Claim no: QB-2022-BHM-000044

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

Between:

(1) HIGH SPEED TWO (HS2) LIMITED
(2) THE SECRETARY OF STATE FOR TRANSPORT

Claimants

-and-

PERSONS UNKNOWN & OTHERS

Defendants

AUTHORITIES BUNDLE

for hearing on 16 May 2023

HS2 and SoST v Persons Unknown [2022] EWHC 2360 (KB) ("**Judgment**"); and

Ruling of the Court of Appeal in CA-2022-001952 dated 9 December 2022 ("**Ruling**") may be found in the Core Bundle Volume A, Tabs 2 and 3 respectively.

TAB	AUTHORITY	PAGE
6	*DPP v Cuciurean* [2022] EWHC 736 (Admin)	AUTH-92 to AUTH-111
7	*Canada Goose v Persons Unknown* [2020] EWCA Civ 303	AUTH-112 to AUTH-134
8	*Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9	AUTH-135 to AUTH-164
9	*Secretary of State for Transport v Cuciurean* [2020] EWHC 2614 (Ch)	AUTH-165 to AUTH-229
10	*FSDEA v Dos Santos* [2018] EWHC 2199	AUTH-230 to AUTH-263

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Neutral Citation Number: [2023] EWHC 402 (KB)

Case No: KB-2022-003542

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2023

Before :

MR JUSTICE CAVANAGH

- -

Between :

TRANSPORT FOR LONDON	**Claimant**
- and -	
LEE AND OTHERS	**Defendant**

- -
- -

Andrew Fraser-Urquhart KC (instructed by **TfL**) for the **Claimant**
Oliver Brady (named Defendant) attended. No attendance or representation for the other **Defendants**

Hearing date: 24 February 2023

- -

Approved Judgment

MR JUSTICE CAVANAGH :

1. On 31 October 2022, Freedman J granted an interim injunction that had been applied for by the claimant, TFL, against 168 named defendants and against persons unknown. The defendants are supporters of, and activists connected with, Just Stop Oil ("JSO"). The injunction prevents the blocking, for the purpose of protests, of the roads/locations currently specified in Annex 2 to that injunction and to the Claim Form in these proceedings. There are approximately 23 of these. These are referred to as "the JSO Roads". The JSO Roads are strategically important roads in London which form an important part of the TfL Strategic Road Network ("the GLA Roads"). GLA Roads are, very broadly speaking, the most important roads in Greater London, carrying a third of London's traffic despite comprising only 5% of its road network length.

2. A large proportion of those protests have involved protesters blocking roads by sitting down in the road and often gluing themselves to its surface and/or locking themselves to each other to make their removal more time consuming. In more recent times, groups of protesters have walked or marched in the roadway at a very slow pace, thereby impeding traffic.

3. The injunction granted by Freedman J continued an injunction which had been granted, without notice, by Yip J, on 18 October 2022. The period covered by Yip J's injunction expired on 23.59 on 27 October 2022. Freedman J heard argument from the claimant's counsel on that day and then continued the injunction for a short time until the return date of 31 October 2022. As I have said, he handed down his ruling on 31 October 2022. The order was sealed on 4 November 2022.

4. The injunction that was granted by Freedman J expires on 23.59 on 28 February 2023.

5. By an application notice dated 1 February 2023, the claimant seeks three further orders. These are that:

   i) There be an extension of the injunction order, until trial or further order or with a backstop of 23.59 on 24 February 2024. The claimant also seeks orders for alternative service and third party disclosure;

   ii) That there be an expedited trial, with a time estimate of 2 days; and

   iii) That there be an Order under CPR r31.22 to use in this Claim any document, including any information therein, which has been disclosed to the Claimant by the Metropolitan Police in Claim No. QB-2021-003841 and Claim No. QB-2021-004122. And to use in those other Claims any document, including any information therein, which has been disclosed to the Claimant by the Metropolitan Police in this Claim. These claims are similar proceedings brought by the claimant against supporters of Insulate Britain, an organisation with similar aims to JSO.

6. None of the Defendants has entered an appearance or attended the hearing before Freedman J. Only one of the Defendants has attended today, Mr Oliver Brady, though the named defendants were served notice of the hearing, using the means provided for in Freedman J's judgment. Specifically, on 14-15 February 2023, the claimant's solicitor sent via post to each named defendant a letter containing the details of this

hearing and stating that the claimant would provide upon request further evidence or other documents filed in these proceedings. That letter was accompanied by the N244 application notice for these applications and the draft Interim JSO Injunction Order including annexes. These documents were also all sent to JSO via email.

7. The claimant is represented before me, as it was before Freedman J, by Mr Andrew Fraser-Urquhart KC and Mr Charles Forrest. I am grateful to them for their assistance. As I have said, Mr Brady has attended the hearing today and I invited him to make submissions. It became clear that the main reason for his attendance, to his credit, is that he did not want the court to think that he was showing disrespect to the court by his non-attendance. He also explained that he had been arrested for actions which he says were outside the prohibited area. He says that he was told yesterday that the police will not take action against him in criminal proceedings. He is concerned that the civil proceedings will continue. He also gave me some explanation of the motivation behind the protests. As for those matters, I must stress that I am not dealing today with the question whether Mr Brady should be personally liable, or whether there should be a final remedy against him. That is a matter for another time and does not affect the question whether there should be a continuation of the injunction. As for the reasons for the protest, that is not a matter upon which the court should comment.

8. I have been provided with a witness statement of Mr Abbey Ameen, the defendant's solicitor, and with a number of other documents. I should add that one key document was not filed with the court. This was the written judgment of Freedman J, which is reported at [2022] EWHC 3102 (KB), in which he considered and dealt with most of the same issues that I am required to deal with, on much of the same evidence. I did not understand why this was not drawn to my attention specifically and filed with the court well in advance of this hearing. However, Mr Fraser-Urquhart KC provided an explanation, which was that the claimant's legal team was unaware that a written copy of the judgment had been published. Fortunately, I located the judgment of my own motion and read it at an early stage of my preparation for this hearing.

9. The factual allegations on the basis of which the injunction is sought, as they stood at 31 October 2022, are very fully set out by Freedman J in his judgment dated 31 October 2022. I will not repeat the summary of the facts which Freedman J has already given in that judgment beyond noting that Freedman J said this following:

    i) JSO is a group which has been demanding that the government halt all future licensing consents for the exploration, development and production of fossil fuels in the United Kingdom. It lends its name to a wider coalition - the JSO coalition - whose demands are (i) no new oil, (ii) tax big polluters and billionaires, (iii) energy for all, (iv) insulate our homes and (v) cheap public transport. J SO have stated that unless the government agrees to do what it requires, it will be forced to intervene and will take direct action, which it has now sought to do on a large number of occasions.

    ii) There is an intersection between the groups Insulate Britain, JSO and Extinction Rebellion. Since September 2021, the courts have granted a number of other injunctions, similar in form to the injunction granted by Freedman J in these proceedings, against members and supporters of those organisations. These were obtained at the behest of other bodies, including National Highways Limited and HS2 Ltd. Many of the same named defendants appear in a number

of the cases. In October and November 2021, the claimant was granted two urgent without notice interim injunctions against certain named defendants and persons unknown in connection with Insulate Britain protests which involved Insulate Britain protesters sitting down in and blocking GLA Roads. There is a large overlap between the defendants named in the TFL Insulate Britain injunctions and the defendants in this case;

iii) JSO protests have, until recently, largely involved protesters blocking highways with their physical presence, normally either by sitting down or gluing themselves to the road surface. The intention is thereby to prevent traffic from proceeding along the highway or to disrupt traffic. The effect has been to cause traffic jams and significant tailing back of traffic.

iv) It is said on behalf of the claimant that JSO's actions have been deliberately to block the highway and cause disturbance, rather than that being an incidental result of their protesting. It is also claimed that the protests have been disruptive and are capable of giving rise to putting the lives of those protesting and people driving on the roads at risk, in particular on the movement of emergency service vehicles. There is also the risk that other motorists and users of the highway, antagonised by the methods of JSO, will engage in violence in the context of their ordinary lives being disrupted. It is submitted that the protests have also caused economic harm, serious nuisance and a great deal of cost to the police and other public bodies, including local authorities, National Highways and the CPS.

v) As of 26 October 2022, 1,900 arrests had been made of JSO protesters since 1 April 2022. 585 of those arrests were made between 1 and 26 October 2022.

vi) Protesters have breached interim injunctions on multiple occasions and there have been committal proceedings.

vii) On 4 May, 9 May and 12 May 2022, JSO declared both Birmingham Crown Court and the prison at which its protesters have been held to be sites of civil resistance. Various instances are referred to of protests both around the court and in prisons.

viii) There were protests daily by JSO between 1 October and 31 October 2022., During that period, there were, on a daily basis, large scale protests at key areas of largely the central London road system; and

ix) On many occasions, JSO have been reported as saying that they will not cease their protests until their demands are met and that they will not be discouraged from doing so by injunctions from the court. The protests on roads in London continued, even after interim injunctions were made and served.

10. All of the same points were made in the evidence before me, contained in Mr Ameen's seventh statement. Indeed, this was an updated version of the statement that was before Freedman J. Mr Ameen's statement also provided evidence, in an appendix, about the strategic importance of the JSO roads, explaining both the damage which has been caused and/or might further be caused by protesters blocking them and therefore also

their attraction to protesters who have sought or who might further seek to cause maximum disruption through their protests in pursuit of their demands.

11. I will now summarise events and developments since Freedman J handed down his judgment. The information upon which this summary is based comes from the seventh witness statement of the claimant's solicitor, Mr Abbey Ameen.

12. The claimant accepts that JSO activity involving blocking roads in London has slowed down somewhat since its peak in October 2022. The claimant believes that the injunction granted by Freedman J and other similar such interim injunctions have had the effect of pausing and/or reducing such protests. The claimant's evidence is also that a factor which temporarily pauses or reduces the intensity of such protests is the cold weather from around mid-December to around the end of March. Experience has shown that the absence of, or reduction in, protests during this period should not be interpreted as a sign that the protesters have stopped for good. Furthermore, the claimant says that the public statements made on behalf of JSO make clear that JSO has no intention of bringing its campaign of protests to an end. At paragraph 50 of his witness statement, Mr Ameen referred to 12 specific occasions, in which JSO (now also the JSO Coalition) and/or its individual protesters have said that they will not cease their deliberatively disruptive protests until their demands are met. For example, on 16 October 2022, in a response directed to the Home Secretary, JSO stated "We will not be intimidated by changes to the law, we will not be stopped by injunctions sought to silence nonviolent people. These are irrelevant when set against mass starvation, slaughter, the loss of our rights, freedoms and communities." On 1 November 2022, JSO stated that it would temporarily pause its disruptive protests to give the government time to reflect on JSO demands. But JSO said that if it did not receive a response by the end of 4 November indicating compliance with its demands then it would escalate its legal disruption against what it called a treasonous government. In late December 2022, JSO stated that it will continue its deliberately disruptive protests notwithstanding Extinction Rebellion saying on 31 December 2022 that it will be temporarily ceasing theirs.

13. There have, in fact, been a considerable number of JSO protests since Freedman J granted his injunction. There have been the following:

    i) On 7 November 2022, JSO started 4 days of protest on the M25. JSO protesters (including one named defendant in the TfL JSO Claim) climbed onto M25 overhead gantries in at least 6 locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25. JSO stated that it would continue to protest on the M25 and urged National Highways Limited to implement a 30mph speed limit on the whole M25.

    ii) On 8 November 2022, around 15 JSO protesters (including a named defendant in the TfL JSO Claim) climbed onto M25 overhead gantries at multiple locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25.

    iii) On 9 November 2022, around 10 JSO protesters, along with Animal Rebellion protesters, climbed onto M25 overhead gantries at multiple locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25. The disruption resulted in two lorries colliding and a police officer, who had been

trying to set up a roadblock, being injured when he was thrown from his motorcycle.

iv) On 10 November 2022, JSO protesters (including a named defendant in the TfL JSO Claim), along with Animal Rebellion protesters, climbed onto M25 overhead gantries at multiple locations clockwise and anti-clockwise, causing the police to have to halt traffic on the M25.

v) On 11 November 2022, JSO said it was ceasing its protests on the M25 to give the government time to reflect on JSO's demands. In the 4 days of protest on the M25, 65 JSO protesters were arrested, 31 of whom were remanded in custody including 13 named defendants in the TfL JSO Claim. In combination with the 5 JSO protesters already in prison this meant on 11 November 2022 there were 36 JSO protesters in prison. Another 6 of the named defendants in the TFL JSO claim were also involved in the JSO M25 protests.

vi) On 14 November 2022, JSO protesters threw orange paint over the Silver Fin building which is the headquarters of Barclays Bank in Aberdeen. This was expressly in connection with a national day of action by Extinction Rebellion aimed at Barclays, with over 100 of the banks' offices and branches targeted with paint, posters, fake oil and crime scene tape.

vii) On 28 November 2022, JSO began a new tactic of slowly marching on roads in London in order to disrupt and delay traffic without necessarily bringing it to an absolute stop. 13 JSO protesters walked onto the road at Shepherds Bush Green and proceeded to march slowly in the road, causing traffic delays. Two were arrested for obstruction of the highway, albeit the Police have since stated on 6 December 2022 that this new tactic makes arrest and prosecution less likely because the protesters have been small in number and traffic is able to move around them.

viii) Also on 28 November 2022, similar JSO 'slow march' protest action was taken at Aldwych delaying motor traffic.

ix) On 30 November 2022, 10 JSO protesters walked onto Aldersgate Street in the City of London and proceeded to march slowly along London Wall, causing traffic delays. The march continued on major roads through the City, followed by at least 7 police vehicles and up to 20 police officers, but there were no arrests.

x) Also on 30 November 2022, similar JSO 'slow march' protest action was taken on Upper Street and Holloway Road near Highbury and Islington station, delaying motor traffic.

xi) On 3 December 2022, 4 JSO protesters occupied beds and sofas in Harrods Department Store.

xii) On 6 December 2022, around 15 JSO protesters walked onto the road at Bricklayers Arms roundabout in South London and proceeded to march slowly along the Old Kent Road, causing delays to motor traffic. The march continued

through South London, followed by at least 3 police vehicles and up to 10 police officers.

xiii) Also on 6 December 2022, similar JSO 'slow march' protest action took place at Bank junction in the City, delaying motor traffic.

xiv) On 8 December 2022, and including in response to the recent government decision to consent to a new coalmine at Whitehaven in Cumbria, around 15 JSO protesters walked onto Whitechapel Road, East London and proceeded to march slowly east and then west causing delays to traffic. The march continued on Commercial Road.

xv) On 12 December 2022, around 20 JSO protesters (including one of the named defendants in the TfL JSO Claim) walked onto the A24 near Clapham South and proceeded to march slowly Northwards, delaying traffic. They continued along Clapham High Street accompanied by around 7 police officers.

xvi) Also on 12 December 2022, similar JSO protest action was taken in Camden Town, delaying motor traffic.

xvii) On 14 December 2022, 17 JSO supporters (including one named defendant in the TfL JSO Claim) walked onto Green Lanes, Finsbury Park, and proceeded to march slowly northwards accompanied by around 7 police officers, delaying traffic. This protest reportedly delayed a people carrier vehicle carrying 9 cancer patients by 30 minutes.

xviii) Also on 14 December 2022, similar JSO protest action was taken in Camden Town.

xix) On 19 January 2023, JSO undertook a 'slow march' protest in Sheffield which delayed traffic an led the police to have to close a road.

xx) On 28 January 2023, JSO protesters (including one named defendant in the TfL JSO Claim) undertook a 'slow march' protest on a road(s) in Manchester causing traffic delays. JSO stated that further such protest action would take place across in the North in the coming months.

xxi) On 11 February 2023, JSO protesters undertook a 'slow march' protest in Islington starting outside Pentonville Prison, delaying motor traffic, and

xxii) On 18 February 2023, in total over 120 JSO protesters (including two named defendants in the TfL JSO Claim) undertook a 'slow march' protest in Liverpool, Norwich, and Brighton, delaying motor traffic and causing tailbacks through those city centres.

Expedited trial

14. It is convenient first to consider whether there should be an expedited trial, because that will affect the likely length of a further extension to the interim injunction.

15. The principles applicable to an application for expedition are set out in the claimant's skeleton argument. They were summarised by Lord Neuberger in **WL Gore and**

Associates GmbH v Geox SPA [2008] EWCA Civ 622. There are four factors to be considered:

i) Whether good reason for expedition has been shown;

ii) Whether expedition would be contrary to the good administration of justice. Good administration of justice involves both:

iii) Consideration of the interests of the various parties involved in the specific case and the efficient disposal of their various competing claims.

iv) Consideration of the interests of those parties not before the court; other litigants who would be prejudiced if the specific claim was given expedited treatment in preference to theirs. (**The Rangers Football Club PLC (In Administration) v Collyer Bristow LLP and others** [2012] EWHC 1427 (Ch));

v) Whether expedition would prejudice the other parties in the specific case; and

vi) Whether there were any special factors involved.

16. In my judgment, all of these factors point in favour of an expedited trial. It is in the public interest for a trial to take place, leading to determination as to whether a final injunction should be granted, as soon as possible, given the importance of this case to the claimant, to the general public and, indeed, to the defendants, who face the risk of committal for contempt if they breach the injunction. The defendants are not prejudiced, since they have not entered an appearance or, with one exception, taken part in the proceedings in any way.

17. The only countervailing factor is that which applies in any case in which expedition is ordered, namely that other cases will go further back in the queue, but I am satisfied that the importance of this case outweighs that factor. In any event, if a final disposition of this case takes place, it will, overall, free up court resources as there will no longer be any need for there to be regular applications to extend the interim injunction.

18. I am, therefore, prepared to order expedition, for a 2 day trial. It will be for the claimant to make arrangements to obtain a listing appointment. However, I have made enquiries myself with KB listing and I am told that a 2 day listing can be accommodated in May to July 2023. This means that, if I grant a further extension to the injunction, it is likely to last for between 2 and 4 months, approximately.

19. It is necessary for directions to be given for the trial. These can be more limited than normal, since the Defendants are not participating.

Should the interim injunction be extended?

20. There are a wide range of considerations that the court must take into account when deciding whether to extend the injunction. I will identify them in a moment. I have carefully considered and taken into account each one. However, there is no need to set out my reasoning on the issues in full detail in this judgment, because they have each been set out and considered in detail in the judgment of Mr Justice Freedman. I am in complete agreement with the reasoning and conclusions of Mr Justice Freedman in his judgment of 31 October 2022, to the clarity of which I pay tribute. This means that I

agree that, on the evidence before him on that date, Mr Justice Freedman was right to grant an extension to the injunction which was originally granted by Mrs Justice Yip, for the reasons that he gave. The relief sought by the claimant in the extension to the injunction is, apart from duration, materially identical to the relief obtained on the 31 October 2022. The real issue before me, therefore, is whether the evidence of events that have taken place since 31 October 2022 provides grounds for declining to extend the injunction on materially identical terms.

21. The answer is that there are no such grounds. The activities of JSO have continued, albeit with a change of tactics, and in my judgment the justification for interim injunctive relief to restrain unlawful activities on the JSO roads is as great as it has ever been.

22. It is true that the protests are less frequent than before the end of October 2022, but there has been no change to JSO's position that it will continue its protests indefinitely, and there have been a substantial number of protests on the roads in London since that time, including one in February 2023. The reduction in protest may be the result of a tactical decision, or it may be a result of the Winter weather, or it may be the result in part of some reduction in appetite because of the earlier injunctive relief, or a combination of all of these things, but in any event the evidence that protests will take place unless restrained by injunctive relief is as strong now as it was before Freedman J. The mere fact that some people have chosen to act in breach of the injunctions is not, of course, a reason for declining to grant a continuation (**South Buckingham DC v Porter** [2003] 2 AC 558; [2003] UKHL 26 at paragraph 32).

23. There has been additional evidence of harm, cost and disruption. Mr Ameen said the following in his witness statement:

> "As a result of a JSO protest on the M25 on 9 November 2022 two lorries collided and a police officer who had been trying to set up a roadblock was injured when he was thrown from his motorcycle. In early December 2022 a JSO protester stepped out on the road in front of a moving lorry which had to come to a sudden halt to avoid hitting him as he back-pedalled to avoid it . They have also caused a risk of violence between protesters and ordinary users of the highway, particularly in the removal of protesters from the highway and indeed force has been used to do this in both Insulate Britain and JSO protests. The force used between protesters and users of the highway seems to be particularly common in London, probably because other users of the highway are more willing to intervene on smaller London roads than strategic roads such as the M25.
>
> The protests have also caused considerable economic harm, serious nuisance, and a great cost to the police and to other public bodies such as NHL, TfL, local authorities, and the CPS. JSO protests have caused fuel shortages in petrol stations around the Midlands and south-east England and, as of 11 May 2022, had cost the police alone £5.9m in just a few months . On 5 February 2023 it was reported that, in just 9 weeks in the autumn of 2022, the JSO protests cost the Metropolitan Police alone £7.5m.

> The protests also cause significant but less measurable harm, such as members of the public missing or being significantly delayed for weddings, funerals, flights for holidays or work, important business meetings, important medical appointments etc. A man missed his father's funeral due to the JSO protests in November 2022 and, as I have said, a JSO protest on 14 December 2022 reportedly delayed a people carrier vehicle carrying 9 cancer patients by 30 mins."

24. Similarly, there have been no new developments that alter the position in relation to the other considerations that the Court must take into account from that which obtained before Freedman J. There are only two other changes of significance.

25. The first is that the tactics appear to have changed, in that protesters are generally taking part in slow marches, rather than sitting down to block the road, as before. Mr Fraser-Urquhart KC has made clear that his client does not intend that the order covers this type of activity, though he leaves open the possibility that an application might be made in the future. The fact that the tactics of JSO have changed for a while, however, does not mean that the risk of a return to the type of action which previously took place, and which was the subject of Freedman J's injunction, has evaporated. However, I have proposed that a form of words be added to the order, making it clear that "For the avoidance of doubt this wording [the wording in paragraph 5 of the injunction] does not apply to the practice of slow marching on the road.". I should add that this means that I do not need to consider whether the recent tactic of slow marching changes the outcome of the balancing exercise which the court must undertake to determine whether the extension of the injunction would infringe the defendants' rights under Articles 10 and 11 of the European Convention on Human Rights. I make clear that I make no observation, one way or another, on this issue.

26. The other change is the obvious one that the duration of the interim injunctive relief will be extended. However, this is only likely to be for 2-4 months, before the trial of the action, and this is not, in my view, a reason to refrain from granting injunctive relief.

27. For the sake of good order, I list the considerations that I have taken into account, though as I have said, I will not set out my reasoning in full detail, as, in relation to each consideration it is exactly the same as the reasoning that was set out by Mr Justice Freedman in his judgment.

28. The considerations are:

    i) Whether the named Defendants have been properly identified, on a proper evidential basis. I am satisfied that they have been, for the reasons given by Freedman J, and in light of the evidence that I have seen;

    ii) Applying the well-known test in **American Cyanamid v Ethicon** [1975] AC 396, whether there is a serious issue to be tried. For the reasons given by Freedman J, which echo the reasoning of Bennathan J in **National Highways Ltd v Persons Unknown and Ors** [2022] EWHC 1105 (QB), at paragraph 37, I am satisfied that there is. There is a serious issue to be tried as to whether the defendants are committing trespass, and private and public nuisance on the roads;

iii) Whether damages are an adequate remedy. They are plainly not. I agree with what was said in this regard in the claimants' skeleton argument, namely that damages would not prevent any further protests because the claimant cannot claim damages for others' loss, and that loss would in any case be impossible to quantify, and in any case the Defendants would not have enough money to pay it. The protests have had a very wide-ranging impact on London given the central role which GLA Roads have for the city. Given London's status as the national centre for commerce/business, politics/government, law, culture and creativity etc., they have also indirectly had an impact on the rest of the country. Impact assessments also cannot measure impacts which are of fundamental importance to those making their journey, e.g. attending hospital appointments, funerals, weddings, important business meetings etc. The claimant has offered a cross-undertaking as to damages, in the highly unlikely event that it might be necessary to rely upon it;

iv) Whether injunctive relief should be refused because this is in the form of a quia timet injunction, or because an injunction would infringe the rights of the defendants under Article 10 and Article 11 of the European Convention on Human Rights. I have taken into account that this is a quia timet injunction. For the reasons given by Freedman J, I do not think that this is a reason to refrain from granting relief. I have conducted the balancing exercise required by the impact of the injunctive relief upon the defendants' rights under Article 10 and Article 11 of the European Convention on Human Rights. In this regard, I have taken account of the guidance of the Supreme Court in **DPP v Ziegler** [2022] AC 408 and the observations made by Lord Neuberger in **Samede** [2012] PTSR 1624. In my judgment, the outcome of the balancing exercise in relation to the defendants' art 10 and 11 Rights remains the same as it was when Freedman J considered the matter, namely that it is not a good ground for declining to grant injunctive relief. Undertaking the same balancing exercise as was undertaken by Freedman J at paragraphs 41-61 of his judgment, I come to the same conclusion as he did. Balancing the relevant considerations, I have come to the view, as he did, that the injunction strikes a fair balance between the rights of individual protestors and the general interest of the community, including the rights of others.

v) Whether the balance of convenience is in favour of continuing the relief. I agree with Freedman J that there is a strong likelihood that the defendants will imminently act to infringe the claimant's rights and that they will cause serious disruption to the claimant and the public. The injunctions are limited to key roads and road junctions. On the evidence before me, the harm would be (and is intended to be) grave and irreparable as well as very widespread. The protesters either give no warning of their protests, or rarely give sufficient details about their nature/location for the claimant to react effectively. Protests also frequently change and move on the day itself, partly in response to policing and other crowd management;

vi) Finally, the effect of section 12 of the Human Rights Act 1998. I agree with what was said by Freedman J on this matter.

29. The order that is sought applies to persons unknown in addition to the named defendants. The claimant says that this is necessary because it is not considered that

the list of named defendants represents the entirety of those engaged in the JSO Protests, and so it remains necessary to identify the category of persons unknown as additional defendants. Freedman J considered whether it was appropriate to include persons unknown amongst the category of defendants at paragraphs 83-93 of his judgment, and addressed the test set out by the Court of Appeal in **Canada Goose v Persons Unknown** [2020] 1 WLR 2802; [2020] EWCA Civ 303. I agree entirely with Freedman J's reasoning and conclusion and so I agree that it is appropriate for the relief to extend to persons unknown. No good purpose would be served by me simply repeating in this judgment what Freedman J said in this part of his judgment, and so I will not do so.

30. For these reasons, I will extend the injunctive relief until trial or further order.

Alternative service

31. I am satisfied that the claimant has made out grounds for the continuation of alternative service under CPR r6.15 and r6.27 of all documents in this Claim, including the sealed interim injunction order as extended, thereby also dispensing with personal service for the purposes of CPR r81.4(2)(c)-(d). I will therefore permit alternative service in the terms of the draft TfL Interim JSO Injunction Order.

32. The reasons for alternative service are set out in paragraph 19 of Mr Ameen's witness statement. Similar orders have been made in other cases of a like nature. Alternative service is necessary for the relief to be effective. Moreover, as Mr Ameen points out, the Defendants already have a great deal of constructive knowledge that the TfL Interim JSO Injunction may well be extended: the extent and disruptive nature of the JSO protests since March 2022 (and the Insulate Britain protests which began in September 2021); the multiple civil and committal proceedings brought in response to those protests by National Highways Limited, TfL, local authorities and energy companies and the frequent service of documents on defendants within those proceedings including multiple interim injunctions; the extensive media and social media coverage of the protests, their impact, and of the legal proceedings brought in response; the large extent to which, in order to organise protests and support each other, JSO protesters are in communication with each other both horizontally between members and vertically by JSO through statements, videos etc. shared through its website and social media. These are not activities that single individuals undertake of their own volition. In my judgment, in the perhaps unusual circumstances of this case, it is very unlikely, perhaps vanishingly unlikely, that anyone who is minded to take part in the JSO protests on JSO roads in London is unaware that injunctive relief has been granted by the courts. An order for alternative service has already been made in identical terms in this litigation, by Freedman J. For these reasons, I do not consider that it is necessary to adopt the step adopted by Bennathan J in the **NHL v Persons Unknown** case of directing 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 relevant organisation's website did not constitute service. However, Mr Fraser-Urquhart KC has said that in practice the claimant adopts and will continue the practice of not commencing committal proceedings against a person unknown unless that person has previously been arrested and has been served with the order.

Third party disclosure

33. The Claimant seeks, in the terms of the draft TfL Interim JSO Injunction Order, continuation of the provision for third party disclosure of information from the Metropolitan Police under CPR r31.17. That information is a) the names and addresses of those who have been arrested in the course of, or as a result of, any JSO protests on the JSO Roads; and b) evidence relating to any potential breach of the TfL Interim JSO Injunction.

34. The Metropolitan Police does not object to such an order, though it requires an order from the court before it will give such disclosure. An order to this effect was granted by Freedman J in the 31 October 2022 order. Similar orders have frequently been made in other cases such as this.

35. Once again, I agree with Freedman J's reasoning on this issue, at paragraphs 94-96 of his judgment, which I will not repeat. The conditions for the making of an order under CPR 31.17 have been met. The relevant circumstances have not changed since Freedman J made his ruling. For the reasons given in those paragraphs of his judgment, I grant this order.

The application for an Order under CPR r31.22

36. This was not a matter that was dealt with at the hearing before Freedman J, though the point was raised by Freedman J.

37. CPR r31.22 provides:

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.
>
> (3) An application for such an order may be made –
>
> (a) by a party; or
>
> (b) by any person to whom the document belongs."

38. The law relating to this is helpfully summarised in the claimant's skeleton argument.

39. This rule applies to protect not just documents themselves but also their contents i.e. the information derived from them (**IG Index Plc v Cloete** [2013] EWHC 3789 (QB) at §31).

40. The Court's power under this rule is a general discretion to be exercised in the interests of justice and having regard to all the circumstances in the case. Good reason has to be shown (but this does not mean that the grant of permission is rare or exceptional if a proper purpose is shown) and the Court has to be satisfied there is no injustice to the party compelled to give disclosure (**Gilani v Saddiq** [2018] EWHC 3084 (Ch) at §21).

41. Documents read by a judge out of court before the hearing on which the judge based their decision and to which they made compendious reference in their judgment were documents referred to at a hearing held in public for the purposes of CPR r31.22(1)(a) (**SmithKline Beecham Biologicals SA v Connaught Laboratories Inc** [2000] FSR 1), as was a document mentioned briefly in oral evidence and exhibited to a witness statement which was before the judge (**NAB v Serco Ltd** [2014] EWHC 1225 (QB) at §27).

42. A Court may grant prospective or retrospective permission and in the case of the latter an important consideration would be whether permission would have been prospectively granted (**The ECU Group Plc v HSBC Bank plc** [2018] EWHC 3045 (Comm))

43. The trigger for the application in the present case is that the claimant has three ongoing Claims: this claim involving JSO, and the two TfL Insulate Britain Claims.

44. Under third-party disclosure Orders made in all of those Claims, the Police have disclosed to the Claimant the names and addresses of protesters who have been arrested for protests on certain roads. This disclosure has been in the form of names and other details (e.g. address, location and date of protest) contained in an excel spreadsheet, or that type of information sent in the body of an email which has then been copied and pasted into such a spreadsheet by the Claimant's lawyers. The disclosure also consists of Body Worn Video footage and arrest notes relating to potential breaches of the TfL Interim JSO Injunction and TfL Interim Insulate Britain Injunctions. I have seen these spreadsheets.

45. Against that background, the Claimant seeks an Order under CPR 31.22(1)(b) for documents, or at least information contained within them, disclosed in the Insulate Britain Claims to be able to be used in the JSO Claim, and vice versa.

46. Mr Fraser-Urquhart KC said that, arguably, such an Order is unnecessary as the material has been seen by the judge outside the hearing and referred to during the hearing. Nevertheless, the Claimant seeks permission from the Court to secure the basis for using such documents/information in all its Claims against these protesters. He said that the reason why permission should be granted is so that the Court can see all the protest activity undertaken by each named defendant, whether for JSO or Insulate Britain. This will help the court to determine whether a final injunction should be granted and against whom. It is also appropriate given the lack of distinction between the two groups: they are in coalition with each other including having joint aims, their protest methods such as sitting down in the road are the same, and there is a large overlap in who protests on each of their behalf.

47. 48. Mr Fraser-Urquhart KC further submitted that granting permission would not cause injustice to the Metropolitan Police who do not object to the proposed use of the disclosed material. It would not result in more of each named defendant's personal data being published and in any case each named defendant's address is redacted in any published document.

48. I agree that, in the interests of justice and having regard to all the circumstances in the case, this order should be made, for the reasons given by Mr Fraser-Urquhart KC.

Conclusion

49. For these relatively brief reasons, I order expedition of the trial of this action, grant the extension of the interim injunction until trial or further order, in the terms sought, and make the other orders sought by the claimant.

Neutral Citation Number: [2022] EWHC 2664 (KB)

Case No: QB-2022-002577

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st October 2022

Before :

HHJ Lickley KC sitting as a Judge of the High Court

- -

Between :

ESSO PETROLEUM COMPANY, LIMITED	**Claimant**
- and –	
(1) SCOTT BREEN **(2) PERSONS UNKNOWN WHO ARE DESCRIBED IN ANNEX 1 TO THE CLAIM FORM DATED 10TH AUGUST 2022**	**Defendants**
(1) JANE SUZANNE EVEREST **(2) HANNAH SHELLEY**	**Interested Persons**

- -
- -

Mr Timothy Morshead KC and Yaaser Vanderman (instructed by **Eversheds**) for the **Claimant**
Mr Owen Greenhall (instructed by **Hodge, Jones and Allen Solicitors**) for the **Interested Persons**

Hearing date: 5th October 2022

- -

Approved Judgment

This judgment was handed down remotely at 10am on 21st October by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ Lickley QC sitting as a Judge of the High Court:

1. This is the return date for an order made by Eyre J on 15th August 2022 (order sealed on 16th August 2022) and amended by order of Ritchie J on 8th September 2022 granting Claimant Esso Petroleum Company Ltd an interim injunction. The order concerns the unlawful disruption of and potential for more unlawful disruption of the Claimant's undertaking of works to install a new oil pipeline running some 105kms across southern England from Southampton to Heathrow airport. I am not concerned with the rights and wrongs of the pipeline works or the wider issue of the use of fossil fuels. My function is to decide if the Claimant is properly entitled to the injunction they seek.

2. I have heard submissions from counsel for the Claimant and the Interested Persons. I have read papers, skeleton arguments submitted and evidence served.

The facts

3. The history is set out in the witness statement of Jon Anstee De Mas (10th August 2022) and is not challenged. In summary the Claimants are engaged in the installation of a new oil pipeline known as the Southampton to London pipeline (SLP). The Claimant owns and operates a network of pipelines from its refinery in Fawley Southampton to terminals across England. One such pipeline conveys aviation jet fuel to the Claimant's West London terminal at London Heathrow Airport. The old pipeline was installed and operated from 1972. The pipeline runs for 105 kms. The initial 10kms of the pipeline was replaced in 2001. The remaining 95 kms of pipeline was considered to be in need of replacement. The new section of pipeline comprises 90 km of underground pipeline. The route is indicated clearly on the plans submitted.

4. The works are designated as a Nationally Significant Infrastructure Project under the Planning Act 2008. The consent for the works is called a Development Consent Order (DCO). As part of the planning process a wide ranging consultation exercise was undertaken from 2017 including Local Authorities and a public consultation. The public consultation exercise included asking for views on a preferred route within the corridor of the existing pipeline. Part of that exercise included indications of potential environmental impacts. Other consultations and assessments were carried out.

5. In June 2019 the Claimant's application for a DCO was accepted by the Planning Inspectorate for examination. The DCO was granted on 7th October 2020. The DCO authorises the pipeline to be laid within the limits of deviation shown on the works plans. The area in which works are authorised, including the pipeline itself, are confined by the terms of the DCO to a strip of land of varying width (often 30m wide) known as the 'Order Limits'. The area concerned will be wider than the pipeline itself to accommodate the space needed along the route of the pipeline which is required for working and for storage compounds etc. No issue is taken as to the planning process, consultations undertaken, working methods or other aspects of the project.

6. Jon Anstee De Mas (witness statement 10th August 2022) provides the detail of the operational parameters and how the majority of the works are undertaken on third party land, some of which is subject to public and private rights of way, and the remainder are street works within the public highway. When operating on the land of third parties the Claimant is doing so by way of Option Agreements with landowners, Deeds of

Easement or under Compulsory Acquisition Powers contained in the DCO. Some Crown land is also included.

7. The ownership of machinery, plant and other materials including sections of pipe belongs to third parties such as contractors until ownership is transferred to the Claimant. The Claimant also owns some items. The works are expected to be completed during 2023.

8. Part of the pipe laying process requires that segments of pipe are left above ground described as 'stringing out'. Segments are welded together above ground and lowered into a trench. Other techniques are used. The effect is that large amounts of pipeline are on display to the public together with heavy plant and machinery at multiple sites throughout the length of the works within the Order Limits. The DCO requires the Claimant to erect temporary fencing to mark construction sites to keep the public away from dangerous operations. The type of fencing used varies and is not designed to be fully secure.

9. Jon Anstee De Mas has set out and described the incidents that affected the SLP project. In total he described 15 incidents at various sites from 19th December 2021 to 1st August 2022. I need not set out the full facts of each as part of this judgement. Incidents of note however are:

   (i) 19th December 2021 Alton compound. Protestors cut through the compound fence, damaged vehicles and attempted to damage the security system. A message was sent indicating an intention to stop the SLP on 1/1/22 from a Twitter account for a group called 'Stop Exxon SLP'. The message referred back to the events of the 19th December 2021 at the compound. The government's failure to act to avert the climate crisis was said to be a reason to '*please halt all new fossil fuel infrastructure'*. Photographs of the damage have been produced.

   (ii) 2nd February 2022 Queen Elizabeth Park Farnborough. A number of protesters, with banners, attended the car park within the Order Limits and formed a blockade across the entrance. Work was stopped for the day that was intended to involve surveys and the clearing of trees. Messages claiming responsibility from the 'XR Group' were posted later with photographs.

   (iii) 15th February 2022 Queen Elizabeth Park Farnborough. This was similar to the event on 2nd February 2022 however the works were not disrupted.

   (iv) 4th May 2022 Hartland Lodge Farnborough. Overnight protestors tampered with security fences. Barbed wire was removed from the top of a fence and a hole was cut in a second fence.

   (v) 17th June 2022 Halebourne Lane compound. Damage was caused by protestors to plant belonging to Flannery Plant hire with repair costs of £11,000. A protest group 'Pipe Busters' claimed responsibility on 22nd June 2022.

   (vi) 17th June 2022 Blind Lane Surrey Heath. Protestors gained access to the site and damaged a section of pipe that was above ground including spraying it with

slogans including '*No SLP'*. The repairs necessary cost £8000. 'Pipe Busters' claimed responsibility on 22nd June 2022 with a message and photographs showing someone using an angle grinder to damage the pipe. The message was that peaceful action was taken to halt expansion of the pipeline.

(vii) 25th June 2022 Naishes Lane Church Crookham. Protestors gained access, said to be unlawful, by unbolting Heras fencing panels and conducted a staged funeral with a child sized coffin that was laid into a pipeline trench. The protest was within the Order Limits. A local XR group later claimed responsibility.

(viii) 4th July 2022 Flannery Plant hire. Contractors engaged in the works were visited by protestors at their head office in Wembley. Posters were put up and the main entrance door locks were glued. Messages were posted by 'Pipe Busters' warning the company to stop working on the SLP or '*we will find you complicit in ecocide and will take steps to ensure your equipment cannot cause any further harm'*.

(ix) 9th July 2022. Excavators belonging to Flannery Plant hire were damaged at sites near Fleet Hampshire within the Order Limits. The repair costs were estimated to be £5000.

(x) 31st July 2022 a protestor Scott Breen (First Defendant) dug a pit at land east of Pannells Farm. The land is owned by Runnymede BC and is within the Order Limits. On 1st August 2022 Scott Breen released a press statement through Facebook and later a video stating his purpose was to disrupt the pipeline and to stop the expansion of the pipe by direct action. The Police attended the site and maintained contact with Scott Breen. I note that the Police, who attended the site, informed the Claimant's staff that it was the landowner or Claimant's responsibility to obtain and enforce a possession order from the Civil Courts. They stated that they did not consider that the offence of aggravated trespass needed consideration at that stage. This has a bearing on the submission of Mr Greenhall for the Interested Persons who submitted that an injunction was not necessary in this case because the police were available to intervene and act as necessary. Scott Breen was subsequently committed to prison for contempt on 6th September 2022 by Ritchie J having breached the earlier order. Another contempt hearing is listed in November for an individual said to have assisted Scott Breen.

(xi) 1st August 2022 Sandgates Encampment. This encampment was set up to support Scott Breen. Despite the order being made on the 15th August 2022 Scott Breen remained within the pit and the DCO Order Limits.

(xii) A plan has been produced showing the wide geographical range of the protests (ex.JA16 p.915).

10. Scott Breen left the site on 2nd September 2022. Therefore action had taken place from 31st July 2022 at the Chertsey site. Work was disrupted as a consequence of his activities.

11. The interested persons are Hannah Shelley (witness statement 5th September 2022) and Jane Everest (witness statement 5th September 2022). Both have taken part in the protests against the SLP. These took place on the 2nd February 2022, 12th February 2022, and 25th June 2022 (see above). Hannah Shelley was present at all three. Jane Everest was present for the last two. They describe the protests as peaceful. Hannah Shelley describes the protests as 'lawful'. Both wish to continue to protest against the building of the pipeline. They give their reasons namely that flying and the use of aviation fuel has a detrimental impact on the environment. They have concerns that their actions may breach the order. In summary they say: peaceful protest is prevented by the order, the maps are not clear to show what land is covered, if they are asked to stop they might not know the person making the request is authorised to do so and they are worried about being arrested for the reasons given.

12. Jon Anstee de Mars (witness statement 29th September 2022) has said that the protests that the Interested Persons were involved in on 12th May 2021 and 25th June 2022 would have breached the order if it had been in place. First, because the protestors' actions deliberately blocked workers access to the SLP and second, because they traversed the Heras fencing intending to prevent or impede construction. On 15th February 2022 although the protest took place within the DCO Order Limits, the protesters did not act in any way that was prohibited in the order.

13. Jon Anstee de Mars has set out why the injunction is still required namely to prevent further action and disruption. He says an unknown number of individuals have taken part in the protests who were supported by known organisations, the campaign against the SLP is longstanding and is designed to stop the pipeline construction, protests against the fossil fuel industry remain active across the UK and the Interested Persons themselves have said they wish to continue protesting. It has been said in argument that the injunction has worked as no other disruptive protest action has been reported since the order was made.

14. The original injunction order was amended by Ritchie J on 8th September 2022 in accordance with the slip rule given the error in paragraph 4(8). Annex 1 to the order describes the description of persons unknown who, by their conduct, are or who may become defendants to the proceedings. Appended to the order are the plans showing the entire route and the order limits. Save for a few limited exceptions, public rights of way within the DCO order limits remain open and closed only temporarily to facilitate the installation of pipeline across the right of way (Anstee de Mars witness statement 29th September 2022).

15. The order (the relevant parts) provided:

3. Until trial or further order, the First and Second Defendants must not do any of the acts listed in paragraph 4 of this order in express or implied agreement with any other person, and with the intention of preventing or impeding construction of the Southampton to London Pipeline Project.
4. The acts referred to in paragraph 3 of this order are:
(1) within the DCO order limits, damaging anything which is used or to be used in or in the course of the construction of the SLPP;

(2) within the DCO order limits, traversing any fence surrounding (or other physical demarcation of) any area of land which is used or to be used in or in the course of the construction of the SLPP;
(3) within the DCO order limits, digging any excavation or affixing or locking themselves to anything or any person;
(4) within the DCO order limits, erecting any structure;
(5) within the DCO order limits, spraying, painting, pouring, depositing or writing any substance on to anything which is used or to be used in or in the course of the construction of the SLPP;
(6) within the DCO order limits, obstructing construction of the SLPP by their presence or activities after having been requested by or on behalf of the Claimant or the police to cease and desist from such obstruction;
(7) whether within or without the DCO order limits, blocking or impeding access to any land within the DCO order limits.
(8) assisting any other person do any of the acts referred to in subparagraphs 4.1 to 4.7.
A Defendant who is ordered not to do something must not: (A) do it himself/herself/themselves or in any other way. (B) do it by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement.

16. Mr Greenhall for the Interested Persons takes no issue with paragraph 4(1) to (5) and (8) of the order above. No issue is taken concerning the service of orders. The order provides from paragraph 10 the process to be complied with. Certificates of service have been produced. Service of further documents was to be effected in accordance with paragraph 14 of the order. The evidence of Nawaz Allybokus (witness statement dated 29th September 2022) provides the evidence to support the effective service of the amended order of Ritchie J.

The law

17. The various tests and requirements to be considered and met before an order for an interim injunction can be made, and renewed, in protest cases are helpfully set out by Johnson J in *Shell Oil Products Ltd v Person Unknown [2022] EWHC 1215 (QB)*. He said at [23]:

> "The injunction is sought on an interim basis before trial, rather than a final basis after trial. It is sought against "persons unknown". It is sought on a precautionary basis to restrain anticipated future conduct. It interferes with freedom of assembly and expression. For these reasons, the law imposes different tests that must all be satisfied before the order can be made. The Claimant must demonstrate:"
>
> (1) There is a serious question to be tried: American Cyanamid v Ethicon [1975] AC 396 per Lord Diplock at 407G.
>
> (2) Damages would not be an adequate remedy for the Claimant, but a cross undertaking in damages would adequately protect the defendants, or

(3) The balance of convenience otherwise lies in favour of the grant of the order: American Cyanamid per Lord Diplock at 408C-F.

(4) There is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction: Islington London Borough Council v Elliott [2012] EWCA Civ 56 per Patten LJ at [28], Ineos Upstream Ltd v Persons Unknown [2019] EWCA Civ 515 [2019] 4 WLR 100 per Longmore LJ at [34], Canada Goose UK Retail Limited v Persons Unknown [2020] EWCA Civ 303 [2020] 1 WLR 2802 per Sir Terence Etherton MR at [82(3)].

(5) The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the Claimant's rights: Canada Goose at [78] and [82(5)].

(6) The terms of the injunction are sufficiently clear and precise: Canada Goose at [82(6)].

(7) The injunction has clear geographical and temporal limits: Canada Goose at [82(7)] (as refined and explained in Barking and Dagenham LBC v Persons Unknown [2022] EWCA Civ 13 per Sir Geoffrey Vos MR at [79] - [92]).

(8) The defendants have not been identified but are, in principle, capable of being identified and served with the order: Canada Goose at [82(1)] and [82(4)].

(9) The defendants are identified in the Claim Form (and the injunction) by reference to their conduct: Canada Goose at [82(2)].

(10) The interferences with the defendants' rights of free assembly and expression are necessary for and proportionate to the need to protect the Claimant's rights: articles 10(2) and 11(2) of the European Convention on Human Rights ("ECHR"), read with section 6(1) of the Human Rights Act 1998.

(11) All practical steps have been taken to notify the defendants: section 12(2) of the Human Rights Act 1998.

(12) The order does not restrain "publication", or, if it does, the Claimant is likely to establish at trial that publication should not be allowed: section 12(3) of the Human Rights Act 1998."

18. For the purposes of this judgment, and with the greatest of respect to Johnson J, I will merge the S.12(3) Human Rights Act 1998 issue (12) with '*serious question to be tried'* (1) given the link between the two points and merge '*interference with the rights of*

defendants' (10) with '*the balance of convenience'* (3) given what I regard as the considerable connection and overlap between the two issues.

19. Subject to the above I take those points in turn:

(1) Serious issue to be tried - Unlawful means conspiracy:

20. The claim is brought alleging 'the tort of conspiracy by unlawful means' [Particulars of Claim p.19]. The Claimant has chosen to allege this tort because it does not have a sufficient degree of control or possession of the whole of the land where works are taking place to enable them to plead trespass to land or nuisance against the individuals concerned. Neither does it have necessary ownership of all of the items targeted and damaged to allege trespass to goods. There are however areas of land and items of property that the Claimant does own. A 'tapestry' of varying owners and rights over property is said to feature over the 90km of the pipeline. To avoid attempting a very detailed and complex exercise in identifying all possible cases, a conspiracy is alleged. The downside for the Claimant is that the actions of an individual acting alone who commits unlawful acts would not be caught. It is said the chosen tort is practical and proportionate.

21. The essential ingredients of the tort are set out in *Cuadrilla Bowland Ltd and others v Person Unknown and others [2020] EWCA Civ 9* per Leggatt LJ at [18]. The ingredients to be proved to establish liability are (i) an unlawful act by the defendant (ii) done with the intention of injuring the Claimant (iii) pursuant to an agreement (whether express or tacit) with one or more persons and (iv) which actually does injure the Claimant. See also Johnson J in *Shell UK Oil Products Limited v Persons unknown [2022] EWHC 1215 (QB)* at [26].

22. The Interested Persons challenge the availability of the tort selected. An issue arises concerning whether the Claimant can pursue such a cause of action if the unlawful act (this may take many different forms) is not actionable by the Claimant itself. It is important to remember however the need for an intention to injure the Claimant is a key ingredient of the tort. In passing one can envisage a number of factual scenarios where there is a conspiracy to commit a tort or to damage the property of a person that will have a direct and intended consequence to injure and damage another. Johnson J in *Shell* considered this point and concluded that '*..it is not necessary to show that the underlying unlawful conduct (to satisfy limb (a)) is actionable by the Claimant. Criminal conduct which is not actionable in tort can suffice (so long as it is directed at the Claimant)'* [27] and at [32].

23. In *Revenue and Customs Commissioners v Total Network SL [2008] 1 AC 1174* the issue was considered. Lord Hope and Lord Walker saw no requirement for an actionable tort at the hands of the Claimant to be necessary. Lord Hope at [44] said:

> "The situation that is contemplated is that of loss caused by an unlawful act directed at the Claimants themselves. The conspirators cannot, on the commissioners' primary contention, be sued as joint tortfeasors because there was no independent tort actionable by the commissioners. This is a gap which needs to be filled. For reasons that I have already explained, I do not

> accept that the commissioners suffered economic harm in this case. But assuming that they did, they suffered that harm as a result of a conspiracy which was entered into with an intention of injuring them by the means that were deliberately selected by the conspirators. If, as Lord Wright said in Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435, 462, it is in the fact of the conspiracy that the unlawfulness resides, why should that principle not apply here? As a subspecies of the tort of unlawful means conspiracy, the case is virtually indistinguishable from the tort of conspiracy to injure. The fact that the unlawful means were not in themselves actionable does not seem, in this context at least, to be significant. ….These factors indicate that a conspiracy is tortious if an intention of the conspirators was to harm the Claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious."

24. Lord Walker at [94] said:

> "From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the Claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort. To hold otherwise would, as has often been pointed out, deprive the tort of conspiracy of any real content, since the conspirators would be joint tortfeasors in any event (and there are cases discussing the notion of conspiracy emerging into some other tort, but I need not go far into those."

25. Finally, in *Ineos Upstream Limited v Persons Unknown [2017] EWHC 2945 (Ch),* a case concerning protests at sites used for shale gas extraction (fracking), Morgan J did not disapprove of the Claimant's choice of unlawful act conspiracy given the facts at [59]. He said:

> "The tort of conspiracy allows a victim of a conspiracy to sue where the acts are aimed at that victim even where the unlawful behaviour has its most direct impact on a third party. The other value of the tort of conspiracy from the Claimant's point of view is that it enables them to claim a remedy on a civil court for breach of a criminal statutes where the conduct in question does not, absent a conspiracy, lead to civil liability."

26. On the facts set out in the witness statements, the Claimant has a strong case given the incidents that have occurred which included and involved trespass to land and trespass to goods including causing significant damage to property. Criminal offences have been committed in some instances. The intention of those participating can thus be demonstrated from the facts themselves to be to stop or interrupt the work and thereby

cause damage to the Claimant. In addition, if more proof of intention were needed, the social media messages and photos that follow the events demonstrate not only who is responsible but the aims and thereby the intentions of those taking such action.

27. The weight of authority strongly supports the proposition that the unlawful means need not be actionable at the suit of the Claimant. Accordingly, the chosen cause of action is available to the Claimant. Given the facts, in my judgement, they are likely to succeed. On any view, there is a serious issue to be tried. I deal with S.12.(3) Human Rights Act 1998 below.

S.12(3) Human Rights Act 1998:

28. It is accepted that ECHR articles 10 (freedom of expression) and 11 (freedom of peaceful assembly) are engaged in this case. Both rights are qualified.

29. The caveat to the '*serious issue to be tried'* test arises if S.12(3) of the Human Rights Act 1998 is engaged. The section relates to '*Freedom of expression'* and S.12(1) states *'if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression'*.

30. If the relief sought might affect the said Convention right, the test to be applied per S.12(3) becomes '*No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed'*. In *Cream Holdings v Banerjee [2005] AC 245* Lord Nicholls said that in a breach of confidence case, the test was stricter than the '*serious issue to be tried'* test, however a degree of flexibility was noted in certain situations at [22]. In *Ineos Upstream*, Morgan J said at [86] that '*likely'* in this context meant '*more likely than not'*.

31. It is said the section applies to the acts of protesters in this case. It is said the injunction is too wide in that it prohibits the past and planned future actions of people such as the Interested Persons who have not been violent or destructive and who have carried out peaceful demonstrations. They have however gained unauthorised access to the areas designated as the DCO Order Limits and have deliberately interrupted pipeline work, albeit for relatively short periods of time. It has been submitted on behalf of the Interested Persons that such acts of protest carried out and envisaged by them is a form of communication in the sense that, to those who can see and hear what they are doing, they are communicating a message concerning the use of fossil fuels and the impact on the environment. It is said by the Claimant that, in some instances, such acts would be actionable given the intention of the participants despite the peaceful nature of them. The addition of the word *'publication'* to S.12(3) is an important qualification and potentially narrows '*freedom of expression'*. The question is therefore what is the 'publication' in protest cases?

32. The submission made by the Interested Parsons is that S.12(3) applies to their protests following the decision in *Birmingham City Council v Afsar [2019] EWHC 1560* per Warby J (as he then was). That case concerned parents who were protesting outside a primary school against aspects of the teaching at the school. Part of the original order prohibited the printing and distribution of leaflets (Appendix A). The original order was discharged because of a breach of the duty of full and frank disclosure on the part of

the applicants and because there was a failure to identify the threshold for granting an injunction as set out in S.12(3) in the submissions made as part of the ex parte hearing. Accordingly, the judge was not informed of the potential for the '*likely to succeed*' test to be applicable. Warby J stated that '*publication*' within the section did not have a limited meaning restricted for example to commercial publication. He did say at [60] '*Section 12(3) applies to any form of communication that falls within article 10 of the Convention'*. I note that at that point, the Judge was considering comment via social media as opposed to commercial publication hence, it would appear, his reference to the law of defamation.

33. In *Lachaux v Independent Print Ltd [2019] UKSC 27,* Lord Sumption at [18] said '*publication does not mean commercial publication, but communication to a reader or hearer other than the Claimant'*.

34. The order made in this case does not restrain *'publication'* in the strict sense. There is no bar to pictures, videos, comment or other messaging being used. Additionally, there is no bar to leaflets, banners or placards, chanting or singing. Therefore '*communication'* in that way is not prohibited or restrained. In that sense there is no bar to '*publication*'.

35. In *Ineos Upstream,* Morgan J was satisfied that S.12(3) applied to the facts of that case. He did so because at [86] '*...the order I am being asked to make 'might' affect the exercise of the convention right to freedom of expression'*.

36. In *High Speed Two (HS2) Limited v Persons Unknown [2022] EWCA 2360 (KB*), Julian Knowles J considered the point in the context of widespread protests against the HS2 rail project and said at [97-98] that S.12(3) applied. That was however because the Claimant accepted the fact of applicability and conceded the point. It was not therefore argued and analysed further.

37. Protests may take many different forms. In *Shell,* protestors went to Shell filling stations and damaged fuel pumps. Other activity at oil depots included digging tunnels under tanker routes and climbing on top of tankers. In *National Highways Ltd v Persons Unknown [2021] EWHC 3081*, protests included the blocking of motorways.

38. The facts of the present case are clearly similar and the objectives of the protesters the same as in *Shell* and *National Highways Ltd*. Lavender J in *National Highways Ltd* said, without saying more, at [41] '*Indeed although S.12(3) of the Human Rights Act 1998 is not applicable, I consider that the test which it imposes is met….'*

39. Johnson J in *Shell* said on this point at [70-72]:

> "The meaning set out by Lord Sumption in Lachaux is sufficient to achieve the underlying policy intention. There is therefore no good reason for giving the word "publication" an artificially broad meaning so as to cover (for example) demonstrative acts of trespass in the course of a protest. Such acts are intended to publicise the protestor's views, but they do not amount to a publication."

> Further, the wording of section 12 itself indicates that the word "publication" has a narrower reach than the term "freedom of expression". That is because the term "freedom of expression" is expressly used in the side-heading to section 12, and in section 12(1), and is used (by reference ("no such relief")) in section 12(2) and section 12(3). The term "publication" is then used in section 12(3) to signify one form of expression. If Parliament had intended section 12(3) to apply to all forms of expression, then there would have been no need to introduce the word "publication".
>
> I therefore respectfully agree with the observation of Lavender J in National Highways Limited v Persons Unknown [2021] EWHC 3081 (QB) at [41] that section 12(3) is "not applicable" in this context."

40. In my judgement, the acts of protest in this case involving trespass and, in some instances, criminal damage are not acts of publication. S.12 is concerned with freedom of expression i.e. communication and not freedom of assembly. Aspects of a protest may involve the expression of opinions and aspects which do not and are not primarily about communication namely the damaging of property causing considerable loss to a third party intending to cause additional loss to another. I agree with Johnson J and his analysis, namely that acts of trespass etc. in the course of a protest while publicising the protestor's views do not amount to '*publication'*. Accordingly S.12(3) does not apply. In any event I am satisfied, given the clear evidence in this case, that the test in S.12(3) is met. The Claimant is '*likely'* to succeed in its claim to prevent such activity.

(2) Damages as an adequate alternate remedy:

41. The Claimant seeks an injunction. The losses to the wider public from disruption to the pipeline may be capable of quantification or they may not. It is said the activities of protestors risk injury to themselves, pipeline workers, emergency workers and the public as works are taking place where they have access. There is no evidence that any defendant has the means to satisfy any judgement.

42. Conversely the granting of an injunction would not cause any injury or loss to a protester and, even if it did the Claimant, as a large multi-national oil company, would be able to compensate. Hence the usual cross-undertaking is offered.

(3) The balance of convenience and proportionality:

43. This question turns on the human rights analysis applied to the particular facts of the case. Articles 10 and 11 are fundamental rights and are central to a democratic society. Both rights permit a degree of disruption and the expression of unpopular views however both are qualified. The right under Article 11 is '*to freedom of peaceful assembly'*. That is not the case where protesters have violent or criminal intentions. There may be instances where some protest peacefully and others, at the same time, act independently and are not peaceful and act unlawfully. Where the line is to be drawn is a matter of fact and degree. A judge is required to undertake a proportionality

assessment balancing the competing interests and the degree to which rights and freedoms of individuals can be legitimately restricted by law.

44. In *DPP v Ziegler [2021] UKSC 23*, the court considered and approved the Divisional Court's assessment of the questions relevant to the proportionality assessment at [16] and [58] (the court was concerned with offences of wilful obstruction of the highway – S.137 Highways Act 1980 namely a single 90 minute peaceful blockage of a road leading to an arms fair causing limited disruption and no disorder). The court at [16] citing from the decision of the lower court stated that questions are as follows:

> "63. That then calls for the usual enquiry which needs to be conducted under the HRA. It requires consideration of the following questions: (1) Is what the defendant did in exercise of one of the rights in articles 10 or 11? (2) If so, is there an interference by a public authority with that right? (3) If there is an interference, is it 'prescribed by law'? (4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of article 10 or article 11, for example the protection of the rights of others? (5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?
>
> 64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate: (1) Is the aim sufficiently important to justify interference with a fundamental right? (2) Is there a rational connection between the means chosen and the aim in view? (3) Are there less restrictive alternative means available to achieve that aim? (4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?
>
> 65. In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific enquiry."

45. The court provided commentary as to the relevant factors for a court to consider when evaluating proportionality. These include the duration of any protest, the degree to which land is occupied and the actual interference the protest causes to the rights of others, whether the views giving rise to the protest relate to *very important issues* and if the protesters believed in the views they were expressing [72]. In addition, I note:

(i) The extent to which the protest was targeted at the object of the protest. Meaning was there a direct connection with the object of the protest, namely the government's failure to reduce carbon emissions and the blocking of pipeline work? At [75].

(ii) The extent to which the continuation of the protest would breach domestic law '*so whilst there is autonomy to choose the manner and form of a protest an*

evaluation of proportionality will include the nature and extent of actual and potential breaches of domestic law' at [77].

(iii) Prior notification and co-operation with the police, especially if the protest is likely to be contentious and provoke disorder at [78].

46. The court however noted in relation to deliberate disruption at [67]:

> "The ECtHR in Kudrevičius at para 97 recognised that intentional disruption of traffic was "not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, …". However, the court continued that "physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by article 11 of the Convention" (emphasis added). …….. However, again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality. "

47. Following that theme, Lord Burnett of Maldon LCJ in *DPP v Cuciurean [2022] EWHC 736 (Admin)* said at [37]:

> "Furthermore, intentionally serious disruption by protesters to ordinary life or to activities lawfully carried on by others, where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly in a public place, may be considered to be a "reprehensible act" within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction."

And at [45] in relation to protests on private land:

> "…. there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see Appleby at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights."

48. Leggatt LJ (as he then was) in *Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9* said at [94]:

> "It was recently underlined by a Divisional Court (Singh LJ and Farbey J) in Director of Public Prosecutions v Ziegler [2019] EWHC 71 (Admin); [2019] 2 WLR 1451, a case – like the Kudrevičius case – involving deliberate obstruction of a highway. After quoting the statement that intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention (see paragraph 44 above), the Divisional Court identified one reason for this as being that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others (see para 53 of the judgment). The court pointed out that persuasion is very different from attempting (through physical obstruction or similar conduct) to *compel* others to act in a way you desire."

49. In the present case, the sort of behaviour described above as '*involving the 'intentional disruption of the activities of others'* has, given the evidence, taken place. As a consequence, Articles 10 and 11 do not attach significant weight to such activities because they are not at the core of these rights.

50. I turn to the applicable questions at [44] above:

(i) Those restrained by the terms of the injunction from obstructing access to land within the DCO order limits from the public highway or other land that the public has a right of access are conceded by the Claimant to arguably be exercising their rights under Articles 10 and 11. That, I assume for present purposes, is correct although some of their activities are not at the core of the rights as I have pointed out.

(ii) The injunction would interfere with the exercise of those rights.

(iii) If the injunction is ordered, such interference with rights will be prescribed by law i.e. it will be a lawful order of the court.

(iv) The interference is, in my judgement, in pursuit of a legitimate aim in that the proposed injunction seeks to protect the rights of others, namely the Claimant to pursue its lawful activities in installing the new pipeline.

51. The final issue concerns the remaining question '*is the interference necessary in a democratic society to achieve the legitimate aim'*? The four sub-questions or rather the answers to them determine if the potential interference is '*proportionate*'. The terms of the order are to be noted as specifically limiting activity within the DCO Order Limits, save for (7) which prevents whether within or without the DCO Order Limits blocking or impeding access to any land within the DCO Order Limits. I have noted that only (6) (being told to move) and (7) are the subject of criticism by counsel for the Interested Persons.

52. In this case I note from the evidence:

(i) The protests in this case have been peaceful in that there has been no widespread public disorder.
(ii) The protesters have a belief in the cause they are pursuing.
(iii) Trespass onto the land of others has undoubtedly taken place. Trespass to goods has occurred. Criminal offences have been committed, namely criminal damage to property that has, in some instances, cost many thousands of pounds to repair.
(iv) The protests are targeted against the Claimant and those engaged by the Claimant in the construction of the pipeline to slow or stop the works as a means of demonstrating the need for the government to give greater emphasis to reducing fossil fuel use and in particular aviation fuel. That said, the environmental policy of the government is the main target of the protesters and not the pipeline itself.
(v) The protests were widespread and over a large geographical area.
(vi) The protests were organised and planned.
(vii) The protests were not notified to the Claimant or police in advance.
(viii) The acts of Scott Breen disrupted works for a considerable time. He was assisted by others to do that.
(ix) A clear intention has been demonstrated to continue the protests and the disruption, which has the potential to be significant, of the pipeline works. That would include further acts of trespass, and damage.

53. The questions are:

(i) *Sufficiently important to justify interference with a fundamental right*? The pipeline works are a major piece of engineering infrastructure that will serve the UK for many years. The Claimant submits that the aim of restricting the activities of protesters permits the Claimant to conduct its lawful business, prevents harm to others and permits aviation fuel to be transported to London Heathrow airport and thereby the airport can operate. Disruption has a potential significance to UK trade and the transportation of people and goods. The aim is therefore sufficiently important to justify interference with the rights of protestors in my judgement.
(ii) *A rational connection between means and aim*? The connection between the means chosen and the aim is rational because it is limited to the area where the pipeline is to be constructed and prevents disruption. The means chosen allow the Claimant to fulfil its contractual obligations. The terms are worded to prohibit activity that would amount to the conspiracy alleged. There is a rational connection.
(iii) *Is there less restrictive alternative means to achieve the aim*? A claim for damages will not prevent disruption. Damages may be impossible to calculate or an award impossible to satisfy by the protestors. The terms of the order are specifically limited to the DCO Order Limits which is, in many areas, a strip of land approximately 30m wide. The injunction is and will be limited in time. An application may be made to vary or discharge the order. In my judgement there is no less restrictive means to permit the construction of the pipeline.

(iv) *Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?* In my judgement taking into account all of the factors which I have identified, the injunction granted by Eyre J strikes a fair balance between the rights of the protestors, the Claimant, the contractors and the general public. Importantly, in my judgement, the order does not prohibit protesters from entering the DCO Order Limits as it might because the Claimant has accepted that is too broad. What the order does is control what they do within the DCO Order Limits. In addition, there are areas very close to the DCO Order Limits, for example paths and rights of way, where protest is not restricted by the order. As a consequence, there is no need to climb fences and get close to potentially hazardous machinery, tools and deep trenches to demonstrate. Having considered the issues and the evidence, the balancing exercise I have performed comes down very clearly in the Claimant's favour given the importance of the works and the threat posed by the protestors to disrupt and cause damage against the protesters' rights under Articles 10 and 11.

(4) A real and imminent risk of harm to justify a precautionary injunction:

54. Given the facts, harm has occurred as a result of the protests. The risk of repetition is evident from that past conduct and accompanying messages posted on social media indicating a plan to continue and disrupt into the future. Those who protest against the use of fossil fuels continue to protest. The Interested Persons have stated that they wish to continue to protest. They appreciate they risk breaching the order should they enter the DCO Order Limits if their intention is to cause damage to the Claimant.

55. The Interested Persons argue that there is no risk to areas where there is no plan for works at present. That ignores the reality of such protests that may target any part of the works that cover a large area at any time. The alternative would be for the Claimant to seek injunctions as and when works were going to start in any given area. That is inherently impractical, cumbersome and costly. Finally given that the route is clearly set out and plotted on the plans absent an order the protesters may 'plan in advance' and select an area to be the subject of works in the future and act to prevent work from starting for example by tunnelling or placing obstructions across a wide area designated as the path of the pipeline. I have to consider the position now. The geographical spread of the action thus far demonstrates the need for the whole of the pipeline route to be protected from what I consider to be a real and imminent risk of harm. On the evidence, I find that the protestors will engage in essentially the same activities in areas not covered by the inunction if it does not cover those areas.

(5) The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the Claimant's rights:

56. The proposed injunction focuses on specific conduct within the DCO order limits save for part (7) concerning access to the area of the DCO order limits. So far as the order may prohibit lawful conduct, a person may theoretically climb a compound fence on public land and thereby commit no wrong assuming they do nothing more, or a person may be on public land and their mere presence may obstruct construction. On private

land such acts would constitute a trespass absent consent from the landowner. These examples are not caught by the terms of the injunction. The order specifically prohibits activity by more than one person intending to damage the Claimant hence the tort of conspiracy pleaded.

