



How effective is committal as a means of securing compliance with a mandatory injunction?

This week I argued a committal application that resulted in an immediate custodial sentence for the defendant. Success, but what did it really deliver?

The story began earlier this year when my client, an online retailer, awoke to find that their web domain had been hacked and redirected to the defendant's website. Substantially all of their customers had been stolen overnight. On 23 August 2019 Snowden J granted a mandatory injunction for the return "*forthwith and in any event by 4.00pm on 29 August 2019*" of the domain and an associated Facebook page pending trial (*The Original Alternative v Bayley* [2019] EWHC 2286 (Ch)).

The defendant did not comply; indeed, he used the intervening period to promote heavily discounted product on a new domain he had created. My client swiftly applied to commit him. Falk J gave directions *ex parte* on 12 September 2019 and ordered an expedited hearing, but by reason of the defendant's right on a committal application to legal aid regardless of means, this could not practically be accommodated until 1 November 2019.

The defendant did not attend then, so it was adjourned to 4 November 2019, when once again he did not attend. Falk J then issued a bench warrant and the matter was listed for 2 December 2019. The defendant was arrested at Gatwick airport on 1 December 2019 and the hearing finally went ahead before HHJ Keyser QC sitting as a judge of the High Court.

He reserved judgment overnight, during which time the defendant miraculously purged the contempt that he denied being in, and returned the domain to my client, neatly demonstrating the coercive power of a committal application even before judgment had been given.

But a web domain being down for some 4 months can have severe commercial repercussions and getting it back in December was not at all the same thing as what getting it back in August would have been. Finding two counts of contempt proved, the judge imposed a 4-month immediate custodial sentence notwithstanding that the contempt had been purged and made a costs order with an interim payment due on the usual 14-day terms.

What I think this shows is that committal still works as a means of securing compliance with orders, and that at least in this case the court regarded the effect on the administration of justice – in the judge's words the rendering of the injunction a "dead letter" – as meriting prison time. But the time taken to get such a hearing on, even on an expedited basis, should not be underestimated.

Classically contempt is supposed to be dealt with "*swiftly and decisively*": *Barnet London Borough Council v Hurst* (Practice Note) [2003] 1 WLR 722 but an increasing regard for the procedural safeguards to which an alleged contemnor is entitled significantly limits the extent to which this is possible. Two particular danger zones are (1) the right to an opportunity to obtain representation. Even where there is a risk that this right is being abused as a delaying tactic there is precedent that an adjournment should be granted if requested: *Re O* [2019] EWCA Civ 1721 (at least on the particular facts of that case); and (2) the circumstances in which the court will proceed in the Defendant's absence (on which see *Absolute Living Developments v DS7* [2018] EWHC 1717 (Ch)). Ultimately that did not come into play here but understandable judicial caution in that regard led to

a further month being added to the time taken to determine the application. Where time is not of the essence that does not matter so much. But where there is real urgency to getting the defendant to comply, committal remains a blunt instrument indeed.

Gareth Tilley
5 December 2019