

On behalf of: Applicants/Claimants  
By: Robert Shaw  
No: 2  
Exhibit: RS1  
Date: 17 December 2020

**PT-2020-BHM-000017**

**IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
PROPERTY TRUSTS AND PROBATE LIST  
BIRMINGHAM DISTRICT REGISTRY**

BETWEEN:

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

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

Applicants/Claimants

- and -

**(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE  
CONSENT OF THE CLAIMANTS ON LAND AT SOUTH CUBBINGTON WOOD,  
SOUTH OF RUGBY ROAD, CUBBINGTON, LEAMINGTON SPA SHOWN  
COLOURED GREEN, BLUE AND PINK AND EDGED IN RED ON PLAN A  
ANNEXED TO THE PARTICULARS OF CLAIM**

**(2) 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 IN RED ON  
PLAN B ANNEXED TO THE PARTICULARS OF CLAIM**

**(5) ELLIOTT CUCIUREAN**

Respondents/Defendants

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**SECOND WITNESS STATEMENT OF  
ROBERT SHAW**

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**I, ROBERT SHAW**, of DLA Piper UK LLP, 1 St. Paul's Place, Sheffield S1 2JX **WILL  
SAY** as follows:

1. I am a solicitor of the Senior Courts of England and Wales and a Legal Director at DLA Piper UK LLP with day-to-day conduct of this matter under the

supervision of my partners. I am authorised to make this Second Witness Statement on behalf of the Claimants in this claim.

2. I make this statement in support of the Claimants' application dated 10 December 2020 ("**Application**") for an extension of the injunction granted by Mrs. Justice Andrews on 17 March 2020 (the "**March Injunction**") and following the directions of Mr. Justice Marcus Smith (as set out in the email from Mr. Gwilym Morris dated 14 December 2020, a copy of which is at pp 1-2 (the "**Directions Email**")).
3. The matters I set out in this statement are within my own knowledge, unless stated otherwise. The contents of this statement are true to the best of my knowledge and belief.
4. There is now shown to me a paginated clip of documents which I exhibit hereto as RS1. Page numbers without qualification refer to that exhibit.

#### **Full and Frank Disclosure**

5. At Paragraph 4(a) of the Directions Email, Mr. Justice Marcus Smith, asks that the Claimants submit further evidence on points that they consider the Judge ought to know by no later than 10:00 am on Thursday 17 December 2020. In this regard, the Claimants' counsel had drafted a skeleton argument ahead of an anticipated oral hearing of the Application. The points below are therefore taken from that skeleton argument for the assistance of the court.
6. In respect of giving prior notice of the Application:
  - 6.1 I set out below at paragraph 13 the steps already taken by the Claimants to notify the Respondents of the Application.
  - 6.2 With the exception of the Fifth Defendant, many of the respondents cannot be identified by name, but only by description. Therefore, to the extent any of the Respondents have not been notified as required by Paragraph 4(d) of the Directions Email, pursuant to paragraph 16.2(4) of the Chancery Guide, this is therefore a case in which prior notice is not necessary.
  - 6.3 Further, as explained at paragraph 26 of my first witness statement, it was only as a result of very recent incidents at the Land that the Claimants

resolved to bring the Application. Given the potential number of respondents, this is also an application where paragraph 16.2(2) of the Chancery Guide is engaged and as I explain at paragraph 6.1 above, the Claimants have taken steps to notify the Respondents of the Application as soon as possible after receipt of the Directions Email.

7. It is difficult to see how in most cases of this kind effective notice could be given. Accordingly, it is appropriate to draw the following points which may tend against the grant of the application expressly to the Court's attention.
8. First, those in opposition to this injunction would wish, no doubt:
  - 8.1 To emphasise what they perceive to be the environmental or economic downsides of the HS2 project, which have now developed into necessity arguments in light of the Covid-19 pandemic. In other similar hearings, they have raised considerable concerns about the destruction of ancient woodland and the potential pollution of groundwater. Such matters have been considered at length already in various recent judgments (noting, in particular, Andrews J.'s judgment, and the judgment of Marcus Smith J. in the related committal proceedings – Secretary of State for Transport and High Speed Two (HS2) Limited v Elliott Cuciurean [2020] EWHC 2614 (Ch) (“**Committal**”); and, in relation to the Harvil Road injunction, David Holland QC's judgments of May 2019 (Secretary of State for Transport and High Speed Two (HS2) Limited v Persons Unknown & anor [2019] EWHC 1437 (Ch), and 4 September 2020 (no neutral citation number)).
  - 8.2 Pray in aid their human rights to expression (Art.10) and assembly (Art.11) in respect of rights to protest. These qualified rights were considered by Andrews J. when giving judgment on 17 March 2020, and by David Holland QC in his judgments.
  - 8.3 They may also wish to challenge the detail of the factual accounts of trespass to and obstruction to the land. It is not thought, however, that there could be any serious challenge to the fact of trespass or obstruction, particularly in light of the committal order in respect of the Fifth Defendant. It is striking that although Andrews J. accepted evidence of Mr Rukin that it was unlikely that any of the existing protesters associated



with the camps will engage in any future trespasses (at [34]), this appears to be exactly what has happened.

