Neutral Citation Number: [2019] EWCA 392 (Civ)

Case No: A2/2018/2591

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Garnham
Claim no HQ16X00032

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/03/2019

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE HAMBLEN
and
LORD JUSTICE HOLROYDE

- -

Between:

LIVERPOOL VICTORIA INSURANCE COMPANY LIMITED	**Appellant**
- and -	
DR ASEF ZAFAR	**Respondent**

- -
- -

Mr Robert Weir QC and Mr Paul Higgins (instructed by **Horwich Farrelly**) for the **Appellant**
Mr Jonathan Goldberg QC and Mr Senghin Kong (instructed by **Goldkorns Solicitors**) for the **Respondent**

Hearing dates: 12th February, 2019

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Approved Judgment

Sir Terence Etherton MR, Hamblen LJ and Holroyde LJ:

1. On 5th October 2018, after a lengthy contested hearing, Garnham J found that ten grounds of contempt of court had been proved by the Appellant, Liverpool Victoria Insurance Company Limited, against the Respondent, Dr Zafar. He ordered that the Respondent be committed to prison for a period of six months, but directed that execution of the order for committal be suspended for a period of two years.

2. The Appellant appeals against that sentence by permission of the judge himself. Unusually, the appeal is brought with a view to increasing the sentence, on the ground that it is wrong in principle and so lenient as to fall outside the range of sentences reasonably open to the judge.

The facts:

3. The Respondent was at all material times employed by the NHS as a registered medical general practitioner. He also had a private practice in medico-legal work, which he conducted at a number of different locations. In his private practice he frequently examined claimants in low-value personal injury claims, and he had developed a system, using appropriate software, for the speedy production of medical reports in such cases. His evidence was that he was able both to examine his patient and to produce a report within about 15 minutes. He charged a fixed fee for the preparation of such reports. No further charge was made if it later emerged that an amendment to a report was necessary (for example because a factual detail was inaccurate). In such circumstances the Respondent would often delegate to one of his staff the work of making the necessary amendment to the report.

4. On the days which he devoted to his private practice, the Respondent worked to a tight schedule and saw many claimants. In all, he produced about 5,000 reports a year, with an annual gross income from this work of some £350,000.

5. On 3rd December 2011 Mr Mudassar Iqbal was involved in a road traffic accident. The driver of the other vehicle was insured by the Appellant. Mr Iqbal wished to claim compensation for his injuries and loss, and approached a claims management business, On Time Claims. A solicitor Mr Kamar Abbas Khan, of TKW Solicitors ("TKW"), was then instructed to act on his behalf in a claim against the other driver.

6. The Respondent was instructed (by TKW, who operated for this purpose through Med-Admin Limited – "Med-Admin") to prepare a medico-legal report. He examined Mr Iqbal on 17th February 2012, about 11 weeks after the accident. He produced his report ("the original report") at the time of the examination, dictating it in the presence of Mr Iqbal and signing it electronically. In this report, he said that Mr Iqbal had developed pain and stiffness in his neck on the day of the accident: those symptoms were due to whiplash, but they resolved one week from the day of the accident. He recorded that Mr Iqbal had taken analgesia four hours after the accident, and that "the treatment finished one week later". The Respondent said that Mr Iqbal was "fully recovered from the injuries sustained in the accident", and that on musculoskeletal examination he had found Mr Iqbal's neck to be normal. He expressed the opinion that Mr Iqbal's injuries and recovery period were entirely consistent with his account of the accident. Under the heading "Prognosis" he wrote that Mr Iqbal "has fully recovered from the injuries sustained in the accident".

7. In a section of his report headed "Declaration", the Respondent stated that he understood that his overriding duty was to the court. He stated that he was aware of the requirements of Part 35 of the Civil Procedure Rules, and of the associated Practice Direction (to both of which we refer below). His declaration continued:

> "I have done my best, in preparing this report, to be accurate and complete. I have mentioned all matters which I regard as relevant to the opinions I have expressed. All of the matters on which I have expressed an opinion lie within my field of expertise. I have drawn to the attention of the court all matters, of which I am aware, which might adversely affect my opinion. Wherever I have no personal knowledge, I have indicated the source of factual information. I have not included anything in this report, which has been suggested to me by anyone, including the lawyers instructing me, without forming my own independent view of the matter."

Beneath that declaration, under the heading "Statement of Truth", the Respondent stated:

> "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

At the foot of the page on which the declaration and statement of truth appeared there was a further note in which the Respondent again asserted that his report was based on his completely independent opinion.

8. The original report was sent to TKW. According to a note in their files, Mr Iqbal rang the solicitor Mr Khan on 22nd February 2012 to say that he was not happy with the prognosis set out in the report because he had told the Respondent that his acute injuries had settled in 1-2 weeks but that he had ongoing symptoms of neck, shoulder and wrist pain.

9. Mr Khan purported to have written a letter to the Respondent on that same day, in which he said that that there may have been a misunderstanding: Mr Iqbal had reported a continuing dull constant pain in his neck, pain symptoms in his shoulder and right wrist pain of moderate severity. He asked the Respondent to review his notes and, if he felt it appropriate, to prepare an amended report complying with Part 35. However, the judge found that no such letter was in fact written on that date, and that Mr Khan fabricated the supposed letter many months later.

