Federal Court  Cour fédérale

Date: 20210901

Docket: T-759-16

Citation: 2021 FC 895

Ottawa, Ontario, September 1, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

BELL CANADA
BELL EXPRESSVU LIMITED PARTNERSHIP
BELL MEDIA INC.
VIDÉOTRON S.E.N.C.
GROUPE TVA INC.
ROGERS COMMUNICATIONS CANADA INC.
ROGERS MEDIA INC.

Plaintiffs (moving parties)

and

RED RHINO ENTERTAINMENT INC. and ERIC ADWOKAT

Defendants (respondents)

and

ANDROID BROS INC. and others

Non-Respondent Defendants

ORDER AND REASONS

I. OVERVIEW

[1] In a decision dated November 19, 2019, I found Eric Adwokat and his company, Red Rhino Entertainment Inc., in contempt of an interlocutory injunction issued by Justice Tremblay-Lamer on June 1, 2016. More specifically, I was satisfied beyond a reasonable doubt that, by configuring, advertising, offering for sale and selling set-top boxes which facilitated unauthorized access to the plaintiffs' television programming, Mr. Adwokat and Red Rhino were in contempt of an order enjoining such conduct. See *Bell Canada v Red Rhino Entertainment Inc*, 2019 FC 1460.

[2] The parties and the Court had agreed that the issue of penalty should be dealt with in a separate hearing. For various reasons, including the impact of the COVID-19 pandemic, that hearing did not take place until March 2021.

[3] The plaintiffs seek to have Mr. Adwokat jailed for not less than 90 days for his contempt. As well, they seek a fine of $200,000 against Red Rhino for which Mr. Adwokat should be jointly liable. They say this fine should be payable forthwith. Finally, they seek an award of costs in the all-inclusive amount of $400,000 for which both Mr. Adwokat and Red Rhino should be jointly liable. They ask that these costs be payable forthwith as well.

[4] For his part, Mr. Adwokat submits that a fine of $20,000 is an appropriate sentence. He asks for 24 months to pay it. He submits that an order that he perform 250 hours of community

service if he cannot pay the fine is also appropriate. He agrees that the plaintiffs are entitled to an award of costs but submits that it should be in the all-inclusive amount of $25,000.

[5] For the reasons that follow, I have concluded that a fit sentence is a fine of $40,000. Mr. Adwokat and Red Rhino shall be jointly liable for payment of this fine. The fine shall be paid within 24 months of the date of this order in accordance with the schedule set out below. If the fine is not paid in full within 24 months, the plaintiffs may move for an order committing Mr. Adwokat to jail for a period not exceeding 90 days. Until the fine is paid in full, Mr. Adwokat must remain in Canada. Finally, I will award costs to the plaintiffs, although in an amount that is considerably less than they have claimed.

II. GENERAL PRINCIPLES OF SENTENCING FOR CIVIL CONTEMPT

[6] Contempt of court is a serious matter. It is "a challenge to the judicial authority whose credibility and efficiency it undermines as well as those of the administration of justice" (*9038-3746 Quebec Inc. v Microsoft Corporation*, 2010 FCA 151 at para 18). Punishing contempt is an exercise of the court's power to uphold its dignity and process. It re-affirms the court's authority when a party has cast that authority into doubt by acting in contempt of one of its orders.

[7] As McLachlin J (as she then was) explained in *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 90, the rule of law, which is at the heart of our society, "is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect" (at 931). With civil contempt, where (unlike criminal contempt) there is no element of public defiance in the conduct giving rise to the contempt finding, "the matter is generally

seen primarily as coercive rather than punitive" (*Carey v Laiken*, 2015 SCC 17 at para 31, internal quotation marks and citation omitted). That is to say, generally the court seeks to bring the offending party into compliance with its legal obligations. Nevertheless, "one purpose of sentencing for civil contempt is punishment for breaching a court order" (*ibid.*). Accordingly, courts "sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct" (*ibid.*).

[8] Rule 472 of the *Federal Courts Rules*, SOR/98-106 provides as follows:

Penalty	**Peine**
472 Where a person is found to be in contempt, a judge may order that	**472** Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :
(a) the person be imprisoned for a period of less than five years or until the person complies with the order;	**a)** qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;
(b) the person be imprisoned for a period of less than five years if the person fails to comply with the order;	**b)** qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance;
(c) the person pay a fine;	**c)** qu'elle paie une amende;
(d) the person do or refrain from doing any act;	**d)** qu'elle accomplisse un acte ou s'abstienne de l'accomplir;
(e) in respect of a person referred to in rule 429, the person's property be sequestered; and	**e)** que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429;

(f) the person pay costs.	**f)** qu'elle soit condamnée aux dépens.

[9] A judge has wide discretion to determine the appropriate sanction for civil contempt (*Tremaine v Canada (Human Rights Commission)*, 2014 FCA 192 at para 26). Apart from setting the maximum period of imprisonment and providing what is presumably an exhaustive list of the kinds of thing the sentencing judge may order, Rule 472 itself imposes no constraints on the sentencing judge's discretion. As a result, courts have looked elsewhere for principles to guide sentencing for civil contempt. Helpful guidance is found in the principles of sentencing developed in the criminal law (*Tremaine* at paras 19-26).

[10] The fundamental principle of criminal sentencing is that the sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*Criminal Code*, RSC, 1985, c C-46, section 718.1). This is equally applicable to civil contempt. Here, the gravity of the offence is measured primarily by its impact on the administration of justice. This includes "both the objective gravity of the contemptuous conduct and the subjective gravity of the conduct (*i.e.* whether the conduct was a technical breach or a flagrant act with full knowledge of its unlawfulness)" (*Tremaine* at para 23, internal quotation marks and citation omitted).

