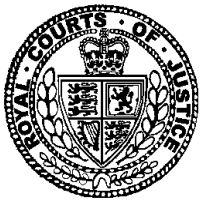

Neutral Citation Number: [2022] EWCA Civ 1631

Case No: CA-2022-001642

IN THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2022

ON APPEAL FROM
His Honour Judge Sephton sitting in the County Court in Manchester, Case: B00WN680
Deputy District Judge Althaus sitting in the County Court in Willesden, Case H00W1728
District Judge Coonan sitting in the County Court in Croydon, Case: F70CR138

Before :

LORD JUSTICE STUART SMITH
LORD JUSTICE BIRSS
and
LORD JUSTICE EDIS

- -

Between :

Christopher Lovett	**Appellant**
- and -	
Wigan Borough Council	**Respondent**

The Appellant appeared in person by video link
Michael Paget instructed directly by **the Respondent**

and between:

Isaac Smith	**Appellant**
- and -	
Network Homes Limited	**Respondent**

- -
- -

Arfan Khan (instructed by **DCK Solicitors**) for the **Appellant**
Tristan Salter (instructed by **Devonshires**) for the **Respondent**

And between:

Gemma Hopkins	**Appellant**
- and -	
Optivo	**Respondent**

- -
- -

Yinka Adedeji (instructed by **Citizens Advice Sutton**) for the **Appellant**
Sam Phillips instructed directly by **the Respondent**

Hearing date: 10 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 16 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Judgment of the court (given by Birss LJ):

1. This is a judgment of the Court to which we have all contributed.

2. It deals with three related civil appeals which are all concerned with breaches of orders made pursuant to the Anti-Social Behaviour, Crime and Policing Act 2014. The cases raise related issues. Orders of this kind are often referred to as ASBIs (Anti-Social Behaviour Injunctions). The ASBI system replaced the previous system based on ASBOs (Anti-Social Behaviour Orders). ASBOs were part of the criminal justice system whereas the scheme of the 2014 Act is that ASBIs are orders made by the civil courts, and breaches of those orders are dealt with as part of the jurisdiction to impose penalties for contempt of court.

3. The appeals were directed to be heard by this court on the same day. Part of the context is a Report by the Civil Justice Council dated July 2020 entitled "Anti-Social Behaviour and the Civil Courts". The relevance of the CJC Report can be demonstrated by the following passage, at the start of the Section on Penalties for Contempt:

> "379. Very early into its work, The Working Party discovered widespread and serious concern about the inconsistency of penalties imposed (which is the correct term as opposed to "sentencing" which occurs only in criminal courts) for breach of orders made under the 2014 Act. Concerns raised by practitioners ranged from judges not considering breaches to be sufficiently serious to warrant action (and thereby undermining the effectiveness of the injunction), through to excessive penalties out of line with what the approach would have been in a criminal court to the substantive conduct behaviour."

4. The Report goes on to make a number of recommendations. The report includes at annex 1 a suggested draft guidance document, setting out a scheme of guidance in relation to penalties for contempt for breach of ASBIs. The Civil Procedure Rules Committee considered whether to embark on issuing such sentencing guidelines but decided it was not part of their remit to do so.

5. Despite the criticism of the term "sentencing" in paragraph 379 of the CJC Report, in preparing this judgment we found that the term is a useful one to use in the civil context and we will use it.

The three cases in summary

6. Although the case of Christopher Lovett was heard first, given the range of issues raised in that appeal, it is convenient to deal with it after the other two.

Optivo v Hopkins

7. Gemma Hopkins is a tenant in her home in Carshalton, Surrey. She moved there in 2018 to flee domestic violence. Optivo is the landlord. An order dated 16 March 2020 by Deputy District Judge Tear, amongst other things, forbade Ms Hopkins from engaging in conduct likely to cause nuisance, annoyance alarm or distress to persons in the neighbourhood near her home. Optivo made an application to commit Ms Hopkins

for 31 alleged breaches of the injunction, including allegations that Ms Hopkins had herself caused or permitted loud banging noises, shouting, doors slamming which caused alarm or distress to residents neighbours, and also that she and her partner Timothy Kurtner (who does not live at the property) were repeatedly shouting and fighting outside her home. On 29 October 2021 before District Judge Coonan, Ms Hopkins admitted one breach of the injunction and Optivo agreed not to pursue the remaining allegations. The admission was recorded in a recital in this form:

> "and Upon the Defendant admitting that on the 10th November 2020 there was shouting outside her property so as to be heard by her neighbours causing them alarm and distress and that was a breach of the injunction order dated 16th March 2020"

8. DJ Coonan decided to adjourn sentencing for six months. The order adjourning sentencing (to come back to the same judge) also contained a recital in this form:

> "and Upon the Court being satisfied that if it had imposed a sentence today it would have imposed a sentence of 28 days imprisonment suspended on the condition of compliance with the injunction order imposed at today's hearing"
>
> [*The reference to "the injunction order imposed at today's hearing" arises because on the same day the injunction was re-issued in an amended form.*]

9. The parties returned before DJ Coonan on 1 August 2022. Optivo had produced a statement from Ms Green which contained allegations about Ms Hopkins' recent conduct, however the judge accepted the submission of counsel for Ms Hopkins that this evidence should be excluded. The judge then decided that since there was no evidence from the defendant that she had complied with the injunction in the meantime since 29 October 2021, there was no reason not to impose the penalty which had been considered at the previous hearing. The judge sentenced Ms Hopkins to 28 days imprisonment suspended until 29 April 2023 on condition that she complies with the injunction.

10. Ms Hopkins appealed by right under s13 of the Administration of Justice Act 1960. The appeal was filed in the County Court at Croydon, transferred to County Court at Central London and then HHJ Luba QC sitting in Central London transferred the appeal to the Court of Appeal under CPR r52.23(1). The two grounds of appeal are (1) that the sentence is immensely excessive and (2) that in sentencing the judge took into account irrelevant information or failed to take into account relevant information.

