15.6.2002

GRAND COURT CAYMAN ISLANDS

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 398 OF 2001

BETWEEN:

1. TELESYSTEM INTERNATIONAL WIRELESS INC.
(A company incorporated under the laws of Canada).

2. TIW DO BRASIL TIDA
(A limited liability company organized under the laws of the Federal Republic of Brazil).

3. LUIS ROBERTO DEMARCO ALMEIDA

PLAINTIFFS

AND:

1. CVC/OPPORTUNITY EQUITY PARTNERS L.P.
(A Cayman Islands Exempted Limited Partnership)

2. CVC/OPPORTUNITY EQUITY PARTNERS, L.P.
(A company incorporated under the laws of the Cayman Islands)
(Sued in its capacity as the General Partner of CVC/Opportunity Equity Partners, LP)

3. OPPORTUNITY FUND
(A company incorporated under the laws of the Cayman Islands)

6. OPPORTUNITY ASSET MANAGEMENT INC.
(A company incorporated under the laws of the Cayman Islands)
(Sued in its capacity as Investments Advisor and Sole Director of Opportunity Fund, and as agent for CVC/Opportunity Equity Partners, LP)

5. HUNTER & HUNTER
(A firm)

DEFENDANTS

IN THE MATTER OF AN APPLICATION ON BEHALF
OF THE 1st – 3rd PLAINTIFFS
AGAINST THE 1ST TO 4TH DEFENDANTS AND
DANIEL DANTAS
FOR AN ORDER OF COMMITTAL AND FOR SEQUESTRATION OF ASSETS.

Appearances:
Mr. Michael Black QC instructed by Mr. Seamus Andrew of Walkers for the Applicants.
Mr. Anthony Trace QC instructed by Mr. Jeremy Walton of Hunter & Hunter for the Respondents.

Before: Chief Justice Anthony Smellie

RULING

This interlocutory notice of motion for contempt is brought in this action by the applicants for the committal of Mr. Daniel Dantas and/or the sequestration of his assets and of the assets of the corporate respondents. The contempt is said to have been committed by the breaches of Orders of this Court.

This action is one of three before this Court which spring from disagreements between the applicants and the respondents over the control of substantial investments in Brazil.

The motion for contempt is brought against the four respondent corporations ("the Companies") and against their chief executive officer Mr. Daniel Dantas, in his official capacity as well as his personal capacity. He is alleged to have aided and abetted the commission of the contempt by the Companies.

The alleged contempt is described in the Notice of Motion. It cites breaches of the Orders of this Court which, among other things, prohibited the disclosure or publication of a sensitive document which belongs to the applicants.

The relevant background is as follows.

On 5th June 2001, the Companies deployed in the other two related actions (Causes 229 and 389 of 2001) a confidential document which was subsequently found by this Court to have been stolen from the 3rd applicant ("Mr. Demarco").

This document ("the TIW document") describes an arrangement between Mr. Demarco and the first applicant ("TIW"). Mr. DeMarco is a former employee and shareholder of one of the Companies; the 2nd respondent.

On its face, the TIW document suggests the existence of an agreement between Mr. Demarco and TIW for their engagement of the same firm of Cayman Islands attorneys for their representation in the related actions against the Companies before this Court. This was expressed as being because of the common "synergies and implications created by the representation by that firm" of Demarco's interest in Cause 389 of 2000 ("the Demarco action") and of TIW's in Cause 229 of 2001 ("the TIW Proceedings").

The agreement goes on to provide Mr. Demarco with a form of indemnity by TIW in the event he is successful in the Demarco action but recovers an award which is diminished because TIW is also successful in the TIW action.

The indemnity is expressed to be limited in amount, to reflect the maximum such loss which Demarco could sustain.

The deployment of the TIW document by the Companies in those actions, was with the pleaded intention of restraining the firm of attorneys from acting on the ground that the TIW document revealed that they suffered a conflict of interest in acting both for DeMarco and TIW.

The deployment for those purposes was shortlived however, because this, the third action, was commenced by writ on 28th June 2001. In it the applicants sought, among other things, an order restraining the Companies from using the TIW document.

On the 3rd – 6th July 2001, Mr. Justice Graham heard the applicants' interlocutory application for an order restraining the use of the TIW document on the grounds that it was confidential and had been stolen from them.

On the 19th July 2001, Graham J restrained the Companies from using the TIW document, pending final determination of that issue at trial. He none the less formed and expressed the view that the TIW document had been stolen by someone who had breached the security of Mr. Demarco's computer where it was stored.

The trial of the matter commenced on 22nd October 2001 before Mr. Justice Sanderson. The central issue taken in the trial as it related to the TIW document, was whether the Companies would be able to use the document and if so for what purpose.

The fifth respondent, Mr. Dantas, was present in Court during most of the trial.

The Companies and Mr. Dantas were represented throughout by the same attorneys from the firm of Hunter and Hunter and leading counsel.

Sanderson J. delivered judgment orally in chambers on 29th October 2001. Attorneys and leading counsel for all parties were then in attendance but Mr. Dantas, although present in the Cayman Islands, was not present at that hearing.

In his oral judgment, Sanderson J. expressed his findings on three of the issues enjoined in the action and reserved his decision on the rest.

As it relates to the present application, the decision of Sanderson J. is pivotal. It dealt with the central issue which was also then on 29th October 2001 described by the learned judge:

"Can the TIW document be used by the plaintiffs in Cause 389 of 2000?"[ie: the DeMarco action; in which he is sued by the Companies for return of certain funds].

The decision on that issue was then, on the 29th October 2001, expressed in the following terms:

"The first question again is can the TIW DeMarco letter [(the TIW document)] be used in the 389 action? I have concluded that it can and accordingly that portion of the plaintiffs' claim is dismissed".

While also concluding that the TIW document had been stolen and was confidential in nature; Sanderson J. further concluded that it was not protected from disclosure by privilege; was relevant to the issues in Cause 389 of 2001 and so was discoverable therein. Sanderson J. later explained that he found no evidence to support the allegation that it had in fact been stolen either by Mr. Dantas or the Companies or by anyone on their behalf.

Implicit in that analysis and having regard to the background of the earlier prohibitory order of Graham J; must objectively have been the understanding that Sanderson J. intended to permit the use of the TIW document for no other purpose but in Cause 389 of 2001. The oral decision on the 29th October did not, however, so expressly state.

The concern then - as is apparent from the transcript of that brief hearing - was to inform the parties as soon as possible of the decision on those matters then pronounced, with decisions on others and full written reasons to be given later.

The upshot was that the continued prohibition against any other use of the TIW document was not expressed until in the final written version of the Order delivered by Sanderson J the next day, 30th October 2001, in relevant part in the following terms:

> "IT IS ORDERED:
>
> 1. The draft document exhibited to the First Affidavit of Maria Amalia Coutrim in Cause No. 389 of 1994 and Cause No. 229 of 2000 respectively ("the TIW document") may be used by the Defendants and their attorneys in and for the purpose of the proceedings in Cause No. 389 of 1999 but for no other purpose and in no other proceedings. Accordingly, that portion of the Plaintiffs' claim seeking to prevent the use of the TIW document in Cause No. 389 of 1999 be dismissed;"
>
> (Emphasis supplied).

