



The Law of Contempt: Jurisdiction and procedure

1. This paper addresses two discrete areas upon which the Chancery Bar Association considers that it can add something of value to the Law Commission's consultation on contempt of court:
 - 1.1. Jurisdiction
 - 1.2. Procedure

2. The author of this paper appeared as junior Counsel, *pro bono*, in the matter of the *Attorney General v Theodora Dallas* [2012] EWHC 156 (Admin) (*Dallas*) and accordingly it is for ease that reference is made to that case to illustrate some of the difficulties that existed, how CPR 81 has not remedied those difficulties and by analogy how the issues of jurisdiction and procedure are to be applied in relation to contempt in tribunals and other forums which are presided over by members of the judiciary (of whom a number are members of the Chancery Bar Association).

3. At the outset it is appropriate to acknowledge Appendix E to the consultation paper. Whilst it cannot be disputed that the High Court, in particular, has an inherent jurisdiction to deal with matters, this does not address how the Crown Court Judge, for example, has the power to order or direct, when contempt is in the face of court or consists of disobedience of an order of the court, the matter should be referred to the Attorney General or tried in the High Court or Divisional Court. In the factual matrix painted this was specifically prevented by Ord 52.1(2)(a)(ii) and the same is still prevented by CPR 81, subject to CPR 81.15 (as further explained by illustration below). More specifically, should the procedures set out now in CPR 81 be applied by analogy in such cases

despite the fact that the factual matrix does not fall within the remit of CPR 81? Or should CPR 81 be amended and extended, so as to retain clarity, consistency and certainty?

The Attorney General v Doctor Theodora Dallas

An issue before the Divisional Court on 19th January 2012:

4. One of the issues before the Divisional Court in the *Dallas* case was whether on the true and proper construction of Order 52 of the Rules of the Supreme Court it was an appropriate method of bringing the matter before the Divisional Court, thereby founding its jurisdiction. Or, put another way, whether the Divisional Court had jurisdiction pursuant to RSC Ord. 52 to hear the matter?
5. It is interesting to note that the Attorney General wrote in his notice of objection to the Supreme Court that “it appears that the Appellant is not contending there was no jurisdiction to make an application for an order for committal under Ord. 52...” Irrespective of whether or not this was his understanding of the Appellant’s case the issue was not determined and some 6 months later a new CPR 81 came into existence.

The Ambit of Order 52

6. Under the Civil Procedure Rules Schedule 1, Order 52 of the Rules of the Supreme Court provides the jurisdiction of the Divisional Court to punish for contempt of court.
7. The relevant portion reads [White Book 2012 vol 1 pg 2374]:

Committal for contempt of court

1 (1) *The power of the High Court or Court of Appeal to punish for contempt of court may be exercised by an order of committal.*

(2) *Where contempt of Court-*

(a) *is committed in connection with –*

(i) *any proceedings before the Divisional Court of the Queen’s Bench Division; or*

(ii) *criminal proceedings, **except where contempt of court is committed in the face of the court, or consists of a disobedience to an order of the court**¹, or a breach of an undertaking to the court, or*

(iii) *proceedings of an inferior court; or*

(b) *is committed otherwise than in connection with any proceedings,*

then, subject to paragraph (4), an order of committal may be made only by a Divisional Court of the Queen’s Bench Division.

This paragraph shall not apply in relation to contempt of the Court of Appeal.”

8. From the bold (my emphasis) highlighted parts it is clear that this exclusive jurisdiction of the Divisional Court does not apply where the contempt is committed in connection with criminal proceedings **and either** in the face of the court, or consists of disobedience of an order of the court, or a breach of an undertaking of an order of the court.

9. It is submitted that on the facts of the *Dallas* case that:

9.1. the alleged contempt was committed ‘in the face of the court’ it was a case of a juror conducting research on the Defendant in a trial;

9.2. there was no order to be disobeyed as a direction to jurors is not an order of the court, or, if a direction is so determined (as was part of the reasoning for refusal of permission from the Supreme Court) then the contempt consisted of disobedience of a court order which would only seek to reinforce the argument that Ord 52 was not the correct procedure;

9.3. there was no breach of an undertaking, and

9.4. the alleged contempt was committed in connection with criminal proceedings.

¹ An Order must state the name of the name and judicial title of person who made it, bear the date on which it is made and be sealed by the court [Civil Procedure Rules 40.2].