10. There was email correspondence which the judge analysed in careful detail. For present purposes, it suffices to note the following. On 24th February 2012 Mr Khan sent an email to Med-Admin, which Med-Admin forwarded to the Respondent, saying that Mr Iqbal still had moderate to severe pain in his neck and shoulders. He continued:

> "I should be grateful if you could review your notes from the examination in light of the following: given that our client is suffering severe to moderate pain in his neck and upper back, now over two months from the date of the accident, is it likely that he will recover over the next 6-8? If so, can you please amend your report in respect thereof. Given that our client is still suffering pain related symptoms can you confirm whether he is likely to benefit from physiotherapy."

One of the Respondent's secretaries offered to make amendments if the Respondent wished him to do so. In answer to an enquiry by the Respondent, the secretary confirmed that the only symptoms noted by the Respondent had resolved after one week and that, on examination, there was no restriction. He asked if that latter record also needed to be altered, and noted that it was the solicitors who suggested a 6-8 month period and physiotherapy.

11. Later that same day, 24th February 2012, a second report ("the revised report") was produced by the Respondent or on his behalf. There had been no further examination of Mr Iqbal, and it does not appear that the Respondent had any significant notes of his initial examination beyond what was recorded in the original report. As the judge noted, the revised report appeared superficially to be identical to the original report. It bore the same date, 17th February 2012, and contained nothing to indicate that there had been a previous report or that this was an amended report. We would add that it contained an identical declaration and statement of truth, and an identical further note at the foot of the relevant page.

12. The revised report did however differ very significantly from the original report. It recorded that symptoms of moderate pain and stiffness in Mr Iqbal's neck and shoulder had developed on the day of the accident and had not yet improved, and that Mr Iqbal was still taking analgesia. It gave a prognosis that pain in the right wrist, and pain and stiffness to the neck and shoulder, "will fully resolve between 6-8 months from the date of the accident".

13. The revised report was sent, via Med-Admin, to TKW. Mr Khan commenced County Court proceedings on behalf of Mr Iqbal, claiming damages for his personal injuries and relying upon the revised report. On 14th August 2013 a paralegal working for TKW prepared a trial bundle and sent it to those representing the other party. Unfortunately for the Respondent, and for Mr Khan, the paralegal mistakenly included in the bundle the original report rather than the revised report. Had that mistake not been made, the Appellant and the court would not have known of the existence of the original report and the claim would have been heard and determined on the basis that the revised report represented the Respondent's independent opinion based on his examination of Mr Iqbal on 17th February 2012. As it was, the trial was adjourned and the judge gave appropriate directions which led to the making of various witness statements by those involved.

14. An enquiry agent instructed by the Appellant spoke to the Respondent, by arrangement, on 20th August 2013. The agent recorded, and the Respondent signed on that day, a witness statement asserting that the correct version was the original report, which had been altered without the Respondent's knowledge, and without his permission, to produce the revised report. The Respondent asserted that such

alteration had been made, not by him, whilst the original report was in the custody of Med-Admin.

15. On 5th September 2013 the Respondent spoke to the Appellant's solicitor. He said that, having looked into the matter more closely, he now realised that he should not have made his witness statement of 20th August. He asserted that he had himself amended the original report, because the original report had only related to Mr Iqbal's acute symptoms. On 22nd October the Respondent made a witness statement to that effect, saying that the original report had been an error on his part, in that it only related to the acute symptoms, and that the revised report (which he recalled producing himself) was the correct one.

16. Each of the Respondent's witness statements made on 20th August and 22nd October 2013 was verified by a statement of truth.

17. It is not necessary, for present purposes, to say more about the litigation of Mr Iqbal's claim for damages. We therefore turn to the claim which the Appellant commenced in 2017 against the Respondent, Mr Khan and two others, seeking their committal for contempt of court. In the result, the judge found proved some, but not all, of the allegations of contempt of court pleaded against the Respondent and against Mr Khan. We need say no more about the two other persons, against whom the allegations of contempt of court were dismissed.

The proceedings for committal for contempt of court:

18. The claim form pleaded 16 grounds against the Respondent. Each alleged interference with the administration of justice. Each was an allegation that the Respondent made, or caused to be made, a false statement in a document verified by a statement of truth, contrary to CPR 32.14 (to which we refer below). Each alleged that, when verifying the statement of truth, the Respondent –

> "… knew that the statement was false or was reckless as to whether it was true or false and the false statement was intended to interfere with and/or was likely to have interfered with the course of justice."

19. Having heard evidence over a number of days, the judge on 5th October 2018 handed down a detailed judgment which is published under neutral citation [2018] EWHC 2581 (QB). The judge indicated that he was satisfied, to the criminal standard of proof, that ten of the grounds alleged against the Respondent had been proved. Four related to specific assertions made in the revised report as to the symptoms (summarised in [12] above) which Mr Iqbal was said still to be suffering. The judge said of these that, when asked to amend his report, the Respondent was so busy that he gave no thought to whether the amendments were justified and did not care whether the amended contents of the report were true or false: all that mattered to him was getting another report out. He therefore just did as he was asked by the solicitor, and accepted what the solicitor said about continuing pain and stiffness despite the fact that there had been no evidence of that when he had examined Mr Iqbal in February 2012. He had no proper basis for his new prognosis. His conduct went beyond negligence: he allowed the relevant assertions to be included in the revised report –

> "… not caring whether they were true or false, and not caring whether or not the court was misled as a result."

