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"Jailhouse Shock – Contempt of court for bad egg directors"

By Markus Esly

The Court of Appeal recently affirmed that company directors are liable for contempt of court if their company breaches a court order without it being necessary for them to have 'aided and abetted' the breach.

English law distinguishes between criminal and civil contempt of court. Civil contempt has a less stringent mental requirement (*mens rea*) than criminal contempt. In October 2020, an amendment to the English Civil Procedure Rules ("**CPR**") removed an express reference to the Court's power to hold company directors in civil contempt. This gave rise to uncertainty: could directors now only be liable for criminal contempt of court if they deliberately 'aided or abetted' the breach of an order of the court?

Two recent cases have grappled with this. First, in *Olympic Council of Asia* v *Novans Jets LLP* & [2023] EWHC 276 Foxton J found that the CPR had not changed the law, in a decision that illustrates some of the difficulties and hurdles to overcome when seeking to hold company directors, or those controlling companies as *de facto* directors, liable for contempt. In *ADM International Sarl* v *Grain House International SA* [2024] EWCA Civ 33, the Court of Appeal then conclusively held that liability of company directors for civil contempt is and remains a substantive principle of English law that can be traced back to the 1670s, and it applies regardless of any procedural refinements to the CPR. In this article, we look at those two decisions and at other aspects of how the English Courts enforce compliance by companies with orders and injunctions, by holding those controlling such corporations personally liable.

Interfere with the administration of justice at your peril – the liability of third parties

Companies have separate legal personality but can only act through their directors and officers. English law has taken the policy decision to hold to account those directors and officers of companies that flout court orders. This ensures that the court's disciplinary powers are preserved. The justification for this is that directors and officers have accepted personal responsibility for the actions of the company that they control and represent, as a consequence of their appointment. Before looking at the principles that apply to company directors specifically, it is useful to recall the position of third parties who interfere with orders of the English Courts. All third parties can be held liable for contempt of court, and this extends to anyone regardless of their relationship with or interest in the defendant who is the subject of the court order (including directors, officers, or shareholders).

The case of *Seaward* v *Paterson* [1897] is a good illustration of this. It has become synonymous with the English Courts' "*Seaward*" contempt jurisdiction. William Seaward let a house at 53 Fetter Lane in the City of London to George Paterson for a term of 21 years. There was a public house on the ground floor. Mr Paterson and two of his associates, a Mr Murray and a Mr Sheppard, went into business together and started to hold unlicensed boxing matches in the public house. That gave rise to complaints because of the noise and disturbance caused. It was also a clear breach of covenant under Mr Paterson's lease, which prohibited this kind of use of the premises. Mr Seaward, as head landlord went to Court to put a stop to this. In July 1896, the Court issued an injunction. Mr Paterson was named as a respondent, but Mr Murray and Mr Sheppard were not. Undeterred, Mr Paterson and his two associates then held more boxing matches in September and October 1896. Mr Seaward went back to court and pressed for Mr Paterson, and also Mr Murray and Mr Sheppard, all to be held in contempt of court for breach of the July 1896 injunction.

The judge at first instance had no difficulty in committing Messrs Paterson and Sheppard. Mr Paterson was personally liable for breach of covenant, since he had permitted the unauthorised use of the premises. Mr Sheppard had acted as the master of ceremonies at the boxing matches, and was found to be personally liable as an agent (or 'servant' in those days) of Mr Paterson in staging and managing the events. Mr Murray's position was somewhat more complicated. He was not bound by the lease and did not act as agent. In his defence, Mr Murray relied on the fact that he had not been served with the injunction until November 1896, so after the alleged breaches had already taken place. He claimed to have attended the boxing matches only as a spectator. Mr Murray admitted that he had attended the court hearing in July 1896 which had led to the injunction, but said he had (perhaps conveniently) left the hearing before judgment was handed down, and so claimed ignorance of the injunction.

This did not fly. The Court found that even though Mr Murray had never been served with the order, and was not a named party to the action, he knew all about the injunction and had played a material part in the breach of it. He could still be liable for contempt, since:

> "*He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction, which was not granted against him in any sense of the word, but that he has been aiding and abetting others in setting the Court at defiance, and deliberately treating the order of the Court as unworthy of notice. …*
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> *… the orders of the Court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the Court, or by assisting those who were bound by its orders.*"

The Court of Appeal in *Seaward* affirmed Mr Murray's conviction. The Lord Justices agreed with the judge at first instance that, far from being an innocent bystander, there was not the slightest doubt that Mr Murray was at the bottom of the whole thing and had a financial interest in the boxing venture. He was too clever to have done anything openly that would have led to him being sent to jail, such as for instance advertising the boxing matches, but the evidence showed that he had nonetheless clandestinely aided and abetted the other defendants in breaching the order, by helping with organising and running these illicit contests. Mr Murray may have learnt of the injunction without having been served, but all the elements of the offence of (criminal) contempt of court were made out against him on the evidence.

