**Contempt of Court and ASB – An Update**

An intermediate level paper by the

Housing & Community Care Team

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##### ABOUT THE AUTHORS

***Michael Marsh-Hyde*** practices in housing, community care and general civil and public law. Before taking up practice as a barrister Michael worked for the housing and homelessness charity Shelter. He has a wealth of knowledge in housing and community care law and has developed a broad practice in this field. Michael is well versed in all housing, community care and property law work including landlord & tenant, homelessness & allocations, leasehold (private and commercial) and planning based work. He is regularly instructed in all types of first instance, judicial review and appellate work in this field.

***Martin Hodgson*** During his career Martin has appeared in the Court of Appeal in Crime, Family, Personal Injury, Real Property, Local Government and Housing cases. More recently, he has appeared in the Supreme Court in 2 cases. In the past he has been instructed regularly by social landlords but he is best known for his work representing tenants. After many years, this is an area of law that Martin still enjoys and it gives him tremendous pleasure to have an expertise that can make a real difference to people’s lives. Martin is committed to social housing and protecting private sector tenants from unscrupulous landlords. He would like to work more closely with responsible social landlords who put the needs of their tenants at the forefront and with local authorities dedicated to tackling rogue landlords.

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**Contempt of Court and ASB – An Update**

**For starters…**

Some brief comments on matters which can be particularly important in Anti-Social Behaviour Cases

Undertakings!

1. If an individual is found to have acted in breach of undertakings, while likely in a lot of trouble and still at risk of losing their home they will not be exposed to the mandatory grounds for possession that they would be if they had breached an ASBI on the same terms. In all the circumstances it is in the best interests of a client, where a court is satisfied that the necessary criteria are met to impose some form of injunction to invite the court to deal with this by way of undertakings. In relation to control and immediate consequences the only substantive difference between an ASBI and an undertaking is that a power of arrest can be attached to the latter. In all the circumstances and given that a Court has a duty when considering the imposition of an injunction to take such steps as are necessary, if a court is not inclined to add a power of arrest to an ASBI and the client is willing to give an undertaking in such terms as the Court requires it is strongly arguable that the Court ought not to then impose an ASBI rather than accept an undertaking. [[1]](#footnote-1) To the extent that claimant’s say they are unwilling to accept an undertaking, this may be true but ultimately the matter is for the Court applying the correct legal principles.

Pre-Trial Settlement Hearings

1. It is not uncommon, particularly with vulnerable clients, that any ASB has arisen due to a lack of care and support for the alleged perpetrator. The reality in a lot of these cases is that it is in the best interests of all parties, including the Claimant, and the wider community for these underlying causes of the ASB to be addressed rather than merely sending the alleged perpetrator to prison or evicting them from their home. Unfortunately this is hard for a Court to do at a committal or possession hearing where all relevant parties may not be parties or in attendance (such as local social services or mental health services) and the issues are confined to the basis of the claim/application. In the circumstances a more cost efficient and productive means of resolving such cases could be to list the matter for a Pre Trial Settlement Hearing and get all relevant parties to court to try and reach a satisfactory outcome for everyone.[[2]](#footnote-2) Draft directions for such hearings are attached and it would be advisable, in suitable cases, to invite the Court to consider listing the cases for such hearings in the break between pre-trial checklists and the trial listing (effectively replacing the PTR). In addition it would be advisable to invite the Court to order/invite relevant third parties to attend such hearings (Local social services, local mental health services, local homelessness department, local housing allocation department etc. etc.) What arises is a quasi-mediation but with a Judge who will not be the trial judge and therefore capable of adding a heavy steer to the parties that can be of great assistance. They can produce very beneficial results for all parties while avoiding the substantial costs that are incurred if such matters proceed to trial.

Review Hearings

1. If a client is found to have acted in breach of an ASBI at committal proceedings they are then exposed to the risk of the claimant relying on the mandatory ground of possession in possession proceedings. To be able to exercise that right the landlord must grant the defendant a review of any decision to serve a notice if sought by the Defendant. It is strongly advisable to get the client to seek a review hearing of the service of such a notice and if at all possible to arrange for a lawyer to attend that review hearing. If the landlord refuses to allow the attendance of a lawyer or denies them the right to speak this is another item to record for any future possession proceedings (albeit tactically it may be best not to warn them and merely turn up on the day). It is noted that this is unlikely to be funded by the Legal Aid Agency but having attended on a pro-bono basis in the past (and would be willing to attend in future cases on a pro bono basis if so instructed) it is noteworthy just how poorly these processes are conducted. The attendance of a lawyer can invariably lead to a positive outcome at such hearings or alternatively a solid record of the steps taken as part of the review that would likely assist with a public law / EA 2010 defence at subsequent proceedings. Examples of matters that have been witnessed at such hearings in the past are provided below:
   1. The Claimant being unwilling to disclose the section of the review bundle that provided the only evidence of allegations against the Defendant to the Defendant or anyone representing the Defendant (This was an introductory tenancy review, but same principles apply). When the irrationality of this was highlighted the Claimant decided to continue to refuse to disclose the material but indicated that, “they’d only wanted to use the review hearing to warn the defendant to behave and were not going to proceed with possession” and promptly withdrew the notice.
   2. All members of the review panel admitted during the review process that they had not heard of the Public Sector Equality Duty or how it should be applied. The notice was promptly withdrawn after the review hearing.
   3. The Claimant continually postponed and delayed the hearing after written submissions had been provided highlighting the discriminatory nature of their process. The case was subsequently withdrawn with no review ever taking place.

It should be noted that there is every likelihood that if matters proceed to trial after attendance at such a hearing and evidence is necessary as to what took place that the lawyer attending may become a witness for the Defendant. Thankfully to date this has not been necessary in any cases with which we’ve been involved.

