

Whistlestop tour of committal proceedings

By [Audrey Archer](#)

3PB Barristers

Starting with the basics:

Contempt triggers

What triggers the need for Committal proceedings is a contempt of court.

When we think of contempt of court:

- Criminal lawyers automatically think of a defendant behaving badly
- Family lawyers think of breach of **injunctive orders: occupation orders, non mols etc.**
- **And, of course, breach of undertakings.**

First thing to check before considering applying for committal if your application is based on breach of an order or undertaking, is whether the appropriate warning

This is also ***stressed*** within the new PD37.

Definition of penal notice at outset of Part 37:

'penal notice' means a prominent notice on the front of an order warning that if the person against whom the order is made disobeys the court's order, the person (or director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law.

Before going any further with looking at a contempt of an injunctive order, look to see if there is a penal notice on the order.

That relates to contempt in respect of ORDERS and undertakings.

Other acts triggering contempt:

With these types of contempt, you are not necessarily going to have a PENAL NOTICE in existence before the contempt arises.

- Contempt in face of court
- False statements and
- Interference with the administration of justice.

Contempt in the face of the court

This type of contempt probably happens more than contempt in relation to breaching orders.

An interesting article that I came across provided examples of contempt in the face of court with reference to various authorities:

- Some forms of contempt in the face of the court were such things as:
 - A party lying down in court and falling asleep during the course of the hearing.
 - Throwing a rat at the clerk of the Court.

HOWEVER - Contempt we are probably all most familiar with is outbursts and insults thrown at the Judge.

In **criminal proceedings**, these situations are a fairly common occurrence. They are taken seriously and dealt with by way of contempt and the defendant will often find himself in the cells for the remaining part of the day or sentenced to a few days/weeks imprisonment.

In **family proceedings**, we see contempt in the face of the court happening a lot but nothing is done about it.

Remote hearings make it even easier for the Judges to do nothing about it.

A recent example on ZOOM: a father in proceedings started to threaten the Judge and was in the process of saying the most awful things to him and the Judge just muted him!

Family Judges seem to not like or enjoy initiating contempt proceedings because of the consequences - they are not hardened criminal judges who may have a daily diet of sending people to prison so initiating contempt proceedings is of no significance to them.

Morris v Crown Office [1970] 2 QB 114

Lord Denning in ***Morris and Crown Office*** clearly felt that the power to initiate contempt of court proceedings was a necessary and essential one to maintain order in the court, and should be used.

*LORD DENNING: 'The phrase 'contempt in the face of the court' has a quaint old fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. **To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power - a power instantly to imprison a person without trial - but it is a necessary power.***

Newman v Modern Bookkeepers [2000] 2 All ER 814

If a Judge does feel something needs to be done about it there is guidance in the case of ***Newman and Modern Bookkeepers*** on HOW the Judge should set about dealing with it.

STEP by STEP process the Judge should follow:

- Tell the offender why he has been detained and warn him of the potential penalty.
- Put the allegation(s) down in writing.
- Give the offender time to reflect and to apologise. Depending on the degree of seriousness of the incident, there may be circumstances where a genuine apology will

be considered to be sufficient. Remember that sensible judge-craft includes not taking exception to every misdemeanour.

- Afford the offender the opportunity of legal representation.
- Afford him an opportunity to organise an interpreter if desired: make sure the offender fully understands the allegations.
- Hear mitigation before passing sentence.
- When giving judgment remember that the criminal burden and standard of proof apply (see CPR PD81 para. 9): set out the facts; set out each allegation of breach; make your finding separately on each reciting that the finding is to the criminal standard.

IF you were acting on APPEAL for someone who was made the subject of a committal order then you would go to this case to see if your client was dealt with appropriately by the Judge.

There was an interesting CoA in 2003 (*Wilkinson v Lord Chancellor's Department*): **the Judge remanded the father into custody there and then - adjourned for a few days for a legal rep to see him, and then she sentenced him to 6 months imprisonment.**

He appealed and the CoA made no criticism of her dealing with the sentencing of him, her having to remand him into custody and deal with him a few days later. The procedure, although not precisely in line with that set out in Newman, was acceptable.

