

IN THE HIGH COURT OF JUSTICE
BIRMINGHAM DISTRICT REGISTRY

B E T W E E N:

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

Claimants/Applicants

-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 PARTICULARS OF CLAIM ("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, GREEN AND BLUE ON THE PLAN ANNEXED TO THE APPLICATION NOTICE ("THE HS2 LAND")
- (3) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE HS2 LAND BY THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT 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/Respondents

CLAIMANTS' SKELETON ARGUMENT

For hearing at 10.30 am on Tuesday 5 April 2022

Pre-Reading (time estimate 5 hrs) The Court is invited to pre-read, in addition to this skeleton:

- (1) *The Application Notice & Draft Order.*
- (2) *The first witness statement of Richard Jordan ("Jordan 1"), the Claimants' Interim Quality and Assurance Director (former Chief Security and Resilience Officer), who provides the background to anti-HS2 activist activities and sets out the evidence in support of this application.*

- (3) *The first witness statement of Julie Dilcock (“**Dilcock 1**”) which explains the HS2 Scheme, the basis for the possession claim, describes injunctions already in place and explains matters concerning service on and the naming of defendants, and explains why the possession claim is appropriate for the High Court.*
- (4) *The second witness statement of Julie Dilcock (“**Dilcock 2**”) which summarises the position on service (the certificates to be provided in the bundle) and updates the Court on the current position as regards protest activities and this application.*
- (5) *There is extensive video evidence submitted with the application which is described in **Jordan 1**. As a result, the Claimants do not suggest any particular pre-watching is necessary, but the Court may wish to review some of that video evidence as it considers **Jordan 1**.*

Introduction

1. This is the Claimants’ skeleton argument for the hearing of its application dated 25 March 2022 for relief in respect of unlawful trespass and related activities on and around land relating to the High Speed Two Railway Scheme (“**the Scheme**”).¹
2. The First Claimant (“**HS2 Ltd**”) is the nominated undertaker appointed by the Secretary of State to construct the Scheme. It has the right to possession of the land, as Nominated Undertaker, or alternatively as freehold or leasehold owner (“**HS2 Land**”).²
3. The Scheme has since October 2017 been beset by unlawful “direct action” protests on the HS2 Land by activists³ opposed to the Scheme. For that reason, the Claimants have had to obtain injunctions in respect of a number of sites along the Scheme route.⁴ At present, there is a significant unlawful protest camp on the HS2 Land at land known as Cash’s Pit, Staffordshire (the “**Cash’s Pit Land**”).
4. The Claimants therefore seek:

¹ The Scheme is explained in **Dilcock 1**, paras. 11-27.

² The Claimants’ right to possession is set out in **Dilcock 1**, paras. 28-36, 44-53.

³ The Claimants refer to the persons engaged in direct action unlawful protests as “**activists**” in an attempt to differentiate between legitimate and lawful protest and unlawful direct action activity. Similarly, although for convenience the Claimants describe the activity they endure as “**protest**” action or activity, that is intended to refer to unlawful direct action protest as opposed to any exercise of lawful rights to protest which the Claimants explicitly do not intend or desire to curtail.

⁴ And recently, Balfour Beatty have obtained an injunction over a part of the HS2 Land of which they are a lessee, which is provided exhibited to **Dilcock 2**.

- 4.1 A possession order in respect of the Cash's Pit Land;
 - 4.2 Injunctive relief requiring cessation of the unlawful trespass at Cash's Pit, and a *quia timet* injunction to protect the remainder of the land acquired or held by the Claimants in connection with the Scheme, because the Claimants reasonably fear that the activists will move from the Cash's Pit Land to elsewhere on the HS2 Land;
 - 4.3 Declarations in respect their entitlement to possession of Cash's Pit Land.⁵ and the HS2 Land;
 - 4.4 Orders for alternative service; and
 - 4.5 As the Claimants have previously been granted several orders prohibiting trespass and nuisance in relation to parts of the HS2 Land,⁶ the Claimants ask that these be discharged (along with discontinuance of the underlying proceedings) upon the grant of the order that is now applied for, a draft of which has been filed with the application.
5. Those Defendants who have been identified and joined individually as Defendants to these proceedings where necessary, are referred to as "**the Named Defendants**"; whilst reference to "**the Defendants**" generally, includes both the Named Defendants and those persons unknown who have not yet been individually identified. The names of all the persons engaged in unlawful trespass were not known at the date of filing the proceedings (and are still not known). That is why different categories of "persons unknown" are identified as Defendants 1 to 4. That was and remains an appropriate means of seeking relief against unknown categories of people in these circumstances.⁷
6. This skeleton argument addresses matters in the following order:

⁵ N.b. the N244 and the draft order at 8(b) incorrectly state that the Claimants also seek a declaration over the balance of the HS2 Land. The Claimant apologise for this drafting error.