[11] One important objective of sentencing is to denounce the unlawful conduct (*c.f. Criminal Code*, paragraph 718(a)).

[12] Further, the sentencing judge must consider the need for specific and general deterrence. In the civil contempt context, these objectives serve to protect the administration of justice. The measures adopted to achieve them must be consistent with the principle of proportionality (*Tremaine* at para 22). As well, these and other objectives of sentencing must be pursued with the principle of restraint in mind – namely, that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances (*Criminal Code*, paragraph 718.2(d)). The sentencing judge must also consider the principle of parity: "similar offenders who commit similar offences in similar circumstances should receive similar sentences" (*R v Friesen*, 2020 SCC 9 at para 31; see also *R v Lacasse*, 2015 SCC 64 at paras 56-60; and *Criminal Code*, paragraph 718.2(b)). Thus, the sentencing judge must consider the range of sentences for similar offences and tailor the sentence in light of the objectives of sentencing and any aggravating or mitigating circumstances that are present (*Tremaine* at para 21; see also *Professional Institute of the Public Service of Canada v Bremsak*, 2013 FCA 214 at para 35 and *Criminal Code*, paragraph 718.2(a)).

[13] Aggravating circumstances can include whether the offending conduct was a prolonged course of conduct as opposed to an isolated incident, the scope or scale of the offending conduct, whether the offending conduct continued even after it was found to constitute contempt, the offender's motivation, and whether the offender has previously been found guilty of contempt. Consistent with criminal law principles, unless they are admitted, any aggravating circumstances relied on by the moving party must be established beyond a reasonable doubt: see *R v Gardiner*, [1982] 2 SCR 368 at 413-17; see also *Criminal Code*, paragraph 724(3)(e). Mitigating circumstances can include a genuine expression of remorse by the offender, acceptance of

responsibility, taking steps towards rehabilitation, and good faith efforts to comply with the order in question (*Tremaine* at para 24). They can also include personal circumstances such as youthfulness or addiction that reduce the offender's degree of responsibility for the wrongful conduct. If disputed, mitigating circumstances must be established on a balance of probabilities (*c.f. Criminal Code*, paragraph 724(3)(d)).

[14] In a commercial context, the profitability of the offending conduct is also a relevant consideration. This can bear on the determination of a fine that meaningfully denounces the wrongful conduct and that protects the administration of justice through specific and general deterrence. None of these objectives will be achieved if a fine is simply a bearable cost of doing business in breach of a court order. The profitability of the offending conduct can also be probative of the offender's motivation for engaging in the conduct. If the motive was greed, this can be an aggravating factor: see *9038-3746 Quebec Inc* at para 18.

[15] The profitability of the offending conduct can also be relevant to the offender's ability to pay any fine that is imposed. This is an important consideration if the sanction of imprisonment in default of payment is available. In such a case, a fine should be imposed for civil contempt only if the court is satisfied that the offender is able to pay it (*c.f. Criminal Code*, subsection 734(2); see also *Bremsak* at para 36). Even apart from the need to avoid imprisoning impecunious offenders, the objectives of sentencing will not be served by imposing a fine an offender has no hope of ever paying. The burden is on the moving party to establish the offender's ability to pay on a balance of probabilities (*R v Topp*, 2011 SCC 43 at paras 18-26).

[16] This is not an exhaustive list of things to consider in fashioning a fit sentence for civil contempt. The relevance of these considerations is not disputed here. Nor do the parties dispute that a judge "has wide discretion when determining the appropriate sanction for civil contempt, based on the circumstances" (*Bremsak* at para 36). Their respective positions are largely a reflection of their divergent views on how these general considerations bear on the particular circumstances of this case.

[17] That being said, I should also say that I do not agree with the plaintiffs that one of the purposes of sentencing for civil contempt is to make good the losses they suffered because of the offending conduct. While the scale of economic loss caused by the offending conduct can be an indication of the objective gravity of the contempt (which in turn informs the determination of whether a fine is appropriate and, if so, its amount), a fine for civil contempt does not serve a compensatory purpose. It is a sanction for the harm done to the administration of justice. To the extent that the plaintiffs suffered economic losses because of Mr. Adwokat's conduct, their remedy lies elsewhere, in their still-pending action against him and Red Rhino. (In written submissions the plaintiffs even suggested that any fine should be "paid in equal portions to the Court and as a restitution order towards the Plaintiffs." Sensibly, they did not press this submission in oral argument.)

III. ANALYSIS

A. *The Seriousness of the Contempt*

(1) Background

[18] Before addressing the objective and subjective gravity of the contempt, it may be helpful to begin by reviewing some of the background to this matter.

[19] The plaintiffs commenced the underlying action against five defendants in May 2016. On June 1, 2016, Justice Tremblay-Lamer issued an interlocutory injunction enjoining the initial defendants from engaging in certain conduct in relation to pre-loaded set-top boxes (as defined in the order). The order provided for its service upon additional individuals or businesses as they became known to the plaintiffs. Once the order was served on a new individual or business, the plaintiffs could amend their pleadings to add that individual or business as a defendant in the underlying action. Once added as a defendant, the individual or business could, within fourteen days of this occurring, bring a motion to vary the interlocutory injunction as it applied to them, should they so choose. Unless excluded from its application on such a motion, the interlocutory injunction applied to all new defendants impleaded in this manner.

[20] As described below, Red Rhino and Mr. Adwokat were both impleaded and became subject to the interlocutory injunction. Neither moved to vary the injunction.

