Neutral Citation Number: [2019] EWCA Civ 55

Case No: B2/2018/2707

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHELMSFORD COUNTY AND FAMILY COURT
HHJ MURFIT
E00CM832

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2019

Before:

LORD JUSTICE GREEN
and
LADY JUSTICE NICOLA DAVIES DBE

- -

Between:

ROLAND DOUHERTY	**Appellant**
- and -	
THE CHIEF CONSTABLE OF ESSEX POLICE	**Respondent**

- -
- -

Stephen Fidler (Solicitor Advocate) (instructed by **Stephen Fidler & Co**) for the **Appellant**
Thom Dyke (instructed by **Essex Police Legal Department**) for the **Respondent**

Hearing date: 22 January 2019

- -

Approved Judgment

Lady Justice Nicola Davies DBE:

1. This is an appeal as of right pursuant to section 13 of the Administration of Justice Act 1960 ("the 1960 Act") from the order made by HHJ Murfit sitting in the County Court at Chelmsford on 2 October 2018 committing the appellant to prison for 28 days suspended for a period of 12 months for breach of an injunction granted by HHJ Lochrane on 25 September 2018.

Background

2. By an application dated 13 September 2018 the respondent applied to Chelmsford County Court for a "Gang Injunction" pursuant to section 34 of the Policing and Crime Act 2009 in respect of the appellant and four other persons. The application was supported by a police witness statement which identified the grounds for asserting that the appellant and others had engaged in, encouraged or assisted, gang-related violence and drug dealing activity and the need for each to be made subject to an injunction. The appellant was not legally represented at the September hearing. He arrived at court after the injunction had been granted. The appellant was invited by the judge to make representations, this he did, however the judge confirmed the terms of the order he had previously made.

3. The order contains no less than 26 conditions, some of which are broad in their drafting which does not assist interpretation nor understanding of the ambit of the relevant condition. They include the following:

> "2. Not to Enter Grays Town Park…
>
> 3. Not to Enter Grays Town Centre…
>
> …
>
> 7. (Not to) Congregate, join or remain in a public place in a group of two or more (with one being himself) where the group is behaving in a manner causing or likely to cause any person to feel intimidated or fear for their safety.
>
> …
>
> 9. (Not to) Be in possession of any knife or bladed article irrespective of length of blade in a public place (no matter what type of knife).
>
> 10. (Not to) Be in possession of any Controlled Drugs or paraphernalia used to possess, sell or manufacture controlled drugs i.e. cannabis, grinders, deal bags.
>
> ...
>
> 13. (Not to) Wear any article of clothing with an attached hood (whether detachable or not) in a public place or a place to which the public have access unless in inclement weather i.e. raining.

> 14. (Not to) Wear any article or item of clothing (for example a hood, scarf or balaclava) covering his face or any part of his face in a public place or a place to which the public have access unless in inclement weather i.e. raining.
>
> …
>
> 17. (Not to) Own, use or have with him any mobile telephone or telephone SIM card the phone number and IMEI number for which has not been disclosed to the Chief Constable of Essex Police or appropriate Police Force for the area in which he resides.
>
> 18. (Not to) Fail to notify the Chief Constable of Essex Police or appropriate Police Force for the area in which he resides immediately or as soon as reasonably practicable with any change or proposed change to his mobile phone number(s)…"

The order contained a provision which permitted the appellant to enter Grays Town Centre for the purpose of attending college with the proviso that he was to leave within a specified time.

4. On 1 October 2018 at 18:30 hours DC Phillips was on duty in Grays Town Centre when he saw the appellant in the company of two males. The appellant was wearing a hooded top underneath a jacket which also had a hood. DC Phillips stopped the appellant and asked him what he was doing. The appellant said that he had finished college at 17:00 hours. DC Phillips thought that it was unreasonable for the appellant to be in the area 90 minutes after he had finished college. He arrested the appellant for breaching conditions 3 and 14 of the injunction.

