

DEVELOPMENTS IN CONTEMPT PROCEEDINGS A GET OUT OF JAIL FREE CARD?



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“Go directly to jail. Do not pass go. Do not collect £200.”

Whilst worldwide freezing orders and search orders often get the headlines, committal proceedings – or contempt proceedings as they are now to be known – are an increasingly frequent feature of litigation in the English courts. Designed to uphold and ensure the effective administration of justice, the contempt regime provides a remedy for various misdemeanours, including breaches of certain Court orders and injunctions and acts that interfere with

the administration of justice (such as forgery and knowingly providing false evidence). The court’s powers of punishment include ordering up to 2 years’ imprisonment, an unlimited fine and the seizure of assets. Contempt proceedings can therefore be a very powerful incentive for parties to behave themselves during English litigation.

Whilst the Courts are keen to clamp down on any unacceptable conduct, pursuing proceedings for contempt of court should not be taken lightly given the seriousness of the potential remedies. During the last year, there have been a number of cases which reinforce this message, culminating in the introduction of new procedural rules on 1 October 2020.

Be clear and precise

The first message from recent caselaw perhaps goes without saying, but it is that the contempt application should be drafted carefully, clearly and precisely. There needs to be no doubt as to what allegations of breach are being made so that he or she has every opportunity to meet those allegations. This is illustrated by a recent case in the Court of Appeal, where it expressed concerns of its own motion about the drafting of the contempt application, identifying various defects including the omission of the date on which the alleged contemnor was supposed to have committed the contempt. Nevertheless, the court was prepared to waive these defects on the basis that no injustice had been caused to the respondent, but not without stating that the defects evidenced “an unfortunate degree of carelessness” in circumstances where “accuracy and clarity should be at a premium”.

Procedural fairness

Once the application has been made, the courts are keen to ensure that the process is procedurally fair to the respondent. In one case, the judge (i) did not find out whether the respondent was content to proceed without any legal representation or inform him of his right to silence, and (ii) asked leading questions of, and extracted admissions from, the respondent. It was not apparent whether the judge had even considered a non-custodial sentence, or given the respondent any chance to make a plea in mitigation before



sentencing. The Court of Appeal found that the conduct of the hearing

“fell far short of the high standards expected in an application for the committal of a litigant in person”. Given the defendant’s liberty was at stake, procedural fairness was of “cardinal importance”.

Had the defects in the application been material such to render the process unfair or unjust, there would have been no option but to allow the appeal irrespective of the underlying merits. However, the court determined that the process was not unfair or unjust, and a properly conducted hearing would have led to the same result. Of particular note is that the judgment stated that the applicant’s counsel would have intervened had he thought there was any risk of unfairness or injustice. This is a useful reminder that it is important for the applicant’s legal team to seek to ensure that the process is conducted fairly and justly, to avoid the subsequent risk of an adjournment or appeal. For example, in one recent case, the court adjourned a contempt application because the respondent only learned of its right to legal aid at the committal hearing itself.

Abuse of process

It is apparent that respondents to contempt proceedings are increasingly seeking to counter-attack with allegations of abuse against the application.

In one case, the respondents argued that the contempt application should be struck out as an abuse of process, on the basis that it was being used as a threat improperly to obtain a more favourable settlement of the underlying dispute. Particular emphasis was placed upon an email concluding that

“The most reasonable solution is therefore to settle the matter and do so as soon as possible, before any arrest

warrants are issued and further legal costs are incurred.”

The judge considered that the question of abuse had to be decided in the context of what was “permissible in hard fought commercial litigation”. In this case, whilst the reference to an arrest warrant was unwise, it did not make the otherwise temperate email abusive. Therefore, the court rejected the abuse allegation, ruling that contempt had been raised legitimately to encourage compliance by the respondents with the injunction against them.

In contrast, in another recent decision, the judge inferred that the applicant had a deep rooted personal animosity against the respondent and that the contempt proceedings were to vex and harass him, rather than draw serious misconduct to the court’s attention. As such the proceedings were struck out as an abuse of process.

New procedural rules

Many of the points considered in the aforementioned cases have been highlighted by the recent introduction of a new procedural code for contempt proceedings. The new rules seek to simplify the process and make it more intelligible for both the practitioner and, crucially, the parties, many of whom are litigants in person. The rules also seek to re-emphasise that contempt proceedings need to be conducted in a fair and proper manner. One of the key new rules is a shopping list of items that need to accompany the contempt

application itself. This spells out that the respondent should be told clearly and precisely of not only the allegations against it, but also its rights during the process.

A get out of jail free card?

Notwithstanding that the courts are keen to ensure that contempt proceedings are conducted properly and fairly, as embodied in the new procedural rules, it is apparent that this is not a charter for miscreants to escape from the consequences of their misconduct. As a quasi-criminal process where people’s personal freedoms are potentially at stake, the role of the applicant’s legal team is akin to a quasi-prosecutor, whose function includes ensuring the integrity of the process and that respondents do not simply “go directly to jail”. That said, just as the process is taken seriously so is misconduct, and it is clear that in appropriate cases the courts will have no hesitation in ordering the most serious of consequences.