Criminal and civil contempt – *mens rea* and burden of proof

Third parties such as Mr Murray can therefore be liable for criminal contempt where they willfully interfere with the administration of justice and 'aid and abet' a breach of a court order. In modern commercial disputes, the prospect of liability for criminal contempt is the mechanism by which the English Courts enforce worldwide freezing orders against the assets of defendants or judgment debtors. The banks who are served with such orders must obey them and sequester the funds, or else risk criminal liability if they facilitate the defendant moving their assets out of reach of the party who has obtained the freezing order. The *mens rea* or mental element required for criminal contempt is that there must be an intention to breach the order, or to aid, abet or enable the breach, and the criminal standard of proof – beyond a reasonable doubt – applies.

As against that, civil contempt is the sanction to be imposed against the parties named in the court order that has been breached. Here, the mental requirement is less stringent. Liability for civil contempt arises where the defendant, having knowledge of the court's order, intentionally acts, or refrains from acting, and that act or

omission is in fact a breach of the order. Put differently, the defendant needs to know of all the facts which constituted the breach of the order, but does not need to have intended to breach the order by acting or failing to act. For a time, there was some doubt as to whether in order to establish civil contempt, it was also necessary to show that the breach had been contumacious – that there had been a deliberate flouting of the court's order.

This uncertainty was caused by the Court of Appeal's decision in *Irtelli* v *Squatriti* [1993] QC 83. The defendants had been ordered to refrain from "*selling, disposing or otherwise dealing with a property*" of which they owned the freehold. They then executed a charge over the property, something that fell within the terms of the order. They belatedly claimed they did not understand that this amounted to 'otherwise dealing' with the property. At first instance, the defendants were convicted of contempt of court. The Court of Appeal then discharged the order, on the basis that "… *it was impossible to conclude that the appellants had intentionally breached the injunction*". After judicial and academic criticism of the decision as going against earlier authority, the Court of Appeal eventually overturned *Irtelli* v *Squatriti* in *Varma* v *Atkinson* [2020] EWCA Civ 1602. It is now settled law that a party is liable for civil contempt of court if they commit acts or omissions knowingly, and that puts them in breach as a matter of fact and law. No further knowledge is required, since:

> "*… the party in whose favour an order has been made is entitled to have it enforced, and also the effective administration of justice normally requires some penalty for disobedience to an order of a court if the disobedience is more than casual or accidental and unintentional.*"

However, liability for civil contempt is not, in truth, completely strict. This is illustrated by the decision of Briggs J in *Sectorguard Plc* v *Dienne Plc* [2009] EWHC 2693 (Ch). The respondent company gave an undertaking to disclose details of the identity of all customers that had been contacted by it in breach of contract. However, the company had kept no records of who had been contacted, and so it was impossible to comply with the undertaking, which should never have been given in the first place. The Court held that even though the undertaking was worded in absolute terms and went beyond using the company's best endeavours, the breach (not doing what was in fact impossible) did not place either the company or its directors in contempt of court:

> "*32. By contrast, I accept the thrust of Mr Grant's second submission that failure to perform an impossible undertaking is not a contempt. The mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order.*
> *…*
>
> *33. Nonetheless, even a mental element of that modest quality assumes that the alleged contemnor had some choice whether to commit the relevant act or omission. An omission to do that which is in truth impossible involves no choice at all. Failure to comply with an order to do something, where the doing of it is impossible, may therefore be a breach of the order, but not, in my judgment, a contempt of court.*"

This so-called impossibility defence should only rarely be relevant, since it is not the Court's practice to require parties to do the impossible. Nonetheless, when the High Court had occasion to revisit this point in *Perkier Foods Ltd* v *Halo Foods Ltd* [2019] EWHC 3462, it affirmed the general principle that there had to be at least some choice for the defendant as to how to act, else there could be no criminal liability (a result that reflects the general rule in criminal law). 'Impossibility' is not, of course, to be confused with compliance with an order of the English Court being expensive, inconvenient or burdensome – none of which are valid excuses for a breach. Neither is acting in good faith, or acting (or not acting) in fear of falling foul of orders made in another jurisdiction. In *Masri* v *Consolidated Contractors International Company SAL* [2011] EWHC 1024, the Commercial Court held that the

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English Courts would not excuse a failure to comply with an order they have made because of any actual or perceived conflict with the orders made by a foreign court. The Commercial Court confirmed that there was no general principle of a 'reasonable excuse' for not complying. Acting in good faith or facing judicial sanctions elsewhere may of course be taken into account by an English judge when sentencing a contemnor, but such matters do not prevent the liability from arising in the first place.