**General ASB updates 2021 – Present**

Possession

1. *Poplar HARCA v Kerr* District Judge Bell County Court at Clerkenwell & Shoreditch February 2022. (*Nearly Legal*) Poplar HARCA’s tenancy agreement with the tenant, Ms Kerr, contained a clause stating which grounds of possession could be relied on by Poplar HARCA and also declaring which grounds could not be used. The tenant argued that Ground 7A Schedule 2 Housing Act 1988 could not be relied upon by the landlord as it was not provided for in the tenancy agreement. District Judge Bell dismissed this argument reliant on *North British Housing v Sheridan [1999] 2 EGLR 138*. This judgment mirrors a judgment of HHJ Bloom at Reading County Court in *Red Kite community housing limited v Finlay* from 2015. There are a substantial number of tenancy agreements that contain wording in this manner (particularly those that were subject to LSVT) and while *North British Housing v Sheridan* is of assistance in considering this issue it is not determinative. *Finlay* was successful on other grounds so that case went no further on that issue. *Kerr* is being appealed to a Circuit Judge and this issue is yet to be resolved in a determinative fashion (and is unlikely to be so until the Court of Appeal grapples with the issue).
2. *Redbridge LBC v Kuria* District Judge Kemp County Court at Romford 31 March 2021. A claim for possession alleging ASB but merely stating “see attached”, referring to an attached witness statement when it came to particulars of the ASB was not compliant with CPR 16.4(1) as it did not contain a concise statement of the facts on which the claimant relies. The Claimant was ordered to re-plead its case.
3. *Taylor v Slough BC* [2020] EWHC 3520 (Ch). In a matter relating to a possession claim for ASB it was established that the Landlord had breached the PSED at an early stage and prior to the issue of proceedings. However the Court adopted the proposition that, “*in possession proceedings brought by a local authority a breach of the PSED at an early stage (for example the decision to commence the proceedings) can be remedied by compliance with the PSED at a late stage (for example in deciding to continue the proceedings)*”. The judge in this matter had not been wrong to conclude that there had overall been compliance with the PSED notwithstanding the original EA assessment had failed to comply with the PSED. The Court did however give these notes of caution:

*“That is not to say that the fact that the PSED was not complied with at the earlier stage is irrelevant to the question of later compliance. It is always necessary to find that the public authority has complied in substance, with rigour and with an open mind with the PSED. Where a public authority has commenced proceedings without complying with the PSED, it is important to guard against the risk that its subsequent purported compliance when deciding to continue the proceedings was tainted by the incentive not to depart from a decision already made.*”

1. *Metropolitan Housing Trust Ltd v TM [2021] EWCA Civ 1890*. In a claim for possession for ASB the Court found that the Claimant had failed to comply with the PSED by failing to review the case after the provision of expert psychiatric evidence but that this was remedied by the Claimant’s officer reviewing the case while giving evidence on the case (during which he admitted that he would have tried alternative ways of dealing with the case if he had known originally when he knew by trial but that it was still reasonable and proportionate to pursue possession). The Court of Appeal did accept that a breach of the PSED can be remedied in possession proceedings but with a series of caveats including that any further review that may remedy the situation must be part of an open-minded conscientious inquiry and further that a belated act of compliance does not expunge any harmful effects of earlier non-compliance. In this case the Court of appeal observed that the approach adopted by the officer in this case was not the same as conducting an open-minded conscientious inquiry as to whether to continue with the claim for possession as was required by the PSED and expecting a witness to carry out a lawful PSED assessment in the witness box is far removed from the open minded conscientious inquiry which is required (there being an obvious danger of confirmation bias). The Court of Appeal duly dismissed the claim. This case also serves as a useful reminder that perseverance can reap reward, the Defendant having been unsuccessful before the Circuit and High Court Judges below before ultimately succeeding before the Court of Appeal.
2. *Bromford Housing Association Ltd v Nightingale* [2020] EWHC 2648 (QB). In a claim for possession relating to ASB largely caused by the Defendant’s children the Defendant sought to admit late evidence provided by an officer of the Local Housing Authority to the effect that if evicted the Defendant would be found intentionally homeless and would be ineligible to join the housing register for at least 12 months and would not be eligible for social hosing and the only other option available to them would be private housing which would be unable to produce anything. The evidence was provided on the morning of the day the case was listed for trial (which subsequently did not proceed due to lack of court time). Applying the Mitchell and Denton principles the Court refused to admit the evidence. This decision was upheld on appeal by the High Court. The judge had a wide discretion under CPR 3.9 and the judge was, “*plainly entitled to conclude that, in all the circumstances of the case, he should not grant relief from sanctions, given the importance of enforcing compliance with the Court’s orders, and the disadvantages of admitting this additional evidence.*”

Anti Social Behaviour Injunctions

1. *Southern Housing Group Ltd v Berry*, Deputy District Judge Martynski The County Court at Clerkenwell and Shoreditch 25 February 2021. A without notice ASBI was granted against the Defendant at an ex-parte hearing. At this further hearing the Deputy District Judge considered the principles relating to full and frank disclosure at ex-parte hearings as articulated in *Tugushev v Orlov* [2019] EWHC 2031 and noted the following principles applied:
   1. The duty of an applicant for a without-notice injunction is to make full and accurate disclosure of all material facts.
   2. The court must be able to rely on the party who appears alone to repsent the argument in a way not just designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments that it can reasonably anticipate the absent party would wish to make
   3. Full disclosure must be linked with fair presentation. The judge must have confidence in the thoroughness and objectivity of the applicant’s case
   4. An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences.
   5. Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an application to make the court aware of the issues likely to arise et cetera.
   6. Where the facts are material I the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limites have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure wil be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect.
   7. The defendant should identify the alleged failures rather than adopt a scattergun approach.
   8. It is inappropriate to seek to set aside an injunction for non-disclosure that is particular to that case.
   9. If material non-disclosure is established the court will be astute to ensure that a claimant who obtains injunctive relief is deprived of any advantage.
   10. Immediate discharge is likely to be the court's starting point.
   11. The court will still discharge the order even if the order would have been made had the relevant matters been brought to its attention (so, it is saying there that the action taken by the court is in the nature of the sanction).
   12. The court nevertheless obviously has a discretion whether to continue the injunction.