10. Therefore, the Attorney General was acting outwith the scope of Ord. 52 when bringing this matter against the *Dallas*. It is not denied that the High Court has an inherent jurisdiction to determine such matters, but this is not the same point. If the inherent jurisdiction of the High Court was invoked then the question would have been what the appropriate procedures to be adopted. These issues were (i) never pleaded and (ii) never addressed, by the Attorney General. There was limited judgment on the reasoning by the Lord Chief Justice Judge as to how the court's jurisdiction had been founded in the matter of *Dallas*. This was unfortunate.
11. Further, on appeal to the Supreme Court the refusal of permission was silent on the issue of jurisdiction, but did state that "the deliberate disobedience of the specific order of the judge not to use the internet unquestionably amounted to contempt of court at common law". This statement cannot be disagreed with. However, this ignores the jurisdiction argument.

Judgment of the Division Court in *Re Dallas* [2012] EWHC 156 (Admin):

12. The only part of judgment on the jurisdiction of the Divisional Court pursuant to Ord. 52 is referred to in paragraph 4 and expanded upon in paragraph 7.

"Contempt may take many forms. In the context of alleged contempt by or affecting a juror or jury in the Crown Court, in our judgment unless it is appropriate for the Crown Court to deal immediately with the contempt of its own motion (which in the light of many judicial warnings about the dangers inherent in a rushed process would be very exceptional), such cases of contempt should continue to be left to proceedings by the Attorney General under Order 52 of the Rules of the Supreme Court..."

13. A point of general public importance was raised in the *Dallas* case:

13.1. This is new territory. The internet threatens the way in which juries try trials. Members of the judiciary do not have a set direction to give to jurors in respect of what can and cannot be done on the internet whilst acting as a juror. An unparticularised direction “you do not go on the internet” cannot be sufficient. This statement would plainly include a prohibition on accessing one’s emails or skyping one’s family. There are risks of breaching one’s right to a family life for all those who use email and skype to contact friends and family in other parts of the country/world on a daily/weekly basis. A clear direction for members of the judiciary is required; this needs also to be available in different languages so as to prevent any “misunderstanding” even if the juror has a good grasp of English as the effects of this misunderstanding can be loss of liberty. Perhaps when selecting jurors a question can be asked of what is your first language so that the relevant translation can be made available at the start of any trial? Is this feasible/workable?

13.2. Moreover, a penal notice should also be given to jurors as applies when one seeks an injunction. This should be provided after the clear and unambiguous direction is given by the presiding judge in the formal environment of the court room. It is imperative that this is provided to the jurors on a written document that they are permitted to retain for the duration of their duties. A printed card, similar to that upon which the oath for witnesses is printed, should be a relatively in expensive option.

13.3. A new test for the common law of contempt has been applied by the Divisional Court in *Dallas*. This test is, at its core, asserting that one (here a juror but it is likely to be extended to others including it is envisaged members of the Bar) can be in contempt of court for breaching

a judge's direction (not order as defined by Civil Procedure Rules 40.2). It is unhelpful that the judgment of the Divisional Court on a number of occasions uses the words 'direction' and 'order' interchangeably:

13.3.1. Paragraph 9, fourth line: "...deliberately disobeyed a court order..."

13.3.2. Paragraph 14, second line: "...the judge gave the jury a number of directions..."

13.3.3. Paragraph 15, fourth and seventh lines: "...advice rather than as an order.... given an order."

13.3.4. Paragraph 19, first and fourth lines: "He directed the jury... Having directed the jury"

13.3.5. Paragraph 32, seventh line: "...any instructions and directions..."

13.3.6. Paragraph 38, second, fourth and fifth lines: "...had directed her...that this was an order.... deliberately disobeyed the order."

13.4. And that when refusing permission for leave to the Supreme Court it was said by Lord Philips, Lord Hope and Lord Kerr that: "the suggested distinction between "direction" and "order" is insupportable. The meaning of each word depends on its context and both can mean the same. The deliberate disobedience of the specific order of the judge not to use the internet unquestionably amounted to contempt of court at common law". Whilst I do not seek to go behind this reason for refusing permission to appeal it does add considerable force to the argument that Ord. 52 is not an available route to bring contempt of court proceedings in the factual matrix that befell the court in *Dallas*.

