



Neutral Citation Number: [2021] EWHC 3062 (QB)

Case No: QB-2020-004209

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2021

Before :

HIS HONOUR JUDGE LEWIS
(sitting as a Judge of the High Court)

Between:

BASILDON DISTRICT COUNCIL

Claimant

- and -

- (1) THOMAS ANDERSON
- (2) WILLIAM THOMAS ANDERSON
- (3) CHARLIE ANDERSON
- (4) BRIAN MCGINLEY
- (5) FREDDIE ANDERSON
- (6) GERRY (JERRY) ANDERSON
- (7) LEAH ELLA MAY FOLEY
- (8) BRIDGET MCDONAGH
- (9) JOHN MCDONAGH
- (10) PATRICK COLLINS
- (11) THOMAS CLEARY
- (12) PERSONS UNKNOWN

Defendants

Wayne Beglan (instructed by **Basildon DC Legal**) for the **Claimant**
William Webster (instructed by Ewing Law) for the **Third and Tenth Defendants**

Hearing date: 11 and 12 November 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE LEWIS

His Honour Judge Lewis:

1. These proceedings were brought by Basildon District Council nearly a year ago to stop unauthorised development by the defendants of green belt land south of Redlands, Hovefields Drive, Wickford, Essex.
2. A full account of the factual background to the original injunction applications, and subsequent events, can be found in detailed judgments of Foxton J dated 9 December 2020 [2020] EWHC 3382 (QB), of the Court of Appeal dated 16 March 2021 [2021] EWCA Civ 363 and of Ritchie J dated 7 October 2021 [2021] EWHC 2734 (QB).
3. In respect of the applications before me today, the chronology of events can be summarised as follows:
 - (a) The second defendant originally owned the land that is the subject of these proceedings. On or around 27 November 2020 he sold the site, dividing it into eleven separate plots. The purchasers included family members and other acquaintances, who are the third – eleventh defendants. They purchased one plot each, save for the third and seventh defendants who purchased two.
 - (b) After close of business that day, Friday 27 November 2020, a planning application in respect of the land was lodged with the claimant on behalf of one or more of the defendants.
 - (c) On Saturday 28 November 2020, Essex Police notified the claimant of extensive work being undertaken on the land, reporting that there were 80-100 people working on it, with diggers, several large trucks and an excavator in operation, and with numerous vehicles driving on and off. It was observed that the land had now been physically divided into plots, and an access track had been created.
 - (d) On Sunday 29 November 2020, the claimant sought to serve a Stop Notice and an Enforcement Notice at the site but were refused entry and threatened by those present. The tenth defendant accepts that he threatened two of the claimant’s officers (one man and one woman) saying that he would kick them “between the legs” if they did not leave. That evening, the claimant obtained a prohibitory injunction, without notice, from Garnham J. This prohibited any development work on the land, save in accordance with planning permission, and prohibited the entry of mobile homes or caravans onto the land.
 - (e) On Monday 30 November 2020, the claimant’s officers observed a large static mobile home and one or more smaller caravans on the land. Work was reported to be continuing. Later that day, following a further without notice application, Cutts J granted a mandatory injunction that required all static caravans, mobile homes and touring caravans to be removed by 4pm on 2 December 2020 and the defendants to

refrain from causing any such mobile homes or similar from being placed on the land.

- (f) There was an ‘on notice’ hearing on 8 December 2020 before Foxton J. By this time, the site contained eighteen touring caravans, one static caravan, three mobile homes, two portacabins, one wooden shed and seventeen motor vehicles. The third – eleventh defendants were represented at that hearing. They did not seek to resist the continuation of the first injunction but sought to vary the second to allow them to continue to reside on the land pending the final determination of their planning applications.
- (g) Foxton J continued the orders. The Court of Appeal later summarised his decision in the following terms: “Foxton J found there to be a serious issue as to a deliberate and flagrant breach of planning controls. The rapid and co-ordinated nature of the work begun on a Saturday suggested an attempt to achieve a *fait accompli* before anticipated legal countermeasures might be deployed. He considered, as required by *South Buckinghamshire District Council v Porter* [2003] 2 AC 558, the impact of the injunction on the Appellants. Having done so at some length, he accepted that being forced to leave the land involved prejudice to them, but that the evidence as to its extent and duration was less clear. He found that little weight could be given to a state of occupation that had been achieved in deliberate contravention of the Council’s notices and the Court’s orders. He therefore continued the orders, and included a power of arrest in the light of the history”: *Anderson & Ors v Basildon District Council* [2021] EWCA Civ 363 per Peter Jackson LJ at [8].
- (h) The injunction granted by Foxton J included the following terms:

“1. The defendants are required by 4pm on 14 December 2021 to remove from the land any static caravans, mobile home and touring caravans.

2. The defendants be prohibited (whether by themselves, their servants or agents) from:

- (a) Bringing a caravan, a mobile home, or any other structure intended for or capable of habitation onto the land.
- (b) Erecting on the land any structure of building capable of or intended to be put to residential use.
- (c) Carrying out any works including but not limited to the laying of hard standing on the land
- (d) Allowing any persons to take up occupation of the land”

The injunction did not prohibit any activity that was undertaken within the scope of any planning permission for the land.