57. Where lawful activity on the highway might be caught by the order, Articles 10 and 11 are engaged and thereby any restriction must be proportionate. A distinction must however be drawn, as I have set out, between lawful activity which would give rise to no cause of action and, for example, the unlawful obstruction of the highway which is designed and intended to cause the disruption of the activities of others as being not '*at the core*' of the rights under consideration. Persuasion is very different to attempting by the use of obstruction to compel others to act in a way desired i.e. to stop work - see *Ziegler* at [94]. I have already given my conclusions regarding the overall balancing test concerning the infringement of the rights of protestors and those of the Claimant. Specifically in this regard and for the same reasons where potentially lawful conduct might be restrained by the order, the balance comes down firmly in favour of the Claimant given the strategic importance of the pipeline project and the potential to protest peacefully without obstruction of the highway.

(6) The terms are of the injunction are sufficiently clear:

58. The terms of the order have been the subject of challenge. The tort requires an intention to damage. In *Cuadrilla*, Leggatt LJ at [69] said that to make the terms of the order correspond with the tort alleged and given that future conduct is the subject of the injunction and that may prohibit conduct that is lawful '*it is necessary to include a requirement that the defendant's conduct was intended to cause damage to the Claimant'*.

59. The order refers at 3. to not doing acts listed '*with any other person with the intention of preventing or impeding construction of the Southampton to London pipeline'*. To meet the requirements of the tort an intention to damage requirement is needed. An intention to cause damage might be implied in the wording chosen, however to avoid confusion and to add clarity the following amendment is necessary: '*with the intention of causing damage to the Claimant by preventing or impeding the construction of the Southampton to London pipeline'*.

60. In addition, it is accepted by the Claimant that paragraph 5.(B) which provides '*or by another person acting with his/her/their encouragement'* is open to misinterpretation given the many ways in which encouragement might be construed. I agree and that part of paragraph 5.(B) is to be deleted. That is consistent with an earlier deletion by Eyre J of a phrase including the word '*encouragement*'.

61. Objection is raised as to the request to the *'cease and desist'* requirement at 4(6). It is said to be unclear who may make such a request and the basis of so doing and as such confers powers on others. The wording is sufficiently clear in my judgement. The protestor would have to be within the DCO Order Limits and obstructing construction of the SLP. It would not be difficult to understand why a person was being asked to move in such a location and the person making the request is unlikely to be unconnected with the works. Any potential breach of the order would not lead to committal unless

an agreement with another, intention to cause damage etc, actual obstruction and a request made by or on behalf of the Claimant or police were proved.

62. Finally, objection is raised as to paragraph 7. '*whether within or without the DCO order limits blocking or impeding access to any land within the DCO order limits'*. I do not see how that can be misinterpreted or misunderstood. The order prevents blocking access to the working areas that would be unlawful if done by for example, obstructing the highway or trespassing onto land intending to case damage to the Claimant. The order is clear in that the acts of an individual are not caught by the order. More than one person must be part of the conspiracy alleged with the requisite intent. The blocking and impeding of access has the potential to cause not only delay but loss. The Claimant is entitled to carry on with the works unhindered by such action.

(7) The injunction has clear geographical and temporal limits:

63. *Geographical limits:* The works are taking place over a large distance and are due to be completed in 2023. The work requires storage of materials and pipes at compounds surrounded by fencing and the work will move as is necessary along the designated route. The works are carefully programmed and take into account matters such as sensitive flora and fauna. The fences have not prevented access to the compounds and working areas. It would be impractical to identify areas within the DCO order limits where items are located or work was to be undertaken from time to time. To leave an area unprotected by an injunction risks exposing that area to disruption. A patchwork of orders changing from time to time will not provide sufficient protection to the Claimant in my judgement. The entire pipeline requires protection. The order is limited to DCO Order Limits identified by the DCO.

64. *Temporal limits*: The Claimant has requested that the order continue until December 2023 to enable the works to be completed. That would in effect be a final order. This is an application for an interim injunction and a shorter period is necessary. The issues that arise require resolution at trial. I will extend the order for 4 months from the date of this decision. I will invite the parties to make representations as to a timetable for preparation and listing of the trial. At that stage, the justification and need for any continuation of the order will be determined.

(8) and (9) Defendants have not been identified but are, in principle, capable of being identified and served with the order or can be identified in the Claim form (and the injunction) by reference to their conduct:

65. Save for Scott Breen, Anthony Green and Roz Aroo being the two people who are said to have assisted Scott Breen, no other persons have been identified as being capable of being properly named as defendants and they cannot be served as a result.

66. The order contains in Annex 1 a comprehensive and detailed list of activities headed '*description of persons unknown who are or who may become defendants to these proceedings'*. The prohibited acts contained within the order are set out. Following my decision, amendment will be necessary as set out above.

Result:

67. The Claimant succeeds in its application to continue the order of Eyre J for a period of 4 months so as to restrain the specified acts of the defendants (set out at paragraph 15 above) as amended in relation to the SLP and the DCO Order Limits.

68. I give the parties 7 days to agree directions regarding the future conduct of the case and setting the case down for trial. Failing agreement, the parties have 14 days to submit written submissions including the issue of costs. These issues to be dealt with on the papers unless there is good reason to do otherwise.

Neutral Citation Number: [2022] EWHC 1215 (QB)

Case No: QB-2022-001420

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2022

Before :

MR JUSTICE JOHNSON

- -

Between :

SHELL UK OIL PRODUCTS LIMITED **Claimant**

- and -

PERSONS UNKNOWN DAMAGING, AND/OR BLOCKING THE USE OF OR ACCESS TO ANY SHELL PETROL STATION IN ENGLAND AND WALES, OR TO ANY EQUIPMENT OR INFRASTRUCTURE UPON IT, BY EXPRESS OR IMPLIED AGREEMENT WITH OTHERS, IN CONNECTION WITH ENVIRONMENTAL PROTEST CAMPAIGNS WITH THE INTENTION OF DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION **Defendants**

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Toby Watkin QC (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the Claimant

Hearing date: 13 May 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10am on 20 May 2022.

Mr Justice Johnson :

1. The claimant sells fossil fuels to those who run Shell branded petrol stations. The defendants are climate and environmental activists who say that the claimant's activities are destroying the planet. They engage in protests to draw attention to the issue and to encourage governmental and societal change.

2. The claimant seeks to maintain an injunction that was granted on an emergency basis by McGowan J on 5 May 2022. It restrains the defendants from undertaking certain activities such as damaging petrol pumps and preventing motorists from entering petrol station forecourts when that is done to prevent the claimant from carrying on its business – see paragraph 20 below. The claimant recognises that the injunction interferes with rights of assembly and expression but contends that the interference is proportionate and justified to protect its rights to trade.

3. The order of McGowan J was necessarily made without notice to the defendants or anybody else. McGowan J made provision for the order to be widely published (including at every Shell filling station in England and Wales, and to over 50 email addresses that are associated with protest groups). McGowan J also required that the order be reconsidered at a public hearing on 13 May 2022 so that the court could reconsider the continuation of the order, and its terms. This provided a specific opportunity for anyone affected by the order to seek to argue that it should be set aside or varied. In the event, nobody did so.

4. Mrs Nancy Friel, who describes herself as an environmental activist, attended the hearing. She asked for the hearing to be adjourned so that she could secure representation and argue that the order should be set aside or varied. I declined the request to adjourn. It was important that this injunction, which was granted without notice to the defendants and which impacts on their rights of assembly and expression, was considered by a court at a public hearing without further delay. Continuing with the hearing does not prejudice any application that Mrs Friel (or anybody else) might wish to make to vary the order or to set it aside: the terms of the order itself permit such an application to be made (and see also rule 40.9 of the Civil Procedure Rules).

5. Mrs Friel was concerned that the terms of the order require that any person who wishes to apply to vary or discharge the order must first apply to be joined as a named defendant. She did not consider that was appropriate, because she is not taking part in any unlawful activity and does not therefore come within the scope of the description of the defendants. There are two answers to that concern. First, the description of the "unknown" defendants does not prevent Mrs Friel from being added as a second defendant to the proceedings; she may be affected by the order – and may be entitled to be joined as a party – even if she does not come within that description. Second, if she otherwise has a right to apply to set aside the order without being joined as a party then she may do so under CPR 40.9, notwithstanding the terms of the order (see *National Highways Limited v Persons Unknown* [2022] EWHC 1105 (QB) *per* Bennathan J at [20]-[22] and *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 *per* Sir Geoffrey Vos MR at [89]).

6. It is not, however, appropriate to vary the terms of the order to give a general right to anyone (beyond that recognised by CPR 40.9) to apply to vary the order without first applying to be a party. That would risk going beyond the ambit of CPR 40.9: although

that provision is stated in wide terms, in practice the circumstances in which a non-party may successfully apply to vary an order are more limited (see the commentary to CPR 40.9 in the 2022 White Book). There is therefore a risk of creating an unjustified advantage for such an applicant (for example, as regards costs) or an unjustified disadvantage for the claimant, without first considering the particular circumstances of the application. The question of whether it is necessary for a person to be joined as a party is best addressed (if and when the issue arises) as and when any application is made, and on the facts of the particular application.

Factual background

7. Benjamin Austin is the claimant's Health, Safety and Security Manager. He has provided two witness statements, supported with extensive exhibits. I take the account of events from his statements and exhibits.

The claimant

8. The claimant is part of a group of companies that are ultimately owned and controlled by Shell plc. It markets and sells fuels to retail customers in England and Wales through a network of 1,062 "Shell-branded" petrol stations ("Shell petrol stations"). The stations are operated by third party contractors, but the fuel is supplied by the claimant. In some cases, the claimant has an interest in the land where the Shell petrol station is located.

Insulate Britain, Just Stop Oil and Extinction Rebellion

9. Insulate Britain, Just Stop Oil and Extinction Rebellion are environmental protest groups that seek to influence government policy in respect of the fossil fuel industry, so as to mitigate climate change. These groups say that they are not violent. I was not shown any evidence to suggest that they have resorted to physical violence against others. They are, however, committed to protesting in ways that are unlawful, short of physical violence to the person. Their public websites demonstrate this, with references to "civil disobedience", "direct action", and a willingness to risk "arrest" and "jail time". The activities of their supporters also demonstrate this, as explained below.

The protests

10. In autumn 2021 a number of protests took place. These involved blocking major roads in the UK, including the M25, including by activists gluing themselves to roads, immovable objects, or each other. Injunctions to restrain such activities were made by the court on the application of National Highways Limited. There were many breaches of those injunctions. Committal proceedings were brought. Initially, the defendants to those proceedings evinced an intention to carry on with the protests in defiance of court orders. Orders for immediate imprisonment for contempt of court were imposed - see *National Highways Ltd v Heyatawin* [2021] EWHC 3078 (QB). Thereafter, unlawful protests in this form came to an end. In subsequent committal hearings, the respondents were unrepentant. They maintained that they were justified in their conduct because of the very great dangers of climate change. However, they did not demonstrate an intention to commit further breaches of court orders. Many indicated that they would find other, lawful, ways to draw attention to the climate crisis and to seek to influence government policy. The court responded by imposing orders of imprisonment for contempt of court that were suspended, subject to compliance with conditions imposed

by the court – *National Highways Ltd v Buse* [2021] EWHC 3404 (QB) (*per* Dingemans LJ at [57]) and *National Highways Ltd v Springorum* [2022] EWHC 205 (QB) (*per* William Davis LJ at [65]).

11. In spring 2022, protests involving similar tactics re-commenced, but directed at the fossil fuel industry rather than the road network. Reports include cases of protesters climbing onto fuel delivery lorries, cutting the air brake cables so that the lorries cannot move, tunnelling under roadways to seek to make them impassable to lorries, climbing onto equipment used for storage of fuels, and tampering with safety equipment, such as valves. One of these protests was at a terminal owned by the Shell Group.

12. On 28 April 2022, there were protests at two petrol stations (one of which was a Shell petrol station) on the M25, Clacket Lane and Cobham. Protestors arrived at around 7am. Video, photographic and written evidence (largely deriving from the websites and media releases of protest groups) show that:

    (1) The entrance to the forecourts were blocked.

    (2) The display screens of fuel pumps were smashed with hammers.

    (3) The display screens of fuel pumps were obscured with spray paint.

    (4) The kiosks were "sabotaged… to stop the flow of petrol".

    (5) Protestors variously glued themselves to the floor, a fuel pump, the roof of a fuel tanker, or each other.

13. A total of 55 fuel pumps were damaged (including 35 out of 36 pumps at Cobham) to the extent that they were not safe for use, and the whole forecourt had to be closed. Five people were arrested and charged with offences, including criminal damage. They are subject to bail conditions. The claimant has not sought to join them as individual named defendants to this claim because (in the case of four of them) it considers that, in the light of the bail conditions, there is not now a significant risk that they will carry out further similar activities, and (in the case of the fifth) it is not sufficiently clear that the conduct of that individual comes within the scope of the injunction.

14. In April 2022 there were protests at an oil storage depot in Warwickshire, which is partly owned by the claimant. These involved the digging of a tunnel under a tanker route, to stop oil tankers leaving the terminal and distributing fuel. An injunction was granted on an application made by the local authority. Protests at the depot have continued. On 9 May 2022 drones were flown over the depot and along its external fence. The claimant thinks this may have been a form of reconnaissance by a group of protestors.

15. On 3 May 2022 more than 50 protestors from Just Stop Oil attended the Nustar Clydebank Oil Depot in Glasgow. They climbed on top of tankers, locked themselves to the entrance of the terminal and climbed onto pipework at height. Their actions halted operations at the depot.

16. The campaign orchestrated by these (and other) groups of environmental activists continues. Just Stop Oil's website says that the disruption will continue "until the government makes a statement that it will end new oil and gas projects in the UK."

17. The claimant says that there is thus an ongoing risk of further incidents of a similar nature to those seen on 28 April 2022.

The risks at petrol stations

18. Aside from the physical damage that has been caused at the petrol stations, and the direct financial impact on the claimant (from lost sales), these types of protest give rise to additional potential risks. Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation, including by the Dangerous Substances and Explosives Atmosphere Regulations 2002, the Highway Code, Health and Safety Executive guidance on "Storing petrol safely" and "Dispensing petrol as a fuel: health and safety guidance for employees", and non-statutory guidance, "Petrol Filling Stations – Guidance on Managing the Risks of Fire and Explosions."

19. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason (see annex 6 to the Highway Code: "Never smoke, or use a mobile phone, on the forecourt of petrol stations as these are major fire risks and could cause an explosion."). The evidence shows that at the protests on 28 April 2022 protestors used mobile phones on the forecourts to photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: "Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations." I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern.

The injunction

20. The operative paragraphs of the injunction are:

> "2. For the period until 4pm on 12 May 2023, and subject to any further order of the Court, the Defendants must not do any of the acts listed in paragraph 3 of this Order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station.
>
> 3. The acts referred to in paragraph 2 of this order are:

> 3.1. blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station or to a building within the Shell Petrol Station;
>
> 3.2. causing damage to any part of a Shell Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;
>
> 3.3. operating or disabling any switch or other device in or on a Shell Petrol Station so as to interrupt the supply of fuel from that Shell Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell Petrol Station.
>
> 3.4. affixing or locking themselves, or any object or person, to any part of a Shell Petrol Station, or to any other person or object on or in a Shell Petrol Station;
>
> 3.5. erecting any structure in, on or against any part of a Shell Petrol Station;
>
> 3.6. spraying, painting, pouring, depositing or writing any substance on to any part of a Shell Petrol Station.
>
> 3.7. encouraging or assisting any other person do any of the acts referred to in sub-paragraphs 3.1 to 3.6."

21. Some of the conduct referred to in paragraph 3 is, in isolation, potentially innocuous ("depositing… any substance on… any part of a Shell Petrol Station" would, literally, cover the disposal of a sweet wrapper in a rubbish bin). The injunction does not prohibit such conduct. The structure is important. The injunction only applies to the defendants. The defendants are those who are "damaging, and/or blocking the use of or access to any Shell petrol station in England and Wales, or to any equipment or infrastructure upon it, by express or implied agreement with others, with the intention of disrupting the sale or supply of fuel to or from the said station." So, the prohibitions in the injunction only apply to those who fall within that description. Further, the order does not impose a blanket prohibition on the conduct identified in paragraph 3. It only does so where that conduct is undertaken "in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station."

22. It follows that while paragraph 3 is drafted quite widely, its impact is narrowed by the requirements of paragraph 2. This is deliberate. It is because the claimant is not able to maintain an action in respect of the activity in paragraph 3 (read in isolation) in respect of those Shell petrol stations where it has no interest in the land. It is only actionable where that conduct fulfils the ingredients of the tort of conspiracy to injure (as to which see paragraph 26 below). The terms of the injunction are therefore deliberately drafted so as only to capture conduct that amounts to the tort of conspiracy to injure.

The legal controls on the grant of an injunction

23. The injunction is sought on an interim basis before trial, rather than a final basis after trial. It is sought against "persons unknown". It is sought on a precautionary basis to restrain anticipated future conduct. It interferes with freedom of assembly and expression. For these reasons, the law imposes different tests that must all be satisfied before the order can be made. The claimant must demonstrate:

(1) There is a serious question to be tried: *American Cyanamid v Ethicon* [1975] AC 396 *per* Lord Diplock at 407G.

(2) Damages would not be an adequate remedy for the claimant, but a cross-undertaking in damages would adequately protect the defendants, or

(3) The balance of convenience otherwise lies in favour of the grant of the order: *American Cyanamid per* Lord Diplock at 408C-F.

(4) There is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction: *Islington London Borough Council v Elliott* [2012] EWCA Civ 56 *per* Patten LJ at [28], *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 [2019] 4 WLR 100 *per* Longmore LJ at [34], *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303 [2020] 1 WLR 2802 *per* Sir Terence Etherton MR at [82(3)].

(5) The prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the claimant's rights: *Canada Goose* at [78] and [82(5)].

(6) The terms of the injunction are sufficiently clear and precise: *Canada Goose* at [82(6)].

(7) The injunction has clear geographical and temporal limits: *Canada Goose* at [82(7)] (as refined and explained in *Barking and Dagenham LBC v Persons Unknown* [2022] EWCA Civ 13 *per* Sir Geoffrey Vos MR at [79] - [92]).

(8) The defendants have not been identified but are, in principle, capable of being identified and served with the order: *Canada Goose* at [82(1)] and [82(4)].

(9) The defendants are identified in the Claim Form (and the injunction) by reference to their conduct: *Canada Goose* at [82(2)].

(10) The interferences with the defendants' rights of free assembly and expression are necessary for and proportionate to the need to protect the claimant's rights: articles 10(2) and 11(2) of the European Convention on Human Rights ("ECHR"), read with section 6(1) of the Human Rights Act 1998.

(11) All practical steps have been taken to notify the defendants: section 12(2) of the Human Rights Act 1998.

(12) The order does not restrain "publication", or, if it does, the claimant is likely to establish at trial that publication should not be allowed: section 12(3) of the Human Rights Act 1998.

24. Section 12 Human Rights Act 1998 (see paragraphs 23(11) and (12) above) states:

> "**12 Freedom of expression.**
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> (a) the extent to which—
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code.
>
> (5) In this section—
>
> "court" includes a tribunal; and
>
> "relief" includes any remedy or order (other than in criminal proceedings)."

(1) Serious issue to be tried

25. The claimant has a strong case that on 28 April 2022 the defendants committed the activities identified in paragraph 3 of the draft order: those activities are shown in photographs and videos. There are apparent instances of trespass to goods (the damage to the petrol pumps and the application of glue), trespass to land (the general implied licence to enter for the purpose of purchasing petrol does not extend to what the defendants did) and nuisance (preventing access to the petrol stations). None of this gives rise to a right of action by the claimant in respect of those Shell petrol stations where it does not have an interest in the land and does not own the petrol pumps. It is therefore not, itself, able to maintain a claim in trespass or nuisance in respect of all Shell petrol stations.

26. The claim advanced by the claimant is framed in the tort of conspiracy to injure by unlawful means ("conspiracy to injure"). The ingredients of that tort are identified in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9 [2020] 4 WLR 29 *per* Leggatt LJ at [18]: (a) an unlawful act by the defendant, (b) with the intention of injuring the claimant, (c) pursuant to an agreement with others, (d) which injures the claimant.

27. As I have explained, the claimant has a strong case that the defendants have acted unlawfully. To establish the tort of conspiracy to injure, it is not necessary to show that the underlying unlawful conduct (to satisfy limb (a)) is actionable by the claimant. Criminal conduct which is not actionable in tort can suffice (so long as it is directed at the claimant): *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19 [2008] 1 AC 1174 *per* Lord Walker at [94] and Lord Hope at [44]. A breach of contract can also suffice, even though it is not actionable by the claimant: *The Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2020] EWCA Civ 1300 [2021] Ch 233 *per* Arnold LJ at [155].

28. The question of whether a tort, or a breach of statutory duty, can suffice was left open by the Supreme Court in *JST BTS Bank v Ablyaszov (No 14)* [2018] UKSC 19 [2020] AC 727. Lord Sumption and Lord Lloyd-Jones observed, at [15], that the issue was complex, not least because it might – in the case of a breach of statutory duty – depend on the purpose and scope of the underlying statute and whether that is consistent "with its deployment as an element in the tort of conspiracy."

29. For the purposes of the present case, it is not necessary to decide whether a breach of statutory duty can found a claim for conspiracy to injure, or whether every (other) tort can do so. It is only necessary to decide whether the claimant has established a serious issue to be tried as to whether the torts that are here in play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant's brand, selling the claimant's fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts. It would be anomalous if a breach of contract (where the existence of the cause of action is dependent on the choice of the contracting parties) could support a claim for conspiracy to injure, but a claim for trespass could not do so. Likewise, it would be anomalous if trespass to goods did not suffice given that criminal damage does. I am

therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act.

30. There is no difficulty in establishing a serious issue to be tried in respect of the remaining elements of the tort. The intention of the defendants' unlawful activities is plain from their conduct and from the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. They are not solitary activities but are protests involving numbers of activists acting in concert. They therefore apparently undertake their protest activities in agreement with one another. Loss is occasioned because the petrol stations are unable to sell the claimant's fuel.

31. I am therefore satisfied that there is a serious issue to be tried.

32. Further, the evidence advanced by the claimant appears credible and is supported by material that is published by the groups to which the defendants appear to be aligned. That evidence is therefore likely to be accepted at trial. I would (if this had been a trial) wished to have clearer and more detailed evidence (perhaps including expert evidence) as to the risks that arise from the use of mobile phones, glue and spray paint in close proximity to fuel, but it is not necessary precisely to calibrate those risks to determine this application. It is also, I find, likely that the court at trial will adopt the legal analysis set out above in respect of the tort of conspiracy to injure (including, in particular, that the necessary unlawful act could be a tort that is not itself actionable by the claimant). It follows that not only is there a serious issue to be tried, but the claimant is also more likely than not to succeed at trial in establishing its claim.

(2) Adequacy of damages

33. The claimant asserts that damages are not an adequate remedy because they could not be quantified. It is difficult to see why that should be so. Any losses ought to be capable of assessment. For example, loss of sales can be assessed by (broadly) identifying the time period when sales were affected, and comparing the sales made during that period with the sales made during the equivalent period the previous week. The possible difficulties in calculation are not a convincing reason for concluding that damages are an inadequate remedy.

34. There is, though, no evidence that the defendants have the financial means to satisfy an award of damages. It is very possible that any award of damages would not, practically, be enforceable. Further, the defendants' conduct gives rise to potential health and safety risks. If such risks materialise then they could not adequately be remedied by way of an award of damages to the claimant.

35. For these reasons, damages are not an adequate remedy for the claimant.

36. Conversely, if any defendant sustains loss as a result of the injunction, then the claimant undertakes to pay any damages which the court considers ought to be paid. It has the means to satisfy any such order. The injunction interferes with rights of expression and assembly, but it does not impact on the core of those rights. It does not prevent the defendants from congregating and expressing their opposition to the claimant's conduct (including in a loud or disruptive fashion, in a location close to Shell petrol stations), so long as it is not done in a way which involves the unlawful conduct prohibited by

paragraphs 2 and 3 of the injunction. To the extent that there is an interference with rights of assembly and expression then (if a court subsequently finds that to be unjustified) that can be met by the cross-undertaking: interferences with such rights to assembly and expression can be remedied by an award of damages, even where the loss is not monetary in nature (see section 8 of the Human Rights Act 1998).

37. So, while damages are not an adequate remedy for the claimant, the cross-undertaking in damages is an adequate remedy for the defendants.

(3) Balance of convenience

38. The fact that damages are not an adequate remedy for the claimant but that the cross-undertaking is adequate protection for the defendants means that it may not be necessary separately to consider the balance of convenience.

39. In any event, the balance of convenience favours the grant of injunctive relief. If an injunction is not granted, then there is a risk of substantial damage to the claimant's legal rights which might not be capable of remedy. Conversely, it is open to the defendants (or anybody else that is affected by the injunction) at any point to apply to vary or set aside the order. Further, although the injunction has a wide effect, there are both temporal and geographical restrictions. It will only run for a maximum of a year before having to be reconsidered by a court. It only applies to Shell petrol stations (not other places where the claimant does business).

(4) Real and imminent risk of harm

40. Harm has already occurred as a result of the protests on 28 April 2022. The risk of repetition is demonstrated by the further protests that have occurred since then, and the public statements that have been made by protest groups as to their determination to continue with similar activities.

41. If the claimant is given sufficient warning of a protest that would involve a conspiracy to injure, then it can seek injunctive relief in respect of that specific event. If there were grounds for confidence that such warnings will be given, then the risk now (in advance of any such warning) might not be sufficiently imminent to justify a more general injunction. There is some indication that protest groups sometimes engage with the police and give prior warning of planned activities. But it is unlikely that sufficient warning would be given to enable an injunction to be obtained. That would be self-defeating. Further, it is not always the case that warnings are given. Extinction Rebellion say in terms (on its website) that it will not always give such warnings. Moreover, the claimant did not receive sufficient (or any) warning of the activities on 28 April 2022.

42. Accordingly, I am satisfied that this application is not premature, and that the risk now is sufficiently imminent. The claimant may not have a further opportunity to seek an injunction before a further protest causes actionable harm.

(5) Prohibited acts to correspond to the threatened tort

43. The acts that are prohibited by the injunction necessarily amount to conduct that constitutes the tort of conspiracy to injure. The structure and terms of the injunction have been drafted to achieve that.

44. It would be permissible for an injunction to prohibit behaviour which is otherwise lawful (or which is not actionable by the claimant) if there are no other proportionate means of protecting the claimant's rights. The claimant does not contend that is the case here, because an order that closely corresponds to the threatened tort will afford adequate protection. I agree.

(6) Terms sufficiently clear and precise

45. The terms of the injunction (see paragraph 20 above) are in clear and simple language that avoids technical legal expression.

46. It is usually desirable that such terms should, so far as possible, be based on objective conduct rather than subjective intention. The drafting of paragraph 3 satisfies that criterion. There is an element of subjective intention in paragraph 2 ("with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station") but that is unavoidable because of the nature of the tort of conspiracy to injure. It is the inevitable price to be paid for closely tracking the tort. The alternative would be to leave out the subjective element and focus only on the objective conduct. That would give wider protection than is necessary or proportionate. It is also necessary to introduce the language of intention to avoid some of the prohibitions having a much broader effect than could ever be justified (for example, the sweet wrapper example at paragraph 21 above).

(7) Clear geographical and temporal limits

47. There are clear geographical limits to the order: it applies only to Shell petrol stations.

48. It is convenient, at this point, to address the question of whether those geographical limits can be justified as being no more than is necessary and proportionate to protect the claimant's interests (so as to ensure compatibility with articles 10 and 11 ECHR – see paragraphs 55-62 below). The only Shell petrol station where acts of conspiracy to injure have occurred so far is on the M25. It is perhaps unsurprising that petrol stations of that profile (large, and on the London orbital motorway) have been targeted. It would be possible to grant an injunction that only applied to the station that has been targeted, but that would leave many other petrol stations vulnerable. The claimant's interests would not be sufficiently protected. It would be possible to fashion an injunction that only targeted certain types of petrol station (for example, those on motorways, or those on trunk roads). Again, that would not properly protect the claimant's interests because there would be plenty of other available targets. It is possible to envisage that the risk at some individual Shell petrol stations is very low, but it is not practical to draft the order in a way that excludes such petrol stations: that would be self-defeating because any excluded station would then be at a heightened risk. I have concluded that the ambit of coverage is justified as being necessary and proportionate to protect the claimant's interests.

49. There is also a clear temporal limit. It will not last for longer than 12 months, without a further order of the court. *Canada Goose*, on one view, might suggest (and at first instance in the cases that led to *Barking and Dagenham* was taken as suggesting) that interim orders should not last for as long as this, that there is an obligation to progress litigation to a final hearing, and that an interim order should only be imposed for so long as is necessary for the case to be progressed to a final hearing. However, the notion that there is a fundamental difference between what can be justified by an interim order, and what can be justified by a final order, was dispelled in *Barking and Dagenham*. In that case, Sir Geoffrey Vos MR made it clear that both interim and final orders should be time-limited, and that it is good practice to provide for a review. Sir Geoffrey Vos MR agreed with the suggestion of Coulson LJ in *Canada Goose* that "persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review." I do not consider it appropriate to grant this interim injunction for longer than a year. But I consider that a year can be justified (bearing in mind the right to apply to vary or set aside at any earlier point). The pattern of protest activity is unpredictable. Providing a much shorter time period might mean that the court will be in no better position then than it is now to predict what is necessary to protect the claimant's interests. Moreover, the period of a year will allow the claimant to progress the litigation so that if continued restraint is necessary after the current order expires the court may have the option of making a final order (albeit, as *Barking and Dagenham* shows, that too will have to be time-limited).

(8) Persons unknown are unidentified but could, in principle, be identified and served

50. Five of those who took part in the protests on 28 April 2022 have been identified. For the reasons explained at paragraph 13 above, the claimant does not seek injunctive relief against them. Others who were involved on 28 April 2022, and others who may undertake such activities in the future, have not been identified. In principle, as and when they take part in such protests, they could be identified and could then be personally served with court documents.

51. In the interim, the issue as to how service should take place was the subject of careful consideration by McGowan J and is reflected in the order that was made on 5 May 2022. That provides on the face of the order that the matter would be considered by the court on 13 May 2022. It also provides that the claimant must send a copy of the order to more than 50 email addresses that are linked with the protest groups. That was done. It also provides that a copy should be made available on the claimant's website "shell.co.uk". Again, that was done. The frontpage of the website contains a link, with the text "Notice of injunction", from which the court documents, including the order of 5 May 2022, can be downloaded. The order also requires that the claimant use all reasonable endeavours to display notices at the entrances of every Shell Petrol station (and also elsewhere within the station) that identify a point of contact from which the order can be requested and identify a website where it can be downloaded. At the time of the hearing, the claimant had done this in respect of well over 50% of Shell petrol stations.

52. As to the future, there is good reason to make slight adjustments to the order that was made by McGowan J. That order was designed only to cover the short period between 5 May 2022 and 13 May 2022. The injunction will (subject to any further order) now remain in place for a longer period of time. It is appropriate therefore to require the claimant not just to take steps to ensure that the notices are displayed at the Shell petrol

stations, but also now to take steps to ensure that those notices remain in place. On the other hand, the order made by McGowan J required a degree of saturation (notices on every entrance to the petrol station, and on every upright steel structure forming part of the canopy infrastructure, and every entrance door to every retail establishment at the petrol station). That was appropriate to ensure initial notification of the existence of the order, but it is logistically difficult to maintain in the long term. It remains necessary for there to be clear notices at every Shell petrol station that draw attention to the injunction, but I do not consider that it remains necessary for these to be displayed on every single upright steel structure. It is also possible to make the order a little more flexible. That will ensure that notices are clearly visible but that the precise mechanism by which this is done can be tailored to the circumstances of individual petrol stations. I will adjust the order accordingly. This means that it is practically unlikely that a defendant could embark on conduct that would be in breach of the injunction without knowing of its existence.

53. By these means I am satisfied that effective service on the defendants can continue to take place.

(9) Persons unknown are identified by reference to their conduct

54. The persons unknown are described in the claim form, and in the injunction, in the way set out in the heading to this judgment. That description is in clear and simple language and relates to their conduct. It is usually desirable that such descriptions should, so far as possible, be based on objective conduct rather than subjective intention. The description that has been used does that. There is an element of subjective intention ("with the intention of disrupting the sale or supply of fuel to or from the said station") but (as with the terms of the injunction) that is unavoidable because of the nature of the tort of conspiracy to injure.

(10) Is the injunction necessary for and proportionate to the need to protect the claimant's rights?

55. The injunction interferes with the defendants' rights to assemble and express their opposition to the fossil fuel industry.

56. Unless such interference can be justified, it is incompatible with the defendants' rights under articles 10 and 11 ECHR and may not therefore be granted (see sections 1 and 6 of the Human Rights Act 1998). Articles 10 and 11 ECHR are not absolute rights. Interferences with those rights can be justified where they are necessary and proportionate to the need to protect the claimant's rights: articles 10(2) and 11(2) ECHR. Proportionality is assessed by considering if (i) the aim is sufficiently important to justify interference with a fundamental right, (ii) there is a rational connection between the means chosen and the aim in view, (iii) there is no less intrusive measure which could achieve that aim, and (iv) a fair balance has been struck between the rights of the defendants and the general interest of the community, including the rights of others: *DPP v Ziegler* [2021] UKSC 23 [2022] AC 408 *per* Lord Sales JSC at [125].

57. Here, the aim is to protect the claimant's right to carry on its business. On the other hand, the defendants are motivated by matters of the greatest importance. The defendants might say that there is an overwhelming global scientific consensus that the business in which the claimant is engaged is contributing to the climate crisis and is

thereby putting the world at risk, and that the claimant's interests pale into insignificance by comparison. This is not, however, "a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important" – *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039 *per* Lord Neuberger at [41]. It is not for the court, on this application, to adjudicate on the important underlying political and policy issues raised by these protests. It is for Parliament to determine whether legal restrictions should be imposed on the trade in fossil fuels. That is why the defendants' actions are directed at securing a change in Government policy. The claimant is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference. Those rights are prescribed by law and their enforcement is necessary in a democratic society. The aim of the injunction is therefore sufficiently important to justify interferences with the defendants' rights of assembly and expression: cf *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 *per* Morgan J at [105] and *Cuadrilla per* Leggatt LJ at [45] and [50].

58. There is a rational connection between the terms of the injunction and the aim that it seeks to achieve. As explained at paragraphs 43-44 above, the terms are constructed so as only to prohibit activity that would amount to the tort of conspiracy to injure. That also means that the terms are no more intrusive than necessary to achieve the aim of the injunction. For the reasons given above (at paragraphs 47-49) the territorial and temporal provisions within the injunction are no more than is necessary to achieve its aim.

59. The injunction also strikes a fair balance between the important rights of the defendants to assembly and expression, and the rights of the claimant. It protects the latter so far as it is necessary to do so, but no further. It does not remove the rights of the defendants to assemble and express their opposition to the fossil fuel industry. It does not prevent them from expressing their views (including in a way that is noisy and/or otherwise disruptive) in close proximity to places where that industry takes place (including Shell petrol stations). It does not therefore prevent activities that are "at the core of these Convention rights" or which form "the essence" of such rights – see *DPP v Cuciurean* [2022] EWHC 736 *per* Lord Burnet of Maldon CJ at [31], [36] and [46]. Although the defendants' activities come within the scope of articles 10 and 11, they are right at the margin of what is protected.

60. All that is prohibited is specified deliberate tortious conduct (in one sense deliberate doubly tortious conduct, because of the nature of conspiracy to injure) that is carried out as part of an agreement and with the intention of harming the claimant's lawful business interests. It would not strike a fair balance between the competing rights simply to leave matters to the police to enforce the criminal law. Such enforcement could only, practicably, take place after the event, meaning that loss to the claimant is inevitable. Moreover, some of the activities that the injunction seeks to restrain are not breaches of the criminal law and could not be enforced by the exercise of conventional policing functions.

61. In *Cuadrilla* Leggatt LJ said (at [94]-[95]):

> "… the disruption caused was not a side-effect of protest held in a public place but was an intended aim of the protest... this is an important distinction. …intentional disruption of activities of

> others is not "at the core" of the freedom protected by article 11 of the Convention …. one reason for this [is] that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others… …persuasion is very different from attempting (through physical obstruction or similar conduct) to *compel* others to act in a way you desire.
>
> Where… individuals not only resort to compulsion to try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect their conscientious motives will insulate them from the sanction of imprisonment." [original emphasis]

62. The context was different (the case was concerned with an appeal against an order for committal), but the same essential distinction applies to the fair balance question. Here, the injunction restrains protests which have as their aim (rather than as a side-effect) intentional unlawful interference with the claimant's activities.

(11) Notification of defendants

63. Section 12(2) of the Human Rights Act 1998 (see paragraph 24 above) requires that the claimant has taken all practical steps to notify the defendants of its application, or else that there are compelling reasons not to notify the defendants.

64. The identity of the defendants is unknown. It was thus impossible to serve them personally with the application. As explained at paragraph 51 above, McGowan J made extensive directions in respect of the service of the injunction (which contains details of the return date).

65. By these means, I am satisfied that the claimant has taken all practical steps to notify the defendants of its application (and I note that Mrs Friel was aware of the application, because she attended the hearing).

(12) Does the order restrain "publication"?

66. The injunction affects the exercise of the Convention right to freedom of expression. Section 12(3) of the Human Rights Act 1998 (see paragraph 24 above) provides that "[n]o such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

67. Nothing in the injunction explicitly restrains publication of anything. Nor does it have that effect. The defendants can publish anything they wish without breaching the injunction. The activities that the injunction restrains do not include publication. It does not, for example, restrain the publication of photographs and videos of the protests that have already taken place. Nor does it prevent anyone from, for example, chanting anything, or from displaying any message on any placard or from placing any material on any website or social media site.

68. Lord Nicholls explained the origin of section 12(3) in *Cream Holdings Limited v Banerjee* [2004] UKHL 44 [2005] 1 AC 253 (at [15]). There was concern that the

incorporation of article 8 ECHR into domestic law might result in the courts readily granting interim applications to restrain the publication by newspapers (or others) of material that interferes with privacy rights. Parliament enacted section 12(3) to address that concern, by setting a high threshold for the grant of an interim injunction in such a case. It codifies the prior restraint principle that previously operated at common law. The policy motivation that gave rise to section 12(3) has no application here.

69. The word "publication" does not have an unduly narrow meaning so as to apply only to commercial publications: "publication does not mean commercial publication, but communication to a reader or hearer other than the claimant" – *Lachaux v Independent Print Limited* [2019] UKSC 27 [2020] AC 612 *per* Lord Sumption at [18]. Lord Sumption's observation was made in the context of defamation, but Parliament legislated against this well-established backdrop. Section 12(3) should be applied accordingly so that "publication" covers "any form of communication": *Birmingham City Council v Asfar* [2019] EWHC 1560 (QB) *per* Warby J at [60].

70. The meaning set out by Lord Sumption in *Lachaux* is sufficient to achieve the underlying policy intention. There is therefore no good reason for giving the word "publication" an artificially broad meaning so as to cover (for example) demonstrative acts of trespass in the course of a protest. Such acts are intended to publicise the protestor's views, but they do not amount to a publication.

71. Further, the wording of section 12 itself indicates that the word "publication" has a narrower reach than the term "freedom of expression". That is because the term "freedom of expression" is expressly used in the side-heading to section 12, and in section 12(1), and is used (by reference ("no such relief")) in section 12(2) and section 12(3). The term "publication" is then used in section 12(3) to signify one form of expression. If Parliament had intended section 12(3) to apply to all forms of expression, then there would have been no need to introduce the word "publication".

72. I therefore respectfully agree with the observation of Lavender J in *National Highways Limited v Persons Unknown* [2021] EWHC 3081 (QB) at [41] that section 12(3) is "not applicable" in this context.

73. It is, though, necessary to address the decisions in *Ineos Upstream v Persons Unknown* [2017] EWHC 2945. That case concerned an injunction that appears to have been similar in scope to the injunction in the present case. At first instance, Morgan J held (a) that section 12(3) applied (at [86]) and (b) the statutory test was satisfied because if the court accepted the evidence put forward by the claimants, then it would be likely, at trial, to grant a final injunction (at [98] and [105]). As to the applicability of section 12(3), Morgan J found the injunction that he was considering might affect the exercise of the right to freedom of expression. That was plainly correct, because the injunction restrained activities that were intended to express support for a particular cause. It does not, however, necessarily follow that section 12(3) is engaged (because, as above, "publication" is not the same as "expression"). There does not appear to have been any argument on that point – rather the focus was on the question of whether there was an interference with the right to freedom of expression. To the extent that Morgan J in *Ineos* and Lavender J in *National Highways* reached different conclusions about the applicability of section 12(3) in this context, I respectfully adopt the latter's approach for the reasons I have given.

74. On appeal ([2019] EWCA Civ 515 [2019] 4 WLR 100), there was no challenge to the holding of Morgan J that section 12(3) applies. The Court of Appeal did not therefore consider or rule on that question. It did not need to do so because it was not in issue. The only issue in relation to section 12(3) was whether (on the assumed basis that it applied) the judge was wrong to approach the statutory test without subjecting the claimants' evidence to critical scrutiny. In that respect, the court accepted the "submissions of principle" and remitted the case for the judge to reconsider "whether interim relief should be granted in the light of section 12(3) HRA."

75. The Court of Appeal decision in *Ineos* is authority for the approach that should be taken where section 12(3) applies, but (because it was assumed rather than determined that section 12(3) applied) I do not consider that it is authority that section 12(3) applies in the circumstances of the present case: *Re Hetherington* [1990] Ch 1 *per* Sir Nicholas Lord Browne Wilkinson VC at 10, *R (Khadim) v Brent London Borough Council Housing Benefit Review Board* [2001] QB 955 *per* Buxton LJ at [33] and [38].

76. *Ineos* does not therefore determine that section 12(3) applies to a case such as the present where there is no question of restraining the defendants from publishing anything. *Ineos* does not mandate a finding in this case that section 12(3) applies. I have concluded that section 12(3) does not apply. If I am wrong, then I have, anyway, found that the claimant is likely to succeed at a final trial (see paragraph 32 above).

Outcome

77. The claimant succeeds in securing the continuation of the order made by McGowan J so as to restrain, for a period of up to a year, at any Shell petrol station, the specified acts of the defendants (set out at paragraph 20 above) that amount to a conspiracy to injure the claimant.

Neutral Citation Number: [2022] EWCA Civ 13

Appeal Nos. See Appendix 1 to [2021] EWHC 1201 (QB)
Case Nos: See Appendix 1 to [2021] EWHC 1201 (QB)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Nicklin
[2021] EWHC 1201 (QB)

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 13/01/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LADY JUSTICE ELISABETH LAING

BETWEEN:

(1) London Borough of Barking and Dagenham
(2) Other Local Authorities (listed in Appendix 1 at [2021] EWHC 1201 (QB))

Claimants/Appellants

-and –

(1) Persons Unknown
(2) Other named Defendants (listed in Appendix 1 at [2021] EWHC 1201 (QB))

Defendants/Respondents

-and -

(1) London Gypsies and Travellers
(2) Friends, Families and Travellers
(3) Derbyshire Gypsy Liaison Group

(4) High Speed Two (HS2) Limited
(5) Basildon Borough Council

Interveners

Caroline Bolton and Natalie Pratt (instructed by **Sharpe Pritchard LLP and LB Barking & Dagenham Legal Services**) for the **1st, 6th, 11th, 16th, 26th, 28th, 33rd and 34th claimants** (London Borough of Barking and Dagenham, London Borough of Havering, London Borough of Redbridge, Basingstoke and Deane Borough Council and Hampshire County Council, Nuneaton and Bedworth Borough Council and Warwickshire County Council, Rochdale Metropolitan Borough Council, Test Valley Borough Council, and Thurrock Council)

Ranjit Bhose QC and Steven Woolf (instructed by **South London Legal Partnership**) for the **7th and 12th claimants** (London Borough of Hillingdon, and London Borough of Richmond-Upon-Thames)

Nigel Giffin QC and Simon Birks (instructed by **Walsall Metropolitan Borough Council Legal Services**) for the **35th claimant** (Walsall Metropolitan Borough Council)

Mark Anderson QC and Michelle Caney (instructed by **Wolverhampton City Council Legal Services**) for the **36th claimant** (Wolverhampton County Council)

Marc Willers QC, Tessa Buchanan and Owen Greenhall (instructed by **Community Law Partnership**) for the **first three interveners** (London Gypsies and Travellers, Friends, Families and Travellers, and Derbyshire Gypsy Liaison Group)

Richard Kimblin QC (instructed by **Eversheds Sutherland (International) LLP**) for the **4th intervener** (HS2)

Wayne Beglan (instructed by **Basildon Borough Council Legal Services**) for the **5th intervener** (Basildon Borough Council) (making written submissions only)

Tristan Jones (instructed by **the Attorney General**) as **Advocate to the Court**

Hearing dates: 30 November and 1 and 2 December 2021

- -

JUDGMENT

"Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.
The date and time for hand-down is deemed to be 10:30am, Thursday 13 January 2022."

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. This case arises in the context of a number of cases in which local authorities have sought interim and sometimes then final injunctions against unidentified and unknown persons who may in the future set up unauthorised encampments on local authority land. These persons have been collectively described in submissions as "newcomers". Mr Marc Willers QC, leading counsel for the first three interveners, explained that the persons concerned fall mainly into three categories, who would describe themselves as Romani Gypsies, Irish Travellers and New Travellers.

2. The central question in this appeal is whether the judge was right to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (i.e. newcomers), from occupying and trespassing on local authority land. The judge, Mr Justice Nicklin, held that this was the effect of a series of decisions, particularly this court's decision in *Canada Goose UK Retail Ltd. v. Persons Unknown and another* [2020] EWCA Civ 202, [2020] 1 WLR 2802 (*Canada Goose*) and the Supreme Court's decision in *Cameron v. Liverpool Victoria Insurance Co Ltd (Motor Insurers' Bureau Intervening)* [2019] UKSC 6, [2019] 1 WLR 1471 (*Cameron*). The judge said that, whilst interim injunctions could be made against persons unknown, final injunctions could only be made against parties who had been identified and had had an opportunity to contest the final order sought.

3. The 15 local authorities that are parties to the appeals before the court contend that the judge was wrong,[1] and that, even if that is what the Court of Appeal said in *Canada Goose*, its decision on that point was not part of its essential reasoning, distinguishable on the basis that it applied only to so-called protester injunctions, and, in any event, should not be followed because (a) it was based on a misunderstanding of the essential decision in *Cameron*, and (b) was decided without proper regard to three earlier Court of Appeal decisions in *South Cambridgeshire District Council v. Gammell* [2006] 1 WLR 658 (*Gammell*), *Ineos Upstream Ltd v. Persons Unknown and others* [2019] EWCA Civ 515, [2019] 4 WLR 100 (*Ineos*), and *Bromley London Borough Council v Persons Unknown* [2020] EWCA Civ 12, [2020] PTSR 1043 (*Bromley*).

4. The case also raises a secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court. In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

5. In addition, there are subsidiary questions as to whether (a) the statutory jurisdiction to make orders against persons unknown under section 187B of the Town and Country Planning Act 1990 (section 187B) to restrain an actual or apprehended breach of

[1] There were 38 local authorities before the judge.

planning control validates the orders made, and (b) the court may in any circumstances like those in the present case make final orders against all the world.

6. I shall first set out the essential factual and procedural background to these claims, then summarise the main authorities that preceded the judge's decision, before identifying the judge's main reasoning, and finally dealing with the issues I have identified.

7. I have concluded that: (i) the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order, from occupying and trespassing on land, and (ii) the procedure adopted by the judge was unorthodox. It was unusual insofar as it sought to call in final orders of the court for revision in the light of subsequent legal developments, but has nonetheless enabled a comprehensive review of the law applicable in an important field. Since most of the orders provided for review and nobody objected to the process at the time, there is now no need for further action. (iii) Section 37 of the Senior Courts Act 1981 (section 37) and section 187B impose the same procedural limitations on applications for injunctions of this kind. (iv) Whilst it is the court's proper function to give procedural guidelines, the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

8. This area of law and practice has been bedevilled by the use of Latin tags. That usage is particularly inappropriate in an area where it is important that members of the public can understand the courts' decisions. I have tried to exclude Latin from this judgment, and would urge other courts to use plain language in its place.

The essential factual and procedural background

9. There were 5 groups of local authorities before the court, although the details are not material. The first group was led by Walsall Metropolitan Borough Council (Walsall), represented by Mr Nigel Giffin QC. The second group was led by Wolverhampton City Council (Wolverhampton), represented by Mr Mark Anderson QC. The third group was led by the London Borough of Hillingdon (Hillingdon), represented by Mr Ranjit Bhose QC. The fourth and fifth groups were led respectively by the London Borough of Barking and Dagenham (Barking) and the London Borough of Havering (Havering), represented by Ms Caroline Bolton. The cases in the groups led by Walsall, Wolverhampton, and Barking related to final injunctions, and those led by Hillingdon and Havering related to interim injunctions.

10. The injunctions granted in each of the cases were in various forms broadly described in the detailed Appendix 1 to the judge's judgment. Some of the final injunctions provided for review of the orders to be made by the court either annually or at other stages. Most, if not all, of the injunctions allowed permission for anyone affected by the order, including persons unknown, to apply to vary or discharge them.

11. It is important to note at the outset that these claims were all started under the procedure laid down by CPR Part 8, which is appropriate where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact (CPR 8.1(2)(a)). Whilst CPR 8.2A(1) contemplates a practice direction setting out circumstances in which a claim form may be issued under Part 8 without naming a defendant, no such practice direction has been made (see *Cameron* at [9]). Moreover, CPR 8.9 makes clear that, where the Part 8 procedure is followed, the defendant is not

required to file a defence, so that several other familiar provisions of the CPR do not apply and any time limit preventing parties taking a step before defence also does not apply. A default judgment cannot be obtained in Part 8 cases (CPR 8.1(5)). Nonetheless, CPR 70.4 provides that a judgment or order against "a person who is not a party to proceedings" may be enforced "against that person by the same methods as if he were a party".

12. These proceedings seem to have their origins from 2 October 2020 when Nicklin J dealt with an application in the case of *London Borough of Enfield v. Persons Unknown* [2020] EWHC 2717 (QB) (*Enfield*), and raised with counsel the issues created by *Canada Goose*. Nicklin J told the parties that he had spoken to the President of the Queen's Bench Division (the PQBD) about there being a "group of local authorities who already have these injunctions and who, therefore, may following the decision today, be intending or considering whether they ought to restore the injunctions in their cases to the Court for reconsideration". He reported that the PQBD's current view was that she would direct that those claims be brought together to be managed centrally. In his judgment in *Enfield*, Nicklin J said that "the legal landscape that [governed] proceedings and injunctions against Persons Unknown [had] transformed since the Interim and Final Orders were granted in this case", referring to *Cameron*, *Ineos*, *Bromley*, *Cuadrilla Bowland Ltd v. Persons Unknown* [2020] 4 WLR 29 (*Cuadrilla*), and *Canada Goose*.

13. Nicklin J concluded at [32] in *Enfield* that, in the light of the decision in *Speedier Logistics v. Aadvark Digital* [2012] EWHC 2276 (Comm) (*Speedier*), there was "a duty on a party, such as the Claimant in this case who (i) has obtained an injunction against Persons Unknown without notice, and (ii) is aware of a material change of circumstances, including for these purposes a change in the law, which gives rise to a real prospect that the court would amend or discharge the injunction, to restore the case within a reasonable period to the court for reconsideration". He said that duty was not limited to public authorities.

14. At [42]-[44], Nicklin J said that *Canada Goose* established that final injunctions against persons unknown did not bind newcomers, so that any "interim injunction the Court granted would be more effective and more extensive in its terms than any final order the court could grant". That raised the question of whether the court ought to grant any interim relief at all. The only way that Enfield could achieve what it sought was "to have a rolling programme of applications for interim orders", resulting in "litigation without end".

15. On 16 October 2020, Nicklin J made an order expressed to be with the concurrence of the PQBD and the judge in charge of the Queen's Bench Division Civil List. That order (the 16 October order) recited the orders that had been made in *Enfield,* and that it appeared that injunctions in similar terms might have been made in 37 scheduled sets of proceedings, and that similar issues might arise. Accordingly, Nicklin J ordered without a hearing and of the court's own motion, that, by 13 November 2020, each claimant in the scheduled actions must file a completed and signed questionnaire in the form set out in schedule 2 to the order. The 16 October order also made provision for those claimants who might want, having considered *Bromley* and *Canada Goose*, to discontinue or apply to vary or discharge the orders they had obtained in their cases. The 16 October order stated that the court's first objective was to "identify those local authorities with existing Traveller Injunctions who [wished] to maintain such

injunctions (possibly with modification), and those who [wished] to discontinue their claims and/or discharge the current Traveller Injunction granted in their favour".

16. Mr Giffin and Mr Anderson emphasised to us that they had not objected to the order the court had made. The 16 October order does, nonetheless, seem to me to be unusual in that it purports to call in actions in which final orders have been made suggesting, at least, that those final orders might need to be discharged in the light of a change in the law since the cases in question concluded. Moreover, Mr Anderson expressed his client's reservations about one judge expressing "deep concern" over the order that had been made in favour of Wolverhampton by 3 other judges. By way of example, Jefford J had said in her judgment on 2 October 2018 that she was satisfied, following the principles in *Bloomsbury Publishing Group Ltd v. News Group Newspapers Ltd* [2003] EWHC 1205, [2003] 1 WLR 1633 (*Bloomsbury*) and *South Cambridgeshire District Council v. Persons Unknown* [2004] EWCA Civ 1280 (*South Cambridgeshire*), that it was appropriate for the application to be made against persons unknown.

17. The 16 October order and the completion of questionnaires by numerous local authorities resulted in the rolled-up hearing before Nicklin J on 27 and 28 January 2021, in respect of which he delivered judgment on 12 May 2021. As a result, the judge made a number of orders discharging the injunctions that the local authorities had obtained and giving consequential directions.

18. Nicklin J concluded his judgment by explaining the consequences of what he had decided, in summary, as follows:

    i) Claims against persons unknown should be subject to stated safeguards.

    ii) Precautionary interim injunctions would only be granted if the applicant demonstrated, by evidence, that there was a sufficiently real and imminent risk of a tort being committed by the respondents.

    iii) If an interim injunction were granted, the court in its order should fix a date for a further hearing suggested to be not more than one month from the interim order.

    iv) The claimant at the further hearing should provide evidence of the efforts made to identify the persons unknown and make any application to amend the claim form to add named defendants.

    v) The court should give directions requiring the claimant, within a defined period: (a) if the persons unknown have not been identified sufficiently that they fall within Category 1 persons unknown,[2] to apply to discharge the interim injunction against persons unknown and discontinue the claim under CPR 38.2(2)(a), (b) otherwise, as against the Category 1 persons unknown defendants, to apply for (i) default judgment;[3] or (ii) summary judgment; or (iii) a date to be fixed for the final hearing of the claim, and, in default of compliance,

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[2] This was a reference to the two categories set out by Lord Sumption at [13] in *Cameron*, as to which see [35] below.

[3] As I have noted above, default judgment is not available in Part 8 cases.

that the claim be struck out and the interim injunction against persons unknown discharged.

vi) Final orders must not be drafted in terms that would capture newcomers.

19. I will return to the issues raised by the procedure the judge adopted when I deal with the second issue before this court raised by Ms Bolton.

The main authorities preceding the judge's decision

20. It is useful to consider these authorities in chronological order, since, as the judge rightly said in *Enfield*, the legal landscape in proceedings against persons unknown seems to have transformed since the injunction was granted in that case in mid-2017, only 4½ years ago.

Bloomsbury: judgment 23 May 2003

21. The persons unknown in *Bloomsbury* had possession of and had made offers to sell unauthorised copies of an unpublished Harry Potter book. Sir Andrew Morritt VC continued orders against the named parties for the limited period until the book would be published, and considered the law concerning making orders against unidentified persons. He concluded that an unknown person could be sued, provided that the description used was sufficiently certain to identify those who were included and those who were not. The description in that case [4] described the defendants' conduct and was held to be sufficient to identify them [16]-[21]. Sir Andrew was assisted by an advocate to the court. He said that the cases decided under the Rules of the Supreme Court did not apply under the Civil Procedure Rules: "the overriding objective and the obligations cast on the court are inconsistent with an undue reliance on form over substance" [19]. Whilst the persons unknown against whom the injunction was granted were in existence at the date of the order and not newcomers in the strict sense, this does not seem to me to be a distinction of any importance. The order he made was also not, in form, a final order made at a hearing attended by the unknown persons or after they had been served, but that too, as it seems to me, is not a distinction of any importance, since the injunction granted was final and binding on those unidentified persons for the relevant period leading up to publication of the book.

Hampshire Waste Services Ltd v. Intending Trespassers Upon Chineham Incinerator Site [2003] EWHC 1738, [2004] Env. L. R. 9 (*Hampshire Waste*): judgment 8 July 2003

22. *Hampshire Waste* was a protester case, in which Sir Andrew Morritt VC granted a without notice injunction against unidentified "[p]ersons entering or remaining without the consent of the claimants, or any of them, on any of the incinerator sites … in connection with the 'Global Day of Action Against Incinerators'". Sir Andrew accepted at [6]-[10] that, subject to two points on the way the unknown persons were described, the position was in essence the same as in *Bloomsbury*. The unknown persons had not been served and there was no argument about whether the order bound newcomers as well as those already threatening to protest.

South Cambridgeshire: judgment 17 September 2004

23. In *South Cambridgeshire*, the Court of Appeal (Brooke and Clarke LJJ) granted a without notice interim injunction against persons unknown causing or permitting hardcore to be deposited, or caravans being stationed, on certain land, under section 187B.

24. At [8]-[11], Brooke LJ said that he was satisfied that section 187B gave the court the power to "make an order of the type sought by the claimants". He explained that the "difficulty in times gone by against obtaining relief against persons unknown" had been remedied either by statute or by rule, citing recent examples of the power to grant such relief in different contexts in *Bloomsbury* and *Hampshire Waste*.

Gammell: judgment 31 October 2005

25. In *Gammell*, two injunctions had been granted against persons unknown under section 187B. The first (in *South Cambridgeshire*) was an interim order granted by the Court of Appeal restraining the occupation of vacant plots of land. The second (in *Bromley London Borough Council v. Maughan*) (*Maughan*) was an order made until further order restraining the stationing of caravans. In both cases, newcomers who violated the injunctions were committed for contempt, and the appeals were dismissed.

26. Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) said that the issue was whether and in what circumstances the approach of the House of Lords in *South Bucks District Council v. Porter* [2003] UKHL 26, [2003] 2 AC 557 (*Porter*) applied to cases where injunctions were granted against newcomers [6]. He explained that, in *Porter*, section 187B injunctions had been granted against unauthorised development of land owned by named defendants, and the House was considering whether there had been a failure to consider the likely effect of the orders on the defendants' Convention rights in accordance with section 6(1) of the Human Rights Act 1998 (the 1998 Act) and the European Convention on Human Rights and Fundamental Freedoms (the Convention).

27. Sir Anthony noted at [10] that in *Porter*, the defendants were in occupation of caravans in breach of planning law when the injunctions were granted. The House had (Lord Bingham at [20]) approved [38]-[42] of Simon Brown LJ's judgment, which suggested that injunctive relief was always discretionary and ought to be proportionate. That meant that it needed to be: "appropriate and necessary for the attainment of the public interest objective sought - here the safeguarding of the environment - but also that it does not impose an excessive burden on the individual whose private interests - here the gipsy's private life and home and the retention of his ethnic identity - are at stake". He cited what Auld LJ (with whom Arden and Jacob LJJ had agreed) had said in *Davis v. Tonbridge & Malling Borough Council* [2004] EWCA Civ 194 (*Davis*) at [34] to the additional effect that it was "questionable whether Article 8 adds anything to the existing equitable duty of a court in the exercise of its discretion under section 187B", and that the jurisdiction was to be exercised with due regard to the purpose for which it was conferred, namely to restrain breaches of planning control. Auld LJ at [37] in *Davis* had explained that *Porter* recognised two stages: first, to look at the planning merits of the matter, according respect to the authority's conclusions, and secondly to consider for itself, in the light of the planning merits and any other circumstances, in particular those of the defendant, whether to grant injunctive relief. The question, as Sir Anthony saw it in *Gammell*, was whether those principles applied to the cases in question [12].

28. At [28]-[29], Sir Anthony held, as a matter of essential decision, that the balancing exercise required in *Porter* did not apply, either directly or by analogy, to cases where the defendant was a newcomer. In such cases, Sir Anthony held at [30]-[31] that the court would have regard to statements in *Mid-Bedfordshire District Council v. Brown* [2004] EWCA Civ 1709, [2005] 1 WLR 1460 (*Brown*) (Lord Phillips MR, Mummery and Jonathan Parker LJJ) as to cases in which defendants occupy or continue to occupy land without planning permission and in disobedience of orders of the court. The principles in *Porter* did not apply to an application to add newcomers (such as the defendants in *Gammell* and *Maughan*) as defendants to the action. It was, in that specific context, that Sir Anthony said what is so often cited at [32] in *Gammell*, namely:

> In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Thus in the case of [Ms Maughan] she became a person to whom the injunction was addressed and a defendant when she caused her three caravans to be stationed on the land on 20 September 2004. In the case of [Ms Gammell] she became both a person to whom the injunction was addressed and the defendant when she caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later.

29. In dismissing the appeals against the findings of contempt, Sir Anthony summarised the position at [33] including the following: (i) *Porter* applied when the court was considering granting an injunction against named defendants. (ii) *Porter* did not apply in full when a court was considering an injunction against persons unknown because the relevant personal information was, *ex hypothesi*, unavailable. That fact made it "important for courts only to grant such injunctions in cases where it was not possible for the applicant to identify the persons concerned or likely to be concerned". (iii) In deciding a newcomer's application to vary or discharge an injunction against persons unknown, the court will take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, applying the *Porter* and *Brown* principles.

30. These holdings were, in my judgment, essential to the decision in *Gammell*. It was submitted that the local authority had to apply to join the newcomers as defendants, and that when the court considered whether to do so, the court had to undertake the *Porter* balancing exercise. The Court of Appeal 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. In such cases, the newcomers automatically became parties by their violation, and the *Porter* exercise was irrelevant. As a result, it was irrelevant also to the question of whether the newcomers were in contempt.

31. There is nothing in *Gammell* to suggest that any part of its reasoning depended on whether the injunctions had been granted on an interim or final basis. Indeed, it was essential to the reasoning that such injunctions, whether interim or final, applied in their full force to newcomers with knowledge of them. It may also be noted that there was nothing in the decision to suggest that it applied only to injunctions granted specifically under section 187B, as opposed to cases where the claim was brought to restrain the commission of a tort.

Secretary of State for the Environment, Food and Rural Affairs v. Meier [2009] UKSC 11, [2009] 1 WLR 2780 (*Meier*): judgment 1 December 2009

32. In *Meier*, the Forestry Commission sought an injunction against travellers who had set up an unauthorised encampment. The injunction was granted by the Court of Appeal against "those people trespassing on, living on, or occupying the land known as Hethfelton Wood". The case did not, therefore, concern newcomers. Nonetheless, Lord Rodger made some general comments at [1]-[2] which are of some relevance to this case. He referred to the situation where the identities of trespassers were not known, and approved the way in which Sir Andrew Morritt VC had overcome the procedural problems in *Bloomsbury* and *Hampshire Waste*. Referring to *South Cambridgeshire*, he cited with approval Brooke LJ's statement that "[t]here was some difficulty in times gone by against obtaining relief against persons unknown, but over the years that problem has been remedied either by statute or by rule".[4]

Cameron: judgment 20 February 2019

33. In *Cameron*, an injured motorist applied to amend her claim to join "[t]he person unknown driving [the other vehicle] who collided with [the claimant's vehicle] on [the date of the collision]". The Court of Appeal granted the application, but the Supreme Court unanimously allowed the appeal.

34. Lord Sumption said at [1] that the question in the case was in what circumstances it was permissible to sue an unnamed defendant. Lord Sumption said at [11] that, since *Bloomsbury*, the jurisdiction had been regularly invoked in relation to abuse of the internet, trespasses and other torts committed by protesters, demonstrators and paparazzi. He said that in some of the cases, proceedings against persons unknown were allowed in support of an application for precautionary injunctions, where the defendants could only be identified as those persons who might in future commit the relevant acts. It was that body of case law that the majority of the Court of Appeal (Gloster and Lloyd-Jones LJJ) had followed in deciding that an action was permissible against the unknown driver who injured Ms Cameron. He said that it was "the first occasion on which the basis and extent of the jurisdiction [had] been considered by the Supreme Court or the House of Lords".

35. After commenting at [12] that the CPR neither expressly authorised nor expressly prohibited exceptions to the general rule that actions against unnamed parties were permissible only against trespassers (see CPR Part 55.3(4), which in fact only refers to possession claims against trespassers), Lord Sumption distinguished at [13] between two kinds of case in which the defendant cannot be named: (i) anonymous defendants who are identifiable but whose names are unknown (e.g. squatters), and (ii) defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction was that those in the first category were described in a way that made it possible in principle to locate or communicate with them, whereas in the second category it was not. It is to be noted that Lord Sumption did not mention a third category of newcomers.

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4 Lord Rodger noted also the discussion of such injunctions in Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" (2007) 66 CLJ 605-624.

36. At [14], Lord Sumption said that the legitimacy of issuing or amending a claim form so as to sue an unnamed defendant could properly be tested by asking whether it was conceptually possible to serve it: the general rule was that service of originating process was the act by which the defendant was subjected to the court's jurisdiction: *Barton v. Wright Hassall LLP* [2018] 1 WLR 1119 at [8]. The court was seised of an action for the purposes of the Brussels Convention when the proceedings were served (as much under the CPR as the preceding Rules of the Supreme Court): *Dresser UK Ltd v. Falcongate Freight Management Ltd* [1992] QB 502 per Bingham LJ at page 523. An identifiable but anonymous defendant could be served with the claim form, if necessary, by alternative service under CPR 6.15, which was why proceedings against anonymous trespassers under CPR 55.3(4) had to be effected in accordance with CPR 55.6 by placing them in a prominent place on the land. In *Bloomsbury*, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. Lord Sumption then referred to *Gammell* as being a case where the Court of Appeal had held that, when proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts. It does not seem that he disapproved of that decision, since he followed up by saying that "[i]n the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis".

37. Accordingly, pausing there, Lord Sumption 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. Although Lord Sumption mentioned that the *Gammell* injunction was "interim", nothing he said places any importance on that fact, since his concern was service, rather than the interim or final nature of the order that the court was considering.

38. Lord Sumption proceeded to explain at [16] that one did not identify unknown persons by referring to something they had done in the past, because it did not enable anyone to know whether any particular persons were the ones referred to. Moreover, service on a person so identified was impossible. It was not enough that the wrongdoers themselves knew who they were. It was that specific problem that Lord Sumption said at [17] was more serious than the recent decisions of the courts had recognised. It was a fundamental principle of justice that a person could not be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard.[5]

39. Pausing once again, 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

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5 See *Jacobson v. Frachon* (1927) 138 LT 386 per Atkin LJ at page 392 (*Jacobson*).

proceedings and of the orders made, and made themselves parties to the proceedings by violating those orders (see [32] in *Gammell*).

40. At [19], Lord Sumption explained why the treatment of the principle that a person could not be made subject to the jurisdiction of the court without having notice of the proceedings had been "neither consistent nor satisfactory". He referred to a series of cases about road accidents, before remarking that CPR 6.3 and 6.15 considerably broadened the permissible modes of service, but that the object of all the permitted modes of service was to enable the court to be satisfied that the method used either had put the recipient in a position to ascertain its contents or was reasonably likely to enable him to do so. He commented that the Court of Appeal in *Cameron* appeared to "have had no regard to these principles in ordering alternative service of the insurer". On that basis, Lord Sumption decided at [21] that, subject to any statutory provision to the contrary, it was an essential requirement for any form of alternative service that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant. The Court of Appeal had been wrong to say that service need not be such as to bring the proceedings to the defendant's attention. At [25], Lord Sumption commented that the power in CPR 6.16 to dispense with service of a claim form in exceptional circumstances had, in general, been used to escape the consequences of a procedural mishap. He found it hard to envisage circumstances in which it would be right to dispense with service in circumstances where there was no reason to believe that the defendant was aware that proceedings had been or were likely to be brought. He concluded at [26] that the anonymous unidentified driver in *Cameron* could not be sued under a pseudonym or description, unless the circumstances were such that the service of the claim form could be effected or properly dispensed with.

