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Case No: KB-2022-BHM-000188

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**BIRMINGHAM DISTRICT REGISTRY**

Birmingham Civil and Family Justice
The Priory Courts
33 Bull Street
Birmingham B4 6DS

Date of hearing: Monday, 29th January 2024

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**Before**:

**HER HONOUR JUDGE EMMA KELLY**

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**Between:**

| | |
|---|---|
| **(1) WALSALL METROPOLITAN BOROUGH COUNCIL** | **Claimants** |
| **(2) WOLVERHAMPTON CITY COUNCIL** | |
| **(3) DUDLEY METROPOLITAN BOROUGH COUNCIL** | |
| **(4) SANDWELL METROPOLITAN BOROUGH COUNCIL** | |
| **- and –** | **Defendant** |
| **MASON PHELPS** | |

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**MR MICHAEL SINGLETON** (instructed by the Claimants' in-house legal departments) appeared for the **Claimants**
**MR ERROL ROBINSON** (solicitor of McGrath & Co Solicitors) appeared for the **Defendant**

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# Approved Judgment

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## HER HONOUR JUDGE EMMA KELLY:

1. By N600 application notice, dated 9 August 2023, Sandwell Metropolitan Borough Council ("the Third Claimant") seeks a finding of contempt against Mr Mason Phelps ("the Defendant") for alleged breach of an interim injunction by his actions when driving his motor car on 29 July 2023.

2. The Third Claimant is represented by Mr Singleton of counsel. The Defendant is represented by his solicitor, Mr Robinson. Neither legal representative produced a skeleton argument, schedule of issues or bundle of authorities. The advocates apologised for their omissions in that regard however it remains the case that they did not seek to comply with the King's Bench Division Guide 2023 or otherwise provide the court with the assistance they should have done. At the request of the court, following the close of evidence and during the lunch adjournment, the legal representatives provided the court with hard copies of any authorities they wished to refer to with the relevant passages marked up.

### Background

3. By order dated 22 December 2022 Hill J granted an interim injunction with a power of arrest attached prohibiting what is known as "car cruising" or "street cruising" within the geographical area referred to as "the Black Country." The Black Country incorporates the administrative areas of the four local authority claimants. There were three defendants to the claim, each a class of persons unknown.

4. Car cruising or street cruising is a form of anti-social behaviour. As Hill J noted [see [2022] EWHC 56 (KB) at para. 5]:

> "There is no statutory definition of car cruising or street cruising as far as I am aware, but it involves (to adopt the wording of the draft injunction in the Wolverhampton case) gatherings of two or more people where some of those present engage in motor racing, motor stunts or other dangerous or obstructive driving. Street cruises attract participants who, whether or not they are taking part in driving or riding, support and encourage others to do so, play loud music, rev their engines, show off their cars, and engage in other similar antisocial activities. These activities are highly dangerous, having caused serious injury and, in come cases, fatalities. The activities taking place at these cruises are frequently unlawful."

5. By order dated 19 May 2023 Ritchie J reviewed and amended the interim injunction ("the Amended Interim Injunction") and power of arrest. He also gave permission for a fourth defendant to be added to the proceedings defined as:

> "Persons unknown being drivers, riders or passengers in or on motor vehicle(s) who participate between the hours of 3:00pm and 7:00am in a gathering of 2 or more persons within the Black Country area shown on plan A (attached) at which such defendants engage in motor racing or motor stunts or other dangerous or obstructive driving."

6. Paragraph 1 of the Amended Interim Injunction states:

> "The Injunction and Power of Arrest granted by the Honourable Mrs Justice Hill, sealed on 22 December 2022, shall remain in force save that paragraph 1 of that Order be amended as set out below until the hearing of the claim unless varied or discharge by further order of the Court.
>
> IT IS FORBIDDEN for any of the Fourth Defendants being a driver, rider or passenger in or on motor vehicle to participate between the hours of 3:00pm and 7:00am in a gathering of 2 or more persons within the Black Country Area shown on Plan A (attached) at which such Defendants engage in motor racing or motor stunts or other dangerous or obstructive driving.
>
> Stunts are driving manoeuvres often undertaken at such gathering including but not limited to:
>
> > 'Burnouts' Causing a vehicle to damage or destroy its tyres by applying power to the drive wheels while braking so as to remain in pace while the wheels revolve at speed.
> >
> > 'Donuts/Donutting' Causing a vehicle to rotate around a fixed point (normally the front axle) while not moving off causing noise, smoke and tire marks to be created.
> >
> > 'Drifting' Turning by placing the vehicle in a skid so that most sideways motions is due to the skid not any significant steering input.
> >
> > 'Undertaking' Passing a vehicle on its nearside so as to undertake in circumstances not permitted by the Highway Code.
>
> A power of arrest pursuant to section 27 of the Police and Criminal Justice Act 2006 shall apply to paragraph 1 of this order."

7. Paragraph 3 of the Amended Interim Injunction states:

> "This Amended Order shall come into effect immediately and be deemed served on the Defendants at 23.59 on the date upon which, in each case, the final step in paragraph 11 of the Combined Directions Order have been complied with."

8. Paragraph 4 of the Amended Interim Injunction provided that any person affected by the order may apply at any time to vary or discharge it.

9. The Amended Interim Injunction contained a penal notice.

10. The "Combined Directions Order" referred to in paragraph 3 of the Amended Interim Injunction is a case management order made in respect of both this claim and a similar car cruising action brought by Birmingham City Council under claim number KB-2022-BHM-000221. The two claims are being case managed together. Paragraph 9 of the Combined Directions Order, also dated 19 May 2023, dispensed with the need for personal service of the Amended Interim Injunction and power of arrest on the defendants, all of whom are categories of persons unknown. Paragraph 11 of the same order set out the steps required of the claimants to effect service by an alternative method of the Amended Interim Injunction, power of arrest and Combined Directions Order:

"In the Wolverhampton claim, service of this Order shall be effected by:

(1) Issuing a media release highlighting the continuation of the Injunction and Power of Arrest, such release must provide:

(a) Details of the application and summarise the order made;

(b) Any deadline for filing documents by the defendants;

(c) The date, time and location of any future hearings, if known;

(d) The addresses of the dedicated webpages maintained by the Claimants regarding car cruising;

(e) The Claimants' contact details; and

(f) Details of where and how copies of the Injunction, Power of Arrest, this Order, the Documents and the Evidence may be obtained.

Such release shall be made to, but is not limited to, local print publications including the Express and Star, Chronicle Week, the Birmingham Mail, Halesowen & Dudley News and Stourbridge News; local radio stations including BBC WM, Free Radio, Signal 107, WCR FM and Heart; the website Birmingham Live (aka) BLive; and the following television stations, BBC (to include the Midlands Today programme) and ITV Central

by 23:59 on 26 May 2023

(2) Placing on the Claimants' social media including Twitter Facebook and Instagram links to the above media release regarding the granting of the High Court injunction and power of arrest and highlighting the introduction of the injunction and power of arrest by 26 May 2023

(3) Updating the dedicated pages on the websites of Wolverhampton City Council, Dudley Council, Sandwell Council and Walsall Council about the Injunction and Power of Arrest and this Order: https://www.wolverhampton.gov.uk/street-racing-injunction

https://www.dudley.gov.uk/residents/parking-and-roads/roads-highways-and-pavements/car-cruising-injunction

https://www.sandwell.gov.uk/info/200284/roads_travel_and_parking/3231/street_racing

https://go.walsall.gov.uk/black_country_car_cruising_injunction

(4) Such pages shall carry a direct link to the Injunction Order, the Power of Arrest, the Order of Freedman J, this Order, the Documents and the Evidence and to be updated by 23:59 on 26 May 2023

(5) Ensuring that the home (or landing) page of each of the Claimants' main websites has a prominent direct link to the dedicated webpages referred to above by 23:59 on 26 May 2023

(6) Ensuring that copies of the Injunction, the Power of Arrest and this Order are available at the front desks of the Claimants' main offices by 23:59 on 26 May 2023

(7) Ensuring that the video previously uploaded to the video sharing website "You Tube" and the Claimants' websites and social media pages (including Instagram, Twitter and Facebook), now states that this Order has been made and the Injunction and Power of Arrest continue in force..

