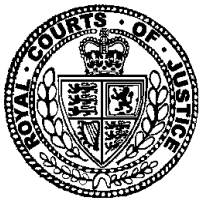

Neutral Citation Number: [2024] EWHC 2854 (Admin)

Case No: AC-2023-LON-001055

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 November 2024

Before :

MR JUSTICE SHELDON

- -

Between :

Ms ALISON WHITE **Claimant**

- and -

PLYMOUTH CITY COUNCIL

Defendant

- -
- -

Rachel Sullivan (instructed by Goodenough Ring Solicitors) for the Claimant
Ranjit Bhose KC and Wayne Beglan (instructed by Plymouth City Council) for the Defendant

Hearing dates: 10 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 09.30am on 13 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SHELDON

Mr Justice Sheldon:

1. In the early hours of 15 March 2023, pursuant to an application made by Alison White ("the Claimant"), Freedman J issued an *ex parte* injunction prohibiting Plymouth City Council ("the Council") from carrying out "any further works for the removal of trees, including pruning, or any works preliminary to those works, at Armada Way, Plymouth, Devon until further order upon the hearing of the Return Date Application". Those works, which included the proposed felling and replacement of most of the trees in Armada Way, formed part of a redevelopment scheme that the Council had decided to implement on 14 March 2023. That decision was published by the Council shortly before 6pm on 14 March 2023.

2. As part of Freedman J's order, the Claimant had to lodge judicial review proceedings by close of business on 15 March 2023. She complied with that direction. Those proceedings were considered at a substantive hearing by David Elvin KC, sitting as a deputy judge of the High Court, in March 2024. The judge decided to dismiss the application for judicial review on the grounds that it was academic: see [2024] EWHC 965 (Admin).

3. The Claimant contends that the way in which the Council conducted itself in advance of, and in making, the decision to remove trees at Armada Way was a contempt of court as it constituted interference with the "due administration of justice": Ground One. The Claimant also contends that the Council breached Freedman J's order and have therefore acted in contempt of court: Ground Two.

4. I have to consider whether (i) to grant permission to the Claimant to proceed with Ground One; and (ii) to strike out Ground Two for being an abuse of process. With respect to (ii), I am also asked to consider whether to dispense with personal service with respect Freedman J's order. In addition, I have to consider applications with respect to costs protection: under the Aarhus Convention (CPR Rules 46.24-27) or more generally for a protective costs order.

Factual Background

5. The background to this matter is set out in some detail in the judgment of David Elvin KC. In summary, the redevelopment scheme at Armada Way involved the felling of 129 mature trees from a total of 149 on site, and the planting of 169 new sustainable semi-mature trees. The scheme had been the subject of much local opposition. The decision to implement the scheme was made by the Leader of the Council on 14 March 2023 pursuant to the Council's "urgency procedure".

6. In his judgment David Elvin KC explained that:

> "4. A week or so in advance of the decision, preparations for physical implementation had been arranged, and it is apparent that contractors had been instructed, subject to a final decision approving the project, and meetings had taken place with the police due to concerns there would be disruptive public protest. Preparations were clearly already underway when the decision was published at 5.54 p.m., since the contractors arrived shortly afterwards, and mobilisation of the site began at about 7 p.m.,

which included setting up protective fencing. This purportedly followed the Council's constitution, which provides that an urgent decision should be immediately implemented. The Council's intention was to fell 126 of the 129 trees that evening, and its contractors proceeded to do so from about 8.00 p.m.

5. Alerted by the mobilisation of the contractors, the claimant, Alison White, took steps to instruct solicitors who had already been acting in her campaign to save the trees. She is a local resident, concerned by the Council's proposals and their effect on the Armada Way trees, and had started an online campaign under the name "Save the Trees of Armada Way" ("STRAW"), with which a large number of local people engaged. STRAW is a collection of volunteers committed to protecting the trees of Armada Way. They had notably organised opposition to the proposal during public consultation, which resulted in a majority of members of the public opposing the proposals."

"6. The claimant explained how events unfolded in her first witness statement:

> "20. I first heard that it looked as though work was going ahead on site at around 18:00 on 14 March 2023. I was surprised as we had received no notice of any decision by the Council, and despite our clear interest in the proposals. I then checked the Council's website and saw that it had been updated with further plans and links to various reports relating to the delegated decision.
>
> 21. The Council did not notify me or other STRAW members of the decision to approve the scheme or of their intention to start felling immediately.
>
> 22. I arrived at Armada Way at around 18:45 and saw numerous contractors, security guards, police, vans and lorries. Fencing was being erected by contractors around the site and the nearby road, which was closed.
>
> 23. At about 19:00 we saw heavy machinery arriving and contractors wearing ear defenders.
>
> 24. A number of supporters including myself stood very close to one of the trees to try and stop it being felled while a contractor was up the tree cutting off branches with a chainsaw. Parts of branches were falling on us. Police told us we should move if we did not want to be hit by falling branches or trees.
>
> 25. I believe one person was arrested for climbing over a fence while trying to protest peacefully and another individual was arrested for climbing a ladder next to the

> fencing. I understand, neither of these individuals were charged with an offence.
>
> 26. One young person climbed a tree and was pulled out by three security guards. He was ejected from the site.
>
> 27. At approximately 00:30 on 15 March I was told by my solicitor that our application for an injunction had been approved and we were awaiting the signed order from the court. I attempted to locate Council officers but none of the contractors would advise me as to who was in charge. We also could not reach the officers to speak to them because they were in a site office, which was located behind the fence.
>
> 28. The police told us that they would not help determine who was in charge until we had a copy of the injunction.
>
> 29. We were able to contact Paul Barnard eventually by calling the phone number on the side of the office.
>
> 30. At 00:53 my solicitor emailed the approved but unsigned order. I showed this to the police and Council officers using my friend's phone and told them to stop felling the trees.
>
> 31. Liz Bailey, a STRAW supporter, spoke with Paul Barnard who told me that he would only comply with a paper copy of an injunction.
>
> 32. At 00:57 I received the signed order by email from my solicitor. This was emailed to Paul Barnard. I asked my husband, Mark Thomas, to print the order and bring it to the site, which he did. We handed the paper copy to Paul Barnard.
>
> 33. At 00:57 contractors stopped felling the trees."

