

**CLASS LEGAL WEBINAR -
16TH JUNE 2021**

Contempt of Court – All Change?

Sir Jonathan Cohen and Nicholas Allen QC

- Do the new streamlined and simplified rules change what constitutes contempt of court or just the procedure that has to be followed?
- What is now required when making a contempt application - what must the application contain and what written evidence must be filed? What facts need to be asserted or proved? What notice needs to be given to the defendant?
- When is legal aid available in civil contempt proceedings?
- When will the court decide to hold the hearing remotely rather than in public? When does the court need to hear submissions from media organisations?
- What is contempt in the face of the court and how will it be dealt with?
- What punishments can the court now impose?
- To what extent does the 2015 Practice Direction - *Practice Direction on Committal for Contempt of Court in Open Court* - still apply?

Background

- 1) The original FPR Part 37 which came into force on 22nd April 2014 (coinciding with the launch of the Family Court) was closely modelled on CPR Part 81.¹
- 2) A new version of Part 81 was substituted with effect from 1st October 2020. Part 37 was also reviewed and a new version, modelled on the new Part 81, also came into force on 1st October 2020.²
- 3) The new Part 37 reduces 38 rules to just to 10.
- 4) Contempt of court (described in r37.1(1) as “*contempt proceedings*”) can take many different forms. Helpfully there is now a common procedure for all of them.
- 5) The procedural changes do not affect the underlying law which remains mixture of common law and statute and, in the case of the High Court, the inherent jurisdiction.³ The powers of the High Court are also different.
- 6) Therefore (for example) the position remains that (i) an order to pay money, or an undertaking to do so, cannot be enforced by committal proceedings, except in the very limited circumstances permitted under the Debtors Act 1869 s5;⁴ and (ii) an application to commit for non-payment requires not merely proof of non-payment but proof (beyond

¹ SI 2014/667. The provisions of RSC 1965 and CCR 1981 on committals which were previously found in the Schedules to the CPR 1998, and which applied in family proceedings prior to 22nd April 2014, had no further application.

² Substituted by the Family Procedure (Amendment No. 2) Rules 2020 (SI 2020/758).

³ Expressly confirmed by r37.1(2) as to jurisdiction and by r37.1(3) as to the substantive law.

⁴ As limited by the Administration of Justice Act 1970, s11 and Sch 8.

reasonable doubt) that the non-payer had the means to pay but refused or neglected to pay.

Representation and Legal Aid

- 7) It is self-evidently generally desirable for a person alleged to be in contempt of court to be legally represented. However, as with any other litigant, an alleged contemnor is entitled to act in person (with or without a *McKenzie* friend). The court has no power to compel representation.
- 8) Persons in danger of losing their liberty are eligible for legal aid under LASPO 2012. It is not subject to means.⁵ Certain courts can grant legal aid to an alleged contemnor. In *Brown v London Borough of Haringey* [2015] EWCA Civ 483 McCombe LJ (giving the judgment of the court) held that the High Court and the Court of Appeal had power to make determinations under LASPO 2012 s6 as to whether an individual qualifies for representation for the purposes of criminal proceedings (which includes committal applications) before them.
- 9) There is no similar power in the County Court.⁶ In *Brown* at paragraphs 26 – 37 it was held that (i) the relevant provisions are to be found in the legislation relating to criminal (as opposed to civil) legal aid; and (ii) applications for publicly funded representation for committal proceedings in the County Court (and it is assumed also the Family Court) are to be made, pursuant to s18, to the Director of the Legal Aid Agency.
- 10) Following the judgment in *Brown* the Legal Aid Agency issued guidance to providers on legal aid applications in such cases - *Apply for legal aid in civil contempt – committal proceedings*. The most recent version of this guidance is dated November 2020.⁷
- 11) Accordingly, the court must consider adjourning (and, in FLA 1996 cases, remanding) to enable the alleged contemnor as it is the judge's duty to permit an opportunity to take legal advice and apply for legal aid – see *Re O (Committal: Legal Representation)* [2020] 1 FLR 288 (per Peter Jackson LJ with whom Moylan LJ agreed).
- 12) If a hearing proceeds without the contemnor being represented, the judge should ensure that he/she understands his right to cross-examine, give evidence, and call witnesses (*Shoreditch County Court Bailiffs v Madeiros* (1988) *The Times*, 24 February, CA).