13.5. If what the Divisional Court is saying is that the direction to the jury was an order of the court then this enhances the position taken by *Dallas* on the Divisional Courts jurisdiction under Ord. 52.

13.6. It is desirable in the interests of clarity, the understanding of all current and future jurors, and certainty of the common law of contempt of court that the matter is conclusively determined.

13.7. In March 2012 I was asked by the Law Commission to prepare a short paper on contempt. My conclusion was that a new section of the Civil Procedure Rules should be drafted to deal with contempt of court. This is what happened less than 6 months later.

Did the Dallas case instigate the making of new law?

14. On 1st October 2012 the Civil Procedure (Amendment No 2) Rules 2012 SI 2012/2208 came into effect. Civil Procedure Rule Part 81 replaces RSC Order 52 in its entirety and amends and replaces other parts of the RSC and CCR.

15. It is noteworthy that in the second supplement to the 2012 White Book the editor has seen fit to state [r81.0.2 pg 112]:

“In an endeavour to summarise the scope of this Part, it is said in r81.1 that it “sets out the procedure in respect of contempt of court” and applies in relation to an order requiring a person guilty of contempt punishable by virtue of any enactment or to give security for good behaviour as it applies in relation to an order for committal.” That is rather ungainly, but the draftsman deserves sympathy.”

16. It cannot be overstated that the substantive law of contempt is a complicated mixture of common law and statute. Contempt can, and unfortunately does, occur in any forum be it civil, criminal or

specialist tribunals. The jurisdiction of the High Court on the one hand and the County Court on the other are substantially different. Further the High Court has jurisdiction to impose sanctions for contempt, not only in relation to its own proceedings, but also in relation to proceedings of inferior courts. An inferior court includes the county courts, family proceedings court, youth courts and magistrates' courts. No mention is made of tribunals or inquiries. A lacuna can be identified. These jurisdictional difficulties make the drafting of a single set of procedural rules (because these rules do not confer upon the courts the power to make an order for committal [r81.2] and are restricted to the procedures to be adopted) applicable in all forums extremely difficult (and the providing of a succinct summary of them almost impossible).

17. One general point about r.81 is that it is less than clear to what extent it is directly, or indirectly, applicable to all cases of contempt in criminal courts. Reference is made to criminal proceedings in r.81.12 but r.81.1(3) states "unless otherwise stated, this Part applies to procedure in the Court of Appeal, the High Court and county courts." Thus at first blush it must be right that only CPR 81.12 applies to criminal proceedings. This therefore leaves the jurisdictional and procedural aspects of contempt in criminal proceedings in far greater disarray than if the whole of r.81 could be applied to criminal proceedings.

Civil Procedure Rule Part 81

18. Several identifiable circumstances can result in persons being guilty of contempt and punishable by custodial or non-custodial sentences. Pt 81 recognises this and is structured accordingly:
 - 18.1. Contempt in the face of the court [section 5 r.81.16];

- 18.2. Contempt for making a false statement of truth or disclosure statement [section 6 rr81.17 & 81.18];
- 18.3. Committal for breach of a judgment, orders (whether final or interlocutory) or undertaking to do or abstain from doing an act either by committal [section 2 r 81.4 to 81.11] or by issue of writ of sequestration [section 7 rr81.19 to 81.27]; and
- 18.4. For the interference with the due administration of justice (either in a particular case or as a continuing process) [Section 3 rr 81.12 to 81.14].
19. Pt 81 is supplemented by Practice Direction 81 and they largely replicate the existing practice and procedure but do so in a clearer and more logical fashion. However, there are two identifiable disadvantages of this “catch all” Part:
- 19.1. Repetition is rife because of the similarity of procedures for several types of contempt
- 19.2. A person may be guilty of more than one type of contempt by the one act or omission and accordingly a choice has to be made and which rule should prevail in those circumstances.
20. The next part of this paper looks at how *Dallas* would have been determined, from a jurisdictional and or procedural point of view, if the case had been brought after 1st October 2012 which is when r.81 was enacted.
21. It is convenient to assume that the totality of r. 81 is applicable to criminal proceedings because it seeks to emphasis the issues that exist.

