Neutral Citation [2020] EWHC 2723 (Ch)

Case No PT-2020-BHM-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST

The Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 16 October 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) THE SECRETARY OF STATE FOR TRANSPORT
(2) HIGH SPEED TWO (HS2) LIMITED

Claimants/Applicants

- and -

ELLIOTT CUCIUREAN

Defendant/Respondent

- -

- -

Mr Michael Fry (instructed by **DLA Piper UK LLP**) for the Applicants
Mr Adam Wagner (instructed by **Robert Lizar Solicitors**) for the Respondent

Hearing date: 16 October 2020

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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.

Mr Justice Marcus Smith:

1. I handed down judgment on liability in this matter on 13 October 2020 under Neutral Citation Number [2020] EWHC 2614 (Ch). This judgment deals with the question of sentence consequent upon my finding that the Respondent, Mr Cuciurean, was in breach of the order of Andrews J, when he committed Incidents 1 to 3 and 5 to 13, as I have described them in my judgment on liability. All of these incidents involved breach of paragraph 4.2 of the Order, which enjoined entry upon what was known as the Crackley Land.

2. This judgment on sanction takes my earlier judgment on liability as read and adopts the terms and definitions set out in that judgment.

3. Before I can proceed to the question of sanction, however, there is an important rider to my judgment on liability, which I must deal with. In his helpful written submissions to me, which I received yesterday evening, Mr Wagner, counsel for Mr Cuciurean, noted that my judgment on liability (handed down on 13 October 2020, in advance of this hearing, at the invitation of Mr Cuciurean) straddles two sets of Civil Procedure Rules regarding contempt and committal. The old rules in CPR Part 81 have been replaced with a new CPR Part 81 with effect from 1 October 2020. That has been done by the Civil Procedure (Amendment No 3) Rules 2020, SI 2020/747.

4. The rules in old CPR Part 81 have been substantially revised, albeit that the difference, at the end of the day, may in practice be minimal. (Mr Fry, when reviewing what had been done procedurally prior to 1 October 2020 in light of the new rules, suggested that very little would have had to have been done differently.) The Practice Direction that was appended to the old CPR Part 81 has been revoked and not replaced.

5. Somewhat surprisingly, the new provisions contain no relevant transitional or saving provisions. Mr Wagoner, quite properly, has raised the implications of this for my attention. He is entirely right to have done so, and it seems to me that I need, in this ruling, to make clear why I consider that the new CPR Part 81 provisions make no difference to the terms of the judgment on liability that I handed down a few days days ago.

6. In my judgment, there are three aspects of the contempt jurisdiction as covered by CPR Part 81 potentially in play. Going through them, they are as follows:

    (1) First, there are the provisions of CPR Part 81 that inform the Order that was made by Andrews J. Andrews J's Order was, of course, made prior to the coming into force of the new CPR rules. It seems to me absolutely clear, and was not gainsaid by either counsel appearing before me, that the Order made by Andrews J must be read and considered in the light of the law as it stood at the time of that Order. Any other conclusion would give an utterly unwarranted retrospective effect to the new rules and that cannot possibly have been intended without the clearest of language (and even then may have been *ultra vires* the rule-maker). Such clear language in no way appears in the new CPR Part 81.

    That, as it seems to me, is the most important point to make in relation to the new rules. The bulk of my judgment on liability, insofar as it dealt with the CPR Part

81, considered the provisions of CPR Part 81 in the light of the Order that Andrews J had made. Those parts of the judgment must stand, whatever the new provisions of CPR Part 81 say.

(2) The second aspect of the new CPR Part 81 that I must consider concerns provisions relating to the procedure or process that has informed these proceedings and this application to date. It is obvious that this application was commenced and substantially heard before the new rules came into force. The dates of the hearings before me are 30 and 31 July and 17 September 2020. It is really only the judgment on liability – handed down on 13 October 2020 – that is caught by the new rules. Thus, all of the procedural steps in this application pre-date the new CPR. It seems to me that steps taken in the application, insofar as they were formal steps prior to 1 October 2020, are matters that must be governed by the old rules of process and not the new. I am not sure that it necessarily matters in the light of the judgment that I handed down on 13 October 2020, but it seems to me clear that it would, again, import a measure of retrospectivity if the Claimants (or, indeed, Mr Cuciurean) were to be criticized or to fall foul of rules that post-date the very application that they have made or been involved in.