20. A fifth ground related to the witness statement of 20th August 2013. The judge was satisfied that, before meeting the enquiry agent, the Respondent had read the revised report and seen that significant amendments had been made, by him or with his approval, which could not readily be explained on the basis of his one examination of Mr Iqbal. The judge found that the Respondent had therefore decided to try to explain away the amendment by blaming someone else, and that in doing so he acted dishonestly. He regarded this as the most serious of the Respondent's acts of contempt of court: a deliberate lie, designed to cover up what had really happened and particularly despicable because it sought to cast the blame on an innocent third party.

21. The remaining five grounds related to specific assertions made by the Respondent in his witness statement of 22nd October 2013, to the effect that the revised report was a true representation of the incident; the original report was mistakenly written; the original report only represented "the first few weeks he felt his acute symptoms"; he recalled amending the original report himself; and the original report was an error on his part and only represented the acute symptoms. The judge found that those assertions were false, and had been made recklessly.

22. The judge found the solicitor Mr Khan to have been in contempt of court on 11 grounds, each of which related to assertions made in witness statements supported by statements of truth, which Mr Khan knew to be untrue.

23. Having heard submissions by counsel, the judge proceeded to sentence. He noted that neither the Respondent nor Mr Khan had admitted their contempt at any stage and had instead sought to justify their behaviour throughout the hearing: the absence of an admission did not aggravate the sentence, but it did deprive them of any credit for a plea. He referred to the words of Moses LJ in *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (see [47] below) and observed that false evidence of the sort which had been proved causes serious damage to the administration of justice. The judge continued:

> "Those who make false claims should expect to go to prison. Solicitors and expert witnesses who act dishonestly in the evidence they give to the court, whether in support of such claims or otherwise, must expect a similar outcome. Mr Khan and Dr Zafar, you must understand that the proper functioning of the court system depended on your honesty. Your conduct in this case amounts to a fundamental betrayal of the trust placed in you by the court."

24. The judge went on to refer to the requirement that an expert witness providing a report to a court must confirm his or her understanding of the duty owed to the court. He said that the Respondent had lied when he said that the original report had been altered by Med-Admin, and had made numerous statements being reckless as to whether they were true or false. He said that the Respondent had been –

> "… motivated first by a desire to keep the report writing factory you had devised running at full capacity, so as to

> continue making the astonishing profit you told me about, and then by a cowardly desire to cover up what you had done."

25. The judge noted in the Respondent's favour that he was a professional man against whom no previous complaint had been made; there was no suggestion that he had acted corruptly; only one of the proved allegations involved dishonesty, the other nine being findings of recklessness; in relation to the finding of dishonesty, he had "corrected the error, without admitting any dishonesty, within 3 weeks"; as a result of the allegations he had lost his medico-legal work and was now struggling financially; and he had brought shame on himself and his family, as well as professional and financial ruin. The judge referred also to testimonials submitted in support of the Respondent, and accepted that he should take into account "the fact that this has been hanging over your head for some years".

26. The judge concluded that the conduct of the solicitor Mr Khan was so serious that the least sentence he could impose was one of 15 months' immediate imprisonment. In relation to the Respondent, he found that the conduct was so serious that only a custodial sentence could be justified, the least possible term being one of 6 months. He observed that the Respondent had been weak and cowardly in failing simply to acknowledge his mistakes when visited by the Appellant's enquiry agent: he had lied about the revised report and been wholly reckless in what he said in other statements. However, it had not been his misconduct, but that of Mr Khan, which had started "this whole sorry affair". The judge concluded that he could properly exercise his power under CPR 81.29 (see [41] below) to suspend the Respondent's sentence for two years. He imposed that sentence, and in addition ordered the Respondent to pay the whole of the costs of the proceedings against him, together with one-quarter of the common costs attributable to the proceedings against all four defendants.

The submissions on appeal:

27. We are grateful to counsel for their written and oral submissions. For the Appellant, Mr Weir QC and Mr Higgins submit that the judge's order was plainly wrong: the Respondent's misconduct was so serious that a longer term of imprisonment, of immediate effect, was necessary. They submit that the judge failed to apply the principles in *South Wales Fire and Rescue Service v Smith* with the rigour which is appropriate in the case of an expert witness, and failed to give sufficient weight to the strong public interest in an expert witness receiving an immediate and substantial prison sentence in circumstances such as these. They further submit that the judge was wrong to treat the Respondent as having persisted in his proven lie for only 3 weeks, when that lie had been replaced by others which the Respondent maintained throughout his trial; and was wrong to treat the reckless acts as being insufficient to justify an immediate custodial sentence. They argue that the judge gave insufficient weight to the fact that in acting as an expert witness, the Respondent occupied a privileged position, from which he derived a very high income: that privileged position rested upon the duty which an expert witness owes to the court, and an expert witness who abuses that privileged position by lying should expect to be treated more severely than a member of the public who tells lies to a court. Counsel point out that a claimant seeking compensation for personal injuries can present his case to the court without necessarily instructing a solicitor, but cannot do so without obtaining expert medical evidence as to his injuries. The parties and the court are in the hands of the expert. As to the matters of mitigation, they argue that the passage of time was

primarily the product of the Respondent's continuing denial of the allegations against him, and that the personal mitigation was of a kind which could probably be put forward by any medico-legal expert witness who committed a similar contempt of court.

28. Counsel referred to a substantial volume of caselaw which, it was submitted, shows that immediate imprisonment should be imposed in a case of this nature unless there was some special feature of the case which justified suspension. On the basis that the judge's decision was wrong, they invited this court to substitute its own decision as to sentence. They added that it is desirable for this court to provide some general guidance as to the effect of "delay" in cases of this nature, as to the appropriate sanction in cases of contempt of court by an expert witness, and as to whether a suspended sentence is appropriate, and if so, when.