Network Homes v Smith

11. Isaac Smith lives in Willesden, North London. He is a tenant of the respondent Network Homes Ltd. He is physically disabled. The Equality Act 2010 Considerations & Proportionality Assessment Form dated June 2021 notes that he spends most of his time in his living room as he is physically disabled, that he is in constant pain and that playing music helps him to manage his quality of life. The Network Holmes anti-social behaviour incident log dated 1st March 2021 records his neighbours, the Caseys, reporting several incidents of audible music and singing both during the day and in the

evening which disturbed their quiet enjoyment of their home. The log includes further later incidents up to 1st November 2021

12. Following initial complaints from the neighbours, which included an allegation of a threat of violence, Network Homes applied for an interim injunction. On 31 August 2021 Deputy District Judge Lawrence made an order to run for one year prohibiting Mr Smith from:

> "Swearing, shouting, banging, playing amplified sound, or causing any other noise nuisance at the Property, so that it can be heard outside the Property."

13. In April 2022 Network Homes applied to commit Mr Smith on the basis of 38 alleged breaches of the order. The court directed the respondent to file an amended, more limited schedule of breaches and the matter was tried before Deputy District Judge Althaus on 11 August 2022, based on a schedule of 10 allegations, nine relating to loud music, sounds, or shouting, and one incident of singing and loud conversations. Mr Smith was represented by counsel at this trial. The judge found nine of the ten allegations proved and made an order committing Mr Smith to prison for 12 weeks, suspended for 12 months.

14. Mr Smith's appeal was filed at the County Court at Central London and again HHJ Luba QC transferred the appeal to the Court of Appeal. A number of points were taken on this appeal which were not pursued at the oral hearing, including a point about the form in which the committal application had been made, a submission that a Deputy District Judge had no jurisdiction to adjudicate and punish for contempt, an argument about a point on the routes of appeal, and a submission that an order at the hearing to retrospectively dispense with affidavit evidence was unfair and irregular.

15. Before this court Mr Smith is again represented by counsel, albeit that Mr Khan who appears in this court, did not represent Mr Smith below. Three grounds of appeal were pressed before us. First a submission that the judgment had not been transcribed and placed on the judiciary website at the proper time, contrary to CPR r81.8(8). Related to this was a point, based on an unapproved note of the judgment, that the judge had failed to take into account the significance of Mr Smith's hearing problems. Second, that the judge erred in not considering a possession order against the defendant as an alternative to committal, which was itself disproportionate in the relevant circumstances. Third that the judge was wrong to determine the committal application without determining whether Mr Smith was eligible to apply for legal aid.

Wigan Council v Lovett

16. The original injunction order under the 2014 Act was made against Christopher Lovett on 9 November 2015. The terms of the original order are not in the bundles but it is clear that, stated broadly, the injunction forbade Mr Lovett from engaging in conduct likely to cause nuisance, annoyance alarm or distress to any person in the neighbourhood near Mr Lovett's home in Tyldesley, in the Metropolitan Borough of Wigan. The applicant for the order was Wigan Council. The order has been amended a number of times since. By an order made on 4 September 2020 a further term was added which prohibits Mr Lovett from being present in a defined area overnight between 6pm and 9am daily. The area is essentially his home. Mr Lovett is instead

able to live at his parents' house, also in Tyldesley. Mr Lovett does not accept that the injunction order was lawful but his various attempts to bring a fundamental challenge to the order have failed. Before the hearing the subject of this appeal, Mr Lovett had already been found to have breached the injunction on 177 separate occasions and had been committed to prison at least four times previously between 2017 and 2021. At the hearing before us Mr Lovett appeared by video link from prison, as a result of a committal order made on 28 April 2022 by Recorder McLoughlin.

17. This appeal relates to the decision made at a trial in the County Court at Manchester, which took place on 11-13 July 2022 before HHJ Sephton KC. The judge found that Mr Lovett had breached the order prohibiting him from being in his home overnight on 21 occasions. All the other alleged breaches were rejected. HHJ Sephton noted that it was no excuse that Mr Lovett believed the injunction order was not properly made, and sentenced Mr Lovett to 30 weeks custody for each breach to run concurrently, with the custodial sentence to be served concurrently with the custodial sentence made by Recorder McLoughlin. HHJ Sephton's order would not extend Mr Lovett's time in custody due to the order of Recorder Mcloughlin. Mr Lovett is due to be released on 11 December 2022.

18. Mr Lovett appealed to this court by an appellant's notice dated 8 August 2022. The issues to be addressed in Mr Lovett's appeal include whether HHJ Sephton was right to find Mr Lovett in breach of the injunction, whether Mr Lovett can, on this appeal, challenge the injunction itself, and other related issues. Part of Mr Lovett's case is an application to set aside an order of Andrews LJ which struck out some of the grounds of Mr Lovett's appeal. The history of the proceedings involving Mr Lovett will need to be dealt with in more detail below.

The law

19. As the CJC Report explains (paragraphs 45-46) the 2014 Act provided new powers to the courts in part because the view was taken that the prior ASBO regime was slow, bureaucratic and expensive and often failed to change a perpetrator's behaviour, failing to provide long term protection for victims and communities. The idea was that the new ASBI system could be used to take low-level anti-social behaviour and "nip emerging problems in the bud". Under the Act the most serious cases of anti-social behaviour, which result in a criminal conviction, can still be addressed through the criminal court by a criminal behaviour order.

20. Section 1 of the 2014 Act provides, so far as material:

> 1 **Power to grant injunctions**
>
> (1) A court may grant an injunction under this section against a person aged 10 or over ("the respondent") if two conditions are met.
>
> (2) The first condition is that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour.

> (3) The second condition is that the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.
>
> (4) An injunction under this section may for the purpose of preventing the respondent from engaging in anti-social behaviour—
>
> > (a) prohibit the respondent from doing anything described in the injunction;
> >
> > (b) require the respondent to do anything described in the injunction.
>
> *[…]*

21. Therefore to make an order the court has to be satisfied to the civil standard that the respondent has engaged in anti-social behaviour (or threatens to do so) and that it is just and convenient to grant an injunction with the purpose of preventing that anti-social behaviour. Anti-social behaviour is defined for the relevant purposes in Section 2 of the Act as (a) conduct that has caused, or is likely to cause, harassment, alarm or distress to any person, (b) conduct capable of causing nuisance or annoyance to a person in relation to that person's occupation of residential premises, or (c) conduct capable of causing housing-related nuisance or annoyance to any person.