(3) The third aspect of the new CPR Part 81 relates to the process going forward, that is to say to matters post-dating 1 October 2020. That process, unsurprisingly, substantially concerns sanction. So far as this aspect is concerned, it seems to me that Mr Wagner is right when he says that the process going forward must be informed by the new rather than by the old rules to the extent that they affect the matters before me. I say that with a measure of trepidation, because ordinarily one would expect this to be dealt with in transitional provisions, which make precisely clear how far the old rules govern old (already commenced) processes and how far the new rules govern old (already commenced) processes. But that has not happened in this case. Although I do not think the new rules affect the matters under consideration before me today, I make clear the approach that informs me, to the extent that there is a mismatch or difference between the old and the new rules. The approach that I would take, were there such a mismatch – and I do not think there is – would be to apply the rules that are most beneficial to Mr Cuciurean. In other words, if there has been a relaxation in terms particularly of sanction in the new rules, then I should apply the new rules. But, equally, if the old rules were to be more beneficial to Mr Cuciurean, then I fail to see why he should be disadvantaged merely by the fact that the timing of my judgment on liability and the timing of this judgment was after and not before 1 October 2020.

7. I say this by way of expansion and enlargement of my judgment on liability. I find, for the reasons that I have given, that there is no need for any substantive change to that judgment to reflect the new rules that have helpfully been brought to my attention.

8. I turn, then, to the question of sanction. In my judgment on liability, I found that Mr Cuciurean had intentionally breached the Order on 12 separate occasions; and was in contempt of court in those respects. It is my duty today to sentence him for those contempts.

9. The court has a broad discretion when considering the nature and length of any penalty for civil contempt. It may impose: *(i)* an immediate or suspended custodial sentence; *(ii)*

an unlimited fine; or *(iii)* order sequestration of assets: Londono (ed), *Arlidge, Eady & Smith on Contempt*, 5th ed (2017) at [14-1].

10. The court's discretion should be exercised with a view to achieving the purpose of the contempt jurisdiction. In *Willoughby v. Solihull Metropolitan Borough Council*, [2013] EWCA Civ 699, Pitchford LJ suggested that that purpose was threefold: *(i)* punishment for breach; *(ii)* ensuring future compliance with the court's orders; and *(iii)*, linked with *(ii)*, rehabilitation of the contemnor (at [20]).

11. In *McKendrick v. The Financial Conduct Authority*, [2019] EWCA Civ 524, the Court of Appeal said that the first step in the analysis is to "consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the breach of the order" (at [39]).

12. A range of mitigating/aggravating factors then arise for consideration in that analysis. These include, but are not limited to those set out in *The Financial Conduct Authority v. McKendrick* [2019] EWHC 607 (Ch) at [23]:[1]

(1) Whether there has been prejudice as a result of the contempt, and whether that prejudice is capable of remedy.

(2) The extent to which the contemnor has acted under pressure.

(3) Whether the breach of the order was deliberate or unintentional.

(4) The degree of culpability.

(5) Whether the contemnor was placed in breach by reason of the conduct of others.

(6) Whether he appreciated the seriousness of the breach.

(7) Whether the contemnor has cooperated. A genuine offer following judgment but before sentence to cooperate in the provision of information is capable of being a serious mitigating factor.

(8) Whether the contemnor has admitted his contempt and has entered the equivalent of a guilty plea. By analogy with sentencing in criminal cases, the earlier the admission is made, the more credit the contemnor is entitled to be given.

(9) Whether a sincere apology has been given for the contempt.

(10) The contemnor's previous good character and antecedents.

(11) Any other personal mitigation that has been advanced on his behalf.

13. Pausing there, *McKendrick* was what I would call an "ordinary" case of civil contempt. It was a breach of an order arising out of proceedings not involving questions of free speech or the right of protest or civil disobedience in a matter of conscience. This case, as Mr Wagner has cogently pointed out on behalf of Mr Cuciurean, is not such a case. It

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[1] A number of these factors were also referred to in Crystalmews Ltd v Metterick [2006] EWHC 3087, [13] per Lawrence Collins J.

is a case where the right of protest and the right of free speech are fully engaged. As I will come to consider, that makes a significant difference to the list that I have just enumerated. Nevertheless, this list is, I consider, a helpful starting point, provided one bears in mind – as I do – that this is an exceptional case involving the human rights of protest and demonstration.

14. Imprisonment is the "most serious sanction"[2] and can only be imposed where the custody threshold is passed; i.e. where "an immediate custodial sentence is the only appropriate sentence to impose upon a person who interferes with the administration of justice unless circumstances are wholly exceptional": *R v. Montgomery* [1995] 2 Cr App R 23 at 27F (*per* Potter J (sitting in the Court of Appeal)).

