

10. Committal and contempt

10.1 General

10.1.1 Purpose of committal proceedings

The purpose is threefold:

- to secure compliance with orders of the court, and in domestic violence cases to protect the safety of the applicant
- to punish breaches of court orders
- to regulate the hearings of the court and protect court users and staff.

10.1.2 General considerations

Committal proceedings are quasi-criminal. The criminal burden of proof has to be applied in the case of each breach. It is important to make absolutely clear that you have applied the higher burden and that you are satisfied, so that you are sure of what you find.

Applications are generally in public and should be heard robed in open court. If you decide that because children are involved, or for some other such reason, the application should be heard in private, your findings and the penalty must be announced in open court (scpd52.6). (There is an identical ccpd29, but only the former is set out in the White Book so references are to that.)

Since committal proceedings involve the liberty of the subject, it is particularly important to ensure that the rules and the general principles of natural justice and human rights are complied with. There is a high responsibility on the judge to ensure that this is done.

In *Newman v Modern Bookbinders* [2000] 2 All ER 814 the Court of Appeal emphasised the importance of a respondent (a) being given precise details of the allegations he faces, preferably in written form, (b) being warned of the possible consequences of breaches being proved and (c) being given the opportunity of obtaining legal advice or representation. Any order for committal where the respondent is not offered the opportunity to be legally advised is likely to be set aside by the Court of Appeal.

Orders on committal must be drawn to reflect what has been found and the sentence passed. They should always be drawn on the appropriate form and the judge should then sign that form.

Permission to appeal is not required against an order for committal (CPR 52.3(1)(a)). This applies both to first appeals from a district judge to the circuit judge and first appeals from a circuit judge to the Court of Appeal. However a second appeal still requires permission from the Court of Appeal (**London Borough of Barnet v Hurst** [2002] 4 All ER 457).

Prior to the decision in *Nicholls v Nicholls* [1997] 1 WLR 314 there were many appeals based on technical defects in committal applications or orders. Since that decision, in which the Court of Appeal held that not all defects would result in an order for committal being set aside, provided that fairness was demonstrated and no prejudice suffered as a result of the defect, such appeals have diminished in number. The new, more flexible approach is set out in scpd52.6.10:

‘The court may waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect.’

Many appeals now are based on the length of the sentence, with the Court of Appeal on occasion increasing as well as decreasing sentences in appropriate cases.

A judge has power to issue proceedings for contempt of his own motion, but should only do so in very exceptional circumstances indeed, and then should not adjudicate himself over the committal (*Re M* [1999] 1 FLR 810).

10.2 Jurisdiction of the county court to commit

10.2.1 General

CCR 29 r1(1) states: ‘Where a person required to do an act, refuses or neglects to do it within the time fixed or disobeys a judgment or order requiring him to abstain from doing an act, then... the judgment or order may be enforced... by a committal order against the defendant or, if a body corporate, against any director or other officer.’

A circuit judge or recorder, but not a district judge, can hear an application to commit under the general jurisdiction of the county court.

10.2.2 Other specific jurisdiction in relation to injunctions

Specific jurisdiction is conferred by the Family Law Act 1996, Pt IV, the Protection from Harassment Act 1997, and the Housing Act 1996, s.152–158. In practice these are the provisions most likely to bring a respondent before the court.

A circuit or district judge, but not a recorder (unless nominated for public law work) nor a deputy district judge, can hear an application to commit under the Family Law Act (Family Proceedings (Allocation to Judiciary) Directions 1999).

Circuit judges and recorders, but not district judges, can hear an application to commit under the Protection from Harassment Act 1997: CPR 2BPD.8.3.

Any judge (including a deputy district judge) can hear an application to commit under the Housing Act 1996: see CPR 65.6(6).

10.2.3 Other specific jurisdiction in relation to the disturbance of the business of the court

Specific jurisdiction is conferred by s.14 of the County Courts Act 1984 (assaults on officers), s.92 (rescue of goods taken in execution) and s.118 (contempt in the face of the court).

