

CITATION: Canadian Western Bank v. Index Holding Group Inc. et al., 2024
ONSC 6599
COURT FILE NO.: CV-23-00698447-00CL
DATE: 20241128

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

**IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, c. B-3, AS AMENDED; AND
SECTION 101 OF THE COURTS OF JUSTICE ACT, RSO 1990, c. C.43, AS AMENDED**

BETWEEN:)
)
CANADIAN WESTERN BANK)
) Lisa Corne for the Applicant
Applicant)
)
- and -)
)
INDEX HOLDING GROUP INC.,) Abdul Muqet on his own behalf
)
INDEX GROUP OF COMPANIES INC.,)
)
INDEX INTERNATIONAL INC.,)
INDEX FOODS INC., 2640179)
ONTARIO INC., 11030434 CANADA)
LTD., 2700774 ONTARIO INC., 2700767)
ONTARIO INC., 2683960 ONTARIO)
LTD., 11030418 CANADA INC., 2723710)
ONTARIO INC., 2718366 ONTARIO)
INC., 2737332 ONTARIO INC., 2737334)
ONTARIO INC., 2723714 ONTARIO)
INC., 2723716 ONTARIO INC., 2737338)
ONTARIO INC., 2790760 ONTARIO)
INC., 2775290 ONTARIO INC., 2775296)
ONTARIO INC., 421 WHARNCLIFFE)
LTD. and 425 WHARNCLIFFE ROAD)
INC.)
Respondents)
)
)
) **HEARD:** October 16, 2024

PENNY J.

REASONS FOR SENTENCE OF JUSTICE PENNY (DELIVERED NOVEMBER 28, 2024):

Background

- [1] In May 2023, the respondent companies were placed in receivership on the application of Canadian Western Bank. MNP was appointed Receiver. The respondent corporations operated seven franchised restaurants and had commenced construction on three more in the Greater Toronto area. Abdul Muqet is the sole officer and director of the respondents.
- [2] Once appointed, the Receiver identified a number of questionable transactions which required further investigation. The Receiver was granted an order by Justice Cavanagh requiring Mr. Muqet to attend an examination under oath and to produce the books and records of the respondents. Mr. Muqet failed to attend. The Receiver initially sought an order finding Mr. Muqet in contempt. However, the parties agreed to a revised schedule. Mr. Muqet attended and was examined in December 2023. Many questions resulted in undertakings and many more were refused or taken under advisement.
- [3] Justice Steele made an order in February 2024 requiring Mr. Muqet to make adequate answer to the undertakings, to answer the questions refused and, prior to April 15, 2024, to reattend for a continuation of his examination to answer all enquiries arising out of his answers to undertakings and refusals. Mr. Muqet was ordered to pay \$10,000 on account of the Receiver's costs. Mr. Muqet did not attend the hearing. There is no doubt, however, that Mr. Muqet was served with the order of Justice Steele.
- [4] Mr. Muqet failed to answer the undertakings and refusals and failed to attend on his continued examination.
- [5] The Receiver brought a motion for contempt against Mr. Muqet. There is no doubt Mr. Muqet was served with the motion – he attended the hearing before Justice Black on June 7, 2024 and expressly admitted he received the material.
- [6] Justice Black found that the three-part test for a finding of contempt had been met. He found that: 1) Justice Steele's order was unambiguous and stated clearly and precisely what had to be done; 2) Mr. Muqet had knowledge of Justice Steele's order and admitted as much; and, 3) Mr. Muqet intentionally breached the order in that he intentionally failed to do what the order required him to do. His excuse, that he had family troubles, "did not excuse... an abiding failure to comply with a clear order of this court." Justice Black had "no difficulty" finding Mr. Muqet in contempt.
- [7] Justice Black did not sentence Mr. Muqet immediately, however. Rather, Mr. Muqet was first provided with an opportunity to purge his contempt and to obviate or at least attenuate the consequences of that contempt. Mr. Muqet was given 30 days to provide responsive answers to the outstanding questions and was then ordered to attend for a further examination on those answers on July 17, 2024. Following these steps, the Receiver was to schedule a further hearing for the sentencing phase of the contempt motion.

