

PART 1

Contempt of Court

When do
directors
become
personally
liable for breach
of a court order?

DATE

17 July 2024

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Introduction

The role of a company director carries significant duties and responsibilities. This extends beyond the duty to act in the best interest in the running and management of the company's affairs, to a duty to ensure compliance with court orders requiring the company to do an act or abstain from doing an act. Directors may be personally liable when a company is found in contempt for disobeying court orders.

This article explores three distinct scenarios where directors' acts or omissions can lead to them being held personally liable for disobeying court orders.

Scenario 1: Director Personally Named in the Court Order

The most straightforward scenario is when a director is named as a party in the court order. In such a case, if it is proven beyond reasonable doubt that a director has knowingly breached the terms of the court order, he can be held directly liable for contempt. The director's knowledge of the terms of the order allegedly breached is a paramount consideration when the court decides whether the alleged contemnor is guilty of contempt¹.

Scenario 2: Director Not Named in the Court Order — Aiding and Abetting a Breach

When the director is not named in the court order requiring the company to do an act or abstain from doing an act, liability for contempt can still arise in two scenarios. Firstly, similar to how the court can find any third party not named in the court order liable for contempt, a director may be found liable for aiding and abetting the company's breach if he knowingly assists or encourages the breach of the court order.

¹ *Churchman and others v Joint Shop Stewards' Committee of the Workers of the Port of London and others* [1972] 3 All ER 603 at p. 607f-j; *Foo Khong Loong v Foo Khong Wong* [2009] 9 MLJ 441 at p. 452d-g.

By aiding and abetting a breach, the director has interfered with and obstructed the course of justice² even though he is not named as a party to the order and not bound by the terms of the order.

Knowledge of the terms of the order by the director must be proven for the director to be guilty of aiding and abetting a breach. Even though the contempt is in the nature of interference with or obstruction to the administration of justice, the court has to be satisfied that the third party not named in the proceedings (the director) was aware of the terms of the order and there was an intention to interfere with or obstruct the administration of justice³.

The distinction between directly breaching a court order and interfering with and obstructing the course of justice is crucial when formulating contempt charges. A charge framed incorrectly may be set aside on the ground that the charge is incurably defective and flawed.

Scenario 3: Director Not Named in the Court Order — Failure to Ensure Compliance

Secondly, a director may be liable under O. 45 r. 5 of the Rules of Court 2012 (“ROC”) specifically for failure to ensure compliance with a court order in respect of an order made against the company.

Personal service of the court order on the officer of the company is a prerequisite to enforcement of orders under O. 45 r. 5 against the particular officer⁴ unless the Court dispenses with the requirement for service. An order requiring a person to abstain from doing an act, i.e. a prohibitory order, may be enforced notwithstanding that service of the order has not been effected if the Court is satisfied that, pending such service, the person has notice of the terms of the order⁵. The court also has general powers to dispense with service of the order, even if not prohibitory, if it thinks just to do so⁶.

² *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151 at p. 154I.

³ *Attorney General v Times Newspapers Ltd and another* [1991] 2 All ER 398 at p. 415b–d.

⁴ O. 45 r. 7(3)(a) of the ROC 2012; *Capital Insurance Bhd v BS Sidhu* [1996] 3 MLJ 1 at p. 5–6; *Matrix Avenue Sdn Bhd v Bumah bt Zainul Abidin & Ors* [2014] 6 MLJ 124 at p. 132D.

⁵ O. 45 r. 7(6) of the ROC 2012; *Juris Technologies Sdn Bhd & Anor v Foo Tiang Sin & Ors* [2019] 12 MLJ 785 at p. 795g.

⁶ O. 45 r. 7(7) of the ROC 2012.

Personal service is a necessary process to make clear to the officer the terms of the order and the fact that the officer must use his position as an officer of the company to effect compliance with the court order⁷. It is also mandatory that the order served must contain a penal notice informing the officer on whom the order is served of the consequences of disobedience⁸.

A director's liability for failure to ensure compliance with a court order can arise even where the director played a purely passive role, and there is no requirement for active participation⁹. Therefore, failure to supervise, failure to investigate and wilful blindness may form the basis of the director's liability for failure to ensure compliance with the court order¹⁰.

Just as in the first and second scenarios, knowledge of the terms of the order must be proven beyond reasonable doubt before the court can find a director guilty of contempt for failing to ensure the company's compliance with a court order.

Commentary

Central to any contempt finding for breach of a court order, whether against a director or otherwise, is the requirement of proving knowledge of the terms of the order. The applicant seeking to establish contempt must prove beyond reasonable doubt that the alleged contemnor had knowledge of the terms of the order. This requirement of knowledge forms the necessary foundation in building a successful contempt case arising from a breach of court order.

Whether one is applying for or defending contempt proceedings, it is important to recognise the different scenarios where directors' liability may arise. For applicants, understanding the nature of the alleged act is critical for accurately framing the contempt charges. For those defending, recognising the scenarios is necessary to develop the appropriate defences.

⁷ *Electrical Angels MSC Sdn Bhd v Proton Edar Sdn Bhd* [2014] 10 CLJ 266; *Yip Chiu Yin Cris v Pappadis & Anor* [1989] 1 HKC 33 at p. 41D; *Excel Noble Development Ltd v Wah Nam Group Ltd* [2001] 4 HKC 148 at p. 157.

⁸ O. 45 r. 7(4) of the ROC; *Electrical Angels MSC Sdn Bhd v Proton Edar Sdn Bhd* [2014] 10 CLJ 266 at p. 277c.

⁹ *Biba Ltd v Stratford Investments Ltd* [1973] Ch 281.

¹⁰ *Attorney General for Tuvalu and another v Philatelic Distribution Corp Ltd and others* [1990] 2 All ER 216 at p. 223g; *Templeton Insurance Ltd v Motorcare Warranties Ltd and Others* [2012] EWHC 795 (Comm).

If you have any questions on this article

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