Ineos: judgment 3 April 2019

41. *Ineos* was argued just 2 weeks after the Supreme Court's decision in *Cameron*. The claimant companies undertook fracking, and obtained interim injunctions restraining unlawful protesting activities such as trespass and nuisance against persons unknown including those entering or remaining without consent on the claimants' land. One of the grounds of appeal raised the issue of whether the judge had been right to grant the injunctions against persons unknown (including, of course, newcomers).

42. Longmore LJ (with whom both David Richards and Leggatt LJJ agreed) first noted that *Bloomsbury* and *Hampshire Waste* had been referred to without disapproval in *Meier*. Having cited *Gammell* in detail, Longmore LJ recorded that Ms Stephanie Harrison QC, counsel for one of the unknown persons (who had been identified for the purposes of the appeal), had submitted that the enforcement against persons unknown was unacceptable because they "had no opportunity, before the injunction was granted, to submit that no order should be made" on the basis of their Convention rights. Longmore LJ then explained *Cameron*, upon which Ms Harrison had relied, before recording that she had submitted that Lord Sumption's two categories of unnamed or unknown defendants at [13] in *Cameron* were exclusive and that the defendants in *Ineos* did not fall within them.

43. Longmore LJ rejected that argument on the basis that it was "too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued". Nobody had suggested that *Bloomsbury* and *Hampshire Waste* were wrongly decided. Instead, she submitted that there was a distinction between

injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. Longmore LJ rejected that submission too at [29]-[30], holding that Lord Sumption's two categories were not considering persons who did not exist at all and would only come into existence in the future (referring to [11] in *Cameron*). Lord Sumption had, according to Longmore LJ, not intended to say anything adverse about suing such persons. Lord Sumption's two categories did not include newcomers, but "[h]e appeared rather to approve them [suing newcomers] provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver" was not infringed (see my analysis above). Lord Sumption's [15] in *Cameron* amounted "at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*". Longmore LJ, therefore, held in *Ineos* that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

44. Once again, there is nothing in this reasoning that justifies a distinction between interim and final injunctions. The basis for the decision was that *Bloomsbury* and *Hampshire Waste* were good law, and that in *Gammell* the defendant became a party to the proceedings when she knew of the injunction and violated it. *Cameron* was about the necessity for parties to know of the proceedings, which the persons unknown in *Ineos* did.

Bromley: judgment 21 January 2020

45. In *Bromley*, there was an interim injunction preventing unauthorised encampment and fly tipping. At the return date, the judge refused the injunction preventing unauthorised encampment on the grounds of proportionality, but granted a final injunction against fly tipping including by newcomers. The appeal was dismissed. *Cameron* was not cited to the Court of Appeal, and *Bloomsbury* and *Hampshire Waste* were cited, but not referred to in the judgments. At [29], however, Coulson LJ (with whom Ryder and Haddon-Cave LJJ agreed), endorsed the elegant synthesis of the principles applicable to the grant of precautionary injunctions against persons unknown set out by Longmore LJ at [34] in *Ineos*. Those principles concerned the court's practice rather than the appropriateness of granting such injunctions at all. Indeed, the whole focus of the judgment of Coulson LJ and the guidance he gave was on the proportionality of granting borough-wide injunctions in the light of the Convention rights of the travelling communities.

46. At [31]-[34], Coulson LJ considered procedural fairness "because that has arisen starkly in this and the other cases involving the gipsy and traveller community". Relying on article 6 of the Convention, *Attorney General v. Newspaper Publishing plc* [1988] Ch 333 and *Jacobson*, Coulson LJ said that "the principle that the court should hear both sides of the argument [was] therefore an elementary rule of procedural fairness".

47. Coulson LJ summarised many of the cases that are now before this court and dealt also with the law reflected in *Porter*, before referring at [44] to *Chapman v. United Kingdom* 33 EHRR 18 (*Chapman*) at [73], where the European Court of Human Rights (ECtHR) had said that the occupation of a caravan by a member of the Gypsy and Traveller community was an integral part of her ethnic identity and her removal from the site interfered with her article 8 rights not only because it interfered with her home, but also

because it a□ected her ability to maintain her identity as a gipsy. Other cases decided by the ECtHR were also mentioned.

48. After rejecting the proportionality appeal, Coulson LJ gave wider guidance starting at [100] by saying that he thought there was an inescapable tension between the "article 8 rights of the Gypsy and Traveller community" and the common law of trespass. The obvious solution was the provision of more designated transit sites.

49. At [102]-[108], Coulson LJ said that local authorities must regularly engage with the travelling communities, and recommended a process of dialogue and communication. If a precautionary injunction were thought to be the only way forward, then engagement was still of the utmost importance: "[w]elfare assessments should be carried out, particularly in relation to children". Particular considerations included that: (a) injunctions against persons unknown were exceptional measures because they tended to avoid the protections of adversarial litigation and article 6 of the Convention, (b) there should be respect for the travelling communities' culture, traditions and practices, in so far as those factors were capable of being realised in accordance with the rule of law, and (c) the clean hands doctrine might require local authorities to demonstrate that they had complied with their general obligations to provide su□cient accommodation and transit sites, (d) borough-wide injunctions were inherently problematic, (e) it was sensible to limit the injunction to one year with subsequent review, as had been done in the Wolverhampton case (now before this court), and (f) credible evidence of criminal conduct or risks to health and safety were important to obtain a wide injunction. Coulson LJ concluded with a summary after saying that he did not accept the submission that this kind of injunction should never be granted, and that the cases made plain that "the gipsy and traveller community have an enshrined freedom not to stay in one place but to move from one place to another": "[a]n injunction which prevents them from stopping at all in a defined part of the UK comprised a potential breach of both the Convention and the Equality Act 2010, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise".

50. It may be commented at once that nothing in *Bromley* suggests that final injunctions against unidentified newcomers can never be granted.

Cuadrilla: judgment 23 January 2020

51. In *Cuadrilla*, the Court of Appeal considered committals for breach of a final injunction preventing persons unknown, including newcomers, from trespassing on land in connection with fracking. The issues are mostly not relevant to this case, save that Leggatt LJ (with whom Underhill and David Richards LJJ substantively agreed) summarised the effect of *Ineos* (in which Leggatt LJ had, of course, been a member of the court) as being that there was no conceptual or legal prohibition on (a) suing persons unknown who were not currently in existence but would come into existence if and when they committed a threatened tort, or (b) granting precautionary injunctions to restrain such persons from committing a tort which has not yet been committed [48]. After further citation of authority, the Court of Appeal departed from one aspect of the guidance given in *Ineos*, but not one that is relevant to this case. Leggatt LJ noted at [50] that the appeal in *Canada Goose* was shortly to consider injunctions against persons unknown.

Canada Goose: judgment 5 March 2020

52. The first paragraph of the judgment of the court in *Canada Goose* (Sir Terence Etherton MR, David Richards and Coulson LJJ) recorded that the appeal concerned the way in which, and the extent to which, civil proceedings for injunctive relief against persons unknown could be used to restrict public protests. On the claimants' application for summary judgment, Nicklin J had refused to grant a final injunction, discharged the interim injunction, and held that the claim form had not been validly served on any defendant in the proceedings and that it was not appropriate to make an order dispensing with service under CPR 6.16(1). The first defendants were named as persons unknown who were protestors against the manufacture and sale at the first claimant's store of clothing made of or containing animal products. An interim injunction had been granted until further order in respect of various tortious activities including assault, trespass and nuisances, with a further hearing also ordered.

53. The grounds of appeal were based on Nicklin J's findings on alternative service and dispensing with service, the description of the persons unknown, and the judge's approach to the evidence and to summary judgment. The appeal on the service issues was dismissed at [37]-[55]. The Court of Appeal started its treatment of the grounds of appeal relating to description and summary judgment by saying that it was established that proceedings might be commenced, and an interim injunction granted, against persons unknown in certain circumstances, as had been expressly acknowledged in *Cameron* and put into effect in *Ineos* and *Cuadrilla*.

54. The court in *Canada Goose* set out at [60] Lord Sumption's two categories from [13] of *Cameron*, before saying at [61] that that distinction was critical to the possibility of service: "Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional" [14]. This citation may have sown the seeds of what was said at [89]-[92], to which I will come in a moment.

55. At [62]-[88] in *Canada Goose*, the court discussed in entirely orthodox terms the decisions in *Cameron, Gammell*, *Ineos*, and *Cuadrilla*, in which Leggatt LJ had referred to *Hubbard v. Pitt* [1976] 1 QB 142 and *Burris v. Azadani* [1995] 1 WLR 1372. At [82], the court built on the *Cameron* and *Ineos* requirements to set out refined procedural guidelines applicable to proceedings for interim relief against persons unknown in protester cases like the one before that court. The court at [83]-[88] applied those guidelines to the appeal to conclude that the judge had been right to dismiss the claim for summary judgment and to discharge the interim injunction.

56. It is worth recording the guidelines for the grant of interim relief laid down in *Canada Goose* at [82] as follows:

> (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 [precautionary] 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.

57. The claim form was held to be defective in *Canada Goose* under those guidelines and the injunctions were impermissible. The description of the persons unknown was also impermissibly wide, because it was capable of applying to persons who had never been at the store and had no intention of ever going there. It would have included a "peaceful protester in Penzance". Moreover, the specified prohibited acts were not confined to unlawful acts, and the original interim order was not time limited. Nicklin J had been bound to dismiss the application for summary judgment and to discharge the interim injunction: "both because of non-service of the proceedings and for the further reasons … set out below".

58. It is the further reasons "set out below" at [89]-[92] that were relied upon by Nicklin J in this case that have been the subject of the most detailed consideration in argument before us. They were as follows:

89. A final injunction cannot be granted in a protester 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 [*Venables*], in which a final injunction may be granted against the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney-General v. Times Newspapers Ltd* [1992] 1 AC 191, 224 [*Spycatcher*]. That is consistent with the fundamental principle in *Cameron* (at [17]) 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.

90. In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v. Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2 (Marcus Smith J), is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* and the decision of the Supreme Court in *Cameron*. Furthermore, there was no reference in *Vastint* to the confirmation in [*Spycatcher*] of the usual principle that a final injunction operates only between the parties to the proceedings.

91. That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at [159]) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v. Afsar* [2019] EWHC 3217 (QB) at [132].

92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the

proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.

The reasons given by the judge

59. The judge began his judgment at [2]-[5] by setting out the background to unauthorised encampment injunctions derived mainly from Coulson LJ's judgment in *Bromley*. At [6], the judge said that the central issue to be determined was whether a final injunction granted against persons unknown was subject to the principle that final injunctions bind only the parties to the proceedings. He said that *Canada Goose* held that it was, but the local authorities contended that it should not be. It may be noted at once that this is a one-sided view of the question that assumes the answer. The question was not whether an assumed general principle derived from *Spycatcher* or *Cameron* applied to final injunctions against persons unknown (which if it were a general principle, it obviously would), but rather what were the general principles to be derived from *Spycatcher*, *Cameron* and *Canada Goose*.

60. At [10]-[25], the judge dealt with three of the main cases: *Cameron*, *Bromley* and *Canada Goose*, as part of what he described as the "changing legal landscape".

61. At [26]-[113], the judge dealt in detail with what he called the Cohort Claims under 9 headings: assembling the Cohort Claims and their features, service of the claim form on persons unknown, description of persons unknown in the claim form and in CPR 8.2A, the [mainly statutory] basis of the civil claims against persons unknown, powers of arrest attached to injunction orders, use of the interim applications court of the Queen's Bench Division (court 37), failure to progress claims after the grant of an interim injunction, particular Cohort Claims, and the case management hearing on 17 December 2020: identification of the issues of principle to be determined.

62. On the first issue before him (what I have described at [4] above as the secondary question before us), the judge stated his conclusion at [120] to the effect that the court retained jurisdiction to consider the terms of the final injunctions. At [136], he said that it was legally unsound to impose concepts of finality against newcomers, who only later discovered that they fell within the definition of persons unknown in a final judgment. The permission to apply provisions in several injunctions recognised that it would be fundamentally unjust not to afford such newcomers the opportunity to ask the court to reconsider the order. A newcomer could apply under CPR 40.9, which provided that: "[a] person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied".

63. On the second and main issue (the primary issue before us), the judge stated his conclusion at [124] that the injunctions granted in the Cohort Claims were subject to the *Spycatcher* principle (derived from page 224 of the speech of Lord Oliver) and applied in *Canada Goose* that a final injunction operated only between the parties to the proceedings, and did not fall into the exceptional category of civil injunction that could be granted against the world. His conclusion is explained at [161]-[189].

64. On the third issue before him (but part of the main issue before us), the judge concluded at [125] that if the relevant local authority cannot identify anyone in the category of persons unknown at the time the final order was granted, then that order bound nobody.

65. The judge stated first, in answer to his second issue, that the court undoubtedly had the power to grant an injunction that bound non-parties to proceedings under section 37. That power extended, exceptionally, to making injunction orders against the world (see *Venables*). The correct starting point was to recognise the fundamental difference between interim and final injunctions. It was well-established that the court could grant an interim injunction against persons unknown which would bind all those falling within the description employed, even if they only became such persons as a result of doing some act after the grant of the interim injunction. He said that the key decision underpinning that principle was *Gammell*, which had decided that a newcomer became a party to the underlying proceedings when they did an act which brought them within the definition of the defendants to the claim. The judge thought that there was no conceptual difficulty about that at the interim stage, and that *Gammell* was a case of a breach of an interim injunction. At [173], the judge stated that *Gammell* was not authority for the proposition that persons could become defendants to proceedings, after a final injunction was granted, by doing acts which brought them within the definition of persons unknown. He did not say why not. But the point is, at least, not free from doubt, bearing in mind that it is not clear whether Ms Maughan's case, decided at the same time as *Gammell*, concerned an interim or final order.

66. At [174], the judge suggested that a claim form had to be served for the court to have jurisdiction over defendants at a trial. Relief could only be granted against identified persons unknown at trial: "[i]t is fundamental to our process of civil litigation that the Court cannot grant a final order against someone who is not party to the claim". Pausing there, it may be noted that, even on the judge's own analysis, that is not the case, since he acknowledged that injunctions were validly granted against the world in cases like *Venables*. He relied on [92] in *Canada Goose* as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. In my judgment, as appears hereafter, that statement was at odds with the decision in *Gammell*.

67. At [175]-[176], the judge rejected the submission that traveller injunctions were "not subject to these fundamental rules of civil litigation or that the principle from *Canada Goose* is limited only to 'protester' cases, or cases involving private litigation". He said that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". Nothing in section 187B suggested that Parliament had granted local authorities the ability to obtain final injunctions against unknown newcomers. The procedural rules in CPR PD 20.4 positively ruled out commencing proceedings against persons unknown who could not be identified. At [180] the judge said that, insofar as any support could be found in *Bromley* for a final injunction binding newcomers, *Bromley* was not considering the point for decision before Nicklin J.

68. The judge then rejected at [186] the idea that he had mentioned in *Enfield* that application of the *Canada Goose* principles would lead to a rolling programme of interim injunctions: (i) On the basis of *Ineos* and *Canada Goose*, the court would not grant interim injunctions against persons unknown unless satisfied that there were people capable of being identified and served. (ii) There would be no civil claim in

which to grant an injunction, if the claim cannot be served in such a way as can reasonably be expected to bring the proceedings to an identified person's attention. (iii) An interim injunction would only be granted against persons unknown if there were a sufficiently real and imminent risk of a tort being committed to justify precautionary relief; thereafter, a claimant will have the period up to the final hearing to identify the persons unknown.

69. The judge said that a final injunction should be seen as a remedy flowing from the final determination of rights between the claimant and the defendants at trial. That made it important to identify those defendants before that trial. The legitimate role for interim injunctions against persons unknown was conditional and to protect the existing state of affairs pending determination of the parties' rights at a trial. A final judgment could not be granted consistently with *Cameron* against category 2 defendants: i.e. those who were anonymous and could not be identified.

70. Between [190]-[241], Nicklin J considered whether final injunctions could ever be granted against the world in these types of case. He decided they could not, and discharged those that had been granted against persons unknown. At [244]-[246], the judge explained the consequential orders he would make, before giving the safeguards that he would provide for future cases (see [17] above).

The main issue: Was the judge right to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (i.e. newcomers), from occupying and trespassing on local authority land?

Introduction to the main issue

71. The judge was correct to state as the foundation of his considerations that the court undoubtedly had the power under section 37 to grant an injunction that bound non-parties to proceedings. He referred to *Venables* as an example of an injunction against the world, and there is a succession of cases to similar effect. It is true that they all say, in the context of injuncting the world from revealing the identity of a criminal granted anonymity to allow him to rehabilitate, that such a remedy is exceptional. I entirely agree. I do not, however, agree that the courts should seek to close the categories of case in which a final injunction against all the world might be shown to be appropriate. The facts of the cases now before the court bear no relation to the facts in *Venables* and related cases, and a detailed consideration of those cases is, therefore, ultimately of limited value.

72. Section 37 is a broad provision providing expressly that "the High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so". The courts should not cut down the breadth of that provision by imposing limitations which may tie a future court's hands in types of case that cannot now be predicted.

73. The judge in this case seems to me to have built upon [89]-[92] of *Canada Goose* to elevate some of what was said into general principles that go beyond what it was necessary to decide either in *Canada Goose* or this case.

74. First, the judge said that it was the "correct starting point" to recognise the fundamental difference between interim and final injunctions. In fact, none of the cases that he relied

upon decided that. As I have already pointed out, none of *Gammell*, *Cameron* or *Ineos* drew such a distinction.

75. Secondly, the judge said at [174] that it was "fundamental to our process of civil litigation that the Court cannot grant a final order against someone who is not party to the claim". Again, as I have already pointed out, no such fundamental principle is stated in any of the cases, and such a principle would be inconsistent with many authorities (not least, *Venables*, *Gammell* and *Ineos*). The highest that *Canada Goose* put the point was to refer to the "usual principle" derived from *Spycatcher* to the effect that a final injunction operated only between the parties to the proceedings. The principle was said to be applicable in *Canada Goose*. Admittedly, *Canada Goose* also described that principle as consistent with the fundamental principle in *Cameron* (at [17]) 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, but that was said without disapproving the mechanism explained by Sir Anthony Clarke in *Gammell* by which a newcomer might become a party to proceedings by knowingly breaching a persons unknown injunction.

76. Thirdly, the judge suggested that the principles enunciated in *Canada Goose*, drawn from *Cameron*, were "of universal application to civil litigation in this jurisdiction". This was, on any analysis, going too far as I shall seek to show in the succeeding paragraphs.

77. Fourthly, the judge said that it was important to identify all defendants before trial, because a final injunction should be seen as a remedy flowing from the final determination of rights between identified parties. This ignores the Part 8 procedure adopted in unauthorised encampment cases, which rarely, if ever, results in a trial. Interim injunctions in other fields often do protect the position pending a trial, but in these kinds of case, as I say, trials are infrequent. Moreover, there is no meaningful distinction between an interim and final injunction, since, as the facts of these cases show and *Bromley* explains, the court needs to keep persons unknown injunctions under review even if they are final in character.

78. With that introduction, I turn to consider whether the statements made in [89]-[92] of *Canada Goose* properly reflect the law. I should say, at once, that those paragraphs were not actually necessary to the decision in *Canada Goose*, even if the court referred to them at [88] as being further reasons for it.

[89] of *Canada Goose*

79. The first sentence of [89] said that "a final injunction cannot be granted in a protester 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". That sentence does not on its face apply to cases such as the present, where the defendants were not protesters but those setting up unauthorised encampments. It is nonetheless very hard to see why the reasoning does not apply to

unauthorised encampment cases, at least insofar as they are based on the torts of trespass and nuisance. I would be unwilling to accede to the local authorities' submission that *Canada Goose* can be distinguished as applying only to protester cases.

80. *Canada Goose* then referred at [89] to "some very limited circumstances" in which a final injunction could be granted against the whole world, giving *Venables* as an example. It said that protester actions did not fall within that exceptional category. That is true, but does not explain why a final injunction against persons unknown might not be appropriate in such cases.

81. *Canada Goose* then said at [89], as I have already mentioned, that the usual principle, which applied in that case, was that a final injunction operated only between the parties to the proceedings, citing *Spycatcher* as being consistent with *Cameron* at [17]. That passage was, in my judgment, a misunderstanding of [17] of *Cameron*. As explained above, [17] of *Cameron* did 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 them (see [32] in *Gammell*). Moreover at [63] in C*anada Goose*, the court had already acknowledged that (i) Lord Sumption had not addressed a third category of anonymous defendants, namely people who will or are highly likely in the future to commit an unlawful civil wrong (i.e. newcomers), and (ii) Lord Sumption had referred at [15] with approval to *Gammell* where it was held that "persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings". There was no valid distinction between such an order made as a final order and one made on an interim basis.

82. There was no reason for the Court of Appeal in *Canada Goose* to rely on the usual principle derived from *Spycatcher* that a final injunction operates only between the parties to the proceedings. In *Gammell* and *Ineos* (cases binding on the Court of Appeal) it was held that a person violating a "persons unknown" injunction became a party to the proceedings. *Cameron* referred to that approach without disapproval. There is and was no reason why the court cannot devise procedures, when making longer term persons unknown injunctions, to deal with the situation in which persons violate the injunction and makes themselves new parties, and then apply to set aside the injunction originally violated, as happened in *Gammell* itself. Lord Sumption in *Cameron* was making the point that parties must always have the opportunity to contest orders against them. But the persons unknown in *Gammell* had just such an opportunity, even though they were held to be in contempt. *Spycatcher* was a very different case, and only described the principle as the usual one, not a universal one. Moreover, it is a principle that sits uneasily with parts of the CPR, as I shall shortly explain.

[90] of *Canada Goose*

83. In my judgment both the judge at [90] and the Court of Appeal in *Canada Goose* at [90] were wrong to suggest that Marcus Smith J's decision in *Vastint Leeds BV v. Persons Unknown* [2018] EWHC 2456 (Ch) (*Vastint*) was wrong. There, a final injunction was granted against persons unknown enjoining them from entering or remaining at the site of the former Tetley Brewery (for the purpose of organising or attending illegal raves). At [19]-[25], Marcus Smith J explained his reasoning relying

on *Bloomsbury*, *Hampshire Waste*, *Gammell* and *Ineos* (at first instance: [2017] EWHC 2945 (Ch)). At [24], he said that the making of orders against persons unknown was settled practice provided the order was clearly enough drawn, and that it worked well within the framework of the CPR: "[u]ntil an act infringing the order is committed, no-one is party to the proceedings. It is the act of infringing the order that makes the infringer a party". Any person a□ected by the order could apply to set it aside under CPR 40.9. None of *Cameron*, *Ineos*, or *Spycatcher* showed *Vastint* to be wrong as the court suggested.

[91] of *Canada Goose*

84. In the first two sentences of [91], *Canada Goose* seeks to limit persons unknown subject to final injunctions to those "within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to [that] date". This holding ignores the fact that *Canada Goose* had already held that Lord Sumption's categories did not deal with newcomers, which were, of course, not relevant to the facts in *Cameron*.

85. The point in *Cameron* was that the proceedings had to be served so that, before enforcement, the defendant had knowledge of the order and could contest it. As already explained, *Gammell* held that persons unknown were served and made parties by violating an order of which they had knowledge. Accordingly, the first two sentences of [91] are wrong and inconsistent both with the court's own reasoning in *Canada Goose* and with a proper understanding of *Gammell*, *Ineos* and *Cameron.*

86. In the third sentence of [91], the court in *Canada Goose* said that the proposed final injunction which Canada Goose sought by way of summary judgment was objectionable as not being limited to Lord Sumption's category 1 defendants, who had already been served and identified. As I have said, that ignores the fact that the court had already said that Lord Sumption excluded newcomers and the *Gammell* situation.

87. The court in *Canada Goose* then approved Nicklin J at [159] in his judgment in *Canada Goose*, where he said this:

> 158. Rather optimistically, Mr Buckpitt suggested that all these concerns could be adequately addressed by the inclusion of a provision in the final order permitting any newcomers to apply to vary or discharge the final order.
>
> 159. Put bluntly, this is just absurd. It turns civil litigation on its head and bypasses almost all of the fundamental principles of civil litigation: see paras 55—60 above. Unknown individuals, without notice of the proceedings, would have judgment and a final injunction granted against them. If subsequently, they stepped forward to object to this state of affairs, I assume Mr Buckpitt envisages that it is only at this point that the question would be addressed whether they had actually done (or threatened to do) anything that would justify an order being made against them. Resolution of any factual dispute taking place, one assumes, at a trial, if necessary. Given the width of the class of protestor, and the anticipated rolling programme of serving the "final order" at future protests, the court could be faced with an

unknown number of applications by individuals seeking to "vary" this "final order" and possible multiple trials. This is the antithesis of finality to litigation.

88. This passage too ignores the essential decision in *Gammell*.

89. As I have already said, there is no real distinction between interim and final injunctions, particularly in the context of those granted against persons unknown. Of course, subject to what I say below, the guidelines in *Canada Goose* need to be adhered to. Orders need to be kept under review. For as long as the court is concerned with the enforcement of an order, the action is not at end. A person who is not a party but who is directly affected by an order may apply under CPR 40.9. In addition, in the case of a third-party costs order, CPR 46.2 requires the non-party to be made party to the proceedings, even though the dispute between the litigants themselves is at an end. In this case, as in *Canada Goose,* the court was effectively concerned with the enforcement of an order, because the problems in *Canada Goose* all arose because of the supposed impossibility of enforcing an order against a non-party. Since the order can be enforced as decided authoritatively in *Gammell*, there is no procedural objection to its being made. The CPR contain many ways of enforcing an order. CPR 70.4 says that an order made against a non-party may be enforced by the same methods as if he were a party. In the case of a possession order against squatters, the enforcement officer will enforce against anyone on the property whether or not a newcomer. Notice must be given to all persons against whom the possession order was made and "any other occupiers": CPR 83.8A. Where a judgment is to be enforced by charging order CPR 73.10 allows "any person" to object and allows the court to decide any issue between any of the parties and any person who objects to the charging order. None of these rules was considered in *Canada Goose*. In addition, in the case of an injunction (unlike the claim for damages in *Cameron*), there is no possibility of a default judgment, and the grant of the injunction will always be in the discretion of the court.

90. The decision of Warby J in *Birmingham City Council v. Afsar* [2019] EWHC 3217 (QB) at [132] provides no further substantive reasoning beyond [159] of Nicklin J.

Paragraph [92] of *Canada Goose*

91. The reasoning in [92] is all based upon the supposed objection (raised in written submissions following the conclusion of the oral hearing of the appeal) to making a final order against persons unknown, because interim relief is temporary and intended to "enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1". Again, this reasoning ignores the holding in *Gammell*, *Ineos* and *Canada Goose* itself that an unknown and unidentified person knowingly violating an injunction makes themselves parties to the action. Where an injunction is granted, whether on an interim or a final basis for a fixed period, the court retains the right to supervise and enforce it, including bringing before it parties violating it and thereby making themselves parties to the action. That is envisaged specifically by point 7 of the guidelines in *Canada Goose*, which said expressly that a persons unknown injunction should have "clear geographical and temporal limits". It was suggested that it must be time limited because it was an interim and not a final injunction, but in fact all persons unknown injunctions ought normally to have a fixed end point for review as the injunctions granted to these local authorities actually had in some cases.

92. It was illogical for the court at [92] in *Canada Goose* to suggest, in the face of *Gammell*, that the parties to the action could only include persons unknown "who have breached the interim injunction and are identifiable albeit anonymous". There is, as I have said, almost never a trial in a persons unknown case, whether one involving protesters or unauthorised encampments. It was wrong to suggest in this context that "[o]nce the trial has taken place and the rights of the parties have been determined, the litigation is at an end". In these cases, the case is not at end until the injunction has been discharged.

The judge's reasoning in this case

93. In my judgment, the judge was wrong to suggest that the correct starting point was the "fundamental difference between interim and final injunctions". There is no difference in jurisdictional terms between the grant of an interim and a final injunction. *Gammell* had not, as the judge thought, drawn any such distinction, and nor had *Ineos* as I have explained at [31] and [44] above. It would have been wrong to do so.

94. The judge, as it seems to me, went too far when he said at [174] that relief could only be granted against identified persons unknown at trial. He relied on *Canada Goose* at [92] as deciding that a person who, at the date of grant of the final order, is not already party to a claim, cannot subsequently become one. But, as I have said, that misunderstands both *Gammell* and *Ineos*. *Ineos* itself made clear that Lord Sumption's two categories of defendant in *Cameron* did not consider persons who did not exist at all and would only come into existence in the future. *Ineos* held that there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort.

95. I agree with the judge that there is no material distinction between an injunction against protesters and one against unauthorised encampment, certainly insofar as they both involve the grant of injunctions against persons unknown in relation to torts of trespass or nuisance. Nor is there any material distinction between those cases and the cases of urban exploring where judges have granted injunctions restraining persons unknown from trespassing on tall buildings (for example, the Shard) by climbing their exteriors (e.g. *Canary Wharf Investments Ltd v. Brewer* [2018] EWHC 1760 (QB) and *Chelsea FC v. Brewer* [2018] EWHC 1424 (Ch)). One of those cases was an interim and one a final injunction, but no distinction was made by either judge.

96. As I have explained, in my judgment, the judge ought not to have applied [89]-[92] of *Canada Goose*. Instead, he ought to have applied *Gammell* and *Ineos. Bromley* too had correctly envisaged the possibility of final injunctions against newcomers. The judge misunderstood the Supreme Court's decision in *Cameron*.

The doctrine of precedent

97. We received helpful submissions during the hearing as to the propriety of our reaching the conclusions already stated. In particular, we were concerned that *Cameron* had been misunderstood in the ways I have now explained in detail. The question, however, was, even if *Cameron* did not mandate the conclusions reached by the judge and [89]-[92] of *Canada Goose*, whether this court would be justified in refusing to follow those paragraphs. That question turns on precisely what *Gammell*, *Ineos* and *Canada Goose* decided.

98. In *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718 (*Young*), three exceptions to the rule that the Court of Appeal is bound by its previous decisions were recognised. First, the Court of Appeal can decide which of two conflicting decisions of its own it will follow. Secondly, the Court of Appeal is bound to refuse to follow a decision of its own which cannot stand with a subsequent decision of the Supreme Court, and thirdly, the Court of Appeal is not bound to follow a decision of its own if given without proper regard to previous binding authority.

99. In my judgment, it is clear that *Gammell* decided, and *Ineos* accepted, that injunctions, whether interim or final, could validly be granted against newcomers. Newcomers were not any part of the decision in *Cameron*, and there is and was no basis to suggest that the mechanism in *Gammell* was not applicable to make an unknown person a party to an action, whether it occurred following an interim or a final injunction. Accordingly, a premise of *Gammell* was that injunctions generally could be validly granted against newcomers in unauthorised encampment cases. *Ineos* held that the same approach applied in protester cases. Accordingly, [89]-[92] of *Canada Goose* were inconsistent with *Ineos* and *Gammell*. Moreover, those paragraphs seem to have overlooked the provisions of the CPR that I have mentioned at [89] above. For those reasons, it is open to this court to apply the first and third exceptions in *Young*. It can decide which of *Gammell* and *Canada Goose* it should follow, and it is not bound to follow the reasons given at [89]-[92] of *Canada Goose*, which even if part of the court's essential reasoning, were given without proper regard to *Gammell*, which was binding on the Court of Appeal in *Canada Goose*.

100. This analysis is applicable even if [89]-[92] of *Canada Goose* are taken as explaining *Gammell* and *Ineos* as being confined to interim injunctions. The Court of Appeal can, in that situation, refuse to follow its second decision if it takes the view, as I do, that [89]-[92] of *Canada Goose* wrongly distinguished *Gammell* and *Ineos* (see *Starmark Enterprises Ltd v. CPL Distribution Ltd* [2001] EWCA Civ 1252, [2002] Ch. 306 at [65]-[67] and [97]).

Conclusion on the main issue

101. For the reasons I have given, I would decide that the judge was wrong to hold that the court cannot grant final injunctions that prevent persons, who are unknown and unidentified at the date of the order (newcomers), from occupying and trespassing on local authority land.

The guidance given in *Bromley* and *Canada Goose* and in this case by Nicklin J

102. We did not hear detailed argument either about the guidance given in relation to interim injunctions against persons unknown at [82] of *Canada Goose* (see [56] above), or in relation to how local authorities should approach persons unknown injunctions in unauthorised encampment cases at [99]-[109] in *Bromley* [see [49] above). It would, therefore, be inappropriate for me to revisit in detail what was said there. I would, however, make the following comments.

103. First, the court's approach to the grant of an interim injunction would obviously be different if it were sought in a case in which a final injunction could not, either as a matter of law or settled practice, be granted. In those circumstances, these passages must, in view of our decision in this case, be viewed with that qualification in mind.

104. Secondly, I doubt whether Coulson LJ was right to comment that: (i) there was an inescapable tension between the article 8 rights of the Gypsy and Traveller community and the common law of trespass, and (ii) the cases made plain that the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another.

105. On the first point, it is not right to say that either "the gipsy and traveller community" or any other community has article 8 rights. Article 8 provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence". In unauthorised encampment cases, unlike in *Porter* (and unlike in *Manchester City Council v. Pinnock* [2010] UKSC 45, [2011] UKSC 6, [2011] 2 AC 104), newcomers cannot rely on an article 8 right to respect for their home, because they have no home on land they do not own. They can rely on a private and family life claim to pursue a nomadic lifestyle, because *Chapman* decided that the pursuit of a traditional nomadic lifestyle is an aspect of a person's private and family life. But the scheme of the HRA 1998 is individualised. It is unlawful under section 6 for a public authority to act incompatibly with a Convention right, which refers to the Convention right of a particular person. The mechanism for enforcing a Convention right is specified in section 7 as being legal proceedings by a person who is or would be a victim of any act made unlawful by section 6. That means, in this context, that it is when individual newcomers make themselves parties to an unauthorised encampment injunction, they have the opportunity to apply to the court to set aside the injunction praying in aid their private and family life right to pursue a nomadic lifestyle. Of course, the court must consider that putative right when it considers granting either an interim or a final injunction against persons unknown, but it is not the only consideration. Moreover, it can only be considered, at that stage, in an abstract way, without the factual context of a particular person's article 8 rights. The landowner, by contrast, has specific Convention rights under article 1 protocol 1 to the peaceful enjoyment of particular possessions. The only point at which a court can test whether an order interferes with a particular person's private and family life, the extent of that interference, and whether the order is proportionate, is when that person comes to court to resist the making of an order or to challenge the validity of an order that has already been made.

106. Secondly, it is not, I think, quite clear what Coulson LJ meant by saying that the Gypsy and Traveller community had an enshrined freedom to move from one place to another. Each member of those communities, and each member of any community, has such a freedom in our democratic society, but the communities themselves do not have Convention rights as I have explained. Individuals' qualified Convention rights must be respected, but the right to that respect will be balanced, in short, against the public interest, when the court considers their challenge to the validity of an unauthorised encampment injunction binding on persons unknown. The court will also take into account any other relevant legal considerations, such as the duties imposed by the Equality Act 2010.

107. Nothing I have said should, however, be regarded as throwing doubt upon Coulson LJ's suggestions that local authorities should engage in a process of dialogue and communication with travelling communities, undertake, where appropriate, welfare and equality impact assessments, and should respect their culture, traditions and practices. I would also want to associate myself with Coulson LJ's suggestion that

persons unknown injunctions against unauthorised encampments should be limited in time, perhaps to one year at a time before a review.

108. It will already be clear that the guidance given by the judge in this case at [248] (see [18] above) requires reconsideration. There are indeed safeguards that apply to injunctions sought against persons unknown in unauthorised encampment cases. Those safeguards are not, however, based on the artificial distinction that the judge drew between interim and final orders. The normal rules are applicable, as are the safeguards mentioned in *Bromley* (subject to the limitations already mentioned at [104]-[106] above), and those mentioned below at [117]. There is no rule that an interim injunction can only be granted for any particular period of time. It is good practice to provide for a periodic review, even when a final order is made. The two categories of persons unknown referred to by Lord Sumption at [13] in *Cameron* have no relevance to cases of this kind. He was not considering the position of newcomers. The judge was wrong to suggest that directions should be given for the claimant to apply for a default judgment. Such judgments cannot be obtained in Part 8 cases. A normal procedural approach should apply to the progress of the Part 8 claims, bearing in mind the importance of serving the proceedings on those affected and giving notice of them, so far as possible, to newcomers.

The secondary question as to the propriety of the procedure adopted by the judge to bring the proceedings in their current form before the court

109. In effect, the judge made a series of orders of the court's own motion requiring the parties to these proceedings to make submissions aimed at allowing the court to reach a decision as to whether the interim and final orders that had been granted in these cases could or should stand. Counsel for one group of local authorities, Ms Caroline Bolton, submitted that it was not open to the court to call in final orders made in the past for reconsideration in the way that the judge did.

110. In my judgment, the procedure adopted was highly unusual, because it was, in effect, calling in cases that had been finally decided on the basis that the law had changed. We heard considerable argument based on the court's power under CPR 3.1(7), which gives the court a power "to vary or revoke [an] order". This court has recently said that the circumstances which would justify varying or revoking a final order would be very rare given the importance of finality (see *Terry v. BCS Corporate Acceptances* [2018] EWCA Civ 2422 at [75]).

111. As it seems to me, however, we do not need to spend much time on the process which was adopted. First, the local authorities concerned did not object at the time to the court calling in their cases. Secondly, the majority of the injunctions either included provision for review at a specified future time or express or implied permission to apply. Thirdly, even without such provisions, the orders in question would, as I have already explained, be reviewable at the instance of newcomers, who had made themselves parties to the claims by knowingly breaching the injunctions against unauthorised encampment.

112. In these circumstances, the process that was adopted has ultimately had a beneficial outcome. It has resulted in greater clarity as to the applicable law and practice.

The statutory jurisdiction to make orders against person unknown under section 187B to restrain an actual or apprehended breach of planning control validates the orders made

113. The injunctions in these cases were mostly granted either on the basis of section 187B or on the basis of apprehended trespass and nuisance, or both.

114. Section 187B provides that: (1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part. (2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach. (3) Rules of court may provide for such an injunction to be issued against a person whose identity is unknown. (4) In this section "the court" means the High Court or the county court.

115. CPR 8APD.20 provides at [20.1]-[20.6] in part as follows: 20.1 This paragraph relates to applications under – (1) [section 187B]; 20.2 An injunction may be granted under those sections against a person whose identity is unknown to the applicant. … 20.4 In the claim form, the applicant must describe the defendant by reference to – (1) a photograph; (2) a thing belonging to or in the possession of the defendant; or (3) any other evidence. 20.5 The description of the defendant under paragraph 20.4 must be sufficiently clear to enable the defendant to be served with the proceedings. (The court has power under Part 6 to dispense with service or make an order permitting service by an alternative method or at an alternative place). 20.6 The application must be accompanied by a witness statement. The witness statement must state – (1) that the applicant was unable to ascertain the defendant's identity within the time reasonably available to him; (2) the steps taken by him to ascertain the defendant's identity; (3) the means by which the defendant has been described in the claim form; and (4) that the description is the best the applicant is able to provide.

116. In the light of what I have decided as to the approach to be followed in relation to injunctions sought under section 37 against persons unknown in relation to unauthorised encampment, the distinctions that the parties sought to draw between section 37 and section 187B applications are of far less significance to this case.

117. In my judgment, sections 37 and 187B impose the same procedural limitations on applications for injunctions of this kind. In either case, the applicant must describe any persons unknown in the claim form by reference to photographs, things belonging to them or any other evidence, and that description must be sufficiently clear to enable persons unknown to be served with the proceedings, whilst acknowledging that the court retains the power in appropriate cases to dispense with service or to permit service by an alternative method or at an alternative place. These safeguards and those referred to with approval earlier in this judgment are as much applicable to an injunction sought in an unauthorised encampment cases under section 187B as they are to one sought in such a case to restrain apprehended trespass or nuisance. Indeed, CPR 8APD.20 seems to me to have been drafted with the objective of providing, so far as possible, procedural coherence and consistency rather than separate procedures for different kinds of cases.

118. There is, therefore, no need for me to say any more about section 187B.

Can the court in any circumstances like those in the present case make final orders against all the world?

119. As I have said, Nicklin J decided at [190]-[241] that final injunctions against persons unknown, being a species of injunction against all the world, could never be granted in unauthorised encampment cases. For the reasons I have given, I take the view that he was wrong.

120. I have already explained the circumstances in which such injunctions can be granted at [102]-[108]. Beyond what I have said, however, I take the view that it is extremely undesirable for the court to lay down limitations on the scope of as broad and important a statutory provision as section 37. Injunctions against the world have been granted in the type of case epitomised by *Venables*. Persons unknown injunctions have been granted in cases of unauthorised encampment and may be appropriate in some protester cases as is demonstrated by the authorities I have already referred to. I would not want to lay down any further limitations. Such cases are certainly exceptional, but that does not mean that other categories will not in future be shown to be proportionate and justified. The urban exploring injunctions I have mentioned are an example of a novel situation in which such relief was shown to be required.

121. I conclude that the court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

Conclusions

122. The parties agreed four issues for determination in terms that I have not directly addressed in this judgment. They did, however, raise substantively the four issues I have dealt with.

123. I have concluded, as I indicated at [7] above, that the judge was wrong to hold that the court cannot grant final injunctions against unauthorised encampment that prevent newcomers from occupying and trespassing on land. Whilst the procedure adopted by the judge was unorthodox and unusual in that he called in final orders for revision, no harm has been done in that the parties did not object at the time and it has been possible to undertake a comprehensive review of the law applicable in an important field. Most of the orders anyway provided for review or gave permission to apply. The procedural limitations applicable to injunctions against person unknown are as much applicable under section 37 as they are to those made under section 187B. The court cannot and should not limit in advance the types of injunction that may in future cases be held appropriate to make under section 37 against the world.

124. I would allow the appeal. I am grateful to all counsel, but particularly to Mr Tristan Jones, whose submissions as advocate to the court have been invaluable. Counsel will no doubt want to make further submissions as to the consequences of this judgment. Without pre-judging what they may say, it may be more appropriate for such matters to be dealt with in the High Court.

Lord Justice Lewison:

125. I agree.

Lady Justice Elisabeth Laing:

126. I also agree.

Neutral Citation Number: [2022] EWHC 2364 (KB)

Case No: QB-2022-BHM-000044

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

Birmingham Civil and Family Justice Centre
33 Bull St
Birmingham B4 6DS

Date: 23/09/2022

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

(1) HIGH SPEED TWO (HS2) LIMITED

(2) THE SECRETARY OF STATE FOR TRANSPORT

Claimants

- and –

(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 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

(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

(5) MR ROSS MONAGHAN (AKA SQUIRREL / ASH TREE) AND 58 OTHER NAMED DEFENDANTS AS SET OUT IN THE SCHEDULE TO THE PARTICULARS OF CLAIM **Defendants**

- - - - - - - - - - - - - - - - - - - -
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Richard Kimblin KC, Michael Fry, Sioned Davies and Jonathan Welch (instructed by **DLA Piper UK LLP**) for the **Claimants**
Tim Moloney KC and Owen Greenhall (instructed by **Robert Lizar Solicitors**) for **D6 (James Knaggs)**
A number of individuals Defendants represented themselves

Hearing dates: **26-27 May 2022**
- - - - - - - - - - - - - - - - - - - -

Approved Judgment
on consequential matters

Mr Justice Julian Knowles:

1. This short judgment addresses matters which have arisen following circulation of my draft judgment to the parties earlier this month.

2. Mr Maloney KC and Mr Greenhall on behalf of D6 made a number of suggested amendments in writing to the draft injunction order and have sought permission to appeal against my judgment.

3. Mr Kimblin KC and his juniors replied in writing on behalf of the Claimants.

4. I have considered all the submissions.

5. I decline to make any of D6s suggested changes and I also refuse permission to appeal, on the grounds that an appeal would have no prospects of success and there is no compelling reason why an appeal should be heard (CPR r 52.6(1)).

6. My reasons for so concluding are essentially those set out in Mr Kimblin's document, the substance of which I agree with, and adopt, and for the following reasons.

Suggested amendments to the Draft Injunction Order

7. D6's first suggestion is that there should be two orders – one for the four groups of unknown defendants, and one for named defendants. It is said there should be two orders 'in the interests of clarity'.

8. I disagree. Firstly, this point was not raised at any stage during the hearing and it is now too late. Second, having two orders would promote confusion and not produce clarity. This is one action, and there will be one order. If any defendant is uncertain about the effect of the order then I am sure D6's solicitors will be willing to assist. They have been very helpful as a point of contact with the unrepresented individual defendants, and are very experienced in this sort of case.

9. Next, D6 suggests modifying the Draft Injunction Order so as to add: (a) a need for there to be defined 'consequences' arising from the prohibited acts in [3(a)-(c)] of the Draft Order, notably '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'; (b) a provision that no person shall be in breach of [3] without a Defendant 'knowing of the existence of the Order and the terms of [3]'; and (c) a provision that where there are ongoing HS2 works on any portion or parcel of HS2 Land, interference with such works will not constitute a breach of [3] of the Draft Order, unless that portion or parcel of the HS2 Land is clearly demarcated.

10. As to the first of these, it is unnecessary. The 'consequence wording' is appropriately drafted within the definitions of 'persons unknown' in D2, D3 and D4. I am satisfied the issue has been appropriately considered in the Draft Judgment. To introduce 'consequence wording' at [3] serves to significantly attenuate the force of the Draft Order, particularly in respect of D1 and D5-63. I rely on and adopt [9]-[18] of the Claimant's Response to D6's submissions.

11. Second, an additional 'knowledge' provision is unnecessary and inappropriate. The question of knowledge of an injunction in the context of persons unknown alleged to have breached it is not straightforward and can be safely and properly left to committal proceedings when it can be tested by reference to evidence and the authorities, rather than hypothetically in advance. Although submissions were made to me about knowledge at the main hearing (certainly in writing by the Claimants), I purposefully did not address it in the judgment, having decided that the appropriate time and place to deal with it will be at any committal proceedings for any alleged breach of the Injunction.

12. Third, demarcation is impractical, inappropriate and unnecessary. Again, this point was not raised at the hearing. I am satisfied that the service provisions in the Draft Injunction Order are extensive, and can reasonably be expected to bring the Order to the Defendants' attention, *per* the *Canada Goose* requirements. Similar provisions in relation to the injunction application were effective, witnessed by the many submissions which the court received. The land affected by the injunction is clearly set out in a publicly accessible form. If any defendant wishes to protest lawfully on land and is unsure of its status as either pink or green land (and so unsure whether they would be trespassing), then they can contact the Claimants' solicitors who, as officers of the court, will be duty bound to assist them and provide the answer. Alternatively, such a defendant can seek the assistance of D6's solicitors, whom I am again confident will assist.

13. As to the practicality of demarcation, Bennathan J remarked in his *National Highways* case, in a passage, which I quoted in the judgment at [147]:

> '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.'

14. The same is true in this case.

15. Furthermore, as the Claimants point out, the requirement for knowledge is not an issue which concerns D6. It has never been part of D6's case that he was not served with the application or the Draft Injunction Order. D6 has participated in proceedings throughout. It cannot properly be argued that a provision on 'knowledge' is therefore necessary in [3] in order to safeguard his position.

Permission to appeal

16. On behalf of D6, four grounds of appeal are suggested. In my judgment they are all unarguable and for that reason I refuse permission to appeal.

17. First, D6 submits that I erred in law in concluding that the Claimant had an immediate right to possession of the entirety of the land subject to the order capable of founding a claim in trespass.

18. I do not consider it to be arguable that I did err. It is a fact that, for the reasons I set out at length in the judgment, the Claimants are either in possession of HS2 Land, or have the right to immediate possession of it, the relevant statutory notices having been served. The evidence was clear and explicit. D6 seeks to construe the statutory provisions in the Phase One Act and the Phase 2a Act as requiring work to be imminent before the relevant possession right is triggered. I disagree. There is nothing in the statutory wording which supports his position and to so construe it would be invite the 'guerilla tactics' by protesters to which I referred in my judgment. Also, as the Claimants point out, at an earlier stage it was accepted by D6 in the context of the possession order for Cash's Pit land that the Claimants had the relevant interests in that land concerned.

19. Next, it is said that I erred in concluding that the First Claimant could rely on its A1P1 rights as against the Defendants' Article 10 and 11 rights. Again, I dealt with this point at length in the judgment. As I explained, there is authority binding upon me that it can. There are also the judgments of Arnold J in the *Olympic Delivery Authority* cases which, whilst not binding upon me strictly, I should follow unless I think they are wrong. I do not. I respectfully consider they are right. If D6 wishes to try and persuade the Court of Appeal to revisit this issue then he is free to do so, but I decline to grant permission to appeal in the face of clear binding and persuasive authority that is against his position.

20. Next, it is said I 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'.

21. Both of these points are, with respect, without merit.

22. The Draft Injunction Order does not define what is *prohibited* by reference to legal causes of action. Paragraphs 3 and 5 are plain. They describe in ordinary non-legal and non-technical language that which the Order prohibits. What the Order does in [4] is carve out exceptions by making clear that *lawful* activities are *not* prohibited. These provisions are for the *benefit* of the Defendants. It is verging on the ridiculous to suggest that the Injunction is somehow wrong or unlawful in so providing. What, one might ask, is the alternative? That the order should spell out all of the different *lawful* potential activities on the highway that are not prohibited, eg, going for an evening stroll; holding a placard; picnicking in a layby and picking bluebells (cf *Hinz v Berry* [1970] 2 QB 40, 42); stopping to admire the view, etc, etc? It is plainly not practicable to do so.

23. As to the 'slow walking' point, this misses out the key provision in [3] of the draft injunction order. This prohibits in [3(b)], 'deliberately obstructing or otherwise interfering with the free movement of vehicles', and then gives as an example of such conduct in [5(f)]: 'deliberate slow walking in front of vehicles in the vicinity of the HS2 Land.'

24. There is nothing vague or unclear about these provisions. I am confident that protesters and would-be protesters know exactly what they or others have been doing which these provisions now prohibit. Also, as the Claimants point out, it was part of D6's case that slow walking should be permitted because it was a long-established form of protest (Skeleton, [118]). At the same time, it was also submitted by D6 that

'slow-walking' was too vague, relying on *Ineos* (Skeleton, [12]). I accept that there is an element of D6 wanting to have it both ways in this suggested ground of appeal.

25. I required the insertion of the words 'deliberately' and 'deliberate' in the original draft Injunction to make clear that a disabled or mobility impaired person who happened to be crossing in front of an HS2 vehicle, thereby temporarily delaying it, would not be in breach.

26. Lastly, so far as service is concerned, I am satisfied that the service provisions are full, extensive, and satisfy *Canada Goose*. They were effective in bringing the application to widespread attention, as I described in the judgment, and I am satisfied they will similarly bring the Order to widespread attention.

27. Furthermore, the Order contains provisions requiring the Claimants to effect personal service on any Defendant of whose identity they become aware (at [11]). So, personal service is a requirement if it is reasonably practicable. The net result is that if the Claimants become aware of, for example, a trespasser, the trespasser has to be served unless there are good reasons why that cannot be done.

Neutral Citation Number: [2022] EWHC 736 (Admin)

Case No: CO/745/2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 March 2022

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE HOLGATE

- -

Between:

DIRECTOR OF PUBLIC PROSECUTIONS	**Appellant**
- and -	
ELLIOTT CUCIUREAN	**Respondent**

- -
- -

Tom Little QC and James Boyd (instructed by **Crown Prosecution Service**) for the **Appellant**
Tim Moloney QC, Blinne Ní Ghrálaigh and Adam Wagner (instructed by **Robert Lizar Solicitors**) for the **Respondent**

Hearing date: 23 March 2022

- -

Approved Judgment

Lord Burnett of Maldon CJ:

Introduction

1. This is the judgment of the court to which we have both contributed. The central issue for determination in this appeal is whether the decision of the Supreme Court in *DPP v. Ziegler* [2021] UKSC 23; [2021] 3 WLR 179 requires a criminal court to determine in all cases which arise out of "non-violent" protest whether the conviction is proportionate for the purposes of articles 10 and 11 of the European Convention on Human Rights ("the Convention") which protect freedom of expression and freedom of peaceful assembly respectively.

2. The respondent was acquitted of a single charge of aggravated trespass contrary to section 68 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") consequent upon his digging and then remaining in a tunnel in land belonging to the Secretary of State for Transport which was being used in connection with the construction of the HS2 railway. The Deputy District Judge, sitting at the City of London Magistrates' Court, accepted a submission advanced on behalf of the respondent that, before she could convict, the prosecution had "to satisfy the court so that it is sure that a conviction is a proportionate interference with the rights of Mr Cuciurean under articles 10 and 11 …" In short, the judge accepted that there was a new ingredient of the offence to that effect.

3. Two questions are asked of the High Court in the case stated:

> "1. Was is it open to me, having decided that the Respondent's Article 10 and 11 rights were engaged, to acquit the Respondent on the basis that, on the facts found, the Claimant had not made me sure that a conviction for the offence under s. 68 was a reasonable restriction and a necessary and proportionate interference with the defendant's Article 10 and 11 rights applying the principles in ***DPP v Ziegler***?
>
> 2. In reaching the decision in (1) above, was I entitled to take into account the very considerable costs of the whole HS2 scheme and the length of time that is likely to take to complete (20 years) when considering whether a conviction was necessary and proportionate?"

4. The prosecution appeal against the acquittal on three grounds:

   1) the prosecution did not engage articles 10 and 11 rights;

   2) if the respondent's prosecution did engage those rights, a conviction for the offence of aggravated trespass is - intrinsically and without the need for a separate consideration of proportionality in individual cases - a justified and proportionate interference with those rights. The decision in ***Ziegler*** did not compel the judge to take a contrary view and undertake a ***Ziegler***-type fact-sensitive assessment of proportionality; and

3) in any event, if a fact-sensitive assessment of proportionality was required, the judge reached a decision on that assessment that was irrational, in the *Wednesbury* sense of the term.

5. Before the judge, the prosecution accepted that the respondent's article 10 and 11 rights were engaged and that there was a proportionality exercise of some sort for the court to perform, albeit not as the respondent suggested. In inviting the judge to state a case, the prosecution expressly disavowed an intention to challenge the conclusion that the Convention rights were engaged. It follows that neither Ground 1 nor Ground 2 was advanced before the judge.

6. The respondent contends that it should not be open to the prosecution to raise Grounds 1 or 2 on appeal. He submits that there is no sign in the application for a case to be stated that Ground 1 is being pursued; and that although Ground 2 was raised, because it was not argued at first instance, the prosecution should not be allowed to take it now.

7. Rule 35.2(2)(c) of the Criminal Procedure Rules relating to an application to state a case requires:

> "35.2(2) The application must—
>
> …
>
> (c) indicate the proposed grounds of appeal"

8. The prosecution did not include what is now Ground 1 of the Grounds of Appeal in its application to the Magistrates' Court for a case to be stated. We do not think it appropriate to determine this part of the appeal, for that reason and also because it does not give rise to a clear-cut point of law. The prosecution seeks to argue that trespass involving damage to land does not engage articles 10 and 11. That issue is potentially fact-sensitive and, had it been in issue before the judge, might well have resulted in the case proceeding in a different way and led to further factual findings.

9. Applying well-established principles set out in *R v R* [2016] 1 WLR 1872 at [53]-[54]; *R v. E* [2018] EWCA Crim 2426 at [17]-[27] and *Food Standards Agency v. Bakers of Nailsea Limited* [2020] EWHC 3632 (Admin) at [25]-[31], we are prepared to deal with Ground 2. It involves a pure point of law arising from the decision of the Supreme Court in *Ziegler* which, according to the respondent, would require a proportionality test to be made an ingredient of any offence which impinges on the exercise of rights under articles 10 and 11 of the Convention, including, for example, theft. There are many public protest cases awaiting determination in both the Magistrates' and Crown Courts which are affected by this issue. It is desirable that the questions which arise from *Ziegler* are determined as soon as possible.

Section 68 of the Criminal Justice and Public Order Act 1994

10. Section 68 of the 1994 Act as amended reads:

> "(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or

adjoining land, does there anything which is intended by him to have the effect—

(a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,

(b) of obstructing that activity, or

(c) of disrupting that activity.

(1A) …

(2) Activity on any occasion on the part of a person or persons on land is "lawful" for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.

(3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 4 on the standard scale, or both.

(4) [repealed].

(5) In this section "land" does not include—

(a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of "land" in subsection (9) of that section; or

(b) a road within the meaning of the Roads (Northern Ireland) Order 1993."

11. Parliament has revisited section 68 since it was first enacted. Originally the offence only applied to trespass on land in the open air. But the words "in the open air" were repealed by the Anti-Social Behaviour Act 2003 to widen section 68 to cover trespass in buildings.

12. The offence has four ingredients, all of which the prosecution must prove (see *Richardson v Director of Public Prosecutions* [2014] AC 635 at [4]): -

"(i) the defendant must be a trespasser on the land;

(ii) there must be a person or persons lawfully on the land (that is to say not themselves trespassing), who are either engaged in or about to engage in some lawful activity;

(iii) the defendant must do an act on the land;

(iv) which is intended by him to intimidate all or some of the persons on the land out of that activity, or to obstruct or disrupt it."

13. Accordingly, section 68 is not concerned simply with the protection of a landowner's right to possession of his land. Instead, it only applies where, in addition, a trespasser does an act on the land to deter by intimidation, or to obstruct or disrupt, the carrying on of a lawful activity by one or more persons on the land.

Factual Background

14. The respondent was charged under section 68 of the 1994 Act that between 16 and 18 March 2021, he trespassed on land referred to as Access Way 201, off Shaw Lane, Hanch, Lichfield, Staffordshire ("the Land") and dug and occupied a tunnel there which was intended by him to have the effect of obstructing or disrupting a lawful activity, namely construction works for the HS2 project.

15. The Land forms part of phase one of HS2, a project which was authorised by the High Speed Rail (London to West Midlands) Act 2017 ("the 2017 Act"). This legislation gave the Secretary of State for Transport power to acquire land compulsorily for the purposes of the project, which the Secretary of State used to purchase the Land on 2 March 2021.

16. The Land was an area of farmland. It is adjacent to, and fenced off from, the West Coast line. The Land was bounded in part by hedgerow and so it was necessary to install further fencing to secure the site. The Secretary of State had previously acquired a site immediately adjacent to the Land. HS2 contractors were already on that site and ready to use the Land for storage purposes once it had been cleared.

17. Protesters against the HS2 project had occupied the Land and the respondent had dug a tunnel there before 2 March 2021. The respondent occupied the tunnel from that date. He slept in it between 15 and 18 March 2021, intending to resist eviction and to disrupt activities of the HS2 project.

18. The HS2 project team applied for a High Court warrant to obtain possession of the Land. On 16 March 2021 they went on to the Land and found four protesters there. One left immediately and two were removed from trees on the site. On the same day the team found the respondent in the tunnel. Between 07.00 and 09.30 he was told that he was trespassing and given three verbal warnings to leave. At 18.55 a High Court enforcement agent handed him a notice to vacate and told him that he would be forcibly evicted if he failed to leave. The respondent went back into the tunnel.

19. The HS2 team instructed health and safety experts to help with the eviction of the respondent and the reinstatement of the Land. They included a "confined space team" who were to be responsible for boarding the tunnel and installing an air supply system. The respondent left the Land voluntarily at about 14.00 on 18 March 2021.

20. The cost of these teams to remove the three protesters over this period of three days was about £195,000.

21. HS2 contractors were unable to go onto the Land until it was completely free of all protesters because it was unsafe to begin any substantial work while they were still present.

The Proceedings in the Magistrates' Court

22. On 18 March 2021 the respondent was charged with an offence contrary to section 68 of the 1994 Act. On 10 April 2021 he pleaded not guilty. The trial took place on 21 September 2021.

23. At the trial the respondent was represented by counsel who did not appear in this court. He produced a skeleton argument in which he made the following submissions: -

    i) "*Ziegler* laid down principles applicable to all criminal charges which trigger an assessment of a defendant's rights under articles 10 and 11 ECHR. It is of general applicability. It is not limited to offences of obstructing the highway";

    ii) *Ziegler* applies with the same force to a charge of aggravated trespass, essentially for two reasons;

        (a) First, the Supreme Court's reasoning stems from the obligation of a court under section 6(1) of the Human Rights Act 1998 ("1998 Act") not to act in a manner contrary to Convention rights (referred to in *Ziegler* at [12]). Accordingly, in determining a criminal charge where issues under articles 10 and 11 ECHR are raised, the court is obliged to take account of those rights;

        (b) Second, violence is the dividing line between cases where articles 10 and 11 ECHR apply and those where they do not. If a protest does not become violent, the court is obliged to take account of a defendant's right to protest in assessing whether a criminal offence has taken place. Section 68 does not require the prosecution to show that a defendant was violent and, on the facts of this case, the respondent was not violent;

    iii) Accordingly, before the court could find the respondent guilty of the offence charged under section 68, it would have to be satisfied by the prosecution so that it was sure that a conviction would be a proportionate interference with his rights under articles 10 and 11. Whether a conviction would be proportionate should be assessed with regard to factors derived from *Ziegler* (at [71] to [78], [80] to [83] and [85] to [86]). This required a fact-sensitive assessment.

24. The prosecution did not produce a skeleton for the judge. She recorded that they did not submit "that the respondent's article 10 and 11 rights could not be engaged in relation to an offence of aggravated trespass" or that the principles in *Ziegler* did not apply in this case (see paragraph 10 of the Case Stated).

25. The judge made the following findings:

    "1. The tunnel was on land owned by HS2.

2. Albeit that the Respondent had dug the tunnel prior to the of transfer of ownership, his continued presence on the land after being served with the warrant disrupted the activity of HS2 because they could not safely hand over the site to the contractors due to their health and safety obligations for the site to be clear.

3. The act of Respondent taking up occupation of the tunnel on 15th March, sleeping overnight and retreating into the tunnel having been served with the Notice to Vacate was an act which obstructed the lawful activity of HS2. This was his intention.

4. The Respondent's article 10 and 11 rights were engaged and the principals in R v Ziegler were to be considered.

5. The Respondent was a lone protester only occupying a small part of the land.

6. He did not act violently.

7. The views of the Respondent giving rise to protest related to important issues.

8. The Respondent believed the views he was expressing.

9. The location of the land meant that there was no inconvenience to the general public or interference with the rights of anyone other than HS2.

10. The land specifically related to the HS2 project.

11. HS2 were aware of the protesters were on site before they acquired the land.

12. The land concerned, which was to be used for storage, is a very small part of the HS2 project which will take up to 20 years complete with a current cost of billions.

13. Taking into account the above, even though there was a delay of 2.5 days and total cost of £195k I found that the [prosecution] had not made me sure to the required standard that a conviction for this offence was a necessary and proportionate interference with the Respondents article 10 and 11 rights"

Convention Rights

26. Article 10 of the Convention provides: -

"**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."

27. Article 11 of the Convention provides: -

"**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."

28. Because section 68 is concerned with trespass, it is also relevant to refer to Article 1 of the First Protocol to the Convention ("A1P1"): -

"**Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"

29. Section 3 of the 1998 Act deals with the interpretation of legislation. Subsection (1) provides that: -

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

30. Section 6(1) provides that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right" unless required by primary legislation (section 6(2)). A "public authority" includes a court (section 6(3)).

31. In the case of a protest there is a link between articles 10 and 11 of the Convention. The protection of personal opinions, secured by article 10, is one of the objectives of the freedom of peaceful assembly enshrined in article 11 (*Ezelin v. France* [1992] EHRR 362 at [37]).

32. The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Accordingly, it should not be interpreted restrictively. The right covers both "private meetings" and "meetings in public places" (*Kudrevicius v. Lithuania* [2016] 62 EHRR 34 at [91]).

33. Article 11 expressly states that it protects only "peaceful" assemblies. In *Kudrevicius v. Lithuania* (2016) 62 EHRR 34, the Grand Chamber of the European Court of Human Rights ("the Strasbourg Court") explained that article 11 applies "to all gatherings except those where the organisers and participants have [violent] intentions, incite violence or otherwise reject the foundations of a democratic society" ([92]).

34. The respondent submits, relying on the Supreme Court judgment in Ziegler at §70, that an assembly is to be treated as "peaceful" and therefore as engaging article 11 other than: where protesters engage in violence, have violent intentions, incite violence or otherwise reject the foundations of a democratic society. He submits that the respondent's peaceful protest did not fall into any of those exclusionary categories and that the trespass on land to which the public does not have access is irrelevant, save at the evaluation of proportionality.

35. Public authorities are generally expected to show some tolerance for disturbance that follows from the normal exercise of the right of peaceful assembly in a *public place* (see e.g. *Kuznetsov v. Russia* No. 10877/04, 23 October 2008 at [44], cited in *City of London Corporation v. Samede* [2012] PTSR 1624 at [43]; *Kudrevicius* at [150] and [155]).

36. The respondent relied on decisions where a protest intentionally disrupting the activity of another party has been held to fall within articles 10 and 11 (e.g. *Hashman v. United Kingdom* [2000] 30 EHRR 241 at [28]). However, conduct deliberately obstructing traffic or seriously disrupting the activities of others is not at the core of these Convention rights (*Kudrevicius* at [97]).

37. Furthermore, intentionally serious disruption by protesters to ordinary life or to activities lawfully carried on by others, where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly *in a public place*, may be considered to be a "reprehensible act" within the meaning of Strasbourg jurisprudence, so as to justify a criminal sanction (*Kudrevicius* at [149] and [172] to

[174]; *Ezelin* at [53]; *Barraco v. France* No. 31684/05, 5 March 2009 at [43] to [44] and [47] to [48]).

38. In *Barraco* the applicant was one of a group of protesters who drove their vehicles at about 10kph along a motorway to form a rolling barricade across all lanes, forcing the traffic behind to travel at the same slow speed. The applicant even stopped his vehicle. The demonstration lasted about five hours and three major highways were blocked, in disregard of police orders and the needs and rights of other road users. The court described the applicant's conduct as "reprehensible" and held that the imposition of a suspended prison sentence for three months and a substantial fine had not violated his article 11 rights.

39. *Barraco* and *Kudrevicius* are examples of protests carried out in locations to which the public has a right of access, such as highways. The present case is concerned with trespass on land to which the public has no right of access at all. The respondent submits that the protection of articles 10 and 11 extends to trespassory demonstrations, including trespass upon private land or upon publicly owned land from which the public are generally excluded (paragraph 31 of skeleton). He relies upon several authorities. It is unnecessary for us to review them all. In several of the cases the point was conceded and not decided. In others the land in question formed part of a highway and so the decisions provide no support for the respondent's argument (e.g. *Samede* at [5] and see Lindblom J (as he then was) [2012] EWHC 34 (QB) at [12] and [136] to [143]; *Canada Goose UK Retail Limited v. Persons Unknown* [2020] 1 WLR 2802). Similarly, we note that *Lambeth LBC v. Grant* [2021] EWHC 1962 (QB) related to an occupation of Clapham Common.

40. Instead, we gain much assistance from *Appleby v. United Kingdom* [2003] 37 EHRR 38. There the applicants had sought to protest in a privately owned shopping mall about the local authority's planning policies. There does not appear to have been any formal public right of access to the centre. But, given the nature of the land use, the public did, of course, have access to the premises for shopping and incidental purposes. The Strasbourg Court decided that the landowner's A1P1 rights were engaged ([43]). It also observed that a shopping centre of this kind may assume the characteristics of a traditional town centre [44]. Nonetheless, the court did not adopt the applicants' suggestion that the centre be regarded as a "quasi-public space".

41. Instead, the court stated at [47]: -

> "[Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (government offices and ministries, for instance). Where, however, the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the

> enjoyment of the Convention rights by regulating property rights. A corporate town where the entire municipality is controlled by a private body might be an example (see Marsh v. Alabama [326 US 501], cited at paragraph 26 above)."

The court indicated that the same analysis applies to article 11 (see [52]).

42. The example given by the court at the end of that passage in [47] shows the rather unusual or even extreme circumstances in which it *might* be possible to show that the protection of a landowner's property rights has the effect of preventing *any* effective exercise of the freedoms of expression and assembly. But in *Appleby* the court had no difficulty in finding that the applicants did have alternative methods by which they could express their views to members of the public ([48]).

