



Neutral Citation Number: [2022] EWCA Civ 1405

Case No: CA-2022-001874

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
MR JUSTICE RITCHIE
[2022] EWHC 2601 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 October 2022

Before:

LORD JUSTICE COULSON
LORD JUSTICE BAKER
and
LORD JUSTICE DINGEMANS

Between:

Breen & others
- and -
Esso Petroleum Company Limited

Appellant

Respondent

Annabel Timan (instructed by **ITN Solicitors**) for the **Appellant**
Timothy Morshead KC (instructed by **Eversheds Sutherland International LLP**) for the
Respondent

Hearing date: 20 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 26 October 2022 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 6 September 2022, Ritchie J (“the judge”) heard the respondent’s application to commit the appellant to prison for contempt of court. In his judgment ([2022] EWHC 2601 (KB)), the judge found that the appellant was in breach of an earlier court order and was guilty of contempt of court. He imposed sanctions of 112 days immediate custody and a fine of £1,500.
2. The appellant seeks to appeal the sanctions imposed upon him. That appeal is brought as of right: s.13(3) of the Administration of Justice Act 1960 provides that a defendant who is found guilty of contempt has an automatic right of appeal¹. However, it is accepted on the appellant’s behalf that he was guilty of contempt of court and, in respect of the sanction, that the custody threshold was passed (see paragraph 27 of the appellant’s replacement skeleton argument). The arguments on appeal are therefore limited.
3. Three points are taken. Ground 1 is the suggestion that the judge’s sanction was wrong in principle. That is concerned with the judge’s method of calculation of the 112 days custody. Although there is also a complaint about the judge’s failure to suspend the sentence, I consider that that is better dealt with under Ground 2 (where the suspension point is also taken). Ground 2 is the submission that the sanction of 112 days immediate custody was unreasonable. That divides into two parts: that it was too long and should have been suspended. Ground 3 is that the fine was unjustified in circumstances where there was already a period of imprisonment and the appellant had no means.
4. At the end of the hearing, the parties were told that, whilst the court acceded to Ground 3 of the appeal (as to the fine), the remainder of this appeal was dismissed. I said that the court would give the reasons for that decision by Monday 24th October, which is when these judgments were provided to the parties in draft.

2. The Law

5. Because this is a case where (i) contempt is admitted; and (ii) it is accepted that the custody threshold has been passed, it is unnecessary to set out copious quotations from the many recent cases concerned with the correct approach to committal proceedings. I should, however, say that I have paid particular regard to *Cuadrilla Boland Ltd. & Others v Persons unknown & Others* [2020] EWCA Civ 9; [2020] 4 WLR 29 (“*Cuadrilla*”); *Cuciurean v SoS for Transport & Anr* [2021] EWCA Civ 357 (“*Cuciurean*”); *Attorney General v Crosland* [2021] UKSC 15; [2021] 4WLR 103 (“*Crosland*”); *National Highways Limited v Heyatawin* [2021] EWHC 3078 (KB); [2022] Env.L.R. 17 (“*Heyatawin*”); *National Highways Limited v Buse & Others*. [2021] EWHC 3404 (QB) (“*Buse*”) and *National Highways Ltd v Springorum and Others* [2022] EWHC 205 (QB) (“*Springorum*”).

¹ This provision has long been the subject of judicial criticism: see, for example, Jackson LJ in *Thursfield v Thursfield* [2013] EWCA Civ 840, where at [45], he said “it may be thought that persons who have been committed to prison for contempt should only be entitled to appeal with permission.”

2.1 The Correct Approach to Sanctions in Contempt Cases

6. The correct approach was summarised in *Crosland* at [44] as follows:

“44. General guidance as to the approach to penalty is provided in the Court of Appeal decision in *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA Civ 392; [2019] 1 WLR 3833, paras 57 to 71. That was a case of criminal contempt consisting in the making of false statements of truth by expert witnesses. The recommended approach may be summarised as follows:

1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council’s Guidelines require the court to assess the seriousness of the conduct by reference to the offender’s culpability and the harm caused, intended or likely to be caused.
2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.
3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.
4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.
5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children of vulnerable adults in their care.
6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council’s Guidelines on Reduction in Sentence for a Guilty Plea.
7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension.”

7. This guidance has been repeated in a number of subsequent cases, in particular at [28] of the judgment of the Divisional Court in *Buse*, which also emphasised that “the purpose of imposing a sanction for contempt is to punish the breach, ensure compliance with the court orders and rehabilitate the person in contempt”.

2.2 Particular Considerations in Protestor Cases

8. In accordance with general principles, any sanction for civil contempt must be just and proportionate. It must not be excessive. But in civil contempt cases, the purposes of sanctions are rather different from those in criminal cases. Whilst they include punishment and rehabilitation, an important aspect of the harm is the breach of the court’s order: see [17] of *Cuciurean*. An important objective of the sanction is to ensure future compliance with the order in question: see *Willoughby v Solihull Metropolitan Borough Council* [2013] EWCA Civ 699 at [20].

