Contempt of Court - Spring Series: 15/15

Submitted by Jessica Armfelt on Mon, 06/21/2021 - 14:53

Civil Contempt Proceedings - Appeals, Purges and Discharge

This final bulletin in our Spring Series examines the law surrounding appeals in respect of contempt proceedings under CPR 81 (also referred to as 'committal proceedings'), both for the claimant and defendant, whether appealing in relation to the finding of contempt or the sanction imposed. It also considers the process by which an individual's contempt can be discharged (in modern terminology) or purged (in old-fashioned terminology).

The defendant's right to appeal vs the claimant's position

A defendant has an absolute right of appeal against being committed to prison for contempt (i.e. no permission to appeal is first required) (*Baho v Meerza* [2014] EWCA Civ 669 and CPR 81.8(7)).

CPR 81.8(7) provides that the court shall inform the defendant of:

- their right to appeal without permission
- the time limits for appealing, and
- the court before which any appeal must be brought

CPR 52.3 provides:

'(1) An appellant or respondent requires permission to appeal—
(a) where the appeal is from a decision of a judge in the County Court or the High Court, or to the Court of Appeal from a decision of a judge in the family court, except where the appeal is against—
(i) a committal order
[....]'

Note that the *right* to appeal under CPR 52.3 only applies to the defendant because the *exception* to the requirement for permission is ringfenced to an appeal 'against a committal order'.

The Court of Appeal took exception to this state of affairs (under the pre-1 October 2020 version of CPR 81) in *Thursfield v Thursfield* [2013] EWCA Civ 840, describing the situation as 'deplorable'. Nevertheless, the drafters of the post-1 October 2020 CPR 81 have not reflected the *Thursfield* court's displeasure despite having the opportunity to do so.

The case of *Barnet LBC v Hurst* [2002] EWCA Civ 1009 gives an adequate summary of the position (under the pre-1 October 2020 CPR but unchanged, in effect, in the post-1 October 2020 CPR 81):

'It is therefore clear that for the purposes of the CPR appellate regime a distinction has to be drawn between an order by which a party is committed to prison (for which permission to appeal is not required) and any other order or decision made by a court in the exercise of jurisdiction to punish for contempt.'

Defendant's right to appeal—an unintended lacuna?

As above, CPR 81.8(7) provides for a defendant's right to appeal, that 'the court shall inform the defendant of the right to appeal without permission'. CPR 81.8 and CPR 81.9 (dealing with sanction), read in conjunction, do not appear to limit the defendant's right to appeal by reference to the committal order.

However, CPR 52.3 limits the 'no permission' right or exception to a 'committal order' (CPR 52.3.1(a)(i)).

Therefore does CPR 81.8(7) in fact widen the scope of the 'no permission' appeal to include any matters with which the defendant disagrees either in relation to the adverse finding, or a sanction lesser than committal, such as a fine or confiscation of assets?

Though it isn't at all clear, it is suggested that the answer is 'probably not'. CPR 81.1 states as follows:

'81.1.

- This Part sets out the procedure to be followed in proceedings for contempt of court ("contempt proceedings").
- This Part **does not alter the scope and extent of the jurisdiction of courts determining contempt proceedings, whether inherent, statutory or at common law**.
- This Part has effect **subject to and to the extent that it is consistent with the substantive law of contempt of court**.' (Emphasis added)

Barnet LBC v Hurst [2002] EWCA Civ 1009 is pre-existing substantive law, and it states:

'a distinction has to be drawn between an order by which a party is committed to prison (for which permission to appeal is not required) **and any other order or decision made by a court in the exercise of jurisdiction to punish for contempt**.'

Further support for this proposition may be obtained from a careful analysis of the language of CPR 81.8, namely:
'The court shall inform the defendant of the right to appeal without permission…'.

It is a fair argument that CPR 81.8(7) merely installs the procedural requirement for the court to inform the defendant of the pre-existing right to an appeal as encapsulated in CPR 52.3.

Practical tip: This is an issue or argument to look out for in the future. The ill-prepared, the judge or advocate, simply referencing CPR 81.8(7) may well fall into error in this regard.

