



Neutral Citation Number: [2021] EWHC 170 (QB)

Case No: QB-2020-004292

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 February 2021

Before:

THE RT. HON. LADY JUSTICE ANDREWS DBE
AND THE HON. MR JUSTICE WARBY

**IN THE MATTER OF A CONTEMPT APPLICATION OF THE COURT'S OWN
INITIATIVE PURSUANT TO CPR 81.6**

AGAINST THE BRITISH BROADCASTING CORPORATION ("the BBC")

IN CONNECTION WITH PROCEEDINGS IN THE ADMINISTRATIVE COURT
CO/4441/2019

Between:

The Queen on the application of Sarah Finch
- and -
Surrey County Council

Claimant

Defendant

Trevor Burke QC and Jonathan Scherbel-Ball for the BBC

Hearing dates: 18 December 2020 and 27 January 2021

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I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Lady Justice Andrews and Mr Justice Warby:

1. On the morning of 17 November 2020, the BBC made a video and audio recording of half a day’s hearing in the Planning Court before Holgate J. The Judge was hearing argument on the first day of a 2-day judicial review of a controversial decision by Surrey County Council to grant planning permission to UK Oil and Gas to carry out “fracking” operations at a site at Horse Hill, near Horley.
2. BBC South East Today is the BBC’s regional television news programme for the South East of England, covering Kent, East Sussex, part of West Sussex and part of Surrey. On the evening of 17 November 2020, South East Today broadcast in its 18.30 and 22.30 news bulletins a special report on the Horse Hill case, which included a short clip from the video (“the report”). All of this was done without the knowledge or consent of the Court.
3. This behaviour, as the BBC admits, was a breach of the statutory prohibitions on making and transmitting unauthorised recordings of court proceedings, and therefore involved at least two criminal offences. In our judgment (and as the BBC also admits) the number and seriousness of the breaches makes this a case of contempt of court.
4. This is the judgment of the Court on the question of penalty.

The legal context

5. A hundred years ago, it was commonplace for photographs to be taken in and around the court room and published in the press. But the practice became highly controversial. As a result, since 22 December 1925 it has been an offence for any person to take photographs in a court, or in or around a court building, and an offence to publish any such photograph. The relevant provisions are those of section 41 of the Criminal Justice Act 1925, barely amended in the last 95 years:-

"41. — Prohibition on taking photographs, &c., in court.

(1) No person shall—

(a) take or attempt to take in any court any photograph ... of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or

(b) publish any photograph ... taken ... in contravention of the foregoing provisions of this section or any reproduction thereof;

...

(2) For the purposes of this section—

...

(c) a photograph ... shall be deemed to be a photograph, portrait ... taken ... in court if it is taken or made in the court-room or in the building or in the precincts of the building in which the court is held, or if it is a photograph ... taken ... of the person while he is entering or

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leaving the court-room or any such building or precincts as aforesaid."

6. Unsurprisingly, it has been held that the term "photograph" includes moving images, so that filming in a courtroom, court building, or its precincts is prohibited: see *J Barber & Sons v Lloyd's Underwriters* [1986] 1 QB 103 [105D-E] and *HM Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB) [2020] 3 All ER 477 [27]. The effect of s. 41 is therefore to prohibit the live-streaming of court proceedings, in the sense of broadcasting those proceedings to the world at large; the language of the section "clearly includes the transmission or broadcasting of any photograph via the internet, no matter how transient that might be": *R (Spurrier) v Secretary of State for Transport* [2019] EWHC 528 (Admin); [2019] EMLR 2016 [21]. Proceedings may be live-streamed within the court, which includes a location that is designated as an extension of the courtroom, but not elsewhere: *Spurrier* [30-31].
7. S.41 creates a summary-only offence, punishable by a fine of up to £1,000; but serious breaches can amount to contempt of court at common law, exposing the wrongdoer to the more severe sanctions available in that jurisdiction, including committal to prison: see *Solicitor General v Cox* [2016] EWHC 1241 (QB) [2016] EMLR 22 and *Yaxley-Lennon* (above) [27], [82-87].
8. Parliament has stepped in to make it a contempt of court to make and publish unauthorised audio recordings. Section 9 of the Contempt of Court Act 1981 provides in relevant part as follows:-

"9 Use of tape recorders.

(1) ... it is a contempt of court—

(a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court;

(b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication;

(c) to use any such recording in contravention of any conditions of leave granted under paragraph (a).

(2) Leave under paragraph (a) of subsection (1) may be granted or refused at the discretion of the court, and if granted—

(a) may ... be granted subject to such conditions as the court thinks proper with respect to the use of any recording made pursuant to the leave ...

...

(4) This section does not apply to the making or use of sound recordings for purposes of official transcripts..."