- (i) The represented defendants' application for permission to appeal the decision of Foxton J was refused by Floyd LJ on paper on 14 December 2020.
- (j) The Court of Appeal's judgment explains what happened next: "The defendants did not obey the orders. They did not remove any static caravans, mobile homes and touring caravans by the date contained in the order of Cutts J, nor by the date fixed by Foxton J. They carried on with further works and in some cases brought more dwellings and vehicles onto the land" *Anderson & Ors v Basildon District Council* (*supra*) at [10].
- (k) The claimant issued its first committal application on 5 January 2021 and its second on 1 February 2021. Both were against eight of the defendants, including the third and tenth defendants.
- (l) The committal hearing took place on 12 February 2021 before Anthony Metzer QC. All the respondents were represented. The third and tenth defendants admitted the breaches in full on the basis set out in the first schedule to this judgment. The court found the eight respondents to be in contempt and imposed custodial sentences. The third defendant received a sentence of four months. The tenth defendant received a sentence of seven months. The others received sentences of between five and eight months, based on the number of breaches. The sentences were suspended for twelve months, on compliance with three conditions:
1. The Defendants shall by 4pm on 3 March 2021 remove from the Land any static caravans, mobile homes and touring caravans. [This deadline was later varied by the Court of Appeal to 22 March 2021]
 2. The Defendants shall thereafter not (a) bring any caravan, mobile home or any other structure intended for or capable of habitation on to the Land; or (b) erect on the Land any structure or building capable of or intended to be put to residential use; or (c) allow any person to occupy the Land.
 3. The Defendants shall remove all of the works undertaken in relation to their respective individual plots by 10 April 2021."
- (m) The court accepted the claimant's submission that it was not easy to envisage a more flagrant and coordinated breach of planning control by a group of individuals acting in concert on previously undeveloped Green Belt land, that there had been a complete failure to comply with the orders, and that the circumstances in which further works had taken place aggravated the position. It considered that the gravity of the breaches passed the 'custody threshold' and the court could not simply ignore continuing breaches of this nature. The judge considered the belated apologies to be of limited mitigation because they came so late, and there had been no attempt to comply with the orders.

(n) Mr Metzer QC concluded his judgment in the following terms:

“In all the circumstances therefore, it is hoped that this will be the last time that these Defendants come before a court. They need to understand, as I am sure they do... that this is the last chance before immediate sentences of imprisonment will be imposed by reason of any breach of any terms of the order that is now being imposed...”

He continued: “I want to stress, as far as the defendants are concerned, they were extremely close to immediate terms of imprisonment and they must understand that they will have to comply and it is very much hoped this is the last time that the court will be involved in any litigation concerning to this matter”.

(o) On 5 March 2021, Deputy High Court Judge Mr Ter Haar QC refused applications on behalf of eight of the defendants – including the third and tenth defendants – to vary injunctions to allow them to remain on the land.

(p) The defendants also made an application to the Court of Appeal in respect of the decisions of Mr Metzer QC: *Anderson & Ors v Basildon District Council (supra)*. On 12 March 2021, Peter Jackson LJ dismissed the appeal and said the following:

“26. The answer to this appeal, brought as of right, is a simple one. These orders were an entirely proper response to the Appellants' calculated disobedience of the court's orders against a background of serious, wholesale defiance of the planning laws. The breaches of the orders were not disputed and the sentences passed by Judge were the least that he could reasonably have imposed in the circumstances. His decision to suspend the sentences was more than fair to the Appellants. The timings he gave for compliance were similarly generous. There is nothing of any substance in the grounds of appeal. (...)

“29. I finally reject the submission that the Judge did not take sufficient account of the Appellants' personal circumstances. The maximum term of imprisonment for a contempt of court is two years, and the breaches in this case are brazen. The level of the sentences shows that the Judge well understood the human factors, in addition to which he suspended them when he might have made them immediate. In any case, as Floyd LJ said, it is unattractive for those who are in plain breach of the civil and criminal law to contend that insufficient consideration has been given to their interests by those taking the necessary steps to return the land to the condition it was in before they entered on it.

“30. The Judge's order is therefore upheld and the appeals are dismissed”. The court extended one of the deadlines and added

“The Appellants should understand that these dates are final and that they will go to prison if they do not now obey the orders.”

- (q) The claimant issued its third committal application on 27 June 2021. This was listed for 8 July 2021 and then re-listed for 28 and 29 July 2021. The defendants – including the third defendant and the tenth defendant - failed to attend and so the court issued bench warrants.
- (r) On 29 September 2021 the third defendant was arrested pursuant to the bench warrant. It was the day after his wedding, and he was at the airport about to go to Corfu for his honeymoon. He was held overnight and brought before the court the next day, represented by counsel and solicitors. Saini J ordered that the third defendant should be held in custody until the substantive hearing of the committal application on Wednesday 6 October 2021.
- (s) The committal application was heard by Ritchie J on 6 and 7 October 2021: ***Basildon Borough Council v Charlie Anderson (D3) And Ors [2021] EWHC 2734 (QB)***. The third defendant was the only defendant present. He admitted the schedule of alleged breaches, save for one minor variation. The breach findings are set out in the first schedule to this judgment.
- (t) The judge expressly took into account “the very serious nature of the breaches”. He said “D3 has persistently pursued a course of conduct which suits himself, breaches the orders of this court, causes huge expense to the tax-payers in Essex, wastes court time and (if that be the final conclusion of the substantive case) breaches the law relating to green belt preservation” at [56].
- (u) Ritchie J said that he was “unimpressed” with D3’s oral evidence, finding him to be “deliberately manipulative”. He did not accept D3’s explanations for non-compliance. He said: “I find as a fact that D3 was aware of the orders, the powers of arrest therein, the hearing on 28 July, the bench warrant and that he understood the contents of those documents. I find that D3 chose to breach the Orders, chose not to come to court on 28th July, chose to ignore the bench warrant for his arrest and chose to continue his development of the Land contrary to the Court’s injunctions” at [66]. The judge also took into account that D3 had already been granted time to comply with the suspended sentence passed in March 2021 and had not done so.
- (v) The judge identified the three main purposes of sentences for contempt – coercion, punishment and deterrence. He was very concerned with the serious, repeated breaches of court orders and non-engagement with aspects of the court process. He was also very concerned about the need to ensure that the injunctions were complied with, development halted and the various homes and other vehicles removed.

- (w) The judge said that he would have passed a sentence of six months but reduced this to three on considering the third defendant's mitigation. He also activated the suspended sentence, to run consecutively with credit given for time served.
- (x) Ritchie J made specific reference to the ability of the third defendant to 'purge' his contempt, which suggests that there was a significant coercive element in the sentence. The third defendant had offered to ensure that his plot was cleared within two weeks: "I take into account that fact that D3 could have purged his contempt or started doing so at any time after 17 June 2021 but chose not to do so. He can still do so through his family and friends, in the next 2 weeks as he offered to me in Court, or thereafter and he will then be able to apply for release from detention." at [70].
- (y) The tenth defendant Patrick Collins was detained on 26 October 2021 pursuant to the bench warrant. He was also at an airport. He was brought before Linden J on 27 October 2021. He had legal representation. The tenth defendant sought to suggest that it was, in fact, his son who was responsible for the plot, but this was at odds with his previous evidence to the court. He now accepts responsibility for the breaches. The court remanded him in custody, adjourning matters to 5 November and then to this hearing on 11 and 12 November 2021.