7. With respect to the decision-making of the Council on the afternoon of 14 March 2023, David Elvin KC stated as follows:

> ". . . the Leader had significantly less than half an hour to read and digest the 30-page (plus appendices) Executive Report, which period of time also included a telephone discussion with the Assistant Chief Executive, before he communicated his decision at 4.02 p.m. on 14 March 2023. Although the Council's letter of 15 March 2024 disclaims the existence of any communications between officers and the Leader, it is clear from the latest witness statement of Mr Giles Perritt, the Assistant Chief Executive, that there were such communications, at least in the form of the telephone call now revealed to have taken

> place. Whilst that short time period may not lead to a conclusion that it was impossible for the Leader to have digested the report, given that much of it would have been familiar to him and there were already Council resolutions in place in support of the project, it is, nonetheless, short - especially if he had to consider the scheme changes and the technical advice and the Engagement Report, which of course is criticised itself by the claimant. Unfortunately, there is no evidence from the former Leader.
>
> 54 . . . although the Executive Report and decision were only published at 5.54 p.m. only minutes before works began to be mobilised at Armada Way, the decision was known to officers shortly after the email of 4.02 p.m, and Mr Barnard's email relating to mobilisation must have been made when he knew of the decision but was waiting for the publication of the Executive Report and decision, since the wording is careful to refer just to publication, and he was clearly aware that it was about to be published. Indeed, in his witness statement filed with the court this morning, he accepts that he confirmed that he did know of the decision at the time he emailed the Council's contractors at 4.39 on the 14th."

8. On 22 March 2023, the Council's Leader announced his intention to resign. On the same day, at a meeting of full Council, it was decided to recommend to the Council's Cabinet (then an exclusively Conservative Party administration) to establish an independent review into the decision-making process relating to the redevelopment scheme. The Conservative Party administration was voted out of power at the local elections held on 4 May 2023. The new Labour Party administration decided not to proceed with implementation of the scheme. On 10 July 2023, the new Leader of the Council confirmed a commitment to establish an independent review into what had taken place. Different options were consulted upon, and on 19 February 2024, the Council's Cabinet approved a new scheme.

Procedural Background

9. On 22 May 2023, Beverley Lang J granted permission to apply for judicial review. On 26 May 2023, the Council's solicitors wrote to the Claimant's solicitors stating that in light of the formal withdrawal of the 14 March 2023 decision the claim had become academic. An application to have the claim dismissed as academic was dismissed on the papers on 28 June 2023, and this was upheld by Thornton J at a hearing on 14 September 2023.

10. On 17 November 2023, the Claimant applied for the Council to be committed for contempt of Court (Grounds One and Two), and sought an order for costs protection. On 21 December 2023, Cotter J adjourned the application pending judgment, with liberty to restore.

11. As already indicated, David Elvin KC dismissed the judicial review application as academic. This was on the basis that the decision to implement the redevelopment scheme had been revoked in May 2023 and would no longer be acted upon, and a new

scheme had been approved. There was, therefore, no longer "a *lis*" between the parties the adjudication of which would directly affect the parties' rights and obligations. There were also no exceptional circumstances to determine the claim.

12. In the course of his judgment, David Elvin KC commented unfavourably on the late disclosure and statements made by the Council with respect to events that occurred in the afternoon of 14 March 2023. The Council's conduct was said to be "highly unsatisfactory" ([52]), and revealed "the lack of transparency in its procedures, in its inadequate compliance with its duty of candour to the court and raised issues about the credibility of some of its witnesses".

13. On 18 April 2024, the Claimant applied to have the applications for contempt restored. The matter was considered by Sir Duncan Ouseley (sitting as a High Court Judge) who listed a hearing to:

    i. consider the application to restore;

    ii. consider all procedural applications of the Claimant and Council, including the amendment of the applications, the admission of further evidence, the Council's contentions about personal service, and other procedural issues raised, including the need for the grant of permission, and for separate proceedings in relation to the abuse of process ground, and whether contempt proceedings should proceed in view of the resolution of the substantive proceedings;

    iii. give directions for the conduct of any contempt proceedings which it permits to continue; and

    iv. consider whether the committal proceedings are Aarhus proceedings and if so are properly seen as part of the earlier and resolved Aarhus proceedings, rather than a further set of proceedings, if the Council wishes to pursue such points.

14. On 19 July 2024, Sir Peter Lane (sitting as a High Court Judge) refused an application to determine whether these proceedings were Aarhus proceedings or to make a cost capping order. On 13 September 2024, Beverley Lang J refused to reconsider Sir Peter Lane's order or the order of Sir Duncan Ouseley.

The Applications for Contempt

15. The details of the Claimant's applications for contempt are as follows:

    i. Ground One:

    The Council interfered with the due administration of justice through impeding the Claimant's ability to apply to court to challenge the decision to implement the redevelopment scheme, and so to commence felling works to the trees on Armada Way, by taking the following steps:

    a. On 14 March 2023, the Council's senior in-house legal advisor sent a letter which implied no decision had been taken to approve the Scheme (and so to commence felling works to the trees on Armada Way, Plymouth, Devon) despite being aware that such a decision had been made;

b. The Council published the decision only at the same time as (or at approximately the same time as) the works commenced.

ii. Ground Two:

a. On 15 March 2023, the Council breached the terms of Paragraph 1 of the Injunction ordered by Freedman J by failing to direct its contractors or agents to cease felling the trees on Armada Way, Plymouth, Devon and works preparatory to such felling until 1:10am despite having actual notice of the terms of the Injunction from 12.35am.

b. In the alternative, on 15 March 2023, the Council breached the terms of Paragraph 1 of the Injunction by failing to direct its contractors or agents to cease felling the trees on Armada Way, Plymouth, Devon and works preparatory to such felling until 1:10am despite having actual notice of the terms of the Injunction from 12.52am.

