Neutral Citation Number: [2023] EWCA Civ 1389

Case No: CA-2023-001971

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BIRMINGHAM DISTRICT REGISTRY
HHJ Rawlings (sitting as a High Court Judge)
C90BM045

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before:

LORD JUSTICE NEWEY
LORD JUSTICE COULSON
and
LORD JUSTICE SNOWDEN

- -

Between:

JOHN BRUCE	**Appellant**
- and -	
WYCHAVON DISTRICT COUNCIL	**Respondent**

- -
- -

Ian Rees Phillips (instructed by **Fisher Jones Greenwood LLP**) for the **Appellant**
Jack Smyth (instructed by **Malvern Hills & Wychavon District Councils**) for the **Respondent**

Hearing date: 9 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 24 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

1. Introduction

1. On 9 August 2023, HHJ Rawlings, sitting as a High Court Judge in the Birmingham District Registry ("the judge") found, in the absence of the appellant ("Mr Bruce"), that he was in contempt of court by reference to four separate allegations. The judge adjourned the sentencing hearing to 21 September 2023, and gave Mr Bruce permission to apply to set aside or vary the order of 9 August by providing "full medical evidence to demonstrate that [he] was incapable of attending court today and why he was unable to instruct counsel in the alternative". At the sentencing hearing on 21 September 2023, the judge was invited, but declined, to re-open the order of 9 August 2023. He proceeded to sentence Mr Bruce to 12 months imprisonment for contempt.

2. The appeal against the imposition of a 12-month custodial sentence for contempt of court does not require permission to appeal: see section 13 of the Administration of Justice Act 1960. A more difficult question might have arisen as to whether Mr Bruce required permission to appeal the first part of the judge's order of 21 September, namely his refusal to re-open his order of 9 August. However, since Mr Smyth on behalf of the Council did not object, at the hearing of the appeal this court allowed Mr Rees Phillips to argue that the judge had been wrong not to set aside the earlier order.

3. It is necessary to set out the factual background in some detail. I do that in Section 2 below. I then set out the events surrounding the hearings on 9 August 2023 and 21 September 2023, together with parts of the judge's two judgments (Sections 3 and 4). In Section 5, I identify the issues that arise on this appeal. In Section 6, I deal with Ground 1 of the Appeal, namely the judge's failure to set aside the order of 9 August 2023. In Section 7, I deal with Ground 2 of the appeal, namely the submission that the term of 12 months imprisonment was manifestly excessive. There is a brief summary of my conclusions in Section 8.

2. The Factual Background

4. At all material times, Mr Bruce was the owner of a large former airfield site in the West Midlands ("the Land"). As long ago as December 2014, the Respondent ("the Council") issued two enforcement notices in respect of the Land to Mr Bruce. The first required him to cease the mixed use of the Land by ceasing the components of that mixed use, including operating and storing plant, and the "importing, storing and burning [of] waste materials". Mr Bruce was also required to remove from the Land unauthorised agricultural machinery, hard standings and bunds, and reinstate the land to its former condition, namely grassland.

5. Mr Bruce did not comply with those notices. Accordingly, the Council sought an injunction restraining him from using the Land "otherwise for the purposes of agriculture" and further restrained him from undertaking development unless authorised by the grant of planning permission. Development was as defined by s.55 of the Town and Country Planning Act 1990 ("TCPA"). The Council also sought an order requiring Mr Bruce to comply with the requirements of the two enforcement notices summarised above.

6. The application came before Soole J on 14 March 2016. He heard counsel for both parties and granted the injunction in the terms noted in paragraph 5 above. Mr Bruce was ordered to pay the Council's costs.

7. Subsequently, Mr Bruce repeatedly and persistently failed to comply with the terms of the injunction. Prior to the hearings in August and September 2023, there had been three previous occasions when Mr Bruce was found to have breached the terms of the injunction and consequently to be in contempt of court.

8. On the first occasion, on 4 November 2016, following a two day trial, the judge found him to be in contempt because there were several items of non-agricultural machinery retained on the Land, and he had failed to remove the bunds containing waste material from the Land. The judge rejected Mr Bruce's defence that he had sold the Land to a Mr Gilder; instead, the judge found that both Mr Bruce and Mr Gilder had lied about there being any such sale. In consequence of the contempt, the judge sentenced Mr Bruce to 12 months imprisonment, but he suspended that sentence, provided that Mr Bruce complied with the terms of the injunction.

9. Mr Bruce did not do so, and was brought back before the judge for a second time. On 9 August 2017, after another two day trial, Mr Bruce was found to have breached the injunction because a shredder and plant van and a large pile of waste were present on the Land. The judge could have activated the 12 months suspended sentence. However he did not do so, principally because he accepted Mr Bruce had taken some steps towards cleaning the Land. Instead he sentenced Mr Bruce to an immediate custodial term of 28 days. The suspended sentence of 12 months imprisonment remained live.

