



Neutral Citation Number: [2024] EWHC 3161 (Comm)

Case No: CL-2017-000323

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 06/12/2024

Before :

THE HONOURABLE MR JUSTICE HENSHAW

Between:

IN THE MATTER OF GERALD MARTIN SMITH

Defendant

AND

IN THE MATTER OF THE CRIMINAL JUSTICE ACT 1988

AND

**IN THE MATTER OF AN APPLICATION BY THE SERIOUS FRAUD OFFICE
FOR THE COMMITTAL OF GERALD MARTIN SMITH TO PRISON FOR
CONTEMPT OF COURT**

Kennedy Talbot KC and Gary Pons (instructed by **Serious Fraud Office**) for the **Applicant**
Richard Thomas KC (instructed by **Berkeley Square Solicitors**) for the **Defendant**

Hearing date: 6 December 2024

Approved Judgment

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Mr Justice Henshaw:

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(A) INTRODUCTION

1. On 29 October 2024 I heard an application by the Serious Fraud Office (“**SFO**”) to commit the you, Dr Gerald Martin Smith, to prison for contempt of court. I reserved judgment and on 31 October 2024 circulated my draft written judgment on the question of liability. I have handed that judgment down this morning, and copies of it will be made available. The case was adjourned for sentencing, and today’s hearing has been listed to deal with sentence.
2. You represented yourself at the hearing on 29 October 2024, and are today represented by Richard Thomas KC. The SFO is represented by Kennedy Talbot KC and Gary Pons.
3. In my written judgment on liability, I have concluded that you committed each of the contempts alleged. The contempts were as follows:
 - i) disobeying a Restraint Order made on 20 May 2005 by Wilkie J under the Criminal Justice Act 1988, as varied by an order made by Andrew Baker J on 20 May 2022, by spending more than the £2000 per month permitted on living expenses on fifteen occasions from June 2022 to December 2023;
 - ii) breaching undertakings you gave to the Court, set out in an agreement dated 27 January 2021 known as “*the LCL Settlement Deed*”, which compromised the claim brought by the SFO and certain Enforcement Receivers with you, by:
 - a) procuring Dr Robert Morris to assign his purported rights in a tenancy in respect of Flat 21 Hamilton House, 81 Southampton Row, London, WC1B 4HA (“**Flat 21**”);
 - b) changing or causing to be changed the front door lock to Flat 21; and
 - c) causing Ms Auta Calgado and Ms Gabrielle Beluzzo to occupy Flat 21; and
 - iii) breaching the same undertakings by:
 - a) failing to give vacant possession of Flats 11 and 12 Hamilton House, 81 Southampton Row, London, WC1B 4HA (“**Flats 11 and 12**”); and
 - b) issuing an application to stay a writ of possession in respect of Flat 11 and 12 without any foundation or proper basis.

4. As set out in my written judgment, I am sure that you did each of those things deliberately and having full knowledge of the terms of the Restraint Order or the Undertakings, as the case may be.
5. As to sanction, have carefully considered the evidence, and counsel's written and oral submissions, for which I am most grateful.

(B) PRINCIPLES

6. The purposes of committal for contempt include punishment and coercion, either in the sense of ensuring future compliance with the order breached or, pertinently to this case, future compliance in general by means of deterrence.
7. *In Attorney General v Crosland* [2021] 4 WLR 103 the Supreme Court cited with approval this guidance:
 - i) The court should adopt an approach analogous to that in criminal cases namely to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused.
 - ii) In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.
 - iii) If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.
 - iv) Due weight must be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.
 - v) Due weight must also be given to the impact of committal on persons other than the defendant, such as children or vulnerable adults in their care.
 - vi) There should be a reduction for an early admission of the contempt.
 - vii) Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment.
8. I have also had regard to the guidance in all the other cases cited to me, and in particular to *Crystal Mews Ltd v Metterick* [2006] EWHC 3087 (Ch), *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch) § 28, *Oliver v Shaikh* [2020] EWHC 2658 (QB) (at §§ 14-21), *Kea Investments Ltd v Watson* [2020] EWHC 2796 (Ch) (at §§ 5-13) and *HM Solicitor General v Stephen Yaxley-Lennon* [2024] EWHC 2732 (KB). These cases make clear, first of all, that there is a range of sanctions available, from making no order, imposing an unlimited fine or the imposition of a sentence of imprisonment of up to two years. The Court has the power to suspend any warrant for committal. As with any sentence of imprisonment, that sanction should only be imposed where the court is satisfied that the defendant's conduct is so serious that no other penalty is appropriate. It is a measure of last resort. A suspended prison sentence, equally, is still a prison sentence, and is not to be regarded as a lesser form of punishment. A sentence of imprisonment may be appropriate where there has been a serious and deliberate flouting of the court's order

