Neutral Citation Number: [2021] EWCA Civ 1610

Case No: A2/2021/1243

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
HHJ Jarman QC
[2018] EWHC 2811 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2021

Before :

LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE EDIS

- -

Between :

GRAHAM MICHAEL WILDIN	**Appellant**
- and -	
FOREST OF DEAN DISTRICT COUNCIL	**Respondent**

- -
- -

Charles Auld (instructed by **Pitman Blackstock White Solicitors**) for the **Appellant**
Stephen Whale (instructed by **Forest of Dean District Council Legal Services**) for the **Respondent**

Hearing dates : 28 September 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am on Thursday 4 November 2021.

Lady Justice Elisabeth Laing DBE:

Introduction

1. This is an appeal against a decision of HHJ Jarman QC sitting as a Judge of the High Court ('the Judge'). It concerns a 'large sports building' built in breach of planning control ('the building'). After a two-day hearing (on 24 and 25 June 2021) the Judge decided that the Appellant ('A') was in contempt of court and had disobeyed paragraphs 3-4 of an order for an injunction ('order 1'). A was represented at that June hearing by counsel (Mr Auld), but did not give evidence, a topic to which I will return. The Judge passed a sentence of six weeks' imprisonment suspended for 12 months, on condition that A did certain works within 18 weeks. A also appeals against that sentence. The Judge imposed no penalty in respect of a further contempt which he found proved.

2. There are two judgments in this case to which I will refer. The Judge handed down a judgment on 26 October 2018 ([2018] EWHC 2811 (QB)) after a hearing, on 20 September 2018, of the Council's application for an injunction pursuant to section 187B of the Town and Country Planning Act 1990 ('the 1990 Act') ('judgment 1'). There was a further hearing on 16 November 2018 at which the Judge decided the terms of the order to reflect judgment 1 ('order 1'). The Council was represented by counsel at both those hearings. A was in person. He gave evidence at the hearing on 20 September 2018. Order 1 was not sealed until 12 December 2018. The Judge also handed down a judgment in June 2021 ('judgment 2') on the Council's application to commit A for contempt of court. The Judge held that A was in contempt as respects some, but not all, of the provisions of order 1. The Judge also sentenced A for his contempt. Judgment 2 was reflected in an order dated 9 July 2021 ('order 2'). A's appeal is against order 2. Unless I say otherwise, paragraph references in this judgment are to the paragraphs of judgment 1 or judgment 2, as the context requires.

3. An appeal against a decision about contempt of court is as of right (see section 13 of the Administration of Justice Act 1960). There is no requirement that A be given leave to appeal either by the Judge or by this Court.

4. There are four grounds of appeal which challenge the findings of contempt.
    i. The Judge should not have found that A was in contempt of court because the Council had not alleged and proved that A was able to comply with order 1. The Council's pleaded 'Particulars of Contempt of Court' did not make any such allegation, whether about order 1 as a whole, or about any part of it, and the Council's evidence did not show that A could comply with it. The Judge should therefore have dismissed the application for committal.
    ii. The Judge was wrong to find that A could comply with paragraph 3 or with paragraph 4 of order 1. There was no evidence about what it would have cost to comply with paragraphs 3 and 4, or that it was possible so to comply without demolishing the whole of the building. The Judge should have held that the Council had failed to prove its case and should have refused the Council's application.
    iii. The Judge was wrong to hold that paragraphs 3 and 4 of order 1 were precise enough.

iv. The Judge was wrong to hold that paragraphs 3 and 4 of order 1 were independent of the rest of order 1. He held that the Council had not shown that A
    1. could make the contract referred to in paragraph 2 of order 1,
    2. could totally demolish the building as required by paragraph 1 of order 1 or
    3. could comply with paragraph 3 sub-paragraph 1 of order 1.

He should therefore have held that A could not be required to comply with paragraphs 3 and 4 of order 1.

5. There are two grounds of appeal against sentence.
    i. The Judge's reasons about sentence are not consistent with the reasoning in judgment 1. He should have given A 46 weeks, not 18 weeks, to do the work specified in the schedule to the 2021 order.
    ii. The Judge was wrong to extend the period of suspension of the committal order beyond the period for doing the work which was specified in the schedule to order 2.
6. On this appeal, A was represented by Mr Auld. The Council was represented by Mr Whale. Both appeared at the committal hearing. I thank them for the written and oral arguments.

The background

7. The background appears from the judgments. In 2013, A began building what Mr Auld described in his skeleton argument as a 'large sports building' in the gardens of 24 and 24A Meendhurst Road, Cinderford, Gloucestershire ('the land'). As I shall explain, the Council indicated in 2013 that this was not permitted development and would be unlikely to be given planning permission. In due course, the Council issued an enforcement notice, which was upheld on appeal, as amended.

8. A, undaunted, continued constructing the building. He accepted in an email he sent the Council in 2014 that he knew that he was taking a risk that the money spent on the building would be wasted and that he might have to demolish it if the Council's view turned out to be right (as, indeed, it did). Now complete, the building is a substantial building. It includes a sports hall, gym, squash court, a cinema, a two-lane ten-pin bowling alley, a casino, a bar and a soft-play area. There are also toilets and stores.

The enforcement notice

9. On 6 March 2014, the Council issued an enforcement notice (see paragraph 2 of judgment 1) ('the notice'). The notice alleged that, without planning permission, A had removed topsoil and soil from the land, had created a new 'landform' and had 'reprofil[ed]' the land so as to change its natural ground level. It also alleged that, without planning permission, he had built walls and installed drainage in connection with the proposed erection of a building on the excavated area of land. The notice gave reasons for its issue (see paragraph 3 of judgment 1). The notice required A to remove all structures from the land and all walls and materials put on the land in connection with the breach, and reinstate the land to its original levels within three months. The notice was served before the building was finished. A did not comply with the notice. Instead, his contractors carried on building the building and fitting it out. A made two points. First, he claimed that he was contractually committed to that

course. Second, he claimed that the building was permitted development within the terms of Class E in Part 1 of Schedule 2 to the Town and Country Planning General Permitted Development Order ('the GPDO'), because it was only one storey high.

A's appeal to the inspector

10. A appealed against the notice, primarily on that second point. The Secretary of State appointed an inspector to decide the appeal. The inspector decided that 'a significant proportion of the building [was] two storeys' and that it did not therefore fall within the provisions of the GPDO. The Council also relied on other arguments but the inspector did not decide those arguments. The inspector also treated the appeal as a deemed application for planning permission. The inspector refused planning permission for the building. His two areas of concern were its effect on the character and appearance of the surrounding area and the effect on the living conditions of A's neighbours, with particular reference to outlook, amenity space, shading and daylight. The inspector considered that, far from being 'innovative' the design of the building is 'bland' and 'very poor'. It is 'a very large, bulky structure that is totally out of scale and proportion with the surrounding development'. It filled in a significant part of the area of land between four different plots of land. The development conflicted with policies in the development plan. It caused unacceptable harm to the outlook of two sets of occupiers. He upheld the notice with some amendments. The substructure and the rear wall should remain, up to a certain height, to act as a retaining wall for the earth behind. He extended the time for compliance to two years.

A's application for permission to appeal

11. A applied to the High Court for permission to appeal against the inspector's decision. In July 2015, Hickinbottom J (as he then was) dismissed that application. A took no steps to comply with the notice, however. As the Judge recorded in judgment 1, A's main reason for not complying with the notice was that he claimed that he could not afford to do so.

