

Neutral Citation Number: [2022] EWHC 2626 (KB)

QB 2022 BHM 000044

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Birmingham Civil Justice Centre

Date: 15 September 2022

Before:

MR JUSTICE RITCHIE

BETWEEN

HS2 (HIGH SPEED TWO LIMITED) (1)
THE SECRETARY OF STATE FOR TRANSPORT (2)

Claimants

- and -

ELLIOTT CUCIUREAN (D33)
And others

Defendant

M. FRY and B. Brett instructed by DLA PIPER Solicitors for the Claimants.
ADAM WAGNER instructed by ROBERT LIZAR Solicitors for the 33rd Defendant and
others.

Hearing dates: 25 -27th July 2022
Sanctions hearing listed for 22 September 2022

Mr Justice Ritchie:

This is a judgment delivered in advance of the sanctions hearing relating to the Defendant D33.

The Parties

- [1] The Claimants are constructing a high speed railway line in England for the benefit of the public in accordance with the will of Parliament.
- [2] The Defendant objects to the construction of the HS2 railway line and have taken direct action against the construction.

Bundles

- [3] For the issue within the committal claim which is the subject of this judgment I had the bundles from the main hearing which were: the hearing bundle, an authorities bundle, a supplementary authorities bundle, various cases handed up on paper, various late served witness statement from some, but not all, of the Defendants and some other documents including character references.
- [4] After an adjournment for the sanction decision for D33, I was provided with two skeleton arguments referring to case law but no bundle of authorities.
- [5] The Defendant issued an application dated 13th September 2022 relating to privacy and seeking various orders.

Background

- [6] The background to the judgment is that 7 Defendants were alleged to be in breach of an injunction granted to the Claimants by Mr. Justice Cotter in April 2022. 6 admitted the pleaded breaches and I have imposed sanctions on them. The judgment concerning them is to be published after the adjourned hearing: *HS2 and the Secretary of State for Transport v Harewood and ors [2022] EWHC **.
- [7] During the hearing in July the Defendant Curciurean asked for privacy in relation to some medical personal information which he wished to put before the Court in relation to his sanctions hearing. No notice of application was issued. With the express agreement of the Claimants I held a short private hearing with the Defendant and his counsel and solicitor at which the Defendant disclosed the alleged private medical information (the Private Information). I considered that information capable of engaging the Defendant's right to privacy under the European Convention on Human Rights and I adjourned that issue over for submissions in writing on procedure and to see if the further evidence which the Defendant indicated he wished to file would be filed and how that should be dealt with. I ordered the Parties to provide written submissions on the appropriate procedure by 24 August 2022 in preparation for the adjourned hearing listed for 22 September 2022.

[8] Neither party complied with that order.

The Issues

[9] The issues dealt with in this judgment are: (1) Should all or any part of the sanctions hearing be held in private? (2) Should the sanctions judgment and all or some of the evidence filed by the Defendant be partially kept private from the public? (3) Should further evidence be admitted for the Defendant and how should that be dealt with if served (4) Should reporting restrictions be imposed? (5) other more minor issues.

The land

[10] This claim concerns the property at Cash's Pit Land which adjoins the A51 at Swinnerton, Staffordshire and is approximately 4 acres in size, rectangular in shape and contains a forest surrounded by farmers' fields, south of Stoke on Trent. It includes a thin strip of land adjoining the northern verge of the A51. I shall refer to the land as "CPL".

Pleadings and chronology of the action

[11] By a notice of application dated the 25th of March 2022 the two Claimants applied for possession of CPL together with a prohibitory and mandatory injunction and declarations and alternative service orders. The application was made against 59 named Defendants and various persons unknown.

[12] The evidence in support of the application was provided in a witness statement of Richard Jordan dated the 23rd of March 2022 and in various other witness statements and affidavits.

[13] By an order made by Mr. Justice Cotter on the 11th of April 2022 at a hearing which was attended by some of the Defendants and both of the Claimants the Judge ordered possession of CPL be granted to the Claimants and granted an injunction which was interlocutory and was to last until the trial or a further order was made in the case or until the 24th of October 2022 (the Cotter Injunction).

[14] By paragraph 4a of the Cotter Injunction the relevant persons were forbidden from entering CPL or remaining there. By paragraph 4b the relevant persons were ordered not to enter CPL, not to interfere with the works at CPL, not to interfere with the fences or gates at CPL, not to damage the property of the Claimants at CPL or of their subcontractors and not to climb onto vehicles or machinery at CPL. By paragraph 4c various persons were ordered to cease tunnelling at CPL and not to encourage or assist tunnelling at CPL.

[15] By paragraph five of the Cotter Injunction it was expressly stated that the Injunction did not prevent the exercise of existing rights of way over CPL or public highways or the rights of the statutory undertakers (service providers). The Injunction declared that the Claimants were entitled to possession of CPL and alternative service provisions

were set out in the Injunction because many of the named Defendants to the Injunction had not provided postal or e-mail addresses or other methods of communication and had not instructed lawyers to accept service on their behalf. The various methods of service were proscribed and included affixing documentation to wooden stakes in the ground at CPL and putting documents to be served in the post box constructed by protesters at CPL and fixing copies of the documents to the entrance at CPL and publishing the documents on various websites. These various alternative service methods were deemed effective by the Injunction. In addition anyone affected by the Injunction was permitted to apply to vary but was required to notify the Claimants' solicitors 48 hours before any hearing of any such application to vary and to provide their names and addresses full service. A directions hearing was required in the Injunction as to the steps required in future.

