Neutral Citation Number: [2022] EWCA Civ 661

Case No: CA-2021-000657

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY
MR JUSTICE MARCUS SMITH
PT-2020-BHM-00001

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
LORD JUSTICE EDIS

- -

Between :

(1) THE SECRETARY OF STATE FOR TRANSPORT	**Claimants/ Respondents**
(2) HIGH SPEED TWO (HS2) LIMITED	
- and –	
ELLIOTT CUCIUREAN	**Defendant/ Appellant**

- -
- -

Adam Wagner and Pippa Woodrow (instructed by **Robert Lizar Solicitors**) for the **Appellant**
Michael Fry and Michael Brett (instructed by **DLA Piper Solicitors**) for the **Respondents**

Hearing date : 5 May 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10am on Monday 16th May 2022

Lord Justice Lewison:

Introduction

1. The issue on this appeal is the approach which the court should take when deciding whether to make an order for costs, and if so what order, against a person who has been found to be in contempt of court by disobeying an injunction granted in the context of political or environmental protest.

The facts

2. Mr Cuciurean is an adamant opponent of HS2. On 17 March 2020 Andrews J granted an order in the form of an injunction restraining trespass on certain woodland in Warwickshire, including an area known as the Crackley Land. The order was made against certain named defendants (not including Mr Cuciurean) and persons unknown. But the effect of the order was that Mr Cuciurean would become bound by the order simply by entering on the Crackley Land. The order contained the usual penal notice which stated that disobedience to the order might be held to be a contempt of court; and could lead to imprisonment, a fine, or seizure of assets. It also contained elaborate provisions about service. On an application for committal for contempt Marcus Smith J found that Mr Cuciurean had made 12 incursions into the Crackley Land between 4 and 14 April 2020; and had done so consciously and deliberately. He also found that Mr Cuciurean knew of the order and that he fully understood that he was not to enter the Crackley Land. His subjective intention in doing what he did was to further the protest against HS2; and to inhibit or thwart the HS2 scheme to the best of his ability.

3. Having found the contempts established, Marcus Smith J imposed a suspended custodial sanction upon Mr Cuciurean. The length of the sentence was subsequently reduced by this court, but the penalty otherwise stood. At a subsequent hearing, Marcus Smith J ordered Mr Cuciurean to pay the claimants' costs. Although the claimants had put forward the figure of £39,905 as the summary assessment for which they contended, the judge ultimately ordered Mr Cuciurean to pay £25,000. The various judgments are at [2020] EWHC 2614 (Ch) (Liability); [2020] EWHC 2723 (Ch) (Sanction) and [2021] EWCA Civ 357 (the Liability and Sanction Appeal).

4. With my permission, Mr Cuciurean now appeals. Since the grant of permission to appeal, there have been two cases decided which bear directly on the question in issue, *A-G v Crosland* and *National Highways Ltd v Heyatawin*, which I shall come to in due course.

The nature of the appeal

5. As provided by CPR Part 52.21(1) an appeal is limited to a review of the decision of the lower court. Where, as here, the judge was exercising a discretion in making a costs order, with arguments from competent counsel on each side, a review of his decision is not the occasion for running new points or introducing fresh material. In *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 423 (a case about service out of the jurisdiction) Males LJ (with whom Snowden LJ and I agreed) put it this way at [5]:

> "Further, it is important to say that the function of this court is to review the decision of the court below. The question is whether the judge has made a significant error having regard to the evidence adduced and the submissions advanced in the lower court. Just as the trial of an action is not a dress rehearsal for an appeal (see the well-known metaphor of Lord Justice Lewison in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]), neither is an application to set aside an order for service out of the jurisdiction. In general an appellant will not be permitted to rely on material which the judge was not invited to consider or to advance an entirely new basis for saying that the judge's evaluation on the issue of appropriate forum was wrong. A judge can hardly be criticised for not taking something into account if he was never asked to do so. Although no doubt this principle will be applied with some flexibility, bearing in mind that the ultimate *Spiliada* question is concerned with "the interests of all the parties and … the ends of justice", good reason will be required for taking a different approach."

6. To similar effect, Lloyd LJ said in *Allen v Bloomsbury Publishing plc* [2011] EWCA Civ 943 at [17]:

> "In our adversarial system of litigation, in a case where each party was professionally represented with plenty of opportunity to formulate and put to the court all points considered to be relevant on a particular point, it seems to me questionable for a judge to be criticised for having failed to take into account a factor which, if relevant, was known or available to all parties and which no party invited him to consider as part of the process of exercising his discretion. It would be one thing if, through inadvertence, the judge overlooked a point of law which should affect his reasoning … but otherwise what is said here is that there was a relevant consideration which the judge failed to take into account. It does not seem to me to be fair either to the judge or to the opposing party or parties for an unsuccessful litigant to be able to challenge the exercise of the court's discretion for failure to take account of a factor which was not in any way hidden and which, if it really is relevant, the exercise of reasonable professional diligence could have brought to light but which was not suggested to the judge as being relevant. This strikes me as being wrong in principle."

The arguments

7. Mr Wagner, for Mr Cuciurean, in essence puts forward two arguments. They are said to apply, not in all cases of contempt of court, but in cases where the contemnor's right to free expression and his right to peaceful assembly are engaged, particularly where he exercises those rights by way of protest or in furtherance of some political cause.

