

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY DIVISION**  
**BUSINESS LIST (ChD)**

Royal Courts of Justice  
Rolls Building  
Fetter Lane  
London EC4A 1NL

Date: 1 March 2019

**Before :**

**THE HONOURABLE MR JUSTICE MARCUS SMITH**

**THE FINANCIAL CONDUCT AUTHORITY**  
(a company limited by guarantee)

Claimant/Applicant

- v -

**ROBERT JOHN McKENDRICK**

Tenth Defendant/Respondent

**Mr Adam Temple** (instructed by **The Financial Conduct Authority (Legal Group)**) for the  
**Claimant**

**Mr Adam Tear** (solicitor-advocate in **Howe & Co**) for the **Tenth Defendant**

Hearing date: 1 March 2019

**Approved Judgment**

## **Mr Justice Marcus Smith:**

### **Introduction**

1. By a claim commenced under CPR Part 8, the Claimant (the Financial Conduct Authority, “FCA”), has applied to commit the Tenth Defendant, Mr McKendrick, for contempt of court. The committal application arises out of proceedings brought in the Chancery Division of the High Court, under claim number HC-2013-000531. Mr McKendrick was the Tenth Defendant in those proceedings.
2. Those proceedings concerned, at least in part, the operation and promotion of investment schemes in which Mr McKendrick was concerned. These proceedings have come to trial, and that trial has taken place, and judgment been rendered. By an order dated 27 March 2018, Mr McKendrick was ordered to pay to the FCA, for distribution to investors, the sum of £13,339,237, later increased to £14,357,991.
3. These sums reflect the investor losses arising out of the schemes that Mr McKendrick was involved in. After an unsuccessful attempt to appeal – an application for permission to appeal was refused – Mr McKendrick was made bankrupt on his own application. Mr McKendrick’s assets now vest in his trustee in bankruptcy.
4. In the course of the proceedings, two worldwide freezing orders were made. The first, dated 23 July 2013, was made by Roth J and I shall refer to it as the “Roth WFO”. The second was made by the trial judge, His Honour Judge McCahill QC, sitting as a Justice of the High Court in the Chancery Division. That worldwide freezing order I shall refer to as the “McCahill WFO” and it was made – post-trial – on 27 March 2018.
5. The McCahill WFO succeeded the Roth WFO and continues in force.

### **Discharge of the McCahill WFO**

6. At the original hearing of this committal application, on 31 January 2019, Mr McKendrick, through his counsel Mr Tear, suggested that it might be appropriate to have the McCahill WFO discharged, although that application was not pressed. Had an application to discharge the McCahill WFO been made, I would not have acceded to it. I should explain why, because it is material to this matter that the McCahill WFO continues in force.
7. There are four reasons why I would not discharge the McCahill WFO. Three of these reasons are procedural and can be dealt with very quickly. The fourth is of greater substance. The three procedural reasons are as follow:
  - (1) It seems to me that it is inappropriate, on the hearing of a committal application, to deal with other, collateral matters. Committal applications, involving as they do the liberty of the subject, ought to be the sole subject-matter of a hearing, unless there is good reason and it is in the interests of the fair hearing of the committal application to deal with such a collateral matter.

- (2) The application to discharge the McCahill WFO has not yet actually been issued.
- (3) The FCA has been unable – in these circumstances – to respond with evidence as to the utility of the McCahill WFO. I would want to hear from the FCA before discharging the McCahill WFO.
8. Turning to the more substantive fourth point, the McCahill WFO was made post-trial, as I have said. Self-evidently, His Honour Judge McCahill, QC considered that such an order did serve a purpose. Absent a material change in circumstances since the making of the McCahill WFO – and I am not satisfied that Mr McKendrick’s bankruptcy is a material change in circumstance – the McCahill WFO ought to stand. The importance of this point to the committal application is simply this: we are concerned with an order that continues in force and is not merely historical.

