

UGANDA / JUDGMENT

**Dilipkumar Patel and 5 Others v
Kashyapkumar Patel and 10 Others
(Miscellaneous Application 840 of 2021)
[2021] UGCommC 183 (3 November 2021)
[2021] UGCommC 183**

COURT

Commercial Court of Uganda

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Miscellaneous Application 840 of 2021

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA****(COMMERCIAL DIVISION)****MISCELLANEOUS APPLICATION NO. 0840 OF 2021****5 (Arising from Civil Suit No. 0362 of 2021)**

| | 1. | DILIPKUMAR P. PATEL | } | |

|---|---|-----|-----|-----|

| | 2. | MAGAN MEGHJI PATEL | } | |

| | 3. | GAURAVKUMAR D. PATEL | } | APPLICANTS |

| | 4. | DHARA MILAN DOBARIA | } | |

| 10 | 5. | PRAMUKH STEEL LIMITED | } | |

| | 6. | KAMULI SUGAR LIMITED | } | |

| | | VERSUS | |

| | 1. | KASHYAPKUMAR B. PATEL | } | |

| | 2. | RAVINDRAKUMAR P. PATEL | } | |

15	3.	PARTH M. PATEL	}	
	4.	MANUBHAI N. PATEL	}	
	5.	PARIMAL M. PATEL	}	
	6.	PATEL YASH AMRUTLAL	}	
		RESPONDENTS		
20	7.	AMRUTLAL NARSINHDAS PATEL	}	
	8.	KAMALABEN A. PATEL	}	
	9.	BRUCE MUSINGUZI	}	
	10.	ELISON KARUHANGA	}	
	11.	BUGIRI SUGAR COMPANY LTD	}	
25				

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

The applicants jointly and severally sued the respondents jointly and severally for breach of contract and procuring a breach of contract. The applicant's case is that the 1st and 3rd respondents on 7th February, 2020 filed civil suit No. 108 of 2020 against the 1st, 4th and 5th applicants seeking a declaration that the sale and transfer of shares held by the applicants in M/s Pramukh Steel Limited to the 1st and 2nd respondents was void. On 6th February, 2020 the 1st, 2nd, 4th and 5th

respondents had filed civil suit No. 102 of 2020 against the 1st, 2nd and 6th applicants seeking a declaration that the sale and transfer of shares held by the applicants in M/s Kamuli Sugar Limited

to the 1st and 2nd respondents was void. The applicants filed their respective defences to the suits. Before the two suits could be heard, the parties negotiated and entered into a "Confidential Release and Settlement Agreement" on 11th March, 2020. Under that agreement, the applicants undertook to pay the 1st – 5th and the 8th respondents a sum of money in full and final settlement of their 5 claims. As part of that settlement, clause 7 (the non-compete clause) stated as follows;

In consideration of group SH Y [the applicants herein] paying the settlement consideration in clause 3.1 in full to group SH X [the respondents herein], group SH X hereby undertake that they each shall not, for a period that will expire five (5) years 10 after payment of the last instalment in clause 3.2, without the prior written consent of group SH Y, or the companies, directly or

indirectly own, manage, operate, control, participate in , perform services for, or otherwise carry on business that is engaged in the manufacture or sale in Uganda of any steel products r sugar products and that they will not during that period , or any time thereafter, challenge the validity of any patent 15 that arises and issue out of patent applications.

> Each group SH X party agrees that each party and such party's affiliate will not, for a period of three (3) years after the closing date, seek to employ any person now employed by the companies or any company subsidiaries.

It is on basis of that Confidential Release and Settlement Agreement that the parties executed consent judgments in the respective suits that determined the issues finally. It is contended by the applicants in the current suit that despite the undertakings made in the Confidential Release and Settlement Agreement, and the subsequent consent judgments, the 1st – 5 th and the 8th respondents 25 have since directly and indirectly through their agents, acquired shares in Bugiri Sugar Company Limited (the 11th respondent) and also otherwise funded it, thereby reviving its activities in the manufacture and sale of sugar products in Uganda. They have also recruited former employees of the 5th and 6th respondents to work with that company.