Though dated 29th October 2001, it is common ground that this written Order was presented to Sanderson J and signed by him on 30th October 2001, having on its face, been first "approved as to form and content" respectively by the attorneys for the applicants on the one side and Mr. Dantas and the Companies on the other. Notwithstanding those express written terms of the final Order, the following events occurred:

1. The publication of the TIW document on the WorldWide Web at site www.no.com.br on 1st November 2001. Displayed in a prominent place on the home page of this site which belongs to the Companies, appeared a banner with the logo of the Companies entitled "Nota de Esclariento". When clicked upon,

the banner led to the text of this "Explanatory Note" as well as, in the same document, a Portuguese translation of the TIW document.

This publication on the WorldWide Web was extended on 6th November until 14th November 2001.

Mr. Dantas in his first affidavit seeks to explain that this publication was a hurried response to a first page article in *Journal do Brazil* which he saw and which had been published on the same date, 1st November 2001. That article had such false and misleading information about this Court's decision on the TIW document, damaging to himself and the Companies; that they felt compelled to respond. *Journal do Brazil* is a leading Brazilian newspaper and which, Mr. Dantas alleges, is partisanly engaged in the public campaign being waged against the Companies and himself by TIW, DeMarco and others.

I note in parenthesis here that whereas the Notice of Motion cites this particular breach as occurring on the 6th November 2001 (the date it first came to the attention of the TIW interests); Mr. Dantas' affidavit contains the foregoing clear admission that it occurred on the 1st November 2001. I could therefore see no prejudice to either Mr.Dantas or the Companies in requiring them to respond to the Notice of Motion on the basis of that admission.

2. An article which included the text of the same "Explanatory Note" was published on 2nd November 2001 in *O Globo* and *O Correio Brasilienese*; two other leading Brazilian newspapers, in the following terms (as taken from the official translation):

"Explanatory Note

Opportunity [(the Companies)] and Newtel Participacios S.A. [(the Brazilian affiliate of the Companies through which their investments in telecommunications in that country are held)] with all due respect for *Journal do Brasil's* past, want to make known the elucidation regarding the untruth that has been published on its edition of November 1st 2001.

1. Cayman's Court result was exactly the opposite of what has been published on the referred newspaper. The use of the Letter of Agreement [(The TIW document)] has been permitted as an evidence of the collusion between TIW and Luiz Roberto DeMarco Almeida. (Mr. DeMarco has judicially tried to impede such use).
2. Hunter & Hunter lawyers, who are assisting Opportunity [(the Companies)] concerning this process, have considered the presentation of witnesses for the defence completely unnecessary, in view of the total lack of evidence and indictment against Opportunity before the Court.
3. The judicial sentence affirms that the (TIW document) can be used and it shall be used in the proceedings that are in course at Cayman's Court and at any other possible Court House.
4. We will not submit ourselves to any kind of pressure. We have already sent two proposals to TIW in order to acquire its participation in Telepart Participacoes S.A., the parent company of Telemig Cellular

> Participacoes and Tele Norte Cellular Participacoes. The price has been established by an independent appraiser, needless to say, without any spurious influence. We shall not waive this principle.
>
> Rio de Janero, November 1st 2001
>
> Opportunity and Newtel Participacoes S.A.".

This paid publication by the Companies in its reference to the TIW document, is important in a number of respects for present purposes.

As it states and as Mr. Dantas deposes, it purports to be a response to earlier publications, in particular an article the day before in *Journal do Brasil* .

There has emerged in Brazil a struggle over the control of the Telepart subsidiaries between the Companies as controlled by Mr. Dantas and his allies on the one hand, and TIW on the other. This matter of control has lasso become the central issue in the TIW action before this Court.

Other protagonists have joined the fray in Brazil with their own ends in sight, including Mr. DeMarco and a large Brazilian pensions fund, allied - so it is said by Mr. Dantas - with TIW against the Companies and himself.

The evidence filed before me on this application reveals that each protagonist has shown a strong penchant for publicity and this has resulted in a vicious cycle of public allegations and counter-allegations, threats, innuendoes and intimidation.

The melodrama of "soap opera" bent, which Sanderson J. described in his written reasons for judgment delivered on 14th November 2001, has now escalated into a high- stakes campaign of destructive proportions. As yet another Brazilian news item describes it:

> "The Long Feud. DeMarco on the left, and Dantas on the right. From partners in the Fund to total war, and it is not over yet".

The considerable volume of material published in the media evidencing this "long feud" reveals that all sides are guilty of engagement in campaigns of harassment, the one seeking by public pressure and opprobrium, to gain advantage over the other. The stakes being interests in entities which are publicly traded and owned. The lamentable reality however, is that ultimately, the likely losers will not be the individual protagonists, but the entities themselves and their many blameless investors.

This is a matter of obvious concern to this Court.

Further "gagging" and mandatory orders were made by Sanderson J. on 16th November 2001. But there are regrettably also, allegations of breaches of these.

For their part, the Companies have sought to explain, through Mr. Dantas in terms of his own explanation, that the "Explanatory Note" was published out of the urgent and genuine concern to refute earlier misleading information which had been published by or on behalf of the TIW interests. If left without response he said, TIW's and DeMarco's media campaign threatened to inflict irremediable damage to the Companies' reputation. This would impair the confidence of their investors, the trust of the Brazilian regulators and, ultimately, result in the Companies' loss of value.

Whatever view one takes of his explanations, the "Explanatory Note" is also significant because of what must be regarded as its deliberately misleading contents: No positive finding had been made by Sanderson J. that the TIW document was "evidence of collusion between TIW and DeMarco". No finding was made that it could be used "at any other possible" forum.

The applicants contend that the Companies published the TIW document in the manner they did in order to try to isolate TIW from its business allies in Brazil, as part of their business strategy of wresting control of the Brazilian telecom assets from TIW. That the publication of the TIW document was so important to the Companies' and Mr. Dantas' business ends; that they made a calculated decision to breach the Orders of this Court and risk the consequences.

Those are all matters which may well go to the secondary issue of motive behind the breach of the Order. The motion for committal is, it must be remembered, based upon the allegation of breaches by the actual publication or other unauthorized use of the TIW document itself. It is therefore to be decided whether the publication on the WorldWide Web and the reference to the TIW document in *O Globo* and *O Correio Brazilienese* were thus in breach of the Order.

The further significance of the "Explanatory Note" for present purposes, is that it also goes on to state that its signatories had already used the TIW document to file a *notitia criminis* - in English a "criminal complaint" - two days earlier with the Brazilian authorities.

3. A criminal complaint was indeed filed - and admittedly so by Mr. Dantas - personally against Messrs DeMarco and Ducharme (the President and Chief Executive of TIW).

   Notwithstanding a date reference in a copy of it suggesting that it was filed on 9th November 2001, Mr. Dantas insists that it was filed on 31st October 2001 and evidence which he filed in support of this contention is otherwise unrefuted.

What is beyond argument, is that there was a breach of the final Order which was delivered the day before, by the admitted filing of the criminal complaint on 31st October 2001. In an annexure to the criminal complaint, is a document in which the TIW document is described as an agreement between TIW and DeMarco to conspire against the Companies. The TIW document is put forward in proof of an allegation in the criminal complaint itself of attempted extortion. Mr. Dantas complains that this attempt, coupled with threats, had been made towards him by an agent of TIW's (said to be yet another prominent Brazilian business figure) some six months earlier.

Concerns were raised in the arguments about Mr. Dantas' motive for using the TIW document in this way. If the extortionary attempt had been made as he describes, the evidence shows that he waited some six months until the very next day after the final Order, and in breach (whether wittingly or unwittingly) of it, to file the criminal complaint.

In his third affidavit Mr. Ducharme explains the nature of his concerns about the criminal complaint.

