Neutral Citation Number: [2024] EWHC 918 (KB)

Case No: KB-2023-004710

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/04/2024

Before :

THE HONOURABLE MR JUSTICE SAINI

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Between :

HM SOLICITOR GENERAL **Claimant**

- and -

TRUDI ANN WARNER **Defendant**

- -
- -

Aidan Eardley KC (instructed by **Government Legal Department**) for the **Claimant**
Clare Montgomery KC and **Rosalind Comyn** (instructed by **Hodge, Jones & Allen Solicitors**) for the **Defendant**

Hearing date: 18 April 2024

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Approved Judgment

This judgment was handed down orally at 10.30am on 22 April 2024 and then released to the National Archives.

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Mr Justice Saini :

This judgment is in 6 main parts as follows:

I. Overview

1. His Majesty's Solicitor General ("the Claimant"), seeks permission of the High Court pursuant to CPR 81.3 to bring proceedings for contempt against Ms Trudi Ann Warner ("Ms Warner"). In his Claim Form the Claimant alleges that Ms Warner is in contempt at common law through conduct which was a direct interference with the administration of justice, and undertaken with an intention to interfere with the administration of justice. The conduct of Ms Warner alleged by the Claimant to amount to contempt is not in dispute. It was captured on CCTV provided to me. I will describe the relevant conduct in more detail below but the focus of the complaint can be summarised as follows.

2. The trial of a number of defendants affiliated with the environmental group *Insulate Britain* was due to begin at Inner London Crown Court on Monday 27 March 2023. Between 8am and 9am, in the area near the entrance to that court used by judges and jurors, Ms Warner carried a placard with the handwritten words: "JURORS YOU HAVE AN ABSOLUTE RIGHT TO ACQUIT A DEFENDANT ACCORDING TO YOUR CONSCIENCE". The Claimant alleges in his Claim Form that Ms Warner "… deliberately targeted jurors with her sign, including in one case hurrying to catch up with a juror so as to draw attention to the sign and, in another case, walking alongside the juror while showing the sign". It is alleged that in doing these acts, Ms Warner "…interfered with the rights of the jurors to go to and from court and perform their duties without let or hindrance, and thereby interfered with the administration of justice itself". The Claimant says that these acts were done by Ms Warner with the specific intention of interfering with the administration of justice by seeking to influence the jurors and in particular to acquit climate change activists, whether or not such acquittal would be in accordance with the trial judge's legal directions.

3. There was no dispute in respect of the legal principles applicable to the granting of permission in a case brought by a Law Officer. At the permission stage the Claimant has to satisfy the Court of two threshold matters: first, that the grounds disclose a reasonable basis for committal; and second, that it is in the public interest that the contempt application should be made: see Attorney General v Yaxley-Lennon [2019] EWHC 1791 at [23]. Whether it is in the public interest to pursue an application is a question of judgment, not fact: see Cavendish Square Holdings BV v Makdessi [2013] EWCA Civ 1540 at [79]. I will deal with these two issues

under the headings "Reasonable Basis" (Section III), and "Public Interest" (Section IV), below. In respect of the Public Interest issue, it was agreed that in the context of the issues in the contempt application, I need to consider whether pursuit of it amounts to a proportionate interference with ECHR rights (here, Ms Warner's Article 10(1) ECHR rights).

4. Although this is a permission hearing where I am considering threshold tests, I received detailed written submissions (with reference to a large number of authorities) supplemented with detailed oral arguments over about a day. I am very grateful to Mr Eardley KC for the Claimant and Ms Montgomery KC and her junior Ms Comyn for the substantial assistance they provided to me.

5. I turn to the facts. The source of my narrative is the evidence of the Claimant (affidavits of Jane Davies and Anna Thomson) and my own viewing of the CCTV but focussing on particular parts identified by Counsel for the parties. As confirmed by Counsel at the hearing, there is no relevant dispute as to what Ms Warner did on the morning of 27 March 2023. The real issue debated before me was rightly described by Mr Eardley KC as a dispute in relation to how Ms Warner's conduct is to be characterised.

II. The Facts

6. On 27 April 2023, a trial of defendants affiliated with the environmental group *Insulate Britain* was due to begin at the Inner London Crown Court ("the Court"). The defendants were charged with causing a public nuisance in respect of acts arising out of a protest. As it was the first day of the trial, a jury had not yet been empanelled. No part heard trials associated with *Insulate Britain* were listed for that day at the Court.