Any judge (including a deputy district judge) can hear such an application under the County Courts Act 1984 (CCA), but as a matter of practice no district judge should hear an application in relation to an assault on bailiffs as they remain responsible for them.

10.2.4 Other specific jurisdiction in relation to the enforcement of the orders of the court

In general terms, orders to pay money are not enforceable by committal. However, judgment summonses are an exception to that principle (see CCR O28) as are orders for judgment debtors to attend court to give information about their means (CPR 71) or to attend for the consideration of an attachment of earnings order against them (CCR 27 r15).

A circuit judge or recorder, but not a district judge, may hear an application to commit under CPR 70 or 71 (see CCA s.28 and CPR 71(8)(1)).

Any judge (including a deputy district judge) may hear an application to commit under the Attachment of Earnings Act 1971 (see s.23(11)).

10.3 Preconditions to application to commit for breach of an injunction

10.3.1 Penal notice

In order to be enforceable by committal an order must contain a penal notice, which in the case of an injunction should be attached automatically by the staff drawing the order (CCR 29 r.1(3)). In other cases, such as an application for contact to a child, a penal notice may be added to the order subsequently but in those cases it is important that the order is in the form required by CCR 29 r.1(1), i.e. that it says 'the respondent permits the applicant to have contact to the child from 2 pm to 3 pm on Friday 12 May 2006' rather than 'contact on Fridays between 2 and 3 pm'.

10.3.2 Exception to requirement for penal notice

By CCR 29 r.1(7) the court may dispense with this requirement, but should only do so in exceptional cases (*Jolly v Jolly; Jolly v Hull* [2000] 2 FLR 69).

10.3.3 Personal service

No order enforceable by committal is so enforceable unless it has been personally served on the person sought to be committed, subject to the exceptions set out below (CCR 29 r1(2)(a)).

An order in positive form can only be enforced if the service was effected before the time limited for carrying out the act required (CCR 29 r.1(2)(b)).

10.3.4 Exceptions to requirement for personal service

The court may dispense with this requirement *if it thinks it just to do so*: for example, where a respondent is avoiding an order for service then placing the order through his letter box may well be appropriate.

Where the order is negative in form, it may be enforced in any event if the defendant was present when the order was made or has been notified of its terms either in writing or orally (CCR 29 r.29(1)(6)).

10.3.5 Proceedings for committal

Bear in mind the following points:

- (a) Save where the defendant is arrested under a power of arrest (see 10.3.6 below), there must be a formal application to commit.
- (b) In the case of existing civil proceedings, this is done by notice of application pursuant to CPR 23.
- (c) In family proceedings, application is by notice to show cause in Form N78.
- (d) Otherwise, application is by claim form under CPR 8.
- (e) In each case the application itself must be served personally (CCR 29 r.1(4)).
- (f) Personal service of the application to commit may be dispensed with, if necessary retrospectively (CCR 29 r.1(7)).
- (g) The application must set out the provisions alleged to have been disobeyed and the ways in which they have been disobeyed (CCR 29 r.1(4A)). It is not sufficient to say: 'see the affidavit attached'.
- (h) The application must be supported by affidavit which must be served with it (*Ibid.*).
- (i) The hearing date must be at least 14 days after the date of service (two days in family proceedings) (scpd52.4.2).
- (j) Where service of the order or the application has been dispensed with and an order for committal made in the absence of the respondent, the judge may order that the respondent is brought before him before the sentence takes effect (CCR 29 r.1(8)).

10.3.6 Exercise of powers of arrest

Where a power of arrest has been attached to an order under the Family Law Act 1996 or the Housing Act 1996 a constable may arrest without warrant but must bring the respondent before a judge within 24 hours of the arrest, excluding Christmas Day, Good Friday or any Sunday (s.47(7) FLA, s.155(2) Housing Act).

Where a power of arrest has not been so attached, the court may issue a warrant on application, substantiated on oath and showing reasonable grounds for believing that the respondent has failed to comply with the injunction (s.47(8) and (9) FLA, s.155 (3) and (4) HA).