9. When dealing with protestors for contempt, the courts have talked about the “moral difference” between “ordinary law-breakers” and protestors which, in many circumstances, can justify a more benign sentencing regime: see [98] of *Cuadrilla* and *R v Roberts* [2018] EWCA Crim 2739; [2019] 1 WLR 2577 at [34]. This is to encourage a dialogue with the defendant so that he or she appreciates that, in a democratic society, it is the duty of responsible citizens to obey the law and respect the right of others, even where the law or other people’s activities are contrary to the protestor’s own moral conviction: see [98] of *Cuadrilla*.
10. The specific issue of dialogue was addressed by Dame Victoria Sharp, President of the King’s Bench Division, in *Heyatawin*. She said at [53]:

“53. In some contempt cases, there may be scope for the court to temper the sanction imposed because there is a realistic prospect that this will deter further law-breaking or, to put it another way, encourage contemnors to engage in the dialogue described in *Cuadrilla* with a view to mending their ways or purging their contempt. However, it is always necessary to consider whether there is such a prospect on the facts of the case. In some cases, there will be. In some cases, not. Moreover, it is important to add, that “there is no principle which justifies treating the conscientious motives of the protestor as a licence to flout court orders with impunity”: *Attorney General v Crosland* [2021] UKSC 15, at [47].”

11. In this way, the importance of complying with court orders, no matter the sincerity of the protestor’s views, still remains paramount: as the Supreme Court said in *Crosland* at [47]:

“47. The respondent was motivated by his concerns and fears relating to the consequences of global warming and his disagreement with the decision of the Supreme Court. However, this does not begin to justify his conduct. There is no principle which justifies treating the conscientious motives of a protestor as a licence to flout court orders with impunity. It was, moreover, a futile gesture as the judgment would in any event have been available some 22 hours later for scrutiny and criticism by the media and the public. However, we do accept that greater clemency is normally required to be shown in cases of civil disobedience than in other cases; see *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 and *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357”

2.3 The Relevance Of Other Authorities

12. In *Thursfield v. Thursfield* [2013] EWCA Civ 840; [2013] C.P. Rep 44), this court was dealing with the appropriate sanction in a contempt of court case. Lloyd LJ deprecated the extensive citation of other authorities. As he said at [33]:

“33 Mr Maguire referred in his skeleton argument, by way of contrast, to a wide variety of other cases including some in the JSC BTA Bank saga. I derive no assistance from any of them and I deprecate the citation of cases which are really said to be precedents or guidance on the facts. Each case, particularly of committal, depends on its own facts, and a comparison with

the facts of other cases, unless they are so closely related as to be in effect the same case, where there might conceivably be arguments as to inconsistency between different contemnors in relation to the same contempt, seems to me to be altogether unhelpful.”

I agree with that. Extensive citation of authority to compare penalties, as opposed to setting out relevant principles, is particularly inappropriate in contempt cases, because they vary so widely in context and fact.

2.4 Suspension or Not?

13. The principles identified in paragraphs 8-11 above mean that suspended committal orders feature prominently in the case law: see *Cuciurean* at [17]. But that does not, of course, mean that there is some sort of default position or presumption that a protestor in contempt of court will ordinarily receive a suspended sentence. The authorities to which I have referred, and the other authorities referred to on behalf of the appellant, are simply examples of the application of general principles to the particular facts of the cases themselves. They are not guideline cases; nor are they intended to apply any particular tariff for any particular type of contempt.
14. Thus, on the facts of the particular cases, suspended sentences were imposed in *Cuadrilla* and *Cuciurean*, but immediate custody was imposed in *Heyatawin*, on one of the contemnors in *Buse*, and some of the contemnors in *Springorum*. In the latter two cases, the prison sentences for other contemnors were suspended because the “dialogue” noted above had started for those particular defendants; they had co-operated at all times; and because of the particular mitigation adduced on their behalf.
15. In the light of the repeated references in the authorities to the application of sentencing guidelines, at least by analogy, particular regard should be had to the Sentencing Council’s Definitive Guideline on the *Imposition of Community and Custodial Sentences*. At page 8, the Guideline contains a table identifying the factors to be weighed in considering whether it is possible to suspend a sentence. On the left-hand side there are three factors that indicate that it would not be appropriate to suspend a custodial sentence. Those are that the offender presents a risk/danger to the public; that an appropriate punishment can only be achieved by immediate custody; and a history of poor compliance with court orders. On the other side of the table, the three factors that indicate that it may be appropriate to suspend a custodial sentence are a realistic prospect of rehabilitation; strong personal mitigation; and where immediate custody will result in significant harmful impact upon others. In addition, the Guideline goes on to state that “the imposition of a custodial sentence is both punishment and a deterrent”.

2.5 Standard of Review on Appeal

16. An appeal like this is not a re-hearing but a review: see CPR 52.21(1). This court will only interfere if it is satisfied that the decision under appeal is “(a) wrong, or (b) unjust because of a serious procedural or other irregularity”: r.52.21(3). A decision on sanction involves an exercise of judgment which is best made by the judge who deals with the case at first instance: see [20] of *Cuciurean*.

17. This approach was clearly stated in [85] of *Cuadrilla*, which led Leggatt LJ to say that it followed that “there is limited scope for challenging on an appeal a sanction which is imposed for contempt of court as being excessive (or unduly lenient)”.

