Neutral Citation Number: [2022] EWCA Civ 49
Case Nos: CA 2021-003224
(CA 2021-003270 and
CA 2021-003271)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT LINCOLN

HIS HONOUR JUDGE ROGERS

F00LN484

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2022

Before :

LORD JUSTICE UNDERHILL

(Vice-President, Court of Appeal (Civil Division))

and

LADY JUSTICE ANDREWS

- -

Between :

THOMAS EDWARD SAUL GREETHAM

Claiman
Respond

- and -

ANDREW CHARLES GREETHAM

Defenda
Appella

-and-

SHIRLEY MARY GREETHAM

Interested P
Respondent

- -
- -

Majeks Walker (instructed on **Direct Access**) for the **Appellant**

James Stuart (instructed by **Adie Pepperdine Solicitors**) for the **Respondent**

The Interested Party did not appear and was not represented.

Hearing date: 20 January 2022

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Approved Judgment Approved Judgment This judgment was handed down remotely at 10.00am on 28th January 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives

Lady Justice Andrews:

INTRODUCTION

1.
The Appellant, Mr Andrew Greetham, appeals against paragraphs 5 to 9 of an order made by HH Judge Rogers, ("the Judge") sitting in the County Court at Lincoln, on 8 December 2021, committing him to prison for a period of 4 months for contempt by his breaches of paragraphs 1 and 4 of the Court's order of 25 September 2020, and for a period of 1 month concurrently for contempt by his partial breaches of paragraph 3 of that order. I shall refer to the Order of 8 December 2021 as "the Committal Order" and the order of 25 September 2020 as "the Unless Order". This was the second occasion on which Mr Greetham was committed to prison for contempt for breaching the Unless Order.

2.
On the same occasion, as recorded in paragraphs 1 to 4 of the Committal Order, the Judge dismissed two ancillary applications made by Mr Greetham as totally without merit and ordered him to pay the other parties' costs of and occasioned by those applications on the indemnity basis. One was an application dated 6 December 2021 for:

"His Honour Judge Rogers to recuse himself from these proceedings and any matters involving the Applicant. (2) Her Honour Judge Fine to recuse herself from these proceedings and any matters involving the Applicant due to pejorative comments and bias, (3) to alter the location of all and any hearings consequential upon (1) and (2) above."

I shall refer to this as "the Recusal Application".

3.
The other was an application dated 22 November 2021 which has been referred to as the "Permission to Bid Application." I will adopt the same label, although it is somewhat misleading, as in substance the application was for an order for the immediate sale to Mr Greetham of property known as Catlins Farm (Title No LL320685) pursuant to CPR 40.16. The application also sought various other orders, including an order varying an order made by the Judge on 17 February 2020 for the immediate sale of Catlins Farm on the open market.

4.
Mr Greetham sought permission to appeal against the dismissal of the two ancillary applications. On the direction of Lewison LJ, the applications for permission to appeal were listed before us as rolled-up applications, with the appeals to follow if permission were granted. Mr Greetham also sought permission to rely upon a substantial amount of evidence that was not before the Judge at the time when he made the Committal Order. Only a small fraction of that evidence post-dates the hearing. Much of the evidence that pre-dates it consists of transcripts of earlier court hearings and judgments.

Jurisdiction

5.

Section 13 of the Administration of Justice Act 1960 provides as follows:

“ An appeal shall lie under this section from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other enactment relating to appeals in civil or criminal proceedings.”

This section gives the contemnor a right of appeal to this Court against a decision to commit him to prison for contempt, and the CPR reflect this right by excepting appeals against such decisions from the requirement to obtain permission to appeal. However, if the decision or order in question relates to an ancillary matter, such as costs, permission to appeal is required: see the discussion in Arlidge, Eady & Smith on Contempt, 5th Ed, at para 15-120.

6.
The first question which arises is whether this Court has jurisdiction to entertain the applications for permission to appeal. None of the parties suggested that it does not. Although, strictly speaking, the Judge was not exercising his jurisdiction to punish for contempt at the time when he ruled on the Recusal application and the Permission to Bid application, he was exercising that jurisdiction when he made the Committal Order which included the paragraphs dismissing those applications and awarding costs against the applicant. Moreover, the application for recusal was so closely bound up with the question whether the Judge should exercise the jurisdiction to punish for contempt that it would make no sense to treat it as falling outside the jurisdictional ambit of s.13 of the 1960 Act.

7.
I was initially more concerned about the Court’s jurisdiction to entertain an application for permission to appeal against the dismissal of the Permission to Bid application; but on reflection, I am satisfied that that, too, was closely bound up with the question whether the Judge should exercise the jurisdiction to punish for contempt and if so, what (if any) sanction should be imposed. Mr Greetham was seeking the variation of an earlier order for the sale of Catlins Farm, which the Unless Order was intended to enforce. The sale that he sought would have stopped him being in breach, and thus put an end to his continuing contempt. The outcome of that application could therefore have had a significant bearing on the question of whether committal was an appropriate punishment for his admitted breaches of the Unless Order.

8.
It obviously makes sense for one court to deal with all three matters. It seems to me that as a matter of common sense, the jurisdiction under s.13 must be treated as extending to any order or decision made by a court in the context of considering an application to commit for contempt, if that order or decision would or did have a direct bearing on the committal application. This would include, for example, an application for an adjournment of the committal application. However, the losing party requires permission to appeal against any such ancillary decision or order.

Admission of further evidence

9.
The evidence that the appellant wished to introduce which had not been before the Judge was not identified in the application to adduce fresh evidence. Lord Justice Bean, when giving case management directions, directed that the evidence be included in a supplementary appeal bundle. That led to Mr Greetham filing and serving a supplementary bundle containing a further witness statement with voluminous exhibits, but this left the Court none the wiser as to what the fresh

evidence was. I caused further enquiries to be made, and the evidence was helpfully identified by Mr Greetham's counsel, Mr Walker, in a supplementary skeleton argument, which also sought to explain the relevance of that evidence to the various applications. Mr Greetham sent an unsolicited "supplemental" witness statement to the court office on the afternoon before the hearing, exhibiting a transcript of the hearing of proceedings in January 2021 which was already included in the Respondent's supplementary bundle.

10.
When an application is made to adduce fresh evidence in the context of an appeal against committal to prison for contempt of court, the Court will adopt the approach taken by the Court of Appeal (Criminal Division) to such applications in appeals against conviction or sentence. The ultimate question is whether the interests of justice require the evidence to be admitted. That does not mean that the question whether it could have been obtained with reasonable diligence and put before the Judge at the hearing below ceases to be relevant, but it is a less important consideration than whether the evidence would have made a material difference to the outcome if the Judge had seen it, or whether it demonstrates to this Court that the Judge's decision was wrong.

11.
There are also practical considerations. In a case such as this, where a complaint has been made of the judge's behaviour at a hearing, it would be difficult, if not impossible, for the Court to assess the merits of that complaint or for the parties to make proper submissions about it, without seeing the transcript of that hearing. An appellant would not require permission to refer to previous judgments; nor would he require permission to refer to a transcript of the hearing which gave rise to the judgment under appeal, if what was said and done at that hearing was relevant to the appeal. It is difficult to draw a logical distinction between that transcript, and transcripts providing a record of what was said and done at earlier hearings. In the light of this, it may be open to debate whether transcripts of previous hearings are "evidence", and even if they are, whether the permission of the Court would be required to refer to them, but in a case such as this the interests of justice would plainly support the grant of permission if it were needed.

12.
However, there is a distinction between seeking to rely on fresh evidence and the raising of new arguments on appeal. An application to adduce fresh evidence is not to be used as a vehicle for raising arguments that were not addressed to the Judge, still less, grounds of appeal that have not been identified in the appellant's notice. The pragmatic approach which we adopted was to consider all the evidence de bene esse and to give our decision on the application to adduce it as part of our judgments in due course. Having done so, I am satisfied that all the transcripts should be admitted, if permission to do so is required, but the other documents appear to be either irrelevant to the applications before us or of no assistance in determining them, and I would refuse to admit them.

The hearing of the appeal and permission applications

13.
The hearing of the permission applications and the appeal was expedited and took place on 20 January 2022. The appellant and the respondent were both represented by counsel; the Appellant by Mr Walker and the Respondent, Thomas Greetham, by Mr Stuart. Both counsel appeared before the Judge on 8 December 2021 at the hearing which gave rise to the Committal Order, although, as I shall later explain, Mr Walker had not been instructed to appear on the substantive application for committal. The interested party, Mrs Shirley Greetham, filed and served a brief statement in

accordance with CPR PD52C.19 which was settled by her counsel, Philip Byrne, which we considered and for which we are grateful. She otherwise took the understandable course of choosing not to incur the further costs of active participation in the hearing.