10. Mr Bruce still did not comply, so on 24 October 2018, following a third two day trial, he was again found by the judge to have breached the terms of the injunction. On this occasion, the judge did activate the 12 months suspended sentence, and imposed a further 28 days of imprisonment on Mr Bruce. However, Mr Bruce applied for early release from prison on the basis that he promised that he would obey the injunction going forward, and would make strenuous attempts to remove the remaining waste from the Land. The judge ordered his early release on the basis of this promise.

11. It was the Council's case that Mr Bruce comprehensively failed to keep his promise. In consequence, a fourth contempt application was made against him by the Council. The particulars of the contempt were as follows:

(a) *Allegation 1*: The Council and Environmental Agency visited the Land on 3 September 2021. They saw waste being tipped onto the Land.

(b) *Allegation 2*: Also on 3 September 2021, an extensive area of waste, comprising shredded waste and woodchip, was seen on the Land which had not been there at the time of a previous visit on 25 May 2021.

(c) *Allegation 3*: Photographs were taken on 3 September 2021 which showed that waste had been burnt on the Land recently, because the area was still smoking and there was an extensive quantity of ash present.

(d) *Allegation 4*: On 16 November 2022, Council officers saw and photographed additional waste on the Land (comprising building and domestic waste) which had not been there at the time of the previous visit on 3 September 2021.

12. On 9 May 2023, HHJ Kelly set out case management directions in respect of the fourth contempt trial. Mr Bruce did not attend that hearing and was not represented. The judge gave him permission to file and serve any evidence that he wanted to rely on, either to resist the application or in respect of mitigation, by 4pm on 6 June 2023. That order went on to say "if the defendant fails to comply with this direction, it will not affect his entitlement to rely on oral and/or written evidence at trial". The Council was entitled to serve and file any evidence in rebuttal by 4pm on 20 June 2023.

13. The date of the trial was fixed for 27 July 2023 but, due to the unavailability of Mr Smyth, it was moved to 9 August 2023. Mr Rees Phillips immediately emailed the Council's solicitor to say that he was unavailable for a hearing on 9 August. He also requested an extension of time to serve the evidence which Mr Bruce intended to rely on, which request was refused. Mr Rees Phillips indicated that Mr Bruce would make an application to vacate the hearing due to take place on 9 August. However there was no application to adjourn the hearing. Further, Mr Bruce did not serve any evidence in defence of the application for committal, and did not instruct alternative counsel. He apparently said that he would attend the hearing in person.

14. Save for the directions hearing in front of HHJ Kelly, each of the committal trials and their related direction hearings had been heard by the judge. He had also had a formal site visit to the Land. As noted above, each of the three committal trials had taken two days and Mr Bruce had given evidence on oath on each occasion. This meant that, by the start of August 2023, the judge had already spent something like 11 High Court days dealing with Mr Bruce's various contempts of court. The judge therefore had the fullest possible knowledge of the detail of this case.

3. The Hearing on 9 August 2023

15. On 8 August 2023, the day before the hearing, Dr Ella BoSmith, from the Pershore Medical Practice, wrote to the court at the request of Mr Bruce. The letter read:

> "I understand John is due to attend court in the morning. He arrived here acutely unwell with chest pain and difficulty breathing this morning. An ambulance was called and he was conveyed to hospital. At this stage I am unsure of the diagnosis or in fact how long he will be in for and would appreciate you consider this with regards to tomorrows proceedings"

The letter arrived on 9 August and was seen by the judge. In addition, there was an email of the same date confirming that Mr Bruce had been taken to A&E.

16. The letter and the email were the totality of the medical evidence before the judge at the trial on 9 August. The judge concluded that the medical evidence did not support an adjournment of the hearing. In the recital to the order he subsequently made, the judge said:

> "**UPON** the Court deciding that it was inappropriate to adjourn the hearing as (i) there was no application or request for an adjournment (ii) there was no

medical evidence to show that the Defendant was unable to attend the hearing or had, in fact, been admitted to hospital (iii) there was no diagnosis of a medical condition and the symptoms complained of (chest pain and breathing difficulties) appear to be self-reported and (iv) no one has attended on the Defendant's behalf to request an adjournment or provided any evidence to indicate that he was incapable of attending.

UPON the Court finding that it was unlikely that there is a good reason for the Defendant's non-attendance."

17. During his submissions to this court on appeal, Mr Rees Phillips expressly accepted that he could not criticise the judge's decision, taken on 9 August, not to adjourn the fourth committal trial. In my judgment, that concession was rightly made. The medical evidence then available was wholly inadequate to permit an adjournment of a trial that had been fixed for some time.

18. On 9 August, the judge then heard from Mrs McCall and Mr Ash, the two witnesses from the Council. He asked questions of both of them, particularly in respect of the photographs. He then went on to find that all four of the allegations of contempt had been made out. The details were set out in the order.

19. As to the necessary subsequent steps, the judge dealt with them at paragraphs 3-5 of his order as follows:

"3 The Claimant shall send to the Defendant by email a copy of its Solicitor's Note of what was said at the hearing today by 4pm on 11 August 2023.

