Neutral Citation Number: [2024] EWHC 3144 (KB)

Case No: KB-2022-003497

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2024

Before :

HIS HONOUR JUDGE AUERBACH
(Sitting as a Judge of the High Court)

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Between :

HART DISTRICT COUNCIL	**Claimant**
- and -	
HELEN FREEMAN	**Defendants**
MATTHEW SILVESTER	

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- -

Robin Green (instructed by **Hart District Council Legal Services**) for the **Claimant**
Mark Lorrell (instructed by **Karen Todner Ltd**) for the **First Defendant**
Ulick Staunton (instructed by **GSG Law**) for the **Second Defendant**

Hearing date: 22 November 2024

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JUDGMENT

HIS HONOUR JUDGE AUERBACH:

1. I am going to start with this. I am not going to keep the two of you waiting until the end. I am going to tell you now that I am not going to send you into immediate custody, either of you, today, but I am going to make a suspended committal order in relation to both of you. So that means an order committing you, both of you, to prison, but suspended so it will not take effect today, but it might take effect in the future and I will explain that. When I get to the end, I am going to ask you both to stand up, but you do not need to stand up at the moment, but I am addressing the two of you.

2. Last week I heard the trial of a committal application made by the claimant in this case, which is the relevant planning authority, alleging breach of an injunction granted against these two defendants in October 2022. In my decision, which should be referred to for its full content and an explanation of the background to this matter, I found that both defendants were in breach of that injunction in the cluster of periods covered by the committal application which fall within a time window from 4 January through to 26 March 2024, although there are gaps in the dates covered during that period.

3. At the request of counsel for both defendants, I put back determination of the matter of sanction for those breaches to today, to enable submissions and supporting materials to be prepared. I have had the benefit this morning of an opening note prepared by Mr Green of counsel on behalf of the claimant, and a short written note on sanction from Mr Staunton of counsel on behalf of Mr Silvester. I have also read a sworn joint affidavit with exhibits from the two defendants, and affidavits or, in one case, a statement, of testimonials, about these two defendants, from people who, in various capacities, have got to know them over various periods of time.

4. At the start of the hearing this morning, Mr Silvester, speaking, he told me, on behalf of both defendants, made a short statement of apology to the court. I have heard oral submissions in mitigation on behalf of their respective clients, and generally on where each of them submits this matter sits in terms of the range of options open to me, from the two counsel, Mr Lorrell, who appears for Ms Freeman once again, and Mr Staunton, appearing once again for Mr Silvester; and I have been referred to various authorities and Sentencing Council guidelines.

5. I am not passing sentence in the Crown Court in respect of criminal offences, but determining the appropriate sanctions on an application for committal. The sanctions available to me include committal, that is to say, a custodial sanction; the imposition of a fine; and confiscation or sequestration of assets. The power that I have in this court to commit in each case is for a maximum of two years and the relevant legislation indicates that, in the event of a committal, automatic release would apply at the halfway point. A committal to prison order may be suspended. It would also be an option for me to adjourn or, in either case, to make no order. What I do not have the power to do, by contrast with the powers of a Crown Court judge sentencing in that court, is to make a community order or equivalent orders accompanying an order of suspended custody.

6. As has been discussed in a number of authorities, the approach of the court is analogous to that taken in the Crown Court when sentencing. This has been discussed in a number of recent authorities, including at the highest level, *Attorney General v Crosland* [2021] UKSC 15 and *Breen v Esso Petroleum* [2022] EWCA Civ 1405, and there are similar authorities in this court.

7. In particular, I should assess seriousness by reference to culpability and actual or potential harm. I should impose the least severe sanction commensurate with what is necessary to fulfil the objectives of such a sanction in the circumstances of this case. I should therefore not direct committal – effectively the equivalent of a custodial sentence – unless I am satisfied that the matter is so serious in terms of culpability and harm as to pass the custodial threshold. I should take into account matters of mitigation, including good character, but also consider whether there are any aggravating factors. If the matter does pass the custodial threshold, and having established what the appropriate period of custody would, in principle, be, I may then go on to consider whether that period of custody or committal should be suspended.

