



Contempt of court

A 15 month prison sentence was one result in a series of cases over the last year in which the court has flexed its muscles to require officers and executives of large businesses to face proceedings for contempt of court.

This hard line approach suggests that the court is sending a message to the boardroom that responsibility for what is said and done in litigation or in response to court orders, even when acting purely on behalf of the company, can land them in prison, disqualified or with large personal fines.

Corporate officers need to be aware when conducting litigation on behalf of the company that they may personally be made responsible, with criminal sanction, if they do not obey the Court strictly.

Hard Time - an extreme example

On 27 January 2014 the Court committed the former deputy chairman (“Z”) of JSC BTA Bank to prison for 15 months. This was the latest episode in the Bank’s long running fraud claim against the Bank’s former senior management, including Z.

However, Z’s custodial sentence was not imposed as a result of his fraud but rather as a result of his failure to comply with orders issued by the court in the course of the litigation. So that he would not flee the UK to escape any successful judgment for the Bank, the court ordered Z to remain in the UK and to hand over all of his passports, which Z purported to do.

The Bank subsequently obtained judgment against Z for US \$1.5 billion, which Z did not pay. It transpired shortly thereafter that Z had left the UK using a passport (which bore his photo but a different name) which Z had not handed over with his other passports. After Z refused to comply with a further court order requiring him to return to the UK, the Bank applied to have Z committed to prison for contempt of court as a result of his failures to comply with court orders. It was this which resulted in Z receiving a 15 month custodial sentence.

Z’s circumstances are extreme, being set against a backdrop of criminal activity on an international scale, and it is difficult to relate to (or indeed sympathise with) Z’s circumstances. However, the cause of Z’s incarceration, contempt of court, is not an issue that only arises in such exotic areas as Kazakhstani banking fraud – it can arise in any piece of litigation.

What is contempt of court?

The civil (and criminal) courts have long held the power to impose custodial sentences for contempt of court by civil litigants. The term ‘contempt of court’ covers a multitude of sins built up under

a patchwork of legislation and cases. However, the two most common examples:

- i) disobeying the court - where a party ignores or breaks a court order or judgment or fails to comply with an undertaking given to the court; and
- ii) interfering with justice - where a party disrupts the court process or interferes with the administration of justice (which can often result from disobeying the court).

What is the test for contempt?

The test is different depending on the type of contempt. However, common requirements in civil cases are that the accused:

- knew of the terms of the order or judgment he was disobeying;
- can be shown on the evidence to have disobeyed the order or judgment;
- knew of the facts that made his disobedience a contempt (although he need not know his acts amounted to a contempt); and
- deliberately committed the acts/ omissions of disobedience.

It is important to note that it is not necessary that the act of contempt had any impact on the proceedings. Even if the act caused no prejudice to any party in the proceedings, the Court will not excuse criminal sanction. The purpose of this rule is to deter litigants from even attempting conduct that may be a contempt of court.

What are the main areas of risk for litigants?

Common areas where the risk of contempt may arise are:

- (a) In complying (or rather failing to comply) with court orders.
- (b) Giving untrue answers to questions in court when called as a witness.
- (c) Signing statements of truth on documents that ultimately prove to contain false information.

A statement of truth is a declaration by the person signing a document that the facts stated in it are true (or true to the best of his/her knowledge and belief). Important documents in litigation - such as those which set out a party’s case (a ‘Statement of Case’) and witness statements - must contain a statement of truth.

Court orders are given at regular intervals in civil litigation as part of the court's management of litigation. They can range from the straightforward (e.g. to submit evidence by a certain date) to the more complex (e.g. an injunction requiring assets to be frozen). Whatever the nature of the order, the court will expect strict compliance unless a valid reason can be given.

How do contempt of court proceedings arise in civil cases?

- The court or a party can apply to have another party, or anyone acting on its behalf in the litigation (such as its officers or lawyers), committed for contempt of court.
- There are special rules governing the procedure for making such an application.
- The main objective of the proceedings will be to show beyond all reasonable doubt that the accused is in contempt on the basis of the test set out above.

Particular risk for company officers and executives

Company officers and executives are more likely to be at risk of breaching court orders when verifying documents than individual litigants.

Where a company (or similar business vehicle) is engaged in litigation, one or more company officers and/or executives (such as the General Counsel) is often tasked with conduct of the litigation and will sign statements of truth on documents filed on the company's behalf and take responsibility for ensuring that court orders are complied with.

By adopting this responsibility, the court may consider that such officers and executives have taken a personal responsibility for completing those tasks and, in the case of non-compliance, can impose custodial and financial punishments on the individual where such non-compliance is deemed to be a contempt of court.

Penalties for contempt of court

- up to two years in prison;
- an unlimited fine;
- seizure of assets; and/or
- a requirement to give security to ensure good behavior.

Relying on others – risky business?

Where there is a potential contempt of court (either because a document verified by the officer has proved to be false or an order has not been properly complied with), in many instances a company officer may be able to avoid sanction if he/ she can demonstrate that the non-compliance arose from:

- (a) bad advice received from the company's lawyers; or
- (b) incorrect information being supplied by the company's employees with direct knowledge of the facts underlying the dispute.