The Deputy District Judge noted that there was material non-disclosure of important facts (namely the Defendant’s mental health condition and that he had made counter-allegations against the complainants) and that, while he recognised the limited resources of the claimant, these failings amounted to poor practice. The Deputy District Judge felt that the injunction could not remain in force in all the circumstances of the case (noting the likely sense of injustice on the part of the Defendant) and accordingly discharged the order.

1. *Metropolitan Housing Trust Ltd v Derrick and Brown*, Recorder Midwinter QC, County Court at Central London 12 March 2021. The recorder refused to make an ASBI there being no evidence that the defendants had committed any acts of ASB. There had been threats of violence and shouting and swearing but in response to abuse and in the context of trying to resolve an issue concerning noise coming from the flat above. It was not just nor convenieant to make an injunction.
2. *Roseberry housing Association Limited v Cara & Elaine Williams* HHJ Luba QC the County Court at Central London 10th December 2021. This case in its simplest terms is required reading for any practitioner dealing with an ASB case. It is a masterclass in how a landlord shouldn’t pursue a case and equally how a case can be well defended and countered. The Claimant sought an ASBI against the Defendant who suffered from serious mental health conditions including OCD and depression. The Defendant contested the application and counter-claimed for discrimination. The Court in this matter held the following:
   1. That, of the 6 sample allegations relied on by the Claimant (of a total of at least 123), only one, which had been admitted by the Defendant in any event, was proven. That sole allegation arose because the Defendant was responding to ASB from one of the complainants and was directly related to that ASB (and has subsequently ceased now the complainant has moved away). The Court also considered whether the evidence could be considered in the round to establish whether there was any basis to make an injunction but was not satisfied that this was the case given that the evidence of the complainants was so poor and prone to exaggeration and embellishment. I the circumstances the Court could only conclude that it was not just or convenient to grant an ASBI.
   2. That the Claimant discriminated against the Defendants in breaching section 15 Equality Act 2010. (Claims for failure to make reasonable adjustments and harassment pursuant to the Equality Act 2010 were not pursued at the trial and dismissed in the judgment).
   3. That the approach to damages for injury to feelings in an Equality Act case is two stage: Firstly to identify the extent of the injury to feelings in the particular case and secondly to quantify it in monetary terms. In relation to these proceedings the Court noted the following,

“…the social landlord failed to see her as a victim rather than a perpetrator. It failed to protect her from the anti-social conduct of others. It was bad enough that she had the misfortune of a life blighted by the crushing rituals and behaviours caused by her OCD. On top of that, she had the burden of defending herself when presented with a deluge of over 100 allegations not previously raised with her, a final warning, a notice seeking possession, and this claim for an injunction haning over her for some eighteen months…

In my judgment, those damages should be significant. The present proceedings should never have been brought. The red flags had been raised by the Council’s earlier decision not to go down this route. Once issued, and in light of the response made to them, they ought to have been stayed or abandoned at an early stage. Pressing on with them, even after undertakings acceptable on everything other than the filming had been openly offered, is inexplicable…

Having considered the totality of the material before me, the comparator authorities to which I was taken and the bands themselves, I am satisfied that this case justified an award reflecting a degree of seriousness just within the lower reaches of the top bamd. That band is described in *Vento* as appropriate for “the most serous cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.” That the characteristic here is disability, and that the discriminatory conduct has extended over a consdireable perio d with very significant adverse impact on the disabled person, to my mind that rings this case into at least the lowest reaches of the top band.”

Damages of £27,500.00 were awarded.

1. *Plymouth Community Homes Ltd v Palmer,* HHJ Mitchell, the County Court at Plymouth 26 February 2021. The Defendant had a mental health condition and was advised to get a dog to manage his condition which he duly did and his condition improved. Landlord advised the Defendant that he must either give up the dog or move to alternative accommodation with a garden. Mr Palmer did not want to move because he had a network of friend and support at his accommodation and did not take either step proposed by the Landlord who subsequently pursued an application for an ASBI. The Defendant opposed the application and pursued a counterclaim for discrimination. The application for an injunction was dismissed and counter-claim granted resulting in an award of £2,500.00 damages against the Claimant. The dog helped alleviate panic attacks and depression and assisted the Defendant with leaving the property, the Claimant’s conduct was not a proportionate means of achieving a legitimate aim (of reducing the impact on other tenants and fire safety of the block or the fabric of the building).

