CITATION: Inivos Limited v. Green, 2024 ONSC 5719
COURT FILE NO.: CV-23-00702356-0000
DATE: 20241015

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Inivos Limited and Warrick Fentiman, Applicants (Moving Parties)

-and-

Richard Green a.k.a. Richard Marsh, Respondent (Responding Party)

BEFORE: Robert Centa J.

COUNSEL: Benjamin Bathgate and Jessica Stansfield, for the applicants (moving parties)

Richard Marsh, self-represented respondent (responding party)

HEARD: September 3, 2024

ENDORSEMENT

[1] On November 7, 2023, Inivos Limited and Warrick Fentiman obtained an order from the Ontario Superior Court of Justice recognizing and enforcing three orders they obtained in the English High Court of Justice against Richard Marsh, who did not attend or participate in the proceeding.

[2] Inivos and Mr. Fentiman bring this motion seeking an order finding Mr. Marsh in contempt of the November 7 order. Inivos and Mr. Fentiman allege that Mr. Marsh violated the portions of the order that required, broadly speaking, that Mr. Marsh "not publish or cause to be published, by any means howsoever, any words" that defamed Mr. Fentiman, Inivos, or its employees. I dismiss the motion for several reasons.

[3] First, Inivos and Mr. Fentiman allege that Mr. Marsh breached the order because certain publications he made before November 7, 2023, remained accessible to the public and were "published again" each time a member of the public viewed the publication after the order was issued. In my view, Inivos and Mr. Fentiman have not proved beyond a reasonable doubt that the order clearly and unequivocally ordered Mr. Marsh to take down the prior publications.

[4] Second, Inivos and Mr. Fentiman have not proved beyond a reasonable doubt that Mr. Marsh had actual knowledge of the terms of the order until January 1, 2024. For that reason, even if Mr. Marsh took steps that breached the order between November 7, 2023, and

January 1, 2024, those actions do not amount to contempt. Inivos concedes that Mr. Marsh did not post any new material that violated the November 7 order after January 1, 2024.

[5] Third, even if Mr. Marsh[1] met the criteria for contempt, I would exercise my discretion to find him not in contempt of the November 7 order. The power to find a party in contempt must be exercised lightly and it is a remedy of last resort. Considering the behaviour of Mr. Marsh since he learned and appreciated the terms of the order, I would exercise my discretion and not make a finding of contempt.

Procedural background

[6] As mentioned above, Inivos and Mr. Fentiman commenced this proceeding to obtain registration and enforcement of three foreign orders. The application came before me on November 7, 2023. To provide some background, I will reproduce portions of my unreported endorsement:

> Inivos Limited and Warrick Fentiman bring this application to register three orders of the English High Court of Justice King's Bench Division. The applicants rely on the *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R.6. ("REJA") to register the monetary portions of those final orders. The applicants rely on the common law regime for the registration and enforcement of foreign judgments to enforce certain injunctive relief. For the reasons that follow, I grant the application.
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> I am satisfied that the applicants served their materials in accordance with my initial order, dated October 26, 2023. The respondent neither contacted the applicants nor appeared at the commencement of the hearing. We waited 15 minutes in accordance with rule 3.03(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, but the respondent did not arrive. I am satisfied that the application should be heard despite his absence.
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> Inivos Limited is a corporation incorporated under the laws of the United Kingdom. Mr. Fentiman is one of its directors. The respondent, Mr. Marsh, is a former employee of Inivos.
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> The applicant's factum sets out the significant history between the parties. I do not think it is necessary to recount that history for the purposes of this motion. The most relevant facts are the following:
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> 1. On July 31, 2019, the English High Court granted a final judgment in the matter of Warrick Fentiman v. Richard Marsh

[1] The original version of this endorsement misnamed Mr. Marsh in two places in this paragraph. I have corrected the error.

