

COMMITTAL FOR CONTEMPT: Procedure, Defences, Funding and Costs

14 July 2020



Paper produced by Tim Baldwin, Barrister at Garden Court Chambers to supplement slides

A. Introduction

1. There are many types of proceedings for committal for contempt. The process we are concerned with is an application to commit someone to prison, or impose a penalty or sanction on them for breach of a common law injunction. As said previously there are many different forms of contempt under the Contempt of Court Act 1981 and other legislation each with their own form of procedure to enforce a court order through imposing a sanction. In this part of the seminar we are interested in examining the procedures, funding and potential costs risks when defending an application for committal in respect of allegations of breach of an injunction. The injunction could be interim or final as the same process is involved. It is the case that only certain forms of statutory injunctions have powers of arrest attached to them whereby an individual who is alleged to have breached an order may be brought to court to face committal proceedings. The most common form of injunction requires the Claimant (or Applicant) make an application to commit the

Defendant (Respondent) to prison for contempt of court as a result allegations of a breach of an injunction. The court does not police its own orders and enforcement of any court order made in the civil courts is dependent on the actions of the party who obtains and benefits from the court order.

2. This part of the seminar is not going to be a detailed exposition of the Contempt and Committals but is aimed at addressing:
 - a. The procedure for such an application
 - b. Preparation in response to an application
 - c. Funding and availability of Legal Aid to defend an application
 - d. Costs and risks associated with defending an application.

Owen Greenhall will be addressing in detail how to defend the applications at trial and the penalties.

B. Procedure

3. In respect of the procedures and the forms which are to be used in applications to commit in the civil courts this is set out in Part 81 of the Civil Procedure Rules and the accompanying practice direction. A copy of Part 81 and the PD are in the pack. We will examine the key points but it is always advisable to have a copy of the White Book or other manual or civil court procedure to hand. Part 81 of the CPR is structured to identify to both the High Court and County Court in a practical way their powers to punish or coerce persons guilty of contempt by imposing custodial or non-custodial sanctions arising in different identifiable circumstances. We are

going to focus on the general provisions and the particulars rules set out in Part II and Part VIII.

4. The general rules for scope and interpretation are set out in r 81.1 – 81.3. The key provisions we are going to look at first of all in under Part II which concerns “Enforcement of judgment, order or undertaking to do or abstain from doing an act” r 81.4.

5. Points under r 81.4

- This sets out the procedure in respect of applications for committal in respect of injunctions to do or abstain from doing an act. The object is to secure compliance;
- This is concerned with procedure only and does not confer on the court the power to make the order for committal but the rule does recite the elements of contempt liability;
- This is applicable in High Court and County Court;
- In order for the procedure to be engaged it is necessary for the applicant to establish the order was made, the Respondent was aware of it and of its terms and thus knew what they were required to do and when;
- The procedural step requiring permission to bring an application to commit;

- Disproportionate committal applications and abuse of process: the court should be astute to detect when contempt proceedings are not being pursued for legitimate aims. In appropriate cases it may be open to a respondent to apply to strike out the application as an abuse of process.
6. Points under r 81.5. Unless the court dispenses with service under r 81.8 an order may not be enforced under r 81.4 unless a copy is served on the person required to do or not to do the act in question. Service must be in accordance with r 81.6 or 81.7 or in accordance with a rule for alternative service under 81.8(2) (b).
 7. Rule 81.6, subject to 81.7 and 81.8, requires personal service and that is defined in the rules on service.
 8. Rule 81.8 provides for circumstances where personal service may be dispensed with.
 9. Rule 81.9: Requirement for a penal notice on the order. It may not be enforced without one. Only if the court is satisfied there is no injustice to a respondent may this requirement be waived. The form of notice does not have a rigid form. There are some examples at page 2308 of the White Book.
 10. Rule 81.10 sets out the process as to how to apply:
 - a. Application notice under Part 23 of CPR
 - b. Must contain a penal notice (PD para 13(2)(4) see Annex 3;
 - c. Grounds on which committal are sought are to be set out in full

