CITATION: Central 1 Credit Union v. UM Financial Inc., 2012 ONSC 889
COURT FILE NO.: CV-11-9144-CL
DATE: 20120208

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: Central 1 Credit Union, Plaintiff

UM Financial Inc. and UM Capital Inc., Defendants

BEFORE: Justice Newbould

COUNSEL: Neil Rabinovitch and Gord McGuire, for Grant Thornton Limited, Receiver

Roger Jaipargas, for the plaintiff

Joel Levitt, for Joseph Adam

DATE HEARD: February 6, 2012

E N D O R S E M E N T

[1] Grant Thornton Limited, in its capacity as Court-appointed receiver pursuant to section 243(1) of the Bankruptcy and Insolvency Act and section 101 of the Courts of Justice Act of all of the assets, undertakings and properties of UM Financial Inc. and UM Capital Inc. ("debtors") seeks an order finding Joseph Adam in contempt of the order of Wilton-Siegel J. dated November 10, 2011 and the order of Morawetz J. dated December 2, 2011.

[2] The orders were made following the appointment of the receiver in an attempt to recover precious metals consisting of gold bars and silver with a value of approximately $2.2 million which the debtors obtained just prior to the receivership order. The silver has been returned to the receiver. However the gold has not. The gold consists of 32 gold bars with a value of approximately $1.85 million.

[3] The order of Wilton-Siegel J. directed that the parties in possession or control of the precious metals deliver possession and control of them by November 14, 2011 to a schedule 1 bank. The order of Morawetz J. directed Mr. Adam and a company said to have been owned by him at the time to immediately provide the receiver with information regarding the location of the precious metals and the contact information for the individuals or entity in possession or in control of them.

[4] The facts surrounding the obtaining and disposal of these precious metals are, to say the least, unusual if not bizarre.

[5] The respondents debtors are federally incorporated companies that provided Shariah compliant residential real estate loans to homeowners secured by property located in Ontario pursuant to "Musharakah Home Financing Agreements – Purchase". There were approximately 172 of such active financing arrangements in the debtors' portfolio at the time the receivership order was granted.

[6] Omar Kalair was the president and CEO of the debtors. The debtors' Shariah Ethics Board, later incorporated as Multicultural Consultancy of Canada Inc. ("MCC"), issued rulings that the MHF Agreements were Shariah compliant. Yusuf Panchbaya was the chairperson of MCC. The transcripts from examinations of Messrs. Kalair and Panchbaya and of Mr. Adams disclose the following:

(a) On March 16, 2011, Central 1 Credit Union, the principal secured lender to the debtors owed in excess of $30 million, commenced an application to appoint a receiver of the property of the debtors. The debtors retained counsel and opposed the appointment of the receiver.

(b) On August 30 in September 2, 2011, Mr. Kalair purchased $1.867 million worth of gold bars from Bank of Nova Scotia with funds from the debtors' bank account. On September 8, 2011, Mr. Kalair purchased silver the valued at $322,343. Mr. Kalair says that he stored the precious metals at his office.

(c) On September 26, 2011 Mr. Kalair, acting on instructions from Mr. Panchbaya, created an invoice for MCC's services to the debtors in the amount of $2,790,000 for Shariah consulting services from 2004 to 2011.

(d) Mr. Kalair says that he was purchasing the precious metals in order to pay the professional fees of the ethical scholars at MCC, notwithstanding that the debtors had never received an invoice and were then defending a receivership application. He also stated that Mr. Panchbaya asked him to make the purchases in gold and silver rather than cash because the Shariah Board did not have a bank account.

(e) On October 4, 2011, by resolution of Mr. Panchbaya as the sole director of the MCC, Mr. Adam was appointed by MCC as Manager-Finance. The resolution was drafted by Mr. Kalair at Mr. Panchbaya's request.

(f) On October 4, 2011, pursuant to Mr. Panchbaya's instructions, Mr. Kalair says that he delivered the precious metals to Mr. Adam during the night at a Shopper's Drug Mart parking lot at Rexdale and Islington. Mr. Adam in his testimony confirmed receipt of the precious metals.