29. For the Respondent, Mr Goldberg QC and Mr Kong submit that the judge clearly gave careful consideration to all relevant factors; that he directed himself impeccably as to the approach he should take in determining the appropriate sentence, and gave appropriate weight to the Respondent's status as an expert witness; and that, whilst other judges might have imposed a more severe sentence, the suspended sentence in this case could not be said to be so lenient as to justify this court's interfering with it. They argue that particular weight should be given to the fact that there was only one finding of dishonesty, with the other nine findings relating to recklessness, a feature which they submit is in itself sufficient to justify suspension. The Respondent, they said, only fell to be sentenced for the proven false statements, and not on the basis of an implicit suggestion by the Appellant that the "factory" must have produced other false reports on other occasions. They argue that, as the Respondent was entitled to contest the allegations against him, and indeed was successful in defeating some of them, the judge was right to take delay into account as one of the factors in the Respondent's favour.

30. Counsel further submit that the judge's approach to sentencing was, rightly, consistent with the approach which criminal courts are directed to take by the Sentencing Council's definitive guideline on the imposition of community and custodial sentences. This requires the court, when considering a custodial sentence in a criminal case, to consider first whether the custody threshold has been passed; secondly, whether it is unavoidable that a sentence of imprisonment be imposed; thirdly, what is the shortest term commensurate with the seriousness of the offence; and fourthly, whether the sentence can be suspended. Counsel point out that factors mentioned in the guideline as indicating that it may be appropriate to suspend are a realistic prospect of rehabilitation; strong personal mitigation; and the fact that immediate custody would result in a significant harmful impact upon others.

31. The test which should be applied by this court, counsel submit, is similar to the approach adopted by the Court of Appeal, Criminal Division in considering whether a sentence in a criminal case was unduly lenient; and the power to increase a sentence should be used sparingly. Insofar as the Appellant was seeking general guidance as to the "tariff" for sentencing an expert witness, counsel submit that no such guidance going beyond what was said in *South Wales Fire and Rescue Service v Smith* is necessary or indeed possible. Even if this court were to be persuaded that too low a tariff had been adopted in other cases, it would not be right to apply a revised tariff retrospectively to the Respondent; and in any event, if the court were considering an

increase in the Respondent's sentence, it should have regard to the principle of double jeopardy.

Discussion:

32. We begin by considering the legal and procedural framework applicable to this appeal, which was not in dispute. It was also common ground between the parties that the issues in this case are not affected by the distinction between civil and criminal contempts of court, and we do not find it necessary to analyse that distinction.

The overriding duty owed by experts to the court:

33. By CPR 35.3 –

> "(1) It is the duty of experts to help the court on matters within their expertise.
>
> (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid."

By CPR 35.5(1) –

> "Expert evidence is to be given in a written report unless the court directs otherwise."

As to the contents of such a report, CPR 35.10 provides, in material part –

> "(1) An expert's report must comply with the requirements set out in Practice Direction 35.
>
> (2) At the end of an expert's report there must be a statement that the expert understands and has complied with their duty to the court.
>
> (3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written."

34. The Practice Direction states that experts and those instructing them are expected to have regard to the guidance contained in the Guidance for the Instruction of Experts in Civil Claims 2014. The provisions of that Guidance which are material to the issues in this case are those contained in paragraphs 48, 49, 52, 53 and 55:

> "48. The content of experts' reports should be governed by their instructions and general obligations, any court directions, CPR 35 and PD35, and the experts' overriding duty to the court.
>
> 49. In preparing reports, experts should maintain professional objectivity and impartiality at all times.

> …
>
> 52. Experts' reports must contain statements that they
>
> (a) understand their duty to the court and have complied and will continue to comply with it; and
>
> (b) are aware of and have complied with the requirements of CPR 35 and PD35 and this guidance.
>
> 53. Experts' reports must also be verified by a statement of truth. The form of the statement of truth is:
>
> '*I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.*'
>
> …
>
> 55. The mandatory statement of the substance of all material instructions should not be incomplete or otherwise tend to mislead. The imperative is transparency. The term 'instructions' includes all material that solicitors send to experts. These should be listed, with dates, in the report or in an appendix. The omission from the statement of 'off-the-record' oral instructions is not permitted. Courts may allow cross-examination about the instructions if there are reasonable grounds to consider that the statement may be inaccurate or incomplete."

Contempt of court by a false verification of truth:

35. CPR 22.1(1) lists the types of document which must be verified by a statement of truth. These include

> "c) a witness statement; …
>
> g) any other document where a rule or practice direction requires."

36. CPR 32.14(1) provides, in material part –

> "Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

37. Procedural provisions as to committal for contempt of court of this nature are contained in Part VI of CPR 81. General rules about committal applications and

orders for committal, including CPR 81.29 to which we refer below, are contained in Part VIII.

Penalties for contempt of court:

38. The principal penalties for contempt of court are a fine or committal to prison. Section 14 of the Contempt of Court Act 1981 provides, in material part –

> "(1) In any cases where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court.
>
> (2) In any case where an inferior court has power to fine a person for contempt of court and (apart from this provision) no limit applies to the amount of the fine, the fine shall not on any occasion exceed £2,500."

39. Although conveniently referred to as a sentence of imprisonment, a term of committal for contempt is not a "sentence of imprisonment" as that term is defined for the purposes of sentencing in criminal cases: see section 76(2) of the Powers of Criminal Courts (Sentencing) Act 2000.

40. 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.

