Sudeall that the order was unclear. Instead, he asserted that his conduct was not contumacious in the sense that there was no specific intention to be wilfully disobedient to the court. After examining the material before it, this court concluded that there was no basis to disturb the finding, by the trial judge, that Mr Suedeall's conduct was contumacious and contemptuous.

[91] Laing JA (Ag), in delivering the decision of this court, referenced this court's position in **National Export Import Bank of Jamaica Limited v Stewart Brown Investments Limited**, and at para. [68] of his reasons, stated:

> "In **National Export Import Bank of Ja Ltd v Stewart Brown Investments Ltd,** the appeal from the decision of Laing J, this court considered the cases on which Laing J relied in applying a strict liability approach, including, **Stancomb v Trowbridge UDC** [1010] 2 Ch 190, **Director General of Fair Trading v Pioneer Concrete (UK) Limited and Another** [1995] 1 AC 456 .... and **Knight v Clifton and Others** [1971] Ch 700. This court concluded that all those cases involved alleged breaches of injunction orders which were clear. Those orders were distinguishable from the order considered by Laing J, which had issues regarding its construction, but which were clarified by a judge of this court. Accordingly, the approach adopted by Laing J to such a different circumstance was flawed." (Emphasis as seen in the original)

[92] The instant case can be distinguished from **National Export Import Bank of Jamaica Limited v Stewart Brown Investments Limited**. As already said, we are here concerned with an order that is clear in terms, so there is no need for the respondent to prove *mens rea* in the classic sense of a specific intent to breach the Order.

[93] Similarly, in **Masri v Consolidated Contractors International Co SAL and others** [2011] EWHC 1024 (Comm), Clarke J dealt with contempt of court orders that were clear and unambiguous (see paras. 169-173 and 371). Following a compendious review of cases dealing with *mens rea* (paras. 150-154), Clarke J decided not to follow **Irtelli v Squatriti.** He reasoned that it would undermine the efficacy of court orders if,

to establish contempt, it had to be proved to the criminal standard that there was an intent to breach an order which was clear and unambiguous.

[94] Returning to the instant case, the affidavit of Rezworth Burchenson bears on the mental element that is to be attributed to the appellant. He avers at paras. 13 and 15:

> "13. I have seen the statements by the Claimants in paragraphs 5 and 6 of his Affidavit indicating that by letter dated December 31, 2020, Ms. Laraine Harrison, VM Group Chief Human Resources Officer, wrote to him and effectively placed him 'on suspension by being told not to 'work, undertake or participate in any work-related activities'. In response, I deny that the Claimant was suspended. **As outlined in the letter to the Claimant, he was being placed on paid administrative leave.** During this period, he continued to receive his full pay and benefits and the time that he was off on administrative leave was not deducted from his vacation or other leave entitlement. **He was simply not required to work for this period at the request and/or discretion of VMWM and accordingly would not have access to his work email**.
>
> ...
>
> 15. **The disciplinary hearing being protracted as a result of the court proceedings and in particular in the interim injunction** in the Court of Appeal, **it was decided that it was in the best interest of the parties that the Claimant not be required to work in the interim** in an effort to minimise or reduce rising tensions." (Emphasis added)

[95] Mr Burchenson made it clear that the appellant was aware of the injunction and acted in direct response to it. The essence of the correspondence, dated 31 December 2020, was to convey that the respondent's status was being changed from that of an employee who worked remotely to one who would not work at all and that this arose from the litigation, specifically the interim injunctive relief contained in the Order.

[96] As the terms of the Order were unambiguous, it was not fatal, on the particular facts of this case, that the learned judge opined that the appellant did not intend to

breach the Order. He had no need to make any finding in relation to a specific intent to breach the Order. The learned judge needed only to find that the appellant did what the Order prohibited and intended to do the act that caused the breach, and he made such a finding at paras. [45]- [48] of his judgment. It was also not necessary to show whether the appellant had acted contumaciously. It was irrelevant that the action it took was also intended to deal with tension in the workplace, as Mr Burchenson represented.

[97] Although the learned judge stated that he was placing reliance on a previous decision of his that was found, by this court, to be flawed, such intended reliance did not result in any prejudice to the appellant in this case. Importantly, the learned judge found that the Order was not in dispute and was unambiguous on its face and that the appellant did the act and intended to do the act which caused the breach. In those circumstances, it cannot be said that the learned judge was plainly wrong in his assessment of the law and its application to the evidence. There is, therefore, no reason to disturb his decision.

[98] For those reasons, grounds e, f and g also fail.

Conclusion

[99] On the facts, as the learned judge found them to be, he was not plainly wrong that the appellant was in contempt of the Order when it placed the respondent on paid administrative leave. The Order was clear and unambiguous; the appellant had due notice of the Order; the appellant knew of the facts which made its conduct a breach; and the appellant intended to do those acts which caused the breach of the Order.

[100] Accordingly, there is no merit in this appeal, and it should be dismissed.

[101] Nothing has been disclosed that would alter the general rule – that costs follow the event. Therefore, the respondent is entitled to his costs. I have considered that this case was set for hearing the week of 20 March and the respondent filed submissions on 15 March. Taking account of the late filing of submissions, he should have 50% of his costs, as are agreed or taxed.

BROOKS P

ORDER

1. The appeal from the decision of Laing J, handed down on 15 July 2021, is dismissed.
2. The decision and orders of the learned judge are affirmed.
3. 50% of the costs of the appeal are awarded to the respondent. Such costs are to be agreed or taxed.