Committal for contempt: CPR Part 81 and recent cases

1. As Foxton J observed in *Integral Petroleum SA v Petrogat FZE* [2020] EWHC 558 (Comm) at [26], applications for committal for contempt of court have become an increasingly common feature of High Court litigation, particularly in the Business and Property Courts.

2. With effect from 1 October 2020 the procedural rules relating to contempt of court were simplified. This articles seeks to:

    a. highlight the principal changes introduced by the new CPR Part 81;

    b. consider the evidential threshold which an applicant must satisfy when seeking permission to pursue a committal application;

    c. offer guidance to those seeking to defend committal applications.

3. It is important to emphasise that the procedural rules are just that and are not intended to affect the substantive law relating to contempt, the sources of which are a mixture of common law and legislation.

Procedural history

4. Since the introduction of the CPR in April 1999 the procedural rules governing applications to commit those said to be guilty of contempt of court have changed a number of times. Initially, provisions of the formerly applicable Rules of the Supreme Court 1965 (RSC)[1] and the County Court Rules 1981 (CCR)[2] relating to contempt

[1] RSC Orders 52.
[2] CCR Ord 29.

continued to apply[3]. In 2012 CPR Part 81 was introduced[4] which (with its accompanying Practice Direction) was intended to provide a comprehensive statement of the rules governing applications and proceedings in relation to contempt of court in both the High Court and County Court.

5. The former Part 81 (which was modified in 2014) provided for various categories of contempt, only some of which required the court's permission before a committal application could be made. Part 81 was the subject of periodic judicial criticism for its uncertainty and lack of consistency (particularly where an alleged contempt fell within more than one category not all of which required permission): see, for example, *Simmonds v Pearce* [2017] EWHC 3126 (Admin); [2018] 1 WLR 1849 (applicable procedure where bankrupt has failed to co-operate with his trustee); *HM Solicitor-General v Holmes* [2019] EWHC 1483 (Admin) (concurrent jurisdiction of Divisional Court and proper categorisation) *Attorney-General v Yaxley-Lennon* [2019] EWHC 1791 (QB); [2020] 3 All ER 477.

6. The new Part 81 was introduced following a consultation exercise undertaken by the Civil Procedure Rule Committee between March and May 2020.[5]

7. By way of broad summary only, the main changes implemented by the new Part 81 have been to:

    a. clarify the procedural routes involved and specify the level of judge to whom a committal application should be made (CPR 81.3);

    b. provide that permission is only required where the application is made in relation to:

[3] By virtue of Schedules 1 and 2 to the CPR.
[4] By virtue of the Civil Procedure (Amendment No. 2) Rules 2012 (SI 2012/2208).
[5] https://consult.justice.gov.uk/digital-communications/rule-changes-relating-contempt-of-court-cpr-81/supporting_documents/cprcrule8.1consultation.pdf

i. interference with the due administration of justice (except in relation to existing High Court or county court proceedings) (CPR 81.3(5)(a));

ii. an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth or in a disclosure statement (CPR 81.3(5)(b)).

c. gather together in one rule (CPR 81.4) the requirements of a contempt application including what factual and other matters are to be specified/addressed and the procedural safeguards intended to achieve fair disposal of the application[6];

d. provide for service of the committal application on a defendant's legal representatives in certain circumstances instead of personal service (CPR 81.5(2));

e. specify in a rule (CPR 81.8) the manner in which contempt proceedings are to be conducted (including a general rule that the hearings are to be heard in public).

8. The practice direction accompanying the old Part 81 was revoked and not replaced when the new Part 81 was adopted.

9. The new Part 81 was not the subject of any transitional provisions. The implications of that were considered by Marcus Smith J in *Secretary of State for Transport and anr v Cuciurean* [2020] EWHC 2723 (Ch). There the committal application had been made under the old Part 81 and was substantially heard while that remained in force. Judgment on liability was, however, delivered after the new Part 81 came into force. Marcus Smith J held (at [6(2)]) that all procedural steps taken before 1 October 2020 were governed by the old Part 81. The steps going forward after 1 October 2020 (principally sanction) were governed by the new Part 81. Insofar as there was a mis-

[6] Described in the Civil Procedure Rule Committee consultation paper as "the cornerstone" of the new Part 81.

match between the old and new rules in relation to the applicable procedure, the rules to be applied were those that were more beneficial to the contemnor ([6(3)].

Contents of the committal application

10. The consequences of a finding of contempt are potentially serious, including, for natural persons, a possible loss of liberty. For those reasons any non-compliance with the applicable procedure may be fatal. The now revoked Practice Direction accompanying the old Part 81 expressly provided (at paragraph 16.2) that the court had the power to waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice had been caused to the respondent by the defect. Notwithstanding such revocation, it has been held that the court retains such power: see *Deutsche Bank AG v Sebastian Holdings Inc and anr* [2020] EWHC 3536 (Comm) at [148].

11. CPR 81.4(2) now provides as follows (as relevant):

A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—

(a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);

(b) the date and terms of any order allegedly breached or disobeyed;

. . .

