



Neutral Citation Number: [2022] EWHC 1010 (QB)

Case No: QB-2021-004465

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 28/03/2022

Before:

THE HONOURABLE MR. JUSTICE LINDEN

Between:

HIGH SPEED TWO LIMITED

Claimant

- and -

(1) LARCH MAXEY
(2) DANIEL HOOPER
(3) ISLA SANDFORD
(4) JULIET STEVENSON-CLARK BETHANY COOKE

Defendants

MR. MICHAEL FRY & MR. JONATHAN WELCH for the **Claimants**
MR. TIM JAMES-MATTHEWS for the **Defendants**

APPROVED JUDGMENT

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MR. JUSTICE LINDEN :

Introduction

1. This is an application, dated Friday 24th March 2022 for approval of a consent order in respect of an application for committal of the defendants for contempt of court which was made by the claimant on 7th December 2021. The matter is listed for a four-day hearing starting today but the effect of the consent order would be to dispose of that application.
2. Mr. Fry appeared with Mr. Welch for the claimant; Mr. James-Matthews appeared for the defendants.

Background

3. The claimant is the nominated undertaker appointed by the Secretary of State for Transport pursuant to section 45 of the High Speed Rail (London-West Midlands) Act 2017. These proceedings relate to direct action taken by the defendants between September 2020 and February 2021 at Euston Square Gardens in Central London which, at the material time, the claimant was engaged in clearing for the purposes of works relating to Phase 1 of the HS2 project.
4. The direct action at Euston Square Gardens involved a number of people establishing a camp on the site which included tents, wooden defence structures and wooden platforms in the trees. However, it was not until a report by the BBC in late January 2021 that it became apparent to the claimant that the occupants of the camp had also dug a network of underground tunnels in anticipation of what were imminent attempts to evict them. Their plan was that they would occupy the tunnels with a view to thwarting their eviction by the claimant, and the progress of the claimant's operations in relation to HS2, by making it difficult to extract them.
5. The exercise of evicting the activists required substantial resources. There were various specialist teams which were supervised by a High Court Enforcement Officer, including a Confined Spaces Team (CST) of personnel who were trained in operations underground and whose responsibility it was to bring activists out of the underground tunnels. This was a highly dangerous task given the poor state of the tunnels. A Mines Rescue Services (MRS) Team was also brought in, together with a Ground Penetrating Radar Team and other relevant specialists. Emergency services were also in attendance and on standby.
6. On 1st February 2021, Mr. Justice Robin Knowles made an order against the first defendant in the context of judicial review proceedings brought by him which challenged the eviction of the occupants of the camp. In summary, paragraph 4 of the Knowles order required the first defendant forthwith:
 - a) To cease any further tunnelling activity and not to cause any other person to engage in tunnelling;
 - b) To provide information about how many people were in the tunnels and how many of them were children. In the case of any occupants who were

children, there was also a requirement to provide additional information which was relevant to their welfare and safeguarding;

- c) To provide details of the tunnelling system which had been constructed so that the layout and the level of risk associated with entering the tunnels could be assessed;
- d) To co-operate with the claimant and the authorities, to leave the tunnel safely and to allow others to do the same.

7. The Knowles order did not include a penal notice.
8. The first defendant failed to comply with the Knowles order. Instead, he applied to set it aside. That application was resisted by the claimant and a cross-application was made for a penal notice to be added to the order against him.
9. On 10th February 2021, Mrs. Justice Steyn rejected the first defendant's application, save for discharging paragraph 4(b) of the Knowles order, and she allowed the claimant's cross-application. The neutral citation number for her judgment is [2021] EWHC 246 (Admin). At paragraph 6, she noted that the evidence was that the tunnels which the activists had built were poorly constructed and liable to collapse. The first defendant and others in the tunnel were in a highly dangerous situation and the danger was equally grave for those who made attempts to rescue them. There was, moreover, nothing hindering the first defendant and other activists from leaving the tunnel and several of the protestors had done so over the course of the preceding week.
10. Mrs. Justice Steyn's order therefore required the first defendant to:
 - (a) cease all tunnelling activity and is not to cause, assist or encourage any other person to engage in further tunnelling;
 - (b) provide details to the Defendant, the Health and Safety Executive, the London Fire Brigade and the Metropolitan Police to the best of the Claimant's knowledge, of the layout, size and engineering used for the tunnel or tunnels (including the composition of the walls, floors and ceiling of the tunnel or tunnels); and
 - (c) cooperate with the Defendant, the Health and Safety Executive, the London Fire Brigade and the Metropolitan Police to leave the tunnel safely and not return and to allow others to do the same.
11. The Steyn order also made provision for alternative service on the first defendant. It was served on the first defendant in accordance with its terms at 10 a.m. on 11th February 2021 and he was also regularly reminded of its terms in the course of the attempts to remove him from the tunnelling system which followed.
12. On 12th February 2021, the claimant issued its claim for possession and trespass against the occupiers of the camp, including the defendants, and in that context the matter came before Mr. Justice Mann on 22nd February 2021. By now the first defendant and some others had been removed from the tunnels. Mr. Justice Mann made an order which

applied to the second to fifth defendants in the present application. The material parts of that order forbade them from remaining on the land and required them to cooperate with the claimant, the Health and Safety Executive, the London Fire Brigade and the Metropolitan Police to leave the tunnel safely and allow others to do the same. The Mann order also made provision for alternative service on the second to fifth defendants. It was served in accordance with its terms at lunchtime on 23rd February 2021.