The Council's application for an injunction

12. The Council then applied for an injunction because A had not complied with the notice. Far from it: he had carried on with the building and with fitting it out. As I have indicated, the Council's application was made under section 187B of the 1990 Act. Section 187B(1) gives a local planning authority power to apply to the court for an injunction, whether or not it has exercised any of its other relevant powers, if 'they consider it necessary or expedient for any actual …breach of planning control to be restrained by injunction'. On such an application, the court may 'grant such injunction as the court thinks appropriate for the purpose of restraining the breach' (section 187B(2)).

13. The Council's application relied, among other things, on a report produced by a firm of consulting civil and structural engineers, O'Brien & Price ('the Report'). It was a report of a structural inspection dated March 2018. It seems to have been produced at the Council's request (made in a letter of '12th January 2017 2018' - presumably 2018). Paragraph 2.4 of the Report is headed 'Recommended Method Statement – Subject to Verification by Detailed Design and Input from Selected Contractors' ('the Method Statement'). It says:

> *'1. Temporarily remove the upper half of the boundary wall between 24 Meendhurst Road and Altea.*
>
> *2. Temporarily remove and store for re-use the decking.*
>
> *3. Temporarily remove the garden room and store for re-use.*
>
> *4. Form temporary stone roadway up garden of Altea.*
>
> *5. Remove low retaining walls adjoining the building's south side to facilitate access.*
>
> *6. Soft strip the interior of the building and de-commission services…*
>
> *14. Reinstate features temporarily removed in items 1-3 and 5 as above'.*

14. The Report estimated that, depending on various factors, the work would take between 18 and 24 weeks. It noted that the Council had obtained an estimate for the cost of the demolition (£68,700) from Haywood Crushing Demolition. This did not appear to cover reinstatement or the work necessary to gain access to the site. The Report considered that the total cost would be between £120-150,000 plus VAT. The author of the Report had consulted Smiths (Gloucester) Limited who had 'verbally advised', on the basis of the plans and photographs, that demolition as described in the Method Statement would be possible.

Judgment 1

15. After the hearing, the Judge handed down judgment 1 and granted an injunction (that is, order 1). The Judge explained in judgment 1 that it was not appropriate for him to re-visit the issue on which the inspector had decided the appeal (ie, whether or not the building had one storey or two). But, he pointed out (paragraph 25), he had agreed to go on a site visit before the hearing. He concluded, having seen the building, that the inspector was entitled to decide that the building had more than one storey.

16. In paragraph 26, the Judge listed the factors which 'point[ed] very strongly…to the grant of an injunction'. A had known, within a month or two of starting the development, that the Council considered that the development was not permitted by the GPDO and that it was unlikely that planning permission for it would be given. On 10 December 2013, a senior planning officer, Mr Colegate, responded to a pre-application enquiry by A. Mr Colegate made the Council's position clear. The Judge referred to the email A sent to the Council in 2014, which I have described in paragraph 8, above. A had taken no steps to comply with the notice. It was clear to the Judge that he would not do so unless and until the court ordered him to.

17. The Judge balanced against those factors the factors relied on by A. A's case was that he did not have the money to comply. The Judge considered the evidence about that, such as it was.

18. A is a chartered accountant and 'sole owner' of an accountancy practice. He had been involved in property development but had no expertise in property valuation. He was sole owner of 24A Meendhurst Road, a large dormer bungalow. He lives there with his partner. He owned 80% of the large dormer bungalow next door, 24 Meendhurst Road. The rest was owned by a company of which his adult children were the directors and shareholders. (That is a reference to Expresser Limited, a company originally incorporated by A: see paragraph 5 of the affidavit of Ms Blundell, dated 12 October 2020). 24 was not occupied, but it had been let out. 'No figures or documents were given in evidence as to this income'. He owned two terraced houses which backed onto the land. Those were the subject of holiday lets. All of those were said to be the subject of mortgages. A and his grandchildren were also shareholders in two luxury holiday companies. His case was that they had never traded.

19. A relied on 'his own valuations' of his business, his car collection and his properties to show that his net equity was just under £193,000 at the end of August 2018. The Judge noted that A had no professional valuations. The Judge did not make any findings about the amounts outstanding on the mortgages, the open market value of the houses, or, it follows, about the value of the equity in any of them. A also had a three-bedroomed apartment in Tenerife, which he used as a holiday home and which was not the subject of mortgage, and a classic car collection which he kept in a garage at 24A Meendhurst Road. The Judge made no findings about the value of either of those. A attributed no value to his business 'due to large redundancies/close down costs'. He claimed that if an injunction were granted, he would have to close down his business with a loss of about 40 jobs. The Judge was not able to make any positive detailed findings on this aspect of the case, because A, who knew all the relevant facts, had not disclosed them fully.

20. The Judge noted that A had accepted in cross-examination that in 2003 he had sold the accountancy business for £1.6m to a company of which his children were the shareholders. He had received some preference shares. The business continued. There were no redundancies. That company went into liquidation in 2009. A claimed to have drawn £600,000 from the company to fund the development. He then bought the goodwill of the business from the liquidator for £1. Its website showed that the business has many clients in the United Kingdom and Ireland. It is said to be the 'most successful accountancy practice in Gloucestershire with a growth rate which is unsurpassed'. A relied on the unaudited internal accounts for the business for the year ended 31 March 2017. Those showed an income of £1,368, 336 and a net profit of £166,472. Net assets were shown as £391,473. No statements were filed for the most recent year.

21. In paragraph 33 of judgment 1, the Judge rejected A's valuations. They did not show the true worth of those assets. The nil value of the business was implausible in the light of the evidence. The Judge did not accept that granting an injunction would lead to the closure of the business. It was likely that the true worth of A's net assets was 'substantially more than' A's figure, and was likely to be enough to fund the works described in the notice, their likely cost notwithstanding.

22. The Judge then considered A's argument against the injunction. If it were granted, he claimed that he and his partner would lose their home, 24A Meendhurst Road. He relied on a letter dated 28 July 2018 from a mortgage lender, which said that the term

of the mortgage expired in 2017 and that just under £263,000 was due. The letter referred to A's proposals for settling the debt, and evinced a willingness to postpone further action until 30 September 2018. Despite the terms of that letter, A maintained in cross-examination that he had not made proposals to settle the debt, but had simply told the mortgagor about the application for the injunction. The Judge said that that version of events was inconsistent with the 'clear' terms of the letter and 'unlikely to be true'. It was more likely that A had made proposals. Those proposals might be compromised if A was ordered to pay for the works set out in the notice, but it was difficult to envisage the mortgagee taking possession when an injunction was in force (paragraph 35). The Judge could not discount the risk of repossession, but A and his partner had other properties in the area where they could live. The works might affect the health of A's partner. That was relevant, but any impact could be mitigated by her moving to another property while the work was being done. The Judge referred to A's contentions about the instability of the site in paragraphs 39-42. He was not persuaded that there was 'such instability as to justify the refusal to grant the injunction'.

23. Balancing those factors, the Judge decided that the balance favoured the grant of the injunction 'requiring the works set out in the notice to be carried out'. The adverse impact on A and his partner was not such as to outweigh the public interest in the compliance with planning control 'to remove a building which has very serious impacts upon the character and appearance of the surrounding area and the effect on the living conditions of neighbouring occupiers' (paragraph 43). The Judge rejected the Council's submission that A should be given 12 months to comply with the injunction. He gave him 18 months, instead. The Judge said that he would deal with consequential matters by written submissions or at a further hearing if that was preferred.