> (Claim No. HQ18M00961). That judgment contained a damages award of £55,000 and a permanent injunction to prohibit Mr. Marsh from making certain statements about Mr. Fentiman. This order was served on Marsh. I will adopt the nomenclature used by the applicants and refer to this order as the "Fentiman Injunctive Order"
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> 2. On April 26, 2023, the English High Court granted a final judgment in the matter of Inivos Limited v. Richard Marsh (Claim No. QB-2015-005162). That judgment found that Mr. Marsh had breached a contract (an earlier resolution between the parties). It imposed a final and permanent injunction on Mr. Marsh, permitted Inivos to serve the order by alternate means, and ordered Mr. Marsh to pay costs of £32,775 to Inivos. I will adopt the nomenclature used by the applicants and refer to this order as the Final Injunction Order.
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> 3. On July 18, 2023, the English High Court found Mr. Marsh in contempt for three breaches of an earlier consent order between the parties. On July 26, 2023, Judge Pearce sentenced Mr. Marsh to 18 months in prison and ordered him to pay £249,000 in costs to Inivos. The time to appeal this order has lapsed. I will adopt the nomenclature used by the applicants and refer to this order as the Committal Order.

[7] I was satisfied that the Ontario Superior Court of Justice had jurisdiction to register and enforce the monetary portions of the judgments under the REJA. I was also satisfied that that it was appropriate to register the injunctions under the common law as articulated in *Pro Swing*.[2] I, therefore, ordered that the injunctive relief contained in the Fentiman Injunctive Order and the Final Injunction Order be registered and enforceable in Ontario.

[8] Although the parties canvass their underlying dispute at length in their factums on this motion, I do not think it is necessary to describe that dispute.

The law of contempt

[9] Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of courts to enforce their process and maintain their dignity and respect. The purpose of a contempt order is to declare that a party has acted in defiance of a court order.[3]

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[2] *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612.
[3] *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, at para. 30, citing *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931, and *Pro Swing Inc.*, at para. 35.

[10] The contempt power is discretionary, and courts have consistently discouraged its routine use to obtain compliance with court orders. It should not be found too easily, and it is an enforcement power of last, rather than first, resort.[4]

[11] Inivos and Mr. Fentiman seek a finding of civil contempt, which is seen primarily as coercive rather than punitive.[5] Civil contempt is a quasi-criminal offence and has three elements. The burden is on Inivos and Mr. Fentiman to prove each of the three elements beyond a reasonable doubt.[6]

Elements of civil contempt

[12] First, Inivos and Mr. Fentiman must prove beyond a reasonable doubt that the November 7 order states clearly and unequivocally what should and should not be done. The requirement of clarity ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear where it is missing essential details about where, when, or to whom it applies, if it incorporates overly broad language, or if external circumstances have obscured its meaning.[7]

[13] Second, Inivos and Mr. Fentiman must prove beyond a reasonable doubt that Mr. Marsh had actual knowledge of the November 7 order before he committed acts that breached it. It may be possible for the court to infer knowledge in the circumstances. Inivos and Mr. Fentiman may also prove that Mr. Marsh is liable on the basis of the wilful blindness doctrine.[8]

[14] Third, Inivos and Mr. Fentiman must prove beyond a reasonable doubt that Mr. Marsh intentionally did the act that the November 7 order prohibits, or failed to do the act that it compels. There is no requirement to prove that Mr. Marsh had a "contumacious intent."[9]

[15] Finally, as noted, the contempt power is one of last resort. The court retains a discretion to decline to make a finding of contempt, even if the three elements are made out. The Supreme Court of Canada noted that where an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the court may properly exercise its discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case.[10] I must consider whether or not to exercise my discretion to decline to make a finding of contempt even if the elements are made out.

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[4] *Carey*, at para. 36.
[5] *Carey*, at para. 31.
[6] *G. (N.) c. Services aux enfants & adultes de Prescott-Russell* (2006), 82 O.R. (3d) 686 (C.A.), at para. 27
[7] *Carey*, at para. 33;
[8] *Carey*, at para. 34.
[9] *Carey*, at paras. 35, 38 to 47.
[10] *Carey*, at para. 37.