⁶ See Particulars of Claim, para. 7.

⁷ See *Boyd & Anor v Ineos Upstream Ltd & Ors* [2019] EWCA Civ 515 at [18]-[34], summarised in *Canada Goose v Persons Unknown* [2020] EWCA Civ 303 at [82] (as below).

- 6.1 The underlying causes of action supporting the interim relief sought: possession, private and public nuisance;
- 6.2 The interim relief sought;
- 6.3 The declaratory relief sought in respect of the Cash's Pit Land and the HS2 Land; and
- 6.4 Service and other consequential matters.

BACKGROUND

7. The Scheme is a project specifically authorised by Acts of Parliament (the High Speed Rail (London - West Midlands) Act 2017 – “the **Phase One Act**”; and the High Speed Rail (West Midlands – Crewe) Act 2021 (“the **Phase 2a Act**”) together: the “**HS2 Acts**”). As recognised very recently by the Divisional Court (Lord Chief Justice and Holgate J) in *DPP v Cuciurean* [2022] EWHC 736 (Admin) at [84], it is:

“...an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament...”

and in relation to the activities undertaken in pursuance of the Scheme:

“...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.”

8. Notwithstanding its democratic legitimacy and public interest, the Scheme has been subjected to a long running campaign of what is euphemistically termed “direct action” protest – that is, action which seeks directly to interfere with the subject matter of its protest. These actions, set out in great detail in **Jordan 1**, began in October 2017 and have continued since, steadily worsening and causing more damage, danger, delay and financial impact over time. Up to December 2021, a total cost of £121.62 million has

been incurred in dealing with activists engaged in anti-HS2 direct action protest. This is borne entirely by the public purse.⁸

9. More significantly even than the substantial costs, activists have been involved in significant violence, criminality and have caused considerable risk to life of the activists, HS2 staff and contractors alike. More than 1,007 incidents having an impact on operational activity have been recorded between Q4 of 2017 and December 2021, and 129 individuals were arrested 407 offences from November 2019 - October 2020 alone.⁹
10. As noted in **Jordan 1** at [12], the direct action protests have appeared less about expressing the activists' views about the Scheme and more about causing direct and repeated harm to the Scheme with the overall aim of "stopping" or "cancelling" the Scheme.¹⁰ As a number of courts have observed when dealing with injunction applications related to the Scheme, that is not how decisions are made in a democratic society.¹¹
11. Of the many incidents which have occurred over recent years, **Jordan 1** seeks to highlight some of the more reprehensible actions. These include incidents such as:
 - 11.1 Using lock-on devices to attach to tunnel shoring and to other activists to resist removal from within dangerous hand dug tunnels on trespassed land at Euston Square Gardens (**Jordan 1** [29.1.8]), and attacking with a wooden stick those attempting to remove a protestor from the tunnels (**Jordan 1** [55.5]).
 - 11.2 Significant abuse including verbal abuse, slapping, punching and spitting in the face of HS2 security officers, in the height of the covid pandemic – (**Jordan 1** [29.1.10(c)]); assaulting a security officer resulting in hospital attention being required (**Jordan 1** [29.8.2]); throwing human waste and a smoke grenade at HS2 contractors (**Jordan 1** [29.8.3]); and carrying weapons including knives and machetes whilst trespassing on the HS2 Land (**Jordan 1** [29.8.4]).

⁸ **Jordan 1**, para. 15.

⁹ **Jordan 1**, paras. 14 and 23.

¹⁰ See for example the remarks of D5 quoted at **Jordan 1** [21.2].

¹¹ See for example, Andrews J. (as she then was), in the Cubbington and Crackley judgment: *SSfT and HS2 v Persons Unknown* [2020] EWHC 671 (Ch) at [36] and [42]. And see *DPP v Cuciurean* at [84].