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9. Parliament has created some limited exceptions to this regime:
- i) The filming and broadcast of proceedings in the Supreme Court is permitted by virtue of section 47 of the Constitutional Reform Act 2005. That section amended the 1925 and 1981 Acts to take the Supreme Court outside their remit.
 - ii) Following a White Paper of 2012 proposing to allow the recording and broadcasting of proceedings in “selected court proceedings”, power to do so was conferred by sections 32 and 58(4) of the Crime and Courts Act 2013. The mechanism for doing this is an order made by the Lord Chancellor with the concurrence of the Lord Chief Justice and approved by a resolution of each House of Parliament.
 - iii) These powers have been exercised in two respects.
 - (a) Proceedings in the Court of Appeal when sitting as a full court in public may be broadcast: see the Court of Appeal (Recording and Broadcasting) Order 2013 (SI 2013/2786). In practice, proceedings of this kind have been broadcast regularly, though not as a matter of course.
 - (b) Authority to record and broadcast certain sentencing remarks by way of a pilot scheme was conferred by SI 2016/612. The Crown Court (Recording and Broadcasting) Order 2020, SI 2020/637 created a permanent regime, with effect from 19 June 2020. No such remarks have yet been recorded and broadcast. Negotiations with the BBC and other broadcasting organisations over the conditions under which this should take place are still under way.
10. In the meantime, the coronavirus pandemic had prompted the rapid increase in proceedings which were not held in any courtroom, but by methods which were entirely remote. Parliament created a temporary and limited regime to ensure open justice in such proceedings. The Coronavirus Act 2020 inserted into the Courts Act 2003, with effect from 25 March 2020, a package of provisions concerned with proceedings that are, in the words of the statute, “wholly video” or “wholly audio”. By s 85A(1), where the court directs that proceedings be conducted in such a way it
- “(a) may direct that the proceedings are to be broadcast (in the manner specified in the direction) for the purpose of enabling members of the public to see and hear the proceedings.”
11. Section 85B of the 2003 Act creates offences of making unauthorised recordings or transmissions of such proceedings. The provisions relevant to this case are those of subsection (1):
- “It is an offence for a person to make, or attempt to make—
- (a) an unauthorised recording, or
 - (b) an unauthorised transmission,
- of an image or sound which is being broadcast in accordance with a direction under section 85A.”

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12. Like the offences created by s. 41 of the 1925 Act, these are summary offences, punishable by a fine.
13. In July 2020, serious breaches of s. 41 and s. 9 came to the attention of the Court during the trial of a libel action, when it emerged that the claimant’s solicitors had advised their clients that a livestream of the trial, which had been authorised for viewing by the press and public in a next-door court room, could be transmitted to a number of individuals in a variety of foreign locations. The trial Judge, Warby J, referred the case to a Divisional Court (Dame Victoria Sharp, President of the Queen’s Bench Division, and Andrews J). In a judgment handed down on 6 August 2020, the Court described the situation as “deeply worrying”: see [4], pointing out that

“51. In normal circumstances a judge can see and hear everything that is going on in court. The judge can see who is present, and whether a witness who is giving live evidence has been present in court observing and listening to the evidence of other witnesses. The judge can see whether someone is attempting to influence, coach or intimidate a witness whilst they are giving evidence. The judge can immediately see, as Warby J did in the course of this hearing, that a person sitting in court who is not a journalist appears to be tweeting on their mobile phone without first obtaining permission. That a judge can see and hear everything that happens in court enables the judge to maintain order, discipline and control over what is done in court, and thus to maintain the dignity and the integrity of the proceedings as a whole. This control extends to the recording of images and sounds of what goes on in court and what is then used outside court.

52. Once live streaming or any other form of live transmission takes place, however, the Court's ability to maintain control is substantially diminished, in particular where information is disseminated outside the jurisdiction, as happened in this case. The opportunity for misuse (via social media for example) is correspondingly enhanced, with the risk that public trust and confidence in the judiciary and in the justice system will be undermined.”

Gubarev v Orbis Business Intelligence Ltd [2020] EWHC 2167 (QB) [2020] 4 WLR 122.

The facts in more detail

14. In 2019, Sarah Finch (“Ms Finch”) began judicial review proceedings (“the JR proceedings”) against Surrey County Council (“the Defendant”) in the High Court of Justice, Queen’s Bench Division, Administrative Court (Planning Court) under claim no. CO/4441/2019. Ms Finch was represented in the JR proceedings by Leigh Day, solicitors.

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15. The substantive hearing of the JR proceedings (“the hearing”) was fixed to take place before Mr Justice Holgate (“the Judge”) on 17 and 18 November 2020. The Court directed that the hearing should be wholly video and (pursuant to section 85A(1)(a) of the Courts Act 2003) that for the purpose of enabling members of the public to see and hear the proceedings it should be conducted using the meeting facility of Microsoft Teams (“Teams”). The case concerned the legal requirement that an assessment be carried out of the environmental impact of the proposed “fracking” operations at Horse Hill, including the nature and scope of such an assessment. The legal arguments were complex. It was the type of case that one might expect the BBC to wish to cover, as these issues were clearly a matter of public interest.
16. The Court authorised the parties, certain representatives of the media, and certain members of the public to see and hear the hearing. It did so by providing or authorising the provision of links to the Teams “meeting” to enable that to be done.
17. In addition to witness statements from BBC England’s Head of Compliance, Mr Timothy Burke, the Head of the Litigation Department, Mr Nicholas Wilcox, and from the Head of TV and Online for England, Mr Declan Wilson, who oversees regional television programmes including BBC South East Today, (none of whom became involved until after the broadcasts), the BBC has served witness statements from four individuals who have described how part of the hearing came to be recorded and edited, and how the clips from the recording came to be broadcast. These are:
 - i) The senior journalist, reporter and presenter who fronted and edited the Horse Hill item (“the reporter”)
 - ii) The producer for BBC South East Today who produced the item (“the producer”)
 - iii) The assistant editor of BBC South East Today who was responsible for producing the main evening news bulletin for the programme on 17 November 2020 (“the news editor”) and
 - iv) The editor of BBC South East Today (“the editor”), who was the most senior of the individuals concerned, although his involvement was most peripheral.

