

Contempt and the right to silence (*Andreewitch v Moutreuil*)

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Family analysis: The judgment in *Andreewitch v Moutreuil* highlights the importance of warning respondents in contempt proceedings of their right to silence. Marc Livingston of Janes Solicitors, and Christopher Sykes of Doughty Street Chambers, solicitor and counsel for the appellant, examine the case and its implications.

Andreewitch v Moutreuil [\[2020\] EWCA Civ 382](#), [\[2020\] All ER \(D\) 108 \(Mar\)](#)

What are the practical implications of this case?

This judgment has two implications.

Firstly, it makes the right to silence in contempt proceedings a matter of required procedure rather than just principle. All alleged contemnors, but particularly those who are unrepresented, must now be warned that they are not obliged to give oral evidence (para [16]). This is because the right to silence is a 'safeguard [that] is available to all, as it is in criminal proceedings' (para [8]).

Secondly, the judgment insists on the core importance of the right to silence. A failure to warn an alleged contemnor of that right cannot be downplayed as a merely technical fault (para [17]). Instead, it is a procedural defect that risks causing real injustice. The risk is all the greater for litigants in person regardless of their intelligence or experience (para [16]).

Going forward, the next issue will be how the courts actually implement this reinforced right. Judges are not helped by a lack of clarity in the Civil Procedure Rules (CPR), [SI 1998/3132](#), specifically [CPR PD 81](#). The court noted that the rules will soon be redrafted so that the procedure concerning contempt of court is clarified (para [11]). Whatever shape the rules do take, the next draft is likely to integrate *Andreewitch* in a way that represents one more evolution in the ever-changing law of contempt.

What was the background?

The dispute between the appellant and the respondent arose from family proceedings. In brief, the respondent had applied to have the appellant committed for contempt due to his alleged breach of a freezing order imposed on a contested asset.

The appellant attended the contempt proceedings as a litigant in person. The judge offered him access to legal aid and strove for procedural fairness. The judge did not, however, warn him of his right to silence and appeared to suggest that he should give evidence (para [5]). For his part, the appellant refused an adjournment and was eager to give oral evidence (para [4]). The evidence he then gave not only led to a finding of contempt but also prejudiced him in the family proceedings.

The appellant argued on appeal that the judge should have warned him of his right to silence before he gave oral evidence.

On appeal, it was common ground that previous authorities (specifically *Re L (A Child)* [2016] EWCA Civ 173, [2017] 1 FLR 1135) had recognised the importance of the right to silence in contempt proceedings. That right was, however, considered to be just one of a number of procedural safeguards that went towards overall fairness. The courts had not previously ruled that the right to silence was in itself vital to procedural fairness in such proceedings.

What did the court decide?

The Court of Appeal re-emphasised the importance of the right to silence. It is the judge who bears the 'duty...to ensure that the accused person is made aware that they are not obliged to give evidence and also warned that adverse consequences or inferences may arise from exercising the right to silence' (para [16]).

With that in mind, the court went on to assess whether these contempt proceedings had in fact been procedurally defective. The court found that they had been defective because the appellant had not been warned of his right to silence. That was the sole defect, but it was significant enough in itself to cause real injustice. This was because 'the right to silence is a core element in criminal proceedings and proceedings of a criminal character' (para [17]).

Having established this procedural irregularity, the next question was whether that irregularity had in fact caused real injustice. If not, then the court could disregard it and reject the appeal. The respondent asserted that the outcome of the contempt proceedings would have been the same regardless of whether the appellant gave evidence. The court disagreed, finding that there 'can be no doubt the judge's conclusions on the matter owed much to her assessment of [his] oral evidence' (para [18]). The court therefore allowed the appeal.

Marc Livingston of Janes Solicitors and Christopher Sykes of Doughty Street Chambers were solicitor and counsel for the appellant in this case. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.

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