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THE CASE OF CHERNUKHIN VS DERIPASKA: CONTEMPT AND ABUSE OF PROCESS

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Navigator Equities Ltd v Deripaska [2020] EWHC 1798 (Comm) (Andrew Baker J) — a successful strike-out as an abuse of process of an application to commit for contempt by alleged breach of an undertaking to the Court; and a signal of greater judicial control of the use of the contempt jurisdiction in commercial disputes.

Note that CPR Part 81 has been recast with effect from 1 October 2020. There is no longer an express provision referencing strike out of committal applications, but that (inherent) power has recently been confirmed to subsist: see *Taylor v Robinson* [2021] EWHC 664 (Ch).

The procedural framework — committal applications as quasi-criminal proceedings

"Contempt proceedings have a particular and distinctive character. They are civil proceedings but bear several important hallmarks of criminal proceedings. They have been described, I think aptly, as quasi-criminal in character. The hearing is not to be equated with a criminal trial and the process is not to be equated with a private prosecution. But the quasi-criminal character of this particular species of civil litigation process has important consequences" (*Deripaska* at [141]).

Some consequences of that:

- Heightened sensitivity to the potential for contempt proceedings to be vexatious or oppressive
- The applicant must "act generally dispassionately, … present the facts fairly and with balance, and then let those facts speak for themselves"
- Prosecuting for contempt can legitimately be used to secure compliance with a court order, or bring to the court's attention serious wrongdoing; it cannot simply be the continuation of a commercial dispute by other means

Pitfalls and the finding of abuse of process in *Deripaska*

Three particular pitfalls emerge from the decision in *Deripaska*, all of which contributed to the decision to strike out:

- Subjective motive matters — the committal application was variously described as motivated by "personal animus" or a "fierce and intense dislike" of an opponent in litigation, and a "tit for tat" or "act of revenge"; and on the facts the applicants' legitimate private interest in securing compliance was spent (compare, in a similarly hard-fought dispute, a committal application that survived strike-out in circumstances where there was a continuing legitimate interest in securing compliance: *Deutsche Bank AG v Sebastian Holdings Inc* [2020] EWHC 3536 (Comm))
- Knowledge or motive at the time of the application is critical — prior perception of wrongdoing is not sufficient, and prior acquiescence will require explanation
- Presentation of the application (in the evidence in support and the skeleton) in "a heavy handed, aggressively partisan fashion" was counterproductive and heavily criticised

Note also:

- The potential for *Henderson v Henderson* abuse of process, if allegedly contemptuous conduct has been in issue in previous interlocutory applications
- The merits may not be straightforward — undertakings and injunctions are interpreted strictly (see *BTA Bank v Ablyazov* [2015] 1 WLR 4754 (SC) at [17]–[19]), breaches must be proved to the criminal standard, and a supposedly "obvious, flagrant, egregious" breach was anything but

Practical take-aways for litigators

Overall, a "better standard of conduct" is likely to be expected of applicants in committal proceedings (although failings to meet *Deripaska's* standards of "perfect rigour" may be excusable: see *Deutsche Bank* at [189]–[191])

Some practical take-aways:

- Think carefully — are contempt proceedings being contemplated for a legitimate purpose; similarly to pleading fraud, legal representatives should approach the possibility of committal proceedings with a view to (heightened) professional obligations, and be prepared to say no
- At the least, a "self-critical analysis of the ideal of prosecuting … for contempt" is required; cross-reference to the obligations of a private prosecutor may also impose discipline (see recently *R (Holloway) v Harrow Crown Court* [2019] EWHC 1731 (Admin) at [18]–[19])
- Get a second opinion — a separate legal team to that involved in the underlying litigation should be considered
- Let the admissible facts speak for themselves, and present the case fairly
- In many cases, evidence in support from the lay client will be required (and note the potential for disclosure orders / RFIs); if the lay client is unwilling to give that evidence or be exposed to cross-examination, think twice
- Litigation objectives can be achieved by other means — for example, reference to alleged breaches in support of (other) interlocutory relief may be effective, and avoid the heightened scrutiny of committal proceedings

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