

Parties not at liberty to add penal notices to orders (Re Taray Brokering Ltd; Avery-Gee (as trustee in bankruptcy of Lawrence Coppen) v Coppen)

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Dispute Resolution analysis: This case somewhat muddies the water as to whether a penal notice can be added to an order without the court having approved it. His Honour Judge Pearce ('the judge') determined that this cannot be done, but he did not consider the Chancery Guide which very clearly states that this can be done. A party that wishes to threaten committal proceedings for non-compliance with an order should consider adding the penal notice to the very first draft of the order that they are seeking. The party served with the order should exercise caution as a handwritten penal notice or one that is typed subsequent to the court's approval or even an order without a penal notice may be permitted or considered a defect that can be waived. Written by Natalie Todd, partner at Cooke, Young & Keidan.

Re Taray Brokering Ltd; Avery-Gee (as trustee in bankruptcy of Lawrence Coppen) v Coppen and another [\[2022\] EWHC 2958 \(Ch\)](#)

What are the practical implications of this case?

A party to litigation is not at liberty to add a penal notice to an order of the court of its own motion. Instead, that party must apply to the court to vary the order if it wishes a penal notice to be added.

The passage in Blackstone's Civil Practice (2022 Edition) at paragraph 81.15 is no longer good law (if it ever was) and it is arguable that *Anglo Eastern Trust v Kermanshahchi* [\[2002\] All ER \(D\) 296 \(Oct\)](#) was wrongly decided.

Interestingly, the Chancery Guide 2022 was not considered which provides:

- 'In drafting the new order, consideration should always be given to whether a penal notice should be included. A penal notice is added by the party, not by the court' (para 15.60, Chancery Guide 2022)
- 'It is not necessary to obtain the consent of the court before a penal notice is endorsed on an order before service' (para 16.31, Chancery Guide 2022)
- Most orders are now drafted by a party nominated by the court. If the drafting party wishes to include a penal notice in the order to be sealed by the court, it should be added to the draft so that it is part of the sealed order. If the party who is not given responsibility for drafting the order wishes it to contain a penal notice, the terms of the penal notice should be provided to the drafting party' (para 16.32, Chancery Guide 2022)
- 'It is, however, always open to the party wishing to enforce the order to endorse a penal notice on the copy of the order to be served. It is not essential that the penal notice forms part of the order when it is sealed' (para 16.33, Chancery Guide 2022)
- 'If the order is being drafted by the court, and the penal notice has not been included in the order, it should be endorsed on the copy of the order to be served' (para 16.34, Chancery Guide 2022)

What was the background?

The claimant was the Trustee in Bankruptcy of Lawrence Coppen. He sought an order pursuant to section 125 of the Companies Act 2016 for rectification of the register of members of Taray Brokering Limited to show that the claimant was the owner of the entirety of its shares.

A court order was made against Lesley Coppen (or other directors) requiring rectification. The order, which did not contain a penal notice within the meaning of [CPR 81.4](#), was served on Lesley Coppen who did not comply within the time allowed. The claimant sent a further copy of the order and hand wrote a penal notice on the front of it. There was a continued failure to comply with the order and the claimant applied to commit them for non-compliance with the order.

The parties reached terms and the application was withdrawn. The judge raised concerns because the second version of the order that had been sent to the court had never directed that a penal notice be attached, yet one had been attached to the order served.

The court was mindful of the following propositions:

- [CPR 81.4\(2\)\(d\)](#) requires that any application for committal on the grounds of the alleged breach or disobeying of an order includes a statement that the order included a penal notice
- there is no set form of words for a penal notice
- the absence of a penal notice is not necessarily fatal to the application to commit, but non-compliance with the rules can only be waived where the court is satisfied that no injustice is caused to the defendant (see *Serious Organized Crime Agency v Hymans* [2011] EWHC 3599 and *Business Mortgage Finance 4 plc v Hussain* [2022] EWHC 449)

What did the court decide?

In those cases, Rules of the Supreme Court (Revision) 1965, SI 1965/1776, r 7(4) were interpreted to suggest that the penal notice was not part of the order itself but might be added onto the copy of the order served under the rule.

The judge noted that the current wording of [CPR 81.4](#) refers to confirmation that the 'order ... included a penal notice'. The judge therefore considered that this new wording contemplates that the penal notice is part of the order itself, which is different from the position in *Anglo Eastern Trust v Kermanshahchi and Deery v Deery*.

The judge concluded that a party is not at liberty to add a penal notice to a court order of its own motion. As a result, a party must apply to the court to vary the order if it wishes a penal notice to be added. It was made clear that a court order is binding on the party to whom it is addressed regardless of whether it contains a penal notice and it is open to the party seeking to enforce it to point out to the disobeying party that their breach of the order could have penal consequences.

Case details:

- Court: Chancery Division, Manchester District Registry
- Judge: Judge Pearce
- Date of judgment: 21 November 2022

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