Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

MARGARITA CASTILLO

Applicant

and

XELA ENTERPRISES LTD., TROPIC INTERNATIONAL LIMITED, FRESH QUEST INC., 696096 ALBERTA LTD., JUAN GUILLERMO GUTIERREZ and CARMEN S. GUTIERREZ, Executor of the Estate of Juan Arturo Gutierrez

Respondents

AND IN THE MATTER OF THE RECEIVERSHIP OF XELA ENTERPRISES LTD.

BOOK OF AUTHORITIES OF THE RECEIVER

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TO: **THE SERVICE LIST**

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2005 CarswellOnt 8323
Ontario Superior Court of Justice

Oakley Manufacturing Inc. v. Bowman

2005 CarswellOnt 8323, [2005] O.J. No. 5318, 151 A.C.W.S. (3d) 430, 24 C.P.C. (6th) 113, 70 W.C.B. (2d) 810

Oakley Manufacturing Inc. v. Terry Bowman, John Penson and Overton Engineering and Machining Ltd.

Stinson J.

Heard: May 13, 2005
Judgment: June 28, 2005
Docket: 03-CV-254484CM3

Proceedings: additional reasons to *Oakley Manufacturing Inc. v. Bowman* (2005), 2005 CarswellOnt 1614 (Ont. S.C.J.)

Counsel: David Foulds for Plaintiff
Terry Bowman for himself
Dale Fitzpatrick for Defendant, Overton Engineering & Machining Ltd.

Subject: Civil Practice and Procedure
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XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
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Judges and courts --- Contempt of court — Punishment for contempt — Remedies available to court — Miscellaneous
Plaintiff commenced action against individual and corporate defendants for damages and injunctive relief when individual defendant resigned from plaintiff company and formed competing business using same suppliers, same designs, and seeking business from plaintiff's customers — Plaintiff obtained interlocutory injunction prohibiting defendants from carrying on business in Ontario — Plaintiff successfully brought contempt motion when plaintiff learned that defendants continued to solicit customers in Ontario, and entered into arrangements with Quebec company to sell defendant's inventory back into Ontario after injunction was granted — Parties made submissions concerning appropriate sanction — Defendant sentenced to 10 days' imprisonment and fined $10,000 — Permanent injunction issued — Defendants' violation of injunction was serious breach warranting extraordinary sanction of incarceration — Defendants' actions were part of intentional pattern of conduct designed to evade limits on their conduct imposed by court order through surreptitious means — Conduct was ongoing and widespread,

involving number of customers and numerous sales in Ontario in breach of order — Violations of injunction were carried out with full knowledge and understanding that conduct was breach of court order — Specific deterrence was particularly important factor given defendant's distinct lack of respect for and concern about processes of court.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Contempt of court

Plaintiff commenced action against individual and corporate defendants for damages and injunctive relief when individual defendant resigned from plaintiff company and formed competing business using same suppliers, same designs, and seeking business from plaintiff's customers — Plaintiff obtained interlocutory injunction prohibiting defendants from carrying on business in Ontario — Plaintiff successfully brought contempt motion when plaintiff learned that defendants continued to solicit customers in Ontario, and entered into arrangements with Quebec company to sell defendant's inventory back into Ontario after injunction was granted — Parties made submissions on costs — Costs in amount of $97,933.13, payable within 30 days, awarded to plaintiff on substantial indemnity basis — As contempt proceedings were occasioned entirely by intentional decision of defendants to disregard injunction, misconduct warranted imposition of costs of contempt proceedings on substantial indemnity basis — Plaintiff was required to go to considerable lengths to gather evidence necessary to prove its case — Factors relevant to determining quantum of costs included complicated and time consuming process of mustering evidence in support of contempt motion, importance of issues on motion to plaintiff, and actions of defendants unnecessarily lengthening duration of proceeding — Amounts claimed in bills of costs submitted by plaintiff were fully justified.

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Cases considered by *Stinson J.*:

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R. 57.01(1) — considered

R. 57.01(1)(c) — considered

R. 57.01(1)(d) — considered

R. 57.01(1)(e) — considered

R. 57.01(1)(i) — considered

ADDITIONAL REASONS to judgment reported at *Oakley Manufacturing Inc. v. Bowman* (2005), 2005 CarswellOnt 1614 (Ont. S.C.J.), concerning sanction for contempt of court and costs.

***Stinson J.*:**

1 In reasons for decision released April 26, 2005 I concluded that the defendants Terry Bowman and Overton Engineering and Machining Ltd. had violated the terms of the injunction granted by Carnwath J. on October 6, 2003 in several respects. I found that they were in contempt of that order. The parties returned before me on May 13, 2005 to make submissions concerning an appropriate sanction. I received subsequent written submissions regarding costs.

2 The position of the plaintiff is that the actions of the defendants reflect severe, ongoing and unrepentant contempt of court that has caused ongoing and irreparable harm to the plaintiff. In the submission of the plaintiff, the defendants' conduct warrants

the sanction of imprisonment. Failing that sanction, a significant fine should be imposed. In addition, a broad, permanent injunction should be granted to prohibit the defendants from engaging in the fan business, directly or indirectly. Finally, the plaintiff seeks an express order directed to the defendants to produce all documents and records relating to their involvement in the fan business.

3 In response to the plaintiff's submissions, Mr. Bowman has apologized for his contempt and has stated that he was very remorseful. With respect to sanction, both Mr. Bowman and Mr. Fitzpatrick made submissions on behalf of the defendants. It is their position that imprisonment is neither warranted nor necessary: having regard to the contempt found by the court and the fact that it is not ongoing, there is no need for the coercive sanction of imprisonment. If there is a fine, the defendants submit that it should be at the lower end of the scale. The defendants point out that there is no evidence as to the revenue actually generated by their conduct; further, the plaintiff may still pursue its damage claim to recover any revenue earned by them. The defendants also submit that there is no need to protect the plaintiff's interest by means of a broader injunction order since the plaintiff's business enterprise was based in Ontario.

4 Rule 16.11(5) provides a range of sanctions that may be imposed by the court where a finding of contempt is made. The court may order that the person in contempt:

> (a) be imprisoned for such period and on such terms as are just;
>
> (b) be imprisoned if he or she fails to comply with a term of the order;
>
> (c) pay a fine;
>
> (d) do or refrain from doing an act;
>
> (e) pay such costs as are just; and
>
> (f) comply with any other order that the judge considers necessary,

5 The rationale for contempt orders and the considerations relevant to the determination of the sanctions to be imposed where contempt is found were admirably summarized by Ferrier J. in *Boucher v. Kennedy*, [1998] O.J. No. 1612 (Ont. Gen. Div.) as follows (at paras. 63 through 70):

> ¶ 63 The rationale for contempt orders is succinctly stated by McLachlin J. in two decisions in the Supreme Court of Canada. In *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, at p. 974, she said:
>
> > If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.
>
> ¶ 64 In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at page 931, she said:
>
> > The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent upon the ability of the courts to enforce their process and maintain their dignity and respect. To maintain that process and respect, courts since the twelfth century have exercised the power to punish for contempt of court.
>
> ¶ 65 Contempt orders have a dual purpose: the primary purpose is to coerce people or citizens into obeying court orders and the secondary is to punish: *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1993), 12 O.R. (3d) 72.
>
> ¶ 66 Gonthier J. in *Videotron Ltee v. Industries Microlec Produits Electroniques Inc.* (1992), 96 D.L.R. (4th) 376 (S.C.C.) commented on penalties related to contempt of court where a purely private order was involved. At page 398 he said:

> ... The penalty for contempt of court, even when it is used to enforce a purely private order, still involves an element of 'public law', in a sense, because respect for the role and authority of the courts, one of the foundations of the rule of law, is always at issue ...