Burden and standard of proof

[16] The burden is on Inivos and Mr. Fentiman to prove each element beyond a reasonable doubt. A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[17] It is virtually impossible to prove anything to an absolute certainty, and Inivos and Mr. Fentiman are not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. I may not find Mr. Marsh in contempt unless I am sure that he committed contempt. Even if I believe that Mr. Marsh is probably guilty of contempt or likely guilty of contempt, that is not sufficient. In those circumstances, I must give the benefit of the doubt to Mr. Marsh and find that he did not commit contempt because Inivos and Mr. Fentiman have failed to satisfy me of Mr. Marsh's guilt beyond a reasonable doubt.

[18] Proof of civil contempt may be based on direct evidence, circumstantial evidence, or a combination of both kinds of evidence. However, where a party asks the court to make a finding of civil contempt based on inferences from circumstantial evidence, the inference on an essential element of the offence may only be drawn where it is the only reasonable inference to be drawn from the evidence as a whole.[11] Justice Cavanagh explained how this doctrine works in the context of a civil contempt proceeding:

> In *Villaroman*, the Supreme Court of Canada addressed the relationship between circumstantial evidence and proof beyond a reasonable doubt and, at para. 26, explained the special concern inherent in the inferential reasoning from circumstantial evidence "that the jury may unconsciously 'fill in the blanks' or bridge gaps in the evidence to support the inference that the Crown invites it to draw". The Court, at para. 37, held that when assessing circumstantial evidence, the trier of fact should consider other plausible theories and other reasonable possibilities which are inconsistent with guilt. These must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. The Court held, at paras. 40-41, that where a conviction is based on circumstantial evidence, the evidence should be such that it excludes any other reasonable alternative, and that this is "a helpful way of describing the line between plausible theories and speculation".
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> To support a finding of guilt based entirely or substantially on circumstantial evidence, the circumstantial evidence, taken as a

[11] *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at paras. 37 and 40-41.

> whole, and assessed in light of human experience, must exclude any other reasonable alternatives. The prosecution is not required to negative every possible conjecture or every possible alternative explanation that might be consistent with innocence. See *R. v. Okojie*, 2021 ONCA 773, at paras. 137-139. The evidence is to be considered as a whole to determine whether the alleged contemnors are guilty. See *R. v. Morin*, 1988 CanLII 8 (SCC), at para. 40.[12]

[19] In this case, Mr. Marsh provided affidavit evidence on which he was cross-examined. Where the respondent provides evidence in a contempt proceeding, the court must examine that evidence using the approach set out in *R. v. W.(D.)*.[13] I will instruct myself that:

a. First, if I believe the evidence of Mr. Marsh, I must dismiss the motion for a finding of contempt;

b. Second, even if I do not believe the evidence of Mr. Marsh, if I am left in reasonable doubt by it, I must dismiss the motion for a finding of contempt;

c. Third, even if I am not left in doubt by the evidence of Mr. Marsh, I must ask myself whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence that Mr. Marsh is in contempt.

Does the order clearly and unequivocally state what should be done or not done?

[20] First, Inivos and Mr. Fentiman must prove beyond a reasonable doubt that the November 7 order states clearly and unequivocally what should and should not be done.

[21] The November 7 order must be interpreted contextually. The Court of Appeal for Ontario explained that principle this way:

> This court has rejected a formalistic interpretation of the relevant order. It is clear that a party subject to an order must comply with both the letter and the spirit of the order…. That party cannot be permitted to "hide behind a restrictive and literal interpretation to circumvent the order and make a mockery of it and the administration of justice"…. [Internal citations omitted.][14]

[22] I must interpret the order in accordance with its ordinary meaning, taking into account its context.[15] However, even giving credit to that principle, Mr. Marsh is nevertheless entitled

