IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2023-000569**

ON APPEAL FROM
THE HIGH COURT OF JUSTICE **Claim No. KB 2022 003098**
KING'S BENCH DIVISION
(THE HONOURABLE MR JUSTICE KERR)

B E T W E E N:-

HIS MAJESTY'S SOLICITOR GENERAL
Claimant/Respondent

AND

EDWARD WILLIAM ELLIS
Defendant/Appellant

RESPONDENT'S SKELETON ARGUMENT
28 APRIL 2023

References in the form ***[CB/-/-] [PB/-/-]*** *and* ***[SB/-/-]*** *are to tab and page number in respectively, the Core Bundle prepared by the Respondent for this appeal; the Permission Bundle used below and the Supplementary Bundle used below. References to the paragraphs in the judgment of Kerr J are in the form* ***J****.*

Suggested pre-reading:

- *Order of Kerr J* **[CB/3/18]**
- *Judgment of Kerr J* [**CB/4/20**]

- *Grounds of Appeal* **[CB/2/14]**
- *Part 8 Claim Form* **[PB/1/3]**
- *Grounds of committal* **[PB/1/6]**
- *Affidavit of Joanne Arnold* **[PB/2/9]**
- *Order extending the GCRO* **[PB/3/90]**
- *The "Hastunc Appellant's Notice"* **[PB/3/141-151]**
- *The "Sood Appellant's Notice* **[PB/3/152-158]]**
- *Skeletons*

Pre-reading time estimate: 2 ½ hrs

Hearing time estimate: ½ day

Introduction

1. On 08.03.23, Kerr J found that the Appellant (**A**) had procured the making of two applications in breach of a general civil restraint order (**GCRO**) and had thereby committed contempt of court. He committed the A to prison for 6 months for these contempts and activated in part a suspended order of committal made by Cutts J for similar breaches, resulting in an overall penalty of 12 months imprisonment which, he ordered, was to commence on the first working day after 08.05.23 (so, Tuesday 09.05.23). He also ordered the A to pay the Respondent's (**R**) costs, not to exceed £10,000. In the course of the hearing on 08.03.23, Kerr J rejected the R's ad hoc applications that he should recuse himself.

2. The Grounds of Appeal are not easy to follow but the R assumes that the A seeks to challenge (a) the two findings of contempt, including on the basis that Kerr J should have recused himself; (b) penalty, including Kerr J's decision to activate in part the suspended order for committal; and (c) costs.

3. This skeleton is structured as follows:

A. Background and chronology
B. The hearing before Kerr J, his judgment and order
C. Liability for contempt - legal principles

D. Liability for contempt - submissions
E. Recusal
F. Penalty – legal principles
G. Penalty - submissions
H. Costs – principles
I. Costs – legal submissions

A. BACKGROUND AND CHRONOLOGY

4. May J gave a pithy account of the A's beliefs and activities in her judgment in February 2018 at [1]-[2] & [14]-[15] **[PB/3/30 @ 31 & 33]**. In brief summary, A "recruits" (his word) vulnerable individuals whom he uses to issue nonsensical claims and applications which are then routinely struck out or dismissed as totally without merit. He believes that doing this provides him with evidence that the courts are corrupt. He believes he has been tasked by a "royal commission" to obtain such evidence, and is devoted to doing so on a huge scale.

5. The Court has made orders designed to control the A on a number of occasions, with limited deterrent effect. The salient events in the chronology are these:

08.03.16 Senior Master Fontaine makes an order providing that D *"is restrained from issuing claims on behalf of others or from assisting others to bring claims in contravention of the Legal Services Act 2007"* ('the March 2016 Order') **[PB/3/325]**

22.02.18 On an application by the Ministry of Justice ('MOJ'), May J finds D in contempt for 7 breaches of the March 2016 Order and makes a committal order for 3 months' imprisonment, suspended for 1 year. She also makes a general civil restraint order ('GCRO') providing that, for a period of 2 years, the D *"be restrained from issuing any claim or making any application in* [the High Court and any county court] *without first obtaining the permission of* [May J or another High Court Judge or deputy Judge]". The GCRO further provides that *"the reference to issuing any claim or making any application extends to*

procuring any other person to issue any claim or make any application” **[PB/3/47]**

