

**IN THE HIGH COURT OF JUSTICE (QBD)**

**Claim no.: QB-2022-BHM-000044**

**BIRMINGHAM DISTRICT REGISTRY**

**Between**

**(1) HIGH SPEED TWO (HS2) LIMITED**

**(2) THE SECRETARY OF STATE FOR TRANSPORT**

**Claimants**

**and**

**(1) PERSONS UNKNOWN**

**(2) MR ROSS MONAGHAN AND 58 OTHER NAMED DEFENDANTS**

**Defendants**

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**SKELETON ARGUMENT ON BEHALF OF JAMES KNAGGS (D6):**

**HEARING 26-27 MAY 2022**

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Essential reading: D6 Skeleton argument, Witness statement of D6

## **INTRODUCTION**

1. This skeleton argument sets out objections to the Injunction sought by the Claimants in the application dated 28.03.22 (as amended).
2. The Sixth Defendant raises concerns over the following matters:
  - i) The Claimants seek injunctive relief on the basis of claims which do not establish such relief, including:
    - a) Seeking to restrain trespass in relation to land to which there is no demonstrated immediate right of possession; and,
    - b) Seeking to restrain lawful protest on the highway;
  - ii) The test for a precautionary (*quia timet*) injunction is not met;

- iii) It is wrong in principle to make a final injunction in the present case;
  - iv) The test for a Precautionary Injunction is not met
  - v) The definition of 'Persons Unknown' is overly broad and does not comply with *Canada Goose* requirements;
  - vi) The service provisions are inadequate;
  - vii) The terms are overly broad and vague;
  - viii) Discretionary relief should not be granted; and
  - ix) The order has a disproportionate chilling effect.
3. The Court is respectfully invited to refuse the Claimants application for injunctive relief.

### **CHRONOLOGY**

4. The following chronology has been extracted from the papers to assist the Court:

Spring 2021	Sixth Defendant and others establish camp at Cash's Pit.
23.02.22	Notice provided under Schedule 15 Phase 2a Act 2017 in relation to Cash's Pit Land.
25.03.22	Claimants file N5 Claim Form for Possession of Cash's Pit land and N244 Application Notice for interim injunction in relation to present claim
28.03.22	Claim form issued.
05.04.22	Initial hearing date.
11.04.22	Adjourned hearing date. Cotter J makes possession order and injunction in relation to Cash's Pit land. Directions made for hearing on service.
27.04.22	Hearing for application for alternative service before Knowles J. Order made for alternative service of Claimants' application

under CPR 6.27 in relation to named and unnamed defendants. Directions made for final hearing.

26-27.05.22 Final hearing of Claimants' application for injunctive relief.

### **SCOPE OF HS2 INJUNCTION**

5. The HS2 Land is defined through a series of maps and plans which number more than 280 pages<sup>1</sup>.
6. It should be noted that the HS2 Land is not limited to isolated areas of countryside. It covers a vast number of roads and urban areas right across the country. Given the limited time since service of the injunction application, it has been difficult to analyse the complete scope of the HS2 Land, but it is clear that:
  - i) Some HS2 Land passes through high-density urban areas with multiple roads and public highways
  - ii) Some HS2 Land covers woodland and other areas with public access and public rights of way.
  - iii) Some HS2 Land remains in the possession of third parties and steps to secure even temporary possession have not been taken by the Claimants.
  - iv) Most of the HS2 Land is not subject to any physical demarcation or barrier.
  - v) The HS2 Land comprises a multitude of plots of land which do not cohere in any logical manner.
7. When combined with the wide definition of 'persons unknown' (see below) it is clear that the HS2 Order is not simply limited to protests which stop construction traffic accessing active HS2 Sites. It covers protests which interfere with the flow of traffic at areas of land across the country on which there is no activity by the Claimants. Importantly, the HS2 Order also covers conduct which may arise in

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<sup>1</sup> The injunction sought shall be referred to as 'the HS2 Order/Injunction' and the land affected as the 'HS2 Land'.

any dispute between the Claimants and those resident or conducting business in the vicinity of the HS2 Land which falls outside the protest context.

8. Notwithstanding the 283 pages of maps which have been produced, the breadth scope and complexity of the land subject to the proposed injunction is such that it is in practical terms not possible for persons to reliably ascertain the scope of the injunction.

#### **GENERAL LEGAL FRAMEWORK:**

9. The general legal framework in relation to both injunctions and Articles 10 and 11 ECHR is set out below.

#### **Injunctions**

10. At paragraph 82 of *Canada Goose Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303, [2020] 1 WLR 2802, building on *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 and *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, the Court of Appeal laid down a series of “procedural guidelines applicable for proceedings for interim relief against “persons unknown” in protestor cases like the present case”. These were as follows (emphasis added):

(1) The “persons unknown” defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The “persons unknown” defendants must be people who have not been identified but 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. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the “persons unknown”.

(2) The “persons unknown” must be defined in the originating process by reference to their conduct which is alleged to be unlawful.

(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief.

(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as “persons unknown”, must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.

(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application.

11. None of the above was disapproved of in *London Borough of Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13.

#### Articles 10 and 11 ECHR

12. Articles 10 and 11 of the European Convention on Human Rights state:

##### Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

##### Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

13. Articles 10 and 11 together protect the right to protest.

14. The Supreme Court recently considered the application of Articles 10 and 11 ECHR in relation to obstructive protests on the highway in the case of *DPP v Ziegler* [2021] UKSC 23. Of particular note are the Supreme Court's findings that:
- i) "intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11" [70];
  - ii) no restrictions may be placed on the enjoyment of Articles 10 and 11 rights "except "such as are prescribed by law and are necessary in a democratic society"" [57];
  - iii) "[a]rrest, prosecution, conviction, and sentence are all "restrictions" within both articles" (ibid.) and there is "a separate evaluation of proportionality in respect of each restriction" (para 67);
  - iv) each of those restrictions will only be "necessary in a democratic society" if it is proportionate ([57]);
  - v) the "determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case" [59];
  - vi) "deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality" [67];
  - vii) "both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality" [70];
  - viii) however, "there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly" [68];
15. The Supreme Court in *Ziegler* set out "*various factors applicable to the evaluation of proportionality*" at [72-78]. However, the Court underscored that "*it is important to recognise that not all of them will be relevant to every conceivable situation*" and that, moreover, "*the examination of the factors must be open textured without being given any pre-ordained weight*" [71].

16. The non-exhaustive list of factors “normally to be taken into account in an evaluation of proportionality” [72], include:
- i) the extent to which the continuation of the protest would breach domestic law [72] and [77];
  - ii) the importance of the precise location to the protesters [72], it being recognised that “the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of article 11” (*Sáska v Hungary* (Application No 58050/08) at [21], as cited in *Ziegler* at [76];
  - iii) the duration of the protest [72];
  - iv) the degree to which the protesters occupy the land [72];
  - v) the “extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public” (*ibid.*);
  - vi) whether the views giving rise to the protest relate to “very important issues” and whether they are “views which many would see as being of considerable breadth, depth and relevance” (*ibid.*);
  - vii) whether the protesters “believed in the views they were expressing” (*ibid.*);
  - viii) the availability of alternative routes to that obstructed [74];
  - ix) whether the obstruction was targeted at the object of the protest [75];
17. It is wrong to view the right of the public to pass and repass as having primacy over the right to protest on the highway, it is a need to “balance the different rights and interests at stake” (see the High Court ruling in *DPP v Ziegler* [2019] EWHC 71 (Admin) at [108]).
18. The present claim clearly engages the Article 10 and 11 rights of any person planning a protest that is subject to the injunction even if such a protest is deliberately disruptive to traffic to some degree.

