Claim No. QBD-2022-BHM-000044

IN THE HIGH COURT OF JUSTICE
QUEENS 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 26 and 27 May 2022

14	*National Highways Limited v Persons Unknown & Ors* [2021] EWHC 3081 (QB)	AUTH222 -AUTH235
15	*Secretary of State for the Environment v Meier* [2009] UKSC 11	AUTH236 -AUTH266
16	*SSfT and HS2 v Persons Unknown (Crackley and Cubbington)* [2020] EWHC 671 (Ch)	AUTH267 -AUTH276
17	*SSfT and High Speed Two (HS2) Limited v Cuciurean* [2020] EWHC 2614 (Ch)	AUTH277 -AUTH341
18	*SST and HS2 v Persons Unknown* Claim No PT-2018-000098	AUTH342 -AUTH394
19	*SSft & HS2 v Persons Unknown* [2021] EWHC 822 (Ch)	AUTH395 -AUTH404
20	Senior Courts Act 1981, section 37	AUTH405 -AUTH407
21	Snell's Equity (32nd edition, 2010) at 18-028	AUTH408 -AUTH408
22	*United States of America v Abacha* [2015] 1 WLR 1917	AUTH409 -AUTH444
23	*West v Sharp* [1999] 79 P&CR 327	AUTH445 -AUTH455
24	*Kanssen v SSEFRA* [2005] EWHC 1024 (Admin)	AUTH456 -AUTH469
25	*HS2 v Maxey Ors* [2022] EWHC 1010 (QB)	AUTH470 -AUTH477
26	High Speed Rail (London - West Midland) Act 2017 & High Speed Rail (West Midlands - Crewe) Act 2021 - Extracts	AUTH478 -AUTH517

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Citation Number: [2020] EWHC 1460 (QB)

Case No: QB-2020-001679

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 13th May 2020

Before:

THE HONOURABLE MR. JUSTICE SWIFT

- -

Between:

(1) STUART ACKROYD	
(2) WIKTORIA ZIENIUK	**Applicants**
- and -	
(1) HIGH SPEED TWO (HS2)	**Respondents**
(2) HIGH COURT ENFORCEMENT GROUP LTD	
(t/a NATIONAL EVICTION TEAM)	

- -

- -

PAUL POWLESLAND for the **Claimants**
TOM ROSCOE (instructed by **Eversheds Sutherland LLP**) for the **First Defendant**
The Second Defendant was not present or represented

- -

APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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AUTH003

THE HONOURABLE MR. JUSTICE SWIFT:

1. This is an application for an injunction made by Stuart Ackroyd and Wiktoria Zieniuk. The respondents to the application are High Speed Two Limited and High Court Enforcement Group Limited. High Speed Two Limited has appeared on this application, although strictly it remains an *ex parte* application, by counsel Mr Roscoe. The Applicants are represented by Mr Powlesland of counsel.

2. When the application was initiated it was to prevent the eviction of the claimants and others from premises known as RMC Garages, Dews Lane in Harefield. That property is owned by HS2, the First Respondent, pursuant to a declaration made in exercise of powers arising under the High Speed Rail (London to West Midlands) Act 2017. Specifically, I have been taken to General Vesting Declaration No. 160 which vests in HS2 the particular land where RMC Garages is located.

3. The Applicants, and I am told approximately 15 others, had entered the property at various times after January 2020. Mr Ackroyd was one of the original occupiers of the property; Ms Zieniuk arrived some two weeks ago at the end of April 2020. Those in the property were there with a view to using it as a protest camp, a base from which to express their opposition to the construction of the HS2 Railway project. It appears that those who have been in the property are not necessarily there all the time; people have come and people have gone. Nevertheless, there has, one way or the other, been a constant presence since January this year. As well as occupying the premises other protesters live near the premises, either in tents or in tree houses that they have constructed, again for the purposes of their protest.

4. Yesterday, 12th May, the Second Respondent (bailiffs retained by HS2), were asked to recover possession of the property. The eviction effort went on throughout the day; it paused in the evening; it then recommenced this morning. I am told that the last protester left the site at around about 9 o'clock this morning. In the skeleton argument prepared for this hearing Mr Powlesland states that those in the property resisted their removal "both physically and verbally". It appears to be the Applicants' position that there was some form of violence on all sides; whether that was directed to property or to persons is presently unclear.

5. The Applicants contend that their eviction was unlawful on three grounds. The first question is whether in relation to any of those causes of action the Applicants have demonstrated a sufficient prima facie case that at trial they will succeed in obtaining relief in the form that they seek now as interim relief.

6. The first ground is that the process of eviction from the site has involved acts that amount to criminal offences under section 6 of the Criminal Law Act 1977. I am not satisfied that there is a sufficient case that the possibility that offences have been committed under that Act provides a proper basis for the grant of injunctive relief in this case. Even assuming breaches of section 6 of the 1977 Act occurred, I am not satisfied that that would give rise to any private law cause of action that could be relied on by the Applicants. The circumstances in which injunctions are available in aid of criminal law prohibitions are relatively rare and when those circumstances do exist ordinarily injunctions are available only on the claim of those who have responsibility for enforcing the relevant statutory provisions.

7. Mr. Roscoe has taken me to two authorities. The first, *Hemmings and wife v Stoke Poges Golf Club* [1920] 1 KB 720, considered the position in relation to a predecessor statute to the 1977 Act. The conclusion reached in that case was that conduct amounting to a breach of that statute and therefore an offence under that statute did not give rise to any civil liability. The next case is *Secretary of State for Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780. This was a decision of the Supreme Court. It did not deal directly with the point in issue in these proceedings as it was concerned primarily with the availability of injunctions in support of claims of civil wrong. Nevertheless, the judgment of Baroness Hale contains passing reference to the provisions of the 1977 Act and recognition that conduct that might amount, for the purposes of any tort claim, to the use of reasonable force that a landlord or owner of a premises is entitled to use in order to remove trespassers might of itself engage the criminal prohibition at section 6 of the 1977 Act. All that can be said is that, having mentioned those matters, there is no suggestion in Baroness Hale's judgment that the provisions of the 1977 Act grounded any form of civil liability but, as I say, that was not a matter that was squarely before the Supreme Court on that occasion.

8. Nevertheless, having regard to the authority of *Hemmings* and having regard to the provisions of the 1977 Act itself, I do not consider that there is any particularly strong argument (i.e. any argument with any real prospect of success) that breach of section 6 of the 1977 Act gives rise to any form of civil claim available to the Applicants in these proceedings. Mr Powlesland for the Applicants says that the difference may now be made by the existence of the Human Rights Act. It seems to me that if any difference is made by the Human Rights Act it would be in the form of a claim being available under the provisions of that Act directly rather than affecting the position of the availability of any civil claim to arise in aid of or in parallel to breach of section 6 of the 1977 Act.

9. The possibility of a claim under the Human Rights Act is the second basis on which it is said the Applicants have a sufficiently arguable prima facie case. I do not agree that the provisions of the Human Rights Act afford the Applicants any such cause of action. There is doubt, on the submissions I have heard, as to whether the First Respondent is a public authority within the meaning of section 6 of the Human Rights Act. However, I will assume for present purposes that it is such an authority and, on that basis, that in principle a claim is available under the 1998 Act.

10. Mr Powlesland puts the Applicants' case on the basis of breach of Article 8. I am also prepared to accept it is arguable that there has been some breach of Article 8 vis-à-vis the Applicants, although it seems to me that the nature of any interference with the rights under Article 8(1) is very limited indeed. Mr Powlesland submits that the property is the home both of Mr Ackroyd and Ms Zieniuk. But Ms Zieniuk has only been there for a matter of days. Moreover, each entered the premises not as their home but as a site of protest. That is a matter which clearly goes to the extent of any interference with Article 8 rights. Mr Powlesland has been unable to tell me where Mr Ackroyd lived before he moved to the premises or, for that matter, where Ms Zieniuk lived before she went to the premises. There is simply no information that suggests that the premises is, in any genuine sense, the home of either of the Applicants.

11. But even assuming the existence of some form of interference with rights protected by Article 8 the question of justification must be considered. It is inevitable that, were a

breach of Article 8 rights to be demonstrated, a court would conclude that the removal of Mr Ackroyd and Ms Zieniuk was justified. The steps taken to remove them were taken by an owner of land who is seeking to fulfil an important statutory objective.

12. The third cause of action relied on by Mr Powlesland was to the effect that, although both the Applicants were trespassers they nevertheless had better title to the land, or a better right of possession than the First Respondent. Mr Powlesland accepted that this submission that would fall away if the First Respondent's legal right to the land could be demonstrated. In his submissions Mr. Roscoe referred me to the General Vesting Declaration No. 160. On instructions, he has explained to me that that declaration does vest in the First Respondent the land that is the subject of the application in this case (which is shown on the plan attached to that Declaration by reference number 47431). I accept what Mr Roscoe has told me on instructions. The consequence is that the third basis advanced for the claim falls away.

13. For these reasons the application for an injunction fails without the need to consider the balance of convenience. But assuming for the moment that I am wrong in the conclusions I have reached so far as to the likely prospects of success of the causes of action advanced, I would in any event have refused the application for an injunction on the basis of the balance of convenience.

14. Assume for the moment it is arguable that offences may have been committed under section 6 of the 1977 Act. If that is the case it is, in the circumstances of this case also arguable that those protesting, including the Applicants, may themselves have committed offences, for example of assault or criminal damage, possibly also, offences under section 8 of the 1977 Act. The point that this goes to is this: if offences have been committed the correct course of action is to involve the police. I am told, and it is accepted by all parties, that the police were informed of the exercise undertaken by the Second Respondent yesterday and this morning to remove the protesters, and that police officers were present on site from time to time in the course of yesterday. That being so, if it was the case that any criminal offences were being committed the police were well-placed to deal with them and consider for themselves whether they had grounds to suspect that any of the activities that took place yesterday amounted to the commission of a criminal offence by any person.

15. The second point relevant to the balance of convenience is the fact that both the Applicants are trespassers. That is a far from promising starting point for any application for an order that would in substance maintain that trespass. It now appears that the protesters, including the Applicants, have been removed from the premises. In those circumstances, Mr Roscoe says that the request that is now being made of me is to make an order that would effectively reinstate a trespass has come to an end. I do not attach any particular significance to that matter. I accept that when the application was made the Applicants were on the premises. Events have moved on, but that is not a matter that seems to me to be particularly material to whether relief should be granted at this stage.

16. The next point suggested as material to the balance of convenience is that Mr Ackroyd says that he will be left "street homeless" if he is required to leave the premises. I attach very little weight to this matter. Mr Powlesland was unable to tell me where Mr Ackroyd lived before January 2020 when he commenced his protest, but in any event the possibility of being street homeless is not in itself licence to enter

premises unlawfully. Further it is obvious that Mr Ackroyd entered the premises in order to undertake his protest against the First Respondent's construction of HS2, not because of any concerns that he had about being homeless. If the consequence of Mr Ackroyd's removal from the premises is that he is without a roof over his head, his appropriate course of action is to identify his relevant local authority and to apply to that authority for relief. The street homeless point is not a matter then that seems to me to add any significant weight to a balancing exercise in this case as to whether or not I should grant the order requested.

17. I also weigh in the balance that were an order to be made, and were it to turn out at trial that that order had been incorrectly made, it is unlikely that the Applicants would be in a position to satisfy any call for damages that arose in consequence of an interlocutory order having been incorrectly made. Each has offered cross-undertakings in damages, but I cannot see that either has the means to honour the undertaking if called upon to do so. On the other hand, I accept Mr Roscoe's submission that in this case there would be significant costs to the First Respondent were the exercise to remove the protesters from the site either to be halted, or, as events have progressed, to be reversed by order of this court.

18. For all those reasons, my conclusion, had it been necessary to consider the balance of convenience, would be that the balance of convenience falls squarely against granting the interim order the Applicants seek.

19. This application for an interim injunction is refused.

This judgment has been approved by the Judge.

[HOUSE OF LORDS]

AMERICAN CYANAMID CO. . . . . APPELLANTS

AND

ETHICON LTD. . . . . RESPONDENTS

1974 Nov. 12, 13, 14;
1975 Feb. 5

Lord Diplock, Viscount Dilhorne, Lord Cross of Chelsea, Lord Salmon and Lord Edmund-Davies

Injunction—Interlocutory—Jurisdiction to grant—Principles on which interlocutory injunction to be granted—No need to be satisfied that permanent injunction probable at trial—Protection of parties—Balance of convenience—Criteria—Rule identical in patent cases

The plaintiffs, an American company, owned a patent covering certain sterile absorbable surgical sutures. The defendants, also an American company, manufactured in the United States and were about to launch on the British market a suture which the plaintiffs claimed infringed their patent. The defendants contested its validity on divers grounds and also contended that it did not cover their product. In an action for an injunction the plaintiffs applied for an interlocutory injunction which was granted by the judge at first instance with the usual undertaking in damages by the plaintiffs. The Court of Appeal reversed his decision on the ground that no prima facie case of infringement had been made out. On the plaintiffs' appeal:

Held, allowing the appeal, (1) that in all cases, including patent cases, the court must determine the matter on a balance of convenience, there being no rule that it could not do so unless first satisfied that, if the case went to trial on no other evidence than that available at the hearing of the application, the plaintiff would be entitled to a permanent injunction in the terms of the interlocutory injunction sought; where there was a doubt as to the parties' respective remedies in damages being adequate to compensate them for loss occasioned by any restraint imposed on them, it would be prudent to preserve the status quo (post, pp. 406C–F, 407G, 408F).

(2) That in the present case there was no ground for interfering with the judge's assessment of the balance of convenience or his exercise of discretion and the injunction should be granted accordingly (post, p. 410C–E).

Hubbard v. *Vosper* [1972] 2 Q.B. 84, C.A. considered.

Decision of the Court of Appeal [1974] F.S.R. 312 reversed.

The following cases are referred to in their Lordships' opinions:

Donmar Productions Ltd. v. *Bart* (*Note*) [1967] 1 W.L.R. 740; [1967] 2 All E.R. 338.

Harman Pictures N.V. v. *Osborne* [1967] 1 W.L.R. 723; [1967] 2 All E.R. 324.

Hubbard v. *Vosper* [1972] 2 Q.B. 84; [1972] 2 W.L.R. 389; [1972] 1 All E.R. 1023, C.A.

Jones v. *Pacaya Rubber and Produce Co. Ltd.* [1911] 1 K.B. 455, C.A.

Preston v. *Luck* (1884) 27 Ch.D. 497, C.A.

Smith v. *Grigg Ltd.* [1924] 1 K.B. 655, C.A.
Wakefield v. *Duke of Buccleugh* (1865) 12 L.T. 628.

The following additional cases were cited in argument:

Acetylene Illuminating Co. Ltd. v. *United Alkali Co. Ltd.* (1904) 22 R.P.C. 145, H.L.(E.).
British Thomson-Houston Co. Ltd. v. *Corona Lamp Works Ltd.* (1921) 39 R.P.C. 49, H.L.(E.).
Carroll v. *Tomado Ltd.* [1971] R.P.C. 401.
Challender v. *Royle* (1887) 36 Ch.D. 425, C.A.
Elwes v. *Payne* (1879) 12 Ch.D. 468, C.A.
Evans Marshall & Co. Ltd. v. *Bertola S.A.* [1973] 1 W.L.R. 349; [1973] 1 All E.R. 992, C.A.
Hatmaker v. *Joseph Nathan & Co. Ltd.* (1919) 36 R.P.C. 231, H.L.(E.).
May & Baker Ltd. and Ciba Ltd.'s Letters Patent, In re (1948) 65 R.P.C. 255; 66 R.P.C. 8, C.A.; *sub nom. May & Baker Ltd.* v. *Boots Pure Drug Co. Ltd.* (1950) 67 R.P.C. 23, H.L.(E.).
Mitchell v. *Henry* (1880) 15 Ch.D. 181, C.A.
Mogul Steamship Co. v. *M'Gregor, Gow & Co.* (1885) 15 Q.B.D. 476.
Natural Colour Kinematograph Co. Ltd. v. *Bioschemes Ltd.* (1915) 32 R.P.C. 256, H.L.(E.).
Newman v. *British & International Proprietaries Ltd.* [1962] R.P.C. 90, C.A.
No-Fume Ltd. v. *Frank Pitchford & Co. Ltd.* (1935) 52 R.P.C. 231, C.A.
R.C.A. Photophone Ltd. v. *Gaumont-British Picture Corporation Ltd.* (1935) 53 R.P.C. 167, C.A.
Wrotham Park Estate Co. Ltd. v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798; [1974] 2 All E.R. 321.
Zaidener v. *Barrisdale Engineers Ltd.* [1968] R.P.C. 488, C.A.