- [16] By a Statement of Case also dated 8th of June 2022 and issued on the same day the Claimants asserted that the Defendant D33 and 6 others were in breach of the Cotter Injunction. The breaches were laid out extensively in the Statement of Claim together with the evidence in support of the assertions that the Defendants were in contempt of court. The Statement of Claim attached the Cotter Injunction dated 11th of April 2022 and a plan of the site of CPL.
- [17] By notice of application dated the 8th of June 2022 the Claimants applied for an urgent directions hearing for the future conduct of the claim for committal to prison of seven Defendants for breaches of the Injunction made by Mr. Justice Cotter.
- [18] On the 14th of June 2022 an order was made by this Court which dealt with the directions governing the application for committal to prison of the seven Defendants. I granted permission to amend the application notice and Statement of Case. I made orders for alternative service on the Defendants because they had not provided postal addresses or electronic addresses and had not instructed lawyers. The alternative service provisions in paragraph five of that directions order were for postal service, electronic service, service on those thought to be hiding in the tunnels under CPL, service on lawyers and service at websites. I also ordered at paragraph 11 that any Defendant who wished to rely on evidence at the final hearing should serve and file the evidence by the 27th of June 2022. Tying the permission to rely on evidence to the direction I gave at paragraph eight I ordered that the Defendants had to, by the 20th of June 2022, provide the Court and the Claimants' solicitors with a postal address or an e-mail address at which they could be served with documents relating to the proceedings. I also ordered that no evidence other than evidence filed in compliance with the directions order would be admitted at the hearing save with permission of the Court. An application would have to be made under CPR part 23 for such permission.
- [19] The committal hearing was listed for four days starting on the 25th of July 2022 in that directions order. The Defendants were required to attend the hearing in person. The Defendants were warned that if the Court, at the hearing, was satisfied that the

Defendants or each of them had been served in accordance with the alternative service provisions in the order then the Court could proceed in the absence of those Defendants. I also ordered that evidence as set out in the witness statements filed by the parties would stand as evidence in chief at the committal hearing. I ordered the parties to file and serve bundles containing their evidence and any authorities by the 15th of July 2022 and any skeleton arguments by the 21st of July 2022.

[20] On 25th July at the hearing of the claim for committal to prison of the seven Defendants, the relevant Defendant did attend and was represented by solicitors and counsel. The Defendant D33 (Curciurean) admitted the pleaded breaches of the Cotter Injunction.

The Evidence in relation to the Defendants

[21] The hearing of this claim for committal to prison of the 7 Defendants continued until the 27th of July and then only that part in relation to D33 was adjourned.

[22] The witness evidence from the Claimants which was accepted by the represented Defendants was as follows -

- An affidavit of James Dobson sworn on the 7th of June 2022;
- An after David of Karl Harrison sworn on the 9th of June 2022;
- An affidavit of Julie Dilcock sworn on the 9th of June 2022;
- An affidavit of Adam Jones sworn on the 12th of June 2022
- An affidavit of Mark Bennett sworn on the 8th of July 2022;
- An affidavit of David Joseph sworn on the 8th of July 2022;
- An affidavit of Vilaime Matakibau sworn on the 8th of July 2022;
- An affidavit of James Dobson sworn on the 11th of July 2022;
- An affidavit of Ian Dent sworn on the 11th of July 2022;
- A witness statement of Julie Dilcock sworn on the 8th of June 2022;
- A witness statement of Robert Shaw sworn on the 11th of July 2022;
- Multiple certificates of service from various witnesses set out at tab 33 of the hearing bundle.

[23] During the hearing I granted an application by D33 to rely on a late served witness statement from D33.

[24] I also heard evidence from Ian Dent who was called by the Claimants and dealt with matters relating to the tunnels dug by and occupied by various of the Defendants.

Findings of fact

[25] At the hearing on 27th July I made findings on the criminal standard so that I was sure as to those findings. Those are repeated below.

[26] The opposers to the HS2 project consist of a broad range of groups including Extinction Rebellion, HS2 rebellion, Stop HS2 and others. The aims generally of

these protesters are to cause direct harm to the HS2 project, to increase the costs thereof and to delay it and to stop it.

- [27] The HS2 organisation and the Secretary of State for Transport work together to construct the railway from London to the North of England. The whole project is funded by the tax payer and so any increase in costs or delays are funded by each and every tax payer in England and Wales.
- [28] So far as a general figure for the security costs is concerned for the whole project amount is approximately 121 million pounds to date.
- [29] I find on the evidence that the security costs for the events at CPL alone amount to approximately £8,000,000. The Defendants before me at the hearing and the many other protesters who have attended at or lived at CPL are responsible for the vast majority of that £8 million and I so find as a fact.
- [30] The direct action taken by protesters in relation to CPL, which is owned by HS2, included trespass, criminal damage, the construction of wooden living accommodation, the construction of tree houses, the digging of tunnels under the earth and various ancillary acts of obstruction to the works carried out by HS2 and their subcontractors in areas nearby.
- [31] The occupants of CPL, or at least some of them, had come over from previous protester camps in Wendover and before that in Euston Square in London. Some had been the subject of previous injunctions whether named or not.
- [32] Quite a few previous injunctions have been granted against HS2 protesters. For instance Mr. Justice Holland granted an injunction in 2019 under the reference EWHC 1437.
- [33] The Claimants asserted and Mr. Justice Cotter accepted that there was a distinct risk of further illegal activity from the protestors at CPL. The evidence put before him included interviews by various Defendants posted on Facebook pages and in the national press including one in the Guardian newspaper on the 13th of February 2021. Various Defendants including D33 asserted publicly that they tunnelled to stop roadbuilding and railway building. The protestors had a “Go fund me” page. The protesters published online that in relation to CPL, HS2 would have to spend £4 million evicting them for their multiple trespasses.
- [34] As I have set out above I find that the protesters estimate of the costs which they had forced upon the taxpayers in England and Wales were actually double what they estimated they would create through their direct action. None of the protesters are taxpayers so they are not paying the bill themselves.