Order 1

24. Order 1 warned A that if he disobeyed it, he could be found guilty of contempt of court and might be sent to prison or fined, or have his assets seized. Order 1 advised A to read it carefully and to consult a solicitor. Paragraph 1 required A, by no later than 25 April 2020, (i) permanently to comply with the requirements of the notice, as varied by the inspector's decision, listed in Schedule C to order 1, and permanently to remove the rest of the building built on the land after 6 March 2014, consistently with paragraph (i). Paragraph 2 required A, not later than 12 weeks from the date of order 1, to provide the Council with a signed copy of a contract for the works described in paragraphs (i) and (ii). Paragraph 3 required A, no later than 16 weeks after the date of order 1, to complete items 1-5 of the Method Statement. Paragraph 4 required A, not later than 18 weeks after the date of order 1, to complete the soft stripping of the inside of the building and the decommissioning of its services. Paragraph 5 required A, no later than 32 weeks from the date of order 1, to complete items 7-9 of the Method Statement.

A's appeal against order 1

25. On 6 December 2018, A, acting in person, filed a notice of appeal against order 1. A raised several arguments in his grounds of appeal. The Council point out that he did not, in his grounds of appeal, suggest that order 1 was imprecise, that he did not understand it, or that he did not know that he had to obey it.

26. He argued that order 1 should only have been made if he could have, and ought to have, complied with it. He argued that there was clear evidence that he could not comply with it. He said that it was the end of the term of his mortgage, the mortgagee was demanding repayment, and was about to foreclose. If the property were sold the necessary access to demolish the building would no longer be available. Completion was now imminent. He had lost his home, Altea (that is, 24A Meendhurst Road).

27. He had produced honest details of his assets and liabilities which showed he did not have £720,000 (the amount which, he asserted in his grounds of appeal, it would cost to have the work done; see paragraph 2.b. of his grounds of appeal, page R15, top line). His net assets were only £193,000. He valued his home at £500,000 but it had only realised £275,000. He now had no net assets. The two main houses in which he had an interest were virtually unsellable. He had 'some equity' in two other properties, but 'not that material'. If it were closed, the assets of his accountancy practice would be nil. His son made a witness statement in which he said that he and his siblings (the owners of 24 Meendhurst Road), and the mortgage lenders, would not consent to taking down the party wall between that house and Altea, or to the trespass on the land which would be entailed by the demolition work. He attached a report from a surveyor which said that there was no right of access over 24 Meendhurst Road for that purpose. A had been a litigant in person and the Judge should have helped with this point of law.

28. A's partner urgently needed a heart transplant. She had a fall recently and had spent time in hospital with a cracked skull. The Judge knew that the injunction could cause terminal stress to her. The Judge had been on a site visit and knew that even though people inside the building were playing squash and ten-pin bowling, and a musical was playing in the cinema room, yet 'no noise could be heard outside the video link. The Judge must have decided that the fact some neighbours could see the roof of the 'sports and leisure complex' from their second-floor windows 'outweighed the value of Amanda's life''.

29. The Judge had required him to make a fraudulent contract for the demolition works, knowing that he could not pay for them.

30. A complained about an apparently anonymous letter which the Judge had allowed into evidence. The Judge should have ignored that letter as it was either written by, or instigated by, the Council.

31. A claimed that Mr Steve Colegate, one of the Council's officers, had admitted in cross-examination that if A had asked him when the building was finished but before the mezzanine areas had been put in, he would have told A that the Council would have accepted that the building was a one-storey building. He also accepted, A claimed, that A could have put in the two mezzanine areas without planning consent. Mr Colegate was negligent, A said.

32. It would be necessary, A continued, to put 9,500 tonnes of crushed rock on the site to enable the work to be done. The rock would reach a height of 18 feet. The work might cause substantial damage to two properties. The work ordered by the Judge was illegal. The Judge relied on the Report. Its authors were incompetent, A said. A gave examples.

33. The costs award was excessive. The Council gave the court 'untrue information', A claimed.

34. On 5 November 2019 Irwin LJ refused permission to appeal on the papers. He said that A was 'entirely the author of his own misfortune'.

Evidence of A's activities

35. The Council's evidence on the committal showed that at the time of 2018 hearing, 24 Meendhurst Road was owned by A and Expresser Limited (A owned 80% of 24 Meendhurst Road). HM Land Registry ('HMLR') records show that on 14 November 2018, about two and a half weeks after judgment 1, A transferred his legal interest in 24 Meendhurst Road to his children, so that it is now owned by them and by Expresser Limited. In November 2018, an alert from HMLR notified the Council's solicitor that A's children were proposing to buy the site of the building from A and that activity was afoot in relation to 24A Meendhurst Road. A sold two other properties, he sold his collection of classic cars to Expresser Limited, he asked for a further hearing, threatened to complain about the Judge, made a complaint to the Solicitors' Regulation Authority ('the SRA') about the Council's solicitor, threatened to report the Council's Monitoring Officer to the SRA, he alleged to the SRA and others that the Council's solicitor had acted fraudulently, and he sent a letter to many households and businesses in the Council's area, alleging that the Council had made false or fraudulent claims for costs. The evidence also showed that A had made very recent and very limited progress in soft stripping the building (see paragraph 45, below).

The Council's written application for committal

36. On 18 January 2021 the Council applied to commit A for contempt of court, using form N600. Page 3 of the application notified A of his rights. A was told that he was entitled to time to prepare, to legal representation, and to legal aid (to which no means test would be applied). He was told that he was entitled, but not obliged, to give written and oral evidence in his defence and that he had the right to stay silent, as he could not be compelled to answer any questions which might incriminate him. Section 12 of form N600 is headed, 'Summary of facts alleged to constitute the contempt (set these out very briefly, in chronological order, in numbered points)'. The Council referred to the attached particulars of contempt. Those particulars described the facts briefly. The relevant parts of order 1 were set out in 5 numbered sub-paragraphs. Paragraph 3.6 asserted that A was in breach of and had disobeyed paragraphs 1-5 of order 1. Paragraph 3.7 then explained, in five numbered sub-paragraphs what those breaches were. As described, they were failures to comply with the relevant provisions of order 1 by the times stipulated in those provisions. The application also sought the committal of A's children and of Expresser Limited. The Judge dismissed that part of the application and I say no more about it.

The committal proceedings

37. A applied for the matter to be heard by a High Court judge, but this application was refused by the Judge. A lodged an affidavit before the hearing, but he did not give oral evidence at the hearing. This Court considered that there might be an issue about the

admissibility of that affidavit. After the oral argument, the Court asked the parties for written submissions on this question, which they provided. Both counsel agree what happened. After the Council's witnesses were cross-examined, Mr Auld asked for Judge to rise so that he could take instructions from his client. He then told the Judge that A would not be giving evidence. The Council did not object to the admissibility of A's affidavit, and did not apply to cross-examine A. Mr Auld says that the Judge did not tell A that he need not give evidence but that if he failed to, the court could draw adverse inferences from that failure. Both sides referred to the affidavit and made submissions about it.

38. A accepted in his affidavit that he had not complied with order 1. He did not claim that the terms of order 1 were imprecise or that he could not understand them. Instead, he argued that he could not fully comply with order 1 for three main reasons (the boundary wall was an obstacle, he could not find contractors to demolish the building and he could not raise £750,000, the sum which, in paragraph 2 a) (bis) of his affidavit, he said that demolition would cost). The only reason he gave for not being able to comply with paragraphs 3 and 4 of order 1 was the boundary wall. He exhibited photographs to show his 'soft stripping' of the building. He did not say that he could not understand what was meant by 'soft stripping' or that he could do no more. He made selective disclosure in the documents exhibited to his affidavit. They included unaudited internal accounts from his accountancy firm. They appeared to show that the firm had had made net profits of nearly £200,000, that he had drawn more than £200,000 from the firm and that there was over £85,000 in the bank. He exhibited two pages of building society statements, covering, respectively, two, and five, days. It is not clear from those documents whose bank account they relate to. During part of the period covered by one of the statements, the account appeared to have a balance of £146,000.

