



ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Khalifa bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

**COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION
BETWEEN**

AEFO TECHNICAL SERVICES LLC
CLAIMANT

and

AQUARIUS GLOBAL LIMITED
DEFENDANT

JUDGMENT OF JUSTICE STONE SBS QC

Neutral Citation:	[2021] ADGMCFI 0003
Before:	Justice Stone SBS QC
Decision Date:	7 April 2021
Decision:	<ol style="list-style-type: none"> 1. The Application be dismissed. 2. There be an order <i>nisi</i> that there be no order as to costs of this Application, such order <i>nisi</i> to become absolute unless within 7 days of the date of the Order herein application so to vary is issued.
Date of Orders:	7 April 2021
Catchwords:	Application for Penalty Order; contempt of court; whether breach of an order for the payment of money into court capable of attracting a contempt order; burden of establishing contempt; criminal standard; whether Defendant, in the exercise of judicial discretion, “otherwise in contempt of court”
Legislation Cited:	<p>Application of English Law Regulations 2015</p> <p>ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, s. 96</p> <p>Commercial Licensing Regulations 2015 (Fines) Rules 2020</p> <p>ADGM Court Procedure Rules 2016, rr 287 and 288</p> <p>UK Civil Procedure Rules, r.81.4</p>
Cases Cited:	<p><i>Prosser v Prosser</i> [2011] EWHC 2172 (Ch)</p> <p><i>Bates v Bates</i> [1888] 14 PD 17 (CA)</p> <p><i>Graham v Graham</i> [1992] 2 FLR 406</p> <p><i>Discovery Land Company and ors v Jirehouse (a body corporate) and ors</i> [2019] EWHC 2249 (Ch)</p>
Case Number:	ADGMCFI-2020-026
Parties and representation:	<p>Ms Sarah Malik, SOL International Ltd for the Claimant</p> <p>Mr Vince Gordon, Holman Fenwick Willan MEA LLP for the Defendant</p>

JUDGMENT

Procedural History

1. This is the Judgment upon the Claimant’s Application for a Penalty Order arising from alleged contempt of court on the part of an officer of the Defendant. It has its origin in Orders made consequent upon the Claimant’s Application dated 20 January 2021 for an Interim Payment Order.

2. The Order on that Interim Payment application, dated 14 February 2021, required that within 14 days the Defendant was to pay into court the sum of AED 21,004,750, this sum representing the purchase monies for the supply by the Defendant of 1 million N95 3M 1860 protective masks, which were to be delivered direct to the NHS in Britain.
3. It is a matter of record that in the event, and in response to this initial Order, the Defendant paid into court the sum of AED 10 million, leaving a shortfall of AED 11,004,750.
4. In turn this prompted the Claimant to issue an application dated 4 March 2021 for an ‘unless’ order, seeking the strike out of the Defendant’s Defence and entry of judgment in the Claimant’s favour in the substantive proceedings unless the Defendant made good the shortfall by payment into court by 11 March 2021.
5. On the same date, 4 March 2021, the Claimant issued the Application the subject of this Judgment, backed by the witness statement of Ms Malik, the Claimant’s solicitor.
6. In this Application the Claimant sought an Order for a penalty by way of contempt of court against Mr Parish, the sole director of the Defendant company, it being suggested on behalf of the Claimant that the Court would benefit from deciding the two outstanding applications together.
7. The Court declined to consider the applications simultaneously, and by Order dated 18 March 2021 granted the Defendant a period of further indulgence to comply with the Order of 14 February 2021, ordering that unless there was compliance with the Order for payment into court by 31 March 2021, the Defence would be struck out; in the event, the time so specified for compliance was extended by final Order dated 1 April 2021 to 4.00 pm on 6 April 2021 upon receipt of an eleventh hour email from the Defendant’s solicitor.
8. A further email to the Court dated 23 March 2021 from Ms Malik urging that “the Court is now in a position to give a ruling on the Penalty Order Application, and that the Court ought to consider that application alongside the Claimant’s Unless Order Application”, met with no agreement, the Court taking the view taken that no extension of time would have been granted had the Court considered that at the time of exercising such indulgence the Defendant then had been in contempt. In response to the email from Ms Malik, Mr Gordon, the solicitor acting on behalf of the Defendant, sent an email dated 24 March 2021 to the Registry stating that the Defendant had elected not to file evidence on the Application.
9. In the event the Defendant failed to make any further payment into court by the extended date and time so specified, namely 4.00 pm on 6 April 2021, and accordingly by Order dated 6 April 2021 the ‘unless’ Order formally was entered in terms, resulting in the striking out of the Defendant’s Defence.
10. The Court considered that it was only at this stage that it was appropriate to consider this contempt application.