9. Second, the point may be made that the Claimants might be accused of having manufactured urgency by not bringing the substantive application before now. The Claimants do not shy away from the fact that it would have been preferable to do that, but the reasons (largely out of the Claimants' control) why that is not possible are set out in my first witness statement.
10. Third, there has been considerable recent consideration on the availability of injunctions against persons unknown in a protest context by the Court of Appeal, in: Boyd v Ineos Upstream Limited [2019] EWCA Civ 515; Cuadrilla v Persons Unknown [2020] EWCA Civ 9 and Canada Goose v Persons Unknown [2020] EWCA Civ 303. All were considered by Andrews J. (see her judgment at [18]-[19]). Canada Goose is the most recent authority on the question of injunctions against protest activities more broadly. It sets out the following guidance (at [82]), of which the Court is aware, but I set it out here for completeness:

*“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."*

- 10.1 It might be said that requirement (1) now compels the joinder of named defendants to these proceedings. The Claimants would say in response that they recognise the need to add named defendants, and that is fully what they expect to do in the Substantive Amendment application. Canada Goose would not appear to say that interim relief properly granted against persons unknown in the first place should not be permitted to continue to allow procedural steps to include named defendants to be

added. The Fifth Defendant (Mr Cuciurean) was not known when these Part 8 proceedings were commenced. The Claimants could seek to provide a list of intended named defendants at this stage, however, that list is still under review and liable to change as the Claimants seek to reduce the number of defendants. Taking that course ahead of the intended Substantive Application may therefore serve to confuse more than clarify.

10.2 The Claimants submit that the requirements (2) to (7) are otherwise clearly met in this case:

10.2.1 The definitions of the First and Second Defendants in these proceedings meet the requirements of (2).

10.2.2 There is a sufficient risk of a tort being committed to justify *quia timet* relief for the purposes of (3):

10.2.3 The Claimants have been subject to a long-running campaign of direct-action protests involving trespass on the Land and adjacent land, in opposition to HS2.

10.2.4 Various protesters have expressed intention to continue and expand their protesting activities in the future.

10.2.5 The Defendants are motivated, resourceful and not deterred by traditional security measures. My first witness statement contains substantial evidence of the protestors removing security fencing, creating relatively elaborate camps and other structures and refusing to move promptly when challenged by security or contractors on the sites.

10.2.6 The nature (especially size and varied terrain) of the sites are such that traditional security methods are unlikely, without more, to be successful. That is only going to be exacerbated whilst social distancing guidelines remain in place.

10.3 Those to be subject to the interim injunction are those falling within the definition of the First and Second Defendants from time to time, and there should be little difficulty with serving such an order in a case like this. Indeed, the March 2020 Injunction and the Committal show that service



ought to present no particular difficulty (see the judgment of Andrews J. at [15]-[16]). The injunction can be prominently displayed at the site (as proposed in the Draft Order), so anyone who might otherwise be minded to enter onto the Land or obstruct access to it is forewarned. So (4) is satisfied.

10.4 The concern in the guidance at (5) is not acute in the case of trespass, where defining the unlawful conduct is straightforward. (5) is therefore satisfied.

10.5 (6) is similarly satisfied; the description of persons unknown for the Land in the March 2020 Injunction (which is untouched in the Draft Order) uses non-technical language, is clear in its scope and application, and Andrews J. was satisfied the wording was appropriate (see her judgment at [40]) as was Marcus Smith J. in the Committal judgment at [76 - 80].

10.6 The geographical limit required in (7) is also met; it is simply the Land identified on the plan to be appended to the Draft Order. The requirement for a temporal limit is also satisfied.