APPEAL from the Court of Appeal.

This was an appeal from an order of the Court of Appeal (Russell and Stephenson L.JJ. and Foster J.) dated February 5, 1974, whereby the judgment of Graham J. dated July 30, 1973, was reversed and his order discharged on a motion for an interlocutory injunction in an action for infringement of letters patent No. 1,043,518 in which the respondents, Ethicon Ltd., were defendants and the appellants, American Cyanamid Co., were plaintiffs. The respondents counterclaimed for revocation of the patent. Graham J. granted the appellants' application for an interlocutory injunction until the trial of the action and counterclaim, but the Court of Appeal unanimously held that, on the present evidence the claims of the patent were not likely to be construed so as to cover the respondents' product, and that a prima facie case of infringement of the patent had therefore not been established. The Court of Appeal therefore discharged the interlocutory injunction ordered by Graham J. The court refrained from expressing any view on any of the other issues raised.

The facts stated in the opinion of Lord Diplock were as follows: This interlocutory appeal concerned a patent for the use as absorbable surgical sutures of filaments made of a particular kind of chain polymer known as "a poly-hydroxyacetic ester" ("PHAE"). These were sutures of a kind that disintegrated and were absorbed by the human body once they had served their purpose. The appellants ("Cyanamid"), an American com-

pany, were the registered proprietors of the patent. Its priority date in the United Kingdom was October 2, 1964. At that date the absorbable sutures in use were of natural origin. They were made from animal tissues popularly known as catgut. The respondents ("Ethicon"), a subsidiary of another American company, were the dominant suppliers of catgut sutures in the United Kingdom market.

Cyanamid introduced their patented product in 1970. The chemical substance of which it was made was a homopolymer, i.e. all the units in the chain, except the first and the last ("the end stabilisers"), consisted of glycolide radicals. Glycolide was the radical of glycolic acid, which was another name for hydroxyacetic acid. By 1973 this product had succeeded in capturing some 15 per cent. of the United Kingdom market for absorbable surgical sutures. Faced with this competition to catgut, Ethicon, who supplied 80 per cent. of the market, were proposing to introduce their own artificial suture ("XLG"). The chemical substance of which it was made was not a homopolymer but a copolymer, i.e. although 90 per cent. by weight of the units in the chain consisted of glycolide radicals, the remaining 10 per cent. are lactide radicals, which were similar in chemical properties to glycolide radicals but not identical in chemical composition.

Cyanamid contended that XLG infringed their patent, of which the principal claim was: "A sterile article for the surgical repair or replacement of living tissue, the article being readily absorbable by living tissue and being formed from a polyhydroxyacetic ester." As was disclosed in the body of the patent, neither the substance PHAE nor the method of making it into filaments was new at the priority date. Processes for manufacturing filaments from PHAE had been the subject of two earlier United States patents in 1953 (Lowe) and 1954 (Higgins). The invention claimed by Cyanamid thus consisted of the discovery of a new use for a known substance.

On March 5, 1973, Cyanamid started a quia timet action against Ethicon for an injunction to restrain the threatened infringement of their patent by supplying sutures made of XLG to surgeons in the United Kingdom. On the same day they gave notice of motion for an interlocutory injunction. Voluminous affidavits and exhibits were filed on behalf of each party. The hearing of the motion before Graham J. lasted three days. On July 30, 1973, he granted an interlocutory injunction upon the usual undertaking in damages by Cyanamid.

Ethicon appealed to the Court of Appeal. The hearing there took eight days. On February 5, 1974, the Court of Appeal gave judgment. They allowed the appeal and discharged the judge's order. Leave to appeal from that decision was granted by the House of Lords.

Andrew Bateson Q.C. and *David Young* for the appellant company. The main issue in this appeal is whether PHAE, construed in the patent in suit, covers more than the homopolymer. In holding that that had not been established prima facie the Court of Appeal was wrong and the trial judge was right in holding that what was meant by comonomer in the patent contemplated copolymers. For the purpose of deciding whether the plaintiffs have established a prima facie case the House must decide whether on the evidence the construction for which they contend is the one

A applicable to the patent in suit. On construction the case put forward by the respondents is barely arguable.

The Court of Appeal wrongly construed the claim and specification and its decision was based on a misapprehension of the evidence. It erred in holding that the appellants had not established that prima facie the patent in suit would be infringed by the marketing of the respondents' suture.

B The onus is not on the plaintiffs to establish a prima facie case of infringement before an interlocutory injunction case can be granted. "Prima facie" can have many meanings. Here, if anything, it means that the plaintiff has more than a 50 per cent. chance of success. The general rule that one must establish a probability, or a strong probability, is not correct. One must look at the whole case to see whether there is a question to be tried and, if there is, then look at the balance of con-

C venience between the parties, bearing in mind that there is good reason why the status quo should be preserved. The relevant authorities are *Preston* v. *Luck* (1884) 27 Ch.D. 497, 504–505; *Halsbury's Laws of England*, 3rd ed., vol. 21 (1957), pp. 365–366, para. 365 and *Donmar Productions Ltd.* v. *Bart* (*Note*) [1967] 1 W.L.R. 740. The shackles of *Harman Pictures N.V.* v. *Osborne* [1967] 1 W.L.R. 723 have been removed

D by *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, 96, 101. See also *Evans Marshall & Co. Ltd.* v. *Bertola S.A.* [1973] 1 W.L.R. 349, 377, 379–380, 385–386; *Wrotham Park Estate Co. Ltd.* v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798, 810; *Terrell on the Law of Patents*, 12th ed. (1971), pp. 319–320, paras. 823, 824, pp. 322–323, para. 833, citing *Newman* v. *British & International Proprietaries Ltd.* [1962] R.P.C. 90, 93; *Challender* v. *Royle* (1887) 36 Ch.D. 425, 429–430, 435–436, 443; *Zaidener* v.

E *Barrisdale Engineers Ltd.* [1968] R.P.C. 488, 495 (Willmer L.J.) 497; and *Carroll* v. *Tomado Ltd.* [1971] R.P.C. 401, 405–406.

The appellants adopt the principle laid down in *Hubbard* v. *Vosper* [1972] 2 Q.B. 84, particularly the judgment of Megaw L.J. at pp. 93H–98B. There is logical reason or justification why the percentages there set out do not equally apply to plaintiffs and defendants. If there is a

F serious issue to be tried it will lead to a just result and mini-trials on the application for an interlocutory injunction would be prevented. It is undesirable to adopt any other course. When the court is considering whether or not to grant an interlocutory injunction the right approach is to ask first whether or not there is a serious question to be tried. When the court has some idea of the strength of the respective cases that is a factor to be taken into consideration.

G In the present case Graham J. placed a heavy onus on the appellants and held that they had discharged it. The differing decisions of the Court of Appeal and the judge on the merits show that there is a serious question to be tried. On the evidence the appellant should succeed. On the question of the balance of convenience reliance is placed on Graham J.'s judgment.

H *Stephen Gratwick Q.C.* and *G. D. Paterson* for the respondent company. On an application for an interlocutory injunction the court must look at the respective situations of the two contending parties. The first question to ask is why a plaintiff should not be left to fight his action and

get his relief by succeeding. The normal rule of English litigation is that a party gets no relief till he has gone to trial and persuaded the court that he has a right which has been infringed. He is not entitled to an interlocutory injunction just because he has a strong case. He is only so entitled if it is shown that there could be injustice if the defendant is left unfettered and that there is a serious risk of irreparable damage to the plaintiff. In the first place the plaintiff should show that there is some serious need for the defendant to be restrained. The law recognises that there are situations in which the property in dispute has some special quality of its own, e.g., cases where there is the danger of the collapse of a party wall, but in a patent action this is rarely the case and usually the interests of the parties are purely monetary, so that no question of irreparable damage arises. The *Evans Marshall* case [1973] 1 W.L.R. 349, 379–380 illustrates a true application of this principle. See also *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* (1885) 15 Q.B.D. 476, 484–486. The question is whether the plaintiff would suffer irreparable injury or only an injury which could be compensated in damages. One must look at the facts of each particular case to see whether irreparable damage would be caused. If there is simply a dispute between traders as to a monopoly there will be no irreparable damage. The grant of a patent is an exception recognised by the Statute of Monopolies 1623 which was designed to give everyone freedom to trade. In each case one must ask why damages are not a sufficient remedy. In the present case it could be serious for the defendants to have to put all their work into cold storage. There is no suggestion that they would not be good for any damages which might be awarded against them if they lost the action eventually. In *Preston* v. *Luck,* 27 Ch.D. 497, 508, the court acted on the basis suggested by the defendants. It should not be the policy of the court to preserve the statuts quo in all cases but only to prevent irreparable damage to the plaintiffs: see *Elwes* v. *Payne* (1879) 12 Ch.D. 468, 476, 479. As to the assessment of damages should the plaintiffs succeed, see *Terrell on the Law of Patents*, 12th ed., p. 372, para. 948. In practical experience, parties in patent litigation rarely find difficulty in reaching an agreement on damages.

If there is evidence of irreparable damage the next question is: What sort of a case has the plaintiff got? It must also be considered on what basis the defendants will defend the action. The plaintiffs must be able to show that the strength of their case is such that in the circumstances there should be an interlocutory injunction. It is accepted that there may be cases in which the risk of damage to the plaintiffs is such that an injunction should be granted (e.g., where a defendant is erecting a fence across the plaintiff's only approach to his house) regardless of the strength of the parties' cases, but in other cases the risk of damage could be very small and the respective cases must be considered.

The House should try this matter to the extent of establishing how much substance there is in the defendants' answer. For the purposes of an interlocutory injunction the case against the specification is so strong that relief should not be granted till the rights of the parties have been tested in court.

One may distinguish between a difficult question and a serious question. Problems may arise, not from the difficulty of a question of

A construction but from the amount of knowledge needed to present the case to the court in an age of increasingly complex technology, and, once this technical problem is mastered, there may be no serious difficulty over the construction of the specification. As to the contents of a specification, see *Terrell on the Law of Patents*, p. 416, para. 1134.

Patent specifications must not be ambiguous: *Natural Colour Kinematograph Co. Ltd.* v. *Bioschemes Ltd.* (1915) 32 R.P.C. 256, 266, 268–269,
B The plaintiffs are seeking equitable relief and he who comes to equity must do equity, whereas their specification is just the sort which was criticised in the *Natural Colour* case, 32 R.P.C. 256, 266, 268–269. If the plaintiffs have made their specification needlessly obscure, they should not be given interlocutory relief and should wait till they have proved their case for a monopoly in court. No sincere attempt was made to make it clear that that copolymers were included.

C If, however, the specification bears the wider meaning alleged, it is invalid for inutility, insufficiency, unfair basis and false suggestion, since the copolymers will not have, as surgical sutures, the characteristics described in the body of the patent. The specification wholly fails to meet the obligation imposed by statute to tell the reader fairly what is required to make the copolymers.

D "Ambiguity" in the present context has not the meaning which it ordinarily has in relation to the construction of documents but refers to the want of clarity which is a ground of objection under section 32 (1) (*i*) of the Patents Act 1949. Such an objection was made in the *Natural Colour* case, 32 R.P.C. 256, 259–260, and what Lord Loreburn said about it at p. 266 is what the defendants say here, since his observations are very appropriate to the present specification.

E The essence of this invention was discovering a material which would make a satisfactory suture. That puts on the inventor the burden of saying what materials serve that purpose; otherwise he is being grossly unfair to the public. It is in this context that the House of Lords should say that the strength of the defendants' case is such that there should be no interlocutory injunction.

F Two inventors may solve a problem by different methods. This has happened here, where the chief problem to be solved was that of absorbability. Someone using a copolymer is not doing something covered by this invention and he should not be held to be within the patent. For the plaintiffs there is no stopping point between a claim for a homopolymer and a wide claim for copolymers.

A patent cannot properly be held to cover things which do not operate
G in the way the inventor says they do: see *Hatmaker* v. *Joseph Nathan & Co. Ltd.* (1919) 36 R.P.C. 231, 232–233, 236–237, 239, which is applicable to the present case. The observations of the Lords were not confined to claims for processes. If an inventor says that by using his invention certain results are achieved, the patent is invalid if they are not achieved.

As to inutility, see *Terrell on the Law of Patents*, 12th ed., p. 99,
H para. 246, pp. 101–102, para. 251 and p. 103, para. 253. The trial judge wrongly applied the test of commercial utility. The plaintiffs say that the claim covers copolymers but the defendants' copolymer does not have any of the qualities which they allege. Different inventors may

arrive at commercially satisfactory ways of solving a problem by different inventions and by things which behave in different ways. This inventor solved the problem only by using homopolymers and materials which he said have certain characteristics. His patent cannot cover the case of people who solved the problem by methods which do not have those characteristics. The observations in *In re May & Baker Ltd. and Ciba Ltd.'s Letters Patent* (1948) 65 R.P.C. 255, 288–289; 66 R.P.C. 8; *sub nom. May & Baker Ltd.* v. *Boots Pure Drug Co. Ltd.* (1950) 67 R.P.C. 23 are directly applicable to the claim in the present case. In the medical field it is very wrong of an inventor to cast his claim more widely than is justified by the work he has done. Here the plaintiffs have cast their claim over a range of copolymers, the scope of which one does not know.

It is legitimate to frame a patent widely if the invention has been so described in the body of the specification. But unless the specification is so framed, the claim cannot be made in that way: see *British Thomson-Houston Co. Ltd.* v. *Corona Lamp Works Ltd.* (1921) 39 R.P.C. 49 quoted in *Terrell on the Law of Patents*, 12th ed., p. 97, para. 242. In the present case any claim would have to be backed up by a description in the specification intimating how other groups and units would affect the properties of the suture. This specification has not been so framed. The approach which the plaintiffs seek to make is one which the specification cannot sustain: see also *No-Fume Ltd.* v. *Frank Pitchford & Co. Ltd.* (1935) 52 R.P.C. 231, 236 and *R.C.A. Photophone Ltd.* v. *Gaumont-British Picture Corporation Ltd.* (1935) 53 R.P.C. 167, 205.

Even assuming that the plaintiffs are entitled to claim in this form, the question remains whether there was infringement. The plaintiffs are debarred from maintaining that there has been infringement because a copolymer has been used, since they have not discharged the onus of proof on this point.

As to the balance of convenience, see *Mitchell* v. *Henry* (1880) 15 Ch.D. 181, 191, 195.

As to the evidence on the balance of convenience what is relevant here, so far as regards damage to the plaintiffs, is the possible impact of an interlocutory injunction on domestic sales. This is a trifling amount of the total sales of a giant corporation and irreparable damage could not conceivably be caused to the plaintiffs. At most there could only be a minor commercial set-back in the development of their business, bearing in mind their resources. The plaintiffs have not adduced any evidence of irreparable damage. Both parties are giant corporations of enormous resources. Such damage as the plaintiffs might suffer, prior to judgment, if they succeed at the trial, will not have any material effect on their annual profit and loss account and that damage can easily be met by the defendants.