Procedure

Adherence to the rules

- 13) As committal for contempt of court is concerned with offences of a quasi-criminal nature and the liberty of the subject is at stake, the relevant rules of court must be complied with and the prescribed forms must be used – “... *given the liberty of the subject is at stake, it is hard to envisage any circumstances where the terms of FPR Part 37... are waived*” (*Re H* [2018] EWCA 3761 (Fam) per Mostyn J at [9]). However in *Nicholls v Nicholls* [1997] 1 FLR 649, Lord Woolf MR, giving the judgment of the Court of Appeal, stated at [655D] that

⁵ *Re O (Committal: Legal Representation)* [2020] 1 FLR 288 per Peter Jackson LJ at [6].

⁶ As the county court is not a court so authorised by the Criminal Legal Aid (Determinations by a Court and Choice of Representatives) Regulations 2013 (S.I. 2013/614). Those regulations also confer no such authorisation on the Family Court.

⁷ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/937410/civil-contempt-guidance.pdf

“While the ... requirements of [the rules] are there to be observed, in the absence of authority to the contrary, even though the liberty of the subject is involved, we would not expect the requirements to be mandatory, in the sense that any non-compliance with the rule means that a committal for contempt is irredeemably invalid” and at 661E gave the following guidance:

'(1) As committal orders involve the liberty of the subject it is particularly important that the relevant rules are duly complied with. It remains the responsibility of the judge when signing the committal order to ensure that it is properly drawn and that it adequately particularises the breaches which have been proved and for which the sentence has been imposed.

(2) As long as the contemnor has had a fair trial and the order has been made on valid grounds the existence of a defect either in the application to commit or in the committal order served will not result in the order being set aside except insofar as the interests of justice require this to be done.

(3) Interests of justice will not require an order to be set aside where there is no prejudice caused as the result of errors in the application to commit or in the order to commit. When necessary the order can be amended.

(4) When considering whether to set aside the order, the court should have regard to the interests of any other party and the need to uphold the reputation of the justice system.

(5) If there has been a procedural irregularity or some other defect in the conduct of the proceedings which has occasioned injustice, the court will consider exercising its powers to order a new trial unless there are circumstances which indicate that it would not be just to do so.'

14) It has also been held that the interests of justice do not require a committal order to be set aside on the ground of procedural irregularity where technical defects in it have not caused prejudice or injustice to the respondent to the application (*M v P (And Others); Butler v Butler* [1993] 1 FLR 773 per Lord Donaldson of Lymington MR).

15) By way of further examples:

- a) in *Devjee v Patel* [2006] EWCA Civ 1211 the fact that the exact process for bringing committal proceedings for breach of a non-molestation order had not been followed did not render the proceedings unfair as no injustice was caused to the contemnor: six months' imprisonment was upheld; and
- b) in *LL v The Lord Chancellor* [2017] 2 FLR 1429, where the lead judgment was given by Jackson LJ, the applicant successfully sought damages following the overturning of his committal for contempt of court on gross obvious irregularities.

16) It should be noted that the omission of a penal notice is fatal to a committal application - *CH v CT* [2019] 1 FLR 700 per Baker J (as he then was). Although there is no longer a prescribed form of words (as there was in the former PD37A)⁸ it is suggested that this wording, or wording substantially to the same effect, and should be used.

Making the application

17) FPR 37.3 sets out how the application is to be made:

⁸ 'If you the within named [] do not comply with this order you may be held to be in contempt of court and imprisoned or fined or your assets may be seized.' 'Penal notice' is now defined by r37.2 as meaning "a prominent notice on the front of an order warning that if the person against whom the order is made (and, in the case of a corporate body, a director or officer of that body) 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".

- a) 37.3(1) – a contempt application made in existing High Court or family court proceedings is made by an application under Part 18 in those proceedings, whether or not the application is made against a party to those proceedings;
- b) 37.3(2):
 - i) if made in the High Court, it shall be determined by a High Court judge of the Division in which the case is proceeding; and
 - ii) if made in the Family Court, it shall be determined by a judge of the Family Court;⁹
- c) 37.3(3) – a contempt application in relation to alleged interference with the due administration of justice, otherwise than in existing High Court or family court proceedings, is made by an application to the High Court under Part 19;
- d) 37.3(5) - permission to make a contempt application is required where the application is made in relation to (a) interference with the due administration of justice, except in relation to existing High Court or Family Court proceedings; or (b) an allegation of knowingly making a false statement in any affidavit, affirmation or other document verified by a statement of truth¹⁰ or in a disclosure statement;¹¹
- e) 37.3(6) - if permission to make the application is needed, the application for permission shall be included in the contempt application, which will proceed to a full hearing only if permission is granted; and
- f) 37.3(7) - if permission is needed and the application relates to High Court proceedings, the question of permission shall be determined by a single judge of the High Court. If permission is granted the contempt application shall be determined by a single judge or Divisional Court of that Division.