15. Authority suggests that this threshold will be passed and committal to prison prima facie appropriate where there has been "serious contumacious flouting of orders of the court": *Gulf Azov Shipping Co v. Idisi*, [2001] EWCA Civ 21 at [72] (*per* Lord Phillips MR); see also *International Sports Tours v. Shorey*, [2015] EWHC 2040 (QB), at [46] (*per* Green J) and *McKendrick v. The Financial Conduct Authority*, [2019] EWCA Civ 524 at [40], both of which confirm that, in cases of a deliberate breach of a court order, the custody threshold will be passed.

16. Any term of imprisonment should be as short as possible but commensurate with the gravity of the events and the need to achieve the objectives of the court's jurisdiction: *Financial Conduct Authority* at [27] (*per* Marcus Smith J).

17. A sentence of imprisonment may be suspended on any terms which seem appropriate to the court.

18. In this respect, regard to should be had to the recent Court of Appeal decision in *Cuadrilla Bowland Ltd v. Persons Unknown*, [2020] EWCA Civ 9. The appellants had been protesting against the claimant company "fracking" near Blackpool. In so doing, they had breached an injunction obtained by the company against "persons unknown" preventing *(i)* trespass to land; *(ii)* nuisance; and *(iii)* unlawful means conspiracy. The conduct in respect of which the appellants had been sentenced involved blocking entrances to the claimant's site. Beyond its use as a comparator in terms of sentence (a matter I return to below), the judgment of Leggatt LJ provides some useful guidance on sentencing protestors in light of protections provided in articles 10 and 11 of the ECHR (see [87] – [99]). That passage of Leggatt LJ's judgment can be summarised as follows:

(1) No principle justifies treating the conscientious motives of a protestor as a licence to flout court orders with impunity, whatever the nature or extent of the harm intended or caused provided only that no violence is used; such a principle would render court orders toothless: at [91].

(2) There is a distinction to be drawn between disruption caused by the side-effect of protest held in a public place and disruption which is an intended aim of the protest. In the latter case, where protesters do so in deliberate defiance of a court order, they have no reason to expect that their conscientious motives will insulate them from

[2] *Willoughby* at [27] (*per* Pitchford LJ).

the sanction of imprisonment. This approach is consistent with the European jurisprudence on articles 10 and 11 of the ECHR:[3] at [92] to [95].

(3) However, courts are frequently reluctant to make orders for the immediate imprisonment of protestors who engage in deliberately disruptive but non-violent forms of direct-action protest for conscientious reasons: at [96].

(4) Such acts may be properly characterised as "acts of civil disobedience", which may be defined as "a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government (or possibly, though this is controversial, of private organisations): see e.g. John Rawls, *A Theory of Justice* (1971) at 364: at [96] to [97].

(5) There are at least three reasons for showing greater clemency in cases of civil disobedience. First, there is a moral difference between someone who engages in acts of civil disobedience and an ordinary law-breaker. Second, such a protestor is normally otherwise a law-abiding citizen and therefore less severe punishment is needed to deter them from further law-breaking. Third, the rehabilitative purpose is more likely to be achieved, where the court shows restraint in anticipation the defendant will respond by desisting from further breaches: at [98].

(6) Thus, in cases of civil disobedience which pass the custody threshold, it will often be appropriate to suspend a sentence on condition that there is no further breach during a specified period of time: at [99].

19. Given the importance of the "civil liberties" element, if I may call it such, in this case, there are two other passages in the law reports that I should read into this ruling. First of all, in *R v. Jones*, [2006] UKHL 16, Lord Hoffman said this:

> "My lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind; but there are conventions which are generally accepted by the law breakers on one side and by the law enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience and they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police, the prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take conscientious motives of the protesters into account."

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[3] The two cases referred to in the judgment are *Kudrevicius v. Lithuania*, (2016) 62 EHRR 34 and *Steel v. United Kingdom*, (1999) 28 EHRR 603. The former concerned a demonstration by a group of farmers complaining about a fall in prices of agricultural products and seeking increases in state subsidies. As part of their protests, the caused 48 hours of major disruption to traffic. The farmers received suspended sentences of 60 days' imprisonment and appealed on the basis that the sentences violated articles 10 and 11 ECHR. The Grand Chamber noted that the disruption caused was the result of intentional action ([97]) and therefore saw nothing disproportionate in the sentence (described as "lenient" (at [178])). The latter case concerned a protestor who had intentionally obstructed a member of grouse shoot by placing herself in front him as he lifted his shotgun. The protestor was convicted of a public order offence, fined, and bound over. Having refused to be bound over, she was committed to prison for 7 days. The Court held those measures were proportionate to the legitimate aims of preventing disorder, protecting the rights of others and maintaining the authority of the judiciary.

It seems to me that that captures very appositely some of the issues that arise for me today.