4 The matter is re-listed for a further hearing at 10.30am on 21 September 2023 before HHJ Rawlings with a time estimate of 2 hours. At this hearing, the Court shall proceed to sentence the Defendant and deal with the consequential matters set out at para 10 of the Claimant's Skeleton Argument. **The Defendant must attend this hearing. If he fails to do so, the Court may proceed to fix a penalty in his absence and may issue a Bench Warrant for his arrest.** If the Defendant wishes (but is not obliged) to rely upon any evidence in mitigation or provided evidence that he has purged his contempt, he should bring this to Court.

5 Permission to the Defendant to apply to set aside or vary this order within 7 days of service of it. *Any such application must provide full medical evidence to demonstrate that the Defendant was incapable of attending Court today and why he was unable to instruct Counsel in the alternative*. If an application is issued, it will be determined at the hearing listed at paragraph 4. If unsuccessful, the Court shall proceed to sentence." (My emphasis in italics)

4. The Hearing on 21 September 2023

20. Mr Bruce made the application to set aside the order within the time period stipulated by the judge. By the time of the hearing before the judge on 21 September, further evidence was available in relation to his medical condition on 9 August. That evidence was contained in Mr Bruce's witness statement dated 16 August 2023, and exhibits. He described various symptoms in the week before the hearing on 9 August 2023; a visit

to his doctor on 8 August and a diagnosis of what he said was "very high blood pressure"; a transfer to the A&E department via ambulance; a diagnosis at the hospital of suspected angina; and a subsequent appointment at the rapid chest pain clinic on 9 October 2023.

21. The documents exhibited to his statement told a rather less colourful story. The notes made at the Alexandra Hospital on 8 August show that the "suspected diagnosis" was "angina (stable)". The ECG was "slightly hypertensive". Mr Bruce was not kept at the hospital after being seen by the doctor in A&E at 4pm on 8 August, and he was not given any medication. The reference to the chest pain review clinic was made on 10 August 2023, for a telephone appointment on 9 October 2023.

22. There was also a sick note completed by a GP on 9 August. It appears that this followed an appointment on that day, which means that Mr Bruce chose to go and see a doctor rather than contact the court, let alone actually come to court for the trial. The condition identified by the doctor was "raised blood pressure" (not "very high" as Mr Bruce described it). The doctor ticked the box that "you are not fit for work". The explanation for that wording on the sick note itself was that "your health condition means that you may not be able to work for the period shown." The period shown was from 9 August to 23 August 2023.

23. I should note (because it was a matter to which the judge attached some importance) that, on 21 September, there was still no separate witness statement from Mr Bruce addressing the four allegations of contempt, and endeavouring to set out any sort of defence. That was despite the fact that he had said in his statement of 16 August that he intended to provide such a statement "in advance of the hearing on 21 September".

24. At the hearing on 21 September, Mr Rees Phillips argued on behalf of Mr Bruce that, in consequence of the further medical evidence, the judge should set aside his order of 9 August 2023 and permit a re-trial of the four allegations. The judge considered the further evidence, but declined to set aside the order. His reasons were set out orally in a lengthy passage of the transcript between pages 13 and 17. In particular:

(a) He emphasised the absence of any evidence from a doctor that, on the basis of what the doctor had seen, Mr Bruce was unfit to attend trial on 9 August.

(b) He noted that Mr Bruce had not arranged any alternative counsel to represent him at the hearing on 9 August, despite the fact that he knew, by no later than 4 July, that Mr Rees Phillips was unable to attend that hearing.

(c) He also noted the absence of any completed and signed witness statement from Mr Bruce disputing the charges of contempt.

25. In summary, the judge said:

> "In those circumstances I conclude that Mr Bruce had taken no material step to dispute the allegations that he had breached the injunction in advance of the hearing on 9 August. And that he knew that he ought to have done so, if he wished to dispute the matter, that the evidence of him being unfit for trial due to a medical condition is almost exclusively based upon Mr Bruce having reported his symptoms to his GP and then to the hospital. And it is not

> substantially supported by either the evidence of the doctor, his GP, or the doctor at the hospital, which is largely, simply, referring to the symptoms that are reported by Mr Bruce.
>
> And in those circumstances he has not made out anywhere near a case that he was unfit due to his medical condition to attend court on 9 August."

26. The judge therefore refused to set aside his previous findings of contempt, and then went on to consider the question of sanction. That led to an *ex-tempore* judgment that was subsequently transcribed and approved by the judge. Having set out the lengthy background, the judge summarised the four allegations. At paragraphs 12-15, the judge noted the various points that Mr Rees Phillips put forward by way of mitigation. At paragraph 16, he identified the aggravating features that Mr Smyth had identified. Throughout this process, the judge treated allegation 4 separately because, as he noted at paragraph 15, Mr Bruce accepted that allegation. At paragraph 18, the judge said that, regardless of allegations 1, 2 and 3, he would have imposed the same sanction if he had been considering allegation 4 alone. That was because the judge regarded it as the most serious. Mr Rees Phillips, in making his submissions to this court, agreed that allegation 4 was the most serious of the four allegations.