Interestingly new PD 37 does not set out the procedure to be followed when such a contempt occurs in the face of the Court, it focuses more on what to do when applying for committal - therefore on notice.

New R37.6

New **R37.6**: Short and sweet and simply says that if the court itself initiates committal proceedings then it shall summon the defendant and all safeguards specified in previous body of the direction must be complied with as far as they can be. Those safeguards relate to dealing with committals on notice so to speak.

A Judge encountering this will not find much guidance in Part 37.

So - new case law will undoubtably show us how this rule will be used and applied and previous case law followed for the time being.

False statements

Statement of truth must have been made. Permission needed. **CAUTION: Need direct evidence / strong circumstantial evidence to show false.**

Interference with administration of justice

For example: falsifying documents. Permission may be needed [R37.5.a]. **CAUTION: AGAIN: Direct evidence to show this.**

This contempt will become more prevalent as technology advances.

For example: you can alter text messages now. Application whereby you can change the content of a text, time and date: as technology advances we may see more applications for contempt upon this basis.

Recording hearing: client discovers hearing recorded and being played on Facebook: contempt / interference with admin of justice.

Making an application for committal, taking into account that expressed in the new PD 37 which came into effect on 1st October

1. Application for contempt:

So, if you have worked out that there has been a contempt of court... make an application under Part 18 using **FORM FP2**.

Part B of the form : option to tick which box

I (We) wish to rely on: (tick one box)

[BOX] the attached (witness statement)(affidavit)

[BOX] evidence in Part C in support of this application

I would suggest that you TICK both boxes. In part C, just itemise what you are relying upon.

Do not use the D11: in a recent case where the applicant used D11, it was used as an example of flawed procedure by the Respondent.

2. To whom:

Make it to the tier that made the order / undertaking that the respondent would be in breach of.

Go to the Court who made the order or undertaking that has been breached.

Interference with administration of Justice: make it to the HIGH COURT under part 19 unless the contempt is in relation to existing proceedings in the family court.

3. Permission: Rule 37(3)

Permission is ONLY required IF:

- The application made is in relation to interference with the due administration of justice **UNLESS** the application relates to existing proceedings (in High Court or family court) **OR**

- The application is in relation to alleging that the other party KNOWINGLY made a false statement in a document containing a statement of truth.

The application for permission must be included with the contempt application which will proceed to a full hearing if permission is granted.

4. When preparing affidavit, look at PD22(a):

Examples of important bits that need to be considered when preparing the affidavit or affirmation:

Affidavit/affirmation is so important because if it is NOT right, the application will be stayed before any headway is made.

PLEASE ensure you look at **PD22(A)**: it tells you how it should be set out, how exhibits should be attached - extremely helpful.

It gives an example of how the oath should be phrased or the affirmation if an affirmation is being made.

5. Affidavit/affirmation: what must be in it

Rule 37(4): SPOON FEEDS you what must be in the affidavit.

- **THE IMPORTANT word used in 37(4) is MUST**: if it is not included your opponent will take the Judge to the list of MUSTS and say not in there - application flawed.
- **Rule 37(4) shows a list (a)-(s) of 19 requirements**

The MOST important items in that list follow: these items, if missing can fail your application:

2. DATE of the undertaking/order made and its terms: set out the terms and date promises made.

EXHIBIT N117 (undertaking form) OR the order containing the undertakings

[just on that point: undertakings: put into the body of an order if you can. It will help down the road] [R37.4.2(b)]

3. ESSENTIAL: you must CONFIRM that the order/undertaking had a penal notice [R37.4.2 (e)] attached.

Specify where on the order, quote the terms of the penal notice, and also where in correspondence the respondent was WARNED of the effect of breaching the undertaking.

Ensure that the reader of the affidavit is in no doubt that the respondent would have known about the fact he could find himself subject to a committal application if he breached the undertaking.

CH v CT [2018] EWHC 1310 (Fam)

The High Court allowed a mother's appeal against a suspended committal order made following her failure to comply with a child arrangements order. Her **success was based on 2 things:**

1. NO application to commit M had been made; the only application made and served had been for an enforcement order.
2. The Child Arrangements order was incapable of being enforced by committal as it was not endorsed with an effective penal notice.