5. The appellant was taken to Grays Police Station, he was strip searched and a lock knife was found concealed in his waistband. A quantity of cannabis in a small bag and two other deal bags were found in his possession. DC Phillips further arrested and cautioned the appellant for possession of an offensive weapon and possession of cannabis. The appellant was also found to be in possession of two mobile phones. Contrary to conditions 17 and 18 of the injunction, the appellant had not informed the police of his use of these items.

6. At the police station the appellant was given access to independent legal advice and was interviewed under caution by DC Phillips in the company of his solicitor at 21:10 hours. The solicitor was Christopher Holt of THB Solicitors. During the interview the appellant admitted to being in possession of the knife and the cannabis. He was subsequently charged with possession of a bladed article in a public place and possession of a Class B controlled drug. On 12 November 2018 the appellant attended Basildon Magistrates' Court in respect of the criminal charges and entered a guilty plea to the knife offence. The cannabis charge was sent to the Crown Court. Subsequent to this the CPS made the decision not to proceed with the cannabis charge.

7. An email and statement from Christopher Holt have been admitted into evidence by the court. Mr Holt confirms that at the police interview on 1 October 2018 the appellant was questioned in respect of the criminal offences. Mr Holt was aware of the alleged

breaches of a court order, no questions were asked in the interview about the alleged breaches. Following the interview the police confirmed that the appellant would be charged with the two criminal offences. He was granted police bail in respect of the criminal matters but was detained in custody overnight to appear at Chelmsford County Court on 2 October 2018 in relation to the breach of the court order. Mr Holt states:

> "I did not arrange representation for Mr Douherty at Chelmsford County Court on 2 October 2018, as I was under the impression that these proceedings were a civil matter, and not a criminal matter, and my firm does not have a civil contract in place with the LAA. I was informed by the police that the court order obtained at Chelmsford County Court was a standalone injunction. Under the circumstances, I did not believe that a breach of the Order would attract public funding at such short notice under any 'tolerance' pursuant to the Criminal Contract, and as such did not arrange representation on 2 October 2018."

8. In his witness statement prepared for these proceedings the appellant states that he had expected the duty solicitor, i.e. Mr Holt, to arrange for him to be represented in the county court especially as he had signed legal aid forms. His statement continues:

> "3. At no stage was I told by the solicitor that I would not be represented in the county court, especially as I thought that this was a criminal matter and the police kept me in custody overnight. I have never been in custody overnight before and am not familiar with the court system. I am aged 18 years old. At the time of my arrest I had no previous convictions.
>
> 4. When I arrived at Chelmsford County Court I was surprised that there was no legal representation for me and the only solicitor that approached me was Fiona Philpott who said that she was representing the Essex Police. She did not provide to me any copy statements or application but rather they were only in front of me when I went into the witness box. I did not have the opportunity of reading them of considering them in advance. I now understand from my solicitor that it is surprising that I was not given any paper work in advance.
>
> 5. I was approached by Fiona Philpott who asked me whether I was represented. I told her that there was no solicitor present and she asked whether I wished to be represented. I indicated that if there was no solicitor I would have to go ahead on my own.
>
> 6. At no stage did Fiona Philpott explain to me that I could have the benefit of legal aid and that it would mean adjourning the case. In fact, when the Judge explained to me the position about legal aid, I felt that I had no choice but to proceed. I really felt that I was being placed in an awkward position in having to represent myself. I am not good at explaining myself and would

> certainly have wished to have had a solicitor speak to me and explain my rights.
>
> 7. I should also say that I was not aware that I did not have to give evidence, and this was not explained to me at any stage by Fiona Philpott or the Judge. Having been in custody overnight, I felt under some pressure and, have to say, that if I am asked by a Judge to do something, such as come into the witness box and give evidence, I feel under an obligation to comply."

9. Fiona Philpott is a solicitor employed by the respondent and had conduct of the application made by the Chief Constable for the injunction on 25 September 2018 by HHJ Lochrane. In a statement admitted into evidence by this court, she states that the appellant was handed a written copy of the order before he left court on 25 September 2018. On 2 October Ms Philpott was notified by the county court of the fact that the appellant had been arrested for breach of the injunction and was on his way to court. Ms Philpott made enquiries and spoke to Mr Holt. Mr Holt informed her that he would not be representing the appellant as legal aid was not available. Ms Philpott believed legal aid was available. Mr Holt maintained that his firm did not have the relevant legal aid contract.