22. Section 1(4)(b) above is worth noting. This relates to the court's power to make or include in an order what are usually called positive requirements. Examples of such positive requirements could be attendance at alcohol awareness classes or mediation sessions. Section 3 makes further provision about this, dealing with the need for an individual or organisation to be specified who will be responsible for supervising compliance with a positive requirement. Looking at the 2014 Act as a whole, the existence of these powers was clearly intended to be an important component in the civil court's ability to deal with anti-social behaviour and one can well see why. However, as the CJC report makes clear, regrettably in practice these provisions are rarely used in the civil courts because the institutional framework necessary to allow them to be made is absent.

23. By Section 4 of the 2014 Act a power of arrest can be attached to the order, essentially if the court thinks that the anti-social behaviour includes the use or threat of violence or there is a risk of harm to others from the respondent.

24. Section 13 of the 2014 Act provides for a power to exclude a person from their home in cases of violence or risk of harm and section 14 provides for a duty to inform other bodies about the application in certain circumstances. There is no need to consider any other sections of the 2014 Act.

CPR Part 81

25. Breach of an order made under the Part 1 of the 2014 Act is dealt with by proceedings for contempt of court. There are no special rules related to proceedings for breach of

orders under the 2014 Act and the general provisions governing such proceedings apply. They are CPR Part 81.

26. One relevant aspect of Part 81 is rule 81.3(2), which provides that if a contempt application is made in the county court, it shall be determined by a Circuit Judge unless under a rule or practice direction it may be determined by a District Judge. This is relevant because at one time in the Smith appeal (before Mr Khan represented Mr Smith) there was a suggestion, since dropped, that the finding of contempt and the committal order made by a Deputy District Judge (DDJ Althaus) were made without jurisdiction. The answer, which was common ground at the oral hearing, is that Deputy District Judges can make these orders. Practice Direction 2B paragraph 8.1(c)(v) provides that orders under Part 1 of the 2014 are one of the class of applications for injunctions which will be allocated to a District Judge (which includes a Deputy District Judge - see PD 2B para 1.3(b) and s 5 (1)(b) of the County Courts Act 1984). As a result the effect of paragraph 8.3 (a) of PD2B is that committal proceedings relating to an order made under Part 1 of the 2014 may also be allocated to a District Judge (and Deputy District Judge).

27. CPR r81.4(2)(i) and (j) reflect the importance of legal representation for respondents to committal proceedings. They are entitled to legal representation via non-means-tested legal aid if they want it and there is an obligation on the court to ensure that this is made available (***Re O (Committal): Legal Representation*** [2019] 4 WLR 140 at para 2). This entitlement applies as much in the context of breaches of orders under the 2014 Act as any other breaches of orders made by the civil courts. Lack of legal representation for a defendant in committal proceedings represents a serious procedural flaw (***Brown v Haringey LBC*** [2017] 1 WLR 542).

28. Another relevant aspect of Part 81 is rule 81.8, which as follows:

> **Hearings and judgments in contempt proceedings**
>
> 81.8
>
> (1) In accordance with rule 39.2, all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs.
>
> (2) Advocates and the judge shall appear robed in all hearings of contempt proceedings, whether or not the court sits in public.
>
> (3) Before deciding to sit in private for all or part of the hearing, the court shall notify the national print and broadcast media, via the Press Association.
>
> (4) The court shall consider any submissions from the parties or media organisations before deciding whether and if so to what extent the hearing should be in private.
>
> (5) If the court decides to sit in private it shall, before doing so, sit in public to give a reasoned public judgment setting out why it is doing so.

> (6) At the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.
>
> (7) The court shall inform the defendant of the right to appeal without permission, the time limit for appealing and the court before which any appeal must be brought.
>
> (8) The court shall be responsible for ensuring that where a sentence of imprisonment (immediate or suspended) is passed in contempt proceedings under this Part, that judgment is transcribed and published on the website of the judiciary of England and Wales.

29. Sub-paragraph (8) of this rule 81.8 is shown in its current form, as a result of a recent amendment. The change from the previous form of r81.8(8) does not matter because all three of the cases under consideration involved a sentence of imprisonment. A submission made in Mr Smith's case, under the first ground of that appeal, was that the purpose of the requirement for transcription and publication in sub-paragraph (8) was to facilitate legal advice relating to appeals by defendants by in effect obviating the need for the appellant to engage the process of obtaining their own transcript of the judge's oral reasons, which would be relevant to an appeal and to the formulation of any grounds of appeal. The ground of appeal itself is addressed below but it is convenient to address the purpose of r81.8(8) at this stage. It is clear from the scheme of r81.8 as a whole that in fact the primary purpose of the transcription and publication requirement in sub-paragraph (8) is to ensure open justice. No temporal requirement is provided for in the rules. Nevertheless the court must plainly undertake its responsibility in a timely fashion, and take heed of a request from a defendant wishing to appeal; but the submission that supporting appeals is the purpose of this provision is not correct.

30. Section 13 of the Administration of Justice Act 1960 is relevant to appeals in cases of contempt of court. Its effect was considered by the Court of Appeal in ***Barnet LBC v Hurst*** [2003] 1 WLR 722. Two essential points emerge, neither of which were disputed in these appeals. First, no permission is required for an appeal from order in which a party is committed to prison (this is reflected in r81.8(7) above). Second, when a committal order is made by a District Judge (including a Deputy District Judge) there are two possible routes of appeal. One is an appeal within the County Court a Circuit Judge (via PD 52A and The Access to Justice Act 1999 (Destination of Appeals) Order 2016 (SI 2106 No. 917)) and the other is to the Court of Appeal under s13(2)(b) of the Administration of Justice Act 1960. As the court said in ***Barnet***, the normal route of appeal for these matters will be to a Circuit Judge. As was done in two of the cases before us, if the Circuit Judge thinks the matter ought to be transferred to the Court of Appeal, there is power to do so under CPR r52.23.

Guidance on sentencing for contempt of court

31. In ***Hale v Tanner*** [2000] 1 WLR 2377 (Court of Appeal) Hale LJ (as she then was), with whom Swinton Thomas LJ and Sir Christopher Slade agreed, addressed contempt in the context of the Family Law Act 1996, with Hale LJ noting a sense among

practitioners and the judiciary that there was a dearth of guidance on sentencing for contempt of court.