Another important point is that the criminal standard of proof applies even in the case of civil contempt. In *JSC Mezhdunarodniy Promyshelnniy Bank* v *Pugachev* [2016] EWHC 192 the High Court summarised the principles that English judges will apply when reviewing the evidence before them in any contempt of court case. The applicant seeking committal bears the burden of proof that the order has been breached, and that the mental element is established. But where the respondent is advancing a positive defence, then the burden shifts to the respondent for that purpose. The applicant's case must always be proved beyond a reasonable doubt, meaning that the judge must be sure that the offence has been committed. Rose J noted that:

> "*A reasonable doubt is that quality or kind of doubt which when you are dealing with matters of importance in your own affairs you allow to influence you one way or another.*"

The Court will be careful to draw inferences of guilt from circumstantial evidence, and will ask whether the evidence allows for any inferences that are inconsistent with a finding of contempt. If that is the case, the applicant will fail. A defendant will only be convicted based on secondary evidence if that evidence permits only single inference of guilt, and nothing else. This is an important reminder that liability for contempt will not be found lightly, but it should also be recalled that court orders will tend to be aimed at important, and obvious, matters, such as refraining from taking identified steps or dealing with assets, delivering up specific property and so on. A defendant who claims innocence in the face of having done exactly what the court expressly told them not to do may find that such a single inference of guilt can be drawn from all the surrounding circumstances after all.

Specific principles governing the liability of company directors

English law has developed further principles that deal specifically with the liability of company directors. In addition to being subject to the "*Seaward*" jurisdiction (liability for wilful interference with the administration of justice), directors can be held liable under the principle explained most authoritatively by Woolf LJ (as he then was) in *Attorney-General for Tuvalu* v *Philatelic Distribution Corporation Ltd* [1990] 1 WLR 926:

> "*In our view where a company is ordered not to do certain acts or gives an undertaking to like effect and a director of that company is aware of the order or undertaking he is under a duty to take reasonable steps to ensure that the order or undertaking is obeyed, and if he wilfully fails to take those steps and the order or undertaking is breached he can be punished for contempt. We use the word 'wilful' to distinguish the situation where the director can reasonably believe some other director or officer is taking those steps.*"

The mere fact that a company director is aware of the order thus places him or her under a duty to take "*reasonable steps*" to ensure that the company complies with it. Directors are not, however, automatically responsible for any and all breaches of court orders committed by their companies. The High Court in *Sectorguard* expressly rejected such a submission and emphasised that liability will only arise if the officer in question had either aided or abetted the breach or had failed to 'take reasonable steps'. The reference to reasonableness in this context should not, however, be seen as lowering the bar overmuch. The directors control their company. Their duty to take reasonable steps to procure that the company complies with the order is really concerned with a director personally taking the steps in question while acting on behalf of the company, within the applicable corporate governance

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framework in the company's constitution (so convening and holding any necessary board meetings, obtaining any necessary authorisation, and so on). In *Integral Petroleum SA* v *Petrogat FZE* [2020] EWHC 558 (Comm), Foxton J referred to statement of principle in *Attorney-General for Tuvalu* and noted that:

> "*The requirement for wilfulness excludes only those situations where a director can reasonably believe some other director or officer is taking those steps.*"

Any such reasonable belief that someone else was taking care of things would, it is suggested, require proactive checking and following up.

Foreign directors are not beyond the reach of the English Courts

The contempt jurisdiction of the English Courts has extra-territorial reach and is available against directors of companies incorporated outside of the jurisdiction, who are foreign nationals and are not resident in England and Wales.