19. Insofar as the Claimants purport to rely on Article 1 Protocol 1 rights, it is denied that public authorities are able to rely on such rights under the European Convention/Human Rights Act 1998. In fact, the relevant A1P1 rights to consider are those of residents and businesses in the vicinity of HS2 Land which may come into conflict of disputes with the Claimants over the conduct of HS2 works.

### **BASIS OF CLAIMS**

20. The Claimants rely on claims in Trespass and Public and Private Nuisance<sup>2</sup>.

#### Public highway

21. Insofar as the injunction covers land which is a public highway, it should be noted that all of these torts require the defendants' use of the highway to be unreasonable.

22. The public have a right of reasonable use of the highway which may include protest (*DPP v Jones* [1999] 2 AC 240). This is so even when protests deliberately obstruct other road users. Ultimately, the issue is one of the proportionality of interference with rights protected under ECHR 10 and 11 when prohibiting such protest (see the High Court decision in *DPP v Ziegler* [2019] EWHC 71 (Admin)). The Supreme Court in *DPP v Ziegler* [2021] UKSC 23 emphasised the fact specific nature of the assessment of proportionality. Similarly, the Court of Appeal in *INEOS* stated:

“the concept of ‘unreasonably’ obstructing the highway is not susceptible of advance definition... that is a question of fact and degree that can only be assessed in an actual situation and not in advance” (at 40)].

23. Clearly it cannot be asserted any form of obstructive protest on the highway will constitute a trespass without regard to the degree and impact of the obstruction.
24. Similarly protests which do not cause undue interference with the rights of others do not fall within the definition of nuisance. Private nuisance is defined

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<sup>2</sup> Other purported bases of claims in the claim form do not feature as heads of claim in the Particulars of Claim dated 09.11.21.

as: “any continuous activity or state of affairs causing a substantial and unreasonable interference with a [claimant’s] land or his use or enjoyment of that land” (*Bamford v Turnley* (122 ER 25) emphasis added). Public nuisance includes an act which obstructs the public in the exercise of rights common to all citizens (*R v Goldstein* [2003] EWCA Crim 3450). Where this is based on obstructing the public’s right to pass on the highway the issue clearly falls back on the assessment of what constitutes an unreasonable obstruction.

25. The important point is that the claims relied on by the Claimant all rest on an assessment of disruptive protest on the highway as unreasonable. It is far from clear that protests which disrupt minor roads or footpaths passing over the HS2 Land, or where the extent of the interference with more major roads is not a total and extended halting of traffic, will lead to a viable civil claim.
26. In any event, in relation to the majority of the HS2 Land there is no evidence of plans for protests on the HS2 Land such as to justify a precautionary injunction against unnamed defendants.

*Non-public highway land*

27. Insofar as the injunction covers land which is not part of the public highway, the Claimants rely on claims in trespass. The basis of the right to possession on which the claim in trespass is founded varies according to the category of land affected.
  - i) The Pink Land comprises land to which the Claimants hold freehold or leasehold title whether acquired under the GVD process or entering into leases voluntarily
  - ii) The Green Land comprises land to which the First Claimant is entitled to temporary possession pursuant to Section 15 and Schedule 16 of the Phase One Act and Section 13 and Schedules 15 and 16 of the Phase 2a Act.

The Pink Land.

28. In relation to land to which the Claimants hold leasehold or freehold title, it is accepted that this provides a basis on which to found a possession claim subject to confirmation that no subsidiary lease or other legal right has been granted to any portion of the land.

The Green Land

29. The relevant provisions of the Phase 2a Act are set out in Schedule 15 (Temporary Possession and Use of Land) (the provisions of the Phase One Act are materially equivalent)

1. Right to enter on and take possession of land

- (1) The nominated undertaker may enter on and take possession of the land specified in the table in Schedule 16—
- (a) for the purpose specified in relation to the land in column (3) of that table in connection with the authorised works specified in column (4) of the table,
  - (b) for the purpose of constructing such works as are mentioned in column (5) of that table in relation to the land, or
  - (c) otherwise for Phase 2a purposes.

3. Powers exercisable on land of which temporary possession has been taken

- (1) Where under paragraph 1(1) or (2) the nominated undertaker has entered upon and taken possession of land, the nominated undertaker may, for the purposes of or in connection with the construction of the works authorised by this Act—
- (a) remove any structure or vegetation from the land;
  - (b) construct such works as are mentioned in relation to the land in column (5) of the table in Schedule 16;
  - (c) construct temporary works (including the provision of means of access) and structures on the land;
  - (d) construct landscaping and other works on the land to mitigate any adverse effects of the construction, maintenance or operation of the works authorised by this Act.
- (2) The other works referred to in sub-paragraph (1)(d) include works involving the planting of trees and shrubs and the provision of replacement habitat for wild animals.
- (3) In this paragraph, “structure” includes any erection.

4. Procedure and compensation

- (1) Not less than 28 days before entering upon and taking possession of land under paragraph 1(1) or (2), the nominated undertaker must give notice to the owners and occupiers of the land of its intention to do so....

30. The phrase “Phase 2a purposes” in s1(1)(c) is defined in s61 of the Phase 2a Act:

61 “Phase 2a purposes”

References in this Act to anything being done or required for “Phase 2a purposes” are to the thing being done or required—

- (a) for the purposes of or in connection with the works authorised by this Act,
- (b) for the purposes of or in connection with trains all or part of whose journey is on Phase 2a of High Speed 2, or
- (c) otherwise for the purposes of or in connection with Phase 2a of High Speed 2 or any high speed railway transport system of which Phase 2a of High Speed 2 forms or is to form part.

31. Paragraph 1 of Schedule 15 creates a legal right to possession of land provided the conditions in s1 are met and the statutory notice requirements of paragraph (4)(1) are satisfied (*SSfT & HS2 v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch)).

32. It is clear that the right to enter land which is provided for under Schedule 15 only arises once notice requirements are satisfied and entry and possession of the land is needed for the purposes set out in Paragraph 1 of Schedule 15 (constructing specified works or other HS2 purposes) and similarly for the right to take possession of land.

33. Unless the purpose requirements of Schedule 1 are met there is no basis on which the Claimant may enter or take possession of land under Schedule 15. There is hence no basis on which a possession claim may be brought. The Claimant’s right to possession does not crystallise until the possession of the land is needed for constructing specified works or other Phase 2a purposes.

34. To illustrate with an example, consider a plot of land contained in Schedule 16 of the Phase 2a Act on which no work is due to commence until 01.01.24. Were HS2 to serve a Notice under Schedule 15(4)(1) in relation to the plot of land on 01.01.22, the notice period would expire 28 days later on 29.01.22. However, since no work is due to take place on the land until 24 months later, then the right of entry under Schedule 15 cannot be exercised until such entry is genuinely required for the purposes of such works i.e. not until 01.01.24. Similarly, if the nature of the work required entry onto land only and not taking possession, the powers exercised under Schedule 15 would be similarly limited

to entry rather than possession. HS2 cannot rely on powers under Schedule 15 to bring a possession claim against a private landowner where access to the land is not genuinely required for specified work or Phase 2a Purposes at the point the claim is brought.

35. There is hence a fundamental difference between land where works are currently ongoing or due to commence imminently (for which, subject to notification requirements, the Claimants have a cause of action in trespass at the present date) and land where works are not due to commence for a considerable period (for which no cause of action in trespass currently arises for the Claimants). Cases in which injunctive relief has been granted to the Claimants relating to land where there is ongoing or imminent works are of no assistance in securing injunctive relief in relation to land in the second category above.
36. In the present case, the Claimants are required to establish that the Green land subject to the proposed injunction is genuinely required for specified works or Phase 2a purposes either currently or imminently. Absent such evidence the basis for the claim in trespass falls away and no injunctive relief may be founded upon it.

