Neutral Citation Number: [2019] EWCA Civ 613

Case No: A3/2019/0400

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mrs Justice Falk DBE
[2019] EWHC 469 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/04/2019

Before :

LORD JUSTICE HENDERSON
LADY JUSTICE NICOLA DAVIES DBE
and
LADY JUSTICE ROSE DBE

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Between :

OLGA OLITA SELLERS	**Appellant**
- and –	
ARTEM PODSTRESHNYY	**Respondent**

- -
- -

Stephen Fidler (solicitor advocate of **Stephen Fidler & Co**) for the Appellant
Sarah Bousfield (instructed by **Devonshires**) for the Respondent

Hearing date : 19 March 2019

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Approved Judgment

Lady Justice Rose :

1. The Appellant, Ms Sellers, appeals against the order of Falk J made on 14 February 2019 by which concurrent custodial sentences were imposed on Ms Sellers for three breaches of freezing orders, those sentences being two sentences of nine months and one of six months imprisonment, resulting in an overall period of nine months imprisonment. Ms Sellers argues that the sentences were too long and that they should have been suspended. At the end of the hearing of the appeal, the Court announced its decision rejecting the contention that the sentences should be suspended but allowing the appeal to the extent of reducing the two nine month sentences to six months each. These are my reasons for coming to that decision.

Background

2. Ms Sellers ran an estate agency business through the company Pericles Properties Ltd ('Pericles') of which she is the sole director and shareholder. Pericles acted as letting agent for, amongst other landlord clients, the Respondent Mr Podstreshnyy in respect of his property at One St George's Wharf, in Vauxhall London. Pericles received rent from Mr Podstreshnyy's tenants at the property. Those monies were not handed over to Mr Podstreshnyy as they should have been but rather were paid to and spent by Ms Sellers. Once this was discovered, Mr Podstreshnyy sought a pre-action interim freezing injunction from the court. The first order made in the proceedings was that of Nugee J following a without notice hearing on 7 February 2018 ('the Nugee injunction'). It displayed the penal notice prominently in appropriate terms on the front page, set the return date for 21 February 2018 and contained the following provisions:

    i) (by para 6) Ms Sellers' and Pericles' assets within the jurisdiction were frozen up to the value of £100,000;

    ii) (by para 8) monies in a named bank account with Lloyd's Bank were expressly covered by the freezing order;

    iii) (by para 10) Ms Sellers and Pericles were ordered to provide to Mr Podstreshnyy's solicitors immediately and to the best of their ability information about all their assets in the jurisdiction, giving the value, location and details of all such assets up to the value of £100,000;

    iv) (by para 12) Mrs Sellers was permitted to spend a reasonable sum towards her living expenses and she and Pericles were also permitted to spend a reasonable sum on legal advice and representation. Before spending any such sums, Ms Sellers and Pericles were required to inform Mr Podstreshnyy's solicitors where the money was to come from;

    v) (by para 13) Pericles was permitted to deal with or dispose of any of its assets in the ordinary and proper course of business but before spending any money the company was required to tell Mr Podstreshnyy's solicitors where the money was to come from;

vi) (by para 15) the order was to cease to have effect if Ms Sellers and/or Pericles provided security by paying £100,000 into court or by some other agreed method;

vii) (by Schedule B) Mr Podstreshnyy gave the usual cross undertaking in damages and undertook to issue and serve a claim form as soon as practicable.

3. Nugee J also granted an order for third party disclosure against Lloyd's Bank to obtain bank statements for the account of which Mr Podstreshnyy was aware. These statements were provided by the bank and disclosed the existence of another bank account in the name of Ms Sellers personally. They showed that substantial sums had over time been moved from the Pericles account to Ms Sellers' personal account.

4. Ms Sellers was served with the Nugee injunction on 15 February 2018. She made no attempt to provide information about her assets or Pericles' assets as she had been ordered to do. At the return date hearing before Barling J on 21 February 2018, Ms Sellers was present and represented by a solicitor she had by then instructed. Outside court Ms Sellers produced a witness statement made on her own behalf and on behalf of Pericles. In that statement she made many complaints about the procedure followed by Mr Podstreshnyy to obtain the Nugee injunction and described how the freezing of the bank accounts had disrupted her business and resulted in lost sales. There was no information in there about her assets or the assets of Pericles. Barling J made an order on 21 February 2018 ('the Barling injunction') displaying prominently the appropriate penal notice. One of the recitals in the Barling injunction emphasised for Ms Sellers' benefit the importance of complying with the court's order: (referring to Ms Sellers and Pericles as 'the Respondent'):

> "Upon the Respondent's non-compliance with the disclosure obligation and the court reminding the Respondent's legal representatives that this usually merits an immediate sentence of imprisonment of a not insubstantial amount in order to encourage compliance"

5. The Barling injunction (by para 1) continued in force the freezing order made in the Nugee injunction, increasing the value frozen to £112,000. It also provided at para 2 that all other parts of the Nugee injunction, including the requirement at para 10 that the Respondents must immediately and to the best of their ability inform Mr Podstreshnyy's solicitors of all of their assets within the jurisdiction, continued in force. The Barling injunction was served on Ms Sellers via her solicitor on 23 February 2018. I note here that neither the Nugee nor the Barling injunctions required the information about the assets to be provided or confirmed in any particular form.