¶ 67 The Manitoba Court of Appeal commented upon the importance of obeying injunctions in *Chicago Blower Co. vs. 141209 Canada Ltd. and Transregent Holdings Ltd. et al.* (1987), 44 Man.R. (2d) 241, at p. 243:

> An injunction must be implicitly obeyed and every diligence made to obey it to the letter; those who do not obey it are guilty of contempt. It is a punitive jurisdiction of the court based on centuries of experience and founded on the sound principle that it is not for the good of the plaintiff or a party to the action but it is for the good of the public that orders of the court should not be disregarded.

In *Apotex Fermentation Inc. v. Novopharm Ltd.*, [1997] M.J. No. 466, Oliphant A.C.J.Q.B., following a helpful review of the law, said this:

> Respect for the rule of law is essential if we are to have the benefit of living in an orderly, peaceful society. That is why it is so important that the terms imposed by an order of the court be obeyed. If citizens cannot be confident that they can rely upon the protection afforded by an order of the court, the court becomes irrelevant as the vehicle by which disputes between citizens, corporate or otherwise, are resolved in a peaceful manner.
>
> Where there is wilful breach of the court order, the party who is responsible for the breach and who is found to be in contempt of the court must bear the consequences of the contemptuous conduct and be subjected to the sanction of the court.
>
> In the circumstances here, the objectives of the sanctions to be imposed that must be given prominence are punishment and deterrence.
>
> The inflicting of punishing on a party found to be in contempt by breaching an order of the court is important because it demonstrates that the court will not tolerate the offensive conduct committed by the guilty part and that the court will act to protect its integrity and the inviolability of orders it imposes.
>
> The principle of deterrence has a goal that is two-fold in nature. First, the principle is applied to discourage the contemnors before the court from ever again breaching an order of the court. This is often referred to as specific deterrence. The second aspect is to discourage others of like minded nature from breaching an order of the court. This is called general deterrence.

¶ 68 Finally, I note that the importance of the rule of law in our society is reflected in the preamble to the Canadian Charter of Rights and Freedoms:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.

¶ 69 Without limiting the factors that the court may take into account in deciding the amount of a fine to impose for contempt, I am of the view that the court should consider in addition to the nature of the contemptuous conduct, the following:

> (1) whether the contemnor has admitted the breach;
>
> (2) whether the contemnor has demonstrated a full acceptance of the paramountcy of the rule of law, by tendering a formal apology to the court;
>
> (3) whether the breach was a single act or part of an ongoing pattern of conduct in which there were repeated breaches;

(4) whether the breach occurred with the full knowledge and understanding of the contemnor that it was a breach rather than as a result of a mistake or misunderstanding;

(5) the extent to which the conduct of the contemnor displayed defiance;

(6) whether the order was a private one, affecting only the parties to the suit or whether some public benefit lay at the root of the order;

(7) the need for specific and general deterrence;

(8) the ability of the contemnor to pay.

¶ 70 In cases where the contempt is ongoing, increasing fines on a daily basis, or committal, may be the only effective method of ensuring compliance. As well, a contempt may be so serious even though not ongoing as to warrant punishment by committal.

6 I turn now to a consideration of the factors enumerated by Ferrier J.

1. Whether the contemnor has admitted the breach

7 Contempt proceedings are, of course, quasi-criminal. Accordingly, the contemnor's admission of the breach is a factor that may be taken into account only by way of mitigation when determining an appropriate sanction. It may not, however, be considered as an aggravating factor. In the present case the defendants contested the contempt motion and asserted that the evidence tendered by the plaintiff failed to prove that they had violated the order. This factor therefore has no application.

2. Whether the contemnor has demonstrated a full acceptance of the paramountcy of the rule of law, by tendering a formal apology to the court

8 At the commencement of his submissions on May 13, 2005 Mr. Bowman made the following statement:

This is the first opportunity I have had to speak before the court since the judgment made on April 26 and I would like to apologize to the court for my contempt and I am very remorseful for my actions and those it has affected.

Mr. Bowman has thus formally apologized to the court, a mitigating factor.

3. Whether the breach was a single act or part of an ongoing pattern of conduct in which there were repeated breaches

9 In my reasons for decision released April 26, 2005 I found that the defendants had breached the order of Carnwath J. in a number of respects. Contrary to the terms of the October 6, 2003 order, Mr. Bowman continued to solicit customers in Ontario in relation to the sale of fireplace fans through September 2004. The defendants entered into arrangements with Monmet in Quebec to sell the inventory of OEM back into Ontario after the injunction was granted. Mr. Bowman actively participated in that process. Indeed, soon after the injunction was granted, Mr. Bowman told Mr. Penson that, notwithstanding the order, he intended to stay in the fan business. Mr. Bowman discussed with Mr. Neilson ways of getting around the order and decided to pursue a plan to manufacture and warehouse fans in Quebec for sale back into the Ontario market and elsewhere.

10 It is therefore fair to say that the defendants' action were an intentional pattern of conduct designed to evade through surreptitious means the limits on their conduct imposed by the court order. That conduct was ongoing and widespread, involving a number of customers and numerous sales in Ontario in breach of the order.

4. Whether the breach occurred with the full knowledge and understanding of the contemnor that it was a breach rather than as a result of a mistake or misunderstanding

11 During the course of his oral submissions Mr. Bowman alluded to having taken legal advice concerning the arrangements he made with Monmet. No evidence was tendered before me, however, concerning the particulars of that advice nor was it argued that by reason of that advice Mr. Bowman believed that he was complying with the injunction. The defendants' plan to transfer the inventory to Quebec and Mr. Bowman's subsequent active and ongoing involvement in the resale of the inventory to Ontario customers confirmed that their violations of the injunction were carried out with the full knowledge and understanding that their conduct was a breach of a court order.

5. The extent to which the conduct of the contemnor displayed defiance

12 While, as I have found, the defendants continued to participate in prohibited activities, I would not characterize their conduct as open and notorious defiance of a court order. OEM did cease its Ontario based manufacturing and sales operations. There was no public defiance or refusal to comply with the order of the court. That being said, as noted previously, the defendants covertly continued selling fan products into Ontario, in breach of the order.

6. Whether the order was a private one, affecting only the parties to the suit or whether some public benefit lay at the root of the order

13 The order of Carnwath J. was made in the context of a commercial dispute between private parties and it affected only them. This is not a case involving the public interest *per se*.

7. The need for specific and general deterrence

14 Both specific and general deterrence are relevant considerations in the present case. With respect to specific deterrence, Mr. Bowman's conduct suggests that he is an individual who does not pay great heed to the processes of the court. As noted above, after Carnwath J. granted the injunction, Mr. Bowman promptly set about creating a scheme to evade the effect of the order. After the plaintiff served its motion materials seeking a contempt order against the defendants, Mr. Bowman continued to act in breach of the order, through September 2004. The defendants ignored the timetable fixed by the master for delivery of materials in response to the contempt motion. They then withdrew their statement of defence, thereby admitting the very misconduct that the plaintiff had alleged and they had denied when the lawsuit was commenced over a year earlier. Mr. Bowman did not bother to attend in court in response to the contempt motion (apparently having received advice from his lawyer that he was not strictly required to attend) until a warrant for his arrest was issued by me pursuant to rule 60.11(4). Although, following the finding of contempt, Mr. Bowman apologized to the court, the foregoing history reflect a distinct lack of respect for and concern about the processes of the court.

15 These facts suggest that specific deterrence is a particularly important factor when considering a suitable sanction in the case of Mr. Bowman.