43. Likewise, *Taranenko v. Russia* (No.19554/05, 15 May 2014) does not assist the respondent. At [78] the court restated the principles laid down in *Appleby* at [47]. The protest in that case took place in the Administration Building of the President of the Russian Federation. That was a public building to which members of the public had access for the purposes of making complaints, presenting petitions and meeting officials, subject to security checks ([25], [61] and [79]). The qualified public access was an important factor.

44. The respondent also relied upon *Annenkov v. Russia* No. 31475/10, 25 July 2017. There, a public body transferred a town market to a private company which proposed to demolish the market and build a shopping centre. A group of business-people protested by occupying the market at night. The Strasbourg Court referred to inadequacies in the findings of the domestic courts on various points. We note that any entitlement of the entrepreneurs, and certain parties who were paying rent, to gain access to the market is not explored in the decision. Most importantly, there was no consideration of the principle laid down in *Appleby* and applied in *Taranenko*. Although we note that the court found a violation of article 11 rights, we gain no real assistance from the reasoning in the decision for the resolution of the issues in the present case.

45. We conclude that there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of *destroying* the *essence* of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights.

46. The approach taken by the Strasbourg Court should not come as any surprise. articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are

prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms.

47. We now return to *Richardson* and the important statement made by Lord Hughes JSC at [3]:

> "By definition, trespass is unlawful independently of the 1994 Act. It is a tort and committing it exposes the trespasser to a civil action for an injunction and/or damages. The trespasser has no right to be where he is. Section 68 is not concerned with the rights of the trespasser, whether protester or otherwise. References in the course of argument to the rights of free expression conferred by article 10 of the European Convention on Human Rights were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people's property in order to give voice to one's views. Like adjoining sections in Part V of the 1994 Act, section 68 is concerned with a limited class of trespass where the additional sanction of the criminal law has been held by Parliament to be justified. The issue in this case concerns its reach. It must be construed in accordance with normal rules relating to statutes creating criminal offences."

48. *Richardson* was a case concerned with the meaning of "lawful activity", the second of the four ingredients of section 68 identified by Lord Hughes (see [12] above). Accordingly, it is common ground between the parties (and we accept) that the statement was *obiter*. Nonetheless, all members of the Supreme Court agreed with the judgment of Lord Hughes. The *dictum* should be accorded very great respect. In our judgment it is consistent with the law on articles 10 and 11 and A1P1 as summarised above.

49. The proposition which the respondent has urged this court to accept is an attempt to establish new principles of Convention law which go beyond the "clear and constant jurisprudence of the Strasbourg Court". It is clear from the line of authority which begins with *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 at [20] and has recently been summarised by Lord Reed PSC in *R (AB) v. Secretary of State for Justice* [2021] 3 WLR 494 at [54] to [59], that this is not the function of a domestic court.

50. For the reasons we gave in para. [8] above, we do not determine Ground 1 advanced by the prosecution in this appeal. It is sufficient to note that in light of the jurisprudence of the Strasbourg Court it is highly arguable that articles 10 and 11 are not engaged at all on the facts of this case.

Ground 2

51. The respondent's case falls into two parts. First, Mr Moloney QC submits that the Supreme Court in *Ziegler* had decided that in any criminal trial involving an offence which has the effect of restricting the exercise of rights under articles 10 and 11 of the Convention, it is necessary for the prosecution to prove that a conviction would be proportionate, after carrying out a fact-sensitive proportionality assessment applying the factors set out in *Ziegler*. The language of the judgment in *Ziegler* should not be read as being conditioned by the offence under consideration (obstructing the highway) which required the prosecution to prove that the defendant in question did not have a "lawful excuse". If that submission is accepted, Ground 2 would fail.

52. Secondly, if that first contention is rejected, the respondent submits that the court cannot allow the appeal under Ground 2 without going on to decide whether section 68 of the 1994 Act, construed in accordance with ordinary canons of construction, is compatible with articles 10 and 11. If it is not, then he submits that language should be read into section 68 requiring such an assessment to be made in every case where articles 10 and 11 are engaged (applying section 3 of the 1998 Act). If this argument were accepted Ground 2 would fail. This argument was not raised before the judge in addition to direct reliance on the language of *Ziegler*. Mr Moloney has raised the possibility of a declaration of incompatibility under section 4 of the 1998 Act both in his skeleton argument and orally.

53. On this second part of Ground 2, Mr Little QC for the prosecution (but did not appear below) submits that, assuming that rights under articles 10 and 11 are engaged, a conviction based solely upon proof of the ingredients of section 68 is intrinsically proportionate in relation to any interference with those rights. Before turning to *Ziegler,* we consider the case law on this subject, for section 68 and other offences.

54. In *Bauer v. Director of Public Prosecutions (Liberty Intervening)* [2013] 1 WLR 3617 the Divisional Court considered section 68 of the 1994 Act. The case concerned a demonstration in a retail store. The main issue in the case was whether, in addition to the initial trespass, the defendants had committed an act accompanied by the requisite intent (the third and fourth ingredients identified in *Richardson* at [4]). The Divisional Court decided that, on the facts found by the judge, they had and so were guilty under section 68. As part of the reasoning leading to that conclusion, Moses LJ (with whom Parker J agreed) stated that it was important to treat all the defendants as principals, rather than treating some as secondary participants under the law of joint enterprise; the district judge had been wrong to do ([27] to [36]). One reason for this was to avoid the risk of inhibiting legitimate participation in protests ([27]). It was in that context that Liberty had intervened ([37]).

55. Liberty did not suggest that section 68 involved a disproportionate interference with rights under articles 10 and 11 ([37]). But Moses LJ accepted that it was necessary to ensure that criminal liability is not imposed on those taking part in a peaceful protest because others commit offences under section 68 (referring to *Ezelin*). Accordingly,

he held that the prosecution must prove that those present at and participating in a demonstration are themselves guilty of the conduct element of the crime of aggravated trespass ([38]). It was in this context that he said at [39]:

> "In the instant appeals the district judge, towards the end of his judgment, asked whether the prosecution breached the defendants' article 10 and 11 rights. Once he had found that they were guilty of aggravated trespass there could be no question of a breach of those rights. He had, as he was entitled to, concluded that they were guilty of aggravated trespass. Since no one suggests that section 68 of the 1994 Act is itself contrary to either article 10 or 11, there was no room for any further question or discussion. No one can or could suggest that the state was not entitled, for the purpose of preventing disorder or crime, from preventing aggravated trespass as defined in section 68(1)."

56. Moses LJ then went on to say that his earlier judgment in *Dehal v. Crown Prosecution Service* [2005] 169 JP 581 should not be read as requiring the prosecution to prove more than the ingredients of section 68 set out in the legislation. If the prosecution succeeds in doing that, there is nothing more to prove, including proportionality, to convict of that offence ([40]).

57. In *James v. Director of Public Prosecutions* [2016] 1 WLR 2118 the Divisional Court held that public order offences may be divided into two categories. First, there are offences the ingredients of which include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable (if there is sufficient evidence to raise that issue). Any restrictions on the exercise of rights under articles 10 and 11 and the proportionality of those restrictions are relevant to whether that ingredient is proved. In such cases the prosecution must prove that any such restriction was proportionate ([31] to [34]). Offences falling into that first category were the subject of the decisions in *Norwood v. Director of Public Prosecutions* [2003] EWHC 1564 (Admin), *Hammond v. Director of Public Prosecutions* [2004] EWHC 69 (Admin) and *Dehal*.

58. The second category comprises offences where, once the specific ingredients of the offence have been proved, the defendant's conduct has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights. "The necessary balance for proportionality is struck by the terms of the offence-creating provision, without more ado". Section 68 of the 1994 Act is such an offence, as had been decided in *Bauer* (see Ouseley J at [35]).

59. The court added that offences of obstructing a highway, subject to a defence of lawful excuse or reasonable use, fall within the first category. If articles 10 and 11 are engaged, a proportionality assessment is required ([37] to [38]).

60. *James* concerned an offence of failing to comply with a condition imposed by a police officer on the holding of a public assembly contrary to section 14(5) of the Public Order Act 1986. The ingredients of the offence which the prosecution had to prove included that a senior police officer (a) had *reasonably* believed that the assembly might result in serious public disorder, serious damage to property or serious disruption to the life of the community or that the object of the organisers was to intimidate others into not doing something that they have a right to do, and (b) had given a direction imposing

conditions appearing to him to be *necessary* to prevent such disorder, damage, disruption or intimidation. The Divisional Court held that where the prosecution satisfies those statutory tests, that is proof that the making of the direction and the imposition of the condition was proportionate. As in *Bauer*, proof of the ingredients of the offence laid down by Parliament is sufficient to be compatible with the Convention rights. There was no justification for adding a further ingredient that a conviction must be proportionate, or for reading in additional language to that effect, to render the legislation compatible with articles 10 and 11 ([38] to [43]). *James* provides another example of an offence the ingredients of which as enacted by Parliament satisfy any proportionality requirement arising from articles 10 and 11 of the Convention.

61. There are also some instances under the common law where proof of the ingredients of the offence without more renders a conviction proportionate to any interference with articles 10 and 11 ECHR. For example, in Scotland a breach of the peace is an offence involving conduct which is likely to cause fear, alarm, upset or annoyance to any reasonable person or may threaten public safety or serious disturbance to the community. In *Gifford v. HM Advocate* [2012] SCCR 751 the High Court of Justiciary held that "the Convention rights to freedom of expression and freedom of assembly do not entitle protestors to commit a breach of the peace" [15]. Lord Reed added at [17]:

> "Accordingly, if the jury are accurately directed as to the nature of the offence of breach of the peace, their verdict will not constitute a violation of the Convention rights under arts 10 and 11, as those rights have been interpreted by this court in the light of the case law of the Strasbourg Court. It is unnecessary, and inappropriate, to direct the jury in relation to the Convention."

62. Similarly, in *R v. Brown* [2022] EWCA Crim 6 the appellant rightly accepted that articles 10 and 11 ECHR do not provide a defence to the offence of public nuisance as a matter of substantive criminal law ([37]). Essentially for the same reasons, there is no additional "proportionality" ingredient which has to be proved to convict for public nuisance. Moreover, the Court of Appeal held that a prosecution for an offence of that kind cannot be stayed under the abuse of process jurisdiction on the freestanding ground that it is disproportionate in relation to Convention rights ([24] to [39]).

63. *Ziegler* was concerned with section 137 of the Highways Act 1980. This is an offence which is subject to a "lawful excuse" defence and therefore falls into the first category defined in *James*. Indeed, at [2020] QB 253 [87] to [91] the Divisional Court referred to the analysis in *James*.

64. The second question certified for the Supreme Court in *Ziegler* related to the "lawful excuse" defence in section 137 of the Highways Act ([2021] 3 WLR at [7], [55] to [56] and [98] to [99]). Lord Hamblen and Lord Stephens JJSC referred at [16] to the explanation by the Divisional Court about how section 137 should be interpreted compatibly with articles 10 and 11 in cases where, as was common ground, the availability of the "lawful excuse" defence "depends on the proportionality assessment to be made".

65. The Supreme Court's reasoning was clearly expressed solely in the context of the lawful excuse defence to section 137 of the Highways Act. The Supreme Court had no need to consider, and did not express any views about, offences falling into the second

category defined in *James,* where the balance required for proportionality under articles 10 and 11 is struck by the terms of the legislation setting out the ingredients of the offence, so that the prosecution is not required to satisfy any additional case-specific proportionality test. Nor did the Supreme Court in some way *sub silencio* suggest that section 3 of the 1998 Act should be used to insert into no doubt myriad offences a proportionality ingredient. The Supreme Court did not consider, for example, *Bauer* or offences such as section 68. That was unnecessary to resolve the issues before the court.

66. Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well-established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the statement in *Richardson* at [3] or to cases such as *Appleby*.

67. For these reasons, it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights.

68. The passages in *Ziegler* upon which the respondent relies have been wrenched completely out of context. For example, the statements in [57] about a proportionality assessment at a trial, or in relation to a conviction, were made only in the context of a prosecution under section 137 of the Highways Act. They are not to be read as being of general application whenever a criminal offence engages articles 10 and 11. The same goes for the references in [39] to [60] to the need for a fact-specific enquiry and the burden of proof upon the prosecution in relation to proportionality. Paragraphs [62] to [70] are entitled "deliberate obstruction with more than a *de minimis* impact". The reasoning set out in that part of the judgment relates only to the second certified question and was therefore concerned with the "lawful excuse" defence in section 137.

69. We are unable to accept the respondent's submission that section 6 of the 1998 Act requires a court to be satisfied that a conviction for an offence would be proportionate whenever articles 10 and 11 are engaged. Section 6 applies if both (a) Convention rights such as articles 10 and 11 are engaged and (b) proportionality is an ingredient of the offence and therefore something which the prosecution has to prove. That second point depends on the substantive law governing the offence. There is no need for a court to be satisfied that a conviction would be proportionate if the offence is one where proportionality is satisfied by proof of the very ingredients of that offence.

70. Unless a court were to be persuaded that the ingredients of a statutory offence are not compatible with Convention rights, there would be no need for the interpretative provisions in section 3 of the 1998 Act to be considered. It is through that provision that, in a properly argued, appropriate case, a freestanding proportionality requirement might be justified as an additional ingredient of a statutory offence, but not through section 6 by itself. If, despite the use of all interpretative tools, a statutory offence were to remain incompatible with Convention rights because of the lack of a separate "proportionality" ingredient, the question of a declaration of incompatibility under section 4 of the1998 Act would arise. If granted, it would remain a matter for

Parliament to decide whether, and if so how, the law should be changed. In the meantime, the legislation would have to be applied as it stood (section 6(2)).

71. Accordingly, we do not accept that section 6 imposes a freestanding obligation on a court to be satisfied that a conviction would be a proportionate interference with Convention rights if that is not an ingredient of a statutory offence. This suggestion would make it impossible for the legislature to enact a general measure which satisfactorily addresses proportionality itself, to make case-by-case assessment unnecessary. It is well-established that such measures are permissible (see e.g. *Animal Defenders International v. United Kingdom* [2013] EMLR 28).

72. It would be in the case of a common law offence that section 6 of the 1998 Act might itself require the addition of a "proportionality" ingredient if a court were to be satisfied that proof of the existing ingredients of that offence is insufficient to achieve compatibility with Convention rights.

73. The question becomes, is it necessary to read a proportionality test into section 68 of the 1994 Act to render it compatible with articles 10 and 11? In our judgment there are several considerations which, taken together, lead to the conclusion that proof of the ingredients set out in section 68 of the 1994 Act ensures that a conviction is proportionate to any article 10 and 11 rights that may be engaged.

74. First, section 68 has the legitimate aim of protecting property rights in accordance with A1P1. Indeed, interference by an individual with the right to peaceful enjoyment of possessions can give rise to a positive obligation on the part of the State to ensure sufficient protection for such rights in its legal system (*Blumberga v. Latvia* No.70930/01, 14 October 2008).

75. Secondly, section 68 goes beyond simply protecting a landowner's right to possession of land. It only applies where a defendant not merely trespasses on the land, but also carries out an additional act with the intention of intimidating someone performing, or about to perform, a lawful activity from carrying on with, or obstructing or disrupting, that activity. Section 68 protects the use of land by a landowner or occupier for lawful activities.

76. Thirdly, a protest which is carried out for the purposes of disrupting or obstructing the lawful activities of other parties, does not lie at the core of articles 10 and 11, even if carried out on a highway or other publicly accessible land. Furthermore, it is established that serious disruption may amount to reprehensible conduct, so that articles 10 and 11 are not violated. The intimidation, obstruction or disruption to which section 68 applies is not criminalised unless it also involves a trespass and interference with A1P1. On this ground alone, any reliance upon articles 10 and 11 (assuming they are engaged) must be towards the periphery of those freedoms.

77. Fourthly, articles 10 and 11 do not bestow any "freedom of forum" to justify trespass on private land or publicly owned land which is not accessible by the public. There is no basis for supposing that section 68 has had the effect of preventing the effective exercise of freedoms of expression and assembly.

78. Fifthly, one of the aims of section 68 is to help preserve public order and prevent breaches of the peace in circumstances where those objectives are put at risk by trespass linked with intimidation or disruption of lawful activities.

79. Sixthly, the Supreme Court in *Richardson* regarded the private law of trespass as a limitation on the freedom to protest which is "unchallengeably proportionate". In our judgment, the same conclusion applies *a fortiori* to the criminal offence in section 68 because of the ingredients which must be proven in addition to trespass. The sanction of a fine not exceeding level 4 or a term of imprisonment not exceeding three months is in line with that conclusion.

80. We gain no assistance from para. 80 of the judgment in *Leigh v. Commissioner of Metropolitan Police* [2022] EWHC 527 (Admin), relied upon by Mr Moloney. The legislation considered in that case was enacted to address public health risks and involved a wide range of substantial restrictions on freedom of assembly. The need for case-specific assessment in that context arose from the nature and extent of those restrictions and is not analogous to a provision dealing with aggravated trespass and a potential risk to public order.

81. It follows, in our judgment, that section 68 of the 1994 Act is not incompatible with articles 10 or 11 of the Convention. Neither the decision of the Supreme Court in *Ziegler* nor section 3 of the 1998 Act requires a new ingredient to be inserted into section 68 which entails the prosecution proving that a conviction would be proportionate in Convention terms. The appeal must be allowed on Ground 2.

Ground 3

82. In view of our decision on Ground 2, we will give our conclusions on ground 3 briefly.

83. In our judgment the prosecution also succeeds under Ground 3.

84. The judge was not given the assistance she might have been with the result that a few important factors were overlooked. She did not address A1P1 and its significance. Articles 10 and 11 were not the only Convention rights involved. A1P1 pulled in the opposite direction to articles 10 and 11. At the heart of A1P1 and section 68 is protection of the owner and occupier of the Land against interference with the right to possession and to make use of that land for lawful activities without disruption or obstruction. Those lawful activities in this case had been authorised by Parliament through the 2017 Act after lengthy consideration of both the merits of the project and objections to it. The legislature has accepted that the HS2 project is in the national interest. One object of section 68 is to discourage disruption of the kind committed by the respondent, which, according to the will of Parliament, is against the public interest. The respondent (and others who hold similar views) have other methods available to them for protesting against the HS2 project which do not involve committing any offence under section 68, or indeed any offence. The Strasbourg Court has often observed that the Convention is concerned with the fair balance of competing rights. The rights enshrined in articles 10 and 11, long recognised by the Common Law, protect the expression of opinions, the right to persuade and protest and to convey strongly held views. They do not sanction a right to use guerrilla tactics endlessly to delay and increase the cost of an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament.

85. The judge accepted arguments advanced by the respondent which, in our respectful view led her into further error. She concluded that that there was no inconvenience to the general public or "interference with the rights of anyone other than HS2". She added that the Secretary of State was aware of the presence of the protesters on the Land before he acquired it (in the sense of before completion of the purchase). This last observation does not assist a proportionality assessment; but the immediate lack of physical inconvenience to members of the public overlooks the fact that HS2 is a public project.

86. In addition, we consider that the judge took into account factors which were irrelevant to a proportionality exercise for an offence under section 68 of the 1994 Act in the circumstances of this case. She noted that the respondent did not act violently. But if the respondent had been violent, his protest would not have been peaceful, so that he would not have been entitled to rely upon articles 10 and 11. No proportionality exercise would have been necessary at all.

87. It was also immaterial in this case that the Land formed only a small part of the HS2 project, that the costs incurred by the project came to "only" £195,000 and the delay was 2½ days, whereas the project as a whole will take 20 years and cost billions. That argument could be repeated endlessly along the route of a major project such as this. It has no regard to the damage to the project and the public interest that would be caused by encouraging protesters to believe that with impunity they can wage a campaign of attrition. Indeed, we would go so far as to suggest that such an interpretation of a Human Rights instrument would bring it into disrespect.

88. In our judgment, the only conclusion which could have been reached on the relevant facts of this case is that the proportionality balance pointed conclusively in favour of a conviction under section 68 of the 1994 Act, (if proportionality were an element of the offence).

Conclusions

89. We summarise certain key conclusions arising from arguments which have been made about the decision in *Ziegler*:

1) *Ziegler* does not lay down any principle that for all offences arising out of "non-violent" protest the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 of the European Convention on Human Rights;

2) In *Ziegler* the prosecution had to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 because the offence in question was subject to a defence of "lawful excuse". The same would also apply to an offence which is subject to a defence of "reasonable excuse", once a defendant had properly raised the issue. We would add that *Ziegler* made no attempt to establish any benchmark for highway cases about conduct which would be proportionate and conduct which would not. Strasbourg cases such as *Kudrevicius* and *Barraco* are instructive on the correct approach (see [39] above);

3) For other offences, whether the prosecution has to prove that a conviction would be proportionate to the defendant's rights under articles 10 and 11 solely depends upon the proper interpretation of the offence in question;

90. The appeal must be allowed. Our answer to both questions in the Case Stated is "no". The case will be remitted to the Magistrates' Court with a direction to convict the respondent of the offence charged under section 68(1) of the 1994 Act.

Neutral Citation Number: [2020] EWCA Civ 303

Case No: A2/2019/2604

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Nicklin J
[2019] EWHC 2459 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE COULSON

- -

Between :

CANADA GOOSE UK RETAIL LIMITED (1)
James HAYTON (for and on behalf of the Employees, Security Personnel and Protected Persons pursuant to CPR 19.6) (2) — **Appellants**

- and -

PERSONS UNKNOWN WHO ARE PROTESTORS AGAINST THE MANUFACTURE AND SALE OF CLOTHING MADE OF OR CONTAINING ANIMAL PRODUCTS AND AGAINST THE SALE OF SUCH CLOTHING AT CANADA GOOSE, 244 REGENT STREET, LONDON W1B 3BR (1)
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA) FOUNDATION
(a charitable company limited by guarantee, in its own right and for and on behalf of its employees and members pursuant to CPR 19.6) (2) — **Respondents**

- -

Ranjit Bhose QC and **Michael Buckpitt** (instructed by **Lewis Silkin LLP**) for the **Appellants**
The **Respondents** did not appear and were not represented
Sarah Wilkinson appeared as Advocate to the Court

Hearing dates : 4 & 5 February 2020

- -

Approved Judgment

Sir Terence Etherton MR, Lord Justice David Richards and Lord Justice Coulson :

1. This appeal concerns the way in which, and the extent to which, civil proceedings for injunctive relief against "persons unknown" can be used to restrict public protests.

2. The first appellant, Canada Goose Retail Limited UK ("Canada Goose"), is the UK trading arm of Canada Goose, an international retail clothing company which sells products, mostly coats, which contain animal fur and down. In November 2017 it opened a store at 244 Regent Street in London ("the store"). The second appellant is the manager of the store. The appellants are the claimants in these proceedings, in which they seek injunctive relief and damages in respect of what is described in the claim form as "a campaign of harassment and [the commission] of acts of trespass and/or nuisance against [them]".

3. The first respondents ("the Unknown Persons respondents"), who are the first defendants in the proceedings, were described in the claim form as: "Persons unknown who are protesters against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at [the store]". The second respondent, who was added as the second defendant in the course of the proceedings, is People for the Ethical Treatment of Animals (PETA) Foundation ("PETA").

4. This is an appeal from the order of Nicklin J of 20 September 2019 by which he dismissed the application of the appellants for summary judgment for injunctive relief against the respondents and he discharged the interim injunctions which had been granted by Teare J on 29 November 2017 and continued, as varied, by HHJ Moloney QC (sitting as a Judge of the High Court) on 15 December 2017.

Factual background

5. From the week before it opened on 9 November 2017, the store has been the site of many protests from animal rights activists, protesting against Canada Goose's use of animal fur and down, and in particular the way that the fur of coyotes is procured. For a detailed description of the evidence about the protests, reference should be made to Nicklin J's judgment at [132]-[134]. The following is a brief summary.

6. A number of the protestors were members of PETA, which is a charitable company dedicated to establishing and protecting the rights of all animals. PETA organised four demonstrations outside the store. They were small-scale in nature, and PETA gave advance notice of them to the police. In addition, some protestors appear to have been coordinated by Surge Activism ("Surge"), an animal rights organisation. Other protestors have joined the on-going protest as individuals who were not part of any wider group.

7. The demonstrations have been largely small in scale, with up to 20 people attending and generally peaceful in nature, with protestors holding signs or banners and handing out leaflets to those passing or entering the store. On some occasions more aggressive tactics have been used by the protestors, such as insulting members of the public or Canada Goose's employees.

8. A minority of protestors have committed unlawful acts. Prior to the opening of the store, around 4 and 5 November 2018, the front doors of the store were vandalised with "*Don't shop here*" and "*We sell cruelty*" painted on the windows and red paint was splashed over the front door. On three occasions, 11, 18 and 24 November 2017, the number of protestors (400, 300, and 100, respectively) had a serious impact on the operation of the store. The police were present on each of those occasions. On one occasion five arrests were made. On 18 November 2017 the police closed one lane of the carriageway on Regent Street. There is also evidence of criminal offences by certain individual protestors, including an offence of violence reported to the police during the large protest on 18 November 2017.

The proceedings

9. Canada Goose commenced these proceedings against the Unknown Persons respondents by a claim form issued on 29 November 2017. As mentioned above, they were described in the heading of the claim form and the particulars of claim as:

> "Persons unknown who are protestors against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR"

10. They are described in paragraph 6 of the particulars of claim as including "all persons who have since 5 November 2017 protested at the store in furtherance of the Campaign and/or who intend to further the Campaign". The "Campaign" was described in the particulars of claim as a campaign against the sale of animal products by Canada Goose, and included seeking to persuade members of the public to boycott the store until Canada Goose ceased the lawful activity of selling animal products.

11. The particulars of claim stated that an injunction was claimed pursuant to the common law torts of trespass, watching and besetting, public and private nuisance and conspiracy to injure by unlawful means. The injunction was to restrain the Unknown Persons respondents from:

> (1) Assaulting, molesting, or threatening the Protected Persons [defined in the particulars of claim as including Canada Goose's employees, security personnel working at the store and customers];
>
> (2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner towards Protected Persons.
>
> (3) Doing acts which they know or ought to know cause harassment, fear, alarm, distress and/or intimidation to the Protected Persons;
>
> (4) Intentionally photographing or filming the Protected Persons with the purpose of identifying them and/or targeting them;

(5) Making in any way whatsoever any abusive or threatening communication to the Protected Persons;

(6) Making or attempting to make repeated communications not in the ordinary course of the First Claimant's retail business to or with Employees by telephone, email or letter;

(7) Entering the Store;

(8) Blocking or otherwise obstructing the Entrances to the Store;

(9) Demonstrating at the Stores within the Inner Exclusion Zone;

(10) Demonstrating at the Stores within the Outer Exclusion Zone save that no more than 3 Protestors may at any one time demonstrate and hand out leaflets therein;

(11) Using at any time a Loudhailer within the Inner Exclusion Zone and Outer Exclusion Zone or otherwise within 50 metres of the Building Line of the Store.

12. On the same day as the claim form was issued Canada Goose applied to Teare J, without notice, for an interim injunction. He granted an interim injunction restraining the Unknown Persons respondents from doing the following:

"(1) Assaulting, molesting, or threatening the Protected Persons (defined as including Canada Goose's employees, security personnel working at the store, customer and any other person visiting or seeking to visit the store);

(2) Behaving in a threatening and/or intimidating and/or abusive and/or insulting manner directly at any individual or group of individuals within the definition of Protected Persons;

(3) Intentionally photographing or filming the Protected Persons with the purpose of identifying them and/or targeting them in connection with protests against the manufacture and/or sale or supply of Animal Products;

(4) Making in any way whatsoever any abusive or threatening electronic communication to the Protected Persons;

(5) Entering the Store;

(6) Blocking or otherwise obstructing the Entrance to the Store;

(7) Banging on the windows of the Store;

(8) Painting, spraying and/or affixing things to the outside of the Store;

> (9) Projecting images on the outside of the Store;
>
> (10) Demonstrating at the Store within the Inner Exclusion Zone;
>
> (11) Demonstrating at the Store within the Outer Exclusion Zone A save that no more than 3 Protestors may at any one time demonstrate and hand out leaflets within the Outer Exclusion Zone A (but not within the Inner Exclusion Zone provided that no obstruction occurs other than that which is implicit in handing out leaflets;
>
> (12) Demonstrating at the Store within the Outer Exclusion Zone B [as defined in the order] save that no more than 5 Protestors may at any one time demonstrate and hand out leaflets within Outer Exclusion Zone B (but not within the Inner Exclusion Zone) provided that no obstruction occurs other than that which is implicit in handing out leaflets;
>
> (13) Using at any time a Loudhailer [as defined] within the Inner Exclusion Zone and Outer Exclusion Zones or otherwise within 10 metres of the Building Line of the Store;
>
> (14) Using a Loudhailer anywhere within the vicinity of the Store otherwise than for amplification of voice."

13. A plan attached to the order showed the Inner and Outer Exclusion Zones. Essentially those Zones (with a combined width of 7.5 metres) covered roughly a 180-degree radius around the entrance to the store. The Inner Exclusion Zone extended out from the store front for 2.5 metres. The Outer Exclusion Zone extended a further 5m outwards. The Outer Exclusion Zone was divided into Zone A (a section of pavement on Regent Street) and Zone B (a section of pavement in front of the store entrance and part of the carriageway on Regent Street extending to the pavement and the entire carriageway in Little Argyle Street). For all practical purposes, the combined Exclusion Zones covered the entire pavement outside the store on Regent Street and the pavement and entire carriageway of Little Argyle Street outside the entrance to the store.

14. The order permitted the claimant to serve the order on "any person demonstrating at or in the vicinity of the store by handing or attempting to hand a copy of the same to such person and the order shall be deemed served whether or not such person has accepted a copy of this order". It provided for alternative service of the order, stating that "The claimants shall serve this order by the following alternative method namely by serving the same by email to 'contact@surgeactivism.com' and 'info@peta.org.uk'".

15. The order was expressed to continue in force unless varied or discharged by further order of the court but it also provided for a further hearing on 13 December 2017.

16. The order was sent on 29 November 2017 to the two email addresses mentioned in the order: 'contact@surgeactivism.com' and 'info@peta.org.uk'. The claim form and the particulars of claim were also sent to those email addresses.

17. On 30 November 2017 Canada Goose issued an application notice for the continuation of Teare J's order.

18. On 12 December 2017 PETA applied to be joined to the proceedings. It also sought a variation of the interim injunction. On 13 December 2017 Judge Moloney added PETA to the proceedings as a defendant for and on behalf of its employees and members. He adjourned the hearing in relation to all other matters to 15 December 2017, when the issue of the continuation of the interim injunction came before him again.

19. At that hearing PETA challenged paragraphs (10) to (14) of the interim injunction concerning the exclusion zones and use of a loud-hailer on the basis that those prohibitions were a disproportionate interference with the right of the protestors to freedom of expression under Article 10 of the European Convention on Human Rights ("the ECHR") and to freedom of assembly under Article 12 of the ECHR.

20. Judge Moloney continued the interim injunction but varied it by amalgamating Zones A and B in the Outer Exclusion Zone and increasing the number of protestors permitted within the Outer Exclusion Zone to 12 people. He also varied paragraph (14) of Teare J's order, substituting a prohibition on:

> "… using at any time a Loudhailer within the Inner Exclusion Zone and Outer Exclusion Zone… [and] using a Loudhailer anywhere else in the vicinity of the Store (including Regent Street and Little Argyll Street) save that between the hours of 2pm and 8pm a single Loudhailer may be used for the amplification of the human voice only for up to 15 minutes at a time with intervals of 15 minutes between each such use."

21. Judge Moloney's order stated that the order was to continue in force unless varied or discharged by further order of the court, and also provided that all further procedural directions in the claim be stayed, subject to a written notice by any of the parties to the others raising the stay. That was subject to a long-stop requirement that no later than 1 December 2018 Canada Goose was to apply for a case management conference or summary judgment. The order provided that, if neither application was made by that date, the proceedings would stand dismissed and the injunction discharged without further order.

The summary judgment application

22. Regular protests at the store have continued after the grant of the interim injunctions, although none has been on the large scale that occurred before the original injunction was granted. Canada Goose alleges that there have been breaches of those orders.

23. On 29 November 2018 Canada Goose applied for summary judgment against the respondents for a final injunction pursuant to CPR Part 24. The application came before Nicklin J on 29 January 2018. The injunction attached to the application

differed in some respects from the interim injunctions. The prohibitions in paragraphs (1) to (9) were the same but the restrictions applicable to the Zones were different. Only Canada Goose was represented at the hearing. At the invitation of Nicklin J, Mr Michael Buckpitt, junior counsel for Canada Goose, delivered further written submissions after the hearing, including a new description of the Unknown Persons respondents, as follows:

> "Persons who are present at and in the vicinity of 244 Regent Street, London W1B 3BR and are protesting against the manufacture and/or supply and/or sale of clothing made of or containing animal products by Canada Goose UK Retail Limited and are involved in any of the acts prohibited by the terms of this order"

24. Canada Goose says that the further written submissions made clear that it no longer pursued summary judgment against PETA.

25. Nicklin J handed down his judgment on 30 September 2019, the delay being principally due to the sensible decision to wait for the decisions in *Cameron v Liverpool Insurance Co Ltd* [2019] UKSC 6, [2019] 1 WLR 147, and *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515, [2019] 4 WLR 100, which we consider in the Discussion section below, and no doubt also due to the need to consider the successive further sets of written submissions on behalf of Canada Goose.

26. Bearing in mind that only one party was represented before him, Nicklin J's judgment is an impressive document. With no disrespect, we shall only give a very brief summary of the judgment, sufficient to understand the context for this appeal.

27. The judgment addressed two main issues: a procedural issue of whether there had been proper service of the proceedings, and a merits issue as to the substance of the application for summary judgment.

28. Nicklin J held that the claim form had not been validly served on the respondents. There had been no service of the claim form by any method permitted by CPR 6.5, and there had been no order permitting alternative service under CPR 6.15. Teare J's order only permitted alternative service of his order. Nicklin J declined to amend Teare J's order under the "slip rule" in CPR 40.12 and he refused to dispense with service of the claim form on the Unknown Persons respondents under CPR 6.16 without a proper application before him.

29. Nicklin J also considered that the description of the Unknown Persons respondents was too broad as, in its original form, it was capable of including protesters who might never even intend to visit the store. Moreover, both in the interim injunctions and in its proposed final form, the injunction was capable of affecting persons who might not carry out any unlawful activity as some of the prohibited acts would not be or might not be unlawful.

30. He was critical of the failure of Canada Goose to join any individual protestors, bearing in mind that Canada Goose could have named 37 protestors and had identified up to 121 individuals. He regarded as a fundamental difficulty that, as the Unknown

Persons respondents were not a homogeneous unit, the court had no idea who in the broad class of Unknown Persons, as defined, had committed or threatened any civil wrong and, if they had, what it was.

31. Nicklin J also considered that the form of the proposed final injunction was defective in that it would capture new future protesters, who would not have been parties to the proceedings at the time of summary judgment and the grant of the injunction.

32. Nicklin J said the following (at [163]), in conclusion on the form of the proposed final injunction:

> "For the reasons I have addressed above, it is not impossible to name the persons against whom relief is sought and, more importantly, the terms of the injunction would impose restrictions on otherwise lawful conduct. Further, the interim injunction (and in particular the size and location of the Exclusion Zones) practically limits the number of people who can demonstrate outside the Store to 12. This figure is arbitrary; not justified by any evidence; disproportionate (in the sense there is no evidence that permitting a larger group would not achieve the same object); assumes that all demonstrators share the same objectives and so could be 'represented' by 12 people; and wrong in principle ... Who is to decide who should be one of the permitted 12 demonstrators? Is it 'first-come-first-served'? What if other protestors do not agree with the message being advanced by the 12 'authorised' protestors?"

33. His conclusion on whether the respondents had a real prospect of defending the claim were stated as follows:

> "164. The Second Defendant (in its non-representative capacity) does have a real prospect of defending the claim. As I have set out above, the present evidence does not show that the Second Defendant has committed any civil wrong. As such, I am satisfied that it has a real prospect of defending the claim.
>
> 165. In relation to the First Defendants, and those for whom the Second Defendant acts in a representative capacity, it is impossible to answer the question whether they have a real prospect of defending the claim because it is impossible to identify who they are, what they are alleged to have done (or threaten to do) and what defence they might advance. Whether any individual Defendant in these classes was guilty of (or threatening) any civil wrong would require an analysis of the evidence of what s/he had done (or threatened) and whether s/he had any defence to resist any civil liability. On the evidence, therefore, I am not satisfied that the Claimants have demonstrated that the Defendants in each of these classes has no real prospect of defending the claim. On the contrary, on the evidence as it stands, it is clear that there are a large number of people caught by the definition of "persons unknown" who

> have not even arguably committed (or threatened) any civil wrong. As there is no way of discriminating between the various Defendants in these categories, it is impossible to identify those against whom summary judgment could be granted (even assuming that the evidence justified such a course) and those against whom summary judgment should be refused."

34. For those reasons, Nicklin J refused the application for summary judgment. He also held that, in view of the failure of the interim injunction to comply with the relevant principles, and also in view of fundamental issues concerning the validity of the claim form and its service, the interim injunction then in force could not continue. He said:

> "I am also satisfied that, applying the principles from *Cameron* and *Ineos*, the interim injunction that is currently in place cannot continue in its current form, if at all. There are fundamental issues that the Claimants need to address regarding the validity of the Claim Form and its service on any defendant. Presently, no defendant has been validly served. Subject to further submissions, my present view is that if the proceedings are to continue, whether or not a claim can be properly maintained against "persons unknown" for particular civil wrongs (e.g. trespass), other civil claims will require individual defendants to be joined to the proceedings whether by name or description and the nature of the claims made against them identified. Any interim relief must be tailored to and justified by the threatened or actual wrongdoing identified in the Particulars of Claim and any interim injunction granted against "persons unknown" must comply with the requirements suggested in *Ineos*."

The grounds of appeal

35. The grounds of appeal are as follows.

> "Ground 1 (Service of the Claim Form): In relation to the service of the Claim Form, the Judge:
>
> Erred in refusing to amend the Order of 29 November 2017, pursuant to CPR 40.12 or the court's inherent jurisdiction, to provide that service by email was permissible alternative service under CPR 6.15; alternatively
>
> Erred in failing to consider, alternatively in refusing to order, that the steps taken by the Appellants in compliance with the undertaking given to Teare J on 29 November 2017 constituted alternative good service under CPR 6.15(2); alternatively
>
> Adopted a procedurally unfair practice in refusing to consider an application to dispense with service of the Claim Form

> under CPR 6.16, alternatively erred in law in refusing to exercise that power of dispensation.
>
> Ground 2 (Description of First Respondents): The Judge erred in law in holding that the Appellants' proposed re-formulation of the description of the First Respondents was an impermissible one.
>
> Ground 3 (Approach to Summary Judgment): In determining whether summary judgment should be granted for a final prohibitory *quia timet* injunction against the First Respondents (as described in accordance with the proposed reformulation) the Judge erred in law in the approach he took. In particular, and without derogating from the generality of this, the Judge:
>
> Erred in concluding that the proper approach was to focus (and focus alone) on the individual evidence of wrongdoing in relation to each identified individual protester (whether or not that individual was formally joined as a party); and/or
>
> Erred in concluding that the Appellants were bound to differentiate, for the purposes of the description of the First Respondents, between those individuals for whom there was evidence of prior wrongdoing (whether of specific acts or more generally) and those for whom there was not; and/or
>
> Erred in concluding that evidence of wrongdoing of some individuals within the potential class of the First Respondents could not form the basis for a case for injunctive relief against the class as a whole.
>
> Ground 4 (Approach to and assessment of the evidence): The judge erred in his approach to alternatively his assessment of the evidence before him, reaching conclusions which he was not permitted to reach."

36. In a "supplemental note" Canada Goose asks that, if the appeal is allowed, the summary judgment application be remitted.

Discussion

Appeal Ground 1: Service

37. The order of Teare J dated 29 November 2017 directed pursuant to CPR 6.15 that his order for an interim injunction be served by the alternative method of service by email to two email addresses, one for Surge (contact@surgeactivism.com) and one for PETA (info@petga.org.uk). There was no provision for alternative service of the claim form and the particulars of claim or of any other document, other than the order itself. In fact, the claim form and the particulars of claim were sent to the same email addresses as were specified in Teare J's order for alternative service of the order itself.

38. Canada Goose submits that it is clear that there was an accidental oversight in the limitation of the provision for alternative service in Teare J's order to the service of the order itself. That is said to be clear from the fact that the order of Teare J records that Canada Goose, through its counsel, had undertaken to the court, on behalf of all the claimants, "to effect email service as provided for below of the Order, the Claim Form and Particulars of Claim and application notice and evidence in support".

39. Canada Goose submits that in the circumstances Nicklin J was wrong not to order, pursuant to CPR 40.12 or the inherent jurisdiction of the court, that Teare J's order should be corrected so as to provide for the same alternative service for the claim form and the particulars of claim as was specified for the order.

40. Canada Goose submits, alternatively, that Nicklin J should have ordered, pursuant to CPR 6.15(2) that the steps already taken to bring the claim form to the attention of the defendants was good service.

41. In the further alternative, Canada Goose submits that Nicklin J should have dispensed with service of the claim form pursuant to CPR 6.16.

42. We do not accept those submissions. Canada Goose can only succeed if Nicklin J, in refusing to exercise his discretionary management powers, made an error of principle or otherwise acted outside the bounds of a proper exercise of judicial discretion. We consider it is plain that he made no error of that kind.

43. CPR 40.12 provides that the court may at any time correct an accidental slip or omission in a judgment or order. It is well established that this slip rule enables an order to be amended to give effect to the intention of the court by correcting an accidental slip, but it does not enable a court to have second or additional thoughts: see, for example, *Bristol-Myers Squibb Co. v Baker Noton Pharmaceuticals Inc (No. 2)* [2001] EWCA Civ 414, [2001] RPC 45.

44. We do not have a transcript of the hearing before Teare J. From what we were told by Mr Bhose QC, for Canada Goose, it is clear that the order was in the form of the draft presented to Teare J by those acting for Canada Goose and it would appear that the issue of service was not addressed orally at all before him. In the circumstances, it is impossible to say that Teare J ever brought his mind to bear upon the point of alternative service of the claim form and the particulars of claim. The most that can be said is that he intended to make an order in the terms of the draft presented to him. That is what he did. In those circumstances, Nicklin J was fully justified in refusing to exercise his powers under the slip rule. The grounds of appeal refer to the inherent jurisdiction of the court but no argument was addressed to us on behalf of Canada Goose that any inherent jurisdiction of the court differed in any material respect from the principles applicable to CPR 40.12.

45. Nicklin J was not merely acting within the scope of a proper exercise of discretion in refusing to order pursuant to CPR 6.15(2)) that the steps taken by Canada Goose in compliance with the undertaking of counsel constituted good alternative service; he was, at least so far as the Unknown Persons respondents are concerned, plainly correct in his refusal. The legal context for considering this point is the importance of service of proceedings in the delivery of justice. As Lord Sumption, with whom the other justices of the Supreme Court agreed, said in *Cameron* at [14] the general rule is

that service of the originating process is the act by which the defendant is subjected to the court's jurisdiction; and, at [17]:

> "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."

46. Lord Sumption, having observed (at [20]) that CPR 6.3 considerably broadens the permissible methods of service, said that the object of all of them was to enable the court to be satisfied that the method used either had put the recipient in a position to ascertain the contents of the proceedings or was reasonably likely to enable him to do so within any relevant period of time. He went on to say (at [21]), with reference to the provision for alternative service in CPR 6.15, that:

> "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".

47. Sending the claim form to Surge's email address could not reasonably be expected to have brought the proceedings to the attention of the Unknown Persons respondents, whether as they were originally described in Teare J's order or as they were described in the latest form of the proposed injunction placed before Nicklin J. Counsel were not even able to tell us whether Surge is a legal entity. There was no requirement in Teare J's order that Surge give wider notice of the proceedings to anyone.

48. The same acute problem for Canada Goose applies to its complaint that Nicklin J wrongly failed to exercise his power under CPR 6.16 to dispense with service of the claim form. It is not necessary to focus on whether Nicklin J was right to raise the absence of a formal application as an obstacle. Looking at the substance of the matter, there was no proper basis for an order under CPR 6.16.

49. Nicklin J referred in his judgment to the evidence that 385 copies of the interim injunction had been served between 29 November 2017 and 19 January 2019, and that they had been served on a total of 121 separate individuals who could be identified (for example, by body-camera footage). The claimants have been able to identify 37 of those by name, although Canada Goose believes that a number of the names are pseudonyms. None of those who can be individually identified or named have been joined to the action (whether by serving them with the claim form or otherwise) even though there was no obstacle to serving them with the claim form at the same time as the order. Moreover, Canada Goose is not just asking for dispensation from service on the 121 individuals who can be identified. It is asking for dispensation from service on any of the Persons Unknown respondents to the proceedings, even if they have never been served with the order and whether or not they know of the proceedings. There is simply no warrant for subjecting all those persons to the jurisdiction of the court.

50. Furthermore, it would have been open to Canada Goose at any time since the commencement of the proceedings to obtain an order for alternative service which would have a greater likelihood of bringing notice of the proceedings to the attention

of protesters at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media coverage to reach a wide audience of potential protesters and by attaching or otherwise exhibiting copies of the order and of the claim form at or nearby those premises. There is no reason why the court's power to dispense with service of the claim in exceptional circumstances should be used to overcome that failure.

51. Canada Goose says that, in view of the number of orders that have been served on individuals, it is reasonable to conclude that their existence, and likely their terms, will be well known to a far larger class of protester than those served with the order. It also relies on the fact that no person served with the order has made any contact with Canada Goose's solicitors or made any application to the court to vary or discharge the order for to apply to be joined as a party.

52. We have already mentioned, by reference to Lord Sumption's comments in *Cameron*, the importance of service in order to ensure justice is done. We do not consider that speculative estimates of the number of protesters who are likely to know of the proceedings, even though they have never been served with the interim injunction, or the fact that, of the 121 persons served with the order, none has applied to vary or discharge the order or to apply to be joined as a party, can justify using the power under CPR 6.16 in effect to exonerate Canada Goose from failing to obtain an order for alternative service that would have been likely to draw the attention of protesters to the proceedings and their content. Those are not the kind of "exceptional circumstances" that would justify an order under CPR 6.16.

53. In its skeleton argument for this appeal Canada Goose seeks to make a distinction, as regards service, between the Unknown Persons respondents and PETA. Canada Goose points out that Nicklin J recognised, as was plainly the case, that service of the claim form by sending it to PETA's email address had drawn the proceedings to PETA's attention. Canada Goose submits that, in those circumstances, Nicklin J was bound to make an order pursuant to CPR 6.15(2) that there had been good service on PETA or, alternatively, he ought to have made an order under CPR 6.16 dispensing with service on PETA.

54. Bearing in mind that (1) PETA was joined as a party to the proceedings on its own application, (2) Canada Goose says that it informed Nicklin J before he handed down his judgment that judgment was no longer pursued against PETA (which was not mentioned in the proposed final injunction), and (3) Nicklin J reached the conclusion, which is not challenged on this appeal, that there was no evidence that PETA had committed any civil wrong, there would appear to be an air of unreality about that submission. The reason why it has assumed any importance now is because, should the appeal fail as regards Nicklin J's decision on service on the Unknown Persons respondents and PETA, Canada Goose is concerned about the consequences of the requirement in CPR 7.5 that the claim form must be served within four months of its issue. We were not shown anything indicating that the significance of this point was flagged up before Nicklin J as regards PETA. It certainly is not made in the further written submissions dated 28 February 2019 sent on behalf of Canada Goose to Nicklin J on the issue of service. Those submissions concentrated on the question of service on the Unknown Persons respondents. It is not possible to say that in all the circumstances Nicklin J acted outside the limits of a proper exercise of judicial

discretion in failing to order that there had been good service on PETA or that service on PETA should be waived.

55. For those reasons we dismiss Appeal Ground 1.

Appeal Ground 2 and Appeal Ground 3: Interim and Final Injunctions

56. It is convenient to take both these grounds of appeal together. Ground 3 is explicitly related to Nicklin J's dismissal of Canada Goose's application for summary judgment. Appeal Ground 2 appears to be directed at, or at least is capable of applying to, both the dismissal of the summary judgment application and also Nicklin J's discharge of the interim injunction originally granted on 29 November 2017 and continued by the order of Judge Moloney of 15 December 2017. We shall consider, first, the interim injunction, and then the application for a final injunction.

Interim relief against "persons unknown"

57. It is established that proceedings may be commenced, and an interim injunction granted, against "persons unknown" in certain circumstances. That was expressly acknowledged by the Supreme Court in *Cameron* and put into effect by the Court of Appeal in the context of protesters in *Ineos* and *Cuadrilla Bowland Limited v Persons Unknown* [2020] EWCA Civ 9.

58. In *Cameron* the claimant was injured and her car was damaged in a collision with another vehicle. She issued proceedings against the owner of the other vehicle and his insurer. The owner had not in fact been driving the other vehicle at the time of the collision. The claimant applied to amend her claim form so as to substitute for the owner: "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013". The Supreme Court, allowing the appeal from the Court of Appeal, held that the district judge had been right to refuse the application to amend and to give judgment for the insurer.

59. Lord Sumption, referred (at [9]) to the general rule that proceedings may not be brought against unnamed parties, and to the express exception under CPR 55.3(4) for claims for possession against trespassers whose names are unknown, and other specific statutory exceptions. Having observed (at [10]) that English judges had allowed some exceptions to the general rule, he said (at [11]) that the jurisdiction to allow actions and orders against unnamed wrongdoers has been regularly invoked, particularly in the context of abuse of the internet, trespasses and other torts committed by protesters, demonstrators and paparazzi. He then referred to several reported cases, including *Ineos* at first instance.

60. Lord Sumption identified (at [13]) two categories of case to which different considerations apply. The first ("Category 1") comprises anonymous defendants who are identifiable but whose names are unknown, such as squatters occupying the property. The second ("Category 2") comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The critical distinction, as Lord Sumption explained, is that a Category 1 defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further enquiry whether he is the same as the person described in the form, whereas that is not true of the Category 2 defendant.

61. That distinction is critical to the possibility of service. As we have said earlier, by reference to other statements of Lord Sumption in *Cameron*, it is the service of the claim form which subjects a defendant to the court's jurisdiction. Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued but he described that as an emergency jurisdiction which is both provisional and strictly conditional.

62. Lord Sumption said (at [15]) that, in the case of Category 1 defendants, who are anonymous but identifiable, and so can be served with the claim form or other originating process, if necessary by alternative service under CPR 6.15 (such as, in the case of anonymous trespassers, attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letterbox pursuant to CPR 55), the procedures for service are well established and there is no reason to doubt their juridical basis. In the case of the Category 2 defendant, such as in *Cameron*, however, service is conceptually impossible and so, as Lord Sumption said (at [26]), such a person cannot be sued under a pseudonym or description.

63. It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought. He did, however, refer (at [15]) with approval to *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429, [2006] 1 WLR 658, in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land.

64. Lord Sumption also referred (at [11]) to *Ineos*, in which the validity of an interim injunction against "persons unknown", described in terms capable of including future members of a fluctuating group of protesters, was centrally in issue. Lord Sumption did not express disapproval of the case (then decided only at first instance).

65. The claimants in *Ineos* were a group of companies and various individuals connected with the business of shale and gas exploration by hydraulic fracturing, or "fracking". They were concerned to limit the activities of protesters. Each of the first five defendants was a group of persons described as "Persons unknown" followed by an unlawful activity, such as "entering or remaining without the consent of the claimants on [specified] land and buildings", or "interfering with the first and second claimants' rights to pass and repass … over private access roads", or "interfering with the right of way enjoyed by the claimants … over [specified] land". The fifth defendant was described as "Persons unknown combining together to commit the unlawful acts as specified in paragraph 10 of the [relevant] order with the intention set out in para 10 of the [relevant] order". The first instance Judge made interim injunctions, as requested, apart from one relating to harassment.

66. One of the grounds for which permission to appeal was granted in *Ineos* was that the first instance judge was wrong to grant injunctions against persons unknown. Longmore LJ gave the lead and only reasoned judgement, with which the other two

members of the court (David Richards and Leggatt LJJ) agreed. He rejected the submission that Lord Sumption's Category 1 and Category 2 defendants were exhaustive categories of unnamed or unknown defendants. He said (at [29]) that it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. He said that Lord Sumption was not considering persons who do not exist at all and will only come into existence in the future. Longmore LJ concluded (at [30]) that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort (who we call "Newcomers").

67. Longmore LJ said (at [31]) that a court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance. He also referred (at [33]) to section 12(3) of the Human Rights Act 1998 ("the HRA") which provides, in the context of the grant of relief which might affect the exercise of the right to freedom of expression under Article 10 of the ECHR, that no relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. He said that there was considerable force in the submission that the first instance judge had failed properly to apply section 12(3) in that the injunctions against the fifth defendants were neither framed to catch only those who were committing the tort of conspiring to cause damage to the claimant by unlawful means nor clear and precise in their scope. Having regard to those matters, Longmore LJ said (at [34]) that he would "tentatively frame [the] requirements" necessary for the grant of the injunction against unknown persons, as follows:

> "(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. Applying those requirements to the order of the first instance judge, Longmore LJ said that there was no difficulty with the first three requirements. He considered, however, against the background of the right to freedom of peaceful assembly guaranteed by both the common law and Article 11 of the ECHR, that the order was both too wide and insufficiently clear in, for example, restraining the fifth defendants from combining together to commit the act or offence of obstructing free passage along the public highway (or to access to or from a public highway) by slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.

69. Longmore LJ said (at [40]) that the subjective intention of a defendant, which is not necessarily known to the outside world (and in particular the claimants) and is susceptible of change, should not be incorporated into the order. He also criticised the concept of slow walking as too wide and insufficiently defined and said that the concept of "unreasonably" obstructing the highway was not susceptible to advance definition. He further held that it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate right to 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. He said (at [40]) that it was unsatisfactory that the injunctions contained no temporal limit.

70. The result of the appeal was that the injunctions made against the third and fifth defendants were discharged and the claims against them dismissed but the injunctions against the first and second defendants were maintained pending remission to the first instance judge to reconsider whether interim relief should be granted in the light of section 12(3) of the HRA and, if so, what temporal limit was appropriate.

71. *Cuadrilla* was another case concerning injunctions restraining the unlawful actions of fracking protesters. The matter came before the Court of Appeal on appeal from an order committing the three appellants to prison for contempt of court in disobeying an earlier injunction aimed at preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant. One of the grounds of appeal was that the relevant terms of the injunction were insufficiently clear and certain to be enforced by committal because those terms made the question of whether conduct was prohibited depend on the intention of the person concerned.

72. The Court of Appeal dismissed the appeal. The significance of the case, for present purposes, is not simply that it followed *Ineos* in recognising the jurisdiction to grant a *quia timet* interim injunction against Newcomers but also that it both qualified and amplified two of the requirements for such an injunction suggested by Longmore LJ ("the *Ineos* requirements"). Although both David Richards LJ and Leggatt LJ had been members of the Court of Appeal panel in *Ineos* and had given unqualified approval to the judgment of Longmore LJ, they agreed in *Cuadrilla* that the fourth and fifth *Ineos* requirements required some qualification.

73. Leggatt LJ, who gave the lead judgment, with which David Richards LJ and Underhill LJ agreed, said with regard to the fourth requirement that it cannot be regarded as an absolute rule that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct. He referred to *Hubbard v Pitt* [1976] 1 QB 142 and *Burris v Azadani* [1995] 1 WLR 1372, which had not been cited in *Ineos*, as demonstrating that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case.

74. Although the point did not arise for decision in *Cuadrilla*, the point is relevant in the present case in relation to injunctions against persons unknown who are Newcomers because the injunction granted by Teare J and continued by Judge Moloney prohibited

demonstrating within the Inner Exclusion Zone and limited the number of protesters at any one time and their actions within the Outer Exclusion Zone.

75. In *Hubbard v Pitt* [1976] 1 QB 142 the issue was whether the first instance judge had been right to grant an interim injunction restraining named defendants from, in effect, protesting outside the premises of an estate agency about changes in the character of the locality attributed to the assistance given by the plaintiff estate agents. The defendants had behaved in an orderly and peaceful manner throughout. The claim was for nuisance. The appeal was dismissed (Lord Denning MR dissenting). Stamp LJ said (at pp. 187-188) that the injunction was not wider that was necessary for the purpose of giving the plaintiffs the protection they ought to have. Orr LJ said (at p. 190):

> "Mr. Turner-Samuels, however, also advanced an alternative argument that, even if he was wrong in his submission that no interlocutory relief should have been granted, the terms of the injunction were too wide in that it would prevent the defendants from doing that which, as he claimed and as I am for the present purposes prepared to accept, it was not unlawful for them to do, namely, to assemble outside the plaintiffs' premises for the sole purpose of imparting or receiving information. I accept that the court must be careful not to impose an injunction in wider terms than are necessary to do justice in the particular case; but I reject the argument that the court is not entitled, when satisfied that justice requires it, to impose an injunction which may for a limited time prevent the defendant from doing that which he would otherwise be at liberty to do."

76. In *Burris* the defendant had persistently threatened and harassed the plaintiff. The plaintiff obtained an interim injunction preventing the defendant from assaulting, harassing or threatening the claimant as well as remaining within 250 yards of her home. Committal proceedings were subsequently brought against the defendant. On the issue of the validity of the exclusion zone, Sir Thomas Bingham MR, with whom the other two members of the court agreed, said (at pp.1377 and 1380-1381):

> "It would not seem to me to be a valid objection to the making of an "exclusion zone" order that the conduct to be restrained is not in itself tortious or otherwise unlawful if such an order is reasonably regarded as necessary for protection of a plaintiff's legitimate interest … Ordinarily, the victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed, whether trespass to the person or to land, interference with goods, harassment, intimidation or as the case may be. But it may be clear on the facts that if the defendant approaches the vicinity of the plaintiff's home he will succumb to the temptation to enter it, or to abuse or harass the plaintiff; or that he may loiter outside the house, watching and besetting it, in a manner which might be highly stressful and disturbing to a plaintiff. In such a situation the court may properly judge that in the plaintiff's interest —

> and also, but indirectly, the defendant's — a wider measure of restraint is called for.

77. Nicklin J, who was bound by *Ineos*, did not have the benefit of the views of the Court of Appeal in *Cuadrilla* and so, unsurprisingly, did not refer to *Hubbard v Pitt*. He distinguished *Burris* on the grounds that the defendant in that case had already been found to have committed acts of harassment against the plaintiff; an order imposing an exclusion zone around the plaintiff's home did not engage the defendant's rights of freedom of expression or freedom of assembly; it was a case of an order being made against an identified defendant, not "persons unknown", to protect the interests of an identified "victim", not a generic class. He said that the case was, therefore, very different from *Ineos* and the present case.

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.

79. The other *Ineos* requirement which received further consideration and qualification in *Cuadrilla* was the fifth requirement – that the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. As mentioned above, Longmore LJ expressed the view in *Ineos* that it was wrong to include in the order any reference to the subjective intention of the defendant. In *Cuadrilla* Leggatt LJ held that the references to intention in the terms of the injunction he was considering did not have any special legal meaning or were difficult for a member of the public to understand. Such references included, for example, the provision in paragraph 4 of the injunction prohibiting "blocking any part of the bell-mouth at the Site Entrance … with a view to slowing down or stopping the traffic … with the intention of causing inconvenience or delay to the claimants".

80. Leggatt LJ said (at [65]) that he could not accept that there is anything objectionable in principle about including a requirement of intention in an injunction. He acknowledged (at [67]) that in *Ineos* Longmore LJ had commented that an injunction should not contain any reference to the defendants' intention as subjective intention is not necessarily known to the outside world and is susceptible to change, and (at [68]) that he had agreed with the judgment of Longmore LJ and shared responsibility for those observations. He pointed out, however, correctly in our view, that those observations were not an essential part of the court's reasoning in *Ineos*. He said that he now considered the concern expressed about the reference to the defendants' intention to have been misplaced and (at [74]) that there was no reason in principle

why references to intention should not be incorporated into an order or that the inclusion of such references in terms of the injunction in *Cuadrilla* provided a reason not to enforce it by committal.

81. We accept what Leggatt LJ has said about the permissibility in principle of referring to the defendant's intention when that is 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. As Ms Wilkinson helpfully submitted, this can often be done by reference to the effect of an action of the defendant rather than the intention with which it was done. So, in the case of paragraph 4 of the injunction in *Cuadrilla*, it would have been possible to describe the prohibited acts as blocking or obstructing which caused or had the effect (rather than, with the intention) of slowing down traffic and causing inconvenience and delay to the claimants and their contractors.

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.
>
> (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.

83. Applying those principles to the present proceedings, it is clear that the claim form is defective and that the injunctions granted by Teare J on 29 November 2017 and continued, as varied, by Judge Moloney on 15 December 2017, were impermissible.

84. As we have said above, the claim form issued on 29 November 2017 described the "persons unknown" defendants as:

> "Persons unknown who are protesters against the manufacture and sale of clothing made of or containing animal products and against the sale of such clothing at Canada Goose, 244 Regent Street, London W1B 3BR".

85. This description is impermissibly wide. As Nicklin J said (at [23(iii)] and [146]), it is capable of applying to person who has never been at the store and has no intention of ever going there. It would, as the Judge pointedly observed, include a peaceful protester in Penzance.

86. The interim injunction granted by Teare J and that granted by Judge Moloney suffered from the same overly wide description of those bound by the order. Furthermore, the specified prohibited acts were not confined, or not inevitably confined, to unlawful acts: for example, behaving in a threatening and/or intimidating and/or abusive and/or insulting manner at any of the protected persons, intentionally photographing or filming the protected persons, making in any way whatsoever any abusive or threatening electronic communication to the protected persons, projecting images on the outside of the store, demonstrating in the Inner Zone or the Outer Zone, using a loud-hailer anywhere within the vicinity of the store otherwise than for the amplification of voice. Both injunctions were also defective in failing to provide a method of alternative service that was likely to bring the attention of the order to the "persons unknown" as that was unlikely to be achieved (as explained in relation to Ground 1 above) by the specified method of emailing the order to the respective email addresses of Surge and PETA. The order of Teare J was also defective in that it was not time limited but rather was expressed to continue in force unless varied or discharged by further order of the court.

87. Although Judge Moloney's order was stated to continue unless varied or discharged by further order of the court, it was time limited to the extent that, unless Canada Goose made an application for a case management conference or for summary

judgment by 1 December 2018, the claim would stand dismissed and the injunction discharged without further order.

88. Nicklin J was bound to dismiss Canada Goose's application for summary judgment, both because of non-service of the proceedings and for the further reasons we set out below. For the reasons we have given above, he was correct at the same time to discharge the interim injunctions granted by Teare J and Judge Moloney.

Final order against "persons unknown"

89. A final injunction cannot be granted in a protester 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. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* (at [17]) 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.

90. In Canada Goose's written skeleton argument for the appeal, it was submitted that *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch), [2019] 4 WLR 2 (Marcus Smith J), is authority to the contrary. Leaving aside that *Vastint* is a first instance decision, in which only the claimant was represented and which is not binding on us, that case was decided before, and so took no account of, the Court of Appeal's decision in *Ineos* and the decision of the Supreme Court in *Cameron*. Furthermore, there was no reference in *Vastint* to the confirmation in *Attorney-General v Times Newspapers* of the usual principle that a final injunction operates only between the parties to the proceedings.

91. That does not mean to say that there is no scope for making "persons unknown" subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. The proposed final injunction which Canada Goose sought by way of summary judgment was not so limited. Nicklin J was correct (at [159]) to dismiss the summary judgment on that further ground (in addition to non-service of the proceedings). Similarly, Warby J was correct to take the same line in *Birmingham City Council v Afsar* [2019] EWHC 3217 (QB) at [132].

92. In written submissions following the conclusion of the oral hearing of the appeal Mr Bhose submitted that, if there is no power to make a final order against "persons unknown", it must follow that, contrary to *Ineos*, there is no power to make an interim order either. We do not agree. An interim injunction is temporary relief intended to hold the position until trial. In a case like the present, the time between the interim

relief and trial will enable the claimant to identify wrongdoers, either by name or as anonymous persons within Lord Sumption's Category 1. Subject to any appeal, the trial determines the outcome of the litigation between the parties. Those parties include not only persons who have been joined as named parties but also "persons unknown" who have breached the interim injunction and are identifiable albeit anonymous. The trial is between the parties to the proceedings. Once the trial has taken place and the rights of the parties have been determined, the litigation is at an end. There is nothing anomalous about that.

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 protesters. It wishes to use remedies in private litigation in effect to prevent what is 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 protesters. 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* [2019] EWCA Civ 1490, [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.

94. In addition to those matters, the order sought by Canada Goose on the summary judgment application before Nicklin J (the terms and form of which were not finalised until after the conclusion of the hearing before Nicklin J), suffered from some of the same defects as the interim injunction: in particular, as Nicklin J observed, the proposed order still defined the Unknown Persons respondents by reference to conduct which is or might be lawful.

95. In all those circumstances, Nicklin J having concluded (at [145] and [164]) that, on the evidence before him, PETA had not committed any civil wrong (and, in any event, Canada Goose having abandoned its application for summary judgment against PETA, as mentioned above) he was correct to refuse the application for summary judgment.

Appeal Ground 4: Evidence

96. This ground of appeal was not developed by Mr Bhose in his oral submissions. In any event, in the light of our conclusions on the other grounds of appeal, it is not necessary for us to address it.

Conclusion

97. For all those reasons, we dismiss this appeal.

Neutral Citation Number: [2020] EWCA Civ 9

Case No: A3/2019/2391; A3/2019/2395

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
MANCHESTER DISTRICT REGISTRY
HHJ Pelling QC (sitting as a Judge of the High Court)
E30MA313

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2020

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE LEGGATT

- -

Between:

CUADRILLA BOWLAND LIMITED & ORS	**Claimants/ Respondents**
- and -	
(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON LAND AT LITTLE PLUMPTON AS MORE PARTICULARLY DESCRIBED IN THE CLAIM FORM AND SHOWN EDGED RED ON THE PLAN ANNEXED TO THE CLAIM FORM **(2) PERSONS UNKNOWN INTERFERING WITH THE PASSAGE BY THE CLAIMANTS AND THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES OR EMPLOYEES WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT TO, FROM, OVER AND ACROSS THE PUBLIC HIGHWAY KNOWN AS PRESTON NEW ROAD** **(3) PERSONS UNKNOWN COMMITTING THE ACTS SPECIFIED AT PARAGRAPH 7 OF THE ORDER & ORS**	**Defendants**
- and -	

KATRINA LAWRIE **LEE WALSH** **CHRISTOPHER WILSON**	**Appellants/ Respondents to Committal Applications**

- -
- -

Kirsty Brimelow QC, Adam Wagner and Richard Brigden (instructed by **Robert Lizar Solicitors**) for the **Appellants**
Tom Roscoe (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondents**

Hearing dates: 10-11 December 2019

- -

Approved Judgment

Lord Justice Leggatt:

Introduction

1. On 3 September 2019 His Honour Judge Pelling QC, sitting as a judge of the High Court, made an order committing the three appellants to prison for contempt of court. Their contempt consisted in deliberately disobeying an earlier court order, which I will refer to as "the Injunction", made on 11 July 2018 with the aim of preventing trespass on the claimants' land, unlawful interference with the claimants' rights of passage to and from their land and unlawful interference with the supply chain of the first claimant ("Cuadrilla"). As punishment for two deliberate breaches of the Injunction, the judge committed one of the appellants, Katrina Lawrie, to prison for two months plus four weeks. The other appellants, Lee Walsh and Christopher Wilson, were both committed to prison for four weeks. In each case execution of the committal order was suspended on condition that the appellant obeys the Injunction for a period of two years.

2. The appellants have exercised their rights of appeal against the committal order. They appeal on the grounds (1) that the relevant terms of the Injunction were insufficiently clear and certain to be enforceable by committal because those terms made the question whether conduct was prohibited depend on the intention of the person concerned; and (2) that imposing the sanction of imprisonment (albeit suspended) was inappropriate and unduly harsh in the circumstances of this case. Relevant circumstances include the facts that the Injunction was granted, not against the appellants as named individuals, but against "persons unknown" who committed specified acts, and that the acts done by the appellants in breach of the Injunction were part of a campaign of protest involving 'direct action' designed to disrupt Cuadrilla's activities. This context is one in which the appellants' rights to freedom of expression and assembly are engaged.