30 In their joint written statement of defence and counterclaim, the respondents refuted the applicant's claim. The 6th, 7th, 9th, 10th and 11th respondents not being party to the Confidential Release and Settlement Agreement, contend they are not bound by its terms. They contend further that its terms were never incorporated as part of the consent judgment, hence are unenforceable against them. On 18th March 2020 the parties replaced the Confidential Release and Settlement Agreement with

a "Release and Settlement Agreement," rendering the former obsolete. The latter agreement does not contain a non-compete clause. The consent judgments only referenced the Release and Settlement Agreement. Since it was a final discharge and settlement of all issues between the parties, the current suit is barred by law. Instead the applicants should seek to execute the consent

- judgments. The 11th 5 respondent is only engaged in the construction of an industrial building, which activity is not prohibited by the Confidential Release and Settlement Agreement. In any event, the non-compete clause is unreasonable and unenforceable since it serves no legitimate purpose but only the creation of a monopoly for the applicants within the greater Busoga region. The 11th applicant is licenced to manufacture sugar and has already received numerous applications from
- suppliers of sugar cane. The 5th 10 respondent is engaged in steel production only. The suit is an abuse

of process and ought to be dismissed with costs.

Pending the disposal of that suit, the applicants filed the current application seeking an interlocutory injunction restraining the respondents jointly and severally from transferring their

shares in Bugiri Sugar Company Limited and the 11th 15 responding from sanctioning such a transfer. Before the application could be heard, counsel for the respondents raised a preliminary objection.

b. The Preliminary Objection;

20 When the application came up for hearing, the respondents raised a preliminary objection contending that the applicant were by an order of court found to be in contempt and were directed to pay a fine of shs. 50,000,000/= and punitive damages of shs. 100,000,000/=

c. Submissions of counsel for the respondent.

Counsel for the defendants, M/s Oulanyah & Co, Advocates together with M/s J. B. Byamukama and Co, Advocates submitted that the application cannot be heard until the respondents have purged themselves of the contempt. The applicants were found to be in contempt of court. The court gave order that there shall be no further hearing of any matter relating to the main suit unless 30 and until the contempt is purged. The applicants were penalised with a fine of shs. 50,000,000/= and exemplary damages of shs. 100,000,000/= Disobedience of Court order and contempt of court

are not procedural mater but are fundamental and relate to the rule of law ns are not technicalities. It does not arise as a possibility. The court has not been moved to vary a binding court order. The applicants are saying they are ready to proceed. This is a court of law. The administration of justice is rooted in the Constitution. There is a stay and under the case of *Housing Finance Bank and*

5 *another v. Musisi C. A. Civil Application No. 158 of 2010* it was held that there a party coming to court with unclean hands by reason of contempt cannot invoke the court's discretion. One wonders why they have not paid the fine or damages or remove the material from the record. A court cannot vary a procedural order. This is a final order and there is no application to vary it. Purging is achieved by full compliance. They are making oral application that they are to continue disobeying

10 court orders

d. Submissions of counsel for the applicant.

Counsel for the respondents, M/s S & L Advocates submitted that this is not only a court of law 15 but a court of justice. The purpose of vesting the jurisdiction is to determine the merits of the suit between the parties in finality. Any order of a discretionary nature rendered by the court whose effect is to bar the court from executing its Constitutional mandate promotes adjudication and effectual determinate of a dispute is capable of being varied with or without the court being moved. In doing so, the court must be alive to the ultimate dispute between the parties, the circumstances 20 giving rise of the alleged disobedience of the court order and the public policy calling for expeditious resolution of commercial disputes. Those were not applied in the

Housing Finance case. The decision does not contain any principle that a court of justice can never vary an order of contempt where the order is being used to stifle the justice of the case.

25 The applicants moved court to hear the application in order to pave way for the hearing and determination of the substantive issues in the head suit. If the order delays or bars court from achieving the ultimate. If the applicants are compelled to comply by depositing the sum so ordered they concede that they were in contempt, that their matter cannot be determined unless and until the pre-condition given to them to be heard is complied with. The applicants have filed a notice of 30 appeal. This court can vary the order by deferring the orders on terms. Purging is a demonstration

that the applicant will abide by the condition of deferral. Contempt in the instant case is procedural to the extent that it stifles the trial. The order of stay was belated.

e. The decision.

The primary but not exclusive purpose of the court's contempt powers is to ensure that its orders are fulfilled. Another is to punish conduct in defiance of its orders (see *Munib Masri v. Consolidated Contractors International Company SAL, Consolidated Contractors (Oil and Gas) Company SAL [2011] EWHC 2579 (Comm)*). Contempt designed solely to punish the violation of

- 10 a court order is considered criminal contempt and deserves all the procedural safeguards accorded a criminal proceeding. On the other hand, contempt that is coercive or remedial in nature is civil contempt. In *United Nurses of Alberta v. Alberta (Attorney General)*, *[1992] 1 S. C. R. 901 at 931* McLachlin J. (as she then was) described the purpose of contempt proceedings in the following manner:
- 15 Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. 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 on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have 20 exercised the power to punish for contempt of court.