Under the Protection from Harassment Act 1997 there is no power to attach a power of arrest to an injunction but there is power to issue a warrant on evidence as above (s.3(3) and (5)).

In either case, where a respondent is brought before a court, the breaches alleged should be written down and given to him so that he knows exactly the case he faces.

10.3.7 Undertakings

Undertakings are enforceable in the same way as orders, save that personal service of an undertaking is not required if the respondent has received a copy at court, had one sent to his residence or had it sent to his solicitor (CCR 29 r.1A(2)).

10.4 Procedure at initial hearing of committal for breach of an injunction

10.4.1 General

The first issue to decide is whether or not the application can proceed immediately. In practice, difficulties arise most commonly where respondents have been arrested and brought before the court, where there are also significant differences in procedure if the matter is deferred.

The court has the power in an appropriate case to strike out the application to commit (scpd52.5). This should only be done where: (a) no reasonable grounds are disclosed for alleging contempt, or

(b) the application is an abuse of process, or

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

An appropriate case might be where the conduct alleged could not be a breach of the order even if proved, or where the breach disclosed was so trivial or technical as not to merit punishment, or alternatively where the respondent has never been served with the original order and had no knowledge of it.

10.4.2 Attendance

In the absence of the applicant an application to commit should normally be deferred to a fresh date (see 10.4.3 below) or dismissed (see 10.4.1 above). This is so even if the breach is admitted as the applicant has an interest in seeing how the matter is disposed of.

In the absence of a witness reasonably required by either side, the matter should normally be adjourned to a fresh date: to continue to hear an application where the respondent has a relevant witness who is not before the court is a course normally to be avoided.

In the absence of the respondent it is possible to proceed if he has been served or (exceptionally) if you dispense with service, depending on whether you take the view that he is deliberately avoiding coming to court. The alternatives are to defer the hearing and/or where appropriate to issue a warrant. In any case where the respondent is not before the court, it is a wise precaution to order that any sentence of imprisonment should be suspended until he has been brought before you to make representations.

A respondent facing the risk of imprisonment must be clearly informed of that risk and of the desirability of him receiving legal representation.

The circumstances in which an application to commit should proceed without legal representation and where the respondent wants such representation will be very exceptional. The proceedings, although civil, constitute a 'criminal charge' for the purposes of the Human Rights Act 1998 (Re K [2003] 1 FLR 277).

There is no power in the court to order that a person accused of contempt be granted legal aid save in the unusual case where he is facing allegations under the County Courts Act 1984 (see s.29 of the Legal Aid Act 1988). In many cases respondents brought before the court will already be legally represented and the court can notify their solicitors: alternatively any local solicitor with a general civil contract under the Community Legal Service can be asked to attend the court.

Where the respondent has been arrested under a power of arrest, the applicant's solicitor should also be notified to attend. His attendance may not be necessary if the facts are undisputed and admitted but if they are not, both parties should be given the opportunity to be represented.

It is important where at all possible to deal with minor breaches on the first occasion if at all possible.

In any case, if the matter is to proceed on the first occasion and there is no notice to show cause, the allegations should be written down and handed to the respondent at the commencement of the hearing.

10.4.3 Deferral

If the matter cannot proceed on the first hearing it will have to be deferred. Any adjourned hearing date should be notified to the parties there and then and should be as soon as possible. Committal proceedings should not be left to drag on and require priority in listing.

If the matter is before the court on a notice to show cause, it can only be adjourned. There is no power to remand the respondent either in custody or on bail.

If the matter is before the court on a power of arrest or after execution of a warrant then there is power to remand either in custody or on bail (s.47(7) and (10) of the Family Law Act 1996 and s.155(2) and (5) of the Housing Act 1996).

