Neutral Citation Number: [2022] EWCA Civ 479

Case No: CA-2021-000693
(Formerly A3/2021/1276)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)
His Honour Judge Cawson QC
[2021] EWHC 2534 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
LORD JUSTICE BAKER

- -

Between :

1) AAA **2) BBB**	**Appellants/ Applicants**
- and –	
CCC	**Respondent**

- -
- -

Mark Harper QC (instructed by **JMW Solicitors LLP**) for the **Appellants**
The Respondent did not appear and was not represented

Hearing date: 5 April 2022

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APPROVED JUDGMENT

Lord Justice Lewison, Lady Justice Asplin and Lord Justice Baker:

1. This is an appeal from a committal order made by His Honour Judge Cawson QC sealed on 23 July 2021 (the "Committal Order"). The judge ordered the Respondent to be committed to prison for a period of 6 months and suspended that sentence for a period of 3 years from 6 July 2021 on terms that the Respondent comply with paragraph 3 of the order made in the proceedings by His Honour Judge Eyre QC on 14 November 2019, as varied by the order of the Court of Appeal on 7 July 2020 and the Confidential Schedules to that order (the "Substantive Order").

2. The Appellants submit that there are fundamental errors in the judge's approach to the appropriate penalty for contempt and that the sentence imposed is unduly lenient and falls outside the range of reasonable sentences in the circumstances.

3. The substantive proceedings in the High Court and the hearing of the committal application were both subject to anonymity orders and restrictions were placed on access to the court file. Those hearings took place in private. The anonymity order and the restrictions in relation to the court file were continued by an order made by Newey LJ dated 26 November 2021 which amplified an order made by Lewison LJ dated 7 April 2020. Both of those orders were confirmed in a further order made by Lewison LJ dated 25 March 2022. It provided that the hearing before us, which concerned the length of sentence imposed, should take place in public, albeit that the proceedings would not be live-streamed, access would be limited to attendance in person and no transcript should be bespoken without the permission of the court. In the light of the anonymity order, I will confine myself to referring to the parties as the Appellants and the Respondent respectively.

4. The Committal Order was made as a result of 28 breaches of the Substantive Order which occurred almost immediately after the Court of Appeal had varied the order of HHJ Eyre QC of November 2019 and dismissed the Respondent's appeal, on 7 July 2020. The Substantive Order was in the form of a final injunction. In summary, by clause 3, the Respondent was restrained from: using, publishing, communicating or disclosing any part of the information contained in paragraph 17 of the schedule to the Substantive Order or any information which was liable to or might identify the Appellants (the Claimants in the proceedings) as parties to the proceedings or otherwise identify the Claimants; making any adverse or derogatory comment about the First Claimant, its directors or employees, or whilst the Respondent remained a director or employee of the First Claimant, the Second Claimant; and seeking to damage the business of the Claimants, the Second Claimant or the business of any company controlled by the Second Claimant by the release of Information (as defined).

5. The judge found that the 28 breaches had been proved to the criminal standard in a judgment handed down on 25 June 2021, following a hearing of the Appellants' (Claimants') committal application, dated 6 August 2020, on 15 – 17 June 2021. The effect of the 28 breaches of the Substantive Order was to identify the Appellants (the Claimants in the proceedings) and to disclose the allegations which the Substantive Order had expressly restrained, being the very

disclosures which led to the proceedings in the first place. Submissions were made in relation to the Committal Order on 5 July 2021 and judgment was given on 6 July 2021.

The Respondent's absence from the hearing of the appeal

6. The Respondent did not attend the hearing of the appeal before us. We are satisfied, however, that he was both personally served with the Appellants' Notice and all the accompanying documentation and also served in accordance with the process laid down in the Substantive Order. We were also informed by Mr Harper QC, on behalf of the Appellants, that a person using a different name but identified by voice as the Respondent, had telephoned his solicitors on the day before the hearing. That person had enquired about the time and location of the appeal hearing and had been sent the details, including a map, by text and WhatsApp message. The WhatsApp message was later marked as received. In all the circumstances, we considered it appropriate to hear the appeal in the Respondent's absence.