This may be done by uploading a fresh video (which must contain all the matters previously ordered by Hill J) or prominently adding text to the existing video (or the description of the existing video on any website or social media page) stating "Following a hearing on 19 May 2023 the Injunction and Power of Arrest continue in force"

The video and/or additional of text shall be uploaded or the text added by 23:59 on 26 May 2023

(8) Requesting that West Midlands Police post on their website and Instagram, Twitter, and Facebook accounts, a link to the media release. Such request to be made by 23:59 on 26 May 2023

(9) Continuing to cause to be displayed at regular interval on the Claimants' electronic road signage the words "NEW HIGH COURT INJUNCTION PROHIBITING CAR CRUISING AND STREET RACING IN FORCE IN THIS AREA"; or words to the same effect; and thereafter

Maintaining official road signs (fixed, and temporary) throughout the Black Country Area in locations that are, or have been, hotspots car cruising activity stating "NEW HIGH COURT INJUNCTION PROHIBITING CAR CRUISING AND STREET RACING IN FORCE IN THIS AREA."

11. The final hearing of the claim has not yet taken place and is listed for hearing on 27 and 28 February 2024.

12. At around 10.10pm on Saturday 29 July 2023 the police observed and then stopped an orange Seat Leon motor car being driven by the Defendant on Kenrick Way, West Bromwich. The police arrested the Defendant pursuant to the power of arrest attached to the Amended Interim Injunction.

13. The Defendant was produced before Martin Spencer J at a remote hearing on 31 July 2023. The Defendant was bailed and the matter adjourned for the Defendant to obtain legal representation. Martin Spencer J made various case management directions. They included, at paragraph 1 of his order, a requirement that the Claimant file and serve a formal committal application. The judge dispensed with the requirement that the parties rely on affidavit evidence and permitted reliance on evidence in witness statement form. In accordance with that order, much of the evidence before the court is in witness statement form.

14. The Third Claimant, in whose administrative area the driving and arrest had taken place, filed and served a written contempt application, dated 9 August 2023. The application particularises the facts alleged to constitute the contempt as follows:

> "On 29 July 2023 around 10.10pm the Defendant was driving a vehicle, SEAT LEON KP58 MWV, at speeds of approximately 80 mph and was racing other vehicles on Kenrick Way, West Bromwich, West Midlands."

15. The Defendant encountered some difficulties in securing legal representation and public funding. Hearings on 5 September 2023 and 5 October 2023 had to be adjourned due to a lack of representation. The Defendant was discharged from bail on 5 September 2023 and the contempt matter thereafter proceeded pursuant to the written application. By the hearing on 12 October 2023 the Defendant was both represented and in receipt of legal aid. At that hearing the Defendant indicated through his solicitor that he denied the allegation of contempt on the basis that he had no knowledge of the injunction. The application was listed for trial in accordance with the parties' and court's dates of availability.

## The issues

16. The Defendant puts the Third Claimant to proof generally however the principal issues, as identified by the legal representatives, are as follows:

    i) Has the Amended Interim Injunction been served in accordance with paragraph 11(9) of the order of Ritchie J, dated 19 May 2023, in circumstances where an inspection on 3 August 2023 identified that two of the three injunction road signs on Kenrick Way had been removed by unidentified persons?

    ii) If the Amended Interim Injunction has been served, does the Defendant nonetheless have a defence to the contempt application if he was personally unaware of the existence of the injunction?

## The evidence

### The Third Claimant's evidence

17. The Court heard oral evidence from PC Tim Lewis, one of two police officers on duty in an unmarked police car at around 2210 hours on Kenrick Way, West Bromwich. PC Lewis confirmed the contents of his two witness statements, dated 30 July 2023 and 7 August 2023. He stated that he had been made aware by personal radio of large amounts of performance vehicles gathering in Kenrick Way. He described vehicles racing along Kenrick Way completing circuits between the Spon Lane traffic island

and the Telford Way traffic island. He stated that he observed the Orange Seat Leon, registration number, KP58 MWV travel around the Spon Land island onto Kenrick Way where it raced other vehicles travelling in the same eastbound direction, undertaking slower moving traffic. PC Lewis described the police car following at speeds up 75-80mph and not catching the Leon until it started to slow when caught up in other traffic. The police vehicle then illuminated its blue lights, stopped the Leon and PC Lewis arrested the Defendant. PC Lewis described the racing being observed by some 50-100 spectators and other vehicles being parked around the traffic island and on a service road.

18. PC Lewis produced two pieces of video footage, one taken from the in-car camera of his police vehicle and the second taken from his body worn camera. In his oral evidence and by reference to the video footage as it played in court, PC Lewis provided an explanation as to the road layout, the route taken by the police officers and the sightings of the Defendant's vehicle. He describes first seeing the Defendant's orange Seat Leon driving around the Telford Way traffic island and exiting onto Telford Way. He stated that he next saw the Seat entering the Spon Land island before it raced down Kenrick Way.

19. PC Lewis was cross-examined about what the Defendant said on arrest. He accepted that when in the back of the police car, the Defendant said, when asked, that he was not aware of an injunction. It was put to PC Lewis that the Defendant had said words to the effect of "I haven't even got a s.59."PC Lewis said he would have to relisten to the video to comment on the words used but, on relistening, could not discern the words from the recording.

20. The Third Claimant also relies on the evidence of PC Mark Nicholson, by his statement dated 9 August 2023. PC Nicholson was on duty with PC Lewis that evening and was the driver of the police vehicle. PC Nicholson did not attend Court to give oral evidence and, as such, the weight that can be attached to his evidence is necessarily reduced. In any event, his evidence adds nothing to that given by PC Lewis and as seen in the video evidence.

21. The Court also heard oral evidence from Pardip Sandhu, the Third Claimant's "Town Lead Anti-Social Behaviour Officer." He confirmed the contents of his witness statement, dated 10 August 2023, save to the extent that he clarified that the Third Claimant had been unable to obtain any CCTV footage from the local authority control room and did not seek to rely on the same. He explained that he visited Kenrick Way on 3 August 2023 and noted that two of three signs referencing the interim injunction had been removed from Kenrick Way without the permission of the Third Claimant. He exhibits a photograph of the remaining sign located on the westbound carriageway of Kenrick Way adjacent to traffic lights by the Telford Way island. In cross examination Mr Sandhu accepted that the remaining sign was quite small and that it faced northwards and out across the carriageway rather than facing oncoming traffic.

22. The Third Claimant further relies on the affidavit evidence of Paul Brown, the First Claimant's Senior Communications Advisor, dated 29 June 2023. Mr Brown's affidavit was prepared to address the steps taken by the Claimants to serve the Amended Interim Injunction as required by paragraph 11 of the Combined Directions Order of Ritchie J of 19 May 2023. Mr Brown did not attend to give oral evidence but the Defendant does not take issue with the initial steps taken to effect service.