16 With respect to general deterrence, as indicated above, these defendants embarked on a specific plan to evade the effect of a court order. Any sanction imposed as a result of their contempt is a measure of the extent to which others who may be similarly disposed will be deterred from disregarding future court orders. Put another way, the failure to impose a suitable sanction could be viewed by defendants in other cases as a signal that breaches of court orders in civil cases are not taken seriously. In my view, the present case represents a serious violation of a court order warranting a serious sanction.

8. The ability of the contemnor to pay

17 Although there was some evidence concerning the dollar volume of sales effected by Mr. Bowman's companies, that evidence is of questionable reliability. It is fair to say, however, that this is not a situation involving a multimillion dollar business.

18 With respect to Mr. Bowman personally, although he alluded in his submissions to a lack of financial resources, there was no evidence to establish that he is impecunious.

19 Plainly, the defendants had the resources to commence the business of OEM after Mr. Bowman left the plaintiff. They operated that business with sufficient success that it interfered with the plaintiff's operations to the point that the plaintiff found it necessary to commence injunctive proceedings. Thereafter, the defendants continued with their operations through the medium of Monmet.

20 The quantum of any fine that may be imposed is not intended to force the defendants to disgorge any profits they may have wrongfully earned in violation of the plaintiff's rights. The plaintiff is at liberty to pursue such remedy as it may be advised to force the defendants to disgorge those profits or to pay such other damages as may be appropriate. Rather, the purpose of the fine is to impose a suitable sanction and to effect specific and general deterrence in relation to the proven acts of contempt.

Conclusion as to appropriate sanction

21 It has been observed that "it is extraordinary to order the incarceration of a participant in a civil proceeding because of his or her contempt": see *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348 (Ont. S.C.J.) at para. 65. That being said, counsel provided to me a number of cases in which significant terms of incarceration have been imposed for civil contempt: see, for example, *Sussex Group Ltd. v. Fangeat*, *supra*. (6 months); *777829 Ontario Ltd. v. McNally* (1991), 9 C.P.C. (3d) 257 (Ont. Gen. Div.) (12 months); *Milligan v. Lech*, [2004] O.J. No. 3168 (Ont. S.C.J.) (8 months). Cases in which incarceration is ordered often involve an element of contumelious and ongoing contempt. In the present case there is no evidence that, as at the date of the contempt hearing in March 2005, the defendants were still acting in breach of the injunction. That being said, their actions in breach of the order extended over a lengthy period of time (11 months), involved a range of activities and actions, and were carried out with knowledge and intent.

22 I consider the defendants' violation of the injunction to be a serious breach that warrants the extraordinary sanction of incarceration. The factors of specific deterrence and general deterrence are important elements in the present case. Mr. Bowman needs to understand that he cannot disregard the processes of the court with impunity, merely because he considers it in his economic interests to do so. Other individuals who may be tempted to disregard court orders for similar reasons must know that such serious transgressions will be regarded seriously by the court and appropriate and meaningful sanctions imposed.

23 I also consider that a substantial monetary penalty is appropriate, one that will reinforce the court's disapproval of contemptuous conduct that is motivated by defendants' economic interests.

24 For the foregoing reasons I impose the following sanctions consequent upon my finding of contempt:

(a) Mr. Bowman shall be incarcerated in a provincial jail for a period of 10 days;

(b) Mr. Bowman and OEM shall pay a fine of $10,000;

(c) a permanent injunction shall issue restraining each of Mr. Bowman and OEM and, as applicable, their officers, directors, shareholders, servants, employees, agents, successors, assigns, and those in privity with or controlled by Mr. Bowman and/or OEM, including without limitation 9135-0777 Quebec Inc., directly or indirectly from:

(i) engaging in the business of designing, fabricating (under contract or otherwise), marketing or distributing fans, fan kits or components thereof (collectively, "Fans") for installation in fireplaces (collectively, the "Fan Business");

(ii) making use of confidential and proprietary information relating to Fans developed by Oakley Manufacturing Inc. ("Oakley"), Oakley's price structure, Oakley's customers and prospective customers, and Oakley's business plans and marketing strategy for the Fans, until such time as that information is generally known to the public;

(iii) soliciting Oakley's customers and prospective customers in any manner or by any means;

(iv) taking or filling any orders for Fans from Oakley's customers or prospective customers; and

(v) representing themselves in any manner and by any means as the successor(s) to or authorize representative(s) of Oakley.

(d) Mr. Bowman and OEM shall, within thirty days, produce all records in their possession or in the possession of, as applicable, their officers, directors, shareholders, servants, employees, agents, successors, assigns, and those in privity with or directly or indirectly controlled by Mr. Bowman or OEM, including without limitation 9135-0777 Quebec Inc., relating to all sales of Fans or components thereof, including sales made to customers/purchasers located outside Ontario.

Costs

25 These contempt proceedings were occasioned entirely by the intentional decision of the defendants to disregard the order of Carnwath J. That misconduct warrants the imposition of an order requiring them to pay the costs of the contempt proceedings on a substantial indemnity basis: see *Sussex Group Ltd. v. Fangeat (supra)* at para. 78.

26 The plaintiff was required to go to considerable lengths to gather the evidence necessary to prove its case. This was necessitated by the surreptitious manner in which the defendants chose to continue their involvement in the fan business, notwithstanding the injunction. Thus, to the extent the defendants find themselves facing a significant costs order, they largely have themselves to blame.

27 The predominant principle applicable to an award of costs is that it "should reflect more what the court views as fair and reasonable that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant": see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.). Nevertheless, in exercising its discretion to award costs, the court may consider the factors enumerated in rule 57.01(1). In the present case, I find the following factors germane to the quantum of costs:

(a) The complexity of the proceeding (r. 57.01(1)(c)

28 As I have mentioned above, the process of mustering the evidence in support of the contempt motion was complicated and time consuming. In addition to conducting an extensive investigation, interviewing multiple witnesses and preparing numerous affidavits, counsel for the plaintiff examined witnesses (including Mr. Bowman) under oath and reviewed considerable documentation (such as accounting and telephone records) in order to uncover and prove the defendants' contemptuous conduct to the required standard of proof beyond a reasonable doubt. This was by no means a straightforward or simple proceeding.

(b) The importance of the issues (r. 57.01(1)(d))

29 The issues on this motion were extremely important to the plaintiff. Despite the injunction obtained by the plaintiff in October 2003, the defendants continued their improper competition well into 2004, thereby continuing to undermine the plaintiff's business. Having already sought the assistance of the court to enforce its rights and having determined that the defendants were ignoring the court order, the plaintiff had little option but to pursue the sanction of contempt in order to ensure that the violation would cease. The plaintiff was successful.

(c) The conduct of any party that attempted to shorten or to lengthen unnecessarily the duration of the proceeding (r. 57.01(1)(e))

30 The defendants failed to comply with the timetable imposed by the master for delivery of their material in response to the contempt motion. The defendants failed to appear on the first two return dates of the contempt motion. On the third date they sought an adjournment, in order to respond. In my judgment they lengthened unnecessarily the duration of the proceeding.

(d) Other considerations (r. 57.01(1)(i))

31 In their written submissions, the defendants referred to offers to settle exchanged by the parties while the contempt motion was pending. Those offers related to the potential settlement of the overall litigation. They are therefore not relevant considerations when fixing costs of the contempt proceedings alone.

32 The defendants also raised an issue in their written submissions concerning both lead counsel and a junior attending several of the court appearances. In my view, the attendance of the junior lawyer and his supporting role were justified, since he was a direct participant in the evidence-gathering process. In any event, the total claimed for both lawyers' attendances on the motion appearances is well within the amounts recoverable under the costs grid for counsel fee on a motion.