Judgment 2

39. The written evidence before the Judge consisted, as he recorded, of two affidavits from Mr Colegate and one from Ms Blundell, the Council's principal solicitor. The Judge summarised the background. He noted that the Council's two witnesses had been cross-examined on their affidavits but that A had not been called to give evidence. He recorded that A had 'candidly' accepted in his affidavit that he had not complied with order 1. The Judge then summarised A's reasons for disobeying order 1. He noted that A had exhibited photographs showing 'the internal soft stripping' which A had been able to do.

40. The Judge recorded (paragraph 10) that Mr Auld had objected that the notice and the Report should not be admitted as evidence because they had not been served with the committal applications. The Judge said the proceedings were in the nature of criminal proceedings and that it was for the Council to show contempt beyond reasonable doubt. The procedural requirements of CPR 81 must be complied with. The Judge noted that A had not suggested in his affidavit that he had had any difficulty understanding order 1. Mr Auld accepted that the documents were incorporated in the order 1. The Judge was 'sure that [A] is aware of the references to them made in [order 1]'. In those circumstances, it was 'just and appropriate' to have regard to them. If necessary, the Judge was prepared, under CPR 81.5, to dispense with their re-service on A (paragraph 11).

41. The Judge considered, in paragraph 12, Mr Auld's submission that the Council had to show, beyond reasonable doubt, what the order means, whether the defendant has complied with it, and whether the defendant can comply with it. Mr Auld relied on two judgments in family cases: *Re L-W* [2010] EWCA (Civ) 1253, paragraph 33, and paragraph 17 of *S-C v S-C (Children)* [2010] EWCA (Civ). The Judge recorded that Mr Whale accepted all those propositions.

42. The Judge recalled that A had argued in the 2018 hearing that he did not have the means to pay for the demolition, despite being a partner in a successful accountancy firm, owning several properties in the United Kingdom, a flat in Tenerife and a classic car collection. There were no professional valuations of any of those. A had said that the accountancy business was worth nothing and that it would close if an injunction were granted. The Judge had decided then that A's assets were likely to be able to fund the demolition (paragraph 13). The Judge referred to the evidence in June 2021. He said that it did not 'prove beyond reasonable doubt that [A] had the means to demolish the building'. The Judge therefore held that the application failed as respects particulars 4 and 5. He added that there were other particulars (paragraph 14).

43. He then recorded Mr Auld's protest that that was not the case which A had come to meet. Mr Auld referred to *Inplayer Limited v Thorogood* [2014] EWCA (Civ) 1511. In that case there was a breach of article 6 of the European Convention on Human Rights because the defendant 'was not told of the allegations against him until after being found guilty'.

44. The Judge quoted paragraph 39 of the judgment of Peter Jackson LJ in which he said that a judge should confine herself to the contempts which are alleged in the application notice. If she considers that other allegations should be dealt with, she should invite an application to amend the application notice and adjourn the committal hearing so that the defendant can prepare to meet the new allegations. The Judge distinguished that reasoning on the grounds that the three other particulars were set out in the particulars which were served with the application. The Judge considered that it was appropriate for him to consider those particulars. He then did so. He dismissed particular 1 (paragraph 16).

45. He rejected Mr Auld's submission that the requirements to soft-strip the building and to de-commission its services were not precise enough. They were 'adequately clear'. He pointed out that A had used the term 'soft stripping' in his affidavit (paragraph 17). The Judge referred to the Council's evidence about a site visit on 14 June 2021, just before the hearing. Nearly all the interior doors had been removed. Cupboards had been emptied. Some mirrors and pictures had been removed, as had handrails in the gym, but other fittings (which the Judge listed) remained. The lights were working and there was water in the WC. The Judge was sure that this was a breach of the order as particularised in particular 3 (paragraph 18). The Judge could not be sure that A could remove the upper half of the boundary wall on the evidence before him. But he was sure that A could take the temporary steps listed in paragraphs 2-5 (paragraph 19).

46. The Judge summarised, in paragraph 20, material in A's affidavit. He was sure that that material showed that A had the means to pay for the soft stripping of the building and for the decommissioning of its services.

47. In paragraph 22, he dismissed the application to commit the other respondents, on the grounds that the particulars alleged against them were not precise enough.

Sentence

48. The Judge said, in paragraph 23, that counsel had agreed that he should defer sentence for 18 weeks 'to see if the works of soft stripping and decommissioning the services of the building will be completed as it appears the parties will agree'. The Judge accepted that the predominant purpose of the sentence was to achieve compliance with order 1, 'so as to ensure that this building, erected in breach of planning control, is not used for the purpose for which it was intended to be used'. He was not confident that an adjournment would secure compliance. The Judge observed that order 1 had been made nearly four years previously, and that, until October of the year before, A had not complied with it all. He had made various complaints and threats of further legal action. It was not until the committal application was filed that he had made any attempts to start soft stripping the building (paragraph 24). The Judge said he was 'quite sure' that it was the approaching committal hearing 'and nothing else' which had prompted A to do some very limited soft stripping. He was not satisfied that simply adjourning sentence, and giving further time after 'a very long delay will have the necessary effect on [A] to make it clear to him that court orders must be obeyed and so I will not adjourn sentence' (paragraph 25).

49. In his sentencing remarks the Judge described some of the purposes of the sentence: the punishment of A, deterrence of others, and securing from A future respect for court orders. He described his powers and reminded himself that a suspended sentence was nevertheless a sentence of committal to prison, and a measure of last resort. The Judge considered A's culpability and the harm caused by his conduct. The Judge described the long history of non-compliance. A had only taken very limited steps to comply, a couple of weeks before the committal hearing. That showed that A had not understood order 1 to impose only one global requirement. The harm was clear from the inspector's report. There was a public interest in ensuring that planning controls are observed. A clear message needed to be sent to A and to those who built, or were tempted to build, in breach of planning control, that if they did so, 'they might lose the fruits of that breach and be prevented from using them'. The Judge had no confidence that A would comply unless compelled to. The Judge took into account various mitigating factors, but concluded that the custody threshold was passed. He felt able to keep the sentence relatively short because the breaches he had found were 'relatively modest compared to the fact that the building remains standing'. He suspended the sentence for 12 months, on condition that, within 18 weeks, A completed the soft stripping and de-commissioned the services in the building. He said that 'because of the points taken at the hearing' it was desirable 'that there should be a very particular list of what he has to do in the next 18 weeks…'

Order 2

50. Order 2 declared that A was in contempt of court in two respects: by disobeying paragraph 3 of order 1 in that he did not complete items 2-5 of the Method Statement

by the time stipulated and by disobeying paragraph 4 of order 1 by not completing the soft stripping of the interior of the building or the decommissioning of its services. Order 2 declared that second to fifth defendants were not in contempt of court. Order 2 then recorded the Judge's sentence, which was suspended on the condition that A complied with the terms of the Schedule to order 2. That sentence was passed in respect of the second contempt found by the Judge only. There was no penalty in respect of the first contempt of court. The remaining allegations of contempt were dismissed. A was ordered to pay 50% of the Council's costs. The schedule to order 2 required A permanently to decommission all the services in the building within 18 weeks of 25 June 2021, and permanently to soft-strip the building within the same period. Four steps were specified for the first process, and 28 for the second.

A's submissions

51. Mr Auld made a preliminary point. Committal is an exceptional remedy. The courts therefore apply the rules strictly. He referred us to *Hewlett Packard Enterprise Code of Conduct v Sage Practice Note* [2017] EWCA (Civ) 973; [2017] 1 WLR 4599 as an example of that approach. That was a case in which this Court allowed an appeal when a judge had made findings of contempt against a defendant which were not pleaded against him, and then allowed an amendment of the contempt application to plead those extra grounds.

