IN THE COURT OF APPEAL (CIVIL DIVISION) **Claim no.: QB-2022-BHM-000044**

ON APPEAL FROM THE HIGH COURT OF JUSTICE (KBD)

BIRMINGHAM DISTRICT REGISTRY

Between

(1) HIGH SPEED TWO (HS2) LIMITED
(2) THE SECRETARY OF STATE FOR TRANSPORT **Claimants/ Respondents**

and

(6) MR JAMES KNAGGS **Defendant/ Appellant**

(1-4) FOUR CATEGORIES OF PERSONS UNKNOWN
(5) MR ROSS MONAGHAN
AND 57 OTHER NAMED DEFENDANTS **Defendants**

APPELLANT'S SKELETON ARGUMENT FOR PERMISSION TO APPEAL (10.10.22)

INTRODUCTION

1. On 20.09.22, Knowles J gave judgment in the present case and made an Order providing for injunctive relief restraining persons unknown and 59 named defendants from acts of protest in relation to the HS2 railway development ('the Injunction Order'/'the Order').

2. The Appellant/Sixth Defendant (D6) applies for permission to appeal on the following grounds:

i) The learned judge erred in law in concluding that the Respondents had sufficient interest in the entirety of the land subject to the order capable of supporting injunctive relief founded on claims in trespass and private nuisance .

ii) The learned judge erred in law in concluding that the Respondents may rely on rights under Article 1 of Protocol 1 ECHR in support of the application for injunctive relief.

iii) The learned judge erred in law in defining the prohibited conducted in the injunction Order:

a) By reference to a legal cause of action

b) By reference to vague/imprecise terms such as 'slow walking'

c) In a disproportionate manner which does not correspond to the definition of persons unknown.

iv) The learned judge erred in law and/or reached a conclusion no reasonable judge could make in finding that the service provisions in the directions order of 28.04.22 and the draft injunction order are sufficient to bring the proceedings to the attention of all those affected.

3. Submissions are made in support of these grounds below.

BACKGROUND

4. The present case concerns an application for injunctive relief by HS2 Ltd and the Secretary of State for Transport to restrain persons unknown and 59 named defendants from acts of protest in relation to the HS2 railway development.

5. The geographical scope of the order is on any view vast, stretching across the entirety of the HS2 Route from London to Cheshire. The land subject to the order ('the HS2 Land') is defined through a series of maps and plans which number more than 280 pages.

6. The HS2 Land is divided into two categories, depicted by relevant colours on the maps:

i) Pink land: Land to which the Respondents have either the freehold or leasehold title.

ii) Green land: Land to which the Respondents have statutory powers of temporary possession.

7. 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. It is clear that:

i) The HS2 Land is criss-crossed by roads, footpaths and other public rights of way.

ii) Some HS2 Land passes through high-density urban areas with multiple roads and public highways.

iii) Some HS2 Land covers woodland and other areas with public access and public rights of way.

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.

vi) Much of the HS2 Land remains in the possession of third parties and, in relation to the Green Land, beyond service of statutory notices, no further steps to secure temporary possession have been taken by the Respondents.

8. When combined with the wide definition of 'persons unknown' it is clear that the effect of the 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 Respondents. Importantly, the Order also covers conduct which may arise in any dispute between the Respondents and those resident or conducting business in the vicinity of the HS2 Land which falls outside the protest context.

CHRONOLOGY

9. 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 (a site on the HS2 route).
23.02.22	Notice provided under Schedule 15 Phase 2a Act 2017 in relation to Cash's Pit Land.
25.03.22	Claimants/Respondents 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 in relation to HS2 wide order.
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 for Claimants' application for injunctive relief.
20.09.22	Judgment given by Knowles J and Injunction Order made.
23.09.22	Permission to appeal refused by Knowles J.

GENERAL LEGAL FRAMEWORK

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

Injunctions

11. 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.

12. 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

13. 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.

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

15. 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) 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];

iv) "deliberate obstructive conduct which has a more than *de minimis* impact on others still requires careful evaluation in determining proportionality" [67];

v) "both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality" [70];

vi) 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];

16. *Ziegler* was directly concerned with protest on the public highway (like much of the present case). In relation to such protest, 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]).

17. The present claim therefore 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 or access to some degree.

GROUND 1: NO IMMEDIATE RIGHT TO POSSESSION

18. It is submitted that the learned judge erred in law in concluding that the Respondent had sufficient interest in the entirety of the land subject to the order capable of supporting injunctive relief founded on claims in trespass and private nuisance.

