Neutral Citation Number: [2023] EWCA Civ 1566

Case No: CA-2023-001661

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MR JUSTICE LANE
QB-2015-005134

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8/1/2024

Before:

LORD JUSTICE LEWISON
LORD JUSTICE MOYLAN
and
LORD JUSTICE COULSON

- -

Between:

Samuel Westrop	**Appellant**
- and -	
Mohamed Ali Harrath	**Respondent**

- -
- -

Jeremy Scott-Joynt (instructed by **Janes Solicitors**) for the **Appellant**
Sajid Suleman (instructed by **Direct Access**) for the **Respondent**

Hearing date: 19 December 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 22 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

1. Introduction

1. This appeal is concerned with the proper operation of CPR Part 71 (orders to obtain information from judgment debtors). If that sounds a rather workaday subject, this and similar cases demonstrate that it can have very serious consequences. At the end of the process, a judge can make a suspended committal order without a hearing, and subsequently – if appropriate - send the judgment debtor to prison for contempt. It is therefore important that Part 71 is properly understood by practitioners and judges alike because, as this case demonstrates, a failure to ensure that the procedure has been properly followed can result in a person being unjustly at risk of losing their liberty.

2. At the conclusion of the hearing, we announced that we would allow the appeal for reasons to be given in writing. These are my reasons for joining in that decision.

2. The Essential Facts

3. The respondent, Mr Harrath, successfully sued the appellant, Mr Westrop, for libel. Pursuant to a judgment given as long ago as 2017, the claim was successful and Mr Westrop was ordered to pay Mr Harrath damages. The original sum due was £229,408.65. That was not paid. It is said that, including interest, the amount now owing is £338,031.56. Mr Westrop acknowledges that he is a judgment debtor and owes a large sum by way of damages to Mr Harrath.

4. On 28 February 2023, Mr Harrath (as a litigant in person), applied for an order that Mr Westrop attend court for questioning as to his financial position pursuant to CPR 71.2(1). That order was made on 1 March 2023 by Master Thornett, in the King's Bench Division (the first examination order, "FEO"). Both the application and the FEO identified Mr Westrop's address as a property in Shrewsbury.

5. There were no less than four Certificates of Service in respect of the FEO. Each purported to serve the FEO, together with the previous judgments on liability and costs. Each was signed by a Mr Cummings, a paralegal, who was, we understand, employed by the consultancy run by Mr Harrath. The Certificates were all dated 8 March 2023.

6. The first Certificate stated that the documents were served by first class post on Mr Westrop's "last known residence". The address was left blank. The second said that the documents were served by first class post on Mr Westrop's "usual address", which was said to be the property in Shrewsbury. The third said that service was effected by first class post at Mr Westrop's "last known residence" in London, N4. The final Certificate of Service also stated that the documents were served by first class post at Mr Westrop's "last known residence", but this time the address given was in London, N12.

7. The Certificates of Service themselves, therefore, suggested that there was some uncertainty as to where Mr Westrop lived. The costs judgment from 2017, which was served at the same time, compounded that potential uncertainty, stating that Mr Westrop "is now outside the jurisdiction".

8. The FEO required Mr Westrop to attend at the King's Bench Division on 18 April 2023 to provide information about his means. Mr Westrop did not attend on that day. In consequence, Master Thornett made a second order, requiring him to attend on 8 August 2023 (the second examination order, "SEO"). A single Certificate of Service said that order too was served on the property in Shrewsbury, again by first class post.

9. Mr Westrop did not attend on 8 August 2023. In consequence, pursuant to r.71.8(1) the matter was referred to Lane J ("the judge"). On 11 August, he made the order which is the subject of this appeal ("the suspended committal order"). It contained a Penal Notice and various Recitals setting out the history to which I have referred. The material parts of the suspended committal order were as follows:

> "…**AND UPON HEARING** MOHAMED ALI HARRATH the Judgment Creditor
>
> **AND UPON** the Court being satisfied beyond reasonable doubt that:
>
> 1. Samuel Westrop was ordered to attend Court on 18 April 2023 and 08 August 2023 to be questioned;
> 2. The FEO to attend was served on Samuel Westrop on 01 March 2023 and the SEO to attend was served on Samuel Westrop on 23 June 2023;
> 3. Samuel Westrop did not within seven days of the service of the Orders request from the Judgment Creditor payment of any sum for travelling expenses; and
> 4. Samuel Westrop did not attend Court on 18 April or 08 August 2023 to be questioned.
>
> **AND THIS COURT FINDING BEYOND REASONABLE DOUBT THAT** Samuel Westrop has been guilty of contempt by intentionally disobeying the FEO and the SEO.
>
> **AND UPON** giving Judgment in open court today.
>
> **NOW IT IS ORDERED THAT:**
>
> 1 Samuel Westrop, (Date of Birth: 08/03/1989), shall be committed to Her (sic) Majesty's Prison for 21 days.
>
> 2 This Order shall be suspended so long as Samuel Westrop attends Court on 21 August 2023, 10.30am for a hearing with a time estimate of 1 hour and complies with the Order dated 01 March 2023 at that hearing.
>
> 3 If Samuel Westrop does not comply with these terms, a warrant of arrest shall be issued and Samuel Westrop shall, when arrested, be brought before a judge to consider whether the committal order should be discharged…"

