Neutral Citation Number: [2018] EWHC 1540 (QB)

Case No: D92LS739

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SHEFFIELD DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2018

Before :

MR JUSTICE MALES

- -

Between :

SHEFFIELD CITY COUNCIL	**Claimant**
- and -	
PAUL BROOKE	**Defendant**

- -
- -

Yaaser Vanderman (instructed by **Sheffield City Council**) for the **Claimant**
Owen Greenhall (instructed by **Lloyds PR Solicitors**) for the **Defendant**

Hearing dates: 5 to 7 June 2018

- -

Approved Judgment

.....

MR JUSTICE MALES

Mr Justice Males :

Introduction

1. This is my judgment on the application by Sheffield City Council to commit Paul Brooke to prison for contempt of court. It was heard at the same time as applications concerning three other Sheffield citizens, Simon Crump, Fran Grace and Benoit Compin. I gave judgment relating to these other defendants at the conclusion of the hearing on 7th May 2018 (see *Sheffield City Council v Crump* [2018] EWHC 1411 (QB)), but reserved my decision in the case of Mr Brooke in order to consider further the legal submissions which had been made in his case.

2. The application arises out of the council's controversial tree felling programme which forms part of a 25 year highway maintenance programme known as "Streets Ahead". The background is set out in detail in my judgment in *Sheffield City Council v Fairhall* [2017] EWHC 2121 (QB) dated 15th August 2017. In that judgment I decided that there should be an injunction to restrain the defendants from taking action to prevent the felling by the council and its contractor of trees on the public highway by maintaining a presence within a safety zone erected around a tree.

3. Mr Brooke was a defendant in that action who gave an undertaking in the course of the hearing. It was in the following terms:

> "I will not:
>
> i) enter any safety zone erected around any tree within the area shown edged red on the plan attached hereto;
>
> ii) seek to prevent the erection of any safety zone;
>
> iii) remain in any safety zone after it is erected;
>
> iv) knowingly leave any vehicle in any safety zone or intentionally place a vehicle in a position so as to prevent the erection of a safety zone;
>
> Nor will I encourage, aid, counsel, direct or facilitate anybody else to do any of the matters in paragraphs (i) to (iv) above including by posting social media messages."

4. The area shown edged red on the attached plan was the administrative area of the City of Sheffield. The undertaking was stated to apply until 23:59 on 25th July 2018.

5. Although this undertaking was given reluctantly, it was expressly made clear by Mr Brooke's counsel in his presence that Mr Brooke gave the undertaking of his own free will, understanding that it bound him to the same extent as if an order in the same terms had been made against him.

6. I began my judgment on the application to commit the other three defendants by making some points which it is useful to keep in mind:

"4. First, as I hope I made clear in my August 2017 judgment, I expressed no view then, one way or the other, as to the merits of the tree felling programme or the objections to it. That remains the position. It is not for the court to have any view about this or for any such view to play any part in the decision which I now have to make. That decision is whether the defendants or any of them are in breach either of their undertaking or of the injunction.

5. Second, I recognise that the tree felling programme has excited some very strong emotions. That is certainly so in the case of the present defendants who object strongly to the felling of healthy trees. Their views are shared by a large number of Sheffield citizens and others, many of whom have been both vocal and active. On the other hand, there are also strong views on the other side, albeit less vocal. The evidence was that many residents support the programme.

6. Third, it is useful to recall the history of these proceedings. The challenge to the council's tree felling programme began with an application for judicial review which failed. In proceedings brought by Mr David Dillner it was held that the council's decision to remove trees was a decision made pursuant to its statutory duty to maintain the highway and was lawful: see *R (Dillner) v Sheffield City Council* [2016] EWHC 945 (Admin). That was followed by the council's application for an injunction. For the reasons which I gave more fully in my judgment, I held that even if the action taken by protesters had initially been a lawful exercise of the right to protest in order to encourage the council to think again, it was apparent that the council had thought again and had decided that it was in the interests of the people of Sheffield as a whole to maintain its policy. That was, therefore, the considered decision of the democratically accountable statutory body charged with responsibility for determining how the highway should be repaired and maintained and how public resources should be allocated. Whatever view may be had about its decision, it was accountable to the people of Sheffield through the ballot box.

7. Fourth, since the tree felling programme began there have been not one but two opportunities for the people of Sheffield to consider this issue. In May 2016 there was an election in which all 84 council seats were contested. In May 2018 there was a further local election. Politically controversial as this issue undoubtedly is, the fact is that on both occasions the people of Sheffield voted for councillors a majority of whom supported the tree felling programme.

8. Fifth, and fundamentally, this is a society governed by the rule of law. It is for the people to vote for their elected representatives at both national and local level. Parliament then makes the law, which includes determining the functions to be carried out by local authorities. Parliament has entrusted to local authorities, in this case Sheffield City Council, the function of repairing and maintaining the highway. It is then for the courts to interpret and, where necessary, enforce that law. If a court gets the law wrong, as sometimes happens, the aggrieved party can appeal to a higher court. The defendants in this action could have sought permission to appeal against my judgment if they considered that the law gave them the right to continue to prevent tree felling by maintaining a presence within safety zones. They did not do so. I have no doubt that they were competently advised as to the prospects of an appeal and took the view that an appeal would not have any real prospect of success.

> 9. Sixth, it follows that the injunction which I granted reflects the considered decision of the democratically elected body entrusted by Parliament with the responsibility of repairing and maintaining the highway and is in accordance with the law.
>
> 10. Seventh, it was because of the importance of democratic accountability in this case that I sought reassurance at the outset of the hearing of this application that the application was brought with the approval of democratically elected councillors including specifically the Leader of the Council. It may be, as Mr Yasser Vanderman for the council told me, that the decision whether to bring this application was constitutionally a decision for the council's Legal Director to make. Nevertheless, I would have been uneasy in the circumstances of this case if an application was being made on behalf of the council to commit citizens of Sheffield to prison without the support of democratically elected councillors. In response to my enquiry, I was told that the application was supported by the Leader of the Council.
>
> 11. Eighth, it is critical to the rule of law that the orders of the court should be complied with. If we were to reach a position where orders made by the court could be ignored with impunity by those who disagree with them, we would have lost something very precious."