20. The other matter that I would want to refer to arises out of the decision in *Roberts* which is quoted at paragraph 47 of Mr. Wagner's written submissions. In that case the Lord Chief Justice, Lord Burnett, said this at [90]:

> "1. By adhering to the conditions mentioned a person who engages in acts of civil disobedience establishes a moral difference between himself and ordinary law breakers which it is right to take into account in determining what punishment is deserved.
>
> 2. By reason of that difference and the fact that such a protester is generally, apart from their protest activities, a law abiding citizen, there is reason to expect that less severe punishment is necessary to deter such a person from further law breaking.
>
> 3. Part of the purpose of imposing sanctions, whether for a criminal offence or for intentional breach of an injunction, is to engage in a dialogue with the defendant so that he or she appreciates the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law or other people's activities are contrary to the protester's own moral convictions. Such a dialogue is more likely to be effective where authorities, including judicial authorities, show restraint in anticipation that the defendant will respond by desisting from further breaches."

21. That third point is one that I will return to towards the end of this judgment. But, again, all three points are important to bear in mind, but particularly in this case the third.

22. Mr Wagner, on behalf of Mr Cuciurean, sought to persuade me that this was a case where the custody threshold has not been passed. He suggested that the facts of this case were such that the mere finding that there had been, as I have found, a breach of an order of the court and a finding of contempt was enough. He rightly made the point that such a finding is a blot on a person's record and that it is one that is difficult to erase. I fully take that into account. Obviously a finding of a court that there has been a deliberate breach of a court order such as to trigger and find found the contempt jurisdiction is serious. Failing that, Mr Wagner sought to persuade me that a fine, rather than a custodial sentence, was appropriate.

23. I have listened very carefully to these submissions, which both turn on the point that the custody threshold has not been passed. I reject those submissions. In my judgment, in this case, the custody threshold clearly has been passed and I say that taking fully into account the points made regarding the reasons for Mr Cuciurean's infringements of the Order of Andrews J.

24. This is a case where the Order, properly served, was, as I have found, subjectively known to Mr Cuciurean. In his submissions through Mr Wagner to me today, Mr Cuciurean's main point, made at several levels of the argument, was that he had had no notice of the Order and so no sanction or a lesser sanction than custody was appropriate. In the course of my judgment on liability, I found that the Order was properly served. Of course, it may be said that, despite proper service, there was no knowledge or deliberation on the part of Mr Cuciurean. It seems to me that, for the reasons I gave in my judgment on liability, I must be cautious in the use of the term "deliberation"; and I am going to

eschew it from here on in, if I can. I will instead refer to the question of Mr Cuciurean's "knowledge" of the Order.

25. It was suggested that Mr Cuciurean had not seen the penal notice that was prominently on the front of the Order; and had no knowledge of, or access to, the map (Plan B) which was attached to the Order and which defined the Crackley Land onto which entry was prohibited by the Order. In those circumstances, it was contended by Mr Wagner that Mr Cuciurean had entered the Crackley Land knowing it was someone else's land and perhaps knowing that he was trespassing: but not knowing that he was entering upon land that was subject to, and protected by, the Order of Andrews J, which could trigger the very serious contempt jurisdiction that such orders can trigger.

26. It seems to me that there is an air of unreality about these arguments. The fact is that on multiple occasions Mr Cuciurean surmounted or circumvented a three metre hoarding fence. He may have gone over it, he may have gone round it. That varied from time to time. But he entered upon land that he must have known he should not have entered upon, time after time. On such occasions, he was told that he was trespassing. He was told and he knew that there was an order – the Order. He may have thought that the Order existed only in relation to the Cubbington Land and not the Crackley Land. It does seem to me highly improbably that he knew about the Order insofar as it related to land he was not entering upon; and did not know about the Order insofar as it related to land he was entering upon – for the Order, of course, dealts with both tracts of land. Mr Cuciurean's evidence on this point also does not explain why the Claimant's officers mentioned the Order in connection with his trespassed to the Crackley Land.

27. The short point is that he knew there was an Order; and he must have known, if he did not actually know, that in some way it related to the Crackley Land. Mr Cuciurean arrived on site after the eviction of the protesters from Camp 1 (which was in the middle of the Crackley Land) to Camp 2 (which was outside the Crackley Land, but adjoining or close to its southern border).

28. All of these things suggest knowledge of the substance of the Order; and certainly demonstrate the means of acquiring such knowledge given the notice provisions contained in the Order. The whole point about service of an order against persons unknown by alternative means is to take steps that enable the subjects of the order, the persons unknown, to comply with it. To my mind there is nothing in this case to suggest that there was no way in which Mr Cuciurean could not inform himself of the essence of the Order.