So, if there is no interlocutory injunction and the plaintiffs succeed at the trial, they will recover damages under every relevant head of damage appropriate to infringement of a patent. The basis will be the amount of business done by the defendants, which can easily be ascertained from their accounts. No other head of damage would arise. The patent will not expire till 1980 and so the perpetual injunction, which will be granted if

the plaintiffs succeed ultimately, will protect them in re-establishing a monopoly.

If an interlocutory injunction is granted and the defendants succeed at the trial, the plaintiffs will have to pay them such damages as are attributable to the injunction. There will be no simple basis on which to assess it since it must depend on an estimate of the amount of business the defendants would have done during the period of the injunction and of the diminution caused by that injunction in the future value of that business when resumed. A further source of damage to the defendants arises out of the great expense involved in developing and preparing to market their products over many years. Any delay in marketing represents a loss in the return on the investment and a loss in its actual value because it gives more time to other competitors to develop products of their own. These losses are more difficult to assess than any which could arise if an injunction were not granted and the plaintiffs succeeded.

The present case resembles *Zaidener* v. *Barrisdale Engineers Ltd.* [1968] R.P.C. 488. The balance of convenience is against the granting of an interlocutory injunction. The application can be and should be refused without the court needing to form any prima facie view as to the respective rights of the parties.

In every patent action money is at stake and there is some question of substance. If it is right to grant an interlocutory injunction in this case, where there is little evidence of the probability of irreparable damage to the plaintiffs, when would it not be right to grant such an injunction?

Paterson following. There are four points of defence: (1) On the proper construction of claim 1 of the specification there has been no infringement. (2) If on the true construction of claim 1 it is broad enough to cover the defendants' sutures, then it is invalid on grounds of inutility, insufficiency, ambiguity, no fair basis and false suggestion: section 32 (1) (*g*) (*h*) (*i*) and (*j*) of the Patents Act 1949. (3) Each claim is invalid on the ground of obviousness: section 32 (1) (*g*). (4) The balance of convenience does not favour the grant of an interlocutory injunction.

One cannot have a patent for a new use of an old product unless there is invention in the adaptation of the old product to the new use: *Acetylene Illuminating Co. Ltd.* v. *United Alkali Co. Ltd.* (1904) 22 R.P.C. 145, 155–156. The test is whether the new use lies in the track of the old use.

In 1963 three companies independently had the idea of using PHAE as a suture, Graham J. in rejecting the defendants' submissions on this point ignored the evidence of the history of the matter.

[LORD DIPLOCK intimated that their Lordships only required to hear arguments in reply on the question of balance of convenience.]

Bateson Q.C. in reply. Prospective infringers should not "jump the gun." In the light of the defendants' aggressive sales policy and in view of the fact that the case cannot be finished till 1977, there is a danger that the defendants might press the sale of those sutures, not to fill a need, but to get ahead of the plaintiffs. The balance of convenience is primarily a matter for the judge of first instance.

Their Lordships took time for consideration.

February 5, 1975. LORD DIPLOCK stated the facts and continued: My Lords, the question whether the use of XLG as an absorbable surgical suture is an infringement of Cyanamid's patent depends upon the meaning to be given to the three words " a polyhydroxyacetic ester " in the principal claim. Cyanamid's contention is that at the date of publication of the patent those words were used as a term of art in the chemistry of polymerisation not only in the narrower meaning of a homopolymer of which the units in the chain, apart from the end stabilisers, consisted solely of glycolide radicals but also in the broader meaning of a copolymer of which up to 15 per cent. of the units in the chain would be lactide radicals; and that what was said in the body of the patent made it clear that in the claim the words were used in this wider meaning.

Ethicon's first contention is that the words " a polyhydroxyacetic ester " in the principal claim bear the narrower meaning only, viz. that they are restricted to a homopolymer of which all the units in the chain except the end stabilisers consist of glycolide radicals. In the alternative, as commonly happens where the contest is between a narrower and a wider meaning in a patent specification, they attack the validity of the patent, if it bears the wider meaning, on the grounds of inutility, insufficiency, unfair basis and false suggestion. These objections are really the obverse of their argument in favour of the narrower construction. They are all different ways of saying that if the claim is construed widely it includes copolymers which will not have as surgical sutures the characteristics described in the body of the patent. Ethicon also attack the validity of the patent on the ground of obviousness.

Both Graham J. and the Court of Appeal felt constrained by authority to deal with Cyanamid's claim to an interlocutory injunction by considering first whether, upon the whole of the affidavit evidence before them, a prima facie case of infringement had been made out. As Russell L.J. put it in the concluding paragraph of his reasons for judgment with which the other members of the court agreed [1974] F.S.R. 312, 333:

> " . . . if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants' proposed activities, that is the end of the claim to interlocutory relief."

" Prima facie case " may in some contexts be an elusive concept, but the sense in which it was being used by Russell L.J. is apparent from an earlier passage in his judgment. After a detailed analysis of the conflicting expert testimony he said, at p. 330:

> " I am not satisfied on the present evidence that on the proper construction of this specification, addressed as it is to persons skilled in the relevant art or science, the claim extends to sterile surgical sutures produced not only from a homopolymer of glycolide but also from a copolymer of glycolide and up to 15 per cent. of lactide. That is to say that I do not consider that a prima facie case of infringement is established."

In effect what the Court of Appeal was doing was trying the issue of infringement upon the conflicting affidavit evidence as it stood, without the benefit of oral testimony or cross-examination. They were saying:

A "If we had to give judgment in the action now without any further evidence we should hold that Cyanamid had not satisfied the onus of proving that their patent would be infringed by Ethicon's selling sutures made of XLG."

The Court of Appeal accordingly did not find it necessary to go into the questions raised by Ethicon as to the validity of the patent or to consider where the balance of convenience lay.

B Graham J. had adopted the same approach as the Court of Appeal; but, upon the same evidence he had come to the contrary conclusion on the issue of infringement. He considered (at p. 321) that on the evidence as it stood Cyanamid had made out a "strong prima facie case" that their patent would be infringed by Ethicon's selling sutures made of XLG. He then went on to deal briefly with the attack upon the validity of the C patent and came to the conclusion that upon the evidence before him none of the grounds of invalidity advanced by Ethicon was likely to succeed. He therefore felt entitled to consider the balance of convenience. In his opinion it lay in favour of maintaining the status quo until the trial of the action. So he granted Cyanamid an interlocutory injunction restraining Ethicon from infringing the patent until the trial or further order.

D The grant of an interlocutory injunction is a remedy that is both temporary and discretionary. It would be most exceptional for your Lordships to give leave to appeal to this House in a case which turned upon where the balance of convenience lay. In the instant appeal, however, the question of the balance of convenience, although it had been considered by Graham J. and decided in Cyanamid's favour, was never E reached by the Court of Appeal. They considered that there was a rule of practice so well established as to constitute a rule of law that precluded them from granting any interim injunction unless upon the evidence adduced by both the parties on the hearing of the application the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violate the applicant's F legal rights. In the view of the Court of Appeal the case which the applicant had to prove before any question of balance of convenience arose was "prima facie" only in the sense that the conclusion of law reached by the court upon that evidence might need to be modified at some later date in the light of further evidence either detracting from the probative value of the evidence on which the court had acted or proving additional facts. It was in order to enable the existence of any such rule G of law to be considered by your Lordships' House that leave to appeal was granted.

The instant appeal arises in a patent case. Historically there was undoubtedly a time when in an action for infringement of a patent that was not already "well established," whatever that may have meant, an interlocutory injunction to restrain infringement would not be granted if H counsel for the defendant stated that it was intended to attack the validity of the patent.

Relics of this reluctance to enforce a monopoly that was challenged, even though the alleged grounds of invalidity were weak, are to be found

in the judgment of Scrutton L.J. as late as 1924 in *Smith* v. *Grigg Ltd.* [1924] 1 K.B. 655; but the elaborate procedure for the examination of patent specifications by expert examiners before a patent is granted, the opportunity for opposition at that stage and the provisions for appeal to the Patent Appeal Tribunal in the person of a patent judge of the High Court, make the grant of a patent nowadays a good prima facie reason, in the true sense of that term, for supposing the patent to be valid, and have rendered obsolete the former rule of practice as respects interlocutory injunctions in infringement actions. In my view the grant of interlocutory injunctions in actions for infringement of patents is governed by the same principles as in other actions. I turn to consider what those principles are.

My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where " the balance of convenience " lies.

In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent. or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

The notion that it is incumbent upon the court to undertake what is in effect a preliminary trial of the action upon evidential material different from that upon which the actual trial will be conducted, is, I think, of comparatively recent origin, though it can be supported by references in

earlier cases to the need to show "a probability that the plaintiffs are entitled to relief" (*Preston* v. *Luck* (1884) 27 Ch.D. 497, 506, *per* Cotton L.J.) or "a strong prima facie case that the right which he seeks to protect in fact exists" (*Smith* v. *Grigg Ltd.* [1924] 1 K.B. 655, 659, *per* Atkin L.J.). These are to be contrasted with expressions in other cases indicating a much less onerous criterion, such as the need to show that there is "certainly a case to be tried" (*Jones* v. *Pacaya Rubber and Produce Co. Ltd.* [1911] 1 K.B. 455, 457, *per* Buckley L.J.) which corresponds more closely with what judges generally treated as sufficient to justify their considering the balance of convenience upon applications for interlocutory injunctions, at any rate up to the time when I became a member of your Lordships' House.

An attempt had been made to reconcile these apparently differing approaches to the exercise of the discretion by holding that the need to show a probability or a strong prima facie case applied only to the establishment by the plaintiff of his right, and that the lesser burden of showing an arguable case to be tried applied to the alleged violation of that right by the defendant (*Donmar Productions Ltd.* v. *Bart* (*Note*) [1967] 1 W.L.R. 740, 742, *per* Ungoed-Thomas J., *Harman Pictures N.V.* v. *Osborne* [1967] 1 W.L.R. 723, 738, *per* Goff J.). The suggested distinction between what the plaintiff must establish as respects his right and what he must show as respects its violation did not long survive. It was rejected by the Court of Appeal in *Hubbard* v. *Vosper* [1972] 2 Q.B. 84 —a case in which the plaintiff's entitlement to copyright was undisputed but an injunction was refused despite the apparent weakness of the suggested defence. The court, however, expressly deprecated any attempt to fetter the discretion of the court by laying down any rules which would have the effect of limiting the flexibility of the remedy as a means of achieving the objects that I have indicated above. Nevertheless this authority was treated by Graham J. and the Court of Appeal in the instant appeal as leaving intact the supposed rule that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought.

Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability," "a prima facie case," or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the

grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing": *Wakefield* v. *Duke of Buccleugh* (1865) 12 L.T. 628, 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may

show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.

I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases. The instant appeal affords one example of this.

Returning, therefore, to the instant appeal, it cannot be doubted that the affidavit evidence shows that there are serious questions to be tried. Graham J. and the Court of Appeal have already tried the question of infringement on such affidavit evidence as was available and have come to contrary conclusions. Graham J. has already also tried the question of invalidity on these affidavits and has come to the conclusion that the defendant's grounds of objection to the patent are unlikely to succeed, so it was clearly incumbent upon him and on the Court of Appeal to consider the balance of convenience.

Graham J. did so and came to the conclusion that the balance of convenience lay in favour of his exercising his discretion by granting an interlocutory injunction. As patent judge he has unrivalled experience of pharmaceutical patents and the way in which the pharmaceutical industry is carried on. Lacking in this experience, an appellate court should be hesitant to overrule his exercise of his discretion, unless they are satisfied that he has gone wrong in law.

The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so they had no business which would be brought to a stop by the injunction; no factories would be closed and no work-people would be thrown out of work. They held a dominant position in the United Kingdom market for absorbent surgical sutures and adopted an aggressive sales policy. Cyanamid on the other hand were in the course of establishing a growing market in PHAE surgical sutures which competed with the natural catgut sutures marketed by Ethicon. If Ethicon were entitled also to establish themselves in the market for PHAE absorbable surgical sutures until the action is tried, which may not be for two or three years yet, and possibly thereafter until the case is finally disposed of on appeal, Cyanamid, even though ultimately successful in proving infringement, would have lost its chance of continuing to increase

its share in the total market in absorbent surgical sutures which the continuation of an uninterrupted monopoly of PHAE sutures would have gained for it by the time of the expiry of the patent in 1980. It is notorious that new pharmaceutical products used exclusively by doctors or available only on prescription take a long time to become established in the market, that much of the benefit of the monopoly granted by the patent derives from the fact that the patented product is given the opportunity of becoming established and this benefit continues to be reaped after the patent has expired.

In addition there was a special factor to which Graham J. attached importance. This was that, once doctors and patients had got used to Ethicon's product XLG in the period prior to the trial, it might well be commercially impracticable for Cyanamid to deprive the public of it by insisting on a permanent injunction at the trial, owing to the damaging effect which this would have upon its goodwill in this specialised market and thus upon the sale of its other pharmaceutical products.

I can see no ground for interfering in the learned judge's assessment of the balance of convenience or for interfering with the discretion that he exercised by granting the injunction. In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case. The likelihood of such embarrassment provides an additional reason for not adopting the course that both Graham J. and the Court of Appeal thought they were bound to follow, of dealing with the existing evidence in detail and giving reasoned assessments of their views as to the relative strengths of each party's cases.

I would allow the appeal and restore the order of Graham J.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Diplock. I agree with it and that this appeal should be allowed and the order of Graham J. restored.

LORD CROSS OF CHELSEA. My Lords, for the reasons given by my noble and learned friend, Lord Diplock, in his speech, which I have had the advantage of reading in draft, I would allow this appeal.

LORD SALMON. My Lords, I agree with the opinion of my noble and learned friend, Lord Diplock, and for the reasons he gives I would allow the appeal and restore the order of Graham J.

LORD EDMUND-DAVIES. My Lords, for the reasons given by my noble and learned friend, Lord Diplock, I would also allow this appeal.

Appeal allowed.

Solicitors: *Allen & Overy; Lovell, White & King.*

F. C.

APPLEBY v UNITED KINGDOM

(Environmental campaigners prevented from distributing leaflets in privately owned shopping centre)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NO.44306/98

(The *President*, Judge Pellonpää; *Judges* Bratza, Palm, Stráznická, Maruste, Pavlovschi, Garlicki)

(2003) 37 E.H.R.R. 38

May 6, 2003

H1 The first three applicants had established an environmental group, Washington First Forum (the fourth applicant), to campaign against a plan to build on the only public playing field near Washington town centre. They set about collecting signatures for a petition to persuade the council to reject the project. They tried to set up stands in the Galleries, a privately owned shopping mall in Washington. However, they were prevented from doing so by security guards employed by the company which owned the Galleries. Although the manager of one of the shops in the mall allowed the applicants to set up stands in his store in March 1998, this permission was not granted the following month when they wished to collect signatures for a further petition. The manager of the Galleries informed the applicants that permission had been refused because the private owner took a strictly neutral stance on all political and religious issues. Relying on Arts 10 and 11 of the Convention, the applicants complained that they had been prevented from meeting in their town centre to share information and ideas about the proposed building plans. They also complained under Art.13 that they had no effective remedy under domestic law.

H2 **Held:**

(1) by six votes to one that there had been no violation of Art.10;

(2) by six votes to one that there had been no violation of Art.11;

(3) unanimously that there had been no violation of Art.13.

1. Freedom of assembly and association: positive obligation; fair balance; access to private property (Art.10).

H3 (a) The freedom of expression is one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere but may require positive measures of protection, even in the sphere of relations between individuals. [39]

H4 (b) In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the

community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities. [40]

H5 (c) The Government do not bear any direct responsibility for the restriction of the applicants' freedom of expression. No element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel (a private company) or that this was done with ministerial permission. The issue is whether the Government have failed in any positive obligation to protect the exercise of Convention rights from interference by the private owner of the shopping centre. [41]

H6 (d) The nature of the Convention right at stake is an important consideration. The applicants wanted to draw the attention of fellow citizens to their opposition to the plans to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to the debate about the exercise of local government powers. However, while freedom of expression is an important right it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1 [42]–[43].