27. At paragraph 19, the judge accepted that, given that the Land was now in the possession of a receiver, following the making of a Proceeds of Crime Act ("POCA") order against Mr Bruce, the purpose of any sanction that he imposed could not include an attempt to ensure future compliance: that ship had sailed. Instead, the sanction was to be imposed to punish Mr Bruce for breaching the injunction (again), and to deter others from breaching injunctions or court orders.

28. The judge identified the elements of allegations 1, 2 and 3 which he found proved and why, and then dealt with allegation 4. At paragraph 21, he said this about allegation 4:

> "21. Mr Bruce admitted allegation 4. He could hardly have done otherwise. The photographs at pages 108-111 of the bundle clearly show mixed rubbish, which, on any view, could not have been on the site for any length of time, it looks new. Mr Bruce was unwilling to divulge the name of the disgruntled creditor that he suggested persuaded Mr Bruce to allow him to dump that waste onto the Land, absent that information, I am afraid that I do not accept that the circumstances which Mr Bruce suggests, through counsel today, caused that rubbish to be dumped upon the Land are, as Mr Phillips suggests, a disgruntled creditor persuading Mr Bruce to allow that waste to be dumped on the Land. Nor do I accept Mr Bruce's assertion (again through counsel today) that this new waste was removed shortly after it was seen during the visit on 16 November 2022, something which the claimant does not accept, and which Mr Bruce, really, produced no convincing evidence of, other than tickets, produced today that may show waste either being removed from or delivered to the Land – it is unclear which – at the end of 2022 or the beginning of 2023. So in summary, I do not consider that there are any material points in mitigation of the breaches that I have found."

29. At paragraphs 22 and 23, the judge identified the most significant aggravating features of the offences. He said:

> "22. The most significant aggravating features are: (a) the three previous findings of contempt against Mr Bruce; (b) the opportunity that Mr Bruce was given on 4 November 2016 to avoid prison by complying with the injunction and thereby avoiding the 12 month suspended sentence imposed on that occasion from being activated; (c) the chance that Mr Bruce was given, on 9 August 2017, when I did not impose the 12 month suspended sentence, notwithstanding that I found that he had breached the injunction again, instead I imposed a 28 day sentence, leaving the 12 month suspended; and (d) the promise Mr Bruce made in early-2019, when I released him from custody early, by me, that he would immediately start removing waste from his Land and abide by the injunction going forward.
>
> 23. Far, however, from removing the waste from the Land promptly after being released in early 2019, it appears that Mr Bruce delayed doing so until at least 2021, and has, according to my findings imported new waste onto the Land, between 25 May 2021 and 3 September 2021, including on 3 September 2021 itself, burnt waste on Land in or around September 6 2021, and again, brought new waste onto the site between 3 September 2021 and 16 November 2022."

30. So when it came to sanction, the judge imposed a sentence of imprisonment of 12 months. The core of his reasoning was set out at paragraphs 24 and 25 as follows:

> "24. For such continuous and flagrant breaches of the injunction, in my judgment, only a custodial sentence can be appropriate to meet the objectives that I have outlined, namely, to punish Mr Bruce for his breach of the injunction, and also to deter others from breaching court orders and injunctions. I consider that a member of the general public would be surprised if someone who had breached an injunction three times, been sentenced to a 12 month suspended sentence on the first occasion, on the second occasion, instead of having that 12 month sentence activated on the second occasion, been sentenced instead to 28 days, with the 12 months suspended sentence being left in place, and on the third occasion, the 12 month suspended sentence being activated, he was then released early, on a promise to abide by the injunction should be spared from a custodial sentence on the fourth occasion. I think that that illustrates why only a custodial sentence on this occasion will do.
>
> 25. The sentence that I will impose upon Mr Bruce is what I consider to be the minimum sentence required in order to meet the objectives of punishing Mr Bruce for what he has done, and deterring others from breaching court orders and injunctions. The sentence I impose in those circumstances is 12 months in prison. I say that if the only breach found by me to have occurred was the admitted allegation 4 (rather than allegations 1, 2, 3 and 4) the sentence would have been no different, and the reason for that is because the reasons I have given for imposing a custodial sentence, because all of the reasons connected with breaches found on previous occasions and the opportunities that Mr Bruce has had to comply with the injunction remain good, whether there were one breach of the injunction or the four breaches that I have found proved"

5. The Issues on Appeal

31. Ground 1 of the appeal is that the judge was wrong not to set aside the order of 9 August. As we will see, that gives rise to two sub-issues: whether Mr Bruce demonstrated a good reason for his absence on 9 August, and whether, if the contempt allegations were to be re-opened, Mr Bruce had a reasonable prospect of successfully refuting them.

32. Ground 2 of the Appeal is that the sentence was manifestly excessive. Mr Rees Phillips' primary point was that this injunction arose originally out of two planning enforcement notices and that, pursuant to s.179(8) of the TCPA, the sanction for breach of such enforcement notices is a fine. His argument, therefore, was that a prison sentence imposed for essentially the same breach was manifestly excessive. I take each Ground in turn.