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[12] *Sakab Saudi Holding Company et al. v. Al Jabri et al*., 2024 ONSC 1347, at paras. 43-44.
[13] *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *Castillo v. Xela Enterprises Ltd*., 2022 ONSC 4006, 162 O.R. (3d) 124, at para. 29; and *Dephoure v. Dephoure*, 2021 ONSC 1370, at para. 143.
[14] *Chirico v. Szalas*, 2016 ONCA 586, 132 O.R. (3d) 738, at para. 54.
[15] *Fraser Health Authority v. Schmidt*, 2015 BCCA 72, 67 B.C.L.R. (5th) 150, at para. 4; *Sakab Saudi*, at para. 19.

to the most favourable interpretation of the order, and any ambiguity in the text of the order should be resolved in his favour.[16]

[23] The November 7 order provided as follows:

> 1. THIS COURT ORDERS that the order of Richard Spearman QC, sitting as a Deputy High Court Judge of the English High Court of Justice King's Bench Division (the "English High Court"), dated July 31, 2019 (the "Fentiman Injunctive Order"), attached hereto as Appendix "A", be registered and enforceable in Ontario with respect to the damages portion at section 2 of the Fentiman Injunctive Order.
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> 2. THIS COURT ORDERS that the Fentiman Injunctive Order, attached as Appendix A, be registered and enforceable with respect to the injunction against the Respondent set out at section 3 of the Fentiman Injunctive Order. Specifically, the Respondent must not publish or cause to be published, by any means howsoever, any words having the following meanings, or any similar meanings defamatory of the Applicant, Warrick Fentiman ("Fentiman"):
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> > a. That Fentiman was responsible for carrying out an illegal cyber-attack on the Respondent's blogsite at www.deproxfraudinfo and on the Respondent's Facebook and LinkedIn pages;
> >
> > b. That Fentiman is a hacker, who carried out an unlawful hack and cyber-attack on the Respondent, the effect of which was to prevent access to the Respondent's blogsite at www.deproxfraud.info.; and
> >
> > c. That Fentiman (among other directors of Inivos Limited) is facing criminal charges for carrying out a cyber-attack on the Respondent.
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> 3. THIS COURT ORDERS that the order of Judge Walden-Smith of the English High Court, dated April 26, 2023 (the "Inivos Injunction Order"), attached hereto as Appendix "B", be registered and enforceable in Ontario with respect to the costs portion at section 7 of the Inivos Injunction Order.

[16] *Valoris pour enfants et adultes de Prescott-Russell c. K.R.*, 2021 ONCA 366, 466 D.L.R. (4th) 666, at para. 29; *Sakab Saudi*, at para. 19

> 4. THIS COURT ORDERS that the Inivos Injunction Order, attached as Appendix B, be registered and enforceable with respect to the injunction against the Respondent set out at section 4 of the Inivos Injunction Order. Specifically, the Respondent must not (whether by himself, his servants, his agents or otherwise howsoever) speak, disclose, publish cause to be published to any person or entity anywhere in the world and in any medium any information (whether public or private, true or false, defamatory, disparaging or otherwise) of and concerning Inivos Limited, its employees, directors, servants or agents, or its Deprox product, save that in the event that any person or entity approaches the Respondent for any information of and concerning Inivos Limited, the Respondent may state only that he is subject to this injunction.
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> 5. THIS COURT ORDERS that the order of Judge Pearce of the English High Court, dated July 26, 2023 (the "Committal Order"), attached hereto as Appendix "C", be registered and enforceable in Ontario with respect to the costs portion at section 6 of the Committal Order.
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> 6. THIS COURT ORDERS that the Respondent pay costs to the Applicants fixed in the amount of $65,000.00, payable in 30 days.

[24] In my view, the order is clear and unequivocal, except with respect to one set of alleged breaches.

[25] Inivos and Mr. Fentiman allege that Mr. Marsh breached the November 7 order by allowing material that he published before I made the order to remain online after I made the order. Inivos and Mr. Fentiman put it this way:

> The Respondent, under his own name, caused prior prohibited content that breached the English Orders to remain online despite the Ontario Order being granted, which allows for continual republication each time a new viewer accesses the content. As at the time of this factum, the following interviews with the Respondent, which share Prohibited Statements, remain online and have not been removed, altered, or hidden:
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> (a) Podcast 1;
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> (b) Podcast 2;
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> (c) Podcast 3;
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> (d) Interview 1;
>
> (e) Interview 2;

(f) Interview 3;

(g) Get A Life Ep. 74; and

(h) Get A Life Ep. 75

[26] Inivos and Mr. Fentiman also allege that sometime between December 2021, and September 2023, Mr. Fentiman caused a website containing defamatory information to be made available to the public, which remained available after the November 7 order. They submit this is an act of contempt.