29. I find that he knew (either because he had actually seen its terms or – without actually seeing them – by deducing the material content of the Order, which was entirely straightforward) very well what the Order entailed. It entailed not doing what he did, which was crossing the perimeter of the Crackley Land so as to enter upon it in contravention of the Order. Whether Mr Cuciurean called it the Crackley land in his mind or not is neither here nor there. The fact is he knew the essence of the order, which was that he should not enter upon this land.

30. I been very careful, in the judgment on liability, to differentiate between those Incidents which involved a physical perimeter, and those Incidents which did not. I have not found Mr Cuciurean guilty of contempt in relation to these latter Incidents – and I leave them entirely out of account, because I cannot be sure that they took place on the Crackley

Land. Of course, it follows that I also could not be sure that Mr Cuciurean thought they took place on the Crackley Land (not that that is relevant to liability under the Order). However, so far as these Incidents are concerns – which involved entry upon land that was demarcated by a physical barrier – not only has this enabled me to find, so that I am sure, that these Incidents took place on the Crackley Land, but also this fact provides insight into Mr Cuciurean's state of mind. Mr Cuciurean did not accidently or inadvertently step onto the Crackley Land. He repeatedly, and deliberately, did so.

31. Mr Cuciurean is not a lawyer. He is an intelligent and careful individual. I do not accept that he considered this was just trespass. Indeed, I consider that that submission does some disrespect to the principles which were actuating Mr Cuciurean, as I found in my judgment on liability. When I describe the evidence of Mr Cuciurean and his character, I say at [12(3)] of that judgment that Mr Cuciurean was a person who wanted to go and did go to very considerable lengths in order to give his objections to the HS2 Scheme as much force as they possibly could have; and that if such steps involved inconveniencing those carrying forward the Scheme or slowing progress down, then Mr Cuciurean would regard this as a positive and not a negative.

32. It does seem to me that that encapsulates the objectives with which Mr Cuciurean approached his entry upon the Crackley Land; and it seems to me that to say that Mr Cuciurean was, to take a scale of an innocent dog walker accidently crossing a boundary (at one extreme) to someone knowingly infringing upon land protected by a court order with a penal notice (at the other extreme), that Mr. Cuciurean was at the latter end of the scale, and nowhere near the former.

33. It was also said that the Incidents of which I have found Mr Cuciurean guilty were minor. I make clear that I leave entirely out of account the Incidents where I have not found Mr Cuciurean to be guilty of contempt. I consider only the 12 incidents where I have made a finding that I am satisfied, to the requisite standard, that there has been a contempt of court. These Mr Wagner sought to characterise as minor. I disagree. They were a persistent and sustained attempt to breach, and successfully to breach, the perimeter of the Land.

34. Whether one regards these incidents as 12 or as, because they were so closely together in time, less than 12, to my mind matters not. The fact is that the conduct of Mr Cuciurean forced HS2 and its agents and employees to operate on a 24 hour basis on a high level of alert to prevent incursions on land where serious work was going on in order to develop the HS2 Scheme. The risks of injury and/or disturbance to work were obviously considerable.

35. It seems to me that these Incidents are the very reverse of minor. They are significant and the fact that they may have occurred only a few feet (I do not accept that – it may be that some incursions were only several metres inside the Crackley land) is neither here nor there. The fact is a hard perimeter was breached.

36. Equally, it seems to me that the fact that there was tampering with the Heras fence panels is a matter that I must take into account. It was suggested that the removing of the clips or unauthorised tampering with the fence panels, to the extent I have described them within in my judgment on liability – was a matter that was irrelevant, because it did not colour the trespass or entry upon the Land in breach of the Order. That, it seems to me, is entirely wrong. The Order enjoined entry upon the Crackley Land; and one of the

factors that one must take into account when considering the seriousness of the breach of the Order is precisely what was done when the Land was entered upon. It seems to me that what happened was that there was an intention to interfere with works which, I remind myself, *(i)* have been sanctioned by Act of Parliament; *(ii)* are lawful in themselves and *(iii)* were the very reason the Order was made. It is important to bear in mind that the Order was itself made to control infringements of the Claimant's rights, which infringements were inhibiting the HS2 Scheme in the first place.

37. In short, what we have here are, taken individually, 12 separate and knowing breaches of the Order on repeated single occasions over a period of a number of days. Without for the moment straying into the question of a suspended sentence, which I must consider last, a custodial sentence is clearly necessary.

38. Referring back to the purposes of the contempt jurisdiction (which I considered in paragraph 10 above), I consider that a custodial sentence is what is necessary: *(i)* to serve the purposes of punishing Mr Cuciurean for what are, as I have found, serious breaches of an order that he could easily have followed; and, equally important, *(ii)* I find that a custodial sentence will serve the purpose of deterring Mr Cuciurean from future breaches of this Order and others like it.