14.
At the conclusion of the hearing, the Court refused both applications for permission to appeal and dismissed the appeal against the sentence of imprisonment imposed by the Judge for the continuing contempt by disobedience to the Unless Order. That decision was announced in open court by my Lord, the Vice-President, who informed the parties that our reasons would be provided in judgments which would be handed down as soon as practicable. Further directions would be given for written submissions on consequential matters, including any issues on costs and the possible imposition of an Extended Civil Restraint Order. My Lord also explained that this meant that there would be no further extension of the stay of execution of the order for committal granted by Bean LJ until 12 noon on Friday 21 January 2022.

BACKGROUND

15.
The committal application arose in the context of what appears to have become an increasingly bitter family dispute. Mr Andrew Greetham and his son Thomas formerly carried on a farming partnership together under the name "T. Greetham & Sons". The partnership was dissolved in July 2019, but although they agreed that they each had a 50% interest, the former partners were unable to agree upon the extent of the assets of the partnership or their value. In order to resolve the impasse, Thomas commenced Part 8 proceedings against his father in Lincoln County Court, seeking an order that the business and affairs of the Partnership be wound up and that all necessary accounts and inquiries be undertaken to enable this to happen ("the Partnership claim").

16.
This all occurred against the backdrop of Matrimonial proceedings, also in Lincoln County Court, in which Shirley Greetham, the wife of Andrew and mother of Thomas, was claiming ancillary relief in the context of her divorce from Andrew, from whom she had separated in 2018. In order to deal with that claim, it was necessary to ascertain the value of Andrew Greetham's interest in the partnership assets. Therefore the Matrimonial proceedings were initially stayed behind the Partnership claim. In both sets of proceedings, Thomas was contending that since 2011 his father had been using partnership assets and money for his own purposes and had failed to account to the partnership for such use. Andrew was not then making any similar allegations against Thomas.

17.
For simplicity and without intending any discourtesy, in the remainder of this judgment I shall refer to the protagonists by their first names only.

18.
The trial of the Partnership claim was heard by the Judge on 17 February 2020. As the Judge explained in the judgment delivered on that date, Andrew had been represented by solicitors and counsel until shortly before the trial, but in the preceding week the solicitors came off the record. Following a telephone call to the court by Andrew's partner Christina Myland on 13 February 2020, and her submission of doctors' letters pertaining to Andrew's mental health, the Judge took the initiative of convening a telephone hearing on Friday, 14 February 2020, the last working day before the trial, to consider whether the trial should be adjourned on grounds of Andrew's ill-health. However, neither Andrew nor anyone acting on his behalf attended that hearing. Christina, who was 8

months' pregnant at the time, felt too unwell to participate. The Judge refused to adjourn the trial on the basis that the medical evidence was insufficient to establish that Andrew was either unfit on a temporary basis to attend trial or that he lacked the capacity to litigate.

19.
The following Monday, Andrew did not appear and was not represented at the trial of the substantive claim. Thomas was represented by Mr Stuart, who has represented him in almost all of the subsequent hearings. Shirley, who was an interested party, was also represented by counsel but, understandably, he largely adopted a passive role. The Judge was satisfied that Andrew was aware that the hearing was going ahead. He found that, although Andrew had given some disclosure, via his former solicitor, he had not substantially complied with case management directions. Critically, he had not filed an up to date witness statement. The Judge went on to determine the claim on the evidence that was then before him. He allowed the claim, accepting the expert valuation evidence of the Partnership's properties and equipment adduced by Thomas, and the evidence relating to other assets and their values contained in a schedule annexed to Thomas's pleadings.

20.
In his order of 17 February 2020 (sealed on 20 February) the Judge directed that the business and affairs of the Partnership be immediately wound up pursuant to s.39 of the Partnership Act 1890. Apart from certain distributions in specie to Thomas, in return for the payment or crediting of the value ascribed by the Judge to those assets, he ordered the sale of the partnership assets on the open market (though he expressly left it open to the partners to agree otherwise in writing) and the payment of the net proceeds into a designated bank account.

21.
One of those assets was Catlins Farm, which was then occupied by Andrew. The Judge made it clear in his judgment that if Andrew had sought the distribution of Catlins Farm to him in specie (which at that stage he had not) he would have considered making such an order. However, Andrew was not present, he could not justify that, and on the evidence before the court it appeared that Andrew probably would not be able to manage it financially and therefore a sale of the property was required. He ordered that Andrew and any licensee in occupation (which would include Christina) give up vacant possession (apart from a bungalow on the land which had a sitting tenant) by 4pm on 31 May 2020. He directed that certain accounts and inquiries be determined by a District Judge prior to the distribution of the net assets of the partnership in equal shares.

22.
CPR 39.3(1) provides that the Court may proceed with a trial in the absence of a party. CPR 39.3(3) states that:

"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."

If such an application is made, CPR 39.3(5) provides that the court may grant the application only if three conditions are fulfilled, namely, that the applicant:

"(a) acted promptly when he found out that the court had exercised its power 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."

23.
On 25 February 2020, Andrew, then acting in person, made an application for the order of 17 February 2020 to be set aside and for a stay of execution pending the hearing of that application. On 27 February 2020 HH Judge Godsmark directed that the application be heard by Judge Rogers on 5 March, and stayed execution in the meantime. Andrew, Thomas and Shirley were each represented by counsel at the hearing on 5 March 2020, although on that occasion Thomas was represented by someone other than Mr Stuart.

24.
The Judge accepted that the application had been made promptly. However he found that limbs b) and c) of the test were not made out and dismissed the application, with costs. Andrew's then counsel, Ms McDonnell, instructed late in the day on direct access, did the best that she could with unpromising material, but she had no evidence of Andrew's state of health on 17 February other than the same material as had been relied on by Christina and which prompted the telephone hearing on 14 February. The Judge was also shown a letter from a medical practitioner dated 3 March 2020 which suggested that Andrew was unfit to give instructions to counsel "due to a lack of sound coherent judgment" but of course, if true, that would have placed his counsel in an impossible position. She confirmed that she was not contending that Andrew lacked capacity, recognising (as the Judge pointed out) that this would mean that she was unable to accept instructions from him or make submissions on his behalf in support of the application.

25.
Consistently with his rulings on 14 and 17 February, the Judge held that the medical evidence relied upon was inadequate to demonstrate that Andrew had been unfit to attend the trial, and therefore there was no good reason for his non-attendance. When considering whether Andrew had a real prospect of success at trial, the Judge had some difficulty in getting any coherent answer to the question of what order Andrew would have sought from the court had he been present at the trial. In that regard it was significant that Andrew was now trying to raise a case in the Partnership claim that was completely at odds with his pleaded case. In his pleadings, Andrew had expressly accepted that Catlins Farm and another farm, High House Farm, in which Thomas and his family were living, were both partnership assets. Indeed, in the Partnership claim his formal position was that all the assets of the partnership should be sold. The Judge had exercised his discretion to distribute High House Farm in specie to Thomas, and ascribed a valuation to it, which meant that Andrew's 50% interest in that property would be reflected in a balancing payment or credit when the partnership accounts were finalised.

26.
Andrew now sought to contend that he owned Catlins Farm outright, and had a 2/3 interest rather than a 50% interest in High House Farm. The Judge held that the prospects of Andrew demonstrating that he was wrong to make the order that he did were fanciful, and that the new suggestion that Catlins Farm was excluded from the partnership altogether was unarguable.

27.
Andrew did not then seek permission to appeal against the order made on 5 March 2020, which would have been the proper course to take in the circumstances, see Tennero Ltd v Arnold [2006] EWHC 1530 (QB), [2007] 1 WLR 1025. Instead, he sought to appeal against the order of 17 February 2020 out of time, on essentially the same grounds as he had relied on when seeking to set that order aside. In addition, he sought to rely on fresh evidence from a Mr Ofori pertaining to his mental capacity, dated 13 March 2020 (and thus post-dating the decision of 5 March). This report was obtained by

Andrew's brother Richard after the hearing on 5 March, and was based upon a consideration of Andrew's earlier medical records as well as Mr Ofori's assessment of him on 12 March. It was envisaged that Richard would be appointed as Andrew's litigation friend if it was found that Andrew lacked capacity to litigate on his own behalf, although Richard was styling himself as such without any such finding having been made by the court. At a later stage of the litigation, counsel then acting for Richard described him as the "driving force" in the litigation since March 2020. An application for Richard to be appointed as Andrew's litigation friend was first made on 15 May 2020 based on Mr Ofori's report but for reasons it is unnecessary to go into, that application was not progressed.