[27] Inivos and Mr. Fentiman also allege that Mr. Marsh breached the November 7 order by "allowing prior offensive posts…to remain published on Facebook and [Twitter]." These posts include ten messages posted between March 29, 2022, and November 4, 2023.

[28] Inivos and Mr. Fentiman rely on defamation law to submit that, in the time following the order, each time a person views a post made before the November 7, 2023, order was issued, that is an act of "publication" contrary to and in breach of the order dated November 7, 2023. Inivos and Mr. Fentiman put it this way in their factum:

> Additionally, the Prior Content Breaches have not been removed and remain available to be viewed online today, in breach of the clear terms of the Ontario Order. It is not a defence that the Prior Interviews, the Prior Social Posts, and the Website were all first published before the Ontario Order. It is well established that defamation occurs at the time of publication to a third party and, in the case of online content, that publication takes place each time the content is read or downloaded. The Website remains available to be read and the Prior Interviews and Prior Social Posts are being viewed on an ongoing basis, with the Respondent increasing such viewership by promoting links to the Prior Interviews through the Sohail Account and the X Account. This conduct further breaches the Ontario Order and is yet another example of the Respondent trying to finesse around a contempt ruling by obfuscating his identity.

[29] I disagree. Inivos and Mr. Fentiman have not proved beyond a reasonable doubt that the November 7 order clearly and unequivocally required Mr. Marsh to take steps to remove from the internet any posts or interviews that contained defamatory content.

[30] I accept that for the purposes of the law of defamation, publication occurs when impugned statements are read or downloaded, and that every repetition or republication of a defamatory statement constitutes a new publication.[17] However, the question before me is not whether Mr. Marsh is exposed to a future action for defamation. The question is

[17] *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666, at para 20.

whether the term of the order had sufficient clarity such that its breach supports a quasi-criminal finding of civil contempt. In my view, an order that relies on its recipient having a sophisticated understanding of the law of defamation is not clear or unequivocal on its face and cannot ground a contempt finding.

[31] The text and context of the order clearly prohibit Mr. Marsh from taking certain acts after the date of the order, but do not clearly convey a requirement to take positive steps to remove posts that pre-date the order. The key passages of the order are as follows:

> 2. … Specifically, the Respondent must not publish or cause to be published, by any means howsoever, any words having the following meanings, or any similar meanings defamatory of the Applicant, Warrick Fentiman….
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> …
>
> 4. … Specifically, the Respondent must not (whether by himself, his servants, his agents or otherwise howsoever) speak, disclose, publish or cause to be published to any person or entity anywhere in the world and in any medium any information (whether public or private, true or false, defamatory, disparaging or otherwise) of and concerning Inivos Limited, its employees, directors, servants or agents, or its Deprox product, save that in the event that any person or entity approaches the Respondent for any information of and concerning Inivos Limited, the Respondent may state only that he is subject to this injunction.

[32] I am left with a reasonable doubt about whether this order is sufficiently clear and unequivocal to ground a finding of contempt because Mr. Marsh did not remove posts that pre-date the order. The structure, text, verb tense, and grammar of the key passages of the order all look to the future, not the past. The passages clearly and unequivocally prohibit Mr. Marsh from taking certain steps ("the Respondent must not publish or cause to be published") and prohibit certain conduct, but they do not on their face require Mr. Marsh to take remedial steps. For the purposes of a contempt proceeding, an order that is intended to be mandatory (as opposed to prohibitory), should make that requirement explicit.