11. Fourth, the Court's attention is drawn to section 12 of the Human Rights Act 1998. It provides:-

*"(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."*

11.1 The relief sought will – arguably - affect the Defendants' rights to freedom of expression (sub-section (1)). Two considerations follow:

- 11.1.1 The question, for provision of notice, is whether all practicable steps have been taken to notify “the person” against whom relief is sought (sub-section (2)). The section is not readily applicable to the situation of persons unknown, but nevertheless the Claimants will seek to take all practicable steps to draw the application to the attention of those interested, and update the Court in that regard. The steps already taken by the Claimants are explained at paragraph 13 below.
- 11.1.2 Second, the Claimants have to demonstrate that it is “likely” that they would obtain the relief they seek at trial. Andrews J. found that test satisfied on the evidence at [35]. The incidents which have happened since can only bolster the position.
12. Finally, it might be said against the Claimants that Andrews J. said at [43] that 9 months should be long enough for the Claimants to identify the persons unknown against whom they would seek final relief. In that regard:
- 12.1 As set out at paragraph 21 of my first witness statement, the number and identity of “persons unknown” can be considered to be a constantly moving target; and
- 12.2 the Claimants had thought, as explained at paragraph 36 of my first witness statement, it would not be necessary to seek final relief;
- 12.3 the judgment of Andrews J. expressly countenances an extension of time (at [44]).

### **Notification of Application**

13. In accordance with paragraph 4(b) of the Directions Email:
- 13.1 On 11 December 2020 I sent by email to the Fifth Defendant’s solicitors (at the email addresses: [nhall@robertlizar.com](mailto:nhall@robertlizar.com) and [lfrazer@robertlizar.com](mailto:lfrazer@robertlizar.com)), a copy of the Application Notice, my first witness statement and the Claimants’ proposed draft order (the “**Application Documents**”).
- 13.2 On 15 December 2020, in order to bring the Application to the attention of the First Defendants, a process server employed by Arkline Legal



Agents and instructed by the Claimants attended at the Cubbington Land and placed copies of the following documents at conspicuous locations around the Cubbington Land:

13.2.1 the Application Documents;

13.2.2 a draft order prepared by the Claimants pursuant to paragraph (5) of the Directions Email; and

13.2.3 a copy of the Directions Email.

13.3 On 16 December 2020, in order to bring the Application to the attention of the Second Defendants, the same process server attended at the Crackley Land and placed copies of the same documents as had been served at the Cubbington Land, at conspicuous locations around the Crackley Land.

13.4 The steps taken by the process server above were confirmed to me on the same day as the steps were taken by the operations team at Arkline Legal Agents.

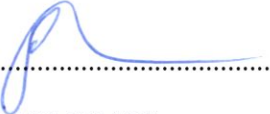
13.5 I can confirm that the Claimants are preparing letters to those individuals it is currently contemplating may be joined to these proceedings. However, as at the date of this witness statement, such letters have not been sent out and as the majority (if not all) of the persons who would receive a letter do not have, to the Claimants' knowledge, a fixed address, it is expected that it will take time to formally serve such letters (assuming the individuals concerned can be located).

13.6 The Claimants intend to file updated evidence at the hearing of the Application in January 2021 to update the Court on the steps taken to notify such individuals (and any response received).

#### **Statement of Truth**

14. I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Dated 17<sup>TH</sup> November 2020

  
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**ROBERT SHAW**

On behalf of: Applicants/Claimants  
By: Robert Shaw  
No: 2  
Exhibit: RS1  
Date: 17 December 2020

**PT-2020-BHM-000017**

**IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
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**(2) HIGH SPEED TWO (HS2) LIMITED**

Applicants/Claimants

- and -

**(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE  
CONSENT OF THE CLAIMANTS ON LAND AT SOUTH CUBBINGTON WOOD,  
SOUTH OF RUGBY ROAD, CUBBINGTON, LEAMINGTON SPA SHOWN  
COLOURED GREEN, BLUE AND PINK AND EDGED IN RED ON PLAN A  
ANNEXED TO THE PARTICULARS OF CLAIM**

**(2) 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 IN RED ON  
PLAN B ANNEXED TO THE PARTICULARS OF CLAIM**

**(5) ELLIOTT CUCIUREAN**

Respondents/Defendants

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**EXHIBIT OF  
ROBERT SHAW**

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This is the exhibit marked RS1 referred to in the second witness statement of ROBERT SHAW dated this 17<sup>TH</sup> day of DECEMBER 2020

Signed .....





On behalf of: Applicants/Claimants  
By: Robert Shaw  
No: 2  
Exhibit: RS1  
Date: 17 December 2020

**PT-2020-BHM-000017**

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BUSINESS AND PROPERTY COURTS OF ENGLAND  
AND WALES  
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CLAIMANTS ON LAND AT SOUTH CUBBINGTON  
WOOD, SOUTH OF RUGBY ROAD, CUBBINGTON,  
LEAMINGTON SPA SHOWN COLOURED GREEN,  
BLUE AND PINK AND EDGED IN RED ON PLAN A  
ANNEXED TO THE PARTICULARS OF CLAIM**

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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  
IN RED ON PLAN B ANNEXED TO THE  
PARTICULARS OF CLAIM**