8. First, he says, the judge ought to have made an order which gave Mr Cuciurean protection equivalent to an order under section 26 of the Legal Aid, Sentencing and

Punishment of Offenders Act 2012 ("LASPO"). The effect of such an order would be (a) that any costs ordered would not exceed the amount (if any) which it is reasonable for the contemnor to pay and (b) the costs order would not be enforceable without a further order of the court.

9. Alternatively, he says, the judge ought to have regarded both the formal sanction (i.e. the suspended sentence) and also the costs order as together amounting to an interference with Mr Cuciurean's right to freedom of expression; and to have asked himself whether, taken together, the interference was disproportionate.

10. Underpinning Mr Wagner's argument was his submission that at every stage of the proceedings, the court had to ask itself and answer the questions formulated by the Divisional Court in *DPP v Zeigler* [2019] EWHC 71 (Admin); [2020] QB 253 and approved by the Supreme Court on appeal: [2021] UKSC 23, [2022] AC 408 at [16] and [58]:

> "(1) Is what the defendant did in exercise of one of the rights in articles 10 or 11 ?
>
> (2) If so, is there an interference by a public authority with that right?
>
> (3) If there is an interference, is it 'prescribed by law'?
>
> (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others?
>
> (5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?"

11. The last question can be broken down into sub-questions:

> "That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:
>
> (1) Is the aim sufficiently important to justify interference with a fundamental right?
>
> (2) Is there a rational connection between the means chosen and the aim in view?
>
> (3) Are there less restrictive alternative means available to achieve that aim?
>
> (4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?"

12. It is necessary to consider these questions at every stage, he says, because in *Zeigler* the Supreme Court said at [57]:

> "Article 11(2) states that "No restrictions shall be placed" except "such as are prescribed by law and are necessary in a democratic society". In *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 100 the European Court of Human Rights ("ECtHR") stated that "The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards" so that it accepted at para 101 "that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly". Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles."

13. Let me say at once that the judge did not follow this structured approach to his costs order. The reason is a simple one. He was not asked to. Nor was this structured approach foreshadowed in Mr Wagner's skeleton argument for this appeal. It emerged only in the course of his oral submissions. In future cases a judge would be well-advised to follow this structure although, as I shall explain, in cases of breach of an injunction such as this one some of these questions will have been asked and answered at an earlier stage. In my judgment the judge in this case cannot be criticised for not having followed a structure that he was not asked to follow.

Legal aid

14. The first argument can be dealt with relatively briefly. The availability of legal aid is governed by LASPO. The relevant provisions were considered in detail by Blake J in *King's Lynn and West Norfolk BC v Bunning* [2013] EWHC 3390 (QB), [2015] 1 WLR 531 (subsequently approved by this court in *Haringey LBC v Brown* [2015] EWCA Civ 483, [2015] 1 WLR 542). In short, the combination of section 14 (h) of LASPO and regulation 9 (v) of the Criminal Legal Aid (General) Regulations 2013 has the effect that an application for committal for contempt is classified as "the determination of a criminal charge" for the purposes of the grant of legal aid. An alleged contemnor is therefore entitled to legal aid under section 16 of LASPO.

15. Despite the fact that an application for committal for contempt is classified as "criminal proceedings" for the purposes of legal aid (and in certain other respects, such as the burden and standard of proof), such an application does not amount to criminal proceedings for all purposes. Such an application is heard in the civil courts and the procedure is governed by the Civil Procedure Rules. Hearsay evidence (which might not be admissible in a criminal trial) is admissible.

16. LASPO itself draws a sharp distinction between criminal proceedings and civil proceedings. Section 1 (2) provides that legal aid is "(a) civil legal services to be made available under section 9 or 10 or paragraph 3 of Schedule 3 (civil legal aid), and (b) services consisting of advice, assistance and representation required to be made available under section 13, 15 or 16 or paragraph 4 or 5 of Schedule 3 (criminal legal aid)". "Civil legal services" are defined by section 8 (3) as "any legal services other than the types of advice, assistance and representation that are required to be made available under sections 13, 15 and 16) (criminal legal aid)".

17. But as we have seen, legal aid for an alleged contemnor is granted under section 16, and therefore falls outside the definition of civil legal aid.

18. Section 26 of LASPO relevantly provides:

> "(1) Costs ordered against an individual in relevant civil proceedings must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including—
>
> (a) the financial resources of all of the parties to the proceedings, and
>
> (b) their conduct in connection with the dispute to which the proceedings relate.
>
> (2) In subsection (1) "relevant civil proceedings", in relation to an individual, means—
>
> (a) proceedings for the purposes of which civil legal services are made available to the individual under this Part, or
>
> (b) if such services are made available to the individual under this Part for the purposes of only part of proceedings, that part of the proceedings.
>
> (3) Regulations may make provision for exceptions from subsection (1)."

19. Because the grant of legal aid to an alleged contemnor does not fall within the definition of "civil legal services", the application for committal cannot be "relevant civil proceedings". The costs protection afforded by section 26 does not, therefore, apply.