- [35] Other injunctions were granted in relation to HS2 protester camps set-up at Harville Road, Hillington and at Cubbington in Warwickshire.
- [36] HS2 and the Secretary of State for Transport applied for a track wide injunction and that application was heard by Mr. Justice Knowles. Judgment is awaited in relation to that at the date on which I am delivering this judgment.
- [37] The Claimants gave evidence, which I accept, that as a generality the protesters used various methods to force HS2 to incur taxpayers expenses as a result of their direct action. Those included “lock on” devices, tunnels, theft, staff abuse, access obstruction, criminal damage, spiking trees, fly tipping, occupying sites, at height protests, tunnelling and the like.
- [38] The protesters established their camp at CPL in approximately March 2021. The protesters called CPL “Bluebell Wood”. It is near a camp organised by Balfour Beatty, a subcontractor of HS2. Various structures were built at CPL by protesters including wooden accommodation, tree houses and a post box was constructed at CPL.
- [39] Balfour Beatty obtained an injunction on the 17th of March 2022 against various protesters.
- [40] In relation to CPL, James Dobson gave evidence that the Claimants and their staff and subcontractors were able to identify: William Harewood, Elliot Cuciurean, David Buchan, Stephan Wright and Liam Walters at the site. These Defendants were known to James Dobson from the previous sites.
- [41] Mr Dobson gave evidence that after the possession order was made by Mr. Justice Cotter the writ of possession was issued and many verbal warnings were given to the protestors on the site. On the 10th of May 2022 enforcement officers went to the site, issued warnings, took videos and cleared the site of the protestors who were above ground. Those protestors included Rory Hooper, David Buchan, Leanne Swateridge and others.
- [42] However I found that 4 Defendants stayed in the tunnel from 10 May 2022. Those were William Harewood; Elliott Cuciurean; Stefan Wright and Liam Walters. They stayed deliberately and in defiance of the Cotter Injunction and in defiance of the application to commit them to prison for breach of the Injunction. They stayed deliberately in defiance of the directions which I made for the case management of the committal application. They deliberately did not attend the pre-trial review to manage the final hearing. They breached the directions order requiring them to provide contact details for service. They chose not to take part in the process until day 1 of the hearing and even then two did not attend.

- [43] Earlier during the hearing I had made findings of fact in relation to each defendant. I was provided with evidence through the Claimants' witness statements and certificates of service which proved to me so that I was sure that each of the 7 defendants had been served with the Cotter Injunction, the claim for committal to prison for breach, the directions order which I made and all of the evidence in support provided by the Claimants. Reference should be made to those detailed findings which are in the transcript of the hearing. I shall incorporate those decisions into this judgment when the transcripts are made available to me at a later date. It should be said here that the following Defendants admitted that they were properly served with all of the above documents. Those admissions were provided by William Harewood, Rory Hooper, Elliot Curciurean, Leanne Swateridge and Liam Walters who were D18, D31, D 33, D62 and D65.
- [44] In addition, taking each Defendant in turn, earlier in the hearing I made findings of fact on the basis that I was sure in relation to each of the pleaded allegations of breach of the Cotter Injunction which were set out in the Statement of Claim. I record here that the following Defendants admitted all of the breaches alleged against them in the Statement of Claim: William Harewood, Rory Hooper, Elliott Curciurean, Leanne Swateridge and Liam Walters.
- [45] As for the two Defendants who failed to attend that hearing pursuant to the directions order dated 15th June 2022 in which I gave an express warning that I would proceed in the absence of Defendants who failed to engage, I made findings of fact in relation to their breaches of the Cotter Injunction based on the evidence put before the Court by the Claimants. My judgment in relation to those findings of fact was provided verbally during the hearing.
- [46] In summary the proven breaches fall into two categories. All seven Defendants were at the CPL site in breach of the Cotter Injunction and failed to leave it. The effects of being at the CPL site were that the tax payer incurred enormous additional expense on security and other staff who had to deal with the protesters onsite. It also delayed the progress of this tax payer funded construction.
- [47] The second category of breach of the Cotter Injunction concerns the four men who descended into the tunnels under CPL and stayed there after the 10th of May 2022. This direct action was not only a deliberate flouting of the Cotter Injunction but also of the authority of the civil justice system and of court orders generally. These Defendants knew that they had been ordered off the land and refused to go. These Defendants knew that they were putting the tax payer through HS2 to very very substantial expense. These Defendants also knew that they were potentially putting the security staff of HS2 and the underground emergency workers at risk if any part of the tunnel system collapsed.