The applications

- 4. There are three substantive applications before the court:
 - a. An application by the claimant on notice dated June 2021 seeking to commit the tenth defendant for contempt.
 - b. An application by the third defendant on notice dated 29 October 2021 for an order pursuant to CPR rule 81.10 for the committal order made by Ritchie J dated 7 October 2021 to be discharged.
 - c. An application by the claimant on notice dated 1 November 2021 to proceed today against the fourth, fifth, sixth, seventh, eighth, ninth and eleventh defendants in the event that they do not attend this hearing, and if the application is granted, to then hear those committal applications.

The committal application against the tenth defendant

- 5. The tenth defendant admits that he breached the order of Foxton J ("the Injunction") as follows:
 - a. Between 11 May 2021 and 24 May 2021, in breach of paragraph 2(a) of the Injunction, the tenth defendant caused or allowed a touring caravan to be brought into Plot 9.
 - b. Between 24 May 2021 and 3 June 2021, in breach of paragraph 2(c) of the Injunction, further groundworks were carried out to Plot 9 and additional hardstanding was created on the plot.

- c. As at 3 June 2021, in continuing breach of paragraph 1 or paragraph 2(a) of the Injunction, the tenth defendant had failed to remove all the caravans from Plot 9 and/or had caused or allowed further caravans to be brought on to Plot 9.
6. The tenth defendant also admits having breached the conditions of his suspended sentence as follows:
 - a. Between 11 May 2021 and 24 May 2021, in breach of the second Condition of Suspension, the tenth defendant caused or allowed a touring caravan to be brought into Plot 9.
 - b. As at 3 June 2021, in continuing breach of the third Condition of Suspension, the tenth defendant failed to remove all of the works undertaken to Plot 9.
 - c. As at 3 June 2021, in continuing breach of the second Condition of Suspension, the tenth defendant had failed to remove all the caravans from Plot 9 and/or had caused or allowed further caravans to be brought on to Plot 9.
7. The claimant no longer pursues findings against the tenth defendant in respect of plot 10.

Sentencing

8. Section 14 of the Contempt of Court Act 1981 provides that a committal must be for a fixed term and that the term should not in on any occasion exceed a fixed term of two years.
9. The object of sanction was summarised in *The Official Receiver v Brown [2017] EWHC 2762 (Ch)* by His Honour Judge Simon Barker QC sitting as a Judge of High Court:

“17. Following a finding or admission of contempt, punishment falls to be considered in the context of both the gravity of the conduct and also the need to secure future compliance with or adherence to the rule of law, that is to deter repetition of the contempt, and further to encourage or ensure compliance with any outstanding and/or continuing obligation pursuant to an order or undertaking to the court or a statutory obligation. The court's interest is confined to (1) punishment to mark the court's disapproval of the breach or non-compliance and disregard of the rule of law, (2) deterring future or continued breaches or non-compliance and upholding the rule of law, and (3) coercion, that is encouraging or ensuring present and/or future compliance by the contemnor. The punitive element addresses the seriousness of the breach or non-compliance of the particular contempt. The deterrence element reflects the public interest in maintaining adherence to the rule of law. The coercive element encourages purging, or atonement, for the particular contempt. A contemnor has an unqualified and continuing right to purge the contempt and seek an order for immediate release.”

10. The approach to determining penalty was considered recently by the Supreme Court in *Attorney General v Crosland* [2021] UKSC 15:

“44. General guidance as to the approach to penalty is provided in the Court of Appeal decision in *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA Civ 392; [2019] 1 WLR 3833, paras 57 to 71. That was a case of criminal contempt consisting in the making of false statements of truth by expert witnesses. The recommended approach may be summarised as follows:

1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council’s Guidelines require the court to assess the seriousness of the conduct by reference to the offender’s culpability and the harm caused, intended or likely to be caused.
2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.
3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.
4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.
5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children of vulnerable adults in their care.
6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council’s Guidelines on Reduction in Sentence for a Guilty Plea.
7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension.”

11. In *Financial Conduct Authority -v- McKendrick* [2019] 4 WLR 65, the Court of Appeal stated:

“[40] Breach of a court order is always serious, because it undermines the administration of justice. We therefore agree with the observations of Jackson LJ in [JSC BTA Bank -v- Solodchenko (No.2) [2012] 1 WLR 350] ... as to the inherent seriousness of a breach of a court order, and as to the likelihood that nothing other than a prison sentence will suffice to punish such a serious contempt of court. The length of that sentence will, of course, depend on all the circumstances of the case, but again we agree with the observations of Jackson LJ as to the length

of sentence which may often be appropriate. Mr Underwood was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum.

[41] As the judge recognised, it may sometimes be necessary for the sentence for this form of contempt of court to include an element intended to encourage belated compliance with the court's order. Where that is the case, that element of the sentence is in principle one which may be remitted if the contemnor subsequently purges his contempt by complying with the order"

12. The tenth defendant has already been sentenced in respect of seven past breaches. It is important to ensure that any sentence passed today relates solely to the breaches identified in the third committal application.
13. In my view these were flagrant and deliberate breaches of the court's orders.
14. The tenth defendant had already been involved in the previous hearings before Foxton J and Mr Metzger QC and so would have been fully aware of the terms of the injunctions, the powers of arrest and the terms on which his first sentence was suspended. Whether or not he was a ringleader, as the claimant suggests, he does very much appear to have been at the centre of things. I am satisfied that he chose not to come to court in July and chose to ignore the bench warrant, even though he would have known that the third defendant had been detained.
15. More significantly, I am satisfied that he deliberately chose to continue to develop his plot, or permitted others to do so, and allowed caravans to remain there. He would have known that this was in breach of the injunction, and he would have known that two judges had already said that if he – and the other defendants – failed to comply with the injunction, they would be sent to prison. The warnings of what might happen could not have been any clearer.
16. There are also aggravating features, for example the fact that this was not the first time he had knowingly breached court orders, and the fact that this happened so soon after the earlier court hearings.
17. In addition, it appears that on more than one occasion the tenth defendant has given false assurances to the court. For the hearing before Foxton J, the tenth defendant lodged a witness statement in which he said that he is now fully aware of the consequences of proceeding with unauthorised development and he undertook not to

carry out any further works until a planning decision had been made. At the hearing before Mr Metzger QC, the tenth defendant is said to have apologised and - along with the other defendants - promised not to pursue development of the site in breach of the court's order.