**The contempts alleged**

9. The contempts alleged by the FCA arise out of various breaches of the Roth WFO and the McCahill WFO. In all, five breaches of these orders are alleged. They are described in the second affidavit of Miss Greenhalgh, on behalf of the FCA, and they are set out in the written submissions that I have seen and read of Mr Temple, counsel for the FCA. In essence, it is said that, in breach of the WFOs, Mr McKendrick (i) failed to disclose assets, (ii) diverted certain rental payments from the account into which they were to be paid, and (iii) spent these monies. Self-evidently, if established, these are most serious breaches of the Roth and McCahill WFOs.
10. I shall now state in greater detail the five contempts alleged by the FCA. They are as follows:

|                   |   |
|-------------------|---|
| <b>Contempt 1</b> | In breach of the McCahill WFO, Mr McKendrick’s affidavit dated 11 April 2018 failed to disclose all of his assets, in that it:<br>(i) failed to disclose Mr McKendrick’s right to receive payments from Mrs Priya McKendrick<br>(ii) failed to disclose that Mrs Priya McKendrick held money on behalf of Mr McKendrick; and/or<br>(iii) failed to disclose that Mrs Priya McKendrick was operating a bank account over which Mr McKendrick exercised <i>de facto</i> control or in relation to which Mrs Priya McKendrick habitually obeyed the instructions of Mr McKendrick. |
| <b>Contempt 2</b> | From around May 2016, Mr McKendrick directed that rental payments on his buy-to-let properties be made to Mrs Priya McKendrick rather than the Barclays Account to which they had previously been paid, in breach of the Roth WFO.  |
| <b>Contempt 3</b> | From around March 2018, Mr McKendrick directed that rental payments on his buy-to-let properties be made to Mrs Priya McKendrick rather than the Barclays Account to which they had previously been paid, in breach of the McCahill WFO.  |
| <b>Contempt 4</b> | Mr McKendrick made mortgage payments on his buy-to-let properties with himself or by Mrs McKendrick other than from the Barclays Account in breach of both the Roth WFO and the McCahill WFO.   |
| <b>Contempt 5</b> | Mr McKendrick disposed of, dealt with or diminished the value of his assets by spending money paid to Mrs Priya McKendrick  |

### **The procedural requirements for this application**

11. I turn to the procedural requirements that have to be met in order for this application to proceed properly. The procedural requirements are as follows:
  - (1) The application notice must contain a prominent notice stating the possible consequences of the court making a committal order. That requirement is satisfied in this case. I have looking at the application notice that has been issued by the FCA, and it contains a prominent penal notice.
  - (2) The written evidence in support of the application, as well as that in opposition to it, must be by way of affidavit. Here, in support of the application, I have the evidence of Miss Greenhalgh, which I have already referred to, and which is properly sworn. From Mr McKendrick, I have two documents. The first, a statement described as a “draft plea of mitigation for Mr McKendrick”, is unsworn: but, because Mr McKendrick wishes to rely upon it, I take it fully into account, notwithstanding that it is unsworn. The second document is much more recent: it is an affidavit, initially served and filed unsworn, but sworn very recently, shortly before this hearing.
  - (3) The application must be personally served, unless personal service is dispensed with. In this case, I am satisfied that the application has personally been served on Mr McKendrick.

The procedural requirements for this application have, therefore, been met.

### **The requirements to establish contempt: formal**

12. I then turn to the requirements to establish contempt, and I begin with the more formal requirement, which are as follow:
  - (1) The order said to have been breached must have been endorsed with a penal notice in the requisite form. In this case, of course, there are two relevant orders: the Roth WFO and the McCahill WFO. I have considered both and, in each case, there is a penal notice prominently attached.
  - (2) The relevant orders must be served personally on the defendant. Again, in this case, I have reviewed the documentation and I see that they have each personally been served on Mr McKendrick.
  - (3) The relevant order – here, orders – must have been served before the end of the time fixed for doing the relevant act or acts required by the order or orders. Again, that is the case here.
13. I am, therefore, satisfied of these three requirements have been met to the criminal standard, which is the standard that I must apply.

### **The requirements to establish contempt: substantive**

14. I turn, then, to the substance of this matter: that is the question of whether Mr McKendrick has breached the orders in a manner sufficient to render him in contempt of court.