16. Freedman J's order was as follows:

> "(1) the Respondent must not whether by themselves or by instructing or encouraging any other person, carry out any further works for the removal of trees, including pruning, or any works preliminary to those works, at Armada Way, Plymouth, Devon until further order upon the hearing of the Return Date Application.
>
> (2) Costs reserved, which the Claimant will say is subject to costs limits in Aarhus Convention claims.
>
> (3) In the first instance, service of an unsealed version of this order shall be deemed good service."

The Parties' Submissions

17. I shall set out first the parties' submissions with respect to the contempt application in respect of both grounds. I will set out the Claimant's submissions on the two grounds separately, and then set out the Council's responses to both of the grounds as there is some overlap in their submissions. I will then set out the parties' submissions on the application to dispense with personal service, followed by their submissions on costs.

The Claimant's submissions on Ground One: Interference with the due administration of justice

18. The Claimant acknowledges that, pursuant to CPR Rule 81.3(5)-(7), the permission of the Court is required to bring an application for contempt for interfering with the "due administration of justice". It is also recognised that the threshold test at the permission stage is whether there is a strong *prima facie* case, and this applies both to the legal test and the facts on which the contempt application is based. In the instant case, Ms Sullivan, who represents the Claimant, submitted that the threshold test was easily met.

19. As a matter of law, Ms Sullivan contended that CPR Rule 81.3 expressly contemplates that this form of contempt can apply even where proceedings are not yet in existence. Support could also be found from *Care Surgical Ltd v Bennetts* [2021] EWHC 3031 at

[7], and from the dicta of Lord Morris of Borth-y-Gest in *Attorney-General v Times Newspapers Ltd.* [1974] AC 273 at 302B, where it was stated that: "In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference".

20. In the instant case, Ms Sullivan contended that the Council had deliberately or recklessly acted in such a way as to deprive the Claimant of access to the Court. The test of recklessness was satisfied where a party is aware that a risk exists, or that a result will occur, and unreasonably takes the risk: see *R v G* [2004] 1 AC 1034. This was evidenced by the way in which the Council made and sought to implement the decision; there was a course of conduct calculated to mislead the Claimant. The Council was aware of the possibility of legal action, but made the decision and started to implement it at such pace that it was obvious that this would prevent the Claimant from obtaining injunctive relief which could have stopped the felling of the trees. The speed with which the Council acted frustrated the Claimant's ability to exercise her rights.

21. The letter sent to the Claimant's solicitor by the Council's solicitor, Ms Jackman, on 14 March 2023 at 17:55, which stated that "we can see no reason . . . to require us to confirm that no further action will be taken by the Council at this stage" was part of this course of conduct. The letter gave the misleading impression that a decision had not yet been taken by the Council when it was due to be taken that day and had already been taken. Although the affidavits that have been served by the Council's witnesses do not evince actual intent, the reliability of their evidence has already been questioned in the judicial review proceedings by the judge, David Elvin KC.

22. Ms Sullivan invited the Court to decide that it was appropriate for the Claimant to have used the Part 23 procedure for initiating the contempt application, notwithstanding the requirements of CPR Rule 81.3(3) that an application in relation to alleged interference with the due administration of justice should be brought by Part 8 'otherwise than in existing High Court proceedings'. At the time when the contempt application was made, there were existing High Court proceedings: the judicial review. Alternatively, Ms Sullivan contended that the Court should waive the requirement to have started the proceedings by Part 8, when there are other proceedings (Ground Two) which can properly be brought under that Part. Mr Bhose KC, for the Council, did not oppose this application. I therefore direct that the requirement to have started the contempt proceedings for alleged interference with the due administration of justice by the Part 8 procedure be waived.

The Claimant's submissions on Ground Two: Breach of Freedman J's order

23. Ms Sullivan contended that to establish contempt it was necessary to show that: (i) the alleged contemnor knew of the terms of the order; (ii) he acted (or failed to act) in a manner which involved a breach of the order; and (iii) he knew of the facts which made his conduct a breach: see *Kea Investments Ltd v Watson* [2020] EWHC 2599 (Ch), per Nugee LJ at [19]. In the instant case, Ms Sullivan submitted that taking the Council's case at it its highest, officers and agents of the Council were aware of the fact that an injunction had been granted at 00:35 on 15 March 2023, and that they had been advised to comply with it only when a hard copy had been received and it had been verified by legal officers. The Council's awareness at 00:35 that an injunction had been granted was sufficient to establish that the contemnor was aware of the terms of the order: the Council was aware that an injunction might be sought to restrain the works, the Council

was aware that an injunction had been sought by members of STRAW, and there can have been no real doubt as to what the injunction restrained the Council from doing.

24. Ms Sullivan contended that the breach of Freedman J's order was not merely technical. On the evidence currently available, it cannot be said that no trees were being felled at the time when the injunction was made; and, in any event, the injunction was directed at more than the actual felling of trees, but included works preparatory thereto. Even if this was wrong, and there was no tangible harm, there was still a case for the public authority Council to answer. It was not right for a local authority with notice of an injunction to stand on its rights and wait for service of a hard copy of the order before it acts. In the circumstances, contrary to the warning of Briggs J in *Sectorguard plc v Dienne plc* [2009] EWHC 2693 (Ch) (an authority relied on by the Council), the contempt application was not trivial and it could not be said that there could be no useful outcome, or that this was simply a waste of Court time, if this application was heard.

25. The present proceedings were also the only vehicle available through which the lawfulness of the Council's conduct could be investigated by the Courts, given the dismissal of the judicial review claim by David Elvin KC.

The Council's submissions on Grounds One and Two

26. The Council was represented by Mr Bhose KC and Mr Beglan. They submitted that the application to restore should be dismissed because of the delay in making the committal application in the first place. There was an unexplained delay of 8 months between the events in question and the date of the application.