## The Defendant's evidence

23. The Defendant elected to file and serve a witness statement, dated 8 November 2023, and give oral evidence. His statement is extremely short and the material parts state:

> "2. I deny breaching the Injunction.…
>
> 5. On the night in question, the 29th July 2023, I accept I was driving on Kenrick Way in West Bromwich.
>
> 6. I had been to my friend's house in Rednal, Birmingham, to collect his two dogs to take care of them for a week while he went on holiday.
>
> 7. The dogs were in the car when I was pulled over by police.
>
> 8. I then drove down the M5 from Rednal to West Bromwich to meet some friends to go for a drive and get some food.
>
> 9. I was not aware of an injunction being in place.
>
> 10. At no point did I see any signs which indicated the road was in a High Court injunction zone. It was pitch black at the time."

24. The Defendant expanded on his account under cross examination. He explained that he lived in Erdington, Birmingham and agreed that, after collecting the dogs in Rednal, he entered the M5 northbound at junction 4 with an intended route home on the M5 northbound, filtering onto the M6 southbound before exiting the M6 at junction 6 onto the A38. He told the court that he had been intending to go and get some food with his friend. He stated that as he was driving down the M5 he saw "all the cars" on the other side of the road and, as he liked cars, decided to go and have a look. He explained that his friend was driving in another car in front of him and the two had spoken on the phone and agreed to stop to look at the cars. He admitted driving to the end of Kenrick Way and then doubling back on himself. He stated he did not remember driving at 75mph but accepted that he thought he did change lanes. He maintained he had just been there to see the cars and allow others to see his car. He said he had been looking for somewhere to pull over to watch but it was too busy. He was stopped just as he was about to leave the area. The Defendant maintained that he didn't know about the injunction. He was asked about his reference to not having a "section 59" notice and said that his knowledge of such matters came from friends who had been stopped for anti-social driving who had received such a notice.

## The legal framework

25. Disobedience of a civil injunction amounts to civil contempt. The contempt proceedings remain civil in nature. The burden of proof rests upon the Third Claimant to prove the elements of the contempt to the criminal standard, namely beyond reasonable doubt. [*Re Bramblevale Ltd* [1970] Ch 128 (CA), applied in *Secretary of State for Transport v Cuciurean* [2021] EWCA Civ 357.]

26. The Court may order service by alternative means in respect of injunctions against persons unknown. [*Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303 at para. 82(2).] In *Secretary of State for Transport v Cuciurean* [2021] EWCA

Civ 357 Warby LJ considered alternative service in the context of the then requirements of CPR 81.

> "14. Rule 81.5 as it stood at the material time provided that a judgment or order could not be enforced by contempt proceedings unless "a copy of it has been served on the person required to … not do the act in question" or "the court dispenses with service under rule 81.8". The primary rule required personal service of the order, as defined in CPR 6.5(3) . In the case of an individual, this is "(a) … leaving it with that individual". The exceptions were provided for in Rule 81.8 as follows:-
>
> > "(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—
> >
> > (a) by being present when the judgment or order was given or made; or
> >
> > (b) by being notified of its terms by telephone, email or otherwise.
>
> (2) In the case of any judgment or order the court may—
>
> > (a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or
> >
> > (b) make an order in respect of service by an alternative method or at an alternative place."
>
> 15. In this case there was no question of dispensing with service. We are concerned with r 81.8(2)(b): service by an alternative method. Personal service on someone whose identity is unknown can pose difficulties. As the Court pointed out in *Canada Goose* at [82(1)], persons unknown defendants "are, by definition, people who have not been identified at the time of the commencement of the proceedings". But they must be:
>
> > "people who … are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention."
>
> The Court went on to state at [82(5)] that where alternative service is ordered, "the method … must be set out in the order." Methods of alternative service vary considerably but typically, in trespass cases, alternative service will involve the display of notices on the land, coupled with other measures such as online and other advertising."

27. The whole of CPR 81 was replaced from 1 October 2020 but the requirements as to service remain the same. Personal service of an injunction order is required by CPR 81.4(2)(c), unless the Court has permitted alternative service. [*MBR Acres Ltd v Maher* [2022] EWHC 1123 (QB) at para. 105]

28. The Defendant seeks to argue that, even if the Third Claimant can establish compliance with the alternative service provisions, he cannot be held in contempt if he did not have personal knowledge of the injunction. Through his solicitor, he relies on the judgment in *P v P (Contempt of Court: Mental Capacity) [1999] 7 WLUK 278*. In that case the primary issue was whether the husband had the mental capacity to understand the terms of an injunction. Judge LJ, in a second judgment dealing only with the husband's argument that the contempt jurisdiction does not encompass an individual who does not know or comprehend the nature of the court's jurisdiction, held as follows:

> "Proceedings for contempt of court are punitive. In cases which arise from disobedience to an order made by the court prohibiting a particular act, proof of the alleged contempt involves establishing the commission of that prohibited act together with the requisite guilty mind. To amount to contempt the disobedience must be wilful or deliberate rather than accidental and unintentional, and so, consistently with that principle, contempt cannot be established, for example, against an individual who, unaware of the existence of the order, acts contrary to its terms. What however is not required is proof that in committing the prohibited act he intended to be contumacious or that he was motivated by a desire to defy the court.
>
> > "Mens rea, or an intention on the part of the person proceeded against to omit or commit the act, the omission or commission of which constitutes disobedience of the injunctive order, must be established … Mens rea in this context does not mean a wilful intention to disobey the court's order, but an intention to do the act which constitutes the disobedience with knowledge of the terms of the order, although not necessarily an understanding that the act is prohibited." (Per Lord Donaldson MR in *Re Supply of Ready Mixed Concrete [1992] 2 QB 213* at 230, and 239, respectively.)"

29. In *Atkinson v Varma* [2020] EWCA Civ 1602 the court was concerned with contempt proceedings arising from alleged breach of orders made to disclose details of assets and copy bank statements to liquidators of a company. Mr Varma appealed against the first instance finding that he was in contempt in circumstances where the judge had accepted his evidence that he had not realised that his failures to act as ordered by the court were breaches of the court orders. The Court of Appeal considered the mental element required for a finding of contempt. Rose LJ held as follows:

> "52. … Arlidge, Eady & Smith on Contempt (5th ed) at para. 12-93 cites the judgment of Warrington J *in Stancomb v Trowbridge UDC* [1910] 2 Ch 190 , 194. He expressed the principle as follows:
>
> > "If a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction and is liable for process of contempt if he or it in fact does the act and it is no answer to say that the act was not contumacious in the sense that in doing it there was no direct intention to disobey the order."
>
> 53. Arlidge then lists a long line of authority confirming that principle; motive is immaterial to the question of liability. In para. 12-101, the learned authors refer

> to the case of *Irtelli v Squatriti* [1993] QB 83 as hinting at "a degree of apparent coalescence between the requirements for mens rea in civil and criminal contempt". In that case the defendants were injuncted from selling, disposing or otherwise dealing with a property of which they owned the freehold. They later executed a charge over the property in favour of another. At the first instance hearing they did not attend and were found liable for contempt. On appeal, the Court of Appeal discharged the order on the basis that "it was impossible to conclude that the appellants had intentionally breached the injunction". There are various unsatisfactory features about the judgments in *Irtelli.* The first, as Lewison LJ pointed out during argument, is that the record in the law report of counsel's submissions on behalf of the appellants indicates that he did not assert that they were not liable for contempt, but submitted rather that the breach of the order was 'merely technical'. Secondly, the court was not referred to the contrary authorities such as *Stancomb* or *Knight v Clifton* [1971] Ch 700. The court was, on the other hand, referred to *Supply of Ready Mixed Concrete* [1992] QB 213, a decision of the Court of Appeal which was later overturned on this point by the House of Lords: *Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 AC 456 (' Pioneer ').
>
> 54. In my judgment *Irtelli v Squatriti* cannot stand in the light of the many earlier and later cases which establish that once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach. In *Pioneer*, Lord Nolan (with whom Lord Mustill, Lord Slynn of Hadley and Lord Jauncy of Tullichettle agreed) quoted from the opinion of Lord Wilberforce in *Heatons Transport (St Helens) Ltd. v Transport and General Workers' Union* [1973] AC 15 to explain the policy behind the principle: (479G of Pioneer )
>
> > "The view of Warrington J [in *Stancomb*] has thus acquired high authority. It is also the reasonable view, because the party in whose favour an order has been made is entitled to have it enforced, and also the effective administration of justice normally requires some penalty for disobedience to an order of a court if the disobedience is more than casual or accidental and unintentional."

