Neutral Citation Number: [2019] EWCA Civ 524

Case No: A3/2019/0500

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES,
BUSINESS LIST (Ch D)
Mr Justice Marcus Smith
[2019] EWHC 607 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2019

Before:

LORD JUSTICE HAMBLEN
and
LORD JUSTICE HOLROYDE

- -

Between:

ROBERT JOHN McKENDRICK	**Appellant**
- and -	
THE FINANCIAL CONDUCT AUTHORITY	**Respondent**

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- -

Mr Ashley Underwood QC & Mr Adam Tear (instructed by **Howe & Co**) for the **Appellant**
Mr Adam Temple (instructed by **The Financial Conduct Authority**) for the **Respondent**

Hearing date: 14th March 2019

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Approved Judgment

Lord Justice Hamblen and Lord Justice Holroyde:

1. Mr Robert McKendrick ("the appellant") was one of a number of defendants to a claim brought by the respondent Financial Conduct Authority ("the FCA"). In the course of the proceedings two worldwide freezing orders ("WFOs") were made against him. He breached those orders in a number of different ways and admitted that he was thereby in contempt of court. On 1st March 2019 Marcus Smith J ("the judge") committed him to prison for a term of 6 months. The appellant appealed against that order, contending that it was far too long. At the conclusion of the hearing of the appeal we announced our decision to dismiss the appeal, and indicated that our reasons would be given in writing. These are our reasons for dismissing the appeal.

   The facts:

2. For present purposes, the underlying litigation can be summarised very briefly. The appellant was involved in a number of investment schemes, in respect of which investors suffered losses. The FCA brought proceedings in relation to the operation and promotion of those schemes. After a contested hearing in March 2018 before HH Judge McCahill QC the appellant was found to have acted in contravention of the provisions of section 397, and to have been knowingly concerned in contraventions of sections 19, 21 and 397, of the Financial Services and Markets Act 2000, including by the making of false, misleading and deceptive statements in relation to one of the schemes. Judge McCahill QC recorded that he had found the appellant to be "an evasive and untruthful witness on critical matters". The appellant was ordered to pay a sum in excess of £14.3 million to the FCA, for distribution to the investors. The appellant sought to appeal against that order, but permission to appeal was refused. On 23rd October 2018 he was made bankrupt on his own application.

3. The first of the WFOs was made on 23rd July 2013 by Roth J ("the Roth WFO"). The second was made by Judge McCahill QC on 27th March 2018, after the conclusion of the trial ("the McCahill WFO"). Each of the WFOs contained disclosure requirements and a worldwide freezing provision. Each required the appellant to give details of all his assets, including any bank account whether in his own name or not.

4. The appellant has at all material times owned a number of buy-to-let properties from which he derives a rental income. It was clearly in the interest of all parties that he should continue to receive that income and should therefore be able to meet the mortgage payments and other outgoings of the lettings business. Each of the WFOs reflected that interest by allowing the appellant a sufficient sum to enable him to meet his liabilities each month, in addition to a sum for his living expenses.

5. By a consent order dated 29th January 2014 the Roth WFO was varied in relation to a named account, account number 20641197 with Barclays Bank ("the Barclays account") and was replaced by undertakings that the appellant would not spend more than £38,600 from the Barclays account. The appellant also undertook to provide the FCA with copies of statements of the Barclays account within 5 days at the end of each calendar month, thus enabling the FCA to monitor the appellant's income and expenditure.

6. The McCahill WFO brought the undertakings into the terms of the WFO. The McCahill WFO included a prohibition on the appellant dealing with his assets up to the value of £13.5 million, save only (i) if his assets exceeded that value (which they did not); and (ii) in respect of expenditure from the Barclays account, limited to £20,000 (later increased to £22,000 with the FCA's consent) towards living expenses, the buy-to-let properties and also a reasonable sum on legal expenses. This was subject to the FCA being informed of any disposal in excess of £1,000. The McCahill WFO was to operate, therefore, by the whole of the buy-to-let business operating through the Barclays account, in relation to which the FCA was again to receive bank statements within 5 days at the end of each calendar month.

7. On 11th April 2018 the appellant provided an affidavit of his means, as he had been required to do by the McCahill WFO. Nothing in this affidavit suggested that rental payments were held in any account other than the Barclays account, and nothing was said to suggest that the appellant's wife or former wife Mrs Priya McKendrick ("Mrs McKendrick") held any money on his behalf.