[33] Inivos and Mr. Fentiman could have sought an order that contained an explicit takedown provision. They did not do so. Such an order would have then contained text placing a positive obligation on Mr. Marsh to remove (or to try and remove) any content from the internet. Moreover, that order would have explicitly listed the posts that Mr. Marsh was to remove. The November 7 order provides no direction as to what posts or content must be deleted or made private.

[34] I must interpret the order in accordance with its ordinary meaning and context. I must also give Mr. Marsh the most favourable interpretation of the order and resolve any ambiguity

in the text of the order in his favour.[18] Having done so, I am left with a reasonable doubt that the November 7 order was sufficiently clear and unequivocal as to support a contempt finding because Mr. Marsh did not remove certain posts made before the order was granted.

When did Mr. Marsh have actual notice of the order?

[35] The next issue to be determined is when Mr. Marsh had actual notice of the order. As noted above, Inivos and Mr. Fentiman must prove beyond a reasonable doubt that Mr. Marsh had actual knowledge of the November 7 order. It may be possible for the court to infer knowledge in the circumstances. Inivos and Mr. Fentiman may also prove that Mr. Marsh is liable based on the wilful blindness doctrine.[19]

[36] I accept Mr. Marsh's evidence that he did not even see the order until December 2, 2023. For that reason, combined with my finding above about merely leaving postings accessible, I find that he could not have committed an act of contempt before December 2, 2023, at the very earliest.

[37] I do not accept the evidence of Inivos and Mr. Fentiman about what social media notifications Mr. Marsh may have seen. There was no expert evidence to explain to me how the notifications would have worked, or what Mr. Marsh's social media settings were at any specific point in time. I do not accept the submission that Mr. Marsh "ought to have been aware" of the existence of the order due to these notifications. Such speculation cannot ground a finding of civil contempt.

[38] I also accept Mr. Marsh's evidence that he was unaware of the portions of the order that he is alleged to have breached until January 1, 2024. In his affidavit, he states that he did not download the documents from the website of counsel for Inivos and Mr. Fentiman until December 3, 2023. He states that he was overwhelmed by the sheer volume of documents and triaged them by reading the first page of each document. One of the documents stated that Inivos and Mr. Fentiman were requiring him to be the subject of a judgment debtor examination arising out of litigation Inivos commenced against him in Saskatchewan. He then focussed on that document, given the immediacy of the issue it raised. His affidavit states:

> I received a total of 35 separate documents, totaling 3355 pages. Needless to say, for a layman this was overwhelming, as much of the language employed was opaque, but also threatening.
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> As my attached medical notes show, I have a medical history of severe depressive disorder and Autism Spectrum Disorder. I therefore have to take care of my mental health by avoiding highly stressful situations which could trigger a depressive episode.

[18] *Valoris*, at para. 29; *Sakab Saudi*, at para. 19.
[19] *Carey*, at para. 34.

> My strategy when faced with a challenge such as was presented by this huge file of documents is to address the task one piece at a time, and to spread the work over an extended time period, to avoid being overwhelmed.
>
> Consequently, I went through all the documents, but only looked at the first page of each to determine their nature, and which, if any of them needed immediate attention. Nine of the documents related to cases the Applicant is taking against me in Saskatchewan, and the balance related to Ontario. The Saskatchewan documents demanded that: " The Respondent, Richard Marsh, must attend an examination of the judgment debtor on December 4, 2023 at 10 am Central Standard Time"
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> This examination was scheduled for the morning of December 4th, and I only discovered the documents on December 3. This obviously required my immediate attention, and I commenced to research on the subject of debtors' examinations, eventually scheduling an appointment with a Trustee for Bankruptcy with MNP to discuss my options. This process is ongoing.

[39] Mr. Marsh correctly points out that the first page of the November 7 order does not contain any of the provisions that ground this contempt motion:

> [The] first page of November 7th Order referred only to the damages portion of the Fentiman Injunctive onder, and had no reference to the Inivos Injunction order.
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> Unfortunately, as I only read the first page of each of the documents served, I was unaware of the scope of the November 7th order. The first page referred only to registering the damages of the Fentiman Injunction order in Ontario, and I wrongly assumed that the entire document related to that. In fact, as I later discovered, page 2 of the Order registered the Inivos Injunction order, which was the order I inadvertently breached. …
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> On December 24 2023 I checked the WeirFoulds Facebook messenger account again, and found some further documents had been served. I downloaded them, but did not read them until January 1st [2024].