6. Ground 1: The Failure to Set Aside

6.1 The Relevant Legal Framework

33. Mr Rees Phillips properly accepted that the judge's decision not to set aside his earlier order was a case management decision. Accordingly, as he also acknowledged, this meant that he faced a high hurdle in persuading this court to reverse that decision. That will only happen if this court concluded that the judge was "plainly wrong, in the sense of being outside the generous ambit where reasonable decision makers may disagree": see *Global Torch Ltd v Apex Global Management Ltd (No.2)* [2014] UK SC 64, [2014] 1 WLR 4495 at page 4500. That was the test identified by Lord Neuberger, approving the test previously stated by Lewison LJ in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743 at paragraph 51.

34. CPR 39.3 is concerned with a failure to attend trial. The relevant part of the rule is at 39.3(3)-(5) which provides as follows:

> "**39.3**
> (3) Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
> (4) An application under paragraph (2) or paragraph (3) must be supported by evidence.
> (5) Where an application is made under paragraph (2) or (3) by a party who failed to attend the trial, the court may grant the application only if the applicant –
> (a) acted promptly when he found out that the court had exercised its power to strike out or to enter judgment or make an order against him;
> (b) had a good reason for not attending the trial; and
> (c) has a reasonable prospect of success at the trial."

A party seeking to set aside a regular judgment of the court must satisfy all three requirements of promptness, good reason, and a reasonable prospect of success: see *Mabrouk v Murray* [2022] EWCA Civ 960.

35. In the present case promptness is not in issue, since the application to set aside was made 7 days after the order of 9 August, and in accordance with the time period stipulated in that order.

36. There is a good deal of authority concerned with what may constitute adequate medical evidence, in circumstances where that is proffered as the good reason for the non-attendance. The most useful guidance is set out by Norris J in *Levy v Ellis-Carr* [2012] EWHC 63 (Ch) at [36], where he said:

> "…Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), *should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process*, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)." (My emphasis)

That approach was expressly endorsed at [26] of the judgment of Lewison LJ in the subsequent case of *Forresters Ketley v Brent* [2012] EWCA Civ 324.

6.2 Good Reason

37. The judge had already found that there was no good reason for Mr Bruce's absence from court on 9 August 2023, a decision which Mr Rees Phillips accepted he could not criticise. So the issue on 21 September 2023 was whether the additional medical evidence made it appropriate to reconsider that conclusion. The judge said that the further evidence did not justify setting aside the order. For the reasons set out below, I am in no doubt that that was a decision which the judge was quite entitled to reach. It was well within the generous ambit where reasonable decision makers may disagree: indeed, for what it may be worth, I consider it to have been the right decision.

38. The glaring omission from the medical evidence put forward by Mr Bruce at the hearing on 21 September was the absence of any evidence that met the test in *Ellis-Carr*. What was required was evidence from a medical practitioner which identified the features of Mr Bruce's condition which, in that medical practitioner's opinion, prevented his participation in the trial on 9 August. There was no such evidence. It is accepted that there was no such evidence before the judge on 9 August 2023. But neither was there any such evidence at the hearing on 21 September. In essence, the further medical evidence merely demonstrated that Mr Bruce had (suspected) stable angina, and slightly raised blood pressure. Those are very common conditions. There is nothing to indicate that they prevented his participation in the trial on 9 August, let alone was there an opinion of a doctor to that effect.

39. Furthermore, it is not as if the particular requirements of the test in *Ellis-Carr* were a mystery to Mr Bruce as a litigant in person. That was because the judge's order expressly spelled out what it was he had to do in order to seek to set aside the order of 9 August. Paragraph 5 of the order required him to provide "full medical evidence to demonstrate that [he] was incapable of attending court today". But there was no medical evidence which made any attempt to link the conditions noted in the documents - i.e. the stable angina and the slightly raised blood pressure - to Mr Bruce's alleged inability to attend the trial.

40. Mr Rees Phillips suggested that this was an overly-pedantic approach to the necessary medical evidence, submitting that there was no magic in any particular form of words, and that the court had to consider the entirety of the medical evidence in the round. But in my view, that submission misses the point. Judges are not doctors. If a party wishes to set aside an order because he or she had a medical condition which prevented them from attending court, then they are obliged to provide medical evidence which says that in unambiguous terms. It is not appropriate or fair to expect a judge to draw inferences from evidence which – whether deliberately or otherwise – fails to address that critical point.

41. I should add one further observation. Although these cases will always turn on their facts, I am aware that, all too often, parties seek to justify their non-attendance at court by reference to the sort of "tick box" sick note used here. The first difficulty with such documents is that they do not indicate whether the party seeking to rely on them was even seen by a doctor. If they were not seen, they are simply the doctor's record of the party's self-reported condition, and therefore add little. And although, in the present case, Mr Bruce was seen by a GP, the sick note simply said that he was not fit for work (it made no mention of attendance at court) and explained that that meant that he "*may* not be able to work", which also does not advance matters very far.