- [8] Justice Black emphasized to Mr. Muqet that the Receiver was seeking a term of incarceration and that Mr Muqet’s timely, good faith cooperation with the Receiver in providing the required information could weigh in his favour at the sentencing hearing. Justice Black explained to Mr. Muqet the concept of “purging” his contempt and urged Mr. Muqet to take advantage of the opportunity to do so.
- [9] While Mr. Muqet provided answers and attended an examination on July 17, 2024, he again gave numerous undertakings which he agreed would be answered within 10 days. When he failed to do so, he claimed he had been unwell and promised the requested information by August 13. That date came and went without compliance. On August 17, he promised responsive answers by the next day. Again, he failed to comply. It was not until October 8 that any answers were provided, and a number of them were inadequate, non-responsive or incomplete. After more prodding, some additional information was provided on October 11. Indeed, the final bits of outstanding information were not provided until I questioned Mr. Muqet about his behaviour at the sentencing hearing on October 16.
- [10] After hearing from counsel for the Receiver and from Mr. Muqet, I took the matter under reserve.
- [11] On October 24, 2024, I order that Abdul Muqet appear before the court in person at the Courthouse, 361 University Avenue, Toronto, at 10:00 AM on November 28, 2024 for the purpose of the court pronouncing his sentence for the finding of contempt made against him by Justice Black on June 7, 2024.
- [12] On November 27, 2024, yesterday, Mr. Muqet submitted three new documents by emailing them to the Commercial List Trial Co-ordinator: pay stubs and a doctor’s note. These documents are not properly before the court. There is no accompanying affidavit, nor is there any explanation why these documents, particularly the doctor’s note, could not have been tendered at the time of the sentencing hearing on October 16, 2024. Even considering the doctor’s note on its merits, it is of no assistance to Mr. Muqet. The note says Mr. Muqet attended at a medical clinic on August 12 and September 4, 2024. The note contains no explanation, no opinion – nothing. These documents do not establish, nor are they capable of establishing, that Mr. Muqet was, by reason of medical infirmity beyond his control, incapable of co-operating with the Receiver and complying with the disclosure obligations clearly ordered by Justices Steele and Black on a timely basis.

Analysis

- [13] There are two issues to be decided. First, what is the appropriate penalty for the contempt as found by Justice Black? Second, should I accept the Receiver’s request for an award of substantial indemnity costs?

The Sentence

- [14] Rule 60.11(5) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that in disposing of motion for a contempt order, the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,
- (a) be imprisoned for such period and on such terms as are just;
 - (b) be imprisoned if the person 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.
- [15] The applicable principles in sentencing for civil contempt are well-established. The purpose of sentencing for civil contempt is somewhat different than for criminal contempt. The purpose of a sentence for criminal contempt is primarily about punishment whereas the purpose of a sentence for civil contempt is primarily about coercion and is designed to protect and enforce the rights of a private party: see *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663, at para. 77.
- [16] However, the courts have recognized that while gaining compliance with the court's orders is the primary aim of sentencing in civil contempt proceedings, acts of civil contempt, like criminal contempt, undermine the authority of the courts and diminish respect for the law: see *Cavalon*, at para. 78.
- [17] As stated in *Cavalon*, at para. 81, “[b]ecause civil contempt engages issues of public law and the need to condemn acts which undermine the authority and dignity of the court, punishment has been recognized as a secondary purpose for sentencing in such cases.” In *Boily v. Carleton Condominium Corporation 145*, 2014 ONCA 574, at para. 79, the court observed that one of the purposes of a penalty for civil contempt is to “to ensure societal respect for the courts” and “to enforce the efficacy of the process of the court itself.”
- [18] The principles of sentencing for contempt are:
- (a) a sentence must be proportionate to the gravity of the events and the degree of responsibility of the offender;
 - (b) a sentence should be increased or reduced to account for aggravating or mitigating factors surrounding the contempt;
 - (c) a sentence should be similar to sentences imposed on similar contemnors for similar contempt committed in similar circumstances;

