Neutral Citation Number: [2024] EWCA Civ 807

Case No: CA-2023-001257

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
Mr Justice Sweeting
[2024] EWHC 1595 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 July 2024

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE COULSON
and
LORD JUSTICE WARBY

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Between:

Mr Mark Cooper	**Appellant**
- and -	
(1) Ignite International Brands (UK) Limited	**Respondents**
(2) Ignite International Brands (Luxembourg) Limited	
(3) Inpero Limited	

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Jeremy Scott-Joynt (instructed by **Janes Solicitors**) for the **Appellant**
Joshua Hitchens (instructed by **Mackrell Solicitors**) for the **Respondents**

Hearing date: 12 July 2024

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Approved Judgment

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LORD JUSTICE COULSON:

1. Introduction

1. On 13 May 2024, Sweeting J imposed an immediate custodial sentence of 9 months on the appellant, Mark Cooper. This was in respect of two separate findings of contempt of court. Mr Cooper appealed as of right. The single issue on appeal was whether or not the judge should have suspended the sentence. At the end of the oral hearing, we indicated that the appeal would be dismissed. These are my reasons for joining in that decision.

2. The Background Facts

2. The background facts are complex, but it is necessary to set out some of them in order to give an idea of the nature, scope and extent of Mr Cooper's contempt of court.

3. Pursuant to a contract dated 14 December 2021, Mr Cooper and his company, Inpero, provided warehousing services to the Ignite Group of companies. Ignite's business is the production, promotion and sale of nicotine, alcohol, CBD, energy drinks and apparel products. In early 2022, Ignite's auditors became concerned that there were significant discrepancies between the physical stock held at the Inpero warehouse, and Ignite's own inventory reports, produced using SAGE accountancy software. The updates requested from and provided by Mr Cooper only increased those concerns and, on 1 June 2022, the contract between the parties was terminated. Thereafter, Ignite had problems recovering its stock.

4. In consequence, Ignite commenced proceedings against Mr Cooper and Inpero alleging a substantial fraud, resulting in losses of well over £2m. Amongst other things, they alleged that Mr Cooper had fabricated customer orders, sold Ignite products after the contract had been terminated, retained the entire proceeds of various sales, and made unauthorised sales at heavily discounted prices. Ignite also alleged that some of their products had been unlawfully retained and moved to other storage facilities to which they had no access.

5. The goods in question were perishable, so Ignite sought speedy relief. On 25 October 2022, Mr Healey-Pratt KC, sitting as a Deputy High Court Judge, ordered Mr Cooper and Inpero to deliver up to Ignite the entirety of the Ignite product inventory that they still had, and (to the extent that the Ignite products which were delivered up fell short of the closing inventory account provided by Ignite) to provide them with detailed information as to all the dispositions and/or sales of any Ignite product inventory. In addition, where any of the Ignite products were no longer within the possession of Mr Cooper and Inpero, they had to provide written information, by 28 October 2022, about where the product had gone, including full details of any relevant transfer or disposal, the current location of the product, details of the price received, and so on. In essence, Mr Cooper and Inpero either had to hand back the Ignite stock or explain what had become of it. In addition, they were ordered to pay £25,000 on account of Ignite's costs.

6. Following the order of 25 October 2022, stock valued at £647,263 was recovered from Mr Cooper/Inpero. On the basis of Ignite's records, that left a shortfall of missing stock with a market value of £2.9m.

7. By an email dated 28 October, Mr Cooper provided some limited information as to certain units of Ignite's V600 vapes (the most valuable element of the missing stock) which had been sold to a third party purchaser at a reduced price. The invoice relating to that sale was dated after Ignite's termination of the contract. The information in relation to the V600 vapes fell far short of what had been ordered. So too did the other information Mr Cooper provided as to what had happened to numerous other items of missing stock. For example, one entry in the email of 28 October read: "Gummies - All: Water damage to storage container". Perhaps generously, the judge described this level of detail as "sparse".

8. On 30 March 2023, Ignite made an application to have Mr Cooper committed to prison for non-compliance with the delivery-up order of 25 October 2022. That has been referred to as Contempt 1. There was a three day hearing of that application in July 2023. In his subsequent judgment dated 7 February 2024 ([2024] EWHC 220 (KB)), the judge dealt in detail with Contempt 1 from [33]–[57]. He found to the criminal standard that Mr Cooper was in breach of the delivery up order, and that the application in respect of Contempt 1 had been made out.