[21] Red Rhino was incorporated on June 24, 2014. Mr. Adwokat is its sole director and directing mind. Through Red Rhino, Mr. Adwokat marketed and sold the Red Rhino device. As explained in my earlier decision, the Red Rhino device is a set-top box which, once finally configured by the end-user, facilitates unauthorized access to television programming, including programming belonging to the plaintiffs. Facebook posts by Red Rhino Entertainment Inc. and Mr. Adwokat that were filed by the plaintiffs suggest that the Red Rhino device was being

offered for sale as early as the summer of 2014 – notably at the Canadian National Exhibition. It was offered for sale at many other events in 2015 and 2016 – e.g. the Toronto Home Show, the Kitchener Home Show, the Calgary Stampede, the Toronto Fall Home Show, the Zoomer Show Lifestyle Expo, the Niagara Lifestyle Home Show, the Vaughn Lifestyle Home Show and the Pickering Ribfest.

[22] An Amended Statement of Claim and the interlocutory injunction were served on Red Rhino at its office in Toronto on June 21, 2016. The Amended Statement of Claim was amended again in October 2016 to add Mr. Adwokat as a defendant. This Amended Statement of Claim and the interlocutory injunction were served on Mr. Adwokat personally on February 24, 2017, when he was working at a Red Rhino sales booth at the Canadian International Auto Show in Toronto. However, Mr. Adwokat acknowledged in the present proceeding that he was aware of the order at least as early as July 25, 2016.

[23] A motion for a hearing to determine whether Mr. Adwokat and Red Rhino were in contempt of the order of Justice Tremblay-Lamer was filed on September 26, 2018. When the matter finally proceeded before me in June 2019, the plaintiffs alleged seven specific instances of contempt involving the offering for sale and selling of Red Rhino devices, namely:

- December 3, 2016, at the Pickering Flea Market;
- December 16, 2016, from the Red Rhino website;
- March 3, 2017, from Red Rhino's office in Toronto;
- March 11, 2017, at the National Home Show in Toronto;
- August 21, 2017, at the Canadian National Exhibition in Toronto;
- February 18, 2018, at the Canadian International Auto Show in Toronto;
- March 11, 2018, at the National Home Show in Toronto.

[24] As set out in my earlier decision, I found that all seven of these allegations of contempt were established beyond a reasonable doubt.

(2) Objective Gravity

[25] Turning now to the seriousness of the contempt, several aspects of Mr. Adwokat's conduct lead me to conclude that it falls at the high end of the scale of objective gravity.

[26] First, at a minimum, Mr. Adwokat was in contempt of the order of Justice Tremblay-Lamer for over a year and a half after he admits to having had notice of the injunction. This was not a brief or isolated instance of contempt. It was a sustained course of conduct.

[27] Second, the interlocutory injunction was granted because the plaintiffs had demonstrated, among other things, that set-top boxes like the Red Rhino device were intended to be used in ways that unlawfully caused them irreparable harm. The offending conduct of Mr. Adwokat and Red Rhino undermined the injunction's fundamental rationale. It was far from a merely technical breach.

[28] Third, this was a large-scale, sophisticated commercial operation. I accept the plaintiffs' evidence (which I do not understand Mr. Adwokat to contest) that Red Rhino devices were marketed and sold through at least two brick-and-mortar locations, at least two websites, at least three third-party distributors, and at sales booths at numerous high-traffic commercial events like those listed in paragraph 23, above. The devices were also promoted on Facebook and Twitter. For his part, Mr. Adwokat describes Red Rhino Entertainment Inc. as "generally a wholesaler

that sold directly to other businesses." To state the obvious, this was not a covert or clandestine operation. Mr. Adwokat and Red Rhino engaged in conduct prohibited by the injunction in plain view.

[29] Fourth, the sophistication and professionalism of the presentation of Red Rhino devices (particularly at the sales booths) lent an unwarranted and misleading air of legitimacy to an illegal activity – namely, gaining unauthorized access to television programming belonging to the plaintiffs. As well, unlike smaller operations offering similar products whose customers had to search them out in places they would otherwise have no reason to go (such as the case of Vincent Wesley, which is discussed further below), Mr. Adwokat's marketing strategy exposed the Red Rhino device to countless people who likely had never heard of it before they saw it at, for example, an auto or home show they were attending.

[30] Finally, it is incontrovertible that Mr. Adwokat's activities caused the plaintiffs economic harm, even if that harm cannot be quantified. As I have already discussed, the primary measure of the objective gravity of the offending conduct is its impact on the administration of justice. However, I also accept that the impact of that conduct on the plaintiffs' private interests is relevant to the assessment of the objective seriousness of the contempt. At the same time, and especially because the plaintiffs' actual losses cannot be quantified, this factor should not be overemphasized in fashioning a fit sentence for the contempt.

[31] The plaintiffs submit that the scale of statutory damages for copyright infringement potentially available to them in relation to just the Red Rhino devices purchased in connection

with this contempt proceeding is an important indication of the scale of harm Mr. Adwokat's activities may be presumed to have caused. They submit that these devices alone provided unauthorized access to programming for which Mr. Adwokat and Red Rhino could be liable for statutory damages of over $30 million. However, the potential range of statutory damages is very wide. Awards are determined having regard to a variety of factors, including the need to deter copyright infringers; they are not purely compensatory. A test of proportionality will also be applied: see *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2020 FC 794 at paras 6-9. Here, there is no evidence that the plaintiffs' losses or Mr. Adwokat's profits came anywhere close to the upper range of statutory damages cited by the plaintiffs. Nor is there any suggestion that the plaintiffs do not continue to be viable and profitable enterprises. Their businesses are subject to any number of market pressures today, not simply the impact of pre-loaded set top boxes. Moreover, in this latter regard, as the scale of the underlying litigation demonstrates, Mr. Adwokat and Red Rhino were not the only source of offending devices (even if it appears that, at least for a time, they were the single largest such source). Nevertheless, I do find that the harm caused to the plaintiffs' economic interests, in combination with the other factors I have identified, increases the objective gravity of the offending conduct.