Legal principles

7. The following principles apply generally to an application to commit for contempt:

   (1) The burden of proof is on the applicant to show that the defendant has intentionally committed acts which are contrary to the order or undertaking.

   (2) This must be proved to the criminal standard.

   (3) The conduct prohibited must be clearly stated in the order or undertaking.

   (4) If the order or undertaking is reasonably susceptible to more than one meaning, the meaning favourable to the defendant should be adopted.

The application to commit Mr Brooke

8. The application to commit Mr Brooke is concerned with an incident which took place on Meersbrook Park Road in Sheffield on 22nd January 2018. The council alleges that he entered a safety zone in breach of his undertaking.

9. Mr Brooke accepts that there was a properly constituted safety zone erected around a tree on that road which was due to be felled, that he intentionally entered the safety zone, and that he was aware of the terms of his undertaking. Pausing there, it would appear that it is proved to the criminal standard that Mr Brooke intentionally committed an act which was contrary to his undertaking.

10. Mr Brooke maintains, however, that he was not in breach of the undertaking because it was lawful for him to enter the zone to go to the defence of a female protester who was being forcibly removed by security staff engaged by Amey, the contractor

employed by the council under a PFI contract to deliver the "Streets Ahead" programme.

11. This defence raises some issues on which, so far as counsel are aware, there is no direct authority.

12. The issues for decision are as follows:

(1) Is it in principle a defence to an application to commit for contempt that the defendant did the prohibited act in defence of another person?

(2) If so, who has the burden of proof?

(3) Does the criminal or civil law test apply?

(4) Did Mr Brooke have an honest belief, alternatively an honest and reasonable belief, that it was necessary to do the prohibited act?

(5) Was it reasonable for Mr Brooke to do the prohibited act?

13. I have stated the issues in this way rather than in terms of whether it was lawful for Mr Brooke to use force because this better reflects what actually occurred. However, the use of reasonable force in accordance with section 3 of the Criminal Law Act 1967 and the common law defence of defence of another was the starting point for the submissions of Mr Owen Greenhall on behalf of Mr Brooke, as I shall explain.

The evidence

14. Evidence relating to Mr Brooke's case was given on behalf of the council by a number of witnesses. These included Richard Milligan and Jake Webb, both of whom are employed by Servoca Solutions Ltd, the contractor engaged by Amey to provide security staff to remove protesters from safety zones and to film what they regarded as potential breaches of the injunction. Mr Milligan and Mr Webb observed the incident on 22nd January 2018. Mr Milligan was the team leader on site on the day and attended the briefing given to security staff that morning.

15. Evidence was also given by Darren Butt, Amey's Account Director responsible for the delivery of the "Streets Ahead" programme. He was not present on 22nd January, but explained the reasons for the decision to use force to remove protesters. In short, this was because of an escalation of protests in safety zones in breach of the injunction, including the wearing of masks by protesters to conceal their identity. Mr Butt explained also the training given to security staff to ensure that force was only used after a series of warnings had been ignored and that the force used was reasonable.

16. Mr Brooke provided an affirmation and was cross examined. It is evident that he is a sincere and committed protester strongly opposed to the tree felling programme. He has been a leading campaigner before and since the grant of the injunction in 2017. Subject to the issues arising on this application, however, he has always complied with the terms of his undertaking, staying outside of safety zones despite attending protests on many occasions (he thought that there had been about 40 such occasions). There was one other occasion on which he was present in a safety zone for a few

minutes, on 15th December 2017, but the council does not suggest that he was in breach of his undertaking on that occasion, or at any rate has not brought committal proceedings in respect of it, and I will therefore assume that he was not. He is, however, aware of the identity of others who do flagrantly breach the injunction, including the identity of the masked female protester whose attempted removal precipitated the incident on 22nd February 2018.

17. Mr Brooke sought to adduce expert evidence from Mr Mark Banner, who was said to be an expert on the question of whether the force used by Amey's security staff was reasonable. I refused permission for such evidence, in part because Mr Banner (who had qualified for a licence as a door supervisor but who had no practical experience in this role, let alone of providing security at a public protest) was not a properly qualified expert and in part because, to the extent that it is necessary to decide whether force used by security staff was reasonable, it is not an issue which requires expert evidence.

18. Of most assistance, however, there was video evidence recorded at the time of the incident in question. Some of this was recorded by Servoca staff. Other recordings were made by protestors who were present.

The 22nd January incident

19. I find the facts relating to the incident on 22nd January 2018 as follows.

20. As already mentioned, by 22nd January Amey had engaged Servoca to provide security personnel to remove protesters from safety zones by force. This was a recent development which had begun on 15th January. It is accepted on behalf of Mr Brooke that, provided that the force used was reasonable, it was lawful for protestors to be removed in this way. At the time, however, the use of any force was – and perhaps still is – highly controversial.

21. Mr Brooke arrived at the felling site on Meersbrook Park Road at about 1 pm. By that time two incidents had already occurred. Mr Brooke was shown a film recorded by another protester of one of these previous incidents (in fact the second incident, although the first one which came to Mr Brooke's attention) in which a masked female protester had been removed by force. He took the view that the force used was unreasonable and amounted to an assault on the protester, a woman whom he knew. He was also told by Calvin Payne about another incident (in fact the first) earlier that day in which, according to Mr Payne, security staff had "beaten up" a male protester during a scuffle inside the safety zone. That was something of an exaggeration by Mr Payne, although a film of this incident (which Mr Brooke did not see at the time) does show that a punch was thrown by one of the security staff. There was no evidence in the hearing before me about the circumstances which led to the punch being thrown and it is unnecessary to make any finding about it. What matters is what Mr Brooke was told.