Legal Framework

19. The statutory scheme on which the Respondents' right to possession of the relevant land are set out in Schedule 15 (Temporary Possession and Use of Land) of the Phase 2a Act (the provisions of the Phase One Act are materially equivalent). It states (emphasis added):

> *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.

20. 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.

21. The procedural requirements of the Phase 2a Act require that 28 days notice is provided of an intention to take possession of land (paragraph 4(1) of Schedule 15).

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

23. Paragraph 1(1) imposes a statutory limit on the right to possession: possession must be needed 'for Phase 2a purposes'. At any point in time where this statutory condition is not met the Respondents have no right to possession of the land whatsoever.

24. In relation to the Green Land, the Respondents have served statutory notices of temporary possession under Schedule 15 (Temporary Possession and Use of Land) of the Phase 2a Act. However, no evidence has been served as to when access to the land is actually required for works to be conducted. Given the long timescale for the HS2 project, for much land no access to the land will be required for a long time.

Judge's ruling

25. It was contended by the Appellant that the statutory scheme did not provide a sufficient basis for injunctive relief without evidence that access to the land was required at any point in the near future.

26. The judge's conclusion on this point is set out at Paragraph 78 of the judgment which states:

> "Mr Kimblin [counsel for the Claimant] was quite explicit that the Claimants do, as of now, have the right to immediate possession over the green land because the relevant statutory notices have been served, albeit (to speak colloquially) the diggers have not yet moved in. That does not matter, in my judgment. I am satisfied that the Claimants do, as a consequence, have a better title to possession that the current occupiers – and certainly any protesters who might wish to come on site. Actual occupation or possession of land is not required, as *Dutton* shows (see in particular Laws LJ's judgment at p151; the legal right to occupy or possess land, without more, is sufficient to maintain an action for trespass against those not so entitled. That is what the First Claimant has in relation to the green land."

27. At paragraph 152 he also states:

> "I am therefore satisfied that the Claimants are entitled to possession of all of the land comprising the HS2 Land. The fact they are not actually in possession (yet) of all of it does not matter, for the reasons I have already explained. The statutory notices have been served and they are entitled to immediate possession. That is all that is required."

Submissions

28. It is accepted that *actual* possession of land is not required to found a claim for an injunction based on trespass, a *right* to immediate possession will suffice. However, it is submitted that the Respondents do not currently have even a right to immediate possession of all the relevant land at the present time.

29. The judge's reasoning fails to address the statutory limit on the right to possession imposed by Paragraph 1(1) of Schedule 15: possession must be needed 'for Phase 2a purposes'. At any point in time where this statutory condition is not met the Respondents have no right to possession of the land whatsoever. Where works are not scheduled to take place on land imminently then the Respondents are not only not in actual possession but have no right to such possession either immediately or imminently. It is therefore wrong to conclude in relation to such land that the Respondents "are entitled to immediate possession".

30. It is also wrong to conclude that the Respondents have a better title to land than the current occupiers/Defendants. First, it should be noted that the Order binds guests of any freeholder of the land in question or those exercising rights of passage on public highways. Such persons clearly have a right of access to suh land. Second, a person who is in actual occupation of land which is not needed imminently by the Respondents for Phase 2a purposes will have a better title (actual possession) than the Respondents (no right to possession at all).

31. 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 Respondents may 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 Respondents). Previous cases (such as *SSfT & HS2 v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch)) in which injunctive relief has been granted to the Respondents relating to land where there is ongoing or imminent works are of no assistance in securing injunctive relief in relation to land where no such work is planned.

GROUND 2: RESPONDENTS' RIGHTS UNDER A1P1

32. It is submitted that the learned judge erred in concluding that the Respondents, as a public body, may rely on rights under Article 1 of Protocol 1 ECHR in support of their claims.