12.06.18 The CA dismisses D’s appeal against the committal order and refuses permission to appeal against the GCRO **[PB/3/76]**

12.02.20 May J makes an order extending the GCRO for a further 2 years (so, until 21.02.22). It is slightly amended under the slip rule on 17.02.20 **[PB/3/90]**

18.12.20 Cutts J finds D in contempt for 9 breaches of the GCRO. Sentencing is adjourned;

16.04.21 Cutts J makes a committal order for 9 months imprisonment, suspended for 2 years. **[PB/3/135]**

05.11.21 An application for permission to appeal is filed in the High Court in the case of *Eastnow Estates Ltd v Mr Ediz Hastunc* (‘the Hastunc Appellant’s Notice’) **[PB/3/141-151]]**. It bears the hallmarks of the D’s drafting. This is the first alleged breach of the GCRO (as extended) relied upon in the contempt application heard by Kerr J.

07.01.22 An application for permission to appeal is filed in the High Court in the case of *Mr Vishal Sood v Mr Sham Pal Sood* (‘the Sood Appellant’s Notice’) **[PB/3/152-158]]**. It too bears the hallmarks of the D’s drafting. This is the second alleged breach of the GCRO (as extended) relied upon in the contempt application heard by Kerr J.

16.08.22 Eyre J further extends the GCRO **[SB/1/5]**

20.09.22 The present contempt application is issued **[PB/1/3]**. It is served personally on the A on 10.10.22. A certificate of service is at **[PB/4/306]**.

23.11.22 Soole J grants permission for the application to proceed and gives directions: He also dispenses with the requirement for personal service of the GCRO (the

A having been aware of its terms at all material times): Order at **[SB/2/7]**; judgment at **[SB/3/9]**.

23.02.23 The CA refuses permission to appeal against the Order of Soole J: **[SB/5/21]**.

08.03.23 Hearing before Kerr J

B. THE HEARING BEFORE KERR J, HIS JUDGMENT AND ORDER

6. The A represented himself at the hearing. As the Judgment records (**J16**), he had been advised of his right to legal aid but (consistent with his stance on previous occasions) did not avail himself. At the outset, the A objected unsuccessfully to the hearing going ahead (**J2**), and he made a number of impromptu recusal applications in the course of the day that were rejected (**J3**). Joanne Arnold, the author of the affidavit relied upon by the R, was tendered for cross-examination but the A's questioning did not appear to be pertinent to the issues in dispute.

7. Kerr J gave an extempore judgment on liability. The judgment needs to be read with that in mind. There was then discussion as to whether he should deal with penalty immediately or adjourn for medical evidence. Kerr J decided that this would be futile given the A's indication that he could not/would not obtain such evidence (see summary of non-transcribed part of hearing, beneath **J50**).

8. Kerr J dealt with penalty at **J51-J72**. He postponed the commencement of the order for committal until 08.05.23 or the first working day thereafter. This was out of a concern that, if he were imprisoned immediately, the A would struggle to exercise his right of appeal.

C. LIABILITY FOR CONTEMPT – LEGAL PRINCIPLES

Civil or criminal contempt?

9. Kerr J accepted the R's invitation to treat the case as one of criminal contempt on the basis that breach of a GCRO interferes with the administration of justice generally and concerns more than a party's non-compliance with an order made for the benefit of the opposing party : **J23-J29**. That is the more favourable analysis from the A's point of view since, at the very least, it imposes a threshold of seriousness that is not a feature of

civil contempt: *Director of Serious Fraud Office v O'Brien* [2014] AC 1246 at [39]. Arguably (though not on the R's case) it also imposes a higher *mens rea* standard.

10. Since the analysis cannot affect the outcome of this appeal in a manner detrimental to the A, it is suggested that the CA should defer consideration of this issue for the time being.

Mens rea

11. The R submitted, and Kerr J appeared to accept (**J31**) that the applicable *mens rea* for a criminal contempt of this nature consists in (a) knowledge of the terms of the GCRO and (b) an intentional act which, as a matter of fact breaches those terms (whether or not the alleged contemner knew/believed/intended that their conduct would breach the terms).