28.
On 16 July 2020, having heard oral submissions by fresh counsel instructed on direct access on behalf of Andrew, Mr Becker, and by Mr Stuart on behalf of Thomas, Martin Spencer J dismissed the application for permission to appeal and for a further stay of execution as an abuse of process. He refused an application by Mr Becker to amend the application to make the subject of the proposed appeal the 5 March order rather than the 17 February order.

29.
In the course of his judgment, he expressed surprise at the conclusion of Mr Ofori that Andrew lacked capacity to litigate what was erroneously described as "a possession claim" on 17 February 2020, because the documentation filed in support of the appeal against the order of 17 February, more than a month after Mr Ofori's report, appeared to directly contradict that view. As he observed, the documentation was complex, it was signed by Andrew at a time when he was acting in person, and it seemed to the judge to be "impossible that somebody who lacks capacity, as described by Mr Ofori, would have been able to draft those documents." Martin Spencer J was unwilling to accept as likely the alternative scenario that someone else, aware of Andrew's lack of capacity, had produced those documents and procured Andrew to sign them without his appreciating what they were.

30.
On 11 September 2020, Andrew issued an application notice seeking permission to appeal out of time against the order of 5 March 2020, and a stay of execution of the 17 February 2020 order pending that appeal. He also reiterated the application for the appointment of Richard as his litigation friend on the basis that he, Andrew, lacked capacity to litigate (notwithstanding Martin Spencer J's adverse findings on that issue in his judgment of 16 July 2020). A further report was prepared by Mr Ofori on 5 August 2020 addressing Andrew's capacity, though this related to his capacity to enter into a contract or make a gift, rather than his capacity to litigate. As Soole J later found, Mr Ofori did not have the advantage of knowing the full history of the partnership dispute, and was unaware of the various steps taken by Andrew in the litigation, which might have caused him to take a very different view.

31.
Meanwhile, on 17 September 2020 Thomas issued an application for an "Unless" order with a penal notice attached, requiring Andrew to comply with the terms of the order of 17 February 2020, including but not limited to those parts of it requiring him to vacate Catlins Farm. That application was fixed for hearing before Judge Rogers at the same time as the application for ancillary relief in the Matrimonial proceedings, which was due to be heard on 24-25 September 2020, because there were some overlapping issues. Richard made an unsuccessful attempt to adjourn the hearing of both applications pending the outcome of Andrew's application for permission to appeal against the order of 5 March 2020. Richard's application was dismissed on 23 September.

32.
By the time of the hearing on 24 and 25 September 2020, the High Court had not yet considered Andrew's application for a stay of execution of the order of 17 February 2020 pending consideration of the application for permission to appeal against the order of 5 March, and so there was no stay in place. The hearing on 24 and 25 September took place by video conference. We have been supplied with a transcript of the hearing. Andrew was represented by a new barrister, Dr Joseph, again instructed directly. The Judge heard the arguments in the Matrimonial proceedings first. As certain aspects of the case were confidential, Thomas's counsel, Mr Stuart, only attended for those parts of the hearing which concerned the partnership dispute and Thomas's application for an order to enforce the terms of the 17 February order.

33.
In the Matrimonial proceedings, Shirley's counsel, Mr Charles, sought an immediate order for the sale of Catlins Farm, pointing to the fact that such an order had already been made in the Partnership proceedings and that Thomas was seeking to enforce that order. He submitted that the only way that Andrew could resolve the Matrimonial proceedings was by making a lump sum payment to Shirley, and that in the absence of evidence that the money could be raised in any other way, the proceeds of sale of Catlins Farm were likely to be the only source from which the ancillary relief could be satisfied. Dr Joseph, on the other hand, sought the postponement of the sale for a year to try and give Andrew the opportunity to raise the funds to make payment of the capital sum to Shirley without the necessity for a sale. There was a suggestion that he might borrow some of the funds from Richard. Obviously, as there was already an order for immediate sale in place in the Partnership proceedings, this could only be resolved by agreement with Thomas. Dr Joseph expressed a degree of optimism that the matter would be capable of settlement.

34.
When his time came to address the court, on 25 September, Mr Stuart pointed out that Catlins Farm was a partnership asset which could still be distributed in specie to Andrew at the valuation ascribed to it by the Judge at trial, if Thomas consented. However he made it clear that Thomas would only agree to this if all Andrew's debts to Thomas were paid (including those which had accumulated under various costs orders, which were by then quite substantial). Andrew's share of the partnership assets, other than the farm, was plainly not going to generate sufficient money. Mr Stuart took the Judge through the figures. He said that it appeared that the immediate sale of Catlins Farm was going to be the only practical means of ensuring that Andrew paid all his debts, including the costs orders in favour of Thomas and whatever lump sum he was ordered to pay to Shirley. Moreover there were other aspects of the Order of 17 February that still had not been complied with, and this was holding up the taking of the partnership accounts.

35.
The Judge made an order for Ancillary Relief in the Matrimonial proceedings which included detailed provisions concerning Catlins Farm and what should happen if it was not sold as a Partnership asset, either because it was transferred in specie to Andrew as part of the process of winding up or taking of accounts within the winding up of the Partnership, or because Thomas elected not to enforce the order for sale made within the Partnership proceedings. The Judge ordered that in either of those events, the farm should be sold for such price as Shirley might determine and that she should have conduct of the sale. In any event, Andrew was ordered to pay Shirley a specified six-figure sum on the sale of Catlins Farm.

36.

In the Partnership proceedings the Judge accepted Mr Stuart's submissions. He was not persuaded that Andrew would be able to pay all his debts unless Catlins Farm was sold. He made the Unless Order requested by Thomas, endorsed with a penal notice, which he tried to explain to Andrew, but as the order itself records, Andrew left the video conference before the Judge had completed that explanation. The time for vacating Catlins Farm was extended to 4pm on Friday 9 October 2020.

37.
In the context of Thomas's application for the Unless Order, Dr Joseph told the Judge that her instructions were that if Richard were appointed as Andrew's litigation friend, there would be no further breaches of court orders. When Mr Stuart sought clarification that this meant that Andrew no longer intended to appeal against either the 5 March or 17 February orders, Dr Joseph confirmed that this was her understanding. When Dr Joseph subsequently sought permission to appeal on the (mistaken) basis that there was a stay of execution in place, the Judge sought clarification as to how that submission could be reconciled with there being no intention to prosecute the appeal against the 5 March order. He received no satisfactory response.

38.
On 2 October 2020, Martin Spencer J refused to grant the application for a stay of execution of the 17 February order on the basis that it should be considered by the judge dealing with the application for permission to appeal against the 5 March 2020 order, and at the same time as that application.

39.
On the same day, Andrew sought permission to appeal against the Unless Order imposed on 25 September 2020. His application notice sought that the order for sale should remain under the order of 17 February 2020, but there should be no penal sanction attached: "to allow the parties to make arrangements for the properties" (i.e. to facilitate a negotiated settlement). The evidence in support of that application alleged that the court office had erroneously allocated the fees for the application for a stay of execution to a different application, which meant it was not dealt with before the hearing on 25 September. Andrew also relied on grounds of appeal settled by Dr Joseph which suggested that the Judge should not have made an enforcement order when he knew that there was an application pending for a stay of execution and for permission to appeal against the order of 17 February (sic). Significantly, no complaint was made about anything done or said by the Judge in the course of the hearing on 24-25 September.

40.
This application, together with the application for permission to appeal out of time against the 5 March 2020 order and the application for a stay of execution of the 17 February order, came before Foster J for consideration on the papers on 9 October 2020. She gave them short shrift, and refused to extend the time for appealing, finding that there was no arguable basis for any appeal against any of the Judge's orders. She also refused permission to appeal on the merits and refused the stay of execution. Her order records that she considered a transcript of the 5 March 2020 decision and decided that there was:

"nothing to suggest that there is any arguable appealable error in this decision such that I should be persuaded to impose a stay upon the Order made in February 2020 (and reiterated in September 2020)… these are in my judgment further delaying tactics".

She described the decision of the Judge to proceed with the trial of the Partnership claim in the absence of Andrew as "unimpeachable".

41.
No application was made at that stage for Foster J's order to be reconsidered. When the 7 days for doing so had expired, to all intents and purposes Andrew had exhausted all viable procedural avenues for challenging the orders made on 17 February and 5 March. As will be seen, however, this has failed to deter him from making further attempts, even after the Committal Order.