(g) The debtors withdrew their opposition to the receivership on October 6, 2011 and the receivership order was made the next day.

(h) Mr. Kalair said that Mr. Adam returned the silver to him on November 1, 2011 in the parking lot beside his office and later that day Mr. Panchbaya came by and picked it up. Mr. Panchbaya testified that he picked up the silver on November 7, 2011 from Mr. Kalair's office parking lot. He later returned the silver to the receiver.

(i) Mr. Adam said that on November 7, 2011, he left for Egypt with 32 gold bars in his luggage and that the gold bars were to be used to pay Egyptians who had provided some sharia advice to the debtor through him. He said the Egyptians never rendered any accounts or invoices and had provided four one page rulings to the debtor in 2005.

(j) Mr. Adam said that on November 8 or 9, 2011, one day before the order of Wilton-Siegel J. requiring the precious metal to be given to the receiver, he gave the gold to his cousin who distributed it to 20 Islamic scholars.

Test for contempt of court

[7] Notwithstanding its civil nature, civil contempt of court is quasi-criminal and the burden of proof is beyond a reasonable doubt. A three-pronged test is required. First, the order that was breached must state clearly and unequivocally what should and should not be done. Second, the party who disobeys the order must do so deliberately and willfully. Third, the evidence must show contempt beyond a reasonable doubt. See *Prescott-Russell Services for Children and Adults v. N.G. et al*, (2006) 82 O.R. (3d) 686 (C.A.) at paras. 26 and 27.

Analysis

(a) Order of Wilton-Siegel J.

[8] Mr. Adam acknowledges having received a copy of the order of Wilton-Siegel J. dated November 10, 2011. There is no question but that the order states clearly and unequivocally what should be done. It directed that the parties in possession or control of the precious metals deliver possession and control of them by November 14, 2011 to a schedule 1 bank chosen by the receiver.

[9] Mr. Adam takes the position that while he took the 32 gold bars to Egypt, he delivered them to his cousin one or two days before the order of November 10, 2011 and thus cannot be said to be in breach of it. The issue therefore is whether it can be said that Mr. Adam is "in possession or control" of the gold bars that he says he delivered to his cousin.

[10] Mr. Adam was examined under oath in Egypt on February 3, 2012. It was done through Skype. While all that is available is a transcript of the examination, it is quite obvious that what Mr. Adam says needs to be looked at with a healthy skepticism, as it is apparent that he is prepared to be untruthful. On his examination, he at first said that he had been in Egypt since November 7, 2011 when he went there with the gold bars. When asked if he accessed his RBC account in Toronto at the end of November and early December 2011, he said that he did not. However, when shown a photograph of him taken by the RBC security cameras on November 26 and December 1, 2011, he admitted that it was he in the photographs and that he was in Toronto

between those dates. He purported not to remember when he had come back to Toronto or when he then returned to Egypt.

[11] Prior to his examination, Mr. Adam was in communication with his counsel Mr. Levitt and was aware of the court order requiring the gold bars to be returned. He said that he had spoken with a family member, who I take to be the cousin to whom says he gave the gold bars, who told him that there were 10 people who had received one gold bar each who were willing to give the gold bars back. When asked directly whether he was prepared to get those 10 gold bars back from the 10 people who said they would return them, and turn that gold over to the receiver, he replied that family members told him they would guarantee to get the gold from the 10 people, but then said "How about me? I need a guarantee from you." What he meant by a guarantee was a release. When asked directly what it was he was asking for in exchange for the 10 gold bars, he said that Mr. Levitt knew and Mr. Levitt said that Mr. Adam proposed providing the 10 gold bars on condition that he be given a release. In other words, in return for a release, he will deliver 10 of the 32 gold bars.