7. At 08.32 that morning, Ms Warner, a retired social worker, arrived outside the Judges' entrance of the Court ("the Entrance") on Harper Road with a friend. Ms Warner had a placard with her upon which it was hand-written: "JURORS YOU HAVE AN ABSOLUTE RIGHT TO ACQUIT A DEFENDANT ACCORDING TO YOUR CONSCIENCE" ("the Placard"). The Entrance, which was at the time used by judges, staff, vulnerable witnesses, and jurors**,** is reached via a small side road off Harper Road. The public part of the side road running up to the gate is flanked by a public footpath on either side. As appears from the CCTV footage, when Ms Warner arrived the Entrance was closed. A group of around six people had congregated on the footpath beside the side road, waiting for the gate to open. Ms Warner stood on the public footpath against the wall running along the perimeter of the Court for about a minute. She then went to speak to the friend she had arrived with, who was standing at the far edge of the footpath, running along Harper Road. They spoke for approximately three minutes. Ms Warner was holding the Placard in her left hand (it was hanging down by her leg). Neither Ms Warner or her friend approached, spoke to, or otherwise engaged with any of the individuals waiting to enter the Court.

8. At around 8.37am, the Entrance was opened. The group of individuals waiting on the footpath, which now numbered about eight people, walked towards the gate and entered the perimeter of the Court. Over the course of the next 20 minutes Ms Warner walked back and forth in the public area between the wall marking the perimeter of the Court and her friend standing on the footpath. When by the wall, she stood

silently holding her Placard. When she walked to her friend, they chatted with the Placard generally hanging down by her side or tucked under her arm. I pause here to note that insofar as the Claimant argues that the Placard was at this point kept "concealed" that is not correct and I was not clear this point was in fact ultimately pursued by Mr Eardley KC. While Ms Warner was standing by the wall, some individuals looked briefly towards her as they walked by. One individual paused for a second, of his own accord, to look in Ms Warner's direction and others walked past without even looking towards Ms Warner. At least two people stopped on the footpath near to Ms Warner before they entered the precincts of the Court (one seemingly to sort through her bag and the other to smoke a cigarette). Ms Warner did not approach them. Indeed, while they paused nearby, Ms Warner appears just to be speaking to her friend. One man directly approached Ms Warner, while she had the Placard lowered under her arm and was speaking to her friend, to ask them something. They appear to speak briefly and Ms Warner then returned to the wall but did not try to show him the Placard as he walked away towards the Entrance.

9. In oral arguments, it was rightly not suggested on behalf of the Claimant that any individual was compelled or pressured to look at the Placard by Ms Warner. Given she was largely standing at the inner edge of the public footpath alongside the wall marking the perimeter of the Court, pedestrians could move freely along the footpath without having to interact with Ms Warner or look at the Placard. When she walked into the middle of the footpath, with her Placard lowered, to speak to her friend, Ms Warner would retreat to the wall as a passer-by approached, to enable them to pass without hindrance.

10. At around 08.58am, there was a lull in people walking towards the Entrance. Ms Warner and her friend packed up the Placard and started to walk away from the Entrance. There was then the appearance of more people passing back from around 09.00 and Ms Warner unpacked the Placard, walked quickly back into her position against the wall, and held it up. This happened twice. As before, she did not take any steps to hinder individuals accessing Court, speak to them, or otherwise attempt to catch their attention. I accept that many of those who entered via the Entrance that at this time are likely to have been jurors attending for their first day and will have seen the Placard. Ms Warner and her friend left about one minute later.

11. A jury was empanelled from the cohort of individuals who reported for jury service for the first time on 27 March 2023 and the trial of a number of *Insulate Britain* defendants commenced. HHJ Reid gave the jury the normal directions at the start of the trial as to the role of judge and jury and the jury will have watched the video as to their role and received the written information on that issue. The judge also gave a relatively brief direction about protests which were taking place outside of the front of the Court that day. The protests concerned HHJ Reid's legal rulings in the *Insulate Britain* trials. According to a note HHJ Reid made in respect of the incident, he first became aware of Ms Warner's conduct later that day. It was drawn to his attention over the lunch adjournment by a Recorder who had walked past Ms Warner on her way into the Court. HHJ Reid examined the CCTV footage sometime that afternoon. The following day HHJ Reid gave the jury a direction ("the Direction") in the following terms:

> "I directed you yesterday about protests as I was aware of a protest occurring outside the front of the court. What I was not