#### **WRONG IN PRINCIPLE TO MAKE FINAL ORDER AGAINST PERSONS UNKNOWN**

37. The matter is listed for a “final hearing of the Claimants’ Application” (Case Management Directions, Order of Knowles J 27.04.22) and the Claimants seek a final injunction. Notwithstanding references to “Interim Injunctive Relief” in the Claimants Skeleton Argument on Legal Principles dated 18.05.22 (see [15-19]) later references are made to final injunctions against persons unknown (see [22]). There are no further provisions in the draft order for further case management beyond provision for yearly review. The claims are otherwise to be stayed (Draft Order at [19]). The Order sought is therefore in substance a final order.
38. As stated by the Court of Appeal in *Canada Goose v Persons Unknown*:

“89 A final injunction cannot be granted in a protestor case against ‘persons unknown’ who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the “persons unknown” and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [2001] Fam 430, in which a final injunction may be granted against the whole world. Protestor actions, like the present proceedings, do not fall within that exceptional category.”

39. Notwithstanding the decision of the Court of Appeal in *LB Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13 that final injunctions may in principle be made against persons unknown, they remain inappropriate in protest cases in which the Article 10 and 11 rights of the individual must be finely balanced against the rights of the claimant. As the Court of Appeal stated in *Canada Goose* (which was not criticised in *LB Barking and Dagenham*):

“93 As Nicklin J correctly identified, Canada Goose’s problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. It wishes to use remedies in private litigation in effect to prevent what it sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protestors. They include, most graphically in the case of an exclusion zone, the impact on neighbouring properties and businesses, local residents, workers and shoppers. It is notable that the powers conferred by Parliament on local authorities, for example to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression, and to carry out extensive consultation: see, for example, *Dulgheriu v Ealing London Borough Council* [2020] 1 WLR 609. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it.” (at [93])

40. A final injunction against persons unknown is therefore inappropriate in the present case.
41. Moreover, as highlighted by Bennathan J in *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (QB) it is not possible for a court to grant a final injunction without first determining the underlying claim. As Bennathan J stated:

“25. An injunction is not a cause of action, it is a remedy. An application for an injunction can only succeed if it is advanced as a necessary relief for an underlying substantive claim. In my view this is basic and beyond debate:

(1) In *Injunctions* [Bean et al, Sweet and Maxwell, 14th Edition, at page 4] under the heading, “ Requirement of a substantive claim ” the authors write, “ There is

one overriding requirement: the applicant must normally have a cause of action in law entitling him to substantive relief. An injunction is not a cause of action (like a tort or a breach of contract) but a remedy (like damages) "

(2) In *Fourie v Le Roux* [2007] 1 WLR 320 [2] Lord Bingham stated that injunctions " are a supplementary remedy, granted to protect the efficacy of court proceedings, domestic or foreign ". In Lord Scott's speech in the same judgment [30], he also spoke of the need for an underlying cause of action, albeit as a rule of practice rather than a matter of jurisdiction.

26. Summary judgment under CPR part 24 is available for a cause of action or for an issue within that cause of action, but not for a remedy. This is not to say that Judge granting summary judgment may not also grant the consequent relief, but she or he can only do so after the cause of action has been resolved. Although the word " trial " is at times used to describe an assessment of a remedy [see, for example, White Book 2022 at 12.0.1] in both the CPR 24 and the accompanying Practice Direction the language is consistent with the narrower meaning, namely a trial of a cause of action. Further, in the context of this case it would make no sense to describe an injunction as " final " if the underlying cause of action was yet to be resolved."

42. Whilst couched in terms of summary judgment, the underlying principles in the passages above are of general application.
43. The Claimants do not appear to seek determination of the underlying claims. The Amended Particulars of Claim plead claims at such a level of generality so as to preclude a particularised response from individual defendants. In such circumstances, the application for a final injunction is premature.

#### **INSUFFICIENT EVIDENCE FOR PRECAUTIONARY INJUNCTION**

44. The present application is sought on a precautionary basis to restrain conduct by persons unknown who have not to date committed tortious acts, it remains a precautionary (*quia timet*) injunction notwithstanding that it is a final order.
45. Similarly, regarding any named defendants who may have been proven to have committed tortious acts at specified locations, the injunction sought goes well beyond what is reasonably necessary to prevent the repetition of such acts and is therefore in substance a precautionary injunction.
46. Regarding injunctions granted on a precautionary basis, as stated in Snell's Equity , 30th ed (2000), p 719, para. 45–13 (approved by the Court of Appeal in *Secretary of State for Environment v Meier* [2008] EWCA Civ 903 at [16])

“Although the claimant must establish his right, he may be entitled to an injunction even though an infringement has not taken place but is merely feared or threatened; for “preventing justice excelleth punishing justice”. This class of action, known as quia timet , has long been established, but the claimant must establish a strong case; “no one can obtain a quia timet order by merely saying ‘timeo .’ He must prove that there is an imminent danger of very substantial damage ...” (emphasis added)

47. In *Elliot v Islington LBC* [2012] 7 EG 90 (Ch) the requirements were expressed as:

“the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on American Cyanamid principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted.” (at [29], emphasis added).

48. The Claimant must establish that there is a risk of actual damage occurring on the HS2 Land subject to the injunction that is imminent and real. This is not borne out on the evidence. In relation to land where there is no currently scheduled HS2 works to be carried out imminently there is no risk of disruptive activity on the land and therefore no basis for a precautionary injunction.

49. In any event, there is no evidence of groups other than those already identified with a history or plans for protests against HS2 such as to justify injunctive relief against them on a precautionary basis either as named or unnamed defendants.

### **DEFINITION OF PERSONS UNKNOWN**

50. The Claimants seek an interim injunction against four categories of persons unknown and 59 named defendants. The categories of persons unknown are defined as:

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND KNOWN AS LAND AT CASH’S PIT, STAFFORDSHIRE SHOWN COLOURED ORANGE ON PLAN A ANNEXED TO THE ORDER DATED 11 APRIL 2022 (“THE CASH’S PIT LAND”)

(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND ACQUIRED OR HELD BY THE CLAIMANTS IN CONNECTION WITH THE HIGH SPEED TWO RAILWAY SCHEME SHOWN COLOURED PINK AND GREEN ON THE PLANS AT <https://www.gov.uk/government/publications/hs2-route-wide-injunction-proceedings> (“THE HS2 LAND”) WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES

(3) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE HS2 LAND IN CONNECTION WITH THE HS2 SCHEME WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT, WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITHOUT THE CONSENT OF THE CLAIMANTS

(4) PERSONS UNKNOWN CUTTING, DAMAGING, MOVING, CLIMBING ON OR OVER, DIGGING BENEATH OR REMOVING ANY ITEMS AFFIXED TO ANY TEMPORARY OR PERMANENT FENCING OR GATES ON OR AT THE PERIMETER OF THE HS2 LAND, OR DAMAGING, APPLYING ANY SUBSTANCE TO OR INTERFERING WITH ANY LOCK OR ANY GATE AT THE PERIMETER OF THE HS2 LAND WITHOUT THE CONSENT OF THE CLAIMANTS

51. Identical definitions are provided in the Amended Particulars of Claim.

Scope of definition

52. Notwithstanding the amendments to the definitions of persons unknown at the hearing of 27.04.22, the Sixth Defendant has specific concerns in relation to Categories (2) and (3) above.

