IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
BUSINESS LIST (ChD)
[2022] EWHC 2268 (Ch)

Case No. BL-2019-MAN-000091

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Wednesday, 1 June 2022

Before:

HIS HONOUR JUDGE CAWSON QC

(Sitting as a Judge of the High Court)

B E T W E E N :

(1)AAA
(2)BBB Claimants

- and -

CCC Defendant

ANONYMISATION AND REPORTING RESTRICTIONS APPLY

Mark Harper QC (instructed by JMW Solicitors LLP) appeared on behalf of the Claimants.

The Defendant did not attend and was not represented.

J U D G M E N T

HHJ CAWSON QC:

1. Following a hearing on 15 to 17 June 2021 of the Claimant's application dated 6 August 2020 seeking the committal of the Defendant for contempt of court, in a judgment handed down on 25 June 2021, I held that the Defendant had committed some 28 breaches of paragraph 3 of the order of his HHJ Eyre QC dated 14 November 2019 as upheld (with minor variations) by the Court of Appeal on 7 July 2020 ("**the Substantive Order**"), being satisfied that the breaches had been proved to the requisite criminal standard.

2. In a judgment delivered orally on 6 July 2021 following a hearing on 5 July 2021, I sentenced the Defendant to a term of imprisonment of six months suspended for a period of three years, subject to compliance to the terms of paragraph 3 of the Substantive Order and the relevant schedule thereto. Although there has been no appeal by the Defendant in respect of either my finding that he had acted in contempt of court or in respect of sentence, the Claimants have successfully appealed to the Court of Appeal in respect of the sentence that I imposed, the Court of Appeal holding that my sentence had been unduly lenient to the Defendant, was flawed in a number of respects and, therefore, should be set aside. The judgment of the Court of Appeal (Lewison, Asplin and Baker LJJ) dated 7 April 2022 is reported at [2022] EWCA Civ 479.

3. Rather than imposing its own sentence, and given that the Defendant had not attended the appeal, the Court of Appeal remitted the case to the Business and Property Courts in Manchester for *"the judge"* to reconsider the issue as to the appropriate committal order to be made consequential upon my findings of contempt on 25 June 2021 in the light of *"any further subsequent matters which are drawn to his attention by way of mitigation or aggravation"* (see paragraph [49] of the judgment of the Court of Appeal).

4. It is in these circumstances that the case comes back before me to reconsider the appropriate committal order to be made in the light of the decision of the Court of Appeal.

5. There are a couple of preliminary matters that I must deal with.

   (1) Firstly, as with the hearing in the Court of Appeal, the present hearing has taken place and this judgment has been delivered in public, but on the basis that no transcript should be bespoken without the permission of the court;

   (2) Secondly, although the Defendant was present and made submissions as to mitigation at the original hearing before me on 5 July 2021, and was present on 6 July 2021 when I sentenced him, the Defendant did not attend the hearing of the appeal and the appeal proceeded in his absence, as did the handing down of judgment in respect of the appeal in the circumstances described in paragraph [6] of the judgment of the Court of Appeal. The Defendant has not attended today, but I am satisfied that he has been duly served by service at a designated email address appointed for the purposes of the present proceedings and by leaving documentation at his last known residence including, amongst other documents, a copy of the order of the Court of Appeal dated 7 April 2022 and notice of the present hearing. Further attempts have been made by the solicitors acting for the

> Claimants to communicate with the Defendant, including by way of WhatsApp communication using a known telephone number of the Defendant. In these circumstances, and given the steps that have been taken, I am satisfied that I should proceed in the Defendant's absence in the same way that the Court of Appeal was proceeded.

6. In reconsidering the appropriate committal order to make, I necessarily take into account the criticisms of my judgment delivered on 6 July 2021 as set out in the judgment of the Court of Appeal.

7. This judgment should be read together with my judgment handed down on 25 June 2021, and the judgment of the Court of Appeal.