12. That is a lower mens rea standard than that which is often identified as applicable in criminal contempts, namely a specific intention to interfere with the administration of justice.

13. Support for the lower standard is found in *Solicitor General v Cox* [2016] 2 Cr. App. R 15 and *Attorney General v Crosland* [2021] 4 WLR 103. In *Cox* a Divisional Court held at [66] that "*The circumstances in which contempts of court arise are too varied, in our judgment, for one mens rea to be applicable to all forms of contempt. Nor is that the law.* […]" and went on to hold that, in the case of *"acts which fall into the broad category of contempt in the face of the court or contempts closely related to such contempts"* (*ibid*) there is no requirement for specific intent where the conduct is a criminal offence or contravenes an order of the Court of which the contemnor knows: [69]-[74]. In *Crosland* (which concerned breach of the embargo on publication of draft judgments) the Supreme Court broadened this principle so that it is no longer confined to contempts in the face or similar: see [28][1].

14. In any event, as Kerr J acknowledged at **J32**, a specific intent to interfere with the administration of justice (if that is what is required) can be inferred from the

[1] There was an appeal to a 5-member panel of the Supreme Court ([2022] 1 WLR 367) but the first-instance panel's decision on this point was not challenged.

circumstances[2] and it makes no difference that the alleged contemnor may have been seeking what he believed to be a just outcome[3].

D. LIABILITY FOR CONTEMPT - SUBMISSIONS

15. The GCRO **[PB/3/90]** provides that the A *"be restrained from issuing any claim or making any application ..."* but also *"procuring any other person to issue any claim or make any application"*. It then sets out in para 3 a number of features typical of the A's drafting which, if present, will result in a claim/application being deemed as one made or procured by the A. This is to assist court staff to recognise such claims/applications and then either decline to issue the document or apply the automatic striking out provisions in CPR PD 3C, para 4.3. Evidently, the procedure does not always work, since the Court issued sealed copies of both the Hastunc and Sood Appellant's Notices and they had to be dealt with by judges.

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[2] *Attorney General v Newspaper Publishing Plc* [1988] Ch 333**,** 374 (Sir John Donaldson MR): *"Such an intent need not be expressly avowed or admitted, but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct. Nor need it be the sole intention of the contemnor. An intent is to be distinguished from motive or desire…"*[2]; *Attorney General v Newspaper Publishing Plc* [1989] 1 FSR 457, 487 (Morritt J): "*I have no doubt that it was the intention of Mr. Neil to interfere in the administration of justice by publishing extracts from Spycatcher. He did not wish to be in contempt of court and because there was no injunction against the Sunday Times he believed genuinely, but wrongly, that he could not be in contempt of court. But, for the reasons that I have given, that cannot in the circumstances be a defence.*"

[3] see e.g. *Attorney General's Reference (No.1 of 2002)* [2002] EWCA Crim 2392, where (in a case concerning the offence of perverting the course of justice) a police officer had prepared a false statement for the victim of a burglary in order to avoid having to call an elderly and reluctant witness to give the necessary evidence. See further *Connolly v Dale* [1996] QB 120, where a police officer was held in contempt when, seeking to ensure the integrity of a possible ID parade, he prevented the solicitor for the accused from showing the accused's photo to third parties in an attempt to track down alibi witnesses.

16. The R did not rely on the "deeming" provision in para 3 of the GCRO to prove its case that the A made or procured the two applications in dispute. The R accepted that it must satisfy the Court to the criminal standard that the A did in fact make or procure each of these applications. The presence of features described in para 3 of the GCRO were however highly pertinent to that task.

17. Also, the R did not rely solely on indications that the A had drafted the two appellants' notices. It is accepted that this in itself would have been insufficient to prove that the A made or procured the applications. Rather, the R's case was that, whoever actually made the applications, in the sense of filing them with the court, the A at the very least "procured" them to be made: i.e. he persuaded or caused someone to make the application; produced that result by his endeavours or, more colloquially, put someone up to it[4]. Kerr J was aware of and accepted this case: see **J34-J36** & **J58-J59**.

18. Kerr J was right to find that the A was the drafter of both documents (**J42-J48**) and right to find that the A had procured the applications to be made.