10. Ms Philpott prepared a hearing bundle which comprised the injunction order with power of arrest, the breach of injunction form (MG8) and the statement of DC Phillips dated 1 October 2018. At court she introduced herself to the appellant and states:

> "I asked him whether he had legal representation and he said that he did not. I explained that he was at risk of a custodial sentence and that it was in his interest to have legal representation. I explained that if he wanted the court could adjourn the case so that he could get legal representation. The appellant said he did not want a solicitor and that he wanted to speak for himself. I was concerned to ensure he fully understood the risk and so I explained the position again and asked him again. The appellant confirmed again that he did not want a solicitor and that he would explain himself to the court.
>
> I then handed a copy of the hearing bundle to the appellant … I then took the appellant through every document in the bundle explaining what it was and what it said. I explained the procedure and asked the appellant if he had any questions. The appellant did not ask me any questions and I gave the appellant a copy of the bundle to give him a chance to read through it on his own and I left the room."

Thereafter they were called into court.

11. A transcript of the court hearing has been prepared, the hearing commenced at 11:09 and ended at 11:27. Ms Philpott informed the judge that she had spoken to the appellant's legal representative who had attended the police station with him the previous evening and that the legal representative had said he was not in a position to apply for legal aid for the appellant for these matters. The hearing continued as follows:

> "JUDGE MURFIT: Usually in civil committal proceedings the eligibility for Legal Aid will be similar to the eligibility for Legal Aid in criminal proceedings, but, as you may imagine, there are relatively few solicitors who handle civil Legal Aid so it may well be that the firm that he instructs in criminal matters is unfamiliar with civil procedure and it may be that he can refer him on to somebody who is more familiar with that.
>
> MISS PHILPOTT: Indeed, your Honour, and I have spoken to Mr. Douherty this morning and explained that he is at risk of a custodial sentence if found or admits the breaches, and asked whether he wants legal representation today. He tells me no, ma'am, but I wonder whether your Honour would be prepared to explore that with him further.
>
> JUDGE MURFIT: Certainly. Well, Mr. Douherty, as you have heard Miss Philpott outline, you may, with a different firm of solicitors, be successful in obtaining Legal Aid. It usually depends upon your means, so if you are in receipt of benefits there should be no problem. If you are not in receipt of benefits then there will need to be a bit of an enquiry as to your ability to contribute. But if you would like to have representation that is something obviously that is helpful if you feel less confident about speaking for yourself. If, on the other hand, it is a matter that you feel completely confident in dealing with yourself then I can hear you as a litigant in person, but that is an option you need to consider. All right?
>
> MR. DOUHERTY: Yes, I'd just like to explain to you basically myself if that's all right.
>
> JUDGE MURFIT: You would like me to explain what?
>
> MR. DOUHERTY: I'd like to explain.
>
> JUDGE MURFIT: What it is that's been alleged against you.
>
> MR. DOUHERTY: Yes.
>
> JUDGE MURFIT: Right. What I will ask you to do is to come perhaps into the witness box, which is just here, to take an oath or give an affirmation…"

12. The appellant was sworn, he identified himself and was asked by the judge if he had an opportunity to read the statement of DC Phillips which sets out the detail of what the officer said he saw at about 18:30 hours on Monday, the events at the police station and the interview. The appellant confirmed that he had read all of it. The judge then stated that she would deal with the five different allegations made against the appellant which were said to be in breach of the court order which HHJ Lochrane had made.

13. The judge identified the first as prohibiting the appellant from entering Grays Town Centre except for the purpose of attending booked probation appointments, booked On Track appointments and college attendance. The judge put the matter in this way: "What essentially it is saying is that at 6.30 you were in the area you were not supposed to be in and that was a good hour after you told him that the college hours ended." The appellant responded as follows:

> "Yes, and to be honest that was my fault and I'm very sorry for that, I didn't take it as seriously as I should of, but when the police officer did see me I was on my way back home because I was at the taxi station. Because I live in Chafford Hundred there's very few ways I can get back home, which is only by bus or train – I mean bus or taxi, not train, because I live on the other side of Chafford Hundred. When he did see me I was literally just about to get into the taxi home."