33 Overall, I reach the conclusion that the amounts claimed in the bills of costs submitted by the plaintiff are fully justified and that it is fair and reasonable to require the defendants to pay those sums. I therefore fix the plaintiff's costs of the contempt proceedings at $97,933.13, inclusive of disbursements and GST. I order the defendants to pay that sum to the plaintiff within 30 days.

Order accordingly.

End of Document

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Caja Parguaya De Jubilaciones Y Pensiones Del Personal De Itaipu Binacional v. Obregon et al. | 2022 ONSC 2360, 2022 CarswellOnt 6143 | (Ont. S.C.J. [Commercial List], Apr 28, 2022)

2003 CarswellOnt 3246
Ontario Superior Court of Justice

Sussex Group Ltd. v. Fangeat

2003 CarswellOnt 3246, [2003] O.J. No. 3348, [2003] O.T.C. 781, 125 A.C.W.S. (3d) 64, 42 C.P.C. (5th) 274

SUSSEX GROUP LIMITED (Applicant) and RICHARD J. FANGEAT (Respondent)

Cumming J.

Heard: July 9, 23, 2003; September 2, 2003
Judgment: September 2, 2003
Docket: 98-CL003030

Counsel: Luis Sarabia, Jason Wadden for Applicant
Aaron Crangle for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Judges and courts
XIX Contempt of court
XIX.4 Forms of contempt
XIX.4.c Disobedience of court
XIX.4.c.ii Mandatory orders
Headnote
Judges and courts --- Contempt of court — Forms of contempt — Disobedience of court — Mandatory orders
F was vice-president of company and was in charge of day-to-day operations of company's printing and beverage businesses in Cuba — Court-appointed interim manager assumed responsibility for company in April 2002 and F was "Affected Person" pursuant to that order — F was to report directly to interim manager, did not have control over company's financial affairs and was expressly denied authority to bind company in absence of approval of interim manager — Interim manager subsequently concluded that many of company's problems were due to F, who was party to wrongdoing in collusion with company's suppliers in seeking to harm company's business relationships in Cuba for his and their own self-interest and benefit — F's employment was terminated — Interim manager obtained orders enjoining F from interfering with company's interests in Cuba, having dealings with company's suppliers and creditors, and undertaking any activities that were inconsistent with his duties and obligations arising from his former employment with company — Interim manager subsequently brought motion for contempt order against F — Motion granted — Provisions of orders were clearly directive, not permissive — F had knowledge of terms of orders and intentionally and wilfully violated them by seeking to undermine and destabilize company in its business relationships, and by undertaking and participating in activities that were inconsistent with duties and obligations arising from his former employment — F was in civil contempt of orders — F's efforts to undermine interim manager's mandate in Cuba had contributed to company's significant business difficulties — Incarceration was warranted in view of deliberate wilfulness in contempt and because of serious harm and prejudice to company and interim manager — F was sentenced to six months' imprisonment.
Table of Authorities
Cases considered by *Cumming J.*:

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Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2) (1974), 4 O.R. (2d) 585, 48 D.L.R. (3d) 641, 19 C.C.C. (2d) 218 (Ont. H.C.) — referred to
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s. 101 — referred to
Criminal Code, R.S.C. 1985, c. C-46
s. 742.1 [en. 1992, c. 11, s. 16] — referred to
s. 742.3(1)(b) [en. 1995, c. 22, s. 6] — referred to
s. 742.3(1)(c) [en. 1995, c. 22, s. 6] — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 60.11(1) — pursuant to

R. 60.11(4) — referred to

R. 60.11(5) — considered

R. 60.11(5)(b) — considered

R. 60.11(5)(d) — considered

R. 60.11(5)(f) — considered

MOTION for finding of contempt of court.

***Cumming J.*:**

The Motion for a Finding of Contempt

1 The court-appointed Interim Manager, Horwath Orenstein Consultants Inc. ("Interim Manager" or "HOCI"), of the applicant, Sussex Group Limited and 200164 Ontario Limited (collectively, "Sussex"), brings a motion for a contempt order against the respondent, Richard J. Fangeat. The motion is brought pursuant to Rule 60.11(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules").

2 Sussex alleges the respondent has failed to comply with this Court's Orders dated April 2, 2002 ("the April 2 Order") and September 30, 2002 ("the September 30 Order").

3 Mr. Fangeat had ample and proper notice of the hearing date for this motion. He refuses to, and has failed to, appear personally for the motion although he has been represented by counsel throughout the proceeding. On July 23, 2003, a warrant was issued for Mr. Fangeat's arrest, pursuant to Rule 60.11(4), without success. He apparently is in Cuba.

The April 2 Order

4 The April 2 Order provides, *inter alia*:

. . . .

8. THIS COURT ORDERS that Sussex and all of its respective present and former directors, officers, employees, agents, and shareholders, and any other persons acting on their instructions, including, without limitation, the accountants and counsel of Sussex, and all other persons having notice of the Order (all of whom are collectively referred to as the "Affected Persons") . . .

9. THIS COURT ORDERS that the Affected Persons be and they are hereby restrained and enjoined from disturbing or interfering with the Assets and the Interim Manager and with the exercise of the powers and authority of the Interim Manager conferred hereunder, and to the extent required to affect the provisions hereof, the Affected Persons are hereby relieved of the powers conferred on such Affected Persons by virtue of any office or position they may hold relating to Sussex. The Affected Persons are to co-operate with the Interim Manager in carrying out the provisions of this Order.

. . .

12. THIS COURT ORDERS that, without limiting the generality of any of the provisions hereof, the officers, directors, shareholders and employees of Sussex and all persons having knowledge of this Order be enjoined and they are hereby restrained from interrupting, terminating, altering, delaying or suspending performance of, claiming any offset or deduction or diminution of liability or responsibility or in any way interfering with the payment and performance of any contracts, leases, agreements or arrangements, whether written or oral, or with payment of any monies due or to become due to Sussex; provided nothing herein shall be construed as prohibiting a person from requiring payments to be made in cash

for goods, services, use or leased or licensed property of or other valuable consideration in respect of obligations incurred after the date of this Order or as requiring the further advance of money or credit.

The September 30 Order

5 The September 30 Order provides, *inter alia*:

. . . .

16. THIS COURT ORDERS that RGF International, Sussex International Ltd., 3933938 Canada Inc. operating as Global Export Consulting, and Mr. Michael Hersey, shall have no contact or dealings of any nature with Mr. Rick Fangeat, his surrogates, agents or related entities, with respect to any business matter in Cuba.

17. THIS COURT ORDERS that Mr. Rick Fangeat forthwith return or arrange for the return to the Interim Manager, as it may direct, any Protocol House #69 assets in his possession and all other assets of Protocol House #69.

18. THIS COURT ORDERS that Mr. Rick Fangeat:

(a) cease and desist from any dealings with suppliers and creditors of Sussex;

(b) cease and desist from interfering with any Sussex's interests in Cuba and the Interim Manager's efforts on behalf of Sussex, including, without limitation, ceasing any actions on behalf of Sussex International Ltd.; and

(c) undertake no activities that are in any manner inconsistent with his duties and obligations arising from his former employment with Sussex.

Background to Sussex

6 The business of Sussex is conducted primarily in Cuba, but also in Mexico, Barbados and the Bahamas. It is a complex business involving many corporate entities and different operations. Saxton Investments Limited ("Saxton") and Export Investors Group Ltd. ("Export") are the direct or indirect investors in Sussex of some $36 million. A number of individual investors have invested their savings in Saxton and Export which, in turn, have been placed with Sussex.