19. As to the Hastunc Appellant's Notice **[PB/3/141-151]**;

    (1) The Notice was sealed and issued by the High Court;

    (2) It bears many of the hallmarks of D's drafting as noted by May J in her judgment and listed in para 3 of the GCRO (see in particular the attachment at **[PB/3/151]**);

    (3) It does not assist Mr Hastunc at all. The Order appealed against was a simple adjournment decision which could not meaningfully have been challenged on appeal (see the Order of Roth J dismissing the application as totally without merit: [**PB/3/267]**). The Notice does not address the Order under challenge at all;

    (4) Instead, the Notice is used to ventilate the D's usual complaints of corruption etc

20. As to the Sood Appellant's Notice **[PB/3/152-162]**

[4] See the Judgment of Cutts J at [22]/

(1) The same points about the drafting style arise;

(2) The Notice does not properly identify the Order appealed against, nor what is said to be wrong with it. Again, the Notice would appear to be simply a vehicle for the D to advance his usual complaints rather than providing any material assistance to Mr Sood.

21. Kerr J was further correct to decide (**J49**) that the threshold of seriousness was crossed, especially when viewed in the context of the A's past conduct to like effect. In the case of the Hastunc Appellant's Notice, a High Court Judge had to spend time considering it and writing a notice declaring it to be totally without merit. At the time this contempt application was filed, the Sood Appellant's Notice was due to be placed before a Judge: Arnold [32] **[PB/2/19]**.

22. The A did not dispute that he was aware of the terms of the GCRO at all material times. If it is necessary to prove that he had a specific intention to interfere with the administration of justice, then that can be inferred. The purpose of his "mass remedy process" is to overwhelm the courts with hopeless applications so as to obtain orders which, in his view, demonstrate corruption. That is self-evidently an intention to interfere with the ordinary functioning of the courts.

E. RECUSAL

23. The principles will be well known to the Court: a judge should only recuse themselves if a fair minded and informed observer, aware of all the facts, would conclude that there was a real possibility of bias.

24. At the hearing before Kerr J, the A made an initial recusal application on the mistaken basis that it was Kerr J who had extended the GCRO in August 2022 (in fact, it was Eyre J). He raised recusal at further points simply, it seems, because he was dissatisfied about how Kerr J was managing the hearing. The Grounds do not seem to identify any arguable case on apparent bias.

F. PENALTY – LEGAL PRINCIPLES

25. The available penalties include imprisonment of up to 2 years[5] (with a power to suspend[6]) and an unlimited fine[7]. Community sentences are not available[8].

26. The purpose of imposing a sanction for contempt arising out of breach of an order is to "*punish the breach, ensure compliance with court orders, and rehabilitate the person in contempt*": *National Highways Ltd v Buse* [2021] EWHC 3404 (Divisional Court).

27. The correct approach was set out by the Supreme Court in *Crosland* at [44]:

[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 57–71 . 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.*

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[5] CCA 1981 s14
[6] CPR 81.9
[7] See AES 14-118.
[8] AES 14-114 to 14-117

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.

28. There is a more extensive review of authorities containing guidance on sentencing in *Coveris Flexibles UK Ltd v Brears* [2022] EWHC 1594 at [30]-[39] but the cases all converge and it is unlikely that the Court will need to look beyond the principles set out in *Crosland*.

29. The only decision on penalty for breach of a GCRO prior to Kerr J's decision was the decision of Cutts J's decision concerning this A and the same GCRO. 9 breaches were proven and she imposed a penalty of 9 months imprisonment, suspended for 2 years. Comparison with penalties for contempt in other situations is unlikely to be instructive.

Activation of suspended sentence

30. The present breaches occurred during the operational period of the suspended committal order imposed by Cutts J. In those circumstances, the Court had a discretion to activate the suspended committal order in whole or in part, to impose a fine, or no penalty at all: *In Re W* [1969] Ch 50 at 56. Rather than activating, the Court may treat the breach of the suspended committal order as an aggravating feature when punishing for the new contempts: *Al-Ko Kober Ltd v Sambhi* [2018] EWHC 3523 at [18].