**Part 81 of the Civil Procedure Rules**

# Introduction

1. Civil contempt is behaviour that tends to obstruct, prejudice and/or abuse the administration of justice. Such conduct is punishable by the court and includes:
   1. disobeying or breaching a court order or judgment, including breaching an injunction order made under Part 1 of the Anti-social Behaviour, Crime and Policing Act 2014 (“the 2014 Act”);
   2. disrupting court proceedings or the court process itself.
2. Where orders are made by the County Court, the court has the same common law powers as the High Court to enforce obedience of them (*s.38(1) County Courts Act 1984*) and can commit a person to prison for a fixed term that shall not on any occasion exceed two years (*s.14 Contempt of Court Act 1981*).
3. A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt (*Re: Bramblevale Ltd [1970] Ch 128 per Denning LJ at 137*).
4. Committal proceedings are to be categorised as criminal proceedings for the purposes of Article 6 ECHR ( *Daltel Europe Ltd v Makki [2006] 1 WLR 2713 per Lloyd LJ at paragraph 29*).
5. Part 81 of the Civil Procedure Rules governs contempt of court applications. It was amended by statutory instrument – the Civil Procedure (Amendment No. 3) Rules (SI 2020/747) – and a new Part 81 came into force on 1 October 2020. Rule 81(3) of the revised rules was subsequently amended by the Civil Procedure (Amendment No. 6) Rules (SI 2020/1228) and these latest amendments came into force on 27 November 2020.
6. The commentary to CPR 81.4 in the White Book 2021 provides the following:

“Committing a person to prison by committal order (for any reason) is a serious matter. Courts with criminal jurisdiction, unlike courts with civil jurisdiction, routinely impose imprisonment as a punishment for criminal offences and the procedures of those courts are tempered accordingly. For courts with civil jurisdiction the power to imprison is exceptional and the procedures of such courts have to be specially adapted in certain respects for its exercise. The relevant procedure must comply with fair hearing standards and the court must proceed very carefully. One of the principal objectives of the rules in Pt81 is to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations.”

1. The new Part 81 streamlines and simplifies the previous version, which has been replaced entirely, to make the rules more accessible and introduce a uniform procedural code for all contempt proceedings in the civil courts. It now consists of 10 rules instead of 38; there is no supporting Practice Direction (in contrast to the previous two Practice Directions and Practice Guidance document) and there are now only five prescribed forms,[[3]](#footnote-3) instead of more than twenty-five.

1. There are also no transitional provisions and the new Part 81 applies both to proceedings on foot at 1 October 2020 and to proceedings started after 1 October 2020.

1. There is, however, a saving provision: rule 2 of the Civil Procedure (Amendment No. 3) Rules (SI 2020/747) provides that the old Part 81 continues to have effect in respect of applications under CPR 83.2A to enforce by means of a writ of sequestration.

1. It is also worth remembering that a practice direction is an exercise of the Court’s inherent power, that is to say it is an explanation and enunciation of that inherent power and of how it will be exercised in particular circumstances, but a practice direction does not of itself create new powers. It follows that the absence of a practice direction referring to any power, such as the inherent power of the Court to strike out a committal application, does not remove the power or preclude its use.[[4]](#footnote-4) So to the extent that matters that were contained in the former practice directions are no longer addressed or amended by the new CPR 81 those inherent powers or requirements are still relevant as a matter of common law.
2. As committal proceedings arising from an allegation of breach of an injunction made under the 2014 Act often begin without a formal application, such proceedings are also considered briefly below.8

**The new rules[[5]](#footnote-5)**

# Scope

1. Rule 81.1 makes it clear that Part 81:
   1. is concerned with procedure and not the substantive law of contempt (CPR 81.1(1) and (3));
   2. does not alter the scope and extent of the courts’ jurisdiction to deal with contempt of court (CPR 81.1(2)).

# Interpretation

1. Rule 81.2 replaces the terms “applicant” and “respondent” with “claimant” and “defendant” and defines certain other terms including:
   1. order of committal, which is stated to mean the imposition of a sentence of imprisonment (whether immediate or suspended) for contempt of court.

# How to make a contempt application

1. Rule 81.3 is concerned with how to make a formal contempt application; the level of judge to hear contempt applications where permission is not needed; when permission is required to bring contempt proceedings and the level of judge to hear applications for permission.

1. Rule 81.3(1) provides that:

A contempt application made in existing High Court or county court proceedings is made by an application under Part 23 in those proceedings, whether or not the application is made against a party to those proceedings.

1. The Civil Procedure (Amendment No. 6) Rules (SI 2020/1228) recently amended the revised CPR 81.3 in order to:[[6]](#footnote-6)
   1. ensure that a district judge is able to determine a contempt application in the county court where a rule or practice direction so provides (CPR 81.3(2));11
   2. give the Queen’s Bench Division jurisdiction to determine certain permission applications and contempt applications (CPR 81.3(8)).

1. Consequently, CPR 81.3(2)[[7]](#footnote-7) now provides:

If the application is made in the High Court, it shall be determined by a High Court Judge of the Division in which the case is proceeding. If it is made in the county court, it shall be determined by a Circuit Judge sitting in the county court, unless under a rule or practice direction it may be determined by a District Judge.

1. Practice Direction 2B (Allocation of Judges to Levels of Judiciary)[[8]](#footnote-8) provides for district judges to hear injunctions under the 2014 Act and committal proceedings arising from such hearings.

# Requirements of a contempt application

1. Rule 81.4 sets out what a contempt application must contain. It is intended to stand as the guarantor of procedural fairness and has been described as the cornerstone of the new Part 81.[[9]](#footnote-9) The rule requires every contempt application to be supported by written evidence given by affidavit or affirmation, unless the court directs otherwise (CPR 81.4(1)). CPR 82.4(2) also highlights the steps that are necessary for a lawful committal application to proceed by requiring statements in relation to the same:
   1. Any order which is allegedly breached must be served personally unless the court or the parties dispensed with personal service, in which case the terms and date of the court’s order dispensing with personal service must be provided in the application (CPR 81.4(2)(c)&(d)).
   2. Any order which has allegedly been breached must include a penal notice.
   3. In relation to any undertaking given the Defendant must have understood its terms and the consequences of failure to comply with it.