3.The Contempt in Detail

3.1 History

18. The respondent owns and operates a network of pipelines from its refinery in Fawley, near Southampton, to several distribution terminals across England. One such pipeline runs from Fawley to West London and onwards to Heathrow Airport. It is 105 kilometres in length. The initial 10 kms was replaced in 2001 but the remainder of the pipeline is now 50 years old and the need for inspections and maintenance has increased. It needs to be replaced.
19. The replacement of this pipeline is referred to as the Southampton to London Pipeline Project (“the SLP Project”). It is considered a Nationally Significant Infrastructure Project under the Planning Act 2008. Consent for the project has been given by way of a Development Consent Order which requires the replacement pipeline to be installed and run on a particular route from Boorley Green, via Alton in North Hampshire, to the respondent’s West London terminal storage facility. The work requires a construction corridor, typically 30m wide, which straddles the pipeline route. It also involves logistic hubs, construction compounds, access routes to allow access to the public highway and environmental mitigation areas where the respondent has to carry out mitigation works.
20. Construction activities are currently taking place at multiple locations along the route. They are scheduled to last until July 2023. There are up to 35 different worksites employing in excess 600 workers. Construction is spread across 10 local authorities, although the majority of the construction is on third party land.
21. There has been a long history of disruption to the SLP Project caused by environmental protestors. Those are set out at paragraph 6 of the first affirmation of Jon Anstee De Mas, dated 10 August 2022. He is Land and Pipeline Technical Lead for the SLP Project. He identified a total of 15 separate incidents where protestors caused damage and delay to the SLP Project during the latter part of 2021 and 2022.
22. The penultimate incident to which Mr De Mas referred involved the appellant. On or around Sunday 31 July 2022, the appellant, assisted by unknown others, dug a pit around 1.5m square and 2.5m deep on land east of Pannell’s Farm off Hanworth Lane, in Chertsey. The land is owned by Runnymede Borough Council. On 1 August 2022, a video message released by the appellant suggested that he and others intended the pit to be the starting point for the construction of a tunnel or a network of tunnels with a view to making it difficult, time-consuming and expensive to carry out an eviction.
23. The appellant has a long history of involvement with environmental protests. His social media accounts identify him as “Digger Down”. In this role he occupied an illegal tunnel for an unknown number of days in January and February 2021 at Euston Square Gardens, as part of the protests against the HS2 project. In addition, the appellant has engaged in similar activity as part of anti-fracking protests in Bury Hill

Wood in Surrey and Preston New Road in Lancashire. Both of those protests were the subject of injunctions. A third involvement at Horse Hill, near Horley in Surrey, was said to be in the cause of anti-oil drilling.

24. Mr De Mas said at paragraphs 6.56-6.57 of his first affirmation:

“The location of the pit/intended tunnel to the east of Pannell’s Farm has been chosen to disrupt the [respondent’s] works to construct that section of the SLP pipeline, part of which will extend below the M25 motorway. This section of the works depends upon specialist plant and equipment having access across the land where the pit has been constructed...the location of the pit means [the respondent] is no longer able to use the access track. This is currently preventing vehicular access required for the preparation of the schedules construction of the horizontal directional drill under the M25 and will subsequently obstruct the construction of the pipeline at the pit site.”

25. The appellant issued a press statement on 1 August 2022 to say that “the activists will remain locked on until [the respondent] cancels the pipeline project”. In the video which he uploaded on the same day he made plain that he was going to stop the expansion of the oil terminal and oil pipe so as to stop the expansion of Heathrow. He said he was “currently digging a bottomless pit...”.

26. Mr De Mas attended the site on 1 August, soon after the pit was discovered. He asked the appellant to leave because he was trespassing. The appellant refused. Two days later, on 3 August 2022, in a conversation with a Mr Jastrzebski of the Principal Contractor, the appellant said that it would take at least 18 days to evict him from the land and that, once he had been evicted, he intended to construct another tunnel somewhere else on the route of the SLP Project. On 4 August, he informed site security staff that his objective was to stop the contractors from digging below the M25. On the same day, a representative of Runnymede Borough Council told him he was trespassing and demanded that he leave. The appellant again refused.

27. In consequence of these events, the respondent sought an injunction.

3.2 The Order of Eyre J.

28. The application for an injunction was heard by Eyre J on 15 August 2022. Paragraphs 2-5 of the order he made against the appellant (referred to as the First Defendant) were in these terms:

“2. The First Defendant shall remove his person and possessions within 72 hours of service of this order from any and every excavation he has made within the DCO order limits.

3. Until trial or further order, the First and Second Defendants must not do any of the acts listed in paragraph 4 of this order in express or implied agreement with any other person, and with the intention of preventing or impeding construction of the Southampton to London Pipeline Project.

4. The acts referred to in paragraph 3 of this order are:

- (1) within the DCO order limits, damaging anything which is used or to be used in or in the course of the construction of the SLPP;
- (2) within the DCO order limits, traversing any fence surrounding (or other physical demarcation of) any area of land which is used or to be used in or in the course of the construction of the SLPP;
- (3) within the DCO order limits, digging any excavation or affixing or locking themselves to anything or any person;
- (4) within the DCO order limits, erecting any structure;
- (5) within the DCO order limits, spraying, painting, pouring, depositing or writing any substance on to anything which is used or to be used in or in the course of the construction of the SLPP;
- (6) within the DCO order limits, obstructing construction of the SLPP by their presence or activities after having been requested by or on behalf of the Claimant or the police to cease and desist from such obstruction;
- (7) whether within or without the DCO order limits, blocking or impeding access to any land within the DCO order limits.
- (8) assisting any other person do any of the acts referred to in sub-paragraphs 3.1 to 3.7.

5. A Defendant who is ordered not to do something must not:

- (A) do it himself/herself/themselves or in any other way.
- (B) do it by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement”

The DCO covered the entirety of the SLP Project, and not just the site at Pannell’s Farm.