In *Dar Al Arkan Real Estate Development Co* v *Refai* [2014] EWCA Civ, the Court of Appeal considered the liability of a director of a foreign company which had commenced litigation in England. The claimants were a Saudi Arabian property developer and a Bahraini bank. They alleged that the former CEO of the bank had instigated a campaign of blackmail after he had himself been dismissed for misconduct. Internal corporate governance documents relating to the claimants had been published on a rogue website, together with commentary alleging that these documents were evidence of serious malpractice. The claimants suspected that the ex-CEO was behind this. They commenced litigation in London against the ex-CEO and alleged accomplices, arguing that the English Courts had jurisdiction because the tortious and unlawful acts would lead to the claimants suffering loss in England, satisfying the requirements of Article 4(1) the (then applicable) Rome II Regulation (the Regulation on the Law Applicable to Non-Contractual Obligations). This was because the website had, the claimants argued, made it impossible to refinance certain debt instruments, some of which were traded on the London Stock Exchange. They quantified their losses as in excess of US$ 500 million.

The claimants applied for injunctive relief, relying on documents which incriminated the ex-CEO from two hard drives which the claimants told the Court had been delivered to them anonymously. The documents contained numerous emails from the ex-CEO's own inbox. At an *ex parte* hearing, counsel for the claimants submitted that the while the claimants suspected that the data on the hard drives might have been obtained unlawfully, they themselves had not done anything unlawful and should thus be allowed to rely on the documents. Directors of the claimant companies gave witness statements supporting that position. The Court granted the orders sought but also required that the hard drives be kept safe by the claimants before being delivered up to the claimant's solicitors.

The provenance of the incriminating emails became a major issue in the proceedings once the defendants were served with the orders, which they contested. Forensic analysis showed that the hard drives had in all likelihood been connected to the claimant's IT system, and important files had been deleted immediately prior to the delivery up to the drives into the custody of the solicitors, in breach of the undertakings required by the court of the claimants. There was a strong indication that the claimants had in fact hacked the ex-CEO's email account and there had been no 'anonymous' tip off. Armed with that evidence, the defendants succeeded in persuading the Court to set aside the *ex parte* orders. The Court found that the claimants had been dishonest and breached their duty to give full and frank disclosure during the *ex parte* stage of the proceedings, as well as the undertakings relating to the preservation of the hard drives.

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The defendants then applied to have the claimant companies and their directors held in contempt of court for having dishonestly procured the *ex parte* orders, and having breached the undertakings given in relation to the safekeeping of the hard drives. The difficulty was that one of the directors, one was resident in Saudi Arabia, was not within jurisdiction and could not be served here. The judge found that the English Courts did nevertheless have jurisdiction over the director. The director appealed on a point that turned on the meaning and effect of the relevant provisions of the CPR. In the Court of Appeal, Beatson LJ noted that there was a general presumption against extra-territoriality but that the Rule Committee which issued and amended the CPR did have the power to legislate with extra-territorial effect. In this situation, the Court of Appeal was prepared to infer such legislative intent, since there was a clear need to ensure that proceedings conducted within the jurisdiction by foreign corporations could be controlled effectively. Beatson LJ noted:

> "*The negative impact on the court's disciplinary powers is likely to be particularly marked in the case of a foreign registered company with no assets in this jurisdiction but which has chosen to institute proceedings here or is properly sued here. In the light of the extent to which commercial litigation in this jurisdiction is of an international character and involves foreign companies, and has done so over the last century, if the appellant's submissions are correct, the problems would not be theoretical or marginal.*"

The Court of Appeal noted that the relevant part of the CPR – Rule 81.4 – would only apply if English Courts had jurisdiction over the company in question (which they did here, considering that the claimants had chosen to litigate in England), and so the scope of contempt proceedings was already limited to directors of corporate litigants before the English Courts. Beatson LJ also held that the requirements for service out of the jurisdiction in Saudi Arabia in Part 6 of the CPR were met, since there was a 'real issue to be tried' as between the applicants and the director in question.

Olympic Council of Asia* v *Novans Jets LLP

Prior to 1 October 2020, CPR Rule 81.4 had stated that a failure by a party to comply with a judgment or order of the court could be enforced by an order for committal, and that:

> "*(3) If the person referred to … is a company or other corporation, the committal order may be made against any director or other officer of that company or corporation.*"

That (or any similar) wording was then omitted from the amended CPR Part 81. In *Olympic Council of Asia* v *Novans Jets LLP* [2023] EWHC 276 (Comm), Foxton J had to consider whether the amendments to Part 81 of the CPR were intended to excuse directors or officers from being liable for civil contempt. The claimant had succeeded in earlier litigation arising out of an aircraft 'lease to purchase' agreement, with the Court finding the defendant liable for US$ 7 million in damages, plus a share of the defendants' profits generated by using the aircraft when it should have been deployed for the benefit of the claimants. Having obtained the judgment, the claimants sought further orders requiring the defendants to disclose the profits generated for all flights of the aircraft in question from November 2020 to December 2021. The defendants failed to provide the information, which led the claimants to apply for the committal of the defendant English LLP, a further associated English limited company that had been used to charter the aircraft, and Mr Gringuz.