Statements which a contempt application must contain include:

* 1. the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court) (CPR 81.4(2)(a));
  2. the date and terms of any order allegedly breached or disobeyed (CPR 81.4(2)(b));
  3. a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order[[10]](#footnote-10)
  4. that the defendant has the right to be legally represented in the contempt proceedings and may be entitled to the services of an interpreter (CPR 81.4(2)(i) and (k));
  5. that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid (CPR 81.4(2)(j));
  6. that the defendant is entitled to a reasonable time to prepare for the hearing (CPR 81.4(2)(l));
  7. that the defendant is entitled but not obliged to give written or oral evidence (CPR 81.4(2)(m))[[11]](#footnote-11);
  8. that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate him/her (CPR 81.4(2)(n))16;
  9. that the court may proceed in the defendant’s absence but, in any event, will only make an order of committal if satisfied beyond reasonable doubt of the facts (CPR 81.4(2)(o));
  10. that, if 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 (CPR 81.4(2)(p));
  11. that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment (CPR 81.4(2)(q));
  12. that the court’s findings will be provided in writing as soon as practicable after the hearing (CPR 81.4(2)(r));
  13. that the court will sit in public, unless the court directs otherwise, and the findings will be made public (CPR 81.4(2)(s)).

These requirements are all addressed in the new prescribed form N600 as prescribed in PD4. They are important obligations and given that the N600 is essentially a tick box list of these requirements provided to educate, inform and assist all parties if a Claimant fails to comply with these requirements there ought to be limited tolerance of such failings by any Court considering a Committal application.

# Service of a contempt application

1. Rule 81.5 provides that contempt applications and evidence in support are to be served personally on a defendant unless:
   1. the court directs otherwise in accordance with Part 6[[12]](#footnote-12) (CPR 81.5(1)); or
   2. the defendant has a legal representative on record in the proceedings in which, or in connection with which, the alleged contempt is committed (CPR 81.5(2)).

1. A legal representative can object to being served providing s/he does so in writing within seven days of receipt of the application and evidence in support (CPR 81.5.(2)(a)). If such an objection is made, the matter shall be referred to a judge who shall consider written representations from the parties and determine the issue on the papers unless the judge directs otherwise (CPR 81.5(2)(c)).

1. If the representative does not object in writing, they must at once provide to the defendant a copy of the contempt application and the evidence in support and take all reasonable steps to ensure that the defendant understands them (CPR 81.5(2)(b)).

1. Rule 81.5(2) was introduced to reduce the cost and delay caused by applications to dispense with personal service where solicitors are on the record.[[13]](#footnote-13)

# Cases where no application is made

1. Rule 81.6 gives the court power to commit of its own initiative. It provides that the court shall consider whether to proceed against the defendant in contempt proceedings if it considers that a contempt of court may have been committed (CPR 81.6(1)). The court, if it decides to proceed, shall issue a summons to the defendant (CPR 81.6(3)) which shall be served on the defendant personally (CPR 81.6(4)). In the hierarchy of individuals who could pursue an application to commit a Defendant ((1) The party that obtained the order, (2) the Attorney General and (3) the Court) the Court is the least well placed to do so and the exercise of this power is likely to be in rare and exceptional circumstances[[14]](#footnote-14). It is unlikely to arise in housing cases unless there is a contempt in the face of the Court.

# Directions for hearing of contempt proceedings

1. Rule 81.7(1) provides that 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. The rule gives the court power to issue a bench warrant to secure the attendance of the defendant (CPR 81.7(2)). However, the court may not give any direction compelling the defendant to give evidence either orally or in writing (CPR 81.7(3)).[[15]](#footnote-15)

1. The rule does not specify a minimum period of time between service of the committal application and the hearing date. However, an earlier rule provides that the defendant is entitled to a reasonable opportunity to:
   1. obtain legal representation and apply for legal aid (CPR 81.4(2)(j)); and
   2. prepare for the hearing (CPR 81.4.(2)(l)).
2. Given the criminal nature of proceedings it is important to avoid making standard directions as though these are standard civil proceedings. For example it is worth noting, given the Defendant’s right to not self-incriminate it is unlikely that standard disclosure directions ought to apply to the Defendant (In standard criminal cases the Defendant is subject to no disclosure obligation while a Prosecutor is subject to arguably more onerous disclosure obligations than those which arise in civil proceedings). It would be appropriate however to require the Claimant to provide standard disclosure by list and further consideration ought to be given to requiring the claimant at the outset to ensure that they obtain and disclose specific material that may not be in their control, including disclosable material in the possession of the police (e.g. custody records and body-cam footage).

# Hearings and judgments in contempt proceedings

1. Rule 81.8 contains provisions about sitting in public and private.20 It provides that:
   1. all committal proceedings should be listed and heard in public unless the court directs otherwise (CPR 81.8(1));
   2. advocates and the judge shall be robed in all committal proceedings, whether or not the court sits in public (CPR 81.8(2)).[[16]](#footnote-16)

1. Before deciding to sit in private, the court has to notify the media (CPR 81.8(3)), consider any submissions on the issue from the parties or media organisations (CPR 81.8(4)) and, if it decides to sit in private, give its reasons in public (CPR 81.8(5)). Judgment and sentencing should always take place in public (CPR 81.8(6)). The court is also required to inform the defendant of the right to appeal without permission, the time limit for appealing and the route of appeal (CPR 81.8(7)). Judgments should also be published (CPR 81.8.(8)).

