



Criminal contempt: the pendulum swings

Wilson Leung examines a recent judgment providing much-needed clarity on the process of bringing committal proceedings in Hong Kong

IN BRIEF

► The Hong Kong Court of Final Appeal has held that a party does *not* need to inform or seek the consent of the Secretary for Justice (the equivalent of the attorney general (AG) in other jurisdictions) before commencing committal proceedings in relation to criminal contempt.

► This decision provides welcome clarification for practitioners in civil litigation.

► It now appears clear that the litigant may bring such proceedings without having to seek the AG's consent.

Contempt of court has traditionally been classified as criminal or civil contempt. Civil contempt is concerned with breaches of court orders or undertakings, whereas criminal contempt relates to other acts which seriously impede the administration of justice (*A-G v Times Newspapers Ltd* [1974] AC 273).

Despite occasional criticism of the distinction (eg *Jennison v Baker* [1972] 2 QB 52, p61H), it continues to persist for the time being, at least in England (*R v O'Brien* [2014] UKSC 23; *Attorney General v Crosland* [2021] UKSC 15).

Criminal contempt in civil proceedings

Whether a contempt is a criminal or civil contempt does not depend on whether the proceedings within which they took place were themselves criminal or civil

proceedings. Instead, it depends on the nature of the conduct. Thus, breach of a procedural order made by the court in criminal proceedings would still be a civil contempt, while noisily disrupting a civil trial would amount to criminal contempt (see: *R v O'Brien* at [42]).

Thus, it is not uncommon for practitioners in *civil* litigation to encounter situations where their clients may wish to bring committal proceedings against another person for misconduct that would be classified as *criminal* contempt.

One classic situation is where a third party (who is not a party to the action) has aided and abetted a party's breach of a court order, or has otherwise knowingly acted so as to frustrate the court order. Such a third party would be liable for contempt of court (*A-G v Punch Ltd* [2002] UKHL 50). Specifically, the third party's conduct would be *criminal* contempt, while the party in breach of the court order would be liable for civil contempt (*A-G v Times Newspapers Ltd* [1992] 1 AC 191). Thus, if the litigant who had obtained the order wished to bring committal proceedings against the third party, this would be for criminal contempt.

Another possible situation is where a solicitor acting for another party is suspected of knowingly taking steps to subvert a court order against his client. Again, this would be *criminal* contempt, because the solicitor is not themselves enjoined by the order. A dramatic illustration occurred in *Ocado Group plc and another v McKeeve* [2022] EWHC 2079

(Ch), where a solicitor was found liable for criminal contempt because he had advised his client to destroy electronic documents after his client was served with a search order.

The AG's role in bringing criminal contempt proceedings

There is no doubt that the attorney general (AG) has standing to bring proceedings for criminal contempt. The question, however, is whether she has exclusive standing—in other words, whether her involvement *must* be sought before criminal contempt proceedings are commenced.

The authorities have not spoken with one voice. In *AG v Times Newspapers* [1974] AC 273, several of the judges suggested that it was 'most desirable' for proceedings in respect of criminal contempt to be brought by the AG, given her role as the public officer who represents the public interest. However, they also stated that if the AG refused to bring proceedings, the party aggrieved by the contempt had standing to do so.

By contrast, in *A-G v Newspaper Publishing plc* [1988] Ch 333, Sir John Donaldson MR opined at p362D that criminal contempt was 'in general' a matter for the AG to raise, acting as guardian of the public interest.

In *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 and *Dobson v Hastings* [1992] Ch 394, it was submitted that only the AG has standing to bring proceedings for criminal contempt, on the ground that it is the exclusive right of the AG to represent the public interest. However, the court declined to resolve this argument, noting that it was a 'difficult and important' question.

Chu Kong v Sun Min: the background
Chu Kong v Sun Min [2022] HKCFA 24 involved civil proceedings in which Mr Sun Min sued Mr Chu Kong over control of a ship. Mr Sun obtained an *ex parte* injunction against Mr Chu. Subsequently,

Mr Chu alleged that Mr Sun had relied on forged emails in obtaining the injunction. Accordingly, Mr Chu sought to commence criminal contempt proceedings against Mr Sun.

Mr Sun argued that Mr Chu did not have standing to commence the proceedings because proceedings for criminal contempt could only be brought with the consent of the Secretary for Justice (SJ) (the equivalent of the AG in other jurisdictions).

The court's decision

Lord Neuberger NPJ (giving the only reasoned judgment in the Hong Kong Court of Final Appeal) came to the conclusion that the SJ does *not* have the exclusive right to bring criminal contempt proceedings, and that a litigant is not required to consult the SJ before bringing such proceedings.

Contempt jurisdiction: the principles

Lord Neuberger first examined the question as a matter of legal principle. He began by emphasising the societal importance of the law of contempt. There was a fundamental public interest in the law being properly administered by the courts. An 'essential ingredient' of that was the courts' power to punish those who commit contempts (at [21]). This power existed to enable judges to maintain the authority of the courts by preventing abuse or obstruction of the judicial process.