6. Shortly after the hearing before Barling J, Ms Sellers completed but did not sign an admissions form admitting £70,000 of the debt. In the pages of the form dealing with her finances, she described herself as an estate agent but in the box for her annual turnover she put "t.b.a". She claimed to have only £500 in a bank account and indicated that she was living in rented property. Her only income was from state benefits, namely income support, child benefit and housing benefit. In the boxes for her outgoings she included rent and other household expenses amounting to more than her monthly income. She also listed various debts, for rent arrears, council tax and utilities as well as substantial credit card debts. The forms indicated that she and

Pericles could only afford to pay off the admitted portion of the debt in monthly instalments of £5000 starting at the beginning of 2019.

7. In the light of the information in the admissions form, Mr Podstreshnyy obtained judgment against Pericles for part of his claim by order of Master Price dated 20 April 2018. Judgment was entered in the sum of £89,727.49 with execution of about £20,000 of the sum claimed being stayed because Pericles asserted a counterclaim arising from purchases and repairs it said it had paid for and that allegedly fell to be deducted from the rental monies owed. Pericles was ordered by Master Price to serve an amended Defence and Counterclaim by 4 May 2018. A schedule of monthly instalment payments was ordered for the payment of the judgment debt. The order provided that this did not preclude any application for a charging order to secure the amount of the debt immediately due. Ms Sellers was granted permission to defend the total value of the claim. No pleading was in fact served by Pericles in accordance with Master Price's directions.

8. At some point Mr Podstreshnyy became aware that Mrs Sellers and her former husband Mr Sellers jointly owned three properties in Cheam. These properties ('the Cheam properties') comprise the freehold of premises at 10 Station Way, Cheam, SM3 8SW which Ms Sellers owns with Mr Sellers in equal shares, a leasehold commercial property in the ground floor of the premises also owned jointly in equal shares and a residential flat on the upper floor of the premises, the address of the flat being 9 Cheam Court. Ms Sellers still owns the legal title to the flat jointly in equal shares with Mr Sellers. As part of the settlement of their matrimonial proceedings, Ms Sellers was to buy Mr Sellers' share. She still owes about £10,000 of that purchase price, having paid the majority of it using funds loaned to her by her brother. Title has not been transferred into her name but will be transferred by Mr Sellers if and when he receives the balance of the purchase price.

9. It therefore became apparent to Mr Podstreshnyy that Ms Sellers had breached the Nugee and Barling injunctions in a number of respects. On 14 June 2018 Mr Podstreshnyy issued committal proceedings against Ms Sellers supported by an affidavit of David Pack, a solicitor with Devonshires who were now instructed by Mr Podstreshnyy. The following day there was a hearing before Morgan J of an application by Mr Podstreshnyy for an order that unless Ms Sellers and Pericles serve defences to the claim, judgment be entered for the remainder of the monies claimed. At that hearing Ms Bousfield, appearing for Mr Podstreshnyy, told Morgan J that Ms Sellers had taken no steps to comply with the information provisions in the Nugee and Barling injunctions and that an application for committal had been issued the previous day. Morgan J stressed in Ms Sellers' presence the importance and seriousness of the orders that had been made. He told her that there was well established precedent for someone who breaks such an order being imprisoned for up to two years. The result of that hearing was an order made by Morgan J on 15 June 2018 providing that unless Ms Sellers and Pericles "disclose all of their assets within the jurisdiction" in an affidavit by Ms Sellers in her personal capacity and as director of Pericles by 4 pm on 22 June 2018, the defences would be struck out, judgment would be entered for Mr Podstreshnyy against Ms Sellers in the sum claimed, that is £112,452, and any stay imposed by Master Price would be lifted. He also ordered that the committal application be served personally on Ms Sellers in court before him and recorded that service had been effected in his presence.