H7 (e) Although United States cases illustrate an increasing trend in accommodating freedom of expression to privately owned property open to the public, the United States Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. It cannot be said that there is as yet any emerging consensus that could assist the examination of the case under Art.10. [46]

H8 (f) Despite the importance of freedom of expression, Art.10 does not bestow any freedom of forum for the exercise of the right. While 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 to all publicly owned property. However, where the bar on access to property has the effect of preventing any effective exercise of freedom of expression or the essence of the right is destroyed, the State may have a positive obligation to protect the enjoyment of Convention rights by regulating property rights. [47]

H9 (g) The restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the new town centre. It did not prevent them from obtaining individual permission from businesses or from distributing their leaflets on the paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means. Consequently, they cannot claim that the private company's refusal effectively prevented them from communicating their views to their fellow citizens and therefore exercising their freedom of expression in a meaningful manner. [48]

H10 (h) Balancing the rights in issue and having regard to the nature and scope of the restriction, the Government did not fail in any positive obligation to protect the

applicants' freedom of expression. Accordingly, there was no violation of Art.10. [49]–[50]

2. Freedom of association (Art.11).

H11 Largely identical considerations arise under Art.11. For the same reasons, there was no failure to protect the applicants' freedom of assembly. [52]

3. Right to an effective remedy: Human Rights Act 1998 (Art.13).

H12 (a) Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention. [56]

H13 (b) Since October 2, 2000 when the Human Rights Act 1998 took effect, the applicants could have raised their complaints before the domestic courts, which would have had a range of possible redress available to them. Accordingly, there is no breach of Art.13. [56]

H14 **The following cases are referred to in the Court's judgment:**

1. *Fuentes Bobo v Spain*: (2001) 31 E.H.R.R. 50.
2. *James v United Kingdom* (A/98): (1986) 8 E.H.R.R. 123.
3. *Osman v United Kingdom*: (2000) 29 E.H.R.R. 245.
4. *Özgür Gündem v Turkey*: (2001) 31 E.H.R.R. 49.
5. *Rees v United Kingdom* (A/106): (1987) 9 E.H.R.R. 56.

H15 **The following domestic cases are referred to in the Court's judgment:**

6. *Batchelder v Allied Stores Int'l N.E.* 2d 590 (Mass. 1983).
7. *Bock v Westminster Mall Co*, 819 P.2d 55 (Colo. 1991).
8. *Charleston Joint Venture v McPherson*, 417 S.E.2d 544 (SC 1992).
9. *Cin Properties Ltd v Rawlins* [1995] 2 E.G.L.R. 130.
10. *Citizens for Ethical Gov't v Gwinnet Place Assoc.*, 392 S.E.2d 8 (Ga. 1990).
11. *Cologne v Westfarms Assocs*, 469 1.2d 1201 (Conn. 1984).
12. *Committee for Cth of Canada v Canada* [1991] 1 SCR 139.
13. *Eastwood Mall v Slanco*, 626 N.E.2d 59 (Ohio 1994).
14. *Fiesta Mall Venture v Mecham Recall Comm.*, 767 P.2d 719 (Ariz. Ct. App. 1989).
15. *Hague v Committee for Industrial Organisation*, 307 US 496 (1939).
16. *Harrison v Carswell*, 62 D.L.R. (3d) 68.
17. *Hudgens v Nlrb*, 424 US 507 (1976).
18. *Jacobs v Major*, 407 N.W.2d 832 (Wis. 1987).
19. *Jamestown v Beneda*, 477 N.W. 2d (N.D. 1991).
20. *Lloyd Corp v Tanner*, 47 U.S. 551, 92 S. Ct. 2219, 33 L.Ed. 2d 131 (1972).
21. *Lloyd Corp v Whiffen*, 849 P.2d 446, 453–54 (Or. 1993).
22. *Marsh v Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946).

23. *Pruneyard Shopping Center v Robbins*, 447 US 74, 64 L.Ed. 2d 741, 100 S Ct. 2035 (1980).
24. *R. v Layton*, 38 CCC(3d) 550 (1986) (Provincial Court, Judicial District of York, Ontario).
25. *Southcenter Joint Venture v National Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989).
26. *State v Schmit* (1980) N.J. 423A 2d 615
27. *State v Shack*, 277 1.2d 369 (N.J. 1971).
28. *State of Minnesota v Wicklund*, April 7, 1998 (Minnesota Court of Appeals).
29. *State of North Carolina v Felmet*, 273 S.E.2d 708 N.C. 1981).
30. *Streetwatch v National Railroad Passenger Corp*, 875 F. Supp. 1055 (S.D.N.Y. 1995).
31. *Uston v Resorts International*, 445 A.2d 370 (N.J. 1982).
32. *Western PA Socialist Workers 1982 Campaign v Connecticut Gen. Life Ins. Co*, 515 1.2d 1331 (Pa 1986).
33. *Woodland v Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985).

THE FACTS

I. The circumstances of the case

10 The first, second and third applicants were born in 1952, 1966 and 1947 respectively and live in Washington in Tyne and Wear, where the fourth applicant, an environmental group set up by the applicants, is also based.

11 The new town centre of Washington is known as the Galleries and is located within an area now owned by Postel Properties Limited ("Postel"), a private company. This town centre was originally built by the Washington Development Corporation ("the Corporation"), a body set up by the government of the United Kingdom pursuant to an Act of Parliament to build the "new" centre. The centre was sold to Postel on December 30, 1987.

12 The Galleries, as owned by Postel at the relevant time, comprised a shopping mall (with two hypermarkets and major shops), the surrounding car parks with spaces for approximately 3,000 cars and walkways. Public services were also available in this vicinity. However, the freehold of the careers' office and the public library was owned by the Council, the social services office and health centre were leased to the Council by the Secretary of State and the freehold of the police station was held on behalf of Northumbria Police Authority. There was a post office and the offices of the housing department, leased to the Council by Postel, within the Galleries.

13 In about September 1997, the Council gave outline planning permission to the City of Sunderland College ("the College") to build on part of the Princess Anne Park in Washington, known as the Arena. The Arena is the only playing field in the vicinity of Washington town centre which is available for use by the local community. The first to third applicants, together with other concerned residents, formed the fourth applicant to campaign against the College's proposal and to persuade the Council not to grant the College permission to build on the field.

14 On or about March 14, 1998, the first applicant, together with her husband and son, set up two stands in the entrance of the shopping mall in the Galleries,

displaying posters alerting the public to the likely loss of the open space and seeking signatures to present to the Council on behalf of Washington First Forum. Security guards employed by Postel would not allow the first applicant or her assistants to continue to collect signatures on any land or premises owned by Postel. The applicants had to remove their stands and stop collecting signatures.

15 The manager of one of the hypermarkets gave the applicants permission to set up stands within that store in March 1998, allowing them to transmit their message and collect signatures, albeit from a reduced number of persons. However this permission was not granted in April 1998 when the applicants wished to collect signatures for a further petition.

16 On April 10, 1998 the third applicant, as acting chair of Washington First Forum, wrote to the manager of the Galleries to ask for permission to set up a stall and to canvass views from the public either in the mall or in the adjacent car parks and offered to make a payment to be able to do so. On April 14, 1998 the manager of the Galleries replied and refused access. The letter stated:

> ". . . the Galleries is unique in as much as although it is the Town Centre, it is also privately owned.
>
> The owner's stance on all political and religious issues, is one of strict neutrality and I am charged with applying this philosophy.
>
> I am therefore obliged to refuse permission for you to carry out a petition within the Galleries or the adjacent car parks".

17 On April 19, 1998, the third applicant wrote again to the manager of the Galleries asking him to reconsider his decision. The applicants have received no response to this letter.

18 The fourth applicant has continued to seek access to the public by setting up stalls by the side of the road on public footpaths and visiting the old town centre at Concord, which however is visited by a much smaller percentage of the residents of Washington.

19 The deadline for letters of representation to the Council regarding the building works was May 1, 1998. The applicants submitted the 3,200 letters of representation they had obtained on April 30, 1998.

20 The applicant has provided a list of organisations which have been allowed to carry out collections, set up stalls and displays within the Galleries, including the Salvation Army (collection before Christmas), local school choirs (carol singing and collection before Christmas), Stop Smoking Campaign (advertising display handing out nicotine patches), Blood Transfusion Service (blood collection), Royal British Legion (collection for Armistice Day), various photographers (advertising and taking photographs) and British Gas (staffed advertising display).

21 From January 31 to March 6, 2001, Sunderland Council ran a consultation campaign "Your Council, Your Choice" informing the local residents of three leadership choices for the future of the Council and were allowed to use the Galleries for this purpose. This was a statutory consultation exercise under s.25 of the Local Government Act 2000, which required local authorities to draw up proposals for the operation of "executive arrangements" and consult local electors before sending them to the Secretary of State. Some 8,500 people were reported as responding to the survey issued.

II. Relevant domestic law and practice

22 At common law, a private property owner may, in certain circumstances, be presumed to have extended an implied invitation to members of the public to come onto his land for lawful purposes. This covers commercial premises, such as shops, theatres and restaurants as well as private premises (for example there is a presumption that a house owner authorises people to come up the path to his front door to deliver letters or newspapers or for political canvassing). Any implied invitation may be revoked at will. A private person's ability to eject people from his land is generally unfettered and he does not have to justify his conduct or comply with any test of reasonableness.

23 In the case of *Cin Properties Ltd v Rawlins*,[1] where the applicants (young men) were barred from a shopping centre in Wellingborough as the private company owner CIN considered that their behaviour was a nuisance, the Court of Appeal held that CIN had the right to determine any licence which the applicants might have had to enter the Centre. In giving judgment, Lord Phillips found that the local authority had not entered into any walkways agreement with the company within the meaning of s.18(1) of the Highways Act 1971[2] which would have dedicated the walkways or footpaths as public rights of way and which would have given the local council the power to issue bye-laws regulating use of those rights of way. Nor was there any basis for finding an equitable licence. He also considered case law from North America concerning the applicants' arguments for the finding of some kind of public right:

> "Of more obvious relevance are two North American cases. In *Uston v Resorts International Inc* (1982) N.J. 445A.2D 370, the Supreme Court of New Jersey laid down as a general proposition that when property owners open their premises—in that case a gaming casino—to the general public in pursuit of their own property interests, they have no right to exclude people unreasonably but, on the contrary, have a duty not to act in an arbitrary or discriminatory manner towards persons who come on their premises. However, that decision was based upon a previous decision of the same court in *State v Schmid* (1980) N.J. 423A 2d 615, which clearly turned upon the constitutional freedoms of the First Amendment. The general proposition cited above has no application in English law.
>
> The case of *Harrison v Carswell* (1975) 62 D.L.R. (3d.) 68 in the Supreme Court of Canada, concerned the right of an employee of a tenant in a shopping centre to picket her employer in the centre, against the wishes of the owner of the centre. The majority of the Supreme Court held that she had no such right and that the owner of the centre had sufficient control or possession of the common areas to enable it to invoke the remedy of trespass. However, Laskin C.J.C., in a strong dissenting judgment held that since a shopping centre was freely accessible to the public, the public did not enter under a revocable licence subject only to the owner's whim. He said that the case involved a search for an appropriate legal framework for new social facts and:

[1] *Cin Properties Ltd v Rawlins* [1995] 2 E.G.L.R. 130.
[2] Later replaced by s.35 of the Highways Act 1980.

> 'If it was necessary to categorise the legal situation which, in my view, arises upon the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of members of the public, doing violence to neither and recognising the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based'.
>
> I have already said that this was a dissenting judgment. Nevertheless counsel [for the applicants] submitted that we should apply it in the present case. I accept that courts may have to be ready to adapt the law to new social facts where necessary. However there is no such necessity where Parliament has already made adequate provision for the new social facts in question as it has here by s.18 of the Highways Act 1971 and s.35 of the Highways Act 1980. (*Harrison v Carswell* makes no mention of any similar legislation in Canada.) Where Parliament has legislated and the Council, as representing the public, chooses not to invoke the machinery which the statute provides, it is not for the courts to intervene.
>
> I would allow this appeal . . . on the basis that CIN, had the right, subject only to the issue under s.20 of the Race Relations Act 1976, to determine any licence the [applicants] may have had to enter the Centre".

III. Cases from other jurisdictions

24 The parties have referred to case law from the United States and Canada.

United States

25 The First Amendment to the Federal Constitution protects freedom of speech and peaceful assembly.

26 The United States Supreme Court has accepted a general right of access to certain types of public places, such as streets and parks, known as "public fora" for the exercise of free speech rights.[3] In *Marsh v Alabama*,[4] the Supreme Court also held that a privately owned corporate town (a company town) having all the characteristics of other municipalities was subject to the First Amendment rights of free speech and peaceable assembly. It has found that the First Amendment does not require access to privately owned properties, such as shopping centres, on the basis that there has to be "State action" (a degree of State involvement) for the amendment to apply.[5]

27 The US Supreme Court has taken the position that the First Amendment does not prevent a private shopping centre owner from prohibiting distribution on its

[3] *Hague v Committee for Industrial Organisation*, 307 US 496 (1939).
[4] *Marsh v Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946).
[5] *e.g. Hudgens v Nlrb*, 424 US 507 (1976).

premises of leaflets unrelated to its own operations.[6] This did not however prevent state constitutional provisions from adopting more expansive liberties than the Federal Constitution to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping centre to which the public was invited and this did not violate the property rights of the shopping centre owner so long as any restriction did not amount to taking without compensation or contravene any other federal constitutional provisions.[7]

28 Some State courts have found that a right of access to shopping centres could be derived from provisions in their State constitutions according to which individuals could initiate legislation by gathering a certain number of signatures in a petition or individuals could stand for office by gathering a certain number of signatures.[8] Some cases found State obligations arising due to State involvement, for example, *Bock v Westminster Mall Co*[9] (the shopping centre was a State actor because of financial participation of public authorities in the development of the shopping centre and the active presence of government agencies in the common areas of the shopping centre) and *Jamestown v Beneda*[10] (where the shopping centre was owned by a public body, though leased to a private developer).

29 Other cases cited as indicating a right to reasonable access to property under State private law were *State v Shack*[11] where the court ruled that under New Jersey property law ownership of real property did not include the right to bar access to governmental services available to migrant workers, in this case a publicly funded non-profit lawyer attempting to advise migrant workers; *Uston v Resorts International*,[12] a New Jersey case concerning casinos where the court held that when property owners open their premises to the general public in pursuit of their own property interests they have no right to exclude people unreasonably (though it was acknowledged that the private law of most states did not require a right of reasonable access to privately owned property)[13]; *Streetwatch v National Railroad Passenger Corp*[14] concerning the ejection of homeless people from a railway station.

[6] *Lloyd Corp v Tanner*, 47 U.S. 551, 92 S. Ct. 2219, 33 L.Ed. 2d 131 (1972).
[7] *Pruneyard Shopping Center v Robbins*, 447 US 74, 64 L.Ed. 2d 741, 100 S Ct. 2035 (1980).
[8] *e.g. Batchelder v Allied Stores Int'l* N.E. 2d 590 (Mass. 1983), *Lloyd Corp v Whiffenl*, 849 P.2d 446, 453–54 (Or. 1993), *Southcenter Joint Venture v National Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989).
[9] *Bock v Westminster Mall Co*, 819 P.2d 55 (Colo. 1991).
[10] *Jamestown v Beneda*, 477 N.W. 2d (N.D. 1991).
[11] *State v Shack*, 277 1.2d 369 (N.J. 1971).
[12] *Uston v Resorts International*, 445 A.2d 370 (N.J. 1982).
[13] *ibid.* p.374.
[14] *Streetwatch v National Railroad Passenger Corp*, 875 F. Supp. 1055 (S.D.N.Y. 1995).