41. By CPR 81.29(1) –

> "The court making the committal order may also order that its execution will be suspended for such period or on such terms or conditions as it may specify."

Appeals against committal orders:

42. In relation to appeals, the Administration of Justice Act 1960 ("AJA 1960") provides as follows:

> "13 Appeal in cases of contempt of court.
>
> (1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings.

> (2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant; and the appeal shall lie—
>
> …
>
> (b) from an order or decision of the county court or any other inferior court from which appeals generally lie to the Court of Appeal, and from an order or decision (other than a decision on an appeal under this section) of a single judge of the High Court, or of any court having the powers of the High Court or of a judge of that court, to the Court of Appeal;
>
> …
>
> (3) The court to which an appeal is brought under this section may reverse or vary the order or decision of the court below, and make such other order as may be just; and without prejudice to the inherent powers of any court referred to in subsection (2) of this section…."

43. The AJA 1960 should be read alongside CPR 52.21 (Hearing of Appeals):

> **"52.21**
>
> (1) Every appeal will be limited to a review of the decision of the lower court unless—
>
> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> (2) Unless it orders otherwise, the appeal court will not receive—
>
> (a) oral evidence; or
>
> (b) evidence which was not before the lower court.
>
> (3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

> (4) The appeal court may draw any inference of fact which it considers justified on the evidence.
>
> (5) At the hearing of the appeal, a party may not rely on a matter not contained in that party's appeal notice unless the court gives permission."

44. In determining whether the decision of the lower court is "wrong", it should be recognised that a decision as to the appropriate level of penalty to impose for a contempt of court involves a value judgment being made and the assessment and weighing of a number of different factors. It is now well established that a civil appellate court will be reluctant to interfere with decisions involving such a balancing of factors or "multi-factorial assessments". It will generally only do so if the judge:

    i) Made an error of principle;

    ii) Took into account immaterial factors or failed to take into account material factors; or

    iii) Reached a decision which was plainly wrong in that it was outside the range of decisions reasonably open to the judge.

    See *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101 at [35]-[36], *Aldi Stores Ltd* [2008] 1 WLR 748 at [16], *Stuart v Goldberg Linde* [2008] 1WLR 823 at [76] and [81].

45. A decision as to the appropriate level of penalty will be plainly wrong where it is so lenient, or so excessive, that it is outside the range of reasonable decision making. This is similar to the circumstances in which the Court of Appeal, Criminal Division would interfere with a decision reached by a judge as to the level of sentence, namely when satisfied that it is unduly lenient or manifestly excessive - see *Neil v Ryan* (1998 WL 1044247). A sentence will only be unduly lenient or manifestly excessive where – to adopt the words used by Lord Lane CJ in setting out the test of undue leniency in the criminal context in *Attorney-General's Reference (no 4 of 1989)* [1990] 1 WLR 41 at p46A - "it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate".

46. If the appellate court is satisfied that the sentence was "wrong" on one of these grounds, it will reverse the decision below and either remit the case to the judge for further consideration of sanction or substitute its own decision.

    Relevant case law:

47. The seriousness of a contempt of court committed by a claimant who makes a false statement in support of a false or exaggerated claim for compensation has been emphasised in many cases. In *South Wales Fire and Rescue Service v Smith* a fireman injured in an accident at work had made a false claim that he had been unable to work since his accident. In May 2009 he admitted to a District Judge that his claim was false. He was required to repay all the money which he had received from his employers by way of severance and sick pay. Permission to bring contempt

proceedings was applied for in February 2010 but not granted until July 2010. There were then delays, including in obtaining legal aid, which had the result that the application for committal was not heard until May 2011. A Divisional Court of the Queen's Bench Division (Moses LJ and Dobbs J) concluded that a committal to prison for 12 months was necessary but that the passage of time meant that the term of committal could be suspended for 2 years. At the beginning of his judgment, Moses LJ (with whom Dobbs J agreed) said –

> "2. For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those who are injured as a result of the fault of their employer or a defendant can receive just compensation.
>
> 3. They undermine that system in a number of serious ways. They impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are justified and those claims which are unjustified. They impose a burden upon honest claimants and honest claims, when in response to those claims, understandably, those who are liable are required to discern those which are deserving and those which are not.
>
> 4. Quite apart from that effect on those involved in such litigation is the effect upon the court. Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability.
>
> 5. Those who make such false claims if caught should expect to go to prison. There is no other way to underline the gravity of the conduct. There is no other way to deter those who may be tempted to make such claims, and there is no other way to improve the administration of justice.
>
> 6. The public and advisers must be aware that, however easy it is to make false claims, either in relation to liability or in relation to compensation, if found out the consequences for those tempted to do so will be disastrous. They are almost inevitably in the future going to lead to sentences of imprisonment, which will have the knock-on effect that the lives of those tempted to behave in that way, of both themselves and their families, are likely to be ruined.
>
> 7. But the prevalence of such temptation and of those who succumb to that temptation is such that nothing else but such severe condemnation is likely to suffice."

48. Those words have been cited and adopted in many subsequent cases. In *Summers v Fairclough Homes Ltd* [2012] UKSC 26, [2012] 1 WLR 2004, a case in which a claimant injured in an accident at work had grossly exaggerated his claim, they were approved by the Supreme Court. Lord Clarke, giving the judgment of the court, quoted them in full and said at [58]:

> "We have set out those paragraphs verbatim because we agree with them and in order to make clear to all what is the correct approach to contempt of court on the facts of cases such as this."