Baker said that the standard warning in a child arrangements order was not sufficient to justify committal.

WARN CLIENTS: Warning in CaO does not mean the other side WILL be committed to prison.

4. Evidence that the undertakings were SERVED

RULE relating to this is at 37(4)(2) (c)-(d)

(c) confirmation that any such order was **personally served**, and the date it was served, unless the court or the parties **dispensed** with personal service;

(d) if the court dispensed with personal service, the terms and date of **the court's order** dispensing with personal service. *Can't argue that it was implicit that the court's dispensed with personal service because you need the order dispensing with service!*

Example: Respondent in court makes his promises to the court and is given the formal warning. He then leaves court with no copy of the signed undertakings. Solicitor forgets to post then / email them. Order from the hearing does not record that the magistrates dispensed with service... you are in difficulties.

Re L (A Child); Re Oddin [2016] EWCA Civ 173

Father's appeal against a committal order being made against him was successful on the grounds of procedural irregularity because there was no evidence of service **and** penal notice was not prominently displayed on the front of the order

The Court said: 'He was denied the safeguards which anyone facing committal proceedings was entitled to... It had also never been proved that the Appellant had been served with the original order. A further defect was that the penal notice was not prominently displayed on the front of the order...'

Lord Justice Vos in this case said:

- Committal proceedings are highly technical BECAUSE of the importance of protecting the RIGHTS of those charged with contempt of court.
- At para 75 of this judgement he listed everything that MUST be done to protect an accused's rights: his list in 2016 replicated in new PART 37.

RE-CAP: 3 MOST IMPORTANT things that must be set out in the affidavit:

- Proof of the order / undertaking
- Penal notice
- Served

AFFIDAVIT:

Must ALSO include:

- *WHY YOUR client believe the Respondent (1) understood the terms of the undertaking and (2) the consequences of breach [37.4.2(g)].*

Note: he was present in court, my solicitor wrote to him telling him. Text message: *I don't care if I go to prison!*

- (B) CHRONOLOGY of facts giving rise to the breaches.
- This was stressed by Mr Justice Baker in **CH**.
- Correspond each date to the evidence upon which you rely:
 - * *IDEALLY direct evidence*
 - * *Circumstantial evidence: powerful.*
- Correspond the breaches to the relevant prohibition.

It will not harm your client to set out a **TABLE**:

DATE	EVENT	PROHIBITION BREACHED	EVIDENCE
4th November 2020	Attended my address and started banging on my door	Promise number 2 of the undertakings	Ring doorbell footage.

- **MUST** contain refer to **ALL** the evidence upon which you rely in asserting contempt
- Do not think '*well I won't refer to that incident and further evidence can be adduced later ...*' Permission would be needed for that.
- SPOON FEED the reader.

This process also helps in focusing on whether your client has enough evidence to prove the breaches beyond reasonable doubt.

You will note:

Part 37: refers to the respondent as '**the defendant**': essentially stressing that these proceedings are criminal proceedings.

YOU have a duty to provide the defendant with his rights.

These are set out within part 37(2) (i) - (s): **11** things that the respondent (the defendant) must know.

To ensure you do not miss anything out: **cut and paste** subsections (i) - (s) into the document.

I would **set it out at the start**, so you do not forget it. It says to the reader '*I am being fair and letting him know about their rights*'.

You'll see these are things such as:

- You have the right to be legally represented.

NOTE: **LEGAL AID** can be obtained and should be granted because defendant's liberty is at stake. CoA has given guidance on how legal aid is obtained in committal proceedings.

Court of Appeal in Brown v The London Borough of Haringey [2015] EWCA Civ 483

- *Stressed the importance of a defendant having legal aid where his liberty is at stake.*
- *Quote passages from judgement in any application for legal aid.*

One of the things to warn him about is:

HE has the right to remain silent and not to answer any question that may incriminate yourself (Rule 37.4.2. (m-n)).

Like the criminal CAUTION: **BUT INTERESTINGLY**, does not refer to an **adverse inference** being drawn against the defendant.

WARNINGS: bring it home that these are criminal proceedings in the family court but in my view they are even more PRO the FAMILY defendant than criminal defendant.