29. The injunction contained a Penal Notice on the front page which warned the appellant (and the persons unknown who were assisting him) that if they disobeyed the order they might be held in contempt of court and may be imprisoned, fined or have their assets seized. The order also contained detailed provisions in relation to the service of the documents.

3.3 The Contempt

30. The events between 15 and 25 August 2022 are set out in the second affirmation of Mr De Mas sworn on that later date. He confirmed that, on 16 August, personal service of the order and the proceedings was effected on the appellant. The Penal Notice on the front of the Eyre J’s order was read out to him. Paragraph 2 of the order meant that the appellant should have left and removed his possessions from the pit within 72 hours, that is to say by 18.20 on Friday 19 August 2022.
31. The appellant failed to comply with Eyre J’s order. Instead, he built a make-shift structure above the pit, constructed from wooden pallets, which he then occupied. That was a breach of paragraph 4 (4) of the order.

32. There can be no doubt that, as the judge found, these breaches were deliberate. Indeed, almost as soon as he had been served with the order, the appellant took a photograph of the front page of the order - namely the Penal Notice - and posted it on his social media page. The judge found that the only purpose in doing this was to mock the order made by Eyre J.
33. In consequence, the respondent began committal proceedings against the appellant. That was supported by the second affirmation of Mr De Mas, to which I have already referred, and an affirmation of Mr Stuart Wortley, a partner with Eversheds Sutherland (International) LLP, the respondent's solicitors. Amongst other things, Mr Wortley's affirmation exhibited an interview with the appellant on *SurreyLive*, an online news reporting service, dated 25 August, in which the appellant boasted that he was surrounded by a minimum of 4 security guards and that, although they came four times a day, to read the injunction to him, "I've got a tannoy that I use to just play police sirens at them, so I have no idea what they are saying".
34. The interview was important for another reason. The penultimate paragraph of the report of the interview said this:

"He [the appellant] has plenty of experience of this kind of action, having spent the last 10 years campaigning full time. He previously spent 20 days in the tunnel protestors built outside Euston Station to protest the new HS2 rail-link, and he has participated in various anti-fracking campaigns. These previous actions have meant that he now has a criminal record, but he insists he will keep on taking action. 'I've always been fighting the oil industry' he said. 'There needs to be an immediate transition into renewable energy'."
35. The committal application was served personally on the appellant on Friday 26 August. A warning as to the consequences of non-compliance and strong advice to seek legal advice was read to him. The appellant ignored the application and continued to occupy the site in defiance of the order of Eyre J and the committal application.
36. On 2 September 2022 the appellant was required to attend a hearing of the respondent's claim for committal to prison for contempt. The appellant did not attend. The judge found that his failure was intentional and "yet another obvious public flouting of the order made by Eyre J". As a result of his non-attendance, Williams J issued a warrant for his arrest not backed for bail.
37. On the evening of 2 September 2022, the appellant was still on site. Three police officers went there to arrest him. They told him that he would be in more trouble if he did not give himself up. He went to the top of the wooden structure and the police officers were warned that if they tried to climb the structure, the appellant would go into his hole and lock himself in, and "there would then be an emergency". Instead, the appellant said that if the officers returned the next day in the morning, he would hand himself in so they could arrest him. The police left the site at 9pm.
38. Once the police had gone, the appellant climbed down from the wooden structure and fled the site. He was assisted by two other protestors, at least one of whom was

masked. So, contrary to his promise, he was not there when the police returned to arrest him the following day.

39. On 5 September 2022, the appellant appeared in court, having instructed solicitors. He was represented by counsel. Following a 2 hour hearing the arrest warrant was discharged and the appellant undertook to attend court the following day for the contempt hearing. Overnight, he produced a witness statement. This took a variety of points and made a number of limited admissions: he said he did not believe that he was breaching the injunction by living above ground on the structure because he thought the order was only preventing him from being in the pit. He admitted that he played police sirens so that he could not hear what the bailiffs said; that he continued to use the pit when he needed to; and that he had breached the injunction. The last paragraph of his statement contained a short apology and an undertaking “that I will not engage in any future incursions onto land enjoined in these proceedings”.

4. The Judge’s Judgment

40. The judge gave an *ex tempore* judgment following the hearing on 6 September 2022. He noted at [28]-[29] that the appellant’s partial defence, that he thought the injunction only ordered him to leave the pit, not the land, so he was entitled to build the wooden structure to live on, had been abandoned during the hearing. I am not surprised by that: the point was a manifestly bad one, particularly since he deliberately drowned out any attempt to explain what the injunction actually required.

41. The judge made the following findings in relation to the appellant (who was of course the defendant in those proceedings):

“32. I find as a fact that the Defendant's approach to the Court order was to flout it continuously and contumeliously, to publicise that he was flouting it and to worsen an already serious situation by building an unsafe wooden structure so that the police were unlikely to arrest him due to their potential to suffer injuries when climbing the unsafe structure.

33. I find that the Defendant refused to engage in the civil process which led to the injunction and refused to comply with the injunction intentionally and I find that he refused to comply with the warrant for the arrest issued by Williams J. Indeed, up until the morning of the hearing the Defendant was still trying to wriggle his way out of his responsibility for his breaches by suggesting that he thought the injunction only applied to order him out of the pit and permitted him to continue obstructing the progress of the construction of the pipeline in his wooden structure.”

