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Three cases on contempt of court and what they mean for commercial fraud litigation

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Recent weeks have seen a spate of decisions on contempt of court. Most are sentencing cases and thus of little general interest since they turn on their facts. However, 3 cases do raise issues of general principle which not infrequently arise in the commercial fraud context.

1) The right to silence at a committal hearing

In ***Andreewitch v Moutreuil*** [2020] EWCA Civ 382, the Respondent, A, appealed against his committal for contempt of court for breaching a freezing injunction in family proceedings relating to a company of which he was sole shareholder and director.

A appeared at the committal hearing unrepresented. He had filed an unsigned witness statement and accepted the judge's invitation to go into the witness box to swear to the truth of its contents. He was then cross-examined. He was found to be in contempt of court. On appeal, A contended that he should have been informed that he was not obliged to give oral evidence and that the hearing had for this reason been procedurally unfair. Interestingly, on appeal he does not appear to have contended that had he been informed of his right to silence he would (necessarily) have exercised it.

Neither PD 37A of the Family Proceedings Rules nor CPR PD 81 currently refers to the alleged contemnor's right to silence. (The Rules Committee is consulting about changes to CPR PD 81 which include the addition of such a reference.)

The Court of Appeal held that the Judge's failure to inform A of his right to silence (and to warn that adverse inferences might be drawn from its exercise) was not a purely technical failure, but a procedural defect which had deprived him of a proper choice about how to proceed.

Even so, that did not necessarily render the hearing procedurally unfair. What did so was that the key factual issue in the committal

was whether A had procured the making of payments by the company *knowing* that they were not being made in discharge of proper liabilities.

In finding that he had, the Judge had relied heavily on his oral testimony. A's witness statement need only have been signed for it to be accepted as evidence, there was therefore no need for him to go into the witness box for that purpose. If A had been informed of his right not to give evidence, he might not have done so and the Judge's findings might have been different.

For this reason, the Court of Appeal could not be satisfied that no injustice had occurred and allowed A's appeal.

2) Threats to commit – abuse of process?

Whether the commencement or pursuit of a committal application will be regarded as an abuse of process, will usually depend on what the applicant says about them. The purpose of committal proceedings is to secure compliance with the order of the court; does this mean that to threaten the bringing or continuation of them with any other purpose is an abuse of process?

Perhaps that stark position used to be the law but, if so, a more nuanced approach now seems to prevail.

In ***Integral Petroleum SA v Petrogat FZE*** [2020] EWHC 558 (Comm), Foxton J considered the decisions of the Court of Appeal in ***Knox v D'Arcy Ltd*** (unreported) (19 December 1995) and ***Ferster v Ferster*** [2016] EWCA Civ 77 (in both of which the threat to commit was clearly being used as a lever to secure a favourable settlement) and ***Boreh v Republic of Djibouti*** [2015] EWHC 769 (Comm)).

Foxton J concluded that the question of abuse had to be decided in the context of what was "permissible in hard fought commercial litigation". He noted that committal proceedings were now a common feature of modern commercial litigation and that once such proceedings were under way, settlement of the overall dispute would inevitably have to address the committal application in order to settle all disputes between the parties.

The use of a committal application as a lever to bully a respondent into settlement will always be wrong and such a threat about contempt proceedings would fall within the "unambiguous impropriety" exception to "without prejudice" privilege so as to allow the relevant communication to be seen by the court.

However, the very fact that settlement of the underlying dispute will usually include settlement of the committal application means that the court should not too readily conclude that references to committal proceedings in settlement correspondence constitute an improper threat.

Foxton J proceeded

> "on the basis that the pursuit of an application to commit will not be such an abuse unless the applicant had as a 'real and substantial purpose' the use of the threat of committal to force the respondents to settle the claim"

He left open the question whether the appropriate test of motive should be "predominant purpose" - for the purposes of the case

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before him it did not matter – but he could see the force of predominant purpose (as with the tort of abuse of civil process) because

> “an enhanced mental element is generally required to make ostensibly lawful steps unlawful because of the purpose for which they are taken.”

