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HOLDING THE DIRECTOR IN CONTEMPT - COURT FINDS DIRECTOR DELIBERATELY BREACHED FREEZING ORDER AGAINST HIS COMPANY

FRAUD AND FINANCIAL CRIME

INTRODUCTION

In this publication we consider the recent case of *Templeton Insurance Ltd v Motorcare Warranties Ltd and others [2012] EWHC 795 (Comm)* in which the High Court ruled that a director and a shareholder were in contempt of court for breaching a freezing order made against their company.

BACKGROUND

The first defendant company, Motorcare Warranties (Motorcare) sold mechanical breakdown insurance policies through a network of car dealers and other representatives. The majority of the policies sold by Motorcare were underwritten by the claimant insurance company, "Templeton". A dispute subsequently arose between the parties over the payment of premiums. Templeton alleged that it was not receiving the full amount of the premiums and it issued proceedings against Motorcare seeking damages for fraudulent misrepresentation. It also pursued claims for deceit, knowing assistance and knowing receipt.

THE FREEZING INJUNCTION

Templeton obtained a freezing injunction against Motorcare preventing it from removing from the jurisdiction or in any way disposing of, dealing with, or diminishing the value of, other than by payment to Templeton, any of its assets in England and Wales. The injunction included a standard penal notice which stated that "*it is a contempt of court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be sent to prison, fined or have his assets seized*".

THE ALLEGED BREACH

Templeton alleged that the second defendant, Mr Thomas, who was a 50 per cent shareholder of Motorcare, and the third defendant, Mr Panesar, who was the director of Motorcare and Mr Thomas' son in law, had, within a week of the injunction being granted, set up a new company, "Motorcare Elite Ltd" and had transferred Motorcare's entire business to it. Although no monies or other tangible assets belonging to Motorcare were actually transferred, the new company took over Motorcare's office premises, staff, telephone number, website address, website wording and product documentation. The new company also held itself out as "Motorcare" and it worked with a number of agents and car dealers that had connections with Motorcare.

Templeton were successful at trial, although the determination of quantum and the misrepresentation claim were adjourned. However, by this stage, Motorcare had gone into liquidation, which left Templeton unable to enforce any judgment against it. Templeton, therefore, sought the committal of Mr Thomas and Mr Panesar on the basis that they had assisted or permitted Motorcare to breach the freezing injunction. It contended that the transfer of the business had been in breach of the injunction as it had knowingly involved the "disposal of and/or dealing with" Motorcare's assets, in particular its goodwill. Mr Thomas and Mr Panesar responded by arguing that they believed that the injunction prevented Motorcare from trading and that the new company had been set up out of necessity. Further, that Mr Thomas had no knowledge of the new company being set up and that the men did not consider the steps they had taken to be in breach of the freezing injunction.

THE DECISION

Eder J found that both Mr Thomas and Mr Panesar were in contempt of court. He held that although there had been no express reference to goodwill in the injunction he accepted that the goodwill of Motorcare was part of its assets and that Mr Thomas and Mr Panesar had understood them to be such. The steps that the men had taken to convince agents (and through them the dealers) to work for the new company had been in plain breach of the freezing injunction. Eder J also held that the use that the men had made of Motorcare's website, telephone numbers and business address likewise constituted "dealing with" if not "disposal of" assets. He considered that Mr Thomas and Mr Panesar knew full well that what they were doing was a breach of the order and that they had acted with the intention of interfering with the freezing injunction. He dismissed the men's argument that they believed that the injunction had prevented Motorcare from trading and that the new company had been set up out of necessity as the injunction had "crippled" Motorcare. Indeed he held that that evidence was false and had been given by Mr Thomas knowing it to be untrue.

Eder J held that on the evidence, the only reason Mr Thomas and Mr Panesar had established the new company was to carry on the business of Motorcare outside the purview of the freezing injunction. Indeed he thought that Mr Thomas' evidence had been most unsatisfactory. He was also unimpressed by the fact that Mr Panesar had voluntarily admitted himself to an unidentified hospital, finding that because Mr Panesar had done so without any recommendation from a doctor he was entitled to draw an adverse inference that Mr Panesar had done so to avoid giving evidence.

DIRECTOR'S DUTIES

Eder J found that the authorities showed that where a company was ordered not to do certain acts and a director of that company was aware of that order he was under an obligation to take reasonable steps to ensure that the order was obeyed. If the director failed to take those steps and the order was breached he could be punished for contempt. Further, a director could be liable for civil contempt without necessarily being in contempt under the general law. Mr Panesar, as director, was, therefore, in contempt.

Eder J held that, although Mr Thomas and Mr Panesar believed that Templeton's application was oppressive and vengeful, a breach of a freezing order was particularly serious matter. He noted that freezing orders had become an important and crucial part of modern litigation and that a claimant's success on his substantive claim was generally worthless if there were no assets to meet that claim. The order had been clear and unambiguous and the actions of Mr Thomas and Mr Panesar had constituted a breach of it and a deliberate interference with justice. Eder J adjourned the sentencing of the men, but he was quite clear that all options, iincluding a term of imprisonment remained open.

COMMENT

Two particular points are highlighted by this judgment. First it reinforces the point that a director of a company which has had a court order made against it is under an obligation to take reasonable steps to ensure that the order is obeyed. Therefore, it offers a stark warning to directors of the importance of obtaining legal advice upon receipt of a court order, particularly one which contains a penal notice. A wilful failure to obey a court order could lead to a finding of contempt of court against the director. Here the judge dismissed the defendants' assertions that they had not understood the injunction, finding that the evidence showed that they had deliberately taken steps to avoid it. However, the actions taken by an individual, who is aware of an order, though not a party to it, do not have to be deliberate for them to constitute a breach. Ignorance might not be sufficient defence to avoid liability.

Secondly, the case underlines the rigorous manner in which the courts will enforce freezing injunctions; as Eder J recognised, they have become a vital tool in modern litigation and the administration of justice. In his view the breaching of a freezing injunction was a particularly serious matter as it potentially left a successful claimant with no way of enforcing his judgment. Indeed, so serious did he find the breach that he was quite prepared to consider sentencing the defendants to a term of imprisonment as a result of their actions.

CONTACT DETAILS

If you would like further information or specific advice please contact:

BARRY DONNELLY
DD: +44 (0)20 7849 2950
barry.donnelly@macfarlanes.com

IAIN MACKIE
DD: +44 (0)20 7849 2299
iain.mackie@macfarlanes.com

CHARLES LLOYD
DD: +44 (0)20 7849 2338
charles.lloyd@macfarlanes.com

DAN LAVENDER
DD: +44 (0)20 7849 2606
dan.lavender@macfarlanes.com

MATT MCCAHEARTY
DD: +44 (0)20 7849 2659
matt.mccahearty@macfarlanes.com

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MACFARLANES LLP
20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com