Neutral Citation Number: [2021] EWHC 3093 (QB)

Case No: QB-2021-003576
QB-2021-003626
QB-2021-003737

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2021

Before:

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE CHAMBERLAIN

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Between:

National Highways Limited	**Claimant**
- and -	
(1) Ana Heyatawin	
(2) Ben Taylor	
(3) Benjamin Buse	
(4) Emma Smart	
(5) James Thomas	
(6) Louis McKechnie	
(7) Oliver Rock	
(8) Roman Paluch-Machnik	
(9) Tim Speers	**Defendants**

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Myriam Stacey QC, Joel Semakula & Horatio Waller (instructed by **DLA Piper UK LLP**) for the **Claimant**
Owen Greenhall (instructed by **Hodge Jones & Allen**) for **Benjamin Buse;** the other defendants appeared in person

Hearing dates: 16 and 17 November 2021

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Approved Judgment (Costs)

Dame Victoria Sharp P:

Introduction

1 This is our judgment on costs, following our judgment on liability and sanction: see [2021] EWHC 3078 (QB).

2 A costs schedule was originally served on 15 November 2021. An updated schedule, with reductions to reflect the fact that the hearing was shorter than expected, was provided on 17 November 2021. The total now claimed is £91,307.92. The costs claimed comprise: (i) those specifically attributable to each defendant; and (ii) common costs incurred in the application generally and not specifically attributable to any defendant. The claimant seeks a separate order against each defendant comprising (i) and one ninth of (ii).

3 We heard brief submissions from Myriam Stacey QC on behalf of the claimant and from Owen Greenhall on behalf of Mr Buse. The other defendants made brief submissions opposing costs and noting that they were of limited means.

The law

4 The usual rule is that costs follow the event: CPR r. 44.2(2). The claimant did not suggest that costs should be assessed on the indemnity basis. Where costs are assessed on the standard basis, the question for the court is whether the costs claimed are "proportionately and reasonably incurred" and "proportionate and reasonable in amount": CPR r. 44.4(1)(a). In considering those questions, the court must have regard to all the circumstances of the case and in particular to the factors set out in CPR r. 44.4(3), namely:

> "(a) the conduct of all the parties, including in particular–
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> (i) conduct before, as well as during, the proceedings; and
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> (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
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> (b) the amount or value of any money or property involved;
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> (c) the importance of the matter to all the parties;
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> (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
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> (e) the skill, effort, specialised knowledge and responsibility involved;
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> (f) the time spent on the case;
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> (g) the place where and the circumstances in which work or any part of it was done; and
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> (h) the receiving party's last approved or agreed budget."

5 The means of the paying party do not figure among these factors. The general position in civil litigation is that, if after applying the test in CPR r. 44.4 costs claimed were proportionately and reasonably incurred and are proportionate and reasonable in amount, an order will be made in that amount irrespective of the means of the paying party. Means may, however, be relevant when considering how much time should be given for payment and how the order should be enforced.

6 A three-judge panel of the Supreme Court confirmed recently in *Attorney General v Crossland* [2021] UKSC 15, at [9], that "[w]hen a respondent is found to be in contempt of court, there will usually be no principled basis for opposing a costs order… Normally, the sole question will be whether the costs claimed are reasonable and proportionate". The panel went on, however, to make two further points. The first was that, in determining whether the claimed amount is reasonable and proportionate, the court may take into account the defendant's means. The second was that the court must ensure that the combination of the penal sanction and costs order do not constitute disproportionate interference with the defendant's rights under Articles 10 and 11 ECHR: see [10] and [12] respectively.

7 The authority cited for first of these points was the costs order and reasons of the Divisional Court (Dame Victoria Sharp P and Warby J) on 11 September 2019 in *Attorney General v Yaxley-Lennon*. Although in that case the contemnor was invited to file information about his means, he declined to do so. The Divisional Court did not in that case decide, as a general proposition, that a party's means are relevant to the question whether an opposing party's costs are proportionate and reasonable in amount. The reasons for the costs order are recorded in that order as follows:

> "1. We can see no good reason to depart from the general principle that costs should follow the event.
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> 2. We were initially asked to give the Respondent time to submit evidence of means before making a decision on costs. We did so even though, as a matter of principle, the payment of costs in contempt proceedings is not the equivalent of a fine in criminal proceedings, the assessment of which requires the court to have regard to means. In the event, no statement of means has been provided, and the Respondent has not disputed the amount sought by way of costs. We agree that the Applicant's costs are reasonable and proportionate, and we assess them summarily in the sums set out in the Applicant's revised statement."