32. The judge took care to distinguish between the principles relating to sentencing in ordinary criminal cases and those applicable to sentencing for contempt. Although ***Hale v Tanner*** was a family case, this distinction is just as relevant to contempt in the context of breaches of orders made by the civil courts. There are a number reasons for the distinction. One (noted in ***Hale v Tanner***) is because the circumstances surrounding contempt cases are much more various. Another is because, by comparison with the range of sentencing options in a criminal court, the powers of the civil court are much more limited. As the CJC report points out, an important difference is the absence of a power in the civil court to impose a community sentence.

33. A key difference is that the objectives underlying penalties for contempt are different from those in crime, at least in the sense of the relative significance of punishment as compared to ensuring future compliance with the order. We refer to paragraph 8 of the judgment of Coulson LJ in ***Breen v Esso Petroleum*** [2022] EWCA Civ 1405 with which we agree. This places the emphasis in civil contempt case on the importance of the objective of ensuring future compliance. We refer also to the very recent ***Cuciurean v Secretary of State for Transport*** [2022] EWCA 1519 (17 November 2022) and the judgment of Edis LJ at paragraphs 103-108 which also highlights ***Breen*** and draws attention to the fact that the statutory purposes of criminal sentencing established by section 57 of the Sentencing Act 2020 do not apply in the contempt jurisdiction (compare paragraph 38 below to s57(2)).

34. It follows that the passage in the CJC Report at paragraph 383 which may have been derived from the Sentencing Council guidelines, and could be understood as putting the objective of punishment first in the order of priority, ahead of ensuring compliance, is not right. Moreover the parts of the CJC Report (e.g. Annex 1 first paragraph) which propose that judges undertaking the task of sentencing for contempt regard as relevant the guidance produced by the Sentencing Council, must be treated with care.

35. In ***Hale v Tanner***, Hale LJ went ahead to make ten general points, all of which remain applicable to civil cases, with suitable modifications of examples given a family context. We will not set them out here because there are differences between that context and the present one, but we have adopted the same principles in what follows.

36. In the three sentencing decisions in these appeals the judges each made reference to the 2018 Sentencing Guidelines issued by the Sentencing Council which relate to breach of a Criminal Behaviour Order. This is understandable in the absence of any other material, given the encouragement to do so in the CJC Report itself, and also given the reference in ***Amicus v Thorley*** [2012] EWCA Civ 817 to an older set of Sentencing Council guidelines (see below). However for the reasons just given in paragraphs 32 - 34 above, save in special circumstances (e.g. when the breach itself is a criminal offence), the current Sentencing Council guidelines can only be relevant in the very broadest and generalised sense. The maximum penalty available to the civil court is far shorter than that for a criminal breach of a criminal behaviour order, which is 5 years. The differences between the two systems are great enough that as a general rule, if a sentence contemplated in a civil court was one which was the same or more severe than what would be derived from the Sentencing Council guidelines, it is likely to be wrong.

37. In ***Amicus v Thorley*** the Court of Appeal encouraged the use of the then current Sentencing Council guidelines dated December 2008. Those guidelines, which are different from the current ones, are no longer applicable and that is a sufficient distinction for present purposes. It is also notable that the court there did not have the benefit of adversarial argument, which might have highlighted the major differences between the two systems.

38. There is nevertheless help which can be given to assist judges faced with the task of sentencing for breach of an ASBI. The fact that all three judges used the Sentencing Council guidelines is a strong indication that judges faced with this task would benefit from some assistance. Notably at p2380 D-E, the court in ***Hale v Tanner*** declined to give guidance as to the length of sentences to be contemplated for particular types of breach because the information normally made available to support such guidance was not available on that appeal. This court is in a different position from the court in that case because the CJC Report has already undertaken the work in the ASBI context which was not available in ***Hale v Tanner***.

39. We can start with the objectives of sentencing for breach of an order under Part I of the 2014 Act. As these orders are injunctions made by a civil court, the objectives in sentencing for breach are the ones applicable to civil contempt, namely (in this order):

    i) Ensuring future compliance with the order;
    ii) Punishment; and
    iii) Rehabilitation.

40. For the same reason, that this is concerned with civil contempt, the five options available to the court when dealing with a contemnor are:

    i) An immediate order for committal to prison.
    ii) A suspended order for committal to prison, with conditions.
    iii) Adjourning the consideration of a penalty.
    iv) A fine.
    v) No order.

41. Suspension and adjournment may also provide an occasion for amendments (if appropriate) to the injunction itself, as wells an opportunity to impose a variety of conditions, perhaps including a positive requirement.

42. The maximum term that can be imposed is 2 years' imprisonment (s14 Contempt of Court Act 1981). One half of the custodial term will be served in prison before automatic release (s258 Criminal Justice Act 2003). Time spent on remand is not automatically deducted, so, if credit is given for that, consideration should also be given to doubling the period deducted to take s258 CJA 2003 into account.

43. The concept of a custody threshold, as used in criminal sentencing, has application here, bearing in mind that the civil context has its own objectives and range of penalties. Custody should be reserved for the most serious breaches, and for less serious cases where other methods of securing compliance with the order have failed. It is good practice to consider a penalty for each breach found proved, and the terms of imprisonment may be concurrent or consecutive to each other. Nevertheless consideration must also be given to the totality of the penalties imposed. Simply adding

up what may well be appropriate penalties for each individual breach is likely to lead to an excessive total. A custodial sentence should never be imposed if an alternative course is sufficient and appropriate. If the court decides to impose a term of imprisonment, that term should always be the shortest term which will achieve the purpose for which it is being imposed.

Suspension

44. If custody is appropriate, the length of the sentence should be decided without reference to whether or not it is to be suspended.