A court exercises its contempt power to uphold the dignity and process of the court, thereby sustaining the rule of law and maintaining the orderly, fair and impartial administration of justice. "No society which believes in a system of even-handed justice can permit its members to ignore, 25 disobey or defy its laws and its courts' orders at their whim because in their own particular view, it is right to do so. A society which countenances such conduct is a society tottering on the precipice of disorder and injustice" (see *Surgeoner v. Surgeoner (1991), 6 C. P. C. (3d) 318 (Ont. Gen. Div.)*).

30 It is trite that the court's power to punish a party for contempt is an exercise of judicial power by the court to protect the due administration of justice. Contempt proceedings are quasi-criminal in nature but not all contempts are criminal. Contempt of court must be proven to the criminal standard, that is, beyond a reasonable doubt. Notwithstanding the more onerous burden of proof,

proceedings for contempt of court are civil proceedings and not in the nature of a criminal trial. The applicant must prove: (i) that the party knew of the terms of the relevant order; (ii) acted or failed to act in a manner that involved breach of the order; and (iii) knew of the facts which made his conduct a breach. Typically, proving that the order has been properly served on a party is

5 enough to show that the defendant knew of the terms of the relevant order. Such orders must include a penal notice, which warns the party of the consequences of non-compliance with an order, for example, by including wording such as: "If you the within-named [...] do not comply with this order you may be held to be in contempt of court and imprisoned or fined, or your assets may be seized."

A contempt order may be of three types: coercive, criminal, or compensatory. Compensatory and coercive contempt are both civil sanctions. The distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that 15 contempt in disregarding orders or judgments of a Civil Court or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involved a public injury or offence, it is criminal in its nature, and the proper remedy is committal--but where the contempt involves a private injury only it is not criminal in its nature (see *Poje v. Attorney General for British Columbia* [1953] 1 S. C. R. 516 at 522*). A person who simply breaches a court 20 order is viewed as having committed civil contempt.

However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal. In terms of the latter instance, disgrace is brought upon the Court's moral authority. The gravamen of the offence is

- 25 rather the open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court. A criminal contempt of court violates the public's rights generally since the court serves as the public's instrument of justice. Judicial authority, in the form of criminal contempt power, is vindicated through punishment and fines.
- 30 Where contempt proceedings appear to be remedial or coercive in nature as opposed to punitive, they are not proceedings for criminal contempt. In contrast, where the failure to obey an injunction

is defiant and contumacious, it is regarded as a criminal contempt. The relief sought in a criminal contempt is punitive, rather than remedial or coercive and the proceeding is a penal proceeding. With prohibitory orders, the requirement of service will be dispensed with where the person concerned in fact has notice of the order. An order requiring a person to abstain from doing an act

- 5 may be enforced notwithstanding that service of a copy of the order has not been effected if the court is satisfied that pending such service, the person against whom it is sought to enforce the order had notice of it either by being present when the order was made, or by being notified of the terms of the order, whether by telephone or otherwise (see **Davy International Ltd v. Tazzyman* [1997] 1 WLR 1256; *Nicholls v. Nicholls* [1997] 1 WLR 314 at 326,* and **Bell v. Tuohy* [2002] 1*
- 10 **WLR 2703 at [47]**). Civil contempt violates the rights of civil litigants in a purely private capacity. Here, coercive imprisonment, fines, or monetary indemnity serve to repair the private damage caused by disobedience to a court's order.

Courts employ coercive contempt to secure a party's substantive right when another party refuses to obey a personal order. Coercive contempt is prospective; it seeks to affect future obedience. Coercive contempt is indeterminate; courts apply it until the party has complied with the court order. In contrast, criminal and compensatory contempt are retrospective; they respond to past violations. Criminal contempt includes an intent element called wantonness or wilfulness. If a party wilfully disobeys an injunction, the court may impose criminal contempt in the form of a fine or imprisonment. Courts resort to criminal and compensatory contempt when it is too late to coerce a party into the desired mode of conduct. The general goals of criminal contempt are to punish and deter, as well as to vindicate the public interest in obedience to court orders. The power of the court to punish for criminal contempt is exercised by imprisonment or by imposition of a fine or both. The punishment expresses society's concern that people obey court orders. Criminal

contempt responds to harm the contemnor has already committed. To correct a public wrong, the court imposes a fixed and determinate sanction.

