

# AG v Crosland: Supreme Court Finds Contempt in Leaked Judgment Case

8 September 2021

## INTRODUCTION

The Supreme Court in *HM Attorney General v Crosland* [2021]<sup>1</sup> has found against a party which publicly revealed the contents of an embargoed judgment in contempt of court proceedings. The judgment serves as a reminder to practitioners that the Court takes very seriously the duty of confidentiality when it comes to the pre-release of judgments. The Attorney General chose to pursue contempt proceedings after the case was referred by Lord Reed.

## BACKGROUND

The present case results from the judgment in *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020]<sup>2</sup> (the “Friends of the Earth Judgment”), that concerned the lawfulness of the Airports National Policy Statement and its accompanying environmental report. The case was brought in relation to the proposed construction of a third runway at Heathrow Airport. Mr Timothy Crosland (an unregistered barrister) represented the charity Plan B in those proceedings. It is not necessary in considering the present case to examine the Friends of the Earth Judgment beyond noting that it concerned a matter of significant public interest and controversy.

Mr Crosland, in his capacity as a legal representative, was provided with an embargoed copy of the Friends of the Earth Judgment on 9 December 2020. On 15 December 2020, Mr Crosland published the result of the appeal in an email to the Press Association, and a similar statement was published on Plan B’s Twitter account. On the same day, the Supreme Court began notifying the media of the embargo breach. By this time, the story had already been picked up by a multitude of media outlets including *The Daily Telegraph*, *The Independent* and *Mail Online*. Later that day the Supreme Court contacted

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<sup>1</sup> UKSC 15.

<sup>2</sup> UKSC 52; [2021] PTSR 190.

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Mr Crosland requesting the confidential material be removed from Twitter. This request was not complied with.

The Friends of the Earth Judgment was formally handed down by the Supreme Court on 16 December 2020. *The Independent* published an online article on 17 December 2020, authored by Mr Crosland, with the title “*I am the lawyer who committed contempt of court over Heathrow’s expansion plans - this is why I did it*”.<sup>3</sup>

The facts described above were not in dispute between the parties in the present case. Mr Crosland submitted that he was justified in his breach because it was a reasonable and proportionate measure to prevent harm to the public as a result of global warming.

## JUDGMENT

### Overview

Early in the judgment, the Court focussed on the actual text printed on the face of the embargoed document. The text is often skipped over by practitioners as boilerplate language, but the Court placed such value on it that it was reproduced in full in the judgment. The wording is clear that any breach of confidentiality “*may be treated as a contempt of court*”. Reinforcing the point, the judgment also quoted the wording of Supreme Court Practice Direction 6.8.3-5,<sup>4</sup> which, among other practical advice, states that, “*The contents of this document are subject to a strict embargo and are not for publication...*”.<sup>5</sup>

The principal issues for the decision were straightforward. The Court found (i) Mr Crosland was *responsible* for the disclosure itself; and (ii) he was *aware* of the embargo on disclosure at the relevant time. The Court then considered if Mr Crosland’s actions represented an interference with the administration of justice that was sufficiently serious to amount to criminal contempt.

### Criminal/Civil Contempt

The judgment cites Lord Toulson as follows, “*A criminal contempt is conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice*”.<sup>6</sup> The Court found that the breached order was designed to protect the administration of justice (rather than, for example, the private rights of a party in proceedings). Moreover, the duty of confidentiality contained

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<sup>3</sup> <https://www.independent.co.uk/voices/heathrow-expansion-third-runway-b1775755.html>.

<sup>4</sup> <https://www.supremecourt.uk/procedures/practice-direction-06.html>.

<sup>5</sup> See Practice Direction 40E for similar guidance in the CPR.

<sup>6</sup> *Director of the Serious Fraud Office v O’Brien* [2014] UKSC 23; [2014] AC 1246, para 39.

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within the order applied directly to Mr Crosland and the underpinning of that duty was well established.<sup>7</sup> The Court considered the threshold of seriousness for criminal contempt had been met based on the following factors:

- Preserving the authority of the Court that judgments should be delivered at a time of its choosing and in a definitive form. Leaks of draft judgments could undermine the authority of the Court and its judgments.
- The importance of the procedure for correcting typographical or other errors.
- It was clearly the intention of Mr Crosland to publish the result and his comments on it as *widely as possible*.
- Mr Crosland's statements were in terms which defied the authority of the Court and which could encourage others to disobey the prohibition on publication and to disclose this or other draft judgments.