(h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;

12. As to whether there has been compliance with these provisions, the overall test is whether the respondent, having regard to the background against which the committal application is launched, would be in any doubt as to the substance of the breaches alleged (*Deutsche Bank AG v Sebastian Holdings* (supra) at [77] per Cockerill J).

13. Read carefully, said Cockerill J, the authorities indicate that the Application Notice need only set out a succinct summary of the claimant's case, to be read in the light of the relevant background known to the parties; it is for the evidence to set out the detail (*ibid* at [80]).

14. The amount of detail required will depend on the nature of the alleged contempt. If, for example, the alleged contempt arises out of breach of an order requiring the defendant to do a specific act by a specific date or time, it may be sufficient simply to allege non-compliance. Where the order is more complicated, more details of the alleged breach will be required.

15. A schedule may be useful (in a suitable case where lengthy particulars are needed) but it not necessary in all cases (*ibid* at [86]).

Defendant's evidence in answer

16. The defendant to a committal application is entitled to remain silent and is not a compellable witness: *Re L (A Child)* [2016] EWCA Civ 173; [2017] 1 FLR 1135 at [31]-[32]. This is reflected in CPR 81.4(2)which provide that a committal application must include statements that the defendant (paragraph (m)) is entitled but not obliged to give written and oral evidence in their defence and (paragraph (n)) has the right to remain silent and to decline to answer any question the answer to which may incriminate him or her.

17. As Cockerill J explained in *Deutsche Bank AG v Sebastian Holdings Inc* (supra) at [53], that means that if a respondent serves evidence in advance of the committal hearing that evidence is not taken as having been deployed. The respondent may, right until the last moment, choose not to deploy it. And until it is so deployed it is inadmissible (*Templeton Insurance v Motorcare Warranties* [2012] EWHC 795 (Comm) at [24] (second)). Any evidence which is served in advance of the committal hearing by the respondent may, however, be used by the applicant for the purposes of "gathering

preparatory evidence in reply" (*Re B (A Minor)* [1996] 1 WLR 627, at 635-636 B and 638 B-G). Pending deployment of the respondent's evidence both his affidavit and any evidence in reply remain "in limbo".

18. Mrs Justice Cockerill confirmed in *Deutsche Bank AG v Sebastian Holdings Inc* (supra) at [53] that none of the authorities referred to in this context have been affected by anything in the new Part 81.

19. It follows that a defendant to a committal application may conclude that he or she has nothing to lose by adducing written evidence in answer as the totality of the applicant's evidence will be known to the respondent by the time he or she is required to make his election as to deployment. Of course, if the respondent chooses at the last minute not to deploy his written evidence the judge hearing the application is likely to have read it albeit that he or she will direct him or herself to leave it out of account.

Permission Threshold

20. Part 81 is (and, in its old form, was) silent about the threshold to be met in cases where permission for a committal application is required.

21. Various authorities referred to a need for the applicant (claimant under the new Part 81) to show a "strong prima facie case" while others spoke of "at least a prima facie case".

22. In *HM Solicitor General v Holmes* (supra) the Divisional Court expressly left open which of these thresholds applied (the evidence on the application before it satisfying the higher threshold). The court did, however, recognise the force of the argument on behalf of the applicant Solicitor-General that, although the higher threshold was understandable for applications brought by private litigants in respect of alleged contempts involving the signing of an untrue document endorsed with a statement of truth, a requirement for a strong prima facie case for applications relating to contempt in the face of the court may be setting the bar too high.

23. In *Ocado Group plc and anr v McKeeve* [2021] EWCA Civ 145 the Court of Appeal allowed the claimant's appeal against the decision of Marcus Smith J that it had failed to show "at least a prima facie" in a case of contempt against a solicitor who, during execution of a search order against his client, had directed the destruction of various messages on a private messaging system, rendering them irretrievable. Lord Justice Davis (with whom David Richards and Nugee LJJ agreed) reviewed the authorities and considered (at [68]) that ordinarily the test to be taken is strong prima facie case. Such a test, said Davis LJ:

    a. was supported by the weight of authority ([66]);

    b. avoided the application of different thresholds depending on the nature of the alleged contempt ([68]);

    c. would enable the filtering out of cases which could, "even on a prima facie basis, be assessed as weak and tenuous, even if just about sufficient to limp through a strike out application" ([69]).

24. The one potential exception to the strong prima facie case threshold generally to be applied was, said Davis LJ, a permission application made by a Law Officer[7] or other relevant public body, citing the decision of the Divisional Court in *Attorney-General v Yaxley-Lennon* (supra).

25. In seeking to apply the threshold test, it must be remembered that the ultimate burden faced by the applicant (claimant) at any final hearing of a committal application is the criminal one of proof beyond reasonable doubt. The court should not, however, at the permission stage, delve too deeply into the merits to avoid prejudicing the outcome if permission is granted: *KJM Superbikes Ltd v Hinton* [2008] EWCA Civ 1280 at [20]; *Ocado Group plc v McKeeve* (supra) at [69].

[7] The Attorney General or Solicitor General.