On the other hand, compensatory contempt is a money award for one party when another party has injured him or her by violating an injunction. Civil contempt benefits a party directly while criminal contempt is the state's method of punishing a recalcitrant without benefiting opposing litigants directly. The goal of compensatory contempt is to indemnify the party directly for the

harm the contemnor caused by breaching the injunction. Courts utilise compensatory contempt to restore the party as nearly as possible to his or her original position. The remedy is not penal, but rather remedial. Compensatory contempt is strict liability in the sense that the court cannot exonerate the contemnor merely because he or she breached the injunction with a blameless state

5 of mind.

However, the aim of sanctions for civil contempt differs from that of sanctions for criminal contempt. The primary objective of the civil law sanction for contempt is to secure compliance with the courts' orders rather than punishment. The general principle is that criminal contempt is 10 to be answered with penal sanctions, while sanctions for civil contempt should protect the rights as between private litigants and thus should be "coercive" as opposed to punitive. While civil and criminal contempt is that civil contempt is used to compel compliance, criminal contempt is employed to punish non-compliance.

15 That notwithstanding, this important distinction between the two types of contempt is not all that clearly drawn. Indeed, all contempt proceedings are quasi-criminal in nature. Even with civil contempt, a perpetrator can be imprisoned, and may be subjected to other penalties available for criminal offences such as fines or community service. So notwithstanding the distinctions between the purposes and definitions of criminal and civil contempt, the legal treatment of both types of 20 contempt is the same such that a case of civil or criminal contempt must meet the criminal standard

of proof, that is, it must be proved beyond a reasonable doubt.

The test for determining whether the contempt is civil or criminal is what the court primarily seeks to accomplish by imposing sentence. A criminal contempt proceeding is characterised by the 25 imposition of an unconditional sentence for punishment or deterrence (see *Shillitani v. United States, 384 US 364 (1966*). The imposition of non-compensatory contempt fines for the violation of an injunction will be deemed a criminal proceedings (see *International Union, United Mine Workers of America v. Bagwell, 512 U. S. 821 (1994*). A contempt fine is considered civil and remedial if it either coerces a contemnor into compliance with a court order or compensates the 30 complainant for losses sustained (see *United States v. Mine Workers, 330 U. S. 258*). In summary, where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal.

Where the primary purpose is to provide a remedy for an injured party and to coerce compliance 5 with an order, the contempt is civil. The proceeding and remedy are for civil contempt if the punishment is remedial, and for the complainant's benefit; but for criminal contempt, the sentence is punitive, to vindicate the court's authority (see *Hicks v. Feiock, 485 U. S. 624*). Criminal contempt is used to punish a person for violating a court order or expressing disrespect for the court. Civil contempt, on the other hand, is intended to make someone obey a court order. While 10 the purpose of criminal contempt is punishment, the purpose of civil contempt is compliance. Thus, if the relief provided is a sentence of imprisonment, it is remedial if the contemnor stands committed unless and until he or she performs the affirmative act required by the court's order, and is punitive if the sentence is limited to unconditional imprisonment for a definite period. If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is 15 paid to the court, though a fine that is payable to the court is also remedial when the contemnor can avoid paying the fine simply by performing the act required

by the court's order.

In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive, or both. Since both coercive and compensatory contempt contemplate the payment of 20 money, the judge may be tempted to overcompensate the applicant by utilising an ostensibly compensatory award to coerce the contemnor. For that reason Courts usually measure the amount of damages for the compensatory contempt award by evidence of the party's actual losses or reimbursable loss (see **Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418,447 (1911); *Allied Materials Corp. v. Superior Prods. Co.*, 620 F.2d 224, 227 (10th Cir. 1980); *Yanish v. Barber*, 232 F.2d 939, 944 (9th Cir. 1956); *Parker v. United States*, 153 F.2d 66, 71 (1st* 25 *Cir. 1946); *Chemical Fireproofing Corp. v. Bronska*, 553 S. W.2d 710, 715 (Mo. App. 1973)* and generally *Moskovitz*,

Contempt of Injunctions, Civil and Criminal, 43 CoLUM. L. REV. 780, 806-08 (1943). It is necessary to bear in mind that any contempt is a serious matter, but it is also necessary to bear in mind how flagrant the contempt is, viewing it from the gravity of the breach. A Judge may strike 30 the balance incorrectly in giving undue weight to the necessity for the court to insist upon its orders being obeyed and to punish for the contempt.

