



Neutral Citation Number: [2023] EWCA Civ 1487

Case No: CA-2023-002243

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT HASTINGS
Her Honour Judge Venn
G02BN018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 December 2023

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE NEWEY
and
LORD JUSTICE NUGEE

Between :

MARK GARY COATES

**Appellant/
Defendant**

- and -

(1) JANICE ELIZABETH TURNER
(2) BRIAN DAVID ABERNEITHY
GREENWOOD

**Respondents/
Claimants**

Iain Colville (instructed by Holden & Co LLP) for the Appellant/Defendant
Clare Anslow (instructed by Field Seymour Parkes LLP) for the Respondents/Claimants

Hearing date : 12 December 2023

Approved Judgment

This judgment was handed down remotely at 2.00pm on 13 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

1. This is an appeal by Mark Gary Coates from the committal order made by Her Honour Judge Venn on 26 October 2023, by which he was sentenced to a term of committal amounting to 252 days in prison. The sentence was passed after the judge had found Mr Coates to be in contempt of court as a result of seven breaches of an order made on 20 September 2022.
2. At the hearing before the judge, Mr Coates represented himself. Before us, he is represented by Mr Colville. The Respondents, Ms Turner and Mr Greenwood, have been represented at both hearings by Ms Anslow. We are grateful to counsel for their assistance, which has made our task much easier than the judge's was.
3. The committal proceedings arise out of a civil claim involving Mr Coates and his wife, the occupants of No 9 Eatenden Lane, Robertsbridge, and the Respondents, who live at No 10 Eatenden Lane. A dispute concerning the boundary between the properties was determined by the judge on 20 September 2022 after a 5-day trial. The Respondents, who were the Claimants, succeeded and the judge made a series of orders in their favour. These included damages amounting to £260,000, costs on an indemnity basis and a series of orders under the Protection from Harassment Act 1997. For our purposes, the relevant ones are:

“8. The defendants shall by no later than 4.00 pm 16 December 2022 remove all structures and other items that have been placed on the track, including but not limited to:

(1) such parts of the concrete block L-shaped structures identified in plan 7 which are located on the track;

(2) any other items including but not limited to storage sheds, vehicles, equipment, building materials, rubbish or waste.

16. The Defendants must not make verbal or abusive comments (including shouting or singing derogatory songs directed at the Claimants) or engage in physical threatening behaviour (including but not limited to following or staring) or otherwise intimidate or harass the Claimants or other occupiers of, or visitors, to the Claimants' Property.

17. The Defendants must not cause damage or threaten to cause any damage to the Claimants' Property, including any trees or other vegetation growing on the Claimants' Property, or any items of personal property belonging to the Claimants or belonging to any other occupiers or visitors to the Claimants' Property, including without limitation cars or other vehicles, whether located on the Claimants' Property, the Track or anywhere else.

19. The Defendants must by no later than 4pm on 23 September 2022 remove all cameras or video recording equipment which

has a view of any part of the Claimants' Property or the Track and must not thereafter reinstate any such cameras or equipment.

20. The Defendants must not, without lawful excuse, film or photograph or make any audio recordings of the Claimants or of any other occupiers of or visitors to the Claimants' Property."