7 There have been very extensive court proceedings to date. As well, there have been investigations by regulatory authorities. The record suggests that the affairs of Sussex are in significant confusion and disarray, that there has probably been intentional wrongdoing by individuals to the serious prejudice and harm of the individual investors underlying Sussex, and that the chance of any recovery by the investors is very doubtful.

8 Given this unfortunate situation, on April 2, 2002 this Court issued an Order under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, (the "April 2 Order") appointing HOCI as Interim Manager of Sussex.

9 At the relevant times, Sussex has had contracts with two key business partners in Cuba, Inversiones Locarinos S.A. ("Locarinos") and Caribbean Labels. Locarinos is in the business of distributing beer and soft drinks. Caribbean Labels is in the printing business. An entity of the Cuban government, Poligrafica S.A. ("Poligrafica"), is in partnership with Sussex in the Caribbean Labels venture.

10 The Interim Manager's affiant to this motion, Stuart Mitchell, describes in his affidavits Sussex's history and its relationships with Mr. Fangeat, leading to the motion at hand.

11 There have been civil contempt proceedings brought against two other individuals, Mr. James Sylvester and Mr. Michael Hersey, in two separate motions. See *Sussex Group Ltd. v. Sylvester* (2002), 62 O.R. (3d) 123 (Ont. S.C.J. [Commercial List]); *Sussex Group Ltd. v. 3933938 Canada Inc.*, [2003] O.J. No. 2906 (Ont. S.C.J. [Commercial List]) and [2003] O.J. No. 2952 (Ont. S.C.J. [Commercial List])

The Evidence

12 Mr. Fangeat was the Vice President of Operations of Sussex, appointed by the Sussex Board of Directors shortly after February 1, 2001. In this capacity Mr. Fangeat was in charge of the day-to-day operations of Sussex's printing and beverage businesses in Cuba.

13 In December 2001, Mr. Fangeat was accused of wrongdoing and was terminated from his position with Sussex. Mr. Fangeat refused to vacate the premises of Sussex in Cuba known as Protocol House #69. On December 24, 2001, Sussex obtained an injunction from this Court requiring Mr. Fangeat to vacate these premises. A contempt motion was brought before Ground J. of this Court, and remains to be heard.

14 The Interim Manager assumed responsibility for Sussex pursuant to the April 2, 2002 Order. Mr. Fangeat is an "Affected Person" pursuant to that Order.

15 The Interim Manager was appointed because it was apparent that the affairs of Sussex were in disarray, many business records were missing, and some $36 million of the investors' money was largely unaccounted for. It was clear that one or more, and quite possibly several, persons within Sussex were at the least negligent, and probably fraudulent, in managing Sussex's businesses, such that the invested monies and existing businesses were in very serious jeopardy.

16 When the Interim Manager was appointed, he engaged Mr. Fangeat as Sussex's Manager-Operations in Cuba on or about May 3, 2002, given that Mr. Fangeat had extensive experience with Sussex's business operations in Cuba and its Canadian suppliers. Mr. Fangeat was made responsible for managing Sussex's operations in Cuba and was to assist the Interim Manager in renegotiating Sussex's business contracts in Cuba. He was to report directly to the Interim Manager. He was expressly denied the authority to bind Sussex in the absence of the approval of the Interim Manager. Nor did he have control over financial matters.

17 Mr. Fangeat was given a position of great responsibility and trust with Sussex. He was intimately involved with the business operations of both Locarinos and Caribbean Labels. He was well aware of the past accusations against him, and was present at the hearing giving rise to the April 2 Order. He was fully knowledgeable about the terms of the Order and about his responsibilities as an employee, past and present, in respect of the Order's provisions.

18 Mr. Michael Hersey, a resident of London, Ontario, is the directing mind of both 3933938 Canada Inc. (o/a Global Export Consulting) ("Global") and Sussex International Ltd. Prior to the Interim Manager's appointment of April 2, 2002, Global and Mr. Hersey had been on contract to Sussex. Global's duties included the sourcing of goods and supplies for Sussex's Cuban operations. This contract with Sussex was terminated by Sussex in December 2001. Mr. Hersey has also exercised control in respect of Sussex International Ltd. ("Sussex International") since about March 15, 2002, purportedly having received a transfer of the controlling shares in that corporation from Mr. Fangeat.

19 As stated above, in May, 2002, the Interim Manager caused Sussex to hire Mr. Fangeat to be the Manager-Operations for Sussex's Cuban operations. At that time, his knowledge of and experience with Sussex's operations was considered to be of assistance to the Interim Manager in carrying out its mandate. Mr. Fangeat was to assist in the renegotiation of contracts and was closely involved with Sussex's Cuban business partners, customers and suppliers.

20 Mr. Hersey and Global were also reinstated in May, 2002, as a supplier to Sussex in its Cuban operations.

21 In the summer of 2002, the Interim Manager came to the conclusion that many of Sussex's problems were due to, or contributed to, by Mr. Fangeat. The Interim Manager learned that one of Sussex's long-time suppliers was shipping products directly to Locarinos. Sussex was to supply such products to Locarinos pursuant to the exclusive Locarinos contract. The principals of these related suppliers, 131150 Ontario Inc., operating as "RGF International", and 1288098 Ontario Ltd., operating as "Toscana International", had reportedly been closely connected to Mr. Fangeat for many years. The Interim Manager now has shipping documents relating to these suppliers which indicate that the shipments were planned prior to the purported termination

by Locarinos of its contract with Sussex in July 2002. When confronted by the Interim Manager on July 31, 2002 as to its suspicions that suppliers were shipping directly to Locarinos, Mr. Fangeat denied any knowledge of this.

22 The record establishes that Mr. Fangeat, despite being the Manager-Operations for Sussex, acquiesced in the wrongful conduct in respect of supplying the Cuban operations. Indeed, the record suggests he quite probably was a party to this wrongdoing in collusion with these suppliers in seeking to harm Sussex's business relationships in Cuba for his and their own self-interest and benefit. The Interim Manager concluded that Mr. Fangeat was attempting to cause Sussex to become insolvent and thereby end the appointment of the Interim Manager so that the business of Sussex could be effectively moved to Mr. Fangeat or his affiliates. Mr. Fangeat's employment with Sussex was terminated by the Interim Manager on September 6, 2002. Mr. Hersey's relationship and Global's relationship as a supplier were terminated at the same time.

23 The Third Report of the Interim Manager to this Court dated September 23, 2002 sets forth numerous issues in respect of Mr. Fangeat alleged wrongdoings. These included the following allegations: that Mr. Fangeat's repeatedly failed to provide documentation regarding Sussex's assets and the reasons for unilaterally increasing the Special Projects amounts by 50%; that Mr. Fangeat was aware that Sussex's suppliers were shipping products directly to Locarinos with his acquiescence; that despite repeated requests, Mr. Fangeat refused to obtain written confirmation from Poligrafica that the Caribbean Labels contract had been extended for one year; that Mr. Fangeat refused to effect a US $25,000.00 wire transfer from Caribbean Labels to Sussex as directed by the Interim Manager; that Mr. Fangeat failed to provide documentation or evidence of export sales he claimed to have secured; that Mr. Fangeat was requesting Caribbean Labels to pay monies directly to him; that Mr. Fangeat remained involved in Caribbean Labels' affairs after his employment with Sussex was terminated; and that Mr. Fangeat had misled the Interim Manager about the assets formerly stored at Protocol House #69.

24 The evidentiary record suggests that secret, collusive agreements were entered into between Mr. Fangeat and Mr. Hersey on December 12, 2001 and September 3, 2002, with the purpose of harming Sussex for their personal benefit and self-interest, and when the two parties both knew that Mr. Fangeat had no authority to purportedly bind Sussex. The record also suggests that Mr. Fangeat was circulating in September 2002, to Sussex's business partners in Cuba, a letter addressed to the Interim Manager dated September 11, 2002, purportedly from Sussex International signed by Mr. Hersey as President. This letter includes apparent misrepresentations and seems calculated to harm Sussex in its business relationships in Cuba through its circulation.