The proved actual damage rule prevents windfalls for applicants, created when courts confuse coercive and compensatory contempt. Courts measure damages only by a party's loss, rejecting the contemnor's gain, hence he or she cannot recover any punitive damages (see *Dobbs*, **Contempt of Court: A Survey**, 56 CORNELL L. REV. 183, 278 (1971). Punitive damages are granted to 5 create an incentive to pursue wrongdoers, to deter violations of legal standards, to punish wrongdoers, and to set an example to the public. Aggravated misconduct animated by a malicious mental state, is normally a prerequisite for punitive damages (see **Esso Standard (U) Ltd v. Semu Emanu Opio* [1992-93] HCB* 107 and **Wavamunno Eriab v. Teddy Sseezi Cheeye* [1992-93] HCB*

**1*73*). It is contended in the instant case that the applicants must purge themselves of the contempt

10 by paying both the fine and the punitive damages before they can be heard.

To purge is to apologise or the taking of action, such as agreeing to comply with the order or behave more appropriately in the courtroom, or by restoring the status quo as far as possible, or such other action as may be deemed by a court of law to suffice for the purposes of vacating a 15 charge of contempt of court. In **Harris v. Harris* [2001] EWCA Civ 1645, para 21*, Thorpe LJ accepted that "the application to purge is rooted in quasi-religious concepts of purification, expiation and atonement." The general practice is that a person in contempt is usually relieved from the consequences of that contempt when he or purges himself of the contempt by doing that which he or she neglected or wilfully refused to do. Whether or not that general practice is made 20 applicable in a particular case lies with the discretion of the judge disposing of the application (see **Labour Relations Board v. The Queen*, [1956] S. C. R. 82*). There is a practical difference in this context between the purging of contempt where the offence is breach of a

mandatory order and

where, as here, it is breach of a prohibitory order.

25 A civil contempt is traditionally viewed as the refusal of a person in a civil case to obey a mandatory order. It does not involve a punishment or sentence for a definite period of time. It is incomplete in nature, and may be purged by obedience to the court order. The object of any penalty for civil contempt is both to punish conduct in defiance of the court's order as well as serving a coercive function by holding out the threat of future punishment as a means of securing the 30 protection which the injunction is primarily there to do (see **Crystal Mews Ltd v. Metterick and others* [2006] EWHC 3087 (Ch)*; **Enfield LBC v. Mahoney* [1983] 2 All ER 90*; **Robinson v.**

**Robinson* [2001] EWCA Civ 2098 at para 11* and **Hale v. Tanner* [2000] 1WLR 2377 at 2381*). Another category of a coercive sentence is where the contemnor has been ordered to do something and is refusing to do it (see **Lightfoot v. Lightfoot* [1989] 1 FLR 414*). Where the primary purpose is to provide a remedy for an injured party and to coerce compliance with an order, the contempt

5 is civil (see **Blue Jeans Corporation v. Amalgamated Clothing Workers of America*, 169 S. E.2d 867 (1969*). Purging a civil contempt is by an act of sufficient contrition which a court can evaluate.

There are no unfettered discretions. A judge cannot let a contemnor out because he feels sorry for him or because he would not himself have imposed so long a sentence. There has to be a reason 10 for discharge known to the law. Secondly, it is for the contemnor to advance such a reason for discharge, not for the court to find a reason for refusing it. Thirdly, this is not a matter of practice or parlance: it is a matter of substantive justice. This is why the vocabulary of judgment is more relevant than the vocabulary of discretion. Fourthly, it is at the point of sentence that necessity and proportionality govern judgment. When a judge comes to consider discharge from a sentence

- 15 which has already been found both necessary and proportionate, he or she is looking at new factors, if there are any, albeit these may modify what is now necessary and what is now proportionate. While compliance with a mandatory order may be the kind of proof of contrition which a court can evaluate, contrition sufficient to purge a breach of a prohibitory order is much more elusive.
- 20 When the nature of the contemptuous act has the effect of impeding the court's ability to adjudicate fairly in the proceedings before it by undermining its authority, such contempt must be purged before further steps may be taken. A party in contempt by disobeying an existing order cannot be heard in a different but related cause of action, until such a person has purged himself / herself of the contempt (see **Kabale University v. Henry Rwaganika and another*, H. C. Civil Appeal No. 007*

- 25 *of 2016*). Civil contempt must always provide a means for the person to purge the contempt and be freed. Because the purpose of civil contempt is compliance, the contempt order must always include a means by which the person who is being held in contempt can clear the contempt and avoid the imprisonment or other sanction that is being imposed by the court. The order of the court holding a person in contempt must specify how the person may purge himself of the contempt.