22. It is clear that this was a day on which feelings were running particularly high, with considerable tension, and with a view on the part of protesters that security staff were using excessive force. Mr Payne remarked to Mr Brooke that they were "out of control today". That too appears to have been something of an exaggeration, but I see

no reason to doubt that it represented Mr Payne's belief and that Mr Brooke accepted what he was told. He was predisposed to do so.

23. This was the background to the incident which then occurred.

24. When Mr Brooke arrived there was a masked female protester inside the zone holding on to a park railing. She was the same female protester as had been removed earlier, but she had climbed over the barrier back into the zone shortly before Mr Brooke's arrival on the scene. Mr Brooke remained outside the zone, making no attempt to enter. He was told about the earlier incidents as I have already described.

25. At about 1:17 pm, security staff approached the masked female protester. I am satisfied that she was asked to leave but refused to do so, either by saying so or by ignoring the request. At this time she was holding on to the park railing with one hand. Another female who was in the park outside the zone held her other hand. The security staff attempted to disengage the protestor from the railing by rocking her to and fro. As they did so, the woman holding her hand (who would clearly have let go if the protestor had wanted her to) began to chant in a loud voice, "don't hurt her, don't hurt her". There is no reason to suppose that the protester was being hurt at this stage. The chanting was calculated to and did inflame the situation. In immediate response to this chanting, another woman some distance away in the park ran up and seized the masked protester's hand, pulling at it with some force. At this, the masked protester cried out in pain and let go her hand. The woman who had been holding her hand accused the security staff in a loud voice of bullying. In fact the reason – and in all probability the only reason – for the masked protester crying out in pain was the fact that her hand had been violently seized by the woman who had run up in response to the chanting. A man was shouting "not revenge, not revenge", which also had the effect of inflaming the situation.

26. The security staff then attempted to escort the masked protester away from the railings, taking hold of her arms. However, she dropped to the floor face down, flopping deliberately as a deadweight in an attempt to prevent her removal. She was pulled under the arms a short distance by the security personnel, before being allowed to lie on the ground. The protester was then turned over onto her back by which time her upper clothing had ridden up to expose her midriff. One of her legs was underneath the other and a security man moved it so that she was lying on her back with her legs together. At one point a security man pulled the protestor as she was on the ground by the waistband of her trousers. In my judgment this at any rate was inappropriate, but it only lasted moments. However, the protestor was unharmed and was able to pull down her clothing to cover her midriff.

27. Once the protester was lying on her back and had pulled down her clothing, it is apparent that the security staff realised that they would not be able to remove her from the safety zone. They ceased their attempt to do so and began to move away from her.

28. All this was viewed from a distance by the protesters standing outside the safety zone including Mr Brooke. Mr Brooke was some distance away from the incident at the park railings and did not have a particularly good view of it. He heard the protester's companion shouting "don't hurt her". He heard also the protester's scream and concluded, wrongly, that this was the result of pain inflicted by the security staff attempting to remove her. He saw the protester being dragged, as he saw it, away

from the railings and the security man moving her leg. He thought that the man who moved the female protester's leg kicked her or stepped on her as he approached her, but in fact this did not happen.

29. Mr Brooke's state of mind as a result of what he had seen and heard, albeit with only a limited and in some respects mistaken view of what had occurred, was that the female protestor had been assaulted by the security staff and was liable to be assaulted further. In fact Mr Brooke was mistaken about this, as the security staff had ceased their attempt to remove the protester, but I accept his evidence that this was his understanding. It made him extremely angry and he wanted to stop the security personnel from (as he understood it) hurting the woman further. Accordingly he pushed at the safety zone barriers. As he did so, one of the security staff standing by the barriers (not one of those involved in attempting to remove the female protester) kicked out at his hand. This individual did not give evidence, but it is hard to think of any justification for his action. In the event the barriers gave way to the pressure applied by Mr Brooke and, together with other protesters, he broke through into the now breached safety zone.

30. As he did so, his way towards the masked female protester was blocked, although he could see that she was unharmed and was getting to her feet. A female member of the security staff shouted a warning that he was being filmed and that the film would constitute evidence. Another member of the security staff, Mark Turnball, grabbed his arm and called his name, seeking to calm him down. This was just as well as to some extent Mr Brooke did calm down. However, he was still angry and upset. He swore at Mr Turnball and other security staff but he made no attempt to proceed further into the safety zone as he could see that the female protester was on her feet and in no difficulty, and that she was being left alone. After swearing further at the security staff around him, Mr Brooke kicked out at the safety barrier which had been knocked over and stood on it, in his own words in evidence "behaving like an idiot". It is not suggested that he caused it any damage. After a short while he left.

31. By now there were numerous protesters within what had been the safety zone, some of whom (but not Mr Brooke) linked arms around the tree. The masked female protester was not removed and joined the others around the tree.

32. As a result of all this the planned felling of the tree did not take place. Moreover, the events of this day represented a significant escalation of the protests as a result of which further felling was suspended until 26th February 2018.

33. It is apparent that Mr Brooke's behaviour throughout this whole incident was out of character, which is no doubt a reflection of how he perceived the situation.

Use of force

34. As initially formulated, Mr Brooke's defence was that he was entitled to use reasonable force in the prevention of crime (i.e. in preventing an assault on the female protester by security staff) pursuant to section 3 of the Criminal Law Act 1967 or pursuant to a common law defence of defence of another (i.e. a variant of self-defence).

35. Section 3 of the Criminal Law Act 1967 provides:

> "(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

36. At common law a person is entitled to use reasonable force in self-defence, a concept which includes the defence of another. There is no need to deal separately with the statutory and common law defences. So far as relevant to this application, the issues raised are the same.

37. It is common ground that both under the statute and at common law the elements of these defences vary according to whether the proceedings in question are criminal or civil. I shall have to return to these differences and the reasons for them. A preliminary question is whether what Mr Brooke did amounted to the use of force at all. He did not in the end use violence on anybody but merely pushed at the barriers and, after he could see that the incident with the female protester was effectively over, kicked and stood on an overturned barrier.