42.
As Andrew had still failed to comply with almost all the provisions of the Order of 25 September 2020, on 19 October 2020 Thomas issued his first application for committal for contempt of court, which was fixed for hearing on 3 December 2020. As that hearing approached, Andrew issued an urgent application on 1 December to "purge my contempt and vacate the hearing on 3 December due to ill health." He claimed that he was unable to comply with the order to give vacant possession of Catlins Farm because Christina's elderly aunt, Mrs Machin, who was terminally ill, was living in the property and could not be moved, especially because of the restrictions imposed due to the pandemic. He also asserted in the application notice that his own health had deteriorated and he would be unable to attend the hearing. In a letter to the court sent separately by email he said that he, his partner and other members of the household had apparently begun to experience Covid symptoms. However, there was no evidence of a positive diagnosis.

43.
The Judge kept the matter in the list, directed a remote hearing and made it clear that Andrew was welcome to participate on the remote platform, though he should not attempt to attend court in person. However on 3 December he did not appear. His counsel, again Dr Joseph, told the Judge that he was unwell, but that she was instructed to pursue the application to purge his contempt and for an adjournment of any consideration of the punishment for that contempt.

44.
The Judge heard submissions from Dr Joseph on behalf of Andrew and Mr Stuart on behalf of Thomas. His order records that Dr Joseph unequivocally accepted that Andrew had breached and remained in breach of the Unless Order as to paragraphs 1, 2 and 4 entirely and paragraph 3 substantially. As his judgment on that occasion explains, the application to purge the contempt was premature, because Andrew had done nothing at that stage to demonstrate any altered behaviour. In the light of his counsel's concessions, made on instructions, and the overwhelming evidence before him, the Judge found that it had been established to the criminal standard that Andrew was in contempt of court. However, he acceded to the application to adjourn the punishment hearing. It is clear from his judgment that he did so mainly because of compassion for the position of the terminally ill aunt, despite the fact that she had only moved into Catlins Farm after the order for vacant possession had been made. However the adjournment also afforded Andrew a final opportunity to comply with the Unless Order.

45.
The Judge made it clear that he would not expect the property to be vacated unless it was by agreement or, sadly, Mrs Machin died, but he did expect Andrew to comply with the remaining aspects of the Unless Order. He indicated that the court presently considered that Andrew's liberty was very likely at risk and any failure to conduct himself in accordance with the court's requirements spelled out in the order of 3 December 2020 would substantially undermine any request by Andrew to purge his contempt or for the Court to impose any sentence other than immediate custody. This gave Andrew fair warning of what to expect if he remained defiant. In the event, and as foreshadowed, Mrs Machin did die before the next hearing of the committal application, which was on 5 January 2021.

46.
On 21 December 2020, Richard, on behalf of Andrew, produced a draft appellant's notice seeking to appeal against Foster J's order, on the grounds that he lacked the capacity to litigate at all material times. Although it was legally misconceived, the complexity and articulacy of that document, produced in Andrew's name and signed by him, did not sit well with an allegation of lack of capacity. There were two fundamental problems, quite apart from the fact that the application was issued well beyond the time for seeking permission to appeal (though on its face, the contrary was represented). The first was that the appropriate route of challenge to an order made by a judge on the papers is to seek reconsideration, and not appeal. The second was that in any event there is no jurisdiction to entertain a further appeal against a refusal of permission to appeal made by a judge of the appellate court (which Foster J was for these purposes).

47.
On 31 December 2020 Andrew sent an email to the Queen's Bench listing office seeking an urgent oral hearing to be listed on 5 January 2021. On 4 January 2021, Andrew Baker J, who was the judge sitting in the interim applications court during vacation, refused that request, pointing out that any appeal against Foster J's order was a matter for the Court of Appeal, the draft appellant's notice had not been issued, there appeared to be no grounds or possible basis for the grant of an extension of time for appealing against that order, and no attempt had been made to explain why an urgent hearing was required.

48.
Richard Greetham, styling himself "the Defendant's litigation friend", then issued an application on 4 January 2021 to adjourn the punishment hearing scheduled for 5 January "pending determination of the Defendant's permission to appeal application". Andrew Baker J's directions were provided to the Judge, who ensured that the parties were made aware of them. The Judge considered all the various applications, including Richard's, at the punishment hearing on 5 January, which was conducted by video conference. Dr Joseph again represented Andrew, and Mr Stuart again represented Thomas. Andrew attended for part of the remote hearing. The Judge refused to adjourn the punishment hearing, for clear and cogent reasons, and committed Andrew to prison for 42 days.

49.
I have read the transcript of the Judge's judgment of 5 January 2021 with care. Although the judgment contains criticisms of the way in which the litigation had been conducted by Andrew, they are expressed in temperate language and are, to my mind, entirely fair. The Judge recited that on the evidence before him, which he did not understand to be contradicted, not a single step had been taken towards compliance since the order he made adjourning the contempt proceedings. He then dealt with an application by Dr Joseph to adjourn the hearing on three new grounds, the first of which was that there was an outstanding appeal or application which needed to be determined.

50.
The Judge set out the history of the matter to date. He referred to Foster J's order and to the fact that nothing was done to challenge it for many weeks. He described as "entirely curious" the fact that the essence of what was now being said was that there was an underlying challenge to the entirety of the process and the entirety of his decision-making, notwithstanding that it had already been reviewed twice by different judges of the High Court, and permission to appeal had been refused. He expressed concerns about the use of the "litigation friend" terminology, pointing out that the legal and procedural requirements for the appointment of a litigation friend had not been met. He explained that because of his concerns about Richard Greetham's role, given that he was neither in a position to

control the litigation nor make the key substantive decisions required, he had asked Dr Joseph in terms at the previous hearing (on 3 December) for an assurance, which she gave categorically, that the concessions and admissions of breach were made on instructions, and that she did not regard her client as lacking in capacity.

51.
The Judge then said this in para 14:

“I then adjourned that matter on the basis of the admissions, as I said at the beginning of this judgment. What has happened since procedurally is, to my mind, astonishing and, notwithstanding her tenacious pursuit of this, I am surprised that Dr Joseph is prepared to lend her professional name to a process that is so lacking in merit as to my mind to be wholly tactical and avoidant of the realities of this case.”

It is quite clear from the paragraphs of his judgment that followed, that although the Judge made it clear that he did not believe that counsel played any part in the utterly misconceived appellant’s notice, or the equally misconceived application to Andrew Baker J, the belated attempts to challenge Foster J’s order were so obviously wholly devoid of merit that it was surprising, as he put it, that she was prepared to put forward an argument seeking an adjournment of the punishment hearing on the back of them. That was fair comment on what was perceived to be a lack of professional judgment in advancing a hopeless argument. What the Judge did not do, as Andrew has repeatedly alleged, was question Dr Joseph as to why she was “staking her professionalism” by representing him, or say anything else to suggest that Andrew should not have legal representation on an application to commit him for contempt of court.

52.
In paragraphs 21 and 22 the Judge dealt with complaints made by Dr Joseph on Andrew’s behalf that the distribution made under the 17 February order was unfair, and in particular that it was unfair to assign High House Farm in specie to Thomas, who was present at the trial, but not to assign Catlins Farm to Andrew, who was not. The Judge explained that the financial ramifications of the distribution were something he had in mind, including the need to find the means of paying a significant lump sum to Shirley in the ancillary relief proceedings. He said that it seemed to him to be almost inevitable that Catlins Farm would have to go in order to raise the necessary funds. However, as he said, the rights and wrongs of the order that he made would be a matter for another court to determine (implicitly, on the assumption that the challenge to Foster J’s order ever became the subject of judicial consideration).

53.
Having refused the adjournment because of the “pending appeal”, the Judge went on to give his reasons for refusing it on the other grounds advanced by Dr Joseph. Finally, he itemised the aggravating and mitigating factors before deciding that the contempt was so serious that only a custodial sentence could do. He devoted an entire paragraph, paragraph 51, to the impact of the pandemic on a custodial sentence, and took into account Andrew’s age, risk profile and mental fragility. The period of six weeks’ custody was fixed by particular reference to the impact of the pandemic, the Judge having made it abundantly clear in his sentencing remarks that the sentence would otherwise have been considerably longer. He also took the exceptional course of giving Andrew until 15 January to surrender himself to custody, so that he had one last opportunity to take steps to comply with the order and to purge his contempt. The Judge made it plain to Andrew that if he

continued to disobey the order after his release from prison he could be made the subject of a further committal application.