30 State courts which ruled that free speech provisions in their State constitutions did not apply to privately owned shopping centre included Arizona[15]; Connecticut[16]; Georgia[17]; Michigan[18]; Minnesota[19]; North Carolina[20]; Ohio[21]; Pennsylvania[22]; South Carolina[23]; Washington[24]; Wisconsin.[25]

Canada

31 Prior to the entry into force of the Canadian Charter of Rights and Freedoms, the Canadian Supreme Court had taken the view that the owner of a shopping centre could exclude protesters.[26] After the Charter entered into force, a lower court held that the right to free speech applied in privately owned shopping centres.[27] However an individual judge of the Canadian Supreme Court has since expressed the opposite view, stating *obiter* that the Charter does not confer a right to use private property as a forum of expression.[28]

JUDGMENT

I. Alleged violation of Article 10 of the Convention

32 Article 10 of the Convention provides as relevant:

> "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. . . .
>
> 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".

A. The parties' submissions

1. The applicants

33 The applicants submitted that the State was directly responsible for the interference with their freedom of expression and assembly as it was a public entity

[15] *Fiesta Mall Venture v Mecham Recall Comm.*, 767 P.2d 719 (Ariz. Ct. App. 1989).
[16] *Cologne v Westfarms Assocs*, 469 1.2d 1201 (Conn. 1984).
[17] *Citizens for Ethical Gov't v Gwinnet Place Assoc*, 392 S.E.2d 8 (Ga. 1990).
[18] *Woodland v Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985).
[19] *State of Minnesota v Wicklund*, April 7, 1998 (Minnesota Court of Appeals).
[20] *State of North Carolina v Felmet*, 273 S.E.2d 708 (N.C. 1981).
[21] *Eastwood Mall v Slanco*, 626 N.E.2d 59 (Ohio 1994).
[22] *Western PA Socialist Workers 1982 Campaign v Connecticut Gen. Life Ins Co*, 515 1.2d 1331 (Pa 1986).
[23] *Charleston Joint Venture v McPherson*, 417 S.E.2d 544 (SC 1992).
[24] *South Center Joint Venture v National Democratic Policy Comm*, 780 P.2d 1282 (Wash. 1989).
[25] *Jacobs v Major*, 407 N.W.2d 832 (Wis. 1987).
[26] *Harrison v Carswell*, 62 D.L.R. (3d) 68.
[27] *R. v Layton*, 38 CCC(3d) 550 (1986) (Provincial Court, Judicial District of York, Ontario).
[28] McLachlin J., *Committee for Cth of Canada v Canada* [1991] 1 SCR 139, p. 128.

that built the Galleries on public land and a minister who approved the transfer into private ownership. The local authority could have required that the purchaser enter into a walkways agreement which would have extended bye-law protection to access ways but did not do so.

34 The applicants also argued that the State owed a positive obligation to secure the exercise of their rights within the Galleries. As the information and ideas which they wished to communicate were of a political nature, their expression was entitled to the greatest level of protection. Access to the town centre was essential for the exercise of those rights as it was the most effective way of communicating their ideas to the population, as was shown by the fact that the local authority itself used the Galleries to advocate a political proposal regarding the reorganisation of local government. The applicants however had been refused permission to use the Galleries for expression opposing local government action, showing that the private owner was not neutral in its decisions as to who should be given permission. The finding of an obligation would impose no significant financial burden on the State as it was merely under a duty to put in place a legal framework which provided effective protection for their rights of freedom of expression and peaceful assembly by balancing those rights against the rights of the property owner as already existed in a number of areas. They considered that no proper balance has been struck as protection was given to property owners who wielded an absolute discretion as to access to their land and no regard was given to individuals seeking to exercise their individual rights.

35 The applicants submitted that it was for the State to decide how to remedy this shortcoming and that any purported definitional problems and difficulties of application could be resolved by carefully drafted legislation. A definition of "quasi-public" land could be proposed that excluded, for example, theatres. They also referred to case law from other jurisdictions (in particular the United States) where concepts of reasonable access or limitations on arbitrary exclusion powers of landowners were being developed, *inter alia*, in the context of shopping malls and university campuses, which gave an indication of how the State could approach the perceived problems.

2. The Government

36 The Government submitted that at the relevant time the town centre was owned by a private company Postel and that it was Postel, in the exercise of its rights as property owner, which refused the applicants' permission to use the Galleries for their activities. They argued that the Government in those circumstances could not be regarded as bearing direct responsibility for any interference with the applicants' exercise of their rights. The fact that the local authority had previously owned the land was irrelevant.

37 In so far as the applicants claimed that the State's positive obligation to secure their rights is engaged, the Government acknowledged that positive obligations were capable of arising under Arts 10 and 11. However, such obligations did not arise in the present case having regard to a number of factors. The alleged breach did not have a serious impact on the applicants who had many other opportunities to exercise their rights and used them to obtain thousands of signatures on their

petition as a result. The burden imposed on the State by finding a positive obligation would also be a heavy one. Local authorities when selling land were not under any duty to enter into walkways agreements to render access areas subject to regulation by bye-law. The State's ability to comply by entering into such agreements when selling State-owned land would depend entirely on obtaining the co-operation of the private sector purchaser who might reasonably not want to allow any form of canvassing on his land and might feel that customers to commercial services would be deterred by political canvassers, religious activists, animal rights campaigners and so on.

38 Furthermore a fair balance had been struck between the competing interests in this case. The applicants in their view only looked at one side of the balancing exercise, whereas legitimate objections could be taken by property owners if they were required to allow people to exercise their freedom of expression or assembly on their land, when means to exercise those rights were widely available on genuinely public land and in the media. As the facts of this case illustrated, the applicants could canvass support in public places, on the streets, in squares and on common land, they could canvass from door to door or by post, and they could write letters to the newspapers or appear on radio and television. The Government argued that it was not for the Court to prescribe the necessary content of domestic law by imposing some ill defined concept of "quasi-public" land to which a test of reasonable access should be applied. That no problems arose from the balance struck in this case was shown by the fact that no serious controversy had arisen to date. The cases from the United States and Canada referred to by the applicants were not relevant as they dealt with different legal provisions and different factual situations, and in any event, did not show any predominant trend in requiring special regimes to attach to "quasi-public" land.

B. The Court's assessment

1. General principles

39 The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals,[29] where the Turkish Government were found to be under a positive obligation to take investigative and protective measures where the "pro-PKK" newspaper and its journalists and staff had been victim to a campaign of violence and intimidation; also *Fuentes Bobo v Spain*,[30] concerning the obligation on the State to protect freedom of expression in the employment context.

40 In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the

[29] See *Özgür Gündem v Turkey*: (2001) 31 E.H.R.R. 49, paras [42]–[46].
[30] *Fuentes Bobo v Spain*: (2001) 31 E.H.R.R. 50, para.[38].

diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.[31]

2. Application in the present case

41 In this case, the applicants were stopped from setting up a stand and distributing leaflets in the Galleries by Postel, the private company, which owned the shopping centre. The Court does not find that the Government bear any direct responsibility for this restriction in the applicants' freedom of expression. It is not persuaded that any element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel or that this was done with ministerial permission. The issue to be determined is whether the Government have failed in any positive obligation to protect the exercise of the applicants' Art.10 rights from interference by others, in this case, the owner of the Galleries.

42 The nature of the Convention right at stake is an important consideration.

43 The Court recalls that the applicants wished to draw attention of fellow citizens to their opposition to the plans of their locally elected representatives to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1.

44 The Court has noted the applicants' arguments and the references in the US cases, which draw attention to the way in which shopping centres, though their purpose is primarily the pursuit of private commercial interests, are designed increasingly to serve as gathering places and events centres, with multiple activities concentrated within their boundaries. Frequently, individuals are not merely invited to shop but encouraged to linger and participate in activities covering a broad spectrum from entertainment to community, educational and charitable events. Such shopping centres can assume the characteristics of the traditional town centre and indeed, in this case, the Galleries is labelled on maps as the town centre and either contains, or is in close proximity to, public services and facilities. As a result, the applicants argued that the shopping centre must be regarded as a "quasi-public" space in which individuals can claim the right to exercise freedom of expression in a reasonable manner.

45 The Government have disputed the usefulness or coherence of employing definitions of "quasi-public" spaces and pointed to the difficulties which would ensue if places open to the public, such as theatres or museums, were required to permit people freedom of access for purposes other than the cultural activities on offer.

[31] See, among other authorities, *Rees v United Kingdom* (A/106): (1987) 9 E.H.R.R. 56, and *Osman v United Kingdom*: (2000) 29 E.H.R.R. 245, para.[116].

46 The Court would observe that, though the cases from the United States in particular illustrate an interesting trend in accommodating freedom of expression to privately owned property open to the public, the US Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. Authorities from the individual states show a variety of approaches to the public and private law issues that have arisen in widely differing factual situations. It cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning Art.10 of the Convention.

47 That provision, 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 Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example.[32]

48 In the present case, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the Galleries. It did not prevent them from obtaining individual permission from businesses within the Galleries (the manager of a hypermarket granted permission for a stand within his store on one occasion) or from distributing their leaflets on the public access paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means, such as calling door to door or seeking exposure in the local press, radio and television. The applicants do not deny that these other methods were available to them. Their argument, essentially, is that the easiest and most effective method of reaching people was in using the Galleries, as shown by the local authority's own information campaign.[33] The Court does not consider however that the applicants can claim that they were, as a result of the refusal of the private company, Postel, effectively prevented from communicating their views to their fellow citizens. Some 3,200 people submitted letters in their support. Whether more would have done so if the stand had remained in the Galleries is speculation which is insufficient to support an argument that the applicants were unable otherwise to exercise their freedom of expression in a meaningful manner.

49 Balancing therefore the rights in issue and having regard to the nature and scope of the restriction in this case, the Court does not find that the Government failed in any positive obligation to protect the applicants' freedom of expression.

50 Consequently, there has been no violation of Art.10 of the Convention.

[32] See *Marsh v Alabama*, cited at para.[26] above.
[33] See para.[21].

II. Alleged violation of Article 11 of the Convention

51 Article 11 of the Convention provides as relevant:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others . . .
>
> 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".

52 The Court finds largely identical considerations arise under this provision as examined above under Art.10 of the Convention. For the same reasons, it also finds no failure to protect the applicants' freedom of assembly and accordingly, no violation of Art.11 of the Convention.

III. Alleged violation of Article 13 of the Convention

53 Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

54 The applicants submitted that they have no remedy for the complaints, which disclosed arguable claims of violations of provisions of the Convention. Domestic law provided at that time no remedy to test whether any interference with their rights was unlawful. The case law of the English courts indicated that the owner of a shopping centre can give a bad reason, or no reason at all, for the exclusion of individuals from its land. No judicial review would lie against the decision of such a private body.

55 The Government accepted that, if contrary to their arguments, the State's positive obligations were engaged and that there was an unjustified interference under Arts 10 or 11, there was no remedy available to the applicants under domestic law.

56 The case law of the Convention institutions indicates, however, that Art.13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention.[34] In so far therefore as no remedy existed in domestic law prior to October 2, 2000 when the Human Rights Act 1998 took effect, the applicants' complaints fall foul of this principle. Following that date, it would have been possible for the applicants to raise their complaints before the domestic courts, which would have had a range of possible redress available to them.

57 The Court finds in the circumstances no breach of Art.13 of the Convention in the present case.

[34] See the *James v United Kingdom* (A/98): (1986) 8 E.H.R.R. 123, para.[86].

For these reasons, THE COURT

1. *Holds* by six votes to one that there has been no violation of Art.10 of the Convention;
2. *Holds* by six votes to one that there has been no violation of Art.11 of the Convention;
3. *Holds* unanimously that there has been no violation of Art.13 of the Convention.

Partly Dissenting Opinion of Judge Maruste

O-I1[35] To my regret I am unable to share the finding of the majority of the Chamber that the applicants' rights under Arts 10 and 11 were not infringed. In my view, the property rights of the owners of the shopping mall were unnecessarily given priority over the applicants' freedom of expression and assembly.

O-I2 The case raises the important issue of the State's positive obligations in a modern liberal State where many traditionally state owned services like post, transport, energy, health and community services and others have been or could be privatised. In this situation should private owners' property rights prevail over other rights or does the State still have some responsibility to secure the right balance between private and public interests?

O-I3 The new town centre was planned and built originally by a body set up by the government.[36] At a later stage the shopping centre was privatised. The area was huge, with many shops and hypermarkets, and also included car parks and walkways. Because of its central nature several important public services like the public library, the social services office, the health centre and even the police station were also located in or adjacent to the centre. Through specific actions and decisions the public authorities and public money were involved and there was an active presence of public agencies in the vicinity. That means that the public authorities also bore some responsibility for decisions about the nature of the area and access to and use of it.

O-I4 There is no doubt that the area in its functional nature and essence is a forum publicum or "quasi-public" space, as argued by the applicants and clearly recognised also by the Chamber.[37] The place as such is not something which has belonged to the owners for ages. This was a new creation where public interests and money were and still are involved. That is why the situation is clearly distinguishable from the "my home is my castle" type of situation.

O-I5 Although the applicants were not complaining about unequal treatment, it is evident that they had justified expectations of being able to use the area as a public gathering area and to have access to the public and its services on an equal footing with other groups including local government[38] who had used the place for similar purposes without restrictions.

O-I6 The applicants sought access to the public to discuss with them a topic of a public, not private, nature and to contribute to the debate about the exercise of local

[35] Paragraph numbers added by publisher.
[36] See para.[11].
[37] See para.[44].
[38] See paras [20] and [34].

government powers; in other words, for entirely lawful purposes. They acted as others did, without disturbing the public peace or interfering with business by other unacceptable or disruptive methods.In these circumstances it is hard to agree with the Chamber's finding that the Government bear no direct responsibility for the restrictions applied to the applicants. In a strict and formal sense that is true. But it does not mean that there were no indirect responsibilities. It cannot be the case that through privatisation the public authorities can divest themselves of any responsibility to protect rights and freedoms other than property rights. They still bear responsibility for deciding how the forum created by them is to be used and for ensuring that public interests and individuals' rights are respected. It is in the public interest to permit reasonable exercise of individual rights and freedoms, including the freedoms of speech and assembly on the property of a privately owned shopping centre, and not to make some public services and institutions inaccessible to the public and participants in demonstrations. The Court has consistently held that if there is a conflict between rights and freedoms, the freedom of expression takes precedence. But in this case it appears to be the other way round—property rights prevailed over freedom of speech.

O-I7 Of course, it would clearly be too far reaching to say that no limitations can be put on the exercise of rights and freedoms on private grounds or premises. They should be exercised in a manner consistent with respect for owners' rights too. And that is exactly what the Chamber did not take into account in this case. The public authorities did not carry out a balancing exercise and did not regulate how the privately owned forum publicum was to be used in the public interest. The old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions and society. Consequently, the State failed to discharge its positive obligations under Arts 10 and 11.