38. As Mr Greenhall pointed out, there is authority that "force" is used in a wide sense in the Criminal Law Act 1967. *Swales v Cox* [1981] 1 QB 849 was concerned with whether a police constable had power to use force to enter the defendant's house pursuant to section 2(6) of the Act which authorises entry, "if need be by force", for the purpose of arrest of a person suspected with reasonable cause to have committed an arrestable offence. Donaldson LJ said at 854G to 855A:

> "First of all, let me define what I think is meant by 'force'. In the context of outside premises of course there is no problem about force unless there is a gate or something of that sort. The constable simply enters the place and is authorised to do so by section 2(6). If he meets an obstacle, then he uses force if he applies any energy to the obstacle with a view to removing it. It would follow that, if my view is correct, where there is a door which is ajar but is insufficiently ajar for someone to go through the opening without moving the door and energy is applied to that door to make it open further, force is being used. *A fortiori* force is used when the door is latched and you turn the handle from the outside and then ease the door open. Similarly, if someone opens any window or increases the opening in any window, or indeed dislodges the window by the application of any energy, he is using force to enter, and in all those cases a constable will have to justify the use of force."

39. If "force" in section 3 is to be given the same meaning (I note that some reservations about this were expressed in *R v Margaret Jones* [2006] UKHL 16, [2007] 1 AC 136 by Lord Bingham at [25] and Lord Hoffmann at [71]), it would follow that Mr Brooke used force when he pushed at the barrier causing it to fall over, although the complaint against him is not that he pushed at the barrier but that, having done so, he then entered the safety zone contrary to the terms of his undertaking. It may be that he entered with the intention to use force of some kind if necessary to restrain the security staff who had been attempting to remove the masked female protester, but it is not clear exactly what he intended to do and it is probable that he himself had not formed a clear intention about this. It is more likely that his intention was to do no more than to create a distraction drawing the attention of the security staff away from the female protester.

40. In my judgment this case is not in reality a case about the use of force. The real issue is whether Mr Brooke was entitled to do the prohibited act (or at any rate was not in contempt for having done it) in defence of the female protestor. Hence my formulation of the issues for decision. Exactly the same issues would have arisen if, changing the facts slightly, Mr Brooke had jumped over a barrier placed against a retaining garden wall on which he had been standing without touching the barrier. On those facts there would have been no question of the use of force, even as defined in *Swales v Cox* [1981] 1 QB 849. The present case illustrates the anomaly identified by counsel in *R (Director of Public Prosecutions) v Stratford Magistrates Court* [2017] EWHC 1794 (Admin), [2018] 4 WLR 47, namely that it would be strange if the use of reasonable force provided a statutory defence to a criminal charge of wilfully obstructing the highway but that something less than the use of force did not. The answer given by the Divisional Court (see Simon LJ at [51]) was that there is a defence where something less than force is used, provided that there is a nexus between the conduct and the criminality sought to be prevented by the conduct in question.

41. In my judgment the same approach should be adopted here. If the use of force would have provided Mr Brooke with a defence to the application to commit him, either under section 3 of the Criminal Law Act 1967 or at common law, he should equally have a defence in circumstances where what he did was something less than the use of force.

42. In the present case there is a clear nexus between Mr Brooke's entry into the safety zone and what was happening and, as Mr Brooke perceived the situation, was about to happen to the masked female protestor. It is clear that this was the sole reason for his entry into the zone and that, as he saw it, he was going to her defence. It is therefore necessary to consider whether this provides him with a defence to the application to commit.

Is doing the prohibited act in defence of another a defence in principle?

43. Mr Vanderman submitted that as a matter of principle defence of another or prevention of crime cannot provide a justification for acting in breach of a court injunction and therefore cannot be an answer to an application to commit for contempt, save perhaps in exceptional circumstances. He relied on two decisions concerning counterfeiting of soft drinks.

44. In the first case, *Coca Cola Company v Gilbey* [1996] FSR 23, the defendant refused to give information which he had been ordered to give by what was then known as an *Anton Piller* order, claiming that to do so would put his life and the safety of his family at risk. However, this was not an application to commit, but an application to discharge the order. Lightman J was clearly sceptical about this claim, but was prepared to take it at face value. He held that the risk was a factor to be taken into account in exercising his discretion whether to discharge the order, but held that despite the risk (which could for example be mitigated by police protection) the order for disclosure should be maintained. The interests of the claimant and the public interest in the suppression of crime should prevail. The Court of Appeal refused permission to appeal.

45. The second case was *Coca Cola Company v Aytacli* [2003] EWHC 91 (Ch). Unlike *Gilbey*, this was an application for committal. The defendant claimed that he had acted under duress in doing the acts complained of. Peter Smith J found that there was no duress established as a matter of fact, which was sufficient to dispose of the application. However, he went on to address some legal issues in the course of which he held at [52] and [53] that *Gilbey* was a binding decision of the Court of Appeal that duress is not a defence to an application to commit for contempt but merely provided mitigation.

46. With respect I cannot accept this *obiter* view of what *Gilbey* decided. As I have explained, *Gilbey* was not an application to commit at all and, in any event, the Court of Appeal was deciding an application for permission to appeal. Its decision would, therefore, not normally be authoritative. Moreover, these cases were concerned with duress, which may raise different considerations from defence of another. In particular, *Gilbey* was a case (as other duress cases may also be) where the risk of adverse consequences for the defendant had been taken into account in deciding whether to make the order in the first place or to discharge it on an application to discharge. If, following a failure to provide the information which the defendant was ordered to provide, there had been an application to commit for contempt, it would have been surprising if the same risk as had already been taken into account had provided a justification for disobedience to the order.