Counsel for Mr Gringuz argued that following the amendments to the CPR, it was necessary to prove that Mr Gringuz had aided and abetted a breach of the Court's order, and that he could no longer be held in civil contempt under the principle in *Tuvalu* (for failing to take reasonable steps to ensure compliance). Foxton J traced the origins of the CPR Rule that had been amended back to the Common Law Procedure Act 1860. The immediate

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origins of that provision were not immediately clear to the judge (although he would go on to look into it in great detail). He did, however, examine very closely the wording in the amended provisions of the CPR itself. Foxton J held that:

> "*Clearly, the position under the October 2020 Version in relation to committal applications against the directors or officers of a body corporate which has not complied with a court order requiring it to do (or abstain from doing) something is not as clear as it could be. [Counsel] understandably, and very properly, pointed to the seriousness of the committal jurisdiction, the potentially highly adverse consequences it can have for a director or officer of a company who is the subject of such an application, and the clarity which is generally required of statutes or delegated legislation which are alleged to have made particular individuals susceptible to criminal punishment: Bennion, Bailey and Norbury on Statutory Interpretation (8th), section 26.4 ("the principle against doubtful penalisation"). Nonetheless, I am satisfied that the intention in the October 2020 Version to preserve the existing law as to the circumstances in which a director or officer may be subject to a committal application in relation to the breach of an order made against a company is sufficiently clear.*"

That conclusion was based on a close reading of the amended provisions of CPR Part 81, which still variously referred to committal applications against a director of a company, showing that directors remained in a different category from other non-parties to the Court's order.

De jure and _de facto_ directors

Having decided that the law had not really changed, Foxton J considered two other points that are of interest.

The first related to the particular office held by Mr Gringuz. He was a director of a company called Novans Investments Limited, which was a corporate member (partner) of Novans Jets LLP, the defendant itself. Counsel for Mr Gringuz conceded that LLPs were bodies corporate for the purposes of the Court's contempt powers, nonetheless Mr Gringuz, being twice removed from the LLP, could not be deemed to be a 'director or officer' of the defendant LLP. Foxton J rejected this on the facts. He found that when it comes to corporate defendants, the law of contempt distinguishes between 'insiders' and 'outsiders'. 'Insiders' are those who manage or control the activities of a corporate respondent, and they are thus responsible for the conduct of the corporate entity because they have primary control. This concept of 'insiders' extends to both *de jure* and *de facto* directors, but not shadow directors, who fall into the outsider camp and can only be responsible like other third parties, for willful interference with the administration of justice. As regards Mr Gringuz, the claimants' contention was not that he has a *de jure*, but that he was the *de facto* functional equivalent of a director of officers of the LLP. The fact that Mr Gringuz also held a *de jure* position as the director in some other corporate entity in the defendants' corporate structure did not prevent him from becoming liable. The factual evidence supporting that conclusion was unequivocal: Mr Gringuz had signed the statement of truth for the LLP in the litigation, described himself as the ultimate beneficial owner of the Novans group, and was the only 'person with significant control' registered at Companies House since 2019. Note, however, that to be able to apply to have a company director committed, it is good practice to ensure that the order in question features an appropriately worded penal notice, warning that the company but also its officers and directors (and anyone standing in the same position) face liability for contempt of court if they do not comply.

The nature of the order breached and the appropriate sanction

The second point of interest related to the nature or purpose of the Court's order that had been breached. The applicant sought to hold Mr Gringuz in contempt because the defendant had failed to comply with an order to disclose "… *a consolidated flight report of all flights operated by the Aircraft for that period, to be categorised by:*

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flight date, departure airport, arrival airport and block hours for each sector", copies of the aircraft's log book entries for all such flights, and (this was the information that the applicant was really after) "… *the proposed net profit margin of each flight operated by the Aircraft during that period, with supporting documentation evidencing such profits.*" This was an order made as part of the Court's adjudicative jurisdiction, aimed at securing the evidence needed to decide an issue between the parties - here, the profit share for which the defendants would have to account to the claimants. The sanctions for a failure to disclose documents or do anything else ordered by the Court pursuant to its adjudicative jurisdiction are, in the ordinary course, to prevent a claiming party from advancing a case or to draw adverse inferences against a defending party. An (adjudicative) disclosure order is not normally subject to contempt, and this particular order did not bear the penal notice one finds on orders that do carry that penalty.