All these individuals have many years’ experience in broadcasting. Even the producer, the most junior of those directly involved, had been a full-time journalist, presenter, and producer for almost 9 years at the time of the Horse Hill reports.
18. The BBC South East office is in Tunbridge Wells. The newsroom is a single multimedia newsroom covering radio, television, and digital broadcasts. Before the pandemic, each of the three sections would have had around 20 people working in it. However, at the relevant time a maximum of 15 people were permitted to be in the newsroom. Most reporters, including the reporter assigned to the Horse Hill story, and many of the other staff were working from home, although the assistant news editor for the day’s bulletins, the editor, the news organiser (who oversees logistical, non-editorial issues) and some of the production staff were in the building.
19. Within the office there is also a small team of in-house technical staff known as “the Hub” which has specialist recording equipment and provides technical support to

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journalists. The work of the technical operators includes ensuring that digital content is accessible to journalists on a shared server; setting up video conferencing meetings; uploading and importing images and stills; downloading audio files; and recording livestream events such as council meetings, planning meetings and parliamentary committees.

20. The production of the Horse Hill reports involved interaction between a number of different BBC staff in different locations playing different roles, including technical, production, content and editorial.
21. At some point prior to 17 November 2020, a journalist in the BBC South East online team informed the editor that there was to be a hearing against Surrey County Council in the Horse Hill case. He was aware that the Horse Hill story had been covered by the BBC previously, and passed that information on to the planning team, who are responsible for setting up stories and briefing reporters on their next day's assignment.
22. There is no witness statement from anyone who was involved in the planning operation on 16 November 2020 at which the decision was made to cover the Horse Hill story. However, Mr Wilcox explained that the story was considered to be an important matter of public interest to residents within BBC South East's area of coverage, as well as having potentially broader significance regarding the way that environmental impact assessments were used as part of planning decisions by local authorities. It was therefore decided to include a report on the first day of the case and the circumstances leading up to the proceedings in the South East Today evening news bulletins on 17 November.
23. A senior journalist in the planning team emailed the Court to request a link to the hearing, and was sent a response informing him that a Teams invitation would be sent out the next day. Arrangements were made separately for an on-camera interview with Ms Finch to take place on 17 November. The journalist from the planning team rang the reporter at around 6pm that evening to brief her on the assignment.
24. A video conference was set up for the journalists working on BBC South Today for 09.15 on the morning of 17 November. Shortly before that meeting, the reporter spoke to the news editor about the Horse Hill story. She declined the offer of a crew to work on the story, preferring to work as a sole video journalist (which would mean that she would do her own editing). Since she was deployed to film interviews and footage at the site at Horse Hill, she knew she would be unable to watch the proceedings. Her recollection is that she asked for the Hub to be "across" the hearing, by which she meant getting them to record it.
25. Both the reporter and the news editor frankly accept that they knew that there was a prohibition on recording and broadcasting court hearings, both physical and remote, and that if anyone had raised a query about the legality of what they were proposing to do, the penny might have dropped. However, against a background where most of their reports included online interviews and footage from virtual meetings, the fact that they should not have been recording the hearing of the JR proceedings, let alone broadcasting it, simply did not occur to either of them. As Mr Trevor Burke QC, who appeared on behalf of the BBC together with Mr Jonathan Scherbel-Ball, put it, they and all the other journalists involved in this unhappy saga "failed to join up the dots".

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26. The morning conference was chaired by the editor, who was working in his office adjacent to the newsroom. After some introductory housekeeping matters, he handed over to the news editor and got on with preparing for other matters he was dealing with that day, whilst listening in. He therefore did not pay any conscious attention to what was said about Horse Hill. The news editor gave a brief summary of the background to the Horse Hill story. The planning journalist added more detail about the story, and mentioned that he had received a link to the hearing which he had forwarded to the newsroom (it later transpired that the link did not work). The producer, who was in the office, and working as an item producer for the lunchtime and early evening news, was assigned to the story and told she would be working with the reporter. The news editor mentioned that the Hub would “sit across” the hearing. At the time, there was nothing that struck him as odd or strange about involving the Hub, as it was “normal practice” for links to live hearings such as parliamentary hearings or news feeds to be sent to the Hub. Nobody raised any concerns about this.
27. After the video conference, and before she began driving to Horse Hill, the reporter spoke to the producer and asked her to make sure that the Hub were “across” the hearing. The producer understood this to mean that she had to make sure that the technicians would record the proceedings. They also agreed that she would send the reporter some archive footage from previous reports on the Horse Hill story. The producer was aware that filming could not take place within court buildings, but she did not know at that time that it was illegal to record or broadcast a hearing of this nature. She was the only one of those who were directly involved who did not know this.
28. The Court circulated two links to the hearing on the morning of 17 November 2020. Unfortunately, neither of these was sent directly to the BBC, as had been arranged the previous day, but nobody from the BBC contacted the Court to chase the matter up. The first link was sent at 09.15 and, as already mentioned, the planning journalist somehow managed to obtain it and circulated it to the newsroom in the course of the morning conference. The hearing was listed to begin at 10.15am rather than the more usual time of 10.30. The second link was sent at 10.16, after it transpired that recipients had experienced problems with the first link.
29. At the start of the hearing, the Judge gave the following warning:
- “It is a contempt of court, a criminal offence, for anyone else to make a recording of any part of these proceedings... although we are conducting the hearing remotely, it is a formal court process and everyone should behave as they would if they were physically in court.”
- Ms Finch did not hear that warning because, in common with everyone else to whom it had been sent, she had been unable to use the first link to access the court proceedings.
30. At 10.23, the producer sent an email to Ms Finch which read:
- “Hi Sarah
- We can’t see anything on the link yet – can you?