8. On 17th April 2018 the appellant reported to the FCA that the Barclays account had been frozen or blocked by the bank, to the extent that payments into the account could still be received, and existing direct debits would still be paid, but the appellant could not access the account or make any amendment to it. The appellant has throughout contended that he could not realistically use the account for the purpose of his lettings business whilst it was blocked in that way.

9. Correspondence which was shown to the judge and to this court gave conflicting information as to the period of time for which the Barclays account remained blocked. The FCA were told by the bank that it had been unblocked by 27th April 2018; but correspondence between the bank and the appellant showed that the account remained blocked until 15th August 2018.

10. The appellant failed to deliver copy bank statements to the FCA in accordance with his obligations under the McCahill WFO. In particular, he did not provide the March 2018 statement until 2nd May 2018; did not provide the April 2018 statement until 14th May 2018; and did not provide the May 2018 statement until 23rd July 2018. He blamed that failure on the difficulties he was encountering in operating the Barclays account. When statements were eventually provided, it could be seen that the Barclays account was no longer being used to receive the rental payments made by the appellant's tenants. The last rental payment into the Barclays account was made on 22nd March 2018 (about 5 weeks after the draft of Judge McCahill QC's reserved judgment had been provided to the parties, but before its hand-down).

11. On 3rd August 2018 the FCA wrote to the appellant asking what had happened to the rental payments. In his reply dated 17th August the appellant said that rental payments were being paid into "a third party account whom I signed an agency agreement with" and that mortgage payments had been made "by my agent on my behalf". In mid-September 2018, the appellant revealed that the third party agent to whom he had referred was Mrs McKendrick. He said that she had "been running the lettings for years", and that the arrangement had been "formalised in 2017". He provided to the FCA a copy of a contract for Mrs McKendrick's services which was dated 1st April 2017. That contract provided for Mrs McKendrick to receive a commission of 10% of all rental income plus 12% of the annual rent of each tenancy signed or renewed.

That entitlement was considerably higher than the commission which the appellant said he had paid to agents whom he had previously engaged but had replaced with Mrs McKendrick.

12. It is the FCA's case that the agreement to pay Mrs McKendrick such large commissions indicated a deliberate decision to ensure that there was no profit from the buy-to-let business, so that the funds could be kept away from the FCA, and that all of this had been kept from the FCA.

13. Investigations by the FCA led to the allegations that the appellant had acted in breach of both WFOs in failing to make disclosure, directing that rental payments be made to Mrs McKendrick and to accounts other than the Barclays account and by spending money paid to Mrs McKendrick. The FCA alleged that between March 2018 and his bankruptcy the appellant had failed to account for a sum approaching £40,000. They were not able to quantify the total sum for which he had failed to account.

The application for committal:

14. The FCA's application to commit the appellant for contempt of court was issued on 12th October 2018. Five allegations of contempt of court were made against the appellant. They were in the following terms, which reflect the terms of the relevant requirements in the two WFOs:

> "1: in breach of the McCahill WFO, Mr McKendrick's affidavit dated 11 April 2018 failed to disclose all his assets, in that it:
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> (i) failed to disclose Mr McKendrick's right to receive payments from Mrs Priya McKendrick;
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> (ii) failed to disclose that Mrs Priya McKendrick held money on behalf of Mr McKendrick; and/or
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> (iii) failed to disclose that Mrs Priya McKendrick was operating a bank account over which Mr McKendrick exercised *de facto* control or in relation to which Mrs Priya McKendrick habitually obeyed the instructions of Mr McKendrick.
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> 2: from around May 2016, Mr McKendrick directed that rental payments on his buy-to-let properties be made to Mrs Priya McKendrick rather than the Barclays account to which they had previously been paid, in breach of the Roth WFO.
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> 3: from around March 2018, Mr McKendrick directed that rental payments on his buy-to-let properties be made to Mrs Priya McKendrick rather than the Barclays account to which they had previously been paid, in breach of the McCahill WFO.
>
> 4: Mr McKendrick made mortgage payments on his buy-to-let properties either himself or by Mrs McKendrick other than from the Barclays account in breach of both the Roth WFO and the McCahill WFO.