54.
Richard Greetham, who still had no status to do so, issued an application on 14 January to vary the Judge's first committal order. The Judge heard submissions by Dr Joseph and Mr Stuart on 15 January by video conference (which Andrew attended remotely) and struck out Richard's application as an abuse of the process of the court. However he entertained a similar application to vary made by Dr Joseph on Andrew's behalf, and refused it on the merits.

55.
There was no attempt to appeal against the first committal order. Andrew took no steps to comply with the Unless Order in the further time afforded by the Judge, and therefore was imprisoned on 15 January 2021. He served the custodial element of his sentence, 21 days.

56.
Meanwhile, on 20 January 2021, Richard issued an application notice in the High Court seeking an oral hearing of a challenge to Foster J's order, an extension of time for doing so, permission to adduce fresh evidence, a stay of execution, and his appointment as litigation friend. HH Judge Kelly directed that Richard's various applications be listed for hearing together before a High Court Judge. Soole J heard them on 30 March 2021. On that occasion Dr Joseph represented Richard and Mr Stuart represented Thomas.

57.
In a comprehensive reserved judgment handed down on 29 April 2021 Soole J dismissed all those applications. He examined the procedural history in minute detail. He was informed that the orders of 17 February and 25 September 2020 had still not been complied with. For the reasons that he gave, he was not persuaded that Andrew lacked the capacity to litigate. As he pointed out, the evidence of Mr Ofori and of a Ms Thornton (who was not medically qualified) upon which Richard was seeking to rely, was fundamentally undermined by the fact that neither of them had been provided with any significant information about the litigation, its issues and the history of its conduct. Soole J was unimpressed by that, for good reason, particularly as there was no explanation for withholding that information from them. He also reached the conclusion, independently, that even if he had been satisfied that Andrew lacked capacity, Richard would be "most unsuitable" as a litigation friend, giving equally compelling reasons for taking that view.

58.
On 16 June 2021, Thomas made a second application for the committal of Andrew for contempt of court because of his continuing non-compliance with the Unless Order, and in particular his continuing occupation of Catlins Farm. Undeterred, Andrew issued an application on 2 July 2021 seeking to set aside all orders made in the Partnership claim on the basis that the judgment in that claim was obtained by fraud. This application was dismissed by District Judge Armitage on 13 July, on the basis that the procedure was inappropriate, and that Andrew should either have appealed or issued fresh proceedings.

59.
On 23 July 2021 Thomas's second contempt application was heard by HH Judge Fine. Thomas was represented by different counsel and Andrew by Mr Becker, who had last appeared on his behalf at the hearing before Martin Spencer J. The judge refused an application to adjourn the hearing of the application, which she certified as totally without merit. Andrew, through his counsel, then accepted

unequivocally that he was in breach of the Unless Order as to paragraphs 1 and 3 entirely and paragraph 4 in part. The Judge was persuaded to adjourn the hearing of the issue of punishment to enable the fraud allegations to be resolved. She also adopted a similar course to that which Judge Rogers had adopted in the previous contempt proceedings, of spelling out what Andrew needed to do to comply with the Unless Order in the period before the punishment hearing, and warning him of the likely consequences if he did not. Judge Fine initially reserved the punishment hearing to herself, directing that it be listed in the week of 6 September 2021, but provided that the court should re-list as it saw fit if the application based on the fraud allegations had not been determined by then.

60.
On 2 August 2021 Andrew issued an appellant's notice in the High Court in London with grounds of appeal of his own composition against the order of 17 February 2020, claiming that the judgment in the Partnership claim was obtained by fraud and that, in summary, he had discovered evidence since the trial that Thomas had been diverting monies due to the partnership to his own personal accounts or those of his wife. The appeal was transferred to Birmingham.

61.
Meanwhile, on 18 August 2021, in the Matrimonial proceedings, Shirley obtained a Warrant of Possession against Andrew in respect of Catlins Farm. An application to suspend the Warrant of Possession pending the fraud appeal was dismissed by Judge Rogers on 29 September 2021.

62.
On 2 November 2021 Marcus Smith J dismissed Andrew's application for permission to appeal on grounds of fraud as totally without merit and an abuse of process. He said that it was entirely inappropriate for this very serious question to be litigated by way of an appeal from the order of the Judge who had declined to set aside that order. The appropriate course of action would be to start separate proceedings seeking to set aside the earlier judgment for fraud and to plead the particulars of fraud properly in Particulars of Claim.

63.
The punishment hearing, which had been adjourned several times pending the consideration of the application which Marcus Smith J dismissed, was finally adjourned on 27 October 2021 at Andrew's request to a hearing initially fixed for 10 am on 8 December 2021 with a time estimate of 2½ hours. Following Marcus Smith J's order, Andrew wrote a letter to the County Court on 8 November 2021 which he asked should be placed before HH Judge Fine. He indicated that he intended to take the course of action suggested by Marcus Smith J and said this:

"In closing, when dealing with the matter of punishment, I ask that you exercise the same discretion and fairness which you have previously, and for which I am extremely grateful, and allow the fraud (in whatever form) to be fully determined before punishment can be considered. In the event the fraud is proven, the issue of punishment would fall away in any event."

64.
That informal application for an adjournment does not appear to have been acted upon. In the event, Andrew did nothing further to seek to set aside the judgment in the Partnership proceedings for fraud until 19 January 2022 (the day before the hearing of this appeal) when he issued a Part 7 claim form, with "Particulars of Claim to follow", in the Chancery Division of the High Court in London, which seeks, among other matters, a stay of execution of all matters in both the Partnership proceedings and the Matrimonial proceedings.

65.
The next event of importance was Andrew's issue of the Permission to Bid application on 23 November 2021. On 30 November HH Judge Godsmark made an order directing that this application be heard remotely on the morning of 8 December 2021 with a time estimate of 2.5 hours. The court notified the parties, on the same day, that Judge Fine proposed to deal with the Permission to Bid application prior to the contempt hearing, and that the former had been listed at 11am and the punishment hearing was rescheduled for 2pm.

66.
Andrew sent an email to the court office objecting to the rescheduling on the basis that his counsel, Mr Walker, could not attend in the afternoon but only in the morning due to a conflicting professional engagement. Andrew said that because of the importance of the punishment hearing, it was appropriate for the two matters to be dealt with by the same barrister, and asked for the matters to be relisted. What is peculiar about this, is that whilst it is true that Mr Walker had a conflicting professional engagement at 2pm that day, he had never been instructed to represent Andrew in the contempt proceedings (and, in the event, never was). He had only been instructed, at that stage, in the Permission to Bid application.

67.
Thomas's legal representatives opposed this informal application for a yet further adjournment, bearing in mind that the committal application had been listed for 8 December as long ago as 27 October. They pointed out that Andrew had 7 more days in which to brief alternative counsel and that by now, the Unless Order had not been complied with for some 18 months. Andrew's response to that was that the punishment hearing had been listed for 10am and that "Counsel was notified accordingly". If that was true, he must have been referring to different Counsel, because Mr Walker was not briefed for the punishment hearing at the time when it was listed for 10am. At the very least, this information gave a misleading impression. Andrew said that in the light of the opposition, he would make a formal application for an adjournment. The matter therefore remained in the list.

68.
In the course of further correspondence with the court, Thomas's solicitor sent an email at 15.25 on 6 December noting that Andrew had not made a formal request for an adjournment and seeking confirmation that the hearings would be taking place on 8 December at the times ordered by the court. In response to that, Andrew sent an email at 16.38 stating that he had not been provided with a hearing notice advising the details of the punishment hearing. That was incorrect; he had received both the original hearing notice listing it for 10am on 8 December, and the email stating that the hearing would be rescheduled for 2pm on that date. He also stated in the email that his counsel was available at 10am, as per the original notice, but had further commitments in the afternoon. Again, that was misleading because Mr Walker may well have been available at 10am, but he was not briefed to deal with the punishment hearing. This email gave the clear impression that he was.

69.
Up to that point in time, there had not been the slightest indication of any complaint on the part of Andrew about the conduct of any judge who had heard the many applications in this fraught litigation. The email sent at 16.38 on 6 December was the first indication to Thomas's legal representatives that Andrew was making an application for recusal, though it was not until that application was served on the following day that it became clear that he was seeking the recusal of Judge Rogers and Judge Fine (and indeed all other judges "on the East Midlands circuit").

70.
The following morning, Mr Walker sent a message to the court for the attention of HH Judge Fine, which he copied to Mr Stuart. He said that he was instructed in the Permission to Bid application which he understood had been listed for 10am on 8 December for 2½ hours, and that he had another commitment at 2pm. He now understood that the Permission to Bid application had been listed for 11am, which put him at risk of missing his other hearing, and he asked if the judge could be made aware of this. He also said that he understood that his client had made an application for recusal and transfer of the proceedings which they intended to instruct him to deal with. He was not sure when that would be heard, but it seemed to him that it should take priority over the other applications he had before the court.