30. The current version of Arlidge, Eady & Smith on Contempt remains the 5th edition, published in 2017, accompanied by a first supplement published in 2019. There have been further cases of relevance since then such that its commentary on the mental element in civil contempt cannot be considered to be up-to-date.

31. In *Secretary of State for Transport v Cuciurean* [2021] EWCA Civ 357 Mr Cuciurean was an unnamed defendant said to be one of the Persons Unknown who had breached an injunction prohibiting trespass on land being used as part of the HS2 high-speed rail project. The injunction order against the Persons Unknown had been subject to alternative service provisions, which the first instance judge found had been complied with. A finding of contempt was made, which Mr Cuciurean appealed. At para. 13 of the judgment, Warby LJ summarised the ingredients of civil contempt in the following manner:

> "13. The ingredients of civil contempt are not laid down by statute but established by common law authorities. In this case, both parties have relied on the following summary by Proudman J, DBE in *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch) [20], approved by this Court in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 [25]:
>
> > "A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court's order is relevant to penalty.""

32. Mr Cuciurean argued that the claimant had to prove good service of the injunction to the criminal standard, including negativing any suggestion of injustice raised by the defendant. The injustice he referred to was his asserted lack of knowledge of the terms of the order. Warby LJ rejected the ground of appeal, dealing with it in the following way:

> "55. … The Grounds of Appeal assert that "The correct test is whether there was good service or not, which is for the claimant to prove beyond reasonable doubt, including negativing any suggestion of injustice raised by the defendant."
>
> 56. This is a problematic formulation. It assumes that in order to establish "good service" a claimant must prove not only that what was done complied with the rules or the relevant Court order but also something more, including (if the issue is raised by the defendant) that proceeding on that basis is not unjust. As the Judge observed, there is no authority to support any such proposition. More than that, the proposition appears to be contrary to authority. The effect of the authorities was summarised by Lord Oliver in *Attorney General v Times Newspapers Ltd* [1992] 1 AC 181, 217-218 :
>
> > "One particular form of contempt by a party to proceedings is that constituted by an intentional act which is in breach of the order of a competent court. Where this occurs as a result of the act of a party who is bound by the order … it constitutes a civil contempt by him which is punishable by the court at the instance of the party for whose benefit the order was made and which can be waived by him. The intention with which the act was done will, of course, be of the highest relevance in the determination of the penalty (if any) to be imposed by the court, but the liability here is a strict one in the sense that all that requires to be proved is service of the order and the subsequent doing by the party bound of that which is prohibited."
>
> 57. The proceedings in *Cuadrilla* were conducted on that basis. It was common ground that the ingredients of civil contempt were those identified in *Farnsworth* (above) but it was understood that proof that these were met would not necessarily

establish knowing disobedience to the order. HHJ Pelling QC addressed the possibility that "the respondents did not, in fact, know of the terms of the order even though technically the order had been served as directed". He identified this as an issue "relevant to penalty if that stage is reached", observing that in such a case "it is highly likely that a court would consider it inappropriate to impose any penalty for the breach…": [2019] E30MA3131 [14]. On appeal, this Court endorsed this as a "sensible approach": *Cuadrilla* (above) [25].

58. These authorities indicate that (1) in this context "notice" is equivalent to "service" and vice versa ; (2) the Court's civil contempt jurisdiction is engaged if the claimant proves to the criminal standard that the order in question was served, and that the defendant performed at least one deliberate act that, as a matter of fact, was non- compliant with the order; (3) there is no further requirement of mens rea , though the respondent's state of knowledge may be important in deciding what if any action to take in respect of the contempt. I agree also with the Judge's description of the appellant's argument below: "it replaces the very clear rules on service with an altogether incoherent additional criterion for the service of the order." But nor am I comfortable with the notion that service in accordance with an order properly made can be set aside if the respondent shows that it would be "unjust in the circumstances" to proceed. This is not how the Court saw the matter in Cuadrilla, nor is it a basis on which good service can generally be set aside. It also seems to me too nebulous a test."

33. In *MBR Acres v Maher* [above] the principal issue before Nicklin J was whether service of an injunction on an instructed solicitor amounted to good service. However, at paragraphs 27 and 28 of his judgment, he commented on the effect of the Court of Appeal's decision in *Cuciurean* (above):

"27. In some cases, the need to secure compliance with a lawful injunction order will justify the Court granting permission to serve the injunction order by means other than personal service. In Cuciurean, the Court of Appeal held that if an order for alternative service has been made, and its terms complied with, then the respondent will have been given sufficient notice of the injunction order to sustain a contempt application. Thereafter, if s/he is found, to the necessary standard, to have breached the terms of the order, the defendant will be held to be in contempt of court.

28. But that is not an end of the matter. If such 'deemed' notice is unfair on the facts of any individual case, there are two safeguards.

i) First, in an appropriate case, a respondent can apply to set aside the alternative service order. As the Court of Appeal noted in *Cuciurean*, on any application for an order for alternative service, the Court must be satisfied that such an order is justified by evidence and an appropriate order to make. Fundamentally, the Court will not grant an order for alternative service unless satisfied that the proposed method of service is such as can reasonably be expected to bring the order to the attention of the defendant: *Cameron -v- Liverpool Victoria Insurance Co Ltd [2019] 1 WLR 1471 [21]* per Lord Sumption; and *Ineos Upstream Ltd -v- Persons Unknown [2019] 4 WLR 100 [34* (3)] per Longmore LJ. Too liberal an approach to alternative service orders increases the risk that respondents to injunction orders will not actually

> receive notice of what the Court has ordered them to do. In turn, that risks generating costly satellite contempt applications that serve little purpose.
>
> ii) Second, if the Court is satisfied on the evidence that, despite the alternative service order, the respondent was not aware of the terms of the injunction, then applying *Cuciurean* – and consistent with ECtHR jurisprudence (see further [94]-[97] below) – that will be highly relevant to the penalty (if any) that the Court would impose for the breach: see [58] and [62] per Warby LJ."

34. In *Wolverhampton City Council & others v London Gypsies and Travellers & others* [2023] UKSC 47 the Supreme Court concluded that the court does have the power to grant 'newcomer' injunctions, namely ones which bind persons unknown who were not identifiable when the order was granted and who had not at that time infringed or threatened any right or duty which the claimant seeks to enforce. The case did not directly concern the mental element required for contempt to be established or the requirements of service of an injunction. In the context of considering how newcomer injunctions are to be treated, at paragraph 132 of the judgment:

> "132. As it seems to us, the difficulty which has been experienced in the English cases, and to which *Gammell* has hitherto been regarded as providing a solution, arises from treating newcomer injunctions as a particular type of conventional injunction inter partes, subject to the usual requirements as to service. The logic of that approach has led to the conclusion that persons affected by the injunction only become parties, and are only enjoined, in the event that they breach the injunction. An alternative approach would begin by accepting that newcomer injunctions are analogous to injunctions and other orders which operate contra mundum, as noted in para 109 above and explained further at paras 155-159 below. Although the persons enjoined by a newcomer injunction should be described as precisely as may be possible in the circumstances, they potentially embrace the whole of humanity. Viewed in that way, if newcomer injunctions operate in the same way as the orders and injunctions to which they are analogous, then anyone who knowingly breaches the injunction is liable to be held in contempt, whether or not they have been served with the proceedings. Anyone affected by the injunction can apply to have it varied or discharged, and can apply to be made a defendant, whether they have obeyed it or disobeyed it, as explained in para 40 above. Although not strictly necessary, those safeguards might also be reflected in provisions of the order: for example, in relation to liberty to apply. We shall return below to the question whether this alternative approach is permissible as a matter of legal principle." [Emphasis added.]