Legal and procedural framework

7. CPR Part 81 is concerned with contempt proceedings. With effect from 1 October 2020 the whole of Part 81 was re-enacted by the Civil Procedure (Amendment No. 3) Rules 2020 (SI 2020/747). The contempt application in this case was filed before the change in the rules. The new rules do not have retrospective effect. Nevertheless, the contempt application became subject to them prospectively from 1 October 2020: *Secretary of State for Transport v Cuciurean* [2020] EWHC 2723 (Ch) at [6]. The authorities concerning the approach to sentence which pre-date 1 October 2020 remain relevant.

8. The penalties for contempt of court are set out in section 14 Contempt of Court Act 1981. In the case of a committal by a superior court, section 14(1) provides that the committal shall be for a fixed term which shall not on any occasion exceed 2 years. Sub-section 14(2) provides that any fine shall not on any occasion exceed £2,500. If a committal order is to take effect immediately, the contemnor is entitled to automatic release, without conditions, having served half of the term of committal pursuant to section 258 of the Criminal Justice Act 2003. CPR r81.9(1) is in similar, albeit slightly wider terms. The differences are not relevant for these purposes. Neither is it necessary to consider the distinction between criminal and civil contempt.

9. 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: *R v Yaxley-Lennon* [2018] EWCA Crim 1865.

10. In relation to appeals, the Administration of Justice Act 1960 provides, where relevant, as follows:

> "13 Appeal in cases of contempt of court.
>
> (1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of

> a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings.
>
> (2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant; and the appeal shall lie—
>
> …
>
> (b) from an order or decision of the county court or any other inferior court from which appeals generally lie to the Court of Appeal, and from an order or decision (other than a decision on an appeal under this section) of a single judge of the High Court, or of any court having the powers of the High Court or of a judge of that court, to the Court of Appeal;
>
> . . .
>
> (3) 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…."

11. Those provisions should be read alongside CPR r52.21 (Hearing of Appeals):

> "52.21
>
> (1) Every appeal will be limited to a review of the decision of the lower court unless—
>
> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (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—
>
> (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."

12. As this court pointed out in *Liverpool Victoria Insurance Co Ltd v Khan & Ors: Practice Note* [2019] 1 WLR 3833:

> "44. In determining whether the decision of the lower court is "wrong", it should be recognised that a decision as to the appropriate level of penalty to impose for a contempt of court involves a value judgment being made and the assessment and weighing of a number of different factors. It is now well established that a civil appellate court will be reluctant to interfere with decisions involving such a balancing of factors or "multi-factorial assessments". It 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].
>
> 45. A decision as to the appropriate level of penalty will be plainly wrong where it is so lenient, or so excessive, that it is outside the range of reasonable decision making. This is similar to the circumstances in which the Court of Appeal, Criminal Division would interfere with a decision reached by a judge as to the level of sentence, namely when satisfied that it is unduly lenient or manifestly excessive - see *Neil v Ryan* (1998 WL 1044247). A sentence will only be unduly lenient or manifestly excessive where – to adopt the words used by Lord Lane CJ in setting out the test of undue leniency in the criminal context in *Attorney-General's Reference (no 4 of 1989)* [1990] 1 WLR 41 at p46A – "it falls outside the range of sentences which the judge, applying his

> mind to all the relevant factors, could reasonably consider appropriate".
>
> 46. If the appellate court is satisfied that the sentence was "wrong" on one of these 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."

We also note the caution which is appropriate in relation to all appeals in relation to decisions arrived at after a multi-factorial evaluation of the facts: *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, in particular, at [114] and [115] and *Re Sprintroom Ltd* [2019] EWCA Civ 932.

13. Unfortunately, CPR 81 makes no reference to the procedure to be adopted on an appeal in relation to a committal order nor does it contain a cross-reference to CPR r52.21. It would be helpful if this omission were addressed by the Rules Committee. In the meantime, we have proceeded with caution. Having satisfied ourselves that the Respondent had been personally served and that it was appropriate to continue with the appeal in the Respondent's absence, we reserved judgment and have delivered this judgment in person and in public.

