THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2013-00972

IN THE MATTER OF PEARL JOB, PENSIONER OF NO.93 MT. GOMERY LOCAL ROAD, TOBAGO IN CONTEMPT PROCEEDINGS ARISING OUT OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM by her Daughter and next of friend HEATHER JOB also of No.93 Mt. Gomery Local Road, Tobago

CONTEMPT PROCEEDINGS

BETWEEN

PEARL JOB

Claimant

AND

THE TOBAGO REGIONAL HEALTH AUTHORITY

Defendant

Before The Hon. Madam Justice C. Gobin
Appearances:
Mr. M. George for the Claimant
Mr. R. Thomas for the Defendant

JUDGMENT

1. This is an application for commital for contempt of court. Before I proceed to rule on it, I find it necessary to recount some of the history which preceded it. The case began with a writ of habeas corpus.

The Application for Habeas Corpus

2. Late on the evening of 8th March 2013 I considered an exparte application made on behalf of the claimant by Heather Job, her daughter, and granted an order for the

production of Mrs. Pearl Job, at the Scarborough High Court, at noon on the 11th March 2013. I shall refer to the daughter by her name 'Heather' to avoid confusion. I mean no disrespect.

3. In her affidavit in support of that application, Heather detailed her 85 year old mother's history of very ill-health, which had led to several periods of hospitalization, first at the Scarborough General Hospital and then at a facility called the Geriatric Unit. Both of these institutions are run by the Defendant. She made several complaints about the level of care which her mother received at both places, but in particular very serious ones were made about the conditions under which she was being kept at the Geriatric Unit. Heather went so far as to say that the place which served as the Geriatric Unit's home, is described by locals as "Tobago's Secret shame". It must be said at this point, that the allegations as to the conditionS and the substandard level of care and treatment have been strenuously denied by the defendant since the first hearing.

4. While I was naturally very concerned about these matters, for the purposes of this case, they were relevant only insofar as they described the situation from which Heather claimed to want to free her mother. It was her mother's liberty and inaccessibility that was in issue. I have conducted no inquiry into the allegations, as such was not necessary for the determination of the application before me. This was a case for the production of Mrs. Job and the provision of reasons for her "detention" and inaccessibility.

5. Essentially, Heather claimed that the last time she saw her mother was on the 27th December 2012. Since that date, and it seems because of some confrontation with staff at the Geriatric Unit, she (Heather) had not been allowed to visit her. She became concerned about the conditions under which Mrs. Job was being kept. So desperate was she (Heather), she went to the television stations, her story was run on national TV. She was still denied access. A meeting with Dr. Nathaniel Duke, the respondent's Medical Chief of Staff, produced no result. On the 18th January 2013, Senior Counsel Mr. Gift, wrote a preaction letter on her behalf seeking inter alia information on the whereabouts of her mother. There was no response.

6. At paragraph 28 of her affidavit she said:

> **I greatly fear that unless this Honourable Court intervenes urgently, I will never see my mother again. At this stage I am not even sure if she is still alive at the respondent's Geriatric Unit or what is her current state of health or deterioration. I am extremely worried about her health and I have no medical report from the respondent so that I can know about her present condition and the respondent's continued stonewalling of me and preventing me from getting information about or access to my mother is heightening my worst fears and anxieties about her state of health. I have always cared for my mother, and though modest my means may be, I am willing to continue to care for her to the best of my ability, once the respondent takes appropriate responsibility for rehabilitating and healing her properly in respect of the damage and trauma they have caused to her buttocks area by allowing this terrible bedsore to develop and then to spiral out of control.**

7. On the basis of what was contained in Heather's affidavit I granted the order for the issue of the writ of habeas corpus and the production of a medical report. This was against the background of the concern about the state of health of the patient at the expected date of her production in Court. After I had granted the order I communicated with counsel for the applicant, Mr. George, and suggested that he have on standby a medical practitioner, who would be available to carry out an independent assessment, in the event the respondent claimed the patient was too ill to be produced in Court. I considered this course, prudent.