47. Accordingly I do not regard either of these cases as providing any real assistance on the present issue.

48. Approaching the issue as one of principle, it seems to me that although in many cases the nature of the prohibited act will be such that the question cannot arise, there must be some circumstances in which defence of another could be a defence to a charge of contempt. To take what is, I emphasise, a hypothetical example, if security staff (or indeed anyone else) were engaged in the violent beating up of a defenceless individual within a safety zone, it could hardly be the law that those outside the safety zone could only stand and watch and that any intervention to restrain such conduct regardless of the circumstances would expose them to potential liability to imprisonment for contempt. It is not enough to say that this would be an exceptional case. That would only beg the question on less extreme facts. Nor would it be satisfactory to regard intervention in such circumstances as a point of mitigation. A finding of contempt, even if no sanction is necessary, is itself a serious matter. A principled answer must therefore be given. In principle, I would hold that defence of another is capable of providing a defence to an application to commit for contempt.

49. That said, any court will need to be careful to ensure that its orders are not too easily circumvented by defendants advancing spurious justifications for doing acts which have been prohibited. There is a danger that tensions may be too easily heightened by false allegations of misconduct, leading others to intervene too readily or to claim that it was necessary to do so. Such a heightening of tension appears to have happened here, as a result of the chanting of "don't hurt her" and the intervention of the woman who grabbed the protester's hand causing her to scream. Such dangers mean that a court will need to look carefully and on occasion sceptically at claims made by defendants that it was necessary to intervene. I have done so in considering the facts of the present case. However, the fact that such dangers may exist does not mean that such claims should be ruled inadmissible as a matter of law regardless of whether the

claim is made good as a matter of fact. The principles applicable to the defence of defence of another, including in particular the requirement that the defendant's actions are objectively reasonable, are well capable of identifying spurious claims.

Who has the burden of proof?

50. It is well established that when an issue of self-defence (including defence of another) is raised as an issue in criminal proceedings, the burden is on the prosecution to negative the defence, while in civil proceedings it is for the defendant to establish the defence: *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] AC 962. It is established also that on an application to commit for contempt, the contempt must be proved to the criminal standard.

51. The question where the burden of proof lies when the defence is raised as a defence to an application to commit for contempt received relatively little attention in argument, as distinct from the next issue to be considered which concerns the substantive differences between the defence of defence of another in criminal and civil proceedings. In principle I am inclined to think that if the criminal test applies substantively, so too should the criminal burden of proof. However, as the question of burden of proof is not decisive in this case, I need not decide this.

Does the criminal or civil law test apply?

52. It is common ground that in criminal proceedings the question is whether the defendant had a genuine belief as to the existence of circumstances rendering it necessary to take action and that it does not matter whether his belief was reasonable, whereas in civil proceedings the defendant's belief must be both genuine and reasonable: *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] AC 962. In both cases, however, the action taken by the defendant (i.e. the force used) must be reasonable, the reasonableness of the action taken being judged objectively by reference to the circumstances as the defendant subjectively believed them to be.

53. The question arises whether in contempt proceedings the criminal or civil test applies when such an issue needs to be decided. In order to determine which of these tests it is appropriate to apply in contempt proceedings, it is necessary to examine the rationale for the differences between the criminal and civil tests. This rationale was examined in *Ashley* [2008] UKHL 25, [2008] AC 962, where a submission that the test should be the same in civil as in criminal proceedings was rejected. As Lord Bingham said at [3], "the ends of justice which the two rules respectively exist to serve are different". Lord Scott made the same point at [17], continuing:

> "17. … One of the main functions of the criminal law is to identify, and provide punitive sanctions for, behaviour that is categorised as criminal because it is damaging to the good order of society. It is fundamental to criminal law and procedure that everyone charged with criminal behaviour should be presumed innocent until proven guilty and that, as a general rule, no one should be punished for a crime that he or she did not intend to commit or be punished for the consequences of an honest mistake. …
>
> 18. The function of the civil law of tort is different. Its main function is to identify and protect the rights that every person is entitled to assert against, and require to

> be respected by, others. The rights of one person, however, often run counter to the rights of others and the civil law, in particular the law of tort, must then strike a balance between the conflicting rights. … As to assault and battery and self-defence, every person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also to protect himself by using reasonable force to repel an attacker or to prevent an imminent attack. The rules and principles defining what does constitute legitimate self-defence must strike the balance between these conflicting rights. The balance struck is serving a quite different purpose from that served by the criminal law when answering the question whether the infliction of physical injury on another in consequence of a mistaken belief by the assailant of a need for self-defence should be categorised as a criminal offence and attract penal sanctions."

54. Lord Rodger, Lord Carswell and Lord Neuberger agreed with this reasoning. Lord Carswell added at [76]:

> "I do not see that there is any *a priori* reason why the criteria should be identical. Indeed, as Lord Scott has pointed out (para 17), there is a clear difference between the aims of the two branches of the law. The criminal law has moved in recent years in the direction of emphasising individual responsibility. In pursuance of this trend it has been held in different areas of the criminal law that it is the subjective personal knowledge or intention of the accused person which has to be established … So in the case of self-defence it has been held that if a defendant is labouring under an honest mistake, even if it is regarded as unreasonable, the defence is open to him … The function of the civil law is quite distinct. It is to provide a framework for compensation for wrongs which holds the balance fairly between the conflicting rights and interests of different people. I agree that that aim is best met by holding that for the defence of self-defence to succeed in civil law the defendant must establish that he honestly believed in the existence of facts which might afford him that defence and that that belief was based upon reasonable grounds. …"

55. Mr Vanderman for the council submitted that the civil test should apply, so that a belief must be reasonable as well as genuine. He submitted that the starting point is that these are civil proceedings to which civil rules of procedure and evidence apply; that the purpose of contempt proceedings is to ensure compliance with court orders made after balancing competing interests as distinct from punishing behaviour which society has decided should be criminal; and that the same stigma does not apply to a finding of contempt as to a criminal conviction.

56. Mr Greenhall for Mr Brooke submitted that the criminal test should apply. He submitted that contempt proceedings do involve an element of punishment as well as enforcement of a civil judgment; that there is a public interest in the enforcement of court orders which is similar to the interest in play in criminal proceedings; and that a criminal sanction of imprisonment applies. In particular, he submitted that it would be wrong as a matter of principle to expose a defendant to imprisonment based on an honest but mistaken belief and that it was insufficient to treat such a belief as going only to mitigation.