39. I want to say a little bit more about deterrence, which is the second point that I have just raised as the purpose of a custodial sentence, and I shall do so after I explain why I do not consider this to be a case where rehabilitation is an issue (the third reason for the jurisdiction, described in paragraph 10 above). As I have found, Mr Cuciurean is, out of concerns of principle that I respect, whether I agree with them or not, opposed to the HS2 Scheme. I see nothing here to rehabilitate: these are perfectly understandable and respectable objectives. Such opposition, as Lord Hoffman eloquently put it, is an important element in a free society and I have no desire to deter it or to "rehabilitate" Mr Cuciurean in his views.

40. However, I do consider that the manner in which Mr Cuciurean has expressed his opposition, which involves breaches of court orders on a serial basis, is a matter that requires firm deterrence. My concern is that Mr Cuciurean has quite simply decided that part of the efficacy of his protest is precisely that he brings the protest to those developing the HS2 Scheme, rather than standing on the sidelines outside the works where, as Mr. Cuciurean would no doubt see it, he can safely be ignored by the developers of the HS2 Scheme. It is this thinking, in my judgment, that was anticipated by Andrews J, in her Judgment, and it is this thinking that results in what I find to be extremely serious breaches of an important order of this court.

41. Regarding the length of the custodial sentence, I obviously must have regard to what was said in *Cuadrilla*. In this case, there were two breaches. The first involved all three appellants blocking the site entrance for several hours, for which the judge imposed a short, suspended term of imprisonment fixed at four weeks (*Cuadrilla* at [35]). The second, more severe incident involved one appellant lying down in front of a lorry in wet conditions, causing risk of death or injury to the appellant, the driver of the lorry, and the other road users into which the lorry driver was forced (at [36]). The sentence imposed was two month's imprisonment suspended on condition of compliance with the order (*Cuadrilla* at [36] – [37]).

42. The Court of Appeal upheld the judge regarding the first incident, although "[h]ad it not been for the fact that the appellants' actions could be regarded as acts of civil disobedience…short immediate custodial terms would in my view have been warranted" (*Cuadrilla*, [106]). Regarding the second incident, the court reduced the sentence to a suspended period of four weeks' imprisonment, this even in light of the fact this was the appellant's second breach of the order and she evinced a lack of contrition (*Cuadrilla*, at [109]).

43. *Cuadrilla* is an obviously helpful authority, because it raises (and addresses) similar concerns relating to Articles 10 and 11 of the ECHR that clearly arise in the present case. It also concerned sentencing for breaches of an injunction against "persons unknown".

44. I also find it helpful to have regard to the Sentencing Council guideline on breach of a criminal behaviour order (the "Guideline"). In *Venables v. News Group Newspapers*, [2019] EWHC 241 (QB), a divisional court consisting of Lord Burnett of Maldon CJ and Warby J held that regard should be had to the Guideline. However, in so doing I bear in mind that it has no direct application to committal proceedings, but is "a useful comparison", which requires caution in application, especially since the custody starting points and ranges in the Guideline cannot be the subject of a linear adjustment to account for the fact that the maximum penalty for contempt is two years' imprisonment: see *Cuadrilla*, at [102] to [103].

45. The following factors are, as it seems to me, relevant to the question of sentence:

(1) I bear the following, general points, in mind:

(a) This is a case where Mr. Cuciurean has persistently breached the order some 12 separate times on the 4, 7 and 14 April 2020. This is not a case of accidental breach, it is a case of sustained, deliberate, contumacious breach.

(b) This is not a case where Mr Cuciurean has expressed any remorse. Frankly, I would not expect him to do so, given the principled nature of his objections to the HS2 Scheme. Certainly I do not regard this as an aggravating factor.

(c) What I must evaluate – and I will return to this in due course – is the extent to which Mr Cuciurean was willing to subordinate his entirely understandable desire to protest against the HS2 Scheme against the primacy of the rule of law as represented by the Order of Andrews J. Here I find that Mr. Cuciurean has, up to the date of this application at least, evinced quite the reverse order of priority. He has quite deliberately set himself against an extremely clear order and so has undermined, indeed flouted, the rule of law. That is something that I weigh very heavily indeed.