15. In terms of the relevant legal principles, the law is stated in the judgment of Proudman J in *FW Farnsworth v. Lacy*, [2013] EWHC 3487 (Ch). I do not need to consider the facts of this case, but there are three paragraphs in that judgment to which I must refer. I begin at [3]:

“The burden of proof is on the claimants to establish the contempt and the standard of proof is to the criminal standard. In other words, the claimants have to satisfy me so that I am sure that the alleged contempts have been established. In the time-honoured phrase, the matter must be beyond reasonable doubt.”

16. Then, at [20] of the same judgment:

“A person is guilty of contempt by breach of an order only if all of the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act, as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court order is relevant to penalty.”

17. Finally, going back a couple of paragraphs to [17], the order must be unambiguous. Proudman J said:

“I have, however, to be satisfied that the consent order was unambiguous.”

18. In this case, I have considered with great care the evidence of Mrs Greenhalgh and also the evidence of Mr McKendrick in light of these principles. I am greatly assisted by the fact that Mr McKendrick has accepted that the contempts alleged against him are well-founded and are true. As a result of this fact, it was unnecessary for me to hear evidence going into the question of breach although, of course, I did hear evidence from Mr McKendrick on the question of mitigation.

19. Before Mr McKendrick gave evidence, Mr Tear, on his behalf, fired a number of warning shots, all of which I consider to have been well-made. Mr Tear’s points went to the fact that – in giving evidence – Mr McKendrick was only doing so for the purposes of mitigation, and there could be no question of the FCA seeking – through the evidence of Mr McKendrick – to expand or supplement or add in new contempts over-and-above those described in paragraph 10 above. I agree with that. It is certainly the course that I have followed.

20. I take into account, as I will describe later in this judgment, that the length of this hearing was appreciably shortened by virtue of Mr McKendrick’s acceptance of the five contempts alleged against him. I have, by reference to the evidence before me, independently satisfied myself that the contempts have been made out: but, nevertheless, a great deal of time has been saved.

### **Mitigation and penalty**

21. I turn, then, to the principles relating to mitigation and penalty.

22. The purpose of the contempt jurisdiction is twofold:

- (1) First, it upholds the authority of the court by punishing the contemnor and deterring others. Such punishment is nothing to do with the dignity of the court and everything to do with the public interest that court orders should be obeyed. As Norris J said in *Commissioners for Her Majesty's Revenue and Customs v. Munir* [2015] EWHC 366 (Ch) at [9(i)]:

“A contempt of court is not a wrong done to another party to the litigation. It is an affront to the rule of law itself and to the court.”

- (2) Secondly, in some instances, the contempt jurisdiction provides an incentive for belated compliance because the contemnor may seek a reduction or discharge of sentence if he subsequently purges his contempt by complying with the court order in question.

23. I move to a consideration of the relevant factors that I should take into account when sentencing for contempt. The relevant factors include – but are not limited to – the following:

- (1) Whether there has been prejudice as a result of the contempt, and whether that prejudice is capable of remedy.
- (2) The extent to which the contemnor has acted under pressure.
- (3) Whether the breach of the order was deliberate or unintentional.
- (4) The degree of culpability.
- (5) Whether the contemnor was placed in breach by reason of the conduct of others.
- (6) Whether he appreciated the seriousness of the breach.
- (7) Whether the contemnor has cooperated. A genuine offer following judgment but before sentence to cooperate in the provision of information is capable of being a serious mitigating factor.
- (8) Whether the contemnor has admitted his contempt and has entered the equivalent of a guilty plea. By analogy with sentencing in criminal cases, the earlier the admission is made, the more credit the contemnor is entitled to be given.
- (9) Whether a sincere apology has been given for the contempt.
- (10) The contemnor's previous good character and antecedents.
- (11) Any other personal mitigation that has been advanced on his behalf.

24. I remind myself that a sentence of imprisonment should only be imposed if a custodial sentence only is justified. The custodial sentence must be of a fixed term and the maximum is one of two years. The court may also impose an unlimited fine or order sequestration.

25. The custody threshold has not been defined, but in *R v. Montgomery*, [1995] 2 Cr App R 23, Potter LJ said:

“An immediate custodial sentence is the only appropriate sentence to impose upon a person who interferes with the administration of justice unless the circumstances are wholly exceptional.”