9. On 26 April 2023 Ignite were granted a freezing order by O'Farrell J, who ordered Mr Cooper to provide an affidavit of his assets within the jurisdiction exceeding £1,000 by 3 May 2023. No such affidavit was provided. On 12 May 2023, before Mr Dexter Dias KC, sitting as a Deputy High Court Judge, Mr Cooper claimed that he had provided a list of assets by way of an email dated 3 May 2023. Ignite said that the email had never been received and was patently fabricated because (amongst other things) Mr Cooper's email address was incorrect and incomplete. Mr Cooper accepted that he had not complied with the order of O'Farrell J, and Mr Dias KC made a further order requiring an affidavit by 19 May. The importance of providing a sworn affidavit was explained to Mr Cooper.

10. No affidavit was served in compliance with the order of Mr Dias KC. In consequence, on 2 June 2023, Ignite brought a second contempt application in relation to that order, known as Contempt 2. That was also addressed at the hearing of July 2023, and was the subject of the judge's judgment of February 2023 at [58]-[62]. Amongst other things, the judge noted that Mr Cooper had ignored that order "just as he had ignored the earlier order [(i.e., the freezing order of O'Farrell J]. His assertion that he mistakenly thought he had complied in relation to both orders is unconvincing." Contempt 2 was therefore also proved.

11. Having found that Mr Cooper was in contempt in respect of both alleged contempts, there was then the question of sanction. The judge noted in his February judgment that it would be wise for Mr Cooper to take steps to purge his contempt. Other than the provision of a psychiatric report from Dr Pilgrim, Mr Cooper did nothing until 10 May 2024, the last working day before the sanction hearing on 13 May, when he provided an affidavit which purported to purge Contempt 2. Ignite say that that, too, is incomplete.

12. At the contested sanctions hearing on 13 May 2024, the judge considered the submissions put forward by both parties and imposed on Mr Cooper two terms of immediate imprisonment, each of 9 months, to be served concurrently. I shall refer to particular parts of that second judgement of May 2024 ([2024] 1595 (KB)) when dealing with the Grounds of Appeal.

13. On 2 November 2023, Ignite were granted default judgment against Mr Cooper and Inpero in the sum of £3,520,121.65. Mr Cooper now says that he and Inpero are entirely impecunious. On 20 June 2024, Master Armstrong made an interim order in respect of the property disclosed by Mr Cooper, non-party disclosure orders against Mr Cooper's family members and companies, and an order that, on his release from custody, Mr Cooper attend the court for questioning as to his means.

14. I summarise the principles of law that are relevant to this appeal in Section 3 below. I identify the two Grounds of Appeal, and the issues that arise under each, in Section 4. Thereafter I deal with those various grounds of appeal, and set out my conclusion, in Sections 5 to 8.

3. The Law

3.1 General

15. The general principles applicable to sentencing in contempt cases are set out in *Liverpool Victoria Insurance Co Ltd v Khan and Others* [2019] EWCA Civ 392. It is unnecessary to set out any part of the judgment in that case because no issue arises here on the general principles to be applied.

3.2 The Seriousness of the Contempt.

16. In his sanctions judgment, the judge at [15] had regard to the decision in *Crystal Mews Limited v Metterick & Ors* [2006] EWHC 3087 (Ch) as to the factors to be considered when assessing the seriousness of the contempt. Those are:

> "First, whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy. Second, the extent to which the contemnor has acted under pressure. Third, whether the breach of the order was deliberate or unintentional. Fourth, the degree of culpability. Fifth, whether the contemn or has been placed in breach of the order by reason of the conduct of others. Sixth, whether the contemnor appreciates the seriousness of the deliberate breach. Seventh, whether the contemnor has co-operated."

17. There are numerous authorities which support the proposition that a breach of the information requirements of a freezing order is a very serious form of contempt. In *Templeton Insurance v Thomas* [2023] EWCA Civ 35, Rix LJ described breaches of freezing orders as "an attack on the administration of justice" which usually warranted an immediate sentence of imprisonment of a not insubstantial length. More recently, in *Asia Islamic Trade Financing Fund Ltd v Drum Risk Management Ltd* [2015] EWHC 3748 (Com), Popplewell J (as he then was) reiterated that same observation.

3.3 Suspended Sentences

18. In some cases of contempt, the circumstances may warrant the suspension of the custodial term. That was the case in *Templeton,* where Rix LJ concluded, on the facts, that the decision to suspend the sentence for an unregretted and unpurged contempt was "perhaps a merciful conclusion". He justified it on the basis that "no private harm

has been proved to have been actually inflicted on the complainant" [150]. As to suspension being justified because of the impact on others, this court said in *Liverpool Victoria v Khan* at [66] that "in a case in which nothing less than an order for committal can be justified, the impact on others may provide a compelling reason to suspend its operation".