The relief sought/ statutory basis relied upon

11. In this Application the Claimant sought the following relief:
 - (1) For the contempt of Mr Parish, the matter shall be referred to the Attorney General of Abu Dhabi;
 - (2) [Alternatively, for his contempt Mr Richard Parish shall pay a fine of USD 10,000, with such sum to be paid into the office of the Court within 14 days of the date of the Order];
 - (3) The Defendant and Mr Parish shall pay the Claimant’s costs of the Application.

12. In the Witness Statement leading the Application, Ms Malik made it clear that this Application was mounted pursuant to rules 287 and 288 of the ADGM Court Procedure Rules 2016 (“ADGM CPR”), and also pursuant to Regulation 96 of the *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015* (the “Regulations”).
13. Rule 287 is entitled “**Penalty for breach of a Judgment, Order or Undertaking to do or abstain from doing an act**”, and in material part reads:
- (1) *If a person required by a judgment or order to do an act does not do it within the time fixed by the judgment or order, or disobeys a judgment or order not to do an act, the judgment or order may be enforced by an order for a penalty.*
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- (3) *If the person referred to in paragraph (1) is a company or other corporation or a partnership, the penalty order may be made –*
- (a) in the case of a company or other corporation, against any director or other officer of that company or corporation;*
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- (5) *Unless the Court dispenses with service or a rule, relevant practice direction or other ADGM enactment provides otherwise, a judgment or order may not be enforced unless a copy of it has been served on the person required to do the act or not do the act in question and, in the case of a judgment or order requiring a person to do an act, in accordance with and within the time provided by, the judgment or order.*
14. Regulation 96 of the Regulations provides as follows:
- (1) *The Courts have jurisdiction, on application or on their own motion, to deal with matters relating to contempt.*
- (2) *The Courts have jurisdiction under this section to deal with any person who –*
- (a) *wilfully insults the Judge or Judges, the Registrar, any witnesses before or officer of the Court or any lawyer having business in the Court, during his or their sitting or attendance in Court or in going to or returning from the Court;*
- (b) *wilfully interrupts the proceedings of the Court or otherwise misbehaves in Court; or*
- (c) ***is otherwise in contempt of court.***
- (emphasis added)*
- (3) *In any such case the Court may, if it thinks fit:*
- (a) *impose on him a fine not exceeding level 4 on the standard fine scale;*
- (b) *refer the matter to the Attorney General of Dubai; or*
- (c) *make such other order as it considers necessary to achieve the ends of justice.*
15. The ‘standard fine scale’ is set out in the *Commercial Licensing Regulations 2015 (Fines) Rules 2020*, wherein Level 4 is defined as a fine of USD 10,000, albeit Rule 2(2) provides for an

element of discretion within the fine-administering body to decide that a fine of a lesser amount within the standard fines scale is justified in the circumstances.