57. It is apparent from the citations above that the law draws a broad distinction, which is a distinction of substance and not merely of form, between the ends of justice which criminal and civil proceedings exist to serve. Criminal proceedings perform an essentially public function, defining and punishing behaviour which is damaging to the good order of society. Of course, there is an immensely wide spectrum of such behaviour from offences such as murder at one end to relatively minor traffic offences at the other. Some of these offences carry with them an element of social stigma, while others do not. Civil proceedings, and in particular proceedings in tort, however, are concerned to balance essentially private rights and interests in order to determine what conduct should attract liability to pay financial compensation.

58. The application to commit Mr Brooke for contempt has something in common with both civil and criminal proceedings. It arises out of civil proceedings for an injunction which is a civil remedy, albeit that in the present case the injunction was granted (and Mr Brooke's undertaking was given) to restrain conduct which was both criminal (wilful obstruction of the highway, although this is not the most serious of offences: see [67] of my August 2017 judgment) and tortious (the commission of a trespass: see [69]). It has been subject to civil rules of procedure and evidence. The contempt proceedings themselves are civil proceedings.

59. On the other hand, the application is not concerned with financial compensation which is the typical function of civil proceedings. Its purpose is to enforce the order of the court, to punish past breaches of the order and to deter future breaches. The more demanding criminal standard of proof applies and contempt may be punished with a prison sentence, the paradigm example of a criminal sanction. A defendant who was punished for contempt by being sent to prison would not be being punished for committing an obstruction of the highway or for the tort of trespass, neither of which attracts a sanction of imprisonment, but for disobedience to the order of the court, a more serious matter which damages the proper functioning of society. As I indicated at the outset of this judgment, it is critical to the rule of law that the orders of the court should be complied with. The law of contempt therefore represents a vital public interest and invokes the full power of the state to enforce that interest.

60. In the present case, moreover, the injunction was sought by the council as a public authority in order to enable it to carry out its function as a highway authority. Enforcement of an injunction in such circumstances serves a more obviously public purpose than in the case of a purely private dispute.

61. Applying the test which I have described, I conclude that the objective of the application to commit Mr Brooke is essentially a public objective which has more in common with the objective of criminal proceedings than it does with that of civil proceedings, notwithstanding that as a matter of legal classification the application is classified as civil. I accept also that it would be wrong to expose a defendant to liability for imprisonment on the basis of an honest but mistaken belief. It follows in my judgment that it is appropriate to apply the criminal test.

62. Accordingly the question is whether Mr Brooke had an honest belief as to the existence of circumstances rendering it necessary to enter the safety zone, regardless whether that belief was mistaken or reasonable.

Did Mr Brooke have an honest belief that it was necessary to do the prohibited act?

63. As I have already found, Mr Brooke believed that the female protestor had been assaulted by the security staff and was liable to be assaulted further. That was a genuine and honestly held belief, albeit that it was mistaken. In particular, the security staff had not stepped on the protester's body and had ceased their attempt to remove her by the time Mr Brooke entered the safety zone whether or not any further attempt would have involved the use of more than reasonable force. However, I accept his evidence that this was his belief and that he entered the zone in order to come to the protester's assistance in some way to prevent her (as he saw it) from being further hurt. He acted instinctively and angrily on the spur of the moment, believing that this was necessary in response to what he had seen and heard. In all probability he had not formulated in his mind exactly what it was that he proposed to do, other than intervene to prevent what he thought was the likely rough and unjustifiable treatment of a female protestor.

64. It follows that I reject Mr Vanderman's submission that the real reason for Mr Brooke entering the safety zone was to prevent the felling of the tree. If that was what he wanted to do, he could have entered the zone at any stage. I reject also his submission that it did not matter to Mr Brooke whether the female protester had been assaulted. On the contrary, it mattered a great deal to him.

65. If it were necessary to decide whether the belief which Mr Brooke held was objectively reasonable, I would conclude that it was not. By the time he entered the safety zone, the security staff had moved away from the protester and were showing no sign of any imminent further contact with her.

Was it reasonable for Mr Brooke to do the prohibited act?

66. It was common ground that (assuming the defence to be available at all) Mr Brooke would only have been justified in entering the safety zone contrary to the terms of his undertaking if it was reasonable for him to do so. That question must be determined by reference to what he subjectively believed was about to happen, but is nevertheless an objective test.

67. Mr Vanderman submitted that in circumstances where there were a number of police officers present at the felling site, none of whom attempted to intervene to stop what was happening to the female protester, it cannot have been reasonable for Mr Brooke to take it upon himself to intervene instead. Mr Vanderman submitted that what he should have done was to draw the incident to the attention of the police and leave it to them to decide what to do. As I understood it, this was a submission in effect that it cannot as a matter of law have been reasonable for Mr Brooke intervene, notwithstanding that what is reasonable in any particular circumstances is quintessentially a question of fact. Mr Vanderman relied for this submission on two authorities, *R v Margaret Jones* [2006] UKHL 16, [2007] 1 AC 136 and the *Stratford Magistrates* case [2017] EWHC 1794 (Admin), [2018] 4 WLR 47 to which I have already referred.

68. It is therefore necessary to examine these authorities to see whether they do establish such a rule of law.

69. In *R v Margaret Jones* [2006] UKHL 16, [2007] 1 AC 136 the defendants were charged with causing criminal damage and public order offences at military bases. Their defence was that they were protesting against the war in Iraq which, they asserted, constituted unlawful and criminal conduct on the part of the United Kingdom. Accordingly they relied on section 3 of the Criminal Act 1967, maintaining that they were using reasonable force to prevent a crime. The House of Lords held that the reference to "crime" in section 3 was a reference to a crime under domestic law, not international law, and that the crime of aggression under international law was not a crime within the meaning of section 3.