It was put to the appellant by the judge that he was breaching the order in not going straight home from college and he agreed.

14. The "second item" raised by the judge was the breach of condition 9, namely possession of a bladed item in the appellant's waistband, which was found when he was strip searched at the police station. To that, the appellant said:

> "…I revealed the blade out of my waistband because in June of this year my little brother died and he was stabbed and he was only 15, so after he died my best friend … gave me a little flick knife to just hold – hold with me so that I'd be safe at all times, but I didn't know that I could be arrested for a flick knife that length."

15. The judge then referred to condition 10 of the order, the prohibition in respect of controlled drugs or paraphernalia. To that the appellant responded:

> "Yes, I was found with one bag of cannabis, because I do smoke cannabis because I am quite stressed out, to be honest, I won't lie, I'll be honest, I do smoke it quite frequently and just before when I need to go to sleep, and I had one bag for when I got home so that I could smoke it so I can sleep because the main reason why I do have trouble sleeping is because of my little brother when I go home I see his room and his room is empty and it just breaks my heart."

The appellant said that he did not have any intention of smoking it outside his home or selling it, the judge pointed out that there was no need for him to take it with him and he agreed.

16. As to condition 14, namely the wearing of a hood, the judge did not find there had been a breach. The appellant admitted not notifying the police of his new phone number, he said he did not realise he would have to contact the police to tell them of that in breach of condition 17.

17. Asked by the judge whether there was anything else the appellant wanted to say he stated that he was genuinely sorry and promised not to breach the injunction again. He said he had good intentions, wanted to finish his last year at college so that he could go to university. The judge then asked the appellant if he wanted her to deal with this matter without the benefit of legal representation and he said "yes". The judge said "you know that it is a matter which I could put off for you to have legal representation if you wanted me to" to which the appellant replied "yes".

18. In sentencing the appellant the judge made an order that he should serve seven days' imprisonment for each of the four breaches but stated that she was going to suspend the operation of the imprisonment order on terms that he complied with the injunction. The appellant was warned that if he transgressed any of the provisions then the 28 days would automatically fall to be served. The judge did not identify the period of the suspension. Further, given the appellant's age, any sentence should have been one of detention and not imprisonment. Insofar as mitigation was mentioned by the judge it appears to have been the reason for the suspension, in that she stated that "…it recognised that you have admitted the offences and expressed your contrition for them…". There is no mention of the appellant's youth nor absence of previous convictions.

19. Mr Fidler, on behalf of the appellant, identifies the two issues for the court, namely:

    i) Were there any breaches of procedure by the judge?

    ii) If any breaches are found by the court, were they of such materiality as to deprive the appellant of a fair hearing?

    Mr Fidler realistically concedes that errors made, for example the absence of a formal Application Notice, are remediable. The breaches which are alleged and relied upon as being material, such as to render the committal proceedings unfair are:

    i) The failure of the judge to adjourn the proceedings to enable the appellant to obtain legal aid, to which he was entitled, and thereafter obtain legal representation;

    ii) The failure at the hearing to inform the appellant of his right to remain silent;

    iii) The appellant having agreed to give evidence, the failure of the judge to warn him of the risk of self-incrimination;

    iv) The failure at the conclusion of the appellant's evidence to adjourn the proceedings to permit the appellant to obtain legal representation in order that appropriate and focused mitigation could be placed before the court.

20. Mr Dyke, on behalf of the respondent, contends that these were summary proceedings which are required to be dealt with expeditiously. He accepted they were not so urgent as to preclude an adjournment. The respondent accepts that the judge failed to advise the appellant of his right to remain silent or warn him about self-incrimination. The essence of his submission is that these failures would have made no difference to the result of the appellant's trial. The respondent relies upon the admissions made by the appellants in his police interview when he was accompanied and advised by a solicitor.