18. Given what has happened since then, it seems very unlikely that the tenth defendant had any intention of keeping his word. I have no doubt that if the tenth defendant had not been detained at the airport, he would not be engaging in proceedings now and I think it unlikely that steps would have been taken to clear his plot.
19. The injunction orders were put in place to ensure that harm is not caused to the environment and local community through the wholesale defiance of planning laws. I have looked at the photographs of Plot 9 from the end of March onwards, including those relied upon in support of three breaches relevant to this application. In fairness to the tenth defendant, it appears that he did take some action around the time of the first committal hearing, removing various items that he had installed. Since then, he has not undertaken any further major works, although he has continued to permit mobile homes to remain on the plot, and more significantly he has admitted undertaking further structural groundworks. In terms of the breaches that form part of this committal application, they can probably fairly be described as neither the most serious, nor trivial.
20. The tenth defendant says that he now accepts that the recent breaches were egregious and custodial sentences are justified. He has offered further apologies, which I am told are sincere. He has also expressed remorse. Given that he has said all this before, I struggle to believe him, although I do accept that he does not wish to be in prison and that being incarcerated for a couple of weeks has made him reflect on the seriousness of his actions.
21. The second defendant has confirmed via counsel that plot 9 is "now wholly cleared and re-seeded". I need to give credit for the site now having been cleared, albeit nearly a year after proceedings were brought. This is relevant to the overall level of any sentence, since there is no need to include a coercive element. It is also relevant more generally in terms of mitigation, with the tenth defendant demonstrating that he is now prepared to comply with the court's orders.
22. The other matter that I need to consider carefully is the tenth defendant's health. He had at least one heart attack in 2020 – he says four - has diabetes and other health complaints and takes ten or so different forms of medication each day.
23. In the time available, the tenth defendant has produced lengthy extracts from his medical notes, a short letter from his GP, and a more detailed letter from a private GP, who has never met him but has had sight of some (but not all) of his medical records. The letter from the private GP is not formal expert evidence as provided for by the rules, but I accept that in the time available it at least provides some assistance to the court in more general terms in understanding the health issues identified in the medical notes.

24. It is apparent from this letter that the tenth defendant requires exercise and a balanced diet and proper monitoring and control of his diabetic indicators. It concludes by saying “In the community such risk reduction is done with a multidisciplinary team including nutritionists, diabetic clinical specialists, cardiac rehabilitation specialists and the primary care services to tie it all in so all correspondence, investigation monitoring and actions are all co-ordinated. This would be very ambitious to undertake within a prison setting as such settings do not have such a coordinative approach to chronic disease management to reduce acute exacerbation”.
25. It seems to me that these health issues are ones that are capable of being addressed by the prison, which has duties in respect of the health needs of its prisoners. It does also need noting that the tenth defendant has not let his health needs deter him from embarking on a construction project, nor threatening and being abusive to the claimant’s officials, nor continuing to flout court orders after being told by two judges that this would result in him being sent to prison.
26. I am asked to take account of the fact that the tenth defendant is 45 years old, with five children between 6 and 20 and a wife who has problems with her nerves. I told that the family has been badly affected by his incarceration, and this has affected his children’s school attendance. I am also told that the tenth defendant has not been to prison before, save for a week on remand when he was 16 or 17.
27. I am satisfied that the tenth defendant’s repeated breaches of the court’s orders are sufficiently serious that a fine would not be a sufficient penalty.
28. I am going to impose a custodial sentence of four months, comprising one month for each of the first and third breaches, and two months for the second. They are to run consecutively. This sentence is heavily discounted to reflect the fact that the plot has been cleared, and so there is no need for a coercive element. It is also discounted to take account of the tenth defendant’s medical circumstances, which I accept are likely to mean that his experience of prison is likely to be more challenging than someone in better health. It does however also reflect the flagrant and wilful disregard that the tenth defendant has paid to the court’s orders and processes, and the need to act as a deterrent for the future. I am satisfied that this is the shortest period of imprisonment which properly reflects the seriousness of the contempt.
29. This is a sentence of 119 days. From this I must deduct 32 days, to reflect the 16 days already served. I also apply a discount of 15% for the tenth defendant accepting the breaches a week or two before this hearing. This leaves a sentence in respect of the third committal application of 74 days, to run from today.
30. I am not suspending this sentence. The tenth defendant’s actions are too serious, for the reasons I have explained.

31. I also need to activate the suspended sentence of seven months. This was imposed in respect of a significant number of serious breaches of the court's orders. It is accepted that the conditions of suspension have been breached, and there does not seem to be any good reason why this sentence should not now be served. It shall run consecutively to the sentence imposed today.
32. In total, this gives a sentence of 285 days, of which the tenth defendant will serve half: see Section 258, Criminal Justice Act 2003.
33. It is of course always open to the tenth defendant to make an application in due course to discharge this order pursuant to CPR rule 81.10.

The third defendant's application

34. The approach that the court should take when considering applications to discharge an order for committal was considered by the Court of Appeal in *CJ v Flintshire BC* [2010] EWCA Civ 393. Each case needs to be considered on its own facts. Wilson LJ said the following at [21]:

“With the advantage of more time for reflection than was vouchsafed to the judge, I consider that, had I been hearing the appellant's application for early discharge, I might have asked myself eight, somewhat overlapping, questions. In case they prove to be of any value to other judges confronted with applications for early discharge in similar circumstances, I set them out as follows:

- (i) Can the court conclude, in all the circumstances as they now are, that the contemnor has suffered punishment proportionate to his contempt?
- (ii) Would the interest of the State in upholding the rule of law be significantly prejudiced by early discharge?
- (iii) How genuine is the contemnor's expression of contrition?
- (iv) Has he done all that he reasonably can to demonstrate a resolve and an ability not to commit a further breach if discharged early?
- (v) In particular has he done all that he reasonably can (bearing in mind the difficulties of his so doing while in prison) in order to construct for himself proposed living and other practical arrangements in the event of early discharge in such a way as to minimise the risk of his committing a further breach?