(d) There could have been more invasive and aggressive protests. In this case Mr Cuciurean breached the perimeter fencing on a number of occasions despite being told that in doing so he was in breach of the Order (Incident 1). Mr Cuciurean himself removed clips from the fencing (Incident 6). He was a member of a group of protesters who removed fencing panels (Incident 8). That said, he also left the Crackley Land peacefully on a number of occasions, when asked to do so by enforcement officers. As regards these incidents, which are the only ones I take into account, whilst

there clearly was much more than *de minimis* disruption to the work of the Claimants, indeed I find that it was material disruption well above the *de minimis*, there is no evidence that the Claimants suffered major disruptions on account of the incidents that I have found were contempts.

(2) Turning to the list of factors set out in *McKendrick* (see paragraph 12 above):

(a) There has, as I have described, been some prejudice to the Claimants above the *de minimis* level but below the level of major disruption (paragraph 12(1) above).

(b) Mr Cuciurean has acted entirely voluntarily (paragraph 12(2) above). The evidence is that he came to the Land after the other protesters had been evicted from Camp 1 so as to carry on the protest by other means.

(c) Turning to the third, fourth, fifth and sixth factors in the list (paragraphs 12(3) to 12(6) above), the breaches of the Order were, as I have found, deliberate and intentional. Mr Cuciurean's personal culpability is high. He acted on his own in the sense that he was the master of his own fate, he made his own choices. There were of course others involved, but Mr Cuciurean acted in accordance with his own lights and he appreciated the seriousness of his conduct.

(d) Turning to the factors at paragraphs 12(7), (8) and (9), Mr Cuciurean has cooperated in the sense that he has appeared, quite properly, in this court and has behaved in a properly respectful manner in these proceedings. But he has not cooperated in the sense of accepting the points that have been made against him. To the contrary, as was his right, he has raised a number of points regarding his culpability which I have had to consider. Neither has he admitted his contempt, nor has he apologised. Given Mr Cuciurean's views, I regard these as neutral or ameliorating factors.

(e) I treat Mr Cuciurean as a person of good character (paragraph 12(10)).

(3) If this were an ordinary case of disobedience to the Order, independent of M Cuciurean's reasons for acting (i.e., his principled opposition to the HS2 Scheme), this serial flouting of a straightforward order of the court would rank at or close to the maximum punishment that this court could order. In short, if this were an ordinary case, I would be looking at a term of imprisonment of well in excess of one year. It seems to me, leaving out of account altogether the civil liberties aspects of this case, the sentence that I would be minded to impose would be one of 18 months' imprisonment. But this is not an ordinary case and I must bear in mind the approach taken by the Court of Appeal in *Cuadrilla*.

(4) However, factoring in these aspects, and having *Cuadrilla* specifically in mind, there are some aggravating factors to this case. Mr Cuciurean's culpability, as reflected in his determination to protest whatever the consequences, and the related repeated nature of the breaches are specific to this case. So, although this is undoubtedly a case of civil disobedience, Mr Cuciurean's acts are not a public non-violent conscientious act contrary to law done with the aim of bringing about a change in the law or policies of the Government. Public and conscientious, yes.

> Non-violent? Just about, although there has been clear physical invasion of another's land and some physicality in the Incidents that I have described. Aiming to bring about a change in law or policy? Perhaps, but only marginally or only by making the project so expensive that the political will to continue it evaporates or diminishes.

46. Taking all of these factors into account, the sentence that I impose is one of six months' imprisonment. I make it clear that Mr Cuciurean will serve only half of this sentence and will, subject to the question of suspension (to which I will now come, and in which case he will of course not go to prison at all) be released after three months.

47. I turn to the question of suspension, which I have considered most anxiously. There is a moral difference between Mr Cuciurean and an ordinary law breaker. It seems to me that, if I can be assured that Mr Cuciurean will, whatever his feelings about the HS2 Scheme and the importance of the environment, subordinate his desire to protest to an obedience to orders of the court, then a suspended sentence is in this case appropriate. What I need to be assured of is that, if I impose a condition on Mr Cuciurean's sentence, it will be complied with.

48. I am satisfied that it will be. As I said, Mr Cuciurean has appeared before this court. He has given evidence. He has been very frank about his approach and about his motives, although less frank in other respects. It seems to me that he will abide by any condition imposed by this court and that suspending a sentence will not be an exercise in futility, which this court should not undertake. It seems to me that that is the first reason why sentence should be suspended.

49. The second reason is the importance that has been stressed in the passages that I have read of a dialogue between the court that enforces its orders and the protester. It seems to me that it is very important that that dialogue carry on and part of that dialogue is the consideration of the conduct of the contemnor and suspension of the sentence that the court finds that it must make. It seems to me that it is right, particularly in the case of civil protesters, to give such a protester the opportunity to avoid prison by complying with the condition that the court imposes.