It appears that on at least one previous occasion, the Companies had sought to institute criminal proceedings against representatives of TIW in Brazil. Civil proceedings have also been brought. So far, all proceedings have been unsuccessful but have resulted at least in harassment and intimidation.

He deposes that he is particularly concerned, because the existence of further criminal proceedings against himself or other TIW executives might restrict their access to Brazil for fear of arrest. They are required to travel frequently to Brazil to represent the

business interests of TIW in order to protect TIW's investment of some USD 390 million said to be invested in the telecom enterprises.

The cited breaches of the Order of Sanderson J. are, as described above, admitted by Mr. Dantas and the Companies, but no admission is made as to the necessary knowledge of its final prohibitory terms.

In his affidavit and later in cross-examination, Mr. Dantas - who was present upon this motion in his own right as well as on behalf of the Companies - proferred certain explanations. I see the need only to summarise them here. Essentially, they go to that crucial issue of knowledge in this matter; ie: whether or not he and the Companies had notice of the prohibitory terms of the final Order.

Not only was Mr. Dantas himself not present in Court on either the 29th October or 30th October 2001, it is common ground that no other officer or employee of the Companies was. Mr. Dantas testified that on the 29th October, he was privy to a telephone conversation between his sister Veronica Dantas and Mr. Andrew Bolton of Hunter & Hunter (his Cayman Islands Attorneys). This was while he and his sister awaited their departure from the local airport. They were about to depart for return to Brazil, having attended here for the trial in this matter before Sanderson J. earlier that week. The decision of the 29th October having been pronounced in their absence, he testified that Mr. Bolton spoke to Veronica Dantas in a "quick telephone call" to inform them that Mr. Justice Sanderson had ordered that the plaintiffs' claim to restrain the use of the TIW document be dismissed. That Mr. Bolton further informed them only that there was an injunction restraining the Companies and Hunter & Hunter, from receiving or reviewing any document that was or might have been taken from Mr. DeMarco or his companies,

without the leave of the Court. In a second even more brief telephone call, Mr. Dantas said Mr. Bolton informed them only that "they were now free to catch the plane back to Brazil".

Thus, despite the unarguably confidential and sensitive nature of the TIW document, Mr. Dantas testified that he and his sister (also it seems an officer or employee of the Companies) returned to Brazil believing that they were free to deploy its publication in the way they did.

He admits that they were anxious to do so in order to "prove the link between Mr. DeMarco and TIW" and thus to counter the negative publicity about the Companies.

Here, however, Mr. Dantas' affidavit (the 1st at paragraph 28) revealed a telling insight into what I found to be his lack of credibility on this issue.

Despite his oral testimony given in cross-examination - of having been faced with the attempted extortion, threats of blackmail and intimidation; some six months earlier from the TIW agent; and of having the very next day sought the advice of his criminal lawyer; a Mr. Nelio Machado about the matter - his affidavit states:

> "28. On 31st October 2001, already back in Brazil (on return from the Cayman Court proceedings) and free, we believed, to prove the link between Mr. DeMarco and TIW, we arranged a meeting with our criminal lawyer, Mr. Nelio Machado, and told him about the threats that I had received from (the TIW agent), as set out above (in paragraphs 21 – 25 of his affidavit).
> 29. Mr. Machado advised me to communicate the facts about the meeting of 1st May 2001 [(when the threats were made)] to the appropriate authorities immediately. He further explained that the crimes of threat and extortion are publicly prosecuted crimes in Brazil and therefore we should file a formal complaint, ---- reporting it."

None of this is consistent with his testimony in cross-examination in which he emphasized that the reason he had not reported the matter six months earlier, was the

advice then given by Mr. Machado that he should not report the matter to the police but wait and see whether more evidence would come to light.

I am compelled to conclude that in the heat of cross-examination, Mr. Dantas forgot the prepared version of his defence as set out in his affidavit.

Similar inconsistencies plagued his evidence over the events of the 7th November 2001. Then it was, he testified, that the Companies first became aware of the prohibitory terms of the final Order as handed down on 30th October 2000.

Mr. Dantas in his affidavit (his 2nd at paragraph 5) stated that on 7th November 2001, Miss Ana Silva (an in-house attorney of the Companies at their offices in Brazil) telephoned Mr. Bolton at Hunter & Hunter having seen a reference to the case in a newspaper. That it was only then, he said, that Mr. Bolton informed her that "the modification" to the Order had been made on 30th October 2001. That by that time, the breaches of the Order by the events of abuse or publication as described above, had already taken place. Despite this communication, however, the breaches continued by the publication on the web-site until at least 12th November 2001.

This is against the background of the complete absence of evidence either from Mr.Bolton, Mr. Dantas or Miss Silva and a refusal, despite written requests, to present the latter for cross-examination.

Mr. Dantas' explanation – one which I unhesitatingly reject – is that despite the communication on the 7th November; Mr. Bolton failed to explain to Miss Silva the full prohibitory nature of "the modification" as made in the final Order. He testified moreover, that a clear explanation from Mr. Bolton was not forthcoming until a still later

telephone conversation with Miss Silva on 15th November 2001 which he was not told about until the 16th November.

I have no difficulty concluding that the Companies themselves must be fixed with notice of the full terms of the Order no later than 7th November 2001 when it is admitted that "the modification" was brought to the attention of their in-house legal advisor Miss Silva. It is simply inconceivable, even on this version of events, that their attorney Mr. Bolton, would have sought to bring the final Order to their attention without explaining the prohibitory nature of its terms.

Mr. Trace conceded that in the event of such a finding of fact of notice of the final terms of the Order, given to an officer of the Companies highly placed such as Miss Silva is, then the Companies would be bound.

Mr. Trace urged me however, to find that if indeed the 7th November was the earliest that the Companies might be fixed with notice of the final Order, there would be powerful factors in mitigation.

He cited the fact that the TIW document had already reached the public domain (at the behest, he contends, of Mr. DeMarco) by publication in another Brazilian newspaper called *Carta Capital* and had been the subject of the article on 1st November in *Journal do Brazil*. He also submitted that the publication for only 5 days between November 7th and 12th when the website publication was discontinued, amounted to a breach only *de minimis* of the final Order. Finally, in this regard, Mr. Trace submitted that continued publication beyond 7th November is not actionable here, because the Notice of Motion cites the contempt (at paragraph 1.18) as being the initial publication on the website on (now admitted to have been on 1st November 2001).

All this, of course, also will depend on whether or not the Companies can properly be fixed with notice of the Order at any earlier time. That, for reasons which follow, will depend on whether or not the Companies can be bound by the fact of their attorneys' *presence* when the final Order was made and must be examined according to the case law.

Liability for breach of the Order of Graham J

As for the liability of Mr. Dantas himself, lacking in credibility though I regard him on this issue, I have concluded that there is insufficient evidence upon which to fix him with personal knowledge of the full prohibitory terms of the final Order at any time before November 16th 2001.

The law is clear that he might be found liable for aiding and abetting the Companies in the breaching of the Order only if he had personal notice of the Order and of precisely what it prohibited. See, for an early pronouncement of that principle; Seaward v Patterson [1897] 1. Ch. 545.

While he was certainly aware of the restrictive terms of the earlier order of Graham J. of 19th July 2001, as it related to the TIW document, I conclude that that order could no longer have been regarded as governing the TIW document after the 29th October 2001. Mr. Black's initial concession of that point must be correct; although he later sought to qualify it saying that the order of Graham J. ceased to have effect in respect of the TIW document only to the extent that the Order of Sanderson J. as pronounced on the 29th October 2001, permitted its limited use. I am unable to agree.