20. In *Chief Constable of Essex Police v Douherty* [2020] EW Misc 9 (CC) HHJ Lewis drew attention to what he described as a "lacuna." As he explained at [14]:

> "There are mechanisms in place to protect impecunious parties facing costs orders in the criminal courts, and legally aided parties in the civil courts. The exception seems to be civil committal proceedings. There is nothing to suggest such an omission is intentional, rather it appears to have come about because of the general confusion in 2012 about the type of legal aid that respondents to civil committal applications should receive, as outlined in *Bunning* (supra). It does, however, seem unfair to those defendants who are impecunious that in certain respects they are put in a worse position by the decision that they should receive criminal, rather than civil legal aid."

21. Nevertheless, he went on to make an order for costs applying the ordinary principles in CPR Part 44. As he also said at [18]:

> "The ability of a person to pay costs is not usually considered during civil costs assessment. Where there are policy reasons for managing costs exposure, rules or regulations either limit the level of costs (eg small claims, possession cases with fixed costs, etc), refer in explicit terms to means (eg CPR 52.19) or introduce an alternative assessment procedure (eg s.26 LASPO). So far, no such rules have been made in respect of civil committals."

22. He might also have added a reference to Aarhus Convention claims (CPR Part 45.43 to 43.5, and Part 52.19A). The court also has power to make a costs capping order under CPR Part 3.19 and 3.20.

23. In the costs ruling that this court made following Mr Cuciurean's appeal on liability and sanction, it was stated:

> "On the appellant's own case, he does not benefit from the costs protection afforded by LASPO, and the applicable regulations. In other words, Parliament has legislated in such a way as to exclude this appellant from the protective regime conferred by those provisions. We are not, at present, attracted by the submission that this is a legislative "lacuna" which the Court should fill by a creative and novel costs order which replicates the effect of the provisions that do not apply. We note that this is not a step that HHJ Lewis felt willing or able to take in *Chief Constable of Essex Police v Douherty (Costs)* [2020] EW Misc 9 (CC), the appellant's strongest case. Judge Lewis was not prepared to make an order that took account of the defendant's means "without reference to any legal authority", any clear support from the rules or case law, or any evidence that the defendant would have qualified for protection if it were available."

24. I appreciate that because of the way in which LASPO is drafted Mr Cuciurean does not have the protection of section 26 or any of the specific provisions of the CPR that limit liability to pay costs. But that, in my judgment, is a matter for Parliament or the Rules Committee to consider.

Costs in criminal cases

25. In his skeleton argument, Mr Wagner also drew an analogy with the practice of awarding costs in criminal cases. He recognised, of course, that an application for committal for contempt of court on the ground of breach of an injunction does not amount to criminal proceedings (even though such an application is classified as a criminal charge for the purposes of article 6 of the European Convention of Human Rights and Fundamental Freedoms ("the ECHR")).

26. In criminal cases, where a costs order is made against a defendant, a long line of authority shows that in imposing a financial penalty (including a liability to pay costs) the defendant's ability to pay is always taken into account. That long-standing approach is reflected in the *Practice Direction (Costs in Criminal Proceedings)* [2015] EWCA Crim 1568.

27. As we will see, however, this analogy was rejected by the Supreme Court in *Crosland* and Mr Wagner did not press this analogy in oral submissions.

The competing rights

28. As is so often the case, there are rights that pull in different directions. It has also been authoritatively decided that there is no hierarchy as between the various rights in play. On the one hand, then, there are Mr Cuciurean's rights to freedom of expression and freedom of peaceful assembly contained in articles 10 (1) and 11 (1) of the ECHR. On the other, there are the claimants' rights to the peaceful enjoyment of their property. There was some debate about whether these were themselves convention rights (given that the Secretary of State for Transport is himself a public authority and cannot therefore be a "victim" for the purposes of the Convention, and HS2 Ltd may not be regarded as a "non-governmental" organisation for that purpose). But whether or not they are convention rights, they are clearly legal rights (either proprietary or possessory) recognised by national law. Articles 10 (2) and 11 (2) of the ECHR qualify the rights created by articles 10 (1) and 11 (1) respectively. Article 10 (2) relevantly provides that:

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the protection of health or morals, for the protection of the reputation or rights of others… or for maintaining the authority… of the judiciary."

29. Article 11 (2) relevantly provides:

> "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society … for the protection of the rights and freedoms of others."

30. There is no doubt that the right to freedom of expression and the right of peaceful assembly both extend to protesters. In *Hashman v United Kingdom* (2000) EHHR 241, for example, the European Court of Human Rights held that the activity of hunt saboteurs in disrupting a hunt by the blowing of hunting horns fell within the ambit of article 10 of the ECHR. In *City of London Corporation v Samede* [2012] EWCA Civ 160, [2012] PTSR 1624 protesters who were part of the "Occupy London" movement set up a protest camp in the churchyard of St Paul's Cathedral. This court held that their activities fell within the ambit of both article 10 and also article 11.

31. On the other hand, articles 10 and 11 do not entitle a protester to protest on any land of his choice. They do not, for example, entitle a protester to protest on private land: *Appleby v United Kingdom* (2003) 37 EHHR 38; *Samede* at [26]. The Divisional Court so held in another HS2 protest case, involving Mr Cuciurean himself who at that time was living in a tunnel for the purpose of disrupting HS2: *DPP v Cuciurean* [2022] EWHC 736 (Admin). In that case the court (Lord Burnett CJ and Holgate J) said at [45]:

> "We conclude that there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the

> freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of *destroying* the essence of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights."