(3) Subjective Gravity

[32] Mr. Adwokat contends that he honestly and reasonably believed that the Red Rhino devices were not covered by the interlocutory injunction and that this reduces the moral blameworthiness of his conduct. I do not agree. In my view, at best Mr. Adwokat was reckless as to the implications of the injunction (something he actually concedes, albeit only in retrospect). This places his moral blameworthiness at the higher end of the scale.

[33] While it is a close call, I am prepared to give Mr. Adwokat the benefit of the doubt that he actually believed that the Red Rhino devices were not covered by the injunction. An important consideration in this regard is the openness with which he conducted his business, as discussed above. On the other hand, I do not accept that this was a reasonable belief – quite the contrary. I base this finding on the following considerations.

[34] First, from October 2016 until February 2019, Mr. Adwokat deliberately attempted to avoid being served with documents relating to the underlying litigation and this contempt hearing. This suggests that, at the very least, he was concerned about the legal vulnerability of his business. Rather than confront this issue directly, he made a concerted effort to frustrate the plaintiffs' efforts to enforce their legal rights and protect their legitimate economic interests.

[35] Second, once he had finally been served with the injunction, he did not bother to read it. He testified that he "read the first couple [of] pages but I didn't go through the whole thing." This weighs heavily against the suggestion that his belief that his conduct was legal was a reasonable one.

[36] Third, despite never reading the order, his position is that he had "designed Red Rhino's business model in an attempt to avoid any restrictions on what it was doing, including trying to avoid the provisions of the Injunction Order" (*Affidavit of Eric Adwokat solemnly affirmed February 18, 2021*, paragraph 9). Left unexplained is how he could do this without knowing what the injunction said. Importantly, even if this was Mr. Adwokat's goal, he did not take

advantage of the one way of determining in advance whether he had succeeded – namely, a motion to vary the interlocutory injunction.

[37] Fourth, during the relevant time, Mr. Adwokat was lackadaisical at best in seeking legal advice regarding the injunction and the underlying litigation. He claims to have received poor advice (not from his present counsel, I hasten to add) in deciding early on not to file a Statement of Defence (something he has still not done). As is his right, he has not produced any other evidence of this legal advice in this proceeding. However, while he is entitled to withhold this advice, he cannot at the same time rely on it to support the reasonableness of his belief that the injunction did not apply to his devices. He also claims that friends who were lawyers assured him that the injunction did not apply to the Red Rhino device. It appears that Mr. Adwokat was also content to rely on the fact that "everywhere" he went, "everyone" he spoke to said his devices were not pre-loaded and, as a result, were not caught by the injunction. Even if this is true, such broad assurances from people whose qualifications to provide them are unknown are worthless for establishing the reasonableness of his belief that the injunction did not apply to his activities.

B. *Aggravating and Mitigating Circumstances*

[38] I have already reviewed the principal aggravating circumstances in connection with the seriousness of the offending conduct. To the ones discussed above I would only add that Mr. Adwokat's motivation is another aggravating factor. Whether or not it is appropriate to describe his motivation as greed, it is clear that he was motivated by financial gain. While there is nothing inherently blameworthy about this, he pursued this goal by means that were prohibited

by the interlocutory injunction. That is to say, he put his own financial interests ahead of his legal obligations. This is an aggravating factor.

[39] It is important to note that one potential aggravating factor – being a repeat offender – is absent here. This is the first time that Mr. Adwokat or Red Rhino have been found in contempt.

[40] With regard to mitigating circumstances, I begin by observing that I know very little about Mr. Adwokat's personal circumstances. I understand him to be in his early 40's. No evidence was offered concerning his education or past work experience (apart from Red Rhino, of course). While I have heard passing references to members of his family, I know nothing about his domestic life or whether he has any dependents. Mr. Adwokat presented evidence of certain medical conditions he suffers from but they have little bearing on the issues I must determine.

[41] I also note that Mr. Adwokat has presented nothing to support a sentence geared to rehabilitative goals (among others).

[42] The principal mitigating circumstance Mr. Adwokat relies on is the combined effect of his apology, his expression of remorse and his acceptance of responsibility for breaching the interlocutory injunction. The plaintiffs submit that this should be given no weight. I do not agree. As I will explain, while it does not deserve a great deal of weight, it is entitled to some.

[43] Remorse is a relevant mitigating factor. It "gains added significance when it is paired with insight and signs that the offender has come to realize the gravity of the conduct, and as a result has achieved a change in attitude or imposed some self-discipline which significantly reduces the likelihood of further offending" (*Friesen* at para 165, internal quotation marks and citation omitted).

[44] In his affidavit filed on the sentencing hearing, Mr. Adwokat states the following:

> I sincerely and without reservation apologize to the Court and the plaintiffs for my conduct. I have reviewed the reasons of Justice Norris resulting in the Contempt Order. I understand and accept the Court's reasoning and interpretation of the Injunction Order and accept that I was in breach of the Injunction Order.

After explaining that he honestly believed that the Red Rhino devices were not covered by the injunction, Mr. Adwokat continues:

> I had designed Red Rhino's business model in an attempt to avoid any restrictions on what it was doing, including trying to avoid the provisions of the Injunction Order. At the time, I believed that I was entitled to do this, that I could cleverly come up with a business model so that the plaintiffs could not legitimately complain about what I was doing. I now recognize and understand that this was not appropriate and that I was facilitating improper conduct and breaching the Injunction Order. My attempt to evade any restrictions on what I was doing resulted in me breaching the restrictions I sought to avoid.
>
> Justice Norris' decision finding me in contempt has clarified for me that I should not have done what I did. I understand now that I should not have been looking for ways to evade restrictions on what I was doing. I regret my conduct, which I now understand was improper. In retrospect, my conduct was reckless. I have learned that I need to be more careful in the future and that I should not assume that I can conduct a business that is improper because I believe I have found a clever way to avoid the restrictions on conducting that business.