These are Orders which carried from the outset, penal sanctions upon breach. For those purposes they must not be ambiguous or uncertain.

As Graham J. entirely prohibited *any use* of the TIW document but the Order as pronounced orally on the 29th October permitted its limited use, the Order of Graham J as it related to the TIW document was superceded. This must be so also because that order was expressed by Graham J to last "until final determination of the issue at trial or until further order". The parties to the action could quite understandably have had that in mind and the issue as to whether the TIW document could be used was finally determined only after trial on 29th October 2001.

Moreover, the judgment of Sanderson J. was made and became effective when it was made in the same proceedings on 29th October 2001, notwithstanding that the "ministerial act" of drawing it up and filing it for his signature did not take place until 30th October 2001. See Guardian of West Ham Union v Church Wardens of Bathnal Green [1895] 1 Q.B. 662.

Any other conclusion which would give ongoing currency to the order of Graham J. as regards the TIW document, would be an invitation to uncertainty; which cannot be allowed in these proceedings which are penal in nature.

The importance of avoiding uncertainty must also have been recognized as evidenced by the express introduction of the prohibitory words on the 30th October in "modification" of the wording of 29th October.

For all those reasons, I conclude that the Order of Graham J. of 19th July 2001 had lapsed on the 29th October 2001 before any of the matters which could have constituted breaches of it occurred on the 31st October, 1st November or 2nd November 2001.

I proceed on the basis that liability here for contempt can arise therefore only in respect of the Orders of Sanderson J.

Mr. Dantas' breach

The plaintiffs have adduced no evidence that allows me positively to attribute notice of the full terms of Justice Sanderson's final Order to Mr. Dantas and contrary to his version of events, dubious though they may be.

It is trite law that the burden of proof that a respondent did have the requisite notice of the full terms of an order is upon the applicants: Churchman v Joint Shop Steward's Committee of the Workers of the Port of London [1972] 3 All. E.R. 603 at 606 b-c. And the standard of proof that he did have that notice is to the criminal standard (ibid; at letters g –h).

Unlikely though I regard it, Mr. Dantas' unrefuted evidence is that he was told on the 29th October only of the permissive nature of the Order as orally delivered.

And, while I do not accept it, his evidence is that even after the telephone call of the 7th November 2001 (between Mr. Bolton and Miss Silva) he was not himself informed of the prohibitory terms of the Order until November 16th 2001. As the Chief Executive Officer, he says he was simply not available to be earlier advised by Miss Silva and that by 12th November 2001, the urgency had passed in any event because the offending publication had been removed from the website.

My disbelief of his evidence on this issue in the final analysis, does not, however, become proof positive to the contrary.

Even though I conclude that Mr. Dantas ought to have been aware - from the very nature of the issues joined at trial before Sanderson J. - that his admitted publication of the TIW document would be in breach of the Order; the law is settled that it is only when an order of the Court has been made clear and unambiguous in its terms and actually brought to his attention, so that the person bound can determine with precision what he can or cannot do, that the order can be relied on for the purpose of a committal motion for contempt. See Seaward v Patterson (supra) and City of London Magistrate's Court ex p Green [1997] 3 All E.R. 557,per Scott Baker J at 558g.

Despite Mr. Dantas' undoubted knowledge and understanding of the nature of the issues joined before Sanderson J; the law also stipulates that a person bound should not have to cross – refer to other materials or circumstances to establish his precise obligation under an order. See Rudkin-Jones v Trustee of the Property of a Bankrupt [1965] 109 Sol. Jo 334 where Lord Upjohn said that he must protest as strongly as he could against the making of an injunction which meant that the person enjoined had to look at another document to see what it was he was enjoined from doing and that: "It could not be too clearly understood, that a person should have to look at and only at the order to see what it was that he was enjoined from doing - -". See also Arlidge , Eady and Smith in Contempt 23rd Edition, 1999 at paragraph 12 – 50.

When his potential liability is considered in terms of his position as the Chief Executive Officer of the Companies, the requirements of proof against Mr. Dantas are no less strict. On the true construction of GCR Order 45 Rule 5 - under which a director or other officer of a company may be committed or have his property sequestrated where the company disobeys an injunction (or other prohibitory order) - such a person is not rendered liable

in contempt merely by virtue of his office or his knowledge that the order sought to be enforced was made, but will only be liable if he can otherwise be shown to be in contempt under the general law of contempt. Accordingly, absent proof of mens rea or actus reus, such a director or other officer of a company will not be liable in contempt. See Director General of Fair Trading v Buckland and another [1990] 1 All E.R. 545, a persuasive and clear judgment at first stance of the Restrictive Practices Court which has come to be authoritatively cited on the principles it states by the editors of the Supreme Court Practice 1997 Ed. at p754.

This position has since however, come to be tempered by the views expressed by the English Court of Appeal in A.G. for Tuvalu v Philatelic Distribution Corp. Ltd [1990] 2 All E.R. 216. There Woolf LJ, explained that that decision of the Restrictive Practices Court was in a case where there was no finding of culpable conduct against a director and it was not to be assumed that it is only where a director has actively participated in the breach of the order,that there could be basis for his committal or for sequestration of his assets under the Rules of Court. The Court of Appeal held that where a company was enjoined by a court not to do certain acts and a director of the company was aware of that order, he was under a duty to take reasonable steps to ensure that the order was obeyed and if he wilfully failed to take those steps and the order was breached; he could be punished for contempt, unless he reasonably believed that some other director or officer of the company was taking them.

In the result and notwithstanding that position in law, while Mr. Dantas was aware that an order was made on the 29th October and was no doubt able to understand and surmise from the issues joined at trial before Sanderson J. what would be the implications of the

final Order; I might not conclude that he personally had actual notice of its final terms with sufficient precision for the purposes of a motion for committal for contempt. I accord him the strict benefit of the doubt and refuse the motion for his committal and for sequestration of his assets.

Notice and the Companies

The matter of notice of the precise terms of the final Order is also the crucial issue where the Companies are concerned.

In light of my earlier finding above that they had notice no later than 7th November, the remaining issue is whether notice might be attributed to them at any time earlier, in particular before the admitted breaches were committed on the 1st and 2nd November 2001. (The breach on 31st October by the filing of the criminal complaint being that of Mr. Dantas personally).

As the Companies were not represented by any of its officers, servants or employees before Sanderson J on either the 29th or 30th October, the issue then becomes whether the Companies might be deemed to have had notice through the presence of their legal representatives. This in particular, for present purposes, would have been on the 30th October when the prohibitory terms of the final Order were made express.

The legal context is set by the Grand Court Rules Order 45 Rules 5 and 7. I set these out here in relevant part:

> 5. (1) Where -
>
> (a) a person is required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time, or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act;

then, subject to the provisions of these Rules, the judgment or orders may be enforce by one or more of the following means, that is to say –

(i) with the leave of the Court, writ of sequestration against the property of that person;
(ii) where the person is a body corporate, with the leave of the Court, a writ of sequestration against the property of any director or other officer of the body;
(iii) an order of committal against that person or, where that person is a body corporate, against any such officer

\- - -

7. (2) Subject to - - - paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless –

(a) a copy of the order has been served personally on the person required to do or abstain personally from doing the act in question; and
(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act.

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1), (ii) or (iii) unless -

(a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of sequestration or against whom an order of committal is ought; and
(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.