32. Even the right to protest on a public highway has its limits. In *DPP v Ziegler* protesters were charged with obstructing the highway without lawful excuse. The Supreme Court held that whether there was a "lawful excuse" depended on the proportionality of any interference with the protesters' rights under articles 10 and 11. Lords Hamblen and Stephens said at [70]:

> "It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional action even with an effect that is more than de minimis does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was "necessary in a democratic society"."

33. But that proportionality exercise does not apply in a case in which the protest takes place on private land. In *DPP v Cuciurean* the court said:

> "66. Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well-established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the statement in *Richardson* at [3] or to cases such as *Appleby*.
>
> 67. For these reasons, it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also

> prove that a conviction would be a proportionate interference with those rights."

34. Where a land owner, such as the claimants in the present case, seeks an injunction restraining action which is carried on in the exercise of the right of freedom of expression or the right of peaceful assembly (or both) on private land, the time for the proportionality assessment (to the extent that it arises at all) is at the stage when the injunction is granted. Any "chilling effect" will also be taken into account at that stage: see for example the decision of Mr John Male QC in *UK Oil and Gas Investments plc v Persons Unknown* [2018] EWHC 2252 (Ch), especially at [104] to [121], [158] to [167] and [176] (another case of protest predominantly on the highway); and the decision of Lavender J in *National Highways Ltd v Heyatawin* [2021] EWHC 3081 (QB) (also a case of protest on the highway). Once the injunction has been granted then, absent any appeal or application to vary, the balance between the competing rights has been struck: see *National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB) at [44]; *National Highways Ltd v Buse* [2021] EWHC 3404 (QB) at [30].

35. Accordingly, what differentiates this case from many of the authorities to which we were referred is that in the present case the court had made an order, of which Mr Cuciurean was aware, protecting land to which the public had no right of access, and spelling out what was not permitted, before he decided deliberately and consciously to break its terms.

A-G v Crosland

36. On 9 December 2020 the Supreme Court circulated a draft judgment in an appeal relating to the expansion of Heathrow Airport. The rubric on the draft stated:

> "IN CONFIDENCE
>
> This is a judgment to which paragraphs 6.8.3 to 6.8.5 of Practice Direction 6 apply. The contents of this draft are confidential initially to the parties' legal representatives and, when disclosed to the parties in the 24 hours prior to delivery, also to the parties themselves. Those to whom the contents are disclosed must take all reasonable steps to preserve their confidentiality. No action is to be taken in response to them before judgment is formally pronounced unless this has been authorised by the court. A breach of any of these obligations may be treated as a contempt of court."

37. Before formal hand down Mr Crosland publicised the result of the appeal. In so doing, he breached the terms on which the draft judgment had been circulated. A panel of the Supreme Court found that that amounted to contempt. They imposed a fine on Mr Crosland of £5,000. The panel also considered the question of costs in a separate judgment: [2021] UKSC 15 (not reported at [2021] 4 WLR 103). At [5] they rejected the argument that the practice in criminal cases applied to a civil contempt. But they went on to say:

> "8. Costs normally follow the event in committal proceedings and a respondent who is found to be in contempt will normally be ordered to bear the costs of the proceedings in addition to any penalty imposed (Arlidge, Eady & Smith on Contempt "Arlidge"), at 14-154 and *Attorney General v Yaxley-Lennon* QB-2019-000741 (costs order and reasons, 11 September 2019). However, the court will seek to make an order which is fair, just and reasonable in all the circumstances (*Solicitor General v Jones* [2013] EWHC 2579 (Fam) at para 41 per Sir James Munby PFD).
>
> 9. When a respondent is found to be in contempt of court, there will usually be no principled basis for opposing a costs order. (See generally *Calderdale & Huddersfield NHS Foundation Trust v Atwal* [2018] EWHC 2537 (QB), per Spencer J at para 14; *LTE Scientific Ltd v Thomas* [2005] EWHC 7 (QB), per Richards J at paras 105-109.) Normally, the sole question will be whether the costs claimed in relation to a contempt application are reasonable and proportionate (*Solanki v Intercity Telecom Ltd* [2018] EWCA Civ 101; [2018] 1 Costs LR 103, at paras 56, 69-70 per Gloster LJ; *Calderdale* at para 14).
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> 10. In determining whether the claimed amount is reasonable and proportionate, the court may take into account the respondent's means (*Yaxley-Lennon*). The court may also consider the relationship between the value of any costs order and the level of any fine which has been or is due to be imposed. (See generally *Deputy Chief Legal Ombudsman v Young* [2011] EWHC 2923 (Admin); [2012] 1 WLR 3227, para 55 per Lindblom J, citing *LTE Scientific* at para 105.)
>
> 11. The court may summarily assess costs or, if appropriate, order that they are subject to a detailed assessment (Arlidge, at 14-154, citing *Taylor Made Golf Co Inc v Rata & Rata* [1996] FSR 528, pp 536-537 per Laddie J). The court may, if appropriate, order costs on an indemnity basis rather than the standard basis (Arlidge at 14-155).
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> 12. As the respondent's rights under article 10 ECHR are engaged in the present case, the combination of any penal measure and any costs order must be a proportionate interference with such rights (see, for example, *Ileana Constantinescu v Romania* (unreported), No 32563/04, ECHR 2013-III, para 49)."