35. The Supreme Court summarised the nature of newcomer injunctions at paragraph 238(ii):

> "(ii) Such an injunction (a "newcomer injunction") will be effective to bind anyone who has notice of it while it remains in force, even though that person had no intention and had made no threat to do the act prohibited at the time when the injunction was granted and was therefore someone against whom, at that time, the applicant had no cause of action. It is inherently an order with effect contra mundum, and is not to be justified on the basis that those who disobey it automatically become defendants."

## Discussion and analysis

### Service of the injunction

36. Alternative service of the Amended Interim Injunction was considered and authorised by Ritchie J at paragraph 11 of the Combined Directions Order of 19 May 2023. The Court does not have a transcript of the judgment of Ritchie J. However, his requirements as the alternative service are in substance the same as the provisions as to alternative service authorised by Hill J when granting the original interim injunction on 22 December 2022. The transcript of her judgment [[2023] EWHC 56 (KB)] expressly considers the appropriate method of alternative service in the context of the requirements of *Canada Goose*. The Defendant does not take issue with the methods of alternative service authorised by Ritchie J nor has he availed himself of liberty to apply provision provided to any person affected by the order.

37. What is in issue is whether the Third Claimant can prove to the criminal standard of proof that the Amended Interim Injunction has been served as required by paragraph 11.

38. Mr Robinson, on behalf of the Defendant, submits that the Claimants have failed to comply with the alternative service provision embodied in paragraph 11(9) of the Combined Directions Order by failing to maintain official road signs on Kenrick Way. No issue is taken with the compliance with the other aspects of paragraph 11. He argues that the Third Claimant must demonstrate that it had a reasonable system of inspection to maintain the injunction road signage but that there is no evidence of any such system. He suggested an inspection regime of possibly every 3 to 4 weeks was required to satisfy the ongoing maintenance obligation. He further submits that the remaining sign on Kenrick Way was insufficient to discharge the obligation for signage on the basis that it was too small and pointed out across the carriageway rather than towards drivers.

39. Mr Singleton, on behalf of the Third Claimant, relies on the evidence of Mr Brown as to service. He submits that the alternative service provisions do not prescribe specific sites at which signage must be erected and maintained. He argues that "maintaining" the signage in the context of paragraph 11(9) should be construed as meaning keeping the signage under review and, if signage is removed, reinstating it in a reasonable period. He submits the fact that Mr Sandu inspected the signage 5 days after the Defendant's arrest demonstrates the ongoing oversight on the part of the Claimants.

40. The affidavit evidence of Mr Brown, dated 29 June 2023, was not challenged. In that statement he adopts the contents of his witness statement of 13 June 2023, which deals with the steps taken to comply with paragraph 11 of the Combined Directions Order. At paragraph 15 of his statement, he states: "I can confirm that the signage continues to be displayed, both at fixed locations and at regular intervals on digital signage, as described above, throughout the Black Country area." That evidence has not been challenged. The evidence of Mr Sandhu is that three signs had originally been installed on Kenrick Way as an identified car cruising hotspot. That aspect of Mr Sandhu's evidence has not been challenged. Neither has the Defendant challenged the reasonableness of the erecting three signs on Kenrick Way. In light of the combination of that evidence, I am satisfied to the criminal standard and find as a fact that as at 29 June 2023, the date of Mr Brown's affidavit, the three signs were displayed on Kenrick

Way. Those signs, being situated in an identified car cruising hot spot, complied with the requirements of paragraph 11(9). It therefore follows that two of the signs on Kenrick Way must have been removed at an unidentified time, and without the Claimants' permission, between 29 June 2023 and Mr Sandhu's inspection on 3 August 2023. In other words, at some stage over a five week period.

41. Paragraph 11(9) of the Combined Directions Order requires the Claimants to "[maintain] official road signs (fixed, and temporary) throughout the Black Country Area in locations that are, or have been, hotspots car cruising activity…" The interpretation of the obligation under that clause has to be construed in the context of paragraph 11 as a whole. The alternative service provisions were no doubt designed to ensure that details of the Amended Interim Injunction entered the public domain in a multitude of ways. This included via print media, radio, television, social media (both of the Claimants and the police), the Claimants' websites, hard copies at the Claimants' offices, YouTube, electronic road signage and fixed road signage. It is also relevant that, simultaneously with the granting of the Amended Interim Injunction in this case, a similar injunction was granted in favour of Birmingham City Council, the neighbouring local authority and the one where the Defendant lived, in claim KB-2022-BHM-000221. As the Combined Directions Order demonstrates, similar provisions as to alternative service of that injunction were made. The practical effect therefore was that there will have been publicity over a large geographical area as to the granting of injunctions to prevent car cruising. The obligation to maintain official road signs is thus but one of a plethora of means by which the Amended Interim Injunction was to be promoted.

42. It is further relevant that paragraph 11(9) imposes no requirement to erect signage in specific locations or to erect a specified number of signs in a hotspot or is it prescriptive as to the size or how the signage is to be installed. The obligation to maintain has to be seen against the fact that the Claimants were given significant latitude as to how and where to install signage.

43. In my judgment, the obligation to "maintain" the signage means to reasonably maintain. It would be unworkable and contrary to the public interest to impose a requirement that the Claimants must ensure that the signage is always be in place, not least because it would allow those wishing to engage in car cruising to circumvent the order by simply removing the signage. The evidence before the Court is that the Third Claimant was reasonably maintaining the signage at Kenrick Way. The very fact that Mr Sandhu undertook an inspection on 3 August, just 4 working days after the Defendant's arrest, demonstrates the Third Claimant's commitment to checking the signage. Mr Robinson's submission that an inspection is required "possibly every 3 to 4 weeks" is unsupported by any authority. It also ignores the reality that, once an inspection reveals a sign is missing, the Claimants will need a reasonable time to source a replacement. On the time scales in this case, the two signs were missing for, at most, five weeks. Even an inspection every 3 to 4 weeks is unlikely to have yielded a replacement sign prior to the 29 July 2023. The Defendant's position ignores the other multiple means by which notice of the Amended Interim Injunction was served. As such, I am satisfied to the criminal standard that the Claimants served the Amended Interim Injunction as required by paragraph 11 of the Combined Directions Order.

**The Defendant's state of knowledge**

44. Mr Robinson, on behalf of the Defendant, submits that in order for the Third Claimant to establish contempt, it must prove that the Defendant had personal knowledge of the existence of an injunction albeit not necessarily the detail of the terms. In the course of his submissions, he expanded upon this arguing that the requisite knowledge of the order requires something more than service. In support of his argument, he relies on the judgment in *P v P* that a "contempt cannot be established, for example, against an individual who, unaware of the existence of the order, acts contrary to its terms." He further argues that *Wolverhampton City Council v London Gypsies and Travellers* supports his proposition in that it refers to a contemnor's knowledge as being a requirement for a finding of contempt: "anyone who knowingly breaches the injunction is liable to be held in contempt, whether or not they have been served with the proceedings." [At para. 132] Mr Robinson does not accept that *Cuciurean* applies to a defendant who has no knowledge of an order at all.