10.4.4 Powers of remand where respondent is brought before a court on a power of arrest or under a warrant

The arresting officer is not normally at court. However it is still important to ascertain that the officer had reasonable grounds for the arrest. Check particularly that:

- (a) the conduct alleged related to a provision in the injunction order to which a power of arrest was attached
- (b) that the officer had reasonable grounds from what he had seen or been told to suspect that a breach had occurred and
- (c) that the respondent has been brought before a judge within the required time limits. If any of these are not complied with, he must be released.

If the matter has to be deferred the court has the following powers:

- (a) to remand in custody
- (b) to remand for a medical examination and report
- (c) to remand on bail or
- (d) to adjourn to a fresh date without remanding the respondent.

Any remand in custody can only be for a maximum of eight clear days: para. 2(5) of Sch. 5 to the Family Law Act 1996 and para. 4(1) of Sch. 15 to the Housing Act 1996. However there can be successive remands (paras 2(2) and 4(1)).

The decision as to whether or not to remand in custody depends on the facts of the case, and although the criminal provisions as to bail do not apply some of the principles set out do. Remember however that an application to commit can be heard even if the respondent does not attend. In a case where the applicant is at serious risk, a remand in custody is normally appropriate. Remember that many respondents, unlike in the criminal courts, are not used to prison and a very short remand, or even being in custody after their arrest, may alter their perspective on the court's order.

A remand for a medical examination and report may be for up to three weeks if the remand is in custody or four weeks if on bail: s.48(2) of the Family Law Act 1996, s.156(2) of the Housing Act 1996. It is important before making such an order to ascertain whether such a

report will be forthcoming and how it is to be funded. Prison doctors are unwilling to carry out such work.

A remand on bail has no advantages over simply adjourning the case to a fixed date as the only sanction for breach of bail is forfeiture of the respondent's recognisance. The disadvantage is that a remand on bail can only be for eight days unless the other party consents to a longer period, and the other party may of course not be before the court.

If the matter is adjourned for a fixed date, the applicant ought to be invited to proceed by notice to show cause supported by affidavit in accordance with the general procedure and the respondent ought to be specifically warned that the case may go ahead without him if he does not attend and that the injunction continues in force.

10.4.5 Directions

If the matter cannot proceed on the first occasion, it is important that effective directions are given so that it is not adjourned further unless absolutely necessary and in particular that the respondent is made aware in writing as soon as possible of the allegations against him.

Written evidence in support of or in opposition to an application to commit must be given by affidavit (scpd52.3).

A respondent may give oral evidence at the hearing of a committal whether or not he has sworn an affidavit and may call a witness to give oral evidence whether or not he has sworn an affidavit (Ibid.) Thus it is one of the few instances left where an ambush of the other party may legitimately take place.

Attempt to ascertain before adjourning whether or not the service of the order or the application is in dispute and whether or not the evidence of any arresting officer is required.

The parties should be ordered to file their evidence in time for the adjourned hearing date.

10.5 Procedure at final hearing of committal for breach of an injunction

10.5.1. General

An application for committal can only be withdrawn with the permission of the court (scpd 52.6.8). In practice, if an applicant will not proceed there is generally no alternative but to dismiss the application.

If the applicant does not appear, you can dismiss the application or adjourn it further, but it is sensible to attempt to ascertain whether the matter is in fact to proceed. One course is to adjourn to a fixed date but order that the application be dismissed unless the applicant gives written notice of his intention to proceed within seven days.

If the respondent does not appear and you are satisfied that he knew of the hearing either because he has been personally served with notice or was present at the earlier hearing then you may proceed in his absence or issue a warrant for his arrest.

The fact that there are concurrent criminal proceedings should not deter you from proceeding in most cases. Criminal proceedings have a different purpose and committal proceedings are intended to be a summary remedy. They are generally dealt with very much more speedily than are criminal cases.

10.5.2 Dealing with the allegations

Firstly, ascertain which allegations are admitted wholly or in part and which are in dispute.

Decide whether or not it is necessary to continue to hear the allegations which are disputed or whether they add nothing to what has been admitted.

Do not be tempted to accept a compromise in which the most serious allegations are left unproven (see *Sherwin v Sherwin* [2003] EWCA Civ 1726).