38. Mr Crosland was ordered to pay £15,000 by way of costs in addition to the fine. It is to be noted that at [10] the panel said that the court *may* (not must) take into account the respondent's means. But I should also note that at [12] the panel referred to the proportionality of "any" penal measure and any costs order. Although on the facts the only penal measure imposed in that case was the fine, the statement of principle went beyond that.

39. The case of *Constantinescu* to which the panel referred was a case of defamation. The complainant (who was the unsuccessful defendant in the action) was ordered to pay a fine, and, in addition, damages and interest and legal costs. The amount of the costs was a very small part of the total financial package (2 per cent). The European Court of Human Rights held that the totality of the award was disproportionate in order to protect the reputation or rights of others. What they said in the paragraph to which the Supreme Court referred was this:

> "Enfin, compte tenu de la sévérité d'une sanction pénale doublée d'une condamnation à des dommages et intérêts, auxquels s'ajoute le remboursement des frais de justice, la Cour estime que les moyens employés ont été disproportionnés par rapport au but visé, à savoir « la protection de la réputation ou des droits d'autrui »."

40. It is important to note that the court looked at the question from the perspective of protecting the person whose reputation and rights were to be protected; not from the perspective of whether the person against whom the sanctions were imposed was able to meet them. It is also important to note that the court was not concerned simply with costs but with the totality of the package of financial sanctions imposed. Of the three components which made up the aggregate financial penalty the court did not single out any particular one. In addition, *Constantinescu* was, in effect, a case in which the complainant had been under no court-imposed tailored restriction prior to the publication of the defamatory material. The sanctions imposed upon her were entirely retrospective.

41. Mr Crosland appealed against the decision of the panel. His appeal was dismissed by a further panel of the Supreme Court: [2021] UKSC 58, [2022] 1 WLR 367. One of his grounds of appeal concerned the costs order. The appeal panel also rejected the argument that the practice in criminal cases ought to be applied by analogy. At [90] the appeal panel summarised the principles as set out by the first instance panel (including the reference at [12] to the proportionality of "any" penal measure and any costs order). They went on to say:

> "92. … The award of costs is a matter for the discretion of the court making the order and an appeal court should interfere only if there has been an error of legal principle. We can detect no such error. The principles governing the award of costs in contempt proceedings are not the same as those in other criminal law cases and the First Instance Panel correctly identified those principles and applied them in a manner that cannot be faulted.
>
> 93. In particular, as we have seen in para 90 above, the First Instance Panel explicitly referred to Mr Crosland's means and the relationship between the value of any costs order and the level of fine. And again, at para 18 of the Costs Judgment, the Panel made clear that it had had regard to Mr Crosland's means; and that it had also had regard to "the requirement that the combined effect of any fine and costs order must, to the extent that it interferes with the respondent's rights under article 10, … be proportionate". In paras 20–23 it then explained the "limited"

> information (see para 20), it had had about Mr Crosland's means and the opportunity it had given him to provide the relevant information."

42. I observe that neither the first instance panel in *Crosland*, nor the appeal panel followed the structured approach that Mr Wagner advocates when considering the question of costs. In both decisions, the focus of the structured approach was in deciding whether there had been a contempt of court at all.

43. There may be an interesting debate to be had about the precedential status of *Crosland*. The first instance panel was, in effect, acting as a court of first instance, and the appeal panel was an internal appeal within the same court, rather than an appeal from this court or its equivalent in other jurisdictions. Whether a decision of that kind is binding on this court may be open to question. But be that as it may, I consider that a decision of no fewer than eight Justices of the Supreme Court is (at least) of high persuasive authority, and that we should follow it.

National Highways v Heyatawin

44. Between the decision of the first panel in *Crosland* and the decision of the appeal panel, the Divisional Court (Dame Victoria Sharp PQBD and Chamberlain J) considered the question of costs in another protest case involving breach of an injunction: *National Highways Ltd v Heyatawin* [2021] EWHC 3093 (QB), [2022] 1 WLR 1521. The defendants in that case were members of the "Insulate Britain" movement who had breached an injunction by disrupting traffic on the M25. The court set out some of the relevant provisions dealing with costs in Part 44 of the CPR. They noted that the means of the paying party are not among the factors that the court is required to take into account. Having referred to authority cited by the Supreme Court in *Crosland*, they said:

> "9. These cases show that the costs order may be relevant to sanction in a case where the court is considering imposing a financial sanction. *Crosland* was such a case. In our judgment, however, they do not show, as a general proposition, that the means of the contemnor are relevant to the proportionality or reasonableness of the costs claimed."