42. Furthermore, particularly post-pandemic, the potential difference between being unfit for work and being unfit to attend court, is of some significance, given the wide use of live streaming and CVP in most court centres. It is now much easier for parties to attend court remotely, and for their evidence to be given, or their submissions heard, over a live link. In this way, even a party with a medical condition may, depending on the symptoms, be expected to participate remotely in a court hearing.

43. For those reasons, therefore, a party in the position of Mr Bruce must appreciate that a pro-forma sick note of this type does not generally comply with the *Ellis-Carr* guidance.

44. There is a further factor here which, in my judgment, the judge properly took into account when refusing to re-open his order of 9 August. That was the fact that, weeks before, Mr Bruce had indicated that he was going to seek an adjournment because of the non-availability of Mr Rees Phillips, and also put in his own written evidence (for which he needed an extension). He never made an application to adjourn, or provided any written evidence. The judge was therefore entitled to scrutinise the medical evidence with a wary eye, in the knowledge that it was being advanced to justify an after-the-event adjournment of a hearing which Mr Bruce had previously said he needed, but had never sought, and which would avoid the consequences of a hearing (on 9 August) for which Mr Bruce had provided no evidence in defence of the allegations at all.

45. For these reasons, I am in no doubt that the judge was entitled to conclude on 21 September that the medical evidence did not provide a good reason for Mr Bruce's non-attendance on 9 August 2023. That was a case management decision which the judge was entitled to reach, and with which this court will not interfere. On that basis alone, therefore, the first Ground of Appeal must fail.

6.3 Reasonable Prospect of Success

46. In the light of my conclusions in Section 6.2 above, it is unnecessary to say very much about the other limb of the r.39.3(5) test which is in issue, namely whether Mr Bruce would have had a reasonable prospect of success at a reopened trial. But I should say, for the reasons briefly outlined below, that I was not persuaded that he had met that element of the test either.

47. The first reason for that view is that, as the judge rightly said (and Mr Rees Phillips agreed), allegation 4 was not only the most serious allegation, it was also admitted. Although Mr Bruce sought to hedge his admission with the explanation that he had allowed an "unsavoury" company to whom he owed money to store waste at the site, that was dealt with by the judge by way of mitigation in any event.

48. So allegation 4 was an admitted breach of the injunction, involving approximately 75 metric tonnes of waste, years after the promise made by Mr Bruce (in order to be released from his previous term of imprisonment) that he would comply with the injunction. Accordingly, it seems to me that the judge was right to say that, whatever the position in respect of allegations 1, 2, and 3, they would not have made a significant difference to the eventual sanction to be imposed for allegation 4. They were therefore of marginal relevance.

49. Secondly, in respect of allegations 1, 2 and 3, and the mitigation on allegation 4, Mr Bruce was in grave evidential difficulties on 21 September 2023. This was because, other than a very short statement from a Mr Hall touching on - but not resolving - allegation 1, there was no evidence in support of his case at all. As the judge correctly noted, Mr Rees Phillips told him that there was a draft statement from Mr Bruce, but that was not in the bundle before him. Mr Rees Phillips told this court that that statement would have had to have been reviewed, approved and signed by Mr Bruce before it could have been adduced in evidence.

50. The problem with that, of course, was that on 21 September, Mr Bruce was arguing that the order of 9 August should be set aside, and that he should be allowed to defend the four allegations, because he had a reasonable prospect of success. But he could not have made that case by reference to the draft statement which has subsequently been provided, because that statement had not been approved and was not before the judge. Moreover, amongst other things, it sought to exhibit over 200 pages of material.

51. This led to a debate with Mr Rees Phillips as to the extent, if at all, to which a contemnor is entitled to give oral evidence in defence of his position, having given no notice to the other side (or the court) of what he might say. In my view, it is unnecessary to decide that point for the purposes of this appeal. I can see that, however, that in certain circumstances, such an approach could give rise to real difficulties.

52. CPR 81.7(3) provides that the court "may not give any direction compelling the defendant to give evidence either orally or in writing". This clearly preserves the defendant's right to remain silent and to decide not to give evidence at trial at all. But I do not think that it indicates that a defendant who does choose to give evidence has complete freedom of action as to how that is to be done, irrespective of the power to the court to control its own procedure. It may be that HHJ Kelly's qualification to her order in the instant case (paragraph 12 above) was intended to make clear that failure to comply would not prevent Mr Bruce from making an application to adduce evidence out of time at trial. But I do not read it as confirming that Mr Bruce could ignore the timetable set for evidence and insist on a right to serve written evidence or to give oral evidence by way of ambush at the trial. That point is reflected in Chapter 15 of *Arlidge, Eady & Smith on Contempt*, where at paragraph 15-55 the learned authors say that "the court by virtue of its power to regulate its own procedure is entitled to require respondents to swear affidavits or produce statements of witnesses as to facts upon which they wish to rely, in advance of the hearing".