(vi) Does he make any specific proposal to augment the protection against any further breach of those whom the order which he breached was designed to protect?

(vii) What is the length of time which he has served in prison, including its relation to (a) the full term imposed upon him and (b) the term which he will otherwise be required to serve prior to release pursuant to s.258(2) of the Criminal Justice Act 2003?

(viii) Are there any special factors which impinge upon the exercise of the discretion in one way or the other?"

35. The third defendant has now been in detention for 43 days of a 7-month sentence. Assuming his automatic release half-way through his sentence, this is the equivalent of him having served 86 days, or around 40% of the time he could expect to spend in detention.
36. The third defendant also now accepts that his breaches were egregious, and the custodial sentences justified. He has offered what he says are sincere apologies. I have considered a witness statement from him, and a heartfelt account that he dictated through his wife, explaining the impact that prison has had on him.
37. It appears that Plots 1 and 2 have now been cleared and re-seeded, albeit nearly a year after the court ordered that this must happen. To this extent, it can be said that the coercive element of the sentence appears to have served its purpose.
38. The only works remaining comprise the access road to the site, which is on the third defendant's land. This has been kept in place to allow the other plots to be cleared. The third defendant has offered an undertaking to the court to ensure this is cleared within 28 days. He has also said that he will do what he can to encourage the other owners to clear their plots, and will encourage his twin, the fifth defendant, and his cousin, the sixth defendant, to hand themselves in.
39. Ritchie J imposed a custodial sentence to achieve more than one objective. He clearly had in mind that there needed to be a significant coercive element and noted the possibility of a discharge application if steps were taken promptly to clear the third defendant's plots. The sentence would also have been intended to act as a deterrent, so that the third defendant does not breach the orders again.
40. There was however also a significant penal element of the sentence. Not only had the third defendant failed to comply with the first two injunctions, he ignored the third one made at a hearing where he was represented. He was then given a final chance to comply by Mr Metzger QC – and told that he faced prison if he did not comply – but he ignored this warning, and continued to flout not only the injunction but the conditions upon which his sentence had been suspended. When further committal proceedings

were brought, the third defendant ignored them altogether, as he did when notified of the terms of the bench warrant.

41. Can it be said, in all the circumstances, that the third defendant has demonstrated that he has received sufficient punishment proportionate to his contempt?
42. In his witness statement, the third defendant says detention has been worst experience of his life – awful and frightening. He has been scared constantly. There have been significant numbers of cockroaches, to the extent that he had to spend a night on the top bunk with his cell mate. He says he does not receive sufficient food, and at times has had limited washing facilities. He says that he has also been expected to share space – including showers - with adult prisoners, despite being in a Young Offenders Institution. He says he feels hopeless and depressed.
43. The third defendant’s failure to comply with court orders was extremely serious, repeated, deliberate and flagrant. There is a significant public interest in contemnors serving a proper sentence for such non-compliance with court orders, not only to punish the third defendant himself, but to deter him (and others) from disregarding court orders.
44. That said, I am satisfied that there is now a solid basis for the third defendant to be released given the fact that the site has been cleared, and he is very close to having served the penal part of his sentence.
45. I will accept the formal undertaking offered by him. I need to remind the third defendant that the injunction of Foxton J remains in force and he is bound by its terms. It hopefully goes without saying that should he breach the injunction again he would likely be facing a more significant period of detention.

The remaining defendants

46. I am asked to make decisions in the absence of the fourth, fifth, sixth, seventh, eighth, ninth and eleventh defendants, who I will refer to as the “remaining defendants”.
47. The relevant law on considering committal applications in the absence of a defendant was summarised by Nicklin J in in *Oliver v Shaikh* [2020] EWHC 2253 (QB):

“25. In respect of the Adjournment Application, the Defendant’s failure to attend the hearing means that the Court may proceed to hear and determine the application in his absence: CPR Part 23.11(1).

26. The general power to adjourn a hearing is provided under CPR Part 3.1(2)(b). This is a case management decision, and the Court must have regard to the overriding objective. Of particular importance is the fact that the hearing sought to be adjourned is the

trial of the Committal Application. The Court's power to proceed in the absence of a party at a trial (CPR Part 39.3) extends to the trial of committal applications, but as the proceedings are quasi-criminal in nature, continuing in the absence of a party is an exceptional course that requires justification: *Lamb -v- Lamb* [1984] FLR 278.

27. In *JSC BTA Bank -v- Stepanov* [2010] EWHC 794 (Ch), Roth J applied, by analogy, the principles from criminal cases concerning proceeding in the defendant's absence: [12]-[19]. See also *JSC BTA Bank -v- Solodchenko* [2011] EWHC 1613 (Ch) [13]-[14] per Briggs J.

28. To be balanced against that, there is an important public interest, reflecting the rule of law, that orders of the Court must be obeyed and contempt proceedings concerning alleged failure to comply with orders should be dealt with swiftly and decisively: *Barnet LBC -v- Hurst* [2003] 1 WLR 722 [33] per Brooke LJ; *M -v- M (Contempt: Committal)* [1997] 1 FLR 762, 765 per Lord Bingham LCJ. That principle applies with even greater force where what is alleged is a continuing breach or failure to comply, rather than an isolated historic breach.

