

IN THE HIGH COURT OF JUSTICE (KBD)

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

SUBMISSIONS ON DRAFT ORDER

ON BEHALF OF JAMES KNAGGS (D6):

INTRODUCTION

1. These submissions are made on behalf of the Sixth Defendant (D6) in relation to the Draft Order. They do not seek to reargue matters which were raised during the hearing in May 2022 but aim to assist the Court in providing clarity on the form of the draft order which, it is submitted, is in the interest of all parties.
2. D6 makes one overarching submission and three substantive points.
 - a) Overarching submission: there should be separate orders for persons unknown and named defendants/consequential matters.
 - b) Substantive points:
 - i) The terms of the prohibited conduct should match the definitions of persons unknown with the inclusion of the 'effect clause'

- ii) There should be a requirement for knowledge built into the order
- iii) There should be a requirement for demarcation of land where there are ongoing HS2 works.

OVERARCHING SUBMISSION

3. The draft order as proposed contains both the provisions relating to the route-wide injunction order as well as a number of provisions relating to specific areas of land and which deal with case management concerns relating to associated claims (the Harvil Road order etc). It is submitted that it is in the interests of clarity to have:
 - i) one order that is solely a route-wide injunction order against persons unknown; and,
 - ii) a second separate order which deals with provisions relating to named defendants and case management matters in relation to the associated claims.
4. The above proposal will mean that those subject to the persons unknown injunction will be able to read the order in a format that does not contain extraneous provisions relating to case management and that this will put things in the most easily accessible format for non-legally trained persons.
5. The three substantive proposals on the draft order are dealt with below.

I) EFFECT CLAUSE:

6. It is submitted that the 'effect clause' in the definition of persons unknown should be repeated in the definition of the prohibited conduct in paragraph 3.
7. As initially drafted in original application the definition of persons unknown in the present claim were: "persons unknown entering or remaining without the consent of the claimants ... on the HS2 land' and similar. There was symmetry between these definitions of persons unknown and the prohibited conduct in paragraph 3.

8. During the early stages of litigation, the Claimant was given permission to amend the definition of persons unknown by adding the following words to these definitions: “with the effect of damaging and//or delaying and/or hindering the Claimants, their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees” (‘the effect clause’). However, no corresponding changes were made to the prohibited conduct in paragraph (3) of the draft order.
9. As a principle of drafting the definition of persons unknown should match the prohibited conduct as closely as possible. This ensures compliance with the principle in *South Cambridgeshire District Council -v- Gammell* [2006] 1 WLR 658: that a person becomes a party to proceedings at the point at which they do the prohibited conduct. Symmetry between the prohibited conduct and the definition of persons unknown also makes the order easier to understand. As the order stands, newcomers reading the order and noticing the discrepancy between the definition of persons unknown and the prohibited conduct may wrongly think the order prohibits them from any entry onto the HS2 Land even if this does not cause any delay or disruption to works (and even if there are no works taking place anywhere near the land).
10. The failure to amend the prohibited conduct to mirror the definition of persons unknown also has the consequence that where a person falls within the definition of persons unknown at any point in time, they become bound by the order from that moment on (since service provisions do not require any form of personal service). Therefore an individual who, for whatever reason, enters HS2 land with the unintended effect of delaying the Claimants contractors (even for 5 minutes) is thereafter excluded from the entirety of the HS2 Land on pain of committal for the duration of the order -even where there is no work ongoing and no disruption is caused.
11. In light of the above, it is therefore proposed that Paragraph 3 of the draft order should be amended as follows (with underlined passages added):

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 any of the following where such conduct has 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:

- 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.
12. This proposed amendment is similar in effect to wording used by Mr Justice Cotter in the Cash's Pitt order. It provides protection to the Claimant for all acts which cause delay or disruption and limits the prohibitions to matters which correspond to such tortious activity.

II) KNOWLEDGE

13. It is submitted that the Order should specify that committal proceedings may not be brought against persons unknown unless they have knowledge of the existence of the order and the prohibited conduct.
14. Where orders against persons unknown are made with service provisions that do not require personal service or clearly advertising with notices on all the land affected it is possible that service may be complied with, and newcomers become bound by the order by falling within the definition of persons unknown, without having actual knowledge of the existence or terms of the order.
15. The Court of Appeal in *London Borough of Barking and Dagenham v Persons Unknown* [2022] EWCA Civ 13 assumed (following *Gammell*) that a person could not become a party to an action and face committal proceedings unless they knowingly breached an order (at [30], [75] and [91]). This is inconsistent with the comments of the Court of Appeal in *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357
16. The issue was recently considered by Nicklin J in *MBR Acres v McGivern and Persons Unknown* [2022] EWHC 2072 (QB) where he stated:

“67. I would note however, that, in the following parts of his judgment in *Barking* , Sir Geoffrey Vos MR suggested that the Gammell principle operated to make a newcomer a party to the proceedings (and bound by an injunction) only when s/he had knowingly breached the injunction (emphasis added):

"[Gammell] decided that there was no need to join newcomers to an action in which injunctions against persons unknown had been granted and knowingly violated by those newcomers" [30]

"... it was essential to the reasoning [in *Gammell*] that such injunctions, whether interim or final, applied in their full force to newcomers with knowledge of them " [31];

"Lord Sumption [in *Cameron*] seems to have accepted that, where an action was brought against unknown trespassers, newcomers could, as Sir Anthony Clarke MR had said in *Gammell* , make themselves parties to the action by (knowingly) doing one of the prohibited acts. This makes perfect sense, of course, because Lord Sumption's thesis was that, for proceedings to be competent, they had to be served. Once Ms Gammell knowingly breached the injunction, she was both aware of the proceedings and made herself a party" [37]; and finally