53. In my view, whatever issues of this nature might arise in an ordinary case of contempt, they do not arise here for two reasons. First, the issue was whether Mr Bruce could set aside the judge's earlier order. For that, he needed to demonstrate a reasonable prospect of success, and he could only sensibly have done that by way of a witness statement setting out his defence, which he did not have. Secondly, Mr Bruce had been required by the court to serve a witness statement by 6 June 2023. He had not done so. He had not served any statement by 9 August either, despite the stated intention in July to do so (paragraph 13 above). And although his statement of 16 August again said that he would serve a statement dealing with the substantive issues "in advance of the hearing on 21 September", he did not do that either.

54. Therefore, in my view, the judge was entitled to weigh in the balance, when considering whether a reasonable prospect of success had been made out, that there was no witness statement served by Mr Bruce setting out his alleged defences.

55. Thirdly, I consider that, on analysis, the issues raised by Mr Bruce in his draft statement concerning allegations 1, 2, and 3, and his mitigation in relation to allegation 4, ultimately turned on the credibility of Mr Bruce himself. In the light of the judge's previous findings - including at least one instance of lying to the court - and his repeated breaches of the injunction and his subsequent promises not to do it again, it is wholly unrealistic to imagine that the judge, or any judge, would have preferred Mr Bruce's account to those of the Council's officers. The documents, which are mainly photographs, are voluminous but largely neutral.

56. Thus, in respect of allegation 1, it was admitted that a waste management company, Pegasus, were indeed dealing with waste on the Land on 3 September 2021, as the Council averred. Mr Bruce suggested that Ms McCall was "mistaken" when she said Pegasus were tipping; he said that they were in fact removing waste. Mr Bruce's fallback position in respect of allegation 1 was that, if Pegasus were tipping unlawful waste, it was an "isolated incident". But not only are these good examples of points of fact that would realistically have been decided against Mr Bruce on the credibility ground noted above, but they demonstrate that, 7 years after the injunction, Mr Bruce had still not complied with its terms. There is a short statement from Mr Hall of Pegasus, but his evidence is far from determinative of allegation 1.

57. As to allegation 2, the piles of material on site are shown in the photographs. The Council's evidence was that they comprised wood chip mixed with waste. Mr Bruce wanted to say that the waste in the photographs had been spread (unlawfully) in the past over the surrounding fields and had now been piled up on the concrete apron for removal. This was to support the suggestion that it was not new waste. However, even if that had been true (and of course Mr Bruce's credibility difficulties would again have been in play), it was still waste that was wrongfully on site which he had not removed, almost a decade after the enforcement notices and 7 years after the injunction. The breach of the injunction, and therefore the contempt, were plain.

58. As to allegation 3, it appears to be clear that Mr Bruce accepted burning the material. He said that any waste that was burnt in this exercise "went unnoticed" and was incidental to the lawful burning of wood and vegetation. Again, the credibility of that explanation was, in the light of the prior history, markedly low.

59. I have already dealt with allegation 4 and Mr Bruce's explanation as to the creditor which, to my mind, makes very little difference to the admitted breach. Indeed, it merely confirms that it was a deliberate breach, involving approximately 75 metric tonnes of waste. Moreover, although Mr Bruce suggested that the waste had been removed shortly afterwards, there was no independent evidence to support that. The credibility of Mr Bruce's case on allegation 4 was also adversely affected by Mr Bruce's refusal to identify the allegedly disgruntled creditor.

60. Accordingly, it seems to me that, in the round, it cannot be said that Mr Bruce had a reasonable prospect of successfully avoiding the findings of contempt. On the contrary, I consider that there was no realistic prospect of a contested trial altering the result set out in the order of 9 August, or the sanction which the judge was minded to impose on 21 September.

6.4 Summary

61. For all those reasons, therefore, I would reject Ground 1 of the appeal.

7. Ground 2: Manifestly Excessive Sentence

7.1 The Relevant Legal Framework

62. A criminal breach of a planning enforcement notice is an either way offence with a maximum sentence of a fine: see s.179(8) of the TCPA. A contempt of court, on the other hand, is punishable, not only by a fine, but by a term of imprisonment, with a maximum period of 2 years: see s.14 of the Contempt of Court Act 1981.

63. The leading case on sentencing in cases of contempt is *Liverpool Victoria Insurance Co. Ltd v Zafar* [2019] EWCA Civ 392. Although that case was concerned with a false statement of truth, the principles apply to all committals. First, it is necessary to consider culpability, to see whether the custody threshold has been passed. Secondly, if the threshold has been passed, the court must determine "what is the least period of committal which properly reflects the seriousness of the contempt of court" [65]. Thirdly, having reached a conclusion as to the appropriate length of the term, the court must consider whether that sentence could properly be suspended.

7.2 The Relevance of the TCPA

64. Mr Rees Phillips' overarching submission was that, in circumstances where Parliament had considered that the breach of a planning enforcement notice should be punishable by a fine, the imposition of a term of imprisonment in respect of the breach of an injunction based on such notices was, of itself, manifestly excessive. I disagree.

