Lexis Nexis E-Bulletin Series: Contempt Proceedings and Contempt of Court - Part 2

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2/12 The Application and Supporting Evidence - a Strict Regime

This e-bulletin is part of a series covering **contempt of court** in all its forms and the series is designed to be relevant to all practice areas. Richard Shepherd has been commissioned by Lexis Nexis to draft their Professional Practice Notes on the subject. Albion Chambers is delighted that we have been granted permission by Lexis Nexis to share these guides with our instructing solicitors and professional clients **before** they have been published online. The next e-bulletins in the series will be published every Tuesday morning.

Generally

Unless the court permits otherwise, the adherence to the requirements of CPR 81 is mandatory. Depending on the type of committal, sometimes an applicant must first apply for permission to bring committal proceedings. Permission hearings are governed by CPR 81.13 and 14.

An applicant may only rely on the following (some may not apply in all cases);

- Application forms (or similar)

  - the matters set out in the claim form or application notice
  - any statement of grounds (in cases alleging interference with the administration of justice)
  - any statement of grounds (in cases where certification is required)

- Evidence

  - evidence adduced by affidavit, filed with the court.

This strict regime means that any practitioner considering bringing committal proceedings must first

ensure that the case is sufficiently distilled prior to submitting the application/grounds. The flexibility that is available in other areas of law, or through other parts of the CPR (see 32 or CPR 2.3 for instance) has little bearing on Part 81 applications. The reason for this strict approach was addressed by the Court of Appeal in *Makdessi v Cavendish Square Holdings BV & others (committal)* [2013] EWCA Civ 1540 as follows;

> "*Part 81 is a self contained part of the Rules applying to the specific circumstance of an application for permission to commit, itself a quasi-criminal procedure, and must take precedence over the more general provisions of CPR 32.6. If CPR 81.14 requires more of the applicant than might otherwise be required, it must be complied with. CPR 81.14 (1) (b) requires the exhibition of "*all*" documents relied on. "All" means all.*"

A Staged Approach

Bearing in mind this strict regime and the burden of proof being on the applicant, a staged process of evidence gathering is recommended;

Step 1 – identify (and evidence) the terms of the order or injunction concerned;

Step 2 – prove that the alleged contemnor was aware of the terms;

Step 3 – identify what breaches can be identified in a 'clear and unambiguous' way;

Step 4 – prove the breaches.

By following this staged process, the distillation of the case prior to making an application for committal or sequestration (CPR 81.26) (or in fact prior to applying for permission where required) a practitioner will avoid falling foul of the "*All means all"* evidential requirement under CPR 81.

Nevertheless, despite the strict regime, the court does have some discretion in allowing proceedings even where there have been breaches of the CPR. In *Devere v Hither Green Developments Ltd* [2015] EWCA 1365 the court waived procedural defects and proceeded to hear the application because the respondent was aware of the proceedings and was aware of the court orders and the procedural breaches did not cause any "*injustice, prejudice or unfairness*".

Service

As per CPR 81.22 personal service is required. If the object of an application is a company, this personal service includes directors or other company officers, if committal or writs of sequestration are also sought against them.

As an example where the failure to serve personally was found to be a deliberate act (and the consequences flowing from that), see *Sports Direct International Plc v Rangers International Football Club Plc & anor* [2016] EWHC 85 (Ch).

Service Outside the Jurisdiction

Service outside of the jurisdiction is more than a mere formality. The courts expect strenuous efforts to be made in achieving effective service.

It may be the case that the court is prepared to waive, for instance, personal service (CPR 81.24) where this has not been possible, but an applicant must be able to establish proper efforts. The case of *Compañia Sud Americana De Vapores S.A. v Hin-Pro International Logistics Ltd* [2013] EWHC 987

(Comm) is a good example as to the lengths that are appropriate in such cases.