45. Mr Singleton, on behalf of the Third Claimant, does not accept the Defendant's analysis. He submits that although some historic authorities, such as *P v P,* indicated that an act undertaken in ignorance would not sound in contempt, that issue has been clarified in *Varma.* He submits that the position is further clarified in *Cuciurean* which establishes that service equates to notice such that personal knowledge is not a required element. Mr Singleton argues that *Wolverhampton City Council v London Gypsies and Travellers* has to be read in light of *Cuciurean* to the effect that, if someone is served, they are fixed with knowledge of the injunction.

46. In my judgment, the decision in *P v P* has to be read in light of the subsequent decisions of the Court of Appeal. The Defendant cannot simply cherry pick a historic authority without recognising subsequent developments in the law. In *Varma* the Court of Appeal held that *Irtelli v Squatriti*, in which contempt proceedings failed on the basis that it could not be proved that the defendant had intentionally breached the injunction, could not stand. *Varma* established that "once knowledge of the order is proved, and once it is proved that the contemnor knew that he was doing or omitting to do certain things, then it is not necessary for the contemnor to know that his actions put him in breach of the order; it is enough that as a matter of fact and law, they do so put him in breach."

47. The problem with the Defendant's submission on this issue is that it requires the Third Claimant to prove not only service, which it has done, but also something more, namely that the Defendant did not have personal knowledge of the Amended Interim Injunction. The requirement to prove "something more" was considered by the Court of Appeal in *Cuciurean* where, at paragraph 56, Warby LJ held that "there is no authority to support any such proposition. More than that, the proposition appears contrary to authority." Warby LJ went on, at paragraph 58, to agree with the first instance judge's view that such a formulation "replaces the very clear rules on service with an altogether incoherent additional criterion for the service of the order." The Defendant's argument in this case gives rise to exactly the same concerns. Instead of service being governed by the express terms of paragraph 11 of the Combined Directions Order, an additional criterion would have to be applied. That additional criterion is not only vague ("knowledge of the existence of the injunction albeit not the precise terms") but founded on matters than can only be in the personal knowledge of the Defendant.

48. The Defendant's submission that the decision of the Supreme Court in *Wolverhampton City Council v London Gypsies and Travellers* undermines the position of the law as held at paragraphs 54 -62 of *Cuciurean* is unattractive. It must be borne in mind that the issue before the Supreme Court was not whether personal knowledge was required to establish contempt, nor did the Supreme Court overrule *Cuciurean.* Moreover, in my judgment, insofar as paragraph 132 of *Wolverhampton* requires an individual to "knowingly" breach an injunction before contempt can arise, such a formulation is consistent with the decision in *Cuciurean.* Warby LJ, at paragraph 58, held that "'notice' is equivalent to 'service' and vice versa…" The knowledge referred to by the Supreme Court in Wolverhampton is to be equated with the notice provided by service. There is thus no inconsistency on this issue between *Cuciurean* and *Wolverhampton.*

49. For the aforementioned reasons, the Defendant's submissions on this issue are flawed and contrary to the current authorities. The Third Claimant has proved service in accordance with paragraph 11 of the Combined Directions Order and does not additionally need to prove that the Defendant was personally aware of the existence of the order.

50. The Defendant's state of knowledge may however be important if all other aspects of the contempt are established and the Court has to determine what action to take thereon. The parties have requested that the Court make a finding of fact at this stage as to the Defendant's state of knowledge.

51. The Court raised with the advocates the issue as to the burden and standard of proof in establishing the Defendant's state of knowledge. Each party has diametrically opposing positions on the point but neither can take the Court to any authority in support of their propositions.

    i) The Third Claimant submits that, assuming all elements of the contempt have been proved by the Third Claimant to the criminal standard, the burden then falls on the Defendant to prove on the balance of probabilities that he had no personal knowledge of the Amended Interim Injunction. In other words, that the breach was non-contumacious. Mr Singleton submits that such is a matter of mitigation not defence. As the facts are within the personal knowledge of the Defendant, it follows that the Defendant must establish them.

    ii) The Defendant submits that whilst the Defendant has an evidential burden, it is for the Third Claimant to disprove the alleged lack of personal knowledge to the criminal standard. Mr Robinson draws an analogy with the law of self-defence in criminal law.

52. Per *Cuciurean* at paragraph 58, a defendant's state of knowledge may be important in deciding what action to take in respect of any proved contempt. It is not however a constituent element of the contempt. By the time the Court is considering sentence, it necessarily follows that the Court must already have been persuaded that a claimant had proved the contempt to the criminal standard.

53. The authors of Blackstones Criminal Practice 2024 at D:20.81 provide the following commentary under the heading 'Requirement to Prove Mitigation':

> "D20.81
>
> … The requirement to prove mitigation should not be confused with the resolution of a factual dispute as to the circumstances of the offence in a Newton hearing (see D20.8 et seq.). The cases appear to draw a distinction between 'true Newton' situations, where the dispute is about the immediate circumstances of the offence, and what have been described as 'reverse Newton' situations. In the latter, the dispute is about extraneous matters about which the prosecution witnesses are unlikely to have any knowledge. Since these matters would not have formed part of the prosecution case, or be within the prosecution's knowledge, and may well be within the peculiar knowledge of the offender, the rule is that the onus of satisfying the judge rests on the defence."

54. In *R v Guppy* (1995) 16 Cr. App. R. (S.) Hirst LJ considered the burden of proof in relation to Newton hearings and mitigation and held:

> "… There seems to us to be a marked difference in principle between the Newton situation (where the issue goes directly to the facts and circumstances of the crime itself as presented respectively by the prosecution and defence), and consideration of extraneous facts put forward in mitigation, which will usually be within the exclusive knowledge of the defendant or appellant himself, and will have been raised by him entirely on his own initiative.
>
> We agree with the view of the editors of Archbold, and we consider that if his extraneous mitigation is of doubtful validity, he should have to make it good, and that the prosecution should not be obliged to disprove it…
>
> As a result we hold that, in relation to extraneous matters of mitigation raised by a defendant or appellant, a civil burden of proof rests on the defendant or appellant, though of course in the general run of cases the sentencing judge will readily accept the accuracy of defending counsel's statements in this context."

55. The Defendant's asserted lack of personal knowledge is irrelevant to the proof of contempt. It bears on mitigation only. It is a not matter upon which the Third Claimant's witnesses could have any knowledge, being something within the peculiar knowledge of the Defendant. By analogy with the position in criminal law discussed above, in my judgment the Defendant thus bears the burden in establishing his state of personal knowledge to the civil standard of proof. Such an approach is not only consistent with the criminal jurisdiction, but it accords with first principles that the burden of proof lies on the party making the assertion. [See for example, *Robins v National Trust Co* [1927] AC 515 at 520]. As a matter of principle, it would therefore be illogical to impose a further requirement on a claimant to prove an ingredient not forming part of the contempt to the criminal standard. The Defendant's analogy with self-defence is flawed; whereas self-defence provides a complete defence to an offence, a lack of personal knowledge in the context of contempt is a matter of mitigation only.

56. Furthermore, as noted by Nicklin J in *MBR Acres* [at para. 28(1], a party affected by an alternative service provision has the ability to apply to vary the terms. If the Defendant had issued an application to vary the service provision, the burden of proof would have rested on him on the balance of probabilities to prove his application. It

would therefore be inconsistent with the operation of the liberty to apply procedural safeguard if a defendant who has not sought to vary the alternative service provisions, is put in a more advantageous position than someone who has.

57. For the aforementioned reasons, I proceed on the basis that it is for the Defendant to prove his personal state of knowledge on the balance of probabilities.