49. In relation to fraudulent claims in respect of injuries said to have been sustained in road traffic accidents, Sir John Thomas P in *Liverpool Victoria Insurance v Bashir* [2012] EWHC 895 (Admin) referred to the great difficulty of detecting such fraud. The court in that case concluded that the conduct of the defendants was of great seriousness and must attract a custodial sentence, even though they were only "foot soldiers" who had been recruited for a fee to make a false claim in relation to a contrived collision, and even though the amount of the claim was only in the range £5,000 to £15,000. The court initially had in mind sentences "well in excess of 12 months' imprisonment", but found two very important factors in the defendants' favour: their early admissions of their fraud; and the assistance they had given to the insurers in relation to the wider fraud. One defendant was the mother of two children, the younger of whom was only four months old and was still being breast-fed. The court made a very substantial reduction in the length of the sentence to reflect the factors in her favour, but committed her for an immediate term of 6 weeks.

50. In the present case we are concerned with contempt of court committed by an expert witness who makes a false statement with no honest belief in its truth. We therefore do not think it necessary to refer to other cases which were shown to us as illustrating the seriousness of claimants making fraudulent claims for compensation. Nor do we think it necessary or helpful to refer to the several cases which were brought to our attention in relation to the significance or otherwise of delay: all were fact-specific decisions, and turned on the circumstances of the individual case. We accordingly turn to cases relevant to appeals against sanctions which are said to be unduly lenient.

51. In *Neil v Ryan* (see [45] above) the contemnor had breached an injunction by going to the home of his former partner and assaulting her. A suspended committal order was made. On appeal, this court concluded that it was wrong in principle for the sentence to have been suspended, and ordered that it take effect immediately. Judge LJ (as he then was) said –

> "Normally speaking, this court would not interfere with a decision reached by a judge about the appropriate level of penalty or a contempt of court. There is no doubt, however, that the jurisdiction exists … . Before considering any increase in sentence or changing the impact of any sentence adversely to the defendant we have to remind ourselves that this is a power which should be used sparingly. The sort of circumstances in which it could reasonably be used would be to approach the problem as of the case were a reference by the Attorney General under the 1988 Criminal Justice Act. Plainly, this is

> not a case which comes within that jurisdiction, but a sentence should not be increased under that Act unless the court is satisfied that it is not merely lenient but "unduly" lenient. And, what is more, if the court reaches that conclusion, when deciding the appropriate level of sentence the court must also reflect the element of what is sometimes described as double jeopardy."

52. In the context of references by the Attorney General under the Criminal Justice Act 1988, the classic definition of an unduly lenient sentence is that given by Lord Lane CJ in *Attorney-General's Reference (no 4 of 1989)*, cited at [45] above.

53. The decisions in *Attorney-General's Reference (no 4 of 1989)* and *Neil v Ryan* predate the development and clarification of civil and appellate powers including in relation to multi-factorial decisions. The approach which they indicate is however consistent with the principles we have stated at [44] above, because a sentence which is unduly lenient in accordance with Lord Lane CJ's definition would be a sentence which fell outside the range reasonably open to the judge.

54. As to the concept of double jeopardy in the context of an Attorney General's reference under the 1988 Act, Lord Phillips CJ in *Attorney General's reference nos 14 and 15 of 2006, R v French and Webster* [2006] EWCA Crim 1335, [2007] 1 Cr App R (S) 40 explained that since the introduction by that Act of a procedure by which unduly lenient sentences could be referred to the Court of Appeal, Criminal Division it had been the practice, when considering whether to impose a heavier sentence, to have regard to the anxiety to which the offender is subjected by that procedure and normally to give some discount in the sentence which would otherwise be imposed. He said at [59] that the range of discount was wide, generally lying between 12% and 30%. At [61] he said this:

> "The distress and anxiety is likely to be particularly great where the decision of this court results in a defendant being placed in prison where originally no custodial sentence was employed, where a custodial sentence has been completed, where the defendant is young and immature or where the defendant was about to be discharged from prison. In all of these cases the distress and anxiety caused by the double jeopardy is likely to be significant when weighed against the original offending. The authorities show that in such circumstances discounts for double jeopardy tend to be granted that are near the upper end of the range."

55. It should however be noted that the more recent practice of the Court of Appeal, Criminal Division in relation to double jeopardy has altered to reflect changes in the sentencing regime in 2006, in particular the availability in criminal cases of clear sentencing guidelines. In *Attorney General's Reference no 45 of 2014, R v Afzal* [2014] EWCA Crim 1566 Lord Thomas CJ said that, although the principle of double jeopardy remains for consideration in the kind of case identified in *Attorney General's reference nos 14 and 15 of 2006, French and Webster*, such cases have become, and are likely to remain, rare.

56. The practice in the criminal courts has therefore developed since the practice which was relied on, by way of analogy, in *Neil v Ryan*. However, *Neil v Ryan* remains authority for the proposition that, when an appellate court is satisfied that a sanction imposed by a civil court for contempt of court must be quashed as being unduly lenient, and is considering how to exercise its own powers, it can in an appropriate case properly take into account the fact that the contemnor, having previously been dealt with in a way which did not entail immediate loss of liberty, has in the appeal proceedings had the anxiety of knowing that the outcome may be an immediate committal to prison.

Analysis:

57. In granting permission to appeal, the judge noted that "there is no authority or reported decision on the appropriate sentence to be passed on an expert witness whose reporting practices place him or her in contempt of court, or who tells repeated lies when questioned about them". Of course, every case will depend on its individual facts and circumstances, but some general guidance can be given.