> Since the Contempt Order was made, I have not sold any set-top boxes and although, for reasons explained below, the corporation still exists, Red Rhino no longer carries on business. I have stopped selling set-top boxes entirely and will never do this again.
>
> At no point did I ever intend to disrespect the Court's processes. On learning that I had breached a court order, I immediately ceased selling devices and complied with the Injunction Order.
>
> (*Affidavit of Eric Adwokat affirmed February 18, 2021*, paragraphs 5 and 9-12)

[45] Mr. Adwokat reiterated this apology in his testimony before me on March 10, 2021. He added that he also apologized for making it difficult for the plaintiffs to serve him with documents in connection with this matter.

[46] The plaintiffs contend that Mr. Adwokat's apology is insincere, his evidence expressing it should be rejected, and in any event it comes too late to have any value. While I have many issues with Mr. Adwokat's credibility (some of them will be discussed below), the evidence relied on by the plaintiffs does not persuade me that the apology is insincere. Further, while the apology comes very late in the day, and as a result does not have the same value in mitigation as would an acceptance of responsibility that came earlier (especially one that obviated the need for a trial), it is still entitled to some mitigating effect, provided that it is genuine (*c.f. Lacasse* at para 81).

[47] The plaintiffs allege – and Mr. Adwokat does not deny – that after the contempt hearing in June 2019 and while the matter was under reserve, he continued to engage in activities associated with Red Rhino and its devices – in particular, making certain Facebook posts in October 2019. The plaintiffs also allege – and Mr. Adwokat denies – that he is carrying on

Red Rhino's business under another guise, namely as Warranty Services Ltd. and New Pay Group, LLC. They say that this undermines any suggestion that Mr. Adwokat's apology and acceptance of responsibility are genuine. I agree with the plaintiffs that the online presentation of Warranty Services Ltd. is strikingly similar to that of Red Rhino. I also accept the plaintiffs' submission that there must be *some* connection between Red Rhino, on the one hand, and Warranty Services Ltd. and New Pay Group, on the other hand, given that one can log into the latter's websites using Red Rhino credentials. Thus, I do not believe Mr. Adwokat's denial of a connection between himself and Warranty Services Ltd. and New Pay Group. Nevertheless, the evidence does not permit me to find even on a balance of probabilities what exactly that connection is.

[48] The plaintiffs also allege that there is a connection between Mr. Adwokat and a set-top box marketed under the name Lime Juice Box (an allegation he also denies). Given the obvious similarities between the Red Rhino device and the Lime Juice Box device (including how the two are marketed), given that Warranty Services Ltd., New Pay Group and Lime Juice Box all share a phone number, and given the otherwise inexplicable coincidence that Lime Juice Box Inc. is owned by a Facebook friend of Mr. Adwokat's brother, I find that there must be *some* connection between Mr. Adwokat and Lime Juice Box as well. However, as with Warranty Services Ltd. and New Pay Group, I cannot say what that connection is.

[49] The plaintiffs submit that Mr. Adwokat must have a reason for wanting to keep these activities secret but this is nothing but speculation. The important point is that while any sort of association with Warranty Services Ltd., New Pay Group or Lime Juice box may be further

evidence of Mr. Adwokat's recklessness with respect to the interlocutory injunction, there is no evidence that any such activities continued after November 19, 2019, when my decision finding him in contempt was released. This was the point when Mr. Adwokat was fixed with knowledge that his conduct was in breach of the injunction. There is no evidence that he has engaged in any offending conduct since then, whether in connection with Red Rhino or otherwise.

[50] In sum, while Mr. Adwokat's credibility leaves much to be desired in many respects, I accept as sincere his statement that he now recognizes the error of his ways, that he has not engaged in conduct contrary to the injunction since November 2019, and that he will not do so in the future. While I do not give his late apology and acceptance of responsibility much weight, they are entitled to some. Accordingly, they will have some mitigating effect, particularly with respect to the need for specific deterrence.

C. *The Range of Sentence in Comparable Cases*

[51] One of the challenges in fashioning an appropriate sentence in this matter is that there are very few directly comparable cases. The closest is that of Vincent Wesley. Understandably, Mr. Adwokat places considerable emphasis on the sentences Mr. Wesley received for contempt of court as helpful benchmarks in this case. The plaintiffs, on the other hand, argue that the circumstances of Mr. Wesley's cases are so different from the present one that the sentences imposed there are of little assistance here. As I will explain, while there are important differences between the cases, I agree with Mr. Adwokat that the sentences imposed on Mr. Wesley serve as helpful benchmarks in this case.

[52] Mr. Wesley was found to be in contempt of the very same order as Mr. Adwokat – the June 1, 2016, interlocutory injunction – for engaging in the same type of conduct as Mr. Adwokat – the offering for sale and selling set-top boxes that facilitate unauthorized access to the plaintiffs' television programming. Indeed, Mr. Wesley was found in contempt of this order twice: first by Justice LeBlanc on a guilty plea (*Bell Canada c Vincent Wesley dba MtlFreeTV.com*, 2016 CF 1370 ("*Wesley 2016*") and then by Justice Roy after a trial (*Bell Canada v Vincent Wesley dba MtlFreeTV.com*, 2018 FC 66). The second contempt related to a work-around by which Mr. Wesley attempted to avoid the constraints of the interlocutory injunction. His efforts in this regard were not dissimilar to how Mr. Adwokat attempted to achieve the same goal with the Red Rhino device.