Nonetheless, Counsel for the claimants argued that there was nothing in principle stopping the Court from holding the defendants in contempt for failing to comply with a disclosure order. Foxton J noted that orders for disclosure that are punishable by contempt are usually made when the Court exercises its enforcement jurisdiction, as an ancillary measure where injunctive relief is granted to allow the claimant to locate or preserve assets out of which a judgment can be satisfied, including freezing orders. Such orders can also be addressed to non-parties to litigation, where the applicable requirements are satisfied. In neither of those situations could a failure to comply be punished adequately by a strike-out or drawing adverse inferences, and so a finding of contempt of court is the appropriate sanction. While the judge could not rule out that in some rare circumstances, a party might be in contempt of court by failing to ignore a disclosure order made by the Court in the exercise of its adjudicative function, this was not such a case. Mr Gringuz could not be guilty of contempt without more since the failure had been one of complying with a 'mere' standard order for disclosure (and not for instance an 'unless' order obtained by the applicant). Foxton J concluded that even without receiving the information required by the disclosure order, the claimants were still able to:

> "*… quantify its profit share claim with the benefit of the material it does have, publicly available material such as flight path information, expert evidence of charter rates and expenses, and the tools open to the court when there has been a breach of a disclosure order made for the purposes of the court's adjudicative jurisdiction … . There is no reason why it cannot quantify that claim, either through a judgment or on the basis of its own assessment and evidence, for the purpose of submitting a claim in Jets' insolvency. Accordingly, had the issue arisen, I would not have felt it appropriate to make a finding of contempt of court in relation to this complaint. As noted in Arlidge, Eady & Smith on Contempt (5th), [12-20], committal is "the court's ultimate weapon in securing compliance with its orders", which should only be invoked where it is "truly needed." This particular breach is not such a case.*"

The judge noted that if Mr Gringuz, instead of withholding the information, had dishonestly procured a false schedule, then that might have brought into play the Court's *Seaward* jurisdiction:

> "*While I can see that there might well be grounds for this jurisdiction to be invoked if I was satisfied to the criminal standard that Mr Gringuz had procured the submission of a schedule which he knew was incomplete and inaccurate, I am not able to make such a finding to the criminal standard of proof.*"

As matters stood, however, Mr Gringuz's deliberate refusal or omission to comply with a disclosure order was insufficient to support a finding of criminal contempt, and the adjudicative nature of the order breached meant that liability for civil, 'director's' contempt under the principle in *Tuvalu* was not an available sanction.

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A salutary tale – failure to disclose assets leads to a custodial sentence for the director

In contrast, a disclosure order made in aid of the English Court's enforcement jurisdiction is breached at the defendant's peril. That jurisdiction extends to the enforcement of arbitration awards under the Arbitration Act 1996, as is well illustrated by *Ifaco Feed Company SA* v *Société De Distribution Nouvelle D'Afrique* [2019] EWHC 3715 (Comm). The claimant, a Swiss company, had obtained an arbitration award for €4.75 million. This went unpaid by the defendant, a company incorporated in Cameroon. The seat of the arbitration was London, and so the claimants went to the English Courts to ask for an order that the defendants disclose all their assets worldwide, exceeding €10,000 in value. In late January 2019, the High Court duly made that order, and the claimants took extensive steps to ensure it was served on the defendants and its director, Mr Siaka, in Cameroon. The defendants did nothing and ignored the order. In July 2019, the claimants made a committal application against the defendants and the director. The High Court asked the claimants to serve notice of this application on the director in person. However, he could not be found. The application was heard by Phillips J in September 2019. The defendants did not appear. The judge satisfied himself that the defendants and the director were well aware of the application and the date of the hearing, and formally dispensed with the requirement for personal service.

Next, the judge considered whether the hearing should proceed in the absence of the defendants. He found that the defendants had full notice of the hearing and the subject matter, and had plenty of time to prepare and ensure they were represented. They had failed to give any reason for their non-appearance and had withdrawn any instructions to their solicitors. It was reasonable to infer (because the defendants had full knowledge of the matter but had done nothing) that they had taken a positive decision not to engage, and any adjournment would not dissuade them from that stance. The order was clear on its face and the judge could see no reasonable excuse for the non-compliance – all the defendants had to do was list their assets, something that was clearly within their power. Bearing in mind their stance, the defendants would suffer no prejudice if the hearing went ahead, but the claimants would if it did not. The CPR's overriding objective of dealing with cases justly and expeditiously required the Court to proceed.