45. Having referred to *Constantinescu* the court continued:

> "12. We doubt that much can be drawn from this judgment of the Chamber of the Strasbourg court in this factually very different case. We would not rule out that, in an extreme case, the imposition on a contemnor in a protest case of an order to pay a large sum of costs might be part of a package of measures that would render the interference with his Convention rights under articles 10 and 11 disproportionate. However, in most cases, the application of the usual costs rules to contemnors in protest cases is unlikely to give rise to an unjustified interference with the protestor's rights under articles 10 and 11 of the Convention, given that: (a) those who deliberately breach orders of the court know in advance that doing so may give rise to

> contempt proceedings (the order contains a notice to this effect) and the costs consequences of such proceedings are well known; (b) costs are recoverable on the standard basis if and only if they are proportionately and reasonably incurred and proportionate and reasonable in amount, having regard to (among other things) the conduct of the parties, the importance of the matter and the particular complexity of the matter or the difficulty or novelty of the questions raised; (c) if these conditions are met, any interference with the contemnor's rights under articles 10 and 11 is likely to be proportionate to a legitimate aim."

46. Nevertheless, as the Divisional Court also said, in such cases the court must be careful to ensure that costs claimed have been proportionately and reasonably incurred and are proportionate and reasonable in amount.

47. As Edis LJ pointed out in argument, there are two concepts of proportionality in play. There is the question of proportionality of the costs claimed which will be assessed under CPR Part 44. CPR Part 44.3 (2) (a) says that in an assessment on the standard basis the court will only allow costs which are "proportionate to the matters in issue". That is amplified by CPR Part 44.3 (5) which provides:

> "(5) Costs incurred are proportionate if they bear a reasonable relationship to—
>
> (a) the sums in issue in the proceedings;
>
> (b) the value of any non-monetary relief in issue in the proceedings;
>
> (c) the complexity of the litigation;
>
> (d) any additional work generated by the conduct of the paying party;
>
> (e) any wider factors involved in the proceedings, such as reputation or public importance; and
>
> (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness."

48. That rule states in terms what costs are to be regarded as proportionate, and with the exception of factor (e) the various factors are entirely concerned with the nature and conduct of the proceedings. Proportionality in the Convention sense is a broader concept. The latter is the kind of proportionality to which the Supreme Court referred in *Crosland*. In my judgment, therefore, it does not necessarily follow that costs which are proportionate in the CPR sense will necessarily be proportionate in the Convention sense. Moreover, I do not consider that the Divisional Court was correct in confining *Crosland* to cases in which the only sanction was a financial one, given that both the first instance panel and the appeal panel referred to the combination of a costs order and "any" penal sanction.

49. Nevertheless, I consider that *Heyatawin* was correctly decided, although for slightly different reasons, as I shall try to explain.

Breach of an injunction

50. As a broad generality, the approach of the court to an award of costs in a case of contempt of court is the same as in any other form of civil proceedings: *Symes v Phillips* [2005] EWCA Civ 663, [2006] 4 Costs LR 553, at [6].

51. Jeremy Bentham famously said in *Truth versus Ashworth*:

> "It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do* – they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it."
>
> (Quoted in *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 at [33])

52. By contrast, in a breach of injunction case, the court will have made it perfectly clear what cannot lawfully be done. In devising the terms of the injunction, the court will already have considered the question of interference with rights under articles 10 and 11 to the extent that it was necessary to do so. It will have struck the balance between competing rights, tailored to the peculiar facts of the case in question. A person who, with knowledge of the order, chooses consciously and deliberately to disobey it knows beforehand what it is he should not do. In my judgment that is one of the critical differences between a case like this and a case like *Constantinescu*.

53. In addition, the approach of the court in *Constantinescu* was to ask itself whether the sanctions imposed on Ms Constantinescu went beyond what was proportionate in order to protect the rights of the person whom she defamed; not whether they were penalties that she could afford to pay. To that extent, the Divisional Court in *Heyatawin* were correct to say that as a general proposition the means of the contemnor are not relevant to proportionality. In a case such as this, the rights of the claimants are two-fold. In the first place they have their rights to the peaceful enjoyment of property, which, as the Divisional Court held in *Cuciurean* and this court held in the liability appeal, are not overridden by articles 10 or 11. But second, and equally important, they have sought and obtained the protection of the court in protecting and enforcing those rights. In order to vindicate those rights and that protection, they have been compelled to incur legal costs. Some of those costs (perhaps a considerable proportion of them) could have been avoided if Mr Cuciurean had admitted the contempt, rather than contesting his liability. He exercised his right of protest by breaching the injunction in the first place. Whether his unsuccessful defence to the committal application was itself the exercise of rights under articles 10 and 11 (rather than, say, the exercise of rights under article 6) is highly debatable. In a case brought under the law of England and Wales, the principal sanctions involved (a fine or a prison sentence) are essentially matters

between the contemnor and the state, and do not directly benefit or compensate the applicant for committal. Only the costs award does that. Not to award the claimants their costs reasonably and proportionately incurred in vindicating their rights would be to derogate from those rights. Moreover, in bringing the application for committal the applicants are seeking to uphold both the rule of law and the authority of the court. Mr Wagner accepted that both were legitimate aims which were capable of justifying an interference with rights under articles 10 and 11. Quite apart from that it is highly likely that any claimant will be out of pocket on any assessment of costs on the standard basis. In this case, for example, the claimants incurred costs of some £80,000, claimed a contribution of some £39,900 and were ultimately awarded £25,000 inclusive of VAT.