8 In many cases, it will be appropriate to invite the contemnors to file information about their means. One reason is that, when imposing a financial sanction, the court must consider means; and it would be impossible to do this without first knowing the extent of any costs liability. The court may even conclude that the liability for costs is on its own a sufficient sanction such that no penalty (in the strict sense) is required: see *Deputy Chief Legal Ombudsman v Young* [2011] EWHC 2923 (Admin), [2012] 1 WLR 3227, at [55], citing *LTE Scientific Ltd v Thomas* [2005] EWHC 7 (QB), at [105].

9 These cases show that the costs order may be relevant to sanction in a case where the court is considering imposing a financial sanction. *Crossland* was such a case. In our

judgment, however, they do not show, as a general proposition, that the means of the contemnor are relevant to the proportionality or reasonableness of the costs claimed.

10 The second point emerging from *Crossland* is that the combination of sanction and costs order may be such as to constitute a disproportionate interference with the contemnor's rights under Articles 10 and 11 ECHR. The authority given for this is the decision of a Chamber of the European Court of Human Rights in *Constantinescu v Romania*, App. No. 32563/04, judgment of 11 December 2012, at [49].

11 This decision, which is available in French only, concerned libel proceedings in Romania in which the applicant had been fined and required to pay a penal fine of 5,000,000 old Romanian lei (ROL), damages and interest of 30,000,000 ROL and *"frais de justice"* (which can mean "court costs" or "legal costs") of 750,000 ROL. It can be seen that the latter element was a very small proportion of the total package. The Court held at [49] that on the facts of the case the combination of these was disproportionate to the aim of protecting the reputation and rights of others, with the result that there had been a violation of Article 10 ECHR.

12 We doubt that much can be drawn from this judgment of the Chamber of the Strasbourg Court in this factually very different case. We would not rule out that, in an extreme case, the imposition on a contemnor in a protest case of an order to pay a large sum of costs might be part of a package of measures that would render the interference with his rights under Articles 10 and 11 ECHR disproportionate. However, in most cases, the application of the usual costs rules to contemnors in protest cases is unlikely to give rise to an unjustified interference with the protestor's rights under Article 10 and 11 ECHR, given that:

(a) those who deliberately breach orders of the court know in advance that doing so may give rise to contempt proceedings (the order contains a notice to this effect) and the costs consequences of such proceedings are well known;

(b) costs are recoverable on the standard basis if and only if they are proportionately and reasonably incurred and proportionate and reasonable in amount, having regard to (among other things) the conduct of the parties, the importance of the matter and the particular complexity of the matter or the difficulty or novelty of the questions raised;

(c) if these conditions are met, any interference with the contemnor's rights under Articles 10 and 11 is likely to be proportionate to a legitimate aim.

13 In a protest case, a court applying the factors in CPR r. 44.4(3) will be particularly careful to ensure that the sums claimed for a committal application are commensurate with the damage caused by the breach and the damage reasonably feared if further breaches were to take place, including damage to third parties. It would not be proportionate or reasonable to incur substantial costs on a contempt application in respect of a breach whose consequences were minor or insignificant or in a case where there was no realistic prospect of further breaches. Similarly, where the breaches are open and obvious, and the legal issues straightforward, the court will scrutinise with care any substantial claim for costs, while bearing in mind the need for any breaches to be established to the criminal standard.

14 If the court has applied the factors in CPR r. 44.4(3) and concluded that the costs claimed have been proportionately and reasonably incurred and are proportionate and reasonable in amount, an order for costs against the contemnor will usually be "necessary in a democratic society" for one of the aims listed in Article 10(2) or 11(2) ECHR. Here, the aims which the committal proceedings seek to achieve are the prevention of disorder and the protection of the rights and freedoms of others.