27. They also submitted that there is no proper purpose in restoring and prosecuting the contempt application. The alleged contempts occurred 18 months ago. The interim injunction on which Ground Two is premised was discharged by the order of David Elvin KC on 20 March 2024. The new and approved redevelopment scheme retains all of the existing trees and provides for the planting of 163 new semi-mature trees. An independent review of the 14 March 2023 decision and of its implementation will be carried out. A further hearing will require a number of witnesses and a significant call on judicial time as well as further legal costs. The purpose of the proceedings is simply to let the Claimant have "her day in Court", and that is not a legitimate purpose for committal proceedings.

28. With respect to Ground One, it was submitted that this is a novel claim, and there is no sufficient public interest for the application to proceed. It was not an abuse of the Court's procedure for a party to act in a way which might be foreseen to prejudice the rights of a party, or potential party, in future litigation, relying on *Harrow LBC v Johnstone* [1997] 1 WLR 459 at 468E-470G per Lord Mustill. On the facts, there was a legitimate reason for using the urgency procedure: an election was coming up, and the urgent procedure enabled a decision to be taken before the period in which ordinary local authority decisions could not be taken. There were good reasons for implementing the decision immediately: public safety meant that the felling needed to be done safely and away from the public, and there was a risk of "direct action" by protesters. There is no evidence to suggest that thwarting an injunction was part of the motivation for the way in which the decision was made and implemented.

29. As for the correspondence from the Council's solicitor, Ms Jackman, this did not support the case that the Council was attempting to thwart injunctive proceedings. The Claimant accepts that, when she wrote her letter, Ms Jackman did not know that the decision had been made.

30. With respect to Ground Two, an application to commit may be struck out if it discloses no reasonable ground for alleging contempt or if the application is an abuse of process. Mr Bhose KC and Mr Beglan contended that it is an abuse of the Court's processes to commit for Ground Two and the committal hearing would take up a disproportionate use of the Court's time and resources, especially as the evidence involves a technical breach, if any. Reliance was placed on the case of *Sectorguard plc v Dienne plc* [2009] EWHC 2693 (Ch). At [47], Briggs J stated that:

> "Committal proceedings are an appropriate way, albeit as a last resort, of seeking to obtain compliance with the court's order . . . , and they are also an appropriate means of bringing to the court's attention serious rather than technical . . . breaches of them. In my judgment the court should, in the exercise of its case management powers be astute to detect cases in which contempt proceedings are not being pursued for those legitimate ends. Indications that contempt proceedings are not so being pursued include applications relating to purely technical contempt, applications not directed at the obtaining of compliance with the order in question, and applications which, on the fact of the documentary evidence, have no real prospect of success. Committal proceedings of that type are properly to be regarded as an abuse of process . . .".

31. In the instant case, the contempt about which the Claimant complains is purely technical. There was no evidence that any works at all were ongoing at the time when personal service was actually effected at 01:10 on 15 March 2023. What was imparted by Ms Bailey was that there was an injunction to "stop the works". That would not reasonably be understood as including preparatory works to the felling. In any event, there is no evidence that any trees were felled or works preparatory to their felling took place after 00:35 when Ms Bailey informed Mr Howard that an injunction to "stop the works" had been obtained. The only evidence before the Court is that between 00:35 and 01:03 the "already felled trees" were being processed.

32. There was also no evidence that the Council's officials knew the actual terms of the injunction before a copy of the unsigned order was sent through at 00:53 on 15 March 2023. Furthermore, within minutes of the signed copy of Freedman J's order being sent through (00:57), advice was given by Ms Jackman that works should cease immediately, and shortly afterwards all works had ceased. Of the 126 trees that the Council intended to fell that night, 17 had not been felled by the time works stopped.

<u>The Claimant's application to dispense with personal service</u>

33. Ms Sullivan acknowledged that personal service of the injunction was required if Ground Two was to succeed, but that this could be dispensed with. In the instant case, Ms Sullivan contended that the Court could, at this hearing, retrospectively dispense with the requirement for personal service. The evidence demonstrated that the

Council's officers were aware of the terms of the injunction at a much earlier stage than when they issued instructions for all works to cease.

34. Mr Bhose KC and Mr Beglan contended that personal service should not be dispensed with. As at 00:35, when she made her call to Mr Barnard, Ms Bailey had neither seen nor knew the specific terms of the order, and so it was impossible for her to impart those specific terms to Mr Barnard. Further, in any event, there was no public interest to make a retrospective order: Freedman J had only granted dispensation to serve a sealed order; the Council's officers were advised that they were entitled to wait for proper service in accordance with the rules and terms of the injunction.

35. The Council submitted that retrospective dispensation of the requirement for personal service was only appropriate where the Court was satisfied "to the criminal standard … that the material terms of the injunction order said to have been breached were effectively communicated to the defendant": see *MBR Acres Ltd. v Maher* [2023] QB 186 at [117], per Nicklin J. That was not the case here.

Costs: Aarhus Convention or Protective Costs Order

The Claimant's submissions

36. Ms Sullivan submitted that the Claimant should be entitled to the costs protection provided by the Aarhus Convention as she fell within its terms. Ms Sullivan contended that whilst the application for contempt was not directly within the scope of CPR Rule 46.24 (Costs Limits in Aarhus Convention cases) if that rule was read literally, the application should be treated as forming part of those proceedings as it was made in the course of substantive judicial review proceedings which was accepted to be an Aarhus Convention claim and the contempt application arises from the facts in issue in that claim.

37. Ms Sullivan also contended that the present proceedings fell within the scope of Article 9(3) of the Aarhus Convention which provides protection for "judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment". That is what the contempt proceedings were seeking to do. In making this argument, Ms Sullivan sought to draw assistance from *Austin v Miller Argent* [2015] 1 WLR 62, where the Court of Appeal had held that, in principle, a claim for private nuisance could fall within the scope of Article 9(3) of the Aarhus Convention.