Background

3. Cuadrilla and the other claimants own an area of land off the Preston New Road (A583), near Blackpool in Lancashire, on which Cuadrilla has engaged in the hydraulic fracturing, or "fracking", of rock deep underground for the purpose of extracting shale gas. It is not in dispute that all Cuadrilla's activities have been carried out in accordance with the law. Equally, there is no dispute that Cuadrilla's activities are controversial and that a significant number of people, including the appellants, have sincere and strongly held views that fracking ought not to take place because of its impact on the environment. It is also common ground that the appellants, like everyone else, have the right to express their views and to protest against an activity to which they object subject only to such restrictions as are prescribed by law and are necessary in a democratic society for (amongst other legitimate aims) the prevention of disorder or crime or the protection of the rights and freedoms of others. The right of protest is protected both by the common law of England and Wales and by articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Human Rights Convention") which is incorporated into UK law by the Human Rights Act 1998.

4. Protests on and near Cuadrilla's site started in 2014, well before any drilling or preparatory work had commenced, when part of the site was occupied by a group of protestors. On 21 August 2014 Cuadrilla issued proceedings to recover possession of the land and for an injunction to prohibit further trespassing. Such an injunction was granted until 6 October 2016.

5. Protests intensified after work in preparation for exploratory drilling at the site started in January 2017. The evidence adduced by the claimants when they applied for a further injunction in May 2018 showed that, since January 2017, Cuadrilla and its employees, contractors and suppliers had been subjected to numerous 'direct action' protests, designed to obstruct works on the site. The actions taken by some protestors included 'locking on' – that is, chaining oneself to an object or another person – at the entrance to the site in order to prevent vehicles from entering or leaving it; 'slow walking' – that is, walking on the highway as slowly as possible in front of vehicles attempting to enter or leave the site; and climbing onto vehicles to prevent them from moving.

6. The overall scale of such protest activity is indicated by the fact that, between January 2017 and May 2018, the police had made over 350 arrests in connection with protests against Cuadrilla's operations, including 160 arrests for obstructing the highway, and substantial police resources had to be deployed in order to deal with the actions of protestors, with around 100 officers directly involved each day and at a total policing cost of some £7 million.

7. In July 2017 a group calling themselves "Reclaim the Power" organised a "month of action" targeting Cuadrilla. Of the many actions taken by protestors during that month to attempt to disrupt transport to and from the Preston New Road site, one particularly disruptive incident involved criminal offences and led to sentences which were the subject of an appeal to the Criminal Division of the Court of Appeal: see *R v Roberts* [2018] EWCA Crim 2739; [2019] 1 WLR 2577. That incident began on the morning of 25 July 2017, when two protestors managed to climb on top of lorries approaching the site along the Preston New Road, forcing the lorries to stop to avoid putting the safety of the two men at risk. Two more men later climbed on top of the lorries. Each of the protestors stayed there for two or three days and the last one did not come down until 29 July 2017. For all this time the lorries were therefore unable to move, with the result that one carriageway of the road remained blocked. Substantial disruption was caused to local residents and other members of the public.

8. Further particularly serious disruption occurred on 31 July 2017. The events of that day were described in a letter from Assistant Chief Constable Terry Woods put in evidence by Cuadrilla, as follows:

> "The last day of the RTP [Reclaim the Power] rolling resistance month of action saw a final lock-in involving a supposedly one tonne weight concrete barrel lock-on in the rear of a van with a prominent RTP activist attached to it via an arm tube. This action, coupled with an already tense atmosphere amongst the RTP activists, anti-fracking activists and local protestors, resulted in confrontation with police and they arrested two protestors. During the evening the protestors then became aware of a convoy *en route* to the drill site resulting in four

> protestors deploying in two pairs with arm tube lock-ons and blocking the A583. Further confrontation and aggression towards police ensued, with one of the locked-on protestors also assaulting a police officer. A security staff van was then mobbed by protestors and damaged, with a further protestor being arrested from that incident. Protestors also blockaded three vans of police protest liaison officers outside the Maple Farm Camp. The vehicle of a drill site staff member's partner dropping them off was then confronted by protestors, with a number of protestors climbing on the roof of the vehicle as it attempted to reverse away. The A583 was finally reopened to traffic at around 21:00 once police had removed all the protestors locked on, resulting in four arrests …"

9. At the hearing of the application for an injunction on 31 May and 1 June 2018, evidence was also adduced that the "Reclaim the Power" protest group was planning and promoting a further campaign of sustained direct action targeting Cuadrilla from 11 June to 1 July 2018. The group had openly stated their intention to organise a mass blockade of the Preston New Road dubbed "Block around the Clock" with the aim of completely preventing access to and egress from Cuadrilla's site for four days from 27 June to 1 July 2018.

The Injunction

10. It was against this background that HHJ Pelling QC granted an interim injunction on 1 June 2018 to restrain four named individuals and "persons unknown" from trespassing on the claimants' land, unlawfully interfering with the claimants' rights of passage to and from their land and unlawfully interfering with Cuadrilla's supply chain. This injunction was granted until 11 July 2018. On that date it was replaced by a further order in similar terms, to continue until 1 June 2020 (unless varied or discharged in the meantime). This is the Injunction that was in force when the appellants did the acts which led to their committal for contempt of court.

11. As with the order initially made on 1 June 2018, the Injunction had three limbs, each designed to prevent a different type of wrong (tort) being done to the claimants.

Paragraph 2: trespass

12. The first type of wrong, prohibited by paragraph 2 of the Injunction, was trespassing on the claimants' land situated off the Preston New Road. The land was identified by reference to the title numbers under which it is registered at the Land Registry and was denoted in the order as "the PNR Land".

Paragraph 4: nuisance

13. The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land. An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the

obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see *Clerk & Lindsell on Torts* (22nd Edn, 2018) para 20-181.

14. These rights protected by the law of nuisance underpinned paragraph 4 of the Injunction, which applied to the second defendant. The second defendant to the proceedings is described as:

> "Persons unknown interfering with the passage by the claimants and their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees with or without vehicles, materials and equipment to, from, over and across the public highway known as Preston New Road."

Paragraph 4 of the Injunction prohibited persons falling within this description from carrying out the following acts on any part of "the PNR Access Route":

> "4.1 blocking any part of the bell-mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic;
>
> 4.2 blocking or obstructing the highway by slow walking in front of vehicles with the object of slowing them down;
>
> 4.3 climbing onto any part of any vehicle or attaching themselves or anything or any object to any vehicle at any part of the Site Entrance;
>
> in each case with the intention of causing inconvenience or delay to the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees."

An exception was made in paragraph 5 for a weekly walk or march from Maple Farm on the Preston New Road to the Site Entrance followed by a meeting or assembly for up to 15 minutes at the bell-mouth of the Site Entrance.

15. The "PNR Access Route" was defined in paragraph 3 to mean:

> "The whole of the Preston New Road (A583) between the junction with Peel Hill to the northwest and 50 metres to the east of the vehicular entrance to the PNR Site ("the Site Entrance" - as marked on the plan annexed to this Order as Annex 2) …"

Paragraph 7: unlawful means conspiracy

16. The third type of wrong which the Injunction was designed to prevent was unlawful interference with Cuadrilla's supply chain. This was the subject of paragraph 7 of the Injunction, which prohibited persons unknown from "committing any of the following

offences or unlawful acts by or with the agreement or understanding of any other person":

> "…
>
> 7.2 obstructing the free passage along a public highway, or the access to or from a public highway, by:
>
> (i) blocking the highway or access thereto with persons or things when done with a view to slowing down or stopping vehicular or pedestrian traffic, and with the intention of causing inconvenience and delay;
>
> (ii) slow walking in front of vehicles with the object of slowing them down, and with the intention of causing inconvenience and delay;
>
> (iii) climbing onto or attaching themselves to vehicles;
>
> …
>
> in each case with an intention of damaging [Cuadrilla] by obstructing, impeding or interfering with the lawful activities undertaken by it or its group companies, or contractors, sub-contractors, suppliers or service providers engaged by [Cuadrilla], in connection with [Cuadrilla's] searching or boring for or getting any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata at the PNR Site or on the PNR Land."

17. The tort underpinning this limb of the Injunction was that of conspiracy to injure by unlawful means.

18. Conspiracy is one of a group of "economic torts" which are an exception to the general rule that there is no duty in tort to avoid causing economic loss to another person unless the loss is parasitic upon some injury to person or damage to property. As explained by Lord Sumption and Lord Lloyd-Jones in *JSC BTA Bank v Ablyazov (No 14)* [2018] UKSC 19; [2018] 2 WLR 1125, para 7, the modern law of conspiracy developed in the late nineteenth and early twentieth centuries as a basis for imposing civil liability on the organisers of strikes and other industrial action. In the form of the tort relevant for present purposes, the matters which the claimant must prove to establish liability are: (i) an unlawful act by the defendant, (ii) done with the intention of injuring the claimant, (iii) pursuant to an agreement (whether express or tacit) with one or more other persons, and (iv) which actually does injure the claimant.

The breaches of the Injunction

19. As required by the terms of the Injunction, extensive steps were taken to publicise it and bring it to the notice of protestors. These steps included: (i) fixing sealed copies of the Injunction in transparent envelopes to posts, gates, fences and hedges and positioning signs at no fewer than 20 conspicuous locations around the PNR Land including at the Site Entrance and at either side of the public highway in each

direction from the Site Entrance advertising the existence of the Injunction; (ii) leaving a sealed copy of the Injunction at protest camps; (iii) advertising and making copies of the Injunction available online; and (iv) sending a press release and copies of the Injunction to 16 specified news outlets.

20. Despite this publicity, a number of incidents occurred in the period July to September 2018 which led Cuadrilla on 11 October 2018 to issue a committal application.

The incident on 24 July 2018

21. The first main incident occurred on 24 July 2018 and involved all three appellants. The facts alleged, which were not seriously disputed by the appellants, were that at around 7am on the morning of that day they (and three other individuals) lay down in pairs on the road across the Site Entrance. Each person was attached to the other person in the pair by an 'arm tube' device. This was done in such a way as to prevent any vehicle from entering or leaving the site. The protestors remained in place for some six and a half hours until around 1.30pm, when they were cut out of the arm tube devices and removed by the police.

The incident on 3 August 2018

22. The second main incident occurred on 3 August 2018 and involved Ms Lawrie alone. It took place on the "PNR Access Route" (as defined in paragraph 3 of the Injunction) about 1200 metres to the west of the Site Entrance. At about 12.55pm Ms Lawrie, along with three other people, attempted to stop a tanker lorry which was on its way to the site in order to collect rainwater. In doing so she stood in the path of the lorry, raising her arms above her head. To avoid hitting her, the lorry had to veer across the centre line of the carriageway into the opposite lane. These facts were proved by video evidence from a camera on the dashboard of the lorry cab.

The other breaches of the Injunction

23. There were three more minor incidents:

    (1) On 1 August 2018 Ms Lawrie trespassed on the PNR Land for approximately two minutes.

    (2) Also on 1 August 2018, Mr Walsh sat down on the road in front of the Site Entrance until he was forcibly removed by police officers.

    (3) On 22 September 2018, as a sewage tanker was attempting to enter the site, Ms Lawrie ran into its path, forcing it to stop. She then lay on the ground in front of the lorry before being helped to her feet by security staff and persuaded to move.

The findings of contempt of court

24. Although two other individuals were also named as respondents, the committal application was pursued only against the three current appellants. The application was heard in two stages. The first stage was a hearing over four days from 25 to 28 June 2019 to decide whether the appellants were guilty of contempt of court.

The legal test for contempt

25. It was common ground at that hearing that a person is guilty of contempt of court by disobeying a court order that prohibits particular conduct only if it is proved to the criminal standard of proof (that is, beyond reasonable doubt) that the person: (i) having received notice of the order did an act prohibited by it; (ii) intended to do the act; and (iii) had knowledge of all the facts which would make doing the act a breach of the order: see *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch), para 20. It would not necessarily follow from proof of these facts that the person had knowingly disobeyed the order; but the judge took the sensible approach that, unless this further fact was established, it would not be appropriate to impose any penalty for the breach.

26. For reasons given in a judgment delivered on 28 June 2018, the judge found all the relevant factual allegations proved to the requisite criminal standard of proof. There is no appeal against any of his factual findings.

Knowledge of the Injunction

27. The main factual dispute at the hearing concerned the appellants' knowledge of the Injunction at the time when the incidents occurred. Although they gave evidence to the effect that they did not know of its terms, the judge rejected that evidence as inherently incredible and untruthful.

28. The judge explained in detail his reasons for reaching that conclusion. In the case of Ms Lawrie, the relevant evidence included her own admissions that there was a lot of discussion about the Injunction around the time that it was granted and that she was concerned about its effect on lawful protesting. As the judge observed, that evidence only made sense on the basis that she was aware of its terms. There were also photographs showing Ms Lawrie placing decorations on the fence around the site "in such close proximity to the notices summarising the effect of the [Injunction] as to make it virtually impossible for her not to have read the information in the notice unless she was deliberately choosing not to do so". In the case of Mr Walsh, the relevant evidence included social media posts that he had shared with others that referred to or summarised the main effects of the Injunction. The third appellant, Mr Wilson, accepted that he was aware of the Injunction and that it affected protests at the site entrance. There was also video evidence of Cuadrilla's security guards seeking to draw the Injunction to the attention of the appellants by providing them with copies of it, which they refused to take.

The intentions proved

29. In relation to the first main incident on 24 July 2018, in which each of the appellants lay in the road across the Site Entrance attached to another person by an arm tube device, they all gave evidence that in taking this action they intended to protest. The judge accepted this but thought it obvious from what they did, and was satisfied beyond reasonable doubt, that they also intended to stop vehicles from entering or leaving the site and thereby cause inconvenience and delay to Cuadrilla. Having found on this basis that the appellants were in breach of paragraph 4 of the Injunction, he considered it unnecessary to decide whether they were also in breach of paragraph 7.

30. In relation to the second main incident which occurred on 3 August 2018, Ms Lawrie admitted that she together with others was attempting to stop the lorry. The judge found it proved beyond reasonable doubt that she was acting with the agreement or understanding of others present and with the intention of slowing down or stopping the vehicle, causing inconvenience and delay, and thereby damaging Cuadrilla by interfering with the activities undertaken at the site. He accordingly found that she was in breach of paragraph 7 of the Injunction.

31. The judge also found that the three more minor incidents (referred to at paragraph 23 above) all involved intentional breaches of the Injunction, but he did not consider that it was in the public interest to impose any sanction for those breaches.

The committal order

32. The second stage of the committal application was a hearing held on 2 and 3 September 2019 to decide what sanctions to impose for the two principal breaches of the Injunction found proved at the earlier hearing. The judge had already made it clear that he would not impose immediate terms of imprisonment, so that the available penalties were (a) no order (except in relation to costs), (b) a fine or (c) a suspended term of imprisonment.

33. The judge was satisfied that, in relation to both incidents, the custody threshold was passed such that it was necessary to make orders for committal to prison, although their effect should be suspended. In reaching that conclusion and in fixing the length of the suspended prison terms, the judge had regard to his finding that the breaches were intentional and to the need not only to punish the appellants for their intentional disobedience of the court's order, but also to deter future breaches of the order (whether by them or others).

34. The judge recognised that the breaches were committed as part of a protest but was not persuaded that this should result in lesser penalties. The judge also had regard, by analogy, to the Sentencing Council guideline on sentencing for breach of a criminal behaviour order. This guideline identifies three levels of culpability, where level A represents a very serious or persistent breach, level B a deliberate breach falling between levels A and C, and level C a minor breach or one just short of reasonable excuse. Harm – which includes not only any harm actually caused but any risk of harm posed by the breach – is also divided into three categories. Category 1 applies where the breach causes very serious harm or distress or "demonstrates a continuing risk of serious criminal and/or anti-social behaviour". Category 3 applies where the breach causes little or no harm or distress or "demonstrates a continuing risk of minor criminal and/or anti-social behaviour". Category 2 applies to cases falling between categories 1 and 3.

35. In the case of the first incident involving all three appellants, where the Site Entrance was blocked by a 'lock-on' for several hours, the judge assessed the level of culpability as falling at the lower end of level B and the harm caused together with the continuing risk of breach demonstrated as falling at the lower end of category 2. The guideline indicates that the starting point in sentencing for breach of a criminal behaviour order in category 2B is 12 weeks' custody, with a category range between a medium level community order and one year's custody. A community order is not an available sanction for contempt of court. In the circumstances the judge concluded

that the appropriate penalty was a short suspended term of imprisonment, which he fixed at four weeks.

36. In relation to the second main incident, involving Ms Lawrie alone, the judge assessed the level of culpability as at the top end of level B within the guideline and the degree of harm that was at risk of being caused as in the top half of category 2. In making that assessment, he said:

> "The risk I have identified was a serious one, involving the risk of death or injury to Ms Lawrie; to the driver of the vehicle she was attempting to stop by standing in front of it in the highway; and those driving on the other side of the road into which the lorry was forced by reason of the presence of Ms Lawrie in the road. Those risks were worsened by the fact that the incident occurred during a period of heavy rain …"

The judge also found that the breach was aggravated by "the failure of Ms Lawrie to acknowledge the danger posed by her conduct, or to apologise for it, or to offer any assurance that it will not happen again".

37. The sanction imposed for this contempt of court was committal to prison for two months. As with the penalties imposed in relation to the first incident, execution of the order was suspended on condition that the Injunction is obeyed for a period of two years.

Variation of the Injunction

38. In the same judgment given on 3 September 2019 in which he decided what sanctions to impose, HHJ Pelling QC also dealt with an application by the appellants to vary the Injunction, in particular by removing paragraphs 4 and 7. In making that application, the appellants relied on the decision of this court in *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515; [2019] 4 WLR 100, which I will discuss shortly. For the moment I note that, while the judge on 3 September 2019 made some variations to the wording of the Injunction, he rejected the appellants' contention that the original wording was impermissibly wide or uncertain. Furthermore, none of the variations made on 3 September 2019 would, had they been incorporated in the original wording of the Injunction, have rendered the appellants' conduct not a breach.

39. The appellants applied for permission to appeal against the decision not to vary the Injunction by removing paragraphs 4 and 7. However, on 2 November 2019 the Government announced a moratorium on fracking with immediate effect. In the light of the moratorium, the claimants themselves applied on 19 November 2019 to remove paragraphs 4 and 7 of the Injunction for the future on the ground that they no longer require this protection, as Cuadrilla has ceased fracking operations on the site and will not be able to resume such operations unless and until the moratorium is lifted. On 25 November 2019 the judge granted the claimants' application. In these circumstances the appellants withdrew their appeal against the judge's previous refusal to vary the Injunction in that way, as the relief which they were seeking had been granted (albeit for different reasons from those which they were advancing).

The right to protest

40. Before I come to the grounds of the appeal against the committal order, I need to say something more about the two contextual features of this case which I mentioned at the start of this judgment. The first is the legal relevance of the fact, properly emphasised by counsel for the appellants, that the appellants' breaches of the Injunction were a form of non-violent protest against activities to which they strongly object.

41. The right to engage in public protest is an important aspect of the fundamental rights to freedom of expression and freedom of peaceful assembly which are protected by articles 10 and 11 of the Human Rights Convention. Those rights, and hence the right to protest, are not absolute; but any restriction on their exercise will be a breach of articles 10 and 11 unless the restriction (a) is prescribed by law, (b) pursues one (or more) of the legitimate aims stated in articles 10(2) and 11(2) of the Convention and (c) is "necessary in a democratic society" for the achievement of that aim. Applying the last part of this test requires the court to assess the proportionality of the interference with the aim pursued.

42. Exercise of the right to protest – for example, holding a demonstration in a public place – often results in some disruption to ordinary life and inconvenience to other citizens. That by itself does not justify restricting the exercise of the right. As Laws LJ said in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23, para 43:

> "Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them."

Such side-effects of demonstrations and protests are a form of inconvenience which the state and other members of society are required to tolerate.

43. The distinction between protests which cause disruption as an inevitable side-effect and protests which are deliberately intended to cause disruption, for example by impeding activities of which the protestors disapprove, is an important one, and I will come back to it later. But at this stage I note that even forms of protest which are deliberately intended to cause disruption fall within the scope of articles 10 and 11. Restrictions on such protests may much more readily be justified, however, under articles 10(2) and 11(2) as "necessary in a democratic society" for the achievement of legitimate aims.

44. The clear and constant jurisprudence of the European Court of Human Rights on this point was reiterated in the judgment of the Grand Chamber in *Kudrevičius v Lithuania* (2016) 62 EHRR 34. That case concerned a demonstration by a group of farmers complaining about a fall in prices of agricultural products and seeking increases in state subsidies for the agricultural sector. As part of their protest, some farmers including the applicants used their tractors to block three main roads for approximately 48 hours causing major disruption to traffic. The applicants were convicted in the Lithuanian courts of public order offences and received suspended sentences of 60 days imprisonment. They complained to the European Court that their criminal convictions and sentences violated articles 10 and 11 of the Convention.

In examining their complaints, the Grand Chamber first considered whether the case fell within the scope of article 11 and concluded that it did. The court noted (at para 97) that, on the facts of the case, "the disruption of traffic cannot be described as a side-effect of a meeting held in a public place, but rather as the result of intentional action by the farmers, who wished to attract attention to the problems in the agricultural sector and to push the government to accept their demands". The judgment continues:

> "In the Court's view, although not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by article 11 of the Convention."

Despite this, the court did not consider that the applicants' conduct was "of such a nature and degree as to remove their participation in the demonstration from the scope of protection of … article 11" (see para 98).

45. In the present case the claimants accept that the conduct of the appellants which constituted contempt of court likewise fell within the scope of articles 10 and 11 of the Human Rights Convention, even though disruption of Cuadrilla's activities was not merely a side-effect but an intended aim of the appellants' conduct. It follows that both the Injunction prohibiting this conduct and the sanctions imposed for disobeying the Injunction were restrictions on the appellants' exercise of their rights under articles 10(1) and 11(1) which could only be justified if those restrictions satisfied the requirements of articles 10(2) and 11(2) of the Convention.

The *Ineos* case

46. A second significant feature of this case is that the Injunction was granted not against the current appellants as named individuals but against "persons unknown". Injunctions of this kind were considered in *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515; [2019] 4 WLR 100, which forms an essential part of the backdrop to the issues raised on this appeal.

47. Like the present case, the *Ineos* case concerned an injunction granted on the application of a company engaged or planning to engage in 'fracking' to restrain unlawful interference with its activities by protestors whom it was unable to name. In the *Ineos* case, however, the court was not concerned, as it is here, with breaches of such an injunction. The appeal involved a challenge to the making of an injunction against persons unknown before any allegedly unlawful interference with the claimants' activities had yet occurred. This context is important in understanding the decision.

48. The main question raised on the appeal was whether it was appropriate in principle to grant an injunction against "persons unknown". That question was decided in favour of the claimant companies. The court held that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence if and when they commit a threatened tort. Nor is there any such prohibition on granting a '*quia timet*' injunction to restrain such persons from

committing a tort which has not yet been committed. Nonetheless, Longmore LJ (with whose judgment David Richards LJ and I agreed) warned that a court should be inherently cautious about granting such injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance (see para 31).

49. Longmore LJ stated the requirements necessary for the grant of an injunction of this nature "tentatively" (at para 34) in the following way:

> "(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."

50. In the light of precedents which were not cited in the *Ineos* case but which have been drawn to our attention on the present appeal, I would enter a caveat in relation to the fourth of these requirements. While it is undoubtedly desirable that the terms of an injunction should correspond to the threatened tort and not be so wide that they prohibit lawful conduct, this cannot be regarded as an absolute rule. The decisions of the Court of Appeal in *Hubbard v Pitt* [1976] QB 142 and *Burris v Azadani* [1995] 1 WLR 1372 demonstrate that, although the court must be careful not to impose an injunction in wider terms than are necessary to do justice, the court is entitled to restrain conduct that is not in itself tortious or otherwise unlawful if it is satisfied that such a restriction is necessary in order to afford effective protection to the rights of the claimant in the particular case. In both those cases the injunction was granted against a named person or persons. What, if any, difference it makes in this regard that the injunction is sought against unknown persons is a question which does not need to be decided on the present appeal but which may, as I understand, arise on a pending appeal from the decision of Nicklin J in *Canada Goose UK Retail Ltd v Persons Unknown* [2019] EWHC 2459 (QB); and in these circumstances I express no opinion on the point.

51. In the *Ineos* case the judge had proceeded on the basis that the evidence adduced by the claimants of protests against other companies engaged in fracking (including Cuadrilla) would, if accepted at trial, be sufficient to show a real and imminent threat of trespass on the claimants' land, interference with the claimants' rights of passage to and from their land and interference with their supply chain. On that basis he granted an injunction in similar – although in some respects wider and more vaguely worded – terms to the Injunction granted in the present case. The Court of Appeal allowed an appeal brought by two individuals who objected to the order made on the ground that the judge's approach – which simply accepted the claimants' evidence at face value – did not adequately justify granting a *quia timet* injunction which might affect the exercise of the right to freedom of expression, as it did not satisfy the requirement in section 12(3) of the Human Rights Act 1998 that the applicant is "likely" to establish at trial that such an injunction should be granted. The Court of Appeal also held that

the parts of the injunction seeking to restrain future acts which would amount to an actionable nuisance or a conspiracy to cause loss by unlawful means should be discharged in any event, as the relevant terms were too widely drafted and lacked the necessary degree of certainty. I will come back to one aspect of the reasoning on that point when discussing the first ground of appeal.

This appeal

52. I turn now to the issues raised on this appeal. The appellants' notice puts forward three grounds. However, Ms Brimelow QC, who now represents the appellants, did not pursue one of them. This challenged the judge's finding that Ms Lawrie was in contempt of court by trespassing on the "PNR Land" on 1 August 2018 in breach of paragraph 2 of the Injunction. As Ms Brimelow accepted, a challenge to that finding, even if successful, would provide no reason for disturbing the committal order, as the judge considered that there was no public interest in taking any further action in relation to the three minor incidents, of which the trespass incident was one, and made no order in respect of them. The order under appeal was based only on the 'lock-on' at the Site Entrance by all three appellants on 24 July 2018 and Ms Lawrie's action in standing in the path of a lorry on 3 August 2018. Nothing turns, therefore, on whether or not Ms Lawrie trespassed on the "PNR Land" on 1 August 2018.

53. The two grounds of appeal pursued are that, in relation to the two incidents on which the order for committal was based:

(1) the judge erred in committing the appellants under paragraphs 4 and 7 of the Injunction, as these paragraphs were insufficiently clear and certain because they included references to intention;

(2) alternatively, the judge erred by imposing an inappropriate sanction (consisting of suspended orders for imprisonment) which was too harsh.

(1) Was the Injunction unclear?

54. It is a well-established principle that an injunction must be expressed in terms which are clear and certain so as to make plain what is permitted and what is prohibited: see e.g. *Attorney General v Punch Ltd* [2002] UKHL 50; [2003] 1 AC 1046, para 35. This is just as, if not even more, essential where the injunction is addressed to "persons unknown" rather than named defendants. As Longmore LJ said in the *Ineos* case, para 34, in stating the fifth of the requirements quoted at paragraph 49 above: "the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do".

55. A similar need for clarity and precision "to a degree that is reasonable in the circumstances" forms part of the requirement in articles 10(2) and 11(2) of the Human Rights Convention that any interference with the rights to freedom of expression and assembly must be "prescribed by law": see *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49; *Kudrevičius v Lithuania* (2016) 62 EHRR 34, para 109.

The references to intention in the Injunction

56. As mentioned, the aspect of paragraphs 4 and 7 of the Injunction which the appellants contend made those terms insufficiently clear and certain to support findings of contempt was the fact that they included references to the defendant's intention. Paragraph 4.1, of which all three appellants were found to be in breach by their 'lock on' at the Site Entrance on 24 July 2018, prohibited "blocking any part of the bell mouth at the Site Entrance with persons or things when done with a view to slowing down or stopping the traffic" and "with the intention of causing inconvenience or delay to the claimants". Establishing a breach of this term therefore required proof of two intentions. Paragraph 7.2(1), of which Ms Lawrie was found to have been in breach when she stood in front of a lorry on 3 August 2018, required proof of three intentions: namely, those of "slowing down or stopping vehicular or pedestrian traffic", "causing inconvenience and delay", and "damaging [Cuadrilla] by obstructing, impeding or interfering with the lawful activities undertaken by it or its group companies, or contractors …" It was also necessary to prove that the act was done with the agreement or understanding of another person.

Types of unclarity

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.

59. All these kinds of clarity (or lack of it) are relevant at the stage of deciding whether to grant an injunction and, if so, in what terms. They are also relevant where an application is made to enforce compliance or punish breach of an injunction by

seeking an order for committal. In principle, people should not be at risk of being penalised for breach of a court order if they act in a way which the order does not clearly prohibit. Hence a person should not be held to be in contempt of court if it is unclear whether their conduct is covered by the terms of the order. That is so whether the term in question is unclear because it is ambiguous, vague or inaccessible.

60. It is important to note that whether a term of an order is unclear in any of these ways is dependent on context. Words which are clear enough in one factual situation may be unclear in another. This can be illustrated by reference to the ground of appeal which was abandoned. The argument advanced was that paragraph 2 of the Injunction was insufficiently clear to form the basis of a finding of contempt of court because the "PNR Land" was described by reference to a Land Registry map and such maps are, so it was said, only accurate to around one metre. Assuming (which was in issue) that there is this margin of error, the objection that the relevant term of the Injunction was insufficiently clear would have been compelling in the absence of proof that Ms Lawrie crossed the boundary of the land as it was marked on the map by more than a metre. As it was, however, the judge was satisfied from video evidence that Ms Lawrie entered on the land by much more than a metre. The alleged vagueness in the term of the Injunction was therefore immaterial.

The concept of intention

61. Of these three types of unclarity, it is the third that is said to be material in the present case. For the appellants, Ms Brimelow QC argued that references to intention in an injunction addressed to "persons unknown" made the terms insufficiently clear because intention is a legal concept which is difficult for a member of the public to understand. In the judgment given on 28 June 2019 in which he made findings of contempt of court, the judge referred to the maxim that a person "is presumed to intend the natural and probable consequences of his acts", citing a passage from the speech of Lord Bridge in *R v Maloney* [1985] AC 905, 928-9. Ms Brimelow submitted that a person with no legal knowledge or training would not understand that, even if they do not have in mind a particular consequence of their action, they will be held to intend any natural and probable consequence of it. Such a person might reasonably consider that their intention was, for example, to prevent fracking, or to protect the environment, or to protest, rather than, say, to cause inconvenience and delay to Cuadrilla, even if such inconvenience and delay was a natural or probable consequence of what they did.

62. I do not accept that the references in the terms of the Injunction to intention had any special legal meaning or were difficult for a member of the public to understand. In criminal law there has not for more than 50 years been any rule of law that persons are presumed to intend the natural and probable consequences of their acts. That notion was given its quietus by section 8 of the Criminal Justice Act 1967, which provides:

> "A court or jury, in determining whether a person has committed an offence —
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but

> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

63. This was the point that Lord Bridge was making in the *Maloney* case in the passage to which HHJ Pelling QC referred. The House of Lords made it clear in that case that juries should no longer, save in rare cases, be given legal directions as to what is meant by intention. Lord Bridge described it (at 926) as the "golden rule" that, when directing a jury on intent, a judge should avoid any elaboration or paraphrase of what is meant by intent and should leave it to the jury's good sense to decide whether the person accused acted with the intention required to be guilty of a crime. Just as no elaboration of the concept of intention is required for juries, so equally its meaning does not need to be explained to members of the public to whom a court order is addressed. It is not a technical term nor one that, when used in an injunction prohibiting acts done with a specific intention, is to be understood in any special or unusual sense. It is an ordinary English word to be given its ordinary meaning and with which anyone who read the Injunction would be perfectly familiar.

64. That is not to say that proof of an intention is always straightforward. Often it causes no difficulty. A person's immediate intention may be obvious from their actions. Thus, when the appellants and three others lay across the Site Entrance on 24 July 2018 in pairs linked by arm tube devices, it was obvious that they were intending to stop vehicles from entering or leaving the site. Had that not been their intention, they would not have positioned themselves where they did. Similarly, when in the incident on 3 August 2018 Ms Lawrie stood in the road in front of a lorry, waving her arms, there could be no doubt that her intention was to cause the vehicle to stop. To determine whether less direct consequences or potential consequences of a person's actions are intended may require further knowledge of, or inference as to, their plans or goals. In so far as there is evidential uncertainty, however, a person alleged to be in contempt of court by disobeying an injunction is protected by the requirement that the relevant facts must be proved to the criminal standard of proof. Hence where the injunction prohibits an act done with a particular intention, if there is any reasonable doubt about whether the defendant acted with that intention, contempt of court will not be established.

65. I accordingly cannot accept that there is anything objectionable in principle about including a requirement of intention in an injunction. Nor do I accept that there is anything in such a requirement which is inherently unclear or which requires any legal training or knowledge to comprehend.

Dicta in the Ineos case

66. Nevertheless, I acknowledge that the appellants' argument gains some traction from a statement in the judgment of Longmore LJ in the *Ineos* case. One of the terms of the injunction granted by the judge at first instance in that case, like paragraph 7 of the Injunction in this case, was designed to protect the claimants from financial damage caused by an unlawful means conspiracy. In the *Ineos* case the term in question prohibited persons unknown from "combining together to commit the act or offence of obstructing free passage along a public highway (or access to or from a public highway) by … slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or … otherwise

unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants." The wording of this prohibition was held to be insufficiently clear, both because it contained language which was too vague ("slow walking" and "unreasonably and/or without lawful authority or excuse obstructing the highway") and because, as Longmore LJ put it, "an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse": see *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515; [2019] 4 WLR 100, para 40.

67. In addition to making these points, however, Longmore LJ also agreed with a submission that one of the "problems with a *quia timet* order in this form" was that "it is of the essence of the tort [of conspiracy] that it must cause damage". He commented:

> "While that cannot of itself be an objection to the grant of *quia timet* relief, the requirement that it cause damage can only be incorporated into the order by reference to the defendants' intention which, as Sir Andrew Morritt said in *Hampshire Waste*, depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible to change and, for that reason, should not be incorporated into the order."

68. Although this was not an essential part of the court's reasoning, I agreed with the judgment of Longmore LJ in the *Ineos* case and therefore share responsibility for these observations. However, while I continue to agree with the other reasons given for finding the form of order made by the judge in the *Ineos* case unclear as well as too widely drawn, with the benefit of the further scrutiny that the point has received on this appeal I now consider the concern expressed about the reference to the defendants' intention to have been misplaced.

69. It is not in fact correct, as suggested in the passage quoted above, that the requirement of the tort of conspiracy to show damage can only be incorporated into a *quia timet* injunction by reference to the defendants' intention. It is perfectly possible to frame a prohibition which applies only to future conduct that actually causes damage. It is, however, correct that, in order to make the terms of the injunction correspond to the tort and avoid prohibiting conduct that is lawful, it is necessary to include a requirement that the defendants' conduct was intended to cause damage to the claimant. As already discussed, there is nothing ambiguous, vague or difficult to understand about such a requirement. The only potential difficulty created by its inclusion is one of proof.

The Hampshire Waste case

70. The case of *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1739 (Ch); [2004] Env LR 9, to which Longmore LJ referred, involved an application by companies which owned and operated waste incineration sites for an injunction to restrain persons from trespassing on their sites in connection with a planned day of protest by environmental protestors described as "Global Day of Action Against Incinerators". On similar occasions in the past

protestors had invaded sites owned by the claimants and caused substantial irrecoverable costs.

71. The injunction was sought against defendants described in the draft order as "Persons intending to trespass and/or trespassing" on six specified sites "in connection with the 'Global Day of Action Against Incinerators' (or similarly described event) on or around 14 July 2003". Sir Andrew Morritt V-C considered that the case for granting an injunction to prevent the threatened trespass to the claimants' property was clearly made out and that, in circumstances where the claimants were unable to name any of the protestors who might be involved, it was appropriate to grant the injunction against persons unknown. He raised two points, however, about the proposed description of the defendants (see para 9). The two points were that:

> "it seems to me to be wrong that the description of the defendant should involve a legal conclusion such as is implicit in the use of the word 'trespass'. Similarly, it seems to me to be undesirable to use a description such as 'intending to trespass' because that depends on the subjective intention of the individual which is not necessarily known to the outside world and in particular the claimants, and is susceptible of change."

To address these points, the Vice-Chancellor amended the opening words of the proposed description of the defendants to refer to: "Persons entering or remaining without the consent of the claimants" on the specified sites.

72. I take the Vice-Chancellor's objection to the use of the word "trespass" to have been that trespass is a legal concept and that the class of persons affected by the injunction ought to be identified in language which does not use a legal term of art. His objection to the reference to intention was different. It was not that intention is a legal concept which might not be clear to persons notified of the injunction. It was that "the outside world and in particular the claimants" would not necessarily know whether a person did or did not have the relevant intention and also that this state of affairs was susceptible of change.

73. Although the Vice-Chancellor did not spell this out, what was particularly unsatisfactory, as it seems to me, about the proposed description was that it would have made the question whether a person was a defendant to the proceedings dependent not on anything which that person had done (with or without a specific intention) but solely on their state of mind at any given time (which might change). Thus, a person who had formed an intention of joining a protest which would involve entering on the claimants' land would fall within the scope of the injunction even if he or she had done nothing which interfered with the claimants' legal rights or which was even preparatory or gave rise to a risk of such interference. It is easy to see why the Vice-Chancellor regarded this as undesirable.

74. I do not consider that the same objection applies to a term of an injunction which prohibits doing specified acts with a specified intention. Limiting the scope of a prohibition by reference to the intention required to make the act wrongful avoids restraining conduct that is lawful. In so far as it creates difficulty of proof, that is a difficulty for the claimant and not for a person accused of breaching the injunction – for whom the need to prove the specified intention provides an additional protection.

Accordingly, although the inclusion of multiple references to intention – as in paragraph 7 of the Injunction in this case – risks introducing an undesirable degree of complexity, I would reject the suggestion that there is any reason in principle why references to intention should not be incorporated into an order or that the inclusion of such references in the terms of the Injunction in the present case provided a reason not to enforce it by committal.

The width of the Injunction

75. I mentioned earlier that the appellants withdrew their appeal against the judge's decision on 3 September 2019 to refuse their application to vary the Injunction, when the relief which they were seeking was granted for different reasons following the Government's moratorium on fracking. The arguments which the appellants would have made on that appeal, however, did not disappear from the picture.

76. It is no defence to an application for the committal of a defendant who has disobeyed a court order for the defendant to say that the order is not one that ought to have been made. As a matter of principle, a court order takes effect when it is made and remains binding unless and until it is revoked by the court that made it or on an appeal; and for as long as the order is in effect, it is a contempt of court to disobey the order whether or not the court was right to make it in the first place: see e.g. *M v Home Office* [1992] QB 270, 298-299; *Burris v Azadani* [1995] 1 WLR 1372, 1381. In the present case, therefore, it is not open to the appellants to argue that they were not guilty of contempt of court because the Injunction should not have been granted or should not have been granted in terms which prohibited the acts which they chose to commit in defiance of the court's order.

77. If it were shown that the court was wrong to grant an injunction which prohibited the appellants' conduct, that would nonetheless be relevant to the question whether it was appropriate to punish the appellants' contempt of court by ordering their committal to prison. Although no such argument was raised in the appellants' grounds of appeal against the committal order, in the course of her oral submissions Ms Brimelow QC suggested that this was the case. She did so, as I understood it, by reference to the grounds on which the appellants had sought permission to appeal against the judge's refusal to remove paragraphs 4 and 7 of the Injunction (before that appeal was withdrawn). Although there was no formal application to rely on those grounds for the purpose of the appeal against the committal order, it would be unreasonable not to permit this.

78. The grounds on which the appellants argued that paragraphs 4 and 7 should not have been included in the Injunction were essentially the same, however, as the grounds on which they argued that those terms could not properly form the basis of findings of contempt of court – namely, that the terms were insufficiently clear and certain because of their references to intention. For the reasons already given, I do not consider this to be a valid objection.

79. I would add that it has not been argued – and I see no reason to think – that on the facts of this case paragraph 4 of the Injunction, as it stood when the breaches occurred, was too widely drawn. Although a similarly worded term was criticised by this court in the *Ineos* case, there was in that case, as I have emphasised, no previous history of interference with the claimants' rights. The injunction sought was therefore

what might be called a 'pure' *quia timet* injunction, in that it was not aimed at preventing repetition of wrongful acts which had caused harm to the claimants but at preventing such acts in circumstances where none had yet taken place. The significance which the court attached to this can be seen from para 42 of the judgment of Longmore LJ, where he said:

> "[Counsel] for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide ranging injunctions of the kind granted against the third and fifth defendants should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example."

80. In the present case, by contrast, there was a well documented history of obstruction and attempts to obstruct access to and egress from Cuadrilla's site by blocking the Site Entrance and by obstructing the highway or otherwise interfering with traffic on the part of the Preston New Road defined in paragraph 3 of the Injunction as the "PNR Access Route". That history of conduct which clearly infringed the claimants' rights of free passage provided a solid basis for the prohibition in paragraph 4.

81. Paragraph 7 is a different matter. The only breach of paragraph 7 in issue on this appeal, however, is Ms Lawrie's conduct on 3 August 2018 in standing in the road in an attempt to stop a lorry which was approaching the Site Entrance and with the intention of causing inconvenience and delay to Cuadrilla. Cuadrilla had no need to rely on the tort of unlawful means conspiracy in seeking to restrain such conduct. It clearly amounted to an actionable public nuisance. As such, the prohibition in paragraph 4 could have been framed so as to prohibit such conduct. Indeed, one of the variations made to the Injunction on 3 September 2019 was an amendment to paragraph 4 to prohibit:

> "Standing, sitting, walking or lying in front of any vehicle on the carriageway with the effect of interfering with the vehicular passage along the PNR Access Route by the claimants and/or their agents, servants, contractors, sub-contractors, group companies, licensees, invitees or employees;"

This squarely covered conduct of the kind which occurred on 3 August 2018.

82. The word "effect" was included in the variations made on 3 September 2019 to avoid referring to intention. In my view, reference to intention should not have been removed because there is nothing unclear in such a requirement and I see no sufficient justification for framing the prohibition more widely so as to catch unintended effects. But what matters for present purposes is that the terms of the Injunction were not criticised – and it seems to me could not reasonably be criticised – as too wide in so far as they prohibited the conduct of Ms Lawrie on 3 August 2018, as they did both before and after the variations were made.

83. I am therefore satisfied that, when considering the sanctions imposed on the appellants, it cannot be said in mitigation that the acts which formed the basis of the committal order were not acts which ought to have been prohibited by the Injunction.

(2) Were the sanctions too harsh?

84. The second ground of appeal pursued by the appellants is that – on the footing that the relevant restrictions placed on their conduct by the Injunction were legally justified – the judge was nevertheless wrong to punish their breaches of the Injunction by ordering their committal to prison (albeit that execution of the order was suspended).

The standard of review on appeal

85. In deciding what sanction to impose for a contempt of court, a judge has to assess and weigh a number of different factors. The law recognises that a decision of this nature involves an exercise of judgment which is best made by the judge who deals with the case at first instance and with which an appeal court should be slow to interfere. It will generally do so only if the judge: (i) made an error of principle; (ii) took into account immaterial factors or failed to take into account material factors; or (iii) reached a decision which was outside the range of decisions reasonably open to the judge. It follows that there is limited scope for challenging on an appeal a sanction imposed for contempt of court as being excessive (or unduly lenient). If, however, the appeal court is satisfied that the decision of the lower court was wrong on one of the above grounds, it will reverse the decision and either substitute its own decision or remit the case to the judge for further consideration of sanction. See *Liverpool Victoria Insurance Co Ltd v Zafar* [2019] EWCA 392 (Civ), paras 44-46; *McKendrick v Financial Conduct Authority* [2019] EWCA Civ 524; [2019] 4 WLR 65, paras 37-38.

86. The appellants' case that the judge's decision was wrong is put in two ways. First, it is argued that the judge made an error of principle and/or failed to take into account a material factor in treating as irrelevant the fact that, when they disobeyed the Injunction, the appellants were exercising rights of protest which are protected by the common law and by articles 10 and 11 of the Human Rights Convention. Secondly, it is argued that, in having regard (as the judge did) to the guideline issued by the Sentencing Council which applies to sentencing in criminal cases for breach of a criminal behaviour order, the judge misapplied that guideline and, in consequence, reached a decision that was unduly harsh.

Sentencing protestors

87. The fact that acts of deliberate disobedience to the law were committed as part of a peaceful protest will seldom provide a defence to a criminal charge. But it is well established that it is a relevant factor in assessing culpability for the purpose of sentencing in a criminal case. On behalf of the appellants, Ms Brimelow QC emphasised the following observations of Lord Hoffmann in *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136, para 89:

> "My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or

> government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account."

88. This passage was quoted with approval by Lord Burnett of Maldon CJ, giving the judgment of the Court of Appeal Criminal Division in *R v Roberts* [2018] EWCA Crim 2739; [2019] 1 WLR 2577, the case mentioned earlier that arose from 'direct action' protests at Cuadrilla's site in July 2017 by four men who climbed on top of lorries. Three of the protestors were sentenced to immediate terms of imprisonment, but on appeal those sentences were replaced by orders for their conditional discharge, having regard to the fact that they had already spent three weeks in prison before their appeals were heard. The Court of Appeal indicated that the appropriate sentence would otherwise have been a community sentence with a punitive element involving work (or perhaps a curfew). The Lord Chief Justice (at para 34) summarised the proper approach to sentencing in cases of this kind as being that:

> "the conscientious motives of protestors will be taken into account when they are sentenced for their offences but that there is in essence a bargain or mutual understanding operating in such cases. A sense of proportion on the part of the offenders in avoiding excessive damage or inconvenience is matched by a relatively benign approach to sentencing. When sentencing an offender, the value of the right to freedom of expression finds its voice in the approach to sentencing."

89. Ms Brimelow submitted that this approach to sentencing should have been, but was not, followed in the present case when deciding what sanction to impose for the breaches of the Injunction committed by the appellants.

Were custodial sentences wrong in principle?

90. At one point in her oral submissions Ms Brimelow sought to argue that, where a deliberate breach of a court order is committed in the course of a peaceful protest, it is wrong in principle to punish the breach by imprisonment, even if the sanction is suspended on condition that there is no further breach within a specified period. This mirrored a submission which she made when representing the protestors in the *Roberts* case. The submission was rejected in the *Roberts* case (at para 43) and I would likewise reject it as contrary to both principle and authority.

91. There is no principle which justifies treating the conscientious motives of a protestor as a licence to flout court orders with impunity from imprisonment, whatever the nature or extent of the harm intended or caused provided only that no violence is used.

Court orders would become toothless if such an approach were adopted – particularly in relation to those for whom a financial penalty holds no deterrent because it cannot be enforced as they do not have funds from which to pay it. Unsurprisingly, no case law was cited in which such an approach has been endorsed. Not only, as mentioned, was it rejected in the *Roberts* case in the context of sentencing for criminal offences, but it is also inconsistent with the jurisprudence of the European Court of Human Rights.

92. Thus, in *Kudrevičius v Lithuania* (2016) 62 EHRR 34, mentioned earlier, the Grand Chamber of the European Court saw nothing disproportionate in the decision to impose on the applicants a 60 day custodial sentence suspended for one year (along with some restrictions on their freedom of movement) – a sentence which the court described as "lenient" (see para 178). The Grand Chamber also referred with approval to earlier cases in which sentences of imprisonment imposed on demonstrators who intentionally caused disruption had been held not to violate articles 10 and 11 of the Human Rights Convention. For example, in *Barraco v France* (application no 31684/05) 5 March 2009, the applicant had taken part in a protest which involved blocking traffic on a motorway for several hours. The European Court held that his conviction and sentence to a suspended term of three months' imprisonment (together with a fine of €1,500) did not violate article 11.

93. Another case cited by the Grand Chamber in *Kudrevičius* that is particularly in point because it involved defiance of court orders is *Steel v United Kingdom* (1999) 28 EHRR 603. In that case the first applicant took part in a protest against a grouse shoot in which she intentionally obstructed a member of the shoot by walking in front of him as he lifted his shotgun to take aim, thus preventing him from firing. She was convicted of a public order offence, fined and ordered to be bound over to keep the peace for 12 months. Having refused to be bound over, the applicant was committed to prison for 28 days. The second applicant took part in a protest against the building of a motorway extension in which she stood under the bucket of a JCB digger in order to impede construction work. She was likewise convicted of a public order offence, fined and ordered to be bound over. She also refused to be bound over and was committed to prison for seven days. The European Court held that in each of these cases the measures taken against the protestors interfered with their rights under article 10 of the Convention but that in each case the measures were proportionate to the legitimate aims of preventing disorder, protecting the rights of others and also (in relation to their committal to prison for refusing to agree to be bound over) maintaining the authority of the judiciary.

94. The common feature of these cases, as the court observed in the *Kudrevičius* case, is that the disruption caused was not a side-effect of a protest held in a public place but was an intended aim of the protest. As foreshadowed earlier, this is an important distinction. It was recently underlined by a Divisional Court (Singh LJ and Farbey J) in *Director of Public Prosecutions v Ziegler* [2019] EWHC 71 (Admin); [2019] 2 WLR 1451, a case – like the *Kudrevičius* case – involving deliberate obstruction of a highway. After quoting the statement that intentional disruption of activities of others is not "at the core" of the freedom protected by article 11 of the Convention (see paragraph 44 above), the Divisional Court identified one reason for this as being that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others (see para 53 of the judgment). The court pointed out

that persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way you desire.

95. Where, as in the present case, individuals not only resort to compulsion to hinder or try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect that their conscientious motives will insulate them from the sanction of imprisonment.

96. On the other hand, courts are frequently reluctant to make orders for the immediate imprisonment of protestors who engage in deliberately disruptive but non-violent forms of direct action protest for conscientious reasons. It is notable that in the *Kudrevičius* case and in the earlier cases there cited in which custodial sentences were held by the European Court to be a proportionate restriction on the rights of protestors, in all but one instance the sentence imposed was a suspended sentence. The exception was *Steel v United Kingdom*, but in that case too the protestors were not immediately sentenced to imprisonment: it was only when they refused to be bound over to keep the peace that they were sent to prison. A similar reluctance to make (or uphold) orders for immediate imprisonment is apparent in the domestic cases to which counsel for the appellants referred, including the *Roberts* case. As Lord Burnett CJ summed up the position in that case (at para 43):

> "There are no bright lines, but particular caution attaches to immediate custodial sentences."

There are good reasons for this, which stem from the nature of acts which may properly be characterised as acts of civil disobedience.

Civil disobedience

97. Civil disobedience may be defined as a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government (or possibly, though this is controversial, of private organisations): see e.g. John Rawls, *A Theory of Justice* (1971) p.364. Where these conditions are met, such acts represent a form of political protest, both in the sense that they are guided by principles of justice or social good and in the sense that they are addressed to other members of the community or those who hold power within it. The public nature of the act – in contrast to the actions of other law-breakers who generally seek to avoid detection – is a demonstration of the protestor's sincerity and willingness to accept the legal consequences of their actions. It is also essential to characterising the act as a form of political communication or address. Eschewing violence and showing some measure of moderation in the level of harm intended again signal that, although the means of protest adopted transgress the law, the protestor is engaged in a form of political action undertaken on moral grounds rather than in mere criminality.

98. It seems to me that there are at least three reasons for showing greater clemency in response to such acts of civil disobedience than in dealing with other disobedience of the law. First, by adhering to the conditions mentioned, a person who engages in acts of civil disobedience establishes a moral difference between herself and ordinary law-breakers which it is right to take into account in determining what punishment is deserved. Second, by reason of that difference and the fact that such a protestor is generally – apart from their protest activity – a law-abiding citizen, there is reason to

expect that less severe punishment is necessary to deter such a person from further law-breaking. Third, part of the purpose of imposing sanctions, whether for a criminal offence or for intentional breach of an injunction, is to engage in a dialogue with the defendant so that he or she appreciates the reasons why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law or other people's lawful activities are contrary to the protestor's own moral convictions. Such a dialogue is more likely to be effective where authorities (including judicial authorities) show restraint in anticipation that the defendant will respond by desisting from further breaches. This is part of what I believe Lord Burnett CJ meant in the *Roberts* case at para 34 (quoted above) when he referred to "a bargain or mutual understanding operating in such cases".

99. These considerations explain why, in a case where an act of civil disobedience constitutes a criminal offence or contempt of a court order which is so serious that it crosses the custody threshold, it will nonetheless very often be appropriate to suspend the operation of the sanction on condition there is no further breach during a specified period of time. Of course, if the defendant does not comply with that condition, he or she must expect that the order for imprisonment will be implemented.

The judge's approach

100. The judge had regard to the fact that the breaches of the Injunction committed by the appellants in this case were part of a protest but did not accept that this was relevant in deciding what sanction to impose. That was an error. As I have indicated, it is clear from the case law that, even where protest takes the form of intentional disruption of the lawful activities of others, as it did here, such protest still falls within the scope of articles 10 and 11 of the Human Rights Convention. Any restrictions imposed on such protestors are therefore lawful only if they satisfy the requirements set out in articles 10(2) and 11(2). That is so even where the protestors' actions involve disobeying a court order. Although – as the judge observed – the appellants' rights to freedom of expression and assembly had already been taken into account in deciding whether to make the order which they disobeyed, imposing a sanction for such disobedience involved a further and separate restriction of their rights which also required justification in accordance with articles 10(2) and 11(2) of the Human Rights Convention.

101. That said, the judge was in my opinion entitled to conclude – as he made it clear that he did – that the restrictions which he imposed on the liberty of the appellants by making suspended orders for their committal to prison were in any event justified by the need to protect the rights of the claimants and to maintain the court's authority. The latter aim is specifically identified in article 10(2) as a purpose capable of justifying restrictions on the exercise of freedom of expression. It is also, as it seems to me, essential for the legitimate purpose identified in both articles 10(2) and 11(2) of preventing disorder.

Reference to the Sentencing Council guideline

102. In deciding what sanctions were appropriate, the judge approached the decision, correctly, by considering both the culpability of the appellants and the harm caused, intended or likely to be caused by their breaches of the Injunction. I see no merit in the appellants' argument that, in making this assessment, he misapplied the

Sentencing Council guideline on sentencing for breach of a criminal behaviour order. In *Venables v News Group Newspapers* [2019] EWCA Civ 534, para 26, this court thought it appropriate to have regard to that guideline in deciding what penalty to impose for contempt of court in breaching an injunction. As the court noted, however, the guideline does not apply to proceedings for committal. There is therefore no obligation on a judge to follow the guideline in such proceedings and I do not consider that, if a judge does not have regard to it, this can be said to be an error of law. The criminal sentencing guideline provides, at most, a useful comparison.

103. Caution is needed in any such comparison, however, as the maximum penalty for contempt of court is two years' imprisonment as opposed to five years for breach of a criminal behaviour order. It would be a mistake to assume that the starting points and category ranges indicated in the sentencing guideline should on that account be made the subject of a linear adjustment such that, for example, the starting point for a contempt of court that would fall in the most serious category in the guideline (category 1A) should only be of the order of 10 months' custody (which is roughly 40% of the guideline starting point of two years' custody). As the Court of Appeal observed in *McKendrick v Financial Conduct Authority* [2019] EWCA Civ 524; [2019] 4 WLR 65, para 40:

> "[Counsel for the appellant] was correct to submit that the decision as to the length of sentence appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum."

104. A further material difference is that, in proceedings for contempt of court, a community order is not available as a lesser alternative to the sanction of imprisonment. There may therefore be cases where, although the sentencing guideline for breach offences might suggest that a community order would be an appropriate sentence, it is necessary to punish a contempt of court by an order for imprisonment because the contempt is so serious that neither of the only alternative sanctions of a fine and/or an order for costs could be justified.

Sanction for the first incident

105. In relation to the first incident on 24 July 2018 involving all three appellants, there is no basis for saying that the judge's assessment of culpability and harm by reference to the sentencing guideline for breach offences, or his decision on sanction in the light of that assessment, was wrong on any of the grounds listed in paragraph 85 above. The judge was right to start from the position that a deliberate breach of a court order is itself a serious matter. He was entitled, as he also did, to treat the appellants' culpability as aggravated by the element of planning involved in their use of lock-on devices and to take account of (i) the number of hours of disruption and delay caused by their conduct, (ii) evidence that the incident caused Cuadrilla additional (and

irrecoverable) costs of around £1,000, and (iii) the fact that the incident only ended when police were deployed to cut through the arm lock devices and remove the appellants. It was also relevant that the appellants expressed no remorse and gave no indication that they would not commit further breaches of the Injunction. Nor were they entitled to any credit for admitting their contempt, as they declined to do so, thereby necessitating a trial at which evidence had to be called.

106. Had it not been for the fact that the appellants' actions could be regarded as acts of civil disobedience in the sense I have described, short immediate custodial terms would in my view have been warranted. As it is, it cannot be said that the judge's decision to impose suspended terms of imprisonment of four weeks was wrong in principle or outside the range of decisions reasonably open to him.

Sanction for the second incident

107. In relation to the second incident on 3 August 2018 involving Ms Lawrie alone, somewhat different considerations apply. Although Ms Lawrie's action in standing in the path of a lorry to try to stop it was also found to be a deliberate breach of the court's order, there was no evidence of planning and the incident was far shorter in duration lasting only a few seconds. In assessing the harm caused or risked by Ms Lawrie's breach of the Injunction, the judge emphasised the danger of injury or death to which her action had exposed Ms Lawrie herself, the driver of the lorry and other road-users. However, as David Richards LJ pointed out in the course of argument, in approaching the matter in this way the judge seems to have lost sight of the fact that the purpose of paragraph 7 of the Injunction, which he was punishing Ms Lawrie for disobeying, was not to protect the safety of road-users but was to protect Cuadrilla from suffering economic loss as a result of conspiracy to disrupt its supply chain by unlawful means. In assessing the seriousness of the breach, the judge should have focused on the extent to which the breach caused, or was intended to cause or risked causing, harm of the kind which the relevant term of the Injunction was intended to prevent. Had he done this, the judge would have been bound to conclude not only that no harm was actually caused but that the amount of economic loss intended or threatened by delaying a lorry on its way to collect rainwater from the site was slight.

108. The judge was, I consider, entitled to take into account as aggravating Ms Lawrie's culpability the nature of the unlawful means used and the fact that, on his findings, it amounted not merely to a public nuisance through obstruction of the highway but to an offence of causing danger to road-users contrary to section 22A of the Road Traffic Act 1988. To be guilty of an offence under that statutory provision, it is not necessary that the person concerned should have intended to cause, or realised that they were causing, danger to life or limb, and the judge made no such finding in relation to Ms Lawrie. It is sufficient that it would be obvious to a reasonable person that their action would be dangerous – a matter of which the judge was clearly satisfied on the evidence.

109. Ms Lawrie was not prosecuted, however, and the judge was not sentencing her for a criminal offence under the Road Traffic Act. In the circumstances, giving all due weight to the nature of the unlawful means used, the fact that this was Ms Lawrie's second deliberate breach of the Injunction and her complete lack of contrition, I do not consider that the term of imprisonment of two months which the judge imposed was justified. In my judgment, although the judge was right to conclude that the

custody threshold was crossed, the appropriate penalty for this contempt of court was the same as that imposed for the earlier contempt committed by all three appellants – that is, a suspended term of imprisonment of four weeks.

Conclusion

110. For these reasons, I would vary the committal order made by HHJ Pelling QC on 3 September 2019 by substituting for the period of imprisonment of two months in paragraph 2 of the order a period of four weeks. In all other respects I would dismiss the appeal.

Lord Justice David Richards:

111. I agree.

Lord Justice Underhill:

112. I agree with Leggatt LJ, for the reasons which he gives, that this appeal should be dismissed save in the one respect which he identifies. The courts attach great weight to the right of peaceful protest, even where this causes disruption to others; but it is also important for the rule of law that deliberate breaches of court orders attract a real penalty, and I can see nothing wrong in principle in the judge's conclusion that the appellants' conduct here merited a custodial sentence, albeit suspended.

Neutral Citation [2020] EWHC 2614 (Ch)

Case No PT-2020-BHM-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST

The Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 13 October 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

(1) THE SECRETARY OF STATE FOR TRANSPORT
(2) HIGH SPEED TWO (HS2) LIMITED

Claimants/Applicants

- and -

ELLIOTT CUCIUREAN

Defendant/Respondent

- -

- -

Mr Michael Fry (instructed by **DLA Piper UK LLP**) for the Applicants
Mr Adam Wagner (instructed by **Robert Lizar Solicitors**) for the Respondent

Hearing dates: 30 and 31 July, 17 September and 13 October 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

(1) The Order

1. By an order dated 17 March 2020, sealed on 23 March 2020, Andrews J made various orders consequential upon her decision in these proceedings dated 20 March 2020, published under Neutral Citation Number [2020] EWHC 671 (Ch) (respectively, the **Order** and the **Judgment**[1]).

2. The Order, obtained on the application of the above-named Claimants/Applicants (together either the **Claimants** or **HS2**), was directed at four (groups of) defendants (**Defendants**). The second (group of) Defendants, the **Second Defendants**, were defined and identified in the Order as follows:

> "Persons Unknown entering or remaining without the consent of the Claimants on Land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire shown coloured green, blue and pink and edged red on Plan B annexed to the Particulars of Claim."

3. I shall refer to the land described in this definition of the Second Defendants as the **Crackley Land** or the **Land** and the plan identifying this land as **Plan B**. A copy of Plan B, which formed part of the Order and was appended to it, is appended to this Judgment as **Annex 2**. Thus, the Second Defendants are persons defined by reference to their entering upon or remaining on the Land without the Claimants' consent. It appears to be perfectly possible – in these circumstances – to become one of the Second Defendants simply by entering upon the Land absent consent.

4. The other (groups of) Defendants identified in the Order are not relevant to this Judgment, and I consider them no further.

5. The Order contained a penal notice (the **Penal Notice**), headed as such in bold capital letters, in the following terms:

> "**Penal Notice**
>
> If you the within named Defendants or any of you disobey this order you may be held to be in contempt of court and may be imprisoned, fined or have your assets seized.
>
> **Important Notice to the Defendants**
>
> This Order prohibits you from doing the acts set out in this Order. You should read it very carefully. You are advised to consult a solicitor as soon as possible. You have the right to ask the Court to vary or discharge this Order."

6. The Order contains a number of recitals, and then, provides:

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[1] The terms and abbreviations used in this Judgment are listed in **Annex 1** hereto, together with the paragraph number in the judgment in which each term/abbreviation is first used.

(1) By paragraph 1, that the steps taken by the Claimants "to serve the Claim, the Application and the evidence in support on the Defendants shall amount to good and proper service of the proceedings on the Defendants and each of them. The proceedings shall be deemed served on 4 March 2020."

(2) By paragraphs 8, 9 and 10, service of the Order on (amongst others) the Second Defendants is provided for. These paragraphs provide:

> "8. Pursuant to CPR 6.27 and 81.8, service of this Order on the…Second Defendants shall be dealt with as follows:
>
> 8.1 The Claimants shall affix sealed copies of this Order in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around…the Crackley Land.
>
> 8.2 The Claimants shall position signs, no smaller than A3 in size, advertising the existence of this Order and providing the Claimants' solicitors contact details in case of requests for a copy of the Order or further information in relation to it.
>
> 8.3. The Claimants shall email a copy of the Order to the email address helpstophs2@gmail.com.
>
> 8.4 The Claimants shall further advertise the existence of this Order in a prominent location on the websites: (i) https://hs2warwicks.commonplace.is/; and https:/www.gov.uk/government/organisations/high-speed-two-limited, together with a link to download an electronic copy of this Order.
>
> 9. The taking of the steps set out in paragraph 8 shall be good and sufficient service of this Order on the…Second Defendants and each of them. This Order shall be deemed served on those Defendants the date that the last of the above steps is taken, and shall be verified by a certificate of service.
>
> 10. The Claimants shall from time-to-time (and no less frequently than every 28 days) confirm that copies of the orders and signs referred to at paragraphs [8.1] and [8.2][2] remain in place and legible, and, if not, shall replace them as soon as practicable."

(3) By paragraph 3, the Second Defendants (amongst others) were obliged forthwith to give the Claimants vacant possession of all the Crackley Land. By paragraph 7.2, the court declared that "[t]he Claimants are entitled to possession of the Crackley Land and the Defendants have no right to dispossess them and where the Defendants or any of them enter the said land the Claimants shall be entitled to possession of the same."

(4) By paragraph 4, from 4pm on 24 March 2020 – and subject to a "carve-out" in paragraph 5 of the Order considered below – the Second Defendants and each of them were forbidden from entering or remaining upon the Crackley Land.

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[2] The Order refers to paragraphs 7.1 and 7.2, which is an obvious error. The correct references are, as is evident from the face of the Order, clearly the paragraphs I have identified.

(5) Paragraph 5 – the "carve-out" – provided that:

"Nothing in paragraph 4 of this Order:

5.1 Shall prevent any person from exercising their rights over any open public right of way over the Land. These public rights of way shall, for the purposes of this Order, include the "unofficial footpath" between two points of the public footbath "PROW130" in the location indicated on Plan C annexted to the Particulars of Claim and reproduced as an annexe to this Order;

5.2 Shall affect any private rights of access over the Land held by any neighbouring landowner."

(6) The injunction in paragraph 4 of the Order is explicitly an interim injunction, as is made clear by paragraph 6 of the Order, which provides:

"The order at paragraph 4 above shall:

6.1 remain in effect until trial or further order or, if earlier, a long-stop date of 17 December 2020."

(2) This Application

7. This is the application, dated 9 June 2020, of the Claimants to commit the Respondent, Mr Cuciurean, for various breaches of the Order (the **Application**). The Application is supported by a statement of case (the **Statement of Case**) and by an affidavit sworn by a Mr Gary Bovan (**Bovan 1**). The Statement of Case provides as follows:

"18. It is the [Claimants'] case that [Mr Cuciurean] has on at least 17 separate occasions between 4 April 2020 and 26 April 2020 acted in contempt of the Order, by wilfully breaching paragraph 4.2 of the Order by entering on to and remaining on the Crackley Land.

19. The [Claimants] set out in the Schedule to this Statement of Case each of the 17 alleged acts of contempt. Plan E and the Incident Location Photo also identify the location of each act.

20. As set out by the [Claimants] in the **Proceedings**,[3] the protestors (such as [Mr Cuciurean]) are strongly against the HS2 Scheme and, as feared, have not been deterred from seeking to return and trespass on the Crackley Land simply because the Second Defendants were evicted from the Crackley Land and relocated to Camp 2.[4]

21. The conduct of [Mr Cuciurean] is very serious and significant and has resulted in:

[3] These were the proceedings commenced by the Claimants before Andrews J, which resulted in the Order.

[4] **Camp 1** was the protestors' original location, within the Crackley Land. Pursuant to the Order, and as is further described below, the protestors were removed from Camp 1 and relocated to **Camp 2**, which lies on the Southern border of the Crackley Land.

21.1 substantial costs being incurred by the [Claimants] in seeking to ensure compliance with the Order. The costs alone of [High Court Enforcement Group Limited, **HCE**][5] are in the hundreds of thousands of pounds.

21.2 delays to the HS2 Scheme in the region of approximately 6 months;

21.3 serious risks to the health and safety of the [Claimants'] staff and contractors, members of the public and the protestors themselves;

21.4 risks of damage to plant and machinery used by the [Claimants'] contractors to carry out Phase One works; and

21.5 the [Claimants] now incurring further legal fees in seeking to enforce the Order via this application.

22. There is a real risk that if [Mr Cuciurean] is not sanctioned for the breach of the Order that he (and other protestors) will continue to act in contempt of the authority of the court and continue to breach the Order. In the event of continuing delays to works at the Crackley Land the HS2 Scheme will not be prevented, however, the necessary costs to the taxpayer will be substantial and is estimated to be in the hundreds of millions of pounds."

8. Paragraph 18 of the Statement of Case refers to "at least" 17 alleged breaches of the Order said to amount to contempt of court. I am obviously only interested in, and will only take account of, the 17 incidents described in the schedule to the Statement of Case (the **Schedule**). It will be necessary to consider these 17 incidents specifically in due course. For the present, all that needs to be noted is that I shall, in this judgment, refer to them as **Incidents 1 to 17**.