Mrs. Job is produced before the Court

8. In answer to the writ and in compliance with it, the respondent produced Mrs. Job at the appointed time. She was transported by ambulance and was wheeled into the courtroom on a gurney. She appeared to be unaware of what was taking place, not fully conscious, very weak and frail. She had been properly cleaned and freshened up for the presentation in Court, but both her hands and part of her forearms were completely bandaged with clean dressings.

9. By that first hearing then, the respondent had complied with the writ and its representatives indicated that the patient could be returned to her home, they were ready to release her into Heather's care. I expressed concerns about the reason for the bandages of Mrs. Job's hands and asked the parties to speak with a view to establishing the claimant's medical condition at the time of the handover. I felt this would provide some measure of protection for both sides in the event any issue arose in the future as

to the state of health as at the date of her release. I urged the parties to co-operate for the sake of the dignity of the claimant and for her comfort and everyone agreed that this was what was required.

The consent order

10. The parties were allowed time for private discussions and when the matter was recalled, the following draft consent order signed by both sides was entered.

> **ORDER**
>
> **UPON this matter coming up hearing**
>
> **AND UPON HEARING Attorney-at-Law for the claimant and Attorney-at-Law for the defendant.**
>
> **AND the defendant having produced the body of Pearl Job before the Court**
>
> **IT IS ORDERED that:**
>
> 1. **The Applicant be medically examined by an independent medical professional at the Respondent's facility as to the present condition, state of body regarding the presence of bedsores, reason for bandaging of hands and any other matter of importance or relevance to the conditions under which she is being kept which presents itself.**
>
> 2. **The applicant's relatives and friends will have unrestricted access to the applicant at the Respondent's facility during normal visiting hours while respecting the Respondent's rules and regulations.**
>
> 3. **The medical report be presented to the Court within fourteen (14) days from today's date.**

4. **Issue of costs is reserved.**

5. **This matter is returnable on the 25th March, 2013 at 1:30p.m. in Court room POS 07 before the Honourable Madam Justice Gobin at Hall of Justice, Port of Spain.**

By order of the Court.

11. Neither party at that time during that hearing raised the matter of the production of medical records which had been included in the order of 11th March 2013. The Court's focus was to secure a medical examination before her release and for the provision of a report as to her condition as at the date of such examination. Quite frankly, I expected that Mrs. Job would have been returned to her home soon after that date. The matter was adjourned to the 25th March 2013 for an update and that report coming out of that medical examination.

The Application

12. On the 20th March 2013, the instant notice of application for contempt of court was filed on the grounds that the defendant had breached the original order by failing or refusing to provide the medical records. It alleged further that the defendant had breached the order of 11th March 2013 by preventing the medical examination.

13. On the 22nd March 2013, the contempt application was listed. After I had read the allegations and cross allegations, and with a view to avoiding a repeat of what had led to the unsuccessful attempt to visit Dr. David Toby, the specialist who had been

engaged to examine Mrs. Job, I gave more comprehensive directions which specified the place of the visit and inserted a provision for reasonable prior notice of the doctor's intended arrival. Very shortly after this hearing, Dr. Toby's visit actually came off on the 24th March 2013 and he produced a report.

14. Insofar as the second ground for the contempt application is concerned, that is the alleged failure to comply with the order for the production on the first date of the medical records, the respondents accepted that the records had not been passed to the Court but the reason for this was explained. On the 22nd March 2013, counsel for the respondent Mr. Thomas, faxed a letter to the claimant's counsel, the text of which was as follows and which contained the explantion:

> ***Dear Sir,***
>
> ***Re: Medical Records of Pearl Job***
>
> ***Please find enclosed the Medical Records of Pearl Job as per the court's order.***
>
> ***I regret that same was not handed to you on the date of the hearing on the 11th March 2013 at the Tobago High Court as the said records were ready and in my possession.***
>
> ***My reason for not disclosing same on the day in question was due to the manner in which the court and Attorneys-at-Law dealt with the matter. In other words it was an oversight due the unfolding of events that cause the failure to disclose.***
>
> ***Only upon reading your new application received today did I realize that they were still in my possession.***
>
> ***The delay therfore is NOT and I repeat NOT the fault of the Authority who duly complied with the honourable court's order in handing same to me for transmission to you.***
>
> ***Any convenience caused as a result is regretted.***