(4) There must be indorsed on the copy of an order served under this rule a notice informing the person on whom the copy is served -

(a) in the case of service under paragraph (2) that if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and
(b) in the case of service under paragraph (3) that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

(6) An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either -

(a) by being present when the order was made; or

(b) by being notified of the terms of the order, whether by telephone, telegram or otherwise

(7) Without prejudice to its powers under Order 65 rule 4[(to make orders for substituted service)], the Court may dispense with service of a copy of an order under this rule if it thinks fit to do so."

These rules govern the methods for enforcement by the Court of its judgments or orders in circumstances of disobedience or non-compliance amounting to a contempt of Court. Where the breach involves damage to the interests of a party to an action in which the judgment or Order is made, two distinct concerns arise. The matter becomes one in which there is liability by way of penal sanction for the disobedience or non-compliance, as well as one in which there is the substantive interference with or obstruction of the due administration of justice in the particular cause or another.

It is this distinction that gives rise to what have come commonly, if somewhat misleadingly, to be regarded as the two branches of the law of contempt: criminal and civil. The distinction may be misleading because the same criminal burden and standard of proof apply to both branches and in both, the imperative of compelling obedience to orders of the court in the interests of justice applies. It is the case though, that the criminal contempt is actionable in the public interest in the due administration of justice in ensuring that the judgments and orders of Court are obeyed; whereas the latter, the

civil, is actionable at the instance of the party improperly affected by the breach, by complaint to the Court. See A.G. v Newspaper Publishing Plc [1988] 1 Ch 338 at 362. This latter is the nature of the present proceedings. It will nonetheless be important to bear in mind when any appropriate sanction is to be considered, that in either branch the wider interests of justice remain an imperative and penal sanctions can apply. See also the Grand Court Rules Order 52 Rule 9.

As a matter of the application of the Rules of Court, it is also important to note the distinction between prohibitory and mandatory orders – the former prohibiting an act, the latter mandating that an act be done.

The order which is now in issue, the final Order of 30th October, is an order of the prohibitory type. The mandatory orders also later made by Sanderson J on 16th November about which complaints of breach are also raised in the notice of motion, will be dealt with in due course.

The remedies available against a contemnor company doubtless include sequestration against its assets (as distinct from against those of its controlling officers). See Rules of the Supreme Court (upon which the Grand Court Rules are based) at the Notes to Order 45 Rule 5 at page 754 (1997 Edition):

> "Enforcement against body corporate – the remedies under this rule for enforcement of a judgment or order against a body corporate are (1) by writ of sequestration against the corporate property of that body (2) by writ of sequestration against the personal property of any director or other officer of the body; and (3) by an order of committal against any director or other officer of that body".

As to the alleged breaches of the final Order, for reasons of Mr. Dantas' acquittal already explained, the only civil remedy remaining to be considered would be sequestration against the corporate property of the Companies.

In summary, the Rules set out above make explicit the conditions precedent to enforcement of an order. Where appropriate, as in the case of a mandatory order, they provide for the time within which the notice must be served and complied with and again in the case of mandatory orders, the terms of the penal notice to be attached.

For present purposes, however, it is important to consider the Rules which allow the Court to proceed to enforcement of a prohibitory order in the absence of actual service of notice of the order.

It is of immediate significance that GCR Order 45 Rule 7 (6) permits, in the case of an order requiring a person to abstain from doing an act - a prohibitory order - enforcement of the order although the order may itself not have been actually served. This is only if the person to be bound by it was present when the order was made. The import of this sub-rule being that actual notice may be deemed to have been taken of the order by being present when it was made.

The question then becomes as submitted by Mr. Trace on behalf of the Companies - whether there appears any reason why actual notice of the order should not be deemed to be had by a company which is present when it is made, as it would be had by an individual who is present.

The kinds of mischief addressed by prohibitory orders is so legion in my view, that it could often defeat the ends of justice to first require notice by actual service, presence

notwithstanding, before such orders might be enforced. This is no doubt the reason for the sub-rule.

How then is a corporation to be regarded as being present?

The normal principle is that a corporation can only pursue litigation by being represented by its legal advisors. Only in exceptional circumstances will a corporation be allowed for those purposes to be represented by its officers or employees. The normal principle is recognized in the Rules of Court. In GCR Order 12 Rule 1 (2), it is provided that apart from acknowledging service of a writ and giving notice of intention to defend, a corporate defendant may take no step in a writ action otherwise than by an attorney. And more generally, GCR Order 5 Rule 6 (2) provides, that except as expressly provided by or under any law, a body corporate may not begin or carry on or defend any proceedings otherwise than by an attorney.

These are rules of considerable antiquity embracing the practice of the Courts for more than a century. See Re. L.C.C etc. (1897) 13 T.L.R. 254 and Scriven v Jescott (1908) 53 S.J. 101 (both cited at R.S.C. 1997 Edition page 30).

These are rules which are rarely waived having, as they do, their basis in fairness and common sense. So observed Sir Thomas Bingham MR in delivering the judgment of the English Court of Appeal in Radford v Freeway Classics Ltd [1994] 1 BCLC 445.

He further explained (at 448 f-h):

> "It is worthy of note that the provisions which I have cited from the rules which require corporations to appear through solicitors are not merely rules for the sake of having rules but rest on a basis of fairness and good sense --.
> A limited company, by virtue of the limitation of the liabilities of those who own it, is in a very privileged position because those who are owed money by it, or obtain orders against it, must go empty handed away if the corporate cupboard is bare. The assets of the directors and shareholders are not at risk.

> That is an enormous benefit to a limited company but it is a benefit bought at a price. Part of the price is that in certain circumstances security for costs can be obtained against a limited company in cases where it could not be obtained against an individual, and another part of the price is the rule that I have already referred to that a corporation cannot act without legal advisors. The sense of these rules plainly is that limited companies, which may litigate with them, should be subject to certain constraints in the interests of their potential creditors".

This dictum is as important for all it implies as it is for all it expresses.

As I understand it, the principle is not simply that a company which is represented by and therefore can afford legal representation will also likely be able to satisfy a judgment debt obtained by its creditors. That may or may not be the case.

More importantly, what is implied I believe, is that as attorneys also owe public duties as officers of the Court, the Court can more readily assume that corporations who are represented by attorneys, are more likely to conduct themselves in a responsible manner in relation to litigation before the Court.

This consideration is itself very complex but an elemental example which can readily and appropriately be identified here, would be an undertaking in damages of the type so often given to the Court by an attorney on behalf of his client. So special is the nature of his obligations owed to the Court, that an attorney who causes a worthless undertaking to be put before the Court (even without mala fides) may find himself liable in costs and damages. See for instance Schmitten v Faulkes [1993] W.N. 64 or R.S.C. 1997 Edition p510. The duty of vigilance such an obligation imposes upon an attorney in no way diminished when he makes representations on behalf of a client corporation.

The House of Lords in Tritonia Limited and others v Equity and Law Life Assurance Society [1943] 584 enforced the rule requiring representation by its counsel, when the appellant corporations sought to be represented by someone (who happened only

incidentally to be a solicitor) appointed as an agent by resolutions of their boards for the purpose.

Viscount Simon L.C. explained the reasons for the rule in the following terms which are also as important for all they imply as they express:

> " Such a rule, limiting a right of audience on behalf of others to members of the English or Scottish or Northern Irish Bars, secures that the House will be served by barristers or advocates who observe the rules of their profession, who are subject to a disciplinary code, and who are familiar with the methods and scope of advocacy which are followed in presenting arguments to this House".

In the context of litigation before the court, it must surely be a further important if implicit aspect of the professional duties, that attorneys will fulfill their obligations owed to the court and their client; by ensuring that their client has actual notice of orders of the court and understands their meaning.