45. It has been observed that suspension is usually the first way of attempting to secure compliance with the underlying order (***Hale v Tanner*** (p2381 D)). However, as was done in the case of Ms Hopkins, another first option in many cases will be to adjourn the consideration of a sentence. The court can use this as an opportunity to speak directly to the contemnor about their behaviour. An indication of what sentence would have been imposed if the matter had not been adjourned is likely to be appropriate, together with a clear statement of what the consequences of good or bad conduct in the intervening period will be. The clarity of a statement about consequences is vital and it is important for judges to avoid making representations they did not intend to make. The best approach would be to include an appropriate recital in the order. If a sentence is adjourned and there is no evidence of breaches of the order or any other relevant bad conduct in the interim, the ultimate sentence should usually be a lesser sentence than would be imposed if the case had not been adjourned. In some cases the court may conclude that a fine will be sufficient. In the most minor cases the court may decide that the impact of the proceedings is likely to achieve the purposes of the contempt jurisdiction, and that it may be appropriate to make no order, save for the finding of breach. All of these means of disposal will mean that any future breach of the order will be treated as substantially more serious.

Harm and culpability

46. The approach in crime of giving distinct consideration to the degree of harm and the degree of culpability also has application here, again bearing in mind the civil context. The CJC Report (Annex 1) proposes a scheme based on the three levels each of culpability and harm, closely modelled on the Sentencing Council's scheme for breaches of Criminal Behaviour Orders, with suitable adjustments. The CJC's proposed scheme is a valuable tool for judges to use, always bearing in mind that sentencing is highly fact sensitive and the facts will vary widely. It also bears emphasis that the proposed scheme does not have the authority of guidelines produced by a statutory body like the Sentencing Council.

47. The three levels of culpability are:

> A High culpability; very serious breach or persistent serious breaches
>
> B Deliberate breach falling between A and C
>
> C Lower culpability; Minor breach or breaches

48. The level of harm is determined by weighing up all the factors of the case to determine the harm that was caused or was at risk of being caused by the breach or breaches. In assessing any risk of harm posed by the breach(es), consideration should be given to the facts or activity which led to the order being made. The three levels of harm are:

> Category 1 Breach causes very serious harm or distress
>
> Category 2 Cases falling between categories 1 and 3
>
> Category 3 Breach causes little or no harm or distress

49. The analytical approach based on separately identifying culpability and harm allows the court to determine a starting point for the sentence and a range within which the sentence can be adjusted taking into account additional elements which increase or decrease the seriousness of what has happened or amount to personal mitigation. It is impossible to identify all the factors of this kind which might apply. Examples of factors increasing seriousness include a history of disobedience and the particular vulnerability of any victim of the behaviour concerned. Persistent breaches of the injunction are likely to amount to an important aggravating factor. Examples of mitigating factors include genuine remorse, ill health, and age or lack of maturity when it affects the responsibility of the contemnor. An early admission of contempt (together with an appropriate apology) will usually serve as a significant mitigating factor.

50. Reasons for making adjustments from a starting point, whether to increase or decrease, should always be identified and their impact explained, albeit briefly. If the court wishes to go outside the indicative range, cogent reasons should be given to explain why.

51. The Sentencing Council guidelines provide a grid based on the degrees of culpability and harm, with the provisions for the highest degree of culpability and harm a sentence of 2 years custody is the starting point with a category range of 1-4 years. Clearly those sentences are not appropriate in the civil context and the CJC Report has undertaken the task of recalibrating a suitable grid, giving proper account for the fundamental differences in sentencing options available in a civil court. Notably, and unlike the approach which may perhaps have been taken in at least one of the sentencing decisions in this case, the CJC's proposals do not simplistically scale the sentencing options from the Sentencing Council's grid by a factor based on the approximate ratio between the maximum sentence in crime (5 years) as opposed to civil (2 years).

52. It may also be noted that the Sentencing Council grid is simpler than it looks in two ways. Naturally, the severity of the sentence reduces as the degree of culpability and harm reduces; and the grid is also symmetrical, in that the provisions for B1 are the same as for A2, and so on. These two principles, the reduction in severity and the symmetry also make sense in the civil context and, as one would expect, the CJC's proposed grid adopts them. Accordingly if one can start by determining the appropriate sentences (starting point and range) for the highest degree of harm and culpability, category A1, the rest of the entries in the table follow logically.

53. For the highest degree of culpability and harm, category A1, the CJC Report proposes a sentence of 6 months as the starting point with a category range of 8 weeks to 18 months. We agree that those are both appropriate as general guidance. It follows that

the scaling and the arrangement of the remainder of the table also makes sense bearing in mind the range of options available.

54. The CJC's proposals are below:

Harm	**Culpability**		
	A	**B**	**C**
Category 1	*Starting point:* 6 months *Category range:* 8 weeks to 18 months	*Starting point:* 3 months *Category range:* Adjourned consideration to 6 months	*Starting point:* 1 month *Category range:* Adjourned consideration to 3 months
Category 2	*Starting point:* 3 months *Category range:* Adjourned consideration to 6 months	*Starting point:* 1 month *Category range:* Adjourned consideration to 3 months	*Starting point:* Adjourned consideration *Category range:* Adjourned consideration to 1 month
Category 3	*Starting point:* 1 month *Category range:* Adjourned consideration to 3 months	*Starting point:* Adjourned consideration *Category range:* Adjourned consideration to 1 month	*Starting point:* Adjourned consideration *Category range:* No order/fine to two weeks

55. The reference to adjourned consideration of sentence indicates that the table is focussed on the first occasion in which a sentence is to be considered when a contempt has been found.

56. It cannot be over emphasised that the task of sentencing a defendant for breach of orders in contempt of court is a multifactorial exercise of judgment based on the particular facts and circumstances of the case before the judge. Any sentence must be just and proportionate. Nothing in what has been said above is intended to detract from that. However the approach set out above should allow judges to approach the task of sentencing in cases like these in a relatively systematic manner.

57. Finally, it bears repeating that the approach set out above is concerned with breaches of orders under Part 1 of the 2014 Act.

The particular cases

Assessment – Optivo v Hopkins

58. To recap, following Ms Hopkins' admission of one breach and the other alleged breaches being dropped, DJ Coonan decided to adjourn sentencing but indicated that the sentence she would impose if not adjourning would be 28 days suspended for 6 months. When the matter came back about 9 months later, the judge decided that since there was no evidence Ms Hopkins had complied with the injunction in the meantime, the sentence as originally indicated would be imposed.