It is an essential feature of civil contempt that the person who is being held in contempt always be given a means to purge the contempt and avoid the sanction. Since the contemnor initially could have chosen to obey the court order, and since at any time he can comply and be released, hence the saying that persons found in civil contempt and incarcerated "hold the keys to the jail" or "carry

- the keys of their prison in their own pockets" (see *In re Nevitt, 117 F. 448, 461 (8th* 5 *Cir. 1902*) and *Hicks v. Feiock, 485 U. S. 624*). The court crafts a determinate sentence of incarceration with an incentive of earlier release if the contemnor decides to comply with the order. A person imprisoned for civil contempt is committed to prison unless and until he performs the act required by the court's order. "He carries the keys of his prison in his own pocket. He can end the sentence and
- 10 discharge himself at any moment by doing what he had previously refused to do" see (*Gompers v. Buck's Stove and Range Company, 221 U. S. 418, 450 (1911*). When the contemnor elects to "purge" his or her contempt of court, i.e. to undo whatever act constituted the contempt and cooperate fully with the court proceedings, admit the contempt and to offer an unreserved written apology, this may result in an indefinite suspension of a prison sentence, or even the imposition of

15 a fine in place of an order for imprisonment. If there is no way to purge the contempt, then the person is being punished for criminal contempt rather than civil contempt.

The purpose of civil contempt is to coerce a contemnor to do that which has been ordered and which is capable of being done by the contemnor or to compel compensation for losses resulting 20 from noncompliance. For this reason the law gives the judge entering an order of contempt continued jurisdiction over the case in order to ensure that the contemnor complies with the order. In civil contempt, despite the fact that the contemnor has not served the term originally imposed, the court considering that the contemnor has demonstrated that he has now received sufficient punishment for his breach of the court's injunction, may order early discharge.

Assuming that to 25 have been proved, the court must also consider whether the interests of justice will be best served in permitting his early discharge. The matters that the court will consider will depend on the type of case in hand. The court may also consider early release where there are other extenuating circumstances which require that the court consider the exercise of its power to grant an early release.

For example in the United Kingdom, when considering an application for early release following an order of committal for contempt under section 14 (1) of **The Contempt of Court Act 1981**, it was held in **CJ v. Flintshire Borough Council [2010] EWCA Civ 393** that the court ought to consider the following; (i) can the court conclude, in all the circumstances as they now are, that

- 5 the contemnor has suffered punishment proportionate to his contempt? (ii) Would the interest of the State in upholding the rule of law be significantly prejudiced by early discharge? (iii) How genuine is the contemnor's expression of contrition? (iv) Has he done all that he reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early? (v) In particular has he done all that he reasonably can (bearing in mind the difficulties of his so doing
- 10 while in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach? (vi) Does he make any specific proposal to augment the protection against any further breach of those whom the order which he breached was designed to protect? (vii) What is the length of time which he has served in prison, including its relation to (a) the full term imposed upon him and (b) the term which he will otherwise be required to serve prior to release pursuant
- to s.258(2) of the Criminal Justice Act 2003? (viii) Are there any special factors which impinge upon the exercise of the discretion in one way or the other? It was held further that success of an application for an order for early discharge does not depend on favourable answers to all the questions.
- 20

In **Harris v. Harris; Harris v. Attorney General [2001] 3 WLR 765**, the applicant had been committed for ten months for contempt, being in breach of family court injunctions. He applied to be released after two months on the basis that the unserved balance of the sentence be suspended. The court held that it had the power to do this, even in the absence of any direct authority. It should use its powers in such a way as to maximise compliance with court orders, and that it could best be achieved in this way in the circumstances.