38. Alternatively, Ms Sullivan submitted that a Protective Costs Order was justified on the basis set out by the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 at [74]. Ms Sullivan contended that:

    i. The instant case raises issues of general public importance, relating to issues of lawful decision-making and accountability. An issue may be of general public importance even if it directly affects only part of the general public: *R (Compton) v Wiltshire Primary Care Trust [*2009] 1 WLR 1436. In this case, not only did more than 10,000 people sign a petition to save the trees before the impugned decision, there is a more general public interest in public authorities making decisions lawfully and abiding by an order of the court;

ii. The public interest in the lawfulness of decision-making by local government, as well as in environmental protection generally, requires those issues to be resolved;

iii. It is fair and just to make the order, having regard to the limited financial resources of the Claimant on the one hand and the financial resources available to the Council on the other; and

iv. If such an order is not made, the Claimant is likely to discontinue proceedings, and (given the finances available to her and her lack of any direct personal interest in these proceedings) would be acting reasonably in doing so.

39. Ms Sullivan contended that the present case was distinguishable from *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539, where the Court of Appeal held that a protective costs order could not be made in respect of a statutory appeal under section 288 of the Town and Country Planning Act 1988 as there was (at that time) a limitation in the regime for Aarhus Convention costs protection to judicial review claims under the CPR (then CPR Rule 45.41). The Court of Appeal held that it would be wrong to side-step that limitation in CPR Rule 45.41 by allowing for costs protection under the protective costs order regime for statutory appeals. Ms Sullivan contended that *Venn* applied to statutory claims only, and that the Court of Appeal did not decide that all claims falling with the ambit of the Aarhus Convention, but outside the definition of the CPR, should not benefit from a protective costs order.

The Council's submissions

40. On behalf of the Council, Mr Bhose KC and Mr Beglan (Mr Beglan made the oral submissions on the question of costs protection), submit that the present case did not fall within the ambit of Aarhus cost protection. Contempt applications did not fall within CPR Rule 46.24, or Article 9.3 of the Convention.

41. Whilst it was accepted that the enforcement of injunctive relief was potentially capable of protection under Aarhus, that did not apply to enforcement applications in academic claims. The purpose of Aarhus cost protection was to deal with relief that may compensate for past damage, prevent future damage and/or to provide for restoration; none of these objectives were present here. The case law talked of judicial procedures that "confer significant environmental benefits": see *Austin Miller v Argent* [2015] 1 WLR 62 at [22]. The present contempt applications would not achieve such benefits. It was accepted by Mr Beglan, for the Council, that if Aarhus protection applied it could have retrospective effect to the beginning of the contempt application.

42. A protective costs order should also be refused: they were reserved for exceptional circumstances where the issue to be determined was one of general public importance. That was not the case here.

Discussion

Contempt application: Ground One

43. The test for the grant of permission under CPR Rule 81.3(5) (interference with the due administration of justice) is that (i) a strong *prima facie* case must be shown; and (ii) it

is in the public interest for an application for committal to be made (see *Cavendish Square Holdings BV v Makdessi* [2013] EWCA Civ 1540 at [79]).

44. As a matter of principle, I accept that this form of contempt can be committed even where proceedings are not in existence. This is implicit in CPR Rule 81.3(5)(a) which states that permission is required where the application is made in relation to "interference with the due administration of justice, except in relation to existing High Court or county court proceedings". This rule contemplates, therefore, that there will be cases where High Court or County Court proceedings are not in existence. That may be because they have concluded. Equally, that may be because they have not yet been started.

45. Furthermore, if, through the alleged contemnor's deliberate conduct a party is in fact precluded from obtaining access to a Court so that the administration of justice cannot be carried out, it is not hard to see that this would amount to interference, in substance, with the due administration of justice.

46. In the instant case, I do not consider that it can sensibly be argued that the Claimant was precluded from obtaining access to a Court so that the administration of justice could not be carried out.

47. There is no direct evidence that the Council sought to impede the Claimant's access to the Court, and the indirect or circumstantial evidence is slender. The Claimant relies primarily on (i) the use by the Council of the urgency procedure; (ii) the Council's actions in delaying publication of the decision as long as possible; and (iii) the correspondence with Ms Jackman. In her affidavit, the Claimant summarises the Council's conduct at paragraph 26:

> "in the weeks leading up to the decision and felling of 14/03/2023, the Council and its officers discussed how to avoid scrutiny via the call in process, and carefully planned when a decision would be formally made and published so as to avoid any protest or challenge to the decision. It is also clear that Ms Jackman was involved throughout this period, including drafting the request to the Chair of the Scrutiny Committee for sign-off of the urgency procedure, holding discussions about when the decision could be published and providing legal support on the night about what to do in the event an injunction was received".

48. It does not seem to me that these factors evidence a *prima facie* case that the Council sought to impede the Claimant's access to the Court, let alone a strong *prima facie* case, which is a necessary element for the grant of permission. The Council has advanced a reason for the use of the urgency procedure – the necessity to take a decision before the election period in which ordinary local authority decisions cannot be made – which seems plausible.

49. Furthermore, the overwhelming evidence is that the Council's conduct was mainly designed to avoid protest, rather than legal action. The evidence before the Court demonstrates that there was a real concern that there would be "direct action" taken against the plan to fell the trees. That explains why security guards had been engaged

by the Council (as described by the Claimant in her witness statement), and the police were involved. Mr Barnard referred to this in his affidavit at paragraph 12:

> "as there had been previous indications on Facebook by supporters of 'STRAW' that they intended to take direct action, it was considered expedient to immediately implement the decision on the same evening as the publication of the Executive Decision by the Leader".

50. This also explains why the felling of the trees occurred at night. Mr Barnard explained in his affidavit at paragraph 11 that:

> "it was always the intention to fell the trees at night (assuming and approved Executive Decision). This was based on advice from Morgan Sindall, in relation to their Construction Design and Management ('CMD') responsibilities in relation to public safety given the high footfalls in the city centre during the day and early evening. It was also based on the specific Risk Assessment and Method Statement produced by the specialist arboriculture contractors Glendale who regularly remove trees at night for public safety reasons. In addition, in accordance with the Section 171 Permit secured from the Highway Authority, careful arrangements to keep access open to local businesses who would still be trading up to 11:00 at night and for the public to traverse the public highway on either side of Armada Way also had to be accommodated whilst removing the trees safely. Moreover, the City Centre Company advised that they considered disruption to city centre businesses by felling trees and sectioning off parts of Armada Way during shopping hours, given the fragility of the economic climate at present would not be acceptable."