Requirements of a contempt application

18) FPR 37.4 sets out the requirements of the application. In summary:

- a) 37.4(1) - unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation;
- b) 37.4(2) (a) – (s) sets out that a contempt application must include numerous statements unless (in the case of (b) to (g)) they are 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;

⁹ The Family Court (Composition and Distribution of Business) Rules 2014 make provision for which level of judge may determine a contempt application.

¹⁰ No statute creates an offence in relation to a false statement of truth. Accordingly a false statement can only be dealt with as a contempt of court under the inherent jurisdiction (see *Brighton and Hove Bus and Coach Co Ltd v Brooks* [2011] EWHC 806). Permission of the court is required to bring to bring such an application under r 37.3(5).

¹¹ The test for permission is governed by case law not rules. Most recent cases which require permission concern applications in respect of false statements of truth. See guidance in *Stobart Group v Elliott* [2014] EWCA Civ 564.

- (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;
 - (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
 - (f) the date and terms of any undertaking allegedly breached;
 - (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
 - (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
 - (i) that the defendant has the right to be legally represented in the contempt proceedings;
 - (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
 - (k) that the defendant may be entitled to the services of an interpreter;
 - (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
 - (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
 - (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
 - (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
 - (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
 - (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
 - (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
 - (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.
- c) the rule sets out clearly the requirements of a valid application to commit. The grounds for alleging contempt must clearly set out in full even in a case where it is known that the defendant intends to plead guilty (*R v Yaxley-Lennon* [2019] 1 WLR 5400). The new procedure is more onerous for the claimant but is based on the principles of open justice. Thus, for example, the defendant has a right of silence and must be reminded of it (r37.4 (2)(n)). The affidavit supporting the application must comply with all the relevant matters listed in r37.4(2) (see the comments in *Re H* above).

Rules 37.4(f) and (g) refer to undertakings. An undertaking can be enforced in the same way as an injunction by committal (*Bishlawi v Minrealm Ltd* [2007] EWHC 2204

(Ch)).

- 19) FPR PD37A provides at paragraph 2(1)(c) that a court may strike out a committal application *inter alia* if it appears to the court that there has been a failure to comply with a rule, practice direction or court order. Although 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 (paragraph 2(2)), case law (see above) shows that many defects may be regarded by the court as fundamental.

Service of a contempt application

- 20) Pursuant to r37.5 a contempt application and evidence in support must be served on the defendant personally unless the court directs otherwise in accordance with Part 6 and except as provided in sub-rule (2) (which applies where a legal representative for the defendant is on the record in the proceedings in which, or in connection with which, an alleged contempt is committed) and the application may then be served on the representative for the defendant¹² unless the representative objects in writing within seven days of receipt of the application and evidence in support (and, if they do, the issue of service shall be referred to a judge of the court dealing with the contempt application).

Directions

- 21) Pursuant to r37.7 the court shall give such directions as it thinks fit for the hearing and determination of contempt proceedings, including directions for the attendance of witnesses and oral evidence, as it considers appropriate.
- 22) The court may issue a bench warrant to secure the attendance of the defendant at a directions hearing or at the substantive hearing. Upon the defendant being brought to court the warrant expires (see *Hanson v Carlino* [2019] EWHC 1366 (Ch) for a recent case). There is no power to remand someone in breach of an order to attend to secure attendance, except (probably) by order of a HCJ to the next working day when without it there are grounds to expect non-attendance.
- 23) The court can issue a witness summons to a person who witnessed an alleged contempt to attend committal proceedings although no application has been made by a party (*Yianni v Yianni* [1966] 1 WLR 120, ChD).
- 24) An alleged contemnor is not a compellable witness (*Comet Products UK Ltd v Hawkes Plastics Ltd* [1971] 2 QB 67, CA). Therefore pursuant to r37.7(3) the court may not give any direction compelling the defendant to give evidence either orally or in writing. As noted above a defendant has a right of silence and must be reminded of it in the application (r37.4(2)(n)). A defendant may be given permission to file a witness statement but must not be compelled to do so.¹³

The committal hearing itself

- 25) All committal proceedings should be dealt with promptly. But the defendant must be given the opportunity to obtain legal advice and apply for legal aid so the court will have

¹² FPR Part 26; where a party employs a solicitor the solicitor's address is the address for service.