[40] I accept Mr. Marsh’s evidence and find as a fact that he only read the key portions of the order for this motion on January 1, 2024. I do not agree with the submission of Inivos and Mr. Fentiman that Mr. Marsh is not credible. Even if I did not accept Mr. Marsh’s evidence, and I do, it would leave me with a reasonable doubt as to whether he was aware of the entire order prior to January 1, 2024.

[41] Inivos and Mr. Fentiman submit that I should find that Mr. Marsh was willfully blind when he read only the first page of the November 7 order. I disagree.

[42] The burden is on Inivos and Mr. Fentiman to prove beyond a reasonable doubt that Mr. Marsh was wilfully blind. The doctrine of wilful blindness "imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries but *deliberately* chooses not to make those inquiries." [Emphasis in original.][20]

[43] Therefore, Inivos and Mr. Fentiman must prove beyond a reasonable doubt that Mr. Marsh suspected that there might be provisions of the order that required him to take or refrain from taking certain actions, but deliberately suppressed that suspicion and chose not to make further inquiries even though he subjectively saw the need for such inquiries.[21] Inivos and Mr. Fentiman must prove that in the circumstances, Mr. Marsh deliberately chose to ignore the indications because he did not want to know the truth.[22]

[44] It is not enough for Inivos and Mr. Fentiman to prove that Mr. Marsh appreciated a risk, even a low one, that there might be such terms, and chose to run the risk. The mental element of recklessness is not sufficient for a finding of contempt.

[45] Mr. Marsh faced an overwhelming task on December 3, 2023. Inivos had served him with 35 legal documents, comprising over 3500 pages relating to litigation in at least two jurisdictions. One of the documents indicated that Mr. Marsh was under compulsion to attend an examination in connection with a Saskatchewan proceeding the very next day. It is entirely understandable that he focussed immediately on that document and his possible insolvency. I am left with a reasonable doubt that Mr. Marsh was wilfully blind between December 3, 2023, and January 1, 2024.

[46] I conclude that Mr. Marsh did not have actual knowledge of the November 7 order until January 1, 2024. Inivos and Mr. Fentiman concede that Mr. Marsh did not post any content that violated the November 7 order after January 1, 2024. I have already found that the November 7 order was not sufficiently clear to ground a finding of contempt for any material left accessible to the public. In conclusion, Inivos and Mr. Fentiman have not proven beyond a reasonable doubt that Mr. Marsh acted in contempt of the November 7 order. I dismiss the motion.

Residual discretion

[47] Finally, even if Inivos and Mr. Fentiman had proven the elements of the contempt offence against Mr. Marsh beyond a reasonable doubt, I would exercise my discretion to decline to make a finding of contempt.

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[20] *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at para. 21; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 98.
[21] *R. v. Hason*, 2024 ONCA 369, 171 O.R. (3d) 225, at para. 48.
[22] *R. v. A.B.*, 2024 ONCA 446, 438 C.C.C. (3d) 520, at paras. 34-42.

[48] The contempt power is one of last resort and it would work an injustice in the circumstances of this case to make a finding of contempt. The purpose of a contempt order is to obtain compliance with prior court orders. Inivos and Mr. Fentiman have had very substantial compliance with the court order since January 1, 2024. They also have very large damages and costs orders against Mr. Marsh. The interests of justice do not require a finding of contempt.

Costs

[49] If the parties are not able to resolve costs of this action, Mr. Marsh may email his costs submission of no more than three double-spaced pages to my judicial assistant on or before October 22, 2024. Inivos and Mr. Fentiman may deliver their responding submission of no more than three double-spaced pages on or before October 29, 2024. No reply submissions are to be delivered without leave.

Robert Centa J.

Date: October 15, 2024