54. In addition, of course, the only financial sanction imposed on Mr Cuciurean was his liability to pay costs.

55. If, therefore, one asks whether Mr Cuciurean's liability to make partial compensation to the claimants in vindicating their legal rights goes beyond what is necessary to protect those rights, I consider that the answer is "no". Like the Divisional Court in *Heyatwin*, although for slightly different reasons, I do not consider that an award of proportionate costs in the claimants' favour goes beyond what is necessary in a democratic society for the protection of the rights of others or maintaining the authority of the judiciary.

The judge's judgment

56. The judge's reasoning is contained in his order of 28 March 2021. It is admirably concise, so I set it out in full:

> "4.1 It seems to me that there is no general rule that (civil) contempt proceedings are - in general terms - to be treated differently from other civil litigation. Certainly that is not the general practice, where (in the ordinary case) a costs order is made in favour of the successful applicant on the indemnity basis. To be clear, I do not consider the indemnity basis to be the appropriate basis for assessment in this case (and it was not contended for by the Claimants) the correct starting point is that costs should follow the event, and in this regard the Claimants have clearly won.
>
> 4.2 It does, however, seem to me to be relevant that this case turned on a number of important points of principle and did involve the right of protest and free speech. That, to my mind, means that I must be careful in avoiding any kind of disproportionate costs order against the Fifth Defendant. However, it would be wrong not to make any costs order at all. In the first place, costs orders are intended to be compensatory and no more. There is no punitive element. Secondly, the chilling effect on the right of protest can - and in this case is - overstated. This case, as both Andrews J and I have made clear, is about deliberate breaches of court orders protecting property rights (also, I would note, a protected human right).

> 4.3 I have not been vouchsafed any insight into the Fifth Defendant's ability to pay or the hardship that a costs order would impose, beyond general statements that huge costs orders are a burden (which, of course, I accept).
>
> 4.4 Although the Claimants put forward the sum of £39,905.12 as the endpoint for costs, I use it as the starting-point. I recognise that - for a complex four-day witness action, involving difficult points of fact and law - this is a reasonable and proportionate starting point. But I must factor in the conduct of Mr Sah and the fact that, on a number of allegations, the Claimants simply failed. That said, viewed in the round, the Claimants have succeeded and the general attack mounted by the Fifth Defendant on "persons unknown" orders has failed.
>
> 4.5 Taking fully into account section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which (whilst not directly applicable) clearly must inform the exercise of my discretion, I order that costs summarily assessed in the amount of £25,000 (inclusive of any VAT) be paid within 28 days of the date of this order."

57. Paragraph 4.1 of the judge's reasons mirrors what the first instance Supreme Court panel said in *Crosland* at [8]. Paragraph 4.2 of the reasons mirrors what the panel said at [12].

58. As far as paragraph 4.3 is concerned, the judge had no evidence before him of Mr Cuciurean's ability to pay or of the hardship that any costs order would impose on him. I do not consider that it was incumbent on the judge to initiate his own inquiries. In that respect I agree with what Lady Arden sitting with the appeal panel in *Crosland* said at [152], that it was up to the defendant to provide satisfactory evidence of his lack of means. Much the same approach applies even in criminal cases, where the court does take into account the means of the defendant: *R v F Howe and Sons Engineers Ltd* [1999] 2 Cr App R (S) 37; *R v Northallerton Magistrates' Court ex p Dove* [2000] 1 Cr App R. (S) 136, 142 at (5). In the latter case Lord Bingham CJ quoted with approval a statement in an earlier case:

> "It is of course a fundamental principle of sentencing that financial obligations must be matched to the ability to pay, and there is an overriding consideration that financial obligations are to be subjected to that test. But that does not mean that the court has to set about an inquisitorial function and dig out all the information that exists about the appellant's means. The appellant knows what his means are and he is perfectly capable of putting them before the court on his own initiative. If, as happened here, the court is only given the rather meagre details of the appellant's means, then it is the appellant's fault."

59. The *Northallerton* case was referred to with approval by the appeal panel in *Crosland*.

60. We have since been shown a witness statement made on 20 April 2021 by Ms Hall, Mr Cuciurean's solicitor. That statement was made after the judge had made his order. She said that she had spoken to him and had been told that he was unemployed and not in receipt of benefit; that he had no property and no savings; that he survived on donations given to protest camps, and that his monthly mobile telephone bill was paid by his mother. We have also been shown an updating witness statement made on 21 March 2022 by Mr Cuciurean himself. But reliance on materials that were not before the judge cannot impugn the exercise of his discretion on the materials before him. Moreover, there is no application to admit fresh evidence on appeal; and even if there had been it is not easy to see how evidence about Mr Cuciurean's means would have satisfied the guidelines in *Ladd v Marshall* [1954] 1 WLR 1489. Although Ms Hall's statement was apparently before the judge when he came to consider an application for permission to appeal, by that time he had made his decision; and I do not consider that he was compelled to revisit it.

61. Paragraph 4.4 of the judge's reasons reflects the general approach under CPR Part 44 where the successful party has not succeeded on the whole of his case. I observe parenthetically that it is not entirely clear from the judge's reasons whether the £39,900-odd which the claimants put forward was itself a discounted figure to take account of the claimants' partial failure. Paragraph 3 of the judge's reasons suggests that it was, in which event the judge appears to have made a double discount. But the claimants do not complain about that.