10. It is Mr Westrop's case that he is resident in the USA and was therefore unaware of either the FEO or the SEO. When the order of 11 August was drawn to his attention by his father on 13 August, he instructed solicitors to represent him at the return date of 21 August. He was unable to attend that hearing at such short notice but instructed

Mr Livingston, a solicitor, to represent him. Master Thornett decided that the terms of the suspended committal order were binary and that, in the absence of Mr Westrop, or any formal application to adjourn, or any written evidence, he had no option but to record the fact that Mr Westrop was not in attendance, and to activate the committal order. He issued an arrest warrant. On 23 August, Mr Westrop appealed against the suspended committal order.

11. There is a factual dispute relating to Mr Westrop's real place of residence. At this stage, it is necessary only to say that Mr Westrop has at least an arguable case that he is now resident in the USA. The property in Shrewsbury belongs to his parents.

3. The Grounds of Appeal

12. There are nine separate Grounds of Appeal against the suspended committal order made by the judge. In my judgment, they fall into two distinct categories.

13. Grounds 2, 3, 6, 7 and 9 are concerned with the alleged failure to comply with the procedure set out in CPR Part 71, and related failures in respect of other parts of the CPR. These failures are primarily concerned with service of the FEO and SEO, the absence of an affidavit from the judgment creditor, and the terms of the suspended committal order.

14. The second category, encompassing Grounds 1, 4, and 5, relate to the factual disputes between the parties. At the root of all these different complaints is Mr Westrop's case that, because he was in the USA and did not live at the property to which the documents were sent, he did not know about either the FEO or the SEO and should not have been made the subject of the suspended committal order. Ground 8 is a discrete issue concerned with extra-territoriality.

15. If one or more of the Grounds of Appeal in the first category are upheld, and the failure is such that the suspended committal order of 11 August must be set aside, it will be unnecessary for this court to consider the Grounds of Appeal in the second category noted above. Accordingly, having summarised the law, I will turn to that first category of issues.

4. The Law

16. CPR 71 is a self-contained process designed to assist judgment creditors in obtaining information from judgment debtors. It provides for a simple and robust system to ensure compliance by those avoiding payment of judgment sums. Rule 71.2 begins the process:

> "(1) A judgment creditor may apply for an order requiring –
> (a) a judgment debtor; or
> (b) if a judgment debtor is a company or other corporation, an officer of that body, to attend court to provide information about –
> (i) the judgment debtor's means; or
> (ii) any other matter about which information is needed to enforce a judgment or order.
> (2) An application under paragraph (1) –
> (a) may be made without notice; and

> (b) must be issued in the court or County Court hearing centre which made the judgment or order which it is sought to enforce, except that –
> (i) if the proceedings have since been transferred to a different court or hearing centre, it must be issued in that court; or
> (ii) subject to subparagraph (b)(i), if it is to enforce a judgment made in the Civil National Business Centre, it must be issued in accordance with section 2 of Practice Direction 70.
> (3) The application notice must –
> (a) be in the form; and
> (b) contain the information required by Practice Direction 71.
> (4) An application under paragraph (1) may be dealt with by a court officer without a hearing.
> (5) If the application notice complies with paragraph (3), an order to attend court will be issued in the terms of paragraph (6).
> (6) A person served with an order issued under this rule must –
> (a) attend court at the time and place specified in the order;
> (b) when he does so, produce at court documents in his control which are described in the order; and
> (c) answer on oath such questions as the court may require.
> (7) An order under this rule will contain a notice in the following terms, or in terms to substantially the same effect – "If you the within-named [ ] do not comply with this order you may be held to be in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law""

17. Rule 71.3 is concerned with the service of the order requiring the judgment debtor's attendance at court. That provides as follows:

> "(1) An order to attend court must, unless the court otherwise orders, be served personally on the person ordered to attend court not less than 14 days before the hearing.
> (2) If the order is to be served by the judgment creditor, he must inform the court not less than 7 days before the date of the hearing if he has been unable to serve it."

The reference to personal service is explained in CPR Rule 6.5. Rule 6.5(3)(a) provides that a claim form is served personally on an individual "by leaving it with that individual".