52. He then submitted that there was a considerable overlap between the first four grounds of appeal and that it was convenient to consider them in pairs.

53. He referred us, in connection with grounds 1 and 2, to two paragraphs (33 and 34) in *Re L-W* [2010] EWCA (Civ) 1253; [2011] EWCA (Civ) 1095, a case about an 'intractable' contact dispute. Mr Auld submitted, first, that it was necessary for the Council to allege in its application, and to prove, to the criminal standard, that A was able to comply with order 1. The committal application made no such allegation and the Council's evidence did not show that A could comply with order 1. He submitted that, where an order is made restraining a defendant from doing something, it is sufficient to plead that the claimant did it, but, in the case of mandatory order, a claimant must plead, and prove, to the criminal standard, that the defendant was able to do the act which he has failed to do.

54. The Judge was wrong to hold that A knew the case he had to meet. The case A had to meet was that he had breached all the requirements of order 1 which were referred to in the committal application. He did not know that the court was going to hold that he was able to do some, but not all, of the work. On its true construction, order 1 required all the work to be done, and could not be construed as imposing severable obligations on A. A did not know that his affidavit was required to show that he could not afford to do part of the work. A had been found in contempt without knowing in advance what case he had to meet. There was no evidence that the separate pieces of work could be done separately from one another.

55. The Judge relied on A's affidavit to show that A had enough money to do the works of soft stripping and decommissioning. He was wrong to do so in the absence of evidence of the exact amount which those works would cost. The Judge was not

entitled to rely on what he saw on a site view, over two years after order 1, as a basis for a finding that A could afford what needed to be done.

56. Mr Auld then submitted, in relation to grounds 3 and 4, that A had to know with complete precision what it was that he had to do. He referred us to paragraph 288 of *Harris v Harris* [2001] FLR 895 (see further, paragraphs 85-87, below). Only the headnote and paragraphs 286-300 of that decision were in the bundle of authorities.

57. The Court asked Mr Auld whether he had submitted to the Judge that the fact that the paragraphs of the Report were referred to in, but not transposed into, order 1 meant that A could not be guilty of contempt of court, because he did not know what he was required to do. Mr Auld accepted that he did not rely on that submission. He had, instead, submitted that the Judge could not receive the Report in evidence at the committal hearing as it had not been annexed to order 1 and A had not been served with the Report when order 1 was served. The view that the Judge had taken, Mr Auld said, was that the Report was incorporated by reference and that that was enough (see paragraphs 10 and 11 of judgment 2). He had not referred the Judge to *Harris v Harris*.

58. Mr Auld developed his submission that the individual paragraphs of order 1 were not severable. Paragraphs 3 and 5 were steps which were inseparable from the demolition of the 'sports hall' (ie, the building). Once it was accepted that A could not demolish it, the other steps 'fell away'. Order 1 did not address what A should do if he was not able to comply with parts of it. The premise of the finding of contempt was that a term had been implied in order 1 that if A could not demolish the building, he should do as many of the steps in order 1 as he could. The specific express provisions now made in the committal order should have been in order 1. The Report was expressly a preliminary document with express caveats. There was no definition of the upper half of the boundary wall. 'Soft stripping' was a jargon word from the demolition trade, with no certain meaning. A used that term in his affidavit, but with a different meaning from its meaning in the Report. Decommissioning was also imprecise, as it was not clear whether that was temporary or permanent.

59. Mr Auld sought to counter a point in the Council's skeleton argument (that A had not sought to appeal order 1 on the grounds that it was unclear and he did not know what it required him to do) by submitting that A had not known the terms of order 1 when he made his application for permission to appeal to the Court of Appeal against order 1 on 6 December 2018. Order 1 was not sealed until 12 December 2018, he submitted. It is convenient here to note Mr Whale's response. The order was not sealed until 12 December 2018, but its terms were settled at a hearing on 16 November 2018, which A attended.

60. Mr Auld concluded his submissions on the finding of contempt in four points.
    i. Order 1 incorporated the Report by reference. The Report was not served with or attached to, order 1.
    ii. The application for committal did not plead, or show, that A was able to do all, or part of, the work.
    iii. Order 1 was ambiguous and did not tell A what he should do if he could only do part of the work.

iv. It was not necessary for A to show prejudice; but he had been committed for contempt of court when there was no basis for that finding in the documents and he had been confronted with a case which he was not prepared to meet.

61. Mr Auld did not challenge the length of the suspended period of imprisonment. He contended that there was no evidence that the works could be done in 18 weeks, or about how the works should be done. The Judge should have allowed the same period as was provided for in order 1 to enable A to find a contractor and should then have allowed a further period, in addition, for the work to be done. Some of the work was simple and routine, but some, such as moving the large radiators, would require plant and equipment (see section 11 of the Appellant's Notice which is verified at C8). He also submitted that it was wrong in principle to suspend the sentence for a period which was longer than the period stipulated for completing the works.

The Council's submissions

62. Mr Whale made three relevant preliminary points in his skeleton argument. His fourth preliminary point is no longer in issue.
    i. The appeal, in part, is an impermissible attack on order 1.
    ii. A's grounds of appeal against order 1 contradict the case he now advances.
    iii. The affidavit which A made for the committal hearing also contradicts his current case. He did not complain then that the order 1 was imprecise or deficient. He candidly accepted that he had not complied with order 1 and gave various reasons (some of which the Judge accepted) why he could not comply with some of its requirements. Those are not now in issue.

63. The Council submits, in relation to ground 1, that there was evidence before the Judge (from A) that A had 'very considerable financial resources'. The Judge was entitled to take that into account in finding that A had the resources to do the four temporary steps (2-5) described in the Report and the soft stripping of the building. The four steps were temporarily removing and storing the decking, and the garden room, making a temporary stone roadway up the garden of Altea, and removing the low retaining walls next to south side of the building in order to give access to the site. The Judge had seen the decking, the garden room, the garden and low retaining walls. He had also seen photographs. A did not say in his affidavit that he could not do those four steps. The Judge accepted A's argument about the boundary wall.

64. For similar reasons the Judge was also entitled to decide that A could do the soft stripping of the building and decommission its services. A explained in his affidavit that he had done some soft stripping before the committal hearing. He did not say in his affidavit that he could do no more. The Council produced some evidence of the partial soft stripping, as the Judge recorded in judgment 2.

65. The Council disputes that the applicant must plead that the respondent to the committal application can comply with the relevant order. That is not the effect of CPR 81.4 or of the authorities A relies on. A did not suggest in his affidavit that he did not understand order 1. His only defence was that he could not comply with parts

of it. The application notice and particulars were sufficient. A 'could have been in no doubt as to the case which he had to meet' (*Ocado Group v McKeeve* [2021] EWCA (Civ) 145 at paragraph 89). The Judge rejected a submission to the contrary which A made about the particulars (judgment 2, paragraphs 15-16). In paragraph 88 of *Ocado*, this Court indicated that 'unwanted elaboration' was to be avoided.

66. The Council make several points about ground 2. They include that the section 187B procedure was appropriate, and the submission to the contrary is irrelevant; the Judge was entitled to take into account all the evidence in deciding that A could comply with paragraphs 3 and 4 and that conclusion did not depend on evidence of the cost of complying with each component of the order; A did not say in his affidavit that he could not afford to comply with paragraphs 3 and 4, and the imminence of the committal hearing prompted him to do some soft stripping; the Judge plainly did not apply the civil standard; and the Judge did set out each relevant ground of committal before considering, to the criminal standard, whether it was made out.