4. Mr and Mrs Coates sought permission to appeal, which was refused twice by Meade J: on paper on 12 January 2023 and again at an oral hearing on 27 February 2023. They then applied for the decision to be reopened: this was refused by Miles J on 19 April 2023. A further attempt to take their case to this court was refused by Asplin LJ on 11 October 2023.
5. On 10 May 2023, the Respondents made a contempt application, alleging that Mr and Mrs Coates had breached the orders recited above in 24 respects. The Respondents subsequently indicated that they did not wish to pursue the application against Mrs Coates.
6. The matter was listed for hearing on 7 July 2023, but was adjourned before that date due to judicial unavailability. It was relisted for 10 August, but was again adjourned to 22 September as Mr Coates had only obtained legal aid on 31 July. That hearing was then adjourned by another judge until 26 October because of apparent difficulty in finding counsel for Mr Coates. On that occasion he was directed to file any evidence he intended to rely on by 19 October. On 24 October, two days before the hearing, the solicitors applied to come off the record for lack of counsel.
7. At the outset of the hearing on 26 October 2023, Mr Coates applied for the judge to recuse herself. She rightly refused and there is no appeal from that decision. He then applied for a further adjournment to allow him time to seek legal representation. The judge refused that application on the basis that the proceedings had been on foot since May and a fair opportunity to obtain representation had already been given. Again, there is no appeal from that decision.
8. At the hearing, the Respondents relied upon a number of affidavits. Mr Coates had signed two witness statements on 2 September 2023. They ran to 75 pages including many exhibits. Ms Turner gave lengthy evidence under cross-examination by Mr Coates; he chose not to give evidence and relied upon his witness statements, and he made closing submissions.
9. The judge found that that the Respondents had proved beyond a reasonable doubt seven allegations of breach of the injunction by Mr Coates. These were that he had failed to remove various objects (Allegations 1 & 2); that he had threatened and filmed Ms Turner (Allegations 7 and 8); that had threatened the Respondents during the hearing before Meade J on 27 February 2023 (Allegation 9); that he had thrown stones over the fence (Allegation 11); and that he still had cameras trained on the Respondents' land (Allegation 12).
10. Having heard mitigation, the judge referred to this Court's recent guidance on sentencing for contempt of court in *Lovett v Wigan Borough Council* [2022] EWCA

Civ 1631 (at paragraphs 31-57). She also referred to the Civil Justice Council's report, produced in July 2020 and approved in *Lovett*, entitled 'Anti-Social Behaviour and the Civil Courts'. She considered the breaches to merit the following sentences of imprisonment:

- 1 28 days
- 2 No Order
- 7 84 days
- 8 28 days
- 9 168 days
- 11 28 days
- 12 84 days

The judge then reduced the total figure of 420 days by 40% to produce a term of committal of 252 days, so approximately 8 months.

11. On 15 November 2023, Mr Coates appealed. He seeks the quashing of the contempt finding, alternatively a lesser sentence leading to his release. His grounds of appeal, expanded without opposition from the Respondents, are these:
 1. The sentence is manifestly excessive.
 2. The Judge failed to consider whether each sentence for the allegations proved should run concurrently, as opposed to consecutively.
 3. The Judge failed to give any or any sufficient consideration as to why the sentence should not be suspended.
 4. Having dismissed Mr Coates's application to adjourn the hearing to seek legal representation, thereby necessitating him to act as a litigant in person, and upon Mr Coates electing not to give evidence during the hearing, the Judge erred in considering and taking into account the witness statements prepared by his and his wife's previous solicitors and included in the trial bundle, and his closing submissions, in determining whether the Respondents had proved the allegations.
 5. In respect of the ninth allegation, the Judge erred in concluding that the submissions made by Mr Coates at the hearing of his oral application for permission to appeal, heard by Meade J on 27 February 2023, were threatening behaviour in breach of para.16 of the order dated 15 September 2022. Further, she erred in finding that this was "a very serious breach, to threaten to escalate matters (inaudible) very high culpability" warranting a sentence of 168 days in custody.
12. I will first consider Grounds 4 and 5.
13. On Ground 4, Mr Colville argues that a defendant has the right to remain silent and cannot be compelled to give evidence in a contempt application – see CPR r.81.7(3) and r.81.4(2)(n). As Mr Coates appeared as a litigant in person and chose not to give evidence, the witness statements prepared earlier ought to have been excluded from

the proceedings. The judge erred by failing to do so, and by taking those statements into account.

14. We have considered *Comet Products v Hawkex Plastics* [1971] 2 QB 67, Arlidge, Eady & Smith on Contempt, 5th ed. at para. 15-55, and *In re B* (Contempt of Court: Affidavit Evidence) [1996] 1 WLR 627, where Wall J held at 638A-D that the court does have the power to direct a respondent to committal proceedings to file and serve any affidavits or statements on which they might wish to rely. However, at 638E-G, he went on to say this about the respondent who does not wish to deploy the evidence thus filed:

“In my judgment, the correct approach is that adopted by Sir Stephen Brown P. in *In re W. (Wards) (Publication of Information)* [1989] 1 F.L.R. 246. The applicant can make no use of the respondent's evidence until it is deployed by the respondent, either by reading it or relying upon it. It equally follows that a respondent who obeys the direction to swear, file and serve affidavit evidence prior to the hearing does not by so doing put himself in peril of cross examination, until such time as he deploys the evidence in support of his own case.