8. Paragraphs [28]-[33] of the judgment of the Court of Appeal set out a number of authorities dealing with the correct approach to penalty in a committal case.

9. At paragraph [28], the Court of Appeal referred to *McKendrick v Financial Conduct Authority* [2019] 4 WLR 65; [2019] EWCA Civ 524 at [40] which I had quoted at [19] of my judgment dated 6 July 2021, which stated as follows:

> "Breach of a court order is always serious, because it undermines the administration of justice. We therefore agree with the observations of Jackson LJ in *Solodchenko* (see [31] above) as to the inherent seriousness of a breach of a court order, and as to the likelihood that nothing other than a prison sentence will suffice to punish such a serious contempt of court. The length of that sentence will, of course, depend on all the circumstances of the case, but again we agree with the observations of Jackson LJ as to the length of sentence which may often be appropriate. Mr Underwood was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum".

10. The judgment of the Court of Appeal at paragraphs [29] and [30] referred to two cases that were not cited to me, namely the decision of the Court of Appeal in *Liverpool Victoria Insurance Company v Khan & Ors: Practice Note* [2019] 1 WLR 3833 and a decision of the Supreme Court in *Her Majesty's Attorney General v Crosland* [2021] 4 WLR 103. In the former *Liverpool Victoria Insurance* case, the Court of Appeal addressed mitigation and the suspension of a custodial sentence for contempt in the following way:

"65. An early admission of the conduct constituting the contempt of court, before proceedings are commenced, will provide important mitigation, especially if it is volunteered before any allegation is made. So too will cooperation with any investigation into contempt of court committed by others involved in the same proceedings or in other fraudulent claims. Where the court is satisfied that the contemnor has shown genuine remorse for his or her conduct, that will provide mitigation. Serious ill health may be a factor properly taken into account. Previous positive good character, an unblemished professional record … are also matters which can be taken into account in the contemnor's favour…

…

68. Having reached a conclusion that a term of committal is inevitable, and having decided the appropriate length of that term, the court must consider what reduction should be made to reflect any admission of the contempt. In this regard, the timing of the admission is important: the earlier an admission is made in the proceedings, the greater the reduction which will be appropriate. Consistently with the approach taken in criminal cases pursuant to the Sentencing Council's definitive guideline, we think that a maximum reduction of one-third (from the term reached after consideration of all relevant aggravating and mitigating features, including any admissions made before the commencement of proceedings) will only be appropriate where conduct constituting the contempt of court has been admitted as soon as proceedings are commenced. Thereafter, any reduction should be on a sliding scale down to about 10% where an admission is made at trial.

69. The court must, finally, consider whether the term of committal can properly be suspended … We do not think that the court is necessarily precluded from taking into account, at this stage of the process, factors which have already been considered when deciding the appropriate length of the term of committal. Usually, however, the court in deciding the length of the term will already have given full weight to the mitigation, with the result that there is no powerful factor making it appropriate to suspend the term. If the immediate imprisonment of the contemnor will have a serious adverse effect on others, for example where the contemnor is the sole or principal carer of children or of vulnerable adults, that may make it appropriate for the term to be suspended; but even then, as the *Bashir* case [2012] ACD 69 shows, an immediate term – greatly shortened to reflect the personal mitigation – may well be necessary.

…

> 71. It follows from all we have said about the approach to sentencing in cases of this nature, and about the limited grounds for interfering with a decision of this nature, that there will be few cases in which a decision as to the appropriate sentence for contempt will be open to challenge in this court, whether on grounds of undue leniency or of undue severity."

11. The latter case of *Her Majesty's Attorney General v Crosland* was concerned with the appropriate penalty where a contemnor had been responsible for disclosing to the public the outcome of the Supreme Court's judgment prior to it having been handed down in breach of an embargo on disclosure when fully aware of the embargo. Lords Lloyd-Jones, Hamblen and Stephens stated that general guidance as to the approach to penalty was as provided in the *Liverpool Victoria Insurance* case, but they also summarised the recommended approach as follows in paragraph [44] of their judgment:

> "1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused.
>
> 2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.
>
> 3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.
>
> 4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.
>
> 5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children of vulnerable adults in their care.
>
> 6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.
>
> 7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension."