¹³ Defendants to an application to commit can be required by the court to swear, file and serve affidavits, or produce statements of witnesses of fact upon which they might wish to rely before the hearing, in order to enable proper preparation of the evidence in reply (*Re B (Contempt: Evidence)* [1996] 1 FLR 239 per Wall J (as he then was)).

to strike a balance to achieve both these aims. If there are multiple allegations of contempt it is desirable that they all be considered at the same hearing.

- 26) Hearings of committal proceedings are in many respects similar to hearings of criminal charges. In *Hammerton v Hammerton* [2007] 2 FLR 1133 Moses LJ reiterated a number of 'well-settled' principles in respect of committal hearings including that proceedings for committal are a criminal charge for the purposes of ECHR Article 6 and therefore the defendant to such proceedings has the right enshrined in Art 6(3)(c):

"to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require"

- 27) Committal proceedings must be conducted formally with the judge and advocates robed (see r37.8(7) - below).

- 28) The defendant has a right of silence and he must be reminded of it at the start of the hearing (*Andreewitch v Moutreuil* [2020] 2 FLR 213 per Peter Jackson LJ (with whom Poplewell LJ agreed)).

- 29) The burden of proof rests on the person making the allegation of contempt. The standard of proof is the criminal standard (*Cambra v Jones* [2014] EWHC 2264 (Fam) per Munby P). The defendant must be allowed to cross-examine witnesses and to call evidence. The defendant is entitled to submit that there is no case to answer (*Savings and Investment Bank v Gasco Investments (Netherlands)* (1986) 136 NLJ 657, ChD).

- 30) The claimant must prove the case on the evidence filed in support of the application, supplemented by any admissions made by the defendant upon which the claimant was entitled to rely. The claimant can make no use of the defendant's evidence until it has been deployed by the defendant. A defendant who complies with a direction from the court in the foregoing terms is not in peril of cross-examination until such time as he deploys the evidence in his own case - *Re B (Contempt: Evidence)* [1996] 1 FLR 239 per Wall J (as he then was)).

- 31) If a contempt is found proved, the contemnor must be allowed to address the court by way of mitigation or seeking to purge his contempt (*Stilwell v Williamson* (1986) *The Times*, 1 September, CA). *Autrefois acquit* and *autrefois convict* apply. In some cases it may be advisable to adjourn punishment to a separate hearing.

- 32) Hearsay evidence is admissible but caution should be exercised (*Savings and Investment Bank v Gasco Investments (Netherlands) BV (No. 2)* [1988] Ch 422, CA).

- 33) Hearings and judgments are dealt with in r37.8. The rule deals with matters formerly in *Practice Direction Committal for Contempt of Court-Open Court* (26th March 2015) [2015] 1 WLR 2195. So although the rule is new, the procedure is not.

- 34) Pursuant to r37.8(13) the court shall inform the defendant of the right to appeal without permission, the time limit for appealing and the court before which any appeal must be brought.

- 35) A committal hearing must be separate from and not heard at the same time as any other application in the case (*Hammerton v Hammerton* [2007] 2 FLR 1133). This is important

to protect the integrity of the proceedings.

- 36) The court may proceed to a hearing in the defendant's absence – the applicable principles can be derived from *Sanchez v Oboz (Committal Proceedings in Absence of Respondents)* [2016] 1 FLR 897 per Cobb J at [5]. The checklist includes *inter alia* the following considerations:
- a) whether the respondent has been served with the relevant documents including the notice of hearing;
 - b) whether the respondent has had sufficient notice to enable them to prepare for the hearing;
 - c) whether any reason has been advanced for the respondent's non-appearance;
 - d) whether an adjournment would be likely to secure the attendance of the respondent or facilitate their representation;
 - e) the extent of the disadvantage to the respondent in not being able to present their account of events;
 - f) whether undue prejudice would be caused to the applicant by any delay; and
 - g) the terms of the overriding objective.