1. As regards, CPR 81.8(7), by reason of section 13 of the Administration of Justice Act 1960 and CPR 52, an appeal against a committal order lies to the Court of Appeal and does not require permission to appeal.[[17]](#footnote-17) The Civil Justice Council has recently considered the route of appeal issue:23

* 1. An appeal in relation to a committal order made by a district judge may lie to either a circuit judge or the Court of Appeal under section 13(2) [of the Administration of Justice Act 1960]. An appellant should ordinarily, but not necessarily, follow the former. … A circuit judge faced with such an appeal can transfer the case to the Court of Appeal (CPR52.14) or determine it. If the circuit judge dismisses the appeal there is a right of appeal to the Court of Appeal under section 13(2); as this is a second appeal, permission is required.[[18]](#footnote-18)
  2. An appeal from a circuit judge lies to the Court of Appeal under section 13(2). *Hurst* predated the Access to Justice Act 1999 (Destination of Appeals) Order 2016 and CPR PD 52A, so does not provide any authority for a route of appeal to a High Court Judge (which would usually be quicker, easier and less costly to arrange than an appeal to the Court of Appeal, something which is of particular importance if dealing with short sentences).[[19]](#footnote-19)
  3. An appeal from the youth court will lie to the Crown Court.

# Applications to discharge committal orders

1. Rule 81.10 allows a person who has been committed to prison for contempt of court to apply to the court to purge his or her contempt by, for example, apologising to the court for their past behaviour and promising to comply in future with the court’s orders. The rule provides that a defendant against whom a committal order has been made may apply to discharge it (CPR 81.10(1)) by an application notice under Part 23 (CPR 81.10(2)). The court hearing the application should consider all the circumstances and make any order under the law as it thinks fit (CPR 81.10(3)).
2. An application to discharge a committal order should normally be heard by the judge who made the order.[[20]](#footnote-20) The court can grant the application (resulting in the defendant’s immediate release), or refuse it, or order release on a future date.[[21]](#footnote-21)

# Arrest

1. Committal proceedings often begin without a formal application when a person alleged to have breached an injunction order made under the 2014 Act is arrested either pursuant to a power of arrest attached to a provision of an injunction[[22]](#footnote-22) or a warrant of arrest.[[23]](#footnote-23)

1. A person arrested pursuant to a power of arrest attached to a term of the injunction must be brought before a judge within 24 hours of arrest,[[24]](#footnote-24) otherwise the statutory power to remand[[25]](#footnote-25) does not arise and the defendant must be released. Where this power is exercised shortly after an injunction has been made it is also worth clarifying whether the Defendant has been personally served with the injunction and power of arrest prior to this power being exercised.
2. CPR 65 provides that the judge may, whether the arrest was by power of arrest or warrant of arrest, either deal with the matter or adjourn the proceedings (CPR 65.47(2)). However, if the proceedings are adjourned and the arrested person is released, the matter must be dealt with within 28 days of the date on which the arrested person appears in court (CPR 65.47(3)(a)), or thereafter by formal committal application[[26]](#footnote-26) (CPR 65.47(4)).

1. Finally, subparagraph (5) of CPR 65.47 which used to confer jurisdiction to a district judge to deal with committal applications under the previous Part 81 has been omitted.

Sentencing

1. This part of the paper is mostly directed at drawing Practitioners attention to the recommendations of the Civil Council Report ‘Anti-Social Behaviour and the Civil Courts’ dated July 2020 but published in October 2020 on sentencing. To date these remain recommendations but they are highly persuasive as they emanate from a panel of distinguished and experienced practitioners and judiciary and have been commended by the Master of the Rolls.

Sentencing

1. The report highlights, in particular, 2 important points on sentencing. The first is to remind practitioners and judges that many principles of sentencing in Criminal law apply to sentences for committals for breaches of ASBIs. Regrettably, these are often unfamiliar to civil practitioners and judges (see para 381 where lack of knowledge by some civil judges is highlighted). Secondly, the report has its own sentencing guidelines which are significantly more lenient than the guidelines currently used. The current guidelines are criticised as not really being fit for purpose when applied to civil contempt.
2. Remember that the powers of the Civil court are much less than the Criminal court and fining is often not a practical punishment. This essentially leaves the judge with immediate or suspended imprisonment, no order or deferring sentence. There is no power to make a community order.
3. Criminal law principles that apply when sentencing in committal:
4. The purpose of sentencing is threefold: punishment for the breach, secure future compliance and rehabilitation.[[27]](#footnote-27)
5. Before custody is imposed the custody threshold must be passed including suspending custody. It is wrong to pass a suspended sentence because the alternative would be no order (and see 5).
6. The clear intention of the custody threshold is to reserve prison as a punishment for the most serious offences.[[28]](#footnote-28)
7. If Custody is required, the least period that can properly be justified must be imposed.[[29]](#footnote-29) That is step 1; step 2 is to then consider whether to suspend.
8. It is a ‘cardinal principle of sentencing’ that a suspended sentence must not be imposed unless the custody threshold is passed. The common practice by civil judges to suspend custody where the custody threshold has not been passed is wrong in principle (see 402).
9. A suspended sentence must be for a fixed term, but until trial is OK.
10. The sentence imposed must have some relationship to the maximum sentence the court can impose. In civil committals that is 2 years.
11. It is wrong in principle to impose a custodial sentence where a fine would otherwise be appropriate because the respondent is unable to pay.[[30]](#footnote-30)
12. The principal sentencing guidelines in criminal sentencing apply equally, with necessary modifications, to sentencing for committals. These are: Breach Offences: Definitive Guideline; Imposition of Community and Custodial sentences: Definitive Guideline;[[31]](#footnote-31) Reduction in sentence for a guilty Plea: Definitive Guideline and Offences taken into consideration and totality: Definitive Guideline;
13. Where a Respondent pleads guilty to the contempt allegations, the sentence should be reduced by one third.[[32]](#footnote-32)
14. The total time that the respondent can be expected to serve should be explained at sentencing by the judge[[33]](#footnote-33). The working party argues that this applies equally to civil judge and if it does not it should be adopted by them It is almost always omitted (see para 451). This requirement has recently been repealed as of December 2020 but, arguably, remains good practice.
15. As soon as a contemnor has served half his sentence, s/he must be released unconditionally: S. 258(2) Criminal Justice Act 2003.