"... one can see that, assuming these statements were part of the essential decision in *Cameron* , they do not affect the validity of the orders against newcomers made in *Gammell* (whether interim or final) because before any steps could be taken against such newcomers, they would, by definition, have become aware of the proceedings and of the orders made , and made themselves parties to the proceedings by violating those orders (*Gammell* [32])" [38]

68. I do not find it easy to reconcile a requirement of knowing breach of injunction, as a pre-requisite for becoming a "Persons Unknown" defendant by operation of the Gammell principle, with the earlier decision of the Court of Appeal in *Cuciurean* , in which the Court rejected any requirement of " knowing " breach. What was required, the Court of Appeal held in that decision, was notice or service of the relevant order, and that could be achieved by alternative service.

69. In *Cuciurean* , committal proceedings were brought against the appellant. He had not been named as a defendant in the underlying proceedings, but an injunction had been granted against "persons unknown". The appellant had argued that, for him to be liable for contempt for breaching the "persons unknown" injunction, he had to be shown to have knowledge of its terms. This argument was rejected.

...

70. *Cuciurean* is therefore authority for the proposition that, providing there has been compliance with the terms granting permission to serve the injunction order by alternative means, the respondent will be taken to have notice of the terms of the injunction. There is no requirement of knowledge. Ignorance of the terms of the injunction is relevant only to penalty, not liability, although where the Court was satisfied that the respondent was ignorant of the relevant order or its terms, then no penalty would be imposed for what would amount to a wholly technical breach. *Cuciurean* was not apparently cited to, or considered by, the Court of Appeal in *Barking* .“

17. It is clear that there is an unhelpful lack of clarity in the authorities in relation to the requirement for knowledge of an order which may be a very important issue

when it comes to enforcement by means of committal. However, it is submitted that there is a clear and simple means to resolve the issue in any case, such as the present, where service provisions do not require personal service and there is a practical possibility that they are not sufficient to ensure that those falling within the definitions of persons unknown have actual knowledge of the order. The solution proposed is to build the requirement for knowledge into the order itself.

18. This solution was adopted by Eyre J in the attached order dated 16.08.22 from the recent case of *Esso Petroleum v Persons Unknown* (Claim QB-2022-002577)¹ which states at paragraph 13 (emphasis added).

13. Personal service on the First Defendant shall be sufficient in his case. Otherwise, pursuant to CPR 6.12(3) and 6.27, the Claim Documents and Order shall be deemed to be served on the latest date on which compliance with the provisions of paragraph 10 shall have occurred, such date to be verified by the completion of a certificate of service or witness statement. For the avoidance of doubt, no person shall be in breach of the terms of this Order unless they fail to comply with paragraphs 2 and 3 of this Order knowing of the existence of this Order.

19. It is submitted that a similar provision should be included in the order in the present case.

Proposed amendment:

20. It is proposed that the following provision is inserted following the requirements relating to service in Paragraph 9.

9': No person shall be in breach of the terms of paragraph 3 of this Order unless they fail to comply with its terms knowing of the existence of this Order and the terms of paragraph 3.

21. The aim of 9' is to prevent those who are unaware of the terms of the order from facing committal proceedings without imposing further service requirements on the claimants. Simply telling someone about the order will fix them with knowledge it therefore does not impose onerous service requirements on the Claimants.

¹ The order was made on an *ex parte* application. The case is due to be further considered on 05.10.22.

III) DEMARCATION OF LAND

22. It is submitted that if the injunction is to be enforced in relation to any piece of land where there are ongoing works, that area of that land should be clearly demarcated.
23. It is clear that the HS2 land covers a very wide area and is not generally marked out and does not cohere in a clearly identifiable manner to persons on the ground. The precise boundaries of the land are therefore not easy to identify when on the ground. Whilst the Claimants object to any requirement that the entirety of the HS2 land is to be fenced or demarcated due to the time consuming and costly nature of the task; these concerns do not apply with the same force to land *where construction work is actively taking place*. At any moment in time this is a much smaller portion of the HS2 land and by definition there will be HS2 workers present on the land.
24. The purpose of having clear demarcation in relation to any piece of land where there are ongoing works is to ensure that those who know of the terms of the order are clear about the relevant land that is affected in relation to ongoing works. Where ongoing HS2 works are taking place on a portion of HS2 land, such that interfering with those works will breach the order, then that land should be demarcated in some way.
25. The obligation applies only whilst the works are ongoing. That way it is clear on what land the order will bite at the time of the works. It does not require the entire HS2 land to be demarcated at any one time. The method of demarcation does not need to be stipulated since it will depend on the circumstances (no doubt it will be heras fencing in some circumstances and a rope or tape in others). In any event, most ongoing construction sites will have some form of demarcation due to health and safety concerns and therefore ensuring that the relevant land is clearly marked out imposes a limited additional obligation.

Proposed amendment:

26. It is proposed that the following provision is inserted following the requirements relating to service in Paragraph 9.

9'': Where there are ongoing HS2 works on any portion or parcel of HS2 land, obstruction or interference with such works will not constitute a breach of paragraph 3 of this order unless that portion or parcel of HS2 Land is clearly demarcated.

CONCLUSION

27. The Sixth Defendant respectfully asks that the order is amended in line with the above submissions.

Tim Moloney QC, Doughty Street Chambers

Owen Greenhall, Garden Court Chambers

16.09.22