53. The HS2 land covers a massive area. The plans defining the land run to 280 pages.

54. Category (2) applies to anyone who enters HS2 Land without the consent of the Claimants whose presence has the effect of hindering anyone connected with the Claimants:

i) It includes those present on HS2 land on public highways. A person who walks over HS2 land on a public footpath is covered by the definition (subject to the consent of the Claimants). A demonstration on a public footpath which had the effect (intended or not) of hindering those connected to the Claimants (for any degree) would be caught within the definition.

ii) It includes those present on HS2 land which has been sublet. A person present on sublet HS2 land with the permission of the subletor but without the consent of HS2 is covered by the definition.

55. Similarly, provisions within the recital that the Claimants do not intend to act against guests of any freeholder or leaseholder unless such persons undertake actions with the effect of hindering the HS2 Scheme do not alleviate the

problems identified above. First, a person present on HS2 Land as the guest of a freeholder is not trespassing and does not fall within the scope of the causes of action relied on. Second, it would also create anomalous scenarios, for example where a family reside on land, the parents (as freeholders) might have protection for acts which hindered HS2 but children or others living on the land would not.

56. Category (3) applies to anyone who does any act which interferes with access/egress from HS2 sites in whatever form and for whatever duration.
  - i) It includes those participating in a small demonstration anywhere along the HS2 route which restricts access to an HS2 site for even a matter of minutes.
  - ii) It includes those who interfere with all access points to HS2 land. Therefore it includes those whose actions interfere with access to HS2 land on any public highway, including public footpaths. A small demonstration on a public footpath which crosses HS2 land is therefore covered whatever the degree of interference with access/egress.
  - iii) It includes those who interfere with access to HS2 land for all invitees of HS2. Given the vast area of land covered and the wide array of access rights concerned, this covers those who interfere with access to HS2 land for a wide-range of purposes.
57. There is no restriction on the purpose for which a person might interfere with access to HS2 land. It is not limited to direct-action protests or even to protests of any form. It includes any group, or individual, who protests anywhere on the HS2 land and interferes with traffic seeking access to the land. It would include a group of school children who marched along a country lane to demonstrate against the felling of a wood -or indeed, to protest about a matter unrelated to HS2 but which had the effect of interfering with traffic flow for whatever duration.

Need for unlawful conduct

58. The definition of Persons Unknown in the present claims fails to be defined in relation to conduct which is alleged to be unlawful and does not meet the requirements set out in *Canada Goose*. Clearly, given the guidance in *Ziegler*, not every protest which (even deliberately) causes interferes with access to HS2 Land for a short period will be unlawful. The definition therefore covers lawful conduct as well as unlawful conduct.

Legal requirements:

59. There is an important distinction between the requirements applicable to the definition of persons unknown in an interim injunction and the terms which may be applied. The definition of persons unknown must be “defined by reference to conduct which is alleged to be unlawful”; whereas the terms that may be included in an injunction which “may include lawful conduct if and only if there is no other proportionate means of protecting the claimant’s rights”.

60. This distinction is captured in the requirements set out in *Canada Goose (CA)* where the Court of Appeal stated:

82. Building on *Cameron* and the *Ineos* requirements, it is now possible to set out the following procedural guidelines applicable to proceedings for interim relief against “persons unknown” in protester cases like the present one:

(1) The “persons unknown” defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The “persons unknown” defendants must be people who have not been identified but 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. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the “persons unknown”.

(2) The “persons unknown” must be defined in the originating process by reference to their conduct which is alleged to be unlawful.

(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.

...

(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.

...

61. It is clear from Clause (2) that the definition of persons unknown (when seeking to capture newcomers) must capture those who have committed tortious acts. When someone falls within that definition then, by virtue of Clause (5), they may be restrained from both tortious and lawful conduct (if the latter is necessary to protect the claimant's rights). What the definition of persons unknown must not do is prohibit those who do nothing unlawful from acts which are similarly not unlawful. That is prohibited on principle.

Clause (2)

62. The requirements on the definition of persons unknown in (1) and (2) above come from *Cameron*. The issuing and service of a claim form is a pre-requisite of making any person subject to the Court's jurisdiction. Without a valid underlying claim against a defendant no injunction can be granted. This applies as much to persons unknown as to named defendants.
63. An injunction against a named defendant can only be granted either to prevent a tort that has already been committed or, on a precautionary (*quia timet*) basis, to prevent a tort that is threatened. The same applies to persons unknown. It is therefore necessary to establish a viable claim (or threatened tort) against such persons in order to obtain injunctive relief. As Nicklin J states in *LB Barking and Dagenham*:
- "In cases where a claimant wishes to bring a claim against defendants who are (or include) 'Persons Unknown', then an interim injunction can be granted where the evidence demonstrates actual or threatened commission of a tort or other civil wrong by the 'Persons Unknown'." (at [189])
64. When persons unknown are defined by reference to unlawful activity then no issue arises because by definition all those falling within the scope of persons unknown will have committed a tort. The same does not hold if the definition of persons unknown covers entirely lawful activity unrelated to any torts threatened by others.

65. The way clause (2) in *Canada Goose* has been phrased is therefore not accidental. Persons unknown must be defined by reference to unlawful conduct.

Clause (5)

66. That “the prohibited acts” in (5) refers to the terms of the injunction and not the definition of persons unknown is supported by the genesis of this principle in the recent caselaw.

67. In *Ineos* (CA) the Court of Appeal set out the following requirements on persons unknown injunctions (at 34, emphasis added):

"(1) there must be a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief;

(2) it is impossible to name the persons who are likely to commit the tort unless restrained;

(3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order;

(4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct;

(5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits."

68. The fourth *Ineos* requirement clearly relates to the terms of the injunction and not the definition of persons unknown.

69. In *Cuadrilla*, the Court of Appeal said the following regarding clause (4) relating to terms not prohibiting lawful conduct:

"78. It is open to us, as suggested by the Court of Appeal in *Cuadrilla* , to qualify the fourth *Ineos* requirement in the light of *Hubbard* and *Burris* , as neither of those cases was cited in *Ineos*. Although neither of those cases concerned a claim against "persons unknown", or section 12(3) of the HRA or Articles 10 and 11 of the ECHR , *Hubbard* did concern competing considerations of the right of the defendants to peaceful assembly and protest, on the one hand, and the private property rights of the plaintiffs, on the other hand. We consider that, since an interim injunction can be granted in appropriate circumstances against "persons unknown" who are Newcomers and wish to join an ongoing protest, it is in principle open to the court in appropriate circumstances to limit even lawful activity. We have had the benefit of submissions from Ms Wilkinson on this issue. She submits that a potential gloss to the fourth *Ineos* requirement might be that the court may prohibit lawful conduct where there is no other proportionate means of protecting the claimant's rights. We agree with that submission, and hold that the fourth *Ineos* requirement should be qualified in that way."

70. It is therefore clear that in *Cuadrilla* the court was amending the requirement that the terms of an injunction prohibit unlawful conduct and not the conditions applicable to the definition of persons unknown.
71. This interpretation is adopted by Nicklin J in *London Borough of Barking and Dagenham v Persons Unknown* [2021] EWHC 1201 (QB) where he refers to the “terms” of the injunction satisfying the Canada Goose requirements (5) to (7) (at [248]).
72. This requirement again accords with principle. A person who has committed an unlawful act, or who threatens to do so, can be restrained from lawful conduct if that is necessary to protect the Claimant. The commission or threat of the unlawful act can justify the proportionate restriction on that individual’s rights. There is no corresponding justification for a restriction on the rights of a person who neither does an unlawful act, nor threatens to do so.

### Conclusion

73. There is hence a distinction in principle between the definition of persons unknown -which must correspond to the conduct which is alleged to be unlawful- and the terms of the injunction -which can prohibit lawful and unlawful conduct. A person who commits or threatens an unlawful act may be prohibited from future lawful as well as unlawful conduct. However, an injunction cannot be used to prevent those who have neither done anything wrong, nor threatened to do so, from carrying out entirely lawful conduct.