- d. Amendments can be made by permission of the court;
- e. Judge confines themselves to allegations in notice;
- f. Procedural defects may be waived only if no injustice to Respondent
- g. May not be discontinued without permission of the court (PD 16.3)
- h. May not dispose of application without a hearing (PD 13.2(3));
- i. Court may strike out the application (PD 16.1).
- j. Evidence Supporting written evidence should be by way of affidavit and be filed.
- k. Personal service is governed by CPR r 6.5(3) alternative methods r 6.15;
- l. Hearing date – adjournment or say.

11. Rule 81.28: Sets out the procedure for the hearing: powers are set out in the rules.

Burden and standard of proof. Hearings in absence of the Respondent.

12. Rule 81.29: Power to suspend the execution of the committal order

13. Rule 81.30 Warrant of committal.

14. Rule 81.31 application to discharge – always consider habeas

C. Preparation

15. The key issues:

- a. Is there a defence to the grounds claimed?
- b. Is there a defect in process or procedure?
- c. Are you really a Respondent or subject to the terms of the injunction?

- d. Are there grounds to make an application to set aside or vary the terms of the injunction as well as defending the breach?
- e. Preparation of grounds of response
- f. Do you want to test the Applicant's evidence: Witness statements and witnesses
- g. Adjournment to a contested hearing with oral evidence and cross examination: Prepare case management directions, disclosure including possible sanctions for non-disclosure, witness statements and trial preparation.
- h. "Yaxley-Lennon" case: Fair procedure
- i. Appeals r 52.3 committal and committal orders (no permission required)

D. Funding your defence

16. Following the judgment in Brown v London Borough of Haringey [2015] EWCA Civ 483 (see enclosure), the LAA has issued new guidance on applying for legal aid to represent those accused of contempt of court (see attached). As McCombe LJ said in Brown, this is criminal legal aid - even where the proceedings are in the civil courts - and so an application for a criminal representation order will be necessary.
17. Applications are made to the Nottingham office of the LAA, using form CRM14. If your firm doesn't have a criminal contract, you will also need to apply for an individual case contract (ICC). Criminal legal aid for contempt is not means tested.

18. There is a guidance document for general contempt cases, and a separate one for applications for contempt cases in breach of injunctions made under Part 1 Anti-Social Behaviour Crime and Policing Act 2014.

19. Claims are made using form CRMCLAIM11 and the payment rates depend on the venue in which the contempt proceedings are heard. The LAA's guidance unhelpfully refers to the 2013 Regulations "as amended" but doesn't set out what the amendments are, where they are to be found, or acknowledge that an amended version of the 2013 Regulations isn't available anywhere to the best of our knowledge.

These are the applicable payment rates

20. For cases started where the Representation Order was granted before 1 July 2015:

- a. Magistrates Court - Paras 10 & 11 Schedule 3, Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014
- b. Crown Court - Para 13, Schedule 3, Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014
- c. County Court - Para 14, Schedule 3, Criminal Legal Aid (Remuneration) (Amendment) Regulations 2014
- d. For cases started where the Representation Order was granted on or after 1 July 2015:
- e. Magistrates Court - Para 5, Schedule 3, Criminal Legal Aid (Remuneration etc) (Amendment) Regulations 2015

f. Crown Court - Para 8(a), Schedule 3, Criminal Legal Aid (Remuneration etc) (Amendment) Regulations 2015

g. County Court- Para 8(b), Schedule 3, Criminal Legal Aid (Remuneration etc) (Amendment) Regulations 2015

21. There is an upper costs limit of £1,368.75 (£1,237.50 from 1 July) that can only be exceeded with prior approval from the LAA.

22. The July 2015 fee cut was revoked for cases starting on or after 1 April 2016. These cases will attract the rates, and costs limits, set out in the 2014 regs, above.

23. Providers dealing with civil contempt cases can now apply for criminal legal aid to represent clients for committal proceedings.