9. Clearly, the background to the Order and to this Application is the **HS2 Scheme**, by which I mean the works for the high speed rail project commonly referred to as HS2. Phase One of the construction of the HS2 Scheme has been sanctioned by – amongst other legislation – the High Speed Rail (London – West Midlands) Act 2017.

10. As is common knowledge, the HS2 Scheme is a highly controversial one, the sanctioning of which has provoked significant public protest, which has resulted in (amongst other things) the Proceedings and the Order. I should make absolutely clear that these are background facts only, of substantial irrelevance to the matters arising out of the Application. More particularly:

(1) I am not concerned with the lawfulness or desirability of the HS2 Scheme. I proceed on the basis that, in a democratic society such as ours, people are in general entitled to protest, and to voice their protest, in relation to matters that move them. Whilst there are limits to the right to protest, those limits are not before me for any kind of determination.

(2) The Claimants – in paragraph 3 of the Statement of Case – quoted from [133] of *Packham v. Secretary of State for Transport*:[6]

[5] As explained in paragraph 9 of the Statement of Case

[6] [2020] EWHC 829 (Admin).

> "…the clearance works were long ago authorised by Parliament and there is a strong public interest in ensuring that, in a democracy, activities sanctioned by Parliament are not stopped by individuals merely because they do not personally agree with them."

This statement was made in connection with an attempt to judicially review and injunct certain clearance works done – or about to be done – in furtherance of the HS2 Scheme. The point is of no relevance to this Application. This Application is concerned only with *(i)* whether the Order has been breached and *(ii)* whether the circumstances of those breaches – if they occurred – are such as to trigger the contempt jurisdiction. These are extremely important questions to do with the consequences of an alleged breach of a court order. Their resolution does not depend on the merits or otherwise of the HS2 Scheme or the extent of a person's right of protest to that Scheme. The rule of law is, in this case, narrowly and importantly engaged in the sense that there is, before me, the question of whether an order of the court – the Order – has been breached.

(3) Mr Wagner, on behalf of Mr Cuciurean, contended that I should tread with particular care, and apply the rules of contempt with particular rigour, because Mr Cuciurean was exercising his fundamental right of free speech. I reject that submission, which was considered and rejected by Andrews J:[7]

> "…the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly…"

The fact is that Andrews J declared that the Claimants had the right to possess the Crackley Land[8] and she made an order buttressing that right to possess in the form of an interim injunction forbidding the Second Defendants and each of them from entering or remaining upon the Crackley Land. It is the breach of that order that is before me: <u>why</u> the order is breached is irrelevant to the contempt jurisdiction, although it may be relevant to the question of sanction (which is not a matter on which I have been addressed). Thus, whilst I shall of course apply the rigour and care that I would apply in any application to commit, I see no cause for adopting a different or more rigorous standard in the present case.

11. This is, therefore, an application made under CPR 81.4 concerning the enforcement, against Mr Cuciurean, of the Order. No-one – in particular not Mr Cuciurean – sought to dispute the validity of the Order. However, for reasons that I describe more specifically below, Mr Cuciurean contended that the Application must be dismissed.

(3) The hearing of the Application

12. The hearing of the Application was listed for two days, on 30 and 31 July 2020. I received helpful written submissions from both the Claimants and Mr Cuciurean before the hearing, and at the hearing heard – over two very full days – the oral evidence adduced by the parties. This evidence comprised:

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[7] Judgment at [35].

[8] Paragraph 7.2 of the Order.

(1) *The evidence of Mr Bovan on behalf of the Claimants.* Mr Bovan is a High Court Enforcement Officer, who was present on the Crackley Land to execute the writ of possession made pursuant to the Order (the **Writ**).[9] Mr Bovan's evidence was contained in two affidavits, Bovan 1 (sworn 9 June 2020) and **Bovan 2** (sworn 23 July 2020). Mr Bovan gave evidence, for about 3 hours, on 30 July 2020, when he was largely cross-examined (his affidavits being admitted as evidence in-chief). In response to a request from me for a diagrammatic representation of his understanding of the perimeter to the Crackley Land, Mr Bovan produced a plan, which he spoke to briefly at the conclusion of the evidence on 31 July 2020. On his recall, Mr Bovan explained the diagram he had produced (by himself) and was briefly cross-examined on it. At my invitation, he formalised his evidence in a third affidavit (**Bovan 3**), sworn 14 August 2020.

I found Mr Bovan to be a stolid witness, clearly telling what he considered to be the truth, and doing his best to assist the court.

(2) *The evidence of Mr William Sah on behalf of the Claimants.* Mr Sah is a project engineer retained by the Claimants in connection with the HS2 Scheme. Mr Sah's evidence was contained in an affidavit sworn on 24 July 2020 (**Sah 1**). Mr Sah gave evidence – briefly, for about 30 minutes – on 30 July 2020. Mr Sah's evidence was unsatisfactory. In their written closing submissions, the Claimants suggested that Mr Sah "appeared to be over-awed by the occasion, and failed to come up to proof".[10] I hope and believe that the atmosphere in court was not so difficult for witnesses as this, and certainly all of the other witnesses appeared to give their evidence unimpaired by their surroundings. It appeared to me that Mr Sah simply did not recognise the affidavit he had sworn, and parts of it appeared to have been written for him. Thus, Mr Sah did not recognise – and certainly was unable to give evidence in relation to[11] – a plan exhibited to his statement[12] and a video similarly exhibited.[13] I do not propose to speculate on why Mr Sah was adduced as a witness, but clearly I can place no weight on his evidence.

(3) *The evidence of Mr Cuciurean.* As to this:

(a) Mr Cuciurean gave two witness statements to the court. His first was dated 15 July 2020 (**Cuciurean 1**) and his second bears the date 15 July 2020 (**Cuciurean 2**), but is almost certainly made later than this date.[14]

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[9] As I have described, the Order gave possession of the Crackley Land to the Claimants: see paragraph 3 of the Order and paragraph 6(3) above.

[10] Claimants' written closing submissions at paragraph 34.

[11] Indeed, Mr Sah came close to disowning the evidence, on the basis it was nothing to do with him.

[12] This was the plan at page 4 of the exhibit to Sah 1. The plan – referred to at paragraph 14 of Sah 1 – was provided to Mr Sah by a Mr Maurice Stokes.

[13] See paragraph 9 of Sah 1. The video was again provided by Mr Stokes.

[14] A number of the witness statements given on behalf of Mr Cuciurean were unsigned at the time of the hearing, but all of the witnesses adopted their evidence, and nothing turns on this. Signed statements were subsequently provided by Mr Cuciurean's representatives. However, it does mean that the dates of the statements before me were almost certainly wrong, assuming those dates to refer to the date the statement was made. Nothing turns on this, but I note the formal position for completeness.

(b) Mr Cuciurean gave evidence on his own behalf on 31 July 2020. He was to have given evidence on the previous day, 30 July 2020. It was clear during the course of the afternoon of 30 July 2020 that it would not be possible to complete Mr Cuciurean's evidence on 30 July 2020, if it was commenced after that of Mr Sah which, as I say, was given on on 30 July 2020. Mr Wagner, counsel for Mr Cuciurean suggested that, rather than be in "purdah" overnight, it would be better for Mr Cuciurean to give evidence fresh at the beginning of the next day. That sensible suggestion was adopted by the court.

(c) Mr Cuciurean gave evidence for about three hours, most of this being cross-examination. Mr Cuciurean was a charming, funny but ultimately evasive witness. He was – and is – obviously very much committed to his opposition to the HS2 Scheme, and was willing to place himself (and others) in positions of some danger if that furthered his ends in resisting the HS2 Scheme. One example of this arises in relation to Incident 14. Incident 14 involved Mr Cuciurean climbing the extending arm or boom of a piece of machinery used in connection with the HS2 Scheme, locking himself on to the boom (using a thumb lock) approximately 20 metres above the ground, without (so far as I could see) any form of protective harness. Mr Cuciurean was removed from this position by four specialist climbing officers, using two cherry pickers. Mr Cuciurean was either unable or unwilling to disengage or release the thumb lock, which had to be cut off, resulting in injury to Mr Cuciurean.

(d) For the present, it does not matter whether this conduct amounted to a breach of the Order or constituted some other offence. The latter is a matter falling altogether outside the province of this judgment; the former is a matter that I shall come to. I refer to the incident simply as a rather graphic illustration of Mr Cuciurean's commitment. I consider that Mr Cuciurean would go to very considerable lengths in order to give his objections to the HS2 Scheme as much force as they possibly could have. If such steps involved inconveniencing those carrying forward the Scheme or slowed progress down, then I consider that Mr Cucuirean would regard this as a positive and not a negative.

(e) I consider that Mr Cuciurean regarded the Application in exactly the same light. Mr Cuciurean saw the expense and trouble incurred by the Claimants in seeking to make good their Application as a positive and not a negative, and it is my judgement (having watched Mr Cucuirean carefully in the witness box) that in furtherance of this objective he was prepared to be evasive, but not to outright lie to the court.

(f) In short, Mr Cucuirean was a committed opponent of the HS2 Scheme, and I must treat his evidence with considerable caution. However, I do not reject that evidence as that of a liar.

(g) Three of the Incidents (Incidents 14, 16 and 17) have exposed Mr Cuciurean to the potential for separate criminal proceedings.[15] Mr Cucuirean invoked his right against self-incrimination in relation to these incidents and declined to answer certain questions in relation to them.[16] I am satisfied that Mr Cuciurean properly invoked his privilege against self-incrimination, and draw no adverse inference from his failure to answer.

(4) *Other evidence in support of Mr Cuciurean.* The other witnesses who gave evidence on behalf of Mr Cuciurean were all fellow protestors[17] against the HS2 Scheme. The original intention was for all of these witnesses to give evidence in person – as Mr Bovan, Mr Sah and Mr Cuciurean had done[18] - but (late in the day) three witnesses sought permission to give evidence remotely by Skype. More specifically:

(a) Mr Alexander Corcos was interposed as a witness before Mr Cuciurean gave evidence, on 30 July 2020. Mr Corcos is an academic living close to the HS2 Scheme development at the Crackley Land. His exercise regime brought him close to the HS2 Scheme work, but he was not a resident of either of the two camps at which protesters to the HS2 Scheme resided, nor did he regard himself as a part of these protests. However, he was independently concerned about the HS2 Scheme, and filmed and recorded activities on and around the Crackley Land. He made one statement in these proceedings (**Corcos 1**) and gave evidence briefly (for about 30 minutes) on 30 July 2020. He was a clear and careful witness, and I found the video footage exhibited to Corcos 1 particularly helpful in understanding the physical dynamics of the Crackley Land.

The remaining witnesses were called after Mr Cuciurean gave evidence, on 31 July 2020.

(b) Ms Brenda Hillier is, in her own words, opposed to the HS2 Scheme, and gave evidence chiefly in relation to the footpaths ordinarily running across the Crackley Land. Her evidence was contained in one witness statement

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[15] Early in the course of the Application, it was suggested by Mr Cucuirean's solicitors that the substantive determination of the Application should await the outcome of the criminal proceedings. That point was not pursued and the Application was heard, without objection, in the manner I have described.

[16] The existence of related criminal proceedings was always known. The specific question of self-incrimination arose during the course of Mr Cuciurean's evidence. I permitted Mr Wagner, Mr Cuciurean's counsel, and his solicitor, to speak to Mr Cuciurean during the course of his evidence, to determine the extent to which Mr Cuciurean wished to invoke the privilege. The invocation of the privilege was assessed on a question-by-question basis, with Mr Fry, counsel for the Claimants, asking his questions, and Mr Cuciurean invoking his right not to answer individually.

[17] To a greater or lesser extent. All were opposed to the HS2 Scheme: some would not accept the label "protester", and in some cases (but not in others) that would be a fair point to take in the sense that some were not "professional" protestors. I use the term simply to refer generically to people present around the Crackley Land, interested in and opposed to the HS2 Scheme.

[18] This was a hearing during the COVID-19 pandemic, and a socially distanced court room was used, with other interested persons (other members of the legal teams, the press, members of the public) participating by Skype for Business. I should record my great debt to both the court staff and to the parties' legal teams for their considerable assistance in making the trial work as well as it did.

(**Hillier 1**), and Ms Hillier was only briefly cross-examined on it (for less than 5 minutes). I therefore had little time to assess Ms Hillier as a witness, as her evidence was substantially unchallenged by the Claimants. I accept her as an honest witness, doing her best to assist the court.

(c) Mr Hicks has resided at both camps, and is part of the local protests to the HS2 Scheme. The evidence in his first statement (**Hicks 1**) chiefly concerned an incident taking place on 21 April 2020 (Incident 16). Mr Hicks – both in the video footage and before me in court – presented as a massively calm and naturally authoritative figure. He gave evidence for about 10 minutes, and was forthright and clear in his evidence. After the evidential hearings on 30 and 31 July, Mr Hicks submitted a further statement (**Hicks 2**), which was essentially in response to Bovan 3.

(d) Ms Elizabeth Cairns runs her own business, and in her spare time supports the protests against the HS2 Scheme. She did not reside at either camp, but attended both camps from time-to-time. She gave one witness statement (**Cairns 1**) and gave evidence briefly (for about 20 minutes) on 31 July 2020. Although clearly and firmly opposed to the HS2 Scheme, she sought to give her evidence as clearly and fairly as she could, and was obviously an honest and straightforward witness.

(e) Ms Hayley Pitwell sought to give evidence by video–link (Skype for Business). The connection was appalling, and there was no way in which Ms Pitwell's evidence could sensibly be heard. Fortunately, Ms Pitwell's statement (**Pitwell 1**) sought to adduce video footage, and she made no other substantive points. On this basis, I admitted her statement into evidence, but Mr Fry did not have the opportunity of cross-examining her. I do not consider – given the nature of Ms Pitwell's evidence – that the Claimants were in any way prejudiced by this.

(f) Ms Rebecca Beaumont is a photographer, living close to the Crackley Land in Leamington Spa (less than 10 miles from the site). She attended the site, according to her statement, on three occasions. Ms Beaumont was a not particularly satisfactory witness, in that she attempted to portray herself as rather less engaged in the protests against the HS2 Scheme than she in fact was. Although I accept her interest in photography, I do not accept that that was why she was present around the Crackley Land. I do not know why she sought to play down her role as a protestor (for that is what I consider her to have been), but if it was in order to portray herself as a more objective witness, then she did not come across in this way. For the reasons I give later on in this judgment, I consider that I must treat the evidence of all the witnesses with some care: but Ms Beaumont's evidence I consider to have been tendentious and I have approached it with particular caution. Ms Beaumont gave one witness statement (**Beaumont 1)** and was cross-examined upon it for about 20 minutes. I take account of the fact that Ms Beaumont gave evidence by video-link (Skype for Business) and not in court. However, I consider that the quality of her evidence was sufficient for me to reliably make the assessment of her evidence that I have done.

(g) Mr Simon Pook is a solicitor in Robert Lizar Solicitors, the firm retained by Mr Cuciurean. He made a single statement (**Pook 1**) and gave evidence via video-link (Skype for Business). He presented as an entirely clear and straightforward witness, and the concerns that I express in this paragraph have nothing to do with the tenor of his evidence. Mr Pook's evidence post-dated the Incidents, and described a site visit made by him on 1 July 2020. His statement principally concerned the signage around the Crackley Land on that date. My concerns about Mr Pook's evidence are twofold:

(i) First, I am not sure that his was factual evidence at all. Essentially, Mr Pook was seeking to evidence the signage at the Crackley Land at the time the Incidents took place by an *ex post facto* examination. This, as it seems to me, was either expert evidence or irrelevant factual evidence, relating to a point in time that I am not concerned with.

(ii) Secondly, Mr Pook is obviously *parti pris*, being part of the firm whose duty it is to represent Mr Cuciurean.

In these circumstances, I do not consider that I can place much weight on Mr Pook's evidence. But I would wish to stress that this is in no way a criticism of the manner in which Mr Pook gave his evidence (which was for about 20 minutes).

13. With two exceptions – Mr Cuciurean himself and Ms Beaumont – where, for the reasons I have given, I treat their evidence with caution, I have found that all of the witnesses (with the further exception of Ms Pitwell, whose evidence was effectively admitted without examination, for reasons beyond her control) sought to give their evidence honestly and with the intention of doing their best to assist the court. However, I am conscious that the work on the HS2 Scheme and the protests to that Scheme have polarised views and that this inevitably affects how one group regards the other. There is an entirely unsurprising degree of mistrust and wariness, occasionally manifesting itself in violence. Each side is inclined unconsciously to read the worst and not the best into the conduct of the other, and I consider that this will have affected all of the evidence before me, even though I acknowledge (and have so found) that most of the witnesses were trying to help the court as best they could. Nevertheless, this an aspect of the oral evidence that I bear well in mind.

14. In many cases, a judge would draw on contemporaneous documentary evidence to cross-check – and often prefer over – the after-the-event oral evidence that is heard in court. In this case, there is an unsurprising absence of such documentary evidence:

(1) Although I have before me – generally exhibited to the witness statements that I have described – a large number of photographs and diagrams, these are inevitably not capable of presenting a complete contemporary picture of what was going on at the Crackley Land. Diagrams are essentially subjective representations of the views of the person making the diagram. Although it might be said that the camera does not lie (an aphorism I treat with a degree of scepticism in any event), the fact is that the photographs in this case are inevitably a snapshot of what occurred at a specific instant, and from a single

distance and angle. They will lack – inevitably, and without any criticism of the photographer – context.

(2) I was shown, and have admitted into evidence, a great deal of video-footage. Like photographs, such footage lacks context, and must be treated with caution. Inevitably, the camera operator films what he or she wants to record, which will (depending on the skill of the operator) be that person's take of the events being films. Although I have admitted into evidence – with the agreement of all parties – all of the video-evidence, I place more weight on the excerpts that were shown to the witnesses, about which they were asked. Even so, I treat this evidence with care.

15. Two days (30 and 31 July 2020) were set aside for the hearing of the Application. In the event, those days were only sufficient to hear the evidence in the case, and I adjourned the Application to the next two days convenient to the parties and to the court, 17 and 18 September 2020. I should place on the record that this is no criticism of the parties' hearing timetable. The fact is that technical issues arising out of the hearing forum (a socially distanced, "hybrid", hearing involving the attempted streaming of significant portions of video footage) meant that a great deal of time was lost, despite the very considerable efforts of both the legal teams before me and the court staff.

16. At the end of the hearing on 31 July 2020, the limited need for further evidence (Bovan 3 and Hicks 2, which I have described) was discussed, and a timetable for written closing submissions arranged, so that I could read and consider these well-before the resumed hearing on 17 September 2020. On 17 September 2020, I heard (sitting remotely in Birmingham[19]) oral closing submissions, and reserved my judgment. The hearing day scheduled for 18 September 2020 was vacated.

17. A further hearing – 16 October 2020 – was arranged for the hand-down of this Judgment, and any consequential matters.

B. THE RELEVANT LEGAL PRINCIPLES IN GENERAL TERMS

(1) Introduction

18. The breach of an order of the court is an act of contempt of court for which a defendant can be committed.[20] Unsurprisingly, given that the liberty of the subject is potentially at stake, the rules regarding committal are stringent and designed to protect the defendant.

19. This Section seeks to set out the applicable rules in general terms, before considering – in later Sections – whether the Application for committal can succeed in this case. I should stress that these legal principles have been articulated and developed in the context of "traditional" orders, where there is a named – an identified – defendant. This

[19] This was due to the "enhanced" COVID-19 restrictions in force in Birmingham at that time. These did not render an in-person hearing impossible, but did cause me to raise with counsel the (un)desirability of multiple persons physically assembling in Birmingham. The consensus was that oral closings could be as effectively conducted remotely.

[20] CPR 81.4.

case, of course, involves an order against "persons unknown" and Mr Cuciurean contended that the rules applied differently in the context of such orders. This Section does no more than articulate the general rules: the points taken by Mr Cuciurean are considered in later Sections.

(2) The standard of proof

20. The standard of proof on a committal application is the criminal standard of proof, that is to say, beyond reasonable doubt.[21] Rather than, mantra like, to repeat this requirement throughout this judgment, I should stress that this is the standard that I have applied throughout. When I say, in this judgment, that I am satisfied of something or find that something is the case, that means that I am satisfied to or have made a finding at and to the requisite standard.

(3) Requirements regarding the application for committal itself

21. As I have noted, the Application is for committal for breach of a judgment, order or undertaking to do or abstain from doing an act.[22] Such an application is made under CPR 23 and CPR 81.10.

22. The following requirements must be met in relation to such an application:[23]

(1) The application must "set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts".[24] The importance of stating precisely and specifically the grounds of contempt was emphasised in *Ocado Group plc v. McKeeve*.[25]

(2) The application notice must contain a prominent notice stating the possible consequences of the court making a committal order.[26]

(3) The written evidence in support of the application must be by way of affidavit.[27]

(4) Unless dispensed with, the committal application must be personally served.[28]

23. I consider whether these requirements are met in Section C below.

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[21] CPR PD 81.9.

[22] The relevant rules are in Section II of CPR 81.

[23] I am adopting the formulation in *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [26].

[24] CPR 81.10(3)(a).

[25] [2020] EWHC 1463 (Ch) at [18] to [36].

[26] CPR PD 81.13.2(4).

[27] CPR 81.10(3)(b).

[28] CPR. 81.10(4).

(4) Procedural pre-conditions regarding the order said to have been breached

24. Not every breach of a judgment, order or undertaking is capable of founding an application under CPR 81.10. There are three requirements that must be satisfied for a breached order to found the basis for an application under CPR 81.10:[29]

(1) Subject to limited exceptions, the order that is said to have been breached must have been endorsed with a penal notice in the requisite form.[30]

(2) The order said to have been breached must have been served personally on the defendant, unless the requirement is dispensed with.[31]

(3) The relevant order must have been served before the end of the time fixed for the doing of the relevant acts.[32] According to its wording, this provision applies only to a mandatory order requiring the doing of an act. The point is that the target of the order must be able – within the time-frame envisaged by the order – to do the act ordered, in order for commital for breach of the order to be sought. There is no similar rule as regard prohibitory orders. That is because – as the wording of the relevant provision makes clear[33] – service is sufficient to put the defendant on notice not to do a certain act, and there is no time needed for compliance. Given that this was a prohibitory and not a mandatory order, it follows that I will only need to note this requirement.

25. I consider these requirements in Section D below.

(5) Substantive requirements

26. Assuming these (important) procedural requirements in relation to the order are met, there are two (what I shall call) substantive requirements:[34]

(1) The order must be clear and unambiguous.[35]

(2) The order must have been breached, and that breach must have been deliberate. It will be necessary to consider, in the context of this case, precisely what "deliberate" means.

27. I consider these requirements in Section E below.

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[29] I am adopting the formulation in *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [28].

[30] CPR 81.9(1).

[31] CPR 81.5 and CPR 81.6.

[32] CPR 81.5(1).

[33] I.e. CPR 81.5(1).

[34] See, generally, *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [30].

[35] *Absolute Living Developments Ltd v. DS7 Ltd*, [2018] EWHC 1717 (Ch) at [30(1)] lists a number of other requirements, which have already been identified. I do not repeat them.

C. PROCEDURAL REQUIREMENTS IN RELATION TO THE APPLICATION

28. I set out the procedural requirements that had to be met in relation to the Application in paragraph 22 above.

29. Turning, then, to the requirements set out in paragraph 22 above:

(1) As to the first requirement described in paragraph 22(1) above:

(a) The Application was made by formal application notice, supported by the Statement of Case. The Statement of Case sets out, with great specificity, the alleged grounds of contempt, in particular in the Schedule which lists the 17 Incidents, each of which is said to constitute a breach of the Order and a contempt of court.

(b) Paragraph 50.2.2 of Mr Cuciurean's written closing submissions asserts that the Claimants are now pleading (or, perhaps more clearly, contending for) a different case to that set out in their Application. Specifically, the Schedule to the Statement of Case sought to identify the location of the various Incidents by reference to certain plans and photographs of the Crackley Land. However, in cross-examination, Mr Bovan accepted that the locations there set out were approximate or rough. Mr Cuciurean contends that this renders the Schedule "inaccurate". It is contended that the Claimants should have applied to amend the Statement of Case and/or the Schedule and – absent such amendment – the Application must fail.

(c) I reject this contention. It is, of course, the case that a respondent to an application for committal is entitled to know, with proper particularity stated in the application for committal, just what the case against him or her is.[36] That is precisely what the Claimants have done. Rather than simply assert that the nature of Mr Cuciurean's alleged contempt is the breach of paragraph 4.2 of the Order, the Claimants have (helpfully and properly) sought to enable Mr Cuciurean to respond in his own defence, by identifying each Incident relied upon with precision.

(d) In due course, I will consider whether the grounds of contempt have, or have not, been made out. But the suggestion that the Application is defective on this ground is hopeless.

I find that the requirement described in paragraph 22(1) above is satisfied.

(2) The Statement of Case, which is part of the application notice, contains a clear and appropriately prominent notice setting out the consequences of the Application. I find that the requirement described in paragraph 22(2) above is satisfied.

[36] *Ocado Group plc v. McKeeve*, [2020] EWHC 1463 (Ch) at [18] to [36].

(3) The Application is supported by Bovan 1, which an affidavit sworn by Mr Bovan, as I have described, and which was attached to the application notice. I find that the requirement described in paragraph 22(3) above is satisfied.

(4) The Application (meaning the application notice, Statement of Case, Bovan 1 and exhibits) have been served on Mr Cucuirean in the manner described in the affidavit of Mr Robert Shaw, a solicitor in the firm instructed by the Claimants, DLA Piper UK LLP (**Shaw 1**). The content of Shaw 1 was not challenged by Mr Cuciurean. It is evident from Shaw 1 that the Claimants were put to considerable trouble in seeking to serve Mr Cuciurean personally. By this, I do not mean to suggest that Mr Cuciurean was consciously seeking to evade service. However, the fact that Mr Cuciurean was, at this time, continuing his activities as a protester to the HS2 Scheme, and the unfortunate hostility that exists as between those who protest the HS2 Scheme and those who are engaged in it (even if only as process servers) meant that although the Application was ready for service on 19 June 2020,[37] it was only served personally on Mr Cuciurean on 24 June 2020, when Mr Cuciurean attended the hotel at which the process server (Mr Long, an enforcement officer with HCE) was staying.[38] I therefore find that Mr Cuciurean was personally served on 24 June 2020, and that the requirement described in paragraph 22(4) above is satisfied. I should be clear that I consider that Mr Cuciurean had notice of the Application well before this date: I cannot be sure whether he actually received the Application prior to 24 June 2020, but clearly something caused Mr Cuciurean to attend at Mr Long's hotel. Had it been necessary – and it is not – I would have been prepared to dispense with personal service of the Application.

D. PROCEDURAL PRE-CONDITIONS REGARDING THE ORDER SAID TO HAVE BEEN BREACHED

(1) The pre-conditions

30. I set out the procedural pre-conditions that must be met before an application for committal can substantively be entertained in paragraph 24 above.

(2) The first pre-condition

31. So far as the first requirement is concerned (described in paragraph 24(1) above), it was accepted by all, and is clear from the face of the Order, that the Order – at least in the abstract – contains the appropriate penal notice. Had the Order been served personally, this requirement would unequivocally have been satisfied.

32. In his submissions to me, Mr Wagner for Mr Cuciurean contended that the importance of a penal notice was clear given that it is expressly dealt with in a specific rule of the CPR, CPR 81.9(1). I accept this. Mr Wagner's point was that – given the way in which the Order was served (a point I have yet to consider) – CPR 81.9(1) was not satisfied. I propose to consider this point when I consider the question of service on "persons unknown", and it seems to me these points (service and the need for a penal notice) are

[37] See paragraphs 8 and 9 of Shaw 1.

[38] See paragraph 18 and in particular paragraphs 18.8 to 18.10 of Shaw 1.

inextricably linked. Subject, therefore, to this major reservation, which I deal with later, I find that the first pre-condition has been satisfied.

(3) The second pre-condition

(a) The issue stated

33. So far as the second requirement is concerned (described in paragraph 24(2) above), it was common ground, and indeed obvious from the narrative in this judgment, that the Order was not personally served on Mr Cuciurean at the time it was made.

34. If this is a deficiency in the Application, it is not one that I consider can be cured after the event. That is because the contempt jurisdiction must operate prospectively. In other words, the acts said to have been in breach of the Order must, at the very least,[39] have been done after service of the Order. The Incidents all took place between 4 April 2020 and 26 April 2020 and it is common ground that there was no personal service of the Order on Mr Cuciurean during this period – although, as Mr Cuciurean stressed, there could have been.

35. In short, unless the requirement for personal service has been dispensed with, and service properly undertaken in accordance with some form of alternative service, this deficiency is fatal to the Application, which would have to be dismissed on this basis alone. Unless I am satisfied that there has been proper service in advance of the Incidents, I am not going to permit any deficiency to be cured retrospectively. The law clearly sets its face against retrospective rules: and that is all the more important in the contempt jurisdiction, where the liberty of the subject is at stake.

36. Claims against persons unknown have in recent years come before the courts with increasing frequency. The civil legal process, and private law rights, are used in order to control ongoing public demonstrations by a continually fluctuating body of protestors. In *Canada Goose UK Retail Ltd v. Persons Unknown*, the Court of Appeal sounded a cautionary note in relation to such processes:[40]

> "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 protesters. 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 protesters. 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…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."

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[39] Mr Cuciurean contended that even this was not enough. That is a point I consider later on in this judgment.

[40] [2020] EWCA Civ 303 at [93].

37. *Canada Goose* concerned an injunction in relation to persons demonstrating near a store at 244 Regent Street in London. The present case concerns trespass to land with a defined perimeter in the countryside[41] to which the Claimants have the right of possession, which the court has declared in their favour.[42] They are doing work on that land pursuant to statutory authority, to which (amongst others) Mr Cuciurean objects. As Andrews J made clear in the Judgment, interests of public protest and demonstration are attenuated in this case:[43]

> "…the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly…"

As I noted earlier, no-one is seeking to enjoin the right of protest or free expression, save where that protest or free expression involves trespass onto the Crackley Land.

38. The Claimants are, therefore, simply asserting, against an unknown body of persons, their right to free enjoyment of their property. True it is that civil proceedings against a fluctuating body of persons are a "blunt instrument", but it is a blunt instrument that must be made to work so that the rights of all interested persons, including the civil rights of property-holders, are properly respected and upheld.[44]

39. The present issue – one of service – concerns the rights not of the Claimants, but of persons like Mr Cuciurean, who have not, in any conventional sense, been made party to these proceedings. Making an order against such persons is, in itself, a serious matter; bringing committal proceedings for breach of such an order even more so. Mr Wagner, on behalf of Mr Cucuirean, stressed the importance of procedural safegards. He was right to do so.

(b) Procedural guidelines

40. The law has recently and helpfully been clarified in a trilogy of cases, *Cameron*, *Cuadrilla* and *Ineos*.[45] These culminated in *Canada Goose*, to which I have already

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[41] I shall come to the definition of the Crackley Land, its perimiter, and how that perimeter was demarcated, in due course. Nothing in this paragraph should be taken as a suggestion that I am assuming that the perimeter was clear.

[42] I.e. by way of the Order.

[43] Judgment at [35].

[44] In this regard, it is worth noting that the Claimants did try to engage non-civil remedies. The description of Incident 1 in the schedule to the Statement of Case states:

"[Mr Cuciurean] appeared intoxicated and refused to leave the Crackley Land. [Mr Cuciurean] was therefore arrested by Enforcement Agents, employed by [HCE], for preventing a High Court Enforcement Officer from carrying out his lawful duty. [Mr Cuciurean] became violent by resisting his arrest and was subsequently restrained using reasonable force and secured on the ground.

Warwickshire Police were contacted. However, due to the lack of available space in custody and available policy units, they refused to attend to take [Mr Cuciurean] into custody. [Mr Cuciurean] was therefore de-arrested at approximately 21:00 by the Enforcement Officer and excorted off the Crackley Land."

[45] The trilogy, fully considered in *Canada Goose*, are: *Cameron v. Hussain*, [2019] UKSC 6; *Cuadrilla Bowland Ltd v. Persons Unknown*, [2020] EWCA Civ 9; *Ineos Upsteam Ltd v. Persons Unknown*, [2019] EWCA Civ 515.

referred. In *Canada Goose*, the Court of Appeal identified three classes of "persons unknown" against whom proceedings might be commenced and against whom injunctions might be sought. Those classes are as follow:

(1) *Category 1*. Anonymous defendants who are identifiable but whose names are unknown, such as squatters occupying property.[46]

(2) *Category 2*. Defendants who are not only anonymous, but who cannot even be identified. A good example of a Category 2 Defendant is a "hit and run" driver.[47]

(3) *Category 3*. People who will or who are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought.[48]

41. The present case concerns **Category 3 Defendants**. The Court of Appeal noted at [63] in relation to this category:

> "It will be noted that *Cameron* did not concern, and Lord Sumption did not expressly address, a third category of anonymous defendants, who are particularly relevant in ongoing protests and demonstrations, namely people who will or are highly likely in the future to commit an unlawful civil wrong, against whom a *quia timet* injunction is sought. He did, however, refer (at [15]) with approval to *South Cambridgeshire Distict Council v. Gammell*…[49] in which the Court of Appeal held that persons who entered onto land and occupied it in breach of, and subsequent to the grant of, an interim injunction became persons to whom the injunction was addressed and defendants to the proceedings. In that case, pursuant to an order permitting alternative service, the claim form and the order were served by placing a copy in prominent positions on the land."

42. At [64], the Court of Appeal also noted:

> "Lord Sumption also referred (at [11]) to *Ineos*, in which the validlty of an interim injunction against "persons unknown", described in terms capable of including future members of a fluctuating group of protesters, was centrally in issue. Lord Sumption did not express disapproval of the case (then decided only at first instance)."

43. It is fair to say that Morgan J, who decided *Ineos* at first instance, expressed a degree of concern about proceedings and orders having this effect.[50] Nevertheless, the Court of Appeal in *South Cambridgeshire Distict Council v. Gammell* was clear:[51]

> "…In each of these appeals the appellant became a party to the proceedings when she did an act which brought her within the definition of defendant in the particular case. Thus in the case of WM she became a person to whom the injunction was addressed and a defendant when she caused her three caravans to be stationed on the land on 20 September 2004. In the case of KG she became both a person to whom the injunction was addressed and the defendant when she

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[46] *Canada Goose* at [60].

[47] *Canada Goose* at [60].

[48] *Canada Goose* at [63].

[49] [2005] EWCA Civ 1429.

[50] [2017] EWHC 2945 9 (Ch) at [119].

[51] [2005] EWCA Civ 1429 at [32]. Emphasis added.

caused or permitted her caravans to occupy the site. In neither case was it necessary to make her a defendant to the proceedings later."

44. In short, the identity of a defendant in this, third category, is defined by reference to a person's future act, provided that act is defined with sufficient clarity in the proceedings. Thus, in this case, as I have described, the Second Defendants, were:

> "Persons Unknown entering or remaining without the consent of the Claimants on Land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire shown coloured green, blue and pink and edged red on Plan B annexed to the Particulars of Claim."

A person would become a Second Defendant by entering on the Crackley Land without the Claimants' consent.

45. Clearly, this is why Category 3 Defendants have caused a degree of unease. It would be concerning if a person could become party to proceedings, subject to an order and in breach of that order (all at the same time) simply by doing something enjoined by that very order. No doubt for this reason, the Court of Appeal emphasised that, whilst the doing of such an enjoined act might be a necessary condition to becoming a Category 3 Defendant, this was by no means a sufficient condition. Service of the proceedings is a fundamental, and generally anterior, critical requirement;[52] as is service of the order itself in order to commit.[53] The question of service of the order is the matter here specifically in issue. As regards the service of the proceedings, the Court of Appeal said this in *Canada Goose*:[54]

> "…it is the service of the claim form which subjects a defendant to the court's jurisdiction. Lord Sumption acknowledged that the court may grant interim relief before the proceedings have been served or even issued, but he described that as an emergency jurisdiction which is both provisional and strictly conditional."

46. In light of this, the Court of Appeal articulated "the following procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protestor cases like the present one":[55]

> "(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".

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[52] *Canada Goose* at [61].

[53] Hence the requirement of service of the order, now being considered.

[54] *Canada Goose* at [61].

[55] *Canada Goose* at [82]. The guidance is more general than this, but here we are concerned with a Category 3 Defendant.

(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 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, 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."

(c) The Canada Goose guidelines and service in this case

47. Andrews J has, of course, made the Order, which includes the making of an interim injunction against persons unknown. That Order was made after careful submissions by counsel and a reserved judgment – the Judgment – by Andrews J. The Order includes, as I have described, specific provision for:

(1) Service of the originating proceedings and the application for – amongst other things – the interim injunction: see paragraph 6(1) above.

(2) Service of the Order itself, containing the interim injunction: see paragraph 6(2) above.

48. In each case, the specific service provisions – which were expressly contemplating service on the Second Defendants, a class of persons unknown – did <u>not</u> require personal service, but rather service in accordance with the terms of the Order. However, the Order does not, <u>in terms</u>, state that personal service is to be dispensed with.

49. The Judgment, however, makes clear that the issues regarding service on "persons unknown" were carefully considered by the Judge, with the assistance of counsel.[56] The

[56] The Judgment at [2] states that "Mr Wagner [of counsel, and counsel to Mr Cuciurean in this case]…assisted the Court by drawing attention to points that he considered might have been made by the "persons unknown" trespassing on the...Crackley Land..., who are named as the…Second Defendants and who were not represented at the hearing".

question of the service of the proceedings on the Second Defendants was considered by the Judge at [15] and [16] of the Judgment:

> "15. There is a bespoke procedure for serving trespassers who are "persons unknown" with a claim for possession of the land under CPR 55.6. That procedure was followed by the Claimants' solicitors and the process servers, Mr Finch and Mr Seymour, but additional steps were also taken to bring these proceedings to the attention of anyone likely to have an interest in defending them.I am satisfied that the further steps that were taken, described in the evidence of Ms Jenkins, were both reasonable and sufficient, as evidenced by the fact that Mr Bishp and Mr Rukin [these were the Third and Fourth Defendants, obviously not persons unknown and specifically identified in the proceedings by name] were able to respond to the claim and instruct counsel to represent them.
>
> 16. The Claimants have made an application, to the extent that elements of the claim go beyond a claim for possession, for an order that the steps taken to bring the claim form to the attention of the defendants (including the "persons unknown" defendants) were good alternative service methods pursuant to CPR 6.15 and 6.27. I am satisfied that they were. Quite apart from the fact that these service methods sufficed to bring the proceedings to the attention of the two named defendants, Ms Jenkins' second witness statement confirms that a number of interested parties have sought and obtained copies of the proceedings since the notice was published on the websites to which she refers."

50. Equally, the question of interim injunctive relief against protestors whose identities are unknown was specifically considered, and the Judge expressly referred to the *Canada Goose* guidelines, the Court of Appeal's decision in *Canada Goose* having been handed down on 5 March 2020, a couple of weeks before the Judgment and the Order. The Judge bore these (and other) authorities in mind when making the Order. The Judgment says this (under the heading "The claim for an interim injunction"):

> "30. This proved to be the most controversial aspect of the claim, and at one point I was minded to refuse such relief on the basis that the declaration would suffice to protect the Claimants' interests. However, Mr Roscoe [counsel for the Claimants] made the valid point that an injunction may have a deterrent effect, at least so far as otherwise law-abiding protesters are concerned, and that the difficulties of enforcement which he acknowledged when pressing for declaratory relief have not prevented such relief from being granted by the courts in the past.
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> 31. To the extent that injunctive relief was pursued against Mr Bishop and Mr Rukin personally, there was no evidence that either of these gentlemen was likely to trespass on the land in future if they were required by the Court to give possession back to the Claimants. Mr Wagner [counsel for Mr Bishop] assured me that this was so in the case of his client, and that if I granted an order for possession the only purpose for which Mr Bishop would return would be to assist in the dismantling of the camps and the removal of any structures erected by the protesters. Mr Powlesland [counsel for Mr Rukin], in echoing those assurances, pointed out that Mr Rukin had gone to the trouble of seeking out land that he believed did not belong to the Secretary of State on which to set up the protest site at Crackley, which was a clear indication that he would not deliberately set out to trespass on land to which the Claimants had rights of possession.
>
> 32. I made it very clear to Mr Bishop and Mr Rukin, who were present in court, that if they were found trespassing on the land in future, contrary to those assurances, it would not bode well for them in any contempt proceedings. I did not require any express undertakings to be given in lieu of an injunction because in order to obtain relief of

either sort the Claimants must first establish a real and imminent risk of further torts being committed by the relevant defendant. The Claimants have failed to do so. That being the case, there is no need for either Mr Bishop or Mr Rukin to continue to be named defendants to these proceedings.

33. So far as the claim for injunctive relief against "persons unknown" (including new protesters) is concerned, there is no dispute that, apart from Mr Bishop and Mr Rukin, the previous and current occupiers of the…Crackley Land have not been identified by the Claimants. Both Mr Wagner and Mr Powlesland raised the question whether sufficient steps had been taken by the Claimants to attempt to identify those other persons. There was no evidence, for example, that any of the "persons unknown" referred to in the evidence of Mr Corvin who were encountered by contractors, were asked the simple question "who are you?". That is fair comment, although it may be unrealistic to expect that a protester would answer that question. The group of protesters at the Crackley site comprised a handful of people, and the posts on social media could have been used in an effort to trace them, but it seems that apart from Mr Bishop and Mr Rukin no such effort was made. Indeed, no-one appears to have taken the fairly obvious step of asking Mr Bishop and Mr Rukin to identify them.

34. In light of this, I accept that perhaps the Claimants could have done more to identify the protesters who were in occupation of the protest camps on the two sites; but bearing in mind the evidence of Mr Bishop, in particular, it seems unlikely that any of the existing protesters associated with the camps will engage in any future trespasses. The problem lies with those who did not abide by the Code of Conduct.

35. If an injunction is granted in the short-term, the Claimants know that they will have to do better in terms of identifying those responsible if they are to convert it into a final order In a case such as this, the test for interim relief is a higher one than the standard *American Cyanamid* test for an injunction, because it must be shown that the Claimants are likely to obtain final relief. I consider that they are. In this regard, the simple fact remains that, other than when exercising the legal rights that attach to public or private rights of way, no member of the public has any right at all to come onto these two parcels of land, even if their motives are simply to engage in peaceful protest or monitor the activities of the contractors to ensure that they behave properly. If persons are found trespassing in the future, and those people are identified or are sufficiently capable of being identified by the time of the hearing, then the conditions for final relief will be established.

36. The next thing that the Claimants must establish is that there is a sufficiently real and imminent risk of a tort being committed (in this case, a future trespass or trespasses) to justify *quia timet* relief. Mr Wagner submitted that much of the evidence of past behaviour relied on by the Claimants was contested. So far as the uncontested evidence was concerned – the nails and glass on the roadway, for example – these were isolated incidents for which the protesters at the camp were not responsible. Unlike *Cuadrilla*, this was not a case where committed and experienced protesters were using direct action to disrupt the works every day, by standing in front of truck and so forth. This was a case where peaceful protest camps had attracted one or two unfortunate incidents from outsiders, and going forward, such matters may well resolve. If they did not, it would be open to the Claimants to come back with better evidence.

37. Mr Powesland likewise submitted that so far as the Crackley Land was concerned, the incidents logged on Plan D and referred to in Mr Corvin's evidence were all in the immediate vicinity of the camp. Soe where well in the past, and had not been repeated, whilst others were apparently committed on the public highway. Once the camp has gone, he submitted, there was unlikely to be any risk of repetition.

38. However, as Mr Roscoe pointed out, such control of the land as there was by the responsible element of the protesters will cease with the dismantling of the camps. The problem potentially lies with those of a more militant persuasion who are prepared to do the type of things that Mr Bishop and those associated with him would not do, and have vehemently denied doing in the past, such as the breaking down of fencing or cutting the ties and padlocks on it; the digging up of closed badger setts; and the placing of nails and glass on the access roads. People who are prepared to engage in that sort of behaviour are less likely than the current protesters to make themselves known and less likely to desist in the face of orders for possession and declarations of landowners' rights.

39. I am satisfied that there is enough evidence to demonstrate a real risk of further trespasses on the land in future by persons who are opposed to the HS2 project and that such persons are unlikely to confine their activities in the way in which the peaceful protesters allied to Mr Bishop and Mr Rukin have done in the past.

40. I was initially inclined to take the view that it might be possible to formulate any interim injunction in a more focussed way that would specifically address the type of objectionable (and tortious) behaviour which is a particular cause of concern – breaking down fencing, for example. However, leaving aside the difficulty of proving individual responsibility for such acts, there is a wide variety of conduct that could disrupt the project – someone wandering into an area where soil has been excavated from the woodland for the purpose of replanting, for example. The concept of interference with the work of contrators is far more nebulous than trespass and there is a need to define with clarity precisely what someone is and is not entitled to do. Trespass is a binary and simple tort which is easily defined as entering on another person's land without permission, and therefore it is simple enough to formulate an injunction preventing future trespasses in terms that are clear and unambiguous.

41. Both Mr Wagner and Mr Powlesland raised consideration of whether HS2 had come to equity with clean hands. Reference was made to the evidence that their contractors had felled woodland that was outside the construction boundaries, and to Mr Rukin's evidence of incidents on other sites on the HS2 corridor where, for example, the habitats of nesting birds had been disturbed. Mr Roscoe's response was that the concerns that the Defendants have may well be legitimate concerns shared by the general public, but they have no private rights to protect the trees or the wildlife. There are bodies that do have such rights and they are the appropriate bodies to be policing the matter. There are ecologists who are actively involved in supervising the works, and it would be unrealistic to suggest that a largescale project of this type would not cause some ecological damage. Nevertheless, steps are being taken to mitigate that damage.

42. Like it or not, Mr Roscoe submitted, secure access is needed to the whole of the site in order for the works to be carried out safely. You cannot have people roaming around freely on the site in order to carry out monitoring. As Mr Holland QC observed in the previous HS2 case at [136], "there is not warrant for the court contemplating the commission of torts even if this could be described as "peaceful and non-violent civil disobedience" or "direct action". I respectfully agree.

43. At the end of the day, there is no material distinction to be drawn between the situation in that case and in this, so far as justification exists for granting an interim injunction. That said, I am not prepared to grant the injunction for a period of 2 yesrs as Mr Roscoe initially sought. 9 months should suffice to cover the two key periods of the year within the ecological cycle referred to by Mr Corvin, namely April-May and September-October, and given the Claimants sufficient time to identify the "persons

> unknown" against whom they would seek final injunctive relief. These proceedings should not be allowed to remain unresolved for longer than is necessary.
>
> 44. The Claimants can always seek an extension of time, but at the present time of economic uncertainty, there are many factors which could have an impact on the future of this project. That is yet another reason why I am not prepared to grant an injunction for more than 9 months. Mr Roscoe offered to include in the order a provision requiring the Claimants to inform the Court if something that materially affects the future of the HS2 project arises during the period of the injunction and I consider it would be sensible to do so."

51. It was not contended by Mr Cuciurean that the Order was irregular. Nor did Mr Cuciurean seek to avail himself of his undoubted right under paragraph 15 of the Order to apply to the court at any time (on notice to the Claimants) to vary or discharge it.

52. In these circumstances, it is very difficult to see how the Order has not, <u>of itself</u>, dispensed with the requirement for personal service:

(1) It is quite clear from *Canada Goose* that it is perfectly possible for a person or persons unknown – including Category 3 Defendants, which Mr Cuciurean is – to be joined to proceedings by alternative service and for an interim injunction to be made against such person or persons.

(2) In such a case, the persons unknown must be defined in the originating process by reference to their alleged unlawful conduct. In this case, the Second Defendants are materially defined as those "entering…without the consent of the Claimants [the Crackley Land]". Assuming – for present purposes – that Mr Cuciurean <u>did</u> enter the Crackley Land without the consent of the Claimants, he became a Second Defendant at that instant <u>provided</u> he was properly served with the proceedings.

(3) In this case, the Order expressly provided that the steps taken by the Claimants to serve the claim, the application and the evidence in support should amount to good service, the proceedings being deemed served on 4 March 2020.[57]

(4) <u>Assuming</u> entry by Mr Cuciurean onto the Crackley Land any time after 4 March 2020 (I will, of course, be coming to the Incidents), there is no doubt in my mind that by the operation of the Order, Mr Cuciurean became a Second Defendant at the time when entry was effected.

(5) Paragraph 1 of the Order only made provision for the service of the proceedings and the application pursuant to which the Order was ultimately made. Whether an order <u>should</u> be made, and whether it should contain an interim injunction was – as has been seen from the passages quoted in paragraph 50 above – the subject of careful consideration by the Judge. The Judge determined that it was appropriate to order an interim injunction. She obviously had well in mind the *Canada Goose* guidelines:

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[57] See paragraph 1 of the Order, quoted in paragraph 6(1) above.

(a) The injunction in the Order was expressly limited in time, with a long stop date of 17 December 2020.[58]

(b) The injunction was expressly limited in geographical scope, as set out in Plan B appended to the Order.[59]

(c) Service of the Order was expressly provided for. Paragraph 8 of the Order deals with service on the Second Defendants,[60] and provides that "service of this Order on the…Second Defendants shall be dealt with"[61] in the various ways set out in paragraph 8. Paragraph 8 is mandatory, in that service had to be effected in this way. That provision must have been made pursuant to CPR 81.8(2)(b), and it seems to me that an automatic consequence of making an order for alternative service under this provision is that personal service be dispensed with. CPR 81.8(2) provides:

> "In the case of any judgment or order the court may –
>
> (a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or
>
> (b) make an order in respect of service by an alternative method or at an alternative place".

The court, in paragraph 8 of the Order, was obviously exercising the jurisdiction under CPR 81.8(2)(b). That is clear from the reference to CPR 6.27 and CPR 81.8.[62] The whole point of providing service "by an alternative method"[63] is that the primary method of service is dispensed with, but only to be replaced by a different (and, inferentially, in the circumstances more appropriate) form of service. There is no way that paragraph 8 of the Order can be read as making provision for service by an additional method.

(6) I have yet to consider whether these requirements in the Order were met. Mr Cuciurean's contentions focussed on the point that personal service was a requirement of the Order notwithstanding what I have found to be the effect of CPR 81.8(2)(b) and the relevant provisions of the Order. As to this:

(a) The foregoing analysis was adopted by His Honour Judge Pelling and the Court of Appeal in *Cuadrilla Bowland v. Ellis*[64] and was relied upon by

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[58] See paragraph 6 of the Order, quoted in paragraph 6(6) above.

[59] See paragraphs 2, 3 and 6(4) above, which refer to the relevant parts of the Order.

[60] Quoted in paragraph 6(2) above.

[61] Emphasis supplied.

[62] These are both provisions dealing with service by an alternative method.

[63] Emphasis added.

[64] [2019] E30MA313 at [13] and [14]; [2020] EWCA Civ 9 at [28].

the Claimants in support of their contention that personal service was not a requirement in this case.[65]

(b) Mr Cuciurean's written submissions did not address CPR81.8(2)(b). Rather, reference was made to service not being compliant with CPR81.8(1), which provides:

> "In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it –
>
> (a) by being present when the judgment or order was given or made; or
>
> (b) by being notified of its terms by telephone, email or otherwise".

This provision deals with dispensation of service, not the present case of alternative service. It is clearly irrelevant in the present circumstances. The Order, as I have stated, makes provision for alternative service, it does not dispense with service altogether or at all. It might, fairly, be said that the method of alternative service replaces personal service.

53. It follows that Mr Cuciurean's points that he needed to be personally served and that, because he had not been, the Application must fail, are misconceived, and I reject them. Personal service was not required: alternative service was specified in the Order pursuant to CPR81.8(2)(b).

54. Of course, it does not follow from this that the Application must succeed. Mr Wagner, on behalf of Mr Cucuirean, made a number of points related to – but, in the final analysis, different from – the question of service that I have just considered. It will be necessary to consider these points specifically, and I do so in Section D(3)*(e)* below. Before I turn to these points, however, I must satisfy myself that the service requirements stipulated in the Order were complied with.

(d) The service requirements contained in the Order

(i) Compliance

55. It is, of course, necessary that the service requirements in the Order be strictly complied with. I find that they were:

(1) Paragraph 9 of the Order provides that the taking of the steps set out in paragraph 8 would be good and sufficient service of the Order on the Second Defendants. Service would be deemed when the last of those steps had been taken, and needed to be verified by a certificate of service.[66]

(2) The steps taken in order to comply with the service provisions of the Order are set out in a witness statement of a process server, Mr Ian Beim, dated 27 March 2020

[65] See paragraphs 24 and 25 of the Claimants' written opening submissions.

[66] See paragraph 6(2) above.

(**Beim 1**). Mr Beim was not called for cross-examination as the content of his statement was not challenged.

(3) In accordance with the Order, certificates of service were provided. They were before me, and I am satisfied that they show service of the Order in accordance with its terms.

56. I find that the service requirements contained in the Order were complied with. I find that, in accordance with the terms of the Order, service of the Order was effective on 25 March 2020.

(ii) The provisions regarding notice of the Order

57. Notice of the Order was thus provided for in three ways:

(1) On-line by publication on a website: see paragraph 8.4 of the Order.[67]

(2) By email to an email address: see paragraph 8.3 of the Order.[68]

(3) By notice: see paragraphs 8.1 and 8.2 of the Order.[69] It is necessary to explore the nature of these notices in greater detail:

(a) The Order specified two types of notice:

(i) What I shall term an **Injunction Notice**, affixing sealed copies of the Order in transparent envelopes to posts, gates, fences and hedges at conspicuous locations around the Crackley Land.[70]

(ii) What I shall term an **Injunction Warning Notice**, a notice no smaller than A3 size, advertising the existence of the Order, and providing the Claimants' solicitors' contact details in case of requests for a copy of the Order or further information in relation to it.

(b) From the photographic evidence exhibited to Bovan 1, it is clear that Injunction Notices and Injunction Warning Notices were actually placed in the same locations (and that, I infer, was the intention of the Order: the Injunction Warning Notice was intended to advertise the Injunction Notice). Even if this was not the intention of the Order, this was an entirely proper and sensible course: the Injunction Notice is a copy of the Order (on A4 paper) and lacks a degree of visual prominence when affixed in the open air. That lack of visual prominence is made up for by the Injunction Warning Notice, which (whilst twice the size of the Injunction Notice) contains less detail, and a much more stark warning (white lettering on a red background) stating "HIGH COURT INJUNCTION IN

[67] These provisions are all set out in paragraph 6(2) above.

[68] These provisions are all set out in paragraph 6(2) above.

[69] These provisions are all set out in paragraph 6(2) above.

[70] Paragraph 8.1 of the Order.

FORCE" together with the necessary details and a map of the relevant land affected.

(c) I shall come to describe the Crackley Land – and the parts of the Crackley Land most important for the purposes of the Application – in due course. Conservatively, there were seven Injunction Notices and Injunction Warning Notices in the most important parts of the Crackley Land, and more if one considers the Crackley Land as a whole.

(d) In addition to the Injunction Notice and the Injunction Warning Notice, there was a third form of notice, which I shall call a **No Trespass Notice**. The No Trespass Notice – which was not provided for in the Order – stated:

"Trespassers keep out

Private property

This land is in possession of HS2

This is a personal protective equipment zone

Risk of injury from construction activities

Trespassers may be subject to civil/criminal proceedings

24/7 Freephone Community Helpline 08081 434 434"

These notices were large (about twice the size of the A3 Injunction Warning Notices) and again were visually distinctive – white text on a red background.

(e) As I have said, the No Trespass Notices were not ordered, and I was not provided with a map of their locations. However, it was common ground that these notices appeared not only at the perimeter of the Crackley Land, but also inside the perimeter. A person penetrating the Crackley Land, and proceeding within it, would be likely to see multiple No Trespass Notices.

(e) Further points taken by Mr Cucuirean

(i) Introduction

58. As I have noted, Mr Cuciurean's first point, as regards the requirement of service, was that personal service was required: and so, the Order was not properly served. I have rejected that contention, for the reasons already given.

59. However, the Order is no ordinary order and, as I noted in paragraph 54 above, Mr Cuciurean took a number of points <u>related</u> to the question of service but <u>distinct</u> from it. In short, Mr Cuciurean contended that <u>even if</u> (as I have found) there was proper service, the Application must still fail for these (independent) reasons. These points were as follows:

(1) There was a requirement of knowledge of the Order, including knowledge of its terms, operating independently of the requirement of service, that had to be satisfied before the Application could succeed. It was Mr Wagner's contention, on behalf of Mr Cuciurean, that what was required was some knowledge of the Order – going beyond the service requirements contained in the Order – of which I had to be satisfied before acceding to the Application (assuming satisfaction of all other requirements).

(2) There was a requirement that the penal notice in the Order be specifically – and separately – drawn to Mr Cuciurean's attention, and that this had not been done, sufficiently or otherwise.

(3) There was a continuing requirement that the service requirements specified in the Order be complied with. Mr Wagner made the point that the Order, albeit interim, had a duration of months (it had a long-stop date of 17 December 2020[71]) and that the notices put up pursuant to the Order might be subject of physical deterioration or damage (whether accidental or deliberate).

60. I consider these points in turn below.

(ii) An additional requirement of knowledge

61. In the law of contempt, it is very difficult to point to any clear law suggesting that there is a requirement of "knowledge" of the order independent of the requirement that the order be served, and neither Mr Wagner (for Mr Cuciurean) nor Mr Fry (for the Claimants) were able to do so. Of course, the vast majority of the case-law in this area relates to orders where there is a named defendant who is personally served. In such cases, it is very difficult to see how there is space for the existence of a knowledge requirement going beyond personal service. The whole point about personal service is to bring the order to the attention or notice of the person being served. If that person – despite personal service – chooses to pay no heed to the order, by (for instance) immediately binning it, then that sort of unwillingness to engage clearly cannot permit such a person to avoid the consequences of breaching the order (including committal).

62. 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.

63. In these circumstances, I approach the question of the need for an additional knowledge requirement – over and above service – in the following way:

(1) The Order in this case is, as I have repeatedly noted, made against persons unknown. Almost inevitably in such cases – and inevitably in the case of Category 3 Defendants – that will involve some dispensation from the obligation

[71] See paragraph 6 of the Order.

of personal service and some form of alternative or substituted service in place of personal service.

(2) Because of the need to have effective service before the order in question is breached, it is inevitable that the question of alternative service be considered when the order is made and not when the breach of the order is brought before the court.

(3) A judge, when considering alternative service must, in the case of persons unknown, bear in mind and apply the guidance of the Court of Appeal in *Canada Goose*. In particular, it is necessary to note the fundamental importance of service, both of the originating proceedings and of the order itself.

(4) Obviously, what ought to be ordered by way of service depends on all the circumstances of the case. It is the judge making the order who is the person best qualified to determine:

(a) Whether service by alternative means is appropriate; and

(b) If so, how such service should be accomplished.

Where such an order is breached, and an application for committal made, the judge hearing that application ought to be slow to second guess the judge who made the order itself, particularly where the judge who made the order has paid due regard to the *Canada Goose* guidance.

(5) In this case, as I have described, Andrews J considered both the service of the originating process and the service of the Order with great care, in light of the *Canada Goose* guidance. The question of alternative service was expressly considered. It seems to me – if I may respectfully say so – that the question of service was gone into extremely thoroughly by the Judge, and that this is precisely the sort of case where the judge making the order ought not to be second-guessed. Matters would be very different if the service provisions either failed to consider the *Canada Goose* guidance or – in light of the circumstances as they stood at the time of the order – failed properly to apply that guidance. Neither of these points pertains here.

(6) This means that I must be slow to re-visit the question of service. But I do not consider that the question of service can be altogether disregarded on an application for committal, no matter how carefully the matter has been considered by the judge making the order. There is no inconsistency between attaching proper weight to the order of the judge making it, and taking account of matters subsequent to the making of the order. The circumstances in which service is in fact effected will always be relevant. Generally speaking, personal service of an order will be sufficient to bring both the existence of the order and the ability to consider its terms to the attention of the person served. But there may be exceptions. Even in the case of personal service, it is possible that (unknown to the applicant for committal) the person served suffers from some lack of capacity, rendering him or her incapable of considering the terms of the order or even the fact that it is an order of the court at all. In such a case – whilst the burden of proving this hypothetical lack of capacity would rest on those representing that

person – it is inconceivable that a court would consider the contempt procedure applicable. What was, on the face of it, good service, would be set aside.[72]

(7) I consider that precisely the same approach must apply in this case. Given that, in the case of Category 3 Defendants, the service provisions in the order will have to deal with the question of notice to an unknown and fluctuating body of potential defendants, there may very well be cases where *(i)* the rules on service may have been complied with, but *(ii)* the person infringing the order knows nothing about even the existence of the order, when infringing it, or that he or she is doing anything wrong. In such a case, provided the person alleged to be in contempt can show that the service provisions have operated unjustly against him or her, the service against that person may be set aside.

(8) I stress that where it can be shown that the service provisions that apply in the case of a given order can be shown to have operated unjustly, this is a matter that goes not merely to sanction (although such matters might also be relevant to sanction). Where the person subject to the order can show that the service provisions have operated unjustly against him or her, then service ought to be set aside and the threat of committal removed altogether. It is not, to my mind, sufficient to say, in such a case, that there is a contempt, but that the punishment ought to be minimal or none.[73]

(9) Mr Wagner contended that such an approach effectively reversed the burden of proof, and required Mr Cuciurean to show he had not been served with the Order. I disagree. The whole point of alternative service is that appropriate alternative means of service are imposed on the claimant, who is obliged to comply with them and to prove (to the requisite standard) that service on the defendant has been effected in this way. This, the Claimants have done, as I have found. There is nothing to prevent Mr Cuciurean from contending that the circumstances in this case are such that service should be set aside because the service provisions operate unjustly against him, even though the *Canada Goose* guidance has been carefully and appropriately considered by Andrews J. But – at this point – the burden is on him.

(10) Mr Wagner did not put Mr Cuciurean's case in this way. He contended that it was for the Claimants to show that some criterion beyond service had been satisfied (although he was unclear as to precisely what that criterion might be), rather than it being for Mr Cuciurean to show that ordinarily proper requirements for service had, in this case, operated unjustly. I reject this argument because it replaces the

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[72] I stress that I was taken to no authority for this point, but it seems to me inevitable when considering how courts generally deal with service. Thus, for instance, where proceedings are served out of the jurisdiction, and that service is found to be (for whatever reason) wrongly based, service is set aside.

[73] In *Cuadrilla Bowland v. Ellis*, [2019] E30MA313 at [14], His Honour Judge Pelling, QC said:

"…If the respondents did not, in fact, know of the terms of the order even though technically the order had been served as directed, then it is highly likely that a court would consider it inappropriate to impose any penalty for the breach…"

I agree. However, one much not overlook the anterior question that it always possible – albeit only in the appropriate case – to set aside service altogether.

very clear rules on service with an altogether incoherent additional criterion for the service of an order.

(11) Although, for the reasons that I have given, I have rejected Mr Wagner's argument, it is nevertheless appropriate to consider whether the circumstances of this case warrant the setting aside of service. I have no doubt that they do not:

(a) Mr Wagner submitted that there were a number of other steps that the Claimants could have taken so as to bring the Order to Mr Cuciurean's notice or attention. For instance, when Mr Cuciurean was in the Claimants' custody or in the presence of agents or employees of the Claimants, it would have been easy to hand Mr Cuciurean a copy of the order and (say) video-tape the event as evidence. That may very well be the case, but it is not the point. This is to suggest an embellishment to the service provisions, not to suggest that service in accordance with the order operated unjustly against Mr Cuciurean.

(b) Mr Wagner submitted that, whilst he could not say that Mr Cuciurean was unaware of the Order (he knew there was an order in existence, but (according to his evidence, thought it related only to the Cubbington Land), he (Mr Cuciurean) was unaware of its terms, and that this was enough to render it unjust to proceed with the committal. I am afraid that I do not accept this contention. It will be necessary – when considering the various Incidents said to amount to a breach of the Order – to make findings as to Mr Cuciurean's knowledge, and I do not intend to anticipate those findings, which at least in part turn on a description of the Incidents themselves. It is sufficient for me to note now that, for the reasons I give later on in this judgment, I am satisfied:

(i) That Mr Cuciurean knew of the existence of the Order.

(ii) That Mr Cuciurean not only knew of the existence of the Order, but of its material terms. The material terms of the Order, to be clear, were not to enter upon the Crackley Land.

Mr Cuciurean came closer to admitting the first point than the second. Certainly, he accepted that there was an order made, but his evidence appeared to be that that order related to land that was not the Crackley Land.

64. For these reasons, I reject the contention that something more than compliance with the service provisions of the Order was required.

(iii) The penal notice

65. CPR 81.9(1) provides that an order to do or not to do an act may only be enforced by the committal process under CPR 81.4 where "there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this Section, a warning to the person required to do or not do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets".

66. It is accepted by all that the Order contains an appropriate penal notice.

67. All that CPR 81.9 requires is that the order be served in accordance with this Section. It was not accepted by Mr Cuciurean that the Order had been served in accordance with the applicable Section (Section II) of CPR 81. However, I am satisfied that it was, for the reasons that I have given. In these circumstances, it is clear that CPR 81.9 has been complied with. There is nothing in this point, which I reject.

(iv) A continuing requirement that the service provisions in the Order be complied with

68. Clearly, the notice given to interested persons by service via email and by posting on a webside will not degrade over time. The same cannot be said of the physical notices – the Injunction Notices and the Injunction Warning Notices that I have described. I quite accept that, over the duration of operation of the Order – a period of months – these Notices might be subject to physical deterioration or damage (whether accidental or deliberate).

69. This contingency was anticipated by Andrews J in paragraph 10 of the Order:

> "The Claimants shall from time-to-time (and no less frequently than every 28 days) confirm that copies of the orders and signs referred to at paragraphs [8.1] and [8.2] remain in place and legible and, if not, shall replace them as soon as reasonably practicable."

70. It is noteworthy that the Order says nothing about the consequences of non-compliance with this provision. It would be possible for an order expressly to provide that, if the notices it stipulates are not replaced as and when necessary during the operation of the order, then service ceases to be effective after the date of that failure to comply.

71. That may be an appropriate order in an appropriate case, but it is <u>not</u> the order made by Andrews J. Clearly, compliance by the Claimants with paragraph 10 of the Order was an important matter. I have no reason to doubt that this part of the Order <u>was</u> complied with by the Claimants, but (as Mr Wagner contended) I do not consider that I can be satisfied <u>to the appropriate standard</u> that the Order was in fact so complied with. For instance, there was not before me any evidence as to the regular inspection of the Injunction Notices and Injunction Warning Notices, nor any evidence of their replacement where Notice were no longer fit for purpose. In these circumstances, it is difficult to be satisfied beyond all reasonable doubt that paragraph 10 of the Order was complied with.

72. If I were required to be satisfied beyond all reasonable doubt that paragraph 10 had been complied with, I would find that it had not been. But I do not consider that to be a necessary or relevant finding for me to make in relation to the Application. The Order does not provide for the automatic setting aside of service where there has been a failure to establish beyond all reasonable doubt that paragraph 10 of the Order has not been complied with. The question, as before, is whether, given that service on Mr Cuciurean was regular and in accordance with the terms of the Order, it would be unjust not to set service aside in all the circumstances. For the following reasons, I consider that service should <u>not</u> be set aside on this basis:

(1) As I have noted, the Order was deemed served on 25 March 2020,[74] pursuant to paragraph 9 of the Order.

(2) The Incidents, as I have noted, all occurred in the period commencing 4 April 2020 and ending 26 April 2020. Thus, assuming an obligation to check the Notices every 28 days, the 28 day period ended on 22 April 2020. Most of the Incidents – although by no means all – fall within the period within which the Claimants were entitled to proceed on the basis that the Notices did not require inspection.

(3) This was Mr Fry's primary point as to why paragraph 10 was an irrelevance, in this case. Although I consider that the point is good as far as it goes, I consider that it misses the reality of the case and the essence of the question that I must ask. The true position is that, the Order having (properly) defined what constitutes service, and the provisions in the Order having been followed, service should not be set aside unless Mr Cucuirean can show – the burden being on him – that the service provisions have operated unjustly against him.

(4) That is not the case here. Clearly, the service provisions were complied with, and (absent a co-ordinated attack on the Injunction Notices and Injunction Warning Notices) they could be expected to survive in readable and usable form throughout the Incidents.