25 At a minimum, the combined conduct of Messrs. Fangeat and Hersey served to confuse Sussex's business partners in Cuba, quite probably caused them to withdraw from relations with the Interim Manager, and tended to destabilize the status of Sussex in Cuba.

26 The Interim Manager then sought and obtained at a hearing on September 27, 2002 what I have termed the September 30 Order. Mr. Fangeat was represented at the hearing by Mr. Arnold Zweig, his counsel at the time, when the terms of that Order were discussed at length and settled upon. The September 30 Order was sent to Mr. Fangeat on October 3, 2002 by mail, fax and e-mail. The September 30 Order was also translated into Spanish and delivered to Sussex's business partners in Cuba.

27 The Interim Manager alleges that Mr. Fangeat:

> (a) has and continues to disturb and interfere with Sussex's assets and the exercise of the powers and authority of the Interim Manager, and has failed to cooperate with the Interim Manager;
>
> (b) has interrupted, delayed and interfered with the performance of a contract, agreement or arrangement;
>
> (c) has failed to cease and desist from interfering with Sussex's interests in Cuba and the Interim Manager's efforts on behalf of Sussex;
>
> (d) has undertaken and participated in activities that are in many ways inconsistent with his duties and obligations arising from his former employment with Sussex;

(e) has failed to return, or arrange for the return, to the Interim Manager, as it may have and has directed, all the Protocol House #69 assets that were in his possession and all other assets of Protocol House #69; and

(f) has continued to have contact and dealings with Mr. Hersey and Global, Caribbean Labels (and its governing agencies), Locarinos and Hautey Brewery regarding business matters in Cuba

The Alleged Breaches of Paragraphs 16, 17 and 18 of the September 30 Order

Paragraph 17

28 Mr. Fangeat took possession of various assets that were formerly contained in Protocol House #69, the premises leased by Sussex to house its employees in Cuba, and has not returned those assets. In the context of the present motion, he claims to have sold, without authority, the furniture for approximately US $1,800.00.

29 Mr. Fangeat has not complied with paragraph 17 of the September 30 Order. In July 2002, Mr. Fangeat signed an inventory list for the premises, prepared by an employee of Sussex, which sets forth that Mr. Fangeat had possession of several items relating to the premises, and also that certain items were in storage, reportedly in a warehouse facility of Locarinos, as arranged by Mr. Fangeat. Mr. Fangeat reportedly subsequently dealt with and alienated these stored items without any authority from Sussex.

30 Demands have been made for the return of the Protocol House assets which Mr. Fangeat has, or should have, in his possession or control, without success. Mr. Fangeat has not returned any of these assets to the Interim Manager.

31 In my view, and I so find, Mr. Fangeat is in continuing breach of paragraph 17 of the September 30 Order.

Paragraphs 16 and 18

32 On December 18, 2002, Mr. Fangeat wrote to Mr. Jesus Perez Oton, the Minister of the Ministerio de la Industria Ligeria (The Ministry of Light Industry), which has jurisdiction over Poligrafica, enclosing a copy of this Court's Order dated December 10, 2002. His letter sets forth various matters.

33 He states:

As I mentioned at our meeting held last September, Sussex Group is already immersed in the liquidation process triggered by its creditors. The Court Order passed on December 10, 2002 is part of this process, in full compliance with the Canadian Corporations Act.

34 This statement is a misrepresentation. In fact, Sussex had an Interim Manager because of an application by a shareholder/director, given that Sussex's affairs were in confusion due to apparent wrongdoing by one or more individuals running the corporation's business contrary to its interests and the interests of the underlying investors. The evidence suggests Mr. Fangeat and Mr. Hersey were two of the wrongdoers. As well, the appointment of the Interim Manager did not necessarily imply a liquidation. Indeed, the appointment was seen as the only hope of avoiding a liquidation. The only reasonable inference from Mr. Fangeat's statement in his letter is that he was seeking to prejudice Sussex in its relationship with Poligrafica.

35 Mr. Fangeat also states in his letter:

I must add that, at the beginning of September, my decision as Operations Manager of Sussex Group was for Caribbean Labels to pay the suppliers of raw materials instead of paying the fees of the interim administrator. My decision was based on the logical reasoning that the suppliers of raw materials are absolutely more necessary for the survival of the business than paying fees to Horwath Orenstein, which neither derived, nor derives any benefit to Caribbean Labels or to Cuba.

36 Mr. Fangeat had stopped a payment from Caribbean Labels that was supposed to be made to the Interim Manager.

37 There are several things wrong with Mr. Fangeat's claims. First, he was appointed by, and was supposed to be working for, the Interim Manager. He was properly to take direction from the Interim Manager, not countermand and frustrate such direction. Second, the Interim Manager had developed concerns and suspicions as to possible conflicts of interest on the part of Mr. Fangeat with the supplier Global and with Mr. Hersey. The Interim Manager had good reason to seek to place constraints upon Mr. Fangeat. Mr. Fangeat's professed concerns to meet the requirements of suppliers might well have been simply to advance his own self-interest at the expense of Sussex.

38 Third, Mr. Fangeat's comments about the court-appointed Interim Manager not providing any benefit to Caribbean Labels is outrageous. Not only is it improper for Mr. Fangeat to provide such unscrupulous opinions of the Interim Manager but, in truth, the only hope for Sussex and the reason for the appointment of the Interim Manager on April 2, 2002, was to protect Sussex's interests, including Sussex's interest in Caribbean Labels.

39 The reality is that the evidentiary record in respect of Sussex suggests that its problems derive from self-interested wrongdoers, including Messrs. Fangeat and Hersey, who have acted contrary to the true interests of the Sussex corporate group. It is clear that the only hope for Sussex lies with an honest, competent manager being in overall charge. This is demonstrated by the Interim Manager, who has done an excellent job to date. The Interim Manager has had to act in very difficult circumstances which have been exacerbated by individuals such as Mr. Fangeat and Mr. Hersey seeking to undermine its mandate so as to advance their own self-interest at the expense of Sussex and its underlying investors.

40 Mr. Fangeat also indicates in his letter that he held a meeting in September 2002 in which he contemplates purchasing Sussex's assets with the cooperation of Caribbean Labels:

> Having said this, Grupo Grafico [being Mr. Fangeat] is still waiting for the decision to implement our total solution. Since our meeting in September, we have identified and confirmed a potential export market for labels, and the possibility of adding over 1 million dollars in new business for CL [being Caribbean Labels].
>
> . . .
>
> At present, it would be advantageous for CL and for the country, if Grupo Grafico signed a contract with Poligrafica, and, as I mentioned to you on several occasions, if GG acquired Sussex Group's assets without interruptions for CL.

41 This letter was written at a time when, as known by Mr. Fangeat, Caribbean Labels, Poligrafica and Sussex had an ongoing business contract and relationship. The letter evidences that Mr. Fangeat had in reality been acting against the interests of Sussex and the Interim Manager for some time. More specifically, the letter is a willful and deliberate breach of the terms of the September 30 Order, specifically, paragraphs 16 and 18.