### Submissions

74. It is submitted that the definition of Persons Unknown in the present case fails to meet the requirements from *Canada Goose* and related cases in that it is not defined by reference to the allegedly unlawful conduct.
75. In any event, it is clear that the definition of persons unknown in the present injunction is so wide that it covers persons entirely unrelated to the previous HS2 protests who have not previously protested in an unlawful manner and who do not threaten to do so. Nevertheless the present injunction prevents such

persons from what would otherwise be entirely lawful conduct. The present injunction is therefore flawed in its approach to persons unknown.

76. The difficulties with the definitions of persons unknown all stem from the approach that has been taken of casting a very wide net over the entirety of the HS2 land and seeking the use qualifying conditions (such as ‘having the effect of hindering HS2 employees’ etc). This approach will inevitably include within the scope of persons unknown those who has not committed tortious acts.

## **SERVICE**

### **Legal framework**

77. CPR 6.27 states:

Service by an alternative method or at an alternative place

- 6.27 Rule 6.15 applies to any document in the proceedings as it applies to a claim form and reference to the defendant in that rule is modified accordingly.

78. CPR 6.15 states:

6.15— Service of the claim form by an alternative method or at an alternative place

- (1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.

79. In relation to possession claims brought in trespass against persons unknown, CPR 55.6 states:

55.6 Service of claims against trespassers

Where, in a possession claim against trespassers, the claim has been issued against “persons unknown”, the claim form, particulars of claim and any witness statements must be served on those persons by—

- (a) (i) attaching copies of the claim form, particulars of claim and any witness statements to the main door or some other part of the land so that they are clearly visible; and
- (ii) if practicable, inserting copies of those documents in a sealed transparent envelope addressed to “the occupiers” through the letter box; or
- (b) placing stakes in the land in places where they are clearly visible and attaching to each stake copies of the claim form, particulars of claim and any witness statements in a sealed transparent envelope addressed to “the occupiers”.

80. Whilst service of a final injunction is distinct from service of a claim form the principles underlying each step have the common element of requiring that those affected by litigation are given sufficient notice of proceedings at a stage by which they can regulate their conduct appropriately.

81. In *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 Lord Sumption stated:

“... Justice in legal proceedings must be available to both sides. It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard. The principle is perhaps self-evident.” (at [17])

“In my opinion, subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant.” (at [21], emphasis added)

82. Similar requirements were included in the Court of Appeal judgment in *Canada Goose UK Retail Ltd v Persons Unknown* [2020] EWCA Civ 303:

“(1) The “persons unknown” defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The “persons unknown” defendants must be people who have not been identified but 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. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the “persons unknown”.

83. In *Barking and Dagenham LBC v Persons Unknown* [2021] EWHC 1201 (QB) Nicklin J stated:

“45. I recognise that the method of service he [the claimant local authority in a Traveller injunction case] proposed reflected the well-established regime for possession claims against unknown trespassers (CPR 55.6). And there can be no real doubt that, in a claim against alleged trespassers in present occupation whose names are not known, displaying prominently the Claim Form (or copies of it), on or around the various sites in respect of which an injunction was to be sought, can usually be expected to bring the proceedings to the attention of the defendants. However, the whole point of Traveller Injunctions was to bind persons who turned up at the land only after the injunction had been granted. In respect of that category of defendant, posting copies of the Claim Form at the various sites was not likely to be an effective means of bringing the proceedings to their attention. To take an obvious example, displaying copies of the Claim Form at the Dagenham Road Car Park (or at any of the other sites covered by the injunction granted to LB Barking & Dagenham) was not likely to bring the proceedings to the attention of a family of Travellers in Rochdale. The first such a family was likely to discover about the proceedings, that had led to an injunction being granted against them, was when they subsequently pitched their caravan for an overnight stay in the Dagenham Road Car Park.

46. It may well be that the importance of this aspect of the decision in *Cameron* on claims against "Persons Unknown" has not been fully appreciated in the Cohort Claims. However, since the Supreme Court decision in *Cameron* the point has been authoritatively determined. In a claim against "Persons Unknown", the method of alternative service of the Claim Form that the Court permits must be one that can reasonably be expected to bring the proceedings to the notice of *all* of those who fall within the definition of "Persons Unknown". Without that safeguard, there is an obvious risk that the method of alternative service will not be effective in bringing the proceedings to a (perhaps significant) number of those in a broadly defined class of "Persons Unknown". By dint of the alternative service order, they would be deemed to have been served, when in fact they have not (a point that becomes important when the Court comes to consider granting final relief against "Persons Unknown"). Such an outcome offends the fundamental principle of justice that each person who is made subject to the jurisdiction of the court had sufficient notice of the proceedings to enable him to be heard (see *Cameron* principles (1) and (4) (see [11] above)).

47. ...the Court must adopt a vigilant and more rigorous process when considering applications under CPR 6.15 for alternative service of the Claim Form on "Persons Unknown". If the requirements of *Cameron* cannot be met, permission for alternative service should be refused. ...In practical terms, the advocate will be expected to demonstrate, by evidence filed in compliance with CPR 6.15(3)(a), how the proposed method of alternative service on the Person(s) Unknown can reasonably be expected to bring the proceedings to the attention of all of those who are sought to be made defendant(s). The greater and more ambitious the width of the definition of "Persons Unknown" in the Claim Form correspondingly the more difficult it is likely to be to satisfy the requirements for an order for alternative service.

48. Save in respect of the exceptional category of claims brought *contra mundum*, it is difficult to conceive of circumstances in which a Court would be prepared to grant an order dispensing with the requirement to serve the Claim Form upon "Persons Unknown" under CPR 6.16 (*Cameron* principle (5)). Consequently, if the Court refuses an order, under CPR 6.15, for alternative service of the Claim Form against "Persons Unknown", the jurisdiction of the Court cannot be established over the "Persons Unknown" defendants. Without having established jurisdiction, there will be no viable civil claim against them. With no civil claim, there can be no question of granting (or maintaining) interim injunctive relief against "Persons Unknown".

...

166. These principles also apply equally to proceedings which are brought against (or include) "Persons Unknown". The Claim Form must be served on "Persons Unknown". Ordinarily, that will require an order for alternative service under CPR 6.15. If the claimant cannot obtain an order for alternative service – because no method can be devised that can reasonably be expected to bring the proceedings to the attention of all of those identified as the "Persons Unknown" – and the Court does not dispense with service of the Claim Form – then the Court's jurisdiction cannot be established over the "Persons Unknown". In that event, there will be no viable civil claim and there will be no question of any injunction being granted, whether interim or final."

84. None of the above principles were criticised by the Court of Appeal in *LB Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13.
85. Where an injunction is defined over a specified area of land, the default position ascertained from the caselaw is to mirror the requirements in CPR 55.6 and require service in the form of signs affixed to the property in question or to

stakes in the ground. The logic clearly being that: (i) the cause of action is based on an interest in land and therefore service provisions reflect that; and (ii) more importantly, this method has some prospect of bringing the existence of the injunction to the attention of those who enter the land (subject to sufficient signs being posted at appropriate points). This is reflected in the caselaw below.