Such admissions would have been admissible in the committal proceedings. The judge had before her the witness statement of PC Phillips. In the event that the appellant had chosen to remain silent the judge would have been entitled to draw an adverse inference from his silence. Given the uncontradicted evidence of the police officer, the admissions in interview and the adverse inference, the judge would have been able to find breaches proven. The failure by the judge to advise and/or warn the appellant was immaterial in the context of the proceedings.

21. Mr Dyke accepts that mitigation could have included matters which were not placed before the court which could have impacted upon the sentence imposed by the judge. However, as to the sentence imposed, these were multiple and serious breaches.

The legal framework

22. CPR Part 81 provides:

> "**Committal for breach of a judgment, order or undertaking to do or abstain from doing an act**
>
> 81.4. Enforcement of judgment, order or undertaking to do or abstain from an act
>
> (1) If a person—
>
> (a) required by a judgment or order to do an act does not do it within the time fixed by the judgment or order; or
>
> (b) disobeys a judgment or order not to do an act,
>
> then, subject to the Debtors Acts 18692 and 18783 and to the provisions of these Rules, the judgment or order may be enforced by an order for committal.
>
> …
>
> 81.28. The hearing
>
> (1) Unless the court hearing the committal application or application for sequestration otherwise permits, the applicant may not rely on—
>
> (a) any grounds other than—
>
> (i) those set out in the claim form or application notice; or
>
> (ii) in relation to a committal application under Section 3 or 4, the statement of grounds required by rule 81.14(1)(a); or

(b) any evidence unless it has been served in accordance with the relevant section of this Part or the Practice Direction supplementing this Part.

(2) At the hearing, the respondent is entitled—

(a) to give oral evidence, whether or not the respondent has filed or served written evidence, and, if doing so, may be cross-examined; and

(b) with the permission of the court, to call a witness to give oral evidence whether or not the witness has made an affidavit or witness statement.

(3) The court may require or permit any party or other person (other than the respondent) to give oral evidence at the hearing.

(4) The court may give directions requiring the attendance for cross-examination of a witness who has given written evidence.

…

81.29. Power to suspend execution of a committal order

(1) The court making the committal order may also order that its execution will be suspended for such period or on such terms or conditions as it may specify.

…

PRACTICE DIRECTION

…

8.1. Subject to paragraph 8.2, this Section of the Practice Direction applies in relation to all matters covered by Part 81.

…

15.4. The court may, on the hearing date—

(1) give case management directions with a view to a hearing of the committal application on a future date; or

(2) if the committal application is ready to be heard, proceed to hear it.

15.5. In dealing with any committal application, the court will have regard to the need for the respondent to have details of the alleged acts of contempt and the opportunity to respond to the committal application.

> 15.6. The court will also have regard to the need for the respondent to be—
>
> (1) allowed a reasonable time for responding to the committal application including, if necessary, preparing a defence;
>
> (2) made aware of the possible availability of criminal legal aid and how to contact the Legal Aid Agency;
>
> (3) given the opportunity, if unrepresented, to obtain legal advice, …"

Re L (a child) v Re Gous Oddin [2016] EWCA Civ 173

23. This was an appeal in respect of committal proceedings involving the inherent jurisdiction of the High Court in relation to children exercised by the Family Division. Sir James Munby, President of the Family Division, reviewed the relevant authorities. In considering the right of a person accused of contempt to remain silent, he stated at [31-32]:

> "31. The absolute right of a person accused of contempt to remain silent, which carries with it the absolute right not to go into the witness box, was established in *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67, where this court held that such a person is not a compellable witness. This right is to be distinguished both from the privilege against self-incrimination and from legal professional privilege, each of which may entitle a witness in certain circumstances to decline to answer a particular question but neither of which entitles the witness to refuse to go into the witness box or refuse to take the oath (or affirm): see *Re X (Disclosure for Purposes of Criminal Proceedings)* [2008] EWHC 242 (Fam), [2008] 2 FLR 944, para 9.
>
> 32. As both *Re G* and *Hammerton v Hammerton* illustrate, the principle in *Comet* has repeatedly been emphasised in this court; see also *Re K (Return Order: Failure to Comply: Committal: Appeal)* [2014] EWCA Civ 905, [2015] 1 FLR 927, para 61, to which we were referred. Most recently, so far as I am aware, the relevant principles were summarised by Jackson LJ, with whom both Lewison LJ and Treacy LJ agreed, in *Inplayer Ltd and ors v Thorogood* [2014] EWCA Civ 1511, paras 40-45:
>
> > '40. A person accused of contempt, like the defendant in a criminal trial, has the right to remain silent: see *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 67. It is the duty of the court to ensure that the accused person is made aware of that right and also of the risk that adverse inferences may be drawn from his silence.