A

Supreme Court

*Cameron *v* Liverpool Victoria Insurance Co Ltd (Motor Insurers' Bureau intervening)

[On appeal from Cameron *v* Hussain and another]

B

[2019] UKSC 6

2018 Nov 28;
2019 Feb 20

Lord Reed DPSC, Lord Carnwath, Lord Hodge, Lady Black JJSC, Lord Sumption

Practice — Parties — Unnamed defendant — Claimant seeking to substitute as defendant unnamed person identified by description — Whether permissible if not possible to bring claim to defendant's attention — CPR rr 6.15, 6.16, 19.2

C

Road traffic — Third party insurance — Insurer's liability — Claimant victim of collision with vehicle driven by unidentified driver — Vehicle insured but in name of fictitious person — Claimant seeking damages against owner of vehicle and declaration that insurer required to satisfy judgment against owner — Claimant applying to substitute unnamed person as first defendant — Whether such amendment to be allowed

D

The claimant suffered personal injuries and her car was damaged in a collision with another vehicle. She issued proceedings seeking damages against the other vehicle's owner and a declaration that the insurer of the other vehicle was obliged under section 151 of the Road Traffic Act 1988[1] to satisfy any judgment obtained against the owner. It later transpired that the owner of the other vehicle had not been driving it at the time of the collision and that the insurance had been in the name of a fictitious person. Consequently the claimant needed to obtain a judgment against the unidentified driver of the other vehicle in order for the insurer to be liable under section 151. Accordingly the claimant applied under CPR r 19.2[2] to amend her claim form so as to substitute for the owner "The person unknown driving [the other vehicle] who collided with [the claimant's vehicle] on [the date of the collision]". The district judge refused the application and gave judgment for the insurer, a decision that was upheld by the judge on appeal. The Court of Appeal allowed the claimant's appeal and granted the amendment sought, holding that it would be entirely consistent with the CPR and the policy of the 1988 Act for proceedings to be brought against an unnamed driver, suitably identified by an appropriate description, in order that the insurer could be made liable under section 151.

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On the insurer's appeal—

Held, allowing the appeal, that 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; that, therefore, it was not legitimate to issue or amend a claim form so as to sue an unnamed defendant if it was conceptually impossible to bring the claim to his attention; that it would only be conceptually possible for proceedings to be brought to the attention of a defendant if he had been described in the claim form in a way that made it possible in principle to locate or communicate with him and to know without further inquiry whether he

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[1] Road Traffic Act 1988, s 151: see post, para 3.

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[2] CPR r 6.15: see post, para 20.
R 16.6: see post, para 25.
R 19.2(2): "The court may order a person to be added as a new party if— (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

was the same as the person described in the claim form; that, in such circumstances, either the proceedings could be brought to a defendant's attention by serving them on him, if necessary by alternative service under CPR r 6.15, or the court might order that service be dispensed with under CPR r 6.16, which could only be done if there was reason to believe that the defendant was aware that proceedings had been or were likely to be brought; that, in the present case, the description of the driver on the claim form, which related to something he had done in the past, did not make it possible in principle to locate or communicate with him or to know whether any particular person was the same as the person described in the claim form; that, therefore, as a matter of English law, the driver in the present case could not be sued under the description relied on by the claimant; that, further, nothing in Parliament and Council Directive 2000/26/EC required the United Kingdom to give a party injured as a result of an accident caused by an insured vehicle a right to sue the driver of the vehicle without identifying him or observing rules of court designed to ensure that he was aware of the proceedings; and that, accordingly, the amendment sought by the claimant would be refused and the district judge's order restored (post, paras 12–18, 21, 25–26, 29, 31).

Dicta of the Court of Appeal in *Porter v Freudenberg* [1915] 1 KB 857, 883, 887–888, CA and of Atkin LJ in *Jacobson v Frachon* (1927) 138 LT 386, 392, CA approved.

Abbey National plc v Frost (Solicitors' Indemnity Fund Ltd intervening) [1999] 1 WLR 1080, CA considered.

Decision of the Court of Appeal [2017] EWCA Civ 366; [2018] 1 WLR 657 reversed.

The following cases are referred to in the judgment of Lord Sumption:

Abbey National plc v Frost (Solicitors' Indemnity Fund Ltd intervening) [1999] 1 WLR 1080; [1999] 2 All ER 206, CA
Abela v Baadarani [2013] UKSC 44; [2013] 1 WLR 2043; [2013] 4 All ER 119, SC(E)
Anderton v Clwyd County Council (No 2) [2002] EWCA Civ 933; [2002] 1 WLR 3174; [2002] 3 All ER 813, CA
Barton v Wright Hassall llp [2018] UKSC 12; [2018] 1 WLR 1119; [2018] 3 All ER 487, SC(E)
Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; [2003] 3 All ER 736
Bovale Ltd v Secretary of State for Communities and Local Government [2009] EWCA Civ 171; [2009] 1 WLR 2274; [2009] 3 All ER 340, CA
Brett Wilson llp v Persons Unknown [2015] EWHC 2628 (QB); [2016] 4 WLR 69; [2016] 1 All ER 1006
CMOC v Persons Unknown [2017] EWHC 3599 (Comm)
Clarke v Vedel [1979] RTR 26, CA
Dresser UK Ltd v Falcongate Freight Management Ltd [1992] QB 502; [1992] 2 WLR 319; [1992] 2 All ER 450, CA
EMI Records Ltd v Kudhail [1985] FSR 36, CA
Friern Barnet Urban District Council v Adams [1927] 2 Ch 25, CA
Gurtner v Circuit [1968] 2 QB 587; [1968] 2 WLR 668; [1968] 1 All ER 328, CA
Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site [2003] EWHC 1738 (Ch; [2004] Env LR 9
Ineos Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch)
Jacobson v Frachon (1927) 138 LT 386, CA
Middleton v Person Unknown [2016] EWHC 2354 (QB)
Murfin v Ashbridge [1941] 1 All ER 231, CA
PML v Persons Unknown [2018] EWHC 838 (QB)
Porter v Freudenberg [1915] 1 KB 857, CA

Smith v Unknown Defendant Pseudonym "Likeicare" [2016] EWHC 1775 (QB)
South Cambridgeshire District Council v Gammell [2005] EWCA Civ 1429, [2006] 1 WLR 658, CA
UK Oil and Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161
Wykeham Terrace, Brighton, Sussex, In re; Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East [1971] Ch 204; [1970] 3 WLR 649

The following additional cases were cited in argument:

Bristol Alliance Ltd Partnership v Williams [2012] EWCA Civ 1267; [2013] QB 806; [2013] 2 WLR 1029; [2013] 1 All ER (Comm) 257; [2013] RTR 9, CA
Delaney v Secretary of State for Transport [2015] EWCA Civ 172; [2015] 1 WLR 5177; [2015] 3 All ER 329; [2015] RTR 9, CA
Sahin v Havard [2016] EWCA Civ 1202; [2017] 1 WLR 1853; [2017] 4 All ER 157; [2017] RTR 9, CA

APPEAL from the Court of Appeal

By a claim form issued on 21 January 2014 in the County Court at Liverpool, the claimant, Bianca Cameron, sought damages against the registered owner of a vehicle, a Nissan Micra registration number Y598 SPS, which collided with the claimant's vehicle on 26 May 2013 in Leeds. In March 2014 the claimant amended the claim to include the insurer, Liverpool Victoria Insurance Co Ltd, which had provided a policy of motor insurance over the registered owner's vehicle to a seemingly fictitious person, and sought a declaration against the insurer under section 151 of the Road Traffic Act 1988 that it was obliged to satisfy any unsatisfied judgment against the registered owner. By an application dated 19 June 2014 the claimant sought permission to amend the claim so as to substitute the registered owner with an unknown defendant driving the vehicle in question.

On 4 June 2014 the insurer applied for summary judgment on the claim on the basis that the registered owner had not been insured to drive the vehicle and the claimant could not prove the identity of the driver at the time of the collision. By an order dated 16 July 2014 District Judge Wright in the County Court at Liverpool refused the claimant's application and granted the insurer summary judgment. Pursuant to permission granted by the district judge on 26 September 2014 the claimant appealed. By an order dated 13 January 2015 Judge Parker dismissed the appeal. On 23 May 2017 the Court of Appeal (Gloster and Lloyd-Jones LJJ, Sir Ross Cranston dissenting) allowed the claimant's appeal.

On 14 December 2017 the Supreme Court (Lord Mance DPSC, Lord Carnwath and Lady Black JJSC) granted the insurer permission to appeal, pursuant to which it appealed.

The issue on the appeal was whether a claimant was entitled to bring a claim for damages against an unnamed defendant if the claimant had been the victim of an unidentified hit-and-run driver, and the car the unidentified driver had been driving was covered by an insurance policy, albeit in the name of someone untraceable.

The facts are stated in the judgment of Lord Sumption, post, paras 1, 6, 7.

Stephen Worthington QC and *Patrick Vincent* (instructed by *Keoghs llp, Bolton, Lancs*) for the insurer.

Tim Horlock QC and *Paul Higgins* (instructed by *Weightmans llp, Liverpool*) for the Motor Insurers' Bureau, intervening.

Benjamin Williams QC, Ben Smiley and *Anneli Howard* (instructed by *Bond Turner, Liverpool*) for the claimant.

The court took time for consideration.

20 February 2019. **LORD SUMPTION** (with whom **LORD REED DPSC, LORD CARNWATH, LORD HODGE** and **LADY BLACK JJSC** agreed) handed down the following judgment.

1 The question at issue on this appeal is: in what circumstances is it permissible to sue an unnamed defendant? It arises in a rather special context in which the problem is not uncommon. On 26 May 2013 Ms Bianca Cameron was injured when her car collided with a Nissan Micra. It is common ground that the incident was due to the negligence of the driver of the Micra. The registration number of the Micra was recorded, but the driver made off without stopping or reporting the accident to the police and has not been heard of since. The registered keeper of the Micra was Mr Naveed Hussain, who was not the driver but has declined to identify the driver and has been convicted of failing to do so. The car was insured under a policy issued by Liverpool Victoria Insurance Co Ltd to a Mr Nissar Bahadur, whom the company believes to be a fictitious person. Neither Mr Hussain nor the driver was insured under the policy to drive the car.

The statutory framework

2 The United Kingdom was the first country in the world to introduce compulsory motor insurance. It originated with the Road Traffic Act 1930, which was part of a package of measures to protect accident victims, including the Third Parties (Rights against Insurers) Act 1930. The latter Act entitled a person to claim directly against the insurer where an insured tortfeasor was insolvent. But it was shortly superseded as regards motor accidents by the Road Traffic Act 1934, which required motor insurers to satisfy any judgment against their insured and restricted the right of insurers to rely as against third parties on certain categories of policy exception or on the right of avoidance for non-disclosure or misrepresentation. The statutory regime has become more elaborate and more comprehensive since 1934, but the basic framework has not changed.

3 The current legislation is Part VI of the Road Traffic Act 1988. As originally enacted, it sought to give effect to the first three EEC Motor Insurance Directives, 72/166/EEC, 84/5/EEC and 90/232/EEC. It was subsequently amended by statutory instruments under the European Communities Act 1972 to reflect the terms of the Fourth, Fifth and Sixth Motor Insurance Directives 2000/26/EC, 2005/14/EC and 2009/103/EC. The object of the current legislation is to enable the victims of negligently caused road accidents to recover, if not from the tortfeasor then from his insurer or, failing that, from a fund operated by the motor insurance industry. Under section 143 of the Act of 1988 (as amended by regulation 2 of the Motor Vehicles (Compulsory Insurance) Regulations 2000 (SI 2000/726)) it is an offence to use or to cause or permit any other person to use a motor vehicle on a road or other public place unless there is in force a policy of insurance against third party risks "in relation to the use of the

A vehicle" by the particular driver (I disregard the statutory provision for the giving of security in lieu of insurance). Section 145 requires the policy to cover specified risks, including bodily injury and damage to property. Section 151(5) requires the insurer, subject to certain conditions, to satisfy any judgment falling within subsection (2). This means (omitting words irrelevant to this appeal)

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> "judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and either— (a) it is a liability covered by the terms of the policy or security . . . , and the judgment is obtained against any person who is insured by the policy . . . or (b) it is a liability . . . which would be so covered if the policy insured all persons . . . , and the judgment is obtained against any person other than one who is insured by the policy . . ."

C

The effect of the latter subsection is that an insurer who has issued a policy in respect of the use of a vehicle is liable on a judgment, even where it was obtained against a person such as the driver of the Micra in this case who was not insured to drive it. The statutory liability of the insurer to satisfy judgments is subject to an exception under section 152 where it is entitled to

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avoid the policy for non-disclosure or misrepresentation and has obtained a declaration to that effect in proceedings begun within a prescribed time period. But the operation of section 152 is currently under review in the light of recent decisions of the Court of Justice of the European Union.

4 Under section 145(2), the policy must have been issued by an "authorised insurer". This means a member of the Motor Insurers' Bureau:

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see sections 95(2) and 145(5). The Bureau has an important place in the statutory scheme for protecting the victims of road accidents in the United Kingdom. Following a recommendation of the Cassell Committee, which reported in 1937 (Cmd 5528/1937), the Bureau was created in 1946 to manage a fund for compensating victims of uninsured motorists. It is a private company owned and funded by all insurers authorised to write motor

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business in the United Kingdom. It has entered into agreements with the Secretary of State to compensate third party victims of road accidents who fall through the compulsory insurance net even under the enlarged coverage provided by section 151(2)(b). This means victims suffering personal injury or property damage caused by (i) vehicles in respect of which no policy of insurance has been issued; and (ii) drivers who cannot be traced. These categories are covered by two agreements with the Secretary of State, the

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Uninsured Drivers Agreement and the Untraced Drivers Agreement respectively. The relevant agreement covering Ms Cameron's case was the 2003 Untraced Drivers Agreement. It applied to persons suffering death, bodily injury or property damage arising out of the use of a motor vehicle in cases where "it is not possible . . . to identify the person who is or appears to be liable": see clause 4(d). The measure of indemnity under this agreement is

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not always total. Under clause 10, there is a limit to the Bureau's liability for legal costs; and under clause 8 the indemnity for property damage is subject to a modest excess (at the relevant time £300) and a maximum limit corresponding to the minimum level of compulsory insurance (at the relevant time £1,000,000). The Bureau assumes liability under the Uninsured Drivers Agreement in cases where the insurer has a defence under the provisions

governing avoided policies in section 152. But under article 75 of the Bureau's articles of association, each insurer binds itself to meet the Bureau's liability to satisfy a judgment in favour of the third party in such cases. In 2017, there were 17,700 concluded applications to the Motor Insurers' Bureau by victims of untraced drivers.

5 It is a fundamental feature of the statutory scheme of compulsory insurance in the United Kingdom that it confers on the victim of a road accident no direct right against an insurer in respect of the underlying liability of the driver. The only direct right against the insurer is the right to require it to satisfy a judgment against the driver, once the latter's liability has been established in legal proceedings. This reflects a number of features of motor insurance in the United Kingdom which originated well before the relevant European legislation bound the United Kingdom, and which differentiate it from many continental systems. In the first place, policies of motor insurance in the United Kingdom normally cover drivers rather than vehicles. Section 151(2)(b) of the Act (quoted above) produces a close but not complete approximation to the continental position. Secondly, the rule of English insurance law is that an insurer is liable to no one but its insured, even when the risks insured include liabilities owed by the insured to third parties. Subject to limited statutory exceptions, the third party has no direct right against the insurer. Thirdly, even the insured cannot claim against his liability insurer unless and until his liability has been ascertained in legal proceedings or by agreement or admission. The Untraced Drivers Agreement assumes that judgment cannot be obtained against the driver if he cannot be identified, and therefore that no liability will attach to the insurer in that case. This is why it is accepted as a liability of the Motor Insurers' Bureau. On the present appeal, Ms Cameron seeks to challenge that assumption. Such a challenge is usually unnecessary. It is cheaper and quicker to claim against the Bureau. But for reasons which remain unclear, in spite of her counsel's attempt to explain them, Ms Cameron has elected not to do that.

The proceedings

6 Ms Cameron initially sued Mr Hussain for damages. The proceedings were then amended to add a claim against Liverpool Victoria Insurance for a declaration that it would be liable to meet any judgment obtained against Mr Hussain. The insurer served a defence which denied liability on the ground that there was no right to obtain a judgment against Mr Hussain, because there was no evidence that he was the driver at the relevant time. Ms Cameron's response was to apply in the Liverpool Civil and Family Court to amend her claim form and particulars of claim so as to substitute for Mr Hussain "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013". District Judge Wright dismissed that application and entered summary judgment for the insurer. Judge Parker dismissed Ms Cameron's appeal. But a further appeal to the Court of Appeal was allowed by a majority (Gloster and Lloyd-Jones LJJ, Sir Ross Cranston dissenting) [2018] 1 WLR 657.