58. In the context of a contempt of court involving a false statement verified by a statement of truth, the contemnor may have acted dishonestly, or recklessly in the sense of not caring whether the statement was true or false. In either case, it is always serious, because it undermines the administration of justice. In considering just how serious it is in all the circumstances of an individual case, and in deciding the appropriate punishment for contempt of court, we think that the approach adopted by the criminal courts provides a useful comparison, though not a precise analogy. In particular, the Sentencing Council's definitive guidelines on the imposition of community and custodial sentences (see [30] above) and on reduction in sentence for a guilty plea are relevant in cases of this nature. It is therefore appropriate for a court dealing with this form of contempt of court to consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the contempt of court. Having in that way determined the seriousness of the case, the court must consider whether a fine would be a sufficient penalty. If it would, committal to prison cannot be justified, even if the contemnor's means are so limited that the amount of the fine must be modest.

59. We say at once, however, that the deliberate or reckless making of a false statement in a document verified by a statement of truth will usually be so inherently serious that nothing other than an order for committal to prison will be sufficient. That is so whether the contemnor is a claimant seeking to support a spurious or exaggerated claim, a lay witness seeking to provide evidence in support of such a claim, or an expert witness putting forward an opinion without an honest belief in its truth. In the case of an expert witness, the fact that he or she is acting corruptly and makes the relevant false statement for reward, will make the case even more serious; but it will be a serious contempt of court even if the expert witness acts from an indirect financial motive (such as a desire to obtain more work from a particular solicitor or claims manager), or without any financial motivation at all, and even if the expert witness stands to gain little financial reward by it. This is so because of the reliance placed on expert witnesses by the court, and because of the corresponding importance of the overriding duty which experts owe to the court (see [33-34] above).

60. Because this form of contempt of court undermines the administration of justice, it is always serious, even if the falsity of the relevant statement is identified at an early stage and does not in the end affect the outcome of the litigation. The fact that only a comparatively modest sum is claimed in the proceedings in which the false statement is made does not remove the seriousness of the contempt. The sum in issue in the proceedings is however relevant, because contempt of court by an expert witness will be even more serious if the relevant false statement supports a claim for a large sum, or a sum which is grossly exaggerated above the true value of any legitimate claim.

61. As we have noted in [36] above, the essential feature of this form of contempt of court is the making of a false statement without an honest belief in its truth. In principle, where a false statement is made without an honest belief in its truth, a contemnor who acts recklessly is less culpable than one who acts intentionally. The extent of that difference in culpability will, however, depend on all the circumstances of the case. Without seeking to lay down an inflexible rule, we take the view that an expert witness who recklessly makes a false statement in a report or witness statement verified by a statement of truth will usually be almost as culpable as an expert witness who does so intentionally. This is so, because the expert witness knows that the court and the parties are dependent on his or her being truthful, and has made a declaration which asserts that he or she is aware of his or her duties to the court and has complied with them (see [33] above). To abuse the trust placed in an expert witness by putting forward a statement which is in fact false, not caring whether it be true or not, is usually almost as serious a contempt of court as telling a deliberate lie.

62. Moreover, as the present case illustrates, the culpability of a contemnor who acts recklessly will be increased if he or she knows of circumstances which cast doubt on the accuracy of the relevant statement, but nonetheless makes it without caring whether it be true or false. When the Respondent made the first of the statements which the judge found to be false, only a week had passed since he had personally examined Mr Iqbal and found him to have made a full recovery. The Respondent therefore had good reason to question the claim of continuing pain which was now being put forward, and no obvious reason to think that he had himself made a mistake and had failed to notice or record those continuing symptoms. He nonetheless made a number of false statements without making any attempt to check their accuracy or to qualify them in any way. He made the declarations to which we have referred, and signed the statement of truth, when the contents of the revised report included (without attribution) something suggested to him by Mr Khan and was to that extent not based on his own independent view; and when the opinions which he expressed did not represent his "true and complete professional opinions" and were not his "completely independent opinion". In all the circumstances, his culpability in our view came close to that of an expert witness who deliberately made false statements. For that reason, we respectfully disagree with the judge's finding that the telling of one deliberate lie was the most serious aspect of the Respondent's conduct. The seriousness of the case lies, in our view, in the putting forward of the revised report as if it represented the Respondent's honest and independent opinion based upon his own examination of Mr Iqbal.

63. Also relevant to the culpability of an expert witness who commits this form of contempt of court is the extent to which the witness persists in the false statement and/or resorts to other forms of misconduct in order to cover up the making of the

false statement. In the present case the judge found that the Respondent, having recklessly made a number of false statements in the revised report, tried to cover up what he had done by telling a direct lie in his witness statement of August 2013 and then recklessly made further false statements in advancing a different explanation in his witness statement of October 2013. In our view, the attempted cover-up, and the making of further false statements, significantly increased the Respondent's culpability.

64. As we have indicated, an order for committal to prison will usually be inevitable where an expert witness commits this form of contempt of court, and counsel for the respondent realistically accepted that it was inevitable in this case. As to the appropriate length of sentence, it is important to emphasise that every case will turn on its particular facts. The conduct involved in a contempt of this kind may vary across a wide range. The court must, therefore, have in mind that the two year maximum term has to cater for that range of conduct, and must seek to impose a sentence in the instant case which sits appropriately within that range. Where more than one contemnor is before the court, as in the present case, it will of course be necessary to make a judgment as to the comparative seriousness of their respective misconduct. As we have noted at [49] above, Sir John Thomas P in *Bashir* had in mind as a starting point sentences "well in excess of 12 months" even for those who played the role of "foot soldiers" in the dishonest claims in that case.