[12] At one point Mr. Adam said on his examination that he had been told by his family member that if he is safe, they will cooperate. It was suggested that this establishes that Mr. Adam does not unconditionally control the 10 gold bars and that the family member will not cooperate unless Mr. Adam is "safe". I do not accept that. Mr. Adams went on to say that family members were asking him "Are you going to be in trouble?" And his reply was "No. If you give me, I will hand it over, and my lawyer will guarantee a letter for my safety. This is my request." I do not read that as saying that the family members are asking for any guarantee for his safety. If any of his family members are truly concerned about Mr. Adam being in trouble, one would expect that they would quickly do what was required in order for Mr. Adam not to be held in contempt of court and subject to a jail sentence in Canada.

[13] In my view assuming that Mr. Adam gave the 32 gold bars to his cousin who gave them to others, as he says, his evidence amounts to an admission that at least with respect to the 10 gold bars, he has "possession or control" of them. Thus he is required by the order of Wilton-Siegel J. to deliver them to a schedule 1 bank to be agreed by the receiver and MCC. He is in

breach of that order, knowingly so, and has no right to demand any release in return for delivering these gold bars to the receiver. In my view, and I so find, Mr. Adam is in contempt of that order.

(b) Order of Morawetz J.

[14] Mr. Adam acknowledges having received a copy of the order of Morawetz J. dated December 2, 2011. There is no question but that the order states clearly and unequivocally what should be done. It directs that Mr. Adam immediately provide the receiver with information regarding the location of the precious metals and the contact information for the individuals in possession or in control of them.

[15] Until his examination, Mr. Adam never provided the receiver with the name or contact information for the person to whom he says he gave the 32 gold bars. Thus he was breach of the order. On his examination, he gave the name of the cousin to whom he gave the gold bars and the city in which he lived. He was asked to provide an address and telephone number for the cousin, and while he said he would provide that information to Mr. Levitt on the following day, a Saturday, no such information was provided to Mr. Levitt by the time this matter was argued on Monday, February 6, 2012.

[16] On his examination, Mr. Adam was asked to provide the names of the 20 persons to whom the gold bars were distributed in Egypt. He refused to disclose the names because he said he had been told that these persons were working without government consent. He was advised on the record by Mr. Levitt that he was going to have to provide the information because of the court order. Mr. Adam then said that he would "ask the two family members to push it". Later in the examination he said that because his cousin was close to him, he could get this information for the receiver.

[17] Mr. Adams was also asked for the names and contact information for the 10 persons who were prepared to return the gold. He said he would talk to his cousin about it.

[18] It is clear that Mr. Adam has the information required to be provided to the receiver pursuant to the order of Morawetz J. of December 2, 2011. It is no answer for him to say that

someone else does not want him to provide that information. In my view, and I so find, Mr. Adam is knowingly in contempt of that order.

Appropriate punishment

[19] The receiver requests that a committal order be issued requiring Mr. Adam to be imprisoned in Canada until he purges his contempt by delivering up at least the 10 bars of gold that he says are available and providing the receiver with full contact information with respect to Mr. Adam's cousin to whom he says he gave the 32 gold bars and the 20 persons who are said to have been given the gold bars by his cousin.

[20] As Mr. Adam has been found in contempt, rule 60.11 (5) of the rules of civil procedure sets out the orders that may be made, as follows:

> 60.11 (5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,
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> (a) be imprisoned for such period and on such terms as are just;
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> (b) be imprisoned if the person fails to comply with a term of the order;
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> (c) pay a fine;
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> (d) do or refrain from doing an act;
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> (e) pay such costs as are just; and
>
> (f) comply with any other order that the judge considers necessary, and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property.

[21] One purpose of a sentencing for civil contempt is punishment for a breach of a court order. But the main purpose is coercive: to promote compliance with the court's orders. Unlike a criminal case in which incarceration is imposed exclusively as a punishment for prior criminal conduct, incarceration for a civil contempt serves both as a punishment and as an incentive to purge an ongoing contempt. See *Re Chiang* (2009), 93 O.R. (3d) 483 (C.A.) at para. 117.