18. Rule 71.4 deals with travelling expenses. Rule 71.5 is primarily concerned with proving personal service:

> "(1) The judgment creditor must file an affidavit or affidavits –
> (a) by the person who served the order (unless it was served by the court) giving details of how and when it was served;
> (b) stating either that –
> (i) the person ordered to attend court has not requested payment of his travelling expenses; or
> (ii) the judgment creditor has paid a sum in accordance with such a request; and
> (c) stating how much of the judgment debt remains unpaid.

> (2) The judgment creditor must either –
> (a) file the affidavit or affidavits not less than 2 days before the hearing; or
> (b) produce it or them at the hearing."

An affidavit is defined in the Glossary to the CPR as "A written, sworn statement of evidence."

19. The consequences of a failure to comply with an order for attendance at court made under r.71.2(5) are dealt with in Rule 71.8:

> "(1) If a person against whom an order has been made under rule 71.2-
> (a) fails to attend court;
> (b) refuses at the hearing to take the oath or to answer any question; or
> (c) otherwise fails to comply with the order,
> the court will refer the matter to a High Court judge or Circuit Judge.
> (2) That judge may, provided the judgment creditor has complied with rules 71.4 and 71.5, hold the person in contempt of court and make an order punishing them by a fine, imprisonment, confiscation of assets or other punishment under the law.
> (3) If such an order is made, the judge will direct that—
> (a) the order shall be suspended, provided that the person—
> (i) attends court at a time and place specified in the order; and
> (ii) complies with all the terms of that order and the original order; and
> (b) if the person fails to comply with any term on which the order is suspended, they shall be brought before a judge to consider whether the order should be discharged."

20. Part 71 does not supplant Part 81, which deals with contempt of court more generally: see *Deutsche Bank AG v Sebastian Holdings Inc* [2018] EWCA Civ 2011; [2019] 1 WLR 1737, at [31]. That case is authority for the proposition that, merely because the alleged breach in question involved an order under CPR 71, that does not necessarily mean that the party alleging contempt must proceed by way of r.71.8. That said, however, it is important to note that there the judgment debtor attended the court hearing as ordered, and the issues arose out of the judgment creditor's subsequent allegations that the debtor failed to give full disclosure and lied on oath at the hearing.

21. In the general run of cases, given the automatic nature of the Part 71 process, as opposed to the process under Part 81 (where contempt proceedings are either expressly instigated by one party or by the court itself), I would respectfully suggest that Part 71 will be both the starting point, and the end point too, for any consideration of the validity of a suspended committal order made under r.71.8. After all, what judgment creditors want – what Mr Harrath wants – is information about the debtor's means; by using Part 71, the judgment creditor has not instigated contempt proceedings, and usually has no real interest in the outcome of any such proceedings. He just wants the financial information, and it has been shown that the making of a suspended committal order under r.71.8 can be a very effective way of ensuring that a recalcitrant debtor attends court to provide it.

22. There are two decisions of this court which directly concern r.71.8. It is a surprise, perhaps, to note that neither of them have been widely reported. That may go some way to explaining why the need for full compliance with the different parts of the Part

71 procedure, before the making of a suspended committal order under r.71.8, has not always been properly understood.

23. In *Islamic Investment Company of the Gulf (Bahamas) Ltd v Symphony Gems N.V. & Others* [2008] EWCA Civ 389, the judgment creditor operated the Part 71 procedure, but there were complications because the judgment debtor was in India. A suspended committal order was made pursuant to r.71.8. This court overturned it because the evidence before the judge was insufficient to warrant making such an order. Rix LJ warned against treating the Part 71 process as a matter of form:

> 28. "Therefore it seems to me that Bean J was not in a position to make his suspended order for committal on that day. I suspect that he was encouraged to do so by what appears to be the somewhat summary nature of the provisions of Part 71.8. It is true that that Part, quite rightly and necessarily, leaves the decision of whether to make a committal order in the discretion of the judge – see CPR 71.8(2) "The judge may…make a committal order against the person" in question. Nevertheless, everything about that rule and the notes in the White Book beneath it suggest that the making of such an order is almost a matter of form, and indeed it is provided for by the fact that there is a court form -- a standard form -- providing for this type of order. It appears to be thought that no harm is done if the very excellent consequence of such an order is that on the next occasion, under the threat of this order having been made, the judgment debtor does indeed appear for examination.
>
> 29. The fact is, however, that an order for committal to prison (albeit suspended) has been made. It seems to me that a judge needs to be suitably cautious about making such an order in the light of evidence before the court -- whether it is of a medical kind or, as in this case, evidence from a lawyer, relating to the fact that the judgment debtor in question was not permitted to be outside a foreign country on the day in question -- which may make it inappropriate for a suspended order to be made. It may be that in such circumstances it would be appropriate for the judge in question to issue a warning that it is very likely that, if the judgment debtor does not appear on the next occasion fixed, such an order for committal may well be made on that occasion. It may be, indeed, that the rule of the court should provide for an alternative procedure from that of an immediate suspended committal order to deal with such a hybrid case."