> …
>
> 44. Mr Milford submits that even if there had been a separate hearing of the contempt application, the result would have been the same. If Mr Thorogood gave evidence, he would have been caught out in cross-examination. If he had declined to give evidence, the court would have drawn adverse inferences.
>
> 45. What Mr Milford says may well be true. Indeed, as things have turned out, Mr Thorogood may be a very lucky man. Nevertheless there can be no question of upholding findings of contempt against a person who has been deprived of valuable safeguards in the circumstances of this case.'"

At [71] Sir James Munby P commended the checklist contained in Theis J's judgment. The "checklist" of Theis J is set out at paragraphs 78 and 79 of her judgment:

> "78. Before any court embarks on hearing a committal application, whether for a contempt in the face of the court or for breach of an order, it should ensure that the following matters are at the forefront of its mind:
>
> (1) There is complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is: contempt in the face of the court, or breach of an order.
>
> (2) Prior to the hearing the alleged contempt should be set out clearly in a document or application that complies with FPR rule 37 and which the person accused of contempt has been served with.
>
> (3) If the alleged contempt is founded on breach of a previous court order, the person accused had been served with that order, and that it contained a penal notice in the required form and place in the order.
>
> (4) Whether the person accused of contempt has been given the opportunity to secure legal representation, as they are entitled to.
>
> (5) Whether the judge hearing the committal application should do so, or whether it should be heard by another judge.
>
> (6) Whether the person accused of contempt has been advised of the right to remain silent.
>
> (7) If the person accused of contempt chooses to give evidence, whether they have been warned about self-incrimination.

> (8) The need to ensure that in order to find the breach proved the evidence must meet the criminal standard of proof, of being sure that the breach is established.
>
> (9) Any committal order made needs to set out what the findings are that establish the contempt of court, which are the foundation of the court's decision regarding any committal order.
>
> 79. Counsel and solicitors are reminded of their duty to assist the court. This is particularly important when considering procedural matters where a person's liberty is at stake."

24. In *Re Stephen Yaxley-Lennon (aka Tommy Robinson)* [2018] EWCA Crim 1856 Lord Burnett CJ, at [43-49] reviewed the relevant authorities as to the procedure to be followed in cases of alleged contempt. At [43] he stated:

> "43. For much of the twentieth century, the courts took a rather mechanistic view of the consequences of any failure to comply with the rules relating to the procedure to be followed in cases of alleged contempt. Such rules existed in civil and family proceedings long before they were introduced into the Criminal Procedure Rules. However, in *M. v. P. (Contempt of Court: Committal Order)* [1993] Fam. 167, the Court of Appeal sought to clarify the nature of the balance which must be struck where the relevant rules have not been followed to the letter. Lord Donaldson identified the following principle at pages 178-9:
>
> 'In all contempt cases, justice requires the court to take account of the interests of at least three categories of person, namely, (a) the contemnor (b) the 'victim' of the contempt and (c) other users of the court for whom the maintenance of the authority of the court is of supreme importance. The interests of the alleged contemnor require that he should have the right to be informed of the charges which he has to meet, to be advised and represented if he so wishes (subject to his being eligible for legal aid or otherwise able to finance his defence), to be given a full and fair opportunity of meeting those charges and, if found guilty of contempt of court, to be informed in sufficiently clear terms of what has been found against him. In all these cases the court has been concerned to ensure that these fundamental requirements are met in the way in which, particularly in the case of the county courts, they are intended to be and should be met. However, we have tended to overlook the fact that they may in some circumstance be met in other ways. Whilst this court should always be quick to identify and condemn any departure from the proper procedures, the interests of the victim and of maintaining the authority of the courts require that in deciding what use to make of its powers under section 13(3) of the Act of 1960, this court should ask itself whether, notwithstanding