- 11.3 Obstruction of access to HS2 sites including lying down in front of compound gates (**Jordan 1** [29.2.1]), dumping a boat in front of a site entrance (**Jordan 1** [29.2.4.1]) and staging a “die-in” by lying on the ground blocking both lanes of a public highway near to a site entrance (**Jordan 1** [29.2.4.3]).
- 11.4 Damage to buildings and equipment including: breaching and damaging fencing followed by assault of 2 security officers, starting of a fire in a skip, 6 vehicles and a marquee damaged, and a number of electronic items stolen (**Jordan 1** [29.1.1]); cutting hydraulic hoses risking spillage (**Jordan 1** [29.3.1]); and scaling one of HS2’s offices in central London, graffitiing and smashing windows (**Jordan 1** [29.3.2]).
- 11.5 Environmental damage including ‘spiking’ trees with nails (both those scheduled for felling and others) (**Jordan 1** [29.4.1]); interference with ecological mitigation works (**Jordan 1** [29.4.2]); waste and fly tipping (**Jordan 1** [29.4.3]).
- 11.6 An activist climbing underneath and attaching to a 13-ton tracked extraction vehicle stationed on soft ground, putting life at considerable risk through potential for crushing (**Jordan 1** [29.1.5]).
- 11.7 Scaling a 150ft crane in the early hours of the morning with no safety equipment, causing danger to passing air traffic (**Jordan 1** [29.1.7]).
- 11.8 Constructing a defensive tower on the HS2 Land at Small Dean to resist removal, protected with barbed wire and booby-trapped with expanding foam and razor wire to create danger and delay for those seeking to evict the camp (that eviction cost £5m and took over a month) (**Jordan 1** [29.6.3] and [58]).
12. These unlawful direct-action protests are likely to continue unless restrained. Clear intention has been shown by several of the Named Defendants to continue the activities.¹² For example:

¹² See generally, **Jordan 1** at paragraph 21.

- 12.1 D27, after being removed from the tunnels at Euston Square Gardens in February 2021 stated *“this is just a start”* (**Jordan 1** [21.3]).
- 12.2 D6 on 23 February 2022 stating that if an injunction was granted over one of the gates providing entrance to Balfour Beatty land, they *“will just hit all the other gates”* and *“if they do get this injunction then we can carry on this game and we can hit every HS2, every Balfour Beatty gate”* (**Jordan 1** [21.12]).
- 12.3 D6 on 24 February 2022 stating if the Cash’s Pit camp is evicted, *“we’ll just move on. And we’ll just do it again and again and again”* (**Jordan 1** [21.13]).
- 12.4 D17 said in a video on 10 March 2022: *“let’s keep...causing as much disruption and cost as possible. Coming to land near you”* (**Jordan 1** [21.14]).
- 12.5 Further detail is given of recent and future likely activities around Cash’s Pit and other HS2 Land in the Swynnerton area at **Jordan 1** [72]-[79].
13. In particular, the Claimants anticipate that following eviction of Cash’s Pit, activists will likely move their activities to another location along the HS2 route. Given the size of the Scheme, it is impossible for the Claimants to reasonably protect the entirety of the HS2 Land by active security patrol or even fencing.

POSSESSION CLAIM

14. As set out in **Dilcock 1**, the Scheme at present consists of Phases One and 2a, pursuant to the HS2 Acts. Section 4(1) of the Phase One Act gives the First Claimant power to acquire so much of the land within the Phase One Act limits as may be required for Phase One purposes. The First Claimant may acquire by way of General Vesting Declaration (“GVD”) or the Notice to Treat (“NTT”) and Notice of Entry (“NoE”) procedure. Section 15 and Schedule 16 of the Phase One Act give the First Claimant the power to take temporary possession of land within the Phase One Act limits for Phase One purposes.
15. In relation to Phase 2a, section 4(1) of the Phase 2a Act gives the First Claimant power to acquire so much of the land within the Phase 2a Act limits as may be required for Phase 2a purposes. As with Phase One, the First Claimant may acquire land by way of

the GVD, and the NTT and NoE procedures. Section 13 and Schedule 15 of the Phase 2a Act give the First Claimant the power to take temporary possession of land within the Phase 2a Act limits for Phase 2a purposes.

16. In addition to the powers of acquisition and temporary possession under the Phase One Act and the Phase 2a Act, some of the HS2 Land has been acquired by the First Claimant under the statutory blight regime pursuant to Chapter II of the Town and Country Planning Act 1990. The First Claimant has acquired other parts of the HS2 Land via transactions under the various Discretionary Schemes set up by the Government to assist property owners affected by the Scheme.
17. Further parts of the HS2 Land have been acquired from landowners by consent and without the need to exercise powers. Finally, the Claimants hold some of the HS2 Land under leases – most notably, the First Claimant’s registered office at Snowhill in Birmingham and its office at The Podium in Euston, both of which have been subject to trespass and (in the case of The Podium) criminal damage by activists opposed to the Scheme (the incident of trespass and criminal damage at The Podium on 6 May 2021 is described in more detail in **Jordan 1** [29.3.2]).
18. The land ownership position can be seen in the exhibits to **Dilcock 1: JAD1, JAD2, JAD3** (which are also provided through online links¹³). Broadly the landholdings are divided into three categories:¹⁴
 - 18.1 Pink land: of which the Claimants are either owner with freehold or leasehold title. The basis of title is explained in **JAD2** (Table 1 reflects land acquired by the GVD process, Table 3 that acquired by other means – e.g. private treaty).
 - 18.2 Blue land: of which the First Claimant is the owner of leasehold title by entering into leases voluntarily, shown in Table 3 to **JAD2**.