**(5) ELLIOTT CUCIUREAN**

Respondents/Defendants

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**SECOND WITNESS STATEMENT OF  
ROBERT SHAW**

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Ref: RXS/RXS//0.0  
Solicitors for the Applicant

**Archived:** 17 December 2020 09:27:35

**From:** Morris, Gwilym

**Sent:** Mon, 14 Dec 2020 14:16:36

**To:** Nicola Hall; Painter, Anna; 'Adam Wagner'; 'Michael Fry'; Shaw, Robert

**Cc:** Bali, Vikas; Bassi, Aryaan; ChanceryJudgesListing

**Subject:** RE: The Secretary of State for Transport and another v Unknown and others PT-2020-BHM-000017 [DLAP-UKMATTERS.FID5480216]

**Sensitivity:** Normal

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**\*\*EXTERNAL\*\***

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Dear Sir/Madam

PT-2020-BHM-000017

Secretary of State for Transport and another v. Persons Unknown and others

I refer to the recent application of the applicants in this matter ("HS2"), issued 10 December 2020. By this application, HS2 seeks to extend the injunction granted by Andrews J (the "Injunction") until 17 April 2021. The Injunction expires, unless extended, on 17 December 2020 - that is to say, this coming Thursday.

I have placed this material before Judge, together with a non-substantive response from the solicitors for the Fifth Respondent, Mr Cuciurean, regarding his counsel's availability on Monday 21 December 2020, which was a date suggested by the Court.

This email is written in response, at the direction of the Judge:

- (1) It is regrettable - albeit understandable, given the evidence of Mr Shaw in support of HS2's application - that this application was issued as late as 10 December 2020, given the sunset provision in the Injunction. That has provided very limited time to fix a hearing that is both convenient to the Court and to interested parties.
- (2) In the event, it is clear that it will be difficult to find a date prior to 17 December that is convenient to the parties, even disregarding the Court's availability. Whilst, no doubt, a judge other than Mr Justice Marcus Smith could be found in a case of extreme emergency, the Judge is of the view that this is not such a case and that - given his involvement - it is appropriate that he deal with the matter (Andrews J having been promoted to the Court of Appeal, and this in any event being a Chancery matter in a jurisdiction for which the Judge is responsible).
- (3) There can be no question of the Judge extending the Injunction to 17 April 2021 without a hearing. That said, given the fact that the Injunction was made by Andrews J, and given the content of Mr Shaw's statement, it would (in the Judge's view) be inappropriate to allow the Injunction to lapse without more. In these circumstances, a limited extension of time is called for.
- (4) The Judge is presently minded to extend the Injunction on its present terms only until no later than 31 January 2021 or further order. The intention would be to have an *inter partes* hearing, before the Judge, with a time estimate of 1 day (to include reading and judgment), well before 31 January 2021. This limited extension would be made on the following basis:
  - (a) The Judge would be minded to treat the application of HS2 as *ex parte* on notice and made on the papers. HS2 would, therefore, be under an application to make full and frank disclosure. Whilst the Judge is confident that the statement of Mr Shaw

of 10 December 2020 is full and frank, the Judge will afford HS2 the opportunity to put in further evidence on points that HS2 considers the Judge ought to know by no later than 10:00am on Thursday 17 December 2020. Nil returns are required.

(b) For this reason, the Judge is not going to hear from the respondents to the application. That is essentially because there will be insufficient time for such parties to provide a detailed substantive response to the application, which is the whole point of making this limited *ex parte* extension. Nevertheless, if any party wishes to address the Judge on the content of this email, they should email me before 4:00pm on Wednesday 16 December 2020.

(c) The Judge will then take a final view on making the order at 10:30am on 17 December 2020, in light of any additional material received.

(d) HS2 must, by no later than Friday 18 December 2020, notify all parties of the application. Whilst that is straightforward as far as Mr Cuciurean is concerned - he having solicitors on the record - the Judge considers that the same steps should be taken to notify the application to "persons unknown" as were taken on the application before Andrews J.

Although the Judge will not order this, any other persons HS2 is thinking about joining to the action in due course should at least be notified in person, even if they are not served and even if there is no present intention to make them a party.

(e) Ideally the parties will reach agreement on a date that is convenient to them and to the Court before 4:00pm on Wednesday. The Judge has a busy January, and I am available to assist the parties in finding a date.

(5) The Judge would be obliged if HS2 could draw an appropriate order for his consideration. To be clear, the Judge will not make such an order until Thursday morning.

Yours sincerely,

Gwilym Morris

The Honourable Mr. Justice Marcus Smith  
Royal Courts of Justice  
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Tel: 07778553094

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