29. Drawing upon these authorities, Spencer J set out a useful summary of the approach to be adopted by the Court when considering whether to proceed with a committal application in the absence of a party in *Calderdale and Huddersfield NHS Foundation Trust -v- Atwal* [2018] EWHC 961 (QB):

[37] Contempt proceedings are quasi-criminal. It is, therefore, appropriate to have regard to the principles which a judge in the Crown Court would apply in deciding whether to proceed with a trial in the absence of the defendant. These principles are conveniently summarized in *R -v- Jones* [2003] 1 AC 1. The relevant factors which the court should consider are:

- (i) the nature and circumstances of the defendant's behaviour in absencing himself from the trial and in particular whether his behaviour is deliberate, voluntary and such as plainly waived his right to appear;
- (ii) whether an adjournment might result in the defendant being caught or attending voluntarily;
- (iii) the likely length of such an adjournment;
- (iv) whether the defendant, though absent, is, or wishes to be, legally represented;
- (v) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;

(vi) the general public interest that a trial should take place within a reasonable time of the events to which it relates.

[38] I have also had regard to the helpful checklist suggested by Cobb J in such circumstances in Sanchez - v- Oboz [2015] EWHC 235 (Fam), derived in part from R -v- Jones, namely:

- (i) whether the defendant has been served with the relevant documents including notice of the hearing;
- (ii) whether the defendant had sufficient notice to enable him to prepare for the hearing;
- (iii) whether any reason has been advanced for his non-appearance;
- (iv) whether by reference to the nature and circumstances of the defendant's behaviour he has waived his right to be present; i.e. is it reasonable to conclude that the defendant knew of and was indifferent to the consequences of the case proceeding in his absence;
- (v) whether an adjournment would be likely to secure the attendance of the defendant or at least facilitate his representation;
- (vi) the extent of the disadvantage to the defendant in not being able to present his account of events;
- (vii) whether undue prejudice would be caused to the applicant by any delay;
- (viii) whether undue prejudice would be caused to the forensic process if the application were pursued in the absence of the defendant;
- (ix) take account of the overriding objective, including the obligation of the court to deal with the case justly, doing so expeditiously and fairly, and taking any step or making any order for the purposes of furthering the overriding objective."

48. I am satisfied that the remaining defendants are all fully aware of the existence of these proceedings, having participated in them and had legal representation until the spring. They are fully aware of the terms of the various injunction orders, and those that were respondents to the first set of committal proceedings accepted that they were in contempt and would have been aware of the terms on which the custodial sentences were suspended.

49. Since then, the remaining defendants have been served with the current application notice seeking their committal, notice of the July committal hearing, the updating evidence and notice of today's hearing. Service took place in accordance with the order of Mathew Gullick QC (sitting as a Deputy High Court Judge), who permitted service

by alternative means through the positing of notices on stakes at each plot, and at the entrance to the site. The claimant has lodged certificates of service. I note that the police had to attend on each occasion to accompany the process servers.

50. It also seems highly likely that as well as having been served in accordance with court rules, the remaining defendants have had *actual knowledge* of the committal application since the summer, and of today's hearing. It is apparent from the evidence that the defendants all know one another. They embarked on this brazen project together, having engaged planning advisers, and it seems quite clear that there must have been extensive co-operation between the respective plot holders at the outset, and also more recently as works have started to be undone. They would also be aware of what has happened to the third and tenth defendants, and they will know that they have not complied with the orders of this court. No reasons have been provided for non-appearance. It is reasonable to conclude that each of the remaining defendants knows of and is indifferent to the consequences of this case proceeding in their absence.
51. The usual course on non-attendance is to issue a bench warrant and adjourn the matter so the warrant can be executed and the defendant brought before the court for the application to be heard: *JSC BTA Bank v Stepanov* [2010] EWHC 794 (Ch) (Roth J). This happened some months ago. Only two of the defendants have been caught. I can see little purpose in adjourning the hearing again in circumstances where I am satisfied that the remaining defendants are aware of what is going on and are clearly seeking to evade legal process. There is nothing to indicate that the position would be any different on another occasion. An adjournment would also cause delay. Contempt applications need to be heard promptly. There would also be prejudice caused to the claimant, who needs the terms of the injunction to be complied with and has been put to considerable additional expense by the approach of the defendants to these proceedings. I note as well that the evidence of breach is compelling and so there is little risk of error in proceeding to determine whether or not there has been a contempt. This is not a case where there would appear to be a realistic defence.
52. I will therefore proceed to consider the applications for committal against the absent defendants, but subject to one further safeguard. This was summarised by Nicklin J in *Oliver (supra)* as follows:

“43. There is a further final consideration – which emerges from the decision of Briggs J in *Solodchenko*. The Judge considered that a further safeguard for the defendant, if the Court proceeded to hear a committal application in his absence, was for the Court to deal only with the decision on liability and to adjourn consideration of penalty (if it arose):

[16] In a case where a serious contempt has been proved in a respondent's absence, it is, in my judgment, appropriate for the court to pause before proceeding immediately to sentence and to

consider whether the matter should, in the alternative, be adjourned. There are a number of reasons for this:

(a) In ordinary criminal proceedings, a decision to proceed to trial in the defendant's absence by no means leads automatically to sentencing in his absence, as well. Although I profess no expertise in criminal procedure, my understanding is that, in such circumstances, a criminal court will frequently afford a defendant an opportunity to attend to mitigate, all the more so where a custodial sentence is on the cards.

(b) The balance of factors which, as here, lead to a conclusion that an absent defendant will suffer no injustice if contempt is proved in his absence may well not lead to the same conclusion in relation to sentence. Liability may, as here, be straightforward, but the possibility of purging contempt or other mitigation may well mean that an immediate sentence could cause, or at least risk, injustice or unfairness.

(c) An adjournment during which the respondent is notified that a serious contempt has been proved and that there is a real likelihood of his being imprisoned may serve the beneficial purpose of bringing him to his senses and ensuring compliance. Alternatively, it may simply be fair to afford him that opportunity”.

53. There are additional reasons in this case for proceeding in this way, if I find the remaining defendants in contempt of court. It is apparent from the judgment of Foxton J that evidence was put forward of individual circumstances. We know that at least one of the defendants has young children, and another may have significant health issues. It seems that the remaining defendants should be afforded a further opportunity to put forward mitigation, particularly in circumstances where the court will need to consider whether to impose custodial sentences.

