

THE COST OF CONTEMPT

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In *Gulf Wings FZE v A & K Trading Limited (1) Mr Kamel Abou Aly (2) Mr Ahmed Abouhashima (3) CA-014-2022*, WFW successfully represented Gulf Wings FZE (the “Claimant”) in its claim against A&K Trading Limited (the “Defendant”) before the Dubai International Financial Centre (“DIFC”) Courts of First Instance and Appeal, with the Claimant recovering its principal damages, interest and (legal) costs. The full judgment can be read [here](#).

"Under English law, the key guiding principle for purging contempt is that the contemnor should make good what has been lost by reason of its contempt."

This case is a helpful reminder from the DIFC Court of Appeal that when dealing with cases of contempt, and particularly the purging of contempt, the DIFC Court will follow the English law guiding principle that a contemnor must make good what has been lost by reason of its contempt if it wishes to have its contempt purged.

BACKGROUND TO THE DISPUTE

On 14 March 2021, the Claimant and the Defendant entered into an aircraft management agreement under which the Claimant agreed to maintain an aircraft (the “Aircraft”) and the Defendant agreed to pay the Claimant for its management

services. The Defendant failed to pay the Claimant and incurred a debt of approximately US\$1.2m. The Claimant (1) commenced substantive proceedings before the DIFC Courts to recover the unpaid sums as the parties had agreed that the DIFC Courts should have jurisdiction to resolve disputes between them, and (2) applied for interim relief – in this case a freezing order over the Aircraft located in onshore Dubai so that it could be held as security for the Claimant’s claims pending the resolution of the substantive dispute.

On 14 January 2022, the DIFC Courts granted a freezing order (the “Freezing Order”). The Freezing Order covered the Defendant’s assets worldwide, but it also specifically referenced the Aircraft as an asset that was not to be removed from Dubai. The Freezing Order was immediately served on the Defendant’s registered shareholders and registered directors (the “Directors”).

In flagrant breach of the Freezing Order, the Aircraft left Dubai on 22 January 2022 for Malta. In addition to securing the arrest of the Aircraft in Malta, the Claimant filed an application with the DIFC Court on 27 January 2022 for an order of contempt/committal against the Defendant and the Directors.

Justice Sir Jeremy Cooke entered default judgment awarding the Claimant the full amount of the debt (US\$1,272,798.55) plus statutory interest at 9% and indemnity costs. In respect of the application for contempt, the Judge found the Defendant and the Directors to be in contempt because the evidence showed that the Directors were aware of the Freezing Order but that they had failed to do anything to stop the Aircraft leaving Dubai.

In accordance with the usual procedures, the DIFC Court issued separate contempt orders against the Defendant and each of the Directors. These orders were then filed with the Attorney General of Dubai who is authorised to execute them in onshore Dubai; importantly, the Attorney General's powers of execution include, in the case of individuals, the issuing of committal orders.

"The decision is a welcome reminder that Penal Notices on injunctions issued by the DIFC Courts should not be ignored and that such orders do have teeth through an effective enforcement process with the Attorney General of Dubai."

Following the recognition and enforcement of the contempt orders by the Attorney General of Dubai, one of the Directors wrote to the DIFC Court asking for his contempt to be purged upon payment of the outstanding principal debt.

That Claimant objected to the Director's request because the First Instance judge had clearly envisaged that any purging should be conditional on the return of the Aircraft and/or payment of the Claimant's claim in full, with a full indemnity for costs and/or making a fully apology to the Court and paying the fines imposed. As matters stood, although the principal debt had been paid, the Claimant was out of pocket for the significant legal costs it had incurred both in the DIFC Courts and in arresting the Aircraft in Malta due to the breach of the terms of the Freezing Order. The Claimant was also entitled to be paid interest on the debt at the rate of 9%.

On 5 September 2022, the DIFC Court of First Instance issued an order purging the applicant Director's contempt upon payment of the principal debt. Having been granted permission to appeal, the Claimant challenged the purging order on the basis that the Defendant and its directors had failed to make good the loss suffered by their contempt.

Under English law, the key guiding principle for purging contempt is that the contemnor should make good what has been lost by reason of its contempt. Whether the contemnor has taken steps to rectify the consequences of its breach is an important consideration for the Court to consider¹, and persistent failure by a contemnor to comply with an injunction after imposition of a committal sentence will aggravate the gravity of the contemnor's conduct and increase the weight given to the punitive element of the contemnor's sentence.² The Court of Appeal provided some guidance in *CJ v Flintshire Borough Council* [2010] EWCA 393, where it set out eight questions for the court to consider when deciding on purging a contemnor's contempt or not:

- can the court conclude, in all the circumstances as they now are, that the contemnor has suffered punishment proportionate to their contempt?;
- would the State's interest in upholding the rule of law be significantly prejudiced by early discharge of the contempt order?;
- is the contemnor's expression of contrition genuine?;
- has the contemnor done all that they reasonably can to demonstrate a resolve and an ability not to commit a further breach?;
- has the contemnor done all they reasonably can to minimise the risk of their committing a further breach if discharged?;

- has any specific proposal been made to augment the protection of those the contempt order was designed to protect against any further breach?;
- how long has the contemnor served in prison, taking account of the full term imposed and the term they would otherwise be required to serve prior to release pursuant to the Criminal Justice Act 2003 s.258(2)?; and
- are there any special factors impinging on the exercise of discretion either way?

The English Court of Appeal subsequently reiterated that the *CJ* list of factors could assist judges “*so long as they are treated not as a tick-list but as windows on a problem which will always be case-specific and to which, as often as not, there will be no single right answer*”.³

Applying these established English law principles, the DIFC Court of Appeal found that the contempt should only be purged once the Defendant and/or the Directors had paid the interest on the principal debt, the Claimant’s assessed costs (at first instance and on appeal), and the fine imposed by the Court. The sums were eventually paid to the Claimant resulting in it being justly compensated for the full recoverable losses it had suffered as a result of the breach of the Freezing Order.

The decision is a welcome reminder that Penal Notices on injunctions issued by the DIFC Courts should not be ignored and that such orders do have teeth through an effective enforcement process with the Attorney General of Dubai.

FOOTNOTES

[1] *Gulf Wings v A&K Trading* CA-014-2022, at paragraph 24 and *Gee on Commercial Injunctions* 7th Ed, paragraph 20-036

[2] *Smith v Doncaster Metropolitan Borough Council* [2014] EWCA Civ 16 at 11 and 12 and *Mid-Bedfordshire District Council v Thomas Brown & Ors* [2004] EWCA Civ 1709.

[3] *Swindon Borough Council v Webb t/a Protective Coatings* [2016] EWCA Civ 152.

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