8. I should bear in mind the objectives of the sanction, in particular, punishment and rehabilitation. But in cases such as this, where the court is dealing with committal for breach

of the court's order, part of the purpose of the sanction is also to recognise that the court's order has been breached, and to reflect what sanction may be needed to ensure future compliance. The discussion in *Breen v Esso Petroleum* also indicates that if the sanction is immediate custody, then it is not appropriate to combine that with a fine, and that it would rarely or exceptionally be appropriate in a case where there is a committal to custody directed to be suspended also to accompany that with a fine.

9. The authorities also indicate that in the context of committal, the Sentencing Guidelines applicable in the Crown Court cannot be slavishly followed as though they applied in this jurisdiction, which they do not, particularly bearing in mind, for example, that the maximum sentence in the Crown Court for breach of a criminal behaviour order is five years, contrasted with the two year maximum committal period that this court can direct. The court also needs to keep in mind the different context and nature of the particular conduct with which it is dealing. Whilst there is a general similarity between breach of, for example, anti-social behaviour orders and of injunctions, in as much as both involve breach of orders made by a court, the particular context and circumstances are likely to be, and in this case are, different.

10. I was shown that in *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631, the Court of Appeal drew upon work that had been done to adapt guidelines from the criminal context for potential use in the context of breach of an anti-social behaviour injunction. At paragraph [54], there is reference to an adapted table indicating suggested starting points and category ranges by reference to where a particular matter may sit in terms of culpability and harm. I do not think, however, that that adapted table can or should be simply transplanted by me into the context of this case where I am dealing with committal for breach of a planning injunction.

11. I do need to consider, however, the degree of culpability and the degree of harm in this case, although again, even the three-fold categorisation of each of those in the Sentencing Council's guidelines for breach of a criminal behaviour order, in terms of the language used in those guidelines, is not entirely apt to the factual context in the present case.

12. The principle of totality is something I also need to consider, bearing in mind that, strictly, the schedule attached to the committal application identified a number of discrete periods, each with a start and end date, and that, whilst I found that the defendants were in breach of the injunction in the time window beginning in early January and ending in late March 2024, to which I have earlier referred, within that time window, there were a number of discrete time periods which do not between them cover the entirety of that time window, because there are some gaps. Were I to consider the appropriate sanction in respect of each sub-time period in turn, I would then need to stand back and apply the principle of totality to ensure as a sense check that my calibration of the matter sat in the right bracket.

13. But realistically, I was not asked and do not propose to deal with each sub-period separately. I will not impose a sanction on the footing that the breaches are other than I found them to be, that is with respect to each of the sub-periods falling in that overall time window. But the practical reality is that this series of breaches reflects a general ongoing pattern of behaviour, and so it cannot be said that the nature of the breaches in any one sub-period of a few days within that window is materially different, from those in any other sub-period of a few days. They are all the same character and part of a general ongoing picture and, therefore, whilst not punishing for anything more than the actual breaches in the actual sub-periods, I will come to a single sanction for each defendant in relation to that totality of breaches.

14. I have read what I have called testimonials from the following people: Tracy Worcester, who knows Ms Freeman through Ms Freeman doing some work for her charity; Andrew Colville, who has known Mr Silvester and Ms Freeman for some years as well; Ian

Hunt, who has known Mr Silvester for some years and provides what may be described as a professional and a personal reference; Nicholas Norton, Mr Silvester's step-father; and Teo Knowles, who has worked for both defendants for about the past three years on the farm.

15. There is also a joint affidavit from the defendants which describes how, following my decision last week, they took steps to book themselves into a hotel, where they are currently living, and they are looking for more suitable accommodation. They refer to the effect that these proceedings have had on the mental health of them both, particularly Ms Freeman against a background of some mental ill-health. Although I do not have any specific medical evidence before me, I entirely accept what they both say about the mental toll that the committal process in particular has taken on them.

16. They indicate that they both understand that they must not be in residential occupation of the twin-unit caravan, as directed by the injunction that remains in force, and they say that they will respect the injunction in future. They refer – and this featured in evidence very much last week – to their two young children, one of whom is, just, of nursery age, and the other of whom is nine months old and still being breastfed by his mother. I also accept as they describe that both of them are very much involved in the care of the children. Both of these defendants are themselves young. They are in their 30s and both of previous good character, and the testimonials pay tribute to their characters, community work and commitment to the ethical values that they have set for themselves as a guide to their field of work and lifestyle. They give an account of the commitment they have both made to their business and how it has grown in recent years, but they describe how, despite the assets which they have, their business is not generating an appreciable income and they are, in fact, both claiming Universal Credit. They describe their respective wider family circumstances, and that there is no one in the immediate family or, indeed, otherwise, who could assist or take on the care of their children.