In **Templeton v. Motorcare Warranties and others [2013] EWCA Civ 3**, two defendant individuals attempted to transfer the entire business of a defendant company to a new company in the face of an asset-freezing order of the English court prohibiting them from doing so. The High Court had previously found in the same matter that this was a serious breach of an order, and that immediate

imprisonment was the appropriate punishment. The Court of Appeal reiterated that this was a serious contempt and that imprisonment was appropriate, but went on to find that significant medical and personal circumstances in the case of the individual defendants (one suffered a stroke, the other was sole care-giver for his spouse who suffered from spina bifida) were sufficient grounds to suspend the imprisonment. Although granting this reprieve to the two

individual defendants, the Court of Appeal was nonetheless particularly critical of the fact that the two

defendants had not shown any regret nor issued any apology for the breach of the court order.

With due respect, in this case the court appears to have lost sight of the principles of compensatory 10 contempt. Punitive damages punish and deter as much as criminal contempt fines. The decision as it stands equates punitive damage malice to criminal contempt wilfulness. Having done so, it follows that a contempt fine is equated with punitive damages such that imposing a criminal contempt fine after punitive compensatory damages is a contradiction in terms or an anomaly akin to double jeopardy. If an ostensible compensatory award actually punishes, then it is really a 15 criminal fine. In a case like this, the Court of Appeal has several alternatives. It may reverse the criminal fine for the court having followed civil procedure or applied a civil standard of proof, or set aside the award because the applicant failed to adduce evidence of damage to support a compensatory award, or for lack of justification for punitive damages. Finally, it may reduce the award to the amount the applicant proved.

Despite the view I have taken and at one point mooted the feasibility of varying the orders by suspending part of the sentence as a way of avoiding the undesirable effect of the order as a clog on the further progress of the trial, I am now guided by the dictum of Lord Justice Sedley in **CJ v. Flintshire Borough Council* [2010] EWCA Civ 393* at para 37, that;

There are no unfettered discretions. A judge cannot let a contemnor out because he feels sorry for him or because he would not himself have imposed so long a sentence. There has to be a reason for discharge known to the law. Secondly, it is for the contemnor to advance such a reason for discharge, not for the court to find a reason 30 for refusing it. Thirdly, this is not a matter or practice or parlance: it is a matter of substantive justice. This is why the vocabulary of judgment is more relevant than the vocabulary of discretion. Fourthly, it is at the point of sentence that necessity and proportionality govern judgment. When a judge comes to consider discharge from a sentence which has already been found both necessary and proportionate, he or she is looking at new factors, if there are any, albeit these may modify what is now necessary and what is now proportionate.

- 5 This proceeding therefore has nothing to do with the correctness of the decision in the contempt hearing except in so far as the propriety of the original order is always taken into account by a court in exercising its discretion as to the enforcement of punishment to be inflicted for the violation. That notwithstanding, for as long as the trial court finds that the contemnor's punishment has not lost its coercive effect, the contemnor is entitled to hearings at reasonable intervals in order

- 10 to assure that the contempt sanction continues to serve, and is limited to, its stated purpose of coercion. The trial court will be obligated to release the incarcerated contemnor if it concludes that he will steadfastly refuse to comply with the court's order even though he retains the ability to comply (see **United States v. Harris*, 582 F.3d 512, 522 (3d Cir. 2009)* and **In re Lawrence*, 279 F.3d 1294*). Most courts faced with an incarcerated contemnor who, after several years in prison,
- 15 has failed to comply with a court order without having established an inability to do so will order the recalcitrant contemnor released.

From this perspective a distinction must be made between prejudicing the administration of justice generally and prejudicing the administration of justice in the case at hand. It is a demonstration 20 that where the purpose of a general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice in the specific case or would damage some other public interest for whose protection, the court will be justified in its derogation from the rule. In the instant case, the contempt orders have

25 the effect of impeding the court's ability to adjudicate the case further.

In doing this I am cognisant though of the fact that a court lacking the power to coerce obedience to its orders, or to punish disobedience of them, is a contradiction in terms. There is no doubt that if a party can make himself or herself a judge of the validity of orders which have been issued by 30 court, and by his or her own disobedience set them aside, then the courts stand the danger of becoming fora for talk shows and judicial power would be a mere mockery. In **Housing Finance**

Bank and another v. Musisi C. A. Civil Application No. 158 of 2010 the Court of Appeal expressed the following opinion;

The principle of law is that the whole purpose of litigation as a process of judicial 5 administration is lost if orders issued by court through the set judicial process in the normal functioning of courts, are not complied with in full by those targeted and / or called upon to give due compliance. A party who knows of an order, regardless of whether, in the view of that party, the order is null or void, regular or irregular, cannot be permitted to disobey it, by reason of what that party regards the order to be. It is not 10 for the party to choose whether or not to comply with such order. The order must be complied with in totality, in all circumstances by the party concerned, subject to the party's right to challenge the order in issue, in such a lawful way as the law permits. This may be by way of revision, review or appeal. See *Chuck v. Creemer (I Corp Jemp 342)*.