86. Regarding protest cases, in *Secretary of State for Transport and HS2 v Cuciurean* [2020] EWHC 2614 (Ch) service provisions for an injunction order were considered:

“CPR 81, as I have described, makes provision for service by alternative means. The whole point of this jurisdiction is to enable proper service to be effected by a different means, a means other than personal service. Any judge exercising this jurisdiction – particularly when the order in question is going to bear a penal notice – will be concerned to ensure that whatever method of alternative service is adopted is sufficient to bring to the notice of the persons concerned both (i) the existence of the order and (ii) either the terms of the order or else the means of knowing the terms of the order. “ (at [62])

87. Service by way of signs on the land, can be supplemented (but not supplanted) by methods such as advertising/publicity both on social media and in print. In *Cuciurean v Secretary of State for Transport and HS2* [2021] EWCA Civ 357 The Court of Appeal further addressed the issue of service of an order:

“...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.”

88. Paragraph 70 sets out the extensive steps taken to serve the order in that case with extensive signs placed around the land affected -which was a relatively small area in comparison to the land in the present case- and other further steps.
89. In Gypsy and Traveller borough-wide injunction cases, which typically prohibit unauthorised encampments rather than any wider conduct, the following provisions on service of the application notice were adopted in *Wolverhampton City Council v Persons Unknown* [2018] EWHC 3777 (QB).

“...Directions were given by HHJ Cooke for the service of this application and notice of this application which provided for alternative means of service. I have been provided with a statement of Miss Danielle Taylor, which sets out the steps that have been taken to comply with those directions. In particular, Miss Taylor informs the court that the council, the claimant, published on a dedicated page on its website the documents which were detailed in the learned judge's order; posted a link to the dedicated website by pinning it to their social media pages on both Twitter and Facebook; issued a press

release which was covered in the Express and Star newspaper; placed an editorial in the Wolverhampton edition of that paper publicising details of the application and today's hearing; and, with a view to those potentially affected who may use other social media or alternatively have issues reading the materials provided, uploaded to YouTube and the claimant's website and other social media pages a video outlining the nature of the application. Finally, copies of the relevant documents were affixed in transparent waterproof envelopes at a prominent position at each of the 60 sites proposed to be covered by the injunction and they have been checked on a weekly basis and replaced where necessary." (at [1], emphasis added)

90. It is understood that similar steps were taken to serve the injunction order itself (see [19])<sup>3</sup>.

91. The Court of Appeal in the related case of *LB Bromley v Persons Unknown* [2020] EWCA Civ 12 approved the approach taken in Wolverhampton and stated:

32. Article 6 of the Convention provides that:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

33. This is reflective of a principle of English law that civil litigation is adversarial: "English civil courts act *in personam*. They adjudicate disputes between the parties to an action and make orders against those parties only" (*A-G v Newspaper Publishing Plc* [1988] Ch 333, per Sir John Donaldson MR at [369C]). This allows disputes to be decided fairly: a defendant is served with a claim, obtains disclosure of the evidence against them, and can substantially present their case before the Court (*Jacobsen v Frachon* (1927) 138 LT 386, per Atkins LJ at [393]). This allows arguments to be fully tested.

34. The principle that the court should hear both sides of the argument is therefore an elementary rule of procedural fairness. This has the consequence that a court should always be cautious when considering granting injunctions against persons unknown, particularly on a final basis, in circumstances where they are not there to put their side of the case." (emphasis added)

92. It is therefore clear that the courts have little difficulty in imposing very onerous service requirements in the form of placing and maintaining signs on the land affected, if this is necessary to ensure that sufficient notice is provided of the existence of an injunction to meet the *Cameron/Canada Goose* requirements.

93. Moreover, in cases in which it has been held to be impossible to comply with such requirements for signs, the consequence has not been to fall back on service through publication/advertising but rather to refuse an order for

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<sup>3</sup> In another Gypsy and Traveller case, the court required notices to be displayed at over 140 separate sites within a single borough (see reference to LB Barking and Dagenham in *LB Barking and Dagenham v Persons Unknown* [2021] EWHC 1201 (QB) at [41]).

alternative service altogether. It is notable that the service provisions in relation to the National Highways Injunctions on which the Claimants rely required either personal service or an alternative form of postal service on named defendants (*National Highways Limited v Persons Unknown* [2021] EWHC 3081 (QB) at [21]).

94. This approach was recently confirmed by Bennathan J who extended the interim orders in the related cases concerning the M25 injunction (see *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (QB)). Bennathan J rejected proposals by the claimants in that case that measures equivalent to the social media and other advertising methods proposed in the present case would be sufficient to comply with the *Cameron/Canada Goose* requirements.

50. Service on the named Defendants poses no difficulty but warning persons unknown of the order is far harder. In the first instance judgment in *Barking and Dagenham v People Unknown* [2021] EWHC 1201 (QB) Nicklin J [at 45-48, passages that were not the subject of criticism in the later appeal] stated that the Court should not grant an injunction against people unknown unless and until there was a satisfactory method of ensuring those who might breach its terms would be made aware of the order's existence.

51. In other cases, it has been possible to create a viable alternative method of service by posting notices at regular intervals around the area that is the subject of the injunctions; this has been done, for example, in injunctions granted recently by the Court in protests against oil companies. That solution, however, is completely impracticable when dealing with a vast road network. Ms Stacey QC suggested an enhanced list of websites and email addresses associated with IB and other groups with overlapping aims, and that the solution could also be that protestors accused of contempt of court for breaching the injunction could raise their ignorance of its terms as a defence. I do not find either solution adequate. There is no way of knowing that groups of people deciding to join a protest in many months' time would necessarily be familiar with any particular website. Nor would it be right to permit people completely unaware of an injunction to be caught up with the stress, cost and worry of being accused of contempt of court before they would get to the stage of proceedings where they could try to prove their innocence.

52. In the absence of any practical and effective method to warn future participants about the existence of the injunction, I adopt the formula used by Lavender J that those who had not been served would not be bound by the terms of the injunction and the fact the order had been sent to the IB website did not constitute service. The effect of this will be that anyone arrested can be served and, thus, will risk imprisonment if they thereafter breach the terms of the injunction.

95. It is clear therefore, that there is no rule of law that a method of alternative service must exist for any given injunction. Where the Claimant seeks an injunction that covers too wide and imprecise an area of land, the court is entitled to find that there is no workable means of alternative service of the proposed injunction and to refuse to permit alternative service of the order.

Proposed Service Requirements in Draft Order

96. The provisions for service of the proposed injunction are:

Service by Alternative Method – This Order

...

8. Pursuant to CPR r6.27 and r.81.4:
  - a. [service on Cash's Pitt defendants]
  - b. Further, the Claimant shall serve this Order upon the Second, Third and Fourth Defendants by:
    - i. Affixing 6 copies in prominent positions on each of the Cash's Pit Land..., the Harvil Road Land and the Cubbington and Crackley Land.
    - ii. Advertising the existence of this Order in the Times and Guardian newspapers, and in particular advertising the web address of the HS2 Proceedings website, and direct link to this Order.
    - iii. Where permission is granted by the relevant authority, by placing an advertisement and/or a hard copy of the Order within 14 libraries approximately every 10 miles along the route of the HS2 Scheme. In the alternative, if permission is not granted, the Claimants shall use reasonable endeavours to place advertisements on local parish council notice boards in the same approximate locations.
    - iv. Publishing social media posts on the HS2 twitter and Facebook platforms advertising the existence of this Order and providing a link to the HS2 Proceedings website.
  - c. [service on named defendants]
  - d. The Claimants shall further advertise the existence of this Order in a prominent location on the HS2 Proceedings website, together with a link to download an electronic copy of this Order.
  - e. The Claimants shall email a copy of this Order to solicitors for D6 and any other party who has at the date hereof provided an email address to the Claimants to the email address: [HS2injunction@governmentlegal.gov.uk](mailto:HS2injunction@governmentlegal.gov.uk).
9. Service in accordance with paragraph 8 above shall:
  - a. be verified by certificates of service to be filed with Court;
  - b. be deemed effective as at the date of the certificates of service; and
  - c. be good and sufficient service of this Order on the Defendants and each of them and the need for personal service be dispensed with.
10. Although not expressed as a mandatory obligation due to the transient nature of the task, the Claimants will seek to maintain copies of this Order on areas of HS2 Land in proximity to potential Defendants, such as on the gates of construction compounds or areas of the HS2 Land known to be targeted by objectors to the HS2 Scheme.
11. Further, without prejudice to paragraph 9, while this Order is in force, the Claimants shall take all reasonably practicable steps to effect personal service of the Order upon any Defendant which it becomes aware is in attendance at the HS2 Land and shall verify any such service with further certificates (where possible if persons unknown can be identified) of service to be filed with Court.