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We'd like to record it but when we've clicked on the link, it constantly says loading.”

31. Ms Finch responded to say that she was having the same issue, and that her solicitor was about to send her a new link. The producer said that it would be fantastic if she could forward it to her. Ms Finch duly did so at 10.27. It did not occur to her that she should not have forwarded anyone a link that was sent to her by her solicitor, still less that the BBC was proposing to do something which was unlawful. The email by which the link was sent to Ms Finch contained no warnings or statements emphasising the prohibition on recording or broadcasting, or telling the recipient that the link was solely for their use and that it should not be forwarded to anyone else.
32. We are satisfied from her witness statement that Ms Finch made this error (for which she has apologised) innocently, without properly considering the message from the producer or appreciating its implications. It was one of many emails that she was receiving at the time, including from other members of her campaign group who could not access the hearing via the first link. Ms Finch's focus was on obtaining a link that worked, as she was very anxious to follow the legal argument in a case about which she had strong feelings. The producer had openly announced the BBC's intention of recording the hearing, but even if Ms Finch had taken that information in, which she did not, she would have assumed that the BBC, as a responsible broadcasting organisation, would have cleared any necessary legal hurdles.
33. At 10.28, the producer forwarded the second link (which worked) to the Hub who began making audio visual recordings of the proceedings at around 10.30, thereby committing an offence contrary to s.85B. The proceedings were already underway and recording began several minutes after the Judge's warning was given. However, on the basis of the description of their working practices in Mr Wilcox's witness statement, even if the recording had begun earlier, it is unlikely that any of the technicians involved in the recording would have heard the Judge's warning. It was not their job to monitor, review or assess the content of any such recordings for journalists. The recording was left running in the background whilst the technicians got on with other tasks.
34. Shortly afterwards, the producer confirmed to the reporter that the hearing was being recorded. As far as she was concerned, someone had already taken a decision about this, and her role was to deliver it. This was just another task to tick off her list. In the course of the morning, she turned her attention to the various items that were to be broadcast in the lunchtime news bulletin.
35. Throughout the day, the news editor had a number of conversations with the reporter about the Horse Hill report, mainly about tenor and tone. He cannot recall the precise details, but has said that the specific details of any visuals would not have been his main concern. The reporter interviewed Ms Finch in her front garden at around 12.45 and then drove back home, arriving at around 15.30, intending to edit the package there. She was concentrating on how to introduce and explain the story, which was not straightforward because the subject matter was complicated.
36. At around the same time that afternoon, the producer briefly viewed the footage that had been recorded by the Hub. Although the technicians had recorded most of the morning session of the hearing, in two separate recordings, and uploaded it into the BBC's internal system used for editing, she only looked at about two minutes of the

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footage, trying to find a section that she could understand. Therefore, even if the Judge's warning had been recorded, it is unlikely that it would have been seen or heard by the producer, unless by chance she had chosen to look at the beginning of the footage. Most of what was said appeared to her to be legal jargon which would not be intelligible to the average viewer.

37. After viewing the two minutes of footage, the producer then exchanged text messages with the reporter (which have been summarised in their evidence, but not exhibited to it). The producer said that the recorded footage was very technical and did not provide any easily accessible footage for viewers, therefore the reporter would not get any spoken content out of it. The reporter asked the producer to send her a minute's footage of the proceedings so that she could include a few shots in her piece, which she did. This was a further unauthorised transmission contrary to s.85B.
38. Towards the end of the editing process, the reporter briefly looked at the footage and decided to include around six seconds from it as an "establishing shot". She had in mind the remote equivalent of a shot from outside the court building to provide a visual illustration of the proceedings to which she was referring in the narrative. She was conscious that the proceedings were court proceedings, and even specifically considered whether anything said in her report could prejudice the proceedings, but still it did not dawn on her that the use of the pictures was prohibited or might amount to a contempt of court. Her primary focus was upon the words being used in the report, and trying to ensure that it was appropriately balanced. The image that she used was one of a conventional remote meeting with the Judge, solicitors, counsel and other participants shown in boxes in a gallery on the screen.
39. At some stage in the afternoon, the reporter had a conversation with the news editor about the introduction and the graphic introduction sequence, but they did not discuss any specifics of recording the hearing or the inclusion of any footage from the recording in the item.
40. When the reporter had finished her report, she sent it to the BBC server and phoned the office to say that she had done so. This was at around 18.20, by which time the producer had left the office without seeing the report.
41. It is standard practice for a report to be watched by a senior member of staff in the office before it is included in the running order for broadcast. The report was one of eight items to be broadcast in the 18.30 news bulletin, only one of which had been pre-recorded. The news editor viewed all of them shortly after receipt, and failed to identify any problems with the Horse Hill report. He thought that the report was a good piece of work and that the reporter had made the story interesting; he failed to appreciate that the clip of footage that was shown in the background had been taken from a video recording of the proceedings. He says that the images did not look like a conventional hearing in a court building and did not register with him as a concern, as he accepts they should have done. He did not discuss the story with the editor before it was broadcast. At no stage did anyone refer, or consider referring the story to the specialist team of media lawyers within the Programme Legal Advice department, or consult the duty lawyer.
42. At around 19.00 there was the usual television team debrief after the bulletin, which took place online. The editor, as usual, led the discussion on each piece in the bulletin,

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which he had watched. Whilst watching it he was still reflecting on the events of the day with which he had been dealing, and he too failed to notice any problem. In the course of the debrief discussion, nobody raised any issues about the Horse Hill report or that it included material from court proceedings; the feedback on it was positive.