24. In *Broomleigh Housing Association Ltd v Emeka Okonkwo* [2010] EWCA Civ 1113; [2011] H.L.R. 5 at page 80, this court also allowed an appeal against an order made under r.71.8, again because of concerns about the way that the judge had exercised his discretion. There was an important joint judgment by Moore-Bick and Wilson LJJ, which also warned against treating the making of such orders as routine:

> "1.The power to commit a person to prison for contempt is one of the most powerful sanctions available to the court to punish those who flout its authority and to compel compliance in the future. Since it involves an interference with the liberty of the subject it is a power which is exercised with care and only in cases where disobedience is intentional and where in all the circumstances the order is appropriate. Sometimes the order is suspended on condition that the defendant does not disobey again. This

appeal raises an important question about the power to commit in circumstances where the evidence before the court is not such as to justify its exercise by reference to general principles, but where a suspended order of committal is nevertheless seen as an effective way in which to ensure future obedience to a separate order…

21.Whatever the practical utility of making suspended orders for committal as a routine response to a failure by a judgment debtor to comply with an order to attend for questioning (which, in the light of the facts of this case, may be more limited than might at first sight appear), we think that Mr. Jacobs was right in saying that the decision of this court in *Islamic Investment Co* is inconsistent with any approach which makes such a response routine. Rule 71.8 gives the court power to make a committal order, but that requires the exercise of discretion, which in turn requires consideration of the circumstances of the contempt. Committing a person to prison for contempt of court is a serious step, too serious, in my view, to be undertaken simply as a matter of routine without enquiring into the nature of the contempt and the circumstances in which it has been committed and giving reasons, at any rate briefly, for the decision.

22.We suggest that, following reference to him under Rule 71.8(1), the judge, in determining whether to exercise his discretion to make a suspended committal order under paragraph (2), has at least four options, all of which he needs to consider:

(a) If satisfied not only that the debtor was served with the order to attend but also that there is sufficient evidence before him to justify a finding to the criminal standard that the debtor's failure to attend (or refusal to take the oath and answer questions) was intentional and that in the circumstances it is appropriate to do so, he may proceed to make a suspended committal order. In our view by doing so he will not infringe the debtor's rights under Article 6 since the debtor will have an opportunity to challenge the order before it is enforced. If he does make an order, however, he must provide written reasons, at any rate briefly, for recital in the order in Form N79A for service upon the debtor. With respect to Rix LJ, we would not ourselves favour a reference in this context to contumacy, if only because the word is perhaps slightly arcane; nor, with respect to the writer of the commentary on Rule 71.8 in *Civil Procedure*, Vol I 2010, would we favour a reference to contumely, which speaks more of insolence than of obstinacy. But, in having regard to the circumstances, the judge will of course weigh all the evidence which suggests that there was – or was not – some extra obstinate or obstructive dimension to the debtor's intentional breach of the order.

(b) If not satisfied of the matters necessary for the making of a suspended committal order, the judge can adjourn consideration of it and, if so, can proceed in one of two ways: either
(i) he can give directions, supported by a penal notice, for a hearing in court, including directions for the debtor (and perhaps also for the creditor) to attend; or

> (ii) he can give directions, again supported by a penal notice, for the debtor (and perhaps also for the creditor) to depose to specified matters and to file and serve the affidavit or affirmation by a specified date
>
> (c) Alternatively, the judge can decide there and then not to make a committal order and to proceed in a different way, probably by making a further order under Rule 71.2 for the debtor's attendance at court to provide information (before a court officer unless there are compelling reasons for the hearing to be before a judge: paragraph 2.2 of the Practice Direction supplementing Part 71). The further order will contain a penal notice in any event (Rule 71.2(7)), but the judge may favour including a recital which, in the light of the background, stresses the possible consequences of further non-attendance even more clearly to the debtor."

5. The Failure to Comply with Rules 71.2 and 71.5 (Grounds of Appeal 2 and 3)

25. Mr Scott-Joynt, on behalf of Mr Westrop, submitted that Mr Harrath failed to comply with CPR 71.3 and 71.5, in particular because: i) there was no personal service on Mr Westrop of either the FEO or the SEO; and ii) there were no affidavits of service. These linked complaints make up Ground 2 of the appeal. It is said that, if they are upheld, the suspended committal order of 11 August should not have been made (Ground 3).

26. On behalf of Mr Harrath, Mr Suleman said that, since it must have been quite clear to the court at the time of the SEO, and then again at the time of the suspended committal order, that the documents had been served by first class post rather than by way of personal service, the court must have been happy with that variation to the service requirement set out in r.71.3. He stressed that at no time did Mr Harrath seek to hide or cover up what he had done, and had never claimed that there had been personal service.