1. Time on remand is automatically deducted from the sentence in criminal cases. Time on remand should also count toward the sentence imposed in civil contempt but **it is not automatic**. This lacuna has been the case for as long as I can recall but it is still not widely known. The sentencing judge not only has to make inquiries to ascertain what time has been spent on remand but he must himself deduct that from the totality of the sentence. Not only that, the time needs to be doubled because of the fact that the respondent will be released after serving half the sentence. The report empathises this point and that many judges are unaware of it (para 451). So, an individual arrested under the power of arrest on Saturday and produced on Monday will (if then bailed) have spent 3 days when his liberty is restricted equivalent to a sentence of 6 days.

The recommended new Guidelines

1. The court was required to have regard to any sentencing guideline that is relevant[[34]](#footnote-34). This has also been repealed by the Sentencing Act 2020. The current position is that the courts refer to, and are referred by the applicant’s counsel, part of the Breach Offences Definitive Guideline under the category ‘Breach of a criminal behaviour order’. The problem is that this was not intended to cover breaches of civil injunctions, the maximum sentence is far more than for contempt (5 years as opposed to 2) and refers to community orders which the civil court cannot impose (community orders are within 8 of the 9 sentencing ranges). Courts should be referred to the criticisms in the Report to the guidelines on breach of a community behaviour order and that S. 125 (1) Coroners and Justice Act 2009 has been repealed. [[35]](#footnote-35) The report recommends a bespoke sentencing guideline which it publishes at pages 144 to 154. In my opinion, all sentencing judges should be referred to this. A copy is annexed to this paper.

Deferring sentence/imposing positive requirement

1. Deferring sentence was quite popular for a period when I practised criminal law for some offenders. In criminal courts this can be for no more than 6 months. The civil court has the same power, not limited to 6 months although the report recommends that this should be the maximum period. The benefit of this is that it provides a strong incentive not only to behave but also to comply with a positive requirement that the court feels would be beneficial: such as attending a drug or alcohol programme.

No Order

1. This will be appropriate, for example where the court does not consider that the conduct merits any further punishment (bear in mind that the process of defending a committal application can be hugely distressing), or the custody threshold is not reached and a fine is inappropriate because of lack of means or for time served.

Michael Marsh-Hyde, Martin Hodgson & Yinka Adedeji

One Pump Court Chambers

7 April 2022

ANNEX A Draft PTSH Direction

This case shall be listed for a Pre-Trial Settlement Hearing (“PTSH”) on the first available date after [Date of Pre-Trial Checklists have been exchanged] at the start of the day with a time estimate of 1hr.The parties must note and comply with the following directions which apply to the PTSH:

1. The PTSH is listed about 4 weeks before the trial window. It is an important hearing the purpose of which is (a) to review compliance with the court’s case management directions and (b) to conduct a conciliation hearing with a view to trying to achieve settlement or to narrow the issues for trial. The judge conducting the PTSH (who will not be the trial judge) will expect to hear about any offers made whether or not they have been made without prejudice.
2. Duly authorised, senior and informed representatives of the following agencies listed shall attend the PTSH:
   1. [insert necessary agencies here]
3. All parties must attend the hearing with their legal representative if they have one. The hearing is not suitable for a telephone hearing. If a party is insured, it is a matter for that party to ensure that whoever attends the PTSH on behalf of the Defendant has sufficient authority to negotiate a settlement. The legal representative attending the PTSH must have conduct of the case and preferably be the proposed trial advocate. At the very least the legal representative must have sufficient knowledge and authority to deal with any issues that might arise at a PTSH, including settlement of the claim. If the PTSH has to be adjourned because of a failure to comply with this direction the court will expect to make a wasted costs order.
4. The Claimant (or the Defendant if represented where the Claimant is a litigant in person) must by no later than 7 days before the PTSH file at court and provide to the Defendant a properly paginated PTSH bundle comprising the following:
   1. a case summary (agreed if possible)
   2. a statement of the issues which are agreed between the parties and those which are not
   3. all directions orders
   4. the statements of case
   5. witness statements
   6. expert evidence including medical reports and any joint statements of experts
   7. an up to date schedule of loss and counter-schedule
   8. other documents limited to those critical to the issues to be considered at the PTSH.
5. The parties shall by no later than 3 working days before the PTSH file at court and exchange statements of their costs to date and estimates of costs to trial.
6. Parties and attendees should attend at least 30 minutes in advance of the time the hearing is listed and be prepared to remain at Court for the remainder of the day. The court shall ensure that conference facilities are available throughout the day.
7. The parties must attend the hearing unless directed by the judge that their attendance is not required. In particular parties should not assume (unless the case has settled or been discontinued) that their attendance is not required because they have filed agreed directions.
8. In the event of non-attendance a claim may be struck out or judgment entered as appropriate.