It is preferable that if the matter proceeds on admissions, these are clearly recorded, preferably in writing.

If there are new allegations which relate to matters after the application, consider whether or not they can properly be dealt with immediately, whether the whole case needs adjourning, or whether the new allegations should be adjourned for a separate hearing.

10.5.3 Contested allegations

Bear in mind the following:

- (a) Concentrate on the serious and recent matters.
- (b) Remember the criminal burden of proof applies.
- (c) It may be appropriate to allow the affidavits to stand as evidence in chief, but in other cases you may wish to hear oral evidence in chief of serious matters.

10.5.4 Findings

Only find the allegation proved if you are sure that (a) the respondent knew of the order, (b) breached it and (c) acted deliberately in breaching it (i.e. not that he necessarily intended to breach it, but that he deliberately did the act alleged).

Give findings of fact and reasons for each breach found proved. Be very clear about which witnesses you found to be truthful and reliable and do not hesitate in a case where there is a clear conflict to say if necessary that one party is a liar.

Any findings of breaches and the sentence passed on each are recorded on Form N79 which must be completed immediately after the hearing. It is your personal responsibility to ensure its accuracy.

10.6 Powers on finding proved breaches of injunctions

10.6.1 Imprisonment

By s.14 of the Contempt of Court Act 1981 the court may imprison for a fixed term which must not exceed two years on any occasion. The two years includes any terms previously suspended which are ordered to be served.

In the case of persons between the ages of 18 and 21, no order committing to prison may be made but an order can be made for detention in a young offender institution (Powers of Criminal Courts (Sentencing) Act 2000, Ch. II and in particular s.108).

In the case of persons under 18, no order can be made committing to custody.

Prisoners serving a sentence for contempt are treated as if on remand for criminal proceedings and have privileges not granted to convicted criminals.

Persons sentenced to imprisonment for contempt are now entitled to be released after serving one half of their sentence (s.258 of Criminal Justice Act 2003). The previous provisions by which those serving 12 months or more were only released after serving two thirds of the term are now repealed.

10.6.2 Suspended terms of imprisonment

The restrictions imposed on the suspension of sentences under the various statutes relating to criminal proceedings do not apply to sentencing for contempt.

Sentences are often suspended on terms that there are no further breaches of the injunction. However there is no reason why orders should not be suspended for a set term or even indefinitely.

10.6.3 Adjourning sentence

It is sometimes appropriate simply to adjourn sentence with liberty to restore in the event of future breaches. This is a more flexible, but less deterrent, remedy than a suspended sentence.

10.6.4 Mental Health Act 1983 orders

The county court has equivalent powers to the crown court to make orders under the Mental Health Act 1983 in appropriate cases: see s.14(4) and (4A) of the Contempt of Court Act 1981.

10.6.5 Fine

This is a remedy rarely used as there is no power to fix a term of imprisonment in default.

10.6.6 Varying or extending injunction

It is always sensible where committing a respondent to consider varying or extending an existing injunction or making a fresh injunction where previously there was an undertaking.

10.7 Considerations on punishment

10.7.1 Representations

It used to be the practice that courts asked the applicant, especially in family cases, to make representations on sentence. In *Rehbeim v Isufai* [2005] EWCA 1046 the Court of Appeal said that it would need full argument before saying that that practice should be followed, and expressed concern about it.

10.7.2 Factors to take into account

These include:

- (a) Was the respondent present when the order was made?
- (b) How soon after the making of the order was it breached?
- (c) What is the previous history and in particular have there been earlier breaches?
- (d) How serious is the breach?
- (e) Were there aggravating features such as the presence of children?
- (f) What if any is the mitigation?
- (g) Did the respondent admit the breaches, and if so when?
- (h) What would be the effect of an immediate sentence of imprisonment on the respondent's domestic circumstances, employment, health etc.?
- (i) Is the breach likely to be repeated?