[22] The principles to be considered in determining an appropriate sentence for civil contempt of court have recently been thoroughly canvassed by Brown J. in *Cellupica v. Di Giulio* (2011), 105 O.R. (3d) 687, and need not be repeated here.

[23] One of the factors to be considered is the gravity of the conduct. In the case of Mr. Adam, it is non-compliance with two court orders. That is a very serious matter. In *Sussex Group Ltd. v. Fangeat* (2003), 42 C.P.C. (5th) 274 Cumming J. stated the following in discussing willful violation of a court order, the sentiment of which I agree:

> 50. It is integral to a free and democratic society like Canada that citizens act pursuant to and under the rule of law. Court orders in force must be respected and followed. The deliberate failure to obey a court order strikes at the very heart of the administration of justice. This includes court orders relating to commercial matters such as in the case at hand. If someone can simply ignore or finesse his way around a court order, it will tend to add uncertainties and risks, with their consequential inefficiencies and additional costs, as well as causing unfairness, with its consequential inequities and additional costs, to the commercial marketplace. It is commonly recognized that the rule of law is essential in a democratic society for the protection of civil liberties and human rights. It should be evident that the rule of law is just as essential for the protection of citizens in their commercial affairs. And just as white collar crime is crime, white collar contempt is contempt.
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> 51. If the remedies a court directs to be put in place through its orders can be ignored with impunity, the road to civil anarchy is close at hand. The thin veil of civilization that cloaks our community through the rule of law is fragile and in need of constant protection.

[24] The failure to return the gold bars and the failure to provide information as to whom those gold bars were given is particularly troublesome in a case such as this in which one may be excused for having considerable skepticism as to whether any of the story makes sense. One must remember that the only hard fact is that the gold bars were obtained with the debtors' money shortly before the debtors agreed to the receiving order.

[25] The receiver has offices in Cairo and would be able to speak directly to the 20 persons allegedly given the gold bars. This no doubt would be of considerable assistance in trying to determine what happened and why it happened.

[26] Mitigation is an issue to be considered. If Mr. Adam were to purge his contempt, that would be a factor to take into account. To date he has shown little willingness to do so. As late as last Friday he for the first time said he would provide certain information to the receiver on the following day, yet he failed to do so.

[27] I do not view the suggested excuses given by Mr. Adam last Friday on his examination as being factors in his favour. It is apparent from his examination that he has information and whether others wish him not to disclose it is of no matter. Mr. Adam did not suggest that he would be in some kind of trouble if he disclosed the information.

[28] I see little purpose in ordering Mr. Adam to pay a fine for his contempt. For certain collectability would be a considerable issue. In my view it is appropriate that Mr. Adam be sentenced to imprisonment for a period of time. I am reluctant to make an order of the kind sought by the receiver that Mr. Adam be incarcerated indefinitely until he purges his contempt. Taking into account all the factors relevant to this case and considering other sentencing cases for civil contempt, in my view an appropriate period of incarceration is six months.

[29] The receiver has offices in Cairo where Mr. Adam can deliver whatever gold bars he has access to in Egypt, which would be at least the 10 gold bars that he says he can deliver to the receiver. The contact information for the receiver in Cairo is

> Grant Thornton International, Cairo
> Grant Thornton Mohamed Hilal
> 87 Ramsis Street (in front of the telecom building), Cairo,
> Contact: Mr. Amr Fathalla, Mobile: 011 20 12-218-2726; Main Office:
> 011-20-2-2574-4810

[30] The information required to be provided to the receiver can be provided to the receiver through Mr. Levitt. It can also be provided to the receiver in Cairo.

[31] In the circumstances, the sentence I impose is that Mr. Adam be incarcerated for six months upon his arrival, or being found, in Canada unless within seven days he completely purges his contempt. If he does not so purge his contempt, an appropriate Form 60 L shall be issued directing that he be imprisoned for a period of six months following which he is to be

returned to this Court to appear before me upon his release from custody. Mr. Adam will not be eligible for parole before the conclusion of his six months of imprisonment.

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Newbould J.

DATE: February 8, 2012