27. Rule 71.3 provides expressly that the court order requiring the judgment debtor to attend for examination must be served personally on the person ordered to attend court. Personal service means what it says: the order must be left with the individual (as per r.6.3). It is common ground that neither the FEO nor the SEO were personally served on Mr Westrop. Furthermore, r.71.3(2) required Mr Harrath to tell the court if he had been unable to serve the FEO and SEO. On the face of it, therefore, there was a failure to comply with r.71.3.

28. I accept that r.71.3 envisages that the court may order service by some other means. But if that discretion is to be exercised, it must be at the time that the order requiring attendance is made; it cannot be retro-fitted after the event. No order requiring alternative service was either sought or made here, either in respect of the FEO or the SEO. This court cannot now rewrite the orders made below. The failure to effect personal service was therefore a failure to comply with r.71.3.

29. I stress that compliance with this particular rule is not merely a technical requirement or some sort of meaningless tick-box process. The reason that personal service is required is because of the consequences for the judgment debtor if he or she does not attend court on the date set out in the order. If they do not attend, they face the prospect of a committal order. It is therefore vital that they know, and the court is

satisfied that they know, that their attendance at court is required on the date identified: hence the requirement for personal service. Moreover, the importance of personal service in this context can be traced back to r.71.2(6), where the attendance that is required is the attendance of "a person served with an order issued under this rule…".

30. As for the second element of Ground 2, Mr Scott-Joynt submits that there was a failure to comply with r.71.5. That makes mandatory the filing of an affidavit by the person who served the order, "giving details of how and when it was served". The commentary in the White Book says this:

> "Proof that the judgment debtor has been served is essential. This is no mere formality as a debtor who failed to attend can be committed to prison for contempt of court: see r.71.8. Thus formal proof of service is essential and r.71.5 is one of the few rules in the CPR which requires an affidavit."

31. In the present case, there was no affidavit from the person serving the order. There were instead numerous Certificates of Service, signed by a paralegal, which said that service was by first class post on at least three different addresses. Again, therefore, there was a failure to comply with the procedure under Part 71. Mr Suleman's argument, that the court knew that there was no affidavit but still made the SEO and the suspended committal order, is even weaker this time round because, unlike the provisions as to service, there is nothing in the rule which contemplates the waiver of this requirement, or its replacement by some other form of proof. Instead r.71.5(1)(a) says that the judgment creditor "must" file an affidavit. There is no alternative. I therefore agree with and endorse the commentary in the White Book noted above.

32. In this way, I consider that both elements of Ground 2 have been made out. Mr Harrath failed to serve the FEO and the SEO in the particular way prescribed by r.71.3, and failed to provide the mandatory affidavit under r.71.5 that would have made that failure crystal clear. He was a litigant in person, so no blame can attach to him personally for these failures. He never suggested that he had served the orders in accordance with r.71.3, but the fact remains that there was material non-compliance with critical elements of Part 71.

33. Mr Scott-Joynt submitted that these failures meant that the judge should not have made the suspended committal order on 11 August (Ground 3). Mr Suleman again pointed out that the judge had decided to proceed with the r.71.8 consideration, despite the absence of either personal service or an affidavit. But in my view, that missed the point. The effect of Mr Scott-Joynt's submission was that, as a result of the prior failures, the committal order of 11 August 2023 was unlawful.

34. I conclude that, in the circumstances that occurred here, the judge had no power to make the suspended committal order. Again, this is not a technicality: personal service and the rare requirement of an affidavit describing that personal service are fundamental to the consequential making of a suspended committal order. Indeed, r.71.8(2) states expressly that a suspended committal order can only be made "provided the judgment creditor has complied with rules 71.4 and 71.5". Mr Harrath had not so complied, so there was no lawful basis on which the suspended committal order could have been made on 11 August.

35. As a matter of practice, it works like this. A judgment debtor must be personally served with the order requiring him to attend at court on a particular date: r.71.3(1). If the judgment creditor has not effected personal service of the order, he must tell the court: r.71(3(2). In those circumstances, the hearing would probably be adjourned. If the judgment creditor has effected personal service, the person who served the order must provide an affidavit explaining how and when the order was personally served: r.71.5(1). If the judgment debtor does not attend, that non-compliance will be certified by a judge or court officer in accordance with 71PD.6. Then, but only then, would a judge considering a reference under r.71.8 have in place the essential building blocks that would allow him or her to conclude that the failure to attend was intentional.

36. By contrast, if the court order was sent by post to an address, and there is no affidavit, the judge has no real idea i) why that address has been chosen; ii) whether it is the debtor's usual or last-known place of residence; and (most important of all) iii) whether the debtor ever became aware of the order requiring their attendance at court. It is difficult in those circumstances to see how a finding that the debtor's non-attendance at court was intentional – the necessary precursor to the making of a suspended committal order – could even be contemplated, without a prior finding that the judgment debtor knew of the hearing in the first place.

