Case No: CA-2022-001739

Neutral Citation Number:[2023] EWCA Civ 366

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**(HIS HONOUR JUDGE JARMAN KC**
**Sitting as a High Court Judge)**

The Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 1 March 2023

**Before:**

**LORD JUSTICE HOLROYDE**
**LADY JUSTICE ELISABETH LAING**
**LORD JUSTICE WARBY**

**Between:**

**GRAHAM MICHAEL WILDIN**

**Appellant**

**- and -**

**FOREST OF DEAN DISTRICT COUNCIL**

**Respondent**

Transcript of Epiq Europe Ltd, Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
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**MR WILDIN** the **Appellant**, appeared in person
**MR S WHALE** appeared on behalf of the **Respondent**

# Judgment
**(Approved)**

**LORD JUSTICE HOLROYDE:**

1. On 12 August 2022 HH Judge Jarman KC, sitting as a High Court Judge, ordered that a suspended committal order for contempt of court be activated and that the appellant be committed to prison for six weeks. The appellant appeals as of right against that order.

The facts

2. For present purposes, the relevant facts and procedural history can sufficiently be summarised as follows.

3. The appellant owned or had an interest in a number of properties in Meendhurst Road, Cinderford, Gloucestershire. The respondent is the local planning authority for that area.

4. The appellant has had a large sports and leisure building constructed in the gardens of 24 and 24A Meendhurst Road. He began the construction in about 2013. Although this has today been disputed by the appellant, it has been found as a fact in previous hearings that he had made a pre-application inquiry to the respondent and submitted plans of his proposal, and had been told by planning officers in December 2013 that the building would not constitute permitted development, that he would need planning permission and that permission was unlikely to be granted because of the size of the proposed development. Believing that he knew better, he went ahead with the construction without seeking permission.

5. On 3 March 2014, before the building was complete, the respondent served an enforcement notice which required the appellant, within three months, to remove all walls, structures and materials from the land and to reinstate the land to its original level. The appellant has today accepted that at that time he owned the relevant land and properties and was capable of carrying out the required works.

6. The appellant appealed to a planning inspector against the enforcement notice. His appeal was dismissed in February 2015, though the notice was varied. He then made an application to the High Court for permission to appeal against the inspector's decision. That application was refused. Nonetheless, the appellant did not comply with the enforcement notice. He completed the construction and fitted out the building with sports and leisure equipment. He subsequently made alterations to one of the neighbouring properties which he owned, thereby restricting access to the building.

The injunction order

7. In 2018 the respondent applied, pursuant to section 187B of the Town and Country Planning Act 1990, for an injunction to compel the appellant to comply with the enforcement notice. The application, which was resisted by the appellant, was heard by HH Judge Jarman KC sitting as a judge of the High Court.

8. In a judgment handed down on 26 October 2018, the judge found that in 2014 the appellant had sent an email to the respondent in which he accepted that he knew the building may have to be demolished if it turned out that the respondent's view as to the need for planning permission was correct. The judge found that the building was a clear breach of planning control, which impacted adversely on neighbouring properties and the character of the landscape. He further found that the appellant had not taken any steps to comply with the enforcement notice and would not do so unless and until the court made an order.

9. As to matters on which the appellant relied, the judge found that the appellant had assets which would likely be adequate to fund the required works, contrary to his assertion that he lacked sufficient means. The judge accepted that the granting of an injunction would give rise to risks that the property at 24A Meendhurst Road, which the appellant and his partner occupied, might be repossessed and that his partner might in any event have to move out because of the impact on her health of carrying out the required works. Having considered those and other factors, the judge concluded that the balance of convenience favoured the granting of the injunction. He made an order endorsed with a penal notice which required the appellant to complete, by specified

dates, a number of specified items of work, the decommissioning of the services to the building and the soft stripping of the interior of the building.

10. The appellant applied for permission to appeal against that order. His application was refused in November 2019 by Irwin LJ, who observed that the appellant was entirely the author of his own misfortune.