70. That was sufficient to decide the appeal, but Lord Hoffmann (with whom Lord Rodger, Lord Carswell and Lord Mance agreed) went on to consider what he described as "the limits of self-help". This was a lengthy passage from which it is sufficient to cite the following extracts:

> "74. The crucial question, in my opinion, is whether one judges the reasonableness of the defendant's actions as if he was the sheriff in a Western, the only law man in town, or whether it should be judged in its actual social setting, in a democratic society with its own appointed agents for the enforcement of the law. …
>
> 76. It is a fundamental characteristic of the state as a social structure that, in the classic formulation of Max Weber (*Politics as a Vocation (Politik als Beruf)*, 1918), it
>
> > 'claims the monopoly of the legitimate use of physical force within a given territory … The right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it.'
>
> 77. That formulation does not of course answer the questions which arise in these appeals, because the appellants say that the state, by its legislation, did indeed permit them to use physical force in the circumstances which existed, or which they honestly thought to exist. But when Parliament speaks of a person being entitled to use such force as is reasonable in the circumstances, the court must, in judging what is reasonable, take into account the reason why the state claims the monopoly of the legitimate use of physical force. A tight control of the use of force is necessary to prevent society from sliding into anarchy …
>
> 78. In principle, therefore, the state entrusts the power to use force only to the armed forces, the police and other similarly trained and disciplined law enforcement officers. Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands. In *Southwark London Borough Council v Williams* [1971] Ch 734, 745 Edmund Davies LJ said:
>
> > 'the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances.

79. There are exceptions when the threat of serious unlawful injury is imminent and it is not practical to call for help. The most obvious example is the right of self-defence. As Hobbes said (*Leviathan*, Chapter 27):

> 'No man is supposed at the making of a Common-wealth, to have abandoned the defence of his life, or limbes, where the Law cannot arrive time enough for his assistance.'

But, he went on to say:

> 'To kill a man, because from his actions, or his threatnings, I may argue he will kill me when he can, (seeing I have time, and means to demand protection, from the Soveraign Power) is a crime.'

…

81. What is true of the use of self-help to protect one's own interests is *a fortiori* true of the use of self-help to protect the interests of third parties or the community at large. In a moment of emergency, when individual action is necessary to prevent some imminent crime or to apprehend an escaping criminal, it may be legitimate, praiseworthy even, for the citizen to use force on his own initiative. But when law enforcement officers, if called upon, would be in a position to do whatever is necessary, the citizen must leave the use of force to them.

82. What if the sovereign power, when called, will not come? Sometimes this is for operational reasons, as when the police lack the resources to provide protection (see, for example, *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418). A citizen whose person or property is under threat would in such a case be entitled to take reasonable steps to protect himself.
…

83. The right of the citizen to use force on his own initiative is even more circumscribed when he is not defending his own person or property but simply wishes to see the law enforced in the interests of the community at large. The law will not tolerate vigilantes. If the citizen cannot get the courts to order the law enforcement authorities to act (compare *R v Commissioner of Police of the Metropolis, Ex p Blackburn* [1968] 2 QB 118) then he must use democratic methods to persuade the government or legislature to intervene.

84. Often the reason why the sovereign power will not intervene is because it takes the view that the threatened action is not a crime. In such a case too, the citizen is not entitled to take the law into his own hands. The rule of law requires that disputes over whether action is lawful should be resolved by the courts. If the citizen is dissatisfied with the law as laid down by the courts, he must campaign for Parliament to change it. …

86. My Lords, to legitimate the use of force in such cases would be to set a most dangerous precedent. As Lord Prosser said in *Lord Advocate's Reference No 1 of 2000* 2001 JC 143, 160G-H:

> 'What one is apparently talking about are people who have come to the view that their own opinions should prevail over those of others … They might of course be persons of otherwise blameless character and of indubitable intelligence. But they might not. It is not only the good or the bright or the balanced who for one reason or another may feel unable to accept the ordinary role of a citizen in a democracy'."

71. The *Stratford Magistrates* case [2017] EWHC 1794 (Admin), [2018] 4 WLR 47 was also a case of political protest, blocking of the highway outside a military equipment exhibition in protest against and with a view to preventing what was said to be the illegal sale of weapons for unlawful uses outside the United Kingdom. The protesters relied on section 3 of the 1967 Act but the Divisional Court held that in order for that section to apply there had to be an apprehension of a need to use force to prevent an imminent or immediate crime from being committed. Simon LJ referred to what Lord Hoffmann had said in *R v Margaret Jones* [2006] UKHL 16. [2007] 1 AC 136 as follows:

> "18. Although it is undesirable to attempt a synthesis of Lord Hoffmann's speech and thereby dilute subtle articulations of principle, certain points are clear. First, ordinary citizens who apprehend a breach of the law are normally expected to call the police and not take the law into their own hands. In general, the use of force by individuals in the prevention of crime must be confined so as to avoid anarchy, see [77] and [78]. Secondly, the use of force to prevent crime may be legitimate and give rise to the defence 'in a moment of emergency, when individual action is necessary to prevent some imminent crime', see [81]. Thirdly, the right of a citizen to use force is even more circumscribed when not in defence of his own person or property, but deployed to enforce the law in the interest of the community at large, see [83] and [84]. Fourthly, while the law recognises conscientious protests and civil disobedience, the honestly held beliefs of protestors as to the legality of certain activities cannot be allowed to subvert the forensic process, see [89], [90] and [93]. Fifthly, in the light of these points, a court should be prepared to conclude that the defence under s.3(1) is not available to a defendant and, in such circumstances, the issue of justification should be withdrawn from a jury, see [94]."