43. As the story was cleared, it was then repeated in the 22.30 bulletin, which is prepared by a pared-down late team. Unless a problem had come to light in the interim, that team would treat any item included in the main evening broadcast as suitable for re-broadcast in the late-night bulletin. The report was identical, apart from minor and irrelevant changes to the introduction by the presenter.
44. The editing of the recording for broadcast, and the unauthorised transmissions of the edited footage in the bulletins on South East News at 18:30 and 22:30 involved further breaches of s.85B.
45. The total number of viewers of the two bulletins on the television and on the BBC iPlayer was approximately 500,000.
46. The first time that the BBC became aware of the problem with the Horse Hill reports was at 10.45 on the morning of 18 November 2020 when the reporter, the editor, and a BBC in-house lawyer received an email from the Judge's clerk expressing the Court's concern about the inclusion in the reports of images taken from the hearing. The Head of Compliance took swift action to ensure that the relevant technical personnel removed the reports from the BBC iPlayer and made them permanently inaccessible, and this was done by 11.17am. The recordings made by the Hub were preserved so that they could be made available to the Court.

These proceedings

47. On 18 November 2020, the BBC provided the Court with brief written submissions and with password protected access to a Dropbox of the video footage taken by the Hub, to seek to explain how it had very regrettably first recorded a portion of the JR proceedings from 17 November 2020, and then included approximately six seconds of video footage from the hearing in two BBC regional South East Today video news reports. The Judge made an order that the reporter and the BBC should attend before him the following day to explain the circumstances in which the recording came to be made and the item broadcast.
48. On 19 November, the reporter, the editor, and Mr Wilcox with a colleague from the BBC legal department, Patrick Callaghan, attended a hearing before the Judge and through leading counsel, Mr Burke QC, apologised unreservedly for what had happened. The Judge was told that this was an innocent mistake, that it did not register with any of the journalists concerned that the court hearing was subject to the same restrictions as a physical court hearing, and that immediate steps had been taken to remedy the problem and to ensure that there was no repetition. A memorandum had been circulated to around 3,000 staff highlighting the specific issue and reminding them of the prohibition on recording court proceedings. The BBC legal department said that training was being arranged promptly to ensure that any journalist involved with court proceedings would be fully apprised of their obligations.

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49. The Judge stated, as was the case, that the matters that had been drawn to the Court's attention raised very serious issues indeed, that the explanation that had been given was unsatisfactory, and that the matter would need to be considered in greater depth and dealt with on a subsequent occasion.
50. On 24 November 2020 relevant editorial staff at BBC South East Today (including those who were working on 17 November 2020) were given refresher training by a Programme Legal Advice lawyer on contempt and court reporting, which covered the prohibition on filming or otherwise recording court proceedings. Although we were not shown any of the training materials, we were told that this made it very clear that recording or broadcasting without express permission of the Court is completely prohibited, and that hearing links should only be obtained from the Court and should not be shared.
51. These contempt proceedings were initiated by the Court pursuant to CPR r.81.6 and directed to be heard by a Divisional Court pursuant to CPR r.3.3(5). A summons dated 7 December 2020 was served on the parties and the BBC.
52. At a directions hearing on 18 December 2020, which was attended by the parties to the underlying JR proceedings and by the partner in Leigh Day with day-to-day conduct of the case on behalf of Ms Finch, as well as by the BBC, the Court considered the evidence that had been served thus far, and heard submissions from counsel on behalf of the BBC and the parties. The BBC drew a "potential jurisdictional issue" to the Court's attention. We are satisfied that no such issue arises. The High Court has the power to require proceedings to be heard by a Divisional Court in appropriate circumstances, except where the CPR provides otherwise: CPR 3.1(2)(bb). This power extends to contempt proceedings initiated on the Court's own motion.
53. At that hearing, which was the earliest practical opportunity for it to do so within the context of the contempt proceedings, the BBC accepted that it was in contempt of court and repeated the apologies tendered to the Court on the previous occasions. In terms of explaining what had happened, it relied on a witness statement from Mr Wilcox dated 16 December 2020, based on evidence that had been gathered by Mr Callaghan from the journalists who were directly involved. Mr Wilcox said, and we accept, that there was no intentional attempt to abuse the court's process or to interfere with the administration of justice. He described what occurred as "a genuine but serious and regrettable mistake made in reporting proceedings to provide some visual element to that report". He said that had anybody within the BBC South East team realised at the time that recording of the JR proceedings was not permitted, they would have stopped the broadcasting of the report.
54. An order was made for the BBC to pay the Defendant's costs, summarily assessed in the sum of £1,000. Ms Finch and the Defendant were not required to provide any further assistance to the court. The contempt proceedings were adjourned, and the BBC was directed that if it wanted to submit any further evidence it must do so by no later than 18 January 2021. Pursuant to that direction the BBC filed the witness statements from the reporter, the producer, the news editor, and the editor, which put more flesh on the outline explanation given by Mr Wilcox in his witness statement, and from Mr Wilson, who reiterated how seriously the BBC was taking the matter, repeated the apology, and indicated the steps that it had taken to ensure that it did not happen again.