Findings against the remaining defendants

54. The claimant must prove the breaches to the criminal standard, namely beyond reasonable doubt.
55. The claimant has filed and served detailed affidavit evidence in support of its application. This includes photographic evidence taken of the site by light aircraft on 23.03.2021, 19.04.2021, 11.05.2021, 24.05.2021, 03.06.2021 and 08.11.2021. The photographs have been marked up to show the plot boundaries. The claimant has also produced extensive schedules, setting out for each plot what had changed between each set of photographs being taken, and what remained on the plot. I was taken through this evidence by the claimant during the hearing.
56. Working through the schedule of alleged breaches, it became apparent that on occasion the claimant had mixed up the obligations under the injunction, and the conditions upon

which the previous committal order had been suspended. They are not the same, and I have taken this into account when considering the findings.

57. On the basis of the claimant's evidence, I am satisfied that the claimant has proved the breaches set out in the second schedule to this judgment.

Next steps

58. I will list a further hearing to consider the penalties to be imposed for the findings of contempt against the remaining defendants. A transcript of this judgment, and consequent order, must be served on each of the remaining defendants. Pursuant to CPR rule 23.11(2) and/or CPR rule 39.3(3), each remaining defendant has the opportunity to apply to the court to ask for the committal application to be reconsidered and/or the order set aside. Any such application must be made on form N244 with evidence in support. Each of the remaining defendants remain eligible for legal aid for the purposes of obtaining advice and representation.

SCHEDULE 1 PAST BREACHES

The claimant's first committal application dated 5 January 2021

Agreed breaches established in respect of D3:

1. On or about Monday 30 November 2020 a touring caravan was brought onto [D3's plot]. At about the same time a storage trailer was also brought onto [D3's plot].
 - a. In breach of paragraph 1 of the Second Order the touring caravan and trailer were not removed from [D3's plot] before 4pm on Wednesday 2 December 2020.
 - b. In breach of paragraph 1 of the Third Order the touring caravan and trailer were not removed from [D3's plot] before 4pm on Monday 14 December 2020.
 - c. In continuing breach of paragraph 1 of the Third Order, as far as the Claimant is aware, the touring caravan and trailer remain on [D3's plot] to date.

Agreed breaches established in respect of D10:

2. On or about Monday 30 November 2020 a touring caravan was brought onto [D10's plot]. Between Tuesday 15 December 2020 and Thursday 17 December, a further touring caravan was brought onto [D10's plot].
 - a. In breach of paragraph 1 of the Second Order the touring caravan was not removed from [D10's plot] before 4pm on Wednesday 2 December 2020.
 - b. In breach of paragraph 1 of the Third Order the touring caravan were not removed from [D10's plot] before 4pm on Monday 14 December 2020.

3. In breach of paragraph 2 of the Third Order the Tenth Defendant whether by himself or a servant or agent, (a) brought a further touring caravan onto [D10's plot] between 15 December and 17 December and (b) allowed people to take up occupation of [D10's plot].
4. In continuing breach of paragraph 1 of the Third Order, as far as the Claimant is aware, two touring caravans remain on [D10's plot] to date.

The claimant's second committal application dated 1 February 2021

Agreed breaches established in respect of D3:

5. On or about Monday 30 November 2020 a touring caravan was brought onto [D3's plot]. At about the same time a storage trailer was also brought onto [D3's plot]. In continuing breach of paragraph 1 of the Third Order, as far as the Claimant is aware, the touring caravan and trailer remain on [D3's plot] to date.

Agreed breaches established in respect of D10:

6. Between Tuesday 15 December 2020 and Thursday 17 December, a further touring caravan was brought onto [C10's plot].
7. In continuing breach of paragraph 1 of the Third Order, two touring caravans have remained on [C10's plot] to date.
8. In breach of paragraph 2(a) of the Third Order, between 19 December 2020 and 24 January 2021 the Tenth Defendant caused or allowed two additional touring - 5 - caravans intended for or capable of being occupied - to be brought on [C10's plot], meaning there are now four touring caravans on the plot.
9. In breach of paragraph 2(c) of the Third Order, between 19 December 2020 and 24 January 2021, the Tenth Defendant has caused or allowed works to take place on the land. In particular:
 - a. Seven piles of material (thought to be scalplings) have been brought on to the Plot;
 - b. Additional hardstanding has been constructed within the Plot;
 - c. A portable toilet, toilet block and storage shed have been installed on the Plot; and
 - d. Blue services cabling or piping has been laid within the Plot

The claimant's third committal application dated June 2021

Agreed breaches established in respect of D3:

10. Between 23 March 2021 and 19 April 2021, in breach of paragraph 2(c) of the Third Order, the Defendant caused or allowed the creation of an area of hardstanding.
11. Between 11 May 2021 and 24 May 2021, in breach of paragraph 2(c) of the Third Order, the Defendant caused or allowed further groundworks to the Plot. A further area of hardstanding was created. Service hatches were installed. Works were undertaken for the installation of a septic tank.

12. Between 24 May 2021 and 3 June 2021, in breach of paragraph 2(c) of the Third Order, the Defendant caused or allowed further groundworks to the Plot. Piles of road scalpings were brought onto and spread around the Plot. Installation of the septic tank was completed.
13. As at 3 June 2021, in continuing breach of paragraph 2(c) of the Third Order and the third Condition of Suspension, the Defendant had failed to remove all of the works undertaken to his plots.