> aware of then was that a person had been approaching people they believed were jurors to show them a placard which said something about how jurors can approach their task on a jury. Also I am aware that there are some posters in the roads today leading up to the court mentioning similar things. I emphasise there is no suggestion that any of these defendants is responsible in any way for that behaviour of other people. The only person who can tell a juror something about the way they can approach their task is the Judge in their case. In this case that is me. The people who were showing the sign yesterday and anyone who put up the signs on the street are wrong about what the law is. That law is exactly as I told you yesterday. You try the case on the evidence you hear in this room and no more. You take the law from me. If you are sure of guilt on the evidence you have to convict. If you are not sure you have to acquit. As the trial goes on there may be general protest or protests directed at me but as I said so long as they are not intended to influence you there is no problem with them. As well as that, I hope you do not, but you may see things outside the courtroom as the trial continues indicating how you can or should approach your task. If you do see anything directed to jurors rather than just protesting generally then please write me a note about what it is and I will sort it out and correct any further false impressions which people seem to think it is sensible to try and impart to jurors".

12. The trial continued without further incident and there is no suggestion on behalf of the Claimant that the fairness of the trial was affected in any way by Ms. Warner's actions.

III. Jury Equity

13. A major feature of this case is the tension between what is sometimes called "jury equity" (the power of the jury to give a verdict according to conscience), and the obligation of a jury to follow a judge's directions on the law and abide by the juror's oath/affirmation, which is to "faithfully try the defendant and deliver a true verdict according to the evidence".

14. As to jury equity, as I understand his case the Solicitor General appears to accept that juries have a power (of some nature) to return a verdict according to their conscience. Mr Eardley KC describes it in his skeleton argument as "a *de facto* power to acquit a defendant regardless of judicial directions, because they cannot be directed to convict and they cannot be punished for acquitting on conscientious grounds, but they have no right to do so" (his emphasis). There was some debate before me about whether this is a "power" or "right" of a jury. That is not ultimately helpful but I note that at the plaque in the *Old Bailey* (I return to this at [17] below) it is described as a "right". It is probably best to describe jury equity as a principle of our law. It is an established feature of our constitutional landscape and has been affirmed, as set out below, in the highest courts.

15. There is however a clear tension between that principle and the well-established legal duty of a jury to apply the law as directed by a trial judge, to the facts as they find them, and to deliver a verdict accordingly. That duty is reflected in the model direction in the *Crown Court Compendium*, Part 1 (2023) at page 27-9 under which the trial judge instructs the jury as follows:

> "…It is also my job to provide you with legal directions that you apply to the fact-finding exercise you are undertaking as the jury. That will involve me giving you some legal directions even in the course of these opening remarks, at other stages during the trial when it's helpful to do so and, in particular, at the end of the trial when I come to sum the case up to you. I will provide to you a legal framework that you must apply in reaching the verdict(s) in respect of the charge(s) you have just heard read out."
>
> (emphasis added)

16. The principle of jury equity is well-established in our common law. It is also recognised across the common law world. I refer, for example, the decision of the Supreme Court of Canada in Krieger v The Queen (2006) SCR 501; the decision of the Supreme Court of New Zealand in L v The Queen [2006] NZSC 18; and, in the United States Supreme Court, to the decision in Sparf v United States 156 US 51 (1895), as followed in United Brotherhood of Carpenters and Joiners of America v United States 330 US 395 (1946). Its origins lie in Bushel's Case (1670) 124 ER 1006, which arose out of the prosecution of two Quaker preachers for holding an unlawful assembly. The Recorder of London, presiding at the trial, directed the jury to convict. The jury refused. They were fined and imprisoned until payment. It was this imprisonment that the jurors successfully challenged by habeas corpus, on the basis that juries have a right to find facts and apply the law to those facts according to conscience and without reprisal.

17. Counsel for Ms Warner referred at the hearing to the plaque at the Central Criminal Court by Court 1, which they accurately submit is visible to any serving juror or court user passing through the Grand Hall. The plaque reads:

> "Near this site WILLIAM PENN and WILLIAM MEAD were tried in 1670 for preaching to an unlawful assembly in Gracechurch Street. This tablet commemorates the courage and endurance of the jury, Thomas Vere, Edward Bushell and ten others, who refused to give a verdict against them although locked up without food for two nights; and were fined for their final verdict of Not Guilty. The case of these jurymen was reviewed on a writ of habeas corpus and Chief Justice Vaughan delivered the opinion of the Court which established the right of juries to give their verdict according to their convictions."