10. Ms Sellers then served a witness statement (not an affidavit) which was dated 22 June 2018 but only provided to Mr Podstreshnyy on 26 June 2018. She said at the start of the statement that it was made "in full compliance" with the Nugee injunction, the Barling injunction and the order of Morgan J. Her evidence was that Pericles has no interest in any real property and its only movable assets are office furniture and equipment, about £17,400 in cash at the bank, trade creditors and intellectual property in client databases. In addition there are rental deposits held by the Deposit Protection Service on behalf of its landlord clients which she recognised should not be regarded as assets of Pericles. Turning to her own assets, Ms Sellers said that her only interest in real property is in the Cheam shop (50 per cent), flat (50 per cent) and freehold (the whole interest). Mr Sellers has been actively marketing the Cheam properties for sale. The most recent offer for the flat was for £322,500 which would mean the equity after repaying the mortgage would be £139,500. On that basis, the net realisable gain for her is likely to be about £45,000. The latest offer for the purchase of the Cheam shop was for £205,000. After paying the mortgage and other expenses and sharing the proceeds with Mr Sellers, she would expect to realise about £49,000 from that sale. The last offer for the freehold was £40,000 and that (for reasons she does not explain) would be divided equally between herself and her ex-husband. Ms Sellers also stated that her brother, who loaned her the money to buy out Mr Sellers' share of the Cheam properties, has a beneficial interest in those properties to the value of his loans of £107,000. As to her moveable assets, Ms Sellers says that these were limited to furniture, her small car and "cash at bank". The household furniture and other items are then listed in detail including a bunk bed, table lamps from B&Q, a YSL handbag, clothes bought at sales in various retail stores and a digital piano. For her bank account details Ms Sellers says only that she has a personal bank account with Halifax with a cash balance of £2,003.37.

11. There was a hearing before Daniel Alexander QC (sitting as a Deputy High Court Judge) on 25 July 2018 to consider an application brought by Mr Podstreshnyy for judgment on the grounds that Ms Sellers had failed to comply with Morgan J's 'unless' order. The judge recorded that nothing had been paid towards the judgment debt arising from the order of Master Price on 20 April 2018: [10]. He found that there had been at least two admitted breaches of Morgan J's order because the witness statement did not in fact disclose all Ms Sellers' assets and it was common ground that it had not been provided by the deadline of 22 June. The judge refused relief from sanctions, entered judgment for Mr Podstreshnyy for the sum claimed and lifted the stay on execution.

12. The application for the committal of Ms Sellers for contempt came before Fancourt J for hearing in December 2018. He granted an adjournment to allow Ms Sellers to obtain legal aid and to instruct Fidler & Co to represent her. Ms Sellers served an affidavit on 31 January 2019. In that affidavit a number of additional bank accounts including personal accounts with Nationwide, Metro and a Post Office account were disclosed and bank statements from those accounts were exhibited. Ms Sellers said that she had been given cash on occasion by friends and by her brother and those monies had been spent. She also disclosed for the first time the receipt of income from lodgers living in the Cheam flat during various periods between January 2018 and January 2019. She described the efforts that had been made to sell the Cheam properties and set out in more detail the position as regards the legal and beneficial ownership of the properties. She said in that affidavit that she would agree to both

properties being transferred to Mr Podstreshnyy so that they could be sold; her share of the proceeds should be enough to cover the judgment debt and the reasonable costs of Mr Podstreshnyy. Ms Sellers said that her new solicitors had made her fully aware of her obligations to be open and honest.

The judgment following the committal hearing

13. The adjourned hearing of the committal application took place before Falk J on 8 February 2019, when she reserved judgment. The hearing reconvened on 14 February 2019 when the judge read out her judgment and then dealt with costs. The judgment sets out the background to the dispute between Mr Podstreshnyy and Ms Sellers, the making of the Nugee and Barling injunctions and the conclusion of the substantive claim. The judge identified three of the seven grounds for committal as the ones she would determine. These were:

    i) Grounds 1 and 2 being the failure by Ms Sellers to disclose assets in breach of both the Nugee and Barling injunctions, those assets being not only the Cheam properties but also income from those properties and other assets including particular bank accounts; and

    ii) Ground 4 being the failure to inform Mr Podstreshnyy's solicitors of the sums spent by Ms Sellers on her living expenses or of the source of the money she was using for those expenses.

14. The judge recorded that at the hearing of the application on 8 February 2019, those three grounds were admitted by Ms Sellers so that the evidence she heard, including oral evidence from Ms Sellers, related to sentencing only. She found the following facts:

    i) There had been a clear failure to disclose the existence of the Cheam properties. Ms Sellers had attempted to sell the properties and to put in place a charge over the properties in favour of her brother in connection with a purported beneficial interest Ms Sellers claimed arose because he had loaned her the money to buy out Mr Sellers' share. The evidence before the court included an email from Ms Sellers to her ex-husband saying that she only agreed to the sale if the proceeds were not given to Devonshires (who were acting for both Mr Podstreshnyy and Mr Sellers) and if her brother's loan was paid off first. The judge rejected Ms Sellers' evidence that her former solicitor had advised her to say that.