42. The judge then summarised the law, referring to the principal authorities which I have noted above. At [49] the judge identified three breaches comprising contempt: the appellant’s failure to remove himself and his possessions in accordance with the order of Eyre J; the construction of the makeshift wooden structure; and the obstruction of the SLP Project by remaining within the site having been requested to move.

43. The judge found at [50] that the occupation lasted for 16 days in breach of the injunction. He said that the breaches were particularly serious for the following reasons:

“51. I find that your breaches are particularly serious in view of the huge cost of the project and the number of subcontractors that need to be organised to achieve success in the project, and also in view of the environmental factors that need to be taken into account to determine when the work is done at various sites by the Claimant. Taking into account the prejudice to the Claimant and the harm to them, I find (without having been given precise figures) that the prejudice is likely to be in the tens of thousands of pounds and possibly in the hundreds of thousands of pounds.

52. Taking into account the question of whether you are acting under pressure or force from other people, or whether the conduct of others has pushed you into acting in the way that you have, I find that you, the Defendant, have carried out all your actions wholly independently, and intentionally.

53. Looking at whether your acts were deliberate or intentional, I consider that all of your actions, including the publicity, the posting of the first page of the injunction on social media, the avoiding of arrest and the failure to turn up at Court, were intentional.

54. As to culpability, I consider that your culpability is high. Not only did you intend to damage the Claimant's business, you intended to waste the time of the High Court bailiffs, the police and the Court Services by failing to engage sensibly and maturely in complying with the Court injunction and with the Court process.

55. In relation to insight, I consider that your witness statement dated 6th December discloses very little insight into the effects of your actions on others. You have not convinced me on the balance of probabilities that you have any insight into the damage you caused to those around you and the waste of money you caused to the emergency services, the police and the Court Service.

56. In relation to cooperation, as set out above, the Court is astute to be involved in a dialogue with conscientious protestors, and indeed to permit a reduction in the severity of sanctions where conscientious objectors are non-violent, cooperative, mature and interactive in their approach with the Courts. You have not been any of those. Quite the opposite. You have been arrogant, dismissive, and have sought to cause chaos by failing to engage in the process.

57. In relation to aggravating factors, I consider that those include refusing to leave for 16 to 17 days; building a structure after service of the Court order; social media posts taunting the Court's order and encouraging the public effectively to do the same; refusing to comply with a warrant for arrest; putting in a witness statement seeking to hoodwink the Court and refusing to listen to verbal warnings given by the security guards.”

44. The judge found that the custody threshold had been passed (a point that is not now disputed). The judge took into account the mitigating factors such as the belated

apology and the undertaking offered. The judge passed an immediate prison sentence, calculated as follows:

a) The judge allocated 5 days imprisonment for each of the days during which the appellant refused to comply with the order of Eyre J. That gave rise to a period of 80 days (5 x 16);

b) The judge added at [63] 21 days imprisonment for each of the five aggravating factors that he identified, namely:

“(i) building a structure on the land after service of the injunction;

(ii) social media posts in effect encouraging the public to disobey Court orders;

(iii) refusing to comply with the warrant for arrest;

(iv) putting in a witness statement seeking to hoodwink the Court;

(v) refusing to listen to verbal warnings given by security guards.”

c) That produced a further 105 days (5 x 21), making a total of 185 days;

d) There was then a reduction of 40% for mitigation, leaving a net period of 112 days imprisonment.

45. Accordingly, the judge passed a sentence of 112 days imprisonment. In addition he imposed a fine of £1,500.

46. Finally, the judge addressed the question of whether the sentence should be suspended. He did that expressly by reference to the six factors identified in the table of the Definitive Guideline on the *Imposition of Community and Custodial Sentences* (paragraph 15 above):

“66. Should that sentence be suspended? The Sentencing Guidelines urge this Court to weigh up the following factors:

(1) Whether the offender presents a risk or danger to the public. I consider you do. I consider that you think you are not bound by the law and you will do what you want. That means that you continue to be a danger to Esso and any other petrochemical company in times when in this country we may have inadequate supplies for heating of houses, schools, hospitals, churches and other establishments.

(2) Whether the appropriate punishment can only be achieved by immediate custody. I believe that is the only appropriate punishment, for you have publicised that you do not care about Court orders and urged that people should breach Court injunctions.

(3) Whether there is a history of poor compliance with Court orders. I have not majored on your antecedents as set out and agreed in the facts, but I do take those into account when looking at the history.

(4) Whether there is a realistic prospect of rehabilitation. You have rehabilitated yourself from one of the greatest challenges in life, which was drugs. You have the Court's sincere congratulations however you will need to rethink your approach on how you protest.

(5) Whether there is strong personal mitigation. I am hugely impressed by your getting off drugs, more power to you, stay off, but this is a bandwagon you may have to get off as well.

(6) Whether immediate custody will result in significant harmful impact upon others. That does not really apply in your case.”