18. It was not in dispute that the principle remains undisturbed and has been endorsed at the highest levels in this jurisdiction in recent times. As Lord Thomas held in R v Goncalves [2011] EWCA Crim 1703; [2013] 2 Cr App R 14 at [38] "a jury is entitled

to acquit and its reasons for so doing are unknown. It is their right which cannot be questioned." It is a corollary of the principle endorsed by the House of Lords in R v Wang [2005] 2 Cr App R 8 that a judge cannot direct a jury to convict a defendant. Lord Bingham, delivering the unanimous opinion of the Committee, confirmed the constitutional role of the jury as the sole arbiter of guilt, and answered the certified question by saying that there are "no circumstances in which a judge is entitled to direct a jury to return a verdict of guilty" ([18]). Lord Bingham addressed the issue of acquittals contrary to the evidence by reference to a number of high-profile acquittals, where exercises of jury equity can readily be inferred, in the following terms at [16]:

> "If there were to be a significant problem, no doubt the role of the jury would call for legislative scrutiny. As it is, however, the acquittals of such high-profile defendants as Ponting, Randle and Pottle have been quite as much welcomed as resented by the public, which over many centuries has adhered tenaciously to its historic choice that decisions on the guilt of defendants charged with serious crime should rest with a jury of lay people, randomly selected, and not with professional judges. That the last word should rest with the jury remains, as Sir Patrick Devlin, writing in 1956, said (Hamlyn Lectures, pp 160, 162): 'an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just. If it does not, the jury will not be a party to its enforcement… The executive knows that in dealing with the liberty of the subject it must not do anything which would seriously disturb the conscience of the average Member of Parliament or of the average juryman. I know of no other real checks that exist today upon the power of the executive.'"

19. Counsel agreed that participants in the trial process cannot lawfully invite a jury to apply the principle of jury equity or indeed to inform them of it. That prohibition is how the common law squares the jury equity and the oath that jurors are required to swear. I was referred to the description of how the tension operates in the United States in the judgment of Judge Leventhal of the United States' Court of Appeals for the DC Circuit in US v Dougherty 473 F2d 113. Judge Leventhal describes how in the United States the existence of an "unreviewable and unreversible power in the jury to acquit in disregard of the instructions on the law given by the trial judge, has for many years co-existed with legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law" (at [1132]). This is also an accurate description of the position in our jurisdiction.

20. Professor JR Spencer's instructive article, *Jury Equity – a Changing Climate?,* Archbold Review, Issue 9, November 2023 at pp.8-12, provides an excellent history of the conflict or tension. He explains that "jury equity" (or the power to return a "verdict according to conscience") can either be seen as a "valuable constitutional safeguard", or an "embarrassing anomaly" and not a right.

21. As identified by Professor Spencer, in 2001, Sir Robin Auld recommended that the law should be changed so that it would be "*declared, by statute if need be, that juries have no right to acquit defendants in defiance of the law or in disregard of the*

evidence, and that judges and advocates should conduct criminal cases accordingly": Review of the Criminal Courts (2001) Ch.5, para.107. Parliament did not enact this recommendation.

22. I turn to the first threshold matter on which the Claimant must satisfy me.

IV. Reasonable Basis

23. I will first summarise at a high level the basic propositions advanced on behalf of the Claimant and Ms Warner.

The Solicitor-General's case

24. Mr Eardley KC puts the Claimant's case as a criminal contempt at common law consisting in the direct interference with the administration of justice. He argued that the interference consisted in Ms Warner's act of "confronting" jurors, as they arrived at court, with a sign calculated to instruct or encourage them to perform their role in a particular way. In oral submissions he went further to describe Ms Warner's actions as "instructing, encouraging or inciting" them to disobey the judge's directions of law and the oath or affirmation they take. He argued that it is not necessary, to prove this form of contempt, to establish that the statement on the Placard was inaccurate as a matter of law. He did argue however that the statement on the Placard was inaccurate as a matter of law, submitting that this was "a serious aggravating feature" but not an essential element of the contempt.

25. As to the actus reus, Mr Eardley KC relied on Attorney General v Davey [2013] EWHC 2317 (a case concerning misconduct by jurors), where the Divisional Court explained at [2]:

> "The law in relation to proof of contempt at common law is well settled. First, the Attorney General must prove to the criminal standard of proof that the respondent had committed an act or omission calculated to interfere with or prejudice the due administration of justice; conduct is calculated to interfere with or prejudice the due administration of justice if there is a real risk, as opposed to a remote possibility, that interference or prejudice would result."