Requirement for Penal Notices

In compliance with CPR PD 81 (Annex 3) any claim form or application for a committal hearing must include the following penal notice;

'*IMPORTANT NOTICE: The court has power to send you to prison, to fine you or seize your assets if it finds that any of the allegations made against you are true and amount to a contempt of court. YOU MUST ATTEND COURT on the date shown on the front of this form. It is in your own interest to do so. You should bring with you any witnesses and documents which you think will help you put your side of the case. If you consider the allegations are not true you must tell the court why. If it is established that they are true, you must tell the court of any good reason why they do not amount to a contempt of court, or, if they do, why you should not be punished. If you need advice, you should show this document at once to your solicitor or go to a Citizen's Advice Bureau or similar organisation.*'

Sufficient Time and Listing the Hearing

Generally, an alleged contemnor must have sufficient details of the allegations of contempt in order to be able to properly respond to them. By adopting the staged process set out above this condition should not cause any difficulty. As an example of a case where insufficient clarity was provided, see *Sports Direct* (CPR PD 81 para 15.5).

In any event, unless otherwise directed, the hearing must not be listed less than 14 days after the service of the claim form or application notice. The hearing date should be specified on the form or notice (Para 15.2).

Allied with the *Brown* principles regarding legal aid (see last week's e-bulletin), PD 81 also suggests that the proposed contemnor be advised as to the availability of legal aid and also be given sufficient time to instruct lawyers. It goes without saying that should the individual require an interpreter, they be given the opportunity to arrange one (Para 15.6).

Deciding when to hear a committal application may also be a difficult decision. There are, of course, the tactical considerations where an applicant believes they have caught a respondent in a lie on the face of the documents (for further information see the practice note on false statements). In addition however, the court will have regard to the effect the committal hearing may have on the main trial, see *Ablyazov v JSC BTA Bank* [2011] EWCA Civ 1386 and also *Dar Al Arkan Real Estate Development Company v Al Refai* [2014] EWHC 1055.

In the latter case the court focussed in particular on whether any new evidence would/may be adduced in the main trial that would inform the committal hearing and also whether the alleged contempt was particularly clear. A common sense approach should be adopted. If the contempt can be ring-fenced and litigated without having a detrimental impact on the main trial it may be anticipated that the court would accede to a hearing, pre-main trial.

Other Evidential Considerations

Where a defence is raised it is for the respondent to provide evidence in relation to it. Only once the defence is established does the evidential burden pass to the applicant to disprove that defence.

Though committal applications can be brought solely 'on the papers/affidavits provided', due to the nature of the proceedings and the criminal standard of proof a court would ordinarily expect the writers of the affidavits to attend and if required, be cross examined, see *Sports Direct*.

Respondent's Case

Purportedly, the same strict rules about the service and reliance of evidence apply to the respondent just as much as the applicant. This includes providing written evidence in the form of affidavit, and a requirement to serve that affidavit, unless otherwise directed (CPR PD 81 para 14).

However, in practise, a respondent's failure to comply with the requirements does not prevent the respondent from giving evidence and being cross examined on it. Similarly, the court may give permission for a witness called by the respondent to give evidence, notwithstanding that an affidavit has not been served previously (CPR 81.28(3) and (4)).

This apparent leniency no doubt stems from the potential sanction for a finding of contempt or successful writ of sequestration.

This leniency must be balanced with an effective administration of justice. As an example, in *ABC v DEF* [2014] EWHC 3346 (QB) the respondent argued that there should be a delay in hearing the committal application to allow time for the applicant's witnesses to attend court and be cross examined. The court denying the request pointed out that CPR 81.10 and 81.28 do not oblige a witness to attend in support of their affidavit. The court suspected that the respondent's indication that the witnesses would be required for cross examination was a tactic, to delay matters. It must be accepted that *ABC* does not sit altogether comfortably with the dicta in *Sports Direct* that the applicant's witnesses should usually attend to be available for cross examination.

Warrants

If the court decides to make a committal order, the approach is to issue a warrant of committal. Of course, if the contemnor is in court, this is an artificial process but one which nevertheless must be complied with.

A number of requirements are set out in CPR 81.30 in this regard (see below).

CPR 81.30 provides as follows;

(1) If a committal order is made, the order will be for the issue of a warrant of committal.

(2) Unless the court orders otherwise–

> (*a) a copy of the committal order must be served on the respondent either before or at the time of the execution of the warrant of committal; or*
>
> *(b) where the warrant of committal has been signed by the judge, the committal order may be served on the respondent at any time within 36 hours after the execution of the warrant.*

(3) Without further order of the court, a warrant of committal must not be enforced more than 2 years after the date on which the warrant is issued."

CPR 81.29 allows a committal order to be suspended for a given period and/or on particular terms.

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For further details please see next week's e-bulletin 'Committal Proceedings - Sentencing'.

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