71.
In the Recusal Application Andrew made the following specific complaints:

i)
That at the hearing on 23 July 2021, Judge Fine laughed at him, called him delusional and humiliated him; allowed Thomas's counsel to behave in a similarly disrespectful way; acted in an unspecified manner that was contrary to the code of Judicial Conduct; gave legal advice to the Respondent (Thomas) by suggesting to his counsel that the matter of Andrew vacating Catlins Farm be referred to the High Court so that the bailiffs could evict him, and that steps be taken to preclude Andrew from making further applications; and suggested that his partner Christina could recover from a C-section within 48 hours. He pointed to the Warrant of Possession obtained by Shirley in the Matrimonial proceedings as evidence that the judge's "legal advice" was acted upon.

ii)
That on 5 January 2021 his partner received a call to say her father had died unexpectedly in "suspicious circumstances", and that this meant she had to make urgent calls on her phone which was being used for remote access to the hearing. That was why he had left the remote hearing partway through. Nevertheless and despite being informed of this, the Judge proceeded to sentence him in his absence.

iii)
That on that occasion the Judge failed to follow the guidance in R v Manning [2020] EWCA Crim 592;

iv)
That Judge Rogers had shown "scant regard for my family" throughout the proceedings but openly showed regard for Thomas and his family;

v)
That Judge Rogers failed to allow him to purchase Catlins Farm;

vi)
That Judge Rogers proceeded with the hearing on 24 and 25 September despite the fact that an application to set aside "the trial judgment" had been submitted;

vii)
That on 25 September the Judge had described him as being volatile, ill-educated and a badly-bred individual, and that these comments had been "removed from the transcript;"

viii)

That on another occasion, as then unidentified, the Judge addressed his counsel, Dr Joseph, and asked why she was staking her professionalism by representing him, meaning that he should be denied legal representation.

Apart from vi), which was one of the matters rightly regarded by Foster J as unarguable, Andrew had never raised any of these complaints in any previous application for permission to appeal. The only judgment he could not have sought to appeal was Judge Fine's, because he had admitted the contempt, and the adjournment of the punishment hearing was a decision in his favour.

72.
Although no explanation for the delay in making these complaints is put forward in Andrew's witness statements, Mr Walker informed the Court on instructions that Andrew was unaware that the alleged behaviour would afford him grounds of appeal until after his release from prison. However, as Mr Stuart pointed out, although he had no solicitor for much of the litigation, Andrew was represented by counsel instructed on direct access at every single hearing after the trial of the Partnership dispute and at least one of those counsel, Dr Joseph, had assisted in the drafting of grounds of appeal against the Unless Order. Indeed she had already made submissions on his behalf that it was unfair to let Thomas have High House Farm and not to let Andrew have Catlins Farm, and the Judge had dealt with those submissions on their merits. Andrew was not without access to legal advice.

73.
Once the recusal application had been issued, there were understandable attempts by Thomas's solicitors to find out when it was being heard and by whom. At one point during the afternoon of 7 December 2021 it was indicated by a member of the court staff that the recusal application had been listed for hearing before Judge Rogers at 11.30am on 8 December. The solicitors responded by pointing out that the Permission to Bid application was currently listed before Judge Fine at 11am on the same day. They asked if Judge Rogers wanted the parties to attend the hearing of the recusal application. The parties were subsequently sent an email which stated that "the only hearing tomorrow is listed by CVP at 11.00 for 1 hour before HH Judge Rogers" and that "all applications are on the court file." Thomas's solicitor sought further clarification that Judge Rogers was dealing with all three applications. On the morning of 8 December the court office informed him and Mr Stuart that Judge Fine was not dealing with anything that day.

74.
Thus, by the time that all three matters came before Judge Rogers later that morning, the parties were aware that the punishment hearing had not been taken out of the list. The court had done its best to accommodate the two last-minute applications issued by Andrew, and since Judge Fine was no longer dealing with the punishment hearing, any application for her to recuse herself had become academic. All the applications were now going to be dealt with in the morning, which Andrew had previously indicated was what he wanted. They would be heard by Judge Rogers, who was fully aware of the complex procedural background and therefore would need far less time to deal with the applications than another judge. There had been no formal application by Andrew to adjourn the punishment hearing.

75.
Moreover, Andrew had deliberately chosen to instruct Mr Walker to represent him only on the Recusal and Permission to Bid applications. He was aware of Mr Walker's professional difficulties on the afternoon of 8 December. The decision not to instruct counsel in respect of the punishment hearing was therefore a deliberate one, and it was taken well before any confusion over the listing of the

recusal application that arose on the afternoon before the hearing. Andrew was taking a calculated risk, knowing that he would be left in a very exposed position and almost certain to go to prison if he did not succeed in one or other of his two preliminary applications. That risk did not pay off.

THE HEARING ON 8 DECEMBER

76.
It appears from the transcript that the remote hearing was called on just before midday, but the Judge indicated that his list for the afternoon had collapsed and so, as he said, there was more time than perhaps was originally anticipated. He identified the application for recusal as the first matter to be dealt with, and then listed all the other applications that he understood he was going to be dealing with, including the Permission to Bid application and the punishment for the admitted continuing contempt.

77.
Mr Walker informed the Judge that if the recusal application failed he would be asking for an adjournment (of the Permission to Bid application) due to the fact that his client wished to respond in more detail to witness statements filed by Shirley and Thomas. He also said that “if imprisonment was an option” he would be asking for a medical report to be commissioned on Andrew so that the court could consider his medical issues before sentence.

78.
There was no suggestion made by Mr Walker that Andrew was not expecting the punishment hearing to take place that day. Indeed, the application to adjourn for a medical report was premised on the assumption that it was going to proceed. Mr Walker did not tell the Judge at that stage that he would be in professional difficulties if the recusal application and applications to adjourn were unsuccessful, or if matters ran over until the afternoon, though of course he had already notified the court that he had another hearing scheduled for 2pm.

79.
The Judge made it clear at the onset that he was not going to entertain an application for the recusal of Judge Fine because she was not active in the case at the moment. Mr Walker did not seek to dissuade him from that course. Nevertheless he did seek to argue, before this Court, that Judge Rodgers should have dealt with that application. An application for recusal is an application made to a judge that he (or she) should not hear a particular matter. Therefore the only relevant application to Judge Rogers was that he should recuse himself. His refusal to deal with any application that Judge Fine should recuse herself was plainly right; that would be a matter for her, in due course, if she were ever called upon to deal with an application in these proceedings.

80.
Mr Walker made it clear to the Judge that he was seeking recusal on grounds of apparent bias. He raised each of the complaints made by Andrew in his application notice, referred to the test in Porter v Magill [2001] UKHL 67, [2002] 2 AC 357, namely, whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased, and submitted (as he did to this Court) that whereas each of the matters taken individually might not in itself give rise to such a conclusion, taken in the round, they would.

81.
The Judge, having ascertained that neither Mr Stuart nor Shirley’s counsel, Mr Byrne, supported the application, delivered a short judgment refusing to recuse himself and certified the application totally

without merit. He next dealt with the application to adjourn the “Permission to Bid” application. Mr Walker submitted that Andrew needed time to respond to allegations that he had feigned illness to avoid being evicted. The Judge was understandably bemused as to how that could have any bearing on whether Andrew should be allowed to buy Catlins Farm in advance of any sale on the open market in which he would have to compete with other prospective purchasers. Mr Walker said that it was only if the statements of Thomas and Shirley would sway the Judge’s mind one way or the other that Andrew would seek the opportunity to respond to those statements.

82.
Finally, on the application to adjourn the punishment hearing, Mr Walker submitted that he would ask for information about Andrew’s health to be provided. The Judge asked what the position was with his health, and Mr Walker said that Andrew had had Covid twice, he had an issue with pneumonia and that there were other matters for a medical professional to look into. He said that Andrew could get a letter from a GP that would address all his health issues and that the matter could come back to court in several days. He was not seeking a long adjournment. The Judge asked why such a report had not been produced earlier, since the penalty hearing had been postponed in July. The only answer Mr Walker was able to provide was that Andrew’s health had deteriorated since July.