Public interest

26. As well as establishing a strong prima facie case that a contempt has been committed, an applicant for permission must also show that committal would be in the public interest. Indeed, it has been described as ultimately "the only question" (*KJM Superbikes Ltd v Hinton* (supra) at [16] per Moore-Bick LJ) into which various factors feed, including the strength of the evidence. The invariable practice of the court is, however, first to consider whether the relevant evidential threshold has been met: *Ocado v McKeeve* (supra) at [63]-[64].

27. The factors relevant to an assessment of the public interest will vary according to the nature of the alleged contempt. In *Ocado* the public interest element only required brief consideration because of the underlying factual position ([92]). Where the contempt takes the form of alleged untrue evidence a more nuanced approach may be called for, as to which see *Tinkler v Elliott* [2014] EWCA Civ 564 at [44] per Gloster LJ; *Zurich Insurance plc v Romaine* [2019] EWCA Civ 851; [2019] 1 WLR 5224 at [26]-[30] per Haddon-Cave LJ.

28. When assessing the public interest of committal proceedings at the permission stage, the proportionality of such proceedings and whether they would further attainment of the overriding objective will always be relevant.

Strike-out Applications

29. Where the permission filter does not apply, the respondent (defendant) to a committal application which is considered weak or which may otherwise be characterised as an abuse of the Court's process should consider a cross-application to strike it out.

30. Paragraph 16.1 of PD 81 (now revoked) provided as follows:

> On application by the respondent or on its own initiative, the court may strike out a committal application if it appears to the court-

(1) that the application and the evidence in support of it disclose no reasonable ground for alleging that the respondent is guilty of contempt of court;

(2) that the application is an abuse of the court's process or, if made in existing proceedings, is otherwise likely to obstruct the just disposal of those proceedings; or

(3) there has been a failure to comply with a rule, practice direction or court order.

31. Notwithstanding the revocation of PD 81, the Court retains an inherent jurisdiction to strike out committal applications in appropriate circumstances (see *Taylor and anr v Ribby Hall Leisure Ltd and anr* [1998] 1 WLR 400 at 407 H- 408 A).

32. Although CPR 3.4 (court's power to strike out) applies only to statements of case (as defined in CPR 2.3(1)) a defendant could, it is suggested, have recourse to CPR 3.1(2)(m) (court's power to take any other step or make any other order for the purpose of managing the case and furthering the overriding objective).

33. Although it has been suggested that complaints of abuse arising out of delay etc are generally best made at the substantive hearing of any committal application rather than by way of pre-emptive strike-out (*Taylor and anr v Ribby Hall Leisure Ltd and anr* (supra) at 409 H – 410 A), more recent authority encourages targeted strike-out applications (as least where the alleged abuse of process is said to arise because the committal application is alleged to be pursued for ulterior or improper purposes or where the alleged contempt is technical rather than serious): see *Sectorguard plc v Dienne* [2009] EWHC 2693 (Ch) at [44]-[47], endorsed by Hamblen J (as he then was) in *Public Joint Stock Company Vseukrainsky Aktsionernyi Bank v Maksimov* [2014] EWHC 4370 (Comm) at [22]; see also *Navigator Equities Ltd and anr v Deripaska* [2020] EWHC 1798 (Comm) at [139].

34. One improper purpose is where the committal application is pursued vindictively to harass defendants against whom the claimant has a grievance (whether justified or not): *KJM Superbikes Ltd v Hinton* (supra) at [17] per Moore-Bick LJ.

35. Another improper purpose is where a committal application is used to secure a settlement of the underlying litigation: see *Integral Petroleum SA v Petrogat FZE* [2020] EWHC 558 (Comm) for a discussion of the authorities.

36. The manner in which a committal application is pursued may also amount to an abuse. The claimant is, in effect, a quasi-prosecutor serving the public interest as much as it is pursuing its own interests as a private litigant. That requires the claimant to act generally dispassionately, to present the facts fairly and with balance and then let those facts speak for themselves, assisting the court to make a fair quasi-criminal judgment: *Navigator Equities Ltd v Deripaska* (supra) at [143] et seq.

37. Where the alleged contempt is a failure to comply with a court order, the scope for striking out the committal application as an abuse may be reduced, at least where the non-compliance has not been remedied: see *Absolute Living Developments Ltd v DS7 Ltd and ors* [2018] EWHC 1717 (Ch) at [36].

Adjournment of the committal application

38. Committal applications should be issued promptly after the relevant alleged contempt and will ordinarily be determined without delay, especially where the alleged contempt relates to breach of a court order: see *Civil Procedure* (the *White Book*), 2020, vol 1, at para 81.28.2.

39. The court may, however, in appropriate circumstances exercise its case management powers to adjourn the final hearing of the application if the evidence adduced in relation to the alleged contempt is better assessed in the context of the evidence to be given at trial. Such a course will often be adopted where the alleged contempt is the giving of false evidence in an affidavit or witness statement. In *Ocado v McKeeve* (supra) the Court of Appeal adjourned the committal application (which arose out of the deliberate destruction of documents) to the judge hearing the trial of the underlying proceedings on the grounds of fairness and overlap of issues.

12.02.21

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