    ii) Ms Sellers had failed to disclose the income she received from the Cheam flat before her affidavit of 31 January 2019.

    iii) Most significant, however, was the evidence disclosed in that affidavit about the Nationwide account in Ms Sellers' name. This account was opened by Ms Sellers on 22 February 2018, the day after the Barling injunction was made, with an initial credit of £2,000 in cash. The judge noted that Ms Sellers was present and legally represented before Barling J and clearly knew about the need for immediate disclosure. But she had not disclosed the existence of the account before October 2018. At that point her solicitor had said the account

had been opened in May 2018. Bank statements were only provided on 31 January 2019.

iv) Other bank accounts were also disclosed only on 31 January 2019. These included an account with Metro bank opened on 25 July 2018 which had clearly been operated. There was an HSBC account which also had a balance. Significant transactions had gone through the HSBC account including withdrawals of several thousand pounds during February 2018, shortly after Ms Sellers became aware that her Halifax bank account had been frozen and shortly after she had attended court for the hearing before Barling J. In total it appeared that over £60,000 had been withdrawn from Ms Sellers' accounts over the period when the freezing orders were in place. Ms Sellers also gave evidence that other sums credited to her bank accounts were rental payments in respect of other clients' properties. Ms Sellers admitted she had used these to pay her personal and business expenses.

v) Ms Sellers had also been using her state benefit receipts for her expenses but she had never engaged with Mr Podstreshnyy's solicitors to tell them where the money spent on her living expenses had come from.

15. Falk J said that Ms Sellers' current level of business was unclear and no up to date accounting information was available for Pericles. She also recorded that Ms Sellers had represented to the bank that the freezing orders had been varied to permit her to make certain withdrawals when in fact no variation had been made. The judge rejected a number of specific complaints about Ms Sellers' former solicitors though she said that she was prepared to accept that there had been some level of poor advice initially: [45]. Ms Sellers had apologised for her breaches for the first time when she was in court on 8 February 2019. The judge also accepted that Ms Sellers may have panicked on first receiving the freezing orders. She went on:

> "46. However, this only goes so far. There is an alternative potential explanation to poor legal advice, which is that Ms Sellers has not chosen to listen to advice. It is quite clear that Ms Sellers is not an unsophisticated person. She has worked in the property business for some 16 years on her own admission, and is clearly familiar with property transactions and their financial effect. … I have no doubt that Ms Sellers fully appreciated what the terms of the freezing orders were. … Ms Sellers was present before Barling J where he expressed concern about the ongoing breach of the information requirement and stated that nothing in the witness statement she had provided for that hearing complied with it. The freezing orders have been in place for a significant period and Ms Sellers has had a great deal of time to get over any initial shock and address the issues properly, if she wished to do so.
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> 47. In my view, Ms Sellers took the view that she should carry on with her life with as little impact from the orders as possible. She was prepared not to disclose assets and to find ways of meeting her expenses in breach of the orders. While she wanted her adviser to get a change to the orders, she was

> clearly aware that no change was made and she preferred to breach them rather than be prepared to engage with their terms and comply with the information provisions. Complying with those provisions would, among other things, have the unfortunate effect, from her perspective, of disclosing additional bank accounts and other assets. She was also prepared to take other steps to seek to frustrate the orders, in particular her attempts to give her brother an interest in the Cheam properties and to prevent any sale proceeds going to Devonshires."

16. The Judge found that even though some steps had been taken to move towards full disclosure, Mr Podstreshnyy might have been significantly prejudiced as a result of Ms Sellers' failure to disclose the existence of the bank accounts which she opened or continued to operate after the freezing orders came into effect.

17. Turning to mitigation, Mr Fidler appearing for Ms Sellers said that Ms Sellers had been poorly advised before he was instructed and that she was now prepared to cooperate in the sale of the Cheam properties so that those proceeds could be used to pay the debt owed to Mr Podstreshnyy. Falk J was not persuaded that Mr Podstreshnyy would in fact be repaid from the proceeds since the sale prices were not established, there were existing mortgages and Ms Sellers had material additional debts: [54]. The position was too unclear to be confident that any or any appreciable recovery would be possible from the sale proceeds of the Cheam properties.

18. The judge then referred to the mitigation arising from Ms Sellers' caring responsibilities for one of her two sons:

> "56. The most significant issue raised in mitigation was the position of Ms Sellers' 13 year old son, who lives with her. She also has a 15 year old son who lives with both boys' father, Ms Sellers' ex-husband. Mr Sellers had provided evidence that he was able to care for the younger son if Ms Sellers was in custody, and that he had a room available. Ms Sellers' evidence was that this would be very unsettling for her son. She referred to Mr Sellers' living some distance from her son's school, and concerns about his schooling, friendships and out of school activities being disrupted. She also said that on a previous occasion in 2016 he had tried to run away from his father.
>
> 57. Whilst these matters took up a lot of time at the hearing on 8 February, I was informed just before the start of the hearing this morning that arrangements have now been made which would enable a friend of Ms Sellers to move into the flat Ms Sellers lives in to stay with her son for up to three weeks, which would allow time for Ms Sellers' mother to fly into the UK to look after him. I will therefore not comment further on these matters, because I am assured on behalf of both parties that there are arrangements in place in relation to care of Ms Sellers' son. Nevertheless, there remains an issue in relation to

> any separation of mother and son, and I have taken careful account of that."