The respondent to a committal summons is thus in no way prejudiced by obeying a direction of the court for the filing of evidence. On the other hand, the filing of such evidence enables the case on both sides to be properly prepared, and unnecessary adjournments avoided.”

15. We heard interesting submissions about the correct interpretation of what had happened in the present case. At the beginning of the hearing, the judge carefully warned Mr Coates that he did not have to give evidence and that he was at liberty to withdraw his statements if he wished. Mr Coates then cross-examined Ms Turner extensively with frequent reference to exhibits to those statements. However, when it came to the point where Mr Coates might have given evidence himself, he declined to do so, but insisted that he relied upon the contents of his statements. Before us, the parties were not agreed as to whether this was a proper course. Mr Colville submitted that the contents of the statements did not become evidence as they had not been verified from the witness box. Ms Anslow submitted that by virtue of their use in cross-examination and the express reliance placed upon them by Mr Coates, they became evidence that had been ‘deployed’ in the manner envisaged in *Re B*.
16. We mention this issue because it may arise in future, though not, we suspect, very often. Where it does, the court will need to take care to ensure that findings of contempt are only based upon evidence that can properly be relied upon. However, it is unnecessary to say more on this appeal, because the judge did not in fact place any significant reliance on anything that appeared in Mr Coates's statements. She referred to him as having made an admission in relation to the first and second breaches only, which related to the presence of objects on the land. Those breaches were proved beyond doubt by the evidence of Ms Turner and by photographs. Nothing that Mr Coates said was necessary to those findings. There was nothing remotely approaching a serious procedural error leading to injustice. This ground fails.

17. Ground 5 arises from the permission hearing before Meade J. In the course of lengthy submissions Mr Coates said this:

“It is just one thing after another, your Honour. I mean, I am waffling on a bit now, your Honour. We are at the end of thinking, "Where is this going to lie?" because I am not going to walk away from my property; I am not going to let someone, you know, something not right, to take our property away from me. So it's only going to escalate, you know what I mean? It can only escalate so it would end up probably being a criminal charge, a criminal matter because I cannot make myself homeless or my family because something was not right or just.”

Ms Turner, who was present in court, understood this to be a threat of physical violence towards her or her partner, or of criminal damage to their property. However, no one intervened and the hearing continued.

18. The judge found:

“72. Mr Coates laughed when it was suggested that this is a clear threat in his own words in front of a judge, but it is difficult to see what he could possibly have meant if it were not a threat (inaudible) a criminal charge, a criminal matter. He declined the opportunity to explain his comments in evidence and to explain what else he could possibly have meant, and I am satisfied beyond all reasonable doubt that he did say those words and meant them as a threat; that is a breach of paragraph 16 of the Order.”

The reference to a laugh may have been to Mr Coates' reaction to Ms Anslow's closing submission about this allegation.

19. It is said on behalf of Mr Coates that these were not a threat to the Respondents nor, if they were, could they be treated as being of very high culpability. For the Respondents it is said that this is a finding of fact with which this Court should be slow to interfere. The principles set out in *Volpi v Volpi* [2022] EWCA Civ 464 are relied upon in support of the contention that it cannot be said that the judge's conclusion was not rationally supportable.

20. I have underlined the only part of paragraph 16 that might be directly relevant:

The Defendants must not make verbal or abusive comments (including shouting or singing derogatory songs directed at the Claimants) or engage in physically threatening behaviour (including but not limited to following or staring) or otherwise intimidate or harass the Claimants or other occupiers of, or visitors, to the Claimants' Property.