Legal Framework

33. The starting point under domestic law is the case of *Aston Cantlow v Wallbank* [2003] UKHL 37; [2003] 3 W.L.R. 283 in which Lord Nicholls drew a distinction between core and hybrid public bodies and stated:

> 8. A further, general point should be noted. One consequence of being a "core" public authority, namely, an authority falling within section 6 without reference to section 6(3), is that the body in question does not itself enjoy Convention rights. It is difficult to see how a core public authority could ever claim to be a victim of an infringement of Convention rights. A core public authority seems inherently incapable of satisfying the Convention description of a victim: "any person, non-governmental organisation or group

> of individuals" (article 34 , with emphasis added). Only victims of an unlawful act may bring proceedings under section 7 of the Human Rights Act 1998, and the Convention description of a victim has been incorporated into the Act, by section 7(7). This feature, that a core public authority is incapable of having Convention rights of its own, is a matter to be borne in mind when considering whether or not a particular body is a core public authority. In itself this feature throws some light on how the expression "public authority" should be understood and applied. It must always be relevant to consider whether Parliament can have been intended that the body in question should have no Convention rights.
>
> …
>
> 11. Unlike a core public authority, a "hybrid" public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights. A hybrid public authority is not a public authority in respect of an act of a private nature. Here again, as with section 6(1) , this feature throws some light on the approach to be adopted when interpreting section 6(3)(b) . Giving a generously wide scope to the expression "public function" in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary." (emphasis added)

34. The position of a hybrid authority when exercising public functions was further considered by the Court of Appeal in *YL v Birmingham City Council and others* [2007] EWCA Civ 26; [2007] EWCA Civ 27 [2008] Q.B. 1 by Buxton LJ:

> "75. A particular difficulty has been seen in this connection in respect of the right of the care home to protect its own position, for instance by asserting its right to control its property under article 1 of the First Protocol. That difficulty arises as follows. When addressing the position of core public authorities, Lord Nicholls in the *Aston Cantlow case [2004] 1 AC 546* , at para 8 (a passage relied on by Mr Sales as in some way undermining the *Leonard Cheshire Foundation case [2002] 2 All ER 936*), pointed to the definition of "victim" in article 34 of the Convention: "any person, non-governmental organisation or group of individuals" (Lord Nicholls's emphasis). It therefore followed that a core public authority would be, or was likely to be, a body that was not a victim, and thus had no Convention rights of its own. But if that is so of core public authorities, it is very difficult to see why that is not so of hybrid public authorities in relation to the activities that confer on them their public status. True it is that in the Aston Cantlow case Lord Nicholls said, at para 11: "Unlike a core public authority, a 'hybrid' public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights." But, with deference, that does not meet the objection in relation to those functions of the hybrid, in the present case the care of section 26 residents, that confer the status of a public authority. And it would therefore seem to follow that when making decisions of the sort indicated above the care home cannot take into account, under the rubric of the rights of others, its own Convention rights, because when discharging its public functions it has no such rights." (emphasis added)

35. The cases of *Aston Cantlow* and *YL* are therefore authority that where a party to litigation is either a core public authority or is exercising functions of a public nature for the purposes of s6(3)(b) HRA 1998 such a party cannot rely on its own Convention Rights either as a cause of action or to be weighed in the balance when assessing the proportionality of interference with the Convention Rights of another.

ECHR Caselaw

36. The issue may also be approached from the perspective of the ECHR case law. Article 34 ECHR states:

> Article 34 ECHR: 'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.'

37. In the Case of *Islamic Republic of Iran Shipping Lines v Turkey* (Application no. 40998/98) the ECtHR stated:

> 79. The term "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities (see Radio France and Others, cited above)." (emphasis added)

38. In *JKP Vodovod Kraljevo v. Serbia* (applications nos. 57691/09 and 19719/10) the Court stated:

> "23. A legal entity claiming to be the victim of a violation by a member State of the rights set forth in the Convention and the Protocols has standing before the Court only if it is a "non-governmental organisation" within the meaning of Article 34 of the Convention. The category of "governmental organisations", as opposed to "non-governmental organisations" within the meaning of Article 34, includes legal entities which participate in the exercise of governmental powers or run a public service under government control. In order to determine whether any given legal person other than a territorial authority falls within that category, account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities (see Radio France and Others v. France (dec.), no. 53984/00, § 26, ECHR 2003-X (extracts)).
>
> …
>
> 25. The Court notes that the applicant company is incorporated under the domestic law as a separate legal entity. However, the company's legal status under domestic law is not decisive in determining whether it is a "non-governmental organisation" within the meaning of Article 34 of the Convention. The Court has held on several occasions that companies lacked locus standi under Article 34, regardless of their formal classification under domestic law (see, for example, *State Holding Company Luganksvugillya v. Ukraine* (dec.), no. 23938/05, 27 January 2009; *Transpetrol, a.s. v. Slovakia* (dec.), no. 28502/08, 15 November 2011; and *Zastava It Turs*, cited above).
>
> 26. What is more relevant is the special nature of the applicant company's activity. As the only water and sewerage company in the municipality of Kraljevo, it provides a public service of vital importance to the municipality population (see, *mutatis mutandis, Yershova v. Russia*, no. 1387/04, § 58, 8 April 2010,