(5) Although the Claimants could not produce evidence of regular inspections and replacements of the Injunction Notices and Injunction Warning Notices, the Claimants did carry out a random spot check of the signage at the Crackley Land on 14 June 2020,[75] and a plan of the Injunction Notices and Injunction Warning Notices present at the site was produced as an exhibit to Bovan 2. This shows a substantial number of notices at the relevant area, perhaps fewer than originally placed, but not materially so. In his evidence, basing himself on this inspection, Mr Bovan stated:[76]

> "I can also confirm that copies of the Order [i.e. Injunction Notices] and A3 Injunction Warning Notice remain in place around the Crackley Land or have been replaced."

Whilst Mr Bovan clearly could not say whether the Notices in question were original or replacement (a point Mr Wagner placed some stress on), the fact is that they were there on 14 June 2020 and had been out there on or before 25 March 2020. I have noted the evidence of Mr Pook – albeit with the reservations identified in paragraph 12(4)(g) above. Mr Pook suggested that when he inspected the site on 1 July 2020, there was a lack of signage. Mr Pook's statement is not especially clear about whether the signs Mr Bovan had identified on 14 June 2020 were no longer present on 1 July 2020. Whatever the position on 1 July 2020, I accept the evidence of Mr Bovan as to the position on 14 June 2020.

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[74] See paragraph 56 above.

[75] Bovan 2 at paragraph 29.

[76] Bovan 2 at paragraph 29.

(6) In all the circumstances, given the presence of the Notices on 25 March 2020 and the presence of the Notices on 14 June 2020, it is difficult to accept – and I do not accept – that there were not Notices on site when the Incidents took place.

73. Thus, I do not consider that Mr Cucuirean has in any way demonstrated that service should be set aside because of an inability to demonstrate – beyond all reasonable doubt – that paragraph 10 of the Order was complied with. For the reasons I have given, I do not consider that it is necessary, in order for the Application to succeed, for strict compliance with paragraph 10 to be shown.

(4) The third pre-condition

74. The third pre-condition does not arise in this case.[77]

E. SUBSTANTIVE REQUIREMENTS

(1) Introduction

75. I turn to the requirements set out in paragraph 26 above. These are that the Order must be clear and unambiguous and that the Order must *(i)* have been breached and *(ii)* that that breach must have been deliberate. I consider these requirements in turn below.

(2) Clear and unambiguous

76. I consider the entirety of the Order to be extremely clear and unambiguous, and will focus on the operative provisions that are most pertinent to this Application. These are, in the first instance, paragraph 4.2 of the Order, which states that the Second Defendants and each of them are forbidden from entering or remaining upon the Crackley Land. The Crackley Land – as I have described – is the land edged red on Plan B, which was annexed to the Order.

77. It is difficult to imagine a more straightforward or clearer provision.

(1) The act enjoined is easy to understand. It is not to enter (or remain upon) certain land.

(2) The land in question is clearly identified as that outlined in red on a plan that is attached to the Order – a copy of which is attached to this judgment as Annex 2.

78. The consequences of breaching the Order are set out in the penal notice that I have already referred to.

79. There is a "carve-out" to paragraph 4 of the Order contained in paragraph 5.1.[78] This provides that nothing in paragraph 4 shall prevent any person from exercising their rights over any open public right of way over the Land. This provision, I find, to be clear and unambiguous on its face. However, it will be necessary to re-visit this provision once the position regarding the footpaths over the Crackley Land has been

[77] For the reason given in paragraph 24(3) above.

[78] Described in paragraph 6(5) above.

explained, for Mr Wagner made a number of submissions in relation to footpaths on behalf of Mr Cuciurean.

80. I am satisfied that the Order is clear and unambiguous.

(3) Breach of the Order

(a) Approach

81. I approach the question of breach of the Order in the following way:

(1) Since all of the Incidents alleged to constitute contempt of court on the part of Mr Cuciurean involve a breach of paragraph 4.2 of the Order (i.e. not to enter upon the Crackley Land), the Incidents can only be understood when once the Crackley Land, certain footpaths on it, and the manner in which its perimeter was protected is understood. These matters are considered in Section E(3)*(b)* below.

(2) Thereafter, in Section E(3)*(c)* below, I describe the various Incidents that underlie the Application, and seek to locate them by reference to my description of the Crackley Land.

(3) I then deal with the various points made by Mr Cuciurean to suggest either that the Order had not, in fact, been breached or that I could not be satisfied, to the appropriate standard, that the Order had been breached. These various points are described and considered in Section E(3)*(d)* below.

My conclusion on the question of breach is stated in Section E(3)*(e)* below.

82. Finally, in Section E(4), I consider the question of deliberation.

(b) The Crackley Land

(i) The Crackley Land generally

83. The Crackley Land, as has been noted, is described by reference to the plan known as Plan B and annexed as such to the Order. It comprises Annex 2 to this Judgment. As can be seen from Annex 2, the Crackley Land is essentially a strip of land running (beginning at its Western tip) South-East. At approximately its halfway point, the strip is bisected by a road (known as Crackley Lane). It can be seen that the red-edging that demarcates the boundary of the Crackley Land runs parallel on either side of Crackley Lane as it bisects the Crackley Land. The Crackley Land is thus not a unitary tract of land, but in fact comprises two tracts of land, both edged red, divided by Crackley Lane.

84. I shall refer to the Crackley Land lying to the West of Crackley Lane as **Crackley Land (West)**. I shall refer to the Crackley Land lying to the Easy of Crackley Lane as **Crackley Land (East)**. It is the latter tract of land – Crackley Land (East) – that we are here concerned with.

(ii) Crackley Land (East)

85. The Incidents are alleged to have involved non-consensual entry upon the land by Mr Cuciurean on the Eastern side of Crackley Lane, that is Crackley Land (East). Although the colours on Plan B signify nothing for the purposes of the Order, they are helpful in identifying specific portions of Crackley Land (East), which I shall use to describe Crackley Land (East) more specifically:

(1) Immediately to the East (or right) of Crackley Lane is a rough square, coloured pink and green on Plan B (the **Square**).

(2) Immediately to the East (or right) of the Square is a portion of land, coloured pale blue on Plan B, in the shape of an isosceles triangle (the **Triangle**).

(3) The **Remaining Portion** comprises the remaining Crackley Land (East), that is all parts of Crackley Land (East) apart from the Square and the Triangle.

(iii) The physical nature of the perimeter of Crackley Land (East)

86. It is necessary to describe the manner in which the perimeter or boundary of Crackley Land (East) was demarcated. In large part, the basis for my findings in this regard is the evidence of Mr Bovan and Mr Hicks, both of whom provided helpful evidence enabling me to understand the nature of the perimeter, as well as the video evidence that was adduced before me. In order to understand the physical perimeter, it is necessary to refer to **Annex 3** to this Judgment, which constitutes a marked-up version of Plan B at Annex 2. The marking up, to be clear, has been done by me, based upon the evidence I have heard. More specifically:

(1) Annex 3 shows a line (running from Point 1 to Point 2) which bisects the Remaining Portion of Crackley Land (East). I stress that this line is roughly drawn, and makes no claims to particular accuracy. It is not necessary in order to understand the physical geography for the line to be precisely drawn.

(2) The line between Point 1 and Point 2 represents a line of **Heras fence panels**. Heras fence panels are forms of temporary, heavy duty, wire-mesh fencing in the form of panels, capable of being linked together. They are, thus, capable of being moved. Generally speaking, they are footed by large concrete blocks, out of which the feet of the Heras fence panel can be lifted.

(3) As part of the development of the HS2 Scheme on the Crackley Land, the contractors employed or retained by the Claimants often fenced off portions within the Crackley Land, using Heras fence panels. This fencing was, I stress, intended to be internal to the Crackley Land and did not seek to demarcate any boundary of or perimeter to the Crackley Land. Rather, the purpose of such internal fencing was to isolate from third parties those specific areas where work was being done or to protect equipment from such third parties. Of course, one might say that since these enclosures were all within the Crackley Land, such enclosures were unnecessary: the only persons present on the Crackley Land would be those present with the consent of the Claimants. That would, however, be wrong. As the Judgment of Andrews J makes clear, in addition to Mr Bishop and Mr Rukin (the individually named defendants to the Proceedings), there were

trespassers on the Crackley Land against whom such internal barriers might be needed:

> "11. The Claimants accepted, as do I, that Mr Bishop's activities as a concerned local resident have been genuine and sincere, and that at all times he has acted responsibly and peacefully. He is seen as a very important moderating influence, who has forged a good relationship with the HS2 representatives.
>
> 12. Mr Rukin has a wider agenda, in that he is the Campaign Manager of "Stop HS2" which, as its name suggests, is opposed to the project in principle. However, so far as the occupation of the Cubbington Land[79] and Crackley Land is concerned, Mr Rukin supports Mr Bishop's evidence that this is aimed at protecting the ancient woodland and observing and recording HS2 Ltd and their contractors' operations with a view to reporting any illegal activities to the relevant authorities. He denies that he or anyone associated with him or the camps has been responsible for litter or any anti-social behaviour on the land.
>
> 13. Unfortunately, the evidence of Ms Jenkins and Mr Corvon-Czarnodolski…on behalf of the Claimants indicates that not all trespassers on the Cubbington Land and Crackley Land are so well-behaved. People have carried out damage to the Heras fencing which is used to demarcate the land, in some areas pulling it down and abusing workmen who have taken in panels to repair it; nails and glass have been placed on roads used by construction traffic, and some people have actively blocked access to the sites or erected structures on them which have impeded the work."

In these circumstances, it is easy to understand why such internal fencing, intended to protect on-going works or equipment, might be necessary. I shall refer to such fencing as ***Ad Hoc* Fencing**, as it was moved according to the work going on. Its defining positive characteristic is that it was intended to protect on-going works; its defining negative characteristic is that *Ad Hoc* Fencing was <u>not</u> intended to demarcate the boundary or perimeter of the Crackley Land.

(4) The Heras fence panels running from Point 1 to Point 2 are to be differentiated from other types of *Ad Hoc* Fencing. This particular fence-line (which I shall refer to as the **Internal Boundary**) is significant because the land to the East (or right) of the Internal Boundary – designated by the letter B in Annex 3 (**Area B**) – was unfenced and comprised essentially open space. The perimeter of Area B was marked by No Trespass Notices,[80] but there was no fencing of any sort. The Internal Boundary thus:

(a) Merely constituted an internal perimeter or boundary <u>within</u> Crackley Land (East). It was not intended to demarcate the edge of the Crackley Land.

(b) However, the Internal Boundary was significant because it constituted a part of the <u>physical</u> boundary of the Crackley Land. A person approaching

[79] This was the other tract of land with which the Judgment was concerned. I have, generally, omitted reference to the Cubbington Land in this judgment, as it is not directly relevant to the Incidents.

[80] There were some Injunction Notices and some Injunction Warning Notices also.

the Internal Boundary through Area B would be on Crackley Land and – absent the consent of the Claimants – would be a trespasser on the land. However – apart from the Notices – there would be no physical demarcation of the boundary until the Internal Boundary was reached.

87. Thus, Area B is a portion of Crackley Land East, largely without perimeter fencing. The only physical perimeter (apart from Notices) was the Internal Boundary running along its Western flank, and dividing Area B from the other part of Crackley Land (East), **Area A**.

88. The Internal Boundary was moved at least once during the period of the Incidents, on 21 April 2020, when the Internal Boundary was moved Eastwards by a couple of meters, so as to enlarge Area A of the Crackley Land (East) and correspondingly reduce Area B of the Crackley Land (East).

89. Area A, in contrast to Area B, was fenced. It is important to describe the nature of this fencing. I shall do so by describing the perimeter of Area A in a clockwise fashion, starting at **Point 1,** which identifies the starting point of the Internal Boundary, and is marked as such on Annex 3. Taking this as the starting point, the perimeter of Area A was as follows:

(1) *Point 1 to* ***Point 2***. This is the Internal Boundary, which comprised, as I have stated, Heras fence panels.

(2) *Point 2 to* ***Point 3***. (I have not marked anything other than Points 1 and 2 on the map at Annex 3. To do so would lend a spurious specificity to what is intended to be a more broadbrush description of the physical geography.) This was intended to comprise part of Crackley Land (East)'s external boundary, and consisted of Heras fence panels. Point 3 was located around the Eastern tip of the Triangle.

(3) *Point 3 to* ***Point 4***. This was a continuation of Crackley Land (East)'s external boundary, and consisted of boarding or hoardings about 3 metres high (the **Hoarding Fence**). The Hoarding Fence ran substantially along the bottom edge of the Triangle, ending roughly at the Western tip of the Triangle, where the Triangle abuts the Square. The Hoarding Fence was intended to offer some sort of visual and sound protection to the residents of the farms located to the South of the Triangle. It was on this land South of the Triangle – not part of the Crackley Land – that the protestors to the HS2 Scheme had their camp (i.e., Camp 2).

(4) *Point 4 to* ***Point 5***, *Point 5 to* ***Point 6***, *Point 6 to* ***Point 7***. These three boundaries represent three sides of the Square, the middle boundary (Points 5 to Point 6) being the boundary running along Crackley Lane. These boundaries comprised Heras fence panels.

(5) *Point 7 to* ***Point 8***. This is part of the Northern boundary of Crackley Land (East), essentially opposite to and running parallel with the Hoarding Fence between Point 3 and Point 4. The perimeter was marked by a post and wire fence (the **Post and Wire Fence**).

(6) *Point 8 to Point 1*. The final stretch of the Northern boundary, terminating with the beginning of the Internal Boundary at Point 1 again comprised Heras fence panels.

90. I should stress that it is unnecessary to be more precise about the geographic location of Points 1 to 8. They are intended to enable better description of the Incidents to which I will come. It is also worth stressing that the demarcation between different fence lines – clear in my description – will have been less clear to the person walking around the Crackley Land. Thus, for example, the Internal Boundary (Point 1 to Point 2) comprised Heras fence panels, as did the external boundaries on either side, namely Point 2 to Point 3 and Point 8 to Point 1. I am not suggesting that it would have been possible to differentiate between these parts of the perimeter of Area A: the perimeter would simply have been a series of Heras fence panels. I do not consider that such inability to differentiate is in any way material to the matters considered in this judgment.

(iv) Footpaths

91. The public right of way known as **PROW165X** runs in part across the Crackley Land. It bisects the Crackley Land (East) running from South to North. Insofar as it crosses Crackley Land (East) it begins (at its Southern-most point) at a point between Point 1 and Point 2. It then runs roughly along the Eastern edge of the Triangle and across a part of the Square to its end (at least so far as material for present purposes) at Cryfield Grange Road on the Northern edge of Crackley Land (East), roughly at Point 7.

92. The Claimants sought to close PROW165X. The reason for this was that protestors were using PROW165X to access the Crackley Land. This is described by Mr Bovan in Bovan 2:

> "18 As described at paragraph 19 of my first affidavit, on 26 March 2020 steps were taken by myself and HCE to enforce the Writ and evict the protestors in Camp 1 on the Crackley Land. While we successfully removed 18 persons on the ground, this was not without difficulties and 5 protestors managed to scale trees at height on the Crackley Land and remained there until 3 April 2020.
>
> 19 4 of these 5 protestors at height had managed to enter onto the Crackley Land (without permission) during the process of eviction by walking on to the PROW and climbing over or under existing wooden fences. If it had not been for the PROW being open there would only have been 1 protestor in the trees at height.
>
> 20 Other protestors were also standing on the PROW during the course of the eviction, some of whom were: *(i)* shouting and being verbally abusive to my team and [me]; *(ii)* at times spitting on my team and [me]; *(iii)* failing and/or refusing to maintain a social distance of at least 2 metres in accordance with COVID-19 Government guidelines; and *(iv)* supplying the protestors at height in the trees with food and water.

I accept this statement of events.

93. It was common ground that:

(1) The Claimants had the statutory power to close PROW165X pursuant to powers conferred under the High Speed Rail (London – West Midlands) Act 2017.

(2) The Claimants' power was exerciseable only on consultation with the relevant local authority, which in this case was Warwickshire County Council (and only that authority). The purpose of the consultation was to ensure public safety and, so far as reasonably practicable, to reduce public inconvenience.

(3) The Claimants did so consult. However, that consultation stated, as I find, that a diversion would be in place before PROW165X was closed. In its consultation, the Claimants identified, on a plan, the route of a temporary diversion, which I shall term a temporary public right of way or **TPROW**.[81]

(4) The planned route of the TPROW was disclosed to Warwickshire County Council, which itself noted that "HS2 have confirmed that at no point will [PROW165X] be closed without the diversion being in place". The TPROW proposed is shown on the plan at **Annex 4** to this judgment. As to this:

(a) For the purposes of orientation, at the bottom left-hand corner of Annex 4, Birches Wood Farm can be seen. Above Birches Wood Farm, one can see the Hoarding Fence that runs between Point 3 and Point 4 marked as a fine red line. The Heras fence panels comprising Point 2 to Point 3 are to the right of the Hoarding Fence, marked as a green line. Other Heras fence panels – which were intended to enclose the TPROW, and to which I shall come – are also marked as a green line.

(b) The route of PROW165X is clearly marked. The part to be closed is marked by a thick red line. The TPROW constitutes a diversion from the closed part of PROW165X. Essentially, the diverted part of PROW165X – which roughly runs along the hypoteneuse of a triangle – is replaced by the TPROW, which runs along the other two sides of that triangle. The first side of that triangle runs parallel to the Hoarding Fence (at about 2-3 metres distance – the **Strip**), and then cuts across the Crackley Land away from the Hoarding Fence so as to rejoin the undiverted part of PROW165X, which then runs on to Cryfield Grange Road.

(c) Apart from the entrance point on the Southern boundary of the Crackley Land, which I shall return to, the TPROW was closed off from the rest of the Crackley Land by Heras fence panels running along either side of the TPROW. Although these enclosures to the TPROW are not fully disclosed in the diagram, I am satisfied that this was the case.[82] Thus, there were Heras fence panels running along either side of the TPROW intended:

(i) To prevent persons on the TPROW from leaving it;

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[81] I should be clear that whether this was a public right of way is a matter of controversy that I will have to consider. Mr Bovan used the term TPROW, which I adopt without prejudice to my consideration of this question.

[82] This was clear from the evidence of Mr Bovan in Bovan 2 (in particular, paragraph 13 of Bovan 2) and the video evidence that I saw. I put my understanding to counsel in the course of oral closing submissions, and neither party dissented from this explanation.

(ii) To ensure that the TPROW was only accessed from the Southern starting point of PROW165X described in paragraph 91 above. Thus, the Heras fence panels were intended to prevent persons joining the TRPOW midway rather than at the Southern starting point of PROW165X.

Clearly, these measures were intended to ensure that the TPROW was only used to pass and repass along its length, and to prevent entrance or exit from that length save at its start and end points. I shall refer to the Heras fence panels running along both sides of the TPROW as the **TPROW Fencing**.

94. PROW165X was closed on 26 March 2020.[83] Although the intention was that the TPROW would be made available to the public, it never was. Mr Bovan explained the position in Bovan 2:

> "21 I thus took the decision that the only way to complete a safe eviction (for both the protestors, HCE staff, [HS2's] contractors and site security) and secure the Crackley Land under the powers afforded to me as the authorised High Court Enforcement Officer under the Writ to close [PROW165X]. This was done by placing metal heras fencing across the top and bottom sections of the PROW to prevent further access.
>
> 22 Following the eviction on 26 March 2020, it was then the intention of the [Claimants] to open the TPROW. However, while we considered opening the TPROW on a couple of occasions, I never considered it feasible to do so due to the recurrent (almost daily) incursions on to the Crackley Land (and the TPROW) by protestors.
>
> 23 The TPROW was therefore never opened. It remained closed between the dates (4 April 2020 to 26 April 2020) on which the [Claimants] assert that [Mr Cuciurean] breached the Order.
>
> 24 The protestors were regularly informed by myself, enforcement officers from HCE and [the Claimants'] contractors that the TPROW was closed and had not been opened."

PROW165X was re-opened on 23 June 2020 (well after the Incidents were over).[84] The TPROW never opened.[85]

95. It was, therefore, the Claimants' position that Mr Cuciurean had no right – during the period in which the Incidents took place – to be on either PROW165X or the TPROW. This was disputed by Mr Cuciurean, and it will be necessary to consider the arguments advanced by both sides on this point.

(v) Gaps in the perimeter

96. It would be wrong to give the impression that the physical boundary surrounding Area A of the Crackley Land (East) was impregnable. Mr Hicks gave evidence that there was – at least for substantial parts of the period during which the Incidents occurred – a gap

[83] Bovan 2 at paragraph 21.

[84] Bovan 2 at paragraph 17.

[85] Bovan 2 at paragraph 23.

in the Heras fence panels between Point 2 and Point 3 – that is the external perimeter between the Internal Boundary fencing and the Hoarding Fence.

97. Mr Hicks' evidence was supported by that of Mr Cuciurean, who made clear in the course of his cross-examination that he entered what the Claimants contend was the Crackley Land not by climbing over the Hoarding Fence (or, at least, not always) but by going around it, which was easier.

98. I should make clear that I accept this evidence. Specifically, I accept that there were times when Mr Cuciurean may have – instead of climbing over the Hoarding Fence – gone around it. Where that may have been the case, I indicate as much in my description of the Incidents below. Equally, where I am satisfied that Mr Cuciurean did climb the Hoarding Fence, I say so.

99. I conclude that there was from time-to-time a gap in the Heras fence panels between Point 2 and Point 3, very roughly at around the point where PROW165X and the TPROW were intended to start at the Southern border of the Crackley Land. I find that the gap was created by unknown third parties. I do not consider that it would have existed without the intervention of such third parties. It was Mr Bovan's evidence, which I accept, that the Claimants closed the Southern end of PROW165X/the TPROW and that the Claimants would not have permitted a gap in the Heras fence panels of the perimeter of Area A. That, of course, does not mean that such a gap did not exist. I find that:

(1) From time-to-time, such a gap did exist; and

(2) It was a gap created by the actions of unknown persons not comprising the Claimants or agents under their control.

(c) The Incidents

100. The Incidents are described in detail in the Schedule. Although the Schedule lists 17 different Incidents, a number of these occurred in very close temporal succession. Thus, for example, Incidents 1, 2, 3, 4 and 5 occurred between 8:30pm and 12:25am on 4 and 5 April 2020. It is necessary to bear in mind this closeness in time, simply because it is (in my view) a little unrealistic (if technically accurate) to say that in the night of 4/5 April 2020 there were five Incidents. In reality, there was a single, but sustained, attempt to penetrate what the Claimants contend was the Crackley Land.

101. The table below sets out a chronology of the relevant Incidents, and seeks to place each of them in context and to describe their salient details as I have found them on the evidence, according to the requisite standard. There was, in fact, remarkable little difference between the parties in terms of the description of events as set out in the Schedule: where such differences have arisen, I have resolved them in my narrative. In general terms, I seek to describe the Incidents by reference to my foregoing description of the Crackley Land. I should make clear that these findings of fact are expressly without prejudice to Mr Cuciurean's contention that the borders of the Crackley Land – as manifested by the physical border I have described – do not match the land edged red as described in Plan B, which was attached to the Order and which appears here as Annex 2 to this judgment. More particularly:

(1) One of Mr Cuciurean's contentions, which I consider below, was that there was a mismatch between the land edged red on Plan B (which was the land that Mr Cuciurean was injuncted from entering: the "Crackley Land") and the physical demarcation of the perimeters of what the Claimants contended was the Crackley Land, those perimeters having been put in place by the Claimants.

(2) In other words, Mr Cuciurean contended that the Claimants had not established and/or he was not actually on the Crackley Land. He might have penetrated the physical perimeter (this Mr Cuciurean rarely denied), but in doing so he did not infringe the land edged in red on Plan B and so did not breach the Order.

I consider this point below. For the purposes of describing the Incidents, however, it is inevitable that I refer to the physical perimeter using the term the "Crackley Land". I do so, in order to make findings as to what Mr Cuciurean did. I stress that these findings are not necessarily findings that the Order was breached (even though I refer to Mr Cuciurean entering (for example) the "Crackley Land"). That is because I have yet to consider and determine the point made by Mr Cuciurean that there was a mismatch between Plan B and the physical perimeter. The table below must be read with that important qualification in mind:

Date	Occurrence
17 March 2020	The Order was granted by Andrews J.
24 March 2020	The injunction under the Order came into force from 4:00pm and the Writ is issued.
25 March 2020	The date of service of the Order, pursuant to its terms.
26 March 2020	Eviction action pursuant to the Writ took place on the Crackley Land. Camp 1 was closed down; and Camp 2 commenced effective operation.
26 March 2020	PROW165X is closed.
4 April 2020	Mr Cuciurean arrived at Camp 2. Incidents 1 to 4 took place during the evening of 4 April 2020. Incident 5 – which is related – took place in the early hours of 5 April 2020.
8:30pm	**Incident 1** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. Mr Cuciurean entered the Strip between the Hoarding Fence and the TPROW Fencing. He unclipped one of the Heras fence panels comprising the TPROW Fencing and entered on to the TPROW. He was asked to leave, and was told that he was on land in breach of an order of the court. He refused to leave, was restrained and arrested. He was then "de-arrested", when it was clear that Warwickshire police would not attend. Mr Cuciurean was released at about 9:00pm.
9:35pm	**Incident 2** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the

	Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. His activities were monitored by the Claimants' agents. When they sought to approach him, he retreated back over the Hoarding Fence.
10:45pm	**Incident 3** Mr Cuciurean entered Area A of the Crackley Land, traversing the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. His movements were monitored by two of the Claimants' enforcement officers. Through the TPROW Fencing, Mr Cuciurean was told he was trespassing. Mr Cuciurean exited the Crackley Land by climbing over the Hoarding Fence and returning to Camp 2.
11:25pm	**Incident 4** This Incident took place at the perimeter of Crackley Land (East) between Points 2 and 3. A Heras fence panel was pulled over by protestors. It was later retrieved and re-installed. Mr Cuciurean was one of the protestors detained but not arrested. Mr Cuciurean and the others were released and returned to Camp 2. I am not satisfied so that I am sure that Mr Cuciurean himself was involved in physically pulling down the Heras fence panel. That would, in my judgment, have involved entering upon the Crackley Land. However, Mr Cuciurean may have been supporting others whilst standing outside the Crackley Land. I am not satisfied so that I am sure that Mr Cuciurean was on the Crackley Land.
5 April 2020	Although Incident 5 formed part of the pattern of Incidents taking place on 4 April, it occurred after midnight. Incidents 6, 7 and 8 occurred later on that day.
00:25am	**Incident 5** Mr Cuciurean and two other protestors were reported as being by the Heras fence panels between Points 2 and 3. That would not necessarily have involved entering the Crackley Land. Mr Cuciurean then climbed the Hoarding Fence (between Points 3 and 4), and approached the TPROW Fencing, walking on the Strip, but he did not enter the TPROW. The protestors were reminded that they were on the Claimants' land, although I have insufficient evidence as to the exact words used. Two of the Claimants' enforcement officers removed a Heras fence panel from the TPROW Fencing in order to arrest Mr Cuciurean. Mr Cucuirean retreated to Camp 2.
10:52am	**Incident 6** Mr Cuciurean removed the clips from a Heras fence panel forming part of the perimeter between Points 2 and 3, and removed the panel from the fence line abutting the Hoarding Fence. He (with others) entered upon the Crackley Land. Mr Bovan informed Mr Cuciurean that he was on the Crackley Land. Mr Bovan attempted to reinstate the Heras fence panel that had been removed, and the protestors (including Mr Cuciurean) left the Crackley Land and returned to Camp 2.

10:55am	**Incident 7** Mr Cuciurean and other protestors entered the Crackley Land at the same place – and by the same means – as in Incident 6. Mr Bovan again attempted to reinstate the Heras fence panel, and the protestors (including Mr Cucuirean) again retreated to Camp 2.
11:25am	**Incident 8** Incident 8 was very similar to Incidents 6 and 7, albeit that this Incident involved the removal of <u>two</u> Heras fence panels from the perimeter between Points 2 and 3. Attempts were made to restore the perimeter fence panels, which was met by resistance from the protesters, including Mr Cuciurean. The protestors took Heras fence panels intended to fill the gap created back to Camp 2. There was a subsequent further attempt by Mr Cuciurean to enter upon the Crackley Land in the same way. Mr Cuciurean was repelled by the Claimants' officers, but not detained.
7 Apr 2020	Incidents 9, 10 and 11 all took place on 7 April 2020.
12:24pm	**Incident 9** The Schedule describes this as a "specimen example of repeated acts of contempt". Incident 9 concerned Mr Cuciurean climbing the Post and Wire Fence on the Northern border of the Crackley Land between Points 7 and 8. It is said that Mr Cuciurean did this on a daily basis, in order to distract the Claimants' staff or to facilitate others entering the Land or to examine the fences for weaknesses. I am satisfied that Incident 9 took place, as described. However, I am not prepared to include it as a "specimen example", and it must stand alone. Equally, I am not satisfied as to Mr Cuciurean's precise motives in entering the Crackley Land here.
1:32pm	**Incident 10** Mr Cuciurean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW. Mr Cuciurean and another protestor attempted to remove Heras fence panels and the footers that keep them upright. When approached by the Claimants' enforcement officers, they left the Crackley Land and returned to Camp 2.
1:39pm	**Incident 11** Mr Cuciurean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the area between the Hoarding Fence and the TPROW Fencing and penetrated the TPROW Fencing, entering upon the TPROW.
14 April 2020	Incidents 12 and 13 took place on 14 April 2020.
2:33pm	**Incident 12** Incident 12 is *mutatis mutandis* the same as Incident 9.

1:58pm[86]	**Incident 13** Mr Cucuirean entered Area A of Crackley Land (East) either by climbing the Hoarding Fence or by going round it through a gap in the Heras fence panels between Point 2 and Point 3. He walked in the Strip between the Hoarding Fence and the TPROW Fencing. He did not enter upon the TPROW.
15 April 2020	
11:50am	**Incident 14** This is the Incident described in paragraph 12(3)(c) above, where Mr Mr Cuciurean penetrated *Ad Hoc* Fencing within the Crackley Land (East) and locked himself to the boom of a machine used by the Claimants for the HS2 works.
17 April 2020	
15:24pm	**Incident 15** Mr Cuciurean and other persons penetrated *Ad Hoc* Fencing on the Crackley Land (East).
21 Apr 2020	
10:40am	**Incident 16** Mr Cuciurean, one of a group of around 12 protestors, penetrated *Ad Hoc* Fencing on the Crackley Land (East). Mr Cuciurean was asked to leave on several occasions and warned of arrest. He resisted removal from the site, and was arrested. There was interference with the works going on in relation to the HS2 Scheme, and those works were disrupted.
26 Apr 2020	
7:30am	**Incident 17** Mr Cuciurean and four other protestors climbed trees on Crackley Land (East). They were warned that they were trespassing by Mr Bovan and asked to climb down. They declined to do so, and specialist climbers had to be deloyed by the Claimants to remove them, using "cherry pickers". There was interference with the works going on in relation to the HS2 Scheme, and those works were disrupted.

102. I am satisfied, so that I am sure, that all of the Incidents that I have described, with the exception of Incident 4, took place on what the Claimants contend was the Crackley Land. Whether these findings are sufficient to amount to findings that the Order was breached depends upon Mr Cuciurean's contention that what the Claimants said was Crackley Land was not, in fact, the land identified in the Order. So far as Incident 4 is concerned, I am not satisfied that it has been established that Mr Cuciurean was even on land that the Claimants contended was Crackley Land.

[86] The timing of this Incident in the Schedule appears to be out of chronological sequence. I do not consider that anything turns on this.

(d) Points taken by Mr Cuciurean

(i) Introduction

103. Mr Cuciurean contended that he was not in breach of the Order – notwithstanding the facts that I have found – for the following reasons:

(1) The boundaries of the Crackley Land were wrongly demarcated and did not reflect the Crackley Land defined in the Order – namely, the land identified as edged in red on Plan B.

(2) The boundaries of the Crackley Land were, in any event, unclear and confusing.

(3) Mr Cuciurean had a licence to enter upon the Crackley Land.

I shall consider each of these points in turn in the following paragraphs.

(ii) The boundaries of the Crackley Land were wrongly demarcated

104. It is clear – and Mr Cuciurean did not contest – that the Order defines the geographical scope of the Crackley Land (by reference to Plan B) and that if Mr Cuciurean entered upon the Crackley Land so defined, Mr Cuciurean will have breached the Order.

105. Mr Cuciurean's point was that it was incumbent upon the Claimants to prove that Mr Cuciurean's actions – as I have described them in the Incidents above – took place on the Crackley Land as defined in the Order and not merely on land that the Claimants asserted to be Crackley Land falling within the Order.

106. It seems to me that this must be right. I consider – contrary to the submissions of the Claimants – that I must be satisfied to the criminal standard that Mr Cuciurean breached the Order, which means that I must be satisfied (so that I am sure) that Mr Cuciurean entered land that he was enjoined from entering by the Order, namely the land "edged in red on Plan B".[87]

107. It was to deal with this point that the Claimants adduced the evidence of Mr Sah. Mr Sah's evidence (in part) addressed the question of how the Claimants caused the physical perimeter of the Crackley Land to be established by reference to GPS measurements. I shall not refer in any detail to the evidence of Mr Sah. That is because – for the reasons given in paragraph 12(3) above – I do not consider that I can place any weight on Mr Sah's evidence.

108. Mr Cuciurean's point was that the evidence of Mr Sah was the only evidence to support the contention that the physical perimeter and the trespass signs were actually on the red-edged land and that – since I could not be satisfied in relation to the evidence of Mr Sah – the Application must fail. In his written closing submissions, Mr Wagner on behalf of Cuciurean submitted that:[88]

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[87] The Order also refers to the colours on the plan, but these are all within the red-edging, and add nothing to the definition of the geographical scope of the Land.

[88] At paragraph 49.6.

> "There is therefore no authoritative evidence before the Court as to the precise land boundaries, and certainly not enough to prove those boundaries to the criminal standard of proof."

109. I accept – as I have already noted – that Mr Sah's evidence cannot be relied upon. However, I do not consider that the point made by Mr Cuciurean is, without more, correct. It is necessary to consider the Incidents – and their geographical location – in greater detail:

(1) I have, in the course of this judgment, attempted to describe the physical perimeter of Crackley Land (East) in some detail, so that the location of the Incidents may be understood. It is very clear that this is far easier to do in the case of Area A than Area B. That is because – as I have described – the perimeter of Area B is largely without perimeter fencing, whereas Area A is entirely fenced in.

(2) It follows that Incidents occurring in Area B – or Incidents where it is not clear, from the Schedule, whether they took place within Area A or Area B – are far harder to give a precise location to, compared to those Incidents were a precise penetration of the physical perimeter has been shown.

(3) Thus, there is, to my mind, a very sharp distinction to be drawn between Incidents 14, 15, 16 and 17 and the other Incidents (with the exception of Incident 4, which I do not consider involved entry on the Crackley Land, even as understood by the Claimants).

(4) Incidents 14, 15, 16 and 17 all have a vagueness to them which has not enabled me to pin down, in my findings in relation to these Incidents, a very precise geographic location. All of the Incidents are (in the evidence before me) detached from the physical geography of the site, as I have described it, such that I do not consider that I can (to the requisite standard) conclude that the Incidents took place on the Crackley Land as defined in the Order. I am quite sure that the Claimants consider that these Incidents took place on the Crackley Land, but that is not enough. Although the Schedule was accompanied by plans purporting to show the actual location of all of the Incidents, Mr Bovan had to accept that this was no more than a rough indicator of location.

(5) Although I appreciate that Mr Cuciurean did not advance any positive case as to location, but only put the Claimants to proof, I do not consider that the Claimants have met that standard in relation to Incidents 14, 15, 16 and 17.[89]

(6) Matters are very different as regards the remaining Incidents (excepting Incident 4, which I shall not refer to again). These Incidents can be pinned down to a precise geographic location, as I have described. It is thus possible to state – as I have stated – that the perimeter of Area A was breached in a very specific way.

(7) Of course, this does not preclude the possibility that there is a mismatch between the physical perimeter of Area A, as I have described it, and the demarcation of

[89] There was, between the parties, debate as to whether expert evidence as to the geographical ambit of the Crackley Land was required. The Claimants did not consider that such evidence was necessary, and Mr Cuciurean never pursued an application to adduce expert evidence himself.

the Crackley Land as set out in the Order. However, on the evidence before me, I consider the possibility of such a mismatch to be within the realms of the theoretical. I consider that the Claimants have established, to the requisite standard, that these Incidents (1 to 3 and 5 to 13) did involve a breach of the Order. It seems to me that Mr Cuciurean's case involves an assertion that the Claimants have been exercising possessory rights over someone else's land in a most aggressive way and in circumstances where one would expect – if that were the case – clear challenge to the exercise of those rights by those whose interests were being usurped. More specifically:

(a) The physical boundaries that I have described were up at the time of Andrews J's Judgment and Order.[90] If there was a serious argument that the Claimants were operating on land to which they had no claim, then that argument would have been articulated before Andrews J. As she noted in her Judgment, one of the purposes of the defendants before her was to monitor the conduct of the Claimants, so as to ensure they did not act unlawfully.[91]

(b) Equally, it is unlikely in the extreme that neighbouring landowners would permit the erection, on their land, of barriers like the Hoarding Fence without objection, particularly given the controversial nature of the HS2 Scheme.

(c) Nor do I consider that the Claimants would dare to pursue the aggressive vindication of their rights (erecting barriers and notices; ejecting persons; arresting them; diverting and closing footpaths) without being very sure that they were acting clearly within their rights.

(8) If Mr Cuciurean had mounted a positive case that the Claimants had overreached, then of course that case would have to be considered by me and determined. But no evidence has been advanced by Mr Cuciurean in this regard, and the Claimants have simply been put to proof. Such a course is absolutely within Mr Cuciurean's rights, and I take the burden and standard of proof – which rests on the Claimants – extremely seriously. But, in the case of Incidents 1 to 3 and 5 to 13, I am satisfied that that burden has been met taking all of the evidence before me into account.

I have used the term "aggressive" in describing the Claimants' vindication of its rights. By this, I do not mean to suggest anything disproportionate or wrong in the Claimants' conduct. The importance of the term lies in the overtness of the Claimants' conduct. This was not a case where the Claimants were, hidden from sight, asserting their rights. Given this overtness, some form of pushpack would be inevitable if the Claimants' were asserting rights that they did not have.

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[90] See, for instance, [13] of the Judgment, referring to the Heras fences.

[91] See [9] of the Judgment in relation to the Crackley Land.

(iii) The boundaries of the Crackley Land were unclear

110. It was contended that the boundaries of the Crackley Land were unclear. A great deal of the evidence adduced by Mr Cuciurean (including in particular the evidence described in paragraph 12(4) above) went to this point. Thus, it was suggested that the Injunction Notices and Injunction Warning Notices were not present; that the multiple layers of No Trespass Notices were confusing; that the agents of the Claimants were unclear as to the boundaries they were patrolling; that the fence lines – in particular the Internal Boundary and the *Ad Hoc* Fencing – were confusing; and that much more could have been done to clarify the position.

111. I do not accept this evidence. It seems to me that once the conclusion has been reached that the physical perimeter around Area A matched the land edged in red defined in the Order, there was little or no scope for misunderstanding the perimeter of the Crackley Land. The suggestion that the boundaries of the Crackley Land were unclear to the protestors in general, and to Mr Cuciurean in particular, rather misstates the purpose of the protests and the purpose of Mr Cuciurean's conduct at the Crackley Land. Mr Cuciurean was not an unknowing roamer of the countryside, accidently coming across the Hoarding Fence and deciding to climb it. He was – as he fully acknowledged – a committed opponent of the HS2 Scheme and his conduct and commitment must be seen in that light. Mr Cuciurean was not, by some terrible mistake that could have been avoided if only the Claimants had been clearer, penetrating the perimeter of the Crackley Land several times in one night (Incidents 1 to 5). He was doing so because (as I have noted) he was seeking to lend as much force to his objections to the HS2 Scheme as he could, by inconveniencing the Claimants as much as possible.

112. In short, whilst I do not consider that the Claimants could (within reason[92]) have been any clearer about the perimeter of Area A, it is my settled view that even if additional steps had been taken to publicize the Area A perimeter, those steps would have made no difference to Mr Cuciurean's conduct.

113. I should add, by way of postscript, that I consider the clarity or otherwise of the boundaries of the Crackley Land to be a matter essentially irrelevant to the outcome of the Application. It seems to me that either Mr Cuciurean entered upon the Crackley Land or he did not. If he did – as I have concluded he did – he was in breach of the Order.

(iv) A licence was granted to Mr Cuciurean to cross the Crackley Land

114. This contention has, as I understand it, two bases: the first is what Mr Cuciurean suggested was the unlawful failure to open the TPROW; the second arises out of paragraph 30 of Bovan 2, which states:

> "…This access across the Crackley Land was tolerated by the [Claimants] as the entirety of the Crackley Land was not required for all times for Phase One works. I have also been informed by employees of LM (the contractor employed by the Second [Claimant]) that there would be a significant and disproportionate cost to fence the entire perimeter…"

[92] It would, of course, have been possible – but economically mad – to have encircled the Crackley Land with an insurmountable barrier.

115. It is convenient to deal with the second point first. It is evident that Mr Bovan is here describing the Claimants' attitude in relation to the unfenced part of Crackley Land (East), what I have termed Area B.[93] I regard the contention that the Claimants were – by reason of the unfenced nature of Area B – consenting to trespasses of the sort described in Incidents 1 to 3 and 5 to 13 as unarguable.[94] In these Incidents, Mr Cuciurean was obviously entering upon land where he was not welcome, and where his presence was quite the reverse of being consented to. He was, in these Incidents, either driven from the land, escorted off it or arrested. The suggestion that his presence was or had been consented to – or even tolerated – is fanciful.

116. Although it is immaterial to the outcome, it seems to me necessary to state that the mere passage and re-passage of persons across Area B cannot, of itself, be enough to establish consent on the part of the Claimants to such passage and re-passage. As Mr Bovan described, the Crackley Land is a large tract of land, which cannot (economically) be completely fenced in. The mere fact that trespass is easily possible in no way means it is permitted.

117. I turn, then, to the question of whether the conduct of the Claimants in relation to PROW165X and TPROW can give rise to any kind of justification for the Incidents (by which I mean Incidents 1 to 3 and 5 to 13) so as to avoid the conclusion that Mr Cuciurean was in breach of the Order. As to this:

(1) The starting point must be the terms of the Order itself, and the relevant part of the Order is paragraph 5.1. As I have described,[95] conduct which would otherwise be an infringement of paragraph 4.2 of the Order (entry upon the Crackley Land) is not an infringement where a person is exercising his or her rights of way over any open public right of way over the land.[96]

(2) It is clear – and not contested – that PROW165X was lawfully closed.[97] Mr Cuciurean contended that the consequence of this was that the TPROW was open and that the Claimants, by their conduct, improperly closed it. As a result, Mr Cuciurean contended, he was entitled to be on the TPROW and was entitled to use "self-help" remedies if (as was the case) the Claimants blocked the access to the TPROW.[98]

(3) I consider that these contentions to be basically misconceived and wrong. They can provide no justification for what would otherwise be a breach of the Order. My reasons for reaching this conclusion are multiple. In the first place, in none of the Incidents did Mr Cuciurean actually seek to use the TPROW. By this, I mean he never sought to pass or re-pass along it from its Southern starting point

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[93] See paragraph 87 above, where the limited perimeter fencing is described.

[94] These are the Incidents where I have concluded that there was – to the requisite standard – entry upon the Crackley Land and therefore – absent consent of the Claimants – a breach of the Order.

[95] See paragraph 6(5) above.

[96] My emphasis. Andrews J had well in mind the power in the Claimants to close public rights of way.

[97] See paragraphs 93(1) and 94 above.

[98] See paragraph 94 above, which describes the manner in which the TPROW was kept closed by the Claimants.

between Point 1 and Point 2.[99] Instead, he either climbed or circumvented the Hoarding Fence (an unjustifiable entry onto the Crackley Land) and entered upon the Strip between the perimeter and the TPROW Fencing (another unjustifiable entry onto the Crackley Land) and (from time to time) scaled the TPROW Fencing (which is not passage or re-passage along the TPROW). In short, Mr Cuciurean was not exercising his right over a public right of way – even assuming, in his favour, that the TPROW was a public right of way within the meaning of paragraph 5.1 of the Order.

(4) On behalf of Mr Cuciurean, it was suggested that the obstruction, by the Claimants, of the access point to the TPROW justified "self-help" in the form of the Incidents I have described. I reject this contention. Whilst I accept – assuming the TPROW to have been open or unlawfully not opened – Mr Cuciurean might have been justified in circumventing the obstruction and entering at the lawful point, that did not justify surmounting or circumventing the Hoarding Fence, thereby gaining access to land (i.e. the Strip) that – on no view – constituted the TPROW (or any right of way).[100]

(5) Moreover, I do not consider that the TPROW was ever open in the sense that a right of way was conferred on the public. The position was that PROW165X was closed, and no footpath was opened to replace it. I accept that this may very well have been a breach of the Claimants' public law powers under High Speed Rail (London – West Midlands) Act 2017. I shall – without deciding the point – assume that the terms of the Claimants' consultation with Warwickshire Country Council[101] were such that it was (in the public law sense) unlawful for the Claimants to close PROW165X without opening the TPROW. Making that assumption in Mr Cuciurean's favour, this might have given him the right to review juducially the Claimants' decision to close PROW165X. But it could in no way confer upon him the right to pass or repass in any way along the TPROW.

118. For these reasons, I do not consider that the exception to paragraph 4 of the Order, contained in paragraph 5.1, was engaged.

(e) Conclusion on breach

119. For all these reasons, the Order, which was clear and unambiguous, was breached by Mr Cucuirean when he committed Incidents 1 to 3 and 5 to 13.

(4) Deliberation

120. Deliberation refers to the mental element or *mens rea* in civil contempt. Proudman J helpfully set out the matters that have to be established where contempt by breach of an order is alleged in *FW Farnsworth Ltd v.* Lacy:[102]

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[99] See paragraphs 91 and 93(4) above.

[100] The reliance on *Stacey v. Sherrin*, (1913) 29 TLR 555 was, for this reason, misconceived.

[101] See paragraph 93 above.

[102] [2013] WHC 3487 (Ch) at [20].

"A person is guilty of contempt by breach of an order only if all the following factors are proved to the relevant standard: (a) having received notice of the order the contemnor did an act prohibited by the order or failed to do an act required by the order within the time set by the order; (b) he intended to do the act or failed to do the act as the case may be; (c) he had knowledge of all the facts which would make the carrying out of the prohibited act or the omission to do the required act a breach of the order. The act constituting the breach must be deliberate rather than merely inadvertent, but an intention to commit a breach is not necessary, although intention or lack of intention to flout the court's order is relevant to penalty."

121. The *mens rea* or mental element for civil contempt (which this Application is concerned with) is considered in *Arlidge*, which both parties before me relied upon:[103]

"12-93 Warrington J expressed the principle in *Stancomb v. Trowbridge UDC*:

> "If a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction and is liable for process of contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it there was no direct intention to disobey the order."

That this expresses the true position has since been confirmed by the Court of Appeal and also by the House of Lords in *Heatons Transport (St Helens) Ltd v. TGWU*, in *Director Genral of Fair Trading v. Pioneer Concrete (UK) Ltd* and in *M: M v. Home Office, Re*. Motive is immaterial to the question of liability.

12-94 What was traditionally required was to demonstrate that the alleged contemnor's *conduct* was intentional (in the sense that what he actually did, or omitted to do, was not accidental); and secondly that he knew the facts which rendered it a breach of the relevant order or undertaking. He must normally be shown at least in the case of a mandatory order to have been notified of its existence. By reason of CPR 81.8(1) in the case of a prohibitory order, the court may dispense with service of a copy of the order if satisfied that the person had been present when the judgment was given or the order made. As Christopher Clarke J explained in *Masri v. Consolidated Contractors* "it would not…be just to exercise a contempt jurisdiction against a defendant who had not had notice of the order in order to be able to comply with it". This will not necessarily, however, in itself demonstrate that the alleged contemnor actually knows of the order. The problem was highlighted by Eveleigh LJ in *Z Ltd v. A-Z and AA-LL*:

> "In the great majority of cases the fact that a person does an act which is contrary to the injunction after having notice of its terms will almost inevitably mean that he is knowingly acting contrary to those terms. However, where a corporation is concerned, it may be a difficult matter to determine when a corporation is said to be acting knowingly."

12-95 Yet there is no need to go so far as to show that the respondent *realised* that his conduct would constitute a breach, or even that he had read the order. This means that liability for civil contempt has been treated as though it were strict; that is to say, not depending upon establishing any specific intention either to breach the terms of the order or to subvert the administration of justice in general."

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[103] Londono (ed), *Arlidge, Eady & Smith on Contempt*, 5th ed (2017) (omitting footnotes and references).

122. Thus, the element of "deliberation" is actually a very attenuated requirement, which in reality requires no more than that the alleged contemnor do the acts that constitute a breach of the order with deliberation, as opposed to by accident or unconsciously. The low standard of the mental element is very well illustrated by the decision of Jacob J in *Adam Phones Ltd v. Gideon Goldschmidt*,[104] where the Jacob J nevertheless (albeit with some reluctance) considered a contempt to be established even where the contemnor had thought he was obeying the court's order:

> "The claimant says that provided that Gideon intended to do what he did, that is enough to prove contempt. It is no defence to say "I thought was obeying the order" if in fact you were wrong.
>
> The claimant relies upon what was said by Mr Justice Millett in *Spectravest v. Aperknit*:
>
> > "To establish contempt of court, it is sufficient to prove that the defendant's conduct was intentional and that he knew of all the facts which made it a breach of the order. It is not necessary to prove that he appreciated that it did breach the order.
> >
> > Authority for this conclusion may be found in *Heatons Transport (St. Helen's) Ltd v Transport & General Workers' Union*, [1973] AC 15 at 108-110, and *Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 WLR 1137. In the first of those cases, Lord Wilberforce described as contempt conduct which was "neither casual nor accidental and unintentional". That phrase was carefully chosen and repeated several times. It clearly describes only two alternatives, not three. Conduct which is deliberate but unintentional, in the sense in which that word was used by Mrs Giret, cannot be brought within Lord Wilbeforce's formula.
> >
> > In the Mileage case, the defendants had given undertakings to the court not to enter into a particular agreement or any agreement "to the like effect". The question whether one agreement is of like effect to another is a question of fact and degree, as the court expressly held. The court, nevertheless, held that a contempt had been established. At 1162 the court said:
> >
> > "We conclude, therefore, that the breaches of undertaking here were contempts of court, even though it were to be shown that they were things done, reasonably and despite all due care and attention, in the belief, based on legal advice, that they were not breaches."
> >
> > A little later on he said:
> >
> > "Questions as to the bona fides of the persons who are in contempt, and their reasons, motives and understandings in doing the acts which constitute the contempt of court, may be highly relevant in mitigation of the contempt. *Bona fide* reliance on legal advice, even though the advice turns out to have been wrong, may be relevant and sometimes very important as mitigation. The extent of such mitigation must, however, depend upon the circumstances of the particular case, and the evidence adduced."
>
> The cases referred to by Millett J support his conclusion. It is also the generally received view, see e.g. the Supreme Court Practice 1999 paragraph 45/5/5:
>
> > "It is no answer to say that the Act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order".

[104] [2000] FSR 163 at 170-171.

123. Although Jacob J considered contrary authority, and expressed the view that "it is appropriate for the mental element of contempt of court to be reconsidered by a higher court",[105] his conclusion was that the law as stated by Millett J and cited by him was the law he was bound to apply.[106] That remains the position in this case.

124. I am satisfied that Mr Cuciurean breached the Order deliberately, in that he consciously and deliberately entered the Crackley Land. That is all the Order enjoined. In case I am wrong about the attenuated nature of the requirement of deliberation, I should make clear the following findings:

(1) Mr Cuciurean obviously entered the Crackley Land wilfully, intending to enter upon land where he knew he should not be. I consider his conduct in crossing the Area A perimeter in the way he did in Incidents 1 to 3 and 5 to 13 to demonstrate a subjective understanding that he was trespassing on another's land, and that he was doing so in the face of a clear determination on the part of the Claimants that he should not do so.

(2) I consider that Mr Cuciurean entered upon the Crackley Land with the subjective intention to further the HS2 protest, and to inhibit or thwart the HS2 Scheme to the best of his ability.

(3) I find that he did so in knowledge of the Order. I cannot say that he knew the full terms of the Order. Mr Cuciurean may very well have taken the course of adopting wilful blindness of its terms. But in light of the events described in this judgment, I conclude that Mr Cuciurean fully understood the terms of paragraph 4.2 of the Order, namely that he was not to enter upon the Crackley Land.

F. CONCLUSIONS

125. For all these reasons, I am satisfied that of the alleged grounds of contempt described in Statement of Case and in the Schedule thereto, Incidents 1 to 3 and 5 to 13 are made out to the requisite standard, and that Mr Cucuirean has breached the Order and is in contempt of court in these respects.

126. At the hearing at which I heard the parties' helpful closing submissions on 17 September 2020, it was agreed that if (as I have found) Mr Cuciurean was in contempt of court, his counsel, Mr Wagner, would wish some time to consider points in mitigation. That is, of course, entirely right.

127. I have listed this matter for hearing on 16 October 2020, when I propose formally to hand down this judgment (subject to any typographical corrections the parties may have). However, it should be noted that this judgment was circulated to the parties, in draft, on 2 October 2020, so as to enable Mr Cuciurean and his legal team to consider it.

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[105] At 172.

[106] At 172.

ANNEX 1

TERMS USED IN THE JUDGMENT

(footnote 1 in the judgment)

TERM	PARAGRAPH IN THE JUDGMENT IN WHICH THE TERM IS FIRST USED
Ad Hoc Fencing	§86(3)
Annex 1	§1 (footnote 1)
Annex 2	§3
Annex 3	§86
Annex 4	§93(4)
Application	§7
Area A	§87
Area B	§85(4)
Beaumont 1	§12(4)(f)
Beim 1	§55(2)
Bovan 1	§7
Bovan 2	§12(1)
Bovan 3	§12(1)
Cairns 1	§12(4)(d)
Camp 1	§7 (footnote 4)
Camp 2	§7 (footnote 4)
Category 3 Defendants	§41
Claimants	§2
Corcos 1	§12(4)(a)
Crackley Land	§3
Crackley Land (East)	§84
Crackley Land (West)	§84
Cuciurean 1	§12(3)(a)
Cuciurean 2	§12(3)(a)
Defendants	§2
HCE	§7 (in quotation)
Heras fence panels	§86(2)

Hicks 1	§12(4)(c)
Hicks 2	§12(4)(c)
Hillier 1	§12(4)(b)
Hoarding Fence	§89(3)
HS2	§2
HS2 Scheme	§10(1)
Incident(s)	§8
Injunction Notice	§57(3)(a)(i)
Injunction Warning Notice	§57(3)(a)(ii)
Internal Boundary	§86(4)
Judgment	§1
Land	§3
No Trespass Notice	§57(3)(d)
Order	§1
Penal Notice	§5
Pitwell 1	§12(4)(e)
Plan B	§3
Point 1	§89
Point 2	§89(1)
Point 3	§89(2)
Point 4	§89(3)
Point 5	§89(4)
Point 6	§89(4)
Point 7	§89(4)
Point 8	§89(5)
Pook 1	§12(4)(g)
Post and Wire Fence	§89(5)
Proceedings	§7 (in quotation)
PROW165X	§91
Remaining Portion	§85(3)
Sah 1	§12(2)
Schedule	§8
Second Defendants	§2
Shaw 1	§29(4)

Square	§85(1)
Statement of Case	§7
Strip	§93(4)(b)
TPROW	§93(3)
TPROW Fencing	§93(4)(c)
Triangle	§85(2)
Writ	§12(1)

ANNEX 2

"PLAN B": THE PLAN OF THE CRACKLEY LAND ATTACHED TO THE ORDER

(paragraph 3 in the judgment)

ANNEX 3

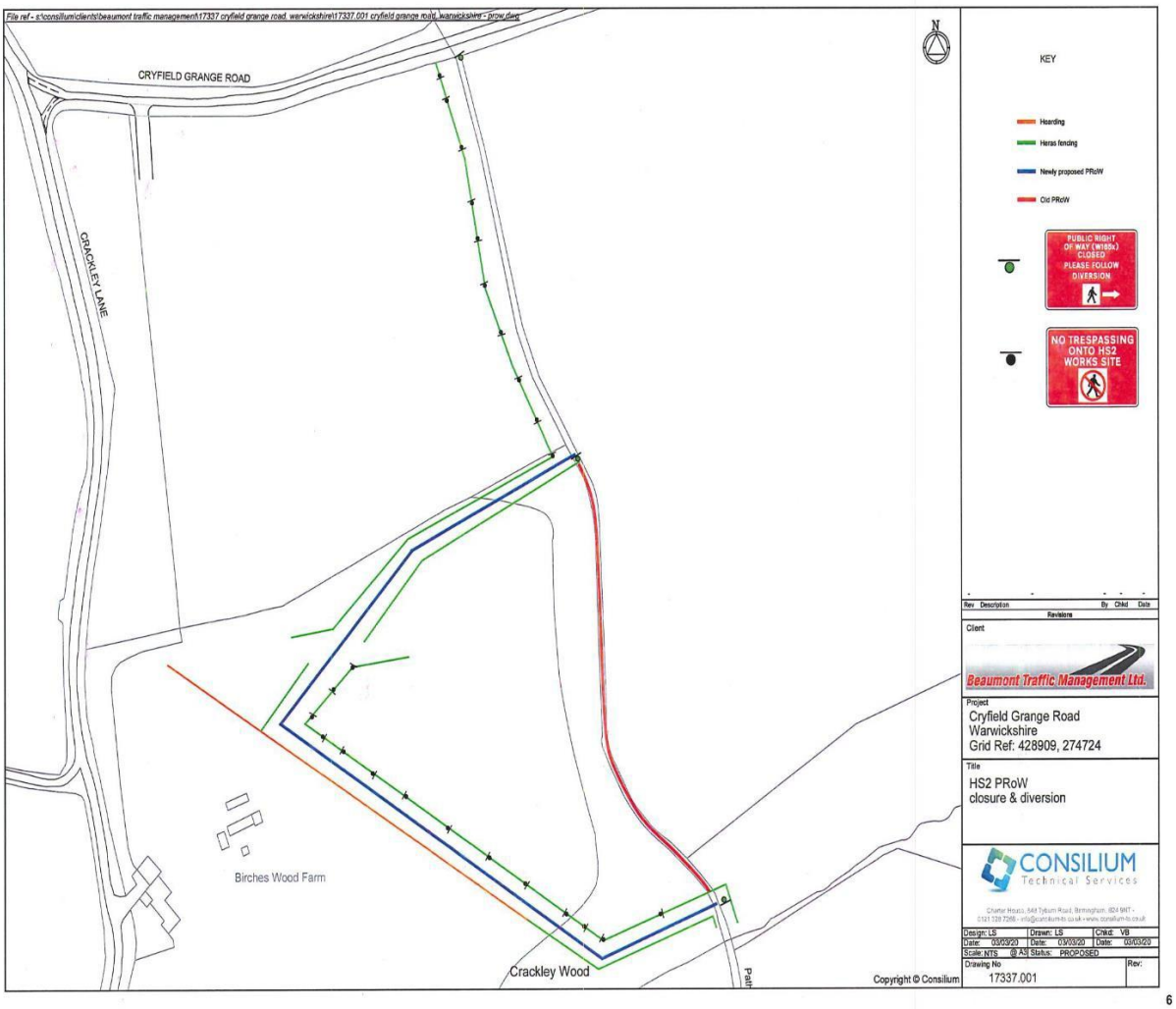
"PLAN B" MARKED UP FOR THE PURPOSE OF THIS JUDGMENT

(paragraph 86 in the judgment)

ANNEX 4

THE PLAN SHOWING THE INTENDED DIVERSION OF PROW165X TO A TPROW

(paragraph 93(4) in the judgment)



Neutral Citation Number: [2018] EWHC 2199 (Comm)

Case No: CL-2018-000269

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2018

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Claimants

(1) FUNDO SOBERANO DE ANGOLA
(2) FSDEA HOTEL INVESTMENT LIMITED
(3) FSDEA AFRICA AGRICULTURE (LP) LIMITED
(4) FSDEA AFRICA INVESTMENT (LP) LIMITED
(5) FSDEA AFRICA HEALTHCARE (LP) LIMITED
(6) FSDEA AFRICA MEZZANINE (LP) LIMITED
(7) FSDEA AFRICAN MINING (LP) LIMITED
(8) FSDEA AFRICA TIMBER (LP) LIMITED

- and -

Defendants

(1) JOSÉ FILOMENO DOS SANTOS
(2) JEAN-CLAUDE BASTOS DE MORAIS
(3) QUANTUM GLOBAL INVESTMENT MANAGEMENT AG
(4) QG INVESTMENTS AFRICA MANAGEMENT LIMITED
(5) QG INVESTMENTS LIMITED
(6) QUANTUM GLOBAL ALTERNATIVE INVESTMENTS AG
(7) INFRASTRUCTURE AFRICA (GP) LTD
(8) HOTEL AFRICA (GP) LTD
(9) AGRICULTURE AFRICA (GP) LTD
(10) HEALTHCARE AFRICA (GP) LTD
(11) MEZZANINE AFRICA (GP) LTD
(12) MINING AFRICA (GP) LTD
(13) TIMBER AFRICA (GP) LTD
(14) QG AFRICAN INFRASTRUCTURE 1 LP
(15) QG AFRICA HOTEL LP
(16) QG AFRICA AGRICULTURE LP
(17) QG AFRICA HEALTHCARE LP

(18) QG AFRICA MEZZANINE LP
(19) QG AFRICA MINING LP
(20) QG AFRICA TIMBER LP
(21) THE NORTHERN TRUST COMPANY

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Paul McGrath QC, Nik Yeo, Alexander Milner, Samuel Ritchie and Joseph Farmer (instructed by **Norton Rose Fulbright LLP**) for the **Claimants**
Mark Anderson QC and Steven Reed (instructed by **Joseph Sutton Solicitors**) for the **First Defendant**
Stephen Auld QC and Alexander Brown (instructed by **Grosvenor Law LLP**) for the **Second Defendant**
Philip Edey QC, Andrew Fulton and Sam Goodman (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Third to Twentieth Defendants**

Hearing dates: 24-27 and 30 July 2018
- - - - - - - - - - - - - - - - - - - -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. The Claimants in this action are the sovereign wealth fund of the Republic of Angola ("FSDEA") and seven of its subsidiaries. On 27 April 2018 Phillips J granted a worldwide freezing order and proprietary injunction ("the WFO") against the First to Twentieth Defendants restraining them from disposing of or dealing with assets up to the value of US$3 billion.

2. At the adjourned return date hearing before me, the Claimants sought an order that the WFO, as amended, be continued until trial or further order. The Defendants sought to set aside the WFO on a number of grounds, including material non-disclosure, and raised various jurisdiction challenges. At the conclusion of the hearing I announced my decision that the WFO should be discharged for non-disclosure, and no fresh order granted, and gave reasons. I reserved judgment in relation to all the issues which I did not address. This is my full judgment, including amplified reasons in relation to non-disclosure.

3. The claims in support of which the WFO was granted arise out of what the Claimants contend was a dishonest conspiracy between the First Defendant, Mr dos Santos, the former Chairman of FSDEA, and his friend and business partner, the Second Defendant, Mr Bastos, who is the 95% beneficial owner of the Quantum group of companies which include the Third to Twentieth Defendants. It is the Claimants' case that, pursuant to this conspiracy, Mr dos Santos placed some US$5 billion at the disposal of the Quantum group to manage and invest on FSDEA's behalf, when the Quantum group manifestly lacked the appropriate or any qualifications and experience for such a mandate; that in the event, most of the US$5 billion has not been invested at all and has simply been used by the Quantum group to extract what were described as an extraordinary levels of fees (amounting to some US$406 million); that of the limited proportion which has been invested, the investments have not been made in the interests of the Claimants but have mostly been channelled into other projects belonging to Mr Bastos; and that in addition, as part of the same conspiracy, Mr dos Santos committed FSDEA to pay around US$153 million to the Quantum and other companies controlled by Mr Bastos, under contracts for various purported services, which contracts, if genuine at all, were manifestly uncommercial and were intended mainly to divert money from FSDEA into the pockets of Mr Bastos without FSDEA receiving anything of remotely commensurate value in return. The Defendants' case is that they are the victims of political change in Angola and a desire on the part of those now in power to get their hands on money which the previous regime sensibly and appropriately invested on a long-term basis for the people of Angola; and that the allegations are a spurious and flawed attempt to achieve this political objective.

Narrative

4. Mr dos Santos' father was the President of Angola from 1979 until 26 September 2017, when he was replaced by President Lourenço, who was elected on 23 August 2017 following President dos Santos' decision to step down.

5. FSDEA was established by a Decree of President dos Santos of 9 March 2011. It was then called the Petroleum Fund. It was renamed FSDEA by a Decree of 19 June 2013. By a further Presidential Decree of 28 June 2013 FSDEA was allocated a capital endowment of US$5 billion for investment. Its Chairman from 2012 to May 2013 was Dr Armando Manuel, who had been the Economic Adviser to President dos Santos. In 2012 its other directors were Mr dos Santos and Mr Gonçalves. In May 2013 Dr Manuel became the Minister of Finance of Angola, and shortly after FSDEA was renamed in June 2013, Mr dos Santos was appointed Chairman. Mr Fortunato was at that time appointed a director. Mr dos Santos remained Chairman until his removal in January 2018. His fellow directors were Mr Gonçalves and Mr Fortunato until the autumn of 2016, when Mr Gago replaced Mr Fortunato. Mr Gago had before that acted as Director of the Office of the Chairman of the Board of Directors from 2013 until 2015. He remains a director of FSDEA. Mr Gonçalves remained a director of FSDEA until January 2018, since when he has acted as a consultant to it. There is a dispute as to the degree of involvement that the other directors had in the running of the fund.

6. On 29 November 2013, Mr dos Santos on behalf of the FSDEA signed an Investment Management Agreement ("the IMA") with the Third Defendant ("QGIM"), acting by Mr Bastos, whereby QGIM was appointed to act as investment manager for FSDEA *"with respect to such monies and properties as are designated to it from time to time"*. QGIM is part of the Quantum group of companies which are 95% owned and controlled by Mr Bastos. Mr Bastos, who has dual Swiss and Angolan citizenship, is a long-standing business associate of Mr dos Santos. They were jointly involved in the founding and management of an Angolan Bank, Banco Kwanza Invest, which was launched in 2008, and they jointly owned several other companies in Angola. Mr Bastos' evidence is that Mr dos Santos relinquished his shareholdings in these companies prior to the IMA but that is not accepted by FSDEA.

7. The IMA is governed by English law and contains an arbitration clause providing for disputes to be resolved by arbitration in accordance with UNCITRAL Rules in Lisbon and in the Portuguese language. There is a dispute as to whether the seat of the arbitration is England (as FSDEA contends) or Portugal (as QGIM contends). The fee payable under the IMA was a base fee of 1% of the average value of the fund plus a performance fee of 20% above a hurdle rate equivalent to the Benchmark Bank of America/Merrill Lynch 3-month Treasury Bill Index.

8. The IMA provided for there to be a custodian of the assets other than QGIM. On the same day as the IMA, 29 November 2013, FSDEA entered into a Master Custody Agreement with the Twenty First Defendant ("Northern Trust"), a US bank established under the laws of Illinois with a London branch in Canary Wharf. It provided for cash and security accounts to be held in FSDEA's name. It did not in terms require the accounts to be at the London branch, although references to the London branch address and UK regulatory standards suggests that that was what was envisaged, and the accounts were in fact established at the London branch.

9. The US$5 billion was to be invested in two conceptually different portfolios. US$2 billion was invested in a portfolio of assets (fixed income, bonds, equities etc) which were to be sufficiently liquid to be realisable within no more than 3 months ("the Liquid Portfolio"). The balance of US$3 billion was to be invested as private equity capital in longer term projects in sectors such as infrastructure, hotels, timber,

agriculture, mining and healthcare, especially in Angola and elsewhere in Africa ("the Illiquid Portfolio"). It is FSDEA's case that the IMA appointed QGIM as investment manager in respect of the entire $5 billion, both the Liquid and Illiquid Portfolios. It is Mr Bastos' and the Quantum group's case that the IMA was confined to the Liquid Portfolio, and that the Illiquid Portfolio was governed by separate contractual arrangements. These involved the establishment of seven limited partnerships governed by Mauritian law ("the Limited Partnership Agreements"), who are the Fourteenth to Twentieth Defendants ("the Limited Partnerships"). Each had a Mauritian limited partner, a subsidiary of FSDEA, who are the Second to Eighth Claimants, ("the Limited Partners") and a Mauritian General Partner owned and controlled by the Quantum group who are the Seventh to Thirteenth Defendants ("the General Partners").