19. The judge then referred to the case of *R v Petherick* [2012] EWCA Crim 2214 which had not been drawn to her attention at the hearing on 8 February but only shortly before the 14 February 2019 hearing. She said she had taken account of the principles established in that case:

> "59. I do accept that immediate custody would have an inevitable unsettling effect on Ms Sellers' younger son, and I have taken careful account of that. However, the weight I am able to place on the significance of Ms Sellers' evidence about the impact on her son is affected by other aspects, including in particular the confirmation that arrangements have been put in place to look after her son, so that the disruption discussed at last week's hearing will not in fact occur. My understanding was that most of the concerns that Ms Sellers expressed on behalf of her son related to his location. However, as I said, I have no doubt that the separation of mother and son is still, even if the son does not have to move, a very serious matter and I have taken account of that."

20. Falk J then referred to some of the well-known authorities on sentencing for breach of freezing orders, particularly *JSC BTA Bank v Solodchenko* [2011] EWCA Civ 1241, [2012] 1 WLR 350 and *Templeton Insurance v Thomas* [2013] EWCA Civ 35, the latter dealing particularly with the suspension of a prison sentence. She described Ms Sellers' breaches as serious and deliberate and of long duration. Some of the actions taken were of a calculated nature with the specific intention of depriving Mr Podstreshnyy of the money to which he is entitled. However, there had been significant if belated disclosure, an admission and an apology. Ms Sellers had engaged with the court process by attending hearings and there was some evidence of the absence of effective legal advice: "Finally and importantly her personal circumstances in relation to her son are relevant": [65].

21. Falk J noted that Mr Fidler had not disputed that a custodial sentence was required. She concluded that the appropriate sentence taking account of mitigating factors was nine months for each of the breaches comprising failure to disclose assets and six months for the failure to disclose the source of living expenses, all sentences to run concurrently. She said that she was not going to make any specific comment about possible remission for future compliance because the factual position was too unclear.

22. The judge then dealt with whether the sentence should be suspended:

> "68. Turning to the question of suspension. Although Mr Fidler accepted that the threshold for a custodial sentence was passed, he submitted that there were mitigating factors justifying suspension. Relying on the full disclosure and the willingness to co-operate, he suggested that suspension could be on terms that regular ongoing disclosure was made, for example, monthly bank statements, until the debt was paid. I have very carefully considered this but have concluded that,

> despite the existence of mitigating factors, including the position of Ms Sellers' son, suspension cannot be justified. I do not think that the mitigating factors are sufficiently strong to depart from the very strong guidance from the Court of Appeal that an immediate custodial sentence is normally required for breaches of freezing orders (*Solodchenko* at [51])"

23. Falk J subsequently ordered that Ms Sellers pay Mr Podstreshnyy the costs of the previous hearings and she set out the amounts agreed between the parties in respect of each hearing. She ordered that the publicly funded costs of Ms Sellers be assessed by the Senior Courts Cost Office. The grounds of appeal lodged by Ms Sellers included a ground challenging the costs order but this was not ultimately pursued before us.

The appeal

24. The three aspects of the present case which Mr Fidler urged on behalf of Ms Sellers in this appeal as requiring a reduction in sentence were:

    i) The sentences were too long because insufficient credit had been given

        a) for the admission of the three contempt allegations that were considered at the hearing;

        b) for the fact that Ms Sellers was taking steps to sell the Cheam properties in order to pay the judgment debt so that the freezing orders would no longer be necessary; and

        c) to take account of Ms Sellers' caring responsibilities for her 13 year old son;

    ii) proper consideration of those factors, particularly the interests of Ms Sellers' son, should have resulted in the suspension of the sentences.

25. The penalties for contempt of court are set out in section 14 of the Contempt of Court Act 1981. This provides that a committal must be for a fixed term and that the term shall not on any occasion exceed two years in the case of committal by a superior court. If a committal is ordered to take effect immediately, the contemnor is entitled to automatic release without conditions after serving half of the term of the committal; there is no provision for release on licence from imprisonment for civil contempt. The scheme for Home Detention Curfew pursuant to section 246 of the Criminal Justice Act 2003 for offenders serving short sentences does not apply to committals for contempt. CPR 81.29(1) provides that the court making a committal order may order that its execution be suspended for such period or on such terms or conditions as the court may specify.