The application for committal

11. The appellant did not do all that was required of him by the order. In January 2021, the respondent applied for him to be committed to prison for his contempt of court in failing to comply with the injunction. That application was heard on 25 June 2021 by HH Judge Jarman KC. The appellant was represented by counsel. He had filed an affidavit in which he reluctantly accepted that the building had been erected in breach of planning control and accepted that he had not complied with the requirements of the injunction. He asserted in his affidavit that he could not comply with the order, in particular, because he could not take down a party wall without the agreement of the owners of the neighbouring property (namely, his children and their limited company, to whom the properties had been sold), and therefore could not gain access to carry out demolition work on the main building; he could not find contractors who would carry out that demolition; and he could not afford the cost of the demolition. He chose not to give evidence and therefore could not be cross-examined on the contents of his affidavit.

12. The judge made a number of findings in the appellant's favour, but found that the appellant was in contempt of the court in that he failed to complete the soft stripping of the interior of the building and had failed to carry out a number of items of work which he had the ability and the financial resources to carry out.

13. The judge considered whether to adjourn the issue of sentence in order to allow further time for the appellant to complete the necessary work. He noted the appellant's acceptance that he had only started any attempts at soft stripping after the application

for committal had been filed and concluded that he was not satisfied that any adjournment would secure compliance with the injunction.

14. The judge directed himself that he should pass the minimum sentence effective to punish the appellant for the contempts of court which had been proved, to deter others from acting in a similar way and to secure the appellant's future respect for court orders. He recognised that a number of possible sanctions were available to him and that imprisonment, even if suspended, was a measure of last resort. He took into account the appellant's age and personal circumstances, and the ill health of the appellant's partner. He nonetheless concluded that only a custodial sentence would be sufficient, though it could be relatively short.

15. The judge ordered that the appellant be sentenced to 6 weeks' imprisonment, that order being suspended for 12 months on condition that the appellant, within 18 weeks, complied fully with the terms of a schedule annexed to the order. The schedule required the permanent decommissioning of the services to the building by disconnecting the electricity supply, removing all electrical sockets, switches, fuses and electricity metering, removing the water supply, and removing the stop cock, water metering and foul water connection. The schedule further required the permanent soft stripping of the building by removing 28 specified fixtures, fittings and other items.

16. The appellant exercised his right of appeal against that order. He was represented by counsel before this court which, on 4 November 2021, dismissed his appeal: see [2021] EWCA Civ 1610. This court extended the time for compliance with the conditions of the committal order until 10 March 2022, 18 weeks after the judgment was handed down.

The further application for committal

17. The respondent carried out a further inspection of the building and on 13 June 2022 applied to commit the appellant to prison for failure to comply with the conditions of

the suspended committal order. That application was heard by HH Judge Jarman KC on 12 August 2022. The appellant acted in person.

18. The judge heard evidence that on an inspection of the building on the day before the hearing, the respondent's inspector had found that there was both an electricity supply and a water supply to the building, and found that many of the 28 items of soft stripping work had not been completed. The appellant did not dispute much of that evidence, though he asserted that the services had previously been disconnected and put forward suggestions, which the judge found implausible, as to how they might accidentally have been reconnected. The judge was sure that there had been no permanent decommissioning in accordance with the suspended committal order. Accepting the evidence of the respondent's inspector, the judge was also sure that the appellant had failed to carry out the majority of the work required by the order.

19. As to the appellant's assertion that he had no money to complete the work, the judge was sure that the smaller items listed in the schedule could have been removed without any cost. He noted the absence of any documentary evidence in support of the appellant's assertions as to what had become of his assets or his assertions as to the circumstances and timing of the sale of much of his property to his children.

20. The judge noted that the appellant had made a number of points about the consequences of imprisonment: that he would lose his professional qualification as an accountant; that there would be redundancies, at public expense, in his firm; that the respondent and the Legal Aid Fund would suffer considerable expense because the appellant would appeal and claim judicial review; and that things would not change because the building would just deteriorate over time and neighbours would suffer a diminution in the value of their properties.