58. The Defendant's assertion to the Court that he was unaware of the injunction, together with his similar comment to the police officers on arrest, are wholly self-serving and need to be assessed against his credibility as a whole. The Defendant was an unsatisfactory witness. At times in his oral evidence he was evasive and on other occasions his account was inconsistent with the account he gave in his witness statement. By way of example:

i) In his witness statement, the Defendant contended that he "drove down the M5 from Rednal to West Bromwich to meet some friends to go for a drive and get some food." That account provides two reasons for visiting West Bromwich: (1) to meet some friends to go for a drive and (2) to get some food. His oral evidence was materially different. He told the Court that (1) he was already driving with one friend in convoy on the M5; (2) he made a spur of the moment decision to go to West Bromwich, not to "meet friends to go for a drive", but to go and look at the gathered cars and let people see his car; (3) he was not planning to get some food in West Bromwich but had been planning to do that closer to home in Birmingham. His witness statement was startling by its brevity running to only a handful of sentences. It was therefore surprising that he was not able to maintain his original account when giving his oral evidence and this is, in my assessment, a sign that he was not telling the truth about his reasons for visiting West Bromwich that evening.

ii) His evidence that he made an impromptu decision to leave the M5 motorway to simply observe other cars when he saw "all the cars on the other side of the road and decided to take a look" is fanciful. The car cruise was not taking place on the M5. It was taking place in West Bromwich on Kenrick Way. The sighting of multiple vehicles on a motorway at nearly 11pm is most unlikely to have alerted a hitherto uninformed driver to the fact that a car cruise was taking place nearby, still less where to find the said car cruise.

iii) His evidence as to how he and his friend made the decision to leave the motorway to drive to Kenrick Way was evasive. On his own evidence his friend was driving in front in another vehicle. When he was asked how the both made the joint decision to leave the motorway, he paused before suggesting they spoke by mobile phone. The far more likely explanation is that the decision to visit Kenrick Way was a decision that had been taken prior to the two vehicles leaving Rednal.

iv) Although the Defendant's evidence was that he was only planning to "stop and look at the cars," the video evidence clearly demonstrates that this is not what he did. On his own case he accepted driving in one direction along Kenrick Way before coming back on himself. He made no effort to pull off onto any of the side roads, as other spectators had done. If, as he asserts, he was looking for somewhere to pull over but it was too busy, the same would have been

apparent when he first drove down Kenrick Way and he could have departed the scene.

v) The Defendant's evidence is that he told the police he didn't even have a "section 59." He told the Court that he was aware of such notices from other friends who had been stopped for anti-social driving and received such a warning. The "section 59" refers to s.59 of the Police Reform Act 2002 which gives the police the ability to give a warning to persons using vehicles in a manner causing alarm, distress or annoyance, prior to seizing such vehicles if the conduct is repeated. Most members of the public are likely ignorant of such a police power and it is revealing that the Defendant admits associating with those who have fallen foul of this provision.

vi) On the Defendant's own case, he went to Kenrick Way both to look at other people's cars but also for others to see his car. The Defendant's car was a distinctive orange Seat Leon. The fact that he thought other car enthusiasts may want to view his vehicle at around 11pm in an urban residential area provides a revealing insight into who he thought would be at such an event.

vii) The Defendant failed to provide any credible explanation as to why he was following his friend who was driving in the lead vehicle. Whilst he suggested that the two were planning to go for food, this does not bear scrutiny. The Defendant had collected his friends' two dogs from Rednal to look after them for the week whilst his friend went away. If, as he told the Court, he was planning to get food closer to his home in Birmingham, it makes no sense for the Defendant to have driven to Rednal to collect the dogs only for his friend to then drive all the way back towards Birmingham to eat. The far more likely explanation is that the two friends were driving in convoy to the car cruise, with the intention of thereafter separating and going to their respective homes. The Defendant provided no details as to his friend's identity, let alone did he call him to give evidence in support.

59. For the aforementioned reasons, I conclude that the Defendant is not a reliable witness. The Defendant's evidence establishes that he has an interest in cars; he associates with others who also have an interest in cars including those who have received s.59 warnings for anti-social behaviour; he has a distinctive car that he believes others may want to see; he knows how to locate a car cruise occurring late at night in an urban residential area many miles from his home and is prepared to attend and participate in such a car cruise. He is, in my judgment, someone who is clearly part of a community of individuals who are interested in car cruising. His evidence to the Court that he was wholly oblivious to the very existence of an injunction prohibiting car cruising cannot be believed. The existence of the Amended Interim Injunction, and the original interim order, have been publicised extensively in the Black County and indeed wider West Midlands since being granted in December 2022 with a further wave of publicity in May 2023. Against that background, the Defendant falls hopelessly short in proving on the balance of probabilities that he was unaware of the existence of the injunction. Indeed, even if my earlier finding as to the burden and standard of burden of proof on the knowledge issue were later held to be incorrect, such is the incredulity of the Defendant's account, I would have been persuaded to the criminal standard that the Defendant knew of the existence of the Amended Interim Injunction.

### The Defendant's driving on Kenrick Way

60. Although the principal issues in dispute in this application are those of service and state of knowledge, the Defendant, as he is entitled to do, puts the Third Claimant to strict proof as to the other elements of contempt.

61. The Third Claimant must prove to the criminal standard that the Defendant's actions that evening fell within that prohibited by paragraph 1 of the Amended Interim Injunction and that he intended to do the action alleged. Having considered the evidence of PC Lewis and viewed the video evidence, I am satisfied to the criminal standard that the Defendant's actions breach the order:

    i) The evidence of PC Lewis and the video evidence establishes that the Defendant was a driver of a motor vehicle on a road within the Black Country Area (as defined) between the hours of 3.00pm and 7.00am. The Defendant does not challenge this.

    ii) The video evidence provides a clear visual of the large number of vehicles that were gathered on and immediately adjacent to Kenrick Way. Indeed, the Defendant's own case is that it was too busy for him to stop. The volume of vehicles thus satisfies the requirement of paragraph 1 there be a gathering of 2 or more persons.

    iii) Paragraph 1 requires a driver to have engaged in "motor racing or motor stunts or other dangerous or obstructive driving." The video evidence again provides a clear visual of the manner of the Defendant's driving. The dual carriageway is in an urban residential area with a 40mph speed limit. Notwithstanding that it was nearly 11pm, the road is busy with other cars driving at speed, there are multiple vehicles parked adjacent to Kenrick Way and multiple pedestrian spectators lining the roadside. The video footage shows the Defendant's vehicle accelerate hard away from the traffic island at Spon Lane alongside other vehicles also proceeding at speed in the same direction. His vehicle is initially in the outside lane, overtakes two vehicles then undertakes another. He then pulls back into the outside lane and overtakes another vehicle before attempting to undertake again but gets stuck behind slower moving traffic in both lanes. The police evidence, which was not challenged, is that the police car followed the Defendant's vehicle at 75-80mph and did not catch up until the Defendant was forced to slow behind other traffic approaching Telford Road traffic island. The manner of the Defendant's driving is clearly deliberate and consistent with 'motor racing' and 'obstructive driving' as prohibited by paragraph 1. I do not however find the driving to be that classified by the order as a motor stunt.

## Conclusion

62. The Third Claimant had proved to the criminal standard that the Defendant's actions on 29 July 2023 amounted to civil contempt. The Amended Interim Injunction was served in accordance with the alternative service provisions, the establishing of contempt was not dependent on the Third Claimant proving that the Defendant had personal knowledge of the order and, in any event, the Defendant was so aware of the

existence of the Amended Interim Injunction. The matter will be listed for the handing down of this judgment and to hear submissions as to the appropriate penalty.

Following the handing down of the written judgment and submissions from the parties as to the appropriate penalty, the following extempore judgment was delivered.

# APPROVED JUDGMENT ON SENTENCE

[Taken from a transcript of the hearing]

1. Mason Phelps appears before this court in respect of a proved contempt arising from his breach of an interim injunction granted by Hill J by order of 22 December 2022, as amended by Ritchie J on 19 May 2023. The breach occurred on 29 July 2023, and the facts thereof are set out in a written reserved judgment that the court handed down earlier this morning following a contempt trial on 4 January 2024. It now falls for the court to determine the appropriate penalty in relation to the contempt.