37. Accordingly, I consider Ground 3 is made out. The judge had no power to make the suspended committal order on 11 August because, in the absence of personal service and, in particular, an affidavit explaining how and when personal service was effected, the proviso in r.71.8(2) had not been satisfied. It was not possible on the material available to the judge for him properly to conclude, to the necessary standard, that Mr Westrop's non-attendance was intentional. That was the principal reason why, at the end of the appeal hearing, we announced that the suspended committal order of 11 August 2023 must be set aside. However, for completeness, I go on to deal with the other points raised by Mr Scott-Joint in respect of r.71.8.

6. The Failure to Comply with CPR 71.8 (Grounds of Appeal 6, 7 and 9)

38. Some of the criticisms made in respect of the suspended committal order made under r.71.8 are a little unusual. This may be because, although the judge's order was made on the papers, without a hearing, the suspended committal order itself gives the impression that it was made at or after a hearing in public. Ground 6 of the appeal complains that, in consequence, the order is inaccurate and misleading.

39. The first point to decide is whether or not the making of an order under r.71.8 requires a hearing in public. The rule does not say so. It contains none of the provisions which one would expect if such a hearing was required. So the highest it can be put is by reference to r.81.8(1), which provides that "all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs." The note in the White Book at r.81.7.3 suggests that, in consequence, any consideration of an order under r.71.8 should be in public.

40. I respectfully disagree with that passage in the commentary in the White Book. When r.71.8 is read as a whole, I think it is plain that it was not intended that a suspended committal order should be made at a public hearing. First, r.71.8(1) and (2) explain that the matter is referred to a High Court Judge or Circuit Judge by an administrative process. It is not an application by any party. Secondly, there is no requirement in

r.71.8 that the parties be notified in advance that the matter is being considered by a judge, or that the matter should be listed in open court. Thirdly, r.71.8(3) makes clear that any such committal order will be suspended, provided that the judgment debtor attends court at the time and place specified. The suspended committal order will not come into force unless the judgment debtor fails to attend court. That also suggests that the making of the suspended order itself, although requiring consideration by a judge, is part of an administrative function and does not require a hearing in open court.

41. That also appears to have been the conclusion of this court in *Broomleigh*. At [22(a)], the court concluded that the debtor's rights under Article 6 were not infringed by this process, since the debtor had the opportunity to challenge the order before it was enforced. As part of the r.71.8 process, this court said that the judge must provide *written* reasons for the suspended committal order (to be included as a recital in the order). The need for written reasons therefore replaced the usual judgment in open court. Furthermore, at [22(b)(i)], the court talked about the judge giving directions for a hearing, which necessarily assumed that the suspended committal order itself was made without such a hearing.

42. Of course, the fact that no hearing is required under r.71.8 emphasises still further what both *Islamic Investment* and *Broomleigh* themselves stressed: namely, the need for caution in the making of the suspended committal order. It can be done without a hearing, on the papers. But that means even more emphasis must be given to ensuring that the Part 71 process – of which the suspended committal order is the result – has been fully complied with.

43. Mr Scott-Joynt did not suggest that there should have been a hearing under r.71.8. Instead, Ground 6 of the appeal is based on the complaint that the suspended committal order was inaccurate and misleading because it suggested that there had been such a hearing. He pointed out that the order starts with the words "Before the Honourable Mr Justice Lane sitting at the Royal Courts of Justice", goes on to say, "having heard Mr Harrath, the judgment creditor", and refers to "giving judgment in open court". In fact, each of those statements was incorrect: Mr Harrath was not present and did not address the court on 11 August, and there was no judgment (apart from the order itself). Nothing happened in open court. Moreover, when an order is made on the papers, without a hearing, it must say so expressly. The suspended committal order of 11 August 2023 did not do so.

44. It is unfortunate, to say the least of it, that the suspended committal order gives the impression that there was a hearing in open court when, in fact, there was not. Trying to work out what actually happened here has caused a good deal of wasted time and effort. But I am not persuaded that these inaccuracies, of themselves, give rise to a sustainable ground of appeal. They do not on their own render the order invalid. I therefore reject Ground 6 of the appeal. However, as I explain below, the confusion may have resulted in a number of important omissions from the suspended committal order itself.

45. The first omission is this. The suspended committal order was made on the papers, but it does not set out the documents on which it is based. Because they are made without a hearing, and without a judgment in open court, I consider that a suspended committal order should list the documents to which the court has had regard when

making that order. It has proved very difficult, both for Mr Westrop's advisers and indeed for this court, to work out precisely what material the judge had when he made the order of 11 August 2023. It should not be necessary for a party made the subject of a suspended committal order, and therefore facing the possibility of imprisonment, to rootle around in documents, which are of necessity in the hands of others, in an attempt to work out on what material that order was based.