19. In *Venables and Thompson v News Group Newspapers Ltd* [2019] EWHC 241 (QB) at [25]-[26]; *Breen and Others v Esso Petroleum Co Ltd* [2022] EWCA Civ 1405 at [13]-[15]; and [70]-[81], and *Bruce v Wychavon Council* [2023] EWCA Civ 1389 at [72]-[75], the courts noted that useful guidance on the issue of suspension in contempt cases can be found in the Sentencing Council's guideline, The Imposition of Community and Custodial Sentences[1]. That sets out, in table form, six factors indicating whether or not it might be appropriate to suspend a custodial sentence. Factors indicating that it would not be appropriate to suspend a custodial sentence are that the offender presents a risk/danger to the public; that appropriate punishment can only be achieved by immediate custody; and that there is a history of poor compliance with court orders. Factors indicating that it may be appropriate to suspend a custodial sentence including a realistic prospect of rehabilitation; strong personal mitigation; and that immediate custody will result in significant or harmful impact on others.

20. In the very recent case of *Isbilen v Turk* [2024] EWCA Civ 568 this court referred to *Templeton* (although not the sentencing guideline). Lewison LJ said at [160]:

> "Like Rix LJ I can see nothing wrong with the sentence that the judge passed. But even so, it is clear from *Templeton* that this court can go down the road of mercy rather than justice. I would be willing to take a few steps down that road and suspend the term of imprisonment imposed by the judge. In reaching that conclusion, in addition to the factors considered by the judge I also take into account (a) the fact that Mr Turk was in fact incarcerated for approximately three weeks until he was released following the grant of bail (the equivalent of a six-week sentence); (b) the fact that the proceedings are ongoing, Mr Turk has no legal representation, and that there will be undoubted difficulties in attempting to conduct his defence from prison and (c) most importantly, it will give Mr Turk a last chance to comply belatedly with his disclosure obligations, which will be harder for him to do if he is in prison."

3.4 The Approach of the Appellate Court

21. The approach of an appellate court to a sanction imposed for contempt is explained in *Financial Conduct Authority v McKendrick* [2019] EWCA Civ 524, [2019] 4 WLR 65 at [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

[1] The guideline does not automatically apply in contempt cases, and it is important always to bear in mind the distinction between criminal sentencing practice and penalties in contempt cases; nevertheless, it is something to which a court considering penalties in a contempt case should have regard.

> 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."

22. As Lewison LJ noted at [138] of *Turk*, the question was not whether this court would have passed the same sentence as the judge, and this court should be reluctant to interfere with the judge's assessment after a trial in which the judge heard witnesses.

23. Finally, in any appeal concerned with a decision whether or not to suspend a sentence, regard must be had to what this court said in *R v Price* [2023] EWCA Crim 1060:

> "12. We acknowledge that the decision whether or not to suspend a custodial sentence is often the most difficult decision which a sentencing judge has to make. In many cases, and certainly in most cases which come before this court, there are things to be said for and against suspending the sentence. The guideline is helpful in so far as it identifies relevant factors, but it is not simply a matter of counting the factors on one side or the other which apply in a particular case. Moreover, the competing factors are incommensurable. Weighting the competing factors can never be an arithmetical exercise. The question of which factor or factors should prevail in any particular case is necessarily a question of judgment, and moreover a judgment of the kind which sentencing judges are experienced in addressing. This court will not lightly interfere with judgments of that nature. Appellants in such cases will not succeed unless they can show that the decision not to suspend their sentence was either manifestly excessive or wrong in principle."

4. The Grounds of Appeal

24. The Grounds of Appeal state expressly that Mr Cooper is appealing "only in relation to the decision of the learned judge not to suspend his sentence". Ground 1 is that the judge "gave no or no adequate consideration to the mitigating circumstances relating to the appellant; in particular his health, and his extensive childcare and family responsibilities". As Mr Hitchens rightly observed in his skeleton argument, there are really two separate complaints within Ground 1. The first (which I shall call Ground 1A) is that the judge gave no or no adequate consideration to Mr Cooper's mitigation. The second (Ground 1B) is that the mitigation should have led to the suspension of the sentence.

25. Ground 2 originally stated that the judge "was unable to take into account the court of appeal's decision in *Turk*…which considered further the circumstances in which an immediate custodial sentence imposed in analogous [circumstances?] could be

suspended in circumstances of strong personal mitigation." Mr Scott-Joynt (who did not appear below) fairly conceded at the outset of his oral submissions that this was not a freestanding point; it was simply his submission that this case was very similar to *Turk,* and that the same result should now eventuate.