- * Court may proceed in your absence and find you in contempt **BUT ONLY** if the court is satisfied beyond reasonable doubt that you are in contempt.

If you do find yourself representing an applicant and the DEFENDANT fails to attend - you'll want to have a copy of the case of **SANCHEZ** in order to understand the checklist that the court will go through BEFORE deciding to proceed in his absence.

The checklist includes, amongst other things, the following considerations:

- Whether the respondent has been served with the relevant documents including the notice of hearing.
 - Whether the respondent has had sufficient notice to enable them to prepare for the hearing.
 - Whether any reason has been advanced for the respondent's non-appearance.
 - Whether an adjournment would be likely to secure the attendance of the respondent or facilitate their representation.
 - The extent of the disadvantage to the respondent in not being able to present their account of events.
 - Whether undue prejudice would be caused to the applicant by any delay.
 - The terms of the overriding objective.
- * CREDIT for a Guilty plea: Admit the contempt and wish to apologise to the Court (criminal courts don't quite phrase it like that). The Court is likely to reduce the seriousness of any punishment by the Court. **[Rule 34.2.Q)**

IF you are advising someone facing a committal application really worth reading the case of Moutreuil and Andrewweech

- A useful summary of the law relating to self-incrimination and the burden and standard of proof.

- STRESSES that at ALL times defendant must be warned about his right not to answer questions and self-incriminate himself.

BURDEN: it confirms that the Applicant only needs to prove that the defendant intended to do the act that constituted the breach, NOT that he knew at the relevant TIME he intended or believed that the act constituted a breach of the order.

So... once you have your FP2 and affidavit all together with all of the necessary information in it and warnings to the defendant....

Then must SERVE it on the defendant...

5: SERVICE of YOUR APPLICATION FOR COMMITTAL: Rule 37.5

Specific rules about this:

- Must be personally served on defendant.
- ONLY IF solicitor is on the record can serve it on their solicitor unless the solicitor objects within 7 days of receiving the application.
- *If the solicitor objects, then you MUST refer the application to Court for the issue of service to be considered and ruled on in relation to how service should take place. Judge has a discretion to order an oral hearing.*
- If you are a solicitor receiving an application for contempt: **YOU have a duty under the rules to ensure that the defendant is provided with a full copy of the application (incl affidavit and exhibits) AND ensure he understands it [MUST].**
- Otherwise the defendant can say *“the solicitor sent me all this paperwork and I did not understand what it all meant / or how serious this was”*.

PD 37(A): STRIKING OUT

Defendant can make an application to strike out a committal application OR the Court can do so of its own initiative.

REASONS why an application can be struck out are threefold

- (a) **NO REASONABLE grounds for alleging breach**: *HALF the TIME SUBMISSION in criminal proceedings but it's been made at THE OUTSET*: weak, tenuous nature, no clear evidence of breach.
- (b) Application is an ABUSE OF PROCESS, aimed at frustrating current proceedings: ulterior motive.
- (c) PROCEDURAL IRREGULARITY: so if you have not addressed what PART 37 advises you to address it can be struck on that basis.

SAVING CLAUSE procedural irregularity:

(2) The court **may waive any procedural defect** in the commencement or conduct of a contempt application if satisfied that **no injustice** has been caused to the defendant by the defect.

ie. You do not list breaches in chronological order.

Injustice = fail to give the defendant the warnings: he turns up with no representative = problem!

IF YOU made it to a hearing... hearing MUST be in PUBLIC HEARING:

Confirmed in August this year that the 2015 Practice Direction in relation to committal proceedings taking place in open court STILL applies.

All committal hearings conducted in public, unless exceptional circumstances, exist to justify a departure from the rule.

COVID 19: exceptional circumstances to justify departure. HOWEVER, if the defendant is found to be in contempt and a committal order will be made - PD says that must be done in public. [para 13 of the PD]

COVID cases

Two recent High Court cases

In **Frejek v Frejek** (7 May 2020) : it was in the interests of justice to deal with the matter swiftly and a remote hearing was held. Mr Justice ROTH went on to find the defendant was in contempt in his absence. He had been given notice of the Skype hearing, failed to log on, no excuse offered, and so Mr Justice Roth proceeded. Found him to be in contempt - ISSUED A BENCH WARRANT to secure this attendant - listed disposal of the case to therefore take place in person at the RCJ.