- [48] I heard evidence from Ian Dent about the construction of the tunnels. He works with authorised High Court enforcement officers. He is a confined spaces specialist enforcement officer. He has 19 years of experience in removing persons from confined spaces. Some of that was experience gained at Euston Square Gardens in January and February 2021 and at Wendover in October and November 2021, both of which are HS2 sites. He was involved throughout the operation at CPL from 10th of May 2022 onwards.
- [49] I found the following facts on the basis that I was sure arising from his evidence. Following discovery of the main shaft into the tunnels an initial assessment of the spoil which had been removed from the tunnel was carried out.
- [50] HS2 with advice from other experts decided that the risk to emergency workers was too great for them to enter the tunnel and remove the protesters. At that time the four Defendants were not in need of rescue and so they were left in the tunnels. The ground at CPL is made-up of a mixture of sandstone and limestone bedrocks and a conglomeration of pebbles and sandy soils. That conglomerate was of concern because as it dried the risks of breaking up and collapsing would increase. HS2 provided a hard wired communication system and monitored the air quality of those in the tunnel and purged the air regularly when it became unsafe. This system was used to reduce the risk of drying the walls which would have arisen or being increased by a more regular changing of the air by HS2. Paramedics were brought on site and kept on site 24 hours a day seven days a week just in case any part of the tunnels did collapse. Warnings were issued to the tunnel occupants not only on the 10th of May but many many times thereafter. The four Defendants displayed a blasé attitude to health and safety and to the dangers they had created. They mocked the warnings given to them.
- [51] Mr Dent considered that the dangers in the tunnel were quite exceptional. He made verbal and visual contact with the four Defendants on many many occasions all of which were videoed or logged. He warned them. They laughed in his face.
- [52] On the 18th of June 2022 Liam Walters left the tunnel. He had occupied it for 39 days. On the 25th of June 2022 security staff saw the three other defendants emerge from a hole 4 metres past the fence on land adjoining CPL which was a field. These three Defendants, William Harewood, Elliot Cuciurean and Sefton Wright had dug a wormhole from the tunnels on CPL to the field and escaped that night.
- [53] After all the Defendants had left the tunnels Mr. Dent and his team entered the tunnels and I have seen photographs of the inside of the tunnel system and of the wormhole dug by the Defendants. The tunnel was stuffed with refuse and spoil. In Mr. Dent's opinion the tunnel was poorly shored up. Some sections were completely without shoring. The wormhole had a very tight diameter and was in Mr. Dent's opinion very dangerous. Mr. Dent considered the construction of shaft one was uniquely dangerous

giving rise to a risk of collapse. Mr. Dent discovered that the very top of the tunnel had been capped with a concrete mix. He stated that “*this method of construction meant that any attempts to remove the concrete cap and to remove and or replace the ad hoc shoring with more robust shoring would have released in the region of two tonnes of loose earth upon anyone in shaft one and below.*” overall Mr. Dent’s opinion was that the tunnels that CPL were of extremely poor and unsafe construction and were highly unstable. There was a serious risk of collapse at anytime. It was his opinion that the Defendants put themselves and any potential rescuers in danger and “*at risk of serious injury or death*”. I accept Mr. Dent’s evidence and find that the tunnel construction was very unsafe and put the lives of the four Defendants at risk and potentially the lives of the rescue services at risk. It also puts the life of Mr. Dent and his staff at risk of injury or death when clearing out the tunnel after the Defendants left.

- [54] It's apparent from the evidence put before me that after the four Defendants left the tunnel various organisations boasted on social media and one Defendant gave an interview to the BBC boasting of this behaviour. I find it difficult to see how it can be a matter of pride for four men to put their lives at risk and to put the lives of emergency workers at potential risk and to waste millions of pounds of taxpayers money.

The Law

- [55] Contempt of Court proceedings have a procedure which is set out in CPR 81. That procedure governs the form of the application and the content of it and the form and content of the evidence. The Claimants in this case have studiously followed the relevant procedures. That procedure entitles but does not require the Defendant to mitigate and speak before sentence and I gave each Defendant that opportunity and each of them took it. It also entitles the Court to proceed in the absence of a Defendant which is the route I have had to take in relation to David Buchan (until he turned up) and Sefton Wright.
- [56] All of the Defendants before the court admitted their breaches and the two Defendants who were absent have been found to be in breach as pleaded.
- [57] The punishment or sanction available to this court for contempt of Court includes imprisonment of up to two years, a fine, confiscation of assets or other punishment permitted by law. The maximum sentence of imprisonment is 2 years. Any sentence of imprisonment may be combined with a fine. See the Contempt of Court Act 1981. In addition this court is entitled to suspend any sentence of imprisonment pursuant to its inherent powers. Finally pursuant to the Criminal Justice Act 2003 section 258 contemnors who are sent to prison are released after serving one half of the sentence.
- [58] The factors that this Court should take into account are well known and are set out in the Supreme Court Practice and in *National Highways Ltd v Ana Heyatawin & Ors*

[2021] EWHC 3078. The President of the Queens Bench Division Dame Victoria Sharp and Chamberlain J. described the key general principles as follows:

- “(a)The court has a broad discretion when considering the nature and length of any penalty for civil contempt. It may impose: (i) an immediate or suspended custodial sentence; (ii) an unlimited fine; or (iii) an order for sequestration of assets;
- (b)The discretion should be exercised with a view to achieving the purpose of the contempt jurisdiction, namely (i) punishment for breach; (ii) ensuring future compliance with the court’s orders; and (iii) rehabilitation of the contemnor;
- (c)The first step in the analysis is to consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the breach of the order;
- (d)The court should consider all the circumstances, including but not limited to:
 - (i) whether there has been prejudice as a result of the contempt, and whether that prejudice is capable of remedy;
 - (ii) the extent to which the contemnor has acted under pressure;
 - (iii) whether the breach of the order was deliberate or unintentional;
 - (iv) the degree of culpability;
 - (v) whether the contemnor was placed in breach by reason of the conduct of others;
 - (vi) whether he appreciated the seriousness of the breach;
 - (vii) whether the contemnor has cooperated, for example by providing information;
 - (viii) whether the contemnor has admitted his contempt and has entered the equivalent of a guilty plea;
 - (ix) whether a sincere apology has been given;
 - (x) the contemnor’s previous good character and antecedents; and
 - (xi) any other personal mitigation;
- (e) Imprisonment is the most serious sanction and can only be imposed where the custody threshold is passed. It is likely to be appropriate where there has been serious contumacious flouting of an order of the court;
- (f) The maximum sentence is 2 years’ imprisonment: s. 14(1) of the Contempt of Court Act 1981. A person committed to prison for contempt is entitled to unconditional release after serving one half of the term for which he was committed: s. 258(2) of the Criminal Justice Act 2003;
- (g) Any term of imprisonment should be as short as possible but commensurate with the gravity of the events and the need to achieve the objectives of the court’s jurisdiction;
- (h) A sentence of imprisonment may be suspended on any terms which seem appropriate to the court.”