The Law

16. Save for reference to relevant ADGM statutory provision, this Application is uninhibited by reference to any authority on the issue of the penalty of contempt, the view apparently taken on behalf of the Claimant being that upon non-compliance with a Court Order, then the sanction of contempt necessarily must follow.
17. This broad-brush approach is unhelpful in the context of an Application which in substance is not without difficulty, and it is unfortunate that the Court has been placed in the position of having to decide this Application without the benefit of research or detailed submission from counsel.
18. The law relating to liability for contempt is complex and frequently opaque. It developed under the Court's inherent jurisdiction and is derived from common law cases "never wholly consistent at any given time" (White Book, Vol 2 at 3C-2) overlaid with statutory provision. Classifying contempt by way of types or classes "has proved to be extremely difficult", and as the White Book observes, "no classification of any real practical use .. has emerged" (White Book, Vol 2 at 3C-3).
19. In England Part 81 of the English CPR dealt with contempt; although since 1 October 2020 replaced with a simplified version, the White Book commentary on the former regime is of assistance in the present discussion.
20. The (now former) English Rule 81.4 (which has its equivalent in ADGM CPR, r 287) provides that where a person required by a judgment or order to do an act does not do it within the time fixed therein, or disobeys a judgment or order not to do an act, the judgment or order may be enforced by an order for committal. Rule 81.4 had broad application, well-known examples of contempt in the English jurisdiction in the context of civil proceedings including breach of freezing orders, frustration of search orders, and non-compliance with disclosure orders (White Book, Vol 2 at 3C-22)
21. In terms of the penalty of contempt for non-payment of a sum of money – the specific complaint in the instant case being that of non-compliance with the Order of 14 February 2021 to make payment into court – the English authorities do not speak with one voice.
22. In part no doubt this is because Rule 81.4 is expressed as being "subject to the Debtors Acts 1869 and 1878", the net effect of which (after taking into account overlay of the Administration of Justice Act 1970) is that the English court's power to imprison for non-payment of a debt due under a judgment or order was "restricted to non-payment of maintenance orders and orders for the payment of certain taxes, contributions and other liabilities specified in Sch 4 to the 1970 Act", whilst a judgment creditor's remedy for non-payment was usually restricted to "enforcement against the debtor's property" (see White Book, Part 81.4.3, Vol 2 at 3C-18 and 3C-41).
23. In *Prosser v Prosser* [2011] EWHC 2172 (Ch), Vos J examined the authorities dealing with the scope of section 4 of the Debtors Act 1869, which stated that "no person shall ...be arrested or imprisoned for making default in payment of a sum of money". These authorities tended to suggest that section 4 of the Debtors Act did not apply to "depositing a sum of money in court to abide an order to be subsequently made": see Lindsay LJ in *Bates v Bates* [1888] 14 PD 17 (CA), with whom Purchas LJ in *Graham v Graham* [1992] 2 FLR 406 appeared to agree; contrast however Cotton LJ in *Bates, op cit.*, and *Discovery Land Company and ors v Jirehouse (a body corporate) and ors* [2019] EWHC 2249 (Ch), per Zacaroli J at 109-110. In the event Vos J sought to square the circle and to reconcile the differing views of the Lords Justices in *Bates, op cit.*, observing at 102:

“...both of them were saying in effect that where there is an order for the payment of money or the giving of security, but not the payment of an ordinary debt and not the payment of money directly to the claimant, then section 4 of the Debtors Act is not engaged...”

24. In ADGM, the law relating to liability for contempt derives from the common law and from Regulation 96 of the Regulations, the applicable penalties for contempt, once established, being set out in Regulation 96(3).
25. However, although ADGM has incorporated some 47 English statutes into law through the *Application of English Law Regulations 2015*, the Debtors Acts, which appear to have formed the statutory foundation of the English jurisprudence in this area, have *not* been so included, and thus there is no equivalent statutory prohibition in ADGM relating to “the payment of a sum of money” within the context of a contempt order.
26. Whilst *Prosser v Prosser, op cit.*, may be regarded as the latest iteration of the English position as to the penalty for contempt for non-payment of money, the common law in this area is not settled, and the historical evolution of this aspect of the law of contempt has depended upon the construction of statutes which have *not* been made part of the law of ADGM; accordingly the law of contempt in ADGM consequent upon breach of an order for non-payment of money remains, at the least, equivocal.