46. Ground 7 complains that, because the order was made without a hearing, it should have contained a statement of Mr Westrop's right to make an application to have the order set aside, varied or stayed in accordance with r.3.3(5). That rule provides that "where the court has made an order of its own initiative…without hearing the parties or giving them an opportunity to make representations…the order must contain a statement of the right" to apply to set aside, vary or stay the order. No such statement was included in the committal order and, so it is therefore said, the order was unjust because of a serious procedural irregularity.

47. Can it be said that the suspended committal order was made on the court's initiative? I think it can. I accept that authorities such as *Shawston Engineering Ltd v DGP International and Anr* [2003] EWCA Civ 1956, where the judge transferred a case from Liverpool to London without any reference to the parties, may be rather more obvious examples of a court acting on its own initiative. However, I think that a suspended committal order is made on the court's initiative. 71PD.6 requires a judge or court officer to certify in writing the judgment debtor's non-compliance with the order for attendance. Thereafter, r.71.8(1) states that "the court will refer the matter to a High Court Judge". That is a process undertaken at the court's own initiative.

48. The need for a notice setting out the right to seek to set aside, vary or stay the order is not a point addressed directly in *Broomleigh*. I had wondered whether the fact that the order under r.71.8 was suspended until the return day was sufficient protection, but I am persuaded that it was not. I consider that, if a committal order was wrongly made, then the alleged contemnor is entitled as of right to challenge it, and should not have to wait for the return day in order to do so. Furthermore, the universality and mandatory nature of r.3.3(5) – there are no qualifications to the requirement that the order must contain a statement setting out the right to set aside, vary, or stay – lead inexorably to the conclusion that the suspended committal order should have contained the r.3.3(5) notice.

49. The suspended committal order in this case did not contain a r.3.3(5) notice. I note that it contained a notice of Mr Westrop's right of appeal under Part 52, but that is a very different thing. Accordingly, I consider that Ground 7 has been made out.

50. Ground 9 is a complaint that a finding of contempt should not have been made because r.81.6(3), which deals with the court acting on its own initiative to bring contempt proceedings, requires a summons setting out all the requirements of r.81.4, explaining (amongst other things) the nature and circumstances of the alleged contempt, the facts said to comprise the alleged contempt, confirmation of personal service, and an explanation of the defendant's rights, including the right to be legally represented.

51. With one important exception, I consider that this argument goes much too far. First, r.81.6 is dealing with the situation where a person in ongoing proceedings either fails

to heed warnings from the judge, or is rude or abusive, or otherwise disrupts those proceedings. It is then open to the judge, on his or her own initiative, to instigate committal proceedings. If they do, they are required to comply with the requirements of r.814. That is because, in that instance, the contempt application is starting from scratch. That has little in common with the process that leads to a suspended committal order under r.71.8, where the matter is automatically referred under r.71.8(1) following a number of previous steps.

52. Secondly, echoing what I said at paragraph 21 above, it is important – unless circumstances dictate otherwise – to keep Part 71 and Part 81 separate. Generally, Part 71 should be regarded as a self-contained process. It may be that the categorisation in *Deutsche Bank* (that Part 71 is for simple cases and Part 81 for more complex cases) is slightly misleading: in reality, Part 71 is confined to judgment debtors who will not pay their bills and do not attend court to say whether they have the financial means to pay. Of course, if there is a question of contempt at or in connection with any of the hearings envisaged by Part 71, then Part 81 may well be applicable. But I consider that, at least in most cases, it introduces unnecessary complexity to look at the operation of Part 71 through the lens of Part 81, which covers civil contempt in all its numerous forms.

53. Thirdly, many of the requirements in r.81.4 are already covered by the provisions of Part 71. For example, as I have explained, confirmation that the order was personally served is an essential element of any valid order under r.71.8 anyway. It is unnecessary to set out the facts giving rise to the contempt all over again: that will usually be the failure to attend the examination hearing, despite the personal service, and that will be a part of the written reasons in the Recitals. In short, I consider that the requirements of r.81.4 are, with one exception, already covered by the Part 71 process (provided it has been properly followed), and do not need to be set out again in the suspended committal order.