[59] When considering sanctions I also take into account the guidance provided in *HS2 v Maxey & Hooper* [2022] EWHC 1010, a decision of Linden J. That decision concerned Daniel Hooper, the father of Rory Hooper, D31 in these proceedings.

[60] I also take into account the decision of the Court of Appeal in *HS2 v Curciurean* [2022] EWCA Civ 661 in relation to costs awards.

[61] I also take into account the decision of the Court of Appeal in *HS2 v Cuciurean* [2021] EWCA Civ 357 in relation to the ingredients for liability for contempt and the custody threshold. In particular paragraph 81:

“81. I see no grounds for disagreement with the Judge’s conclusion that the custody threshold was crossed in this case. Contrary to the submissions of Ms Williams, there is no precise read-across from the statutory custody threshold in criminal sentencing and the standard that applies in contempt: see [18] above. The Judge cited binding authority on the right approach in the present context, and applied it conscientiously. It is, with respect, untenable to suggest that this case could and should have been dealt with by some lesser sanction. The submission that a mere finding of contempt would have been sufficient pays no heed to the need for deterrence, and the importance of upholding the rule of law. I am not impressed with the submission that in arriving at the period of six months the Judge took too literal an approach to the number of contempts, given that there were several incidents close in time. Again, this is to examine the reasoning under a microscope, when what matters is the overall outcome. “

[62] Furthermore I take into account the decision of Marcus Smith J in *HS2 v Cuciurean* [2020] EWHC 2723 on sanctions. Those listening to and reading this judgment will realise that although there was a different judge, that case concerned the same claimants and D33 to this claim and involved the same solicitors and barristers. That decision on sanctions imposed on Mr. Cuciurean went up to the Court of Appeal and the suspended sentence of imprisonment was reduced from 6 months to 3 months.

[63] When imposing the sanctions I imposed I took into account the Defendant’s Art. 10 and 11 rights under the European Convention on Human Rights and considered the sanctions to be proportionate and necessary in the light of the facts set out above and the rights of HS2 and the 2nd Claimant in relation to their land and staff and contractors and the public finances.

Sanctions

[64] My sanctions judgment for the other 6 Defendants is published separately.

Elliott Cuciurean aka “Jellytot”

[65] The Defendant applied on 13th September by skeleton argument and notice of application for the following orders:

- (1) That certain information (the Private Information) should be considered by the Court at a private hearing at which only the Defendant and his lawyers, and the first Claimant and its lawyers and one representative from the First Claimant would be present.
- (2) That evidence in relation to the Private Information should be admitted and considered by the Court in relation to sanctions.

- (3) That evidence in relation to the Private Information would not be made available to be viewed by the public or the press: reporting restrictions should be imposed.
- (4) That reports of the judgment should not contain reference to the Private Information.

[66] The Claimants also served and filed a Skelton out of time. They apply for relief from sanctions.

[67] The Defendant filed his skeleton long out of time and applied for relief from sanctions. The Defendant also made his application dated 13th September very late in the period allowed for the adjournment.

[68] The excuse for late provision of the skeletons was that the Parties were in negotiations. In my judgment that is not a good excuse. The Defendant's skeleton back refers to another skeleton dated 7th September which I have not been given. Despite reference to many cases no bundle of authorities was provided.

Private hearing in July

[69] The Claimants submit that the procedure to which they consented in July was unorthodox. At paras. 11-16 of the Skelton they assert that there was no power to hold the small part of the sanctions hearing in the absence of the Claimants. In effect they regret agreeing to do so. They seek a transcript of that part of the hearing and the short judgment given on whether the Private Information was potentially confidential and engaged the ECHR and was capable of being relevant to sanction.

[70] The small private hearing was held pursuant to CPR rule 39.2(3)(c) to assess whether the information was potentially confidential and could engage the ECHR and could affect sanctions.

[71] CPR Rule 81.8 provides:

“Hearings and judgments in contempt proceedings

81.8—(1) In accordance with rule 39.2, all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs.

(2) [...]

(3) Before deciding to sit in private for all or part of the hearing, the court shall notify the national print and broadcast media, via the Press Association.

(4) The court shall consider any submissions from the parties or media organisations before deciding whether and if so to what extent the hearing should be in private.

(5) If the court decides to sit in private it shall, before doing so, sit in public

to give a reasoned public judgment setting out why it is doing so.

(6) At the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.

(7) ...”

[72] CPR rule 39.2 states:

“39.2— General rule—hearing to be in public

(1) The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties’ consent, unless and to the extent that the court decides that it must be held in private, applying the provisions of paragraph (3).

(2) In deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected.

(2A) The court shall take reasonable steps to ensure that all hearings are of an open and public character, save when a hearing is held in private.

(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in subparagraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice—

(a) publicity would defeat the object of the hearing;

(b) it involves matters relating to national security;

(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

(d) a private hearing is necessary to protect the interests of any child or protected party;

(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person’s estate; or

(g) the court for any other reason considers this to be necessary to secure the proper administration of justice.

(4) The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.

(5) Unless and to the extent that the court otherwise directs, where the court acts under paragraph (3) or (4), a copy of the court’s order shall be published on the website of the Judiciary of England and Wales (which may be found at www.judiciary.uk). Any person who is not a party to the proceedings may apply to attend the hearing and make submissions, or apply to set aside or vary the order.”