26. Mr Eardley KC accepted that that to qualify as a criminal contempt, the interference (actual or risked) must be a serious one: Attorney General v Crosland [2021] 4 WLR 103 at [22]-[27] (and see the further Crosland case at [2022] 1 WLR 367 at [20], [58], [68]). The focus in his oral submissions on the type of acts which amount to serious interference was on the category he described as interference with participants in court proceedings on their way to or from court. He took me to R v Runting (1989) 89 Cr. App. R.243, a case where a press photographer pursued a criminal defendant as

he left court. Rejecting the allegation of contempt on the facts, the Court of Appeal nevertheless said, at 245:

> "It should be made clear at the outset that the law insists that a defendant and witnesses, and indeed anyone else who has a duty to perform at a Court, whether in a criminal trial or in a civil trial, is entitled to go to and from the Court, that is between his home and the Court, whether on foot or otherwise, without being molested or assaulted or threatened with molestation.
>
> There are two reasons for that, it seems to this Court. The first is, there must be nothing to create in the minds of such persons any fear such as to make them less likely to wish to come to Court to carry out their proper functions. The second reason, which is perhaps more difficult to put adequately into words, is this: that the authority and dignity of the Court require that those who attend the Court to carry out their duties should be allowed to do so without let or hindrance, and again without fear of molestation. That principle is derived from part of the judgment of Bowen L.J. in the case of Re Johnson (1888) 20 Q.B.D. 68, 74, as follows:
>
> *"The law has armed the High Court of Justice with the power and imposed on it the duty of preventing brevi manu and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground and not on any exaggerated notion of the dignity of individuals that insults to judges are not allowed. It is on the same ground that insults to witnesses or to jurymen are not allowed. The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom in order that such persons may safely have resort to courts of justice."*

27. Mr Eardley KC relied strongly upon Yaxley-Lennon. In that case, the Divisional Court found a contempt proved where the respondent (also known as *Tommy Robinson*) had aggressively confronted criminal defendants as they arrived at court. The respondent's conduct in that case risked putting the defendants in a frame of mind where they would not be able to focus on proceedings. Such conduct disrespected the right of participants in legal proceedings to attend court "without let or hindrance", and the court explained "It is, fundamentally, a matter of respect for the institutions, and the process by which justice is administered" [80]. Mr Eardley KC relied on the statement of the court that the principle is not limited to instances of physical molestation: see [4], [26], [37] and [78]-[81].

28. In relation to *mens rea*, Mr Eardley KC relied again upon Yaxley-Lennon, at [88], where the Divisional Court held that, for the purposes of the common law of contempt it was not necessary to show a specific intent to interfere with the administration of justice. In R v Jordan [2024] EWCA Crim 229at [41]-[52], the

Court of Appeal held that the same is true, both as a matter of authority and principle, in respect of "cases of contempt in the face of the court generally and to related forms of contempt". Ms Montgomery KC accepted that I am bound by Jordan. She reserved the right to argue that specific intent is necessary on appeal.

29. Mr Eardley KC said that the Claimant does not allege strict liability contempt under sections 1 and 2 of the Contempt of Court Act 1981 ("the 1981 Act") and it was therefore unnecessary for him to establish that Ms Warner's actions created a substantial risk that any particular legal proceedings would be seriously prejudiced or impeded. In his skeleton Mr Eardley KC said that the interference with the administration of justice required for proof of common law contempt occurred "…at the moment Ms Warner displayed her sign to individuals entering via the Judges' Entrance". He argued that it is not dependent on proof that the fairness or effectiveness of any particular trials was compromised.

30. He submitted that Ms Warner's conduct was of a gravity that went well above the baseline requirement of a "serious" interference with the administration of justice. Mr Eardley KC emphasised the following matters:

(1) He accepted that Ms Warner was not verbally aggressive to anyone (as in Yaxley-Lennon) and that, although he said she followed two (suspected) jurors to intercept them, this was not physical pursuit on the scale engaged in in Runting. He argued however that in another sense what he called "the confrontation" was more serious than in either Yaxley-Lennon or Runting because Ms Warner was directly seeking to influence how jurors went about discharging their duties;

(2) He argued Ms Warner's conduct fell within the (now obsolete) indictable offence of "embracery". This is an attempt to influence or instruct a jury or to incline them to be more favourable to one party or the other, regardless of whether the attempt succeeds. Mr Eardley KC submitted that the offence is regarded as obsolete now only because such conduct falls to be treated as contempt of court: R v Owen [1976] 1 WLR 840; and

(3) He submitted that in this case (and in contrast to Yaxley-Lennon and Runting) Ms Warner's actions had what he termed "real-world effects" on the conduct of a trial, in that HHJ Reid had to spend time in crafting and delivering the Direction.