15. The respondent having complied with the writ of habeas corpus on the 11th March 2013 and the medical examination having been completed by Dr. Toby on the 24th March 2013 (by which time Mr. Thomas had already passed certain medical records over to counsel for the claimant), this matter was kept on the list mainly for the purpose of the Court satisfying itself that appropriate arrangements were being made for continued care of the patient and on the issue of costs of the Habeas Corpus application. Indeed it was also to allow for Heather to put arrangements in place to receive her mother.

Subsequent discussions on Mrs. Job's care

16. The matter was called on the 15th April 2013 and on the 19th April 2013 and 26th April 2013. As they had been since the first day, the respondent's representatives including its CEO Mrs. Paula Chester-Cumberbatch, and its medical Chief of Staff Dr. Nathaniel Duke were present at all these appointments. During these later hearings it started to emerge from her Counsel's utterances that Heather had no objection to her mother remaining with the defendant and indeed it seemed she wished her mother to remain there.

17. I indicated at all times that I could not order the Defendant to keep the patient at its facility. Matters of the admission and discharge of patients were properly for its officers. The provision of adequate geriatric and health remains a real social problem in our country, but it is left to the authorised agency, in this case the TRHA, to

determine what, within the available resources and in accordance with his or her needs, can and should be provided for any particular patient. The Court could not on an application such as this, usurp that function.

18. The respondent had long indicated there was nothing further it could do for the patient and it was for Heather to make appropriate arrangements. This position notwithstanding, the respondents representatives helpfully made suggestions as to facilities which could be approached by Heather for her mother's accommodation. They further offered to provide nurses visits and regular visits of wound specialist to assist in Mrs. Job's care at home. Throughout these hearings, in my assessment, the defendant's CEO and the CMO as well as Counsel, Mr. Thomas, demonstrated the highest degree of respect for the Court, a willingness to co-operate and a willingness to go beyond what would usually be required to assist the patient and indeed, Heather, to provide proper care for her.

19. On what I thought would have been the last date of hearing, I dealt with the issue of costs. I ordered the defendant to pay some of the claimant's costs because although there had been some dispute as to whether in fact the patient had been denied access to her family, and as to the circumstances of her stay at the institution, its failure to respond to previous Senior Counsel Mr. Gift's pre-action letter, decided the matter.

20. When the claimant's counsel insisted that that would not bring an end to the matter because the contempt application was still pending, I was taken by surprise.

There had by then, been full compliance with all the Court's directions, and no failure or neglect to comply on the part of the defendant could be said to have impeded the expeditious determination of the matter. Indeed the defendant had assisted the Court throughout and demonstrated only respect and a willingness to assist me in achieving ends which were strictly speaking outside my jurisdiction on a habeas corpus application. Given the spirit in which the matter had proceeded since the first day, Counsel's position appeared to be somewhat inconsistent with the duty of parties to further the overriding objective under the CPR.

The contempt application proceeds

21. In the light of the claimant's counsel's insistence, however I vacated the order for costs and fixed the contempt application for trial and the trial proceeded. In the course of it, what emerged and it was confirmed by her counsel was that since some time in March 2013 when Dr. Toby had made his visit, and after Heather had filed these proceedings to have her mother returned to her care, she had not visited her mother. She explained that she wanted to avoid confrontation and feared she would still be denied visits, but I found this to be somewhat hollow. Her mother should have been at home receiving the continued care she had claimed she was willing to give along with the assistance that had been offered by the defendant.

22. On the two previous occasions when the parties and counsel held open discussions in court about possibilities for her mother's care, Heather went from devoted caregiver (professional was how she first described herself), to someone who

had back problems, who could not manage her on her own, someone who was trying to get helpers without success, someone who was concerned about the cost of private care at a private institution, someone who quite frankly seemed almost unwilling to give serious consideration to or to show appreciation for the offers of extra help that had been made by the defendant. Her seeming reluctance to take responsibility for her mother raised questions of credibility in relation to her statements in her first affidavit.