¹³ <https://www.gov.uk/government/publications/hs2-route-wide-injunction-proceedings>

¹⁴ Further detail is provided at **Dilcock 1**, paragraphs 28-33.

- 18.3 Green land: in respect of which the First Claimant is entitled to temporary possession pursuant to section 15 and Schedule 16 of the Phase One Act and section 13 and Schedule 15 of the Phase 2a Act. (see Table 4 of **JAD2**).
19. David Holland QC (sitting as a Deputy Judge of the High Court) held that the temporary possession powers in the Phase One Act gave sufficient title to sue for trespass in *SSfT & HS2 v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch) at [30]-[31].
20. The Cash's Pit Land is shown in detail in Annex A of the Particulars of Claim, and the Claimants' right of possession is described in **Dilcock 1** at [44] – [55]. The Cash's Pit Land within the HS2 Land can be found on Map 157 which is at page 126 of the HS2 Land Plans – Part 2 (**JAD1**).
21. The Court can therefore be satisfied that the Claimants are entitled to possession of all of the land at Cash's Pit, and all of the land comprising the HS2 Land. As Mann J held in *SSfT & HS2 v Persons Unknown (Euston Square Gardens)* [2021] EWHC 821 (Ch) at [29], in a possession claim such as the instant application, all that need be demonstrated is better title to possession than the occupiers. It is submitted that that threshold is easily passed.

Trespass

22. **Jordan 1** contains ample evidence of trespass by (primarily) persons unknown on the Cash's Pit Land, and elsewhere along the Scheme route. Whilst the focus of the trespass has been various 'protest camps', it has not been confined to those sites, and activists have ranged widely across the HS2 Land at times to carry out their direct-action activities.
23. In circumstances where the Claimants are entitled to possession, it is just and convenient for a possession order to be made over the Cash's Pit Land.

Service and Procedural Requirements

24. To the extent that this claim is a possession claim against unknown trespassers, CPR r.55.6 applies to service. As a result of the injunctive relief sought on an interim basis,

the Application as well as the Claim needs to be served. These must be served on the Named Defendants as well as persons unknown. It will be necessary to serve any order made upon the hearing on those Defendants as well.

25. As detailed in **Dilcock 1** at 61, service in these situations is not straightforward. **Dilcock 1** sets out the steps the Claimants consider ought to be taken, and **Dilcock 2** explains what has been done to date to bring the proceedings to the Defendants' attention. The Claimants therefore ask that the Court retrospectively approves the steps taken to draw these proceedings to the Defendants' attention (to the extent necessary) under CPR r6.15 and 6.17, as well as prospectively any steps to serve any order the Court makes following the hearing.
26. The Claimants' have complied with the procedural requirements set out in CPR PD55A, as set out in the Particulars of Claim, and evidenced in **Dilcock 2**.

The test to apply at a first hearing

27. At this first hearing of the possession claim, the Court ought to make an order for possession unless the claim is genuinely disputed on grounds which appear to be substantial (in which case, case management directions would be given: CPR r.55.8).
28. Genuine and bona fide concerns on the part of the protestors about HS2 or the proposed works on the Cash's Pit Land do not amount to a defence, and the Court should be slow to spend significant time entertaining these: *City of London Corporation v Samede* [2012] EWCA Civ 160 at [63].
29. Similarly, it is now well established that a protestor's Articles 10 and 11 rights, even if engaged in a case like this, will not justify continued trespass onto private land (see, e.g., in the HS2 context, at [136] of Mr Holland QC's May 2019 judgment in the HS2 Harvil Road decision ([2019] EWHC 1437 (Ch), and the recent Divisional Court case of *DPP v Cuciurean* [2022] (*supra.*) at [46], [50] and [77]).
30. The law is now clear that there can be no lawful excuse, or defence, for concerned citizens or protestors taking the law into their own hands or engaging in the tort of trespass to prevent activities they disapprove of. It is difficult to imagine what substantial defence

could credibly be advanced to a possession claim here; though of course any arguments can be dealt with if, as and when they are raised.

31. It is submitted, therefore, that an order for possession should be made forthwith in respect of the Cash's Pit Land.

NUISANCE

32. The underlying claim in respect of which interim relief is sought also includes private and public nuisance. This can be addressed briefly in this skeleton argument.
33. The Claimants suffer private nuisance:
 - (i) in the form of unlawful interference with the Claimants' right of access to its land via the public highway, where the Claimants' land adjoins a public highway: *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 at [13]; and
 - (ii) in the form of unlawful interference with one or more of the Claimants' rights of way over land privately owned by a third party: *Gale on Easements* at 13-01.
34. In respect of public nuisance, that flows from the obstruction or hindering of the free passage along a public highway and the Claimants being specially affected by such nuisance due to the inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: *Cuadrilla* at [13].