> and *Liseytseva and Maslov v. Russia*, nos. 39483/05 and 40527/10, § 209, 9 October 2014). The assets used by the company for those purposes (notably, water, the water supply system and the sewerage system) were (and continue to be) public assets (see paragraph 16 above). Furthermore, it has not been disputed that the tariffs of the water and sewerage services provided by the applicant company required the consent of the local authorities (see paragraph 15 above). Because of the special nature of those services, only statutory utility companies were (and continue to be) allowed to provide them (see paragraph 14 above). …
>
> 27. Lastly, the Court observes that the applicant company was required to write off its large claims against State- and socially-owned companies (see paragraphs 10 and 13 above). The State thus disposed of the applicant's assets as it saw fit. This shows that the applicant company does not enjoy sufficient independence from the political authorities ….
>
> 28. In view of the above, the applicant company cannot be regarded as a "non-governmental organisation" within the meaning of Article 34 of the Convention (compare *RENFE v. Spain*, no. 35216/97, Commission decision of 8 September 1997, Decisions and Reports 90-B)." (emphasis added)

Recent cases

39. The issue of public bodies reliance on A1P1 rights has been considered by the Court of Appeal in two recent cases. *Secretary of State for Transport and HS2 Ltd v Cuciurean* [2022] EWCA Civ 661 was a case concerning costs in committal proceedings. The case involved the same claimants as in the present case and there *was* argument on whether they could rely on A1P1 rights. The Court of Appeal stated:

> "The competing rights
>
> 28. As is so often the case, there are rights that pull in different directions. It has also been authoritatively decided that there is no hierarchy as between the various rights in play. On the one hand, then, there are Mr Cuciurean's rights to freedom of expression and freedom of peaceful assembly contained in articles 10 (1) and 11 (1) of the ECHR. On the other, there are the claimants' rights to the peaceful enjoyment of their property. There was some debate about whether these were themselves convention rights (given that the Secretary of State for Transport is himself a public authority and cannot therefore be a "victim" for the purposes of the Convention, and HS2 Ltd may not be regarded as a "non-governmental" organisation for that purpose). But whether or not they are convention rights, they are clearly legal rights (either proprietary or possessory) recognised by national law. Articles 10 (2) and 11 (2) of the ECHR qualify the rights created by articles 10 (1) and 11 (1) respectively…." (emphasis added)

40. A subsequent case of the Court of Appeal Criminal Division, which was handed down after judgment in the present matter, also addressed the issue. In *Attorney General's Reference Number 1 of 2022* [2022] EWCA Crim 1259 the Court drew a distinction between public and private property in considering when a criminal conviction would be a proportionate interference with A10/11

rights. The Court reviewed Strasbourg jurisprudence and concluded that greater protection was provided for private property:

> "because in addition to the usual questions about the applicability of a Convention right and then proportionality the A1P1 rights of the non-state owner are in play" (at [102], emphasis added).

41. This explained the different degrees of protection to be afforded under the domestic criminal law to public and private property (at [116]). By necessary implication therefore, A1P1 rights are not in play in relation to property owned by the state.

Judge's ruling

42. The judge's finding on this point is set out at Paragraph 125 of the Judgment.

> "I am satisfied that the First Claimant can pray in aid A1P1, and the common law values they reflect, and that the approach set out in *DPP v Cucirean* and other cases is binding upon me. The point raised by D6 was specifically dealt with by the Court of Appeal in *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, [28]…" (emphasis added)

43. When assessing whether the interference with the Defendants' Article 10 and 11 rights was in pursuit of a legitimate aim, he said:

> "…The Claimants' have common law and A1P1 rights over the HS2 Land, as I have explained…" (at [201], emphasis added)

44. The judge effectively considered himself bound by previous authority to allow the Respondents to rely on A1P1 rights.