Mr Siaka was not only a director but also the sole beneficial owner of the company, over which he had complete control. He knew of the order, and the judge found that it was clear beyond reasonable doubt that he was responsible for the company's non-compliance, and the judge noted that Mr Siaka's position and influence were such that he would have been found liable of criminal contempt under the *Seaward* jurisdiction even if he had not been a director. Even though sentencing a respondent for contempt was a serious matter, the Court was prepared to pass sentence over Mr Siaka *in absentia*. In so doing, Phillips J referred to the judgment of Lord Donaldson MR in *Lightfoot* v *Lightfoot* [1989] FLR 414:

> "*Sentences for contempt really fall into two categories. There is the purely punitive sentence where the contemnor is being punished for a breach of an order which has occurred but which was a once and for all breach. A common example, of course, is a non-molestation order where the respondent does molest the petitioner and that is an offence for which he has to be punished. In fixing the sentence there can well be an element of deterrence to deter him from doing it again and to deter others from doing it. That is one category. There is a second category which I might describe as a coercive sentence, where the contemnor has been ordered to do something and is refusing to do. Of course, a sentence in that case also has a punitive element since he has to be punished for having failed to do so up to the moment of the court hearing, but nevertheless it also has a coercive element. Now, it is at that point that it is necessary to realise that in earlier times the courts would in such circumstances have imposed an indefinite sentence. That is to say a man would be committed to prison until such time as he purged his contempt by complying with the order. Under the Contempt of Court Act 1981 a limit has been placed on such sentences, that limit being two years. It would be consistent with the previous practice of the courts and give full effect to the*

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> *modification required by statute, if the courts considered imposing a two-year sentence when the contemnor was in continuing and wilful breach of court orders. Whilst there might be cases in which such a sentence would be disproportionately severe, any wilful defiance of the court and its orders is necessarily a very serious offence and if the contemnor is aggrieved he has a remedy in his own hands he can seek his immediate release by ceasing his defiance, complying with the order, and thereby purging his contempt.*"

Lord Donaldson's reminder, that the Courts once had the power to imprison a defendant until such time as they purged their contempt and complied with the order, is illuminating: a two-year sentence (reflecting the statutory limit introduced in 1981) may seem harsh, but it will be in the hands of the contemnor who is in continuing and willful breach to do what is necessary to bring about their own release. So it was in Mr Siaka's case. The defendant owed a substantial sum of money and had committed a flagrant breach of the Court's order. Mr Siaka was duly sentenced to two years' imprisonment, with leave to apply to vary or discharge the order once disclosure or an adequate explanation for the non-compliance was given.

ADM International SARL* v *Grain House International SA & Anor (Rev1) [2024] EWCA

The Court of Appeal's decision in *ADM International* v *Grain House International* arose out of similar facts. In July 2018, the Swiss claimants secured an arbitration award for US$ 3.5 million against the Moroccan defendants. The defendants did not pay. The claimants obtained permission to enforce the award both in Morocco and in England, the seat of the arbitration. On 22 March 2019, Waksman J ordered the defendants to disclose their worldwide assets above a certain financial limit. The order bore the necessary penal notice, warning the defendants and its officers that they would be liable for contempt if they did not comply, and was served out of the jurisdiction on the defendants and Mr Boutgueray, a director. In July 2019, the asset disclosure order was followed by a worldwide freezing order relating to all of the defendant's assets up to the value of US$ 4 million, which was also served on the defendants and Mr Boutgueray. There then followed several years of protracted litigation, with the defendants resisting enforcement in Morocco (with some success) and drip-feeding information about their assets to the claimants. These assets included certain credit facilities and real property in Morocco that was subject to certain encumbrances. The claimants were dissatisfied with the lack of transparency in the disclosure, and also objected to the defendant continuing to trade and incurring debts relying on the justification that the company's real property assets were very valuable such that its total asset value never dipped below the US$ 4 million limit set by the worldwide freezing order.