7 Gloster LJ delivered the leading judgment. She held that the policy of the legislation was to ensure that the third-party victims of negligent drivers received compensation from insurers whenever a policy had been issued in respect of the vehicle, irrespective of who the driver was. In her judgment,

A the court had a discretion to permit an unknown person to be sued whenever justice required it. Justice required it when the driver could not be identified, because otherwise it would not be possible to obtain a judgment which the issuer of a policy in respect of the car would be bound to satisfy. The majority considered it to be irrelevant that Ms Cameron had an alternative right against the Motor Insurers' Bureau. She had a right against the driver and, upon getting judgment against him, against the insurer. In principle she B was entitled to choose between remedies. Sir Ross Cranston dissented. He agreed that there was a discretion, but he did not consider that justice required an action to be allowed against the unknown driver when compensation was available from the Motor Insurers' Bureau. Accordingly, the Court of Appeal (i) gave Ms Cameron permission to amend the claim form so as to sue the driver under the above description; (ii) directed under C CPR r 6.15 that service on the insurer should constitute service on the driver and that further service on the driver should be dispensed with; and (iii) gave judgment against the driver, as described, recording in their order that the insurer accepted that it was liable to satisfy that judgment.

Suing unnamed persons

D 8 Before the Common Law Procedure Act 1852 (15 & 16 Vict c 76) abolished the practice, it was common to constitute actions for trespass with fictional parties, generally John (or Jane) Doe or Roe, in order to avoid the restrictions imposed on possession proceedings by the forms of action. "Placeholders" such as these were also occasionally named as parties where the identity of the real party was unknown, a practice which subsists in the United States and Canada. After the disappearance of this practice in E England, the extent of any right to sue unnamed persons was governed by rules of court. The basic rule before 1999 was laid down by the Court of Appeal in 1926 in *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25. The Friern Barnet District Council had a statutory right to recover the cost of making up Alexandra Road from the proprietors of the adjoining lands, but in the days before registered title reached Friern Barnet it had no F way of discovering who they were. It therefore began proceedings against a named individual who was not concerned and "the owners of certain lands adjoining Alexandra Road . . . whose names and addresses are not known to the plaintiffs". The judge struck out these words and declined to order substituted service by affixing copies of the writ to posts on the relevant land. The Court of Appeal dismissed the appeal. They held that there was no power to issue a writ in this form because the prescribed form of writ G required it to be directed to "C D of, etc in the County of . . ." (p 30).

9 When the Civil Procedure Rules were introduced in 1999, the function of prescribing the manner in which proceedings should be commenced was taken over by CPR Pt 7. The general rule remains that proceedings may not be brought against unnamed parties. This is implicit in the limited exceptions contemplated by the Rules. CPR r 8.2A provides that a practice direction "may set out circumstances in which a claim form may be issued under this H Part without naming a defendant". It is envisaged that permission will be required, but that the notice of application for permission "need not be served on any other person". However, no such practice direction has been made. The only express provision made for proceedings against an unnamed defendant, other than representative actions, is CPR r 55.3(4), which permits

a claim for possession of property to be brought against trespassers whose names are unknown. This is the successor to RSC Ord 113, which was introduced in order to provide a means of obtaining injunctions against unidentifiable squatters, following the decision of Stamp J in *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204, that they could not be sued if they could not be named. In addition, there are specific statutory exceptions to broadly the same effect, such as the exception for proceedings for an injunction to restrain "any actual or apprehended breach of planning controls" under section 187B of the Town and Country Planning Act 1990. Section 187B(3) (as inserted by section 3 of the Planning and Compensation Act 1991) provides that "rules of court may provide for such an injunction to be issued against a person whose identity is unknown". The Rules are supplemented by a practice direction which deals with the administrative steps involved. Paragraph 4.1 of CPR Practice Direction 7A provides that a claim form must be headed with the title of the proceedings, which "should state", among other things, the "full name of each party".

10 English judges have allowed some exceptions. They have permitted representative actions where the representative can be named but some or all of the class cannot. They have allowed actions and orders against unnamed wrongdoers where some of the wrongdoers were known so they could be sued both personally and as representing their unidentified associates. This technique has been used, for example, in actions against copyright pirates: see *EMI Records Ltd v Kudhail* [1985] FSR 36. But the possibility of a much wider jurisdiction was first opened up by the decision of Sir Andrew Morritt V-C in *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] 1 WLR 1633. The claimant in that case was the publisher of the *Harry Potter* novels. Copies of the latest book in the series had been stolen from the printers before publication and offered to the press by unnamed persons. An injunction was granted in proceedings against "the person or persons who have offered the publishers of the *Sun*, the *Daily Mail* and the *Daily Mirror* newspapers a copy of the book *Harry Potter and the Order of the Phoenix* by J K Rowling or any part thereof and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants". The real object of the injunction was to deter newspapers minded to publish parts of the text, who would expose themselves to proceedings for contempt of court by dealing with the thieves with notice of the order. The Vice-Chancellor held that the decision in *Friern Barnet Urban District Council v Adams* had no application under the Civil Procedure Rules; that the decision of Stamp J in *In re Wykeham Terrace* was wrong; and that the words "should state" in paragraph 4.1 of Practice Direction 7A were not mandatory, but imported a discretion to depart from the practice in appropriate cases. In his view, a person could be sued by a description, provided that the description was "sufficiently certain as to identify both those who are included and those who are not" (para 21).

11 Since this decision, the jurisdiction has regularly been invoked. Judging by the reported cases, there has recently been a significant increase in its use. The main contexts for its exercise have been abuse of the internet, that powerful tool for anonymous wrongdoing; and trespasses and other torts committed by protesters, demonstrators and paparazzi. Cases in the

A former context include *Brett Wilson llp v Persons Unknown* [2016] 4 WLR 69 and *Smith v Unknown Defendant Pseudonym "Likeicare"* [2016] EWHC 1775 (QB) (defamation); *Middleton v Person Unknown* [2016] EWHC 2354 (QB) (theft of information by hackers); *PML v Persons Unknown* [2018] EWHC 838 (QB) (hacking and blackmail); *CMOC v Persons Unknown* [2017] EWHC 3599 (Comm) (hacking and theft of funds). Cases decided in the second context include *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2004] Env LR 9; *Ineos Upstream Ltd v Persons Unknown* [2017] EWHC 2945 (Ch); *UK Oil and Gas Investments plc v Persons Unknown* [2019] JPL 161. In some of these cases, proceedings against persons unknown were allowed in support of an application for a quia timet injunction, where the defendants could be identified only as those persons who might in future commit the relevant acts. The majority of the Court of Appeal followed this body of case law in deciding that an action was permissible against the unknown driver of the Micra who injured Ms Cameron. This is the first occasion on which the basis and extent of the jurisdiction has been considered by the Supreme Court or the House of Lords.

12 The Civil Procedure Rules neither expressly authorise nor expressly prohibit exceptions to the general rule that actions against unnamed parties are permissible only against trespassers. The prescribed forms include a space in which to designate the claimant and the defendant, a format which is equally consistent with their being designated by name or by description. The only requirement for a name is contained in a practice direction. But unlike the Civil Procedure Rules, which are made under statutory powers, a practice direction is no more than guidance on matters of practice issued under the authority of the heads of division. As to those matters, it is binding on judges sitting in the jurisdiction with which it is concerned: *Bovale Ltd v Secretary of State for Communities and Local Government* [2009] 1 WLR 2274. But it has no statutory force, and cannot alter the general law. Whether or not the requirement of paragraph 4.1 of Practice Direction 7A that the claim form "should state" the defendants' full name admits of a discretion on the point, is not therefore the critical question. The critical question is what, as a matter of law, is the basis of the court's jurisdiction over parties, and in what (if any) circumstances can jurisdiction be exercised on that basis against persons who cannot be named.

13 In approaching this question, it is necessary to distinguish between two kinds of case in which the defendant cannot be named, to which different considerations apply. The first category comprises anonymous defendants who are identifiable but whose names are unknown. Squatters occupying a property are, for example, identifiable by their location, although they cannot be named. The second category comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not.

14 This appeal is primarily concerned with the issue or amendment of the claim form. It is not directly concerned with its service, which occurs under the rules up to four months after issue, subject to extension by order of

the court. There is no doubt that a claim form may be issued against a named defendant, although it is not yet known where or how or indeed whether he can in practice be served. But the legitimacy of issuing or amending a claim form so as to sue an unnamed defendant can properly be tested by asking whether it is conceptually (not just practically) possible to serve it. The court generally acts in personam. Although an action is completely constituted on the issue of the claim form, for example for the purpose of stopping the running of a limitation period, the general rule is that "service of originating process is the act by which the defendant is subjected to the court's jurisdiction": *Barton v Wright Hassall llp* [2018] 1 WLR 1119, para 8. The court may grant interim relief before the proceedings have been served or even issued, but that is an emergency jurisdiction which is both provisional and strictly conditional. In *Dresser UK Ltd v Falcongate Freight Management Ltd* [1992] QB 502 the Court of Appeal held that, for the purposes of the Brussels Convention (the relevant provisions of the Brussels Regulation are different), an English court was "seised" of an action when the writ was served, not when it was issued. This was because of the legal status of an unserved writ in English law. Bingham LJ described that status, at p 523, as follows:

> "it is in my judgment artificial, far-fetched and wrong to hold that the English court is seised of proceedings, or that proceedings are decisively, conclusively, finally or definitively pending before it, upon mere issue of proceedings, when at that stage (1) the court's involvement has been confined to a ministerial act by a relatively junior administrative officer; (2) the plaintiff has an unfettered choice whether to pursue the action and serve the proceedings or not, being in breach of no rule or obligation if he chooses to let the writ expire unserved; (3) the plaintiff's claim may be framed in terms of the utmost generality; (4) the defendant is usually unaware of the issue of proceedings and, if unaware, is unable to call on the plaintiff to serve the writ or discontinue the action and unable to rely on the commencement of the action as a lis alibi pendens if proceedings are begun elsewhere; (5) the defendant is not obliged to respond to the plaintiff's claim in any way, and not entitled to do so save by calling on the plaintiff to serve or discontinue; (6) the court cannot exercise any powers which, on appropriate facts, it could not have exercised before issue; (7) the defendant has not become subject to the jurisdiction of the court."

The case was decided under the Rules of the Supreme Court. But Bingham LJ's statement would be equally true (mechanics and terminology apart) of an unserved claim form under the Civil Procedure Rules.

15 An identifiable but anonymous defendant can be served with the claim form or other originating process, if necessary by alternative service under CPR r 6.15. This is because it is possible to locate or communicate with the defendant and to identify him as the person described in the claim form. Thus, in proceedings against anonymous trespassers under CPR r 55.3(4), service must be effected in accordance with CPR r 55.6 by 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 letter box. In *Brett Wilson llp v Persons Unknown* [2016] 4 WLR 69 alternative service was effected by e-mail to a

website which had published defamatory matter, Warby J observing (para 11) that the relevant procedural safeguards must of course be applied. In *Smith v Unknown Defendant Pseudonym "Likeicare"* [2016] EWHC 1775 (QB) Green J made the same observation (para 11) in another case of internet defamation where service was effected in the same way. Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In *Bloomsbury Publishing Group* [2003] 1 WLR 1633, 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. The Court of Appeal has held that where 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: *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, para 32. In 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.

16 One does not, however, identify an unknown person simply by referring to something that he has done in the past. "The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013", does not identify anyone. It does not enable one to know whether any particular person is the one referred to. Nor is there any specific interim relief such as an injunction which can be enforced in a way that will bring the proceedings to his attention. The impossibility of service in such a case is due not just to the fact that the defendant cannot be found but to the fact that it is not known who the defendant is. The problem is conceptual, and not just practical. It is true that the publicity attending the proceedings may sometimes make it possible to speculate that the wrongdoer knows about them. But service is an act of the court, or of the claimant acting under rules of court. It cannot be enough that the wrongdoer himself knows who he is.

17 This is, in my view, a more serious problem than the courts, in their more recent decisions, have recognised. Justice in legal proceedings must be available to both sides. 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. The principle is perhaps self-evident. The clearest statements are to be found in the case law about the enforcement of foreign judgments at common law. The English courts will not enforce or recognise a foreign judgment, even if it has been given by a court of competent jurisdiction, if the judgment debtor had no sufficient notice of the proceedings. The reason is that such a judgment will have been obtained in breach of the rules of natural justice *according to English notions*. In his celebrated judgment in *Jacobson v Frachon* (1927) 138 LT 386, 392, Atkin LJ, after referring to the "principles of natural justice" put the point in this way:

> "Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and

> the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court."

Atkin LJ's principle is reflected in the statutory provisions for the recognition of foreign judgments in section 9(2)(c) of the Administration of Justice Act 1920 and section 8(1) and (2) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, as well as in article 45(1)(b) of the Brussels I Regulation (Recast), Regulation (EU) No 1215/2012.

18 It would be ironic if the English courts were to disregard in their own proceedings a principle which they regard as fundamental to natural justice as applied to the proceedings of others. In fact, the principle is equally central to domestic litigation procedure. Service of originating process was required by the practice of the common law courts long before statutory rules of procedure were introduced following the Judicature Acts of 1873 (36 & 37 Vict c 66) and 1875 (38 & 39 Vict c 77). The first edition of the Rules of the Supreme Court, which was promulgated in 1883, required personal service unless an order was made for what was then called substituted (now alternative) service. Subsequent editions of the rules allowed for certain other modes of service without a special order of the court, notably in the case of corporations, but every mode of service had the common object of bringing the proceedings to the attention of the defendant. In *Porter v Freudenberg* [1915] 1 KB 857 a specially constituted Court of Appeal, comprising the Lord Chief Justice, the Master of the Rolls and all five Lords Justices of the time, held that substituted service served the same function as personal service and therefore had to be such as could be expected to bring the proceedings to the defendant's attention. The defendants in that case were enemy aliens resident in Germany during the First World War. Lord Reading CJ, delivering the judgment of the court, said at p 883:

> "Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's courts in the administration of justice."

It followed, as he went on to observe at pp 887–888, that the court must:

> "take into account the position of the defendant the alien enemy, who is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him . . . In order that substituted service may be permitted, it must be clearly shown that the plaintiff is in fact unable to effect personal service and that the writ is likely to reach the defendant or to come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted."

The principle stated in *Porter v Freudenberg* was incorporated in the Rules of the Supreme Court in the revision of 1962 (SI 1962/2145) as RSC Ord 67, r 4(3). This provided: "Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the court may direct to bring the document to the notice of the person to be served." This provision subsequently became RSC Ord 65, r 4(3), and

A continued to appear in subsequent iterations of the Rules until they were superseded by the Civil Procedure Rules in 1999.

19 The treatment of the principle in the more recent authorities is, unfortunately, neither consistent nor satisfactory. The history may be summarised as follows:

(1) *Murfin v Ashbridge* [1941] 1 All ER 231 arose out of a road accident caused by the alleged negligence of a driver who was identified but could not
B be found. The case is authority for the proposition that while an insurer may be authorised by the policy to defend an action on behalf of his assured, he was not a party in that capacity and could not take any step in his own name. In the course of considering that point, Goddard LJ suggested at p 235 that "possibly" service on the driver might have been effected by substituted service on the insurers. *Porter v Freudenberg* was cited, but the point does
C not appear to have been argued.

(2) In *Gurtner v Circuit* [1968] 2 QB 587, the driver alleged to have been responsible for a road accident had emigrated and could not be traced. He was thought to have been insured, but it was impossible to identify his insurer. The plaintiff was held not to be entitled to an order for substituted service on another insurer who had no relationship with the driver. Lord Denning MR thought (pp 596–597) that the affidavit in support of the
D application was defective because it failed to state that the writ, if served on a non-insurer, was likely to reach the defendant. But he suggested that substituted service might have been effected on the real insurer if it had been identified. Diplock LJ thought (p 605) that it might have been effected on the Motor Insurers' Bureau. *Porter v Freudenberg* was not cited, and the point does not appear to have been argued.