5. Ground 1A: The Failure to Take into Account Personal Mitigation

26. As noted above, the first part of Ground 1 is that the judge failed to take into account, adequately or at all, Mr Cooper's personal mitigation. On any analysis of the judgment of 13 May 2024, I consider that submission to be untenable.

27. The judge dealt extensively with Mr Cooper's personal mitigation. At [26] and [30] the judge expressly identified Mr Coopers previous history of significant depression and his recurring poor mental health. Those paragraphs also refer to his suicidal tendencies, his low mood, sleep and appetite disturbance, alcohol dependency and cocaine usage. The judge made extensive reference to Mr Cooper's medical records and the information set out in Dr Pilgrim's psychiatric report. The judge also referred to Mr Cooper's children and his childcare responsibilities at [27] and [31]: Mr Cooper shares the care of his five children with his ex-partner, and also helps to care for his three stepchildren. The judge expressly noted that, "plainly, any [custodial] sentence would have a significant effect on them". I observe that the summary of Mr Cooper's childcare responsibilities at [31] of the judgment is taken almost verbatim from the skeleton argument put forward on behalf of Mr Cooper at the sanctions hearing in May.

28. In short, every mitigating factor now relied on by Mr Scott-Joynt was expressly referred to by the judge in his judgment. Mr Scott-Joynt largely accepted that, although he argued that the judge failed to refer expressly to the fact that Mr Cooper was described as "the point of contact" in the family court order involving the natural parents of his three stepchildren. I consider that the judge was plainly aware of the extensive role that Mr Cooper played in his stepchildren's care arrangements, which is why he said that any sentence would have a significant effect on them. Accordingly, I reject the suggestion that the judge failed to take into account the nature and effect of the mitigation put forward on behalf of Mr Cooper. On the contrary, he plainly had full regard to it. The real issue is whether those factors should have led to a suspension of the sentence.

6. Ground 1B: The Failure to Suspend

29. In arriving at the appropriate penalty, the judge said this:

> "32. There would be no purpose in a coercive order at this stage. It is unlikely that Mr. Cooper could either return any of the stock which is outstanding or provide any information which would lead to the recovery of usable stock. The claimants' loss is therefore complete and quantifiable in the sum I have referred to earlier.
> 33. The purpose of the sanction in this case is to indicate the court's disapproval of the breach of his orders and to serve the public interest in ensuring that there is a deterrent which

> encourages compliance and makes the consequences of a failure to comply clear.
> 34. The custodial threshold has been passed and the breaches are so serious in my view that only a sanction involving immediate custody is sufficient. The powerful personal mitigation succinctly set out by Mr. Uberoi, in particular the impact of such a sentence on others, can only be reflected in the length of sentence. It will be shorter than it would otherwise have been in their absence. I bear in mind that Mr. Cooper will not have experienced the prison environment before.
> 35. There will be a sentence on each contempt of nine months to run concurrently with each other, so a total sentence of nine months. As I have explained, Mr. Cooper will be entitled to be released when he has served half of that term."

30. Mr Scott-Joynt's complaint is that the mitigation advanced on behalf of Mr Cooper should have resulted in a suspended sentence. In my view, that criticism too is untenable. Moreover, I consider that, even if an exercise had been done by reference to each of the six factors identified in the table in the Sentencing Council guideline (paragraph 19 above), the result would have been precisely the same.

31. The judge had the possibility of suspension well in mind: he referred to it at [14] and again at [19], in the citation of another authority. However, he concluded that suspension was not appropriate in this case because the first and second contempts were so serious that only an immediate custodial term was appropriate. That, in a nutshell, was why the mitigation did not persuade him to suspend the sentence, something which is clear from the paragraphs of his judgment that I have set out in paragraph 29 above.