67. The Council understands ground 3 to be a complaint that the steps in order 1 had to be done in the sequence in which they are ordered in the text of order 1. This meant that the Judge's findings about paragraphs 1 and 2 and sub-paragraph 1 of paragraph 3 of order 1 prevented a finding of contempt of court. The Council contends that this ground is misconceived as the deadline for complying with paragraph 1 of order 1 (25 April 2020) is later than the date for complying with paragraphs 2-5. The works in paragraph 3 are plainly not essential precursors to the work described in paragraph 4. A, after all, did some soft stripping without complying with paragraph 3 in any way. This point was not relied on before the Judge. It is not supported by anything in A's affidavit.

68. The Council argues, in response to ground 4, that the terms of order 1 were quite clear. A did not suggest in his grounds of appeal to the Court of Appeal that the terms of order 1 were not clear, or that he did not understand it. This is an impermissible attack on order 1. Nor did he make any such suggestion in his affidavit. The Judge held at paragraph 11 that A did understand order 1. The Judge was entitled to find that the requirements about soft stripping and decommissioning were clear enough. The fact that A did some soft stripping undermines A's argument. The Judge's findings (to the criminal standard) that A knew about the Report and the notice are not challenged. A's counsel accepted that those documents were incorporated by reference in order 1. The terms of the Report do not make order 1 imprecise.

69. There is only one relevant order. Comparisons with *Harris v Harris* are therefore inapposite.

70. The premise of the first ground of appeal against sentence is that the time limits in paragraph 2-5 of order 1 are wrong because they only allow 32 weeks in all for compliance, when the Judge had held in 2018 that an appropriate time for compliance was 18 months. That premise is incorrect. The date of judgment 1 is 26 October 2018. The deadline in paragraph 1 of order 1 is 25 April 2020. So it does allow 18 months for compliance. In any event, ground 5 is another impermissible attack on order 1. It was contradicted by A's submission to the Judge that sentence should be adjourned for 18 weeks to give A time to do the soft stripping. The 12 weeks in paragraph 2 of order 1 refers to paragraph 1, not to paragraphs 3-4. The time limits in paragraphs 3-4

are concurrent, not consecutive. There is no evidence to support the assertions about what the work entails. The 'overriding difficulty' of order 1 is a re-statement of the other grounds of appeal.

71. There is nothing wrong with the Judge's decision to suspend the sentence of imprisonment subject to a condition. There is no issue of principle about that. The decision in *Oliver v Shaikh* [2020] EWHC (Admin) 2658 (QB) at paragraph 17 is that any sanction imposed for contempt has two purposes: punishment for the historic breach, and to secure compliance with the original order. It is only if the two purposes conflict, the primary purpose of the sanction is to secure compliance. There was no such conflict here.

Discussion

Grounds 1 and 2

Initial observations

72. The Judge held that 'the evidence on this application does not…prove beyond reasonable doubt that [A] has the means to demolish the building' (paragraph 11). He therefore dismissed particulars 4 and 5. He dismissed particular 1 for a related reason (paragraph 16). There is no cross-appeal against those parts of the Judge's decision, and the Council did not argue that that approach was wrong. I would not wish this judgment to be seen as endorsing that approach, however. I mean no criticism of the Judge in this respect, as it seems that he might not have been given the help which he should have been.

73. I have two main reservations about that approach. First, no authority was cited to us in which it has been held that an inability to fund the carrying out an order of the court means that a defendant is not guilty of contempt if he breaches the order. That is not to say that there is no such authority, but the authorities on which Mr Auld did rely (see further, paragraphs 81-88, below) did not support that argument. Second, even assuming that there is such authority, the Judge's language in paragraph 14 suggests that he considered that it was for the Council to prove, to the criminal standard, that A had the means to demolish the building. In my judgment, if that was the Judge's approach, it is not correct.

74. The reason for that is that the Council had no way of proving, to the criminal, or to any other standard, whether A had the means to demolish the building, since all the relevant facts were in A's exclusive knowledge. That makes it intrinsically unlikely that, in a case like this, if a respondent claims he cannot afford to comply with an order of the court, the law could require the applicant to prove, to the criminal standard, that the respondent can afford to comply (cf paragraphs 118 and 131 of *Deutsche Bank AG v Sebastian Holdings Inc* [2020] EWHC 3536 (Comm), a case which was in the authorities bundle although those paragraphs were not cited to us in the parties' skeleton arguments or at the hearing). The position is that if an applicant proves that a respondent has not complied with an order of the court, and the respondent wishes to contend that he cannot comply with an order because he cannot afford to (and that is a possible defence to a committal), there is an evidential burden on him. He must adduce some evidence to support his case. It is then for the applicant to make the court sure that, despite that evidence, the respondent can comply with the

order. The evidence at the 2018 hearing was thin, because A made inadequate disclosure. It was nevertheless clear that A owned significant tangible assets, and A had made wholly inadequate disclosure about their extent and value. In that situation, the Judge was entitled to draw a secure inference that, on the balance of probabilities, A could pay for all the work. That, indeed, was the inference which the Judge drew in judgment 1. If, as I think it was, A's affidavit was admissible at the committal hearing (see further, below), it does not, in my view, begin to discharge that evidential burden, because A has not, at any stage, before, or in, the affidavit, made full disclosure of, and about, all his assets, when it is common ground that they are significant. I have already referred to some of the deficiencies in that material.

75. I turn to the status of A's affidavit. As I have already mentioned, the Court asked the parties, if so advised, to make further written submissions on the question whether, A having chosen not to give evidence, his affidavit was admissible on the committal application. As Mr Whale pointed out in his post-hearing submissions, the Council did not object to A's reliance on the affidavit, or apply to cross-examine A and, as there is no cross-appeal by the Council, whether the affidavit was admissible is not an issue on this appeal. That is right, but as this is a contempt case, and therefore engages, not just the interests of the parties, but the public interest in protecting the court's procedures, I should consider whether or not the affidavit was admissible.

76. CPR 32.7(1) provides that where, at a hearing other than a trial, evidence is given in writing, any party may apply to the court for permission to cross-examine that person. If the court gives permission but the person does not attend as required by the order (presumably, although that is not stated expressly, by the order giving permission), his evidence may not be used unless the court gives permission. This provision, in a somewhat compressed way, reflects RSC Order 38, r 2(3).

77. In *Deutsche Bank*, Cockerill J considered the status of an affidavit made by a respondent to a committal application. In paragraph 53, she explained that if a respondent to a committal application serves evidence before the hearing of the application, that material is to be taken as not having been deployed, unless and until the respondent gives evidence at the committal hearing, because, in order to safeguard his right to silence, the respondent may decide not to deploy the affidavit at the hearing; and, until it is deployed, it is inadmissible. It may be used by the applicant solely for the purposes of 'gathering preliminary evidence in reply'.

78. Both parties drew our attention to two authorities cited by Cockerill J. In *Re B (Contempt of Court) (affidavit evidence)* [1996] 1 WLR 627, at 633F-H, Wall J listed the issues he had to decide. One was how the court should treat an affidavit in a contempt application if a respondent provided one before a hearing. There was no reported authority which decided the question. Wall J reviewed several authorities. He decided that if a respondent chooses to file and rely on an affidavit, he can be cross-examined on it. The applicant can make no use of the respondent's evidence until it is deployed by the respondent 'either by reading it or relying on it'. A respondent who files an affidavit is not liable to be cross-examined on it unless and until 'he deploys the evidence in support of his own case' (p 638E-G). In paragraph 24 (bis) of his judgment in *Templeton Insurance Limited v Motorcare Warranties Limited* [2012] EWHC 795 (Comm) Eder J gave examples of the use of an affidavit by a respondent,

during a hearing, but before a respondent has indicated whether or not he will give evidence, which will entitle an applicant to rely on the respondent's affidavit.