Grounds of appeal

14. It is said that the Committal Order was "wrong" because: (i) the judge took immaterial factors into account and gave undue weight to certain factors and/or did not weigh them against the starting point dictated by the conduct found to have been proved and the other features which aggravated that conduct including the Respondent's belated apology and appreciation of the error of his ways and the seriousness of his conduct; (ii) the judge failed to take account of material factors or did not give them sufficient weight and/or took into account irrelevant matters such as what he considered to the Respondent's motivation for the breaches and lost sight of how serious the conduct was, including the identification of the Appellants as parties to the proceedings; (iii) the judge failed to identify the starting point for the custodial sentence prior to considering mitigation and consider the circumstances which would justify suspension; and (iv) the Committal Order is unduly lenient and outside the range of orders which the judge could reasonably have considered in the light of the relevant factors.

Submissions

15. In summary, in his written argument, Mr Harper says that the judge failed to consider the purpose and importance of paragraph 3 of the Substantive Order and in particular, the protection provided by para 3(b) which was intended to protect the identity of the Appellants as parties to the proceedings. He says that the protection of anonymity is not granted lightly and that a breach of that protection is at the highest end of the spectrum of breaches of court orders. Obeying that part of the Substantive Order, in particular, was highly important to the Appellants and the Respondent's conduct rendered the time and expense of seeking an injunction purposeless. Mr Harper submits that the Respondent

appears to have decided that his response to the dismissal of his appeal from the Substantive Order was to disregard its terms.

16. Mr Harper says, therefore, that the judge: lost sight of the seriousness of the breaches and should have started his consideration of the appropriate sentence towards the maximum of 2 years before turning to mitigation and whether any sentence should be suspended; failed to take proper account of the need for an element of punishment in the light of the seriousness of the breaches; gave undue weight to and mischaracterised the Respondent's apology and failed to weigh it properly against the seriousness of the breaches; took account in mitigation of a lack of bravado, the Respondent's frustration and that the breaches were not made with a view to personal profit or gain which were irrelevant; and took account of what the judge described as the Respondent's "genuine remorse" and his appreciation of the seriousness of the breaches twice. Standing back, he says that the sentence imposed was unduly lenient.

The judge's approach

17. Having set out the relevant authorities, the judge turned first to the question of culpability and harm "by reference to all the circumstances" [18]. In relation to harm, he noted that: there was no real evidence of harm as a result of the emails and tweets but accepted that there was a serious risk that the conduct might well have led to the relationship between the Appellants and one of their clients, which was intended to be protected, being seriously affected and that there was a significant danger that if the conduct were repeated, that would be the case; and that it was an important consideration that given the terms of the Substantive Order, the real harm might lie in a material and deliberate breach of a court order, damaging the authority of the court and the rule of law [19].

18. In relation to culpability, the judge noted that he had found in his previous judgment that the Respondent was aware of the terms of paragraph 3 of the Substantive Order and had been made aware of the potential consequences should there be any breach [22]. He also noted that the Respondent had "doggedly" sought to maintain his position in relation to the interpretation of the Substantive Order and the underlying contractual obligations, a position which was "obviously unsustainable" in the light of the findings of Judge Eyre QC and the Court of Appeal and the relevant terms of the Substantive Order [23] and [24]. He found that the Respondent had, nevertheless, "genuinely persuaded himself that this [his interpretation] was the position" [24]. The judge went on to note that in addition to his "untenable line of defence to the committal application", the Respondent had made a number of "sweeping allegations of fraud against others, including the [Appellants'] Solicitors", during the course of the substantive hearing [25].

19. The judge also considered the Respondent's health ([26] – [28]) but concluded that he must treat with scepticism and caution the suggestion that the Respondent's judgment was clouded by his health issues. However, he was prepared to find that the Respondent acted out of a sense of frustration and that the frustration was fuelled, at least in part, by his medical condition [28].

20. Ultimately, however, the judge was satisfied that the breaches were "contumelious, in other words, deliberate and intentional, and a serious breach of the court order." [32]. He came to that conclusion on the basis that: the Respondent was well aware of the terms of the order and his attempt to play down the correspondence which referred to it was unpersuasive; the fact that the breaches occurred so shortly after the decision of the Court of Appeal was a "significant aggravating factor" [29]; and there was a clear breach of paragraph 3 of the Substantive Order and it was the Respondent's "plain intention . . . to convey information that he knew he was not allowed to disclose or convey, and that he did so with the intention of undermining the commercial relationship between the Appellants and [another entity] and the other customer referred to in the Judgment." [30] The judge also considered that it was "a further not insignificant factor" that the tweets continued after the first complaint of breach and that the Respondent had not helped himself by his evidence in relation to legal reasons and super-injunction and his denial that he was the author of one of the tweets [31].