> 5: Mr McKendrick disposed of, dealt with or diminished the value of his assets by spending money paid to Mrs Priya McKendrick."

15. In summary, therefore, it was alleged that the appellant failed to disclose assets, diverted rental payments into an account other than the Barclays account and spent that money.

16. At a hearing on 29th October 2018, directions were given for the committal application to be heard on the first available date after 25th January 2019. The hearing was subsequently fixed for hearing during a window beginning on 29th January. On 11th January 2019 (nearly 3 months after the application for committal was issued) his solicitors sent an email to the court enclosing a "draft plea" in which the appellant for the first time admitted and apologised for his breaches of the order, which he said were due to a failure of legal advice by his former representatives and a period of time when he was acting as a litigant in person and therefore had no legal advice. The appellant also stated that there was no prospect of any further breach as he had been declared bankrupt on 23rd October 2018 and his funds were accordingly now handled by his receivers.

17. On 25th January 2019 the appellant's solicitors sent to the court a "mitigation statement" in which he apologised unreservedly for his failure to comply fully with the WFOs and said that it would not happen again. He said –

> "2. I maintain that there has been no dissipation of assets that would not in any event have been allowed under the order. I have simply changed the management agent. …
>
> 3. As such, the only money missing is the costs of the agent. I fully appreciate that in hindsight, the appointing of my wife, from whom I'm separated, would cause alarm.
>
> 4. I have been complying with the receivers' request for information, and indeed attached to this statement is a list of the money received by the agent, expenses and commission. This information was supplied to the receiver in November 2018."

The statement went on to refer to the fact that the appellant had been the victim of a violent robbery in his home: he said that the robbers were currently serving long sentences of imprisonment, and that he had no wish to be sent to prison where he might encounter them.

18. At a hearing on 31st January 2019 the judge adjourned the contempt proceedings so that the appellant could provide further information. This the appellant did, filing an affidavit and providing a spreadsheet of the relevant payments relating to his rentals business. On the basis of that information, it appeared that Mrs McKendrick had been his agent since February 2016 and that he owed her more than £40,000 in respect of commission payments to which she was said to be entitled.

The committal hearing:

19. At the substantive hearing on 1st March 2019 the judge was satisfied that all procedural and formal requirements had been complied with. He took into account that the appellant had accepted the five contempts alleged against him and had thereby saved a great deal of court time. He was independently satisfied by the evidence adduced by the FCA that each of the contempts had been proved.

20. In evidence which he gave in mitigation of his breaches of the WFOs, the appellant said that the Barclays account had been blocked from April until August 2018, with the result that he didn't have online banking, could not make transfers and "could hardly do anything". He denied a suggestion in cross-examination that he had paid an increased commission to Mrs McKendrick in a deliberate attempt to boost her income and avoid assets being available to the FCA.

21. The judge reminded himself that the purpose of the contempt jurisdiction was to uphold the authority of the court, by punishing a contemnor and deterring others, and in some cases also to provide an incentive for belated compliance with a court order. He further reminded himself that a sentence of imprisonment should only be imposed if nothing other than a custodial sentence was justified.

22. The judge emphasised that WFOs are important orders of the court. In this case the investors – who had incurred substantial losses – had suffered because the whole purpose of the Roth and McCahill WFOs had been to preserve assets which might make good their losses to at least some extent. The degree to which they had suffered as a result of the diversion of funds by the appellant was unknown, because it had not been possible for the FCA completely to trace the flow of money. Both the Roth and the McCahill WFOs had been clearly worded, and the judge was satisfied that the appellant – even when unrepresented – must have known what they meant. The judge was also satisfied, from the nature of the breaches of the WFOs, that they were planned and deliberate breaches. Not only was information not provided, but money was paid away in breach of the orders and used by the appellant for his own benefit. It was, he said, important to deter such conduct.

23. The judge then considered whether there was continuing non-compliance with the McCahill WFO. He concluded that the appellant had belatedly made genuine attempts to provide the necessary information and to comply with the disclosure requirements of the McCahill WFO. It followed that his sentence should not include any element to ensure compliance.