24. Applications are made to the National Courts Team (NCT) in Nottingham. This is to allow clients to be represented in breach or contempt proceedings including the breach of a civil order.

25. Providers should not apply to the Legal Aid Agency (LAA) for an amendment to an existing civil certificate or submit a fresh civil legal aid application for this work. This is because it can only be funded under criminal legal aid.

26. It is important to note that in order to carry out committal work in civil contempt cases you must be authorised to both undertake criminal legal aid and apply for a representation order.

Why criminal legal aid?

27. Civil contempt proceedings are seen as criminal for the purposes of legal aid because of the risk of imprisonment.
28. How the application process works
29. All applications for criminal legal aid in committal proceedings should be submitted to the NCT in Nottingham.
30. You need to use the paper CRM14 form and also include a copy of the committal application.
31. If you do not hold a crime contract then you should apply for an Individual Case Contract (ICC) by writing to the Nottingham NCT - see email address below.
32. Your email will need to explain why you are applying and how you meet the ICC criteria.
33. More detail on making an application is available in our guidance on applications in civil contempt cases - see below.
34. Applications under the previous arrangements
35. If you follow the previous arrangements your application is likely to be delayed. So you are strongly advised to use the CRM14 form for legal aid in contempt cases and submit this application to NCT.

Payment claims

36. All claims for payment should be submitted to the crime finance team in Nottingham using the CRM11 form.

37. The applicable rates of remuneration are set out in the Criminal Legal Aid (Remuneration) Regulations 2013.

Further information

38. Nottingham.NCT@legalaid.gsi.gov.uk - to submit Individual case contract applications.

39. Apply for legal aid for civil contempt cases - for guidance and CM11 form.

40. CRM14: criminal legal aid application form - to download paper form.

41. Criminal Legal Aid Remuneration Regulations.

Brown and other guidance by the court

42. In Brown v London Borough of Haringey [2015] EWCA Civ 483 the Court of Appeal considered the availability of legal aid for contempt proceedings in the County Court. It was considering an appeal against the committal for contempt of an elderly man who was found to have breached anti-social behaviour injunctions. In the County Court, he was unrepresented following the failure of his solicitor's efforts to obtain legal aid.

43. The solicitor had applied both to the LAA, which said it was a criminal matter and to apply to the Court; and to the Magistrates Court that dealt with legal aid applications in the local area, which said it was a civil matter and to apply to the LAA.

44. Giving judgment, McCombe LJ analysed what he said was "disgracefully complex" legal aid legislation. The relevant analysis is set out at paras 26 to 37. McCombe LJ concluded that this was indeed a criminal matter (that is, that it fell within the

criminal legal aid scheme and the solicitor needed a criminal contract). He approved the judgment of Blake J in King's Lynn and West Norfolk Council v Bunning and anor [2013] EWHC 3390 (QB).

45. In cases in the Crown Court, High Court and Court of Appeal, the Court has the power to grant legal aid itself (which the Court of Appeal did, to allow Mr Brown's representatives to be funded). But the County Court has no equivalent power. These are criminal applications which have to be made by criminal practitioners using criminal application forms and this work can also be done by civil practitioners if the LAA is willing to grant an Individual Case Contract.

46. In the recent case of Re F (Committal Appeal) [2018] EWHC 1310 looks at the timing of the application for legal aid.

47. The Central London County Court has its own guidance document see the pack.

E. Costs risks

48. The difficulty that the legal aid regime creates is that as it is under criminal legal aid there is no costs protection pursuant to section 26 of LASPO. Thus if there is a contested committal that fails then the Respondent may be liable to pay the Applicants costs. The process here must be an assessment of means to pay and quantum if costs are awarded. There must also be consideration of whether a "no order" as to costs is appropriate.

49. The counterpoint. If an application to commit is dismissed then the Respondent is entitled to their costs but the difficulty is that unlike civil legal aid the Respondent may not claim their costs at interpartes rates.

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14 July 2020

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