12. Paragraphs [31]-[33] of the judgment of the Court of Appeal address concerns in respect of freedom of expression in the light of the provisions of section 12 of the Human Rights Act 1998 and Article 10 of the European Convention on Human Rights and as to what the Supreme Court in *Her Majesty's Attorney General v Crosland* had to say in respect thereof, reference being made to the fact that the Supreme Court had pointed out at paragraph [40] that:

> "A permissible interference with freedom of expression must therefore be prescribed by law, must pursue one or more of the legitimate objectives in article 10(2) and must be necessary in a democratic society for the achievement of that aim. The last limb requires an assessment of the proportionality of the interference to the aim pursued."

As the Supreme Court stated in the latter case at paragraph [50], in a case of that kind:

> "Any penalty imposed must be necessary for the legitimate objective of maintaining the authority and impartiality of the judiciary and must be proportionate for that purpose".

13. Applying these authorities, the Court of Appeal in the present case held that the term of committal should have been significantly longer than six months, even when taking the mitigation available to the Defendant into account. The Court of Appeal stated that a term of six months was unduly lenient in the circumstances and outside the range of decisions which was reasonably open for me and indicating that the appropriate range of sentences on the facts before it was between 12 and 24 months, and 12 to 18 months once mitigation was taken into account.

14. Further, the Court of Appeal held that in relation to the suspension of the sentence of imprisonment I took into account what the Court of Appeal considered to be a number of irrelevant factors, including lack of bravado and frustration on the part of the Defendant, and that I took into account the Defendant's good character and the state of his health which I had already weighed in the balance in relation to mitigation. The Court of Appeal further held that I failed to consider whether it would be appropriate to suspend the period of imprisonment in part rather than in whole, and that I had given insufficient weight to the need for punishment in the sentence imposed. The Court of Appeal's reasons are explained in paragraph [35] and following of its judgment.

15. A particular aspect of the decision of the Court of Appeal was the finding that I had given disproportionate weight to the Defendant's belated apology. In paragraph [39] of its judgment, the Court of Appeal referred to the fact that in *Liverpool Victoria Insurance* at paragraph [68], the Court of Appeal had made clear that a substantial reduction in sentence was only appropriate where the admission was made as soon as proceedings were commenced and that, therefore, any reduction should be on a sliding scale down to about 10 per cent where the admission was made at trial. It was the view of the Court of Appeal that the Defendant's belated apology in the present case *"counted for very little, if anything"*.

16. I turn then to consider the appropriate committal order to make in the light of the findings of, and guidance provided by, the Court of Appeal by reference to the authorities that I have referred to.

17. There are in the present case the following aggravating factors:

    (1) On proper analysis, the contempt as found proved involved 28 breaches of the Substantive Order, the effect of which was to undermine the purpose of the Substantive Order and thereby serve to render it nugatory. This is particularly serious in respect of paragraph (b) of the Substantive Order which was intended to protect the identity of the Claimants as parties to the proceedings and to preserve their anonymity, but also serious to the extent that, on the basis of my findings, the Defendant had disseminated information to the Claimants' main client knowing that this was information that he was prevented by the Substantive Order from disseminating, and doing so with the intention of undermining commercial relations between the Claimant and that client.

    (2) The breaches occurred shortly after the decision of the Court of Appeal affirming the decision of HHJ Eyre QC pursuant to which he made the Substantive Order and soon after the Defendant had been informed as to the terms of the Substantive Order and informed in correspondence as to the consequences of breach, correspondence that he unconvincingly sought to play down in evidence and/or submissions.

    (3) The breaches continued after complaint had been made on behalf of the Claimants as to breach.