Submissions

45. The Appellant submits that the learned judge was wrong to allow the Respondent to rely on A1P1 rights in support of the claim because:

    i) P is either a core public authority or a hybrid authority exercising a function of a public nature for the purposes of s6(1) and 6(3)(b) HRA 1998; and,

    ii) P is a governmental organisation for the purposes of Article 34 EHCR.

46. First Respondent is described in the Framework Document between the Secretary of State for Transport and High Speed 2 Limited (2018) (which was before the trial judge) in the following terms:

> "2. HS2 Ltd is a corporate body established on 14 January 2009 by incorporation under the Companies Act 2006, and limited by guarantee. It is an Executive Non-Departmental Public Body tasked with delivering the High Speed 2 project. The Secretary of State is its 'sole member', for whom it is remitted to undertake work (the Secretary of State's sole member status is referred to as the 'shareholder' function throughout this document, as it is equivalent to the rights of a sole shareholder). HS2 Ltd is a separate legal entity from the Crown and is therefore not a Crown Body." (emphasis added)

47. The purpose of HS2 Ltd is defined as:

> 2.1 HS2 Ltd has been established to develop, promote and deliver the UK's new high speed rail network. HS2 Ltd's main duties and powers are specified in Section 4 of the Company's constitution (which is available from Companies House on payment of a fee) and in the Development Agreement (see 2.2 below).

48. It also states:

> Ministerial responsibility
>
> 4. The Secretary of State for Transport will account for HS2 Ltd business in Parliament, and keep Parliament informed about the performance of HS2 Ltd by ensuring HS2 Ltd's Annual Report and Accounts are laid before Parliament each year.
>
> 4.1 As sole shareholder in HS2 Ltd the Secretary of State also has specific shareholding responsibilities that include:
>
> - Ensuring that HS2 Ltd is guided and monitored in the public and taxpayer interest.
> - Approving the amount of capital contribution to be paid to HS2 Ltd and securing Parliamentary or HM Treasury approval if necessary.
> - Holding the HS2 Ltd Board to account for its governance of the Company and its performance.
> - Appointing the HS2 Ltd Chair and annually reviewing their performance, and appointing Non-Executive Directors.
> - Removing a member of the Board from their position if given due cause in accordance with the relevant provisions of the Companies Act 2006 and/or subject to the terms of their appointment letter.
> - Exercising the right to amend the Memorandum and Articles of the Company at any time.

49. It is submitted that HS2 Ltd is a core public body or, alternatively, a hybrid public authority for the purposes of s.6 HRA 1998. Similarly, it is submitted that it is a "governmental organisation" for the purposes of Article 34 ECHR.

50. This is for the following reasons:

i) The Framework document defines HS2 Ltd as: "an Executive Non-Departmental Public Body tasked with delivering the High Speed 2 project." (emphasis added);

ii) The fact that HS2 Ltd is formally a company is not determinative of its status;

iii) HS2 Ltd is wholly owned by the state (the Secretary of State for Transport is its sole shareholder) and is entirely publicly funded;

iv) The state retains control over HS2 Ltd in relation to key areas of funding, governance, composition of the managing board etc.;

v) HS2 Ltd has a specific public service role: "to develop, promote and deliver the UK's new high speed rail network";

vi) HS2 Ltd effectively holds a monopoly position in the delivery of the HS2 project;

vii) HS2 Ltd exercises specific statutory powers granted by primary legislation; and,

viii) Of particular relevance to the present claim are those powers of both compulsory purchase of land, temporary possession of land, the extinction of rights over land and specific powers in relation to planning permission, controls on listed buildings and similar (see sections 4, 10, 13 and related schedules)

51. If HS2 Ltd is held to be a hybrid public authority then it is submitted that the exercise of powers relevant to the present claim fall within "functions of a public nature". The present claims are founded on rights to land which are based on statutorily conferred powers of compulsory purchase and, importantly, temporary possession. These statutory powers lie at the heart of the Respondents' claims in trespass and the related claims in private nuisance arising from land to which a right to possession is asserted. Without such statutory powers the Respondents would not be in a position to bring the present claim and would have no basis on which to seek an injunction.

52. Insofar as the judge held himself to be bound by previous authority, in two of the cases cited (*Olympic Delivery Authority v Persons Unknown* [2012] EWHC 1012 (Ch) and *Cuciurean v Secretary of State for Transport* [2021] EWCA 357) the point was not subject to any argument (and in the *Olympic Delivery Authority* case the defendants were not legally represented).

