

Committing a Director for a Company's Contempt

The recent Commercial Court decision of Mr Justice Blair in the case of *Munib Masri v Consolidated Contractors International and others* [2010] EWHC 2458 (Comm) considers the circumstances where an individual may be subject to a committal application for a company's contempt even though he is (a) not a registered officer of the company, and (b) not specifically named in any penal notice served in respect of that company's non compliance with a court order.

The decision was given in respect of an application by the defendant, Mr Khoury seeking to strike out an application for his committal to prison on the basis of the failure of two Lebanese companies to comply with enforcement orders for a judgment debt that exceeded US\$74 million.

Mr Khoury is not a registered director of the two companies. However, the applicant, Mr Masri claims that he is a de facto or shadow director and responsible for the companies' anti enforcement strategy and acts of contempt.

In his application Mr Khoury sought to strike out the application for his committal to prison on the basis of, amongst other things, that (a) the applicable law on whether or not he is director is Lebanese law which does not recognise the concept of de facto or shadow directors, not English law; and (b) a failure to comply with the procedural requirements by not specifically naming him in any of the penal notices served on the companies or their directors.

In connection with the question of whether Mr Khoury is considered to be a de facto or shadow director Mr Justice Blair referred to the extensive elucidation of the meaning of those terms in case law and concluded that it is something that must be determined by the facts of the case at the hearing of the committal. It was not something that could be addressed on a summary basis in the context of a strike out application.

On the failure to comply with the procedural requirements, as a matter of practice an enforcement order served on a company should, as a preliminary to enforcement against an individual directors, be endorsed with a penal notice including in it the name of the particular director served.

Mr Khoury claims that he was not named in any of the court orders or penal notices served on the two judgment debtor companies; on the contrary the court orders and penal notices identified and named other individuals as directors of the companies.

The prerequisites for a committal order are set out in RSC O.45 r.7. They require service of the order requiring a body corporate to do or abstain from doing an act not to be enforced by way of committal against a director unless a copy of the order has been served personally on the director with a warning to that person endorsed on the copy of the order that the failure to comply would be punishable by imprisonment.

There is no stated prerequisite requiring the penal notice to name specifically the director in question. However, case law suggests that it is good practice to do so.

However the rule does give the court express power of dispensation as to the requirement of service of the copy of the order if it considers it just to do so and to proceed to consider a proper application notice to commit notwithstanding the absence of the service of a penal notice on that individual. It is not a power that should be used readily and only where the court is satisfied that no injustice is caused to the defendant by the procedural defect.

Although he is not a director of the two judgment debtor companies, Mr Khoury was served with copies of the court orders and penal notices with covering letters referring to his involvement and exercise of control, as a de factor or shadow director, of the companies. Accordingly, it could be said that he had sufficient notice of the consequences for those in control of the failure by the two companies to comply with the court orders.

This, together with judicial statements in earlier judgments in the case concerning the two companies' manifest intention to avoid payment, lead Mr Justice Blair to conclude that exceptional circumstances may exist so as to permit the court to exercise its power to dispense with the requirement of service of a penal notice on Mr Khoury and commit him to prison.

Mr Justice Blair's decision is only in respect of an application to strike out a committal application rather than a determination of it. However it dismisses the application and concludes that the existence of certain circumstances may make it possible to commit to prison an individual who is (a) the controlling mind rather than registered officer of a judgment debtor company and (b) has not been specifically served with and named in, but is on notice of a penal notice in respect of that company's failure to comply a court order.

This is particularly helpful given that many fraudsters seek to protect themselves by hiding behind corporate structures with nominee officer holder.

We will have to wait until next year when the committal application is due to be heard for any definitive conclusions in this specific case.

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