Ms Warner's case

31. In their written submissions Ms Montgomery KC and Ms Comyn submitted that the application arises out of conduct not known to the law of contempt. They say that Ms Warner's silent holding of the Placard did no more than informing jurors that they have a right to acquit defendants according to their conscience - the principle of "jury equity". They say that the Placard set out the legal principle in plain terms without comment or direction. They refute the suggestion that Ms Warner harassed, impeded, or even spoke to anyone who walked by and submit that in substance the Placard simply acted as a form of street poster passing legally correct information to potential jurors and other passers-by. As I noted earlier, they say that the Placard was no more objectionable in its contents or placement than the plaque to Penn and Mead on public display in the Old Bailey.

32. The further submissions for Ms Warner as developed orally by Ms Montgomery KC can be summarised as follows:

(1) There is no tenable basis upon which the Court can conclude Ms Warner molested jurors, threatened them with molestation or otherwise hindered their free access to the Court. There is no element of her conduct that would give rise to any contempt without more.

(2) It is not unlawful or improper for members of the public, including jurors or potential jurors, to know about the principle of jury equity or to be made aware of it outside the precincts of a Court.

(3) No interference with the administration of justice was caused by Ms Warner's conduct. All that was required by way of "antidote" to the Placard was the short Direction, delivered by the trial judge the following day. Indeed, the material ordinarily provided to jurors and potential jurors was more than sufficient on its own to counteract the Placard. This material includes the standard jury video, the jury notice, and the directions from the trial judge at the start of any trial.

(4) The allegation of contempt at common law (involving as it does the publication of the Placard commenting on important policy issues) must be subject to (at least) the same restrictions as the statutory contempt regime under the 1981 Act. Not only was Ms Warner's publication of her poster captured by the statutory contempt regime under that Act, but she cannot be deprived of the safeguards in the statutory scheme by a common law charge. This is because the safeguards in the 1981 Act were an attempt to render the interference occasioned by the common law of contempt, compatible with the right to freedom of expression under Article 10 ECHR.

(5) Finally, there is no evidence to establish any (actual or risked) serious interference with the administration of justice, still less a substantial risk that the course of justice in the proceedings would be seriously impeded or prejudiced (as required under the 1981 Act).

Analysis

33. I was reminded by Mr Eardley KC of judicial observations that in an application for permission such as that before me, detailed consideration about the precise strength of the Law Officers' case is to be discouraged. I have had that at the forefront of my mind but have come to the firm conclusion that the Solicitor General's case does not disclose a reasonable basis for committal. This is a case where there is no dispute as to what Ms Warner did on the facts. In my judgment, that conduct does not amount to an actionable contempt for the following four reasons.

34. First, the species of contempt based on the principle that jurors should be free to attend court without being "*molested or assaulted or threatened with molestation*" and without "*let or hindrance*" have no application here. At no point did Ms Warner assault, threaten, block, accost, or impede anyone's access to the Court. The only evidence of any relevant interaction she had with anyone entering the Court was with some people walking past who chose to momentarily look towards her. They

potentially may have read the Placard entirely voluntarily, and as Ms Warner passively held it.

35. The cases put by Mr Eardley KC at the forefront of his submissions do not assist. This is far from a case of confronting defendants as they arrived at court and questioning them in an intimidating manner in "aggressive and provocative terms" as in Yaxley-Lennon [2019] EWHC 1791. In Runting, the Court of Appeal held that even pursuing a defendant on his way out of court to take a photograph, to the extent the defendant collided with scaffolding, was not a sufficiently grave interference with his ability to go to/from court without let/hindrance to amount to a contempt. As explained by the court in that case, the behaviour was "undoubtedly offensive, it was rude, it was uncivilised, it was wholly reprehensible, but it fell short, in our judgment, of acts which, on an objective view, were capable of amounting to interference sufficient to constitute the necessary actus" (p 247).

36. In my judgment, it is fanciful to suggest that Ms Warner's behaviour falls into this category of contempt. The category is limited to threatening, intimidatory, abusive conduct or other forms of harassment (whether physical or verbal). I reject the arguments made in the Claimant's skeleton argument that Ms Warner "*confronted*" jurors and that she "*followed two (suspected) jurors to intercept them"*. These submissions significantly mischaracterise the evidence. Put another way, the CCTV does not disclose a reasonable basis on which a court could be sure of those matters. To the contrary, the CCTV shows Ms Warner: (a) holding the Placard in a strikingly unobtrusive manner, and (b) only hurrying *alongside* two individuals around 09:00, so that she could get back into her previous position along the perimeter of the Court. At no point does Mr Warner "*follow*" or "*intercept*" either woman, nor wave the Placard at them or otherwise try to grab their attention.