> such a departure, the contemnor has suffered any injustice. It does not follow that he has. Nor does it follow that the proper course is to quash the order. If he has not suffered any injustice, the committal order should stand, subject if necessary, to variation of the order to take account of any technical or procedural defects. In other cases it may be possible to do justice between the parties by exercising the court's power under section 13(3) by making "such other order may be just." If the circumstances are such that justice requires the committal order to be quashed amongst the options available is that of ordering a retrial …'"

25. Lord Burnett CJ considered the later authority of *In re West* [2015] 1 WLR 109 and the observations of Sir Brian Leveson P:

> "46. … a case in which a barrister was found to have acted in contempt of court in refusing unreasonably to attend a hearing in a criminal case when he had been ordered so to do. His punishment was a fine of £500.
>
> 47. The Court of Appeal overturned the finding of contempt because the alleged contemnor had not been served with a notice in advance of the hearing as required by the Rules. Sir Brian Leveson P observed at paragraphs [34] and [35]:
>
> '34. While Mr West was thus made aware in advance of the hearing that contempt of court would be considered, the notices provided clearly fell short of the procedural requirements set out in the Crim PR. In the normal course, compliance with the strict provisions of the Crim PR can be waived by the parties or the court; in cases of alleged contempt, however, we have no doubt that strict observance of the provisions is essential. As Mr Cox observed, the contempt jurisdiction is a powerful tool which can directly impact on the liberty of the subject. Compliance with the Crim PR allows the "charge" to be fully formulated and beyond doubt; it provides a structure which forms the four corners of what is in issue and it avoids the very criticism that Mr Cox did advance in this case.
>
> 35. In the circumstances, given the significance of the jurisdiction of contempt of court, we have come to the conclusion that this failure of process invalidates the conclusion that the judge reached. We recognise that it is likely to have made little difference but we are not prepared to assert that; it is far more important to underline the vital importance, where issues of contempt arise in circumstances of this nature, of following the approach laid down by the Crim PR.'"

26. In the *Stephen Yaxley-Lennon* case a central criticism advanced on behalf of the appellant in respect of one set of the committal proceedings was that the sentence was imposed within hours of the conduct complained of. At [60] Lord Burnett CJ stated:

> "… Such haste gave rise to a real risk that procedural safeguards would be overlooked, the nature of the contempt alleged would remain inadequately scrutinised and that points of significant mitigation would be missed. …"

At [61] criticism was levelled at the judge for failing to consider an adjournment "to enable the matter to proceed at a more measured pace". At [66] Lord Burnett CJ stated:

> "… In contempt proceedings, touching as they do on the liberty of the subject, there is a need for the contempt in question to be identified with precision and the conduct of the alleged contemnor identified with sufficient particularity to enable him, with the assistance of legal advice, to respond to what is a criminal charge, in all but name. …"

The finding of contempt in the second set of committal proceedings was quashed upon four grounds, the final of which was "the haste with which the contempt proceedings were conducted led to an inability of counsel to mitigate fully on the appellant's behalf."

Discussion

27. The appellant attended the county court on the morning of 2 October 2018 having spent his first night in custody and expecting to be represented by a lawyer. By the time he appeared before the judge it was clear to all that he had no legal representation in proceedings in which his liberty was at stake. He had received no advice from his own lawyer as to the nature of the contempt proceedings. The terms of the injunction were lengthy and represented less than a model of drafting clarity. There was a real risk that the appellant would not fully or properly understand the nature, detail and consequences of the committal proceedings.