21. When considering mitigation, the judge noted that: the Respondent is a former member of the armed forces and a police officer who was previously of good character; the breaches had not been with a view to personal profit or gain but out of "serious frustration" relating to the circumstances in which he had disposed of his shares to the First Appellant; and that the frustration was "fuelled, perhaps only to a limited extent, by, but certainly not excused by, the [Respondent's] medical issues." The judge contrasted what he characterised as frustration with the bravado demonstrated by Mr Lockett in *Lockett v Minstrell Recruitment* [2020] EWCA (Civ) 102 and the actions of the defendant in *Oliver v Shaikh (No.2)* [2020] EWHC 2688 QB who was described as enjoying his defiance [33].

22. The judge stated that he had concluded that the Respondent came to court to defend the committal application having persuaded himself that the Substantive Order had a meaning which it does not; had accepted that he had breached the terms, that no disrespect to the court was intended and had said that he was deeply sorry for what had happened; and that he would not knowingly have disregarded a court order and unreservedly apologised. The judge considered this to be "albeit very belatedly, some powerful mitigation" [34].

23. When turning to the mitigation factors considered by Nicklin J in *Oliver v Shaikh (No.2)*, the judge considered that: the "admission of breach [had] . . . come very belatedly" but that the Respondent's state of denial in part explained this [36]; the Respondent had "come to appreciate the seriousness of the breach" [37]; and "albeit belatedly, come to terms with the matter" and during the course of the hearing had expressed "genuine remorse for his actions" [38]. The judge acknowledged that it was an aggravating factor that there were some 28 breaches but that it could properly be said that they amounted to a continuous pattern of conduct occurring over a relatively short period [39].

24. As a result, the judge came to the conclusion that the breaches were "intentional, deliberate and serious", the Appellants had contractual rights which they were entitled to have enforced, the authority of the court and the rule of law had been jeopardised and as a result the imposition of a custodial sentence was required.

He went straight on to state that having regard to mitigation, the appropriate sentence was 6 months [41].

25. He noted that one of the key considerations which led him to the conclusion that the sentence should be suspended was the Respondent's belated contrition and apology, that he had "now accepted the error of his ways and is deeply remorseful". He also noted that it was necessary to keep in balance punishment and achieving future compliance and that in this case the order which he proposed to make was more likely to achieve a more lasting compliance with the terms of the Substantive Order [46].

26. The judge stated, however, that but for the belated contrition, he would have felt bound to impose an immediate custodial sentence but that there were other factors which tipped the balance in favour of a suspended sentence. They were: the Respondent's previous good character and ill health; and his lack of bravado, his actions being those of a deeply frustrated man acting out of a sense of frustration [47].

27. In a post-script to the judgment, the judge recorded that Mr Harper had drawn his attention to the fact that perhaps the most serious breach was identifying the Appellants in the proceedings. He stated that he had taken that into account in arriving at the sentence and that that serious breach was still mitigated by the factors he had referred to.

Approach to penalty

28. In relation to the appropriate length of sentence, Mr Harper drew our attention to *McKendrick v The Financial Conduct Authority* [2019] 4 WLR 65, [2019] EWCA Civ at [40]. In fact, the judge quoted [40] at [19] of his judgment. It states as follows:

> "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."

McKendrick was a case in which the respondent had breached two world-wide freezing orders in a number of ways. He was sentenced to 6 months in prison and appealed on the basis that the sentence was far too long. The appeal was dismissed.

29. The Court of Appeal addressed mitigation and the suspension of a custodial sentence for contempt of court in the *Liverpool Victoria Insurance* case, 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."

30. In *Her Majesty's Attorney General v Crosland* [2021] 4 WLR 103, the Supreme Court considered 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 is provided in the *Liverpool Victoria* case. The Supreme Court also summarised the recommended approach, as follows:

> "44. . . .
>
> 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."