53. In the two cases where this point *has* been subject to argument, the Court of Appeal Civil Division explicitly left the point open (in *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661) whereas the Court of Appeal Criminal Division (in *Attorney General's Reference Number 1 of 2022*) premised a decision on the proposition that public authorities could not rely on A1P1 rights.

54. It is submitted that the learned judge's categorisation of the Respondents legal rights as Convention Rights under A1P1 is relevant to the relative weight to be afforded to such legal rights. In concluding that the Respondents could rely on rights under A1P1 ECHR the learned judge erred in law.

GROUND 3: TERMS OF THE ORDER

55. It is submitted that the learned judge erred in law in defining the prohibited conducted in the injunction Order:

    a) By reference to a legal cause of action

    b) By reference to vague/imprecise terms such as 'slow walking'

    c) In a disproportionate manner which does not correspond to the definition of persons unknown.

Legal Framework

56. The terms of an injunction muse 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."

57. 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. 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])

Judge's ruling

58. The learned judge approved the Draft Order in the terms sought by the Respondents (with the exception of requiring the word 'deliberately' to be inserted at two points in the order). He stated:

> "Subject to two points [relating to the insertion of the word 'deliberately'] I consider these provisions [in the draft order] comply with *Canada Goose*, [82], in that the prohibited acts correspond as closely as is reasonably possible to the allegedly tortious acts which the Claimants seeks to prevent. I also consider that the terms of the injunction are sufficiently clear and precise to enable persons potentially affected to know what they must not do. The 'carve-outs' in [4] make clear that ordinary lawful use of the highway is not prohibited. I do not agree with D6's submission (Skeleton Argument, [52], et seq." (at [189])

Submissions: (a) References to legality/cause of action

59. Paragraph (4) of the draft order provides carve outs for conduct on public rights of way. It states (emphasis added):

> (4) Nothing in paragraph (3) or 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.

60. It is clear therefore that the scope of the prohibited conduct in Paragraph (3) and is restricted by Paragraph (4) using legal concepts of "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.

61. Moreover, the terms bring with them an unacceptable vagueness since the "lawful right over the public highway" includes any protest which does not unreasonably obstruct others. The provisions therefore fail to comply with the requirements in *Cuadrilla* on this basis as well.

62. It is clear that "lawful rights over any public highway" may include conduct which is deliberately and intentionally obstructive to others to some degree (see *Ziegler*). A protest on a public highway which causes a limited degree of obstruction will be lawful depending on the degree of obstruction. A prohibition on persons unknown accessing HS2 Land with the effect of hindering the Respondents is therefore inconsistent with the exception for "exercising rights over a public right of way". If such conduct is not intended to be caught by the Order then how is a person to tell in advance whether a particular disruptive protest will render them liable for committal? Clearly, it was open to the Court to remove all public highway land from the scope of the Order entirely and leave it for the police to make a case-by-case assessment of whether any

demonstration amounted to an unreasonable obstruction of the highway (and hence an offence under Section 137 Highways Act 1980).

(b) Slow walking

63. Paragraph (5) of the draft order (as amended) stipulates that prohibited conduct includes:

> f. Deliberate slow walking in front of vehicles in the vicinity of the HS2 Land

64. 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])

65. 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])

66. It is submitted that the insertion of the word 'deliberate' in paragraph 5(f) does not address these concerns. The prohibition remains unduly vague and fails to comply with the requirements in *Ineos* and *Cuadrilla* above.

c) Disproportionate scope of prohibitions

67. The definitions of persons unknown in the Order each contain an 'effect clause' as underlined below:

> 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 HS2 LAND 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, SUBCONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES

68. During the early stages of litigation, the Respondents were given permission to amend the definition of persons unknown by adding the effect clause.

69. However, paragraph 3 of the Order imposes prohibitions on acts which do not require any such effect. Paragraph 3 therefore imposes a blanket prohibition on entering or remaining on HS2 Land to anyone subject to the order.

70. 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).

71. 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, that individual is 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 Respondents 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. Similarly the Appellant, as a named defendant, is prohibited from entering any HS2 Land even where there are no works taking place on such land, or even due to take place at any point in the near future.

72. It is submitted therefore that it was wrong in principle to omit the relevant effect clause from the prohibitions in Paragraph 3 of the Order and the resulting Order is disproportionate in the scope of the conduct prohibited.