59. The proposed 28 days suspended sentence had been decided on at the first hearing in the following way. The judge started from the Sentencing Council guidelines, identifying the case as category B2 in terms of culpability and harm, bearing in mind:

> "it is the Defendant's first offence; the time lag between the offence and today; there was no targeting involved; the Defendant admitted the breach; the Defendant is a victim of domestic violence; the Defendant has serious mental health issues"

60. The Sentencing Council guidelines for category B2 have a starting point of 12 weeks custody. The judge took 6 weeks as a starting point. The reason why was not given but it may have been influenced by scaling between the 5 year and 2 year maxima. Bearing in mind the objective of securing compliance and the admission by Ms Hopkins, the judge arrived at the 28 days suspended sentence.

61. Looking at the matter on 29 October, the judge was plainly right to make an order adjourning the sentencing for 6 months. However the sentence indicated as that which would be given if Ms Hopkins was to be sentenced on that day was too severe. B2 was not the appropriate category for this case in terms of culpability and harm. The admission was of a single breach of the order. The remaining allegations were dropped. Ms Hopkins had limited control over what happened, since her partner Mr Kurtner played at least an equal part and, taken on its own, the harm caused was quite minimal. It is only if the admitted breach is treated as part of a course of similar breaching conduct, which had been abandoned by the Claimant, that one can arrive at more than "little harm" (Category 3)

62. Applying the approach we have suggested above, the category would be B3 (at the most on culpability) and the starting point would be to adjourn consideration. On these facts an appropriate indication on the adjournment would have been that if the order was not breached in the meantime, no order at all might well be the result, whereas if further breaches took place a custodial sentence was likely, which might or might not be suspended.

63. A further problem on 29 October was that nothing clear appears to have been said at that stage about what would or could happen at the restored hearing. We also note that although sentencing was adjourned for 6 months, in fact the hearing did not take place until 9 months afterwards. That was unfortunate. The restored hearing ought to have taken place, if at all possible, as close to 6 months after the order as possible.

64. At the restored hearing the burden of proof did not rest on the defendant. The judge should have held that there was no evidence of further breach or any other aggravating factor. It was wrong to approach the matter by holding that since there was no evidence of compliance, the very same sentence as had been indicated before would be imposed.

65. Even assuming that 28 days suspended had been an appropriate sentence to have given on 29 October, the right approach in those circumstances ought to have been that since there was no evidence of breach, or any other aggravating factor, then the sentence imposed at the restored hearing should be less severe than had been indicated the first time, such as a suspended sentence of 14 days custody or no order at all.

66. We will allow the appeal against the sentence of 28 days suspended and replace it with no order.

Assessment – Network Homes v Smith

67. The first ground of the appeal was that the judgment had not been transcribed and placed on the judiciary website at the proper time, contrary to CPR r81.8(8). The purpose of the rule, a concern with open justice, only serves to emphasise that judgments of this kind must be transcribed and published. HMCTS has the task of producing a transcript of an oral judgment for the judge to approve but the judge giving the judgment also bears a responsibility to ensure that the court staff are aware of the judgment after it has been given, so that they can take the appropriate steps.

68. However we have been told that the problem in this case was a failure of the audio system. While understandable as a cause of delay, it is not a good reason for not producing and publishing at least a note of the sentence. In fact in many cases, as was done here, an approved note of the judgment can be produced with the assistance of the representatives present at the hearing.

69. However while a failure to transcribe and publish a judgment of this kind is a serious irregularity, it does not justify allowing an appeal against the sentence imposed by the court.

70. The second ground is the submission that the judge erred in not considering a possession order against the defendant as an alternative to committal. The context for this submission is that s84A of the Housing Act 1985 provides for anti-social behaviour to be an absolute ground for possession, on an application by a landlord and subject to certain conditions. It is submitted that the judge erred therefore in not considering possession as an alternative to a custodial sentence. However an order for possession is not simply another penalty (along with a custodial sentence or a fine) which the court can consider in the context of sentencing for contempt on an application under Part 81. It is a particular remedy available in particular circumstances under the Housing Act. Since no application was made based on the provisions of the Housing Act, (it being accepted that there were no possession proceedings before the judge), the judge cannot be faulted for not taking it into account. Such an application would have been a possession claim under CPR Part 55 and would have to have been brought in that way. It was not.

71. The third ground of appeal related to legal aid. To recap, the ground is that the judge was wrong to determine the issue of liability on the committal application without determining whether Mr Smith was eligible to apply for legal aid. The simple answer to this is that Mr Smith was represented throughout the trial by solicitors and counsel. Therefore the fact he was or may have been eligible to legal aid at that stage is irrelevant because he had legal representation for the committal hearing. That is sufficient to dispose of this ground of appeal.

72. The judge's order was designed to give the defendant the possibility of obtaining retrospective legal aid but only to the extent the Legal Aid Agency was prepared to and did grant such legal aid funding. If that happened then the order would also provide costs protection of section 26 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO 2012), but its effect was always conditional on what the Legal Aid Agency decided to do. No good reason has been given why the judge was wrong to make that order. As regards any order to be made by this court, there was no dispute that under s.16 of LASPO 2012, the Court of Appeal, as the relevant authority, can make a representation order covering the appeal: ***Devon County Council v Kirk*** [2017] 4 WLR 36 at paragraph 52 and ***Re O (Committal): Legal Representation*** (above) at paragraph 22 (and see paragraphs 2 and 4).

The sentence imposed on Mr Smith

73. To recap, after finding nine of the ten allegations of noise and nuisance proved, DDJ Althaus sentenced Mr Smith to 12 weeks custody, suspended for 12 months.

74. The judge arrived at this sentence by first categorising the degree of harm and culpability as 2B and there is no suggestion this was an error. The judge then applied the Sentencing Council guidelines directly and derived a starting point of 12 weeks custody. This is the starting point for breach of the criminal CBO and to use it this way is a clear error.

75. The judge then considered additional factual elements, holding (rightly) that there were none which increased the seriousness of the circumstances. In relation to factors point in the other direction the judge said this:

> "I bear in mind and satisfied that since the last hearing, D has taken steps to reduce the risk of committing further breaches of injunction order and the fact that D has misfortune to be disabled and confined to his home where the risk of committing a further offence is somewhat higher than if he were able to get out of his property more often. Those are factors which might be said to decrease seriousness, if it were not for the fact that I am sentencing for all 10 breaches, I might reflect that in a reduction of the period of custody, but have to balance that with fact of 6 separate dates of breach, so the starting points appears to me to also be the right end point, which is how I reach the finding of 12 weeks custody"

76. Aside from the fact that this is based on the wrong starting point of 12 weeks, as reasons for remaining at the starting point (assuming it was right) this cannot be faulted.