5 Ground 1: Wrong in Principle

47. The appellant’s argument under Ground 1 is that the 112 days immediate custody was wrong in principle. On the face of it, that is a difficult submission, since the judge referred to all the applicable principles and no criticism is made of his approach to the law. The argument is instead based on the judge’s imposition of what Ms Timan described as “an artificial tariff” of 5 days for each day of breach and 21 days for each aggravating factor. It was said that this was arbitrary and unsupported by any previous authority.
48. It is certainly right that the judge’s methodology was novel. He had a commendable desire to explain to the appellant how he had arrived at the custodial term. I accept that, in criminal cases, judges are encouraged to explain how they have arrived at the sentence they are imposing and the judge may have wanted to adopt a similar approach. But when a crown court judge explains a sentence, he or she is assisted by the numerous sentencing guidelines for particular offences. Beyond the statutory maximum of 2 years imprisonment², there is no sentencing guideline for contempt, and the cases vary so widely and are so fact-dependant that it is difficult to see how there could be.
49. In my view, there are all sorts of dangers and difficulties in adopting the methodology of the judge. It is too granular. It is hard to defend the individual periods of 5 days or 21 days from the charge that they are arbitrary. Furthermore, such an approach would encourage the sort of close textual comparison between one decision and another that the authorities expressly warn against, because they would mean that other defendants would argue in other cases that, although factors 1, 3, 4 and 7 identified by the judge in this case were present, factors 2, 5, 6 and 8 were not, and that that should have a consequence on the term, worked out with mathematical precision. I am therefore unable to endorse the judge’s well-meaning but misguided attempt to calculate the appropriate term in this way.
50. Other points were made by Ms Timan about the individual elements of the calculation. I address those under Ground 2.

² Section 14(1) of Contempt of Court Act 1981.

51. So, where does that leave us under Ground 1 (the argument that the 112 days was wrong in principle)? Although I agree that the methodology is not one that I could commend, it seems to me that what matters is the result. Since this is a case where it was agreed that there had been a contempt of court, and where it was agreed that the offences passed the custody threshold, the real questions concern the length of the term imposed and whether or not it should have been suspended. Those both arise under Ground 2.

6. Ground 2: Unreasonable Custodial Sanction

52. As I have indicated, there are two distinct points made here. The first is that the term of 112 days was too long. The second is that the judge's failure to suspend the term was "far outside the guidance in previous authorities". One or both of these factors are said to make the sanction "unreasonable".

6.1 Length of Term

53. The first question is whether 112 days was excessive. When considering that question, I am mindful of the authorities as to the standard to be adopted on appeal: see paragraphs 16 and 17 above. In my judgment, the short answer to this first part of Ground 2 is that a sentence of 112 days (just under 4 months) was not excessive, and a sanction which the judge was entitled to impose. It is in line with the other, relatively short sentences, identified in the authorities noted above. It is directly in line with the various terms of 6 months, 4 months and 3 months imposed on the defendants in *Heyatawin*.
54. In deference to Ms Timan's detailed submissions, however, I go on to address the specific criticisms she made of the judge's approach. It is the appellant's case that the judge erred in the weight he attached to certain factors and erred in failing to attach sufficient weight to other factors. Hence it is said that the 112 days was unreasonable.

6.2 Weighing the Aggravating and Mitigating Factors

55. The first point to make is that, again mindful of the standard to be adopted on an appeal, questions of aggravating and mitigating factors, and the weight to be given to each, are primarily a matter for the first instance judge. It is not therefore an exercise which this court should, save in exceptional circumstances, undertake itself or redo.
56. The judge identified a number of general aggravating factors. There was the huge cost of the project which would increase because of delay [51]. There were the environmental factors that determined when the work could be done at various sites (also affected by delay) [51]³. There was the fact that the breaches were deliberate and intentional [53]. There was the appellant's intention not only to damage the respondent's business but also to waste the time of the High Court Bailiffs, the police and the court services [54].
57. Specific aggravating factors that the judge identified included the construction of the timber structure on the land after the service of the injunction [63(i)]; the social media

³ The need to ensure that the SLP Project was carried out at different sites at different times was necessary to minimise environmental consequences. As happened on HS2, if protests cause delay, they can upset that delicate environmental balance.

posts which the judge found were intended to encourage the public to disobey court orders [63(ii)]; the refusal to comply with the warrant for arrest [63(iii)]; the witness statement designed to hoodwink the court [63(iv)]; and the refusal to listen to verbal warnings given by security guards [63(v)].

58. I should say that there were a number of other aggravating factors which I consider to be of relevance which the judge did not expressly identify. There was the appellant's failure to attend court on 2 September. There was also his lie to the police officers that they could arrest him in the morning of 3 September and his flight overnight to avoid arrest.
59. As to the aggravating factors identified by the judge, Ms Timan made four submissions. The first was her argument that the factors in the judge's judgment at [63] involved double-counting. However, the only factor she expressly identified in this regard was at [63(iii)], the refusal to comply with the warrant for arrest.
60. I disagree with that submission. The judge's starting point was the length of time that the appellant had failed to comply with the order of Eyre J. The judge was therefore entitled to consider that each of the factors at [63] was additional to that basic breach. In my view, the judge was right to say that the appellant's contempt was aggravated by his refusal to comply with the warrant for arrest [63(iii)]. There was no double-counting.
61. Secondly, Ms Timan suggested that the judge had been wrong to say that the order had been posted on Facebook to mock its terms [63(ii)]. Again, I disagree. It can have had no other purpose. If, as Ms Timan said, the order was just about the appellant and had nothing to do with the public, why did he post it at all? It can only have been to encourage other members of the public to ignore it too. There was evidence to demonstrate that the appellant was not only engaging with the public through his social media accounts throughout this period, but was also being assisted by them during his occupation of the site. It is therefore incorrect to say that his publication of the order did not have a harmful effect on the public.
62. Thirdly, Ms Timan complained that it was wrong for the judge to identify (at [63(iv)]) as an aggravating factor a witness statement that was designed to hoodwink the court (namely the suggestion that the appellant did not know that the order required him to vacate the site). I would agree with her that, certainly in most criminal cases, it would not be usual to regard as an aggravating feature that which a defendant relies on in his or her defence. But a committal application is a different creature: it has at its heart a defendant's flouting of court orders (see the authorities cited above).
63. In the present case, the appellant had maintained in his statement (which statement he said was true), that he did not read beyond page 1 of the order of Eyre J because he was short-sighted. This required the respondent to put in its own photographic evidence showing the appellant actually reading the order. It might be said that this part of the statement demonstrated how lightly the appellant took the statement of truth. In the circumstances, I consider that the judge was entitled to take into account what was in effect false evidence in the appellant's witness statement as an aggravating factor.