54. There is, as I have said, one exception to this. Rule 81.4(2)(j) requires an application to include a statement that "the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test". The judgment of Lindblom LJ in *Baz v Singapore Airlines*, dated 6 September 2017 (which appears not only to be unreported, but also has no neutral citation number), is important in this regard. Whilst the suspended committal order in that case was set aside primarily for other reasons to do with the wording of the order – which do not apply here – this court was concerned about the absence from the suspended committal order of any reference to legal aid and representation. Lindblom LJ said:

> "11. The two fundamental problems to which I refer relate, in the first place, to the whole question of legal aid and representation. Secondly, and distinctly, to the substantive terms of the suspended committal order itself. I shall deal first with the concern that arises as to legal aid and representation. This was a matter which the court sought to clarify at the outset of the hearing, and a clear picture has emerged. The picture is unsatisfactory when viewed in the light of the relevant provisions and supporting note in The White Book (see, in particular, the note at paragraph 81.15 in *The White Book* referring to the first instance decision in *King's Lynn and West Norfolk Council v Bunning* [2013] EWHC 3390 (QB), and the decision of this court in *Brown v*

> *Harringay London Borough Council* [2015] EWCA Civ 483, and paragraph 15.6 of Practice Direction 81, which refers to the need for the opportunity to be given to a litigant in person to obtain legal advice, and to be informed of the availability of criminal legal aid). These principles, enshrined in CPR Part 81 are not explicitly ousted for the purposes of committal orders made under CPR Part 71, and indeed, CPR 71.8 confirms that, 'Part 81 contains provision in relation to committal'. I can see no reason why the principles to which I refer should be excluded in this context, the proceedings being for contempt of court, and the respondent's liberty being at stake.
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> 12. The principles are engaged because it is clear from what the court has been told, and indeed it is not in dispute, that Ms Baz was not aware of her entitlement to legal aid for the purposes of the committal proceedings, and thus was unaware of her entitlement to be represented at the committal hearing. This on its own, in my view, is enough to compel us to allow this appeal, thus enabling Ms Baz to secure the public funding to which she is entitled, and representation, should she choose to have it, in the committal proceedings."

I consider that these comments are directly applicable to the present case, even if Part 81 has been rewritten since Lindblom LJ's judgment.

55. The documents before the judge on 11 August did not disclose any existing legal representation on behalf of Mr Westrop. But the suspended committal order did not make any reference to his right to representation and/or the right to legal aid, despite the fact that he was at risk of imprisonment. In my view, as a result of r.81.6, r.81.4(2)(j), and the passage in *Singapore Airlines* set out above, it should have done. I therefore find that, to this limited extent, Ground 9 is made out.

56. In summary therefore, whilst the order was misleading on its face (Ground 6), I consider that nothing turns on that. But I find that both Ground 7 and Ground 9 (at least in part) are made out. I reiterate the three points I have made, at paragraphs 45, 48-49 and 54-55 above, as to what should be included in any suspended committal order under r.71.8, in addition to those matters which were included and not in issue in this case (such as the Penal Notice and the Reasons). They are: i) a list of the documents considered by the judge when making the order; a clear statement as to the right to apply to set aside, vary or stay the order under r.3.3(5); and a clear statement of the right of the judgment debtor to be legally represented (and to apply for legal aid for that representation) at the return date, in respect of any issue concerning the suspended committal order.

7. Conclusions in respect of Part 71

57. In my view, CPR Part 71 provides a clear route by which a judgment creditor can get a judgment debtor to provide relevant information as to his financial position. If there are difficulties with the debtor, the process can end in a suspended committal order under r.71.8 and, in the vast majority of cases, that should and will be enough to ensure that the judgment debtor complies with the court order. But the procedure only works, and only fairly balances the rights of the judgment creditor and the judgment debtor, if the judgment creditor complies with the detailed rules.

58. Here, the rules were not complied with, as set out in paragraphs 25-37 above. The suspended committal order was therefore unlawful. In addition, it was defective because it failed to include the three matters summarised at paragraph 56 above, in particular the right to apply to set aside, vary or stay, and the right to representation and legal aid.

8. Other Matters

59. In the light of my conclusions in respect of Grounds 2, 3, 6, 7 and 9, it is unnecessary to address the second category of complaints, namely Grounds 1, 4, 5, and 8. Furthermore, since Grounds 1, 4, and 5 all involve issues of fact, and in particular the issue as to where it is that Mr Westrop can be said to be resident, it would not be appropriate for this court, unless it had to, to embark on such a fact-finding exercise. Accordingly, I do not address Grounds 1, 4, and 5 further.

60. Ground 8 is concerned with whether the provisions in Part 71 are extra-territorial. I am aware that, at first instance in the *Deutsche Bank* case, Teare J said that they were. The Court of Appeal did not need to decide that issue, although Gross LJ said at [88] that he could see the "considerable force" of Teare J's conclusions. Since I do not need to decide that issue for the resolution of this appeal, I too would say that Teare J's reasoning seems sound, but I decline to express any concluded view.

61. Finally, I note that the documents in the original libel proceedings in 2017 were satisfactorily served on Mr Westrop. He must therefore have had an address for service. A party who changes their address must give notice to the court and the other parties of that change: see r.6.24. Mr Westrop has not done so. He will therefore be ordered to give formal notice of his change of address.

LORD JUSTICE MOYLAN:

62. I agree

LORD JUSTICE LEWISON:

63. I also agree.