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55. On 27 January 2021, at the resumed hearing, we heard oral submissions by Mr Burke in mitigation and on the question of sanction. Mr Burke and Mr Scherbel-Ball also helpfully provided the Court with a supplementary skeleton argument and drew our attention to some authorities, although as Mr Burke rightly pointed out, this was a unique set of circumstances and there is no authority directly in point.
56. When assessing the seriousness of the offence, the Court will have regard to the purpose for which the contempt was committed and the likelihood of any risk to the process of justice: see *The Attorney General's Office v Pritchard* [2020] EWHC 607 (QB) [10] (Dingemans LJ).
57. In *In re Yaxley-Lennon (Practice Note)* [2018] EWCA Crim 1856 [2018] 1 WLR 5400 at [80], the Court of Appeal set out the factors which would be likely to be relevant to cases involving breach of reporting restrictions, namely:
- i) the effect or potential consequences of the breach upon the trial or trials and those participating in them;
 - ii) the scale of the breach, with particular reference to the numbers of people to whom the report was made, over what period and the medium or media through which it was made;
 - iii) the gravity of the offences being tried in the trial or trials to which the reporting restrictions applied;
 - iv) the contemnor's level of culpability and his or her reasons for acting in breach of the reporting restrictions;
 - v) whether or not the contempt was aggravated by subsequent defiance or lack of remorse;
 - vi) the scale of sentences in similar cases, albeit each case must turn on its own facts;
 - vii) the antecedents, personal circumstances and characteristics of the contemnor, and
 - viii) whether a special deterrent was needed in the particular circumstances of the case.

Although that case concerned criminal proceedings, Mr Burke submitted that those factors are also helpful when determining sanctions on the facts of this case.

58. It seems to us that most of these matters are facets of the two principal factors of culpability and harm which should be the starting point for the assessment of the seriousness of the contempt, before consideration of any additional aggravating and mitigating features. We also take into account the fact that the BBC did accept, at the earliest practical opportunity, that this was a contempt, that the matter was serious and that there was no excuse, and tendered an abject and sincere apology. Those matters are akin to a plea of guilty at the earliest opportunity, and by analogy with criminal cases we consider that a commensurate reduction should be made in the sentence to reflect this.

Harm

59. Open justice is a fundamental principle of the common law, but it has never required the court to let third parties take or publish pictures, or film, or audio recordings of a hearing. None of those activities is necessary to allow effective scrutiny of the administration of justice, or enable fair and accurate reporting. This case illustrates the point. The reporter did not need to watch the whole recording in order to understand the issues, or to put together her report. The brief excerpt from the recording that was broadcast did nothing to explain the proceedings. Although there was audio, nothing of what was being said could be made out clearly. The function of the clip was purely illustrative. Mr Burke aptly described it as “wallpaper”, pointing out – as we accept – that in normal times the reporter would likely have done a piece to camera with the Royal Courts of Justice in the background.
60. By the same token, it can fairly be said, the broadcast of this short and innocuous clip of video did not cause or risk any impediment or prejudice to the administration of justice in the judicial review proceedings. We are nonetheless satisfied that what the BBC did went beyond a mere summary offence, and involved the *actus reus* of contempt of court.
61. The underlying justifications for the court’s monopoly control over the creation of and access to images and sound recordings of its proceedings include the risks that photography, filming, or audio recording may pose to the administration of justice in particular proceedings – what Prof Leslie J Moran has called “... the power of the camera to corrupt and damage some of the courtroom’s key players – defendants, victims, witnesses and jury members – and thereby undermine the justice process”: *Law, judges and visual culture* (Routledge, 2021, p161). But these risks can have many manifestations, and they are far from being the only considerations.
62. The background to s 41 of the 1925 Act is explored in detail in two articles: *Courts on Television*, by the late Martin Dockray, (1988) 51 MLR 593, and *Cameras in the courts: why the prohibition occurred in the UK* by Stephen Mason (*Amicus Curiae*, Issue 91, Autumn 2012, p.22ff). There was widespread concern that the creation and publication of images taken in or near the courtroom might have deterrent effects, or other harmful impacts, on parties and witnesses or potential witnesses in a case, thereby poisoning the process. Modern cases that illustrate this theme include *Yaxley-Lennon*, where the respondent filmed and broadcast online his aggressive confrontation of defendants in a long-running criminal trial, as they arrived at court. Among the grounds on which he was held to be in contempt was that his conduct was harassing in nature and risked causing one or more of the defendants to abscond, or at least distracting them from participation in their trial.
63. There was, and remains, justified concern that public depictions of people taking part in court proceedings may pose risks to the administration of justice more generally. In *Solicitor General v Cox*, the respondent was in the public gallery as his friend Shepherd was sentenced for the brutal murder of a teenager. Cox took a picture of the courtroom scene and posted it online with the words ‘Fuk the judge’. This was held to be contempt on several grounds. One was the risk of disruption to the particular proceedings. But the court also held that such publication might have led to the identification of the dock officer (a potential security risk), and might have broad deterrent effects by suggesting

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to those involved in the proper administration of the criminal justice system, including witnesses, that their involvement might be publicised through the use of photographs.