Jurisdiction to bring *Dallas'* case now:

22. Under Pt 81 where contempt is committed in the face of the court there is also an interference with the due administration of justice and if the contempt amounts to disobedience of an order of the court in criminal proceedings the following avenues would be worthy of consideration.
23. Disobedience of an order of the court is set out in Pt 81.4(1)(b) which provides: "If a person ... disobeys a judgment or order not to do an act, then subject to ... the provisions of these Rules, the judgment or order may be enforced by an order for committal."
24. But by virtue of Pt 81.5 such a judgment or order must be in writing unless service has been dispensed with if the court is satisfied that the person had notice of the judgment or order by being present at the relevant time [Pt 81.8]. Accordingly, if service of the document was dispensed with (which arguably would have to have been stated by the Judge) then Pt 81.4 could apply.
25. However, next it is important to consider Pt 81.9 which requires a penal notice on the judgment or order to do or not to do an act to be prominently displayed. Thus there must be a warning to the person required to do or not do the act in question that disobedience of the order would be contempt of court punishable by imprisonment, a fine or sequestration of assets.
26. Presumably, but currently there is no law or written procedure on this issue, if Pt 81.8 was to be invoked by virtue of the person being present in court, then a penal notice could also be given orally? This appears to be a difficult argument to run but not beyond the bounds of possibility in certain circumstances.

27. It follows in the factual matrix of *Dallas* that disobedience of a court order would not be applicable as no penal notice was given whether in writing or orally.
28. Interference with the due administration of justice pursuant to Pt 81.12 is a catch all section on contempt. It applies to any “interference with the due administration of justice in connection with proceedings in the High Court, Divisional Court, Court of Appeal, inferior courts (e.g. county and magistrates courts but not tribunals) and which are criminal proceedings, **except** where the **contempt is committed in the face of the court or consists of disobedience to an order of the court...**” [Pt81.12].
29. This is not applicable to *Dallas* as the contempt she made was in the face of the court and according to the reasoning of the Supreme Court in *Dallas* did consist of disobedience to an order of the court. This is essentially the same point as under Ord. 52 above.
30. Where contempt has occurred in the face of the court and that court has power to commit for contempt, the court may deal with the matter of its own initiative (summarily) and give such directions as it thinks fit for the disposal of the matter [Pt 81.16].
31. *Dallas* committed contempt in the Crown Court. The Crown Court has, in relation to any contempt of court “the like powers ... as the High Court” [section 45(4) of the Senior Courts Act 1981]. Thus the jurisdictions of the High Court and the Crown Court are to an extent concurrent and inherent.
32. But it is important to remind ourselves of what Lord Chief Justice Lord Judge said at paragraph 7 of the judgment in *Dallas*:

“Contempt may take many forms. In the context of alleged contempt by or affecting a juror or jury in the Crown Court, in our judgment unless it is appropriate for the Crown Court to deal immediately with the contempt of its own motion (which in light of the many judicial warnings about the dangers inherent in a rushed process would be very exceptional) such cases of contempt should continue to be left to proceedings by the Attorney General under Order 52...”

33. Pt 81.16 is of limited assistance in the *Dallas* factual matrix. The high profile nature of the case and the desire to, perhaps, make an example of *Dallas* required any Crown Court judge to decline to deal with this contempt summarily.

34. If the Crown Court judge does deal with the matter summarily under Part 62 of the Criminal Procedure Rules 2012 No 1726 assistance could be gained from the practice direction to Pt 81 which seeks to minimise the risks of unfairness and breach of Convention rights inherent in a summary procedure. The provisions in section 8, r81.28ff. also assist and could be applied and/or adapted as necessary. In particular, Pt 81 PD 4.3 sets out that the judge should do on a summary procedure (much is repeated in Part 62 of the Criminal Procedure Rules):

34.1. Inform the person of the possible penalties (but surely this must have already been done)

34.2. Inform the person in detail, preferably in writing, of their actions and behaviours which have given rise to the committal application

34.3. Inform the person if an apology would remove the need for committal proceedings

34.4. Have regard to the needs of person to (i) file a defence and/or consider their position generally (ii) become aware of the availability of assistance from the LSC (iii) get legal advice (iv) have an interpreter attend to assist if English is not the first language (iv) be brought back for a hearing within a reasonable period of time.