### Submissions

97. Given the nationwide scope of the present injunction it is quite clear that the provisions above are not sufficient to bring the present proceedings to the attention of all of those bound by the order.
98. A person planning a demonstration on HS2 Land which passes by the access point to a site is bound by the HS2 order; however, the steps for alternative service cannot reasonably be expected to bring the proceedings to his/her attention.
99. A person (other than a freeholder or leaseholder) who lives on a property with the HS2 land who does an act which has the effect of hindering HS2 employees (for example parking a car in a driveway used for access) is bound by the order. The steps for alternative service cannot reasonably be expected to bring the proceedings to his/her attention. Similarly concerns arise for businesses which operate in the vicinity of HS2 Land.
100. Whatever difficulties may arise from service on newcomers in the present case, the provisions for alternative service must comply with the law. The present provisions are not sufficient to bring this order to the attention of all of those who are bound by it and such an order for alternative service should not be made.
101. For the avoidance of doubt, the Sixth Defendant does not accept that the Lavender J/Bennathan J approach permitting personal service of the Order on persons unknown is a workable solution in the present case for the following reasons:
  - i) Requiring personal service of the injunction creates a risk of arbitrary enforcement of the injunction in permitting the Claimant to pick and choose who to serve the order on.
  - ii) Those who will be affected by the order are unable to know whether or not they will be served and therefore cannot regulate their behaviour in advance.

- iii) The Claimant remains under an obligation to add all those personally served to the claim as named defendants (identified by name or description). This is inconsistent with the nature of a final injunction.
- iv) There is a clear chilling effect on those seeking to protest against HS2 created by granting a power of service of an injunction to the Claimants to be used at their discretion without further oversight from the court.

## **TERMS OF INJUNCTION**

### **Legal Framework**

102. General principles of proportionality require that an injunction is targeted as closely as practicable on the conduct which constitutes the tortious behaviour. The terms of an order may only prohibit otherwise lawful conduct beyond the scope of the strict tort where it is necessary “in order to provide effective protection of the rights of the claimant in the particular case” (*Cuadrilla Bowland v Lawrie* [2020] EWCA Civ 9 at [50]) and “there is no other proportionate means of protecting the claimants’ rights” (see *Canada Goose* at 78 and 82(5)). Clearly the extent to which an order prohibits lawful conduct must be kept to a minimum.

103. The terms of an injunction must not be unduly vague. In *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 the Court of Appeal stated:

“57. There are at least three different ways in which the terms of an injunction may be unclear. One is that a term may be ambiguous, in that the words used have more than one meaning. Another is that a term may be vague in so far as there are borderline cases to which it is inherently uncertain whether the term applies. Except where quantitative measurements can be used, some degree of imprecision is inevitable. But the wording of an injunction is unacceptably vague to the extent that there is no way of telling with confidence what will count as falling within its scope and what will not. Evaluative language is often open to this objection. For example, a prohibition against “unreasonably” obstructing the highway is vague because there is room for differences of opinion about what is an unreasonable obstruction and no determinate or incontestable standard by which to decide whether particular conduct constitutes a breach. Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a “short” distance of a location (such as the Site Entrance in this case). Without a more precise definition, there is no way of ascertaining what distance does or does not count as “short”.

58. A third way in which the terms of an injunction may lack clarity is that the language used may be too convoluted, technical or otherwise opaque to be readily understandable by the person(s) to whom the injunction is addressed. Where legal knowledge is needed to understand the effect of a term, its clarity will depend on whether the addressee of the injunction can be expected to obtain legal advice. Such an expectation may be reasonable where an injunction is granted in the course of litigation in which each party is legally represented. By contrast, in a case of the present kind where an injunction is granted against “persons unknown”, it is unreasonable to impose on members of the public the cost of consulting a lawyer in order to find out what the injunction does and does not prohibit them from doing.”

104. Even where the strict terms of an order are limited, consideration must be given to any ‘chilling effect’ that the injunction has beyond conduct falling directly within its terms. This is particularly so for injunctions that are vague or broadly drawn (see *INEOS v Boyd* [2020] EWCA Civ 515 at [40]). The temporary nature of an order may still be disproportionate when the chilling effect is considered (see *Christian Democratic People’s Party v Moldova* (2007) 45 EHRR 13).

### Terms of HS2 Order

105. The HS2 Order prohibits:

#### Injunction in force

3. With immediate effect until 23.59hrs on 31 May 2023 unless varied, discharged or extended by further order, the Defendants and each of them are forbidden from doing the following:
  - a. entering or remaining upon the HS2 Land.
  - b. obstructing or otherwise interfering with the free movement of vehicles, equipment or persons accessing or egressing the HS2 Land; or.
  - c. interfering with any fence or gate on or at the perimeter of the HS2 Land.
4. Nothing in paragraph 3 of this Order:
  - a. Shall prevent any person from exercising their rights over any open public right of way over the HS2 Land.
  - b. Shall affect any private rights of access over the HS2 Land.
  - c. Shall prevent any person from exercising their lawful rights over any public highway.
  - d. Shall extend to any person holding a lawful freehold or leasehold interest in land over which the Claimants have taken temporary possession.
  - e. Shall extend to any interest in land held by statutory undertakers.
5. For the purposes of paragraph 3(b) prohibited acts of obstruction and interference shall include (but not be limited to):
  - a. standing, kneeling, sitting or lying or otherwise remaining present on the carriageway when any vehicle is attempting to turn into the HS2 Land or attempting to turn out of the HS2 Land in a manner which impedes the free passage of the vehicle;

- b. digging, erecting any structure or otherwise placing or leaving any object or thing on the carriageway which may slow or impede the safe and uninterrupted passage of vehicles or persons onto or from the HS2 Land;
  - c. affixing or attaching their person to the surface of the carriageway where it may slow or impede the safe and uninterrupted passage of vehicles onto or from the HS2 Land;
  - d. affixing any other object to the HS2 Land which may delay or impede the free passage of any vehicle or person to or from the HS2 Land;
  - e. climbing on to or affixing any object or person to any vehicle in the vicinity of the HS2 Land; and
  - f. slow walking in front of vehicles in the vicinity of the HS2 Land.
6. For the purposes of paragraph 3(c) prohibited acts of interference shall include (but not be limited to):
- a. cutting, damaging, moving, climbing on or over, digging beneath, or removing any items affixed to, any temporary or permanent fencing or gate on or on the perimeter of the HS2 Land;
  - b. the prohibition includes carrying out the aforementioned acts in respect of the fences and gates; and
  - c. interference with a gate includes drilling the lock, gluing the lock or any other activities which may prevent the use of the gate.

106. These are addressed in turn.

*(3a) Forbidden from entering or remaining upon the HS2 Land.*

107. This term imposes a blanket prohibition on entering HS2 land for whatever purpose.

108. Whilst paragraph 4 aims to restrict the impact to permit access to HS2 land via public or private rights of access; given the absolute prohibition in paragraph (3a) it is unclear how such an interpretation is to be arrived at.