77. We will address the argument that there was evidence which the judge ought to have taken into account that Mr Smith's hearing loss was an important factor which had caused or contributed to the noise in the first place, in that he had not appreciated that the noise disturbed his neighbours. The judge was said to have erred in failing to place weight on a letter from Tracey Reilly an NHS prescriber which made this point good. This submission, if pressed, is hopeless. The judge expressly took the letter into account (judgment on breach paragraph 19.6). The letter is not a sound basis for a submission that Mr Smith's hearing difficulties might have contributed to what had

taken place in any event because it simply records, in a list of 12 active problems from which Mr Smith is suffering, that he has a "hearing problem". The submission was not a point made on Mr Smith's behalf by his counsel at the hearing before the judge nor was there any other evidential basis for it if it had been made. Mr Smith's witness statement dated 15 October 2021 does address his disability at paragraph 7, explaining how he uses music to lift his mood given the immense pain in his legs which is caused by his medication. In paragraph 26 of the same judgment the judge did expressly address the fact that Mr Smith had become more conscious of how loud his music was playing and had changed the layout of his room and moved his sound system away from the shared wall between his property and his neighbours. There is no basis for an appeal here.

78. We have asked ourselves whether the 12 week length of the custodial sentence (suspended) was within the range of sentences open to the judge. It is at the very upper limit of the range for category B2 but, as the judge recognised there is no ground for increasing the sentence beyond the starting point at all. We therefore allow this aspect of the appeal and substitute a custodial period of 1 month, suspended for the same period.

Lovett v Wigan – appeal and set aside

79. The first matter to deal with relating to Mr Lovett's case is his application to set aside the order of Andrews LJ made on 6th October 2022. To deal with that involves going into some of the detailed history of this case before it reached HHJ Sephton's judgment made at the July 2022 trial (which is the subject of the main appeal).

80. To recap, the original injunction order was made in 2015. Mr Lovett does not accept it was or remains rightly made and has sought to challenge it. One of his reasons for doing so is based on the submission that, contrary to the way the matter has been dealt with up to now, the only remedy open to a local authority in the face of allegations of noise nuisance, such as are made in this case, was to issue an enforcement notice under the Environmental Protection Act 1990 and not to seek an order under the 2014 Act. He also contends that paragraph 5 of the injunction in its current form, which is the term in the order which prohibits Mr Lovett from being in his home overnight, is unlawful. Paragraph 5 of the order is significant in the present appeal since it was the only term of the order which the judge found Mr Lovett to have breached (on multiple occasions). Mr Lovett contends that paragraph 5 is an infringement of his Article 8 and Art 1 First Protocol rights enshrined in the ECHR and that the injunction amounts to false imprisonment and an unlawful punishment. Mr Lovett also argues that his Art 6 rights are infringed because he has no right of appeal from the order.

81. By an order of Recorder McLoughlin on 23 July 2020 Mr Lovett was committed to prison for previous breaches of the injunction. On 30 April 2021 Knowles J sitting in the High Court in Manchester heard an appeal against that order and dismissed it. There is no appeal before the Court of Appeal relating to the 23 July 2020 order. No appeal against Knowles J's order was filed nor did Knowles J transfer the appeal before him to the Court of Appeal.

82. On 4 October 2021 Mr Lovett applied to discharge the injunction. The application was based solely on a challenge to the validity of the order. It was not an application to set aside or vary the order based on any change in circumstances.

83. In January 2022 a hearing took place to address the fifth application to commit Mr Lovett for contempt for breaches of the injunction. On 27 January 2022 Recorder McLoughlin found 36 breaches by Mr Lovett and adjourned the hearing to deal with penalties. On 28 April 2022 Recorder McLoughlin dealt with Mr Lovett's 4 October 2021 application and refused it. The judge also decided on the penalties for the breaches found on 27 January (having also refused an application to set aside those findings), and sentenced Mr Lovett to prison for 15 months.

84. Mr Lovett filed a Notice of Appeal from the orders of 28 April 2022, which sought to appeal the committal order and also to appeal the injunction itself. By an order made on 16 May 2022 Andrews LJ struck out Mr Lovett's appeal against the injunction as an abuse of process and made an unless order, requiring Mr Lovett to file properly particularised grounds of appeal against the order for committal within a set period. No such grounds were filed and so the appeal against the committal stands dismissed. Mr Lovett applied to set aside the order of Andrews LJ, but Arnold LJ refused that application as wholly without merit by an order made on 10 June 2022.

85. In the meantime on 11 February and 1 April 2022, two further contempt applications were brought. The seventh application raised 14 allegations of breach between 29 October 2021 to 8 February 2022 and the eighth application made 10 allegations of breach from 11 February 2022 to 27 March 2022. Directions were given for them to be tried in Manchester County Court, and that is the trial in July 2022 which took place before HHJ Sephton. As explained already Mr Lovett was sentenced to 30 weeks custody to be served concurrently with the sentence made by Recorder McLoughlin.

86. Mr Lovett filed the Notice of Appeal from the order of HHJ Sephton of 13 July 2022 on 8 August 2022. That is the Notice of Appeal relevant to this appeal. By an order made on 6 October 2022 Andrews LJ in summary (i) struck out as an abuse of process the appeal against the injunction order, and any other material advanced by Mr Lovett on that basis, (ii) struck out two of Mr Lovett's five grounds of appeal, as vexatious and/or an abuse of process, and (iii) gave directions for the hearing of the appeal on the remaining three grounds. The third direction is what led to the hearing before this court.

87. Mr Lovett applies to set aside the order of 6 October 2022. The first order made on 6 October, striking out the appeal insofar as it purported to be a challenge to the injunction order itself, was plainly right. Mr Lovett has sought unsuccessfully to attack the validity of injunction on previous occasions and there is no basis for doing so in this appeal.