37. Second, the Placard did not present, as argued in the Claimant's skeleton, an "*instruction or encouragement"* or constitute a "*plain invitation*" to passers-by to discharge their duties in a particular way. There is a distinction to be drawn between *instructing/encouraging/inviting* an individual to undertake a particular course, on the one hand, and *informing* them of a particular course that is arguably open to them, on the other. That Ms Warner's behaviour was in the latter class is at least evident from:

    (1) The text on the Placard, which was informative. It did not implore jurors to act or give an instruction. It simply communicated directly with jurors to summarise the principle of jury equity in a way which is not far from Lord Bingham's description in Wang and indeed very similar to the Old Bailey plaque. It did not suggest to jurors they should exercise their right to acquit according to their conscience, just that it was a power that they have and indeed such a power seems to be accepted on behalf of the Solicitor General.

    (2) Ms Warner's behaviour towards passers-by was consistent with information sharing. She did not gesture towards any individual (whether by waving her Placard, holding it above her head, or otherwise attempting to attract their attention) or even talk to people walking along the footpath or entering the Court via the Entrance. Indeed, what is striking to me is how little Ms Warner tries to engage with people, to get their attention, or to persuade them of anything. All she is concerned with is being in position to show the text of the Placard to people, if

they chose to look. She was, as rightly submitted by Ms Montgomery KC and Ms Comyn in their skeleton, in essence, a human billboard.

38. Third, insofar as it is relevant, Ms Warner's conduct did not even arguably amount to the old common law offence of embracery, as was submitted for the Claimant. Reported cases concerning this ancient offence are rare, but do not concern conduct which bears any resemblance to Ms Warner's action on the relevant morning. The cases concern matters such as approaching jurors and speaking favourably about a particular defendant (R v Davies (1890) 150 Cent Cr Ct Sess Pap 736); conspiring to obtain a false verdict in which the overt act agreed was contriving by bribes to get two individuals sworn onto the jury (R v Opie (1670) 1 Wms Saund. Or telling a juror that the accused was guilty and had previously stabbed someone else (R v Owen [1976] 1 WLR 840). As I noted above, Owen was relied upon by Mr Eardley KC. In my judgment, it is not authority for the proposition that all conduct which would have constituted the old offence now amounts to contempt at common law. In that case, the court simply observed that embracery had likely become obsolete because the kind of conduct likely to fall within its scope was being dealt with summarily as contempt in practice. It did not consider whether, or conclude that, contempt and embracery are coterminous. In fact, the offence is not merely obsolescent. It was abolished by section 17 of the Bribery Act 2010.

39. Fourth, as to the substance of the Placard, Ms Warner accurately informed potential prospective jurors about one of their legal powers. She did not comment on the merits of the case or make an imputation of the defendants' innocence. As I have noted above there is a tension which the law tolerates between the principle of jury equity and the duties in the oath and affirmation and obligation to follow judicial directions. And, as Lord Bingham explained in Wang, if there were to be a significant problem "*no doubt the role of the jury would call for legislative scrutiny"* [16]. The proper forum for the Solicitor General to address this concern is Parliament not by way of contempt proceedings. It is not unlawful to accurately communicate the bare principle of law to potential jurors in a public forum.

40. Mr Eardley KC argued that Ms Warner's Placard was wrong as a matter of law because juries have the "power" to acquit, but not a "right". He referred to R v Shipley (1784), 4 Dougl. 73, 99 E.R. 774, at 82. In the context of Ms Warner's Placard, that is a distinction without a difference. The distinction drawn by Lord Mansfield in Shipley relates to the question of what role the judge plays in respect of the principle of jury equity and what can be said in open Court i.e., the judge is under a duty to only tell the jury to follow his/her directions, but juries retain a power to acquit contrary to those directions if the jurors' convictions require it. The classification of jury equity as a right or a power has no bearing on its scope or the circumstances in which jurors can exercise it. Matters of classification do not render the information Ms Warner was conveying to jurors outside of court wrong in law. I agree with Ms Montgomery KC that to find otherwise, in the context of criminal contempt proceedings, would be an extraordinary burden to impose on a lay person.

41. Fifth and finally, on the basis that the legal test for the common law species of contempt relied upon in this case is a serious risk of/actual interference with the administration of justice, the Claimant does not come even arguably close to meeting this test. The highest that he can put his case is that as a result of Ms Warner's acts, HHJ Reid delivered a short, tailored judicial direction the day after the events. I

accept that was a complication that the judge could have done without in a challenging series of cases. However, that is standard practice as matters arise during the course of a criminal trial. Any risk arising out of jurors being made aware of the legal principle of jury equity on the first day of trial would have been adequately addressed via the brief jury direction he gave. That risk cannot, on any proper analysis, be considered "serious" given there is a straightforward way to minimise the risk of prejudice.