17. I recognise and take fully into account that these defendants have said that they understand that they must not breach this injunction in future, and that they have taken immediate steps in that regard following my decision last week, and whilst I proceed on the basis that they both can and will ensure that they do not breach the injunction in future, and whilst I have also taken into account what Mr Silvester said when he addressed the court this morning. But I note that what has been said by and on behalf of the defendants stopped short of an unqualified acknowledgment that they broke this injunction, as I found that they did, and an apology to the court specifically for that breach, as opposed to apologising for the trouble, inconvenience and cost to which the court, the claimant and witnesses have been put, as referred to by Mr Silvester when he addressed me this morning.

18. I do have to consider the appropriate sanction in respect of each defendant separately – and, indeed, they are also separately represented – and the court should not start in such a case from the assumption that the sanction in both cases should necessarily be the same. But as a matter of fact in this case, I do not see any basis on which the court can or should distinguish between them with respect to culpability, harm or mitigating factors. They are partners in life, partners in business and were, on any realistic view, jointly involved in the conduct which amounted to a breach of this injunction, with no basis apparent to me on which I could, for example, regard one as more or less culpable than the other.

19. In terms of particular factors in this case which may be relevant to culpability and/or harm, I note the following.

20. Firstly, as to harm, conduct that involves a breach of a court injunction is inherently of a degree of seriousness for that reason alone, because it involves defiance of the court and the damage which it does to confidence in the integrity of the justice system. In this case, the conduct also damages and undermines the effectiveness of, and confidence in the integrity of,

the planning system. The conduct, I am satisfied also in light of the evidence that I heard last week from neighbours during the relevant period, has had a practical effect of undermining the impact on the amenity and ambience of the locality that the designation of the property in question for agricultural but not residential use was intended to secure.

21. That said, however, this is a case where the breach has not caused any irreparable or irreversible harm. It is not like a case of a breach of planning or other restrictions that has resulted, for example, in irreversible damage to the land or something of that sort. I also recognise that the impact on the neighbours relates to disturbance and what I have called loss of amenity, and, whilst the disturbance in particular is not to be understated, it is of a different character from another quite different kind of case that might involve someone being put into fear of personal harm or worse or something of that sort.

22. Another consideration is the degree to which the breach was deliberate or wilful or intentional or unintentional or accidental. These defendants have maintained that they have never at any time intended to breach the injunction. But they did pursue a course by degrees, consciously and intentionally, in terms of the use to which they put the twin-unit caravan, resulting in them being in breach of the injunction during the relevant periods that I have found.

23. As I described in my decision last week, by degrees over a period of time, starting with their decision prior to the grant of the injunction to put the twin-unit caravan on the land and move into it, and then, as events unfolded later following their unsuccessful bid to get the injunction varied, they have proceeded down a road of, at best to start with, wilful blindness, denial and wishful or hopeful thinking that an ongoing challenge to the enforcement order might lead to some resolution in their favour, to a point where, by the time of the period in which these breaches fall, they had settled upon a pattern of use of the twin-unit caravan as their family's base and domestic hub. I have to conclude, realistically, that they must have realised that this certainly put them at real risk of being found to be in breach should the claimant come to appreciate what was going on and bring the matter back before the court.

24. Nevertheless, balancing that, I recognise that – although it does not provide an excuse for their conduct – in their own minds, they felt they were to some extent driven down this road by, as they saw it, force of circumstances and, as they saw it, to a degree, the needs of their business, their family and the exigencies of their financial circumstances.

25. In his submission in writing, Mr Staunton invited the court to conclude and take into account that this was also a case where these defendants had at least some basis on which to properly seek to contest the committal application when considering, in particular, the fact that they did not do the equivalent of entering an early guilty plea. As to that, my starting point is that, because the defendants did not at any point prior to my decision admit their contempt to any degree, I cannot give them credit for something that they did not do. But I do not punish them more severely than I otherwise would because of that. It is simply something for which I cannot give them credit.