28. When the appellant appeared in court Ms Philpott immediately raised with the judge whether or not she was prepared to proceed with the appellant as he was unrepresented. It is clear that Ms Philpott and the judge believed that the appellant would be eligible for legal aid and thus legal representation. The judge noted that legal representation would be helpful to the appellant, an observation which had to be correct given the nature of the proceedings. This was not so urgent a hearing that an adjournment could not be granted. The judge appears not to have acknowledged at the outset of the proceedings the real need for an adjournment in order to permit the appellant to obtain legal aid and legal representation. At the conclusion of the appellant's evidence the judge did raise the possibility of an adjournment to enable the appellant to obtain legal representation. It was too late. From the start of the hearing, the judge was aware of the alleged breaches of the injunction, she would have been aware of the consequences of such breaches directly affecting the liberty of the appellant. Given the age of the appellant, the absence of previous convictions and thus experience of the courts together with the risk to his liberty, the judge should have adjourned the proceedings to enable the appellant to obtain legal aid and legal representation.

29. The respondent accepts that the documents upon which it relied for the purpose of these proceedings did not strictly comply with the relevant Application Notice as required by CPR Part 23. The documents which comprise the bundle for the court did include details of the alleged breaches, the statement of DC Phillips and the original injunction. This court is not in a position to resolve the issue of whether the appellant saw and received these documents from Ms Philpott prior to going into court or whether he saw the same only when giving evidence. In any event, it is not suggested on his behalf that the failure to provide these documents in the prescribed form is a material error such as to undermine the fairness of these proceedings.

30. The judge having decided that the hearing would proceed, and having told the appellant that she could hear from him as a litigant in person, should have informed him of his right to remain silent. Nothing was said to the appellant by the judge or Ms Philpott to inform him of this fundamental right.

31. The appellant having elected to give evidence, the next step for the judge was to warn him about self-incrimination. No such warning was given. This failure compounded the failures to allow him legal representation and the failure to inform the appellant of his right to remain silent.

32. At the conclusion of the appellant's evidence the judge invited him to add anything to his evidence. He said that he was sorry and promised not to break his injunction again. That represented the totality of his mitigation. No mention is made during the hearing of the appellant's age nor of his absence of previous convictions. Those facts are absent in the sentencing remarks of the judge which can only be described as succinct. No questions were asked by the judge as to the appellant's background and circumstances. In such a relatively young offender these are matter which properly should have been before the court. The judge gave no reasons as to why a custodial sentence was appropriate. She made no reference to other means of disposal. The absence of appropriate legal representation resulted in the appellant being deprived of the opportunity to properly put before the court mitigation which represented all the relevant facts and was focused upon the appropriate disposal of the matter.

33. The point is made by the respondent that even if the appellant had been advised of his right to remain silent and warned of self-incrimination the outcome would have been no different. To that submission I note the approach of the court in the matter of *L (a child)* (above). Sir James Munby P rejected the respondent's argument that even if there had been a separate hearing of the contempt application the result would have been the same. He observed that the appellant may have been a very lucky man but went on to state that "…there can be no question of upholding findings of contempt against a person who has been deprived of valuable safeguards in the circumstances of this case". A similar approach was taken by Sir Brian Leveson P in *Re West* where the court recognised that the failure of process invalidated the conclusion reached by the judge. Sir Brian Leveson P stated: "We recognise that it is likely to have made little difference but we are not prepared to assert that; it is far more important to underline the vital importance, where issues of contempt arise in circumstances of this nature, of following the approach laid down by the Crim PR." It is apparent from the authorities that the courts adopt a fairly strict approach and are reluctant to countenance arguments that procedural failings that go to the fairness of proceedings are immaterial.

34. I accept the appellant's submission that there were four breaches of procedure at the appellant's committal proceedings. They were caused by the failure of the judge to:

    i) Adjourn the proceedings to permit the appellant to obtain legal aid and legal representation;

    ii) Advise the appellant of his right to remain silent;

    iii) Warn the appellant of the risk of self-incrimination prior to giving evidence; and

    iv) For a second time, not adjourning the proceedings to afford the appellant the opportunity to obtain legal representation such as to enable properly informed and focused mitigation to be made on his behalf.

35. The effect of these breaches, singularly and cumulatively, was to deprive the appellant of valuable safeguards the purpose of which is to ensure a fair hearing. The appellant did not receive such a hearing. As a result the order for committal must be quashed.

36. The appeal is allowed. The contempt application is remitted for a further hearing before a different judge.

Lord Justice Green:

37. I agree.