79. There are two distinct questions.
    i. In what circumstances is a respondent's affidavit admissible (or, more accurately) in what circumstances does an affidavit become inadmissible?
    ii. When and in what circumstances can an applicant make use of a respondent's affidavit?

80. A's affidavit was admissible unless and until the Council applied to cross-examine him, and he refused to be cross-examined. If that application had been made and A had refused to be cross-examined, he could only have relied on the affidavit with the Judge's permission. If A relied on the affidavit at the hearing, he exposed himself to the risk that the Judge might order him to be cross-examined. But he was entitled to rely on the affidavit, having taken that risk, in circumstances where the risk did not materialise. Both sides wished to make use of A's affidavit at the hearing, and they did so. Both Mr Auld and Mr Whale submitted that A's affidavit was 'deployed' during the hearing by A, and was therefore admissible. Those submissions confuse those two issues. On the facts, the affidavit was admissible whether or not it was used. A relied on it and was entitled to rely on it. A having relied on it, the Council was also entitled to rely on it. I do not understand, however, why the Council did not apply to cross-examine A.

The substance of grounds 1 and 2

81. There were extracts from *L-W* in the authorities bundle. That was a case in which the court made enforcement orders in support of earlier contact orders between a mother and her ten-year old son, M. All attempts at contact failed. The court then made a committal order against the father, based on six breaches of contact orders by the father. Cafcass had reported that the boy was refusing to see his mother under any circumstances, but the court considered that the father should have exercised effective parental control over him and made him have contact with his mother.

82. The issues on the appeal are clear from paragraph 74 of the judgment (which was not in the authorities bundle). They were whether the judge had overstated what the relevant orders required the father to do, and, if not, whether he was wrong to reject the father's defence that he could not make M have contact with his mother. Munby LJ held that, on their proper construction, the orders did not require the father to ensure that there was contact, and (in the alternative, and, therefore, obiter) that there must be a clear (and sustainable) finding that the breach was deliberate. In that context, this Court held that the defendant could not be held to be in contempt of court.

83. Two relevant points emerge from *L-W.* First, it is clear that in referring to a defendant's power to comply with an order, Munby LJ had in mind force majeure, or something similar (see paragraph 40, in which he gives an example of 'unforeseen and insuperable weather problems' such as 'the sudden and unexpected grounding of the nation's airlines by volcanic ash'). Paragraph 40 was not in the extract which we were given, either.

84. Second, the judgment in *L-W* is not authority for the proposition that a claimant must plead that the defendant was able to comply with the order in question. *L-W* refers to the need for an order to be clear and unambiguous, if an allegation of contempt is to be founded on a breach of that order. It says nothing about what must be alleged in a contempt application, and does not say that the claimant must plead that the defendant was able to comply with the order. Mr Auld did not refer the Court to any other authority to support that proposition.

85. *Harris v Harris* concerned another difficult contact dispute. The father had a history of being committed to prison for the breach of injunctions. Against that background the mother again sought to have the father committed for contempt for further breaches.

86. Section VIII of the judgment is headed 'The Injunctions'. The father wanted the existing orders to be discharged and the mother wanted them to continue. Munby J (as he then was) stated in paragraph 288 that it was an elementary principle that no order will be enforced by committal unless 'it is expressed in clear, certain and unambiguous language'. He then referred to several authorities. He cited a dictum of Lord Upjohn's in *Redland Bricks v Morris* [1970] AC 652, 666 that an order must be such that 'the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact'. Terms cannot be implied into an injunction.

87. Munby J (as he then was) said that a related principle was that an order should not require a defendant to cross-refer to other material in order to find out what he has to do. Munby J cited a case in which practitioners were enjoined to ensure that 'orders are not passed unless they are in the proper form'. That was a case in which an order simply referred to continuing an injunction granted by judge 1, as varied by judge 2 and continued by judge 3. Munby J referred to a second case in which the same point was made. He noted that the father had to refer many different orders to work out his obligations, and that the draftsman of one of those had misunderstood the position. Munby J said that that was 'wholly unacceptable'. He said that the proper practice for drawing an order in a case like this was for it to discharge any previous order(s) and then expressly to impose all the current requirements. He did not, however, hold that that bad practice meant that the father was not guilty of any contempt, and held that the scheme of the earlier injunctions (properly drafted in one order) should be maintained, with minor changes (paragraphs 301-312).

88. These cases are, in any event, of limited relevance to this case. I do not consider that dicta from abduction and contact disputes in family cases can readily be transposed to a case like this. In both types of family case, there may be factors, wholly outside the control of the defendant, which prevent him from returning a child from a foreign jurisdiction, or from forcing his child to have contact with the mother. Those factors may well be within the knowledge of the applicant for the order, and there may be good reasons, in such cases, for a requirement that the applicant prove that the defendant can comply with an order (in the sense that I have just described).

89. Subject to Mr Auld's argument about the true construction of order 1, the reasoning I have described in paragraphs 83 and 84 applies both to the cost of all the work, and to the cost of the parts of the work in respect of which, the Judge held, A was in

contempt of court. The Judge nevertheless held that A could not afford to do all the work, and that he was not in contempt of court to that extent. There is no cross-appeal against that finding, so I must proceed on the basis that that was the right approach.

90. I consider, next, whether the Judge was entitled to conclude that he was sure that A was in contempt of court because he had failed to do the soft stripping of the building and to decommission its services, and because he had failed to carry out items 2-5, and, in particular, 2. I approach this question on the assumption that if A could not afford to carry out the work, that would have been a defence to the committal application. In making his findings, the Judge relied on the material in A's affidavit which showed that he had relatively substantial assets. I have held that the Judge was entitled to rely on that evidence. The Judge was also entitled to rely on the evidence adduced at the first hearing, and on his assessment of that evidence in judgment 1 (provided he applied the criminal standard) to that material. I consider that the Judge was entitled to draw a secure inference from all that material, so as to be sure that A could afford to do the soft stripping, decommissioning, and items 2-5, even if the Judge did not know the exact cost of those steps. On any view, the Judge was entitled to be sure that the cost would be significantly less than the cost of complying with order 1. The Judge had concluded, on the basis of the evidence available on the application for the injunction that A could, on the balance of probabilities, have afforded to do all the work. The Judge was also entitled to draw a secure inference at the committal hearing, on the basis of all the evidence (including the lack of full disclosure, such evidence as there was about A's assets, and about the history of his dealings with those assets), that he was sure that A could afford to do the more limited work of soft stripping and decommissioning. To the extent that there was no precision in the Judge's findings, A is (again) entirely the author of his own misfortune. While A was not required to give the court full information, he could have done, and chose not to. A cannot now complain that the Judge made the best he could of the limited material A chose to disclose.

Grounds 3 and 4

91. It is convenient to take these in reverse order. I consider, first, Mr Auld's argument about the construction of order 1. Order 1 is expressed in simple terms. It is not complicated. There is not, on its face, any warrant for reading its requirements as being sequential or inter-dependent. It simply sets out several different requirements. The particulars of contempt follow that pattern. There is no sign in the language of order 1 that if A cannot demolish the building he is exempted from carrying out the other provisions of order 1. There is no warrant for reading the provisions of order 1 as being anything other than severable. Moreover, A's argument is illogical. The soft stripping and decommissioning are works that would be done before, not after, the total demolition of the building.

92. That conclusion also disposes of part of A's argument that he did not know the case which he had to meet. The case he had to meet was clearly set out in the particulars of contempt; it was that he had breached all the provisions of order 1 to which those particulars referred. It necessarily followed that, if the Judge found that some of the particulars were proved, but that others were not, A might be found guilty of contempt of court in respect of some of the particulars, but not of others. If he wanted to run a case that he could not afford to carry out any part of order 1, there was an evidential

burden on him in that respect. There is no merit in the suggestion that he was somehow taken by surprise by the turn of the events which happened, or that that turn of events led to any unfairness. The *Inplayer* case is completely different, as the Judge appreciated (paragraph 16 of judgment 2). In this case, A was exonerated from a pleaded allegation of contempt, but found guilty of other, severable, pleaded allegations. In the *Inplayer* case, the defendant was found guilty of a contempt which was not pleaded until after judgment was handed down.