Therefore it would appear that permission to appeal is required for all matters except if the appeal is against being committed to prison. For the sake of clarity, permission is also not required to appeal an order relating to whether the suspension of a committal order should continue, at least where such order has the effect of depriving a defendant of their liberty (*Re O (Committal: legal representation* [2019] EWCA Civ 1721), as a suspended committal is nonetheless, still a committal.

The strict time limits for appeal (claimant and defendant)

A party has 21 days in which to lodge an appeal unless otherwise stated by the court (CPR 52.12). A respondent must provide a respondent's notice within 14 days of receipt of the appellant's notice unless otherwise directed (CPR 52.13).

Following the well-publicised (non-contempt) cases, *Mitchell v News Group* [2013] EWCA Civ 1537 and *Denton v White* [2014] EWCA Civ 906, the courts now interpret the requirements of the CPR far more strictly, and this includes time limits.

This strict adherence to the rules has filtered through the appeals against committals for contempt. In *Baho v Meerza* [2014] EWCA Civ 669, the court observed the effect of *Mitchell* and that unless a breach is trivial, it is for the appellant to persuade the court to grant relief. In this case, the appeal was only seven days late and an extension was refused.

A good example of the approach the court should adopt can be found in the High Court authority of *Kagalovsky v Turevych* [2014] EWHC 2697 (QB). The court made it clear that time limits are to be strictly applied and the absence of prejudice to the opposing party is not the trump card it once was.

However note the decision of *Berger v Bell* [2020] EWCA Civ 544, in which the court allowed an appeal against a committal order which was nine weeks out of time, but this was in the context of the appellant being a litigant in person.

Appeals against 'sentence' or committal for contempt

The appeal will be limited to a review of the decision of the lower court and will only be allowed if the decision of the lower court is wrong or unjust because of a serious procedural or other irregularity (see *Liverpool Victoria Insurance Company v Zafar* [2019] EWCA Civ 392 at [43]).

Appeals against sanctions imposed for contempt constitute appeals against an exercise of judicial discretion.

Appellants face the additional hurdle of convincing the appellate court to interfere with a value judgment which has been made by a judge including their assessment and weighing of a number of different factors, which the appellate court will be reluctant to do (*Liverpool Victoria v Zafar, McKendrick v The Financial Conduct Authority* [2019] EWCA Civ 524). An appeal will usually only be allowed where it is possible to show that the judge:

- erred in principle
- took into account immaterial factors or failed to take into account material factors, or
- reached a decision which was plainly wrong in that it was outside the range of decisions reasonably open to them

Accordingly, there will be few cases in which a decision as to the appropriate 'sentence' for contempt will be open to challenge on appeal, whether on grounds of undue leniency or of undue severity, but if however the appeal court is satisfied that the sanction was 'wrong' on one of the above grounds, it will reverse the decision below and either remit the case to the judge for further consideration of sanction or substitute its own decision (*Liverpool Victoria v Zafar, McKendrick v The Financial Conduct Authority*).

If it is to be argued that a sentence was too severe, the relevant test is essentially the same test as the 'manifestly excessive' test applied by the Court of Appeal Criminal Division to criminal sentences (*Hussain v Vaswani* [2020] EWCA Civ 1216 at [50]).

Generally speaking, the Court of Appeal disapproves of the practice whereby a party references a range of authorities that purport to demonstrate that the sentence was too long (or too short). In *Lockett v Minstrell Recruitment* [2021] EWCA Civ 102, the Court of Appeal stated that it is not legitimate simply to compare sentences imposed in very different contexts in order to suggest that a

sentence is too harsh. The Court of Appeal in *Lockett* did however reduce a sentence of 12 months to 8 months, taking into account a number of factors, including that the first instance judge did not give a sufficient reduction in sentence to reflect misconduct on the part of the party who had made the contempt application.

In *Thursfield v Thursfield* [2013] EWCA Civ 840, the court dealt with it in this way:

'[counsel for the appellant] referred in his skeleton argument, by way of contrast, to a wide variety of other cases... I derive no assistance from any of them and I deprecate the citation of cases which are really said to be precedents or guidance on the facts. Each case, particularly of committal, depends on its own facts...'

This reticence towards such an approach was also underlined in *Longhurst Homes v Killen* [2008] EWCA Civ 402, which deals with sentencing generally in contempt cases.