23. At the close of the case I was left with the distinct impression that for all her utterances in her affidavit and her witness statement, Heather was quite content to conveniently leave her mother in the care of the defendant even after all of her complaints and the embarassing allegations she had made. She had certainly been free to take her mother home since the 11th March 2013 or at least after Dr. Toby's visit. She had refused to do so. Indeed the respondent's representatives said she had not made herself available to receive her mother at her home when arrangements could be made for her delivery. The relevance of these findings will be disclosed at a later stage.

24. The Court is not insensitive to the challenges that are necessarily involved in the care of the elderly, especially those who are ill and bedridden. But our culture and our duty, as well as a regard for their dignity, demands that we do all that we can. If affordable full time geriatric care can be provided at private institutions then that is all well and good. But as I understand it under present policy, our public health institutions cannot assume responsibility for housing and the care for our elderly

relatives who have no medical grounds for long term stays. The responsibility remains ours, the family's.

The case for contempt

25. I return to the application for contempt. I have read the submissions and am especially grateful for the assistance of counsel for the respondent. The claimant's position has been very simply that there were orders which were not obeyed. On the 9th March 2013, the Court made an order for the production of Mrs. Job along with her medical reports. The latter were not produced to the Court. By the 20th March therefore the claimant was entitled to a finding that the respondent was in contempt. Insofar as the medical examination is concerned, Dr. Toby did not succeed in an attempt to see Mrs. Job at the Geriatric Unit on the 16th March 2013 so that was the end of the matter.

Dismissal/Reasons

26. I have considered the submissions and dismiss the claimant's application for the following reasons: I start with the general observation that in this particular case "context is everything". The directions or orders in respect of which the claimant claims non-compliance must be looked at in context or against what Counsel for the respondent says is "the factual matrix".

27. The order for the production of her medical reports along the patient (which was somewhat unusual) was made against the background of Heather's complaint that she had had no access to her for several months and had no information as to her state of

health at that time. My own request to counsel for the attendance of the claimant's independent doctor at the hearing, was for the purpose of examining the patient only, if the respondent suggested that it would be dangerous to her health to produce her in answer to the writ, in other words to test a refusal or neglect to produce her on the ground of health, if the need arose.

28. Once the patient was produced, then there was no need for the presence of the claimant's independent doctor. Further, once the respondent indicated she could be handed over and delivered to her home, then that left the way for an independent and up to date assessment of her state of health to be made at her family's convenience.

29. In that context and more crucially, and I must emphasise this, in the spirit which was encouraged by the Court and which the parties accepted, that the interest of the patient should prevail, no reference was made to the hospital records on that day nor did anyone require their production. Indeed, a glance at the order which was produced in the hands of the parties would confirm that this was not on anyone's mind. While I would not go so far as to say the earlier order was necessarily overtaken by the consent order, I have concluded that the failure to require the production was an understandable oversight on the part of everyone including the Court's.

30. I accept the evidence of Dr. Duke and Mrs. Chester-Cumberbatch that such records as were available to be produced at such short notice were in fact handed over to the respondent's counsel Mr. Thomas, on the 11th March, 2013. This is supported by

the more contemporaneous letter from Counsel for the respondent to Counsel for the claimant, the terms of which I have already spelt out above. I have attached significant weight to the contents of the letter, even in the absence of first hand evidence from Mr. Thomas. It would be a sad day, when a Court would be expected to ignore or reject evidence of this type.

31. From the evidence and the record, it is clear that by the 22nd March, 2013 albeit two days after the instant application had been filed, the claimant's counsel would have been well aware of the reason for the "non-compliance" if it can be called such at all. Further, by 24th April 2013, and before the hearing at which the claimant's counsel insisted on pursuing this application, the defendant had delivered to the Court two hefty bundles of Mrs. Job complete medical records for two periods 24th September 2012 to 7th October 2012 and 3rd November 2012 to 11th March 2013.