93. A related argument is Mr Auld's argument that order 1 should not have incorporated the Report by reference. Mr Auld is right to the extent that the authorities he cited show that it is bad practice for an order to be other than a self-contained document which enables a defendant to know what he must do and/or must not do without having to refer to any other order. This reasoning does not capture an order which cross-refers to a document which is not an order. But even if it does, it does not follow from the fact the drafting of order 1 was contrary to good practice that it was invalid, or that it could not form the basis of a committal application. The question is whether A knew what he had to do. The Judge found that A did know (paragraph 11), and that was a finding which the Judge was entitled to make. Moreover, in the alternative, the Judge, being satisfied that A was 'aware of the references in [order 1]', was entitled to dispense with service both of the Report and the notice (also paragraph 11).

94. I consider next A's argument that the requirements to 'soft-strip' the building and to decommission its services were not precise enough. The Judge had been on a site view, and knew what the building was like. There was admissible evidence before the Judge from the Council that as the date of the committal hearing grew nearer, A had, for the very first time, done some limited soft stripping of the building. A's affidavit was to similar effect. I consider that that evidence was sufficient to entitle the Judge, to find, as he did, that A did know what that requirement meant, in the words of Lord Upjohn (see paragraph 86, above) 'in fact' (and see further, paragraph 97, below). There is nothing in Mr Auld's suggestion that A did not know whether he was required to decommission the services temporarily or permanently. If the overall requirement was that A should demolish the whole building, the requirement to decommission its services was self-evidently a requirement to do so permanently. A requirement to do so temporarily would imply, against the facts, that a time might come when those services might be reinstated (and see paragraph 23 of judgment 2, which I refer to in paragraph 48, above).

Sentence

95. The next issue is whether the Judge was wrong to pass the sentence which he did. CPR 81 has been recently re-cast. There is ample authority (which is referred to in the White Book), and I do not think that Mr Auld disputed this, that under the former version of CPR 81, the court had an inherent jurisdiction to suspend any sentence of imprisonment. Nor did I understand Mr Auld to argue that the court had no power to attach conditions to the suspension of a sentence of imprisonment.

96. I accept Mr Whale's arguments about the time for compliance. I would therefore dismiss ground 1 of the appeal against sentence.

97. Once it is accepted that the Judge had power to suspend the sentence and to attach conditions to that suspension, the scope for a successful appeal against the content of any condition is narrow. Mr Auld would have to show that the Judge erred in principle, or exercised his discretion in a way in which no reasonable judge could have exercised it. It is clear from judgment 2 and from his sentencing remarks that the Judge was sure that A would not comply with the remaining requirements of order 1 unless his room for manoeuvre was seriously curtailed. The Judge achieved that by not adjourning sentence (despite the parties' agreement that he should), and by suspending the sentence subject to a condition. In the light of the history of prolonged disobedience to the notice and then to order 1, and of the ingenious but unmeritorious arguments A relied on to escape liability, the Judge was entitled to ask the parties to draw up an exact list of what A was required to do, so as to close off future debate. The argument that that precaution shows that order 1 was not precise enough, is, in the circumstances of this case, a bad argument. The Judge was also entitled to suspend the sentence beyond the 18 weeks for compliance, so that, should A not have complied by the end of the 18 weeks, the suspended sentence would still be in force, and act as an lever for future compliance. It follows that I would also dismiss ground 2 of the appeal against sentence.

Conclusion

98. For these reasons, I would dismiss A's appeal against the findings of contempt and against the sentence passed by the Judge.

Lord Justice Edis

99. I agree. I wish to add some words of my own to deal with the way in which the Judge dealt with the evidence of the appellant's means, and with the proper approach to that issue.

100. Like Elisabeth Laing LJ, I reject the submission that a Committal Application must allege in terms that the alleged breaches of an order are intentional in the sense that the alleged contemnor was able to comply with the order of which they are said to be in breach. It is inherent in the allegation that a specified non-compliance with an order amounts to contempt of court that it was intentional in that sense.

101. When judgment 1 was delivered, the cost of the works was believed to be far lower than it later transpired to be. The Judge's findings about the appellant's means at that stage have to be understood with that in mind. However, he did reject the appellant's evidence as to his financial situation. That evidence was incomplete and, in some respects, incapable of belief.

102. At the time of the committal application, as Elisabeth Laing LJ has explained, there was a new affidavit about the appellant's means which was admitted in evidence. The appellant declined to give oral evidence and he was not cross-examined. The many gaps in his affidavit were not therefore filled. Moreover, the transactions which had occurred after the injunction was granted were never properly explained. Some of these transactions were highly questionable. The documentary disclosure of material concerning the appellant's financial situation was wholly inadequate.

103. In civil proceedings, including committal applications, there is no equivalent provision to section 35 of the Criminal Justice and Public Order Act 1994 which enables adverse inferences to be drawn from a failure by a defendant to give evidence. The position was explained by Lord Sumption JSC in *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415 at [44]:

> *"… There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. For my part I would adopt, with a modification which I shall come to, the more balanced [than that of Lord Diplock in Herrington v BRB] view expressed by Lord Lowry with the support of the rest of the committee in R v Inland Revenue Comrs, Ex p TC Coombs & Co [1991] 2 AC 283, 300:*
>
> > *'In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."*
>
> *Cf Wisniewski v Central Manchester Health Authority [1998] PIQR P324, 340".*

104. It is, of course, for the applicant to prove all elements of the alleged contempt and to the criminal standard. However, in an issue where all relevant facts are known to the alleged contemnor, and not to the applicant, the judge in deciding whether the applicant has achieved that proof will have regard to all the evidence, in particular that adduced by the alleged contemnor. Where that evidence is to the effect "I cannot comply with the order because I cannot afford to do so", the court will expect full disclosure and, probably, sworn evidence to that effect before giving the claim any weight.

105. There is, in my judgment, a "reasonable basis" for the hypothesis that the appellant is a very wealthy man. There was a finding to that effect in judgment 1. Moreover, he spent a great deal of money building a large sports hall in his back garden. He knew when he did that that he was gambling because he did not have planning permission, and was therefore risking the loss of the structure on which that money had been spent. It seems unlikely that any rational person would take such a risk unless the potential loss was easily affordable. He owns, or has until very recently, owned a significant number of properties, and has worked for a long time building up what appears to be a successful accountancy business.

106. Here, having been disbelieved on the issue when the injunction was made, the appellant decided to supply an inadequate affidavit, and very little documentary proof of what it said. Having been permitted to rely on that, in the rather odd circumstances described by Elisabeth Laing LJ, he declined to confirm it in the witness box and to expose himself to cross-examination. His contribution to the evidence in the committal proceedings could properly have been regarded as worthless, and inferences drawn accordingly because he could easily have given proper evidence about all relevant matters.

107. In these circumstances he was extremely fortunate, in my judgment, that the Judge found that he was not able to afford the full costs of all the work required by the injunction. Many judges would simply have rejected the affidavit evidence altogether. The Judge does not reason fully his decision to accept it in part, and the Local Authority has not sought to appeal against that decision. It therefore stands. The appellant's criticisms of the finding against him that he could afford to comply with paragraph 4 of the injunction should, nevertheless, be understood in this context. The outcome on the issue of his wealth was very favourable to the appellant, probably wrongly so.