26. Insofar as these submissions are said to go to culpability and/or harm, I recognise, of course, that the committal application did not succeed in respect of the whole of the period in respect of which it was originally pursued. But I am only, in any event, imposing sanctions on these two defendants in respect of the periods for which it did succeed. There were also issues that had to be resolved by evidence and about which I had to be sure of the facts as to the nature and extent of the use being made by the defendants of the twin-unit caravan. But I was sure of that in relation to the period covering the sub-periods of breach that I have found; and the defendants did know what they were, in fact, doing at the time.

27. I do not find there to be any particular aggravating factors of any kind as envisaged in the guidelines that apply in the criminal context or otherwise.

28. Taking all of that into account, and situating this case within the context of the range of types of conduct that this court sees when considering committal applications for breach of injunctions, I consider that, in terms of both culpability and harm, this matter sits towards the lower end of the spectrum. But with respect to neither culpability nor harm is it at the very lowest end. In particular, there have been breaches of a court order that were not one-off or accidental, but arose from a pattern of behaviour with a settled background during a series of periods that between them make up the bulk of a three-month period. Whilst it is entirely reversible, it did have a material effect in terms of undermining the planning-related objectives of the injunction while it was going on. In relation to culpability, having regard to my earlier observations, I do not accept that this was entirely a case of unintentional or accidental breach. The matter does, therefore, in respect of both defendants, cross the custodial threshold.

29. There was some discussion during submissions as to whether a fine might be appropriate or sufficient, although, ultimately, the position of both counsel was that neither of the defendants was inviting me to go down that road, and given everything I have heard and read about their financial circumstances, I would doubt the capacity of either of them to pay a fine of any significant amount. But I should be clear that, in any event, I consider this matter passes the custodial threshold. It would not be right for the court to impose custody simply because a fine was not a practical option or because other options, such as a community order, are not available. I would not impose custody were I not satisfied that the matter passes the custodial threshold. But for the reasons I have given, it is of a seriousness that does cross that line.

30. The custodial period that I consider appropriate for each defendant in light of the degree of culpability and harm, and within the context of an overall maximum of two years, is six weeks for each defendant.

31. However, I must turn to the question of whether, for each or both of these defendants, suspension would be appropriate. Here, again, I bear in mind the general guidelines that are followed in the Crown Court as a useful guide to me. This is certainly not a case where either of these defendants poses any kind of risk or danger to the public, nor do I consider that there is a need for immediate custody as an appropriate punishment necessary in particular to secure future compliance with the court's order. I accept that the defendants have taken pretty much immediate steps in that direction and I decide sanction on the footing that they will continue to comply. I do not think immediate custody is necessary to ensure compliance and, of course, suspended custody provides a powerful incentive to compliance, because non-compliance would likely result in a further application for custody to be made immediately effective.

32. A particularly strong factor pointing in favour of suspension in this case is the welfare of the two very young children, given their ages and given, as I accept, that this is a consideration in relation to both defendants who are both very much involved in their care, and I have no doubt both very much involved in supporting each other to provide the children with the day to day care that they both need. I have borne in mind also the financial and mental health impact that the committal proceedings have already had on each defendant.

33. For these reasons I will, in both cases, suspend the committal and I will suspend for a 12 month period.

34. The fact that I have imposed suspended committal does not mean that there has been no sanction at all on these defendants for this breach. There most certainly has by way of a

committal order and one that may, in either or both cases, be activated should there be any further breach of this injunction by either of them in the next 12 months.

35. So I ask you now both to stand up, please. Helen Freeman, I am directing that for the breaches of injunction that I found last week, you be committed to prison for six weeks, but I am directing that that committal order be suspended, which means that you will not be committed to prison today. The suspension period lasts for 12 months from today, and that means that should there be found by the court to be any further breach of this injunction order, so long as it remains in force, during that 12-month period, by you, you may expect, if that is found by the court to have occurred, that the court will be invited to immediately activate the committal order resulting in your being sent into custody for six weeks, of which you would expect to serve three weeks and be released at the halfway point.

36. Matthew Silvester, the same applies to you. You have heard what I have just said to Ms Freeman. I repeat it in your case. I am directing that you be committed to prison for six weeks. I am suspending that for 12 months running from today's date so that it will not be immediately activated, but so long as the injunction remains in force, if there is any breach by you found by the court during that 12 month period, you may expect the court to activate the committal, resulting in your being sent into custody for six weeks, of which you would expect to serve three weeks prior to release. Have you both understood? OK, you can both sit down.