21. I acknowledge the feel that the judge had for this case. However, even if the order was wide enough to cover remarks made in a courtroom, it is in my view stretching the effect of the injunction too far to treat this as a separate breach of the order. It was certainly yet another clear manifestation of Mr Coates's disobedient and unapologetic attitude, which is understandably distressing to the Respondents, but the words themselves are not unambiguous and the context in which they were spoken was unusual. Without further explanation, it is not possible to see how the judge came to make this finding to the criminal standard. The words, preceded as they were with the statement "I am not going to walk away from my property", did not expressly threaten an attack on the Respondents or their property, and might equally also be read as indicating a threat to resist, possibly with force, an attempt to evict Mr Coates and his family. I therefore do not consider that the finding as it stands can be rationally supported. If that is wrong, I nevertheless consider that it was a clear error to treat this statement as if it was by some distance the most serious of the breaches, attracting a starting point of 24 weeks imprisonment. I doubt if any custodial sentence was warranted for conduct of that kind, but if it was it would have been at a low level.
22. Ground 3 asserts that the judge should have passed a suspended sentence. I would accept that some judges might have done so in the hope that compliance could be achieved. However, in this case Mr Coates showed no appetite for compliance and I do not consider that the judge can be criticised for passing an immediate custodial sentence.
23. Centrally, Mr Colville argues under Ground 1 that the sentence was manifestly excessive as:
 - a. Mr Coates was acting in person.
 - b. He had difficulty in representing himself.
 - c. There was no consideration of the fact that Mr and Mrs Coates had been ordered to pay the sum of £260,000 plus interest and costs (in excess of £400,000 at the date of committal) which was sufficient punishment as it would require the appellant to sell his home.
 - d. Mr and Mrs Coates care for their dependant adult son who has moderate autism with severe social and communication difficulties and his time in custody would impact on the family.
 - e. Mr Coates was a man with a clean record and his time in prison has been a salutary experience which he does not wish to repeat.
24. In my view, these arguments hold little attraction. The fact that Mr Coates was unrepresented is not a factor bearing on sentence. He did not have undue difficulty in representing himself (his cross-examination of Ms Turner runs to 50 pages). The fact that he has been ordered to pay (but has not paid) damages and costs is entirely his own fault, and is a separate matter from the contempt with which the judge was dealing. His personal circumstances were known to the judge, but more particularly they were known to him when he embarked on his contemptuous behaviour. Finally, we have seen or heard nothing to suggest that Mr Coates has altered his attitude. So I am not impressed by the particular arguments in mitigation.
25. Far more persuasive is the broad submission that the sentence imposed was excessive.

26. In *Lovett v Wigan Borough Council* (above) this court gave guidance about sentencing for contempt of court. It noted that the five options available on sentencing are:
- a. an immediate order for committal to prison;
 - b. a suspended order for committal to prison, with conditions attached;
 - c. adjourning consideration of the sentence;
 - d. a fine;
 - e. no order.

A custodial sentence should be reserved for the most serious breaches and for less serious cases where other methods of securing compliance with the order have failed. A penalty may be imposed for each breach proved and the terms of imprisonment may be concurrent or consecutive. Simply adding up what may well be appropriate penalties for individual breaches is likely to lead to an excessive sentence (see [43]).

The three levels of culpability are:

- (A) High culpability—very serious breach or persistent serious breaches;
- (B) deliberate breach falling between (A) and (C);
- (C) Lower culpability—minor breach or breaches.

The level of harm is determined by weighing up all the factors of the case to determine the harm that was caused, or was at risk of being caused, by the breach or breaches.

The three levels of harm are:

- Category 1 - breach causes very serious harm or distress;
Category 2 - cases falling between Categories 1 and 3;
Category 3 - breach causes little or no harm or distress.
(see [47] - [48]).

The Civil Justice Council's table in 'Anti-social Behaviour and the Civil Courts' (July 2020) provides appropriate guidance for the level of sentence. Using that table should allow judges to approach the task in a relatively systematic manner; nevertheless, the task of sentencing for contempt of court is a multifactorial exercise of judgment based on the particular facts and circumstances of the case; any sentence must be just and proportionate (see [53] - [54]).