31. It may assist to look, by analogy, at the factors identified in the Sentencing Council Guidelines on breach of a suspended sentence order[9]. Note though that, in the criminal law, there is a statutory presumption in favour of activation[10]. There is no equivalent presumption at common law in the context of contempt.

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[9] Breach of a suspended sentence order – Sentencing (sentencingcouncil.org.uk)
[10] Sentencing Act 2020, Schedule 16, paras 13-14.

Postponing the commencement of an order of committal

32. There appears to be no authority on this, but it is submitted that the Court has a discretion to direct that an order of committal take effect from a later date than the date that it is made. Note that in crime, there is statutory recognition of a discretion to postpone the commencement of a sentence (with some limitations): Sentencing Act 2020, s384.

Appeals against penalty

33. An appeal court will intervene in the normal way if there has been some error of principle in relation to penalty, but there is limited scope for challenging a decision on penalty solely on the grounds that it was excessive. Imposing a penalty involves an exercise of judgment which is best made by the judge at first instance: *Breen v Esso Petroleum Company Ltd* [2022] EWCA Civ 1405, [16]-[17].

G. PENALTY – SUBMISSIONS

Penalty for the two breaches

34. Kerr J properly identified matters going to culpability and harm and balanced relevant aggravating and mitigating factors: **J52-66**. He rightly attached considerable weight to the A's history of similar behaviour: **J65**

35. At **J64** Kerr J mentioned the A's likely inability to pay a fine. If that were the reason that he found A's conduct to have passed the custody threshold, then it would be an impermissible one. But the other points Kerr J makes amply demonstrated the justification for a custodial penalty.

36. Accordingly, Kerr J's decision to make a committal order of 6 months imprisonment (**J67**) was not vitiated by any error of principle, nor was it so excessive as to justify intervention by the CA.

37. Given the A's history of disobedience to court orders, including during the currency of a suspended committal order, there was no scope for the order to be suspended.

Activation of the suspended committal order of Cutts J

38. When imposing the penalty for the 2 instant breaches, Kerr J was careful to disregard, as a potential aggravating feature, the fact that they were committed during the currency of Cutts

J's suspended committal order: **J65**. It was therefore open to him, in his discretion, to activate part or all of that suspended order, without engaging in any double counting.

39. His decision to activate 2/3 of the suspended committal order (6 months out of a total order of 9 months) was well within the range of decisions that a reasonable judge could have made and the CA should not interfere. The proven breaches occurred, respectively, 6 ½ and 8 ½ months into the 2 year operative period of the suspended order and were of much the same type and gravity as the breaches that had led to that order being made.

Postponing commencement of the custodial penalty

40. Kerr J's decision to postpone for 2 months the commencement of the committal order was innovative but unobjectionable. His concern was that the A, if immediately imprisoned, would struggle to exercise his (unqualified) right of appeal. In some circumstances, the High Court may grant bail pending appeal, but not where the appeal lies to the CA: see RSC Order 109, r3(1). The CA itself may grant bail pending appeal (*ibid* r4) but, while in prison, the A would have faced the same difficulties applying to the CA for bail as he would have faced in filing his substantive appeal. Kerr J's solution was a pragmatic one in the circumstances and should be upheld.

H. COSTS – LEGAL PRINCIPLES

41. The principles were confirmed by the Supreme Court in its costs judgment in *Crosland* [2021] UKSC 15 at [8]-[10][11]: in contempt proceedings, costs normally follow the event but the Court will seek to make an order that is fair, just and reasonable in all the circumstances. The means of the contemnor may be taken into account.

42. Costs decisions are, classically, a matter that an appellate court will be reluctant to interfere with unless there has been some identifiable error of principle.

I. COSTS – SUBMISSIONS

43. Kerr J's ruling on costs is not transcribed. However, his order, that the A should pay the R's costs to be assessed if not agreed, subject to a cap of £10,000 was well within the

[11] Confirmed on appeal [2022] 1 WLR 367 at [92]

boundaries of his discretion. He had noted, at **J64** his impression that the A did not have access to substantial funds.

Conclusion

44. For these reasons, the Court is respectfully invited to dismiss the appeal and confirm the Order of Kerr J.

28 April 2023

Aidan Eardley KC

5RB