64. Other factors were in play in 1925, and remain important. They include (1) unwarranted intrusion into the private lives of participants and others, (2) disrespect for human dignity, and (3) insult or harm to the dignity and authority of the court process itself. Recent illustrations of these themes can be found in *Cox*, *Yaxley-Lennon* and *Gubarev*.
65. In *Cox*, the Court identified two further aspects of the harm: “the affront to friends and family of the murder victim”, who were entitled to see the law and the authority of the court prevail and have their status as victims respected; and the public and visible flouting of the authority of the court. In *Yaxley-Lennon*, the respondent’s conduct was held to involve a “gross want” of the regard and respect for the institutions of justice that is necessary for them to function effectively. The passage we have cited from *Gubarev* identifies the risk that unauthorised images may be misused on social media. Such misuse may be detrimental to the public standing of the court, or to the dignity or privacy of those depicted. On the facts of *Gubarev* itself, the individual defendant and his team were (like the Court) ignorant that their participation was the subject of unauthorised livestreaming to non-participants abroad. After the judgment of the Divisional Court, it emerged that the unauthorised livestream also included images, transmitted without their knowledge or consent, of someone whose only role had been to sit and observe the proceedings in court as a relative of a participant.
66. These policy considerations provide powerful justification for the court retaining control over access to video and audio records of its proceedings. The risks to justice in the particular proceedings may be fewer and less weighty when it comes to hearings in courts that generally deal with points of law only and rarely hear oral evidence. That is doubtless at least part of the explanation for the statutory exceptions in respect of the Supreme Court and Court of Appeal. But as we have made clear, risks to the administration of justice in particular proceedings are not the only justification for control over the creation and publication of recordings. The Supreme Court’s Policy and Rules on broadcasting contains detailed prescription of what may and may not be depicted; and its first principle makes clear that what is broadcast should aim to provide a balanced account of the hearing and “have regard to the dignity of the court.” As Prof Moran observes, “Cameras in courts generate benefits and produce dangers, enhancing justice and undermining it. The transparency they might offer is far from being an unqualified good.” (op. cit., p161).
67. This was a case where images of individuals were recorded and broadcast without their knowledge or consent but, with hindsight, it can be seen that the other factors we have mentioned were not present. But there is no evidence or indication that the BBC gave any thought to any of those matters, and the Judge was never given the opportunity to do so. In *Cox* the Court held at [23] that “illegal photography will in general interfere with the proper administration of justice through the very fact that it defies the criminal law relating to the administration of justice.” We agree with that.
68. In our judgment, there is another facet to the matter which adds to the gravamen of the contempt in the present case. It is the assumption of an unfettered right to take and deal with images and sounds generated by legal proceedings, in disregard of (a) the statutory prohibition and (b) the Court’s statutory right to make its own decision on whether any and if so what exception should be made in the case before it. We note that it has not

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been suggested that the BBC would have sought or that the Judge would or should have granted permission to record what was recorded, or to broadcast the clip that was eventually used. In this case, further, the misconduct involved the commission of multiple offences over the course of one day and evening, and publication to a large audience.

Culpability

69. As Mr Burke conceded, and is readily apparent from the account given above, there is no simple or coherent explanation for what happened. The BBC is the national public service broadcaster, and it has a reputation for the highest standards, not just nationally but all over the world. The Court is entitled to expect it to adhere to those high standards. It has access to a large in-house team of highly qualified lawyers to whom it can turn for advice at any time of the day or night. Yet it never occurred to anyone that there might be a problem with getting the technicians to record the court proceedings and using images taken from an extract of that recording as background to a news report.
70. This was not a minor oversight by an inexperienced individual within a large organisation, but a catalogue of serious errors by a number of people that should have been, but were not picked up by any of the internal systems and safeguards that were put in place to regulate what is broadcast. It beggars belief that a team of very experienced BBC journalists, all but one of whom did not need to hear the Judge's warning at the start of the proceedings because they were well aware of the prohibition on recording court hearings, should have given no thought to the propriety of getting the Hub to record the morning's proceedings that were being conducted in the Royal Courts of Justice and viewed through live links by those who were unable to be physically present. They knew that this was the first day of a two-day hearing by a High Court judge of proceedings for judicial review. None of them would have dreamed of making a video or audio recording inside the courtroom. It should have been obvious to them that the fact that it was possible to view the proceedings remotely made no difference.
71. The recording was a deliberate and pre-planned act, even though there was no intention on the part of those responsible to act unlawfully. This was not a case of deliberate disobedience to a court order, which would have put the case at the top end of the range, but it does not fall much below it. Viewed collectively, and without attributing individual blame, the behaviour of the journalists who knew of the prohibition was closer to reckless disregard than negligent oversight. Whilst the Judge's warning was not heard, that affords no mitigation because that warning would not have acted as a deterrent even if the first link had worked, since none of the journalists would have heard it – the link would have gone straight to the Hub. Although the links that were sent out did not carry a similar warning to that given by the Judge (a practice which may have to be adopted as an additional safeguard for the future, given the experience of this case) the BBC should not have needed any reminder that recording the proceedings or broadcasting them was prohibited by law.
72. As for the broadcast clips, this was not a case of the recording being used as a means by which the reporter could inform herself of what had happened in court in her absence, and compose a report based on that information. Despite the producer's trawl through two minutes of over two hours of uploaded footage looking for usable material,

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and whatever the producer may have thought, we are satisfied that the reporter had no intention of broadcasting extracts from the legal argument in the JR proceedings as part of her report. What she did in terms of using the clip as an “establishing shot” was thoughtless, but there was no intention on her part (or on anyone else’s) to interfere with the due administration of justice.

