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Do's and Don'ts of Committal Applications

An analysis of W v H (No 2) (Contempt, contents of application notice) [2015] EWHC 2436 (Fam).

Introduction:

Whilst the committal hearing is also reported, it is the report, as above, dealing with Parker J's consideration of the procedural requirements of committal applications and the powers of the court to remedy defects, which is of most interest to practitioners.

Facts:

H had failed to meet the payment of a lump sum order in financial remedy proceedings. As ordered he had provided the W's solicitors with share certificates as security, but then he registered the same as lost and then cancelled them, subsequently selling the re-issued shares for personal gain. Predictably enforcement proceedings ensued which H failed to attend as ordered whereupon he was directed to provide certain information.

By further application, W pursued H's committal in the absence of the supply of the information. W had by prior application, first sought, under the **Family Procedure Rules 2010 ('FPR 2010')**, enforcement by such method as the court may consider appropriate pursuant to **Rule 33.3 (2) (b) FPR 2010**. This had resulted in a suspended committal order. In this, her second application to commit, she now sought H's committal for breaches of:-

- (i) an undertaking within the financial remedy order to lodge share certificates as security,
- (ii) an existing enforcement order ie to attend the previous hearing and produce documents, and
- (iii) an order made within a freezing injunction ie to provide details of worldwide held assets (see Para 48).

Before Parker J, H maintained not only that he was not in breach and had no intention to breach the court orders, but also that the committal application itself was defective as it lacked sufficient particularisation.

W's application, in the part of the form which required details of the orders sought, had referred only to the paragraph numbers of the undertakings and orders allegedly breached by H and had not set out their terms or the details of the breach (Para 49). However, the application did attach a draft order in which the terms of the relevant orders and the way they were breached were set out (Para 50). In addition, W had ticked the application box to indicate she relied upon an attached statement from her solicitor, which was both consistent with the application and set out details of the allegations made (Para 51).

Pursuant to *Harmsworth v* and FPR rule 37.10(3)(a), H was defective as it did not contain sufficient particularisation of the particulars supplied outside the notice itself could not cure the deficiency (Para 72), albeit it was permissible to append additional sheets to the notice document.



Harmsworth [1988] 1 FLR 349 claimed that the committal notice (as required by the Rules) breaches alleged and any

Parker J, having reviewed the law, confirmed that the committal application must set out the allegations with sufficient particularity, and accepted that the test set out by Nicholls LJ (as he was) in *Harmsworth*, remained the relevant test as to whether an application to commit was in the appropriate form to constitute sufficient notice of the allegations made (Para 84). Her Ladyship's judgement and the guidance she sought to provide for future such applications is tabulated below for ease of reference (references in parentheses to paragraphs in Judgment):-

Subject:	Procedural Source/ Case law:	Parker J:
<p>Committal Application: Particularisation:</p>	<p>(Para 55) This application is governed by Part 37 of the Family Procedure Rules 2010. Rule 37.10 (3)(a) provides that:-</p> <p>"The committal notice must set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts and be supported by an affidavit."</p> <p>(Para 56). The notes to the Rule at p 2270 in the Family Court Practice 2015 state:-</p> <ul style="list-style-type: none"> - "note the clear requirement of r 37.10 (3) (a)" - "clearly distinguish the application itself from the evidence in support" - "the notice is the equivalent of an indictment." <p>(Para 59). The central point in <i>Harmsworth</i>, per Nicholls LJ, as he then was, is:-</p> <p>"Does the notice specify with sufficient particularity to enable the husband to know from the notice what were the alleged breaches so as to enable him to see the case being made against him." - following <i>Chiltern District Council v Keane</i> [1985] 2 All E. R. 118.</p>	<p>(Para 84) "...the basic premise of <i>Harmsworth</i> is still good law ... that an alleged contemnor must be informed of the allegations against him with particularity."</p> <p>"Nicholls LJ's test "Would the alleged contemnor, having regard to the background against which the application is launched, be in any doubt as to the substance of the breaches alleged?" is still the right one..."</p> <p>The test is consistent with and the foundation of FPR 37 10 (3) (a), and supports the comments to the Rule in the Family Court Practice 2015. The following propositions, therefore, apply:-</p> <ul style="list-style-type: none"> • The Rules are no technicality, but go to the fundamental issue as to whether sufficient information has been given for the alleged contemnor to meet the charge (Para 85); • Particularisation of what is alleged can be provided on an attached sheet or incorporated document of the application but an attached affidavit would be insufficient - the application itself must include the allegations made (Para 86); • Whilst there is an important distinction between the charges made and the facts supporting them, (as is recognised in the application form) any attached evidence, such as an affidavit can be used to prove the facts relied on to make out the assertions set out in the notice of application (Para 87); • The degree of particularisation is not defined in the Rules, however, the more complex the allegation the more the particularisation needed in the application (Para 87); • It cannot be said that a defective notice is no notice at all (Para 94); • It would be a technical defect not to

