

# ENGLISH COMMERCIAL COURT ORDERS TWO YEAR IMPRISONMENT FOR BREACH OF INJUNCTION:



## THE NEW CONTEMPT RULES MEAN BUSINESS

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### In brief

In one of the first judgments under the new contempt rules introduced in October 2020, the Commercial Court has recently imposed the maximum two year imprisonment term against an individual for contempt of court following his multiple and persistent breaches of freezing and proprietary orders. The breaches included:

1. **failure to disclose assets by way of an affidavit in breach of the injunctions; and**
2. **dissipation of assets from bank accounts in breach of the freezing injunctions.**

The second defendant, a director of the defendant company, did not attend the hearing, had not engaged with the proceedings for some years, and his whereabouts was unknown. The court therefore sentenced him in absentia and issued a warrant for his arrest.



### In depth

The judgment in *XL Insurance Company SE v IPORS Underwriting Ltd*, Paul Alan Corcoran & Others [2021] EWHC 1407 (Comm)<sup>1</sup> serves as a reminder that freezing injunctions and related orders must be taken seriously.

The underlying action in this case related to the claimant suing for misappropriation of insurance premiums worth approximately £10 million, which the second defendant's company was meant to hold on trust and then send to the claimant. Instead, the claimant

argued that the second defendant used the monies for his own purposes.

In 2014 and as part of the steps to trace the monies and preserve them, and as would be part of the usual process in these circumstances, the claimant obtained an asset disclosure order as well as various freezing and proprietary injunctions limiting the defendants' expenditure and use of the money subject to the freezing order.

In 2021, the claimant brought contempt proceedings against the defendants for disposing of assets in breach of the injunctions, and for failing to comply with the asset disclosure obligations. The defendants did not fully engage with the proceedings. However, the claimant was able to show evidence of the breaches using the information it received from the various non-party banks, who were required to provide information on assets held in the names

<sup>1</sup> <https://www.bailii.org/ew/cases/EWHC/Comm/2021/474.html>

of the defendants, and in particular the second defendant. This was sufficient for the judge, who found there were 20 separate counts of contempt made up of numerous acts amounting to contempt.

In this case, the second defendant had not fully engaged in the proceedings. However, the judge was satisfied that:

***“[he] breached the Injunctions, that the breaches..... [were] established to the criminal standard; and also that [he] knew that he was breaching the Injunctions both when he failed to provide disclosure and when spending the amounts identified in the evidence.”***

This persuaded the court that the requirements under *Varma v Atkinson & Another* [2020]<sup>2</sup> for a ruling of contempt were proved, and it was not necessary to show the second defendant was aware that his actions amounted to a breach. The judge was satisfied that:

***“the elements of contempt of court [were] proved to the criminal standard and that Mr Corcoran [was] therefore guilty of contempt of court.”***

In terms of sentencing, the judge ordered the maximum two year imprisonment term, finding that there were no mitigating factors, and that as the claimant was unable to recover most of its money, “.... *the harm is about as high as it could well be.*”

The judge had considered issuing a bench warrant to secure the second defendant’s attendance at the hearing, an option available to the courts under the revised CPR 81, but determined that this would not assist, as the claimant’s lawyers had already gone to significant efforts to trace the second defendant without success.



## How does a breach of an injunction lead to imprisonment?

***Freezing and proprietary injunctions contain penal notices. Under CPR 81.2, the penal notice is “a prominent notice on the front of an order warning that if the person against whom the order is made (and, in the case of a corporate body, a director or officer of that body) disobeys the court’s order, the person (or director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law.”***

Committal (imprisonment) proceedings are at the court’s discretion (CPR 81.9), but are generally the remedy for breach of a freezing order, and are generally brought against the person on whom the injunction or order containing a penal notice has been served personally. To commit a person for breach of an injunction, it is necessary to prove beyond a reasonable doubt (the criminal standard of proof) that there has been a deliberate or wilful breach of the order.

Where a corporation is in default, a committal order may be made against a director or other officer of the company, if they were served with the injunction. Their liability for contempt will then depend on whether:

- the company was ordered not to do certain acts, or gives an undertaking to that effect
- the director is aware of the order or undertaking, if so this requires them to ensure the order is obeyed
- the director fails to take reasonable steps, resulting in the order or undertaking being breached.

In terms of sentencing, and as was the case here, a finding of contempt may result in imprisonment for up to two years, as provided for in s.14(1) of the *Contempt of Court Act 1981*. There are no formal guidelines on the length of the sentence, but as referenced by the judge in this case, the key factors include culpability and harm<sup>3</sup>.



## What does this mean for you?

***Freezing and proprietary injunctions are possibly the most useful tool in the claimant’s toolbox, and once obtained they can help reveal and secure assets. The threat of contempt proceedings leading to the possibility of imprisonment (or other punishment) will usually be sufficient to ensure compliance (in or out of the jurisdiction) with the freezing order.***

This is therefore an unusual case for a number of reasons, including the defendants’ lack of engagement in the proceedings; the judge’s consideration of a bench warrant; and the sheer number of acts of contempt, all of which led to the eventual ruling imposing the maximum prison sentence.



<sup>2</sup> [2020] EWCA Civ 1602

<sup>3</sup> *Otkrite v Gersamia* [2015] EWHC 821 (Comm)