24. The judge expressed his decision as to sentence as follows:

> "38. It seems to me that the critical factor in terms of sentence is the deliberateness of the breaches of the worldwide freezing orders. It seems to me that we have, in this case, many and varied breaches of the Roth WFO and the McCahill WFO, but that these breaches all went to the same end, which was to thwart the orders of the court. Given the importance of worldwide freezing orders in this jurisdiction and the deliberateness of the breaches, I consider that a custodial sentence is inevitable.

> 39. I have considered that as a starting point, my sentence ought to be one of 12 months' imprisonment. That, I consider, must be reduced by reference to two factors. First, there is the fact that Mr McKendrick has apologised and that he has admitted the contempts. That is a very significant matter entitling a substantial reduction to the sentence that I would otherwise be minded to impose.
>
> 40. Secondly, there is the fact that, after my invitation, a genuine and bona fide attempt (as I find it) has been made to comply with the McCahill WFO. That also is a substantial and significant matter that requires to be reflected in the sentence that I impose.
>
> 41. I consider that, by reason of these two factors, the initial sentence that I was minded to impose (12 months' imprisonment) should be reduced – halved in fact – to one of six months.
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> 42. The question that finally pertains is whether I should suspend the sentence on condition that the McCahill WFO continue to be complied with or whether I should not suspend. This I found to be a most difficult question. It seems to me that, on the one hand, I must weigh the fact that I have found that it is unlikely to be the case that further information can be provided by Mr McKendrick in this matter. On the other hand, I must also bear in mind that the deliberateness of the breaches of the Roth WFO and the McCahill WFO are most serious and that the intention of the court in making these orders in the first place has been, to an extent unknown, thwarted.
>
> 43. In these circumstances, it seems to me that I must make a custodial sentence that is unsuspended and I therefore order that Mr McKendrick be committed for a period of six months from the date of his apprehension. As I have made clear, Mr McKendrick will be entitled to unconditional release after serving half of his sentence by virtue of section 258 of the Criminal Justice Act 2003."

25. The judge went on to make an order that the appellant must within 14 days pay the FCA's costs, which he summarily assessed.

The grounds of appeal:

26. Three grounds of appeal were put forward: first, that the starting point of 12 months' imprisonment was far too high; secondly, that execution of the sentence should have been stayed pending appeal to this court; and thirdly, that it was unreasonable to order the appellant to pay the costs within 14 days when he was bound to default on such an order.

The submissions:

27. We are grateful to counsel for their clear and helpful submissions. On behalf of the appellant, Mr Ashley Underwood QC realistically acknowledged the serious features of the admitted contempts of court, which he summarised as being that the appellant diverted money to Mrs McKendrick by appointing her as his agent at a high rate of commission, and directed the money to a bank account other than the Barclays account which should have been used. He submitted that it was however important to be precise about the extent and degree of the wrongdoing. He noted that the judge had accepted as truthful the appellant's evidence at the hearing on 1st March 2019. He emphasised that the appellant had been cross-examined at that hearing about his assertion that he had been unable to operate the Barclays account between April and mid-August 2018, and that the judge had not made any specific finding that the account had not been blocked throughout that period. In the absence of any such adverse finding, Mr Underwood submitted that this court must proceed on the basis that the judge accepted that the account had been blocked for the period which the appellant asserted, and that accordingly the account which the appellant should have used could not in practical terms be used for the purpose of his lettings business. Although the appellant should have told the FCA what he was doing, such conduct was not as serious as a diversion of money from a designated account which should and could have been used. To that extent the admitted breaches particularised in allegations 3 and 4 were mitigated. Similarly, whilst accepting that it is not possible to say how much money had been siphoned off by the appellant's actions in contempt of court, Mr Underwood emphasised that there was no specific finding that funds had been dissipated by Mrs McKendrick. He accordingly submitted that this court must proceed on the basis that she had not done so. He pointed out that the sums of money involved were not particularly large, that this is not a case in which the contemnor had been found to have persisted in a series of lies, and that there was no allegation of perjury. He submitted that any sentence of imprisonment imposed for contempt of court must have regard to, and bear an appropriate proportion to, the maximum sentence of two years. In this regard he relied on guidance given in the context of Family Court proceedings in *Hale v Tanner* [2000] EWCA Civ 5570. In those circumstances, he argued, the judge's starting point of 12 months' imprisonment - being half of the maximum sentence permitted for any contempt of court - had been much too high. He made no separate criticism of the extent to which the judge had reduced his starting-point to reflect the matters of mitigation and the admissions made by the appellant. However, because the starting-point had been much too high, he submitted that the final sentence of 6 months was itself much too long.