15 Nonetheless, having applied the ordinary principles in CPR r. 44.4, the court should stand back and ask whether the sanction and costs order, taken together, represent a proportionate interference with the contemnor's Article 10 and 11 rights.

The parties' submissions

16 Miss Stacey QC for the claimant emphasised the usual rule: that costs follow the event. She acknowledged that some of the defendants may find it difficult to pay costs, but submitted that the cost of enforcing orders of the court should in principle fall on those who deliberately flout such orders. She submitted that it was important that an order for costs be made, even if it were largely symbolic.

17 As to the amount claimed, Miss Stacey QC submitted that the application was not a simple one. Although the defendants ultimately admitted their contempt, they did so only late on 12 November 2021, just one clear day before the hearing commenced on 16 November 2021. Given the need to prove the contempts to the criminal standard, substantial work was required to collate the evidence of the police officers, to prepare affidavits, to issue witness summonses, and to serve the proceedings and the application on the nine defendants. She confirmed that the costs sought relate only to the committal application before the court (and not, for example, any preceding work in relation to the underlying order) and that her solicitors' fees were charged at a discounted rate.

18 Mr Greenhall, for Mr Buse, submitted that the costs sought were too high. That was particularly so in light of the custodial sanction imposed and the overall reasonableness and proportionality of any order. He submitted that the application was a simple one and the defendants had admitted their contempt within a reasonable period after the service of the application. In light of the relatively simple nature of the proceedings, there was no need to instruct a QC (and certainly not two QCs). Similarly, the costs incurred in relation to evidence were excessive.

19 Each of the defendants was invited to make submissions on costs. Most of the defendants drew attention to their limited means. Mr Paluch-Machnik submitted that the defendants had approached the application in a frugal manner, with only one of the defendants represented and all of them admitting contempt. The timing of the defendants' admission of contempt was reasonable in the circumstances: they had received the papers only two weeks before the hearing, instructed lawyers shortly thereafter and then admitted contempt four days before the hearing commenced.

Discussion

20 We begin by recalling the findings we made in our judgment on liability and sanction. The defendants all knew in advance that what they were planning to do on 8 October 2021 would be in breach of the M25 Order. They had been warned in the clearest terms that contempt proceedings might follow. They must have known that the claimant would

incur costs in bringing those proceedings. They chose to defy the M25 Order knowing the consequences. In principle, we can see no reason why there should not be orders for costs against them.

21 However, we consider that there is force in some of the criticisms made by Mr Buse of the total amounts claimed.

22 First, counsels' costs include sums for advice from two QCs and four juniors in addition to brief fees for one QC and two junior counsel. Even bearing in mind the need to consider relatively extensive evidence and the principles to be derived from recent authority, we consider that these costs were excessive.

23 A second, related point is that we do not consider it reasonable for three solicitors to attend the hearing.

24 Third, although we appreciate the need to prove the contempts alleged to the criminal standard, we consider that the time spent by the claimant's solicitors on preparing the applications was somewhat greater than necessary given that the contempts were committed quite openly and given the relatively straightforward nature of the applications.

25 We have considered it appropriate to assess costs summarily. The process of assessment in a case such as the present necessarily involves painting with a broad brush. The global sum which we consider proportionate and reasonable in the circumstances is £45,000. Since the claimant sensibly invites us to make a separate order against each defendant, we consider that there should be an order that each defendant pay £5,000 towards the claimant's costs. The orders will be expressed so as to allow for payment by each defendant within 35 days after his or her release from custody. We would expect the claimant to enter into a dialogue with the defendants about how this liability is to be discharged.

26 We have considered whether a costs order for £5,000, when taken together with the custodial sanction imposed on each defendant, represents a proportionate interference with his or her rights under Articles 10 and 11 ECHR. We conclude in each case that it does, having regard to (i) the deliberate decision taken by each defendant to defy the order of the court, (ii) the harm caused by the breach and (iii) the important public interest in securing compliance with orders of the court, in preventing disorder and in protecting the rights and freedom of the public.