In this case, I think it must be against all that background of the nature of the relationship between an attorney, the court and the client; that one might fully appreciate the significance of the rule that requires representation of a corporation by an attorney.

The Rule is to ensure that for all purposes of litigation before the court, a party who is a corporation is as fully bound by the rules of litigation and the orders of the court as any other party who might be present in person or present with an attorney.

Otherwise, it seems to me, just the sort of unfair advantage deprecated by Lord Justice Bingham MR in Redford v Freeway Classics (above) would likely result.

Otherwise, while the Rules of Court require corporations to be represented by an attorney, corporations would argue as do the companies here; that because they were not also represented in court by an officer or other member from within the corporate faculty, they are not bound by the consequences of the Court's deliberations.

In effect, to put it bluntly, that a corporation's attorney must be deemed to speak on its behalf, but not deemed to listen or hear.

The avoidance of such an illogical and unfair outcome appears to have been the imperative that led Neville J. almost a century ago, to conclude that a motion to sequestrate its assets which is the only remedy against a company which disobeys a prohibitive order of the court, will not be invalidated by reason of the order disobeyed not having been personally served upon the company, although duly served upon the solicitors of the company: Aberdonia Cars Limited v Brown Hughes & Strachan Limited [1915] 59 S.J. 598.

That decision was criticised before me as being only at first instance, unreasoned and tersely expressed.

While being concise, it has none the less, stood the test of time, not having been overturned and is authoritatively cited on the point it decides in at least one leading textbook: Arlidge, Eady & Smith on Contempt Sweet & Maxwell 1999 Edition pp742 and 744.

The following passage from page 744 illustrates quite clearly the practical significance of the Rules of Court as they differingly apply in respect of a company itself and to individual respondents who are officers of a company:

> "Although in the case of a company service of an order may generally be effected by serving solicitors [(citing Aberdonia)] special provisions apply where it is sought to enforce a judgment or order against a corporation by means of an order for committal of an officer or sequestration of his assets. Before either of these remedies may be obtained it must be proved that personal service has been effected on the officer concerned _ _".

Having regard to first principles, I am persuaded that the Aberdonia decision is sound.

A corporation is an artificial person and can only act or respond through a real person. In the context of proceedings before the court, for reasons already discussed, apart from exceptional circumstances not presented here, that can only be through its lawyer.

I adopt Justice Neville's dictum bearing also in mind that it was given at a time when personal service of notice of a binding order was indispensable.

He held that that could be achieved in the case of a corporation by service upon its lawyers.

Then, the exception in the modern Rules - GCR O.47 R. 7(6) - which deems notice by virtue of presence in court when the order is made, did not exist.

Here the logic of Justice Neville's dictum assists with even greater force: If personal service upon a company such as binds its corporate consciousness can be deemed by virtue of service upon its lawyer, I can see no reason why personal service ought not to be deemed, in terms of the modern rule, by virtue of its presence through being represented by its lawyer. Indeed the position is, in my view, a fortiori.

When the principles are examined in that light, the cases most strongly relied upon by Mr. Trace on behalf of the Companies are besides the point.

In Re Tuck [1906 Ch. 692 is an even more longstanding decision of the English Court of Appeal which laid down the following principles (as taken from the headnote):

> "A writ of attachment will not usually be issued against a trustee for disobedience of an order directing him to pay money into court unless the order has been personally served upon him. The fact that the order was made by consent, and that he was in court when it was made and initialled one of the briefs, will not make personal service unnecessary unless it is shown that he is evading service".

There is no conflict between this decision and that in Aberdonia (supra) which followed it and in which Neville J. cited and distinguished this decision. Given the state of the Rules

of Court at that time, it may well have been strictly correct that before criminal liability by way of contempt could be visited upon an individual trustee *in personam*; proof of actual service of the binding order was a prerequisite; his presence when it was made notwithstanding.

The question in Aberdonia by contrast, was what should be regarded as effective personal service upon a person which is a corporation and that as we have seen, was held to be service upon its solicitor.

When being considered now, In Re Tuck must, moreover, be viewed in the light of the modern rules which exceptionally allow liability to be attached where presence at the time of the order is established. There can be little doubt that upon its facts, In Re Tuck would be now decided differently under the modern rules.

The decision of the Divisional Court in Ex parte Green (supra) is also besides the point in this case.

There the primary issue was whether motions for committal for contempt could succeed against the Director and other officers of the Serious Fraud Office in their personal capacities even though they were not present when the order with which there had been non-compliance was made.

Following the well established principle that a defendant must first have personal notice of the order and of what it requires in clear and unambiguous terms, the Court refused the motions for committal.

While observing that the Director in his official capacity as the head of a statutory body could be liable if properly served, the Court – per Scott-Baker at page 558a – j – also noted that the Serious Fraud Office was not a corporation.

The notice of motion had alleged personal liability against the Director and the other officers only two of whom had even seen the order before the alleged breach. The Director and one other did not even know about it. The case was thus one dealing with the requirements of proper notice and service of an order upon persons in their individual capacities who were not present when the order was made and provides little assistance in circumstances where a defendant particularly a corporate defendant, is present when an order which has been breached was made. I conclude that there is nothing in the case law that precludes my reliance upon the principle in the Aberdonia case, about which I am persuaded. I conclude that GCR Order 45 Rule 7 (6) - which allows notice to be deemed by the presence of the person to be bound - applies equally to a corporation present by its attorney as it would to any other party present in person. Here this means that the Companies had notice of the final Order both by being present by Mr. Bolton when it was delivered on the 30th October and by service of it in writing (as perfected by Sanderson J.) upon Mr. Bolton at the same time. Thus, the Companies acted with notice of and in knowing breach of the final Order when they caused the publication of the TIW document on the World Wide Web on the 1st November 2001. They so acted when they caused the extension of that publication on 6th November 2001. The same conclusion holds in relation to their extensive use of reference to the TIW document in the paid publication in *O Globo* on 2nd November 2001. Mr. Trace submitted that that publication was for "the purposes of the proceedings" in Cause 389 of 1999 and so was not in breach the final Order.

I am unable to accept that. As I observed during the arguments, the acceptance of such a proposition would be acceptance of the notion of trial in the media as appropriate - the very mischief which the sub judice rules deprecate and which the subsequent "gagging" orders sought to prevent by reinforcing the final Order. The publication in *O Globo* I also hold to have been in breach of the final Order.

I emphasise that in concluding as I have and contrary to Mr. Trace's submissions; I find the Companies to have been bound by *actual* notice by their presence, not *constructive* notice.

Far from thereby creating a disadvantage for companies because their attorneys would not usually be among those persons who are their directing minds, this conclusion avoids the mischief of having to establish in the case of companies; special proof of knowledge even in like circumstances where individual defendants would be bound by being present. Even though a company may be represented only by its attorneys, the further requirement that some individual from within its governing body must also be present before the modern Rule 7 (6) might apply to bind it, would mean that that rule could only apply to a company where it chose to be so represented. If it chose not to, an order could bind a company only when it is actually served upon it.

That would be contrary to the public interest in ensuring that corporate litigants are at least as amenable as other litigants to the Rules of Court.

Intention and Motive: responsibility for breach

A number of cases were cited in the arguments on this issue, some dealing with breaches of undertakings and others with breaches of prohibitory and mandatory orders.