    (4) In seeking to defend the committal application the Defendant pursued untenable lines of defence, including as to the meaning of the Substantive Order, and denying that he had sent two of the relevant Tweets.

    (5) During the hearing of the committal application, in the course of his submissions and in giving evidence, the Defendant made sweeping but unfounded allegations as to fraud on the part of the Claimants' solicitors and more generally in respect of the conduct of individuals behind the Claimant companies.

18. So far as mitigation is concerned, as I have said, the Court of Appeal remitted the matter back to this court so that this court could take into account any further mitigation that might be offered on behalf of the Defendant. It is, therefore, particularly regrettable that the Defendant has not attended today in order to seek to put forward such further mitigation as he might have considered appropriate to put forward. I will, therefore, seek to deal with the matter as best I can in his absence and consider such points of mitigation as might appropriately have been advanced over and above already identified in my previous judgment that it is permissible for me to take into account.

19. I take into account that the Defendant is a former member of the Armed Services and a police officer now in his 60s of previous good character. Further, I am entitled to take into account that the Defendant has significant disabilities and is not in good health. Evidence as to the Defendant's state of health is as provided by a medical report dated 19 October 2020 included within the bundles before me and in evidence before the

court when the matter was last before it. However, although the Defendant sought to maintain during the course of making submissions by way of mitigation on 5 July 2021 that his breaches of the Substantive Order were occasioned by or at least influenced by mental impairment, there was no cogent evidence before the court to support this and I do not take it into account as a mitigating factor. My finding in my judgment handed down on 25 June 2021 was that the breaches had been deliberate and intentional.

20. For the reasons that I have already explained, I must proceed on the basis that the Defendant's belated apology counted for little, if anything, by way of mitigation. Further, it is irrelevant that the Defendant might have acted out of a sense of frustration for the reasons explained in the Court of Appeal's judgment.

21. I do, however, note that in *Her Majesty's Attorney General v Crosland* at paragraph [44(iv)], the Supreme Court identified as a mitigating factor genuine remorse. This is, as I see it, to be contrasted with an apology or an admission which on the basis of the correct approach as identified by the Court of Appeal should count for little, if anything, on the facts of the present case given the very late stage at which an apology was forthcoming. Although perhaps only as a result of the findings against him, the Defendant did after (and I emphasise <u>after</u>) I had passed sentence on 6 July 2021 say in a statement that he made to the court that he was genuinely ashamed of his actions. I am satisfied that he did at least at that stage show genuine remorse rather than confected remorse in respect of his actions. I consider that I am entitled to give the Defendant some credit for this as against the position of a defendant who remains in defiance of the court, notwithstanding the sentence that is imposed upon him. However, given how late the Defendant adopted this approach in contrast to the way in which he has conducted the defence of the committal application, and bearing in mind that he has not attended at court today in order to further express his remorse to the court, I consider that any such credit to be given must be limited.

22. A further potential mitigating factor is the effect of the sentence originally imposed and the fact that the matter has over an extended period of time been the subject matter of the appeal to the Court of Appeal before being referred back to me. In *Liverpool Victoria Insurance* at paragraph [56] of the judgment of the court, it was said as follows:

> "The practice in the criminal courts has therefore developed since the practice which was relied on, by way of analogy, in *Neil v Ryan*. However, *Neil v Ryan* remains authority for the proposition that, when an appellate court is satisfied that a sanction imposed by a civil court for contempt of court must be quashed as being unduly lenient, and is considering how to exercise its own powers, it can in an appropriate case properly take into account the fact that the contemnor, having previously been dealt with in a way which did not entail immediate loss of liberty, has in the appeal proceedings had the anxiety of knowing that the outcome may be an immediate committal to prison".

I consider that this anxiety question is a factor that I am entitled to take into account in mitigation, and I do not understand this to be disputed by Mr Harper on behalf of

the Claimants. However, I consider the extent to which factor can properly be taken into account is tempered by the fact that the Defendant did not engage in the appeal process and has not engaged in the process today by attending at court in which event the court would have had the opportunity of hearing rather more as to whether, in fact, the Defendant had suffered any anxiety as such as a result of the circumstances that I have described. So whilst it is a factor that I take into account, again, the credit to be given must, in my judgment, be limited.