9. The cases also indicate that factors of potential relevance include:
 - i) the harm caused by the breach to the person whose interests the court order or undertaking was designed to protect;
 - ii) whether the breach of the order was deliberate or unintentional;
 - iii) the degree of culpability of the defendant;
 - iv) whether the defendant acted under pressure from a third party;
 - v) whether the contempt is capable of remedy; and
 - vi) what mitigation is available.
10. Mitigation may come from:
 - i) an admission of breach - for example, admitting the breach immediately and not requiring the other party to go to the expense and trouble of proving it;
 - ii) the defendant's frankness in admitting the contempt;
 - iii) an admission or appreciation of the seriousness of the breach;
 - iv) any cooperation by the defendant to mitigate the consequences of the breach including any attempt to comply with it belatedly;
 - v) any genuine expression of remorse or sincere apology to the court for his behaviour, or any reasonable excuse put forward;
 - vi) previous good character and antecedents; and
 - vii) any personal mitigation available.
11. In *JSC BTA Bank v Solodchenko (No.2)* [2012] 1 WLR 350, Jackson LJ noted among other things that any substantial breach of a freezing order is a serious matter, which normally merits a prison sentence, though there may be circumstances in which a substantial fine is sufficient.
12. Any period of imprisonment cannot exceed 2 years (Contempt of Court Act 1981, s.14(1)). If a suspended imprisonment period is activated, the limit remains 2 years including the activated period (*Villers v Villiers* [1994] 1 WLR 493).
13. In *Financial Conduct Authority v McKendrick* [2019] 4 WLR 65 § 40 the Court of Appeal noted that, whilst the length of any prison sentence will always depend on all the circumstances, the comparatively short maximum term for contempt of court means that it is not reserved for the very worst sort of contempt. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum.
14. The Sentencing Council Definitive Guideline: Imposition of Community and Custodial Sentences, which is relevant as an analogy, requires the court to consider whether the

custody threshold is met and explains that: “*The clear intention of the threshold test is to reserve prison as a punishment for the most serious offences*”. That is consistent with the approach adopted in the authorities on contempt. These underline that a custodial sentence is a last resort (*Super-Max Offshore Holdings Ltd v Malhotra* [2020] EWHC 1130, §6(i)) and that committal to prison should be “*reserved for cases of serious, contumacious flouting of orders of the court*” (*Gulf Azov Shipping Co Ltd v Chief Idisi (No 1)* [2001] EWCA Civ 21, §72).

15. The Court has a wide discretion to suspend any sentence of imprisonment: see e.g. *Moutreuil v Andreewitch* [2020] EWHC 3085 (Fam) at §9.
16. The Court has a discretion whether or not to activate a suspended sentence, a point which arises in the present case. As made clear in *Villiers*, activation is in no way automatic. Taking into account the past and current situation and the gravity of the breach, the court can activate the original sentence in whole or in part, impose a fine or not punish at all.
17. A period of imprisonment is imposed by way of an order of committal executed pursuant to a warrant of committal. This has immediate effect unless the court decides to suspend its execution (CPR 81.9(2)). The Court of Appeal held in *Attorney General v Dowie* [2022] EWCA Civ 1574 that there is power to impose a sentence starting at a later date, otherwise perverse and unfair outcomes could arise. Whether the power will be exercised will depend on the circumstances, including whether the offence for which a sentence is currently being served, and the contempt of court, arise from separate matters involving separate events or victims.