26. In *International Sports Tours v. Shorey*, [2015] EWHC 2040 (QB), in which the defendant had admitted knowingly proffering false evidence in an affidavit which he then corrected at an early stage in proceedings, Green J said (with emphasis supplied at [46]):

“I start by considering the intrinsic severity of the contempt. In the present case, the defendant has admitted proffering knowingly false evidence in an affidavit. This was part of the perpetuation of a series of false and misleading statements designed to subvert the due administration of justice. My necessary starting point is that this was a serious infringement committed deliberately and with knowledge, with the specific intent of undermining judicial proceedings. A court would be remiss if it did not conclude that this was the sort of conduct where, in many instances, the custody threshold will *prima facie* be passed. In my view, this particular case follows at or fractionally beyond the custody threshold. I can contemplate many more serious infringements but that does not undermine the seriousness of the contempt of court which is before the court. My starting point, therefore, is that in principle a custodial sentence would *prima facie* be appropriate.”

27. A term of imprisonment should be as short as possible commensurate with the gravity of the events and the need to deter the contemnor and, in an appropriate case coerce compliance. A person committed is entitled to unconditional release after serving half of his sentence by virtue of section 258 of the Criminal Justice Act 2003. This must be made clear by the court in its judgment (see *Official Receiver v. Brown* at [2017] EWHC 2762 (Ch) at [18], and I do so now.
28. A sentence of imprisonment may be suspended, in the exercise of the court’s inherent jurisdiction and pursuant to CPR 81.29. This is a matter for the court’s discretion. Suspension may be appropriate to secure compliance with court orders or taking into account cogent personal mitigation including admissions and remorse. Were a custodial sentence to be suspended in this case, it would be essential to specify the terms of the suspension.
29. I was also referred in the authorities to the case of *Hale v Tanner* [2000] EWCA Civ 5570, which I have read but which I consider adds nothing to the exposition of law that I have provided just now.
30. I turn, then, to the sentence in this particular case.
31. Worldwide freezing orders are important orders of this court. Real prejudice arises where there is non-compliance. In this case, the investors, who have incurred substantial losses, have suffered because the whole purpose of the Roth WFO and the McCahill WFO was to preserve assets that – after trial, and here the trial was successful – might go to make good, at least to some extent, their losses. The degree to which they have suffered by the diversion of funds by Mr McKendrick is unknown, because the FCA has (at least as yet) been unable completely to trace the money flows.
32. Both the Roth WFO and the McCahill WFO are clearly worded; and they make clear on their face that they are very important orders of the court, with serious sanctions for breach. In my judgment, even if Mr McKendrick had no legal advice, he must have

known what they meant. Furthermore, given the nature of the breaches of the orders – which Mr McKendrick has admitted (to his credit) – no conclusion other than the fact that these were planned and deliberate breaches is possible. This is not a case where – in breach of a freezing order – an asset was, by mistake, not identified. These were, in my judgment, deliberate breaches, and Mr McKendrick’s conduct amounted to a planned flouting of the order. Not only was information not provided; but monies were paid away in breach of the order; and used by Mr McKendrick for his own benefit. In my judgment, it is very important to deter such conduct.