23. Although not a requirement that I should do so, as the Court of Appeal have explained, it is preferable and good practice that I should consider what the sentence should be imposed in the light of the seriousness of the breaches before taking mitigation into account. The breaches clearly were serious breaches with a number of serious aggravating factors which are, in my judgment, sufficiently serious to require the imposition of a term of imprisonment towards the top end of the 24-month maximum provided for, and the rejection of any suggestion of a fine.

24. But for the mitigation provided, and as enjoined by the Supreme Court in *Her Majesty's Attorney General v Crosland*, I consider that the shortest period of imprisonment which properly reflects the seriousness of the contempt to be the imposition of a term of imprisonment of 20 months. However, in the light of the mitigation that I consider is properly available to the Defendant, I consider that it is appropriate to reduce this term to a term of imprisonment of 15 months.

25. The Court of Appeal, in finding that I had erred in suspending the sentence of 6 months' imprisonment that I had imposed on 6 July 2021, held at paragraph [26] of its judgment that whilst I had referred to the need to balance punishment and achieving future compliance when addressing the question of whether to suspend the committal order, I had failed to sufficiently address the need to punish the seriousness of the breaches of the Substantive Order.

26. The Court of Appeal later, at paragraph [49], held that I had failed to consider whether the balance between punishment and coercion might be best kept by suspending part of the prison term rather than the whole. Securing future compliance remains, in my judgment, an important consideration in the present circumstances and something that I consider is more likely to be achieved if part of the term of imprisonment that I propose to impose is suspended for a period of time that significantly exceeds the term of imprisonment imposed or that would actually be served.

27. As the Court of Appeal referred at paragraph [9] of its judgment, the power of the High Court when making a committal order to order that its execution should be suspended is derived from the court's inherent jurisdiction (see *R v Yaxley-Lennon* [2018] EWCA Crim 1856). At paragraph [48] of its judgment, the Court of Appeal in the present case implicitly recognised that it would be open to me in reconsidering the sentencing options to suspend part at least of the sentence of imprisonment imposed. Bearing in mind that the jurisdiction to suspend is an inherent one, I can see no reason in principle why it should not be open to me to suspend part of the sentence of imprisonment that I imposed.

28. Seeking to strike a balance as best I can between punishment and future compliance, I consider that of the term of imprisonment of 15 months that I propose to impose, 10

months thereof should take effect as an immediate custodial sentence and five months thereof should be suspended on condition that the Defendant complies with paragraph 3 of, and the confidential schedule to, the Substantive Order.

29. I have given consideration to the alternative course of leaving the term to be served at 20 months on the basis that it would be open to the Defendant to attend court in order to purge his contempt, or to indicate in my judgment that part of the sentence that is imposed reflects a penal element and part of the term that is imposed reflects a coercive element to secure future compliance. So far as the latter form of order is concerned, whilst I consider that might be appropriate in a case where one is concerned with a continuing breach of a court order that the Defendant has failed to comply with, in the circumstances of the present case the breaches have occurred and what one is primarily concerned with is whether the Defendant might act in further breach of those orders, in which case the coercive effect of suspending the remaining five months of the term of imprisonment for a not insignificant period of time is, in my judgment, the more appropriate course to adopt.

30. So far as the term of 10 months imposed by way of immediate custodial sentence is concerned, the Defendant will be entitled to unconditional release after serving half of his sentence, i.e. five months.

31. The Defendant has a right of appeal without permission to the Court of Appeal. Any application notice must be lodged by 4 p.m. on Wednesday, 22 June 2022.

32. Subject to any points arising from this judgment, I propose to hear from Mr Harper as to the terms of the order to be made and with regard to the issuing of a warrant for the Defendant's arrest.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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