51. With respect to the legal process, the very fact that – on the Claimant's own case – the Council was discussing the possibility of an injunction and what to do if one was obtained seems to demonstrate the opposite of a course of conduct calculated to interfere with the due administration of justice. Rather, it evidences the Council acknowledging that the legal process might be accessed by a concerned resident, or group of residents, and that the Council would be obliged to respect the decision of a Court if an injunction was granted. As the Claimant describes at paragraph 37 of her affidavit (referring to Mr Barnard's second witness statement in the judicial review proceedings): "He also says that Emma Jackman had advised him on arrangements to be in place, including for those on site to contact him in order that any injunction could be served on him (para.8). It seems from this that Ms Jackman and Mr Barnard knew an injunction was likely and had discussed what to do in the event that one was obtained."

52. As for the involvement of the Council's solicitor, Emma Jackman, on 14 March 2023 itself, her evidence is that she was working from home in Leicestershire, and not Plymouth, on that date. She says that this meant that she had "limited peripheral knowledge as to what was occurring beyond the matters that I was focusing on that day". She also explained that it was not unusual that she would not be involved in the

progress of a decision report following final legal sign off or review. She was not the Head of Democratic Support, the role with responsibility for decision-making and governance. She was aware that there was a possibility that the decision would be taken on 14 March 2023, but she was not certain that it would be. This is a plausible explanation for what transpired. Indeed, the Claimant accepts that Ms Jackman did not know that the decision to implement the redevelopment scheme had been made when she drafted the letter and sent it out.

53. As a consequence, there is not a *prima facie* case (let alone a strong *prima facie* case) that Ms Jackman sought to mislead the Claimant (or the Claimant's solicitors) when she responded to the solicitors' letter at 17:55, answering the various points that had been made and concluding with:

> "Finally, we can see no reason set out in this or your previous letter to require us to confirm that no further action will be taken by the Council at this stage. We note there remain no points outstanding other than the EIR responses, which will be dealt with in accordance with the statutory regime.
>
> The solicitors had stated at the end of their letter sent earlier on 14 March 2023: "Given the urgency of the situation, please respond within 5 days and before any final decision is made".

54. In any event, even if Ms Jackman had known that the decision had been made earlier by the Council and did not alert the Claimant's solicitor to this fact in her letter, she would also have known that the decision would have to be made public (as a matter of statutory obligation) and would therefore have come to the Claimant's attention. Indeed, publication actually happened within minutes of Ms Jackman's letter being sent out and so her response had no material impact.

55. Moreover, the evidence before the Court is that the Claimant was not, in fact, impeded from seeking access to the Court following publication of the Council's decision. Indeed, had the Claimant acted expeditiously on learning of the Council's actions after 6pm on 14 March 2023, or even after reading the Council's decision at 6:45pm on 14 March 2023, an application for an injunction could have been made much sooner than in fact was the case, and the order may even have been made before the first of the trees was felled. It would appear that the first tree was felled at 8pm, but the Claimant did not even speak to her solicitor until 9pm three hours after she learned that the Council was starting the works to fell the trees. There is no evidence before the Court as to why the Claimant did not seek an injunction earlier that evening. There is no suggestion in the evidence that the Council took any steps which prevented the Claimant from making an application earlier that evening.

56. In her affidavit, dated 3 May 2024, the Claimant describes the correspondence with Ms Jackman, the Council's solicitor (to which I will return later in this judgment). The Claimant also states that:

> "28. I first heard that it looked as though work was going ahead on site at around 6pm on 14/03/2023 when a friend who was with me got a call from a STRAW supporter on Armada Way.

> 29. I then checked the Council's website and saw that it had been updated with further plans and links to various reports relating to the decision. I was surprised as we had received no notice of any decision by the Council, despite our clear interest in the proposals.
>
> 30. The Council did not notify me or other STRAW members of the decision to approve the scheme or of their intention to start felling immediately.
>
> 31. I arrived at Armada Way at around 6.45pm and saw numerous contractors, security guards, police, vans and lorries. Fencing was being erected by contractors around the site and the nearby road, which was closed. I asked a police officer what was happening. She said she didn't know and that she was only told she had to work that afternoon and that she finished at 10pm. I could not see anyone from the Council to speak to.
>
> 32. At about 7pm we saw heavy machinery, including a grab truck, felling machine with a circular saw attached and a very large wood chipping machine, arriving and contractors wearing ear defenders and visors.
>
> 33. It is hard to estimate numbers since it was not possible to view or access all of Armada Way, but I believe there may have been about 30 contractors on site, with perhaps a further 30 security guards stationed around the area and up to 30 police officers at any one time.
>
> 34. At about 9pm I spoke with my solicitor who said she would try and get an injunction."

57. Accordingly, I do not consider that a *prima facie* case has been made out, let alone a strong *prima facie* case, that the Council's conduct was calculated to impede access to the Court; and, in fact, it did impede access. In the circumstances, permission to proceed with this application to commit is refused.

58. I do not need, therefore, to consider whether the public interest requires there to be a hearing of this contempt application. Indeed, it would be artificial to do so given there is not a sufficiently weighty factual, or legal, case to justify permission. I would say, however, that the fact that the Council is carrying out an independent review into the circumstances of the decision-making process and the implementation of that decision would not, by itself, have tipped the balance against the grant of permission. On the other side of the balance would have been the need for the Court to guard against the interference with the due administration of justice, something which an independent review could not achieve.

Contempt application: Ground Two

59. The Council invites the Court to strike out or dismiss the application for committal on Ground Two, as an abuse of process, in accordance with the approach of Briggs J in

Sectorguard. In my judgment, proceeding with this application would be an abuse of process and so it should be struck out and dismissed.