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. Serious ill health may be a factor properly taken into account. Previous positive good character, an unblemished professional record and the fact that an expert witness has brought professional and financial ruin upon himself or herself are also matters which can be taken into account in the contemnor's favour. However, in deciding what weight can be given to those matters, it must be remembered that it is the professional standing and good character of the expert witness which enables him or her to act as an expert witness, and thus to be in a position to make false statements of this kind. Breach of the trust placed in an expert witness by the court must be expected to result in a severe sanction being imposed by the court in addition to any other adverse consequences. The fact that an expert witness has brought ruin upon himself or herself, and/or the fact that he or she faces proceedings by a professional disciplinary body, will therefore not in themselves be a reason not to impose a significant term of committal.

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.

67. As to delay, we think it important to distinguish unreasonable delay, not attributable to any fault on the part of the contemnor, from the passage of time which is a necessary consequence of the proper litigation of allegations of contempt of court. Where a contemnor has made an early admission of wrongdoing, but for reasons beyond his or her control a long period of time then passes before a court imposes a sanction for the wrongdoing, the passage of time, attended as it inevitably would be by great anxiety, may be an important point in mitigation. The position is, however, different when all wrongdoing is denied. An alleged contemnor is, of course, entitled to contest the allegation, and the fact that he or she does so cannot make the contempt more serious; but the contemnor cannot then expect much weight to be given in his or her favour to the fact that the necessary court proceedings result in the passage of a substantial period of time. In the present case, a date for the trial of the contempt allegations was vacated because one of the other parties made a late application, and it is fair to say that the proceedings against the Respondent were thereby delayed for about 9 months. That was a point to which weight could be given in the Respondent's favour. However, it was in our view the only such point. Although it is unfortunate that the contempt proceedings took as long as they did, it was always open to the Respondent to try to shorten them by admitting his wrongdoing. He did not do so. We reject the submission on his behalf that he could not do so because he had to contest those allegations in respect of which he was successful: he could have made admissions regardless of whether the Appellant would regard them as sufficient, and, if he had done so, he would have had much stronger mitigation based on delay.

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.

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 *Bashir* shows, an immediate term – greatly shortened to reflect the personal mitigation – may well be necessary.

70. We should add that we accept, as was submitted on behalf of the Appellant, that the fact that the relevant false statement was made recklessly rather than intentionally will not in itself usually be a powerful factor in favour of suspending the necessary term of committal.

71. It follows from all we have said about the approach to sentencing in cases of this nature, and about the limited grounds for interfering with a decision of this nature, that there will be few cases in which a decision as to the appropriate sentence for contempt will be open to challenge in this court, whether on grounds of undue leniency or of undue severity.

72. With all respect to the judge, however, we are satisfied that the order for committal in this case was wrong in two respects. First, the term of committal should have been significantly longer than 6 months, even taking into account the mitigation available to the Respondent: we do not think the Respondent could have appealed successfully against a term of 12 months, and we cannot think that a term of less than 9 months was appropriate. Secondly, the term should have been ordered to be served immediately, there being no powerful factor in favour of suspending it. We are satisfied that a suspended term of 6 months fell outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.

73. Our reasons are these. In the present case, the inherent seriousness of the Respondent's conduct in contempt of court – in particular, in the putting forward of the revised report as if it represented the Respondent's honest and independent opinion based upon his own examination of Mr Iqbal - was aggravated by a number of factors. First, the judge found it to have been motivated initially by a desire to keep his report-writing factory running at full capacity. The Respondent was, therefore, at least indirectly motivated by a concern for financial profit. Secondly, the Respondent persisted in the conduct which constituted his contempt of court, putting forward false statements on three different occasions. Thirdly, on one of those occasions he acted with deliberate dishonesty. Fourthly, he sought on that occasion to cast the blame for his own misconduct on someone else. Fifthly, although he did not maintain that deliberate untruth for very long, he thereafter recklessly put forward another explanation which was also untrue. Sixthly, having regard to the terms of his declarations and his statement of truth, we are bound to say that we think that the recklessness which the judge found came close to the borderline between reckless and dishonesty.

74. We accept that there were a number of matters in the Respondent's favour, to which some weight had to be given. It seems to us, however, that the judge gave disproportionate weight to one of them, namely the fact that in most respects the misconduct was reckless rather than intentional: for the reasons we have given, there was in the circumstances of this case little difference in culpability between those two states of mind. It also seems to us that disproportionate weight was given to what was referred to as delay, the majority of the passage of time being attributable to the

Respondent's choice to contest the proceedings throughout. The disproportionate weight which he gave to those considerations contributed, in our view, to his passing a sentence which was so lenient as to fall outside the range reasonably available to him. The judge did not identify any powerful factor or combination of factors in favour of suspension.

75. The judge's decision as to sentence therefore falls to be reversed. We can remake that decision. We have however come to the conclusion that we should not impose a more severe sentence. We have decided not to do so, principally because we have sought in this judgment to give some guidance which was not previously available to those sentencing for contempt of court, and we accept that it would be unfair to the Respondent to impose upon him the adverse consequences of that guidance. Accordingly, our remaking of the decision would not result in any increase in the sentence, albeit that our reasons for reaching that outcome differ from those of the judge. In those circumstances we allow the appeal, but think it sufficient to declare that the sentence below was unduly lenient.