- 34.5. Allow the person to apologise, explain their actions and behaviour and address the court on appropriate penalty if applicable.
- 34.6. Recuse themselves if there is a risk of appearance of bias and ask that another judge hear the committal in which case it is for the judge recusing to make a written statement which may be admitted in evidence.
35. In the alternative, Pt 81.15 sets out a procedure which applies where by virtue of any enactment the High Court has power to punish or take steps for the punishment of any person charged with having done or omitted to do anything in relation to a court, tribunal or person which, if it had been an act or omission in relation to the High Court would have been a contempt of that court. This is known in Pt81 as certification of conduct to the High Court and is commenced by a form annexed to Practice Direction 81. There is a non-exhaustive list of statutory powers set out in Pt 81 PD 3. The statutory powers set out in Appendix E to the consultation paper should be added to this list by way of an amendment to the Pt 81.
36. Appendix E to the consultation sets out a list of statutory powers which seek to found the jurisdiction of (some of) the relevant forums that are faced with contempt. Where such a statutory provision exists then it is arguable that this is only method by which the High Court would have jurisdiction to hear *Dallas'* case. But again this does not address the second stage of the dilemma, once jurisdiction exists what procedure should be adopted and applied in the factual matrix. It cannot be enough to use the inherent jurisdiction of the High Court but adopt without reference or discussion the procedures set out in Pt 81. Individuals faced with contempt are entitled to know, with certainty, the way in which the case is to come to court.

37. Is it arguable that the necessary enactment is Pt 81.16(1) where it states “...and give such directions as it thinks fit for the disposal of the matter.” Could this rule be used to allow directions to the Attorney General to bring committal for contempt proceedings in the High Court pursuant to Pt 81.15 and the procedures set out in Pt 81? There is a real difficulty with this argument because of the

37.1. The use of the word “and” as opposed to “or”.

37.2. The fact that the Crown Court Judge does not and cannot direct that the Attorney General bring proceedings in the High Court. On the contrary the hierarchial nature of their respective positions is that a request is made to the Attorney General. It is submitted that it would be a giant leap too far if the use of the word request was extended to direction (especially as the Supreme Court appear to be saying that a direction can be order of the court).

38. In summary, therefore if the case of *Dallas* had been brought after 1st October 2012 pursuant to Pt 81 the exact same issues would have to be addressed as should have been addressed and determined by the Divisional Court under Ord. 52. The largest issue being, if the inherent jurisdiction of the High Court is to be used what procedure is to be adopted?

39. The next stage of the paper looks at the position of a number of other forums including tribunals.

Alternative forums and tribunals:

40. Appendix E is a good starting point. But again in the majority of cases the procedures to be adopted are left in state of flux. In certain cases in some forums the certification procedure may be invoked pursuant to r. 81.15. But this is by no means universally applicable.

41. The fact that many tribunals and other forums do not fall within the definition of inferior courts causes difficulties. The law of contempt should only be extended to forums which act in a judicial, as opposed to administrative or political, capacities.
42. It is important to recall the Hansard debates concerning the enactment of, in particular, clause 7 and schedule 5 of the Contempt of Court Act 1981 [see paragraphs A.270 to A.288 of Appendix A to the consultation]. At first instance these provisions appear to address the issues but the reservations stated at A.277 are real. A balance needs to be reached and applied. A comprehensive exhaustive list of all forums which the law of contempt is to be extended to should be compiled (as was stated by Lord Elwyn-Jones [see A.282]). If anything is missed an appropriate statutory instrument can be quickly enacted to deal with any oversight. Once compiled it would be important to consider whether the jurisdiction of that tribunal or forum should be exercised summarily, under the inherent jurisdiction of the High Court or otherwise. And what procedures are to be adopted in each scenario.

Conclusions:

43. It is far to say that Pt 81 has gone some way to address the jurisdictional difficulties in the *Dallas* case. However, it is equally fair to say that the law of contempt is still a mine field and great care is required.
44. In the author's view the following gaps needs to be addressed:

- 44.1. Jurisdiction and procedure on contempt in tribunals and other forums exercising a judicial function.
- 44.2. Jurisdiction and procedure in criminal proceedings in the face of the court, or which consist of disobedience of a court order or breach of undertaking to transfer the matter to the High Court.
- 44.3. Professional guidance to Barristers and Solicitors about their own conduct in court
- 44.4. A fixed direction on contempt should be provided to jurors, witnesses, court staff and others in courts. A penal notice should be attached. The sanction is loss of liberty so that formality to such a procedure must be required and informality avoided at all costs.

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4th March 2013