2. Turning to the approach to sentencing, the court reminds itself that the objectives when imposing penalties for civil contempt are those as set out by the Court of Appeal in *Lovett v Wigan Borough Council* [2022] EWCA Civ 1631 at paragraph 39. Those objective are, in the following order: ensuring future compliance, punishment and rehabilitation.

3. This court has sentenced a number of other individuals within these proceedings for contempt. As I have done in those previous sentencing exercises, I adopt the approach to assessing sanctions as summarised by the Supreme Court in paragraph 44 in *The Attorney General v Crosland* [2021] UK SC 15, and endorsed by the Court of Appeal in *Breen v Esso Petroleum Limited* [2022] EWCA Civ 1405.

4. The Sentencing Council does not produce guidelines for breach of a civil injunction. However in *Lovett v Wigan Borough Council* the Court of Appeal endorsed the use of the sentencing matrix that is contained in Annex 1 of the Civil Justice Council's report of July 2020 in relation to orders made under the Anti-social Behaviour Crime and Policing Act 2014. In the case of *Birmingham City Council v Lloyd* [2023] EWCA Civ 1355 the Court of Appeal endorsed the use of the *Lovett* guidance by analogy when sentencing cases of contempt that involve anti-social type conduct. *Birmingham City Council v Lloyd* has direct parallels with the case before the court this morning, because it too concerned contempt proceedings arising from breach of a car cruising injunction granted in favour of the neighbouring Local Authority.

5. I proceed on the basis that the defendant's driving on 29 July amounted to a form of anti-social behaviour, and it is therefore appropriate for the court to apply the Civil Justice Council matrix by analogy.

6. I turn to consider the appropriate category of culpability. In my judgment Mr Phelps's actions on 29 July fall to be assessed as medium culpability. His action in gathering at Kenwick Way, and driving with others in the manner he did, was clearly a deliberate act. I accept it is not the highest category of culpability, as this was a first breach, and there is no evidence that he was involved in the organisation of the event.

7. As to the category of harm, the claimant contends this falls within category 1. The defendant concedes that the court may well take the view that this falls within category 1. In assessing the level of harm, the court has to take into account the level of harm that was actually caused, but also that that was intended or was at risk of being caused by the breach. The willingness to engage in racing at speeds of 75 to 80 miles an hour encourages other to partake in similar behaviour. What happened here occurred in an urban area, with a significant volume of traffic using the road, and with spectators present. Racing in such circumstances creates a very obvious high risk of serious harm to other road users and pedestrians. As this court has said to others involved in similar behaviour, it was a matter of luck not judgment that no one was injured or worse, or property damaged. The potential consequences of car cruising are demonstrated by fatalities that occurred at an incident in a similar area in 2022. That said, I nonetheless take the view that the category of harm can properly be considered within category 2, albeit it is at the higher end of that middle category.

8. Applying the Civil Justice Council's matrix, a culpability B, category harm 2 case has a starting point of a one month custodial sentence, with a range of adjourned consideration to three months' imprisonment. If one were consider a culpability B, category 1 harm, which I accept this is not quite in terms of harm, the starting point would have been one of three months' imprisonment.

9. The court then has to look at whether there are aggravating or mitigating circumstances. In my judgment there is one aggravating factor in this case, and that is that the breach took place at a time when the defendant was subject the operational period of a suspended sentence. On 30 September 2021 Warwick Crown Court passed a sentence of fifteen months' imprisonment, suspended for twenty-four months. There in July 2023 the defendant was still within the operational period, albeit within two months of the end thereof.

10. There are however mitigating features to take into account. Mr Phelps is still a relatively young man at aged 27 years, and he has a history of committed employment, being self-employed in exhibition work. I accept that which is submitted on his behalf, namely that he usually receives a gross income of between £2,000 and £4,000 per month. He is not in work at the moment, having been involved in a completely unrelated road traffic accident on 29 November 2023, such that he is physically incapable of work at present. His expectation is that he will return to work in a month or so.

11. I also take into account that this is a first breach of the injunction. Further, as a result of the contempt allegation being contested such that a trial was required, a number of months have now passed since events at the end of July 2023. During that time the defendant has demonstrated his ability to comply with the interim injunction.

12. Taking the aforementioned matters into account, in my judgment neither deferred consideration or a fine would be a sufficient sentence for this breach of the High Court injunction. The participation in a street cruise as a driver, driving at speeds close to twice the legal limit in an urban area with other road users around, is so serious that only a custodial penalty will suffice.

13. The provisional sentence, before consideration of the question of whether the sentence can be suspended, will be one of forty-two days' imprisonment. That sentence takes into account the fact that Mr Phelps spent two days in custody when he was arrested, as

there was a Sunday between his arrest and production before the court. Mr Phelps is not entitled to any credit for any admission as the contempt was found proved after a trial.

14. The court has to consider whether the sentence should be suspended. In my judgment this is clearly a case in which suspension is appropriate. As the Court of Appeal acknowledged in *Lovett*, ordinarily in instances of first breach suspension will be considered appropriate, to give the individual the opportunity to demonstrate that they can comply with the injunction. Given Mr Phelps's compliance over the last six-month period, the court has every reason to be confident that he will comply going forward. Therefore the sentence will be suspended for a period of twelve months from today, on condition of compliance with the terms of the interim injunction of Hill J, as amended by Ritchie J, and any other subsequent form of amended injunction order made in the case.

15. The claimant makes an application for costs. The costs that are sought are in accordance with an N260 costs schedule that has been provided. The costs claimed only include the costs up to the hearing on 5 October 2023. It is unclear why the claimant had not chosen to seek its full costs, but that is something of a windfall for Mr Phelps.

16. The general rule under CPR 44.2(2) is that an unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. The claimant is clearly the successful party, having succeeded in establishing the contempt, and there is no reason to depart from the general order. Mr Phelps will therefore be ordered to pay the claimant's costs of the contempt application in principle.

17. Following clarification by the Court of Appeal in *The Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, costs protection afforded by section 26 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 to those in receipt of civil aid does not apply to those such as Mr Phelps in receipt of Legal Aid for contempt proceedings. Therefore the order as to costs will be enforceable.

18. The costs fall to be assessed on the standard basis. Mr Phelps current lack of financial means is not a valid reason not to make a costs order, particularly in circumstances where be envisaged a return to work. His current means may however sound upon the instalments by which it is appropriate that the costs be paid. The claimed contribution to costs is £7,040.30. That sum is, in my judgment clearly proportionate in circumstances where the matter has proceeded to a full trial. I therefore assess the costs as drawn.

19. I am not going to make an order for payment by instalments today, because Mr Phelps's financial circumstances are likely to change radically when he returns to work and stops receiving Universal Credit. I will make an order for payment in full in three months. That time will give Mr Phelps an opportunity, once he is back in work or his financial position is certain, to make an application to the court for the order to be varied to pay by instalments. That application will need to be supported by evidence as to his means and will allow the court to make an informed decision as to the appropriate level of instalments, if any. It is not helpful to anybody for the court to try to set the level of those instalments today in the absence of clarity as to Mr Phelps' future work position.

20. The court has made a suspended order of committal. Mr Phelps has the right to appeal the order. Any appeal lies to the Court of Appeal Civil Division, and must be filed within 21 days of today.

21. I direct that a transcript of this judgment on sentence be obtained at public expense on an expedited basis. In due course both the written judgment on liability and the approved transcript of the judgment on sentence shall be published on the Judiciary website in the usual way.

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**(This judgment has been approved by the Judge.)**