In light of the public importance of the contempt jurisdiction, Lord Neuberger thought it would be surprising if an entity other than the court had the power to fetter the ability of an applicant to bring an alleged contempt, whether civil or criminal, to the court's attention (at [39]). All citizens had an interest in court orders being respected, and there should be 'as few as possible barriers in the way of bringing alleged contempts to the attention of the court' (at [53]). If there was a mandatory requirement to obtain the SJ's consent, that would involve added delay and expense for applicants who wished to bring contempt proceedings.

Lord Neuberger's inclination to reject the alleged requirement to seek the SJ's consent was bolstered by the (paradoxical) fact that criminal contempt proceedings are ultimately 'civil in nature' and hence outside the scope of the ordinary criminal law (at [30]-[35])—see *Construction, Forestry, Mining and Energy Union v Boral Resources* (2015) 256 CLR 375 at [45]: 'A criminal contempt is a common law offence, albeit not part of the ordinary common law. But even a proceeding for criminal contempt is not a criminal proceeding.'

The only way to bring an alleged contempt before the court is through civil proceedings, and thus it is technically

incorrect to describe the initiation of contempt proceedings as a 'prosecution'. A party who brings contempt proceedings is not acting as 'prosecutor'; instead, their role is to draw the attention of the court to the facts, and then leave it to the court to decide whether there was a contempt.

Given that criminal contempt proceedings are civil in nature, there is little reason to accord the SJ with the privileged role of controlling which instances of criminal contempt could be considered by the court. Logically, criminal contempt proceedings should be more similar to civil contempt proceedings (where the SJ does not exercise such control) than to ordinary criminal proceedings (where the SJ does have such a role).

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A need to prevent abuse?

Lord Neuberger was initially attracted to the notion of the SJ being able to weed out abusive or misconceived contempt applications before the court needs to consider them. However, he held that, if a filter was needed to filter out abusive applications, the filter should be applied by the court, rather than the SJ.

The court was well aware of the need to prevent litigants from bringing contempt proceedings for abusive purposes. In any event, if the court believed that the SJ's assistance was necessary in a particular case, the court could always request it.

Hong Kong law & regulations

Second, Lord Neuberger examined Hong Kong's legislative provisions. He held that there was nothing in the rules of the High Court (in particular, Order 52), the Hong Kong Basic Law, or other legislation which would compel a litigant to seek the SJ's consent before bringing criminal contempt proceedings.

Case law in other jurisdictions

Third, Lord Neuberger conducted a review of the case law in various common law jurisdictions.

In all of the jurisdictions he examined, there was case law which supported the

ability of litigants to commence criminal contempt proceedings without resorting to the AG. This included: *AG v Times Newspapers* [1974] AC 273 (England); *Robb v Caledonian Newspapers Ltd* [1994] SCCR 659 (Scotland); *Witham v Holloway* (1995) 183 CLR 525 (Australia); *R v Ellis* (1889) 28 NBR 497 (Canada); *Murphy v British Broadcasting Corp* [2005] 3 IR 336 (Ireland); and *AG v Kiwanuka* [2022] UGHCCD 46 (Uganda).

The only exception was Singapore, where a litigant must consult the AG before starting criminal contempt proceedings (*Aurol v Sembcorp Marine Ltd* [2013] 2 SLR 246).

Welcome clarification

Chu Kong provides welcome clarification for practitioners in civil litigation. It now appears clear that a litigant may bring criminal contempt proceedings without having to seek the AG's consent. This puts criminal contempt proceedings on the same plane as civil contempt proceedings in that respect. It prevents the anomalous scenario where a litigant could bring (civil) contempt proceedings against another party for breach of a court order without the AG's consent, but would then have to seek the AG's consent to commence (criminal) contempt proceedings against a third party for aiding that very same breach.

Arguably, *Chu Kong* also exemplifies a trend of lowering the barriers for litigants to commence contempt proceedings. This trend appears to be even further advanced in England. In Hong Kong, every committal application still requires the court's leave (Rules of the High Court, Order 52 rule 2); in England, the court's permission is no longer needed for civil contempt, or criminal contempt in relation to existing proceedings (CPR 81.3(5)). In *Navigator Equities Ltd and another v Deripaska* [2021] EWCA Civ 1799, [2021] All ER (D) 106 (Nov), Lady Justice Carr rejected the notion that applicants in civil contempt proceedings must pursue the action solely in the public interest. She also held that, if the contempt application is brought for proper purposes (ie bringing a serious contempt to the court's attention), then the applicant's subjective motive (eg revenge) is irrelevant.

It remains to be seen, however, whether the pendulum will swing back in future, with the courts being concerned—as they have been in the past—about contempt proceedings as a 'procedure which if instituted by one of the parties to litigation is open to abuse' (*AG v Times Newspapers* [1974] AC 273, p312A).

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