42 On January 21, 2003, Mr. Fangeat sent an e-mail to Dr. Hector de la Torre, a senior official of Relaciones Internacionales MINL, a department of the Ministerio de la Industria Ligeria. In that letter, Mr. Fangeat incorrectly claims that Sussex is being wound up pursuant to this Court's Order of December 10, 2002. He also makes the unsubstantiated and disputed claim that Sussex International has a security interest in all the assets of Sussex as its only secured creditor, and claims that the contract with Poligrafica had expired, even though to his knowledge the contract continued in force. He says that he has many clients desiring Caribbean Labels products in Canada and refers to two previous e-mails to Dr. Torre. Finally, he states that he had contacted Roberto Rubio, the manager of Caribbean Labels, on "many occasions" to discuss entering into an arrangement to replace Sussex.

43 Clearly, Mr. Fangeat was acting knowingly and deliberately in direct contravention of the terms of the September 30 Order to defeat the interests of Sussex and the Interim Manager and for the sole purpose of advancing his own self-interest. This e-mail is in breach of paragraphs 16 and 18 of the September 30 Order.

44 The Interim Manager obtained the cell phone records of Mr. Fangeat in Cuba which show some 15 phone calls from his cell phone to the offices of Locarinos between October 1, 2002 and October 11, 2002, five calls to Caribbean Labels, and several calls to Mr. Hersey.

45 Mr. Fangeat reportedly has met with officials of another Sussex business partner in Cuba, Hatuey Brewery, with a view to conducting business with the brewery.

46 In my view, and I so find, Mr. Fangeat was knowingly and willfully in breach of paragraphs 16 and 18 of the September 30 Order in sending the offending letter and e-mails to individuals in Cuba connected with the interests of Caribbean Labels. He knew full well he was interfering with the clear mandate of the Interim Manager and was maliciously seeking to prejudice and defeat that mandate in sending those communications. In doing so, he was acting to advance his own self-interest at the expense of Sussex.

47 The evidentiary record establishes that Mr. Fangeat was acting in his own self- interest and in conflict with Sussex's interests when purportedly acting on behalf of Sussex prior to September, 2002, and acting to interfere with and defeat the mandate of the Interim Manager and Sussex's interests after the termination of his employment by the Interim Manager.

48 In my view, and I so find, the evidence establishes beyond a reasonable doubt that Mr. Fangeat has interfered with the mandate of the Interim Manager in Cuba in seeking to undermine and destabilize Sussex in its business relationships in Cuba with Caribbean Labels by distributing a letter and e-mail containing false statements to people who have the position or influence to materially affect Sussex's business and its viability in Cuba. These actions were in breach of paragraphs 16 and 18 of the September 30, 2002 Order. In my view, and I so find, the evidentiary record establishes beyond a reasonable doubt that these actions and breaches by Mr. Fangeat were in contempt of that Order. For the same reasons, he is in breach of paragraghs 9 and 12 of the April 2 Order and is therefore in contempt of that Order.

The Law

49 I have discussed the law of civil contempt in my two previous rulings relating to Sussex's affairs and Messrs. Sylvester, Hersey, and Global. *Sussex Group Ltd. v. Sylvester*, *supra*; *Sussex Group Ltd. v. 3933938 Canada Inc.*, *supra*.

50 It is integral to a free and democratic society like Canada that citizens act pursuant to and under the rule of law. Court orders in force must be respected and followed. The deliberate failure to obey a court order strikes at the very heart of the administration of justice. This includes court orders relating to commercial matters such as in the case at hand. If someone can simply ignore or finesse his way around a court order, it will tend to add uncertainties and risks, with their consequential inefficiencies and additional costs, as well as causing unfairness, with its consequential inequities and additional costs, to the commercial marketplace. It is commonly recognized that the rule of law is essential in a democratic society for the protection of civil liberties and human rights. It should be evident that the rule of law is just as essential for the protection of citizens in their commercial affairs. And just as white collar crime is crime, white collar contempt is contempt.

51 If the remedies a court directs to be put in place through its orders can be ignored with impunity, the road to civil anarchy is close at hand. The thin veil of civilization that cloaks our community through the rule of law is fragile and in need of constant protection. See generally *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 4 O.R. (2d) 585 (Ont. H.C.), at 613; *Everywoman's Health Centre Society (1988) v. Bridges* (1989), 61 D.L.R. (4th) 154 (B.C. S.C.), at 157, aff'd (1990), 54 B.C.L.R. (2d) 273 (B.C. C.A.)

52 Proceedings for a finding and sanction for contempt of court are quasi-criminal in nature. The freedom of the responding individual is at stake. Accordingly, an applicant has the burden of proving the contempt beyond a reasonable doubt.

53 To prove a person in contempt of a court order requiring that the person do an act, or abstain from doing any act, it must be established that (1) the person had knowledge of the nature of the terms of the Order; (2) the Order is directive and not simply

permissive: and (3) the person's conduct is in contravention of the Order. Each one of these elements must be proven by the moving party beyond a reasonable doubt. See *Sussex Group Ltd. v. Sylvester*

54 It is not necessary to prove that the person allegedly in contempt intended to breach or violate the Order. As stated in *Sheppard, Re* (1976), 12 O.R. (2d) 4 (Ont. C.A.), at 8:

> We are of the view, therefore, that in order to constitute a contempt it is not necessary to prove that the defendant intended to disobey or flout the order of the Court. The offence consists of the intentional doing of an act which is in fact prohibited by the order. The absence of the contumacious intent is a mitigating but not an exculpatory circumstance.

55 However, the intentional violation of a court order will be an aggravating factor when determining the appropriate sanction. As well, even if the contemptuous acts have ceased, or the contemnor has purged his contempt, the Court still retains jurisdiction to consider and punish for contempt. The cessation or purging of contempt is merely a mitigating factor relevant in a consideration of the appropriate sanction. See *Ajax & Pickering General Hospital, Re* (1981), 35 O.R. (2d) 293 (Ont. C.A.)

56 It is not a defence to an allegation of contempt that it is impossible for the contemnor to purge his contempt or to comply with the court order where such impossibility is the result of the contemnor's own conduct. See *Manis v. Manis* (2001), 55 O.R. (3d) 758 (Ont. C.A.).

57 Nor is it a defence to argue that an order is wrong or ineffective in law. It is no defence that the court order is incorrect, null, or under appeal, and thus "ineffective". The order stands, and commands respect in all its aspects, until it is reversed on appeal "or an equally effective order [is] secured to the effect that it need not be obeyed." See Miller, *The Law of Contempt in Canada*, (Toronto: Carswell, 1997) at 95. Thus, it is a contempt to interfere with a receiver acting under a court order, even if the terms of the order clearly are wrong or impracticable. The creditor must attack the receiving order itself through the courts. See also *Merchants Consolidated Ltd. (Receiver of) v. Canstar Sports Group Inc.* (1994), 25 C.B.R. (3d) 203 (Man. C.A.); *Ontario (Securities Commission) v. Gaudet* (1988), 65 O.R. (2d) 424 (Ont. H.C.), at 426; *Paul Magder Furs Ltd. v. Ontario (Attorney General)* (1991), 6 O.R. (3d) 188 (Ont. C.A.).

58 Any person having knowledge of the substance or nature of the order can be found guilty of contempt for acting in contravention of the order. If a directing mind of a corporation prevents the corporation from complying with the order, the person(s) comprising the directing mind is also guilty of contempt. See *Ontario (Attorney General) v. Clark*, [1966] 2 O.R. 547 (Ont. H.C.), aff'd [1967] 1 O.R. 609 (note) (Ont. C.A.); see also *Kroma Printing Inks Corp. of Canada v. Hobbs*, [1999] O.J. No. 1569 (Ont. S.C.J.).

59 Any director or officer who effects the breach of the order, or who fails to do anything that causes the breach, may be held in contempt of court. See *Toronto (City) v. Toronto Railway* (1917), 39 O.L.R. 310 (Ont. C.A.), at 313-315.