27. Here, the judge assessed the breaches in the following way:

- 1/2. Not within guidance
7. A2
8. B2
9. A1
11. B2
12. A2

28. Mr Colville argues that each breach should have counted as falling within C2 of the table – minor breaches with medium culpability – so attracting a starting point of adjournment and with a range of up to one month. The Respondents reply that the judge considered all these matters carefully and reached a proper sentence.

29. The CJC guidelines are not a straight-jacket and judges have a considerable discretion as to how they should categorise breaches. Even so, I agree that it is not possible to categorise three of these breaches falling within Culpability category A (high, very serious). If they were a contempt at all, the words said by the Mr Coates to Meade J at the permission hearing cannot be considered to have been a ‘very serious breach’, when compared with breaches that unfortunately regularly come before the court. The other breaches might at the highest be regarded as falling in category B. The upshot is that the starting point for sentencing for those individual breaches would be one month, with a range of adjournment to 3 months.
30. At paragraph 39 of *Lovett* the objectives in sentencing for civil contempt are described as being “(in this order): (i) Ensuring future compliance; (ii) Punishment; and (iii) Rehabilitation.” I agree with the judge when she said that Mr Coates’s refusal to accept the order and the repetition of breaches were aggravating features. Even so, looking at the matter overall an immediate custodial term of 252 days (about 8 months) was markedly outside the range of proportionate disposals for a first term of committal for breaches of this nature. Even without Allegation 9, the term comes to 151 days, or about 5 months.
31. Finally, Ground 2 concerns the question of whether the judge should have passed consecutive as opposed to concurrent sentences. This is not a straightforward matter, and is clearly linked to the questions of proportionality and totality. *Lovett* makes clear at [43] that it is good practice to consider a penalty for each breach found proved, and that terms of imprisonment may be concurrent or consecutive to each other. In the present case, the judge added up all the breaches and then applied a 40% discount, with no explanation for the amount of the discount beyond the fact that it led to what she considered to be the least possible sentence. Mr Colville submits that she did not sufficiently consider passing a concurrent sentence in a case where all the breaches were different facets of the same dispute. He accepts that the judge had a discretion and argues that in a case of this complexion she was bound to explain why she was making the sentences consecutive. Ms Anslow points out that the judge directed herself by reference to *Lovett*. Her judgement was alive to the totality principle. This is reflected in the fact that she reduced the total sentence by 40%, thereby rendering the sentence proportionate to the overall conduct.
32. When a term of committal is unavoidable, there are different routes by which an appropriate level of sentence can be identified. Had the judge categorised the individual sentences in a way that was more closely aligned with the CJC guidelines, her approach of aggregating the terms and then applying a proportionality (totality) cross-check could not have been criticised. She might also have decided to make some terms concurrent (for example, by grouping together breaches involving a failure to move objects, and doing the same for breaches of harassment). But if the starting points are too high, the process of addition that consecutive sentencing entails carries a risk of an excessive total sentence: see *Lovett* at [43]. This case illustrates that this may be so, even if a discount is then applied. The alternative for the judge was to have sentenced by reference to the overall course of conduct with which she was faced. The breaches all arose from the same order and were largely directed at the Respondents alone. Whichever route the judge chose, this was in my view a case in which a decision to sentence to consecutive terms required explanation.

33. In conclusion, I would uphold the judge's careful findings of contempt, except with regard to Allegation 9. Looked at in the round, these were contemptuous breaches of a clear court order and they could not be ignored. As to sentence, I reject the argument that an immediate custodial sentence was necessarily wrong in principle. However, I would allow the appeal on the basis that the overall sentence was manifestly excessive. In all the circumstances, a sentence of about 3 months imprisonment could not have been the subject of a successful appeal. In fact, Mr Coates has now served 47 days imprisonment. That is the equivalent of a sentence of 94 days, which is approximately three months. I would therefore substitute a sentence that allows for Mr Coates's immediate release.
34. Although the appeal succeeds to that extent, it need hardly be said that any breaches of the judge's orders in the future would be likely to lead to a substantial term of committal. The listing of any future applications would of course be a matter for the court, but for my part I see no reason why they should not continue to be heard by HHJ Venn.

Lord Justice Newey:

35. I agree.

Lord Justice Nugee:

36. I also agree.
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