	<p>(Para 60). Nicholls LJ said that:</p> <p>i) "a person whose liberty was in jeopardy was entitled to know the precise charges against him. It should be apparent on the face of the summons whether or not there were breaches of the undertaking".</p> <p>ii) The question was whether the information was specified within the "four corners" of the notice itself, and even if the knowledge could be acquired from other documents.</p> <p>iii) "The contents of the notice are to be read fairly and sensibly as they would by a reasonable person in the position of the alleged contemnor to whom the notice is addressed."</p> <p>(Para 66) Nicholls LJ had acknowledged that the court had then power under s 13 (3) Administration of Justice Act 1960 to substitute a different order on appeal "...as may be just...(but)... such is the importance which the law attaches to the liberty of the subject... it would only be in an exceptional case that in the absence of (the respondent's) consent the court would exercise its discretion and waive such an irregularity"</p>	<p>include a date of the breach alleged (Para 96);</p> <ul style="list-style-type: none"> • It is not required by the Rules to cite the terms of the order /u/t breached in the application – again any need to reflect the theme of the same in the application depends on the context and any need to make the allegations understandable (Para 97); • In general, the contents of the orders/u/ts must be known or presumed to be known to the respondent, or at least be ascertainable by him/her (Para 97); • If the orders/u/ts could only have been breached in one way - then merely stating the terms of the orders that H allegedly breached (requirements to attend court or provide evidence) would be sufficient in such cases (Para 97); • But where there were a number of ways to commit a breach eg as in the lodging of share certificates as security, then that would call for strict particularisation which in relation to the share security allegation had not been provided in this application (Paras 98 & 99).
<p>Waiver of Defects:</p>	<p>(Para 83) <i>M v P, Butler v Butler</i> [1993] 1 FLR 773 and subsequent authority of the Court of Appeal in both <i>Nicholls v Nicholls</i> [1997] 1 FLR 649 and <i>The Mayors and Burgesses of The London Borough of Hillingdon v Vijayatunga</i> [2007] EWCA Civ 730 has confirmed that as long as the contemnor had had a fair trial and the order had been made on valid grounds, a defect either in the application to commit or in the committal order would not result in the order being set aside, unless this was required in the</p>	<p>(Para 88). It is no longer the law that defects in the notice can only exceptionally be waived. The test is the interests of justice, and whether the alleged contemnor has suffered any injustice or prejudice. The court has to address the fundamental point: did the alleged contemnor have enough information to meet the charge?</p> <p>Whilst the distinction between proposition and fact remains important - It is not to be applied rigidly so as to create injustice- therefore, it does not prevent a court in principle from waiving the defects in the notice on the basis of the contents of the affidavit in support under the current rules and</p>

	<p>interests of justice.</p> <p>Following on from the previous general power of waiver of the above line of cases, FPR 2010 PD37 13.2 now provides specifically:</p> <p>"The court may waive any procedural defect in the commencement of or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect."</p>	<p>following more recent authority (Para 89)</p> <p>While an attached affidavit could not provide the particularisation required of an application (as above), it could justify the waiver of a defect (Para 90).</p> <p>Because circumstances of each case vary widely there must be a degree of judgment and discretion applied as to what particulars are required. The Rule is not fully prescriptive. The degree of particularity required in a given case depends on the context and "what needs to be said to permit the respondent to meet the charge" (Paras 91 to 93).</p> <p>The failures to include dates in this notice and the lack of particularisation of the breach of the undertaking were, therefore, to be cured and it would be wholly wasteful to expect a re-issue in the circumstances (Paras 102 to 108):</p> <p>The totality of the documents served in this case on H would have left him, or indeed any reasonable person in his position, in no doubt as to the case he had to meet. It was in the interests of justice in this case that the defects be waived (Paras 109 & 110).</p>
<p>Wilful Breach:</p>		<p>H had, therefore, committed all the breaches W had claimed – although, he had physically lodged the share certificates, the undertaking had to be viewed as a whole and in the context of its purpose. Lodging the shares was a continuing act, and removing the power of the certificates to provide security by cancelling them placed H in breach (Paras 112 to 122).</p> <p>It was beyond reasonable doubt that each of these breaches by H had been wilful in the sense that he had committed them knowingly and deliberately (Paras 123 to 129).</p>
<p>Further Guidance:</p>	<p>(Para 131 to 136). Contents of a committal notice of application.</p>	<ul style="list-style-type: none"> • The Rules are clear and should be complied with (Para 131); • Obtaining waiver is not just a formality (Para 132) and there are cases where dismissal or an adjournment or re-issue will be necessary in the interests of justice (Para 133); • When providing particulars in the application it is prudent to err on the side of caution (Para 134);

	<p>(Para 137). Drafting of an undertaking.</p>	<ul style="list-style-type: none"> • In general practice (Para 136):- <ul style="list-style-type: none"> - the order/u/t should be at least summarised in the application; -if a simple order then stating it was breached will be sufficient and in other cases a short summary of the breach must be given; - Nicholls LJ in <i>Harmsworth</i> suggested there should be a numbered schedule of breaches in complex cases, to be incorporated in, referred to in, annexed or attached to the notice or otherwise identified as forming part of it - and this may be achieved by reference under the part of the application form stating "please attach a draft copy of the order you are applying for" in terms such as "<i>Paragraphs x and y of the draft order contain the findings which the court is invited to make based on the allegations made by the applicant and the affidavit of evidence in support</i>". -dates and/or times are to be given <p>In retrospect, the undertaking could have recorded that H was <i>not to deal or induce anyone else to deal with the share certificates or the underlying shares</i>,</p> <p>H had been devious and unpredictable, and not every ingenious method of circumventing an undertaking can be foreseen, and the same should not be burdened with too many refinements.</p> <p>However, some thought should be given to drafting orders/undertakings in a way which obviates obvious potential breaches and/or makes it clear what is the underlying purpose of the provision.</p>
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