Decision

27. In principle it is not easy to see why breach of an order for the payment of money by way of security should be viewed as capable of attracting a contempt order, whereas an order for payment of money *direct* to a claimant should not: thus if the Order of the Court in the present case had been that the Defendant was to make an interim payment direct to the Claimant (as the Claimant’s application specifically had requested), then on the basis of *Prosser* contempt apparently would not have lain, whereas the sanction of contempt nevertheless appears to be regarded as *prima facie* available in the instance of an order made (as was the instant case) that the sum in question be paid into court.
28. The Court finds difficulty in accepting this dichotomy, and on this basis alone would have been minded to reject the present Application as being unjustified as a matter of principle.
29. Nevertheless, given that English authority appears at the least to countenance a contempt application being mounted for breach of a procedural order requiring payment into court, and on the *assumed* basis that a like view should prevail in the ADGM Courts, the question then arises whether, in the exercise of judicial discretion, the factual circumstances of this case merit imposition of a contempt order: is the Respondent, in the words of Regulation 96(2)(c), “otherwise in contempt of court”?
30. It seems to the Court that there are three significant matters mitigating against an order for contempt being made in this case.
31. *First*, non-compliance with a procedural order to pay a specified sum into court now has attracted its own procedural sanction under ADGM CPR, since by Order of 1 April 2021 (extending the time specified in the Order of 18 March 2021), such failure to comply has resulted in the strike out of the Defendant’s Defence, which in itself amounts to condign sanction for non-compliance with a court order.
32. In the Court’s view this does not amount to the type of contumelious conduct associated with the sanction of contempt, which attracts public opprobrium associated with the requested referral of the conduct in question to the Attorney General, and/or alternative imposition of a fine, which if levied would enure to the public coffers and certainly would not accrue to the monies standing in court awaiting trial of the Claimant’s claim.

33. *Second*, failure to pay a sum into court as ordered is not of itself unequivocal conduct: it may of course amount to deliberate flouting of a court order, but equally it may be no more than an instance of inability to pay the sum required. In this Application the Court has not heard from Mr Parish, founder and director of the Defendant, whom has elected not to file evidence, but whom in context of the associated ‘unless order’ application put in a witness statement to the effect that the Defendant did not have the money available fully to satisfy the Order of 14 February 2021 for payment into Court of the full sum of approximately AED 21 million, instead making payment only of the sum of AED 10 million, at the same time assuring the Court of the Defendant’s intention to make full payment as ordered. This sentiment was buttressed by a further email from the Defendant’s solicitor dated 31 March 2021, referencing an anticipated influx of funds from ongoing commercial ventures, and which in turn led to the time extension within the further Order of 1 April 2021; yet another last-minute email of 6 April 2021, again promising imminent funds, appeared to ignore the finality of the previous extension, and culminated in entry of the Order of 6 April 2021 striking out the Defendant’s Defence.
34. The consequential point here is that given that the burden of establishing the contempt alleged lies on the Claimant, as the entity asserting such behaviour, and given that it is established law that this is a burden which must be satisfied to the criminal, not civil, standard of beyond reasonable doubt, it is not possible on the present state of the evidence to find that this standard of proof has been met.
35. The assertion by Ms Malik (in her letter to the Registry of 23 March 2021) that in determining whether the alleged contempt had been committed that the Court should “take into account the Defendant’s ongoing and repeated conduct”, of which she makes strident complaint, strikes the Court as fundamentally incorrect in the present context: either the incident of allegedly contemptuous conduct relied on justifies the sanction requested, or it does not, and in principle the alleged contemnor cannot be subject to sanction for contempt for acts unrelated to the matter under specific scrutiny: to do otherwise strikes the Court as embarking upon a slippery slope.
36. *Third*, and purely as a matter of procedure, it is generally accepted that if an order the breach of which is to underpin a contempt order, with accompanying appropriate sanction, then as a matter of practice the Order itself should contain a penal notice, which the Order in question (and subsequent Orders) did not; at the time of the making of the Order on 14 February 2021, there had been neither mention nor consideration of a Penalty Order, the Application for which was filed by the Claimant on 4 March 2021 apparently as a procedural afterthought when it became evident that the Order for payment into Court was not met to the tune of some AED 11 million, and it appears to have been thought by those acting for the Claimant that a Penalty Order would exert additional pressure to comply upon a recalcitrant Defendant, and hopefully to stimulate payment into court of the balance.
37. For the foregoing reasons the Court has declined to grant the Penalty Order sought by the Claimant, hence the Order herein.

Issued by:



Linda Fitz-Alan
Registrar, ADGM Courts

7 April 2021