A similar view was expressed in **The People v*. *Sturtevant**, *9 N. Y. 263* where it was held that;

The principle is of universal force, that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous. The method of correcting error is by appeal, and not by disobedience. A party proceeded against for disobedience to an order or judgment, is never allowed to allege as a defence for his misconduct that the court erred in its judgment. He must go further, and make out that in point of law, there was no order, and no disobedience, by showing that the court had no right to judge between the parties upon the subject. The point has been held over 25 and over again in reference to the very case of disobedience to injunctions..... Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities; they are not voidable but simply void.

The power of courts to punish for contempts is thus a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on court by law. It was argued by counsel for the applicants that they cannot be seen to comply with the order yet that have filed an appeal against it. It is trite that even a "very clearly wrong"

court order is not void and must be obeyed if its operation is not stayed through orderly process. When an order is not stayed during the pendency of the appeal, the requirement of obedience is the same as though no appeal was taken at all.

- 5 However on the other hand, shutting the doors of justice in the face of a contemnor until he or she has purged himself / herself of the contempt when there is no way to purge the contempt, and most particularly when the court has not specified the act the performance of which, if timely made, would constitute purging the contempt, would be a travesty of justice.
- 10 Moreover, punishment for criminal contempt is punitive and imposed to vindicate the authority of the court. Therefore in criminal contempt, purging is neither permitted nor possible because the punishment imposed "cannot undo or remedy what has been done nor afford any compensation" and the contemnor "cannot shorten the term by promising not to repeat the offence" (see **Feiock v. Feiock*, 485 U. S. 624, 637-38 (1988*). Purge is a term more appropriately associated with civil, not
- 15 criminal contempt (see **US v. Perry* 116 F.3d 952 (1997*). Since the penalty imposed in a criminal contempt is intended as punishment, there is no possibility for purging. The classic criminal contempt is one where the act of contempt has been completed, punishment is imposed to vindicate the authority of the court, and a person cannot by subsequent action purge himself of such contempt. The concept of purging will not apply where the sentence is imposed not to seek to enforce compliance with the order but as punishment. In criminal contempt, the contempt is considered "purged" when punishment for breach of the order is pronounced and imposed. Seeking contrition sufficient to purge a breach of a prohibitory order which a court can evaluate, is not really the business of the courts. Their

task is completed, subject to any appeal, at the moment of sentence.

- 25

Where the relief provided is a sentence of imprisonment, it is remedial if the contemnor stands committed unless and until he or she performs the affirmative act required by the court's order, and is punitive if the sentence is limited to imprisonment for a definite period. If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, 30 though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.

There are strong indications in the instant case that the proceeding was intended to be criminal in nature. The contempt order was not made upon refusal of the applicant to do something for the benefit and advantage of the respondent. The award of damages was not based on any proved loss

- 5 or intended to compensate the respondent. The court did not impose civil coercive remedies but rather punitive remedies. The fine and punitive damages were designed to punish not to compensate or to coerce compliance and are payable to court, thus criminal in nature. The court did not specify that the performance of any act, which, if timely made and completed before expiration of a specified time, would have purged applicant's determinate sentence, as would have
- 10 made the relief civil in nature. In short, there is no purge provision in the order aimed at enforcing compliance.

Conscious of the very unusual nature of these proceedings generally and considering that true purpose of contempt proceedings is to prevent a party from disregarding orders of court or bring 15 about compliance with court orders in circumstances where all other measures have been tried and failed, and further that in criminal contempt, purging is neither permitted nor possible, the objection raised is misconceived. Sentences imposed for contempt of court should not be allowed to result in an attempt to bring commercial pressure to bear following failed settlement discussions or preventing further progress of the suit. In the circumstances of this case insisting on payment of 20 the punitive damages before further steps are taken in the suit in the end probably does nothing to

advance the case whatsoever and will serve only to inflame the passions which have already caused enough controversy. For those reasons the objection is overruled.

| | rd day of November, 2021.....
Signed, dated and delivered
this 3 | |

|---|-----|---|

| 25 | Stephen Mubiru | |

| | Judge, | |

|| rd November, 2021.
3 ||

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