However, a decision as to the appropriate level of penalty will be plainly wrong where it is so lenient, or so excessive, that it is outside the range of reasonable decision making (*Liverpool Victoria v Zafar* [2019] EWCA Civ 392 at [45]).

Where a claimant wishes to appeal against a sentence on the basis that the sentence was too short, there is little firm guidance as to how the court should assess 'too short'. In *Wood v Collins* [2006] EWCA Civ 743, the court suggested that:

'in exercising its power to increase a sentence of imprisonment for civil contempt, the Court of Appeal acts on similar principles as the criminal division when dealing with an application to increase a sentence on an Attorney General's reference, pursuant to section 36 of the Criminal Justice Act 1988'

The test specified under section 36 of the Criminal Justice Act 1988 is one of 'undue leniency'. In *Liverpool Victoria v Zafar*, the court had regard to the jurisdiction of the Court of Appeal, Criminal Division, to interfere with a sentence on the basis that it was unduly lenient. Specifically, it noted that undue leniency is defined by Attorney General's Reference No 4 of 1989 ((1989) Times, 11 November) as:

'where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.'

Note that a court order takes effect when it is made and remains binding unless and until it is revoked or appealed; for as long as the order is in effect, it is a contempt of court to breach it (*Cuadrilla Bowland v Lawrie* [2020] EWCA Civ 9 at [85]).

Practical tip: where a sentence of imprisonment is imposed and there is an intention to appeal, consider applying for a stay of the judgment for a short period or for bail, pending the appeal being heard (as counsel did in *Chelsea Football Club v Nichols* [2020] EWHC 454 (QB)). This might be particularly important where the custodial sentence is short and the defendant is likely to have served most or all of it by the time the appeal is heard. In *Kea Investments v Watson* [2020] EWHC 2796 (Ch) the judge stated that he had jurisdiction to order such a stay either under the court's inherent jurisdiction or under the CPR (but did not read CPR 81.9(2) as giving this power, but rather by way of a stay pending appeal) but declined to do so in circumstances where he was of the opinion that there was no real prospect of the Court of Appeal allowing an appeal. In these circumstances the appropriate course of action would be to approach the Court of Appeal for a stay and temporary

release pending appeal if it was possible to persuade the Court of Appeal that there was sufficient merit in the proposed appeal.

Claimant's appeal and relevant jurisdiction

As per CPR 52.3 and *Barnet London Borough Council v Hurst* [2002] 4 All ER 457, a claimant requires permission to appeal against:

- the terms of the order made;
- a decision to purge or discharge a contempt; or
- where the sentence imposed is said to be insufficient in the circumstances

It has been suggested by some commentators that section 13 of the Administration of Justice Act 1960 (AJA 1960) in some way curtails the jurisdiction of the court to hear an applicant's (or in post 1-October 2020 terminology 'claimant's') appeal. The suggestion is based on the absence of reference to the applicant/claimant in AJA 1960, s 13(2), which states:

'(2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant...'

In *Attorney General v Hislop* [1991] 1 All ER 911, the court interpreted AJA 1960, s 13 as follows:

'It appears to me that the opening paragraph of s 13(2) merely refers to the original application. If that application was for committal or attachment, as it was in the present case, the unsuccessful applicant has in my judgment a clear right of appeal...'

Hislop confirms the court's jurisdiction to hear a claimant's appeal; the authority of *Poole Borough Council v Hambridge* [2007] EWCA Civ 990 makes it clear that a claimant must seek permission first.

Purging or discharging a contempt
Procedural requirements

An individual is entitled to apply to discharge (formerly known as purge) their contempt, in essence applying for release from prison or relief from other sanction. In comparison to the pre-1 October 2020 position, CPR 81.10 has replaced the complicated rules regarding how, and to whom an application to discharge should be made.

There are examples of the court actively encouraging a purge of the contempt prior to sentencing, this is in accordance with the part-coercive intent behind the sentencing process—see para 3 of *Touton Far East PTE v Shri Lal Mahal* [2017] EWHC 621 (Comm). Therefore a purge of the contempt can take place either prior to sentencing (in essence, mitigation), or by formal application post-sentencing under CPR 81.10.