[73] The Defendant asserted in July that the Private Information is confidential and “must” be protected because publicity would damage that confidentiality.

[74] In the skeleton arguments submitted to me recently the Claimants asserted and the Defendant now accepts that the Claimants knew of the basic fact at the centre of the Private Information in July. The Court did not and was not able to assess the nature of the Private Information until the private hearing was held. Nor was that “knowledge” which the Claimants now assert they had known to the Court. The Defendant’s skeleton expressly states the main fact of the Private Information in the body of the skeleton. So were that skeleton to be requested by a member of the public the Private Information would become public.

Press notification

[75] The notes in the Supreme Court practice state:

“While no guidance is provided as to how [notification of the Press Association] is to be done, it is likely that it is intended that this is done through the Press Association’s Injunctions Applications Alert Service (<http://www.medialawyer.press.net/courtapplications/notificationsystem.js> p [Accessed 7 February 2022]), as that was the means by which such notification was to be given under para.13 of the Committals PD, albeit reference there was made to the Alert Service’s predecessor, CopyDirect (see para.81MPD.1). Publication of such prior notification on the Judiciary of England and Wales’ website, which was also required by para.13 of the Committals PD is not required under r.81.8. Where a court decides to sit in private, in accordance with r.39.2(3), it must, however, ensure its order to that effect is published on that website, unless and to the extent it directs otherwise, further to CPR r.39.2(5)”

[76] No press were in Court when the small private hearing was permitted by this Court. Attempts were made by the Defendant’s legal team to fulfil the need to contact the press at the address given. It was reported to the Court that the attempts were unsuccessful. I gave my reasons for allowing the small private hearing by consent and it took place. I gave a short ruling at the end of the private hearing. In effect I ruled that the Private Information engaged the Defendant’s ECHR right to privacy.

I consider that the Court could not assess whether the Private Information was sufficiently private and confidential to engage the Defendant's ECHR rights without knowing what the facts were. Likewise the Court could not assess whether disclosure to the Claimants or the public might be damaging to the Defendant and/or his ECHR rights or relevant to sanctions. So the private hearing could either have been held in the Claimants' presence or their absence. They consented to be absent. I do not consider it just or equitable for them now to change their minds on that consent after the event. I reject the Claimants' request, which was also made without issuing any CPR part 23 application, late and without permission

[77] I note that in the recently served skeleton the Defendant does not object to the Claimants seeing the transcript of the small private hearing and the judgment thereon subject to certain deletions none of which have been provided to me. If the Defendant as he has offered, provides the transcript with deletions on time to the Claimants before 22 September 2022 then so be it. If the transcript service cannot provide the transcript in time (as I suspect will be the case) events will have passed by this offer and the application stands dismissed.

PSR

[78] The Claimants submit that the Court should not have ordered a PSR (Pre Sentence Report) on the Defendant and had no power to do so. That submission should have been made at the hearing, but it was not. Whilst, as far as I am aware, no similar order has been made before in civil contempt proceedings, I consider that where the Defendant is faced with imprisonment, where the liberty of a person is at stake, where the Defendant raises potentially powerful points about an issue which may affect the sanction imposed and where, as was submitted to me at the hearing, the Defendant already had a probation officer who had offered to provide a report to this Court and where the PSR can and likely will deal with the points raised, I see no good reason for ruling that the Court has no power to order that the report be provided. Refusing the offer of help provided by a PSR would have been to exclude potentially relevant evidence in mitigation. The Court has wide inherent jurisdiction to seek assistance on sentence and sanctions in my judgment. That jurisdiction should support justice not frustrate it.

[79] Different factors will apply in the majority of committal cases. No probation report will be offered by an extant probation officer already dealing with the Defendant, for there will be none. If no probation officer is already in place the procedure for obtaining and providing such a report does not currently exist. No public funding would or may be made available for such requests. Thus no PSR is likely to be ordered in vast the majority of committal applications. But each case depends on its own facts. I set out no general rule or practice in this case. I am dealing with the facts of only this case.

[80] I ruled that the Private Information was potentially relevant to sanction and I as submitted that the PSR would deal with the Private Information and was offered by

the already appointed and in place probation officer who had been contacted and had agreed to provide the report. We shall have to see if the evidence is provided and the Defendant decides to serve and file it by the date required below.

The sanctions hearing

- [81] The Claimants do not object to but instead agree that a private hearing with themselves present for the sanction for this Defendant may be held on 22 September with or without restrictions on publication of the Private Information and are neutral as to what the Court should do so long as they are present throughout.
- [82] The Defendant seeks what he describes as a proportionate and limited order and in particular an order that:
- a. The Private Hearing need only consider the detail of the 33rd Defendant's Private Information. No other aspect of the sanction hearing needs to be held in private;
 - b. The First Claimant and its representatives will attend the hearing and play a full part but not the Second Claimant;
 - c. The Court's judgment on sanction should be given in public, however any reference to the Private Information should either be referred to by way of a euphemism (for example the "private medical issue" or with reference to paragraphs of the pre sentence report) or that part of the judgment given in private and there be an open and closed version of the judgment as (it is asserted) is relatively common in cases involving issues which engage Article 8 ECHR.
- [83] The Defendant wishes to restrict the number of Parties and persons in Court. I do not consider that only one Claimant should be permitted to attend the sanctions hearing. I judge that the Secretary of State is just as entitled to attend as any other Claimant. There is no good reason to distinguish between the Claimants. The fact that one Claimant knows the basic fact underlying the Private Information and the other does not (or may not) is irrelevant.
- [84] The Defendant also seeks to limit the number of lawyers present at the sanctions hearing and the number of corporate representatives. I see no good or sufficient reason for that restriction either. That request is dismissed.
- [85] The real issue before me relates to whether part of the sanctions hearing should be held away from the public eye when the Court is addressed on the Private Information, the detail thereof and the relevance, if any, to the appropriate sanction.
- [86] This is a difficult issue to decide in advance. On the one hand I have already been appraised in a limited way about the Private Information. But on the other hand the full lay evidence and the expert evidence relating to it is not before me. Nor have I heard the Defendant's full submissions on the evidence or the relevance of it to the

range of sanctions available to the Court. Furthermore the Claimants have not seen the evidence or made submissions upon it. So I consider that it could reasonably be said that it is too early to make the decision.