### Defence

The Court made quick work of Mr Crosland's defence on liability. Mr Crosland claimed that there existed an overwhelming public interest that trumped the confidentiality order. The Court was not concerned with a contractual or equitable duty of confidentiality. Instead, the Court focused on the straightforward point that Mr Crosland had been given a direction by the Court which he chose to disobey.

Mr Crosland also attempted to rely on Article 10 (freedom of expression) of the European Convention on Human Rights. The Court held that whilst there had been a restriction of Mr Crosland's Article 10 rights, this restriction was clearly necessary in order to achieve the legitimate objective of maintaining the authority of the judiciary and judicial decisions and was a proportionate means of achieving that result.

### Penalty

In assessing the correct penalty, the Supreme Court looked to the decision in *Liverpool Victoria Insurance Co Ltd v Khan* [2019].<sup>8</sup> Consideration was given to the following factors: (i) the offender's culpability and the harm caused; (ii) if a fine is sufficient or if the contempt is so serious the Court must impose a custodial penalty; (iii) the offender's genuine remorse and previous good character; (iv) the impact of committal on connected persons (children, vulnerable adults); and (v) any early admission by the offender.

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<sup>7</sup> *Director of Public Prosecutions v P (No 2)* [2007] EWHC 1144 (Admin); [2008] 1 WLR 1024, paras 2 and 10 per Smith LJ; *R v Noshad Hussein* [2013] EWCA Crim 990, paras 1 to 2 per Treacy LJ.

<sup>8</sup> EWCA Civ 392; [2019] 1 WLR 3833, paras 57 to 71.

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The Supreme Court found that there was damage caused by the contempt in that it undermined the validity of the judicial system; however, the direct harm was limited. Further, Mr Crosland was found to be of previous good character and the Court accepted greater clemency than is normally required to be shown in cases of civil disobedience as opposed to other cases.<sup>9</sup> The Court imposed a fine of £5,000 on Mr Crosland, and ordered him to pay £15,000 in costs.

### Going Forward

The facts in the present case are very specific. It is highly unlikely commercial litigation practitioners would find themselves having deliberately leaked an embargoed judgment in order to attract publicity. However, it does serve as a reminder that many of the duties practitioners may take for granted are considered very serious by the Court. It is worth noting the specific language used in the respective rules. As per Practice Direction 6.8.3 of the Supreme Court Rules, the reserved judgment<sup>10</sup> may be released to counsel, solicitors<sup>11</sup> and in-house legal advisers in a client company, Government department or other body.

In terms of the CPR, the position is broadly similar under Practice Direction 40E. The Court will provide a copy of a draft judgment to the parties' "legal representatives" by 4 p.m. on the second working day before a judgment is handed down, or at such other time as the Court may direct.<sup>12</sup> A copy of the judgment may also be supplied, in confidence, to the parties themselves.<sup>13</sup>

In the febrile atmosphere created when an embargoed judgment has been released, it is extremely important that only permitted parties receive a copy and that the need for confidentiality is highlighted. Given the risk of being found in contempt, any litigation practitioner unsure of whom a judgment should be provided to should review the relevant guidance and, where necessary, consult the judge.<sup>14</sup>

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Please do not hesitate to contact us with any questions.

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<sup>9</sup> *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 and *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357.

<sup>10</sup> Unless in the case the Court or the Registrar directs otherwise.

<sup>11</sup> The contents of the judgment and the result of the appeal may be disclosed to the client parties themselves 24 hours before the judgment is to be given. This includes solicitors outside London who have appointed London agents.

<sup>12</sup> CPR Practice Direction 40E (2.3).

<sup>13</sup> Provided that: (a) neither the draft judgment nor its substance is disclosed to any other person or used in the public domain; and (b) no action is taken (other than internally) in response to the draft judgment, before the judgment is handed down. (CPR Practice Direction 40E (2.4))

<sup>14</sup> CPR Practice Direction 40E (2.7).

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