Disposition

60 The record establishes that Mr. Fangeat had knowledge of the nature of all the terms of the April 2 Order and the September 30 Order.

61 The provisions of the April 2 Order and the September 30 Order are clearly directive, not permissive. In my view, the relevant provisions are clear, unambiguous and, as I have said, directive, requiring Mr. Fangeat to do certain acts (including to return any Protocol House #69 assets in his possession and all other assets of Protocol House #69) and to abstain from doing other acts (including interfering with the Interim Manager's mandate or Sussex's business interests in Cuba).

62 The evidence is clear that Mr. Fangeat was fully aware of, and knowledgeable in respect of, the terms of the two Orders at all relevant times.

63 As I have already found, the actions of Mr. Fangeat were in breach of paragraphs 16, 17 and 18 of the September 30 Order. He was also in breach of paragraphs 9 and 12 of the April 2 Order. The breaches were intentional and willful, and are continuing.

Conclusion

64 For the reasons given, the motion is allowed. It has been proven beyond a reasonable doubt that Mr. Fangeat is in civil contempt in respect of the breaches by him of paragraphs 16, 17 and 18 of the September 30 Order and paragraphs 9 and 12 of the April 2 Order.

The Appropriate Sanctions

65 It is extraordinary to order the incarceration of a participant in a civil proceeding because of his or her contempt: *Sussex Group Ltd. v. Sylvester*, *supra.*

66 The Court may make such order as is just, including that the person in contempt be imprisoned on such terms as are appropriate, or that the person be imprisoned for failure to comply with a term of the order: Rule 60.11(5). The Court has a wide discretion to impose "the usual criminal sanctions" on individuals found in civil contempt: Miller, *The Law of Contempt in Canada, supra* at 129.

67 The goals of sentencing in contempt proceedings focus upon general and specific deterrence, punishment and rehabilitation: *Niagara (Regional Municipality) Police Services Board v. Curran* (2002), 57 O.R. (3d) 631 (Ont. S.C.J.). Sentencing principles to be taken into account include a consideration of the available possible sentences, the proportionality of the sentence to the wrongdoing, the presence of mitigating factors, the presence of aggravating factors, deterrence, reasonableness of a fine and the appropriateness of incarceration.

68 It is very probable, and I so find, that Mr. Fangeat's letters and efforts thereby to undermine the Interim Manager's mandate in Cuba have contributed to Sussex's significant difficulties in being able to negotiate a contract with Poligrafica that is more favourable than the current contract extension, and that they have contributed to the purported termination of Sussex's contract with Locarinos in July 2002 and to Sussex's inability to revive its relationship with Locarinos. The contempt of Mr. Fangeat is very serious. The breaches of the September 30 Order and April 2 Order have had serious adverse and prejudicial consequences for the Interim Manager and Sussex.

69 Given that the contempt is so serious, wilful and deliberate, in my view, incarceration is the appropriate sanction. As well, specific and general deterrence are important considerations that apply in the instant case. The imposition of a fine alone would be ineffectual (even assuming that it would be paid) in furthering these objectives.

70 Incarceration is appropriate because of the deliberate wilfulness in the contempt and because of the serious harm and prejudice to the applicant and to the Interim Manager in fulfilling its Court-appointed mandate. Where the disobedience of an order of the Court has been wilful it should not be lightly regarded: *Royal Bank v. Roudafshan*, [1996] B.C.J. No. 1468 (B.C. S.C.). Mr. Fangeat mocks the rule of law with his flagrant acts of contempt. His contempt is contrary to the public interest and is inimical to the administration of justice.

71 The Interim Manager and Sussex have been put to additional outlays in an attempt to obtain compliance with the September 30 Order and arguably have suffered significant consequential losses because of the harm done to Sussex's business relationships in Cuba.

72 This is a contempt proceeding in respect of breaches of a Court Order, pure and simple. It does not have, and must not appear to have, the function of a civil action in tort or breach of contract. The Interim Manager can, of course, pursue remedies for civil wrongs by the respondent through a civil action. However, the Interim Manager has been put to extra, direct costs in time and expenditures, because of the ongoing contempt. It is appropriate and proper that the Interim Manager be reimbursed for these discrete costs. The Court has a broad discretion under Rule 60.11(5): *Lougheed v. Thompson*, [1928] O.J. No. 165, 36 O.W.N. 139 (Ont. H.C.); *R. v. CHEK TV Ltd.* (1987), 33 C.C.C. (3d) 24 (B.C. C.A.). A detailed estimate of such expenses has been submitted. I fix such costs at $30,015.00 plus G.S.T. of $2,101.05 and $4,000.00 for disbursements. I find that these

costs are properly payable by Mr. Fangeat to the Applicant. Such total costs of $36,116.05 are ordered payable by Mr. Fangeat to the Applicant within thirty (30) days.

73 In my view, and I so find, considering all the circumstances of this case, incarceration for a period of six months is an appropriate consequence to the contempt of Mr. Fangeat. Accordingly, I order that Mr. Fangeat be incarcerated for six months in the provincial jail consequential to my finding of contempt.

74 I have given consideration to the question as to whether an appropriate disposition of this sentence might be to provide for what would be in the nature of a conditional sentence order, whereby Mr. Fangeat would be confined to his home for the duration of the period for which he would be otherwise incarcerated in jail. In the context of a criminal case, where a conditional sentence is imposed, a Court can order under s. 742.3 (1) (b) of the *Criminal Code*, R.S.C. 1985, c. C-46 (as am.) that the offender appear before the Court when required to do so and under s. 742.3 (1) (c) that the offender report to a supervisor. In a criminal case, these two provisions allow a judge who imposes a conditional sentence to ensure that the offender is closely supervised by the Court and by a probation officer. However, a civil contempt order cannot be enforced in this way, as s. 742.1 of the *Criminal Code* requires that a person be convicted of an offence under the *Code* before this regime can be imposed.

75 However, Rule 60.11(5)(f) states that a judge may order that the person in contempt comply with any order that the judge considers necessary. In my view, this authorizes any order reasonable in the circumstances. Rule 60.11(5)(b) and (d) allow a judge to require that the person in contempt do or refrain from doing an act and to imprison the person if he or she fails to comply with a term of the order. Thus, the Court has a wide latitude in defining the terms of a contempt order and creating restrictive conditions, which, if breached, may then result in imprisonment.

76 I have given consideration to the possible alternative of a conditional sentence order. I exercise my discretion not to grant such an order. In my view, the sentence of incarceration in jail is the appropriate disposition of this contempt order.

77 Mr. Fangeat has refused to honour the Court's Orders. His contempt has tended to confound the administration of justice in this proceeding. His contempt has caused serious harm and prejudice to Sussex and the underlying investors. He shows no remorse, continues in his contempt, and, indeed, has refused to appear at this hearing. Incarceration in jail is appropriate in the instant situation to further the objectives of specific and general deterrence.

Legal Costs

78 Submissions have been made as to legal costs. A draft bill of costs has been considered. In my view, costs are properly ordered to be on a substantial indemnity basis given the deliberate and wilful nature of the continuing contempt. I fix costs payable to the Applicant on a substantial indemnity basis at $45,835.00 for fees, plus G.S.T. of $3,208.45, plus disbursements of $2,364.07 inclusive of G.S.T. Such total costs of $51,407.52 are ordered payable by Mr. Fangeat to the Applicant within thirty (30) days.

79 The necessary order(s) shall issue in accordance with these Reasons for Decision.

Motion granted.

MARGARITA CASTILLO
Applicant

-and-

XELA ENTERPRISE LTD. et al.
Respondents

Court File No. CV-11-9062-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE MOVING PARTY

(Contempt – Penalty Hearing)

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