50. The third point that I make is this. Mr Wagner accepted that it was a somewhat tendentious passage to quote to the court but nevertheless it has a degree of utility. Mr Wagner quoted Lord Bingham quoting Jeremy Bentham in *R v. Rimington*. What Bentham said in his 1792 polemic *Truth versus Ashurst*, criticising judge made law was this:

> "It is the judges, as we have seen, that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of you wait until he does it and then you beat him for it. This is the way you make laws for your dog and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do. They won't so much as allow you of his being told. They lie by till he's done something which they say he should not have done and then they hang him for it."

I anticipate that Mr Wagner had his tongue slightly in his cheek when he quoted this passage in his written submissions, because the common law, contrary to what Mr Bentham thought, proceeds in an incremental way. There are not intended to be surprises in the way the common law evolves. It is the whole point of the common law that it

develops and reacts to events in society and reflects them in a manner proportionate and unsurprising to the members of that society.

51. But it is fair to say that the persons unknown jurisdiction is a relatively new one. There have been, over the years, some such orders, but recently those orders have ballooned. More to the point, there are relatively few cases dealing with the question of punishment for breach of such orders by way of the contempt jurisdiction, and it is perhaps a testimony to both the difficulties in this area of the law and the assiduous submissions of counsel that my judgment on liability runs to some 127 paragraphs. This is obviously not straightforward law. I would like to think that I have set out in my judgment on liability with some clarity how orders against persons unknown operate, but I think it is entirely fair to say that that judgment itself forms a part of the dialogue that goes on between the court and protesters. It seems to me that it would be wrong to send someone to prison right away given the fresh articulation of these points; and that, as I say, constitutes the third reason why I am minded to suspend the sentence.

52. So that is the conclusion that I reach. This is an appropriate case to suspend Mr Cuciurean's sentence and I must, therefore, consider the appropriate condition to impose. In this regard, the court is afforded a broad discretion. The court may order suspension for such period or on such terms or such conditions as it may specify. Of course a broad discretion requires the court to have anxious consideration to the question of proportionality. The sentence that I impose must itself obviously be proportionate to the offences committed; and so too must the condition applied, if that sentence is to be suspended. It must relate, in my judgment, very directly to the nature of the breaches that are in play.

53. In these circumstances the condition that I impose is as follows:

That for a period of 12 months commencing from the date of this order, Mr Cuciurean comply with any order of a court in England and Wales endorsed with a penal notice and enjoining, however phrased, entry upon any land by persons including, whether named as a defendant or as a person unknown, Mr Cuciurean.

54. I ran a version of this condition past Mr Wagner in the course of his helpful submissions and he made a number of points in relation to it, some of which I have taken on board and some of which I have not. My initial thinking was that the order should run for a period of two years. But I consider, having regard to the provisions of CPR 81.9 – and I am referring in all instances here to the new version of CPR 81 – two years to be too long. I halve the period to 12 months

55. Mr Cuciurean also suggested through Mr Wagner that the condition was too wide and that it would unduly constrain Mr Cuciurean's conduct. I do not accept these submissions. It seems to me that this condition as drafted is closely tied to the conduct which the Order of Andrews J, enjoined. Andrews J, of course, was concerned with one tract, albeit a large tract, of the land required for the HS2 project, but it seems to me that it would be unfortunate if Mr Cuciurean considered himself at liberty to infringe any other orders that might be made or have been made in relation to HS2 property of the sort like that made by Andrews J, simply because the condition was drawn too narrowly. The whole point of my judgment on liability and this present judgment on sanction is to make clear that orders protecting the HS2 Scheme, which obviously can be made

properly only by a Justice of the High Court, are respected, and the condition seeks to reflect that fact.

56. For those reasons that is why I suspend the sentence. I was tempted, albeit very briefly, to consider whether I ought to venture into a split sentence, that is to say a sentence with an immediate custodial sentence but partially suspended. It seems to me that there is good reason why such orders do not seem to have been made in the past and I have no desire to venture into new areas in this judgment, and so that is a matter which, whilst it may be open to the court to consider – the language is very wide in the rules – it is not something that I am minded to consider today.

57. Mr Cuciurean should, finally, be mindful of the fact that, were he to breach the condition that I am minded to impose, not only would the suspended sentence be activated but the court could impose a further sentence for breach of that condition.

58. Mr Cuciurean, would you please stand. For the reasons I have given I sentence you to prison for a period of six months of which you would in the ordinary course serve half suspended on condition that for a period of one year (or 12 months) commencing from the date of this order you comply with any order of the court in England and Wales endorsed with a penal notice enjoining, however phrased, entry upon any land by persons including you, whether as a named defendant or as a person unknown.

59. I make clear that the precise wording of this condition is reserved to the order to be drawn up, on which I will take account of the drafting suggestions of counsel.