It will not be an abuse to threaten committal where the purpose is to encourage the defendant to comply with its obligations (or remedy an existing breach). Whether an abusive threat in respect of committal is being made will often turn on a careful consideration of the terms of the relevant correspondence and, in particular, whether a threat to commit is accompanied by an offer to settle for a sum which exceeds the claimant’s claim (rather than makes an upward adjustment within that claim) or is otherwise unreasonable, for example by threatening publicity. Special care should be taken to avoid making too specific a link between not making (or withdrawing a committal application) and obtaining some particular relief or remedy.

On the facts of *Integral* (and inevitably in a wider context than there is space to describe) none of the impugned emails from the Claimant’s solicitors amounted to impermissible threats. The Defendant relied most strongly on the following passage:

> "We would respectfully submit that this is a very reasonable settlement for all parties. The Claimant proposes a discount of at least US$195,000 compared to its claims in the arbitration. Petrogat's and San Trade's claims in the arbitration are virtually certain to fail. Petrogat's and San Trade's legal fees to run the arbitration until the end are likely to exceed the proposed settlement sum. 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 concluded that although the reference to “arrest warrants” was “unwise” it did not ultimately render an otherwise temperate email abusive.

3) Proceeding in the Respondent’s absence

In ***Dell Emerging Markets (EMEA) Ltd v Systems Equipment Telecommunications Services SAL*** (2 April 2020) Henshaw J had to decide whether to proceed to sentence for contempt of court in the absence of the respondents (and their legal representatives). At an earlier hearing at which they did not appear and were not represented, he had found them to be in contempt of court by continuing proceedings in Lebanon in breach of an anti-suit injunction (see [2020] EWHC 561 (Comm)). Having proceeded in their absence on that occasion, he had adjourned the hearing for sentencing.

The respondent obviously has the right to attend and/or to be legally represented, but these rights can be waived in whole or in part (see ***R v Jones*** [2001] EWCA Crim 168).

The judge therefore has a discretion to proceed in the defendant’s absence and although this is to be exercised in “all the circumstances of the case”, a number of important factors emerge from the authorities (see ***Navig8 Chemicals Pool Inc v Nu Tek (HK) Pvt Ltd*** [2016] EWHC 1790 (Comm) [2016] and ***ICBC Standard Bank PLC v Erdenet Mining Corporation LLC [2017]***

EWHC 3135 (QB) applying, in the commercial context, the "checklist" compiled in the Family Division in ***Sanchez v Oboz [2015] EWHC 235 (Fam)):***

i. Have the respondents been served with the relevant documents, including notice of the hearing?
ii. Have the respondents had sufficient notice to be able to prepare for the hearing?
iii. The reason, if any, advanced for non-appearance?
iv. Whether the nature and circumstances of the respondents' behaviour shows that they have waived their right to be present; [*ie* can it reasonably be concluded that the respondents knew of or were indifferent to the consequences of the case proceeding in their absence?]
v. Whether an adjournment would be likely to secure the attendance of the respondents or facilitate their representation;
vi. The disadvantage to the respondents in not being able to present their account of events;
vii. Whether undue prejudice would be caused to the applicant by any delay?
viii. Whether undue prejudice would be caused to the forensic process if the application proceeded in the absence of the respondents;
ix. The 'overriding objective' [including the obligation on the court to deal with the case justly, including doing so expeditiously and fairly and taking any step or making any order for the purposes of furthering the overriding objective].

Even where a committal hearing proceeds in the absence of the respondent, it is usual – if the contempts are proved – for sentencing to be adjourned. This not only provides the respondent with the opportunity to attend and/or to make submissions but also – in an appropriate case – to seek to purge the contempt.

No transcript is yet available in ***Dell*** but, doubtless influenced by the fact that he had given them every opportunity on the previous (unattended) substantive hearings of the application, Henshaw J seems to have had little difficulty in concluding that it was appropriate to proceed in the Respondents' absence. He sentenced them to substantial periods of imprisonment. Note, however, that the suggestion in the Westlaw summary – at [2020] 4 WLUK 43 – that this included a sentence of 9 years' imprisonment must be incorrect, not least because section 14 of the Contempt of Court Act 1981 limits the court's sentencing power for contempt of court to a maximum of 2 years' imprisonment!

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