42. Overall, in my judgment, the claim is based on a mischaracterisation of what Ms Warner did that morning and a failure to recognise that what her Placard said outside the Court reflects essentially what is regularly read on the *Old Bailey* plaque by jurors, and what our highest courts recognise as part of our constitutional landscape.

43. Given my conclusions that the Claimant does not have a reasonable basis in fact and law for pursuing these proceedings on the basis of the common law form of contempt pleaded in the Claim Form, I will not address Ms Montgomery KC's persuasive further arguments that on the facts of this case the court must interpret common law contempt compatibly with Article 10 ECHR by providing protections at least equivalent to those provided for in the 1981 Act.

V. Public Interest

44. This issue strictly does not arise given my conclusion on the first threshold issue. However, given the nature of the arguments made I will address the matter briefly. Counsel were agreed that the Court has an obligation at each stage of a speech-based contempt case such as the present (including the permission stage) to address a defendant's Article 10 ECHR rights. This is not the same as the question as to whether the ingredients of the offence are sufficient to take into account ECHR considerations, as considered in R v Jordan [2024] EWCA Crim 229 at [73], referring to In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32; [2023] AC 505 at[55]. The issue is whether, assuming there is a reasonable basis for the charge (the first threshold issue), has it been shown that requiring Ms Warner to face substantive criminal proceedings is a proportionate response in ECHR terms to her conduct, as part of the public interest test (the second threshold issue). This is a matter for my assessment. It is common ground that the issuing and pursuit of contempt proceedings in the present case amount to an interference with Ms Warner's Article 10(1) ECHR rights to freedom of speech. Under the familiar analysis, I have to be satisfied that the interference corresponds to a pressing social need, that it is proportionate to the pursuit of a legitimate aim, and that the reasons given by the Claimant to justify it are relevant and sufficient under Article 10(2): see R v Shayler [2002] UKHL; [2003] 1 AC, per Lord Bingham at [23]. Mr Eardley KC submitted, and I accept, that the open-textured nature of the permission test as set out in Yaxley- Lennon is sufficient to ensure that permission is only granted in circumstances where pursuit of a contempt application amounts to a proportionate interference with Convention rights. That is the control mechanism by which the Court can ensure respect for such rights in the present case and comply with its own obligations under section 6 of the Human Rights Act 1998.

45. Were it to have been an issue for my decision, I would not have been satisfied that the interference with Ms Warner's Article 10(1) ECHR rights caused by the commencement and continuation of these proceedings was Convention compliant. That is because the speech and conduct which are the subject of the proceedings are a form of expression in a highly charged and current debate. The prosecution of the *Insulate Britain* cases, the decisions of law reached by judges in those cases, and the scope for the jury to hear evidence on matters of conscience in relation to offences allegedly committed as acts of political protest have become matters of serious public debate. Mr Eardley KC did not appear to contest this although he took issue with whether what was in issue in this case was a higher form of protected political speech. I was referred to a wealth of material concerning the debate in this issue and will provide just a few examples: 'Protesters must be allowed to explain motives in court', 13 March 2023, The Times, available at www.thetimes.co.uk/article/protesters-must-be-allowed-to-explain-motives-in-court zhpg2g3gs ; 'Juries deserve the truth on climate protests', 16 February 2023, Guardian, available at www.theguardian.com/environment/2023/feb/16/juries-deserve-the-truth-on-climate-protests ; 'For history to judge, not the jury': judge rules climate crisis 'irrelevant', 22 February 2022, Open Democracy, https://www.opendemocracy.net/en/insulate-britain-trials-climate-crisis-silas-reid-judge-court- protests/l ; 'UN Special Rapporteur on Environmental Defenders. End of Mission Statement following Visit to United Kingdom', 23 January 2024.

46. Contempt proceedings pursue the legitimate aim of maintaining the integrity of the trial process (including protecting jurors) and the authority and impartiality of the judiciary within Article 10(2) ECHR. However, in my judgment, it has not been shown by the Solicitor General, even on an arguable basis, that the interference with Ms Warner's Article 10(1) ECHR rights is necessary for, and proportionate to, achievement of those aims. The words on Ms Warner's Placard reflected in substance what is recognised as a principle of our constitution. However, even if her words had been wrong in law and her conduct inappropriate, the succinct Direction given by the judge was sufficient to deal with any prejudice to the trial. A criminal prosecution is a disproportionate approach to this situation in a democratic society.

VI. Conclusion

47. I refuse the Solicitor General permission to proceed with these proceedings against Ms Warner, and I dismiss the claim.