88. The second order struck out grounds 3 and 5 of the appeal. These are as follows:

> 3. That the judge relied on an unlawful clause (No. 5) in the injunction for breaches of the injunction. See judgment paras 19 and 20 underlined. Skeleton Argument Para 3 refers.
>
> 5. That the judge failed to consider or ignored whether nay perverting the course of justice element was attempted by or proven against the claimant for the trial. See judgment paras 11 and 14 underlined plus grounds 1, 2 and 3 above. Skeleton argument para. 5 refers.

89. In ground 3 the so called unlawful clause is paragraph 5, i.e. the term in the injunction which prohibits Mr Lovett from being in his home overnight. Accordingly this ground is, as Andrews LJ identified, a collateral attack on the earlier decisions ruling out Mr Lovett's attack on the validity of that injunction. Moreover, as Andrew LJ also noted, it is not open to the appellant to challenge the validity of the underlying order of which he was found to be in breach in an appeal against his committal for such a breach. This ground is an abuse of process and the application to set aside Andrew LJs order to that effect is hopeless.

90. Ground 5 arises from a submission at trial that two witnesses called by the applicant, Mr Gregory and Mrs Young conspired to tell lies about Mr Lovett. As Andrew LJ noted, while HHJ Sephton was critical of some of applicant's evidence, he expressly rejected the submission about conspiracy to lie in the judgment. The relevant passages are paragraphs 10 – 13, as follows:

> "10. I heard from Mr William Gregory who lives next door to Mr Lovett. Mr Gregory produced 34 video recordings to support his evidence. 2 of those recordings were made from his mobile phone from outside Mr Lovatt's home. As to the other 32 recordings, Mr Gregory explained to me that he had installed a CCTV outside his house in June 2021; it overlooks part of No 4. The camera functions continuously. Mr Gregory told me that he had produced to the court all of the recordings in his possession that support the current application to commit. In fact, Mr Gregory did not produce the recordings made by the CCTV; instead, he produced recordings made on his mobile phone of part of the screen on which the CCTV recordings were being displayed. Some of the recordings contained a caption displaying an address different from Mr Gregory's own. Mr Gregory could not explain this; he said that this was technology that was beyond him. He assured me that he had not edited or falsified the recordings. Mr Gregory told me that the CCTV does not record sound, which I find surprising. "
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> 11. Mr Gregory told me that he had heard various occasions on which he said that Mr Lovett had made annoying noise. I am sceptical that Mr Gregory actually heard all of the noise he claims: I suspect that he saw what had been recorded on the video and concluded that a noise had been made. For example, Mr Gregory claims to have heard Mr Lovett making a noise on 13 February 2022 at about 1 am and on 27 February 2022 at about 4 am; he does not explain his Affidavit that he had been woken from sleep (which I would have expected at those hours) or why he was awake at those times. Absent such an explanation, I cannot be sure that his account about hearing these noises is accurate.
>
> 12. I heard from Mrs Denise Young who lives at 1, Wycombe Drive which is immediately behind the rear boundary of Mr Lovett's property. Mrs Young told me, and I accept, that she had made no recording of the noise about which she complained.

> 13. I formed the impression that both Mr Gregory and Mrs Young have developed an antipathy towards Mr Lovett. I have not considered the previous history of this case in any detail, and it may well be that their antipathy is entirely justified. Having regard to the resentment that both these witnesses feel towards Mr Lovatt, I feel sure that if(sic) they have produced all the evidence available relating to Mr Lovett's behaviour in the relevant period. I reject the submission that Mr Gregory and Mrs Young have conspired to tell lies about Mr Lovett. I reject the suggestion that Mr Gregory has edited the CCTV recordings in order to paint an unfair picture of events. Although I consider that it is unsatisfactory that Mr Gregory has made recordings of the recordings rather than present the court with extracts from the original medium on which the CCTV recordings are stored, I accept that they are an accurate illustration of what happened.

91. Given that the point was expressly addressed and rejected by HHJ Sephton, ground 5 is, as Andrews LJ recognised, vexatious. There is therefore no basis to set aside this or any other part of Andrew LJ's order and the set aside application is dismissed.

92. Turning to the appeal itself we start with ground 1 (and in part ground 4). The point here is that some of the breaches relied on in the committal application were alleged to have taken place on dates before the previous application to commit had been made before Recorder McLoughlin on 24 January 2022. Ground 1 characterised the alleged breaches as "legally inadmissible" as a result and in ground 4 Mr Lovett contends that to have considered these grounds was to ignore Mr Lovett's right to a fair trial under Art 6 ECHR. HHJ Sephton clearly understood the timing of these alleged breaches and dealt with whether they should be taken into account before him in paragraph 21. The judge held that in order for the court to refuse to entertain them, Mr Lovett would have to show that the claimant's failure to raise them earlier amounted to an abuse of process. He held that this was not reasonably arguable and so did take those allegations into account. No good reason has been advanced on appeal as to why the judge was wrong to deal with that matter in that way. It was the right course and we dismiss ground 1 (and in part ground 4) of the appeal.

93. Ground 2 is directed to the judge's decision to allow videos to be used which were themselves copies and were "suspect". This is said to show that they could not satisfy the criminal standard of proof. The nature of the video evidence used has been explained in the passages from the judgment quoted above. Paragraph 10 shows that the judge understood that the videos were in fact taken by using a mobile phone to film CCTV video appearing on screen, that the recordings had a caption displaying a different address which Mr Gregory could not explain, and that Mr Gregory had said the videos did not capture sound albeit the judge was surprised about it. Then at paragraph 13 the judge accepted the evidence as accurate despite its shortcomings. We have ourselves viewed all the video footage afresh on this appeal. The judge's finding was one which he was entitled to reach on the material before him. There is nothing in ground 2.

94. The remainder of ground 4 is addressed at paragraph 9 of the judgment in which the judge notes that Mr Lovett's appeal against the injunction itself is long exhausted and also, nevertheless, records Mr Lovett's submission that he has never had the

opportunity to appeal the injunction order. Contrary to ground 4, nothing in paragraph 9 of the judgment impugns Mr Lovett's Article 6 right to a fair trial.

95. That deals with the grounds advance by Mr Lovett in support of his appeal. There was no distinct point taken about the sentence given by HHJ Sephton and no reason in this judgment to consider it further. Mr Lovett's appeal is dismissed.