Similarly, in **Yuzu Hair and Beauty Ltd and another v Selvathiraviam** (13 May 2020): Really worth reading Mr Justice Mann's judgment: clearly was fed up with a defendant who was being dishonest and doing his uttermost to frustrate the process.

Conducting hearing remotely was necessary.

He applied the SANCHEZ checklist: found that proceeding in his absence was justifiable.

He found the breaches of the order in that case and stood the matter down to be dealt with in person at the RCJ due to the defendant facing a term of imprisonment. Dealt with on 3rd June - if he turned up to that hearing!

6. PUNISHMENT

So often clients ask "so what will he get"

Important to manage expectations.

Sentencing options

- No order
- Adjourn sentence on terms
- Fine
- Suspended prison sentence (again having first crossed the threshold for prison)
- Immediately effective prison sentence

Important points on prison sentence: two stage process

1. Sufficiently serious to justify a prison sentence? If yes court will move on to look to...
2. Suspend or not?
 - Sentences can be consecutive or concurrent.

Prison: ONLY where no reasonable alternative exists.

PROPORTIONALITY

- Can suspend for up to 2 years.
- Can defer sentences for up to 6 months.

Sentencing for contempt:

High Court + County Court Judges:

Prison: Up to 2 years imprisonment

Serves one half

These courts can make a hospital order under s37 Mental Health Act IF the Judge would have sent him to prison if he is clearly suffering with a mental disorder. Psychiatric reports would have to be ordered.

Fine: Unlimited fine can be imposed by a High Court Judge, but only up to level 5 on the standard scale for all other Judges. In 2015 level 5 fine became unlimited - so not unlimited.

Magistrates

Can sentence up to **two months**.

Court can attach a power of arrest to a committal order.

Contempt in the face of the court:

High Court Judge: 2 years

District Judge: sentence up to a maximum period of one month.

Magistrates: Sentence up to a maximum of one month.

Worth noting that an order or warrant of committal can NOT be enforced 2 years after the date it was made UNLESS the court directs it can be. Rule 37.9.

Sentencing examples:

Cherwayko v Cherwayko (NO 3) 2016

In the recent case of Cherwayko v Cherwayko (No 3) the Husband was given a custodial sentence for contempt in financial remedy proceedings.

- 9 months for breach court order for failing to attend hearing
- 9 months CONCURRENT for failing to disclose information
- 12 months CONSECUTIVE for breach undertakings.

Mrs Justice Parker held that the Husband's actions "utterly frustrated" the purpose of the undertaking being provided in the first place.

He received a total of 21 months imprisonment. Mrs Justice Parker took no prisoners when dealing with him!

Berger v Bell [2020] EWCA Civ 544

Original orders made under TOLATA. Lord Justice Baker found that the defendant had clearly not accepted the validity of the order made in the TOLATA proceedings and believed that he was entitled to disregard it. BAKER found **He would have continued to defy the order if allowed his liberty therefore a prison sentence of 8 months was fully justifiable.**

Bhayana v Bhayana [2019] EWHC 3587 (Fam)

The sentence of six months' imprisonment was suspended for 28 days to give her a final opportunity to return the child from India.

Mr Justice WILLIAMS said: if not compliance, committal warrant would be issued and the sentence would thereafter take effect.

DEFERRAL of sentence:

Reilly v Shamrez [2019] EWHC 3112 (Fam)

The mother's wish was to have her daughter returned, not for the father to be imprisoned, and Mr Justice Holman adjourned the question of disposal for 6 weeks.

Defendant can apply to discharge a committal order under part 18.

LAST BY NOT LEAST:

The dreaded word: COSTS!

If the respondent on legal aid - legal aid agency may want those costs back.

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you wish to discuss this article further with the author or to instruct one of our barristers on a matter relating to this or any other matter, please contact Robert.leonard@3pb.co.uk.

Any questions? Please email them to me.

5 November 2020

Audrey Archer

Barrister

3PB Barristers

01962 868884

Audrey.archer@3pb.co.uk

3pb.co.uk