83.
Mr Stuart opposed the applications to adjourn, submitting that the Judge could determine the application to buy Catlins Farm on the evidence before him. Given that there was a dispute as to the valuation of the property, the only way to deal with it was to have an open market sale, and it would be sold at the price that a purchaser was willing to pay for it. Andrew would be entitled to make an offer for it. As for the attempt to postpone the punishment hearing, he pointed out that Andrew had had ample opportunity to adduce medical evidence and that he had served a witness statement in support of the Permission to Bid application at the end of November which made no mention of any medical problems or of a wish to adduce evidence from a medical practitioner. He submitted that this was just the latest in a long line of attempts to adjourn every hearing that the Judge had ever heard. Mr Byrne supported Mr Stuart’s submissions and made a few submissions in addition on the question whether the evidence relied on by Andrew demonstrated that Andrew could in fact raise sufficient finance to buy Catlins Farm.

84.
The Judge then delivered his judgment refusing the adjournments. It was only at that juncture that Mr Walker said anything about his hearing at 2pm. The Judge, who was apparently unaware of the problem, was informed by Mr Walker that he had previously advised the Court. The Judge indicated that he would continue sitting through the lunch hour to enable Mr Walker to attend his other hearing. Mr Walker asked for five minutes to take instructions, and was given slightly more than that. When the hearing resumed, the Judge asked Mr Stuart for an update on whether there had been any compliance, and was informed that some items of equipment which Andrew had been ordered to give up had been returned to the partnership, but that he had still not fully complied with paragraph 3 of the Unless Order and remained in breach of paragraphs 1 and 4.

85.
It was only then that Mr Walker told the judge that he had not been instructed on the committal application. He said that this was because it was going to be listed at 2pm. He said that he could make representations on the limited information he had, but he could not mitigate fully. The Judge asked if he was professionally embarrassed, and Mr Walker said that he was not instructed, but he did not feel it was right to abandon his client at that point. The Judge then offered him further time to take

instructions and said that he, the Judge, would be prepared to explain the problem to the judge hearing the other matter at 2pm. Mr Walker accepted that offer, and the court rose for ten minutes. When the court reconvened, Mr Walker made a short plea in mitigation. He raised Andrew's health, the decision in R v Manning, (above), and his partial compliance with the order. He referred to the impact that Andrew's previous spell of incarceration had had upon Christina and their two young children. He sought to persuade the Judge to suspend any custodial sentence he had in mind.

86.
The Judge then gave his judgment. In it, he took into account all of the matters upon which Mr Walker had sought to rely in mitigation. He said that he was prepared to accept that Andrew had suffered once or even twice with the Covid virus and he also took into account the difficulties with his mental health and the fact that he may find incarceration more stressful than many others would. He balanced the aggravating and mitigating factors, and explained that in the light of the matters referred to by Mr Walker in mitigation he had reduced the sentence from a starting point of 9 months to 6, and then, he said as an act of mercy, given credit of one third for admitting the breaches. This produced a sentence of 4 months' imprisonment, of which Andrew will serve only two. He described this as generous, given the obvious nature of the breach and the lack of remorse, but said that he did so reflective of all the factors in the case.

PERMISSION TO APPEAL – RECUSAL APPLICATION

87.
In my judgment, having read numerous transcripts of hearings and judgments given in this matter by the Judge, he behaved throughout these proceedings with exemplary patience, courtesy and fairness, and the reasonable objective bystander would have had no reason whatsoever to conclude otherwise. He was quite right to refuse to recuse himself for the reasons that he gave, after correctly applying the relevant legal principles.

88.
As he pointed out in his judgment on the recusal application, at the hearing of the first committal application on 5 January, 2021, when Andrew dropped off the virtual hearing, he was not given a full explanation of what he termed the "family crisis". Dr Joseph, who was representing Andrew, did give an explanation and an apology for the fact that he absented himself partway through the hearing, which the Judge accepted, but that happened when the Judge was already in the course of delivering his judgment. The Judge said that he understood why Andrew might feel it better to be with his partner (the transcript says "father" but that must be an error) but that he was going to proceed with his judgment. Dr Joseph did not ask for the matter to be adjourned. Moreover, Richard Greetham, who at that time was seeking to be appointed as Andrew's litigation friend, attended the virtual hearing. There was no appeal against the first committal order, as there could and would have been if anyone at the time had felt that the Judge was acting unfairly by continuing in Andrew's absence.

89.
The bulk of the other complaints were simply based on dissatisfaction with the fact that the Judge had made previous findings that were adverse to Andrew but, since his applications were unmeritorious, that was inevitable and the Judge was simply doing his job. As he explained, he had good reasons for distributing High House Farm in specie to Thomas and not distributing Catlins Farm in specie to Andrew. Andrew will get his share of the partnership assets on the conclusion of the accounts and enquiries directed by the Judge, subject of course to the third party debt order which Shirley has obtained in respect of the sums due to her under the order for ancillary relief.

90.
The suggestion that the Judge did not take the pandemic or the case of R v Manning into account when imposing a custodial sentence in January 2021 is patently untrue, as the transcript of his sentencing remarks demonstrates. Mr Walker sought to argue that he did not take these matters sufficiently into account, but that is not an indication of bias, and the sentence, which was short, was not appealed.

91.
Finally, there are the allegations about the Judge's remarks. First, that at the hearing on 24-25 September 2020 it is alleged that the Judge had described Andrew as "volatile, ill-educated and badly bred". The Judge denied ever using such language and it does not appear on the transcript of that hearing. It is disappointing that this serious allegation, together with the suggestion that the transcript must have been tampered with, was persisted in upon appeal. Andrew has suggested that the remarks were made when he was taking the oath (i.e. during the Matrimonial proceedings, and thus before Mr Stuart was involved in the hearing). That would never happen; whenever a witness is called upon to affirm or take the oath there is absolute silence, because the judge needs to hear that the oath or affirmation is taken in proper form, and that applies as much to remote hearings as to hearings in a physical courtroom. Moreover, if such remarks were made in the hearing of counsel, one would have expected them to raise the matter with the Judge and, in Dr Joseph's case, in her grounds of appeal against the Unless Order. The Judge plainly did not say any of those things. The most charitable explanation is that Andrew has convinced himself that he did. It is less easy to explain why his partner is said to support his account.

92.
Secondly, there is the allegation that the Judge showed hostility to Dr Joseph and accused her of staking her professionalism by representing Andrew. The Judge, as he said, did no such thing. I have already referred to the passage in his judgment of 5 January 2021 in which he expressed surprise at her willingness to advance an application for an adjournment on the back of what was obviously a hopeless further challenge to the order of 17 February 2020, but that was no more than, at most, a mild rebuke for possibly displaying excessive forensic zeal. On other occasions the Judge was very complimentary towards Dr Joseph. The reasonable objective bystander would not have considered that he was displaying any unfairness or hostility towards Andrew when he made that remark in the course of explaining why he had refused the adjournment application. He was entitled to point out the obvious difficulties for Andrew in trying to mount yet another challenge to the order of 17 February 2020 when he had already tried and failed several times, including twice on appeal to the High Court.

93.
Thirdly, it is stated in the Appellant's notice that the Judge stated at the commencement of the hearing that the Matrimonial proceedings and Partnership dispute were linked. So they were. However it is incorrect that the Judge refused to set aside Shirley's Warrant of Possession on the grounds that they were not linked. He refused to set it aside on the basis that the grounds relied on by Andrew were wholly unmeritorious. Shirley had obtained a third party debt order which attached to Andrew's interest in Catlins Farm, to enforce the judgment for ancillary relief in her favour. She was entitled to enforce that order irrespective of what happened in the Partnership proceedings. In fairness to Mr Walker, he did not address this point at all in his submissions.

94.

There is and was no proper basis for the application for recusal. It was bound to fail before the Judge and it was bound to fail on appeal. I would refuse permission to appeal and certify that application as totally without merit.

PERMISSION TO APPEAL – THE "PERMISSION TO BID" APPLICATION

95.
The first ground of appeal is bias and that, as I have said, is an allegation devoid of merit. It is next suggested that the Judge did not carefully consider Andrew's application. The fact that he did is evident from the transcripts. Then it is said that he did not understand it. Again, it is plain from the transcripts that he understood it perfectly well. Mr Walker, in his oral submissions, focused upon the Judge's remark in paragraph 4 of his judgment that "whilst the application is framed in terms of an application for Andrew to bid in terms of acquiring the title to this property, that is a misnomer". He suggested that the use of the word "misnomer" indicated that the Judge misdirected himself because the application was a proper one and the Judge had the power to accede to it. However, the Judge was right to characterise it in that way because, as he recognised, what Andrew was seeking in substance was not permission to bid, but a sale of Catlins Farm to him at the value that he was ascribing to the property, based on a valuation which was now well over a year old, but which was not accepted by Thomas to be an accurate reflection of the property's current value.