Notice of a defendant's entitlement to do so should already have been included in the originating application for committal, as per CPR 81.4(2)(q).

CPR 81.10 provides that a defendant can apply to discharge the committal order by submitting an application notice under CPR 23 'in the contempt proceedings', i.e. to the same court (if not the same judge) as that which heard the committal proceedings.

CPR 81.10(3) appears to give a wide latitude to the court in dealing with the application to discharge, to ‘consider all the circumstances and make such order under the law as it thinks fit’. It is suggested that this flexibility must also extend to any directions given for the discharge application to be heard.

It is unclear whether the court can list a discharge of its own motion. It may be desirable, for instance, for a court to discharge a committal order where the defendant, rather than benefitting from the coercive effects of imprisonment, is, in fact, basking in the notoriety. There is nothing in the CPR that would appear to prevent the court making an order of its own motion, subject to the guidance in *Swindon Borough Council v Webb* [2016] EWCA Civ 152. In addition, CPR 3.3(1) provides that ‘Except where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative. CPR 3.3(3) continues that:

'(3) Where the court proposes—
(a) to make an order of its own initiative; and
(b) to hold a hearing to decide whether to make the order,
it must give each party likely to be affected by the order at least 3 days' notice of the hearing.'

In *Webb*, the Court of Appeal was critical of the manner in which a committal order was discharged by the court (with the effect that the defendant was released from prison), in circumstances where the procedure under the pre-1 October 2020 version of CPR 81 regarding ‘discharge of a person in custody’, was not followed by the court. Prior to 1 October 2020, CPR 81.31 provided a procedure for discharging a person in custody which included a requirement for the discharge application to be served on the person at whose instance the warrant of committal was issued (the council in this case). This did not happen and so the defendant was released from prison without the council (the claimant) having the opportunity to make representations on the discharge application, and the council appealed.

The Court of Appeal stated:

'Whilst I hesitate to be prescriptive in a matter where the liberty of the subject is at stake, and where the circumstances are likely to be infinitely various, what has happened in this case demonstrates the wisdom of ordinarily insisting in cases of this sort that the procedure provided by CPR 81.31 is followed where a contemnor seeks his discharge.'

The Court of Appeal recognised the ability of a court to make orders of its own initiative under CPR 3.3, but stated that:

‘it must be obvious that even where the court is minded to act of its own initiative, it ought ordinarily in a case of this sort, so far as practicable, to give notice of its intention to the person or body at whose instance the warrant of committal was issued. That person has an interest which should be respected, and so far as practicable accommodated, by being heard on the question whether the contemnor should be released before serving the full term imposed, subject of course to any statutory entitlement to earlier release.’

In *Hussain v Vaswani* [2021] EWCA Civ 146, the Court of Appeal held that *Webb* remains applicable to CPR 81.10. The Court stated that CPR 81.10(2) explicitly requires the application to be made by application notice, and it therefore followed that, unless the court orders otherwise, the application must be served on each respondent (CPR 23.4(1)) at least three days before the hearing (CPR 23.7(1)) accompanied by a copy of any written evidence in support (CPR 23.7(3)(a)). This case also

demonstrates that where a party is seeking to discharge their contempt they should produce sufficient evidence to support the application. The contempt application was based on a failure to pay sums pursuant to an undertaking to do so, and the contemnor submitted that he now wished to pay those sums but, in the Court of Appeal's opinion, he had not produced evidence to substantiate that assertion, such as a bank statement.

Note, CPR 81.10 does not apply in cases involving failures by a debtor in relation to maintenance orders or in relation to judgment summonses under CCR Ord 28, rule 4 or 14. These matters fall outside of the general jurisdiction of contempt.

The relevant test

As per *Wood v Collins* [2006] EWCA Civ 743, the test for appealing a sentence or the making of a committal order has been seen as analogous to the test of 'undue leniency' (as seen in the criminal sentencing context). In *Poole Borough Council v Hambridge* [2007] EWCA Civ 990, the Court of Appeal had mixed views about whether the same test applies to discharges of contempt, Pill LJ and Buxton LJ expressly reserving their position as to the correct test to be applied for a case where it may be determinative (see the comments of Pill LJ and Buxton LJ as set out in para [30] of *Wood v Collins*).