28. Mr Underwood referred to a number of cases in which sentences had been imposed on contemnors who were in continuing breach of court orders and/or had been proved to have lied to the court. Each of those cases depended on its own facts, and we do not think it necessary to refer to them in any detail.

29. Mr Underwood did not press either ground 2 (because the point had become largely academic in view of the speed with which the appeal had been listed for hearing), or ground 3 (because in view of the bankruptcy of the appellant, the prospects of his being able to comply with the order for costs would not be improved by the granting of a longer period of time in which to pay).

30. For the FCA, Mr Adam Temple submitted that it was important to take into account that the judge made a substantial reduction from his starting-point to reflect the fact

that the appellant had belatedly made disclosures of information and had also admitted his breaches of the WFOs. He pointed out that if the appellant had been in continuing breach of the McCahill WFO, it would have been appropriate to include within the sentence a period of imprisonment as a means of compelling compliance with the order. Mr Temple submitted that it was therefore appropriate to treat the starting-point of 12 months as the sentence which the judge would have imposed if the appellant had neither made disclosures nor made admissions. Viewed in that way, he submitted, the term of 12 months was not excessive. In response to Mr Underwood's submissions about adverse findings which had not been made by the judge, Mr Temple submitted that it was important to focus on the findings which the judge had made – namely that the breaches of the orders had been deliberate, that there had been an element of planned flouting of the orders, that information had not been provided and that money had been paid away in breach of the orders and used for the appellant's benefit instead of being available for the investors. He pointed out that the last payment of rent into the Barclays account had been made just after the draft judgment of Judge McCahill QC had been circulated to the parties, giving rise to an inference that the appellant was deliberately taking steps to retain control of rental income in breach of the order he knew would be made. Mr Temple also pointed to spreadsheets compiled by the appellant which showed that payments to Mrs McKendrick had soaked up all the money which had been received by way of rental income and which had not been spent on paying the mortgages or otherwise funding the investment properties. He submitted that although the sums were not large, the only available assets had been dissipated instead of being available for the FCA to distribute to the investors.

31. Mr Temple relied on the decision of this court in *JSC BTA Bank v Solodchenko and others, (no 2)* [2011] EWCA Civ 1241, in which Jackson LJ (with whom the Master of the Rolls and Carnwath LJ had agreed) had said, at [51] and [55] –

> "51. I shall not attempt to catalogue all those first instance decisions. What they show collectively is that any deliberate and substantial breach of the restraint provisions or the disclosure provisions of a freezing order is a serious matter. Such a breach normally attracts an immediate custodial sentence which is measured in months rather than weeks and may well exceed a year. …
>
> 55.From this review of authority I derive the following propositions concerning sentence for civil contempt, when such contempt consists of non-compliance with the disclosure provisions of a freezing order:
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> (i) Freezing orders are made for good reason and in order to prevent the dissipation or spiriting away of assets. Any substantial breach of such an order is a serious matter, which merits condign punishment.
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> (ii) Condign punishment for such contempt normally means a prison sentence. However, there may be circumstances in which a substantial fine is sufficient: for example, if the contempt has been purged and the relevant assets recovered.

> (iii) Where there is a continuing failure to disclose relevant information, the court should consider imposing a long sentence, possibly even the maximum of two years, in order to encourage future cooperation by the contemnor."

32. Mr Temple also relied on *Asia Islamic Trade Finance Fund v Drum Risk Management* [2015] EWHC 3748 (Comm), in which Popplewell J, having reviewed a number of authorities, said at paragraph 7(3) –

> "A breach of a freezing order and of the disclosure provisions which attach to a freezing order is an attack on the administration of justice which usually merits an immediate sentence of imprisonment of a not insubstantial amount."