10.7.3 Cases on sentence

As set out above, there has recently been a substantial increase in the number of cases reaching the Court of Appeal on sentence. These include the leading case of *Hale v Tanner* [2000] 2 FLR 87, where the considerations to be taken into account are set out in some detail and a number of other more specific decisions: immediate imprisonment is a last resort (*Danchevsky v Danshevsky* [1975] Fam 17).

There is no rule of practice that a first sentence must either be suspended (*Neil v Ryan* [1998] 2 FLR 1069) or necessarily short (*Wilson v Webster* [1998] 1 FLR 109). In the former case it was said that a serious violent attack would normally merit an immediate sentence of imprisonment.

Where there are concurrent proceedings, the first court cannot anticipate what the second court will do, but the second court has to bear in mind what the first court has already done (*Lomas v Parle* [2004] 1 WLR 1642).

The provisions of s.42A of the Family Law Act 1996, as inserted by s.1 of the Domestic Violence Crime and Victims Act 2004 are not yet in force. They provide that a respondent may not be punished for contempt if he has already been sentenced in the criminal court for the same matters, and vice versa.

Sentences must bear a reasonable relationship to the two-year maximum: they must not be manifestly discrepant from sentences for harassment or for similar offences in the Crown Court, although domestic violence has been approached too lightly in the past (*Head v Orrow* [2005] 2 FLR 329, *Murray v Robinson* [2005] EWCA Civ 935 and *Loughran v Pandya* [2005] EWCA Civ 1720).

A suspended sentence should not be passed in circumstances where the breach was not serious enough to justify a sentence of imprisonment and certainly not because the respondent could not pay a fine (*Re M* [2005] EWCA 615).

10.8 Purging contempt

10.8.1 General

By CCR 29 r.3(1) a respondent in custody may apply to the court for his discharge on the grounds that he has purged his contempt.

This application can be heard by a circuit or district judge unless reserved to a circuit judge on the making of the order for committal: in any event an application should if possible be to the judge who made the original order.

Notice should be given to the applicant.

10.8.2 Powers

On hearing an application to purge, the court may refuse the application, or may order the release of the respondent either immediately or at a fixed time in the future, but may not suspend the balance of the sentence (*Harris v Harris* [2002] 1 FLR 248).

10.9 Contempt under the County Courts Act 1984 (see 10.2.2)

10.9.1 General

Procedure under these sections is similar to that set out above but with some modifications set out in Pt II of scpd52.

The maximum sentence under s.14 (assaulting an officer of the court in the execution of his duty) is three months, under s.92 (rescue) it is one month, and under s.118 (insulting the judge or any officer of the court or misbehaving in court) it is also one month.

Although a claim form or application notice is not required, the respondent should be told of the facts alleged in writing and of the possible penalty and should be given the opportunity to take legal advice.

It is not usually sensible to proceed immediately to a committal hearing, especially as there may be no bailiff to take the respondent to prison if committed and no cells within the court building. Calming down generally assists everybody.

A judge should be sensible of the need to ask a colleague (or the DCJ) to hear such an application to avoid the question of bias, but may make a written statement of what occurred. The case of *Wilkinson v S and another* [2003] 1 WLR 1254 sets out relevant considerations.

10.10 Contempt in relation to judgment summonses and the like (see 10.2.4 above).

10.10.1 General

Bear in mind the following points:

- (a) The relevant procedure is set out in the rules referred to.
- (b) The crucial point is that use of the judgment summons procedure has been much curtailed since the Court of Appeal held in *Mubarak v Mubarak* [2001] 1 FLR 698 that the previous procedure was incompatible with the Human Rights Act.
- (c) As a result of that decision it is clear that the procedure cannot be used to obtain evidence from the debtor and then commit him. The evidence must be available when the application is made.
- (d) The maximum sentence in relation to a judgment summons is six weeks (s.5 of the Debtors Act 1869 as amended) which in any event is almost always suspended upon terms that the sum in default is paid.
- (e) Committal orders for failing to appear to be questioned as to means are usually for 14 days, since the purpose of the procedure is to bring the debtor before the court, and they are rarely executed.