The claimants argued that Mr Boutgueray should be held liable for civil contempt under the principles in *Tuvalu*. His counsel objected, arguing that the amendments to Part 81 of the CPR had, after all, changed the law. The Court of Appeal disagreed. In *Olympic Council of Asia* v *Novans Jets LLP*, Foxton J had been able to trace back a procedural provision similar to the old Part 81 of the CPR (which did expressly mention directors) to the Common Law Procedure Act of 1860, but not further. Since deciding that case, the learned judge had however continued to research the matter extrajudicially, writing an article and providing the Court of Appeal with an advance copy of it. Much aided by Foxton J's in-depth historical analysis of the position of company directors, the Court of Appeal conclusively confirmed that the law had not changed.

In *Attorney-General* v *Times Newspapers Ltd* [1992] 1 AC 191, Lord Oliver had held:

> "*My Lords, the inherent jurisdiction of the superior courts of record to ensure the effective administration of justice by punishing contempt of court has been developed by the common law over centuries. It is as essential as it is ancient, for unless litigants can be assured that the rights which it is the duty of the courts to protect can be fairly determined and effectively protected and*

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enforced the system of justice necessarily ceases to command confidence and an essential foundation of the structure of civilised society is undermined."

Popplewell LJ noted that even as long ago as 1705, the writ of *mandamus* had been used to compel the officers of a corporation to perform their personal obligations towards that corporation. But the same writ could also be used to enforce the obligations of the corporation at law, and it could be aimed at its officers. In *Corpe* v *Glyn* (1832) 3 B & Ad 801, 110 ER 294, a writ of *mandamus* had been served on the treasurer and directors of a dock corporation to compel that company to pay a debt due under an arbitration award which had been made into a 'rule of court' (held to be enforceable just like a judgment of the Court). Popplewell LJ explained that the Common Law Procedure Act of 1860 had taken the existing law, which already held directors and officers of companies personally liable if they were responsible for the company's disobedience of a Court order, and streamlined the procedures for issuing writs and injunctions (for example, the directors did not have to be the subject of a second action and could be held liable in the same proceedings in which their company was the defendant).

Following the fusion of equity and the common law, the first version of the Rules of the Supreme Court ("**RSC**") came in 1883. Order 42, rule 31 stated:

"*31. Any judgment or order against a Corporation wilfully disobeyed may, by leave of the Court or a Judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property*."

The Court of Appeal explained that under this provision, 'willful disobedience' was meant to exclude only casual, accidental or unintentional acts (apparent from *Stancomb* v *Trowbridge Urban District Council* [1910] Ch 190). Even then, directors already faced liability for contempt under a legal principle that was wider than the *Seaward* jurisdiction. The Court of Appeal went on to trace all further instances of the procedural provisions in the RSC and then the CPR from 1998 onwards, noting that these rules were meant to govern the enforcement of an underlying substantive principle of law that already existed before any such rules were promulgated – including the 1860 Act.

Counsel for Mr Boutgueray had urged the Court of Appeal to come to a different conclusion, arguing that this line of reasoning ignored the fact that under English law, the separate legal personality of a company was not finally and conclusively established in its modern form until the seminal decision of the House of Lords in *Salomon* v *Salomon & Co* [1897] AC 22 – so 37 years after the 1860 Act. The Court of Appeal disagreed that the advent of *Salomon* v *Salomon & Co* (which confirmed that even a one-man company had separate legal personality) had made any difference:

"*The very essence and raison d'être for bodies corporate, from their earliest existence, was that they should have separate legal personality from their members so as to have perpetual succession; and that they could sue and be sued in their own name rather than that of their members: see for example Blackstone's Commentaries at Book 1 467-8, 475; and The Case of Sutton's Hospital [1610] Co Rep 1, 27a, 32b, 77 ER 937, 964-5, 973. Salomon v Salomon simply involved the application of an accepted background of separate legal personality for companies to the particular factual circumstances of the case involving a one man company …"*

Conclusion

There has been a proliferation of committal applications against companies and their directors. The English Courts do not shy away from punishing those individuals who have failed to comply with orders aimed at enforcing judgments or preserving assets by substantial custodial sentences (Mr Boutgueray was sentenced to six months,

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having been able to reduce his sentence from 12 months on appeal, and he was fined £50,000). Corporate litigants and their officers who have availed themselves of English law and jurisdiction to resolve their disputes should be under no doubt that a failure to respect the outcome of the proceedings can have serious consequences. It is not possible to litigate or arbitrate in England, take one's chances, but then do a runner if the case is lost. By submitting to English jurisdiction, directors of companies incorporated abroad also submit to the substantive principles of English law that govern the liabilities of directors.

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