Referring to the case of *Crystal Mews Limited v Metterick and others* [2006] EWHC 3087 (Ch) Popplewell J went on to say, at paragraph 7(6) –

> "The factors which may make the contempt more or less serious include those identified by Lawrence Collins J as he then was, at para 13 of the *Crystal Mews* case, namely:
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> (a) whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy;
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> (b) the extent to which the contemnor has acted under pressure;
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> (c) whether the breach of the order was deliberate or unintentional;
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> (d) the degree of culpability;
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> (e) whether the contemnor has been placed in breach of the order by reason of the conduct of others;
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> (f) whether the contemnor appreciates the seriousness of the deliberate breach;
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> (g) whether the contemnor has cooperated;
>
> to which I would add:
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> (h) whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward."

The legal framework:

33. The principal penalties for contempt of court are a fine or committal to prison. Section 14 of the Contempt of Court Act 1981 provides, in material part –

> "(1) In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no

> limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court.
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> (2) In any case where an inferior court has power to fine a person for contempt of court and (apart from this provision) no limit applies to the amount of the fine, the fine shall not on any occasion exceed £2,500."

34. If a committal is ordered to take effect immediately, the contemnor is entitled to automatic release, without conditions, after serving half of the term of the committal.

35. By CPR 81.29(1) –

> "The court making the committal order may also order that its execution will be suspended for such period or on such terms or conditions as it may specify."

36. By section 13 of the Administration of Justice Act 1960, an appeal lies to this court against the judge's decision. By section 13(3), the powers of this court are as follows:

> "The court to which an appeal is brought under this section may reverse or vary the order or decision of the court below, and make such other order as may be just; and without prejudice to the inherent powers of any court referred to in subsection (2) of this section…."

It is also necessary to have regard to CPR 52.21, which provides –

> "(1) Every appeal will be limited to a review of the decision of the lower court unless—
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> (a) a practice direction makes different provision for a particular category of appeal; or
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> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> (2) Unless it orders otherwise, the appeal court will not receive—
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> (a) oral evidence; or
>
> (b) evidence which was not before the lower court.
>
> (3) The appeal court will allow an appeal where the decision of the lower court was—

> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
>
> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.
>
> (5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission."

37. In deciding what sentence to impose for a contempt of court, the judge has to weigh and assess a number of factors. This court is reluctant to interfere with decisions of that nature, and will generally only do so if the judge:

    i) Made an error of principle;

    ii) Took into account immaterial factors or failed to take into account material factors; or

    iii) Reached a decision which was plainly wrong in that it was outside the range of decisions reasonably open to the judge.

    See *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101 at [35]-[36], *Aldi Stores Ltd* [2008] 1 WLR 748 at [16], *Stuart v Goldberg Linde* [2008] 1WLR 823 at [76] and [81] and the very recent decision of this court in *Liverpool Victoria Insurance Limited v Zafar* [2019] EWCA 392 (Civ) at [44].

38. It follows from that approach that there will be few cases in which a contemnor will be able successfully to challenge a sentence as being excessive. If however this court is satisfied that the sentence was "wrong" on one of the above grounds, it will reverse the decision below and either remit the case to the judge for further consideration of sanction or substitute its own decision.

    Discussion:

39. In *LVI v Zafar* at [58] this court considered the correct approach to sentencing for a contempt of court involving a false statement verified by a statement of truth. We consider that a similar approach should be adopted when - as in this case - a court is sentencing for contempt of court of the kind which involves one or more breaches of an order of the court. The court should first consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the breach of the order. In this regard, aggravating or mitigating factors which are likely to arise for consideration will often include some of those identified by Popplewell J in *Asia Islamic Trade Finance Fund* (see [32] above). Having determined the seriousness of the case, the court must consider whether a fine would be a sufficient penalty. If it would, committal to prison cannot be justified, even if the contemnor's means are so limited that the amount of the fine must be modest.

40. 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.

41. As the judge recognised, it may sometimes be necessary for the sentence for this form of contempt of court to include an element intended to encourage belated compliance with the court's order. Where that is the case, that element of the sentence is in principle one which may be remitted if the contemnor subsequently purges his contempt by complying with the order. In the present case, however, no coercive order was necessary or appropriate, and the judge was accordingly concerned only with the appropriate sentence by way of punishment for the past breaches of the Roth and McCahill WFOs.

42. The passages which we have summarised and quoted from his judgment show that he directed himself correctly and carefully considered all relevant factors, including those which he found in the appellant's favour. It cannot be said that he took into account any immaterial factor, or left any material factor out of account. The real issue raised by the appeal, in our view, is whether the judge's decision as to sentence was wrong because it fell outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.