26. Section 13(3) of the Administration of Justice Act 1960 provides that the powers of this court on an appeal against the judge's decision on sentence include the power to vary the order of the court below and to make such other order as may be just. The authorities have emphasised that an appellate court will not normally interfere with the trial judge's assessment of the appropriate length of the sentence and should not do so unless satisfied that it was wrong in principle or manifestly excessive: see for

example *Hewlett Packard Enterprise Co and ors v Sage and another* [2017] EWCA Civ 973, [2017] 1 WLR 4599 at [54].

27. The relevant factors for the court to take into account when sentencing for breaches of a freezing order have been set out in many recent authorities of which Mr Fidler referred us to three: *Crystal Mews Limited v Metterick & Others* [2006] EWHC 3087 (Ch), *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Limited* [2015] EWHC 3748 (Comm) and *JSC Mezhdunarodniy Promyshlenniy Bank and ors v Pugachev* [2016] EWHC 258 (Ch.) In *Asia Islamic* at [7] Popplewell J derived the following principles from the case law he considered:

> "(1) In contempt cases the object of the penalty is to punish conduct in defiance of the court's order as well as serving a coercive function by holding out the threat of future punishment as a means of securing the protection which the injunction is primarily there to achieve.
>
> (2) In all cases it is necessary to consider (a) whether committal to prison is necessary; (b) what is the shortest time necessary for such imprisonment; (c) whether a sentence of imprisonment can be suspended; and (d) that the maximum sentence which can be imposed on any one occasion is two years.
>
> (3) A breach of a freezing order, and of the disclosure provisions which attach to a freezing order is an attack on the administration of justice which usually merits an immediate sentence of imprisonment of a not insubstantial amount.
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> (4) Where there is a continuing breach the court should consider imposing a long sentence, possibly even a maximum of two years, in order to encourage future cooperation by the contemnors.
>
> (5) In the case of a continuing breach, the court may see fit to indicate (a) what portion of the sentence should be served in any event as punishment for past breaches; and (b) what portion of a sentence the court might consider remitting in the event of prompt and full compliance thereafter. Any such indication would be persuasive but not binding upon a future court. If it does so, the court will keep in mind that the shorter the punitive element of the sentence, the greater the incentive for the contemnor to comply by disclosing the information required. On the other hand, there is also a public interest in requiring contemnors to serve a proper sentence for past non-compliance with court orders, even if those contemnors are in continuing breach. The punitive element of the sentence both punishes the contemnors and deters others from disregarding court orders.
>
> (6) The factors which may make the contempt more or less serious include those identified by Lawrence Collins J as he then was, at para.13 of the *Crystal Mews* case, namely:

> (a) whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy;
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> (b) the extent to which the contemnor has acted under pressure;
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> (c) whether the breach of the order was deliberate or unintentional;
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> (d) the degree of culpability;
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> (e) whether the contemnor has been placed in breach of the order by reason of the conduct of others;
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> (f) whether the contemnor appreciates the seriousness of the deliberate breach;
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> (g) whether the contemnor has co-operated;
>
> to which I would add:
>
> (h) whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward."

28. Following the hearing of this appeal, this Court handed down judgment in *Liverpool Victoria Insurance Company Ltd v Dr Asef Zafar* [2019] EWCA Civ 392 ('*Zafar*') giving important guidance on sentencing for contempt where an expert witness had provided an expert opinion on the severity of a claimant's injuries in personal injury proceedings when that opinion contained assertions which were false and had been made recklessly. The judgment was given by the Court comprising Sir Terence Etherton MR, Hamblen LJ and Holroyde LJ, a constitution bringing to bear great expertise across the range of civil, commercial and criminal proceedings. The parties to this appeal brought that judgment to our attention and provided short written submissions on it. Although we announced the result of the appeal without the benefit of that judgment, we have considered that new authority on the basis that if it had indicated that the sentence we had imposed was too severe, we would have invited further submissions from the parties as to its application in this instance.

29. As regards the significance of the admission of liability at the start of the hearing on 8 February 2019, Mr Fidler accepted that in *Crystal Mews*, Lawrence Collins J said that very little discount should be allowed for an admission made only shortly before the hearing. But Mr Fidler submitted that the Court should have regard to section 144 of the Criminal Justice Act 2003 which provides that in determining what sentence to pass upon an offender who has pleaded guilty, the court must take into account (a) the stage in the proceedings at which the offender indicated his intention to plead guilty, and (b) the circumstances in which this indication was given. He referred us also to the Sentencing Council's definitive guidelines on reductions in sentence for a guilty plea. The Guidelines note that an acceptance of guilt normally reduces the impact of the crime upon victims; saves victims and witnesses from having to testify; and is in the public interest in that it saves public time and money on investigations and trials. A guilty plea produces greater benefits the earlier the plea is indicated so that there

should be a clear distinction between the reduction available at different stages of the proceedings. The Guidelines also stress that factors such as cooperation with the investigation and demonstrations of remorse should be considered separately and prior to any guilty plea reduction as potential mitigating factors. The maximum level of reduction in sentence for a guilty plea is one third. This is available where a guilty plea is indicated at the first stage of proceedings. There is a sliding scale of reduction thereafter to a maximum of one tenth on the first day of the trial.