The Law

[87] When balancing the right to privacy and confidentiality against other rights the following guidance has been provided.

[88] Maurice Kay LJ in *Donald v Ntuli* [2010] EWCA Civ 1276; [2011] 1 W.L.R. 294; [2011] C.P. Rep. 13 at para. considered the clash between the right to privacy and the right to freedom of expression. At para. 10 he stated:

“... the basic principles of substantive law are now well settled. In *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17, Lord Steyn extracted four propositions from *Campbell v MGN Ltd* [2004] 2 AC 457:

“First, neither article [8 or 10] has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.”

11 So far as article 8 is concerned, the ambit of private life was explained by Lord Nicholls of Birkenhead in the *Campbell* case, at para 21: “Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.”

12 The authorities were rigorously reviewed by Buxton LJ in *McKennitt v Ash* [2008] QB 73 where he said, at para 11:

“in a case such as the present, where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by article 8? If “no”, that is the end of the case. If “yes”, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10? The latter inquiry is commonly referred to as the balancing exercise . . .”

13 He had previously, at para 8, described that case as

“what might be called old-fashioned breach of confidence by way of conduct inconsistent with a pre-existing relationship, rather than simply of the purloining of private information”

[89] In *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; [2011] 1 W.L.R. 1645, Lord Neuberger considered the balance between the right to privacy and the need for open justice and ruled as follows:

“Open justice and the need for restraint

19 The cardinal importance of open justice is demonstrated by what is stated in article 6 of the Convention. But it has long been a feature of the common law. It was famously articulated in the speeches in *Scott v Scott* [1913] AC 417 see particularly at [1913] AC 417, 438, 463 and 477, per Viscount Haldane LC, Lord Atkinson, and Lord Shaw of Dunfermline respectively. The point was perhaps most pithily made by Lord Atkinson when he said “in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect”. For a more recent affirmation of the principle, see *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* [2011] QB 218, paras 38—42, per Lord Judge CJ.

20. However, as with almost all fundamental principles, the open justice rule is not absolute: as is clear from article 6, there will be individual cases, even types of cases, where it has to be qualified. In a case involving the grant of an injunction to restrain the publication of allegedly private information, it is, as I have indicated, rightly common ground that, where the court concludes that it is right to grant an injunction (whether on an interim or final basis) restraining the publication of private information, the court may then have to consider how far it is necessary to impose restrictions on the reporting of the proceedings in order not to deprive the injunction of its effect.

21 In a case such as this, where the protection sought by the claimant is an anonymity order or other restraint on publication of details of a case which are normally in the public domain, certain principles were identified by the judge, and which, together with principles contained in valuable written observations to which I have referred, I would summarise as follows: (1) The general rule is that the names of the parties to an action are included in orders and judgments of the court. (2) There is no general exception for cases where private matters are in issue. (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the article 10 rights of the public at large. (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought. (5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family’s right to respect for their private and family life. (6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less. (7) An order for anonymity or for reporting restrictions should not be

made simply because the parties consent: parties cannot waive the rights of the public. (8) An anonymity order or any other order restraining publication made by a judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date. (9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although G some editing of the judgment or order may be necessary. (10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one.

22 Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way which minimises the extent of any restrictions.”

- [90] So there is a balancing exercise for this Court. I take into account that if the Court does not grant, in advance, the privacy protection for the Private Information the Defendant asserts will adversely affect or damage him or breach his ECHR right to privacy were it to be made public, he may choose not to inform the Court about it at all and may not serve the evidence he wishes to rely upon, and as a result may be disadvantaged in the presentation of his mitigation and that may adversely affect the sanction decision. He would then feel he had been discriminated against by the Court.
- [91] I also take into account that in Criminal Courts every day the personal and medical and adverse family backgrounds of Defendants are disclosed publicly at the sentencing stage. For example previous sexual or physical abuse is one such sensitive matter dealt with in PSRs and expert evidence in mitigation. (I should make clear that this is an example which has no factual bearing on the current case facts whatsoever.)
- [92] It is stated expressly in CPR rule 81 that committal hearings shall be in public. It is very important that the public are informed of such hearings and permitted to be present to see the proper administration of justice. Court orders are to be obeyed. The public have ECHR rights to know about such cases under Art. 10. Those who breach Court orders are sanctioned. The assessment of the sanction and the balancing of the seriousness of the breach and culpability with the mitigation put forward is an open and public process. The public are entitled to know what factors which reduce or alter the sanction and what factors increase it. Secret “deals” and secret facts undermine such open justice and are to be rejected and eschewed unless the secrecy is necessary and proportionate.