SCHEDULE 2
BREACHES PROVEN AGAINST REMAINING DEFENDANTS

Defendant & Plot	Proven breaches of the injunction of Foxton J dated 9 December 2020 “(the Injunction)”	Proven breaches of the “Conditions of Suspension” directed by Mr Metzger QC on 12 February 2021
D4 Plot 3	<p>(a) Between 11 May 2021 and 24 May 2021, in breach of paragraph 2(c) of the Injunction, D4 caused or allowed further groundworks to Plot 3: (i) the area of hardstanding on the plot was increased; (ii) a septic tank was placed on the plot; (iii) a mound of earth/hardcore and/or road scalpings was deposited on the plot.</p> <p>(b) Between 24 May 2021 and 3 June 2021, in breach of paragraph 2(c) of the Injunction, D4 caused or allowed further groundworks to Plot 3: (i) additional road scalpings and/or hardcore were deposited to the plot and spread on the plot; (ii) the septic tank was installed and/or a service hatch was created; (iii) piles of road scalpings were brought onto and spread around the plot; (iv) installation of the septic tank was completed.</p> <p>(c) As at 3 June 2021, in continuing breach of paragraph 1 of the Injunction D4 did not remove from Plot 3 the three touring caravans.</p>	<p>(a) As at 3 June 2021, in continuing breach of the third Condition of Suspension, D4 failed to remove all of the works undertaken to Plot 3.</p>
D5 Plot 4	<p>(a) Between 24 May 2021 and 3 June 2021, in breach of paragraph 2(c) of the Injunction, D5 caused or allowed further groundworks to Plot 4: (i) additional hardstanding was created on the plot.</p>	<p>(a) As at 3 June 2021, in continuing breach of the third Condition of Suspension, D5 failed to remove all of the works undertaken to Plot 4.</p>
D6 Plot 5	<p>(a) As at 3 June 2021, in continuing breach of paragraph 1 of the Injunction D6 had not removed from the land two touring caravans.</p>	<p>(a) As at 3 June 2021, in continuing breach of the third Condition of Suspension, D6 failed to remove all of the works undertaken to Plot 5.</p> <p>(b) As at 3 June 2021, in continuing breach of the first Condition of Suspension, D6 had not removed two touring caravans from Plot 5.</p>
D7 Plot 6	<p>(a) Between 23 March 2021 and 19 April 2021 in breach of paragraph 2(a) of the Injunction, D7 caused or allowed a</p>	<p>No findings sought.</p>

	<p>touring caravan to be stationed on Plot 6;</p> <p>(b) Between 23 March 2021 and 19 April 2021 in breach of paragraph 2(c) of the Injunction, D7 caused or allowed groundworks to be undertaken to Plot 6 creating an area of hardstanding.</p>	
D8 Plot 7	<p>(a) Between 19 April 2021 and 11 May 2021 in breach of paragraph 2(a) of the Injunction, D8 caused or allowed a touring caravan to be brought onto Plot 7;</p> <p>(b) Between 19 April 2021 and 11 May 2021 in breach of paragraph 2(c) of the Injunction D8 caused or allowed: (i) a portable toilet block to be brought onto Plot 7; (ii) an awning was installed onto one of the touring caravans; (iii) additional metal fencing was installed to enclose a section of the plot.</p> <p>(c) Between 11 May 2021 and 24 May 2021 in breach of paragraph 2(a) of the Injunction, D8 caused or allowed a touring caravan to be brought onto Plot 7</p> <p>(d) Between 11 May 2021 and 24 May 2021 in breach of paragraph 2(c) of the Injunction, D8 caused or allowed further hardcore and/or road scalplings to be deposited on Plot 7.</p>	<p>(a) As at 3 June 2021, in continuing breach of the third Condition of Suspension, the D8 had failed to remove all of the works undertaken to Plot 7.</p>
D9 Plot 8	<p>(a) Between 11 May 2021 and 24 May 2021, in breach of paragraph 2(c) of the Injunction D9 caused or allowed: (i) further groundworks to be carried out to Plot 8; (ii) additional hardstanding was introduced; (iii) other materials previously on site were compressed.</p> <p>(b) Between 24 May 2021 and 3 June 2021 in breach of paragraph 2(a) of the Injunction, D9 caused or allowed four touring caravans to be brought onto Plot 8, together with a trailer and a portable toilet block</p> <p>(c) Between 24 May 2021 and 3 June 2021 in breach of paragraph 2(c) of the Injunction, D9 caused or allowed further groundworks to be carried out on Plot 8, namely additional hardcore and/or road scalplings were deposited and laid.</p>	<p>(a) Between 24 May 2021 and 3 June 2021 in breach of the second Condition of Suspension, four touring caravans were brought onto Plot 8, together with a trailer and a portable toilet block.</p> <p>(b) As at 3 June 2021, in continuing breach of the third Condition of Suspension, D9 had failed to remove all of the works undertaken to Plot 8.</p> <p>(c) As at 3 June 2021, in continuing breach of the second Condition of Suspension, D9 failed to remove all caravans from Plot 8 and/or had caused or allowed further caravans to be brought on to Plot 8.</p>

	<p>(d) As at 3 June 2021, in continuing breach of paragraph 1 or paragraph 2(a) of the Injunction, D9 failed to remove all caravans from Plot 8 and/or had caused or allowed further caravans to be brought on to Plot 8.</p>	
<p>D11 Plot 10</p>	<p>(a) Between 23 March 2021 and 19 April 2021, in breach of paragraph 2(a) of the Injunction D11 caused or allowed a touring caravan to be brought onto Plot 10.</p> <p>(b) Between 19 April 2021 and 11 May 2021, in breach of paragraph 2(c) of the Injunction, D11 caused or allowed a toilet block to be brought onto Plot 10.</p> <p>(c) Between 11 May 2021 and 24 May 2021, in breach of paragraph 2(c) of the Injunction, D11 allowed further works to be undertaken to Plot 10: (i) a septic tank was brought onto the plot; (ii) internal fencing was installed subdividing the plot.</p> <p>(d) Between 24 May 2021 and 3 June 2021, in breach of paragraph 2(c) of the Injunction, D11 caused or allowed further groundworks to be carried out to Plot 10: (i) the septic tank was installed; (ii) a soil pipe was laid; (iii) additional piles of road scalping were deposited.</p> <p>(e) As at 3 June 2021, in continuing breach of paragraph 1 or paragraph 2(a) of the Injunction, D11 had failed to remove all caravans from Plot 10 and/or had caused or allowed further caravans to be brought on to Plot 10.</p>	<p>(a) Between 23 March 2021 and 19 April 2021, in breach of the second Condition of Suspension, D11 caused or allowed a touring caravan to be brought onto Plot 10.</p> <p>(b) As at 3 June 2021, in continuing breach of the third Condition of Suspension, D11 failed to remove all of the works undertaken to Plot 10.</p> <p>(c) As at 3 June 2021, in continuing breach of the second Condition of Suspension, D11 failed to remove all caravans from Plot 10 and/or had caused or allowed further caravans to be brought on to the plot.</p>