64. Fourthly, Ms Timan said that the judge had erred in his reference at [66(1)]to the effect of the supply of fuel to the public (in particular schools and churches), when the SLP Project was intended only to provide fuel for Heathrow Airport.
65. In my view, this point is based on a misreading of the judge’s judgment. The relevant passage, set out at paragraph 46 above, was *not* addressing the aggravating factors; it was where the judge, by reference to the relevant guideline concerned with possible suspension, was dealing with the danger or risk which the appellant posed to the public. The only point that the judge was making was that, in view of the appellant’s beliefs, he represented a risk⁴, not only to the respondent and the SLP Project, but to any other petrochemical company, at a time when there was and is a risk of inadequate supplies for heating of “houses, schools, hospitals, churches and other establishments”. That was a view to which the judge was entitled to come, based on the uncontroverted evidence in the affirmations of Mr De Mas and Mr Wortley about the appellant and his wider beliefs (such as “I’ve always been fighting the oil industry”). That was not directly concerned with the SLP Project, but it was obviously not unrelated to the appellant’s actions. The criticism is therefore misplaced.
66. Accordingly, I reject the suggestion that the judge wrongly took into account matters that were not aggravating factors or in some way double-counted them. I consider that all the matters that I have identified above were aggravating factors which the judge was entitled to weigh in the balance when imposing the sanction for the appellant’s contempt of court. Those factors, when taken in the round, led to the judge’s conclusions that the breaches were “particularly serious” and that the appellant’s culpability was “high”.
67. The appellant complains that the judge did not have proper regard to the mitigating factors. But they were relatively few and far between. There was not a full acceptance of his wrongdoing until part way through the hearing on 6 September, when he abandoned the point that he could not read the order of Eyre J. That inevitably diluted his apology, which was itself in the briefest of terms (“I wish to apologise to the court for breaching the injunction.”). The undertaking was only limited to the SLP Project, not other installations owned by the respondent or other petrochemical companies. In the round, it might fairly be said that, in the face of the appellant’s repeated and serious breaches of the orders of the court, the mitigation was limited.
68. More importantly perhaps, the judge made a 40% reduction in his calculation of the term to reflect that mitigation. That was, on any view, a generous reduction. Even though I have concluded that the calculation was itself ill-advised, and should not be repeated, the fact that the judge gave such a big discount for mitigation shows, at the very least, that he had it well in mind.
69. Accordingly, I do not consider that the judge undertook an improper balancing exercise between the aggravating and the mitigating factors. He took account of all relevant matters, and despite the way in which he approached the calculation, I consider that the resulting term of 112 days imprisonment is unassailable.

⁴ The guideline says “risk/danger to the public”. There was no evidence of any danger posed by the appellant.

6.3 Suspension

70. The other argument under Ground 2 is that the sentence should have been suspended. This appears to be on the basis that, in the cases to which I have referred, many of the sentences were suspended. Ms Timan’s argument was that, by reference to [54(b)] of *Heyatawin*, there was in effect a principle that immediate custody was only appropriate where there was direct harm and disruption to the public.

71. In *Heyatawin*, Dame Victoria Sharp P said:

“54 (b) As far as harm is concerned, it is important to focus on both the harm actually caused *and* the harm intended or likely to be caused by the breach. In both respects, the location of the breach and the nature and number of people who would foreseeably be affected by it are critical. Unlike the events the court had to consider in *Cuadrilla* and *Cuciurean*, this was not a protest directed at a specific activity taking place on private land. It was a protest on the slip road of a busy motorway at rush hour on a weekday. The protest affected and was intended to affect large numbers of ordinary members of the travelling public. In other words, harm was not the by-product of the protest; its very objective was to cause harm and disruption to as many ordinary members of the public as possible to bring attention to the cause the defendants advocated.

...

58 The harm caused by breach of the court's order therefore goes beyond the inconvenience and economic damage we have mentioned. By deliberately defying the M25 Order, these defendants broke the social contract under which in a democratic society the public can properly be expected to tolerate peaceful protest. This was bound to give rise to frustration and anger, which carried with it the prospect that the defendants' own safety and the safety of others would be put at risk; and that members of the community might take the law into their own hands in trying to deal with the disruption the protest had caused. We consider this a proper inference to draw from all the evidence we have seen, including the proximity of the protestors to heavy traffic at a busy time of day before the police arrived and the attempts of some of the defendants to go back into the road when traffic started flowing again.”