1. Brooke LJ makes some helpful observations in this regard in *Moat Housing Group-South Ltd v Harris* [2005] EWCA Civ 287 at §171-172 [↑](#footnote-ref-1)
2. Pre-Trial Settlement Hearings were being applied to Multi-Track cases as a standard practice at Southampton County Court until at least 2018 (they may still be applying them there but we do not have recent experience). There is further support for such hearings with the reference to “Early Neutral Evaluation” hearings contained at CPR 3.1(2)(m) (albeit it is recognised that ENE hearings would likely arise much earlier than is proposed with a PTSH). Circuit Judges at Central London County Court have listed and conducted such hearings where sought. [↑](#footnote-ref-2)
3. PD4 refers to: (i) N600 Contempt Application; (ii) N601 Summons – r.81.6(3); (iii) N602 Warrant to Secure attendance at Court – r.81.7(2); (iv) N603 Order – r.81.9; (v) N604 Warrant of Committal – r.81.9. 8 Paragraphs 32-35 of this document. [↑](#footnote-ref-3)
4. *Taylor v Robinson* [2021] EWHC 664 (Ch) HHJ Eyre QC summarising a series of principles derived from more senior courts at §46) [↑](#footnote-ref-4)
5. The new rules are set out in the attached Schedule 1 to the Civil Procedure (Amendment No. 3) Rules 2020 (SI 2020/747) and the Civil Procedure (Amendment No. 6) Rules (SI 2020/1228). [↑](#footnote-ref-5)
6. The amendments correct unintended effects of the Civil Procedure (Amendment No.3) Rules 2020 (SI 2020/747), one of which was to remove the jurisdiction of district Judges (and deputy district judges) to hear committal applications in respect of breaches under the 2014 Act. See, for example, Sarah Salmon: *Committal changes causing problems for breaches of Anti-Social Behaviour, Crime and Policing Act 2014 injunctions*. 11 See paragraph 12 of this document. [↑](#footnote-ref-6)
7. The rule has not been amended on-line yet. [↑](#footnote-ref-7)
8. Paragraph 8.1 and 8.3 [↑](#footnote-ref-8)
9. Civil Procedure Rule Committee: *Proposed rule changes relating to contempt of court; redraft of CPR Part 81* (2020 Consultation). [↑](#footnote-ref-9)
10. In *Ocado Group Plc v McKeeve [2021] EWCA Civ 145* the Court of Appeal reaffirms that the fundamental question when considering if the allegations are sufficiently particularised to enable the alleged contemnor to meet the charges is whether a reasonable person in the position of the alleged contemnor, having regard to the background against which the committal application was launched would be in any doubt as to the substance of the breaches alleged. The application notice needs only set out a succinct summary of the claimant’s case, to be read in the light of the background known to the parties: it is for the evidence to set out the detail. [↑](#footnote-ref-10)
11. See also CPR 81.7(3) referred to in paragraph 20 of this document. 16 Ibid. [↑](#footnote-ref-11)
12. Part 6 of the CPR deals with personal service and dispensing with service. [↑](#footnote-ref-12)
13. Civil Procedure Rule Committee: *Proposed rule changes relating to contempt of court; redraft of CPR Part 81* (2020 Consultation). [↑](#footnote-ref-13)
14. *Isbilen v Turk* [2021] EWHC 854 per Deputy Judge Tracy at §31-§32 – full guidance on the relevant principles can also be found at §26-§44 [↑](#footnote-ref-14)
15. See also CPR 81.4(2)(m) and (n) referred to in paragraph 14 of this document. 20 See also CPR 39.2. [↑](#footnote-ref-15)
16. The inclusion of this provision in the rules is intended to emphasise the gravity of contempt proceedings.

    See Civil Procedure Rule Committee: *Proposed rule changes relating to contempt of court; redraft of CPR Part 81* (2020 Consultation). [↑](#footnote-ref-16)
17. CPR 52.3(1)(i). 23 *Anti-Social Behaviour and the Civil Courts* *(July 2020),* p131*.* [↑](#footnote-ref-17)
18. See also *LB Barnet v Hurst* [2002] EWCA Civ 1009 referred to by the Civil Justice Council at paragraph 464, p. 131, *Anti-Social Behaviour and the Civil Courts* *(July 2020).* [↑](#footnote-ref-18)
19. Ibid. [↑](#footnote-ref-19)
20. *Swindon BC v Webb* [2016] EWCA Civ 152. [↑](#footnote-ref-20)
21. Ibid*.* See *also Harris v Harris* [2001] EWCA Civ 1645; *CJ v* *Flintshire BC* [2010] EWCA Civ 393 and Civil Justice Council: *Anti-social Behaviour and the Civil Courts* *(July 2020*), pp 128-130. [↑](#footnote-ref-21)
22. Section 9 of the 2014 Act. [↑](#footnote-ref-22)
23. Section 10 of the 2014 Act. [↑](#footnote-ref-23)
24. Section 9(3) of the 2014 Act. Christmas Day, Good Friday and Sundays are disregarded in working out the 24 hour period: section 9(4) of the 2014 Act. [↑](#footnote-ref-24)
25. Section (9(5) and (6) of the 2014 Act. [↑](#footnote-ref-25)
26. See CPR 81(3)(1) referred to in paragraph 10 of this document. [↑](#footnote-ref-26)
27. Solihull MBC V Willoughby [2013] EWCA Civ 699 @20 [↑](#footnote-ref-27)
28. See Para 395 and sentencing council guideline [↑](#footnote-ref-28)
29. Solihull V Willoughby @271 [↑](#footnote-ref-29)
30. Re M (contact order) [2005] EWCA Civ 615 [↑](#footnote-ref-30)
31. Obviously, the civil court has no power to impose community sentences but the fact that it can not do so does not make imprisonment appropriate if the custody threshold is not passed [↑](#footnote-ref-31)
32. Technically a respondent does not plead guilty s/he admits the allegation. [↑](#footnote-ref-32)
33. S.174 Criminal Justice Act 2003; repealed by Sentencing Act 2020 [↑](#footnote-ref-33)
34. S.125(1) Coroners and Justice Act 2009 [↑](#footnote-ref-34)
35. See also R V Clarke (Morgan) [2018] 1 Cr. App.R.: there is no statutory duty on a sentencing judge to have regard to any guideline which may be useful where no guideline exists for a particular offence. [↑](#footnote-ref-35)