



Directors at War: Terminating Email Access

"All is fair in love and war...and business is war." (Jasmine Kundra)

When company directors are locked in dispute, one of them may be tempted to cut off the other's access to emails and to the business server - a tactic likely to have immediate and serious consequences for the director thus cut off.

Its appeal as a tactic to force the other director to the negotiating table is obvious, but the question is whether the director thus deprived has any legal remedy available to force immediate restoration of access.

A recent Supreme Court of Appeal matter saw a director in that exact position trying to get his access back urgently with a "spoliation order" application.

"Cut off his email and server access"

When the two directors fell out, one (let's call him 'A') applied for liquidation of the company on the grounds of deadlock. Director B opposed this application, and, alleging that A had resigned his directorship, instructed the web hosting entity hosting the company's server and email addresses to cut off A's 'email and company network/server access' with immediate effect.

A, denying hotly that he had resigned, immediately applied to court for a "spoliation order" restoring his email and server access to him.

Spoliation - a quick and effective way to get back possession, but only if...

- The spoliation process is designed to stop disputing parties from taking the law into their own hands and provides a quick and effective way of regaining possession of something if you have been wrongfully deprived of it. It's a quick and effective remedy because "[T]he injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands". In other words, you can get an immediate spoliation order without having to prove your right to possession of the thing - all you have to prove is the wrongful dispossession.

- So that would have been an ideal outcome for A, giving him immediate restoration of his access to his emails rather than having to fight his way slowly through a full trial proving his rights to email and server access. But it was not to be. His problem was that, in order get a spoliation order, one of the first things you must prove is that you were in "peaceful and undisturbed possession" of something.

- Now A would have been able to prove such possession if he had for example been wrongfully deprived of use of a company car or even of an "incorporeal" right to use property (such as "quasi-possession" of a right of access under a servitude). But he was unable to convince the Court that his email/server access fell into any such category.

- As the Court put it: "Thus only rights to use property, or incidents of occupation, will warrant a spoliation order." A's prior use of the email address and server was not an "incident of possession of movable or immovable property", it is purely "a personal right enforceable, if at all, against [the company]."

- In a nutshell, A must now prove his legal right to email and server access - perhaps he will be advised to apply for an ordinary interdict, perhaps he will sue for damages and/or re-instatement, but whichever course he chooses he will need to accept the inevitable delays. In other words, if B's tactic was to put immediate and substantial pressure on A in the short term it worked - at least for now.

Don't however take any action like this without professional advice - it could come back to bite you badly if it misfires.

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