Mr. Black sought to rely upon them to show, in particular, that corporate defendants will be vicariously liable for breaches of orders or undertakings committed by their officers or employees whether or not the act in breach was expressly authorised by the corporations. As Warrington J. said in Stancomb v Trombridge Urban District Council [1910] 2 Ch. 190 at 194:

> In my judgment, if a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order. I think the expression "wilfully" [(in the old Rules of the Supreme Court)] is intended to exclude only such casual or incidental or unintentional acts as are referred to in Fairclough v Manchester Ship Canal Co. [(1897) 41 Sol. Jo 225)] --.
>
> In my opinion, further, the act need not be done by the person himself. In the case of a corporation it cannot be done by the corporation itself, at any rate in the case of such a corporation as an urban district council.
>
> Such a body can only act by its agents or servants, and I think, if the act is in fact done, it is no answer to say that, done, as it must be, by an officer or servant of the council, the council is not liable for it, even though it may have been done by the servant through carelessness, neglect or even in dereliction of his duty".

This principle was most recently reaffirmed in the House of Lords in Re The Supply of Ready Mixed Concrete (No. 2) [1995] 1 A.C. 456 where Lord Nolan at page 481 concluded:

> "Given that liability for contempt does not require any direct intention on the part of the employer to disobey the order, there is nothing to prevent an employing company from being found to have disobeyed an order "by"

> its servant as a result of a deliberate act on its behalf. In my judgment the decision in *Stancomb's* case is good law and should be followed in the present case".

If Lord Nolan's analysis is to be of general application (as at least one leading textbook submits it should be: Borrie and Lowe, the Law of Contempt 3rd Ed. Butterworths 1996 at page 570) - corporate bodies will be considered to be in contempt if the terms of an injunction made against them are broken by a deliberate act of their agents or servants while acting within the course of their employment; regardless of whether the act in question was authorised or even expressly forbidden by the corporation.

If so, it seems the only defence then would be one in mitigation where the breach was either casual, accidental or truly unintentional; as not meriting being met with the full rigours of the law. As Lord Russel CJ said in Fairclough & Sons v Manchester Ship Canal Co. (No. 2) 41 Sol. Jo 225:

> "Where the court is satisfied that the conduct was not intentional or reckless, but merely casual and accidental and committed under circumstances which negative any suggestion of contumacy, while it might visit the offending party with costs and might order an inquiry as to damages, it would not take the extreme course of ordering either of commitment or of sequestration".

Although Fairclough and numerous cases that followed it - many discussed in Heaton's Transport St. Helens Ltd. [1973] AC 15 at 109 - were decided in the context of the requirement under the old Rule of Court that the breach by a corporation had to be shown to be "wilful", it appears that the practice has not changed even though the modern rules make no mention of the requirement of wilfulness. This is said to be attributed to dicta of the House of Lords in the Heaton's Transport case expressly approving the Fairclough line of cases. See Borrie and Lowe op cit. at page 568.

In Heaton's Transport at page 109 H Lord Wilberforce did, however, explain that the continued practice notwithstanding, liability will be attached where the breach is shown:

> " There (in the modern rules) the word "wilful" before "disobeys" has been omitted. Any effect which that omission may have (for instance perhaps by reducing the applicant's burden of proof to establish a prima facie case) cannot be in favour of the party who has disobeyed the order."

Thus, where lack of contumacy is shown, the issue becomes one of mitigation, not one of liability.

In the case before me, I am unable to accept that the breaches were either casual, accidental or unintentional.

They have certainly been proven beyond any reasonable doubt.

The breach by publication on the WorldWide Web must be considered against the background of the "ongoing feud" and of the high-stakes campaign over control of the Brazilian investment entities. Similarly, the use by the companies of the references to the TIW document for the purposes of the paid publication in *O Globo* on 2nd November 2001.

While the imbroglio in Brazil has resulted no doubt from abuses committed by the TIW/DeMarco interests as well, I am unable to accept the rather palliative and anodine explanation of Mr. Dantas, to the effect that the breaches were unintentional and that the only objective was to counter the misinformation about the proceedings published in *Journal do Brasil* on the 1st November 2001.

And the fact that I have found that Mr. Dantas is not himself to be personally fixed with notice of the prohibitory terms of the final order when the breaches were committed, does not avail the Companies.

I do not accept his account for the purposes of lifting the evidentiary burden upon the Companies to displace the proof of knowledge which is deemed by virtue of their presence by their attorneys. That prima facie proof stands and here I must reiterate my concerns expressed during the arguments: That the Companies chose to answer the Notice of Motion by reliance only upon the evidence of Mr. Dantas much of which was hearsay and which although admissible in interlocutory proceedings, I found to carry little weight when the persons actually involved – notably Mr. Bolton, Miss Dantas and Miss Silva – could readily have testified. In the case of Mr. Bolton, no question of privilege arose; the clients, through Mr. Dantas, having chosen to testify about the communications in question. See Phipson on Evidence 14th Edition paragraph 20 – 36, page 524.

And I may not pass from this matter without expressing the other proper concern of this Court: I wish for it to be clearly understood that I do not regard the position taken by Mr. Bolton as an officer of this Court in this matter as acceptable.

The alleged breaches of the Order of the 16th November 2001

This Order contained two provisions which arose for consideration upon the Notice of Motion and which may be described as reinforcing the final Order of 30th October 2001.

- In paragraphs 1 and 2 Sanderson J expressly prohibited any further publication of the TIW document on the WorldWide Web and restrained the Companies from making any further use whatsoever of it other than in Cause 289 of 1995, without first obtaining leave of the Court.

- By paragraph 3 Sanderson J further ordered that there be no publication of the facts and details of the Cayman Islands proceedings between the parties. This is referred to the "gagging" order.
- He also directed by paragraph 4, the Companies to publish forthwith in the same manner and for the same period of time as the Clarifying Note was published, the orders contained in paragraphs 1,2 and 3 above preceded by the following introductory words:

> "We have been ordered by the Grand Court of the Cayman Islands to publish the following order it has made".

This Order being both mandatory and prohibitory in nature was endorsed with a penal notice in the following terms:

> "Disobedience of this Order is a contempt of Court punishable by sequestration of the assets of the Defendants and imprisonment of any individual responsible".

It is also endorsed as to form and context by the attorneys respectively for the parties. The attorneys were present when it was made. There is however, an issue whether at all material times Mr. Dantas and the Companies had the requisite notice of this order in so far as it contained mandatory terms.

It is said that this order as endorsed with the penal notice was not actually served upon Mr. Dantas and the Companies until 30th November 2001. Moreover, it is said that this aspect of the order being mandatory in terms, failed to comply with GCR Order 45 Rule 5 (1) in that no time for compliance was specified. The Order simply required compliance "forthwith".

Perhaps because of this apparent deficiency and the alleged deficiency of service of notice and perhaps because of lack of proof, the allegations in the Notice of Motion that there had been a contemptuous failure by the Companies to comply with paragraph 4 of this Order (the mandatory terms) were abandoned by the applicants.

I need not and therefore make no finding on those allegations in the Notice of Motion.

Although on the basis of GCR Order 45 Rule 7 (6), notice of the prohibitory terms of the "gagging" order (paragraph 3) need not have awaited actual service of the order, I can briefly dispose of the alleged breach of it as well.

There simply is no evidence to prove to the required standard that - as alleged in the Notice of Motion – on a date unknown prior to 23rd November 2001 and after the gagging order was made, the Companies, their servants or agents provided copies of the written judgment and the final order in Cause 398 of 2001 (this action) to a certain Brazilian businessman and to the press.