96.
Andrew was seeking an order under CPR 40.16. There is nothing in that Rule which refers to "permission to bid". It is entitled "Power to order sale etc." and provides, so far as is material that:

"In any proceedings relating to land, the court may order the land, or part of it, to be

a)
sold…"

The Judge had already exercised that power when he made his order on 17 February 2020 by directing the sale of Catlins Farm on the open market unless the parties otherwise agreed in writing. As Mr Stuart pointed out, the editors of the White Book, in the commentary at 40.16.6 have stated that:

"Under a sale directed by the court any party to the claim, desiring to purchase, should obtain permission to bid before the sale, but the sale will not necessarily be set aside because such permission has not been obtained."

No authority is cited for that proposition, but it appears to reflect para 3.1 of Practice Direction 40D.

97.
There is obvious sense in obtaining the court's prior sanction if one or more of the parties to the underlying dispute wishes to make an offer for the property on the open market, because that would help to avoid any subsequent allegations that a party who successfully purchased the property had connived with the estate agent or auctioneer to get it at a favourable price (or to win the bidding). However, as the Judge made clear in his judgment, and as is reflected in the language of the recital to paragraphs 3 and 4 of the Committal Order, which was agreed by all counsel (including Mr Walker), Andrew and any company owned or controlled by him, alone or jointly with others, is allowed to bid to purchase Catlins Farm when it is sold, whether at public auction or in the open market by private sale, pursuant to the order for sale made on 17 February 2020. If and to the extent that he sought the Court's permission to make an offer, he obtained it.

98.
However it is obvious that the real substance of what Andrew was seeking was an order for the sale to him of Catlins Farm without it being put on the open market as previously ordered by the Court, which is something altogether different from obtaining the Court's blessing to bid for the property on the open market. As the editors of the White Book state in the continuation of their commentary at 40.16.6:

"In an appropriate case, the court may order an immediate sale to one of the parties, but should exercise extreme care before doing so: such an order is draconian and unusual: Kotak v Kotak [2014] EWHC 3121 (Ch)."

Mr Stuart submitted that in essence this was yet another attempt by Andrew to achieve what he had previously tried and failed to achieve in September 2020, having had ample time prior to the hearing on 24 and 25 September to raise the necessary funds to satisfy the court that he could pay all his debts, including to Shirley, if there was a distribution of Catlins Farm in specie.

99.
The Judge refused the adjournment on the grounds on which Mr Walker had sought it, but made it clear that he was not going to rely on the evidence of Thomas and Shirley which Andrew said he wanted time to answer. Given that Mr Walker's application was solely premised on the possibility that the Judge might rely on that evidence as justification for refusing the substantive application, it was both fair and well within the Judge's discretion to refuse the adjournment. He was also entitled, for the reasons that he gave, to refuse the application on its merits.

100.
The Judge recognised that this was yet another attempt to overturn the substance of his previous orders relating to Catlins Farm, the Judge and three separate High Court Judges having rightly rejected all previous attempts to do so. The Judge dealt with the application shortly, in paragraph 14 of his judgment refusing the adjournments, but gave fair and adequate reasons. He said he was not going to re-write the original order and give Andrew a preference in terms of obtaining the property. That was a proper exercise of judicial discretion. He could have described the application (though he did not) as an abuse of the process of the Court, because in substance it amounted to a collateral attack on his earlier decisions after exhausting all avenues of appeal or reconsideration. He was, however, right to certify the application as totally without merit. It was bound to fail. So is any appeal, and permission to appeal must be refused because there is no real prospect of success. Andrew strongly disagrees with the outcome and feels a sense of injustice, but that does not mean that there are any arguable grounds for appealing against the Judge's decision. If he wishes to buy Catlins Farm, he can make an offer for it when it is put up for sale in accordance with the order of 17 February 2020.

APPEAL AGAINST THE COMMITTAL ORDER

101.
This leaves the appeal against the Committal Order itself. The first ground of appeal is that the Judge failed to recuse himself. That is hopeless, for the reasons already given. Next it is claimed that the Judge failed to take into account the fact that Andrew had recently tested positive for Covid for a second time. There was no evidence of this before the Judge and it was disputed by the other parties. However, the Judge expressly stated in his judgment that he was prepared to accept that Andrew had suffered once or even twice from the Covid virus. He did take this into account by way of mitigation. He also took into account the effect of serving a sentence of imprisonment during the continuing

pandemic. He was not obliged to suspend the sentence because of that consideration, any more than he was obliged to suspend the sentence he passed in January 2021.

102.
The next complaint is that the Judge did not adjourn for medical evidence. However, Mr Walker quite properly accepted that the question whether to grant an adjournment was a matter of judicial discretion and that the Judge took into account all relevant factors. Mr Stuart submitted, and I accept, that there was no proper excuse given for the failure to adduce any such evidence between July (when the matter was first adjourned by HH Judge Fine) and the hearing on 8 December, but that in any event sufficient regard was taken of Andrew's age and health. On any view, the refusal of the adjournment for further medical evidence is not a good reason for impugning the sentence that was passed. Mr Walker speculated that more up-to-date information might have led to an even more lenient sentence. However, the Judge was entitled to consider the appropriate punishment on the basis of the evidence that was before him. He also had the advantage of his in-depth knowledge of the history of the matter.

103.
In the light of the procedural history set out in paragraphs 63-86 above I am satisfied that the Judge acted entirely properly in refusing the adjournment for further medical evidence. Moreover, there was no procedural unfairness in his proceeding to deal with the punishment hearing even after he became aware of Mr Walker's conflicting professional engagement at 2pm and the fact that he had not been instructed to represent Andrew in respect of that matter. The Judge acted with scrupulous fairness, and did his best to accommodate Mr Walker's position. He was not asked for any further time to take instructions beyond the two periods that he gave Mr Walker.

104.
In my judgment, Andrew was aware that there was a risk that his last-ditch attempts to put off consideration of the punishment for his continuing and very serious contempt of court would be unsuccessful, and he knew that he was likely to be returned to prison if that happened. The fact that despite that risk, counsel was not instructed to represent him at the punishment hearing was entirely his fault. It was a choice he must have made before he instructed Mr Walker to appear only on the Permission to Bid application, because at that time, the punishment hearing had already been listed for 10am on 8 December. When Andrew found out that the court was prepared to put back the punishment hearing until 2pm to accommodate the prior hearing of the Permission to Bid application, he decided to use Mr Walker's non-availability in the afternoon as an excuse to try and obtain another adjournment, even though he knew that Mr Walker had never been instructed to represent him at the punishment hearing. When the Court then sought to accommodate Andrew's objection to the rescheduling of the punishment hearing by listing all three matters for a single hearing in the morning before Judge Rogers, he still chose to confine Mr Walker's instructions.

105.
Moreover, as Mr Stuart very fairly pointed out, neither any alleged misunderstanding about the listing of the punishment hearing, nor Mr Walker's professional difficulties in the afternoon, were put forward to the Judge at the time as a reason for seeking an adjournment, and therefore they are not a legitimate basis for appealing. The process was fair. The Judge acceded to all the applications Mr Walker made for time to take instructions, and did what he could to accommodate his professional difficulties, given that Mr Walker had felt honour bound to remain and assist as best he could.

106.

In the course of the hearing of the appeal, Mr Walker was asked what further matters he would have wished to put before the Judge by way of mitigation if the matter had been adjourned. He said that he would have wished to explain how the family had fared when Andrew went to prison for the first time, the strain his incarceration put on them and how they had coped whilst he was away, and “proper medical evidence” of his physical and mental health. However, as Mr Stuart was able to demonstrate by reference to the judgment, the Judge took into consideration each and every point that Mr Walker said he would have raised, namely, the couple’s two young children, the strain on the family of separation, the difficulties for his partner in coping, the two alleged bouts of Covid, Andrew’s age and frailty, and his mental and physical condition. The question of which category of prison Andrew should go to was not a matter for the Judge.

107.
At the end of the day, this was plainly a case for immediate custody. Unfortunately, the previous spell in prison did nothing to motivate Andrew to comply with the Unless Order. In those circumstances, he was perhaps fortunate to receive such a short sentence. The Judge was right to describe his approach as generous. His decision was well within the ambit of decisions open to him and he took all relevant factors into account when determining the length of the sentence. I can see no arguable basis for impugning it, and therefore I would dismiss this appeal.

Lord Justice Underhill, Vice-President, Court of Appeal (Civil Division):

108.
I agree.