60. First, the evidence before the Court is that any breach of Freedman J's order would be 'technical' or have no reasonable prospect of success, even if the requirement for personal service was dispensed with. Second, there was a considerable delay in making the application, which has not been explained, or properly explained.

61. The chronology as to what took place in the early hours of 15 March 2023 does not appear to be in dispute:

> "(i) Injunction was granted by Freedman J at 00:29;
>
> (ii) at 00:35, Elizabeth Bailey telephoned the emergency contact number of the contractors and informed Jack Howard, the Assistant Site Manager, that she was with STRAW and they had an injunction "to stop the works". Ms Bailey subsequently met with Paul Barnard, the Council's Service Director for Strategic Planning and Infrastructure, and told him that "the injunction had been approved" and that she was expecting it to come through by email at any moment. Mr Barnard told her to call him when they had an injunction order to serve.
>
> (iii) at 00:52, the Claimant's solicitors sent an unsigned copy of the Order by email to Mr Barnard.
>
> (iv) at 00:57, a signed copy was sent to senior officers of the Council;
>
> (v) at 01:00, Emma Jackman advised senior members of the Council's team that a signed injunction had been received and that works should cease immediately.
>
> (vi) at 01:02, Mr Howard was ordered to stop the works, and he made a call on his radio to stop all works at 01:03. All machinery was stopped within less than two minutes."

62. Although I have been asked to make a decision as to whether to waive the requirement for personal service at this stage, it seems to me that this is a matter that would more sensibly be addressed at a substantive hearing. What was said by Ms Bailey to the Council's officers or contractors with respect to the injunction is clear: they should "stop the works". What they reasonably understood her to mean is a question that cannot be determined on the papers, but should properly be dealt with by live evidence.

63. Even if, however, the Council's officers and contractors understood Ms Bailey to mean that they should stop all work that was preparatory to felling as well as the felling of trees, there is no evidence before the Court that any such work was carried out after Ms Bailey had spoken to Mr Barnard. There is no evidence from the Claimant or Ms Bailey to this effect. Furthermore, there is no evidence from the Council's officers or contractors that suggests such work was carried out.

64. Mr Howard's evidence was that certain trees could not be felled as a result of the presence of protestors. Furthermore, although he cannot say categorically that no trees were felled in the period between 00.35 and 01.03 on 15 March 2023, he gives an explanation for why they would not have been, as there was considerable work involved in "processing the already felled trees". The evidence from Mr Howard is that:

> "15. I then inspected the area next to Subway (upper east side of Armada Way) where there were protestors under the trees which were planned to be felled. It was agreed between the police and sub-contractors that those trees could not be felled because of the risk of injury to the protestors. I returned to the site office at 00.54. I was told once again by Mr Barnard that an injunction has not been formally served (I cannot recall the exact language he used). But I was again instructed to continue work until formally instructed otherwise.
>
> …
>
> 21. I have been asked to explain what works were being undertaken on site from approximately the time I took the phone call at 00:35 until the works stopped following my radio call at 01:03.
>
> 22. The plan for the evening was for trees to be felled at the north and south end of Armada Way at the same time. The "south" trees were smaller so could be chainsawed whilst the heavy machinery felled the larger trees to the north.
>
> 23. Between 00.35 and 01.03hrs the team would have been processing the already felled trees - ie. Reducing the tree lengths to a size which would have enabled transportation away from Armada Way. Since a significant number of trees had been felled and they needed to be processed to make space for the processing of the remaining trees to be felled. However, I cannot say for certain that no trees were being felled in this period."

65. There is no evidence to contradict what Mr Howard has said, or to demonstrate a positive case that trees were actually felled or works preparatory thereto their felling were carried out. There were presumably a number of witnesses who might have been able to put forward that case if that had actually occurred, as there were a number of protestors at the site. Instead, Ms Sullivan argues that disclosure of CCTV footage from the Council might show that works did take place. This is, however, far too speculative, and is not a proper basis for the Court to grant permission.

66. In the absence of any evidence – whether direct or indirect – that the terms of the order had been breached following Ms Bailey's conversation with Mr Barnard about the order, I consider that there is no real prospect of the Claimant successfully establishing anything other than a technical contempt at a substantive hearing, and there is no real purpose to be served by the Court hearing an application for contempt solely for the purpose of seeking to hold the Council to account for something which made no material difference.

67. Furthermore, it is clear that there was a considerable delay in the Claimant making the application for contempt, and yet that delay has not been explained by the Claimant. Whilst I cannot say that the delay between the date of the alleged contempt (15 March 2023) and the issuing of the application for contempt (17 November 2023) has caused any specific prejudice to the Council, it is important as a general matter for applications of this kind to be brought swiftly. In some cases, this is important as the contempt application may lead to the enforcement of the terms of the relevant order that is alleged to be breached. In the instant case, even though there was nothing for the order to bite on, given that most of the trees had already been felled and the Council had committed not to fell the remaining trees, swift action would have enabled the Court to mark the seriousness of the alleged contemnor's conduct in breaching a Court order at or near the time of that alleged conduct.

Costs protection

68. Even though I am dismissing the contempt application, I consider that the Claimant should be entitled to costs protection under the Aarhus Convention, it being agreed by the parties that that protection can apply retrospectively.

69. CPR Rule 46.24(2)(a) provides that an "Aarhus Convention" claim for the purpose of that section of the CPR (which provides for limiting the recoverable cost from a party in an Aarhus Convention claim: see CPR Rule 46.26) is:

> "a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 ("the Aarhus Convention")".

70. CPR Rule 46.24 therefore requires two conditions to be satisfied: (i) the claim must be brought by way of judicial review or statutory review; and (ii) the claim must be within the scope of Article 9(1), 9(2) or 9(3) of the Aarhus Convention.

71. The application for the injunction was a matter that fell within the scope of Article 9(3), as the Claimant sought to challenge an alleged contravention by the Council of domestic law relating to the environment, and so condition (ii) is satisfied. In my judgment, a claim brought by "judicial review" must be read as including an application for contempt that arises from the breach of an order made in, or in anticipation and contemplation of, judicial review proceedings, and so condition (i) is satisfied.