73. The editorial process is supposed to act as a safeguard against material being broadcast which should not be; although the news editor was a busy man who had a lot to do in a short time before the Horse Hill report went out on air, he had known since before the initial meeting on the morning of 17 November that the hearing was going to be recorded by the Hub (indeed, he had expressly sanctioned it without stopping to think about whether this was permissible). Although there would have been no point in recording the proceedings unless the reporter intended to look at some part of the recording later, the news editor would not necessarily have contemplated that this might result in the reporter using clips from the recording in the broadcast report. However, when he got the report and started to view it, the reporter’s opening remarks should have specifically alerted him to the fact that the report concerned ongoing court proceedings, and he has rightly accepted that he should have realised where the “scene-setting” clip used as background had been taken from.
74. The editor was entitled to rely on the news editor to carry out the vetting process properly and to make sure the nature and content of any reports to be broadcast in the evening news bulletins were appropriate, but it is a matter of some concern that even someone of his vast experience and seniority failed to pick up the nature of the “scene-setting” clip or ask where it had come from in the post-transmission debrief at which each of the reports was individually considered. Had he done so, the repeat broadcast might not have happened.
75. It is of very limited mitigation that all the journalists were operating in a world in which Zoom or similar remote platforms had become the new normality. Any competent journalist should know, without having to stop to think about it, that court proceedings are in a different category to proceedings in Parliament or other types of meetings which would have to be held remotely because of the pandemic, such as briefings by the police.
76. The producer appears to have accepted without question that a decision had been made by the reporter and news editor to record the proceedings, and that enabling this to happen was just another task on her list. She did not stop to consider whether this should be done, but even if she had thought about it, she would not have been concerned or raised a query because she was unaware of the prohibition on recording or broadcasting such proceedings. She would hardly have openly advertised the intention to record the proceedings to Ms Finch if she had known this to be unlawful. Her lack of knowledge of something so fundamental points to serious deficiencies in the information and training provided to BBC journalists.
77. Mr Wilcox states in his evidence that lawyers from the Programme Legal Advice Department provide a course called “Beyond the Basics” on the BBC’s Academy intranet site which lasts several hours and is delivered monthly. One of the subjects covered is contempt, and reference is made to the prohibition on filming and taking photos in court precincts and using audio-recording devices in court. The course materials have been revised to reflect the change in the law since 25 March 2020 and

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refer to the “prohibition on recording images or sound – including remote hearings”. However the course is a voluntary one, and only around 100 journalists had undertaken it since March 2020, none of whom were from BBC South East. Mr Wilcox has provided no information on how this training was rolled out to journalists.

78. What the BBC should have done, as it now accepts, was what it belatedly did in the wake of the broadcasts in this case, namely, circulate a memo to all staff in March 2020 which made it clear that the restrictions on filming or recording court proceedings or broadcasting them without the permission of the court apply to hearings that are conducted remotely, and preferably drawn their attention to the relevant statutory provisions. We were glad to hear that steps have now been taken to reinforce that message orally to individual staff at meetings whenever court proceedings are to be covered by BBC reporters.

Decision on penalty

79. Taking all those features into account and weighing them in the balance, we conclude that this is a case of lesser harm but higher culpability, which would place it in the medium category were there a sentencing guideline. We must then consider any specific aggravating and mitigating factors that have not featured in the assessment thus far.
80. Mr Burke rightly accepted that it was an aggravating factor that the BBC is the principal news provider in this country and that this unfortunate sequence of acts in contempt of Court was a departure from the high standards that are rightly expected of it and which it sets for itself. The broadcast was repeated. The clip was seen by around half a million viewers, though none of them complained about it. The problem could and probably would have been avoided had the BBC taken more proactive steps to ensure that their journalists were properly advised of the restrictions that were introduced in the Coronavirus Act and reminded of the existing restrictions on recording and broadcasting court proceedings, at a time when more and more hearings had to be conducted remotely.
81. On the other hand, steps were taken to address the problem as soon as the BBC was made aware of it; it is obvious that senior personnel have taken the case extremely seriously. The offending material was swiftly removed from the iPlayer and the memo was circulated to journalists to remind them of the legal position. Mr Burke also relied on the general reputation of the BBC and its staff for acting responsibly and to the isolated nature of the incident. He submitted that the BBC had taken the matter to heart and responded appropriately. It was highly unlikely that this would ever be repeated; all the journalists concerned have learned a salutary lesson. The BBC is a public service provider, funded by the licence fee, and any fine will detract from the services it can provide.
82. We also bear in mind that the BBC will have to bear its own costs, and has already been ordered to pay the costs of the Defendant’s attendance at the directions hearing to assist the Court, an order which it did not resist. Last, but not least, we have already referred to the immediate, genuine and fulsome apology and acceptance by the BBC that they had acted in contempt of court and that the recording, editing and broadcasts should never have occurred.

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83. We have considered the authorities to which we were referred by Mr Burke, and the value today of the fines imposed in the older cases. There is an obvious danger that if the BBC is seen to be treated too leniently, it will send out the wrong message to those with a more cavalier attitude towards restrictions on reporting, recording and broadcasting court proceedings; on the other hand, the sentence must be fair and proportionate.

84. Standing back, and making an overall assessment, we consider that but for the early acceptance of liability and the apology a fine in the order of £40,000 - £45,000 would have been merited. Discounting by approximately 1/3 for those matters, we will order that the BBC should pay a fine of £28,000.