- [93] A sensitive middle line is often taken in Criminal Courts. The prosecution see the defence mitigation reports and the PSR but not all of the detail of these is read out. The sentencing remarks are sensitively laid out. Not all sensitive factors are fully detailed but instead may be summarised, sometimes in an oblique way. This may be described as the “Art” of sentencing remarks.
- [94] So I have to decide: should the public interest in open justice override this Defendant’s right to confidentiality for this particular Private Information? Should it be “obliquely” referred to without giving away the true detail? Should press reporting be restricted? Should there be a private part to the sanctions hearing?
- [95] I consider that where the private information has relevance to a defendant’s culpability for the offence it may affect the length or type of sentence. It seems to me that this information should be made public for obvious reasons. Other members of the public should generally be informed of how the sentencing or sanctions process works. Relevant factors are relevant to the public. Secret information reducing sentences is not in the public interest.
- [96] Where the Private Information has relevance only to the suffering which a defendant asserts he will or fears he will endure in prison, that is arguably a matter of less relevance to the sanctions procedure. I consider this to be so because the prison service determines what happens in prison, not the Courts. This Court in these proceedings has no jurisdiction over what happens after a defendant is sent down (if that is the sanction passed). So for instance some defendants present with a suicide risk or are at an increased risk of assault in prison. Those are generally matters for the prison service not this Court. The processes and procedure in the prison service are not matters for this Court.
- [97] The general principles are subject to exceptions. An example of the Courts taking into account the prison conditions arose when Covid meant that prisoners were locked in cells for longer than before Covid. The Courts took that into account in sentencing.
- [98] In this case in my judgment the Private Information that has been provided to me has no relevance to culpability. The only relevance asserted at the private hearing in July was in relation to the Defendant’s asserted right to confidentiality and the psychological, emotional and social effects on him of a breach of his right to privacy due to the Private Information going public.
- [99] I note that in the notes to the Supreme Court Practice at 39.2.12 that even greater care has to be taken when a Court is considering a request to hold committal proceedings in private: see *EWQ v GFD* [2013] EWHC 3231, per Males J. At para 19.
- [100] I note and take into account the practice guidance issued by the Lord Chief Justice and the President of the Family Division and President of the Court of Protection on 3

May 2013. That begins by saying that it is a fundamental principle of the administration of justice in England and Wales that applications for committal for contempt should be heard and decided in public, that is in open court. The guidance goes on to make clear that there are some circumstances in which such an application may be heard in private. It is dealing specifically with the position in the Court of Protection and in some circumstances the Family Division, but it seems to me that the same principles apply, in effect, in the Queen's Bench Division in applications of this nature. That is to say, the court has a discretionary power to hear a committal application in private, which should be exercised only in exceptional cases where it is necessary in the interests of justice.

- [101] To balance the various principles and on the facts of this case I consider that the correct procedural way forwards is as follows. The sanctions hearing on 22 September 2022 will go ahead with an increased time estimate of one day.
- [102] I consider that it is necessary and just that the Private Information should be considered at a private hearing within the hearing attended by the parties and reporting restrictions will be put in place for that part of the hearing until the end of that part of the hearing. To that extent the Defendant's application is granted.
- [103] If, after the evidence and submissions, the Court rules that the Confidential Information is irrelevant to sanction then the reporting restrictions will remain in place. The public have no need or right to know irrelevant private matters.
- [104] If the Court rules that the Confidential Information does trigger the Defendant's ECHR right to privacy and is relevant to sanction and mitigation thereof then the Court will weigh the conflicting right to privacy and the potential damage caused by disclosure against the public interest in open justice on the evidence presented and after hearing submissions and will rule on whether the reporting restrictions will stay in place to protect the right to privacy and in what form the sanctions judgment will be published. Alternatively, whether the public interest outweighs the right to privacy for this committal application, of this nature, on these facts.
- [105] What this Court will not do, on the scant evidence provided in this case to date, is give a guarantee in advance of the decision to be made before hearing the full evidence and the full argument from the Parties. So to that extent the Defendant's application is dismissed. I realise that this leaves the Defendant with a decision to make but I consider that is the right way forwards.
- [106] I note that the Defendant thought that the core facts of the Confidential Information were unknown to anyone but in the event HS2 staff assert they have known for months and obtained that information from the Defendant himself. That issue may be highly relevant to the final decision. The final decision will of course be fact specific.

Late served evidence

- [107] The Defendant seeks to rely on two expert reports. One from a psychologist and another from an assistant psychologist. Neither has been provided to the Court yet and neither has been served.
- [108] In addition and slightly delphically, the Defendant seeks to rely on a PSR which he still does not have despite the evidence given in July that the probation officer had offered to provide a report if requested.
- [109] Late service of evidence which should have been obtained in good time for the sanctions hearing in July will have an affect on the costs order this Court will make.
- [110] Late served evidence which is late due to the Defendant's failure to come out of a tunnel in breach of an injunction and consequent failure to instruct lawyers and get advice and evidence in good time is procedurally unimpressive. In addition the Defendant's proposed evidence was not served in accordance with the directions order I made in June 2022.
- [111] The Claimants do not object to the late evidence at this stage.
- [112] Despite the Defendant's breaches of the Court's orders and the Court's directions I do not propose to exclude the proposed evidence before seeing it. If it is relevant to sanctions and served and filed at least 3 days before the hearing, so by 10 am on 19 September 2022, I do grant permission to the Defendant to rely upon it.
- [113] Any evidence served after 10 am on 19th by the Defendant may need to be considered further but only if an application is made pursuant to CPR Part 23 in good time before the deadline. The Claimants May serve evidence by that time too as to how their staff gained the Private Information.

Conclusions

- [114] The order I have made with directions is attached.
- [115] The Claimants' application made without issuing a notice of application is dismissed.
- [116] The Defendant's application dated 13 September 2022 is granted in part.
- [117] Due to time constraints a neutral citation number may be put into this judgment later.

Ritchie J

15 September 2022

END