Hearings in private/public

- 37) Pursuant to r37.8(1) all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs, applying the provisions of paragraph (4).
- 38) Pursuant to r37.8(2) in deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected.
- 39) Pursuant to r37.8(3) the court shall take reasonable steps to ensure that all hearings are of an open and public character, save when a hearing is held in private.
- 40) Pursuant to r37.8(4) a hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice. This is only likely to be in cases where commercially sensitive information is to be given or cases where children or protected parties need to be protected from publicity.
- 41) Pursuant to r37.8(5) the court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness.
- 42) Pursuant to r37.8(7) advocates and the judge shall appear robed in all hearings of contempt proceedings, whether or not the court sits in public.
- 43) Pursuant to r37.8(8) Before deciding to sit in private for all or part of the hearing, the court shall notify the national print and broadcast media, via the Press Association. The court shall consider any submissions from the parties or media organisations before deciding whether and if so to what extent the hearing should be in private (r37.8(9)).
- 44) Pursuant to r37.8(10) if the court decides to sit in private it shall, before doing so, sit in public to give a reasoned public judgment setting out why it is doing so.

- 45) Pursuant to r37.8(11) at the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.

Cases where no application is made/Contempt in face of court

- 46) Pursuant to r37.6 if the court considers that a contempt of court (including a contempt in the face of the court)¹⁴ may have been committed, the court on its own initiative shall consider whether to proceed against the defendant in contempt proceedings.
- 47) If the court proceeds of its own initiative, it shall issue a summons to the defendant which includes the matters set out in rule 37.4(2)(a)–(s) (in so far as applicable) and requires the defendant to attend court for directions to be given.
- 48) The court’s jurisdiction flows from its jurisdiction to punish those who interfere with the due administration of justice/disrupt the court process. See (for example):
- *Morris v Crown Office* [1970] 2 QB 114: protest in court;
 - *Wilkinson v S* [2003] EWCA Civ 95: father threatening mother and her lawyers;
 - *Balogh v St Albans Crown Court* [1975] 1 QB 73: discharge of laughing gas.

But it can also include taking photographs or making recordings, publishing a draft judgment in contravention of an embargo,¹⁵ a witness refusing to answer questions, etc.

- 49) A summons issued under this rule shall be served on the defendant personally and on any other party, unless the court directs otherwise. If r37.5(2) applies, the procedure there set out shall be followed unless the court directs otherwise.
- 50) The hearing should not take place in front of the judge whose hearing was disrupted.
- 51) This rule clearly does not envisage the court proceeding immediately by way of a summary procedure as was often done previously. The requirements of r37.4 apply and the normal rule of personal service applies. The powers of the County Court to commit for this type of contempt are found in CCA 1984, s118. The powers of judges sitting in the Family Court are set out in Family Court (Contempt of Court) (Powers) Regulations 2014. The Family Division of the High Court is distinct from the Family Court but the FPR still apply (r2.1).

Use of remote hearings

- 52) In *Moutreuil v Andrewitch (Contempt: No. 2)* [2020] EWHC 1301 (Fam) (22nd May 2020) Cobb J heard the application remotely:
6. *Open Court hearing*: The default arrangement for the conduct of most family hearings at present is by 'remote' video technology, in accordance with recently published guidance from the senior judiciary, including that issued by the Lord Chief Justice, President of the Family

¹⁴ 'In the face of the court' was a colloquial expression which has become a term of art.

¹⁵ See, most recently, *Her Majesty’s Attorney General v Timothy Crosland* [2021] UKSC 15, an application for permission to pursue an application for committal for contempt concerning a breach of an embargo on publication of *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52.

Division and the Master of the Rolls on 9 April 2020. As it happens, there is currently no explicit guidance in relation to the management of contempt or committal hearings.

7. At an earlier case management hearing, I made it clear that at this hearing I would consider only the disputed factual allegations underpinning this application, and if/as appropriate, make findings; I would not deal with sanction for any proven breach. This hearing was formally listed in the Royal Courts of Justice Cause List 'For Hearing in Open Court', as it should be. I personally sat, robed, in a court in the West Green Building to hear the case. The court was opened for members of the public but in fact no person attended. The parties and their legal teams all participated remotely using Skype for Business. Mr Farmer of the Press Association attended for at least part of the hearing, also joining remotely. All parties were content with this arrangement. In light of my findings, thought will need to be given to the management of the hearing to deal with sanction.