[53] After admitting in the first contempt proceeding that his set-top boxes were covered by the interlocutory injunction and acknowledging his guilt, Mr. Wesley was sentenced by Justice LeBlanc to a fine of $15,000. (He was also ordered to pay costs in the agreed-upon amount of $10,000.) Subsequently, Mr. Wesley made slight modifications to his set-top boxes which, he believed, took them outside the scope of the injunction. Justice Roy found that he was mistaken in this belief and that the sale of the modified device also constituted contempt. Significantly, the sale of the modified device in question occurred less than a month after Mr. Wesley was sentenced on the first contempt. Weighing all of the relevant considerations, Justice Roy concluded that a fit sentence for the second contempt was a fine of $30,000: see *Bell Canada v Vincent Wesley dba MtlFreeTV.com*, 2018 FC 861 ("*Wesley 2018*"). (As discussed below, Mr. Wesley was also ordered to pay costs of $30,000.)

[54] While sentencing is an inherently individualized process, the elements these cases have in common strongly suggest that the sentences imposed on Mr. Wesley (especially for his second contempt) should be given serious consideration when fashioning a sentence for Mr. Adwokat.

[55] At the same time, there are important differences between the cases. One is the nature of the two operations. In contrast to Red Rhino, which I have already characterized as a large-scale, sophisticated operation, Mr. Wesley conducted his business from a small, sparsely furnished room in a non-descript building in an industrial area in Montreal. His first contempt related to the sale of devices to undercover investigators on three occasions in June and July, 2016. The devices were sold for $100. Mr. Wesley testified that he made a profit of $40 on each device. The second contempt related to the sale of a single device to an undercover investigator in January 2017. Despite the modifications, the cost of the device was still $100. Thus, I agree with the plaintiffs that Mr. Adwokat and Mr. Wesley have nothing in common when it comes to the scope, scale or sophistication of their operations.

[56] On the other hand, another distinguishing feature – the fact that Mr. Wesley was found in contempt twice – actually makes the cases more comparable than they would otherwise have been. The gravity of the conduct in the present case and in *Wesley 2018* stem from different aggravating factors but it is still possible to compare the cases in a meaningful way. Doing so, I find that the second sentence imposed on Mr. Wesley in particular is a helpful indicator of the range of a fit sentence for Mr. Adwokat.

[57] In fashioning the sentence in *Wesley 2018*, Justice Roy noted that in *Wesley 2016* Justice LeBlanc had surveyed a number of sentencing cases involving contempt in the intellectual property context (the cases are summarized in an Annex to Justice LeBlanc's decision). Justice LeBlanc had found that fines ranged from $1,000 to $50,000, they tended to be lower when imposed on a person as opposed to a company, and, in the large majority of cases, they were less than $20,000. Notably, none of the cases involved a sentence of immediate incarceration. To this survey we may now add Justice LeBlanc's own decision in *Wesley 2016* as well as Justice Roy's decision in *Wesley 2018*, both of which are consistent with the range identified by Justice LeBlanc. The plaintiffs have not persuaded me that the relevant range of sentence is higher today than it was just a few years ago. Most assuredly, they have not persuaded me that the range comes anywhere close to a fine in the amount that they seek.

[58] Considering the range of sentence, the purposes and principles of sentencing, and the relevant aggravating and mitigating circumstances, I am satisfied that a fine of $40,000 is fit and appropriate. This is higher than the fines imposed on Mr. Wesley (because of the circumstances distinguishing this case from his) but the sentences are still meaningfully comparable because they all fall in the recognized range. While it may be obvious, I have settled on a fine that is at the higher end of the range because of the gravity of Mr. Adwokat's misconduct and the absence of much in the way of mitigating circumstances. I am satisfied that a fine in this amount (unlike the amount proposed by the plaintiffs) meets the objectives of denunciation and deterrence (both general and specific) while respecting the principles of proportionality and restraint. In fixing the fine in this amount, I have considered that Mr. Adwokat will also be responsible for a

substantial award of costs (as discussed below). I address the question of Mr. Adwokat's ability to pay the fine below.

[59] Before leaving this point, I wish to make one final observation. For Mr. Wesley's first contempt finding, the moving parties – the same moving parties as in the present case, represented by the same counsel as here – sought a fine of $100,000 (payable over three years). Justice LeBlanc imposed a fine of $15,000 (payable over 20 months). For Mr. Wesley's second contempt, these same parties sought a period of imprisonment for six months. Justice Roy imposed a fine of $30,000 (payable over 18 months). In the present case, the plaintiffs seek a period of imprisonment of not less than 90 days and a fine of $200,000 (payable forthwith).

[60] In my respectful view, the penalties the plaintiffs seek here are manifestly excessive. Accepting, as I do, that there are features that distinguish the present case from those of Mr. Wesley, nothing justifies a sentencing position that is so far out of proportion to the sentences imposed by my colleagues for breaches of the very same order or, more generally, that is so far outside the established range of sentence for similar conduct. As the plaintiffs should know, the fundamental objectives of sentencing for civil contempt are to re-affirm the authority of the court and to protect and promote the repute of the administration of justice. Taking positions on sentence that a court, properly applying the principles of sentencing, could not possibly adopt risks undermining these objectives by making it appear that, by imposing a substantially lower penalty than was sought by the plaintiffs, the court does not take the contempt seriously. This is an outcome that the plaintiffs, as much as anyone, have an interest in

avoiding. Taking positions on sentence that were more carefully tailored to the principles of sentencing would go a long way in this regard.

D. *Ability to Pay the Fine*

[61] I am satisfied that Mr. Adwokat can pay a fine of $40,000 over 24 months. While I am making both Mr. Adwokat and Red Rhino jointly responsible for payment of the fine, for sentencing purposes I do not see any meaningful difference between the two. Thus, I presume that it is Mr. Adwokat personally who will bear the burden of paying the fine.