72. Whilst it is strictly correct that at the time when the application for an injunction was made, judicial review proceedings were not yet afoot, it was a condition of the order made by Freedman J that the Claimant had to file an application for judicial review by the close of business on the very day that the order was made: 15 March 2023. The application for the injunction was made, therefore, in anticipation of and in contemplation of judicial review proceedings. When CPR Rule 46.24 refers to an Aarhus Convention claim as being one that involves a claim for judicial review, that must sensibly be read to include interim injunction proceedings that are made in

anticipation of and in contemplation of judicial review proceedings. To hold otherwise would mean that the United Kingdom Government, as a Party to the Aarhus Convention, was not giving proper effect to that Convention when setting out its cost protection rules.

73. This can clearly be seen when one considers Article 9(3) of the Aarhus Convention, and the following provisions. Article 9(3) provides that:

> " . . . each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment".

74. Articles 9(4) and (5) provide that:

> "4. . . . the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.
>
> 5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice".

75. It can be seen, therefore, that on its face the Aarhus Convention requires Parties to provide "adequate and effective remedies, including injunctive relief as appropriate" where public authorities act in contravention of provisions of their national law relating to the environment. This must surely include injunctive relief that precedes, but is conditional on, the lodging of judicial review proceedings. In many cases, including the present, it is not realistic to have expected judicial review proceedings to have been initiated before the application for injunctive relief was sought.

76. It also seems to me that contempt proceedings that relate to an order for an injunction made in judicial review proceedings, or in anticipation of those proceedings, would also fall within the scope of the Aarhus Convention. If an order for an injunction made by the Courts in, or in anticipation of, judicial review proceedings alleging a contravention of environmental laws, cannot be enforced then the remedies available will not be "adequate" or "effective" as required by Article 9(4).

77. Mr Beglan, for the Council, submitted that this cannot apply to situations where (i) the application for contempt would not "compensate past damage, prevent future damage and/or to provide for restoration", as the trees had already been felled; and (ii) the substantive proceedings were found to be "academic". Mr Beglan contends that this falls outside of the general understanding of what the Aarhus Convention regime is

intended to cover, referring to the "implementation guide" to the Aarhus Convention, produced by the United Nations Economic Commission for Europe, Second edition, 2014.

78. Under the heading 'Adequate and effective remedies", the implementation guide states that:

> "The objective of any administrative or judicial review process is to have erroneous decisions, acts and omissions corrected and, ultimately, to obtain a remedy for transgressions of law. Under paragraph 4, *Parties must ensure that the review bodies provide "adequate and effective" remedies, including injunctive relief as appropriate. Adequacy requires the relief to ensure the intended effect of the review procedure. This may be to compensate past damage, prevent future damage and/or to provide for restoration. The requirement that the remedies should be effective means that they should be capable of real and efficient enforcement.* Parties should try to eliminate any potential barriers to the enforcement of injunctions and other remedies.
>
> When initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated, courts and administrative review bodies must be able to issue an order to stop or to undertake certain action. This order is called an "injunction" and the remedy achieved by it is called "injunctive relief" (see box below). In practice, use of injunctive relief can be critical in an environmental case, since environmental disputes often involve future, proposed activities, or ongoing activities that present imminent threats to human health and the environment. In many cases, if left unchecked, the resulting damage to health or the environment would be irreversible and compensation in such cases may be inadequate.
>
> In other cases, compensatory measures, e.g., to improve the quality of the environment elsewhere, may be the most adequate remedy possible. Although monetary compensation is often inadequate to remedy the harm to the environment, it may still provide some satisfaction for the persons harmed. Monetary compensation may also be a relevant remedy when paid to public authorities by the operator, so as to compensate for the public money spent in vain to protect an area or a species that was adversely affected by an act or omission by the operator in question.
>
> Yet another related form of remedy available in some countries, for example in France, enables a member of the public to bring civil proceedings to challenge a breach of environmental law (as contemplated in article 9, paragraph 3) to recover civil monetary penalties from the owner or operator of a facility transgressing environmental law in place of the appropriate government

> agency. Such proceedings are sometimes known as "citizen enforcer" proceedings and are discussed again below."

(Emphasis added). Mr Beglan submits that the present application would not "compensate past damage, prevent future damage and/or to provide for restoration", as the trees have already been felled.

79. I consider that Mr Beglan's argument would lead to absurd consequences. It would mean that a public authority against whom an injunction is made could escape the strictures of the Aarhus Convention regime by, as is contended in this case, deliberately breaching an order for an injunction and destroying the subject matter that the injunction was designed to protect. These consequences can be avoided if Article 9(3)-(4) are read as, I understand them to be, to apply to the general mechanisms available to members of the public concerned about environmental matters, rather than to the facts of a particular case. In the domestic context, the contempt regime is the mechanism by which injunctions in environmental matters can generally be enforced even if, in a particular case, enforcement would not have a direct environmentally positive effect.

80. As the application for contempt under Ground Two falls within CPR Rule 46.24, and the Aarhus Convention more generally, the costs of the claim are subject to the protection at CPR Rule 46.24. This applies to the whole claim, and not just to the part of the claim that relates to Ground Two. It is not necessary, therefore, for me to determine whether Ground One would, if brought on its own, have attracted costs protection under CPR Rule 46.24. I have to say, however, that it is doubtful that it would have done. Ground One was not made as part of, or in anticipation of, judicial review proceedings, even though it has connections to some of the factual matters in those proceedings. Ground One was not seeking to enforce an order made in, or in anticipation of, judicial review proceedings, or to mark the failure of the Council to comply with such an order.

81. As I find that the Claimant is entitled to protection under the Aarhus Convention, it is not necessary for me to deal with the alternative contention that costs protection under the *Cornerhouse* principles should have been afforded to the Claimant.

Conclusion

82. For the foregoing reasons, therefore, I refuse permission with respect to Ground One, and dismiss Ground Two.