21. The judge said that he was sure that the appellant had, yet again, not disclosed all his assets. At paragraph 17 of his judgment, the judge continued:

> "I am sure that he has sufficient assets or had sufficient assets to comply with the order as renewed by the Court of Appeal in

> November 2021 and that he then set about transferring his accountancy business and other assets, such as the classic cars, to his children. He could have complied with the order, of that I am sure. He also makes a point that he is 70 years of age. I take into account that he has not been to prison before and that if he goes to prison he will lose his accountancy and other professional qualifications. Nevertheless, in my judgment, the whole history shows that Mr Wildin has set his mind against complying with court orders and during the course of this hearing he said that the finding of the Court of Appeal that he did not have substantial assets was wrong. His affidavit saying that things will not change shows his attitude. One of the things that a court can do in activating a sentence of imprisonment is to reimpose the order requiring matters to be seen to. If Mr Wildin continues to fail to comply, then he is at risk of further committal applications and further committal sentences."

22. For those reasons, the judge concluded that the suspended sentence should be activated and, accordingly, committed the appellant to prison for 6 weeks. He made an order with a penal notice attached requiring the appellant within 18 weeks from his release from prison to permanently decommission the services to the building and to permanently soft strip the building by carrying out 27 specified items of work. He also ordered the appellant to pay the respondent's costs.

23. That sentence has now been served.

The appeal

24. The appellant has exercised his right of appeal against the order for his committal to prison, and so the matter comes before this court today. The appellant also sought permission to appeal in relation to certain procedural rulings which the judge made. However, permission to appeal was refused by Coulson LJ, and I need say no more about those rulings.

The submissions

25. The appellant has represented himself before this court and has effectively expressed his submissions and observations. In his grounds of appeal he contends that the judge

failed to take into account the steps which the appellant had taken to try to comply with the order and failed to give any credit for the "very large number" of items which had been removed from the building. He further contends that the judge failed to give consideration to the steps which the appellant was unable to undertake and, in particular, ignored the fact that the adjoining landowners had issued what the appellant referred to as a legal notice preventing him from removing the remaining items and had erected structures to prevent direct access into the building.

26. The appellant has told us today that he has sold the land on which the building stands, and the building itself, to a Mexican gentleman of whose personal details he says he knows nothing. He told us that the Mexican purchaser had paid £1 for the property notwithstanding that it is, on the appellant's case, inaccessible. He stated that the building was no longer his problem.

27. Mr Whale, appearing for the respondent today as he has done throughout the long history of this matter, submits that the judge correctly directed himself that he had a discretion whether or not to activate the suspended committal order, made a number of findings of fact which are not challenged, and took into account all the points made by the appellant. Mr Whale submits that the appellant had not complied with any of the four requirements in respect of decommissioning the services to the building and, far from having removed a very large number of items, had fully complied with only one of the specified items of removal. He submits that the adjoining land owners, namely the appellant's adult children and their limited company, had not issued any legal notice. They had done no more than write a letter and did not give evidence. He further submits that the recent sale of the building, which might become relevant in any future proceedings, could not alter the fact that the appellant owned the building when the suspended committal order was activated, and is therefore irrelevant to this appeal.

28. We are grateful for the submissions on both sides.

The legal framework

29. I would summarise the legal framework as follows. Pursuant to section 14 of the Contempt of Court Act 1981, the judge had the power to order committal to prison for a fixed term not exceeding two years. By rule 81.29(1) of the Civil Procedure Rules he also had the power to suspend the order:

> "… for such period and on such terms or conditions as [he] may specify."

30. As to the activation of a suspended committal order, the law was stated as follows by Sir Thomas Bingham MR, in *Villiers v Villiers* [1994] 1 WLR 493 at page 498:

> "… a court is not obliged to activate a suspended sentence upon mere proof of breach of the suspensory condition. The judge has a discretion, taking into account both the past and the current situation and the gravity of the breach, either to activate the original sentence or to impose a reduced sentence or a fine, or not to punish at all. In other words, there is nothing automatic about the activation of a suspended sentence, and it involves an exercise of judicial judgment on the occasion when the issue of activation arises."