- (d) sentences should denounce unlawful conduct, promote a sense of responsibility in the contemnor and deter the contemnor and others from defying court orders; and
 - (e) the court should consider sanctions other than a jail term and treat incarceration is a “last resort”.
- [19] Contempt undermines the authority of the court. Conduct that undermines the fundamental principles of the courts should not be treated with leniency and courts have not taken a lenient approach where the contemnor has knowingly breached an order of the court.
- [20] The overriding principle is general and specific deterrence. Parties in contempt must be deterred from further acts of contempt, respect for court orders must be maintained and violations punished adequately in order to deter future violations.
- [21] A fine is not an appropriate remedy where there is little likelihood that the contemnor will pay it.
- [22] Applying these principles to the circumstances of this case I find as follows.
- [23] The Receiver was appointed by the court. The Receiver, as an officer of the court, has an obligation to the court and obligations to all creditors and stakeholders generally. After its appointment, the Receiver reported evidence of suspicious transactions. By failing to attend his examination and produce relevant documents, Mr. Muqet delayed and caused unnecessary expense to the Receiver and to the principal creditor, Canadian Western Bank. When finally cross examined on the documents, Mr. Muqet admitted he was part of a scheme to defraud the Canadian Western Bank by submitting false invoices to make draws on the respondents’ credit line with the Bank.
- [24] The effective and efficient conduct of a receivership requires that those associated with the business, especially a sole officer and director like Mr. Muqet, must cooperate with the Receiver and respond to requests for information in a timely way. In this case in particular, Mr. Muqet was the only person who was in a position to provide books and records of the respondent corporations and to answer questions about the respondents’ business and financial affairs. As noted earlier, the order of Steele J. was clear and unambiguous. Mr. Muqet intentionally did not comply with it.
- [25] Counsel for the Receiver has provided the court with numerous precedents in which sentences of three to six months were given for behaviour somewhat comparable to that of Mr. Muqet. The Receiver asks for a sentence of 30 days incarceration in this case. The Receiver points out that Justice Black explained the concept of purging contempt and explained that timely and effective cooperation with the Receiver would weigh in Mr. Muqet’s favour at the sentencing portion of this hearing. Notwithstanding being offered this opportunity, Mr. Muqet failed to respond to the Receiver’s follow-up requests on a timely basis. Mr. Muqet was only responsive to constant prodding and, ultimately, to the threat of the sentencing hearing being scheduled before the court.

- [26] However, unlike several of the precedents submitted by the Receiver, by the time of the sentencing hearing itself, Mr. Muqet had in fact managed to provide almost all of the information requested. By the end of the hearing, counsel for the Receiver conceded that all the material requests had now been answered.
- [27] Taking this, and all of the circumstances, into account, I find that a sentence of 30 days would be excessive and unwarranted.
- [28] By the same token, a fine is not a viable option. Mr. Muqet has not paid any cost awards against him in these proceedings. He indicated that he has been on unemployment insurance for two years and only recently found a job. Mr. Muqet admitted during cross-examination that he was impecunious. In such circumstances, imposing a fine that will never be paid is no penalty at all. A term of incarceration is, therefore, the only viable penalty to bring home to Mr. Muqet the seriousness of his contempt and to convey to the community at large the necessity of strict and prompt compliance with orders of the court.
- [29] For all these reasons, I sentence you, Mr. Muqet, to a jail term of five consecutive days, to commence immediately. A warrant for committal shall issue forthwith.

Costs

- [30] Although the Receiver requested costs, no cost summary was submitted. Further, given the circumstances outlined above, there is little likelihood any cost award will ever be paid. In the circumstances, I make no further order as to costs.

Penny J.

Released: November 28, 2024

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BETWEEN:

CANADIAN WESTERN BANK

Applicant

– and –

**INDEX HOLDING GROUP INC., INDEX GROUP
OF COMPANIES INC., INDEX INTERNATIONAL
INC., INDEX FOODS INC., 2640179 ONTARIO
INC., 11030434 CANADA LTD., 2700774
ONTARIO INC., 2700767 ONTARIO INC., 2683960
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421 WHARNCLIFFE LTD. and 425
WHARNCLIFFE ROAD INC.**

Respondents

REASONS FOR SENTENCE

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