72. After citing further cases Simon LJ continued:

> "25. Although it is not possible to set out all-embracing principles which can be derived from these cases, certain themes emerge. First, the defence under section 3(1) of the CLA 1967 operates as a justification for the use of force rather than an excuse to use force, and is linked to the concept of necessity. There must be an apprehension of a need to use force (or, I would accept for reasons that I will come to, in an appropriate case something less than force) to prevent an imminent or immediate crime; or as expressed in Hale, *Pleas of the Crown* (1778) volume 1 (p.52) 'an actual and inevitable danger'. There must be a clear nexus between the use of force and the prevention of crime; and there is a clear difference between a protest against what is regarded as objectionable and even illegal conduct on the one hand, and the use of force to prevent an imminent and immediate crime on the other. … Third, on an application to consider the ambit of a defence under section 3(1) of the CLA 1967, a court should consider whether, on the most favourable view of the facts, such a defence is available. In doing so, it should

> keep firmly in mind the points raised in the speech of Lord Hoffmann in *R v. Jones (Margaret)* which I have sought to identify above. If there is no proper evidential basis on which the defence can be said to be available, it should be withdrawn from consideration. … Fifth, … I do not accept that the speech of Lord Hoffmann in *R v. Jones (Margaret)* at [73]-[94] can be dismissed as *obiter dicta*. Whether or not they were strictly speaking necessary for the decision can be debated. What is plain is that they provide a clear and cogent exposition of the legal issues that will arise in this type of case, with which the other members of the House of Lords agreed."

73. There is much in both judgments which repays careful study, but it is clear that in both cases the primary focus of the court was on the use of force (or something less than force) by way of pre-planned political protest against conduct which was alleged by the protesters to be unlawful (the war in Iraq and international arms sales) but which involved no immediate necessity to act. In neither case was there "an imminent or immediate crime" or "an actual and inevitable danger". That is what Simon LJ meant by referring to "the legal issues that will arise in this type of case". In such circumstances there is no necessity to use force because recourse is available to law enforcement agencies such as the police or, if necessary, the courts. Accordingly, it is fair to conclude in such cases that as a matter of law the use of force is not capable of being reasonable. In a Crown Court trial the question whether the force used was reasonable in such a case should not be left to the jury. In any other proceeding it would be an error of law to conclude that the use of force was reasonable.

74. The position is different in my judgment where there is or is reasonably perceived to be an immediate necessity to act to prevent crime, in particular where the crime in question is an imminent or immediate assault on another person. This was expressly recognised by Lord Hoffmann at [79] ("There are exceptions when the threat of serious unlawful injury is imminent and it is not practical to call for help") and [81] ("a moment of emergency, when individual action is necessary to prevent some imminent crime"). In these perhaps more typical cases it will always be relevant to consider whether there was a reasonable alternative to the use of force, including by seeking the intervention of the police. That will often be an important and may sometimes be a decisive factor, but its significance will depend on such matters as the imminence of the threatened assault and the availability of the police to intervene in time. Except in clear cases where it is obvious that there was time to seek the assistance of the police (or conversely that there was not), the question whether it was reasonable for the defendant to take the action in question will be a question of fact depending on all the circumstances. That is in my judgment the position in the present case.

75. What then were the facts here? It appears from the video evidence that a number of police officers were present at the scene. However, they appear to have been at some distance from the incident with the masked female protester and, so far as can be judged from the video evidence, do not appear to have been paying close attention to what was happening to her. Moreover Mr Brooke's evidence, which I accept, was that he had spoken to the police liaison officer three days before this incident, an officer called Pete, who had said that police officers attending felling sites had been instructed only to observe. Certainly none of the police officers present on 22nd January attempted to intervene. None of those police officers was called as a witness

and it is impossible to say whether the reason for their non-intervention was that they did not see the incident clearly or at all or that they did see it but regarded the force used as reasonable.

76. Although Mr Brooke did not analyse the situation in this way, he was presented with a choice. Honestly believing as he did that the female protester had already been assaulted by the security staff and was liable to be assaulted further, he could have sought to engage with one of the police officers present to find out whether the officer had seen the incident and to persuade him to intervene, or he could have done what he did which was to push through the barrier himself in an attempt to stop what he thought was happening. The question whether what he did was reasonable must be determined by reference to the circumstances as he believed them to be, bearing in mind the perceived urgency of the situation and the vulnerability of the female protester as she lay on the ground. If, as Mr Brooke thought, she was about to be assaulted, there were only moments in which to act.

77. Juries considering self-defence are routinely directed that if a person only does what he honestly and instinctively thought was necessary on the spur of the moment, that is powerful evidence that only reasonable action has been taken (see *Palmer v R* [1971] AC 814 at 832). What Mr Brooke did was no more than what he honestly and instinctively thought was necessary. While it may have been preferable (and as the female protester was not in fact about to be assaulted certainly would have been preferable) for him to involve the police officers present, in my judgment it was reasonable for him to conclude, having the belief which he had, that there was not time to do so. Accordingly I find that his entry into the safety zone was reasonable.

78. I emphasise that this is not a finding that it would have been reasonable for him to use violence on the security staff who had been attempting to remove the protestor. By the time that he had reached them, even if only seconds later, it would have been apparent to him that his initial belief was mistaken and that the protester was unharmed and in no danger. However, that is not what happened and need not be considered further. The question is whether it was reasonable for him to enter the safety zone.

Conclusion

79. I have found that in principle defence of another may provide a justification for entering a safety zone contrary to the terms of the undertaking by Mr Brooke; that Mr Brooke had a genuine albeit mistaken belief that it was necessary to do so in order to prevent immediate harm to a female protester; and that in the circumstances which existed on the day in question he did no more than was reasonably necessary in the light of the belief which he held. Accordingly the application to commit Mr Brooke must be dismissed.

80. It must be understood, however, that this decision is not a licence for future breaches of the injunction. Two points must be kept firmly in mind. The first is that it is lawful for reasonable force to be used to remove protesters from safety zones. The second is that, according to the evidence, when felling resumed after the events of 22nd January 2018, the police took a much closer interest in attempts to remove protesters and officers would typically be stationed within a few feet of any removals to ensure that any force used was reasonable. In such circumstances it is most unlikely that any intervention by entering into a safety zone would be reasonable.