33. There is, in addition, the question of present non-compliance with the McCahill WFO by Mr McKendrick. At the last hearing, on 31 January 2019, I made the point that the requirements regarding the provision of information in that order had been breached, and that this breach was continuing. As such, this continuing breach was a matter that was capable of cure by Mr McKendrick. Absent compliance, it would be necessary to factor into any sentence the need to incentivise belated compliance. This is a matter that I need to consider in a little greater detail:
- (1) When this matter was last before me, the FCA suggested a suspended custodial sentence, suspended provided Mr McKendrick complied with certain extremely strict terms regarding the provision of information.
  - (2) I explained at that hearing that I was unsure whether such a course was appropriate. The reason I considered it not to be appropriate was because it seemed to me that the suspension being advocated by the FCA was, effectively, creating new orders and new obligations on the part of Mr McKendrick which, if not complied with, would immediately result in a prison sentence. That, as it seems to me, involved considerable dangers, in particular, were such an order inadvertently to be breached.
  - (3) It also seemed to me that the suspended sentence advocated for by the FCA on the last occasion ignored the fact that the McCahill WFO remained in force and that Mr McKendrick was flouting it.
  - (4) That was the position at the hearing on 31 January 2019, when I made clear my thinking. I adjourned the matter, with the consent of the parties, to today so as to enable Mr McKendrick, if so advised, to purge his continuing contempt. I refer to the order that I made on 31 January 2019 to that effect.
  - (5) The reason I took this somewhat unusual course was because – as it seemed to me – Mr McKendrick had not been advised (i) that the McCahill WFO continued in force, (ii) that he was in breach of it, (iii) that he could take steps to cure or ameliorate that breach, albeit belatedly and (iv) that this would be a matter relevant to sentence and mitigation. It therefore seemed to me that Mr McKendrick should have an opportunity – belatedly – to purge his contempt.
  - (6) Mr McKendrick has sought to do so in the time between the last hearing and this one. His recent affidavit, which I have already referred to, I have read and considered with great care. The affidavit is relatively short, but the detail appended to it is voluminous. A number of spreadsheets have been provided which Mr McKendrick says represent the contemporary records of the rental business that he was running.

- (7) I consider that an attempt has been made to provide relevant information. In the witness box, Mr McKendrick said that he had provided all the information that he could. He was asked about emails regarding the figures that he had produced, and he said that there were none to his knowledge. He was asked about bank statements that he might have produced, and he has said that he cannot produce these because they are not available to him.
- (8) I do not consider that it is open to me, on the evidence, to find that there has now been a withholding of material by Mr McKendrick. It seems to me that I must accept, in these circumstances, that there has been a genuine attempt on the part of Mr McKendrick to comply with the information provision requirements in the McCahill WFO and that it would be wrong, in this case, to deploy a sentence to compel further compliance with the order when I am not, myself, satisfied that further compliance is possible.
- (9) Mr Temple, on behalf of the FCA, did seek to contend that the FCA was not satisfied that there had been proper compliance. I can see that the lateness of the compliance and the fact that there are documents missing that one would expect to see, enables such an argument to be made. But I do not consider that I can properly find, in contempt proceedings, that there is further information that Mr McKendrick could provide that he has not provided.

Accordingly, for sentencing purposes, the coercive function of this jurisdiction – punishment to ensure compliance – is now absent and it should form no part of my sentence.

34. I return to the relevant factors for sentencing. Mr McKendrick has accepted, as I have said, that he is in breach of the orders. He has admitted the contempts pleaded against him. By that acceptance, he has shortened the length of his hearing. He has apologised for his breaches and he has, as I have described, provided information after my invitation at the last hearing. I take this all fully into account.
35. The point has also been made that there is a vast array of documents of considerable complexity throughout these proceedings, including these contempt proceedings. These, it was submitted on behalf of Mr McKendrick have made compliance with the worldwide freezing orders imposed more difficult, perhaps, than is usually the case. Whilst I accept the complexity of the proceedings, I am afraid I do not accept that this rendered Mr McKendrick's breach of the Roth WFO and the McCahill WFO any less deliberate. The point made in paragraph 32 above is undiminished in its force.
36. A number of criticisms were also made of the manner in which the FCA's application in these contempt proceedings had been advanced. These points I disregard. As it seems to me, they are irrelevant to the question of sentence.
37. No particular submissions were directed to Mr McKendrick's good character and antecedents. For the purposes of today, I assume him to be of good character.
38. It seems to me that the critical factor in terms of sentence is the deliberateness of the breaches of the worldwide freezing orders. It seems to me that we have, in this case, many and varied breaches of the Roth WFO and the McCahill WFO, but that these breaches all went to the same end, which was to thwart the orders of the court. Given

the importance of worldwide freezing orders in this jurisdiction and the deliberateness of the breaches, I consider that a custodial sentence is inevitable.

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

Transcript from a recording by Ubiquis  
291-299 Borough High Street, London SE1 1JG  
Tel: 020 7269 0370  
legal@ubiquis.com

This transcript has been approved by the judge.