GROUND 4: SERVICE

73. It is submitted that the learned judge erred in law and/or reached a conclusion no reasonable judge could make in finding that the service provisions in the directions order of 28.04.22 and the draft injunction order are sufficient to bring the proceedings to the attention of all those affected.

74. The service provisions are set out at Paragraph (8) of the Order (which mirrors requirements for service of the application for the injunction). Broadly summarised the provisions for service on persons unknown require notice to be given:

    i) by affixing copies of the Order at the Cash's Pit site (a specific locatoin of previous protest activity),

    ii) by placing an advertisement in the Times and Guardian newspapers,

    iii) by placing copies of the order in libraries every 10 miles along the route; and,

    iv) publishing on social media.

Judge's ruling

75. The learned judge stated:

> "228. The Claimants submitted that the totality of notice, publication and broadcasting had been very extensive and effective in relation to the application. They submitted that service of an order by the same means would be similarly effective, and that is what the First Claimant proposes to do should an injunction be granted.
>
> 229. I agree. The extensive and inventive methods of proposed service in the injunction, in my judgment, satisfy the *Canada Goose* test, [82(1)], that I set out earlier. That this is the test for the service an order, as well as proceedings, is clear from *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, [14]-[15], [24]-[26], [60], [75]."

76. In an earlier discussion (at [143]) of the legal requirements for service, reference was made to provisions required in *National Highways Limited v Persons Unknown and others* [2022] EWHC 1105 (QB) (Bennathan J) which in turn referred to *National Highways Limited v Persons Unknown and others* [2021] EWHC 3081 (QB) (Lavender J). This was another wide-ranging injunction case in which the court found that it was impracticable to place notices on stakes in the

ground on all the land effected. In the *National Highways* cases, the broad scope of the injunction was tempered by requiring personal service on persons unknown. Therefore no person could be in breach of the order without having actual knowledge of the order. No similar requirement was imposed in the present case.

Submissions

77. It is clear that the service provisions allow for the clear possibility that persons may fall within the definition of persons unknown and breach its terms without being aware of the order itself. Importantly, the order is not limited to protestors, but captures others that may come into disputes with HS2. There vast scope of the land affected includes many businesses and residential properties the owners and occupiers of which may remain entirely unaware of these proceedings until a dispute arises when HS2 workers begin construction work in the vicinity of their properties. It is submitted that to impose injunctive prohibitions against such persons without advance notice is wrong in principle.

78. Significantly, there was no requirement to provide written notice by post of either the Injunction application or the Order, to the owners and occupiers of land that is subject to the Order. This is notwithstanding the fact that the Order restricts activity on such land, including in some instances the back gardens of residential properties. Whilst the recital states that the Respondents undertake not to bring committal proceedings against freeholders or leaseholders of the HS2 Land. However, guests of such freeholders who undertake action with the effect of hindering HS2 works (in any way) are subject to the Order. The families of freeholders or leaseholders who are resident on the HS2 Land are therefore bound by the order. Again, it is wrong in principle to make an order restricting conduct on land without providing sufficient notice to guarantee that the owner and occupier of the land will be aware of proceedings.

CONCLUSION

79. Insofar as is relevant, CPR 52.6 states:

52.6 Permission to appeal test – first appeals

(1) Except where rule 52.7 applies, permission to appeal may be given only where—

(a) the court considers that the appeal would have a real prospect of success; or

(b) there is some other compelling reason for the appeal to be heard.

80. It is submitted that each of the grounds of appeal identified have a real prospect of success; or alternatively, there is some other compelling reason for the appeal to be heard.

81. The grounds of appeal all raise issues of important principle or practice which are of general public importance. The background circumstances of the case concern a project of national importance. The explicit aim of the present application has been to avoid the need for repeated applications for site specific injunctions, the case therefore has a potentially wide impact. The status of the claim and the developing nature of the law in this area are also relevant factors. Furthermore, there are currently conflicting or indeterminate decisions of the higher courts relating to many of the grounds of appeal raised. For example, the status of purported A1P1 rights of public bodies in injunction claims was explicitly left open by the Court of Appeal in *Cuciurean*. Also, the service provisions relating to persons unknown in wide-ranging injunction cases have yet to be considered at Court of Appeal level despite the increasing number of such applications being sought in the High Court.

82. On the basis above it is submitted that permission to appeal should be granted.

Tim Moloney KC, Doughty Street Chambers

Owen Greenhall, Garden Court Chambers

10.10. 22