32. En passant, I note that the records reflect that on the first day that Mrs. Job was seen at the hospital, that is 26th September 2012, at which time she had been in Heather's care, her admission notes refer to the presence of "sacral pressure sores". I have previously indicated that I was not going to make findings as the allegations as to the level of treatment and care which Mrs. Job received from the defendant, but I think it fair in the light of all of the well publicised allegations to indicate the specific statements made in relation to cause of this particular complaint and Mrs. Job's resultant suffering. Some entries also detail the unsuccessful efforts by hospital staff to contact Mrs. Job's relatives.

33. Against the above chronology of events, I have had to question the insistence on pursuing the matter of the medical records, and I have come to the conclusion that these contempt proceedings have not been pursued for legitimate ends (Lord Mayor and the Citizens of the City of Westminster v Addbins Ltd and Ors - 2012).

34. I turn to the second alleged breach of the order of 11th March 2013, that the defendant's CEO Mrs. Paula Chester-Cumberbatch and its Medical Chief of Staff, Dr. Nathaniel Duke "failed to have the claimant medically examined by an independent medical profession at the defendant's facility and that both these officers actively sought to frustrate and prevent such medical examination when it was attempted at the defendant's medical facilities".

35. The first point to be repeated, is that by the 24th March 2012 Dr. Toby had carried out his examination and by the 26th March 2012 had produced a report. There was therefore full compliance by the latter date. The motive for the insistence on the 26th April 2012 on pursuing this application was as with the other ground therefore open to question.

36. The ground of the complaint is essentially that the Court ordered a medical examination "at the Respondent's facility". On the 16th March 2012 Dr. Toby, an orthopaedic surgeon attended the Signal Hill Geriatric facility. He arrived at approximately 1:00 p.m., introduced himself and advised staff as to the purpose of his

visit. He was refused entry while several calls were made. He was eventually told that if he was to see Mrs. Job he was to do so at the Scarborough Hospital and that arrangements would have to be made for her transportation by ambulance. He was told too, that no ambulance was available at that time. Dr. Toby left without seeing Mrs. Job. The claimant alleges that the defendant's representative acted intentionally to frustrate the visit and that their non-compliance was deliberate.

37. Both Dr. Cumberbatch and Dr. Duke say that when the consent order was entered in Court, the "respondent's facility" contemplated, was the hospital and not the Geriatric Unit. Indeed they say this was discussed and it was on the insistence of Counsel for the claimant, that that is what was agreed. It was considered more suitable because there would be equipment and other facilities available if such were required and the defendant's representatives thought the examination should take place in the presence of one of their own doctors who would be able to answer any queries of the claimant's doctor. Such a doctor (the defendant's) would be readily available at the hospital.

38. It was in an attempt to ensure compliance with the order, as the defendant's CEO understood it, that the visit at the Geriatric Unit, was not initially accommodated. Instructions were given to transport Mrs. Job to the hospital. Eventually, after Mrs. Chester-Cumberbatch had spoken to her attorney, she was prepared to allow the visit at the Geriatric Unit. Unfortunately Dr. Toby had already left by then.

39. There were several complaints on the part of the respondent's officers of inadequacy of notice in any case, to accommodate the visit and Mrs. Chester-Cumberbatch explained her personal inability to deal with things as they developed because she was ill and flat in bed. Dr. Duke as well, understood from the discussions that the examination was to be carried out at the hospital. Indeed, he thought it would be done on the same day of the court hearing.

40. On the face of it, the order does not specify that the visit was to take place at either of the facilities. But I have said before, context is everything. I accept the defendant's evidence that the consent order was drafted in contemplation of the transportation of Mrs. Job directly from Court to the Scarborough Hospital by the very same ambulance which had brought her to me. It was an order tailored to suit that eventuality. I accept too, as both Dr. Duke and Dr. Cumberbatch have said that the claimant's counsel insisted that the examination should take place there because of the access to equipment and that Dr. Duke agreed because it allowed him to have one of the hospital's doctors present.