INTERIM INJUNCTIVE RELIEF

35. The Claimants seek injunctive relief requiring the Cash's Pit Defendants to remove themselves from the land, restrain future trespass on that land and on the wider HS2 Land, and restrain nuisance as described in the draft order. This relief is sought on an interim basis.
36. The test for an interim injunction is well-known (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396). It requires that there be at least a serious question to be tried and then refers to the adequacy of damages for either party and the balance of justice (or convenience).

37. In relation to the test to be applied for *quia timet* injunctions (which the present case is, at least in part), *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch), Morgan J held at [88] that:

“The general test to be applied by a court faced with an application for a quia timet injunction at trial is quite clear. The court must be satisfied that the risk of an infringement of the claimant's rights causing loss and damage is both imminent and real. The position was described in London Borough of Islington v Elliott [2012] EWCA Civ 56 , per Patten LJ at 29, as follows:

“29 The court has an undoubted jurisdiction to grant injunctive relief on a quia timet basis when that is necessary in order to prevent a threatened or apprehended act of nuisance. But because this kind of relief ordinarily involves an interference with the rights and property of the defendant and may (as in this case) take a mandatory form requiring positive action and expenditure, the practice of the court has necessarily been to proceed with caution and to require to be satisfied that the risk of actual damage occurring is both imminent and real. That is particularly so when, as in this case, the injunction sought is a permanent injunction at trial rather than an interlocutory order granted on American Cyanamid principles having regard to the balance of convenience. A permanent injunction can only be granted if the claimant has proved at the trial that there will be an actual infringement of his rights unless the injunction is granted.”

38. Morgan J continued at [91] to state that the *American Cyanamid* test was applicable in *quia timet* cases, and that the court was bound to apply section 12(3) of the Human Rights Act 1998 and ask what order the court would be likely to make at a trial of the claim. The learned judge concluded at [142] that as he found it likely that the court following trial would grant a permanent injunction to restrain the interferences with the Claimants legal rights, the normal response of a court would be to grant similar interim relief “*without further ado.*”
39. In the present case, there is undoubtedly a **serious issue to be tried**: the causes of action have been set out above, and the previous and threatened acts on behalf of the activists correspond to those causes of action.

40. In relation to the **adequacy of damages**, given the nature and impact of the continuing unlawful protest action, damages would be an inadequate remedy and in any event are very unlikely to be recovered and/or compensate for the considerable total losses suffered. Furthermore, the severe danger of much of the protest activity (to the activists and others) further indicates the effects of this conduct cannot be adequately remedied through damages.
41. In terms of the **balance of convenience**, this involves consideration first of whether there is a real and imminent risk of a tort being committed, and second whether appropriate weight has been had to the Defendants' article 10 and 11 convention rights (such as they apply to the activities complained of by the Claimants) 'in the round'.
42. As to the real and imminent risk of a tort being (or continuing to be) committed:
- 42.1 The evidence that has been summarised above and is provided more fully in **Jordan 1** provides ample basis for concluding there is a real and imminent risk of the tortious behaviour continuing in the way it has done in recent years, on the Cash's Pit Land and across the HS2 Land.
- 42.2 Protection is sought across all of the HS2 Land because, as has been shown, the direct action protests are ongoing and simply move from one location to another seeking to cause maximum disruption across a large geographical extent. Once a particular protest 'hub' on one part of HS2 Land is moved on, the same individuals will invariably seek to set up a new 'hub' from which to launch their protests elsewhere on HS2 Land. The HS2 Land is an area of sufficient size that it is not practicable to police the whole area with security personnel or indeed to fence it or make it otherwise inaccessible.
- 42.3 In terms of the need for a geographically broad injunction to effectively restrain the tortious conduct, the Court has encountered a similar scenario recently: the 'Insulate Britain' protests in the autumn of 2021 displayed a similar strategy of seeking to cause disruption across a very wide area, leading to the need for National Highways to obtain interim injunctions in respect of the M25, other large areas of

strategic road, and ultimately across the whole strategic road network.¹⁵ Lavender J held:

“If the claimant is entitled to an injunction, then I do not consider that it is appropriate to require the claimant to continue seeking separate injunctions for separate roads, effectively chasing the protestors from one location to another, not knowing where they will go next.”¹⁶

42.4 Similarly, judicial notice may be taken of Transport for London’s wide ranging injunctions across a large number of roads in London – again, the scale of the coverage of the injunction was necessitated by the nature of the disruptive protest activity.¹⁷

42.5 For these reasons, it is submitted that there is a real and imminent risk of torts being carried out unless this injunction is granted across the whole of the HS2 Land.