13. The breaches of the Steyn and the Mann orders which are alleged against the defendants by the claimant in its application for committal are as follows:

- a) That the first defendant refused to leave the tunnelling system until 10.25 a.m. on 22nd February 2021, therefore just over eleven days after he was served with the Steyn order. He failed to provide the information which he had been ordered to provide. He continued to tunnel and to assist others with tunnelling. He obstructed attempts to remove him and he interfered with the efforts of CST officers to remove other tunnellers. He also threw soil in the face of one CST officer, stole the phone of another and his actions caused one of the tunnels to collapse.
- b) In the case of the second to fourth defendants, they refused to leave the tunnelling system until 6.57 a.m. on 25th February 2021, so 42 hours after they were served with the Mann order. In the case of the fifth defendant, they refused to leave until 9.05 a.m. on 26th February 2021, so 68 hours after they were served. The second to fifth defendants refused to provide the information which they had been ordered to provide. They continued to engage in tunnelling and in the case of the second defendant, he obstructed CST officers who were attempting to remove him and other tunnellers.

14. The actions of the defendants in failing to comply with the Steyn and the Mann orders immediately, and in obstructing efforts to clear the tunnels as rapidly and safely as possible, are said by the claimant to have endangered their own lives and the lives of others, including the CST officers who were charged with the task of removing them. They also led to additional public resources being wasted, giving the need for the police and emergency services to be available when there were other very pressing calls on their time, including the COVID-19 pandemic. Further particulars of the defendants' actions are provided in a schedule to the claimant's statement of case.

15. The defendants admit that they acted in contempt of court by failing to co-operate with the claimant and emergency services to leave the tunnels, by continuing to engage in tunnelling and by failing to provide the information which they were ordered to provide. They have also agreed with the claimant the terms of a draft consent order which sets out the basis on which the claimant would consent to the dismissal of its application to commit, with no order as to costs.

16. The terms of the order include:

- a) Admissions by the defendants that they acted in contempt of court;
- b) A provision for them to apologise to the court;

- c) Undertakings, which would bind them until 31st December 2024, in summary:
 - i) To comply with any future anti-trespass injunctions made in connection with the HS2 project against persons unknown, as well as any existing injunctions of this sort;
 - ii) Not to obstruct or interfere with the claimant's operations in various specified ways; and
 - iii) Not to train others to engage in the activities in which they themselves have undertaken not to engage.

17. The terms of the proposed consent order suggest a highly pragmatic approach on the part of the claimant having regard to its particular interests and priorities. This is understandable. The court also generally encourages the parties to resolve their differences by agreement if they can. However, the interests and priorities of the parties are not the only relevant consideration in this type of application, given that the court is seized of the fact that its orders were breached by the defendants. Although committal applications for breach of an order are brought by the beneficiary of the order which was breached, and although that party's views as to whether a proposed outcome is satisfactory in terms of ensuring compliance with the order in question and redress for any harm which has been done are relevant, there is also a strong public interest in the court deterring disobedience to its orders and upholding the rule of law. As the Divisional Court put it in *National Highways Limited v Ana Heyatawin & Ors* [2021] EWHC 3078 (QB):

“In our democratic society all citizens are equal under the law and all are subject to the law. It is integral to the rule of law and to the fair and peaceful resolution of disputes first that orders made by the court must be obeyed unless and until they are set aside or subject to successful challenge on appeal, and secondly that a mechanism exists to enforce orders made by the court against those who breach them. In this jurisdiction that mechanism is provided by the law of contempt”.

18. At paragraph 45 the court said:

“The essence of civil contempt is disobedience to a court order. It is not only the applicant but the court and, we would add, the public which has an interest in deterring disobedience to its orders and in upholding the rule of law”.

19. It is for this reason that the court has jurisdiction to commit a person of its own motion, even if no application is made by the beneficiary of an order (see CPR rule 81.6) and the permission of the court is required to discontinue a committal application (see paragraph 16.3 of Practice Direction 81).