43. There was force in Mr Underwood's submission that the judge did not make specific findings on some important matters in issue between the parties. We recognise that this was an ex tempore judgment given under pressure of time at the end of a very full working day, and we acknowledge Mr Temple's point that the judge's thinking can clearly be seen in his observations in the course of submissions to him. We nonetheless accept that we must, as Mr Underwood submits, proceed on the basis that those issues were resolved in the appellant's favour, and on the basis that the Barclays account was blocked until August 2018.

44. Even when approached on that basis, however, the appellant's misconduct was serious. It involved, as the judge found, a deliberate flouting of the WFOs in a variety of ways. The WFOs were repeatedly breached over a significant period of time: each diversion of a rental payment to Mrs McKendrick was a breach of either the Roth WFO (before 27.03.18) or the McCahill WFO (after that date); so too was each payment towards a buy-to-let mortgage made from a source other than the Barclays account. There were, therefore, repeated and deliberate acts in breach of the clear requirements of the WFOs. Whatever difficulties the blocking of the Barclays account caused the appellant, it did not prevent him from taking the obvious step of telling the FCA that rental payments were being made to Mrs McKendrick and being paid into accounts other than the Barclays account: his failure to do so provided further support for the judge's finding that the breaches of the WFOs were deliberate.

The appellant's actions resulted in all of the funds which should have been and otherwise would have been available to the investors being dissipated for the benefit of the appellant. Although the amount of money involved cannot have been very large, and was no more than a drop in the ocean compared to the amount of the order made against the appellant, it was nonetheless all the money which should have been available. It was the appellant's case that he owed more than £40,000 to Mrs McKendrick, so that further money up to that amount would also have been diverted to her if it had been available. At least some of the diverted payments were used to fund the appellant's living expenses, and a substantial sum has not been accounted for.

45. Moreover, the fact that it is impossible to say precisely how much had been dissipated is in itself an indication of the seriousness of the breaches: the purpose of the WFOs and of the special arrangements made for the Barclays account was to ensure that the income from the lettings business could be accurately monitored, and properly applied by the FCA for the benefit of the investors; but that purpose was wholly frustrated by the appellant's actions.

46. The judge correctly took into account the fact that the appellant had made admissions, thereby both acknowledging his wrongdoing and saving a lot of court time. That was an important point in the appellant's favour, but there is a limit to how much weight could be given to it. In *LVI v Zafar*, at [68], this court explained that the timing of any 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."

In the present case, the appellant did not volunteer any admissions prior to the commencement of the application for his committal: at best, he provided information when specifically pressed for it by the FCA, and even then his initial reference to "a third party agent" was far from a frank acknowledgment of what he had been doing. As the chronology summarised at [13] above shows, the admissions which the appellant made after the issuing of the application were certainly not made at the earliest opportunity. In those circumstances, the appellant could not in our view have expected a reduction of more than one-quarter by way of credit for his admissions.

47. The appellant's conduct in contempt of court was plainly so serious that no sanction other than a significant term of imprisonment could be justified. We accept that the judge's starting point of 12 months was high if it was only punishment for past breaches. The reduction of that starting point by half was, however, generous and it is the sentence actually imposed which must be outside the range reasonably open to the

judge if an appeal is to succeed. We see force in Mr Temple's submission that 12 months should be viewed as the sentence the judge would have imposed if he had not only been punishing the past breaches but also encouraging belated compliance with the McCahill WFO. The sentence of six months was thus imposed as punishment for the past breaches, taking into account the admissions made (not at the earliest opportunity) by the appellant. On that basis, it cannot be said that a term of six months was outside the range reasonably open to the judge.

48. As to whether that sentence should be suspended, the judge again correctly identified the relevant considerations. He was in the best position to balance and assess those competing considerations, and it is in our judgment impossible to say that he was not entitled to reach the conclusion he did.

49. We therefore concluded that the first ground of appeal must fail. We do not think it necessary to address the second and third grounds in any detail: Mr Underwood was entirely realistic in his approach to those grounds, and we saw no merit in them.

50. It was for those reasons that we dismissed the appeal. The appellant must pay the FCA's costs of the appeal, summarily assessed in the sum of £4,375.