In *CJ v Flintshire Borough Council* [2010] EWCA Civ 393 (an authority on a defendant's appeal against the lower court's refusal to discharge the contempt), Wilson LJ, after undertaking a review of previous case law set out 'eight, somewhat overlapping, questions', namely:

- can the court conclude, in all the circumstances as they now are, that the defendant has suffered punishment proportionate to his contempt?
- would the interest of the State in upholding the rule of law be significantly prejudiced by early discharge?
- how genuine is the defendant's expression of contrition?
- has he done all that he reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early?
- in particular, has he done all that he reasonably can (bearing in mind the difficulties of his so doing while in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach?
- does he make any specific proposal to augment the protection against any further breach of those whom the order which he breached was designed to protect?
- what is the length of time which he has served in prison, including its relation to:
    - the full term imposed upon him, and
    - the term which he will otherwise be required to serve prior to release pursuant to section 258(2) of the Criminal Justice Act 2003?
- are there any special factors which impinge upon the exercise of the discretion in one way or the other?

The court in *Webb* (reflecting on the judgments in *Flintshire* and *Poole*, expressing caution about the applicability of the undue leniency test to discharges of contempt), came to the conclusion that the test was not analogous. A discharge of contempt very much depends on the change of attitude of the defendant, reflecting both the punitive and coercive objectives of contempt proceedings. That is not to say that once the coercive element has been satisfied, this will necessarily lead to a successful discharge application, see *Smith v Doncaster MBC* [2014] EWCA Civ 16.

This approach has also crept into appeals, where the dividing line between an appeal and an

application to discharge is not always clearly defined, see *Wokingham Borough Council v Dunn* [2014] EWCA Civ 633. In *Wokingham*, a committal to prison for contempt, on appeal, was set aside and fines substituted due to the defendant accepting responsibility for the breaches, apologising for them and the belated compliance with the terms of the injunction. All very much features of the eight-point list of features set out in *Flintshire*.

Where a defendant seeks to purge their contempt and seek an early release from prison on the grounds of the coronavirus (COVID-19) pandemic, for this to be considered a 'special factor' in accordance with the *Flintshire Borough Council* criteria, the specific change in circumstances of the prison sentence must constitute a 'wholly exceptional case'. In considering such an application, the court is likely to give consideration to the health of the defendant and the specific circumstances of the prison where the defendant resides, and the defendant will need to provide evidence in respect of this, as considered in *Lakatamia Shipping Company v Su* [2020] EWHC 806 (Comm) and *Chelsea Football Club v Nichols* [2020] EWHC 827 (QB). Such an approach would be in line with the criminal sentencing authority of *R v Manning* [2020] EWCA Crim 592, where COVID-19 can be taken into account as part of the particular circumstances of the case in deciding length of sentence and whether the sentence should be suspended.

Genuine contrition is required

The first four questions posed by *Flintshire* relate to contrition, in one form or another.

In *Webb*, where the defendant was brought to court and led through an apology, the Court of Appeal commented as follows:

'The apology and the earnest of future compliance which the court accepted were in the circumstances, and on the face of it, almost entirely devoid of content. The Recorder was better placed than us to evaluate Mr Webb's sincerity, but at first blush Mr Webb would appear to have done little more than to accede to the Recorder's invitation to say what the Recorder told him he needed to say in order to secure his release. It fell far short of the considered, spontaneous and reasoned contrition and understanding demonstrated by [*Hambridge*] which persuaded the judge in that case to order early release.'

The process of discharging one's contempt is more than simply a token gesture apology.

For an example of a purged contempt, see the judgment in *A v B* [2017] EWHC 2116 (Comm).

In *Chelsea Football Club v Nichols* [2020] EWHC 454 (QB), an application to purge contempt made in court immediately after sentence was passed, which was made by way of an oral apology to the court by the defendant, was not successful, with the judge stating that the sentence had already been mitigated to the appropriate extent.

Richard Shepherd
Alex West

Albion Chambers
Broad Street
Bristol
BS1 1DR
Telephone: 0117 927 2144
www.albionchambers.co.uk