41. It is accepted that Mrs. Job left court that morning, she was indeed taken to the respondent's facility at Scarborough via ambulance. The examination did not take place only because the doctor that Heather had originally had available at court to examine Mrs. Job and who had initially agreed to conduct the examination at the hospital after she left Court, had subsequently withdrawn from the matter. I accept that at the hospital, the respondent's representatives waited about two hours for the

claimant's doctor to arrive and that eventually Mrs. Job was returned to the Geriatric Unit. These are hardly the actions of persons who wished to frustrate the court's order.

42. Against this background, while the order does not specify either of the facilities, I accept that the defendant's representatives believed and I do not consider their understanding unreasonable, that the examination was to take place, there. This was not an order drafted by the Court and imposed on the parties. It is one which emanated from them. In the circumstances I cannot ignore what they say was on their minds. I reject Heather's evidence on this issue, and prefer that of the respondent's witnesses.

43. What makes the evidence of the defendant's witness more credible, is that Mrs. Job was indeed taken immediately to the hospital that very day and Heather followed. Because the examination did not take place on that day as it had contemplated, the order was rendered somewhat ambiguous and lacking in clarity, and in clear and precise details, regarding what was to then happen. No specific provision was made as to what the defendant was to do in relation to this order, it did not identify steps the defendant was to take to ensure compliance. No provision or limit was made as to time of the examination, as to notice, as would obviously have been required had the parties put their minds to any other possibility. The defendant runs health facilities. The requirement for the advance identification of the doctor and reasonable notice of the proposed time of the visit would be basic requirements in these unusual circumstances. Protocols regarding arrangements for proper notice to allow the defendant's authorised senior officers to be present and to receive an independent doctor should have been

catered for, had the parties properly considered that things needed to be put in place for a visit on any subsequent day.

44. A comparison of the second order and the detail of its terms would readily indicate the shortcomings of the earlier one. While inconvenience and some embarassment to such an eminent specialist as Dr. Toby must be considered a matter of regret, I am unable to find that given the factual matrix, and what was contemplated by the parties, that the defendant failed to comply with the order.

45. In any case I accept the submission that the order as framed is not couched in unambiguous terms directing what is to be done and what is not to be done. Clearly this order was drafted hastily and by the parties with a certain scenario in mind. I accept the legal submissions of the defendant on the well establish principles enunciated in **Nexus Mortgage Securities PTY Ltd v ECTO PTY Ltd 1998 4 VLR – Adrian Pascal & Ors v Public Services Commission**.

46. In the light of these findings, it is not necessary for me to deal with the remaining issues but out of deference to counsel I wish to indicate I accept the defendant's submission that Mrs. Chester-Cumberbatch is in the position of a director and that as such, liability for the alleged breach would only attach if she aided and abetted the respondent in the breach or if she failed to take reasonable steps to ensure compliance.

47. I accept Mrs. Chester-Cumberbatch's evidence that she had been very ill and on sick leave and off duty. She received, very late and in any case inadequate notice of the intended arrival of Dr. Toby. There is no evidence on which I can find (as the authorities suggest) that Mrs. Chester-Cumberbatch failed to take steps to ensure compliance. I accept too that as an employee, which is what the Medical Chief of Staff is, that Dr. Duke cannot be found to be in contempt since he was not enjoined by the orders to do anything and that there is no evidence that Dr. Duke engaged in any conduct which sought to interfere with the due administration of justice. In fact I have found quite the opposite.

Costs

48. On the issue of costs, it is clear that Mrs. Pearl Job could not have given instructions for the filing of this application. Heather was allowed to bring the habeas corpus application on her behalf for obvious reasons. I will therefore hear the parties on whether Heather should not bear the costs whether wholly or partially of these proceedings and further I notify Counsel for the claimant of my intention to consider making an order for "wasted costs" pursuant to Part 66.9 (3) on the following grounds:

(a) That I have concluded there was no proper motive for proceeding with this contempt application.

(b) In the course of the trial, attorneys saw me in chambers. Counsel for the claimant indicated he would take instructions to withdraw the proceedings if the defendant would pay the claimant's costs. I indicated then that there was an issue of abuse of process on the part of the applicant. Counsel chose to continue the trial.

Dated this 20th day of September, 2013

CAROL GOBIN

JUDGE