62. I accept that the reference to section 26 of LASPO in paragraph 4.5 is a little cryptic, but what I think the judge must have meant is that he had in mind the principle that the amount of costs should not exceed the amount which, on the materials he had before him, it was reasonable for Mr Cuciurean to pay. Although this was not a case in which section 26 applied directly, it was something that the judge took into account.

63. That is borne out by the fact that the judge reduced the sum claimed from £39,905 to £25,000. Leaving aside the question of Mr Cuciurean's means (of which there was no evidence before the judge) and the alleged chilling effect, it is not suggested that the judge's final award was disproportionate in the sense that it overcompensated the claimants.

The structured approach

64. By way of cross-check, I turn to Mr Wagner's suggested structured approach which, as I have said, was not the way in which the application was argued before the judge. To the extent that the questions posed by that approach need to be answered at the costs stage they are, in my judgment, to be answered as follows:

    i) Did Mr Cuciurean exercise rights under articles 10 and 11? Yes, in so far as he breached the injunction, although whether he did so in contesting the committal on grounds that failed is much more debatable.

    ii) Was there an interference with those rights? Yes, both the initial grant of the injunction and the sanctions imposed for its breach amounted to an interference with those rights.

iii) If there was an interference, was it 'prescribed by law'? Yes, it was prescribed by the original injunction.

iv) Was the interference in pursuit of a legitimate aim? Yes: there were at least two legitimate aims pursued: the vindication of the claimants' own rights (the protection of rights of others) and the maintenance of the rule of law and the authority of the judiciary. The maintenance of the rule of law and the upholding of the authority of the judiciary are particularly important at the sanction stage.

v) Was the interference necessary in a democratic society? This question is broken down into sub-questions:

a) Is the aim sufficiently important to justify interference with the rights? Yes, both the protection of the rights of others, and the upholding of the rule of law and the authority of the judiciary justify the interference at all stages of the proceedings.

b) Is there a rational connection between the means chosen and the aim in view? The aim in view is the compensation of the claimants for the costs they have incurred in vindicating their rights and upholding the rule of law. There was no adequate material before the judge that would have justified a finding that Mr Cuciurean was so destitute and so lacking in other sources of finance (e.g. from well wishers, crowd funding and the like) that the making of the order was futile. Nor does the fact that the claimants were not "presently" minded to enforce the order make it irrational.

c) Are there less restrictive alternative means available to achieve the aim? The aim is to compensate the claimants. The judge's order does not in fact achieve that aim, because it only partially compensates them. A lesser order would not have achieved the aim. On the contrary it would have fallen even further short of the aim than the judge's order.

d) Is there a fair balance between Mr Cuciurean's rights and the general interest of the community including the rights of others? The balance between conflicting rights was struck by the terms of the original injunction. The community has a general interest in the rule of law and maintaining the authority of the judiciary, and the claimants have their own interests in vindicating their proprietary or possessory rights. Mr Cuciurian chose deliberately and intentionally to flout those rights, and to undermine the authority of the judiciary. Partial compensation of the claimants in upholding both strikes a fair balance between the two. Mr Cuciurian was and remains free to campaign against HS2 so long as he does so without breaching the terms of a court order.

65. It is no doubt the case that an award of costs against a defendant may cause hardship. It may affect their credit rating and in some cases may drive a defendant into insolvency. Countless unfortunate litigants have been driven into bankruptcy by costs orders made against them. But that has never been a reason either to refuse an order for costs in civil proceedings or (save in those cases where the CPR makes specific provision) to limit the amount of costs to an amount which the defendant can in practice afford to pay. In

cases of defamation, for example, all of which engage article 10, the court does not shrink from awarding a successful claimant both damages and costs, as long as the costs are both reasonable and proportionate in the CPR Part 44 sense.

Can this court interfere?

66. An award of costs is an exercise of discretion by the judge. Since the judge has a wide discretion, it is well-settled that an appeal court should not interfere simply because it considers that it would have exercised the discretion differently. As Chadwick LJ explained in *Johnsey Estates (1990) Ltd v Secretary of State for the Environment* [2001] L & TR 32, that principle:

> "…requires an appellate court to exercise a degree of self-restraint. It must recognise the advantage which the trial judge enjoys as a result of his "feel" for the case which he has tried. Indeed, as it seems to me, it is not for an appellate court even to consider whether it would have exercised the discretion differently unless it has first reached the conclusion that the judge's exercise of his discretion is flawed. That is to say, that he has erred in principle, taken into account matters which should have been left out account, left out of account matters which should have been taken into account; or reached a conclusion which is so plainly wrong that it can be described as perverse."

67. The Supreme Court appeal panel made the same point in *Crosland* at [92].

68. Once it is clear that the discretion to award costs is governed by the general principles in the CPR (as the Supreme Court and the Divisional Court have both held); and that contempt cases, even in protest cases, are not in some special category even though tempered to some extent by the approach in *Crosland*, I can identify no flaw in the judge's approach to his task.

69. I would dismiss the appeal.

Lady Justice Asplin:

70. I agree.

Lord Justice Edis:

71. I also agree.