65. It is quite understandable that Parliament considered that a simple breach of a planning enforcement notice should be met with the sanction of a fine. A breach of such a notice usually represents relatively low-level offending. Moreover, there may be rare cases where a fine may be the appropriate sanction, even if there has been a contempt for failing to comply with a subsequent injunction. But that is not this case. This is a case where the Council, presciently in the light of the subsequent history, sought an injunction against Mr Bruce so as to ensure, either that he complied with the terms of the injunction, or was properly sanctioned if he did not. Parliament envisaged that in those circumstances, namely for breach of an injunction, a maximum term of up to 2 years imprisonment was appropriate. In view of the history here, the fine regime under the TCPA had long since ceased to be of relevance in this case.

7.3 The Sentence of 12 Months Imprisonment

66. The judge needed to follow the steps outlined in *London Victoria*. Since he made no express reference to that process, I undertake that exercise now, as a way of testing whether the 12 month sentence that he imposed was wrong in principle or manifestly excessive.

67. As to culpability, Mr Rees Phillips suggested that, regardless of the TCPA point, these four allegations of contempt did not pass the custody threshold, and that a fine was appropriate. I regard that submission as untenable. Mr Bruce had already been sentenced in the past to three terms of imprisonment, and had twice served periods of imprisonment. It was therefore entirely unrealistic to suggest that the custody threshold had not been passed on this fourth set of breaches of the injunction; on the contrary, the threshold had been passed the very first time Mr Bruce breached the injunction. A sentence of imprisonment was now inevitable.

68. What was the least term of imprisonment that reflected the seriousness of this fourth contempt? In my view, the steady escalation of Mr Bruce's offending, the repeated lies and broken promises, meant that, on 21 September 2023, some judges would have started at a period in excess of the 12 month term, which had been identified by the judge as the appropriate term as long ago as the first committal (and never appealed). In those circumstances, I am in no doubt that the judge was certainly entitled to impose a 12 month term on this fourth occasion.

69. Furthermore the judge explained how and why the 12-month sentence was the appropriate term, in particular at paragraphs 24 and 25 of his judgment (set out in full at paragraph 30 above). I would respectfully agree with and endorse that reasoning.

70. That brings us finally to suspension. In my view, it would have been wholly inappropriate to suspend any sentence imposed on Mr Bruce. There are two separate reasons for that.

71. The first arises from the history of this case. A suspended sentence was imposed at the time of the first committal. In other words the judge concluded that, on that first occasion, it was not necessary to require a term of immediate imprisonment. At the time of his second breach, although the judge took a lenient view and did not activate the 12 month suspended sentence, he did find that a term of immediate custody was justified. He imposed a term of 28 days. By the time of the third committal, the judge activated the 12-month suspended sentence, only to accede to an application for early release because of Mr Bruce's promise to comply with the injunction in future. In other words, by the time of both the second and third committals, an immediate term of custody, without suspension, had been found to be justified. A fourth committal, for still further breaches, meant that only an immediate term of custody was appropriate.

72. The second reason why I would not have suspended the sentence is by reference to the Sentencing Council's general guideline in relation to the suspension of sentences of imprisonment. That identifies three factors which indicate that suspension may be appropriate, and three factors which indicate that it may not be appropriate. The three factors indicating that suspension may be appropriate are: a realistic prospect of rehabilitation; strong personal mitigation; and the fact that immediate custody would result in significant harmful impact to others.

73. In the present case, none of those factors applied. There was no real prospect of rehabilitation. If Mr Bruce did not breach the injunction again, it was only because of the terms of the POCA order. There was no personal mitigation at all and none was urged on us. Nor was there any evidence that Mr Bruce's term of imprisonment would result in significant harmful impact to others.

74. The three factors in the guideline indicating that it would be inappropriate to suspend the sentence are: the risk/danger to the public; that the appropriate punishment can only be achieved by immediate custody; and a history of poor compliance with court orders.

75. Each of those factors is in play here. Mr Bruce's activities on this site, unlawfully importing, storing, and burning waste, present a clear risk/danger to the public and to the environment. That is what the Council are protecting. There is a woeful history of compliance with court orders. And in all the circumstances, for the reasons that I have already stated, appropriate punishment could only have been achieved by immediate custody.

7.4 Summary

76. For those reasons, I would not interfere in any way with the sanction imposed by the judge. It was neither wrong in principle nor manifestly excessive. I would therefore reject Ground 2 of the appeal.

8. Conclusion

77. For the reasons that I have given, if my Lords agree, I would dismiss this appeal.

LORD JUSTICE SNOWDEN:

78. I agree.

LORD JUSTICE NEWEY:

79. I also agree, subject only to this. Since the point was not the subject of full argument and we do not need to decide it to dispose of the present appeal, I prefer not to express a final view on whether Mr Bruce could have given oral evidence without having served any written evidence. Assuming, as may very well be the case, that he could not, the law appears to have changed in this respect. Paragraph 3.3 of "Practice Direction RSC 52 and CCR 29 – Committal Applications", which applied despite the introduction of the Civil Procedure Rules, formerly provided, "A respondent may give oral evidence at the hearing whether or not he has filed or served any written evidence". See also Borrie, "The Law of Contempt", 4th ed., at paragraph 13.33.