A publication on 23rd November 2001 by *Isto E Dinheiro*, a Brazilian weekly finance magazine, may well have been the result of those documents being provided to its editor Mr. Leonardo Attuch, by the public relations agency of the Companies. However, this occurred according to Mr. Dantas, on 14th November 2001, two days before the gagging Order of 16th November 2001 and there is no evidence to refute this account or otherwise to attribute publication either to Mr. Dantas or the Companies.

I therefore refuse the Notice of Motion in so far as it cites breaches of the Order of 16th November 2001.

Sanction for breach of the final Order of 30th October 2001 by the Companies

The remedy sought by the applicants is leave to issue a writ of sequestration against the assets of the Companies.

Chitty J. said in Pratt v Inman (1889) 43 Ch. D. 175 at 179 that "sequestration was and is a process of contempt" and as such that writ is normally only available as a means of enforcing a coercive order against someone who has committed a contempt by disobeying the order.

This view was latterly reinforced by the decision of the English Court of Appeal in IRC v Hoogstraten [1984] 3 All E.R. 25 in holding that sequestration only lies against a person who is actually in contempt. In that case, it was held that a writ of sequestration had been wrongly issued because Hoogstraten had made good his breaches of a mareva injunction and had apologized.

With the foregoing judicial dicta in mind, further brief word must be noted about the true nature and purpose of a writ of sequestration. This is best done also by reference to dicta from some decided cases which I adopt as set out in the text of Borrie and Lowe op cit at 606 – 607.

In Can-mech Ltd v Amalgamated Union of Engineering Workers [1993] 1 Cr 620 at 627, Sir John Donaldson MR said:

> "A sequestration order is quite different from a fine. If someone is fined the money is lost to him forever. If his assets are sequestrated the money remains his but he cannot use it. The money stays in the sequestrator's possession until the Court orders what shall be done with it. The man can come to the Court at any time and ask for money to be returned to him, but if he does so the Court will require some explanation of his conduct".

In an Australian case, Australian Consolidated Press Ltd v Morgan (1965) 112 CLR 453 at 501, Windeyer J is said to have described the writ thus:

> "When the property of a contemnor is actually sequestrated and held under sequestration it is not confiscated. The contemnor is deprived of the enjoyment of his rents and profits [(where the property is kind)] for the duration of the sequestration, but he does not forfeit his property in them. When whatever is considered necessary to clear the contempt has been done, the sequestration is discharged by the order of the Court: and the sequestrators must then give up possession on having their costs and expenses".

In this case, the contempt is not shown to be ongoing by reference to any further or continuing breach of the final Order or of the Order of 16th November 2001 by the Companies. Mr. Dantas has apologized to the Court on behalf of the Companies in anticipation of and to the extent of any finding of contemptuous breaches of the Orders. On the basis of the foregoing dicta, and in the present circumstances I turn to consider whether a fine and costs would be the appropriate sanction.

In a case involving a wilful disregard and disobedience of an order but which breaches were remedied before the hearing, Stamp J held that liberty to issue a writ would not be granted but the defendant Company would be fined and ordered to pay the plaintiff's costs: Steiner Products Ltd. V Willy Steiner Ltd [1966] 2 All E.R 387. That learned judge was in that case notably concerned to avoid sequestration of the company's assets as that would also have adversely affected the livelihood of innocent parties (at page 390 letter i).

In this case, I also take account of the following factors which Mr. Trace urged me to:

(i) the breaches were committed after the applicants had themselves (ie: the TIW interests) arranged for the publication of the commentary in *Journal do Brasil* referencing the TIW document.

(ii) Mr. Dantas' assertion that the TIW interest had earlier, through Mr. DeMarco, released the TIW document for publication in *Carta Capital* which has not been refuted.

Those are factors which to my mind go to show that while this is a motion for contempt of the civil kind, a purely civil sanction intended for the benefit of applicants who have themselves been prepared to dispense with the confidentiality of the document which the Orders are intended to protect, would not be appropriate.

I am also concerned here, with the consequences which a writ of sequestration to any significant extent against their assets, would carry for the Companies which are publicly traded and whose ordinary investors must themselves therefore be entirely innocent of the breaches committed by the Companies. For the foregoing reasons, I conclude that the writ of sequestration would be inappropriate and leave for its issuance is refused.

Instead, I impose a fine in the amount of $100,000 dollars to be paid in equal amounts of $25, 000 by each of the Companies.

While reduced to reflect the mitigating circumstances, the fine is intended to be significant enough to attract the attention and scrutiny of the Brazilian regulatory authorities and of the public investors.

The Companies and Mr. Dantas personally (having regard to his admitted if unknowing breach of the final Order) will also pay the applicants' costs of this application, to be taxed if not agreed, on the indemnity basis. Mr. Dantas will be personally and severally liable for one-fifth of the costs; the Companies jointly and severally liable for the remainder.

Summary of Conclusions

1. As of the 29th October 2001, the order of the 19th July 2001 of Graham J no longer governed the TIW document.
2. While intended to prohibit the use of the TIW document for all other purposes and for any other proceedings besides in Cause 389 of 1999, the Order of Sanderson J made on the 29th October 2001 did not expressly so state until in its final written form as signed and delivered him on 30th October 2001.
3. While not accepting his evidence that he had no notice of the full meaning and effect of that Order until 16th November 2001; there is no positive proof that Mr. Dantas was served or otherwise notified of its terms prior to that time. He was not present in court on either the 29th or 30th October 2001. He none the less acted personally in breach, even if unwittingly, of the final Order when he caused the TIW document to be filed in support of the criminal complaint on 31st October 2001.

   He is discharged on the motion.

   Even if it may not now be within his ability to remedy that breach, it must be within his ability to mitigate the possible harm. I regard him as obliged to do so having acted in breach of an order of this Court.

   He is required within 10 days of the approval of a draft by this Court, to write a letter to the Brazilian authorities with whom he filed or caused to be filed the criminal complaint, in terms which are to be propounded by the applicants for my approval. The intention will be to explain to the Brazilian

authorities that this Court has concluded that the TIW document is a confidential document which was stolen from Mr. DeMarco and that it evidences on its face nothing more than an arrangement for the sharing of the services of attorneys for the representation of the DeMarco/TIW parties in related proceedings before this Court.

This letter from Mr. Dantas, in its original Portuguese and English translation, must be lodged with this Court as having been filed with the Brazilian authorities within the deadline to be stipulated.

A formal order is to be extracted for this purpose backed with a penal notice and service of it upon Mr. Dantas will be deemed effective pursuant to GCR Order 65 Rule 4 and GCR Order 45 Rule 7 (7), by service upon his attorneys, Hunter & Hunter.

4. The Companies were present by their attorneys when the Order was made and finalised respectively on the 29th and 30th October 2001. They were thereby fixed with actual notice of the terms of the Order pursuant to GCR Order 45 Rule 7 (6). For the avoidance of doubt and while no issue to the contrary was raised before me, I state that I regard the 1st respondent's entity as a corporation for all the purposes of the motion for contempt.

5. They acted in breach in causing the publication of the TIW document on the WorldWide Web and in using it for the publication in *O Globo*.

6. The Companies have since however remedied their breaches by the discontinuance of the website publication and no further breaches by publication in the press have come to light.

7. The breaches by the Companies not being obstinate, do not require sanction by the issuance of a writ of sequestration against their property.

8. Instead fines, measured so as to reflect the mitigatory circumstances identified above and to reflect the gravity of the consequences of the contempt, are imposed as stated. Those fines are to be paid into Court within 5 working days of today.

9. The award of the applicants' costs on the indemnity basis is also justified and so ordered.

GRAND COURT CAYMAN ISLANDS

Anthony Smellie
Chief Justice
Dated this 28th day of February 2002