- 53) In *Frejek v Frejek* [2020] EWHC 1181 (Ch) (7th May 2020) Roth J heard committal proceedings for breaching requirements in a court order remotely, by Skype, and in the absence of the respondent, F. The judge found F to be in contempt. However, he chose not to deal with the sanction at that hearing, stating that it would be an extreme step to take in F's absence; a bench warrant was issued instead, so that F could be apprehended and brought before the court for sentencing the following week.

Contempt and Criminal Liability

- 54) A common scenario in breach of a NMO. The principles are as set out in *Barnet LBC v Hurst* [2002] EWCA Civ 1009. The main principles are that:
 - a) they are separate jurisdictions;
 - b) contempt should be dealt with promptly; and
 - c) the court should adjourn if the interests of justice demand it.

The court must avoid double punishment. If criminal charges have been brought, the criminal proceedings should be heard and determined first.

Sentencing

- 55) The powers of the court are dealt with in r37.9.
- 56) If the court finds the defendant in contempt of court, the court may impose a period of imprisonment (an order of committal), a fine, confiscation of assets or other punishment permitted under the law. There is no power to impose a community order. The maximum fine is £2,500 unless imposed by a HCJ.
- 57) The powers of the court to deal with contempt of court are prescribed by the Contempt of Court Act 1981 s14 and r37.9 must be construed in that context. The maximum sentence is two years. See *Liverpool Victoria Insurance Co. Ltd v Zafar* [2019] EWCA Civ 392 at paragraphs 57-71 for a restatement of sentencing principles in contempt cases. A fine can be imposed as an alternative to or as well as imprisonment (*Phonographic Performance Ltd v Ellis* [2018] EWCA Civ 2812).
- 58) Query what to do with repeat offenders – e.g. the abducting parent who does not return the child? There comes a time when enough is enough: perhaps after serving two years?
- 59) The Family Court (Contempt of Court) (Powers) Regulations 2014 prescribe the powers of the various level of judges who sit in the Family Court.

- 60) The power of the Family Court to suspend a sentence is quite separate from the power of a criminal court to suspend a sentence. In particular, a sentence can be suspended on terms. The questions of whether to impose a sentence of imprisonment (and if so for how long) and the question of whether to suspend are separate questions to be asked and answered separately.
- 61) The court must be proportionate and allow the normal criminal discount – e.g. up to one-third for plea.
- 62) Execution of an order of committal requires issue of a warrant of committal. An order of committal and a warrant of committal have immediate effect unless and to the extent that the court decides to suspend execution of the order or warrant.
- 63) An order or warrant of committal must be personally served on the defendant unless the court directs otherwise.
- 64) There is no power to remand in custody for sentence – *Delaney v Delaney* [1996] 1 FLR 458 (where the lead judgment was given by Sir Thomas Bingham MR). There is no power to detain anyone under the age of 18. Those aged 18 - 21 will go to a YOI, not prison.
- 65) An order or warrant of committal may not be enforced more than two years after the date it was made unless the court directs otherwise.
- 66) A recent example of a committal application – and sentencing – is *Durrell v Scaife* (19th February 2021) per Cohen J.
- 67) Rule 37.10 governs applications to discharge committal orders. Any such application shall be made by an application notice under Part 18 in the contempt proceedings.
- 68) The court hearing an application to purge shall consider all the circumstances and make such order under the law as it thinks fit. The judge may grant the application (which means immediate release), order release on a future date (*Yager v Musa* [1961] 2 QB 214, CA), or refuse the application (which leaves the original release date unchanged), but the judge cannot suspend the remainder of the sentence (*Harris v Harris* [2002] 1 FLR 248 (per Thorpe LJ)).
- 69) In any event the contemnor will serve only half of the imposed sentence. A sentencing judge cannot evade this by sentencing to a specific date (*Thomson v Mitchell* [2004] EWCA Civ 1271). The Criminal Justice Act 2003 s258 provides that where a contemnor is sentenced to imprisonment “it shall be the duty of the Secretary of State to release him unconditionally” as soon as he has served one half of the sentence. As the release is unconditional, the contemnor is not on licence ('parole') and cannot be recalled to prison.

SIR JONATHAN COHEN
NICHOLAS ALLEN QC

16th June 2021