32. It is therefore important to highlight just how serious the judge found these contempts to be. The judge had set out the test in *Crystal Mews* (paragraph 16 above) and went on to make the following findings as to seriousness:

> "***Aggravating Features- The First Contempt***
> 20. Mr. Cooper was, I found, deliberately evasive in his purported compliance with the order of 25th October 2002. He was well aware of his obligations under the order and chose not to comply with them. Applying the factors in the *Crystal Mews* case I conclude and find that the breach has caused substantial prejudice to the claimants because it has led to the loss of £2.8 million worth of perishable merchandise which is the subject of an entirely unsatisfied judgment. The breach is irrevocable and not capable of remedy. Mr. Cooper's non-compliance with the order was deliberate. His culpability is high because he was in the position of an agent and distributor for the claimants and, hence, in a position of trust in relation to goods which were entrusted to him in the course of the business relationship.
> 21. The inexorable conclusion must be that he abused that trust in order to sell on or dispose of the goods for his own benefit. He has deliberately ignored court orders and has failed on a continuing basis to provide information. He does not share

> responsibility with anyone else as he was the sole director and shareholder of Inpero. He does not appear to appreciate the seriousness of his conduct and has shown, in my view, little remorse.
>
> ***The Second Contempt***
>
> 22. This was a breach of a freezing order. There is a clear public interest in breaches of orders of this type being regarded as amongst the most serious. The purpose of such an order is to provide a speedy, interim remedy. Delayed compliance may be as harmful and serious as no compliance at all."

33. It was for these reasons that the judge concluded at [34] that the breaches were so serious that only immediate custody was appropriate: the seriousness of the contempt outweighed the mitigation. That was a conclusion to which the judge was entitled to come, particularly as he had presided over a three day hearing to establish contempt and had a full grasp of the detail. It is quite impossible to say that, in reaching that view, the judge erred in principle or reached a conclusion that was outside the range of reasonable decisions.

34. Furthermore, if it is said that the judge should have had express regard to the table in the Sentencing Council guideline (despite the fact that that guideline was not referred to him), I consider that it would have made no difference. That is because the two factors indicating that it may be appropriate to suspend the sentence (namely strong personal mitigation and the significant harmful impact on others), were both expressly considered by the judge. Moreover, given the history of the litigation and the judge's other findings, to the effect that the damage had all been done, there was no realistic prospect of rehabilitation (nor was that suggested), so the third factor indicating suspension was not in play at all.

35. As to the factors in the guideline indicating that suspension would not be appropriate, in addition to the judge's conclusion that appropriate punishment could only be achieved by immediate custody, there was also the existence of a second factor, namely a history of poor compliance with court orders. Leaving aside the failure to comply with the order of Mr Healy-Pratt KC, and the order of Mr Dexter Dias KC, that also included the failure to pay the costs of £25,000, and the failure to comply with the original order of O'Farrell J. It is no exaggeration to say that Mr Cooper has been in breach of every important court order made against him. Moreover, that has been a deliberate policy on his part: the non-compliances occurred so that, as the judge found at [21] of his May sanction judgment, Mr Cooper could sell on or dispose of goods which were not his own, and for his own benefit.

36. For these reasons, I would reject both elements of Ground 1.

7. Ground 2: Failure to Take into Account the Decision in *Turk*

37. The decision in *Turk* is not a guideline case and Mr Scott-Joynt accepted that it gave rise to no principle to which the judge failed to have regard. Like many other cases cited to us in the skeleton arguments, it is a decision on its own particular facts. As to the three specific points identified by Lewison LJ in [160] which led him down "the road of mercy" (paragraph 20 above) none of them apply here. These proceedings are only ongoing in this case in order that Ignite can try and recover the monies due to

them on the judgment. There is no question of custody hampering Mr Cooper's defence because judgment has already been entered against him.

38. Moreover, here Contempt 1 can never be purged, and the missing perishable goods appear to be lost to Ignite forever. That makes this case starkly different to *Templeton*, where the fact that no detriment had been suffered by the complainant was the reason why Rix LJ took a merciful approach, and *Turk*, where again no detriment had been suffered by the complainant. By contrast, the detriment to Ignite (arising in particular from Contempt 1) is very significant.

39. In *Turk* this court weighed up the seriousness of the contempt with the consequences of the sanction. In undertaking that balance, they concluded that the correct sanction was a suspended sentence. In the present case, the judge undertook that balancing exercise and concluded, on the facts, that the only appropriate sentence was one of immediate custody. Not only did the judge not err in principle or fail to take into account a relevant factor, but he reached what I consider to be an appropriate sanction for serious contempts of court.

8. Conclusion and Costs

40. For those reasons, I agreed with the decision to dismiss the appeal.

41. After announcing that decision, the court heard oral argument about costs, there being no costs schedule (as there should have been). After deliberation, the court concluded that Mr Cooper should pay Ignite's costs of the appeal in the sum of £4,000 inclusive of VAT, broken down as follows: £1,000 for the solicitors; and £3,000 for counsel.

LORD JUSTICE WARBY:

42. I agree.

LORD JUSTICE PETER JACKSON:

43. I also agree.