72. I reject Ms Timan’s submission. There is no such principle. As I have endeavoured to explain above, the sanctions in *Cuadrilla*, *Cuciurean*, *Heyatawin*, *Buse* and *Springorum* were all the product of the application of the general principles to the facts of the particular case. There is no principle that there has to be a direct effect on the public before immediate custody is ordered. That will undoubtedly be a factor in some cases, but it is not and must not be regarded as determinative. It would ignore, for example, what Sharp P said about the breaking of the social contract.

73. In addition, as Mr Morshead KC pointed out in his submissions, the reason that the harm to the public was a relevant factor in *Heyatawin* was because the original injunction, in respect of the M25, was deliberately designed to protect the public. In other words, the protection of the public was the reason why the injunction was ordered, which in turn explained why it was a relevant factor in the sanction to be imposed. The passages in the judgment cannot be read as suggesting that, in some

way, only direct harm to the public, rather than a private company serving the public, can lead to an imposition of a custodial term.

74. Finally, on this point, whilst recognising the danger of cross-authority comparison, I cannot help but note that the contempt in *Heyatawin* occurred on one morning (8 October 2021) and in some instances it only lasted an hour and a half. The contempt in some of the other cases was equally short-lived. Here, the contempt extended for well in excess of two weeks. That may be regarded as an important point of difference when considering the comparative harm caused. It demonstrates not only an extended period of harm, but also why such a long period of disengagement made any immediate dialogue with the appellant impossible.
75. When considering the possibility of suspension, what the judge did here, and what he was obliged to do in the light of the guidance in *Crosland*, was to have regard to the Guideline on the *Imposition of Community and Custodial Sentences*. That is at [66].
76. Of the items indicating that suspension is not appropriate, the first is whether the appellant is a risk/danger to the public. I have already addressed and rejected the criticism of the judge's consideration of that factor: see paragraphs 64-65 above (although I stress that the appellant is a 'risk', not a 'danger').
77. As to the second factor, the judge concluded that the appropriate punishment can only be achieved by immediate custody. The judge said that that was the only appropriate punishment in this case. The Court of Appeal Criminal Division has said many times⁵ that, if this factor has been established, it may well outweigh any other factors and lead to a decision not to suspend the sentence. I consider that the judge was right to conclude that on the facts of this case, the only appropriate punishment was immediate custody. The sheer volume of the aggravating factors made that conclusion inevitable.
78. Finally, on the items indicating that suspension is not appropriate, there was undoubtedly a history here of poor compliance with court orders. The appellant's deliberate ignoring of the orders in this case has already been discussed.
79. By contrast, it may be said that none of the factors in the guideline which indicate that a sentence should be suspended are present in this case. There is no evidence that there is a realistic prospect of rehabilitating the appellant away from his set views as to his right to protest in defiance of court orders. Although Ms Timan said that it was unfair to deal with the appellant's insight in this way, given the short period here between offence and sentence, as compared to an ordinary criminal case, I do not agree. Here, the duration of the contempt was much longer than in many committal cases. Furthermore, the judge was as positive as he could be: he merely said that the appellant needed to rethink his approach on how he protested.
80. I have already said that, on analysis, there was no strong personal mitigation. Further, there was no suggestion that immediate custody would have any (let alone any significant), harmful impact upon others.

⁵ See, for example, *R v Middleton* [2019] EWCA Crim 663, and *R v S* [2022] EWCA Crim 1362

81. Accordingly, on a consideration of all the factors in the guideline, the judge was right to conclude that this was not a case where the sentence fell to be suspended.

6.3 Summary

82. For those reasons therefore, I do not consider that the sentencing imposed by the judge was unreasonable and/or that he erred in not suspending it. Grounds 1 and 2 of the appeal are therefore rejected.

7. Ground 3: The Fine

83. The judge imposed a fine of £1,500. He did not explain his reasons for so doing.
84. Ms Timan submitted that there was no justification for the imposition of a fine in addition to a period of imprisonment. She also said that it was inappropriate because the appellant had no assets and was of no fixed abode.
85. In my view, the judge was wrong in principle to impose a fine. The reason for that can be traced back to the guidance in *Crosland* at [44], set out in full at paragraph 6 above. The consideration of whether a fine is a sufficient penalty comes early in the process. If a fine is sufficient penalty then custody is not an option. In the present case, by contrast, it is agreed that the custody threshold was passed, so a fine could never have been a sufficient penalty. In those circumstances, there was no principled basis for imposing a fine in addition to the term of imprisonment.
86. Furthermore, there is a separate Sentencing Council guideline in relation to fines which states that “a fine should not generally be imposed in combination with a custodial sentence because of the effect of imprisonment on the means of the defendant.” It goes on to say that there may be exceptional circumstances which would justify the imposition of a fine in addition to a custodial sentence, but that is where the sentence is suspended (which is not this case) and where the offender has the resources to pay the fine (which is not this case). That guidance would also strongly suggest that there was no basis for the fine here.
87. Thirdly, I note that the enforcement of a fine of this nature would have to follow the procedure set out in s.16 of the Contempt of Court Act 1981. This involves, amongst other things, His Majesty’s Remembrancer proceeding to enforce payments as though she was a judgment creditor (s.16(2)(b)). Whilst there may be some cases in which that process is appropriate, I doubt whether it could ever be applicable to an impecunious protestor such as the appellant.
88. For those reasons, I quash paragraph 2 of the amended order of 7 September 2022, which ordered the payment of the fine. Beyond that, the order is unchanged, and the appeal is dismissed.

LORD JUSTICE JONATHAN BAKER

89. I agree.

LORD JUSTICE DINGEMANS

90. I also agree.