Persons unknown

43. There has been much recent consideration of 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 the Court of Appeal in *London Borough of Barking and Dagenham v Persons Unknown & Ors* [2022] EWCA Civ 13. Although other aspects were criticised in that latter case, the guidance from *Canada Goose* at [82] was not and would appear to remain applicable:

“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:

¹⁵ See Lavender J in *National Highways Limited v Persons Unknown & Ors* [2021] EWHC 3081 (QB), at [24(7)]: “the geographical extent is considerable, since it covers 4,300 miles of roads, but this is in response to the unpredictable and itinerant nature of the Insulate Britain protests”.

¹⁶ *Ibid.*, Lavender J at [24(7)(c)].

¹⁷ See Orders in: QB-2021-003841; QB-2021-004122, both dated 15 December 2021.

(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.”

44. In respect of requirement (1) above, the Claimants have sought to take a balanced approach, set out in **Dilcock 1** at [42] - [47]:

44.1 The Claimants have named as Defendants to this Application individuals known to the Claimants including: those believed to be in occupation of the Cash's Pit Land, permanently or from time to time; the named defendants in the Harvil Road Injunction; the named defendants in the Cubbington and Crackley Injunction; and individuals whose participation in incidents is described in the evidence in support of this claim and the injunction application and not otherwise named in one of the previous categories.

44.2 In the case of D32, he has already given a wide-ranging undertaking¹⁸ not to interfere with the HS2 Scheme, and the Claimants have only named him because he is a named defendant to the proceedings for both pre-existing injunctions. The same is true for other Defendants involved in the Euston Square Gardens incident as detailed below.

45. There are no further individuals sought to be named at this stage, however the Claimants continue to keep this under review.

46. In respect of requirements (2) to (7) of Canada Goose, the Claimants submit these are met in this case:

46.1 The definitions of the First to Fourth Defendants in these proceedings meet the requirements of (2), being sufficiently precise to target the relevant conduct.

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

¹⁸ Exhibited to Dilcock 2.

- (i) The Claimants have been subject to a long-running campaign of direct-action protests involving trespass on the HS2 Land and adjacent land, in opposition to the Scheme, as already explained.
- (ii) Various activists have expressed intention to continue and expand their protesting activities in the future (as detailed above).
- (iii) The Defendants are motivated, resourceful and not deterred by traditional security measures. **Jordan 1** contains substantial evidence of the protestors removing security fencing, creating relatively elaborate camps, and other structures and refusing to move promptly (and indeed resisting removal by locking-on to acrow-props within hand-dug tunnels, in the Euston Square Gardens incident) when challenged by security or contractors on the sites.
- (iv) The nature (especially size and varied terrain) of the sites are such that traditional security methods are unlikely, without more, to be successful.

46.3 Those to be subject to the interim injunction are those falling within the definition of the First to Fourth Defendants from time to time, and there is some anticipated difficulty with serving the order. The details are set out in the draft order and the Claimants hope to be able to discuss them with the Court further at the hearing. (4) is thus satisfied.

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

46.5 (6) is similarly satisfied; the description of persons unknown uses non-technical language, is clear in its scope and application, and is similar to language approved by the courts in similar cases.

46.6 The geographical limit required in (7) is broad but justifiable – as it was in the National Highways strategic road network injunction (see above). In any event, the land is identified in maps available to view online. The requirement for a temporal limit is also satisfied here.

47. Beyond satisfying the above elements, it is appropriate to make brief submissions on several further points of detail.

Convention rights

48. Section 12(3) Human Rights Act 1998, adds a further consideration to be addressed in a case such as this:

48.1 Section 12(1) provides that the 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*”.

48.2 It is arguable that restraining trespass as part of a means of protest might impact these rights; on which basis the section is engaged.

48.3 Where it applies, s.12(3) provides that “*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.*”

49. Section 12(3) is, as a matter of ordinary language, not easy to apply to anti-trespass injunctions; because trespassing onto land is not readily viewed as a means of “publication”. Nevertheless, the authorities (e.g. *Ineos* at [44ff]) establish that the Court should be satisfied that the Claimants would be likely to obtain an injunction preventing future trespass at trial; not just that there is a serious question to be tried. Where there has been a history of deliberate trespass aimed at disrupting works, it is submitted that it is likely that a Court would grant injunctive relief at trial. “Likely” in this context usually means more likely than not: *Cream Holdings Limited v Banerjee* [2004] UKHL 44, [2005] 1 AC 253 at [22].