31. Their Lordships also made clear that in a case which is concerned with freedom of expression, the court take full account of section 12 of the Human Rights Act 1998: [39]. Section 12 provides that the court must have particular regard to the importance of the Convention right of freedom of expression when considering whether to grant any relief which, if granted, might affect the exercise of that Convention right.

32. Article 10 of the European Convention on Human Rights provides, where relevant, as follows:

> "(1) Everyone has the right of freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary."

33. As the Supreme Court pointed out, therefore, at [40]: "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 their Lordships stated at [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."

Discussion and conclusions

34. Having exercised the necessary caution which must be applied by an appellate court when considering an evaluative and multi-factorial decision, we consider, nevertheless, that the Committal Order in this case was wrong in two respects. First, in our judgment, the term of committal should have been significantly longer than six months, even when taking the mitigation available to the Respondent into account. It seems to us that the term of committal was unduly lenient in the circumstances and outside the range of decisions which was reasonably open to the judge. That range of sentences was between 12 and 24 months and 12 to 18 months once mitigation is taken into consideration. Secondly, in relation to the suspension of the sentence of imprisonment: the judge took into account irrelevant factors, including lack of bravado and frustration; took account of the Respondent's good character and the state of his health which had already been weighed in the balance in relation to mitigation; and failed to consider whether it would be appropriate to suspend the period of imprisonment in part rather than in whole.

35. Our reasons are these. First, the Respondent's conduct was at the most serious end of the spectrum. He committed 28 breaches of the Substantive Order, the effect of which was to undermine its purpose and to render it nugatory. In particular, the anonymity of the Appellants was undermined and information was disseminated to the Appellants' main client. Although the judge described the breaches as "contumelious, in other words deliberate and intentional, and a serious breach of the court order" ([32]) and "intentional, deliberate and serious" and noted that the Appellants were entitled to have their contractual rights enforced, and that the "authority of the court and the rule of law" had been "jeopardised" ([41]), he did not directly address the fact that the main purposes of the Substantive Order had been completely undermined when addressing the appropriate sentence to impose. It was only after the effect of the breach of the Appellants' anonymity had been brought to his attention that he added the post-script to his judgment, stating that he had taken it into account in arriving at the appropriate sentence.

36. Secondly, despite referring to the need to balance punishment and achieving future compliance when addressing the question of whether to suspend the Committal Order, the judge did not address the need to punish the serious breaches of the Substantive Order when considering the appropriate penalty.

37. As Mr Harper accepted, it is not an error of law that the judge did not begin by stating what he considered the sentence should be in the light of the seriousness

of the breaches, before taking mitigation into account: *SRA v Khan* [2022] EWCA Civ 287 at [42] – [45]. Although that may well be a preferable and clearest course to adopt, and it is the course set out by the Supreme Court in the *Crosland* case at [44] and by the Court of Appeal in the *Liverpool Victoria Insurance* case at [68], it is not essential. A failure to do so will not necessarily undermine a judge's evaluative judgment in relation to sentence. A failure to adopt such a course may well lead to confusion, however. That is what seems to have occurred here.

38. Thirdly, in our judgment, too little weight was given in the balance to the fact that the seriousness of the breaches was aggravated by: the untenable line of defence to the committal application and the sweeping allegations of fraud made at the substantive hearing [25]; the fact that the breaches occurred shortly after the Court of Appeal had dismissed the Respondent's appeal and soon after he had been informed of the terms of the Substantive Order [29]; the Respondent's attempts to play down the correspondence in which he was informed about the Substantive Order and the potential consequences of breaching it [29]; the fact that the Respondent was well aware of the terms of the Substantive Order but as the judge put it, it was his plain intention to convey information he knew he was not entitled to convey or disclose and that he did so with the intention of undermining the commercial relationship between the Appellants and one of its clients and other customers [30]; the fact that that the tweets continued after the first complaint of breach; and that he denied sending one of the tweets [31].