10. The Limited Partnerships were established pursuant to seven agreements signed on FSDEA's side by Mr dos Santos in April 2014. Five Incorporation Service Agreements ("the ISAs") were made with the Fifth Defendant ("QGI Ltd"), to establish five funds to invest in various sectors in Africa. The ISAs were governed by Angolan law and provided for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language. Two Consultancy Agreements ("the CAs") were made with the Sixth Defendant ("QGAI") in relation to the establishment of two further funds to invest in the hotel sector and in infrastructure projects. Each of the Limited Partnerships had a management agreement with the Fourth Defendant ("QGIAM") under which the latter was entitled to an annual management fee of 2% (infrastructure) or 2.5% (other funds) plus in each case 20% above a rate of return of 8%.

11. The US$5 billion was paid to Northern Trust over a period concluding in December 2014. The Liquid Portfolio was held in accounts in FSDEA's name. QGIM was the asset manager which exercised the investment decision making and discretion from its base in Switzerland; Northern Trust's role was executory and as custodian of the investments. FSDEA had visibility over the Liquid Portfolio held in accounts in its name, and received regular investment reports in relation to the portfolio from QGIM.

12. The US$3 billion in the Illiquid Portfolio was transferred to accounts in the name of the Limited Partnerships at Northern Trust. Part of FSDEA's complaint is that it and the Limited Partners had no visibility or control over the monies in those accounts, which were under the control of the General Partners exercising their powers of management in relation to the Limited Partnerships. Only part of this had been invested by the time of the freezing order. Approximately US$2.27 billion remained at Northern Trust in liquid form at the time of the WFO, and has been secured. The balance, apart from deduction of fees, was paid into a number of investment projects of the kind envisaged, including projects controlled by Mr Bastos. For example, it is said that the hotel partnership (the Eighth and Fifteenth Defendants) invested US$157 million in a hotel project in Angola in which Mr Bastos had an interest (although this figure is difficult to reconcile with Table 4 of the EY Report – defined in paragraph 14 below); and the infrastructure partnership (the Seventh and Fourteenth Defendants) invested US$180 million into the Port of Caio in Angola, which Mr Bastos had a concession to develop. These are said to be stark examples of the conflicts inherent in the appointment of Quantum to manage FSDEA's funds with Mr Bastos able to dictate the terms of major transactions from both sides of the table.

13. In addition to the IMA and the agreements relating to the Mauritius funds, Mr dos Santos additionally committed FSDEA to some 49 other contracts with companies connected to Mr Bastos for the provision of various kinds of services (the "Service Contracts"). There is a dispute about whether services were provided to the value of what was charged by the relevant counterparties; FSDEA's case is that they were not and that the Service Contracts were another element of the conspiracy whereby Mr dos Santos permitted Mr Bastos to extract large fees from the Claimants without any proper justification. These counterparties are not Defendants and no claim is brought against them in these proceedings. The Service Contracts have not been avoided or rescinded.

14. In November 2017 details of the arrangements between the Claimants and Quantum were publicly leaked and discussed in the so-called "Paradise Papers". The Angolan government commissioned a report from Ernst & Young ("E&Y") regarding the operation of the FSDEA, which was produced on 15 December 2017 ("the E&Y Report"). Mr dos Santos was removed as Chairman of the FSDEA on 12 January 2018. Notice of termination of the IMA was given on 16 February 2018 and took effect two months later, on 17 April 2018. The Liquid Portfolio was put into the hands of a replacement investment manager. The Claimants brought these proceedings and applied for the WFO on 27 April 2018. In the light of some of the asset disclosure given by the Defendants pursuant to the WFO, E&Y updated their report on 9 July 2018 ("the Updated E&Y Report").

15. There is no evidence that Mr dos Santos benefited at all from any of the arrangements complained of. Following the termination of the IMA, the Liquid Portfolio has remained within FSDEA's control. Although FSDEA's case is that Quantum was manifestly ill qualified to undertake the investment management role of the Liquid Portfolio, there is not in fact any particularised allegation that QGIM acted negligently in the choice of investments or otherwise in the handling of the Liquid Portfolio during its time as investment manager. The complaint is not about the performance of the Liquid Portfolio investment, but about the level of fees set contractually under the IMA at 1% plus 20% above the benchmark hurdle, which EY describe in their report as "high given the size of the portfolio", a relatively slight basis for an allegation of fraud. The total of such fees over the life of the IMA was US$81.83m according to the Updated E&Y Report.

16. Accordingly the argument in respect of the WFO has focussed on the Illiquid Portfolio. The amount of the Illiquid Portfolio was US$3 billion, but at the time of the WFO some US$2.27 billion remained in the accounts in the names of the Limited Partnerships at Northern Trust in London. By letters in March 2018 Northern Trust and their solicitors had made clear to the Claimants that they would not deal with those funds without the written instructions of both sides, and would not change their position without giving the Claimants prior notification. In my view those assurances removed any risk of dissipation in justifying an order freezing that sum, which was more than two thirds of the amount frozen by the WFO. This was the subject matter of material non-disclosure on the without notice application to Phillips J, to which I return below. The Updated E&Y Report suggests that a total of US$454m was invested in projects in the seven Mauritian funds, with the balance presumably being accounted for by fees.

17. The fees alleged to have been paid to Quantum or to other Bastos related companies are set out in the Updated E&Y Report as follows (with figures in brackets being those identified in the E&Y Report which formed the basis for the without notice WFO application, where they differ):

    (1) QGIM was paid US$81.83m (US$82.965m per Table 1 or $92.48m per Table 5), under the IMA for managing the Liquid Portfolio.

    (2) Under the five ISAs QGI Ltd was paid US$26.39m in respect of the establishment of the Illiquid Portfolio funds.

    (3) A further sum of US$10m was due to QGAI for the setting up of the infrastructure and hotel funds under the two CAs, but it does not appear from the E&Y Reports that such sum was paid, although Mr Morris deposes that it was at paragraph 62 of his first affidavit, apparently on the basis that there were two earlier invoices from December 2012 from Quantum Global Wealth Management to the Petroleum Fund requesting payment of $5 million each; he does not exhibit any evidence of payment.

    (4) Under the management agreements for the Illiquid Portfolio, QGIAM received by way of annual management fees a total of US$298.13m (US$263m).

    (5) Under the Service Contracts the following companies received the following fees totalling $153m.

        Stampa QG: US$58.06m

        Tome International AG: US$40.04m

        Djembe Communications: US$9.91m (US$ 0)

        African Innovation Foundation: US$36.29m

        Uniqua Consulting GmbH: US$8.7m

18. The total fees taken by Bastos related entities are therefore put at US$559.35m (US$515m). It is worth emphasising that all these fees were in accordance with the contracts signed between the parties, and none of the contracts had been rescinded or avoided at the date of the WFO. This is not a case in which any of the Defendants are accused of extracting sums to which there was no contractual entitlement. The thrust of the complaint is the creation by Mr dos Santos of that contractual entitlement.

Jurisdiction

19. The following causes of action are asserted against the following Defendants:

    (1) against Mr dos Santos:

        (a) breach of duty under the Public Probity Law of Angola;

        (b) conspiracy to injure by lawful and unlawful means;

(c) procuring breach of contract by QGIM (see below for the breaches of contract alleged against QGIM);

(d) constructive trust: dishonest assistance of breaches of fiduciary duty by QGIM (see below for the breaches of fiduciary duty alleged against QGIM);

(2) against Mr Bastos:

(a) conspiracy to injure by lawful and unlawful means;

(b) procuring breach of contract by QGIM;

(c) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM (I take this to be the intended reference in para 12(e)(ii) of the Claim Form which in fact refers to "QGIM Ltd").

(d) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds;

(3) against QGIM:

(a) breach of clause 4 of the IMA in failing to carry out the services under the IMA with due skill and care and/or in good faith;

(b) breach of clause 14 of the IMA in failing to disclose conflicts of interest and/or procuring contracts which involved a conflict of interest, including the Luanda Hotel and Port of Caio projects;

(c) breach of the IMA in failing to invest the Liquid Portfolio "properly or at all"; although this is a pleaded head of claim, it is not supported by any evidence on these applications of any particularised negligent management or investment of the Liquid Portfolio;

(d) breaches of fiduciary duty in the respects alleged to be breaches of contract under (a), (b) and (c) above;

(e) conspiracy to injure by lawful and unlawful means;

(f) constructive trust: dishonest assistance of breaches of fiduciary duty by Mr dos Santos (in breaching the Public Probity Law);

(g) constructive trust: unconscionable receipt of any part of the US$5 billion its traceable proceeds;

(4) Against QGIAM Ltd (D4), QGI Ltd (D5), QGAI (D6) the General Partners (D7-13) and the Limited Partnerships (D14-20):

(a) conspiracy to injure by lawful and unlawful means;

(b) constructive trust: dishonest assistance of breaches of fiduciary duty by:

(i) Mr dos Santos (in breaching the Public Probity Law); and

(ii) QGIM

(c) constructive trust: unconscionable receipt of any part of the US$ 5 billion received by them or its traceable proceeds.

20. In addition, there is a proprietary claim against each Defendant in respect of any part of the US$5 billion received by them or its traceable proceeds. The basis put forward for the proprietary claim was initially the claim based in constructive trust. In the course of argument, Mr McGrath sought to support it also on the basis that FSDEA at all material times retained a proprietary interest in the funds.

21. Mr dos Santos is resident and domiciled in Angola. There is a dispute whether Mr Bastos is domiciled in Switzerland or Dubai. QGIM (D3) and QGAI (D6) are incorporated in Switzerland. QGIAM (D4) is incorporated in Mauritius and is the manager of the Limited Partnerships, which are domiciled in Mauritius as are the General Partners. QGI Ltd (D5) is a company incorporated in the British Virgin Islands.

22. The challenges to jurisdiction involve the following submissions on behalf of the Defendants:

(1) The claims against the Swiss companies, QGIM (D3) and QGAI (D6), are governed by the Lugano Convention, and those companies must be sued at their place of domicile which is Switzerland. The Claimants assert that under the Lugano Convention these claims may be brought in England. The Claimants also contend that the claims against Mr Bastos may be brought in England pursuant to the Lugano Convention on the grounds that he is domiciled in Switzerland. Mr Bastos disputes that he is domiciled in Switzerland and that jurisdiction over him is governed by the Lugano Convention.

(2) Certain of the claims do not pass the merits threshold of a serious issue to be tried.

(3) England is not the appropriate forum for the claims against the non-Lugano Defendants.

(4) Insofar as any claims would otherwise remain to be tried in England, certain of the claims are within arbitration agreements and are subject to a mandatory stay under s. 9 of the Arbitration Act 1996; and there should be a case management stay of any remaining claims pending the determination of proceedings in arbitration and/or elsewhere abroad.

Jurisdiction: the Lugano Defendants (QGIM and QGAI and query Mr Bastos)

The claims against Mr Bastos

23. The Claimants submitted that jurisdiction could be established under the Lugano Convention against Mr Bastos because he was domiciled in Switzerland. The evidence of his residence is exiguous and there is no Swiss law evidence on domicile. The weight of the evidence is that he left Switzerland to go and live in Dubai in May 2017 and has resided in Dubai since then. Accordingly the Claimants have failed to establish that at the relevant time he was domiciled in Switzerland, and jurisdiction over him falls to be established under the common law, not the Lugano Convention.

FSDEA's breach of contract claim against QGIM (D3)

24. FSDEA invokes Article 5(1) of the Lugano Convention to establish jurisdiction for this claim, which provides that contractual claims may be brought in respect of a contract for services at the place where the services were or should have been provided. The question therefore is where the services were, and were to be, provided by QGIM under the IMA. FSDEA contends that this is London where the Northern Trust accounts were held. I am unable to accept this submission. The services to be provided by QGIM under the IMA were investment management services which involved determining how the Liquid Portfolio was to be invested in various short-term investments. That management function was to be, and was, carried out in Switzerland where Quantum had its place of business. That aspect of its business was regulated and supervised by the Swiss financial authorities, as the preamble to the IMA recorded at paragraph C. QGIM had no custody of the assets, in London or elsewhere. The IMA did not identify any place for the receipt of those instructions, which only became London as a result of FSDEA's choice of custodianship, which might originally have been elsewhere than London and could at any time have been changed to a different location. On any view, therefore, it cannot be said that the IMA provided for any part of the services to be performed in London. It is true that QGIM's investment management in Switzerland in the event resulted in instructions from Switzerland to London to the custodian of the funds in London, but that does not make London the place of performance of the services to be provided under the IMA. Those services do not consist solely or even primarily of the investment instructions, but rather the investment management activity in determining what investments to make, which took place in Switzerland, as envisaged by the IMA.

FSDEA's breach of fiduciary duty claim against QGIM (D3)

25. FSDEA seeks to found jurisdiction under Article 5(3) of the Lugano Convention, which provides that a party may be sued in matters relating to tort, delict or quasi-delict in the courts of the place where the harmful event occurred, which is said to be in London where the payments out of the Northern Trust accounts occurred. However I accept Mr Edey QC's submission that the breach of fiduciary duty claim is properly characterised as being in a "matter relating to contract" so that allocation of jurisdiction falls to be determined in accordance with Article 5(1), not Article 5(3); and that accordingly Switzerland is the allocated jurisdiction for the same reason as for the contractual claims under the IMA. This is because the equitable claim for breach of fiduciary duties depends upon the existence of the IMA: the duties are said to arise by virtue of the relationship created by the IMA. The Claim Form describes them as "arising by virtue of the IMA and/or the authority thereby vested in QGIM to…handle and otherwise deal with assets belonging to the FSDEA". The position is

accurately described in Briggs on Civil Jurisdiction and Judgments 6th Edn at paragraph 2.196:

> "The answer is to be found by deciding whether the obligation which lies at the heart of the claim is rooted in an agreement between the parties, or on an allegation of wrongful behaviour which has caused loss to another. If the obligation arises from the unconscionable disregard of the duties of an agreement, such as those imposed upon a person who has with the agreement of the other party placed himself in a fiduciary relationship with that other, such as an agent to his principal, the matter should be seen as one relating to a contract and the fiduciary aspect of the claim as going only to define or augment the remedies available to the claimant."

FSDEA's proprietary claim against QGIM (D3)

26. A proprietary claim only exists "against" a person to the extent that that person holds property in which the Claimant is entitled to a legal or equitable interest. It is a claim to the property itself, and is only asserted against the holder of the property or one who is in a position to give effect to the proprietary interest. Accordingly, in the current context the question is whether, assuming that there is a sufficiently arguable case that QGIM holds such property, the claim to enforce the proprietary interest in respect of the property against QGIM falls within Article 5(3). Mr McGrath QC submitted that the proprietary claim fell within Article 5(3) as being in a matter relating to tort, delict or quasi delict. Mr Edey submitted that if the proprietary claim passed the threshold merits test of raising a serious issue to be tried, it did not fall within Article 5(3). He submitted that it was clear from ***Kalfelis v Bankhaus Schröder*** 189/87 [1988] ECR 5565 and ***Kleinwort Benson Ltd v Glasgow City Council*** [1999] 1 AC 153 that Article 5(3) only covered claims which gave rise to a personal liability. This submission is in my view well founded. The proprietary claim has nothing to do with any personal liability on the part of QGIM; it is a claim to property insofar as it remains in the hands of QGIM irrespective of fault; it is not based on a constructive trust (which would give rise to a claim falling within Art 5(3): see ***Casio Computer Co Ltd v S*** [2001] EWCA Civ 661 and ***Dexter v Harley*** [2001] All ER (D) 79) because dishonest assistance constructive trust claims are not proprietary: see per Lord Millett in ***Paragon Finance Plc v D B Thackerar & Co*** [1999] 1 All ER 400 at p. 409e-g.

Proprietary claim against QGAI (D6)

27. For the same reasons as apply in relation to QGIM, the proprietary claim against QGAI does not fall within Article 5(3) of the Lugano Convention and can only be brought at its place of domicile which is Switzerland.

Jurisdiction: serious issue to be tried

28. The Defendants argued that the Claimants had failed to establish a serious issue to be tried in respect of the following causes of action:

    (1) the proprietary claim;

    (2) the claim for lawful means conspiracy;

(3) the claims against Mr dos Santos in unlawful means conspiracy and dishonest assistance constructive trust;

(4) the claims by FSDEA against QGIM (D3) for breach of contract and breach of fiduciary duty;

(5) the claims by FSDEA against the general Partners and Limited Partnerships;

(6) the "cross claims" between the Partnerships, i.e. the claims by the Limited Partners against General Partners of other Partnerships, and against those other Partnerships; and

(7) some of the knowing receipt claims.

The proprietary claim

29. The Liquid Portfolio was held in FSDEA's name by Northern Trust. The proprietary claim in respect of those funds, which have been returned to FSDEA's control, is limited to the fees taken by QGIM and their traceable proceeds. So far as the Illiquid Portfolio is concerned, the funds were initially in accounts under QGIM's control at FSDEA and were transferred to accounts at Northern Trust in the names of the Limited Partnerships pursuant to written instructions from FSDEA to QGIM dated 30 June 2015 signed by Mr dos Santos which stated "The transfers doesn't [sic] cause a change in the ultimate beneficial ownership". Mr Edey submitted that there could be no proprietary claim for property which was transferred pursuant to contracts where those contracts had not been avoided or rescinded. He accepted that the Claimants retained a beneficial interest in the investments in the Illiquid Portfolio, but submitted that those interests were held on the terms of the Limited Partnership Agreements which were long term contracts (of 10 or 15 years), such that there was no immediate entitlement to possession. He submitted that property passed in full under the contracts (the IMA and the Limited Partnership Agreements), and unless and until they were avoided there could be no vesting of any equitable interest in the transferor. Until very shortly before the hearing before me the Claimants had not suggested that the agreements were invalid or had been avoided, and indeed had proceeded on the basis that they remained validly in place. Mr McGrath sought to argue before me that they were void, alternatively voidable and had been rescinded. In my view Mr Edey was correct to submit that it was too late to run such an argument, which gave rise to issues of election and affirmation, and to allow the Claimants to do so would have been unfairly prejudicial to the Quantum Defendants, who would have been able to deploy arguments of election and affirmation. Accordingly the question whether there is a serious issue to be tried that the Claimants have a proprietary claim falls to be addressed on the footing that the sums transferred were paid in accordance with contracts which are not void and have not been rescinded.

30. On that footing, Mr McGrath submitted that where a contract split the legal and equitable interests so as to confer a legal title whilst retaining an equitable title, there is no need to rescind or avoid the contract in order for the transferor to assert the equitable proprietary right to the property. That was, he submitted, the effect of the contractual arrangements in this case because the funds were always invested for benefit of the Claimants who retained an equitable interest throughout; the Liquid Portfolio was held in accounts in the name of FSDEA and funds for the Illiquid

Portfolio were transferred into the Limited Partnership accounts by instructions from FSDEA to QGIM which expressly purported to retain "ultimate beneficial ownership" in the funds. This argument does not work for the fees in respect of the Liquid Portfolio, where it was intended by the IMA that legal and beneficial interest in the fees should pass to QGIM. However, the main issue on this point was whether there was a sufficiently arguable proprietary claim to the sums transferred in the Illiquid Portfolio because the challenge is aimed at the proprietary element of the WFO, which is confined in amount to $3 billion to reflect such transfer. So far as that is concerned I was referred to a number of authorities on each side. This is an issue which raises difficult questions of law which will have to be applied to the facts once established. I am inclined to the view that the Claimants have met the relatively low merits threshold of a serious issue to be tried. However I do not propose to explore the legal issues in this judgment which would fall to be addressed in the light of the fact specific circumstances once established, nor to express a concluded view, because in the event this issue is not determinative of the outcome of the applications which I have to decide. I shall assume, without deciding, that there is a serious issue to be tried for the proprietary claim advanced.

Lawful means conspiracy

31. The Claimants submitted that it was sufficient to establish the necessary predominant intention to injure that the predominant intention of the Defendants was to benefit themselves in circumstances in which the benefit could only be at the expense of the Claimants, relying on what was said by the Court of Appeal in ***Revenue and Customs Commissioners v Total Network SL*** [2008] 1 AC 1174 at [34]. The passage relied upon does not support the suggested principle, and the suggested principle is inconsistent with the essence of the tort which is that if lawful means are deployed a conspiracy can only be unlawful if it involves a predominant intention to injure the claimant. If the predominant intention is to benefit the conspirators, by definition the predominant intention cannot be to injure the claimant, even if such injury is the inevitable result and even if it is intended. The lawful means conspiracy does not surmount the merits threshold of raising a serious issue to be tried on the facts alleged by the Claimants in this case, which clearly involve an allegation that the alleged conspirators were motivated by a desire to benefit themselves without any animus against the Claimants.

Claims against Mr dos Santos in conspiracy and dishonest assistance

32. Mr Anderson QC accepted that there was a serious issue to be tried (and a good arguable case) that Mr dos Santos was in breach of the Public Probity law of Angola, but contended that the merits threshold was not met for the claims in conspiracy and dishonest assistance. He submitted that under Article 4 of the Rome II Convention the question was governed by Angolan Law; and that there was no evidence that Angolan law recognised such causes of action. The difficulty with this submission is that the evidence before me simply did not purport to address the question whether Angolan law recognised a liability based on facts which would in English law establish liability for unlawful means conspiracy or dishonest assistance constructive trust. Accordingly, even if the appropriate law is Angolan law, the Court proceeds on the evidential assumption that Angolan law does not differ from English law in the absence of evidence to the contrary. I therefore reject Mr Anderson's submission on this point.

FSDEA claims against QGIM (D3)

33. This argument is of no consequence to the current application because jurisdiction for these claims is governed by the Lugano Convention, which involves no merits threshold, and in any event if there were otherwise jurisdiction, they are governed by the arbitration clause in the IMA (and Mr McGrath confirmed that he was not seeking to maintain any aspect of the WFO under the jurisdiction conferred by s. 44 of the Arbitration Act 1996). Since any such claims are a matter for arbitrators to decide, I decline to express any views on their merits.

FSDEA claims against the Limited Partnerships and the General Partners

34. The argument in respect of these claims was that any loss had been suffered by the Limited Partners, not FSDEA, and that a claim by FSDEA fell foul of the principles that a shareholder may not sue for reflective loss. Mr McGrath countered that the principles were not applicable to the facts of this case, in part at least because FSDEA's claim was in its capacity as the source of the funds and transferor to the Limited Partners, not merely as shareholder in the Limited Partners. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

The cross claims

35. Mr Edey's argument was that there is no evidence that any of the Limited Partnerships or General Partners said or did anything in relation to the project outside its own partnership, and that the Limited Partner of one partnership could not have been caused a loss by anything done by the General Partner or the Limited Partnership itself in another partnership. Mr McGrath's response was that if there was as alleged, a single conspiracy which the General Partners and Limited Partnerships joined, they became liable as conspirators for the losses suffered by any of the victims of the conspiracy, irrespective of their own acts of participation. Again this issue raises questions of law which I decline to decide in the absence of the necessary establishment of the facts, because it is unnecessary to do so. The outcome of this issue is not determinative of the outcome of any aspect of the application. I will assume, without deciding, that there is a serious issue to be tried.

Knowing receipt claims

36. Mr Edey's argument was that the only receipts which could found a knowing receipt constructive trust claim were for the Liquid Portfolio such fees as QGIM received from the US$2 billion Liquid Portfolio; and in respect of the Illiquid Portfolio, the only relevant receipts were by the General Partners of their US$1,000 per annum in fees, and by QGAIM of its fees under the management fees due under the Limited Partnership Agreement; and that there was no wider knowing receipt claim in respect of the US$3 billion because although the Limited Partnerships did receive the US$3 billion, they did not do so beneficially: they held the funds for the Limited Partners on the terms of the Limited Partnership Agreements. The contrary is plainly arguable and on this aspect the Claimants have established a serious issue to be tried.

Jurisdiction: the arbitration agreements

37. By the conclusion of the hearing it was common ground that insofar as there would otherwise be jurisdiction, the following claims must be stayed in favour of arbitration under the mandatory provisions of s. 9 Arbitration Act 1996:

(1) All FSDEA's claims against QGIM (D3) are governed by the arbitration clause in the IMA, which provides for arbitration to take place in Portugal. QGIM commenced an arbitration by a Request dated 18 June 2018. It is common ground that those claims must be the subject matter of a mandatory stay under s. 9 of the Arbitration Act 1996 to the extent that there is otherwise jurisdiction over them. On my findings this catches the claims in conspiracy, dishonest assistance and knowing receipt, the others being claims in respect of which the Claimants have failed to establish jurisdiction under the Lugano Convention in any event. I am inclined to think that the seat of the arbitration is Portugal, not England, but since this does not affect the outcome of anything I have to decide I prefer to express no concluded view.

(2) All FSDEA's claims against QGI Ltd, which are governed by the arbitration agreements in the ISAs which provide for arbitration in Luanda, Angola under ICC Rules conducted in the Portuguese language.

(3) All the claims by the Limited Partners against their General Partners are governed by the arbitration agreement in the Limited Partnership deeds which provide for arbitration in Mauritius. The General Partners and Limited Partnerships commenced arbitrations against the respective Limited Partners in Mauritius on 8 May 2018. The Limited Partners have disputed whether the Partnerships are entitled to invoke the arbitration clause. In the light of my earlier conclusions, I do not need to resolve that question.

Jurisdiction: Forum conveniens

38. This is not a case where fragmentation can be avoided. The starting point is that there are arbitrations in Mauritius which involve the disputes between the Limited Partners and the General Partners in relation to the Illiquid Portfolio, to which the Limited Partnerships are arguably properly joined parties. There are also winding up proceedings commenced by the Limited Partners in Mauritius which will raise some of the issues which arise in these proceedings. There is no jurisdiction under the Lugano Convention over certain of the claims against QGIM (D3) and over the proprietary claim against QGAI (D6), who must be sued in Switzerland; and in any event, even were jurisdiction otherwise to be established, any claims by FSDEA against QGIM would have to be stayed in favour of arbitration in Portugal. It is FSDEA's case that the IMA (and therefore its arbitration clause) governs the Illiquid as well as the Liquid Portfolio. Accordingly, on the Claimants' case, all the tortious and contractual claims by FSDEA against QGIM will have to be dealt with in that arbitration. On any view, and even if the arbitration is confined to the issues in relation to the Liquid Portfolio, that will involve an examination of the circumstances in which the Quantum group came to be appointed, which raises many of the issues at the heart of the dispute in these proceedings.

39. It is against that background that the Claimants bear the burden of establishing that England is clearly and distinctly the appropriate forum: ***Spiliada Maritime Corporation v Cansulex Ltd*** [1987] AC 460.

40. There are weighty factors in favour of Angola as the appropriate forum:

(1) The claim is brought by the sovereign wealth fund of Angola and its special purpose subsidiaries. Of the two personal Defendants, Mr dos Santos is resident in Angola, and Mr Bastos, although resident in Dubai, is currently confined to Angola because his passport has been confiscated. These are the protagonists whose conduct is at the heart of the issues between the parties.

(2) The central ingredient in most of the causes of action against most defendants is the allegation that Mr dos Santos was in breach of the Public Probity Law in granting the contracts to the Quantum Defendants and Bastos-related entities. This is the foundation for the claims in unlawful means conspiracy, dishonest assistance, knowing receipt and the proprietary claims. These allegations of breach are of what occurred in Angola and are clearly more suitably tried in Angola, not only because they are governed by Angolan law, but also because the Public Probity Law imposes duties expressed in terms of generality which take their content from their Angolan context. Article 3 provides: that "*Public agents should, in performance of their duties, be guided by the following principles: (a) principle of legality (b) principle of public probity (c) principle of competence (d) principle of respect for public property (e) principle of impartiality (f) principle of the pursuit of public interest….(j) principle of prudence (k) principle of loyalty to public institutions and entities and to the higher interests of the State.*" The subsequent articles develop these principles, again using language of some generality (e.g. "*the highest criteria for public professionalism*"). These duties are properly to be interpreted in accordance with the cultural standards and norms of Angolan public life at the time, which is clearly a matter on which the Angolan court is better equipped than the English Court.

(3) The projects of which complaint is made include major projects in Angola, including in particular the hotel project in Luanda and the Port of Caio project.

(4) The witnesses or potential witnesses likely to be of central importance, apart from Mr Bastos and Mr dos Santos, will be those involved in the appointment of Quantum and supervision in Angola of its activities, including Dr Manuel, Mr Gonçalves, Mr Fortunato and Mr Gago, who are to be found in Angola.

(5) Similarly, the predominance of the documentary evidence is likely to be found in Angola, and some will be in Portuguese.

41. There are also factors in favour of Mauritius. In particular the claims are in part governed by Mauritian law, and the evidence will have to be gathered and deployed in Mauritius for the purposes of the Mauritian arbitrations and the winding up proceedings.

(1) The Limited Partnership Agreements contain a Mauritian governing law term which is of very wide ambit, such that it will govern both contractual and non-contractual claims between the Limited Partners and the General Partners.

(2) The Limited Partnership Agreements contain Mauritian arbitration clauses and arbitrations have been commenced in Mauritius. The arbitrations will cover much of the ground which is in issue in these proceedings, although Mr dos Santos and Mr Bastos will not be parties.

(3) The winding up proceedings commenced by the Limited Partners in the Mauritian courts involve allegations covering almost exactly the same ground as the allegations in relation to the Illiquid Portfolio in the current proceedings. Such winding up proceedings were foreshadowed at the time of the without notice application and have subsequently been commenced.

(4) The Claim Form in these proceedings does not contain a claim by the Limited Partners against Mr dos Santos for breach of duty, but the Claimants' skeleton argument asserts that such a claim clearly exists for breach by Mr dos Santos of his duties under Mauritian law, and states that the Claimants will seek to amend the Claim Form to include such a claim by the Limited Partners, and ancillary claims for dishonest assistance in relation to such breaches.

42. Some factors also point towards Switzerland. QGIM, the Third Defendant and party to the IMA under which, on FSDEA's case, the entirety of the management took place, is a Swiss company. QGIM is based in and operating from Switzerland. Indeed this is the centre of gravity of all the Quantum group and its activity. The investment management took place from Quantum's offices in Switzerland.

43. Against this there is relatively little which points to England as an appropriate forum.

(1) None of the parties is resident or incorporated in England or carries on business here, other than Northern Trust whose stance is essentially neutral. At the heart of the case against all the Defendants is the personal relationship between an Angolan individual, Mr dos Santos, and a Swiss/Angolan individual, Mr Bastos; breach of Angolan duties owed by the Angolan individual; and Mr Bastos' alleged knowledge of or collusion in that breach (which is relied on as that of all the corporate Quantum Defendants).

(2) None of the relevant witnesses or documents are located in London. (save to the extent brought there for the purpose of these proceedings, and save possibly for a few Northern Trust documents). Much of the relevant evidence, both of witnesses and in documents will originate from Angola and Switzerland. Most of the evidence will have to be collected and deployed abroad: in Portugal in any arbitration with QGIM; and in Mauritius in relation to the partnership arbitrations and the winding up proceedings.

(3) The fact that the Liquid Portfolio and Limited Partnerships bank accounts were held at the London branch of Northern Trust provides only a slight connection with England for the purposes of determining the appropriate forum. The location of the accounts under the Master Custody Agreement was a matter of choice for FSDEA, not a matter of contractual agreement with Mr Bastos or

the Quantum group. Under the IMA, FSDEA could have chosen to establish the custodian accounts at any bank anywhere, for example in New York. The funds were dollar denominated and the Liquid Portfolio was invested in a range of international securities in the usual way. The centre of gravity for the allegations in relation to investment of the Illiquid Portfolio is not in London, from where the funds were to be transferred to be invested in projects, but in the places where the events giving rise to the complaints arises: Switzerland for the decision to set up Mauritian limited partnerships and Angola or elsewhere in Africa in relation to investment in projects where a conflict of interest is complained of. The fact that a London branch of a US Bank was chosen by FSDEA as the place of custody is of no significance to the issues in the case. Nothing turns on the place at which the funds or securities were held.

(4) Some of the issues in the case are, at least arguably, governed by English law. Others, however, are not. Angolan law governs the breach of duty allegation by FSDEA against Mr dos Santos which is at the heart of the complaint. Mauritian law governs the claim intended to be added by amendment by the Limited Partners against Mr dos Santos for breach of duties owed under Mauritian law. Mauritian law governs the Limited Partnership Agreements. The fact that English law governs the IMA is of no significance because there is no jurisdiction over the contractual claims against QGIM which will in any event have to be determined in arbitration in Portugal.

44. For these reasons I conclude that the Claimants have failed to establish that England is clearly or distinctly the appropriate forum. Accordingly, the Court should not exercise jurisdiction over any of the Defendants in relation to any of the causes of action, save those governed by the Lugano Convention (D3 and D6).

Conclusion on jurisdiction

45. The upshot of my conclusions is that there is only a small rump of causes of action in respect of which jurisdiction is established and which do not fall to be stayed for arbitration, namely some, but not all, of the claims against the Lugano Convention Defendants, QGIM (D3) and QGAI (D6). What remains are the claims against QGIM by the Limited Partners in unlawful means conspiracy, dishonest assistance and knowing receipt, (but not any of the claims by FSDEA against QGIM, for which jurisdiction under the Lugano Convention is not established and which are governed by the arbitration clause in the IMA); and the claims by the Limited Partners and FSDEA against QGAI (D6) in those causes of action.

46. The Defendants submitted that there should be a case management stay in respect of any claims which fell into this category. It was agreed at the hearing that arguments in respect of a case management stay should be deferred until after I had given judgment identifying which of the claims might be affected.

The WFO

47. There were essentially four grounds on which the Defendants sought to have the WFO set aside and not continued:

(1) There was no jurisdiction over the claims. FSDEA did not seek to support the relief as appropriate in aid of foreign proceedings. Nor was the application made under s. 44 Arbitration Act 1996. At one stage Mr McGrath did seek to invoke this latter jurisdiction and a s. 44 application was belatedly issued on 25 July 2018, the second day of the hearing. Mr Edey submitted that such an application was made far too late for it fairly to be addressed, correctly in my view, and it was not ultimately pursued by Mr McGrath.

(2) There is no good arguable case in respect of some of the causes of action, including, most relevantly for present purposes, the proprietary claim.

(3) There was a breach of the duty of full and frank disclosure.

(4) FSDEA has not established a sufficient risk of dissipation.

(5) In addition, the Defendants submitted that none of the arguable causes of action raised a good arguable case of a claim to $3 billion or any identified sum.

WFO: No Jurisdiction

48. I have held that the court has no jurisdiction over the claims save for a small rump of some of the claims against QGIM (D3) and QGAI (D6), in respect of which there is an as yet undetermined application for a case management stay. I shall reserve questions of whether this would be a sufficient ground to discharge the WFO or to refuse to continue it, if necessary, until after determination of the question whether there should be a case management stay.

WFO: No good arguable case

49. Although there is a distinction between the merits threshold of a serious issue to be tried, for the purposes of jurisdiction, and that of a good arguable case which is required for the purposes of a freezing order, the Defendants submitted that it made no difference on the facts of this case, and asked me to treat the causes of action as standing or falling together under both tests. Accordingly, my earlier conclusions on the question whether there is a serious issue to be tried in relation to the various impugned causes of action should be treated as conclusions to the same effect in relation to whether the Claimants have established a good arguable case for the purposes of the WFO, including the conclusion that I will assume, without deciding, that the merits threshold is reached in respect of the proprietary claim.

WFO: Non-Disclosure

50. The applicable principles are well settled. It is sufficient for present purposes to quote the summary of Ralph Gibson LJ in ***Brink's Mat Ltd v Elcombe*** [1998] 1WLR 1350 at 1356F to 1357G:

> "In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the

principles relevant to the issues in these appeals appear to me to include the following.

(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 K.B. 486, 514, per Scrutton LJ.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy M.R., at p. 504, citing *Dalglish v. Jarvie* (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92—93.

(5) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure … is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in *Bank Mellat v. Nikpour*, at p. 91, citing Warrington L.J. in the *Kensington Income Tax Commissioners*' case [1917] 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the

> sense that the fact was not known to the applicant or that its relevance was or perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> (7) Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes afforded:" per Lord Denning *M.R. in Bank Mellat v. Nikpour* [1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms.
>
> > "when the whole of the facts, including that of the original non disclosure, are before [the court, it] may well grant … a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell L.J. in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc.*, ante, pp.1343H-1344A."

51. Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process.

52. The second is that although the principle is often expressed in terms of a duty of disclosure, the ultimate touchstone is whether the presentation of the application is fair in all material respects: see Robert Walker LJ in ***Memory Corporation v Sidhu*** (No 2) [2000] 1 WLR1443, citing formulations from, amongst others, Slade LJ in ***Bank Mellat v Nikpour*** [1985] FSR 87, 92, Bingham J in ***Siporex Trade v Comdel Commodities*** [1986] 2 Lloyd's Rep 428, 437 and Carnwath J in ***Marc Rich & Co Holding v Krasner*** (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides. The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is

not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.

53. Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to disclosure of documents (see CPR PD31A and ***Hedrich v Standard Bank London Ltd*** [2008] EWCA Civ 905).

54. In this case I have concluded that there has been a breach of the duty to make a fair presentation of the case in eight material respects.

(1) The selection of Quantum

55. There was non-disclosure and an unfair presentation in respect of the Quantum selection process in a number of ways.

56. The Claimants failed to disclose that Quantum had been selected as investment manager for the Petroleum Fund in July 2012 prior to Mr dos Santos being chairman of that organisation (which subsequently became FSDEA), and at a time when Dr Manuel was Chairman. Dr Manuel is not alleged to be a conspirator or guilty of any wrongdoing. QGIM had entered into an Investment Management Agreement with Quantum on 13 July 2012, signed by Dr Manuel. Further, Quantum entities had been engaged as managers in relation to private equity investments in infrastructure and hotel projects under two engagement letters dated October 2012, each signed by Dr Manuel.

57. Quantum had submitted detailed written proposals in May 2012 in relation to those appointments. There were three presentations dated 18 May 2012, one concerned with liquid investments and two in respect of equity investments, in infrastructure and hotel projects respectively. None were by Mr Bastos. The presentation in relation to the Liquid Portfolio was by Gareth Fielding, QGIM's Chief Investment Officer since 2008, with 25 years' experience in asset management including with Merrill Lynch and Rothschild. The 49-page document was detailed and apparently thorough. The 29-page written presentation of 18 May 2012 in relation to infrastructure was by QGIM's head of private equity, Ulrich Otto, who had more than 10 years' experience of private equity investments involving assets which reached more than $2 billion in value, and sat on the supervisory board of a company with revenues of US$ 1 billion.

It contained a detailed investment strategy and identified the key terms of the proposed commitment and fee structure. A similarly full presentation was made in relation to hotel projects by Mr Antoine Castro, Quantum's managing director of Real estate, with extensive prior experience in that field with Morgan Stanley and a Goldman Sachs group company. There are two versions of his detailed presentation now before the court, one of 88 pages and the other of 108 pages.

58. There was no attempt to put those presentations before the Judge on the without notice application, nor the circumstances of that selection exercise, nor the 2012 IMA or other appointments, nor to address whether that selection was made otherwise than on merit. Instead Mr Morris' first affidavit and the skeleton argument before Phillips J gave the misleading impression that the selection had been entirely that of Mr dos Santos and made in 2013 when he was Chairman.

59. This error resulted in further misleading aspects to Mr Morris' evidence. For example, at paragraph 94(a) of Mr Morris' first affidavit he referred to a contract and addendum with Stampa and Equus for IT services. This was one of the services contracts put forward as an example of companies associated with Mr Bastos extracting unjustifiably large fees. Mr Morris emphasised in this paragraph of his affidavit that the addendum was signed on 18 December 2012, 11 months before FSDEA entered into the IMA, and that it amended an earlier contract of 16 August 2012, thereby giving the impression that Mr dos Santos was already improperly conferring benefits on Mr Bastos before Quantum was even appointed to manage the sovereign wealth funds, and before any selection process; whereas the true position was that this was after the selection process and at a time when Dr Manuel was chairman. Moreover, Mr Morris did not draw attention to the fact, as he should have done, that the August 2012 contract and December 2012 addendum were each signed not by Mr dos Santos but by Dr Manuel. The sub-paragraph also made an unfortunate error in referring to the fees under the addendum contract as being $44 million for 6 months, amounting to $264 million. That would indeed have been breathtaking, to use the epithet applied to fees in the Claimants' skeleton argument, but was wrong: the fees were $44,000 monthly, giving a total of $264,000 for 6 months.

60. It was also misleading to characterise the process in the skeleton argument as "oddly opaque" and "not documented by anything other than a single matrix". Mr Morris' affidavit described the matrix as "the extent of the selection process". Again, this ignores the selection process in 2012 which involved detailed presentations from Quantum. The false impression is reinforced by the assertion at para 31 of the E&Y report that no proposals were requested from any of the four potential managers, i.e. including Quantum, which implied that there had never been a formal proposal from Quantum.

61. Moreover, Mr dos Santos gave a fairly lengthy account of the selection process and the rationale for appointing Quantum in a letter of 27 September 2013 addressed to Jersey trustees who were then contemplated as being involved in the management of the fund and who had identified questions asked by the Jersey Financial Services Commission. This letter was not put in evidence before the Judge and its existence and contents were not referred to.

62. These were important matters. One of the central elements of the case against the Defendants was that it was Mr dos Santos as Chairman of FSDEA who had dishonestly procured the appointment of Quantum because of his close association with Mr Bastos. The fact that the appointment initially took place under Dr Manuel's chairmanship and following detailed presentations by Quantum puts a significantly different complexion on the selection.

63. Mr Morris has said in his subsequent evidence that he was unaware of the 2012 appointment. However it seems likely that the existence of the prior appointment, the 2012 IMA other appointments, and the 2012 proposals were known to those at FSDEA with conduct of the case; and to Mr Gonçalves who was on the Board throughout the period, remains an adviser to FSDEA and who provided a witness statement subsequently; I say he was on the board throughout the relevant period because although in his own statement he describes himself as being on the board from October 2012, Mr Morris in his fifth affidavit says he was on the board from March 2012; and Mr Gonçalves refers to seeing one of the presentations in May 2012 at paragraph 26 of his subsequent witness statement; it seems likely that the circumstances of the 2012 appointment and presentations were known also to Mr Gago, working in a role equivalent to company secretary from late 2013 and on the board from 2016, from whom Mr Morris did take instructions at the time of the without notice application; I say that because Mr Gago records in his witness statement that he was told about how the Petroleum Fund had operated in 2012 by Dr Manuel and Mr Gonçalves and gives evidence about it. At the least, the circumstances of the 2012 presentations and appointments are matters which reasonable enquiries should have revealed. The 27 September 2013 letter should have been identified and disclosed.

(2) Quantum's track record and suitability

64. Mr Morris described Quantum in his first affidavit as "an unknown and untested entity". In paragraph 14 of the skeleton Quantum was described as having a "limited track record" with a capitalisation of only 100,000CHF and contrasted with other candidates of the calibre of UBS, Standard Bank and IFC Asset Management with "billions of dollars under management". It should have been explained to the Judge that:

(1) Quantum had already been appointed under a selection process under Dr Manuel's chairmanship in 2012, in which Quantum had identified in its 2012 proposals the apparently well qualified staff with extensive relevant asset management experience who were employed by Quantum, and the independent board members apart from Mr Bastos who were of apparent eminence and experience.

(2) Quantum had had a capitalisation of CHF 1 million since 2007, as the detail in the E&Y Report accurately recorded.

(3) Quantum had managed assets for the Banco Nacional de Angola, the Angolan state bank, of $2.3 billion in liquid assets and a further $1billion in private equity investments in real property in conjunction with Jones Lang Lasalle. Mr Morris mischaracterised the position at para 39 of his first affidavit by saying that "It appears from the documentation generated for the purposes of

> Project Rainbow…that Quantum Global at least at one point managed several hundred US$ (sic) for Banco Nacional de Angola and has unquantified business interests elsewhere in Africa but had never at the date of its appointment (and indeed has never at any point since) managed funds, even in the aggregate, approaching the volume of funds entrusted to it by the FSDEA".

65. Again, these were important matters which were known to the Claimants (and their legal advisers in relation to the capitalisation of Quantum) and in any event ought to have been known to the legal team because reasonable enquiries would have revealed them. Mr Morris could have spoken to senior members of staff at Banco Nacional de Angola, as he did when subsequently preparing his fifth witness statement. Again, the suitability of Quantum for the role, or absence of it, was at the heart of the allegations on which the Claimants' case is founded.

66. There was, additionally, an unfortunate mischaracterisation in relation to Mr. Bastos' criminal conviction in Switzerland. In particular, it was described as having given rise to a suspended sentence and a fine, giving the impression that it had warranted a suspended custodial sentence; whereas, as was apparent from the material available to Mr Morris, the sanction was a suspended sentence ***of*** a fine, i.e. a fine payment of which was suspended and which in the event Mr Bastos was not required to pay (save in respect of the small sum of CHF 4,500 which was not suspended).

(3) Transparency and supervision

67. The appointment of Quantum, and its activities in carrying out the investment management, were transparent and regularly reported on to an audience within FSDEA beyond Mr dos Santos. The Claimants did not disclose or draw to the Judge's attention, as they should have done, the following.

68. The Board of FSDEA was by Presidential Decree overseen by two other state bodies, namely an Advisory Council and a Fiscal Council. The Advisory Council is by its remit a consultation and auditing body of the President whose responsibilities include supervising the FSDEA Board and advising the President on the FSDEA's policy and investment strategy. It includes the Finance Minister, the Minister of the Economy, the Minister of Planning and Territorial Development, and the Governor of the National bank of Angola. Its role was not specifically addressed in the evidence or argument before Phillips J apart from an inaccurate reference in the E&Y report suggesting that the body never met, inaccurate because Mr Gonçalves' later evidence is that it met at least once. More significantly for present purposes, the second body, the Fiscal Council, was responsible for regular assessment of FSDEA's performance and in particular for overseeing compliance management, certifying the value of FSDEA's funds, verifying FSDEA's accounts and reports and reporting any irregularities to the authorities. It is clear that this body was indeed involved in oversight of FSDEA: for example, it had detailed reports on the Illiquid Portfolio from Deloitte.

69. Moreover, FSDEA's accounts were audited on an annual basis by Deloitte.

70. Quantum also provided regular reports on the investments to FSDEA, including monthly portfolio reports for the Liquid Portfolio and quarterly reports for the Illiquid

Portfolio which contained the sort of detailed information one would expect from investment managers.

71. None of this was addressed in the Claimants' evidence or argument or drawn to the Judge's attention, although it must have been known to those at FSDEA with conduct of the case, and in any event ought to have been apparent from reasonable inquiries. Again, it was of importance to the case being advanced.

(4) The limited partnership model

72. Fourthly there was an unfair presentation of the use of the limited partnership model in the Illiquid Portfolio as evidence of impropriety. The repeated thrust of the complaint was that this was an inappropriate structure and had been chosen to eliminate FSDEA's control and visibility. It is now accepted that Mauritian limited partnership structures are commonly used as private equity investment vehicles. The Judge's attention was not drawn to the fact that the E&Y report described the structures used for the Illiquid Portfolio as based on a standard model and that "such models are commonly used in P[rivate] E[quity] and venture capital schemes and as collective investment vehicles and generally offer limited liability without the rigidity imposed by company law."

73. In argument before me, the thrust of the complaint changed to one that limited partnerships were only suitable vehicles for collective investment schemes, i.e. where there was more than one investor. But this was not the position taken by Deloitte in its audit reports which made no criticism of the structure, nor that of the Mauritian authorities in relation to 5 of the 7 Limited Partnerships. The Judge should have been told that both E&Y and Deloitte had not treated the structures used as inappropriate and that they were a commonly used model. This was obviously important given the criticisms which were being made of the structure.

(5) Conflicts of interest

74. There was non-disclosure in relation to the allegation of conflicts of interest in the projects in the Illiquid Portfolio. Mr Morris asserted in his first affidavit that no disclosure had been made of any conflicts of interest to FSDEA. This was not true. On 17 August 2016 Quantum wrote to FSDEA setting out potential conflicts of interest, attaching a conflicts of interest policy, and expressly disclosing transactions where a conflict could be said to arise. FSDEA granted a waiver in relation to the disclosed projects and conflicts dealt with in accordance with the policy. The disclosure included a hotel project in Luanda in which $157m had been invested which was the subject matter of particular criticism by Mr Morris in his first affidavit. The letter and waiver were signed not only by Mr dos Santos but also by Mr Fortunato, against whom no allegations of impropriety are made.

75. The 17 August 2016 letter was amongst the documents in Norton Rose Fulbright's possession at the time of the without notice application. Mr Morris says that he and the team preparing the application were unaware of it because it was part of a set of over 750 documents which his firm held as a result of their involvement in Project Rainbow, not all of which had been reviewed. Mr McGrath accepted that the letter ought to have been disclosed had Norton Rose Fulbright been aware of it, but sought to excuse its non-disclosure on the grounds that it was reasonable for Mr Morris to

have remained unaware of it. I am afraid I cannot accept that submission. Given the gravity of the allegations and size of the freezing order being sought, it was incumbent on Norton Rose Fulbright to devote sufficient resources to examining all the documents it held which might contain relevant material, so that it could be satisfied that it could fulfil the duty to make a fair presentation if a without notice application was to be made. The Project Rainbow material fell within this category, and its size provides no excuse for a failure to consider it all unless constraints of time or expense made this impossible. Neither applies in this case. This is especially so in circumstances in which Project Rainbow material was relied on by Mr Morris to make criticisms of Quantum: if it was interrogated for that purpose it should have been fully interrogated. In any event Mr Fortunato was obviously aware of the letter, as a countersignatory, and reasonable inquiries would have extended to all the board members in place at the relevant times, including Mr Fortunato, who it is apparent from Mr Morris' fifth witness statement was available to assist with the evidence on the application.

(6) Fees

76. There was non-disclosure and an unfair presentation in respect of the fees charged on the Illiquid Portfolio. The fees as a whole (then put at $515 million) were described as "breathtaking", "extraordinary" and "eye watering". In relation to the Illiquid Portfolio, there was further criticism that the fees were charged on the full amount of the portfolio of $3 billion, when the amount invested in the projects was only a small part of that, some $2.2 billion remaining uninvested and held in liquid funds at the date of the WFO. There are several elements to what the Judge was not told, as he should have been.

(1) As is now accepted, it is common to charge fees on the amount of committed capital rather than the amount drawn down, as E&Y noted at paragraph 54 of the report (to which the Judge's attention was not specifically drawn). In the course of the hearing before me Mr McGrath indicated that the vice in drawing down the funds and putting them in the partnership accounts was that the Claimants thereby lost visibility and control. But this was not how the matter was presented to Phillips J, which did not confine the criticism to this aspect. On the contrary it was suggested that at least one of the improper purposes of the drawdown into the partnership accounts was "to extract management fees by reference to the entirety of the US$3 billion, even though most of it has been sitting in cash (or cash like securities)": see the skeleton at para 16(5)(b), and see para 16(7) which made this criticism as a matter of "the structure by which the fees were calculated".

(2) Further, the Judge was not told what appears in paragraph 23 of Mr Gonçalves's subsequent witness statement, namely that he was aware of the reasons given at the time for the funds going into the partnership accounts, having been told by Mr dos Santos in 2013 that "the Fund was going to face increasing pressure in the economy and pressure to access its funds, so he wanted to use the funds now and put them into the private equity fund, so as not to give appetite to the state to come and use the funds." Mr Gonçalves does not suggest that this explanation gave rise to any surprise or opposition at the time.

(3) Moreover, on the Illiquid Portfolio the level of fees was 2% plus 20% above a specified rate of return for the infrastructure portfolio (which accounted for over $100m of the fees on the figures then presented) and 2.5% plus 20% in relation to the hotel and other illiquid portfolios (which accounted for the balance). The Judge did not have specifically drawn to his attention paragraph 53 of the E&Y report which described 2 plus 20 as a traditional PE fee model. Moreover, the amount of the fees which would be charged had been identified in the presentations to FSDEA in 2012, which set out the 2 plus 20 structure for the infrastructure portfolio and the 2.5 plus 20 structure for the hotel portfolio, again a matter not drawn to the Judge's attention. These fees should not have been included in the total of fees described as "breathtaking" or "extraordinary" without this being made clear. These fees accounted for over half of the total level of fees on the figures then relied on ($263.4m out of $515.84m).

77. The level of fees charged was another of the central elements of the case against the Defendants. It was particularly important that there was a full and fair presentation of the material in respect of that allegation, and the non-disclosures I have identified were important.

(7) The stance of Northern Trust

78. There was a failure to present the stance of Northern Trust fully or fairly. By letters of 23 February 2018 and 4 March 2018, Northern Trust made clear to FSDEA that it would not for the time being take any action to allow movement of funds from the accounts without joint and express written instructions from both FSDEA and Quantum and that it would give prior notification if it intended to change that position. In a letter of 16 March 2018 from Northern Trust's solicitors, largely addressed to requests for disclosure, Northern Trust reiterated that there would be no change of position without prior notification. The first two letters were referred to in a narrative section of Mr Morris' Affidavit but were not identified in the section on risk of dissipation, were not referred to in the skeleton argument and were not drawn to the judge's attention. The latter was referred to in the narrative at paragraph 147 only in respect of disclosure of documents, but was referred to at paragraph 190 of Mr Morris' first affidavit and in the Claimants' skeleton at 109(3) in sections addressing the risk of dissipation. In each case the letter was referred to by treating Northern Trust's statement that it would give prior notice as no more than a then current intention which might change without any prior warning because Northern Trust might feel obliged to follow Quantum's instructions. This was to mischaracterise the correspondence as a whole, which suggested that Northern Trust were caught between conflicting claims and would not take steps without the agreement of both parties. Had the Judge been shown the correspondence, or had it fairly summarised, he would likely have concluded that there was no real risk of dissipation of any of the $2.2 billion held at Northern Trust, and in any event not without the Claimants being given sufficient advance notification to afford an opportunity to come before the Court again in those changed circumstances if necessary. That is my view, with the result that in respect of this aspect of non-disclosure, the Claimants have not made out a case of risk of dissipation in respect of over two thirds of the amount covered by the Freezing Order.

79. This last paragraph reflects what I said on this issue when giving judgment on the non-disclosure points at the conclusion of the hearing. Since then, on 9 August 2018 Mr Morris wrote to the court enclosing a seventh affidavit in which he explains that there were without prejudice communications with Northern Trust in March 2018. He had not consulted his notes when making his first affidavit, but had gone back to them in the light of the non-disclosure arguments at the hearing before me, and was now able to tell the court, having secured a limited waiver of privilege for this purpose, that in those discussions Northern Trust had "made observations with regard to the prospect, at or around the time of preparation of [Mr Morris' first affidavit] of [Northern Trust] making a stakeholder application under Part 86 of the Civil Procedure Rules" (which it is now known was an application which was in fact prepared and about to be issued at the time of the WFO, which overtook it). As Mr Morris fairly accepts, this confirms that what he said about Northern Trust's stance in paragraph 190 misled the Court as to the level of risk that Northern Trust might pay out from the Limited Partnership accounts without notice. It is regrettable, to say the least, that this matter was only drawn to the court's attention after the hearing and after I had announced my decision in relation to non-disclosure.

(8) Other non-disclosures

80. The Defendants advanced a number of arguments that there had been non-disclosure in other more minor respects. None are of sufficient significance to warrant separate consideration, save one. In the skeleton argument put before Phillips J on the without notice application, it was said that no proprietary injunction was sought against Mr dos Santos or Mr Bastos. In fact such an order was sought in paragraph 5(5) of the draft order put before the Judge, and such an order was made by him. Mr McGrath has apologised for this mistake (the mistake being in the skeleton, not in the order sought), and submitted that because the Judge had clearly read the order with care he was not misled and appreciated that such an order was in fact being sought against Mr dos Santos and Mr Bastos. Had there been no room for argument that a proprietary order was justified against Mr dos Santos and Mr Bastos personally this error might have assumed less significance. However there clearly was room for argument on the point, not merely because there was a question whether there was a serious issue to be tried/good arguable case for a proprietary claim, but also because there was and is no evidence of receipt of any of the money or its traceable proceeds by Mr dos Santos. The vice of the mistake lay in these issues being ignored in the written and oral presentation to the Judge. This is a further significant failure to make a fair presentation of the application.

The consequences of the non-disclosure

81. I was referred to a number of authorities which contain summaries of the factors relevant to determining the consequences of material non-disclosure, including ***Congentra AG v Sixteen Thirteen Marine SA*** [2008] EWHC 1615 (Comm), [2008] 2 Lloyd's Rep 602 at [61] to [64] (Flaux J); ***In re OJSC ANK Yugraneft; Millhouse Capital UK Ltd v Sibir Energy Plc*** [2008] EWHC 2614 (Ch) at [102] to [106] (Christopher Clarke J); and ***JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*** [2014] EWHC 4336 (Ch) at [68] to [77] (Mann J); and ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) (Males J).

82. Ultimately the question is one of the interests of justice. The court will take into account the importance of the matters which were not disclosed, the nature and degree of culpability, and the adverse consequences to a claimant of losing protection against a risk of dissipation of assets. It is not sufficient to justify regranting the order that it would be justified had the material matters been disclosed and a fair presentation made, because one important factor in weighing the interests of justice is the penal element of the sanction, which it is in the public interest to apply in order to promote the efficacy of the rule by encouraging others to comply. In ***Banca Turco Romana v Cortuk*** [2018] EWHC 662 (Comm), I expressed it in this way:

> "….It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal, and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, as Christopher Clarke J observed in ***Re OJSC ANK Yugraneft v Sibir Energy PLC*** [2010] BCCC 475 at [104], to ensure that others are deterred from such conduct in the future. Such is the importance of the duty that in the event of any substantial breach the court inclines strongly towards setting aside the order and not renewing it, even where the breach is innocent. Where the breach is deliberate, the conscious abuse of the court's process will almost always make it appropriate to impose the sanction."

83. In this case the breaches taken cumulatively are serious and substantial. They do not relate to a few, merely peripheral, matters, but to numerous matters at the heart of the Claimants' case. The Court was being asked to infer a dishonest conspiracy by which Mr dos Santos sought improperly to benefit his friend and associate Mr Bastos, and a consequent risk of dissipation, from four central allegations, namely (1) that Mr dos Santos was solely responsible for appointing Quantum without any proper selection process; (2) that Quantum was not properly qualified for the task; (3) the extraordinarily high and unjustified level of fees charged; and (4) the funds being used to benefit entities owned by or associated with Mr Bastos involving an undisclosed and inappropriate conflict of interest. The non-disclosures go to one or more of these central elements of the Claimants' case. Proper disclosure would have put a very different complexion on the application, and it is no answer for the Claimants to say that the subsequent evidence put before the court to deal with them raises disputes which are sufficient to surmount the merits hurdle of a good arguable case. Occasional errors in preparing the material in a case of this size and complexity can perhaps be understood. But the unfair presentation in this case in the respects I have identified goes far beyond the odd accidental slip, and goes to the central elements of the case alleging dishonesty in support of a US$3 billion freezing order and proprietary order. There was no urgent timescale in preparing the application, which was not precipitated, as sometimes happens, by an imminent threat of movement of funds. The matter had obviously been under consideration for many months, at least since the E&Y Report in December 2017 and Mr dos Santos' dismissal in January 2018. The application evidence must have been weeks in the preparation. There is no suggestion that there was any restriction on the funding available to Norton Rose Fulbright to use a large team to make the necessary inquiries and to consider all the documents available. Given the size of the freezing order

sought, and the allegations of dishonesty being made, it was incumbent on the Claimants and their legal advisers to make the fullest inquiry into the central elements of their case if they were to proceed without notice. Although Mr Morris emphasised in his first affidavit the limits on the inquiries which had been made by his firm, that does not excuse a failure to make the necessary inquiries or the presentation of incomplete material in an unfairly one-sided way.

84. The Claimants' legal team were at pains to make clear on the without notice application that they were aware of the duty of full and frank disclosure and were purporting to fulfil it. I do not find that there was any deliberate breach on the part of the Claimants' legal team. It is less clear whether that is so of the personnel at FSDEA itself. Some, at least, of the material would have been readily available to anyone in a senior position and the necessity to disclose it obvious to anyone aware of the duty of disclosure. Because privilege attaches to communications between Norton Rose Fulbright and their clients, it is impossible to identify whether any individual was aware of the duty and deliberately failed to comply with it. What can be said, however, is that the failures were serious and should not have occurred had the duty been properly understood and complied with by the Claimants themselves. There was therefore a high degree of culpability in the failures, even though I do not find that anyone deliberately set out to abuse the court's process.

85. This is not a case in which there are any strong reasons for departing from the usual sanction for serious and culpable non-disclosure. I have concluded that for the reasons given below, the Claimants have not established by solid evidence that there is a sufficient risk of dissipation to justify a freezing order, or that the balance of convenience would justify a proprietary injunction, so that there is in fact no prejudice to the Claimants in discharging the injunction and refusing to grant a fresh one as a result of the non-disclosure. I should make clear, however, that I would reach the same conclusion even if satisfied of a risk of dissipation, as was implicit in my decision announced at the conclusion of the hearing. The breaches of duty are sufficiently serious and culpable to warrant discharging the WFO and not granting fresh relief, irrespective of the other grounds of challenge.

WFO: No risk of dissipation

86. The relevant principles have been summarised in a number of recent authorities, themselves referring to many earlier authorities, including ***National Bank Trust v Yurov*** [2016] EWHC 1913 (Comm) at paragraph [70] per Males J; ***Holyoake v Candy*** [2017] 3 WLR 1131 at paragraphs [34] and [59] per Gloster LJ; and ***Petroceltic Resources v Archer*** [2018] EWHC 671 (Comm) at paragraph [21] per Cockerill J. The following aspects are of particular relevance to the current applications:

(1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.

(2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.

(3) The risk of dissipation must be established separately against each respondent.

(4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets are likely to be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.

(5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.

(6) What must be threatened is *unjustified* dissipation. The purpose of a freezing order is not to provide the claimant with security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A freezing order is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the freezing order jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively.

Risk of dissipation: Mr dos Santos

87. There is no solid evidence of a risk of dissipation against Mr dos Santos. The accepted good arguable case of dishonesty does not support such an inference: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. There is no evidence that Mr dos Santos received anything from the investments of the Liquid or Illiquid Portfolio, whether by receipt of part of the fees or otherwise. There is no evidence to suggest that he has any control over the Liquid or Illiquid Portfolio. There is no suggestion or evidence that he has used offshore structures to hold or deal with his own assets. There is no evidence of any change of behaviour in any way by Mr dos Santos as a result of the investigations into the transactions in question, of which Mr dos Santos was likely aware for at least several months prior to the without notice application, having been dismissed on 12 January 2018. Nor is there any evidence that he conducted his affairs any differently in the politically changed environment after the summer of 2017 when his father stepped down as President. The allegation of a risk of dissipation by him is no more than mere assertion unsupported by any solid evidence. There was some suggestion in Mr Morris' evidence that his asset disclosure pursuant to the WFO was incomplete so as to support such an inference,

but his solicitor's letter of 10 July 2018 adequately addresses the points made and leaves no evidence on which the court could conclude that his asset disclosure is incomplete or inadequate.

Risk of dissipation: Mr Bastos and the Quantum defendants

88. In my view the same is true of the different circumstances of Mr Bastos and the Quantum Defendants. Again, the accepted good arguable case of dishonesty does not support an inference of a sufficient risk of dissipation: the matters complained of were transparent to other senior figures within FSDEA at the time of Quantum's selection and at all material times thereafter; and is in any event matched by a respectable case that there was no dishonesty. The particular facts of Mr Bastos' criminal conviction many years ago, for which he ultimately was fined CHF4,500, do not support the inference of a current risk of dissipation. There is no evidence to suggest that the use of offshore structures by The Quantum group was anything other than the normal and legitimate way in the group structured itself for tax, regulatory and other proper business purposes; or that Mr Bastos' personal use of such structures was not his normal modus operandi for legitimate personal reasons. There is no evidence to suggest that the fact or threat of either the claim itself, or the freezing order, has caused or would cause any of them to act in a way which differed from their previous practice so as to make any adverse effect on the claimants' ability to enforce a judgment something which could properly be characterised as "unjustified". This applies with equal force to the Mauritian Limited Partnerships: the evidence is that such structures are not unusual for private equity investments; that they were known about and not disapproved by Deloitte at the time; that the structure was not a matter of criticism by E&Y in their investigations; and that the drawing down of the full committed amounts into the accounts in the names of the Limited Partnerships so as to put them beyond the control of FSDEA was for a legitimate political objective explained at the time by Mr dos Santos to Mr Gonçalves (see above). The Liquid Portfolio and the majority of the Illiquid Portfolio are secured without the need for a freezing order. There is no evidential basis for suggesting that Mr Bastos or the relevant Quantum Defendants intend to deal with the monies invested in the projects or the projects themselves otherwise than by way of promotion of the success of those projects. There is no suggestion that Mr Bastos or the Quantum Defendants have taken any sums other than those to which there is a contractual entitlement; nor that they have dealt with them otherwise than in accordance with those contractual arrangements. The complaint about the execution of those contractual arrangements does not support a risk of dissipation. As the Claimants' skeleton argument itself put it, this is not a routine case of "hands in the till" type fraud.

89. Although this was not put in the forefront of the argument on this point, complaint was also made about the history and nature of the asset disclosure by Mr Bastos and the Quantum Defendants pursuant to the WFO; it was said that the failure to make proper disclosure was a continuing effort to hide assets in order to protect them from a judgment. Whilst the dilatory nature of that disclosure is properly the subject of criticism, full purported compliance has taken place, and there is a hotly contested issue whether there has been any failure to give a full and accurate account of the defendants' assets. It is not clear from the evidence ultimately put before me on the point that there has been any failure to attempt full compliance in a way which would provide any support for a finding of a risk of dissipation.

Proprietary injunction: balance of convenience

90. For similar reasons the balance of convenience would not lie in favour of granting a proprietary injunction. There is no evidence to suggest that Mr dos Santos has, or has ever had, any sums to which a proprietary claim could attach. So far as Mr Bastos and the Quantum Defendants are concerned, I have said that I am prepared to assume, without deciding, that the Claimants have established a serious issue to be tried, but the contrary is plainly arguable and a proprietary claim may well not be capable of being established. There is no real evidential basis for concluding that the funds in the Illiquid Portfolio which have been invested in projects have not been well invested, or that in the absence of an injunction they would not continue to be managed so as to promote their profitability. The adverse effects of the proprietary order on Mr Bastos himself appear to have been serious: he has been unable to say with certainty that any of his assets can be divorced from those received ultimately from FSDEA because his modus operandi has always been to take income through his corporate vehicles from the Quantum group as dividends so that funds have inevitably become mixed. The effect of the proprietary injunction is therefore effectively to prevent Mr Bastos having access to any funds other than the permitted living allowance.

WFO: No justification for US$ 3 billion or any amount

91. Mr Edey submitted, correctly in my view, that the quantum of any loss suffered by FSDEA could not be put at US$3 billion or anything like it. Leaving aside the payment of fees, the investment of those funds was for the benefit of the Claimants who retain their equitable interest in the assets, as is and has always been common ground. In fact, over $2.2 billion remains uninvested in accounts at Northern Trust which are sufficiently secured for the time being. Accordingly, any present quantification of the loss is limited to (1) the fees taken by the Quantum Defendants and other Bastos related companies and (2) such loss as could be established by reference to the value of the projects in which investments have been made. In relation to the fees there is an argument that the amount of loss is not the full amount of the fees but only the amount by which they exceeded what would have been charged by another investment manager or service provider in any event. I have already dealt under the heading of non-disclosure with the failure fairly to address the position of Northern Trust, which itself meant that a freezing order could not be justified in the sum of US$3 billion or anything like it. In the light of my other conclusions, it is not necessary for me to determine what, if anything, had been established as a sufficiently arguable quantum of loss for the purposes of identifying the proper amount of any freezing order or proprietary injuntion.

Conclusion

92. The WFO must be set aside and no fresh freezing order will be granted. I will hear the parties on the case management stay issues which are outstanding and the form of the order.