However, these defences will not work in every situation and a company officer or executive will always retain ultimate responsibility for ensuring that the company complies with court orders and that documents he/ she verifies are in fact true.

It is important to stress that it is relatively rare for civil courts to find that failures to comply with court orders is a contempt of court. However, in the past six to 12 months issues of contempt of court have arisen in a number of high profile cases and the stance taken in those cases demonstrates how seriously the court treats contempt, as exemplified in the following two cases.

HM Solicitor General v Dodd

In this recent case, the CEO and Sales Director ("D" and "C") of a tableware company were given prison terms for giving false witness evidence and tampering with evidence in support of a claim by their tableware company.

The company had sought an injunction to prevent a competitor from copying one of the company's beer glass designs. That application was a good one and was destined to (and indeed did) succeed.

However, angered by the competitor's refusal to accept that it had copied the design, and in the hope of improving their already strong case, D and C solicited emails from distributors to support the injunction application. They then altered the dates of the emails and gave witness statements stating falsely that the emails were unsolicited.

D and C subsequently (and before the injunction application was determined) admitted that the emails had been tampered with and that the emails had been solicited.

Both men showed genuine remorse for what they had done and were able to put ample evidence before the Court of their good character. They also pointed to the fact that they had voluntarily admitted their wrong doing and that no prejudice had been caused.

Re-emphasising the strictness of the contempt rule the Court held that D and C's dishonesty could not be excused and committed both to prison. However, the Court did take those factors into account on sentencing and imposed the, relatively, short sentences of six and two months respectively.

Makdessi v Cavendish

The case concerned a disputed corporate acquisition. Under the share purchase agreement Mr Makdessi had agreed to (i) sell a portion of his shares in the "Target" company to Cavendish and (ii) cease to have any further involvement with the running of a second "Competitor" company of the Target.

In breach of the latter obligation, Mr Makdessi continued to stay involved in running the Competitor. Cavendish sued Mr Makdessi on the basis that his breach of the purchase agreement rendered him a defaulting shareholder in the Target.

Mr Makdessi, who was advised by a Magic Circle law firm and a leading QC, signed a statement of truth on his Defence, which asserted that he had ceased all involvement in running the Competitor. Almost two years into the litigation Mr Makdessi amended his Defence and fully admitted that he had continued his involvement in the Competitor and that he was a defaulting shareholder, resolving the vast majority of the issues in dispute.

In committal proceedings (to decide if contempt of court proceedings should be brought against Mr Makdessi), the court held that Mr Makdessi knew that the statements in his original Defence were false and knew that the false statements would have a significant bearing on the case. It was therefore in the public interest to allow proceedings to be brought to decide if he was in contempt of court. Mr Makdessi must now await the outcome of those proceedings and the potential consequences that could ensue.

Dar al Alkan & Others v Kroll & Others

The claimants in this case had obtained an injunction against the Defendants, including Kroll, preventing them from disclosing certain information.

As a condition of that injunction the court required Dar al Alkan to give an undertaking to preserve hard drives (which also contained the same information) in their original form and deliver them to their solicitors.

Kroll subsequently sought the court's permission to serve committal proceedings on Dar al Alkan and a director of Dar al Alkan in Saudi Arabia, for breaching the undertaking. Kroll alleged that the director, acting on behalf of Dar al Alkan, had deleted emails from the hard drives before they were handed over and had given misleading information to the court in his witness evidence in support of Dar al Alkan's application for the injunction.

The court held that it did have jurisdiction for contempt proceedings against the director and found that Kroll had a reasonable chance of proving that (i) the director had deleted emails from the drives, (ii) submitted false evidence to court and (iii) as a result, there was a prospect of the director being sentenced to imprisonment.

Conclusions

While the cases of both Mr Makdessi and Dar al Alkan are subject to final decision on whether contempt has been committed, they demonstrate the seriousness with which the court will deal with contempt, even where it has not necessarily affected the outcome of a case (in both instances the contemptible conduct was identified before the court gave judgment on the substantive cases).

As a result, a corporate officer or executive charged with the responsibility of running litigation on the company's behalf must take great care to ensure that (i) they do nothing that could mislead the court and (ii) they comply with court orders strictly.

Protections against contempt:

- Never sign a statement of truth if you are in any doubt as to the veracity of document you are verifying or the information on which it is based.
- Only sign a statement of truth when you (i) honestly believe the contents to be true and/or (ii) where the contents come from another person that you are satisfied the information is correct.
- Ask any advisors or employees supplying you with information to be included in a verified document to confirm in writing that it is accurate before you sign.
- Ask your legal advisors to confirm that you are a suitable person to verify the document in question.
- When a court makes an order, seek legal advice in respect of the implications of order a give clear instructions as to what you / the company will do and what you require your lawyers to do.
- If you are in any doubt as to whether an action or omission may or may not breach a court order, seek legal advice as to how you should act.

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