31. The appellant has a right of appeal against the judge's decision pursuant to section 13 of the Administration of Justice Act 1960. By subsection 3 of that section, this court:

> "… may reverse or vary the order or decision of the court below and make such other order as may be just."

32. It is important to note the terms of CPR rule 52.21 which, so far as is material for present purposes, provides:

> " (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."

33. In *Liverpool Victoria Insurance Company Limited v Zafar* [2019] 1 WLR 3833, Sir Terence Etherton MR, giving the judgment of the court said:

"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 'multifactorial assessment.' 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."

34. The same principles apply to this court's determination of the issue in this case. The judge below had to weigh a number of factors in deciding whether to activate the suspended committal order, and the circumstances in which this court will interfere with his decision are limited to those identified in the passage I have just cited.

Analysis

35. The recent sale of the building to the Mexican gentleman may well give rise to a number of issues in the future. Mr Whale is, in my view, correct in his submission that it is irrelevant to the issue which this court has to decide today, namely, whether the decision of the judge was wrong or unjust because of a serious procedural or other irregularity.

36. The judge correctly directed himself that he had a discretion as to whether to activate the suspended committal order and that he must consider whether it was just and proportionate to do so. In my view, he took into account all relevant factors for and against the activation of the suspended committal order. In broad terms, those factors were, on the one hand, the significant culpability of the appellant in continuing to disobey the clear order of the court in circumstances where, as the judge found, he had the ability and the financial means to comply, and the clear intention of the appellant to continue to disobey the order; and on the other hand, the appellant's age and personal circumstances and the adverse consequences for him and his partner of his having to go to prison.

37. In weighing those factors, the judge had the advantage of a very thorough knowledge of the facts and circumstances of the case. It must be remembered that at previous stages of these long running proceedings he had made substantial findings in the appellant's favour. The findings of fact adverse to the appellant which he made in this ruling were amply supported by the evidence. In any event, they were not challenged by the appellant in his appeal notice, though he has today submitted that he had completed at least some of the required work. By reference to photographs which were before the judge, he says that a lot of furniture and other items had been removed to a large

showroom in one of the properties now owned by his children. I am not persuaded that this very late challenge can make any difference to the outcome of the appeal.

38. I can see no basis on which it could be said that the judge fell into any error of the sort which would entitle this court to interfere with his decision. On the contrary, it seems to me that his decision was plainly correct. The appellant is, indeed, the author of his own misfortune. He has persisted in his disobedience to the order of the court. He has continued to assert that he cannot and will not comply with it. He has even sought to use his own defiance of the order, and the consequent costs likely to be incurred by the respondent and by the public purse in enforcing it, as a means of deterring any further proceedings against him.

39. The sentence imposed by the judge was a short one. The appellant was given ample time to comply with the conditions of the suspension but made little, if any, attempt to do so until after the application was made for his committal. By the time of the hearing before the judge, more than a year after the appellant had been found to be in contempt of court and had been made subject to the suspended committal order, only one of the requirements had been completed in full and four others in part; and on any view, many of the remaining items had not been carried out at all. The judge was entitled, and in my view correct, to find that the services had not been permanently decommissioned, that the majority of the required soft stripping works had not been completed, and that the appellant had not been prevented by impecuniosity or otherwise from doing more than he had to comply with the order.

40. In those circumstances, the appellant can, in my view, have no complaint about the judge's order that the suspended order be brought into effect. Given that the committal was only for six weeks, there is no basis on which any challenge could be made to the judge's decision to activate it in full.

41. I would therefore dismiss this appeal.

LADY JUSTICE ELISABETH LAING: I agree.

LORD JUSTICE WARBY: I also agree.

Order: Appeal dismissed

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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