30. The Court in *Zafar* stated that the approach adopted by the criminal courts can provide a useful comparison even though not a precise analogy: [58]. The Court also said as regards admissions:

> "65 In determining what is the least period of committal which properly reflects the seriousness of a contempt of court, the court must of course give due weight to matters of mitigation. An early admission of the conduct constituting the contempt of court, before proceedings are commenced, will provide important mitigation, especially if it is volunteered before any allegation is made. So too will cooperation with any investigation into contempt of court committed by others involved in the same proceedings or in other fraudulent claims. Where the court is satisfied that the contemnor has shown genuine remorse for his or her conduct, that will provide mitigation. …
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> 68. Having reached a conclusion that a term of committal is inevitable, and having decided the appropriate length of that term, the court must consider what reduction should be made to reflect any admission of the contempt. In this regard, the timing of the admission is important: the earlier an admission is made in the proceedings, the greater the reduction which will be appropriate. Consistently with the approach taken in criminal cases pursuant to the Sentencing Council's definitive guideline, we think that a maximum reduction of one-third (from the term reached after consideration of all relevant aggravating and mitigating features, including any admissions made before the commencement of proceedings) will only be appropriate where conduct constituting the contempt of court has been admitted as soon as proceedings are commenced. Thereafter, any reduction should be on a sliding scale down to about 10% where an admission is made at trial."

31. The Court of Appeal in *Zafar* indicated in paragraph 68 that the sentencing judge should decide first the appropriate length of the term and then consider what reduction to make for an admission. Mr Fidler accepted at the hearing that it would not amount to an error of law if a judge failed to express the appropriate length prior to the reduction although he said it was best practice to do so. I agree that that is best practice. However, although Falk J did not spell out what reduction she was making to reflect Ms Sellers' admissions on the morning of the hearing, she did say that she had given credit for the admission: [65].

32. The judge would have been right to conclude that Ms Sellers was entitled only to a minimum reduction in sentence for her admissions. Mr Fidler submitted that Ms Sellers was entitled to full credit. This was on the basis that he had asked at the start of the committal hearing before Falk J on 8 February 2019 for the contempt grounds to be put formally to Ms Sellers, in the manner that the charges on the indictment are put to the defendant at the start of a criminal trial, so that she could 'plead' to them. That does not, however, mean that Ms Sellers should be credited with admitting the breaches at the first opportunity and I reject Mr Fidler's submission that Ms Sellers is entitled to full credit for her admission. Both Barling J in February 2018 and Morgan J in June 2018 had explained to Ms Sellers when she appeared before them in court that compliance with the court's orders was imperative. She can have been in no doubt about the risks she was taking by her failure to disclose her assets during the year between February 2018 and February 2019. She failed to give disclosure about most of her assets until Mr Podstreshnyy had found out about them by other means. Indeed, in her witness statement of 26 June 2018, she descended to a spurious level of detail about table lamps, handbags and other second hand items of minimal value, giving the appearance of providing an exhaustive list of her assets but in fact omitting bank accounts and rental income only disclosed months later. Given that Ms Sellers was entitled to only minimum credit and that the judge stated clearly that she had given credit for the late admission, there is no basis for concluding here that the judge failed to give Ms Sellers sufficient credit for the very late admission.

33. I do not accept Mr Fidler's criticism that the judge failed to distinguish between the reduction for the admission and the reduction for the apology.

34. Turning to Mr Fidler's submissions on the significance of Ms Sellers' caring responsibilities for her 13 year old son, the Court in *Zafar* also gave guidance on this subject both as to mitigation and as a factor pointing in favour of a suspension of any custodial sentence:

> "66. The court must also give due weight to the impact of committal on persons other than the contemnor. In particular, where the contemnor is the sole or principal carer of children or vulnerable adults, the court must ensure it is fully informed as to the consequences for those persons of the imprisonment of their carer. In a borderline case, such considerations may enable the court to avoid making an order for committal which would otherwise be made. In a case in which nothing less than an order for committal can be justified, the impact on others may provide a compelling reason to suspend its operation. …
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> 69. The court must, finally, consider whether the term of committal can properly be suspended. In this regard, both principle and the caselaw to which we were referred lead to the conclusion that in the case of an expert witness, the appropriate term will usually have to be served immediately, and that one or more powerful factors justifying suspension will have to be shown if the term is to be suspended. We do not think that the court is necessarily precluded from taking into account, at this stage of the process, factors which have already been considered when deciding the appropriate length of the term of