109. The prohibition in paragraph (3a) includes entering the HS2 land even with the consent of the Claimants.

110. The prohibition in paragraph (3a) includes entering HS2 land with the consent of any person with a right to immediate possession. The caveat at (4d) disapplying the prohibition to the freeholder/leaseholder of HS2 Land does not alleviate issues that arise in relation to their guests, family or others residing on the HS2 Land who do not have a freehold/leasehold interest.

111. The wide scope of this term of the order is problematic. Given the extent of the HS2 Land, the term has a clear chilling effect on all forms of protest against HS2.

(3b) Forbidden from interfering with access or egress to HS2 Land.

112. This term prohibits conduct in relation to public highways which may be used for access/egress to HS2 land.

(4) References to legality/cause of action

113. The following passages in paragraph (4) raise concern:

- a. Shall prevent any person from exercising their rights over any open public right of way over the HS2 Land.
- b. Shall affect any private rights of access over the HS2 Land.
- c. Shall prevent any person from exercising their lawful rights over any public highway.
- d. Shall extend to any person holding a lawful freehold or leasehold interest in land over which the Claimants have taken temporary possession.

114. In *Ineos v Persons Unknown* the Court of Appeal stated:

“it is wrong to build the concept of “without lawful authority or excuse” into an injunction since an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse. If he is not clear about what he can and cannot do, that may well have a chilling effect also.” (at [40])

115. Similar concerns arise in the present case in relation to the phrases “exercising rights over... public rights of way”, “private rights of access”, “lawful rights over any public highway” and “lawful freehold or leasehold interest”. These are all legal terms. An ordinary person is unlikely to have a clear idea of the limits of these terms and that brings an unacceptable chilling effect.

(5) Conduct stipulated to fall within (3b)

116. The following passages in paragraph (5) concerning conduct stipulated to fall within paragraph (3b) are problematic:

- a. standing, kneeling, sitting or lying or otherwise remaining present on the carriageway when any vehicle is attempting to turn into the HS2 Land or attempting to turn out of the HS2 Land in a manner which impedes the free passage of the vehicle;
- f. slow walking in front of vehicles in the vicinity of the HS2 Land

117. These are dealt with in turn below.

*i) Obstructive protest in the carriageway.*

118. As the UKSC confirmed in *Ziegler*, protests which intentionally disrupt the flow of traffic, even beyond a de minimis impact, nonetheless fall within the scope of Articles 10 and 11. A fact specific inquiry must be made in each case regarding the proportionality of restrictions on such protests. It is therefore impossible to state in advance whether such an obstructive protest will be unlawful. All will turn on fact-specific factors, including importantly: the importance of the issue, whether the protest targets the location affects, the degree of actual disruption caused, the availability of alternative routes and whether any public disorder arises.

*ii) Slow-walking*

119. Slow-walking is a well-recognised form of protest that has a historical connection to the environmental movement. It is a symbolic act of putting the human body before the articulated lorry and to prioritise human movement over mechanised transportation. The manner and form of such protest has therefore acquired a symbolic force inseparable from the protestors message (*Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23).

120. A similarly worded prohibition on slow walking was criticised by the Court of Appeal in *Ineos v Persons Unknown* [2019] EWCA Civ 515 in the following terms:

“...the concept of slow walking in front of vehicles or, more generally, obstructing the highway may not result in any damage to the claimants at all. ... slow walking is not itself defined and is too wide: how slow is slow? Any speed slower than a normal walking speed of two miles per hour? One does not know.” (at [40])

121. In *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 the Court of Appeal stated:

“Language which does not involve a value judgment may also be unduly vague. An example would be an injunction which prohibited particular conduct within a “short” distance of a location (such as the Site Entrance in this case). Without a more precise definition, there is no way of ascertaining what distance does or does not count as “short”.” (at [57])

122. It is submitted that similar concerns arise in relation to the use of the phrase ‘in the vicinity of’ in the draft order. It is impossible to determine what distance will

bring a demonstration ‘in the vicinity’ of HS2 land in order to fall within the scope of paragraph (6f).

*Generally*

123. The impact of protests which block access to the HS2 Land will vary widely depending on the circumstances and the duration of the protest. It cannot be said in advance that any demonstration that slows the flow of traffic onto the HS2 Land will be unlawful.

124. Since a significant portion of the HS2 Land covers urbanised areas, the ban on demonstrations on adjacent roads will prohibit demonstrations that have some impact on the traffic flow (however benign) on relatively small roads. It cannot be said in advance that all such demonstrations would be unlawful.

125. As the above examples demonstrate, the Order appears to prohibit conduct which is not unlawful and is a clear exercise of Article 10 and 11 rights. There is no basis under which the order permits protests which have only a small impact on the flow of traffic. The HS2 Order prohibits all protests that interfere with the flow of traffic in any way. The effect of the order extends considerably beyond tortious conduct and the impact on Article 10 and 11 rights is therefore disproportionate.

126. There are also concerns about the clarity of the proposed order. Such a lack of clarity brings with it a ‘chilling effect’ which may found a separate ground of challenge to the order.

**DURATION OF ORDER**

127. The duration of the HS2 Order is stated as:

“With immediate effect, and until 23.59hrs on 31 May 2023...”

128. For named defendants it is clear that they are bound by the terms of the order from the moment it was made until the end date.

129. A person who is not a named defendant will not bring themselves within the terms of the order unless they satisfy any of the 4 definitions of ‘persons

unknown' including persons 'entering or remaining on the HS2 land without the consent of the Claimants with the effect of hindering HS2 employees' or 'persons obstructing and/or interfering with access or egress to the HS2 land'.

130. However, a person who *at any point and for any purpose* either enters HS2 Land without the consent of the Claimants with the required effect or interferes with access to HS2 Land, brings themselves within definition of persons unknown. Since the service provisions for persons unknown do not require any form of personal service such a person will be bound by the order. On a simple reading of the order, a person meeting the definition of persons unknown will become bound by the order at all times thereafter up until the end date: once bound, they are always bound. In this way they are treated in the same way as named defendants.

131. This interpretation of the order is significant since an individual can fall within the definition of persons unknown through the commission of relatively innocuous acts (a short go-slow demonstration on a low volume road covered by the injunction); however, the individual is then bound by all the terms of the order until the end date. Whilst this may not have been in the intention of the Claimant, it appears to be the consequence of the order. The fact that the order is *capable* of bearing this interpretation clearly a matter of concern for those not already named defendants.

### **PROPORTIONALITY AND EXERCISE OF COURT'S DISCRETION**

132. The Court is required to consider the effect of the injunction order as a whole. Taken cumulatively the scope of the order and range of conduct restrained renders the order wholly disproportionate. The Order clearly lacks "clear geographical and temporal limits" and fails to meet the *Canada Goose* requirements.

133. Moreover those seeking equitable relief in the form of an injunction are required to come to court with "clean hands" (*LB Bromley* at [104(d)]). The

history of disputes arising from heavy handed enforcement of previous injunctions is relevant to the courts assessment of this issue.

134. Alternatively, such history demonstrates the difficulties in enforcing injunctions which cover a wide area of undemarcated land and impose complex conditions on a large body of persons.

### **CONCLUSION**

135. It is submitted that the present orders display many of the flaws identified in *Canada Goose*, as the Court of Appeal stated:

“...Canada Goose’s problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protestors. It wishes to use remedies in private litigation in effect to prevent what it sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protestors....” [at 93]

136. The Sixth Defendant respectfully asks that the court discharge/vary the interim injunction in accordance with the submissions above.

Tim Moloney QC, Doughty Street Chambers

Owen Greenhall, Garden Court Chambers

23.05.22