(C) APPLICATION

18. I begin by considering contempts (ii) and (iii), relating to possession of Flat 21 and Flats 11 and 12. In my view, these were serious, deliberate and highly culpable contempts of court. You knew that the undertaking required you to give vacant possession of the Flats. In relation to Flat 21, you deliberately sought to avoid your obligations and to prevent or delay the giving of vacant possession, by the various ruses I have already mentioned. This was, as you said in your message of 12 January 2023 to Dr Morris, part of your “*battles for control of this asset*”. Your contempt was carefully planned, considered and multi-faceted. You also involved third parties in it, namely Dr Morris and the two purported tenants.
19. Most of those considerations also apply to your contempt regarding Flats 11 and 12. You openly refused to comply with the undertaking, and then started wholly unmeritorious proceedings leading to significant delay in the Enforcement Receivers obtaining possession of the flats. All of this forms part of a substantial history of trying to avoid your legal obligations, in what Foxton J described as “*a rear-guard action by individuals who are dissatisfied with the outcome of the litigation in some or other respects*”.
20. On top of that, you committed these contempts during the operational period of a suspended sentence imposed on you by this court in July 2022. That was a sentence of 8 months’ imprisonment, suspended for 18 months, for opening and operating three bank accounts in breach of the Restraint Order. The commission during that period of

these further contempts for which I am sentencing you suggests that you regard compliance with the court's orders as optional.

21. Although in the end the Enforcement Receiver got possession of all three flats, the delay meant that they remained occupied with no rent being paid but expenses still being paid out. Professional fees also had to be incurred to obtain possession. As set out in my written judgment, the total estimated cost to the receivership, in relation to the three flats together, totals almost £270,000. That in my view amounts to significant harm, and seems incapable of being remedied given your outstanding financial liability under the confiscation order to which you are subject. It reduces the money available to compensate the victim, RBS, of your wrongdoing.
22. Contempts of this nature also create harm by their tendency to undermine the rule of law. You were not entitled to decide for yourself that the Restraint Order did not apply or that the Undertakings you gave were not effective. Such an approach threatens the administration of justice.
23. Your previous record is an aggravating factor. In 1993 you were convicted and sentenced to two years' imprisonment in connection with a theft of £2 million from a corporate group of which you were the chief executive. In that case, you had passed money from a pension fund for your own benefit through a sequence of opaque transactions utilising bank accounts in Geneva and Panama. I accept that was a long time ago.
24. Subsequently, however, in April 2006 you pleaded guilty to ten counts of theft and false accounting and were convicted of stealing £35 million from a company called Izodia Plc. You were sentenced to eight years' imprisonment, and a confiscation order was made against you for approximately £41 million. The contempts of court I have to deal with were committed in the context of attempts by the SFO and Enforcement Receivers to enforce that confiscation order.
25. More recently, on 20 September 2024 – and I appreciate this is a subsequent matter – you were sentenced to 18 months' imprisonment at Southwark Crown Court having been convicted after a trial for the fraudulent procurement of a £50,000 Covid Bounce Back loan. That money was used to settle a costs order made in the SFO and Enforcement Receivers' application on 29 July 2020. You are still serving that sentence.
26. As to mitigation, in your affidavit dated 2 December 2024 you apologise unreservedly for your actions and accept the effect of the draft judgment; and I take those points into account. You say in relation to Flat 21 that you genuinely believed the LCL Settlement Deed, one of the documents relating to the underlying dispute, to be ineffective. As I have said in my written judgment, the points you made in that regard were unmeritorious, and in any event the Undertakings you gave to the court were clear and unequivocal. Any view you may have held on the legal merits of the position could absolutely not provide any basis for your deliberate breach of the Undertakings. I return to personal mitigation after considering the other contempt for which I have to sentence you.
27. Contempt (i), relating to exceeding the spending limits in the Restraint Order, was a recurrence of the same type of contempt for which this court had already imposed a

suspended prison sentence in July 2022 as I have described. In that sense the present contempt was serious by virtue of being a repeat or continuation of such behaviour. You and your counsel have explained that the money you were spending came from your brother, and became an asset of yours only because it first went into an account in your name. You said at the previous hearing that you had not realised it would be caught by the restrictions, but if it was then you unreservedly apologised. You also regularly sent the SFO statements of account relating to the account, as well as quarterly statements of where the money came from, and they had not objected to the expenditure.