50. In having regard to the balance of convenience and the appropriate weight to be had to the Defendants’ convention rights, and although *prima facie* there is no right to protest on private land and therefore articles 10 and 11 rights (which are qualified rights concerning freedom of expression and freedom of assembly respectively) are unlikely to be applicable (see *Ineos* at [36], and *DPP v Cuciurean* at [46], [50] and [77]), it is appropriate to address the issue of proportionality. Although the hearing is strictly

speaking on notice, and although the duty of full and frank disclosure does not extend to an undefended hearing on notice, as it is anticipated the Defendants or some of them may be unrepresented, it is appropriate to draw the Court's attention to the points which may be raised against this application. It is anticipated the area of convention rights will be foremost among the points the Defendants would wish to raise.

51. In relation to articles 10 and 11, the Claimants would note the following:

51.1 The Defendants have a right to express their points of view, and to gather together to do so, but they do not have any rights to do so by trespass on private land (see *DPP v Cuciurean* at [77]). Nor are they entitled to compel the outcome they prefer (i.e. the cancellation of the Scheme via physically getting in the way of it) – that is anarchy, not protest.

51.2 The Divisional Court has very recently emphasised that:

“...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” (*DPP v Cuciurean* at [76]).

51.3 The Divisional Court also noted that disruption of the kind committed by the respondent in that case (digging himself into a tunnel on the HS2 Land and remaining there in opposition to removal) is “*against the public interest*” (at [84]), and emphasised that the rights enshrined in articles 10 and 11:

“...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” (at [84]).

51.4 The Divisional Court was also mindful of the fact that although each individual protest may appear small in the context of the Scheme as a whole, that was not a reason to overlook its impact, since:

“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” (at [87]).

- 51.5 There remain a multitude of other forums for debating the merits of the Scheme, and the order sought would not deprive the Defendants of their right to exercise that voice. The order does not seek to prohibit lawful protest.
- 51.6 To the extent there would be interference with the Convention rights of the Defendants (which as has been explained, must be doubted), this interference must be balanced against the rights of the Claimants under Article 1 Protocol 1, insofar as the HS2 Land is the Claimants’ possession of which they are being deprived by the unlawful protests. The proportionality balance struck in this jurisdiction between rights of owners and those with no permission to be on private land is embodied in the law of trespass, and it would be unattractive to disturb this position on the basis of often violent direct action protesters.
- 51.7 Needless to say, there is a strong public interest in the democratically sanctioned Scheme being completed on time and with minimal excess spend of public money. The Defendants activities actively seek to thwart that. The public expense to date as a result of unlawful protest is vast.
52. To the extent the Defendants may say their protest camp(s) on the HS2 Land have become a home and that their eviction would breach article 8 Convention rights, this issue was grappled with by Swift J in *Ackroyd v HS2 Ltd* [2020] EWHC 1460 (QB) (an application by protestors for an injunction to restrain from a building owned by HS2). The court found that even on the proviso there *was* some form of interference with article 8 rights, under the question of justification it was *“inevitable that... a court would conclude that the removal... was justified. The steps taken to remove them were taken by an owner of land who is seeking to fulfil an important statutory purpose”* (at [11]).

Further interim relief matters

53. As noted above, the Claimants have obtained a number of other injunctions in respect of HS2 Land. These are detailed in **Dilcock 1** at [37] – [41].¹⁹ These have been breached on a number of occasions. Although therefore the injunctions have not been wholly effective, the Claimants believe that they have nevertheless been of assistance in moderating unlawful activities on the relevant land, and it may be assumed that absent the injunctions there may have been, and might be, potential for more frequent unlawful trespass and obstruction of access by a greater number of persons unknown.
54. Generally, the Court expects its orders to be obeyed, but it is submitted that the Court should not let it count against the merits of this Application that the injunction might be disobeyed in the future if they were to be continued. The pursuit of contempt of court proceedings against D33, D32, D24, D25, D26, and D30 demonstrates that the Claimants are seeking to ensure compliance with the injunctions in order to protect their interests (and to uphold the authority of the Court).
55. D33 (Mr Cuciurean) was found in contempt by Marcus Smith J on 13 October 2020. Committal proceedings against the remainder listed above (D32 (Mr Maxey) in respect of Cubbington and Crackley injunctions and Euston Square Gardens, the remainder solely in respect of Euston Square Gardens) were settled following the Claimants accepting wide ranging undertakings from the Defendants to those proceedings, and the Court accepting the Defendants’ sincere apologies for breaching those injunctions. The terms of those orders are exhibited for the information of the Court.²⁰

DECLARATORY RELIEF

56. The Claimants seek declaratory relief confirming their entitlement to possession of the Cash’s Pit Land. The basis for the declaratory relief is that it may assist in securing possession more swiftly in the future if there is a future trespass, as it was suggested in *Secretary of State for the Environment v Meier* [2009] UKSC 11 at [93] that a party with the benefit of such a declaration could obtain the benefit of a writ of restitution in the event of future trespass, without needing to start new proceedings.