39. Fourthly, the judge gave disproportionate weight to the Respondent's belated apology. As Mr Harper pointed out, the initial apology was made to the court when the Respondent was being cross-examined and was not an apology for breach. It was only an apology if his interpretation of the Substantive Order (which he doggedly maintained) was wrong. That interpretation had already been rejected by the Court of Appeal. The very belated apology and "genuine remorse" referred to by the judge at [38] occurred at the end of the hearing and was tendered in mitigation after the judge had found that the breaches were deliberate and intentional. The Supreme Court made clear in the *Crosland* case at [44] that there should be a reduction in penalty for an early admission of contempt calculated in accordance with the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea. The Court of Appeal had made clear in the *Liverpool Victoria Insurance* case at [68] that a substantial reduction in sentence is only appropriate where the admission is made as soon as proceedings are commenced. Thereafter, any reduction is on a sliding scale down to about 10% where the admission is made at trial. In this case it was made at the very last opportunity (described by the judge as "very belatedly") and after the Respondent had denied sending one of the tweets. In our judgment the conditional and belated apology was not the equivalent of a guilty plea. It counted for very little, if anything.

40. Further, although there is nothing to prevent the court from taking account of a factor both in mitigation and when determining whether a custodial sentence should be suspended, in this case, the disproportionate weight placed upon the apology was magnified by reliance upon it under both heads.

41. Fifthly, the judge took into account a number of irrelevant factors. They were: the Respondent's frustration which was a factor he took into account when considering the seriousness of the breaches, in mitigation and in relation to whether the sentence of imprisonment should be suspended; his lack of bravado taken into account in relation to the suspension of the sentence; and the fact that he was not motivated by personal profit or gain, taken into account in mitigation.

42. The judge found that the Respondent's frustration stemmed from the circumstances in which he had disposed of shares in the First Appellant. It is difficult to see, therefore, how it was relevant at all.

43. Furthermore, little weight can be given to a lack of bravado. Although the judge found that the Respondent had not revelled in the breaches of the Substantive Order he did find that the tweets and emails were sent with the "plain intention" of conveying information that the Respondent knew he was not allowed to disclose and did so with the intention of undermining commercial relationships [30]. The Respondent had also continued to argue that he was not in breach of the Substantive Order at the sentencing hearing. It is difficult to distinguish between conduct of that kind which amounts to serious and intentional breach of a court order and bravado. Such conduct is inevitably on a sliding scale and it must be for the judge to gauge the attitude of the contemnor and to deal with the factor accordingly. However, in this case, in the light of the conduct, it seems to us that too much weight was placed on a lack of bravado.

44. The same can be said of a lack of the motive to make a profit or to achieve personal gain given that the breaches wholly undermined the Substantive Order which, in part, was intended to protect the Appellants' contractual rights.

45. In *Crosland* the contempt proven was the disclosure of a draft judgment in breach of an embargo. The Supreme Court said at [47]:

> "The respondent was motivated by his concerns and fears relating to the consequences of global warming and his disagreement with the decision of the Supreme Court. However, this does not begin to justify his conduct. There is no principle which justifies treating the conscientious motives of a protester as a licence to flout court orders with impunity."

46. Flouting court orders with impunity is precisely what the Respondent has done in this case.

47. Sixthly, in relation to suspension, we have already mentioned that the judge erroneously took into account lack of bravado and frustration. He also took into account yet again the Respondent's remorse which had already featured at an earlier stage. As the Court of Appeal pointed on in the *Liverpool Victoria Insurance* case at [69] and the Supreme Court reiterated in the *Crosland* case at [44], usually the court will already have given full weight to such mitigating factors in deciding the length of the term of committal with the result that there may be no powerful factor to make it appropriate to suspend the term. The court may, nevertheless, consider additional factors such as the effect of a prison term

upon others for whom the contemnor is responsible and the health of the contemnor.

48. Lastly, the judge also failed to consider whether the balance between punishment and coercion might best be kept by suspending a part of the prison term rather than the whole.

49. In our judgment, therefore, the Committal Order was unduly lenient and outside the range of decisions reasonably open to the judge and the judge took account of irrelevant matters and failed to take account of relevant ones. In such circumstances, his decision as to sentence must be set aside. We may remit the matter or remake the decision. In this case, and in the light of the fact that the Respondent did not attend the hearing before us, and therefore, was not able to offer any further mitigation, we consider that we should remit the matter for reconsideration by the judge. On that reconsideration, the judge will be able to take into account any further subsequent matters which are drawn to his attention by way of mitigation or aggravation.

50. For all the reasons set out above, we allow the appeal. We set aside the judge's order and remit the question of sentence to the Business and Property Courts in Manchester.