20. The breaches of the relevant orders by all of the defendants in the present case, and especially the first defendant, were particularly serious. They were well aware of the orders which had been made and, in the case of the first defendant, had the benefit of competent legal advice throughout. What made their failures to comply so serious was the fact that they put their lives and the lives of others at a very high degree of risk. It was extremely dangerous for anyone to be down there in makeshift and poorly-

constructed tunnels but they also subjected the CST officers to that risk. Particularly in the case of the first and second defendants, they also heightened that risk by reckless behaviour in obstructing attempts to remove them from the network of tunnels.

21. Initially, I was therefore very doubtful that I should approve the proposed consent order and invited counsel to explain why I should do so. They then addressed arguments to me which I have accepted and which are reflected in the reasons which follow.
22. In coming to a view about whether I should approve the proposed order, I have had regard to the guidance in *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, at paragraphs 9 to 11 in particular, and in *National Highways Limited v Ana Heyatawin & Ors*, at paragraphs 48 to 53, about the approach to determining the sanction for contempt of court where the contempt involves breach of a court order and takes place as part of a protest or direct action in relation to issues of public interest. I have also had regard to the following considerations.
 - i) The narrow issue with which I am concerned in this application is the fact that the defendants have breached the orders to which I have referred, the degree of culpability on their part in doing so and the particular harm which this caused. The wider picture of trespass, disruption and cost to the claimant and the public between September 2020 and February 2021 forms an important part of the context for my decision but they are primarily the subject matter of the underlying proceedings in which the orders were made. It is a matter for the claimant and the police to decide what steps they wish to take in relation to that wider picture.
 - ii) The breaches by the defendants were, in my view, highly culpable given the danger to which they exposed themselves and others.
 - iii) They also caused significant harm in terms of the additional disruption and cost to the public. However, the essential nature of the breaches was a failure to comply with the orders immediately and voluntarily. This meant that the disruption lasted longer than it should have and the cost and risk to safety was increased.
 - iv) There was substantial compliance with the orders within a relatively short time - within 48 hours in the case of the second to fourth defendants at least - and there has now been compliance by all defendants save for aspects of the orders which are now otiose.
 - v) The claimant was also slow to proceed with the application for committal. The breaches occurred in February 2021, as I have noted, and the application was not made until 7th December 2021.
 - vi) No evidence of similar activities by the defendants (inaudible) since February 2021 has been put before the court;
 - vii) Indeed, the first defendant admitted breaches of an earlier order and gave undertakings, in similar terms to the present ones, which formed part of a consent order made by Mr. Justice Marcus Smith on 10th November 2021 albeit that order relates to breaches of an order by Mrs. Justice Andrews, as she then

was, to prevent him from trespassing on other land in connection with HS2. Mr. Fry confirmed that there is no evidence that the first defendant has in any way failed to comply with the undertakings which he gave on that occasion and that in turn gives me a degree of optimism that the undertakings provided to the court will be complied with.

- viii) The defendants have each admitted that they breached the relevant orders and have apologised to the court for doing so. I also accept that their apologies were sincere and that they accept that they should have complied with relevant orders and should not have put the safety of others at risk in the way that they did.
 - ix) The defendants have also given clear undertakings that they will comply with future court orders in connection with HS2 which prohibit trespass on land, as well as wider undertakings not to disrupt the claimant's operations in the future. These undertakings will apply for a period of nearly three years, as I have said. The undertakings are equivalent to a court order and are underpinned by the risk of imprisonment for breach. As Mr. James-Matthews pointed out, the fact that the defendants have given these undertakings precludes arguments by them, pursuant to Articles 10 and 11 of the European Convention on Human Rights, that a degree of future disruption to the claimant's activities by them may be permissible: see *DPP v Zeigler* [2021] 3 WLR 179. The undertakings he submitted, and I accept, therefore contain a measure of punishment.
 - x) The claimant, which is in a good position to judge given its dealings with protestors over the past several months, evidently considers that these undertakings are sufficiently likely to be effective for the proposed consent order to be a more beneficial outcome from its point of view than the outcome if it were to proceed with the application to commit.
 - xi) I also accept, looking at the matter from the point of view of the interests of the public, that provided the undertakings are complied with the consent order will potentially prevent a good deal of further litigation, wasted court time and public expense.
23. I am, therefore, persuaded that I should approve the draft consent order effectively on the basis that it constitutes a final warning to the defendants, but I make clear that I do so with considerable reluctance. Were it not for the fact that the claimant is content with the proposed order, and therefore no longer wishes to proceed, it is highly likely that the defendants would be facing custodial sentences. If any of them breaches the undertakings which they have given to the court they should expect committal to prison to be the consequence. Moreover, in deciding the sentence to be imposed on them, a future court will take into account the circumstances in which the consent order was made in this application.
24. With this in mind, I will direct that this judgment be transcribed at the expense of the claimant so that it will be available to any judge who is called upon to deal with any breaches of the undertakings which have been given.

For proceedings, see separate transcript

This judgment has been approved by Linden J.