28. As I explained in my written judgment, there is no doubt the money in the account was caught by the Restraint Order, and you breached the order by spending money above the stated limits. On the other hand, I accept that in the circumstances there is no evidence that this spending ultimately depleted the pot of money available to the Enforcement Receivers, the preservation of that pot being the objective of the Restraint Order. The direct financial harm is therefore relatively low, and it appears that the overspends have stopped. On the other hand, the harm to the administration of justice and rule of law remains, particularly in circumstances where you had already committed and been sentenced for similar contempts in the recent past. I accept as a mitigating factor the point that you sent those regular accounts to the SFO without objection.
29. In relation to all of the contempts, I take into account the personal mitigation available to you. You are now nearly 70 years old, and while in custody have missed the birth of your first grandson. The affidavits of your daughters explain the part you play in their lives and that of the family in general. They also refer to your deafness and limited fitness which may make time in prison more burdensome.
30. You and your counsel have also explained that, if sentenced to a further period in custody, you will no longer be eligible for Home Detention Curfew under the custodial sentence you are currently serving, and are therefore likely to spend several more months in custody for that offence. I understand that you would otherwise be eligible for release on Home Detention Curfew on or about 8 January 2025.
31. Having all of these matters in mind, I now turn to the appropriate sentences for the contempts.
32. I consider these contempts to be so serious that a fine would not be a sufficient penalty, and only a custodial sentence will suffice, even bearing in mind that imprisonment is always a punishment of last resort. Indeed, through your counsel you realistically accept that the court will impose a custodial sanction, and do not seek to argue that the sentence should be suspended.
33. I have to impose the shortest period of imprisonment that properly reflects the seriousness of the contempts.
34. Your contempts in relation to Flat 21 and Flats 11 and 12 were very serious for the reasons I have given. Even taking into account the mitigation factors and your personal mitigation, I consider that each of the two contempts involved would require a sentence of 7 months' custody if they stood alone, making a total of 14 months' custody. Contempt (i), relating to the overspending, would by itself require a sentence of 2 months' custody.

35. The sentences for those three contempts should in my judgment be consecutive to each other, before considering totality in the round. They arise out of separate groups of incidents and facts; and in any event, the overall seriousness of your conduct could not properly be reflected by concurrent sentences unless they were in any event increased so as to reflect the same overall custodial term.
36. In addition, I have to consider whether or not to activate the 8 month suspended sentence imposed in July 2022. I have concluded that I should reactivate it at least in part. Your contempts in relation to the flats, in particular, were serious and deliberate further contempts committed during the operational period of that earlier sentence. The overspending was a recurrence of similar breaches to those for which you had previously been sentenced.
37. Moreover, I consider that the sentence I impose should in substance run consecutively to the prison sentence you are currently serving. That sentence arose from entirely separate offending from the contempts of court I am dealing with now. Any other approach would in effect make part of the sentence I am imposing a dead letter. Conversely, however, I take account of the point you have made about lost Home Detention Curfew in relation to your current sentence. In my view the equity of the situation indicates that I should address that point by making the custodial term I impose start on 8 January 2025, and the same for the reactivated portion of the suspended sentence. Counsel for both parties were minded to agree with that course, in the event that I imposed a custodial term intended to be consecutive to the sentence you are currently serving.
38. It is also necessary to stand back and consider, having regard to all the factors I have mentioned, what term is appropriate to reflect the totality of your contempts of court. I have come to the conclusion that the appropriate custodial period as a whole for the three contempts I have to deal with, and leaving aside for a moment the suspended sentence, is one of 11 months' imprisonment, comprising 1 month for contempt (i), 5 months for contempt (ii) (Flat 21) and 5 months for contempt (iii) (Flats 11 and 12). Those are the shortest terms that I can impose commensurate with the seriousness of those contempts of court.
39. I have to decide whether those sentences can be suspended. In my view they cannot. I consider that appropriate punishment can be achieved only by immediate custody, immediate in the sense of not being suspended
40. Returning to the suspended sentence, in addition to the custodial terms I have just imposed, I shall reactivate the suspended sentence to the extent of 2 months, for the reasons I have given, and again taking account of totality. That reactivated portion will run consecutively to the custodial terms I have just imposed.
41. I accordingly sentence you to the terms I have just indicated, resulting in a custodial term of 11 months' imprisonment, and reactivate to the extent of 2 months the suspended sentence previously imposed.
42. You will serve half of the overall custodial term I have imposed and the reactivated portion of the suspended sentence, and then be entitled to release from prison on licence.
43. An order of committal and warrant of committal will be issued accordingly.

44. You are entitled to appeal this sentence without permission. The appellate court is the Court of Appeal. Any appeal must be commenced within 21 days after the order reflecting this judgment.
45. I shall now read the statement required by Practice Direction on Committal for Contempt: Open Court.
46. I shall arrange for the publication via the prescribed channels of the Practice Direction summary and of my judgments.