¹⁹ In addition to those granted in respect of Euston Square Gardens, which have fallen away as the activists have left the tunnels.

²⁰ Exhibited to **Dilcock 2**.

DRAFT ORDER

57. The descriptions of persons unknown are intended to capture the range of disruptive activity experienced across the HS2 Land to date. Paragraph 4 contains an injunction with a long stop date of 24 October 2022, seeking to prohibit the conduct which the Claimants fear will otherwise continue. Paragraph 5 provides clarity on the carve outs for HS2 Land, and paragraphs 6 and 7 provide further detail on what may constitute prohibited acts of obstruction and interference. In light of the media report described in **Dilcock 2** at [12] confirming the presence of tunnels at Cash's Pit Land (which has come to light since this claim and application were filed), a further clause is requested to be added to the Order to specifically cover tunnelling and to require immediate exit from the tunnels, cessation of tunnelling and prohibiting the encouragement or assistance of tunnelling by others. The situation is likely to be extremely dangerous, and there should be no doubts about the requirement to leave the tunnels immediately.
58. Paragraphs 9 - 14 are in respect of service. The issue here is the wide geographical area which is to be covered by the injunction. It is submitted that it would be prohibitively expensive to carry out extensive service of the Order on the HS2 Land, and social media and the internet are the dominant forms of the passage of information at present, and used by activists to coordinate and plan activity. If the Order is made, the Claimants are able to tweet and post a link to the Order on facebook through relevant official channels to ensure it is widely appreciated. It may also be anticipated that there will be some discussion of any order made in these proceedings in the national media. Given that position, the court may be satisfied that the provisions set out in the draft order will be sufficient to draw the order and its terms to the attention of any potential defendant.
59. There remains protection for any potential defendant following an inadvertent breach of the order. The Court considered service provisions in great detail in respect of the committal of Mr Cuciurean. In [63(7)] of SSfT and High Speed Two (HS2) Limited v Cuciurean [2020] EWHC 2614 (Ch) Marcus Smith J held:

“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.

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.”

60. Considering this in Cuciurean v SSfT and High Speed Two (HS2) Limited [2021] EWCA Civ 357 – at [14] – [15], [25] – 26] and [70] in particular, the Court of Appeal analysed the provisions for alternative service:

60.1 At [60]: *“The cases make it clear that any provision for alternative service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant. But that is a standard to be applied prospectively. I can see that, in principle, a defendant joined as a person unknown might later seek to set aside or vary an order for service by alternative means, on the grounds that the Court was misinformed or otherwise erred in its assessment of what would be reasonable.”*

60.2 At [69]: *“[regarding the Hoarding Fence] This could not be mistaken for anything but an outward and visible sign that those in possession of the land beyond it were asserting their rights to maintain possession”.*

61. Paragraphs 15 - 16 discharge previous injunctions (which the Claimants consider are otiose if the draft order is granted in substantively the terms set out) and to discontinue the underlying proceedings (the permission of the court is required for this where an interim injunction has been made – CPR 38.2). Consolidation would therefore simplify

and clarify matters for the Defendants, by providing for the same terms across the whole route.²¹

62. Paragraphs 17 - 22 relate to steps which may be taken by Defendants to vary or discharge the order, or acknowledge service of the underlying proceedings. In each case procedures to be followed are provided in Schedules A and B respectively – an approach which follows that taken by Marcus Smith J in his order in relation to Cubbington and Crackley of 3 May 2021. The claim is otherwise to be stayed unless service is acknowledged.
63. The remainder of the draft order and its annexes and appendices are, it is hoped, self explanatory. Schedule C again follows the approach taken by Marcus Smith J in his Order of 3 May referred to above, and is intended to assist Defendants to understand and interact with the proceedings.

Conclusion

64. Subject to any modifications the Court considers appropriate, the Claimants respectfully ask that the Court make the Order in the terms sought.

**MICHAEL FRY
JONATHAN WELCH
SIONED DAVIES**

**Francis Taylor Building
No 5 Chambers**

1 April 2022

*michael.fry@ftbchambers.co.uk
jonathan.welch@ftbchambers.co.uk
sd@no5.com*

020 7353 8415

²¹ At present the Harvil Road and Crackley injunction terms differ from one another.