> committal. Usually, however, the court in deciding the length of the term will already have given full weight to the mitigation, with the result that there is no powerful factor making it appropriate to suspend the term. If the immediate imprisonment of the contemnor will have a serious adverse effect on others, for example where the contemnor is the sole or principal carer of children or of vulnerable adults, that may make it appropriate for the term to be suspended; but even then, as [*Liverpool Victoria Insurance v Bashir* [2012] EWHC 895 (Admin)] shows, an immediate term – greatly shortened to reflect the personal mitigation – may well be necessary."

35. Falk J records that much of the discussion before her at the hearing on 8 February 2019 focused on the logistics of arranging for someone to take care of the boy and that the impression given at the hearing on 14 February was that satisfactory arrangements had by then been put in place with Ms Sellers' mother coming to take care of him. On 22 February 2019 Peter Jackson LJ gave a direction by email that Ms Sellers provide up to date information about the circumstances of the child for the purposes of the appeal. Before us Mr Fidler submitted a letter from Mrs Sciur, Ms Sellers' mother, describing the sadness and anxiety that the boy is suffering as a result of his mother's absence. She says that this has led him to miss school on two occasions and that he feels particularly keenly that he will be separated from his mother over the half term break in February, on Mothers' Day and over the Easter break. She also records that Ms Sellers was moved from HMP Bronzefield in Ashford to HMP Peterborough at the end of February so that family visiting is much more difficult. The child has also written to the court saying how hard the separation has been for him; that he struggles to concentrate on his school studies and that this has had a greater effect on him than he expected.

36. It is clear from the decision of the Court of Appeal Criminal Division in *R v Petherick* that even where satisfactory arrangements have been put in place for the care of a young child for whom a defendant is the sole carer, the Court must recognise the effect of sentence on the relationship between the mother and child. It is those considerations that led to my conclusion that a greater reduction should be given in Ms Sellers' sentence to reflect the problems that her imprisonment is clearly causing and the distress arising from those problems for both herself and her son. I agree with Falk J that this factor is not sufficient to justify the suspension of the prison sentence but the sentence should be reduced from nine months to six months for the first and second findings of contempt.

37. Mr Fidler also provided us with an update of the proposed sale of the Cheam properties. He submitted that there is now a good prospect of monies being available to pay the judgment debt and so lift the freezing injunctions of which Ms Sellers was in breach. Since Ms Sellers has been in custody she has signed further documentation provided by Mr Podstreshnyy's solicitors (who are also acting for Mr Sellers) so that the properties can be sold and the proceeds held safely. Buyers have been found and the process of carrying out surveys and other checks is under way, but contracts have not been exchanged.

38. I consider those prospects to be much too uncertain for that properly to affect the sentence at present. If and when the judgment debt is paid, Ms Sellers can return to

the High Court seeking a reduction in sentence on the basis that she has purged her contempt. It would be premature to treat the contempt as purged now.

39. It is not appropriate for the sentence to be suspended either because of the disruption to Ms Sellers' relationship with her son or to encourage Ms Sellers to cooperate in the sale of the properties. As to the latter, several issues about the availability of any proceeds to satisfy this judgment debt are out of Ms Sellers' hands, for example, the possibility that other claimants whose rental monies Ms Sellers has also spent might come forward. Despite the existence of a charge placed over the properties to protect the judgment debt, there can be no assurance that the judgment debt will soon be paid. Mr Fidler referred us to the judgment of this court in *Templeton Insurance v Thomas* [2013] EWCA Civ 35. In that case Rix LJ, with whom Black and Lewison LJJ agreed, said that the jurisprudence on sanctions for breaches of freezing orders has emphasised the importance of the public interest in compliance with those orders. Such an attack on the administration of justice usually merits an immediate sentence of imprisonment: [42]. Despite the brazenness of the breaches in that case, there was strong personal mitigation in that one contemnor had dementia and suffered a stroke after the sentencing hearing and the other had full time caring responsibilities for his disabled wife. Such personal mitigation can result in a sentence being suspended. In my judgment, however, the personal mitigation that Mr Fidler was able to put forward on behalf of Ms Sellers justifies the reduction in sentence but should not result in the prison sentence being suspended.

40. To the extent identified in paragraph 36 above, namely that the nine month sentences of imprisonment in respect of the first and second findings of contempt are reduced to six months imprisonment, such terms to run concurrently, this appeal is allowed.

Lady Justice Davies:

41. I agree.

Lord Justice Henderson:

42. I also agree.