[62] By proposing a fine of $20,000, Mr. Adwokat has acknowledged that he has the means to pay a significant fine, especially if given time to pay. While the fine I have settled on is twice that which Mr. Adwokat proposed, I am satisfied that it does not exceed his ability to pay. More to the point, I am satisfied that the schedule of four payments I am ordering will achieve the objectives of sentencing without placing a burden on Mr. Adwokat that he cannot meet. I have reached this conclusion bearing in mind that, as is discussed below, Mr. Adwokat will also be responsible for a significant award of costs.

[63] I begin by noting that there is little direct evidence of Mr. Adwokat's present financial circumstances or obligations. Mr. Adwokat (and Red Rhino) filed for bankruptcy protection shortly before the contempt hearing in June 2019. The plaintiffs contend that Mr. Adwokat has failed to cooperate fully with that process but I am not in a position to make a finding on this, one way or the other. There is, however, sufficient circumstantial evidence to support a finding that Mr. Adwokat can pay the fine I am ordering.

[64] First, as discussed above, Mr. Adwokat ran a large-scale, sophisticated commercial operation for several years. The retail price for the Red Rhino device was at the high end compared to similar devices. (It was generally listed for sale at $499.99 but promotional discounts could reduce the price to between $300 and $350. One could also purchase a so-called Magic Wand – a remote control device – for an additional $49.99 along with other accessories. Red Rhino branded t-shirts were also available for purchase.) Mr. Adwokat sold the devices directly to customers as well as wholesale to other retailers. Sales volumes appear to have been high. This business appears to have been Mr. Adwokat's only source of income over a significant period of time. He employed members of his family and others from time to time. While some puffery and self-promotion may have been involved, Mr. Adwokat portrayed himself as living a lavish lifestyle and he linked that lifestyle to Red Rhino. He was a sufficiently good customer for his suppliers that they covered at least some of his expenses on a trip to Asia in October 2016. I infer from all this evidence that Red Rhino was a profitable enterprise. It was open to Mr. Adwokat to produce books and records (including tax records) to show that such an inference should not be drawn because, for example, his sales were low or his costs were high. He has not done so.

[65] Second, Mr. Adwokat has not provided credible evidence of how he has been supporting himself since November 2019. He says he has not worked since he shut down Red Rhino. When the sentencing hearing took place in March 2021, he was in Costa Rica. (Like everyone else because of the COVID-19 pandemic, Mr. Adwokat participated in the hearing by video link.) He had been in Central America for an extended period of time. He said could not recall exactly how long he had been there but he thought it was since at least early 2020. (Recently the

Court was advised that he has returned to Canada.) He claimed that he was living very modestly and was being supported by his new friends there but I do not believe him. His account of these friendships and the generosity of virtual strangers is simply incredible. I find that in fact he has been living on the proceeds of Red Rhino's business activities, at least in part.

[66] Third, Mr. Adwokat has demonstrated that he is a skilled entrepreneur. While it may prove to be more challenging for him to earn a living legitimately, and while I acknowledge that he suffers from certain medical conditions, there is no evidence that he cannot obtain gainful employment.

[67] Finally in this connection, Mr. Adwokat submitted that, in the event that he is unable to pay the fine that is imposed, "an alternative order for 250 hours of community service is appropriate." I do not agree that this term should be included in the sentence I am imposing. Mr. Adwokat has not provided any credible evidence that he will be unable to pay the fine I am imposing. In any event, I am not satisfied that a sentence of community service would be fit and appropriate in the circumstances of this case.

E. *The Threat of Jail*

[68] It is at least implicit in the foregoing that I reject the plaintiffs' submission that an immediate term of imprisonment for Mr. Adwokat should be imposed. An important consideration in this regard is that the plaintiffs have not established that Mr. Adwokat continues to act in contempt of the interlocutory injunction.

[69] The plaintiffs cite an unreported Ontario Superior Court of Justice decision (*Dish Network LLC v Gill et al*, April 27, 2018 (per Carpenter-Gunn J)) in support of their request for an immediate jail term for Mr. Adwokat. In my view, there are several aggravating circumstances in that case that called out for an immediate jail term. Those aggravating circumstances are absent here. As a result, the sentence imposed in that case – imprisonment for four months – is of little assistance. (Justice Roy reached a similar conclusion in *Wesley 2018*.) If anything, that decision demonstrates why an immediate jail term is not a fit or appropriate sentence here. The same is true of *Directv, Inc v Boudreau*, 2006 CanLII 12962, where the Court of Appeal for Ontario upheld a three month jail sentence for contempt.

[70] However, I am satisfied that, considering Mr. Adwokat's past conduct, a threat of jail is necessary to ensure that he pays the fine I have imposed. For far too long, he did not take his obligations to the court seriously. The threat of incarceration built into my order is meant to give him serious encouragement to pay a fine that, as I have already explained, I am satisfied he has the means to pay: see *R v Wu*, 2003 SCC 73 at para 3. This, in turn, will help to ensure that the sentence meets the objectives of denunciation and deterrence (both general and specific).

[71] Mr. Adwokat shall pay the fine in four installments each in the amount of no less than $10,000. The first installment shall be paid no later than March 1, 2022; the second no later than September 1, 2022; the third no later than March 1, 2023; and the fourth no later than September 1, 2023. Mr. Adwokat may, of course, pay off the fine more quickly than this if he wishes. He may also move for an extension of time to pay an installment. Without prejudging the matter, Mr. Adwokat should realize that such an extension would be granted only upon the

demonstration of compelling circumstances. If Mr. Adwokat fails to pay the fine in full by September 1, 2023, the plaintiffs may move for an order for his arrest and committal to jail for a period not exceeding 90 days.

[72] To ensure that this latter relief is available to the plaintiffs should circumstances warrant it, under paragraph 472(d) of the *Federal Courts Rules* I am ordering that Mr. Adwokat may not leave Canada until the fine is paid in full. Once again, in appropriate circumstances, Mr. Adwokat may move to vary this term of the order. I am also ordering that Mr. Adwokat advise the Registry of his current residential address and that he report any change of residential address forthwith until such time as the fine is paid in full.

F. *Costs*

[73] The plaintiffs seek costs in the all-inclusive, lump sum amount of $400,000, payable forthwith. They support this request with affidavit evidence establishing that their counsel have billed them a total of $690,620.51 (excluding taxes) in legal fees and $39,423.12 in disbursements in connection with this contempt proceeding. In my view, the amount claimed is manifestly excessive and unreasonable.

[74] I acknowledge that it is customary to award costs on a solicitor/client scale in contempt cases: see *Lari v Canadian Copyright Licensing Agency*, 2007 FCA 127 at paras 38-39. The rationale for this is to ensure that "a party who assists the Court in the enforcement of its orders and in the enforcement of respect for its orders should not, as a rule, be put out of pocket for having been put to that trouble" (*Pfizer Canada Inc v Apotex Inc* (1998), 86 CPR (3d) 33 (FC) at

para 8, quoted with approval in *Lari* at para 38). That being said, the amounts claimed must be reasonable, proportionate, and within the ability of the defendant to pay. Weighing these considerations, I find (as did Justice Roy in *Wesley 2018* (at para 36)) that this is not a case in which the customary approach to costs in contempt matters is appropriate.

[75] In assessing the plaintiffs' claim for costs, I place particular emphasis on the principle of proportionality. It plays a critical role not only as a principle of sentencing but as a principle of governing litigation in general: see *Hryniak v Mauldin*, 2014 SCC 87 at paras 23-33. Without in any way diminishing the important role the plaintiffs played in bringing this matter forward in the public interest, I fear that they have lost sight of the need for proportionality in all things, including the pursuit of contempt allegations.

[76] In *Wesley 2018*, Justice Roy observed that the amount of costs the plaintiffs had claimed there – $165,000 – "can only be a disincentive for a person of limited means to defend oneself against a contempt charge." This observation applies even more strongly here. To echo a another finding made by my colleague, the plaintiffs' costs claim here is unjustified and is so far beyond any demonstrated ability of the defendant to pay as to be unreasonable: see *Wesley 2018* at para 39.

[77] With regard to the circumstances of this case, I find that the case was not overly complex. The legal and factual issues at play were relatively straightforward. To some extent, the time demands of this matter were the result of the plaintiffs' litigation strategy. While there was nothing improper about how they approached this case, it is nevertheless true that it could have

been pursued in a more streamlined and economical fashion. As well, there was obvious overlap between this contempt hearing and Mr. Wesley's trial and sentencing before Justice Roy, both of which preceded this one. Since the plaintiffs were represented by the same law firm in both cases, it is reasonable to think that there were some economies of scale available to them. As for Mr. Adwokat, aside from his earlier obstructive behaviour and an ill-advised argument that this proceeding should be stayed in favour of the bankruptcy proceeding (see paragraphs 20-27 of my earlier decision), once it was underway, he did not hamper the progress of this hearing in any way by improper, vexatious or unnecessary steps or tactics.

[78] Considering all the relevant circumstances of the case before him, Justice Roy awarded costs against Mr. Wesley of $30,000 (payable within 24 months): see *Wesley 2018* at para 39.

[79] In my view, balancing all the relevant factors in this case, including the fact that Mr. Adwokat is also responsible for paying a substantial fine, an award of costs in the all-inclusive amount of $35,000 is appropriate. This award covers the contempt trial and sentencing as well as the plaintiffs' Rule 147 motion disposed of by Case Management Judge Tabib on May 6, 2019. Mr. Adwokat and Red Rhino shall be jointly responsible for payment of this amount within the next 24 months. To be clear, this award is not subject to the payment schedule set out in paragraph 71, above, in relation to the fine.

IV. CONCLUSION

[80] For these reasons, I have concluded that the sentence set out in detail in the following order is fit and appropriate. I will remain seized of this matter in the event that any motions in relation to this order arise in the future.

ORDER IN T-759-16

THIS COURT ORDERS that

1. A fine in the amount of $40,000 is hereby imposed on Eric Adwokat;
2. Red Rhino Entertainment Inc. is jointly liable for payment of this fine;
3. The fine shall be paid by delivering to the Registry certified cheques or bank drafts made to the order of the Receiver General of Canada in accordance with the following schedule:
    a) the first installment shall be paid no later than March 1, 2022;
    b) the second installment shall be paid no later than September 1, 2022;
    c) the third installment shall be paid no later than March 1, 2023;
    d) the fourth installment shall be paid no later than September 1, 2023;
4. Each installment shall be in an amount of not less than $10,000;
5. Notwithstanding the immediately preceding term, if an installment is paid in an amount greater than $10,000, the next installment may be reduced by the amount that the previous one exceeded $10,000;
6. If the fine is not paid in full by September 1, 2023, the plaintiffs may move for an order for Mr. Adwokat's arrest and committal to jail for a period not exceeding 90 days;
7. Until the fine is paid in full, Mr. Adwokat must remain in Canada;
8. Mr. Adwokat must forthwith provide the Registry with his residential address;
9. Until the fine is paid in full, Mr. Adwokat must inform the Registry of any change in his residential address forthwith;

10. Costs in the all-inclusive amount of $35,000 are awarded to the plaintiffs, payable within 24 months of the date of this order. Eric Adwokat and Red Rhino Entertainment Inc. are jointly liable for payment of these costs;
11. I will remain seized of this matter in the event that any motions in relation to this order arise in the future.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-759-16
STYLE OF CAUSE:	BELL CANADA ET AL v RED RHINO ENTERTAINMENT INC AND ERIC ADWOKAT
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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