E (3) In *Clarke v Vedel* [1979] RTR 26, the question was fully argued by reference to all the relevant authorities in the context of the Road Traffic Acts. A person had stolen a motor cycle, collided with the plaintiffs, given a fictitious name and address and then disappeared. He was sued under the fictitious name he had given, and an application was made for substituted service on the Motor Insurers' Bureau. The affidavit in support understandably failed to state that that mode of service could be expected to reach the driver. The
F Court of Appeal proceeded on the assumption (p 32) that there was: "no more reason to suppose that [the writ] will come to his notice or knowledge by being served on the Motor Insurers' Bureau than by being served on any one else in the wide world." But it declined to treat the dicta in the above cases as stating the law. Stephenson LJ considered (p 36), on the strength of the dicta in *Murfin v Ashbridge* and *Gurtner v Circuit*, that:

G
> "there may be cases where a defendant, who cannot be traced and, therefore, is unlikely to be reached by any form of substituted service, can nevertheless be ordered to be served at the address of insurers or the Bureau in a road accident case. The existence of insurers and of the Bureau and of these various agreements does create a special position which enables a plaintiff to avoid the strictness of the general rule and obtain such an order for substituted service in some cases."

H

But he held (pp 37-38) that:

> "This is a case in which, on the face of it, substituted service under the rule is not permissible and the affidavit supporting the application for it is insufficient. This fictitious, or, at any rate, partly fictitious defendant

> cannot be served, so Mr Crowther is right in saying that he cannot be sued . . . I do not think that Lord Denning MR or Diplock LJ or Salmon LJ or Goddard LJ had anything like the facts of this case in mind; and whatever the cases in which the exception to the general rule should be applied, in my judgment this is not one of them."

In his concurring judgment, Roskill LJ (pp 38–39) approved the statement in the then current edition of the *Supreme Court Practice* that "The steps which the court may direct in making an order for substituted service must be taken to bring the document to the notice of the person to be served," citing *Porter v Freudenberg* in support of it.

(4) 20 years later, another division of the Court of Appeal reached the opposite conclusion in *Abbey National plc v Frost (Solicitors' Indemnity Fund Ltd intervening)* [1999] 1 WLR 1080. The issue was the same, except that the defendant was a solicitor insured by the Solicitors Indemnity Fund pursuant to a scheme managed by the Law Society under the compulsory insurance provisions of the Solicitors Act 1974. The claimant sued his solicitor, who had absconded and could not be found. The Court of Appeal made an order for substituted service on the fund. Nourse LJ (with whom Henry and Robert Walker LJJ agreed) distinguished *Porter v Freudenberg* on the ground that it was based on the practice of the masters of the Supreme Court recorded in the *White Book* at the time; and *Clarke v Vedel* on the ground that the policy of the statutory solicitors' indemnity rules required a right of substituted service on an absconding solicitor. RSC Ord 65, r 4(3) was held to be purely directory and not to limit the discretion of the court as to whether or in what circumstances to order substituted service. Nourse LJ held that RSC Ord 65 did not require that the order should be likely to result in the proceedings coming to the defendants' attention.

20 The current position is set out in CPR Pt 6. CPR r 6.3 provides for service by the court unless the claimant elects to effect service himself. It considerably broadens the permissible modes of service along lines recommended by Lord Woolf's reports on civil justice. But the object of all the permitted modes of service, as his final report made clear, was the same, namely 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 within any relevant time period": see Access to Justice, Final report (July 1996), Ch 12, para 25. CPR r 6.15, which makes provision for alternative service, provides, so far as relevant:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> "(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

CPR r 6.15 does not include the provision formerly at RSC Ord 65, r 4(3). But it treats alternative service as a mode of "service", which is defined in the indicative glossary appended to the Civil Procedure Rules as "steps required by rules of court to bring documents used in court proceedings to a person's attention". Moreover, sub-paragraph (2) of the rule, which is in effect a form of retrospective alternative service, envisages in terms that the mode of

A service adopted will have had that effect. Applying CPR r 6.15 in *Abela v Baadarani* [2013] 1 WLR 2043 Lord Clarke of Stone-cum-Ebony JSC (with whom the rest of this court agreed) held (para 37) that "the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant's case". The Court of Appeal appears to have had no regard to these principles in ordering alternative service of the insurer in the present case.

B **21** In my opinion, 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. *Porter v Freudenberg* was not based on the niceties of practice in the masters' corridor. It gave effect to a basic principle of natural justice which had been the foundation of English C litigation procedure for centuries, and still is. So far as the Court of Appeal intended to state the law generally when it observed in *Abbey National plc v Frost* that service need not be such as to bring the proceedings to the defendant's attention, I consider that they were wrong. An alternative view of that case is that that observation was intended to apply only to claims under schemes such as the solicitors' compulsory insurance scheme, where it was possible to discern a statutory policy that the public should be protected D against defaulting solicitors. If so, the reasoning would apply equally to the compulsory insurance of motorists under the Road Traffic Acts, as indeed the Court of Appeal held in the present case. That would involve a narrower exception to the principle of natural justice to which I have referred, and I do not rule out the possibility that such an exception might be required by other statutory schemes. But I do not think that it can be justified in the case of the E scheme presently before us.

22 In the first place, the Road Traffic Act scheme is expressly based on the principle that as a general rule there is no direct liability on the insurer, except for its liability to meet a judgment against the motorist once it has been obtained. To that extent, Parliament's intention that the victims of negligent motorists should be compensated *by the insurer* is qualified. No doubt Parliament assumed, when qualifying it in this way, that other arrangements F would be made which would fill the compensation gap, as indeed they have been. But those arrangements involve the provision of compensation not by the insurer but by the Motor Insurers' Bureau. The availability of compensation from the Bureau makes it unnecessary to suppose that some way must be found of making the insurer liable for the underlying wrong when his liability is limited by statute to satisfying judgments.

G **23** Secondly, ordinary service on the insurer would not constitute service on the driver, unless the insurer had contractual authority to accept service on the driver's behalf or to appoint solicitors to do so. Such provisions are common in liability policies. I am prepared to assume that the policy in this case conferred such authority on the insurer, although we have not been shown it. But it could only have conferred authority on behalf of the policy-holder (if he existed), and it is agreed that the driver of the Micra H was not the policy holder. Given its contingent liability under section 151 of the Road Traffic Act 1988, the insurer no doubt has a sufficient interest to have itself joined to the proceedings in its own right, if it wishes to be. That would authorise the insurer to make submissions in its own interest, including submissions to the effect that the driver was not liable. But it

would not authorise it to conduct the defence on the driver's behalf. The driver, if sued in these proceedings, is entitled to be heard in his own right.

24 Thirdly, it is plain that alternative service on the insurer could not be expected to reach the driver of the Micra. It would be tantamount to no service at all, and should not therefore have been ordered unless the circumstances were such that it would be appropriate to dispense with service altogether.

25 There is a power under CPR r 6.16 "to dispense with service of a claim form in exceptional circumstances". It has been exercised on a number of occasions and considered on many more. In general, these have been cases in which the claimant has sought to invoke CPR r 6.16 in order to escape the consequences of some procedural mishap in the course of attempting to serve the claim form by one of the specified methods, or to confer priority on the English court over another forum for the purpose of the Brussels Regulation, or to affect the operation of a relevant limitation period. In all of them, the defendant or his agents was in fact aware of the proceedings, generally because of a previous attempt by the claimant to serve them in a manner not authorised by the Rules. As Mummery LJ observed, delivering the judgment of the Court of Appeal in *Anderton v Clwyd County Council (No 2)* [2002] 1 WLR 3174, para 58, service was dispensed with because there was "no point in requiring him to go through the motions of a second attempt to complete in law what he has already achieved in fact". In addition, I would accept that it may be appropriate to dispense with service, even where no attempt has been made to effect it in whatever manner, if the defendant has deliberately evaded service and cannot be reached by way of alternative service under CPR r 6.15. This would include cases where the defendant is unidentifiable but has concealed his identity in order to evade service. However, a person cannot be said to evade service unless, at a minimum, he actually knows that proceedings have been or are likely to be brought against him. A court would have to be satisfied of that before it could dispense with service on that basis. An inference to that effect may be easier to draw in the case of hit and run drivers, because by statute drivers involved in road accidents causing personal injury or damage to another vehicle must either "stop and, if required to do so by any person having reasonable grounds for so requiring, give his name and address and also the name and address of the owner and the identification marks of the vehicle", or else report the incident later. But the mere fact of breach of this duty will not necessarily be enough, for the driver may be unaware of his duty or of the personal injury or damage or of his potential liability. No submission was made to us that we should treat this as a case of evasion of service, and there are no findings which would enable us to do so. I would not wish arbitrarily to limit the discretion which CPR r 6.16 confers on the court, but I find it hard to envisage any circumstances in which it could be right to dispense with service of the claim form in circumstances where there was no reason to believe that the defendant was aware that proceedings had been or were likely to be brought. That would expose him to a default judgment without having had the opportunity to be heard or otherwise to defend his interests. It is no answer to this difficulty to say that the defendant has no reason to care because the insurer is bound to satisfy a judgment against him. If, like the driver of the Micra, the motorist was not insured under the policy, he will be liable to

A indemnify the insurer under section 151(8) of the Road Traffic Act 1988. It must be inherently improbable that he will ever be found or, if found, will be worth pursuing. But the court cannot deny him an opportunity to be heard simply because it thinks it inherently improbable that he would take advantage of it.

26 I conclude that a person, such as the driver of the Micra in the present case, who is not just anonymous but cannot be identified with any B particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with.

The European law issue

27 Mr Williams QC, who appeared for Ms Cameron, submitted that C this result was inconsistent with the Sixth Motor Insurance Directive 2009/103/EC, and that the Road Traffic Act 1988 should be read down so as to conform with it. The submission was pressed with much elaboration, but it really boils down to two points. First, Mr Williams submits that the Directive requires a direct right against the insurer on the driver's underlying liability, and not simply a requirement to have the insurer satisfy a judgment D against the driver. Secondly, he submits that recourse to the Motor Insurers' Bureau is not treated by the Directive as an adequate substitute. Neither point appears to have been raised before the Court of Appeal, for there is no trace of them in the judgments. Before us, they emerged as Mr Williams' main arguments. I propose, however, to deal with them quite shortly, because I think it clear that no point on the Directive arises.

28 Article 3 of the Directive requires member states to ensure that civil E liability in respect of the use of vehicles is covered by insurance, and article 9 lays down minimum amounts to be insured. Recital (30) states:

> "The right to invoke the insurance contract and to claim against the insurance undertaking directly is of great importance for the protection of victims of motor vehicle accidents. In order to facilitate an efficient and speedy settlement of claims and to avoid as far as possible costly legal F proceedings, a right of direct action against the insurance undertaking covering the person responsible against civil liability should be extended to victims of any motor vehicle accident."

Effect is given to this objective by article 18, which provides:

> "*Direct right of action*
>
> "Member states shall ensure that any party injured as a result of an G accident caused by a vehicle covered by insurance as referred to in article 3 enjoys a direct right of action against the insurance undertaking covering the person responsible against civil liability."

29 I assume (without deciding) that article 18 requires a direct right of action against the insurer in respect of the underlying wrong of the "person responsible" and not just a liability to satisfy judgments entered against that H person. It is a plausible construction in the light of the recital and the reference to Directive 2000/26/EC. However, Ms Cameron is not trying in these proceedings to assert a direct right against the insurer for the underlying wrong. Her claim against the insurer is for a declaration that it is liable to meet any judgment against the driver of the Micra. Her claim against the

driver is for damages. But the right that she asserts against him on this appeal is a right to sue him without identifying him or observing rules of court designed to ensure that he is aware of the proceedings. Nothing in the Directive requires the United Kingdom to recognise a right of that kind. Indeed, it is questionable whether it would be consistent with article 47 of the Charter of Fundamental Rights regarding the fairness of legal proceedings.

30 Mr Williams' second point is in reality a reiteration of the first. It is based on article 10 of the Directive, which requires member states to ensure that there is a "national bureau" charged to pay compensation for "damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in article 3 has not been satisfied". The submission is that the Directive requires that recourse to the Bureau, as the relevant body in the United Kingdom, should be unnecessary in a case like this, because the Micra was identified. It was only the driver who was unidentified. This is in effect a complaint that the indemnity available from the Motor Insurers' Bureau under the Untraced Drivers Agreement, which extends to untraced drivers whether or not the vehicle is identified, is wider than the Directive requires. In reality, the complaint is not about the extent of the Bureau's coverage, which unquestionably extends to this case. The complaint is that it is the Bureau which is involved and not the insurer. But that is because the insurer is liable only to satisfy judgments, which is Mr Williams' first point. It is true that the measure of the Bureau's indemnity is slightly smaller than that of the insurer (because of the excess for property damage and the limited provision for costs). But in that respect it is consistent with the Directive.

Disposal

31 I would allow the appeal, set aside the order of the Court of Appeal, and reinstate that of District Judge Wright.

Appeal allowed.

Shiranikha Herbert, Barrister

CHAPTER 19

TRESPASS TO LAND AND DISPOSSESSION

TABLE OF CONTENTS

1. THE NATURE OF TRESPASS

Definition of trespass Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another. The slightest crossing of the boundary is sufficient. "If the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it".[1] But though an actual or intending intruder may be enjoined, the courts cannot by injunction create an exclusion zone around the boundary.[2] **19-01**

Examples of trespass It is a trespass to remove any part of the land in the possession of another or any part of a building or other erection which is attached to the soil so as to form part of the realty. So a landlord who removes the doors and windows of a house in the possession of his tenant commits a trespass,[3] but there is no trespass if he has the supply of gas and electricity cut off so as to compel the tenant to leave the house.[4] It is also a trespass to place anything on or in land in the **19-02**

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1 *Ellis v Loftus Iron Co* (1874) L.R. 10 C. & P. 10 at 12.
2 *Patel v Patel* [1988] 2 F.L.R. 179.
3 *Lavender v Betts* [1942] 2 All E.R. 72.
4 *Perera v Vandiyar* [1953] 1 W.L.R. 672. By the Protection from Eviction Act 1977 s.1 it is an offence unlawfully to evict or harass residential occupiers or to re-enter leasehold premises without court order. But breach of duty under the Act does not give rise to an action for compensation: *McCall v Abelesz* [1976] Q.B. 585. Criminal compensation may be available: *R. v Bokhari* (1974) 59 Cr. App. R. 303. An injunction is available for breach of s.3 of the Act as a tort: *Warder v Cooper*

possession of another, such as fixing air conditioning equipment into his wall,[5] entering land below the surface by mining or otherwise,[6] or growing a creeper up his wall.[7] While dumping rubbish on another's land is trespass, causing land to become fouled by a discharge of oil into a navigable river is not.[8] Equally, one who has a right of entry upon another's land and acts in excess of his right or after his right has expired, is a trespasser.[9] Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues. So one who built on the claimant's land some buttresses to support a road and paid damages in an action for trespass was held liable in damages in a second action for not removing the buttresses after notice.[10]

19-03 Trespass in the air-space above land It may be a trespass to invade the air-space above land.[11] Intrusion into air-space at any height, is not automatically wrongful, but it is clear that it is a wrong where such air-space is necessary for the full use of land below.[12] The earlier authorities were reviewed in *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd*.[13] There, an advertising sign erected by the defendants projected some four inches into the air-space of a neighbouring occupier and McNair J held this to be a trespass, and not a nuisance,[14] granting a mandatory injunction for removal.[15] The limits of this decision should, however, be noted. So, although it is not a trespass to fly over private property at a reasonable and safe height,[16] this does not mean that *all* intrusions by low-flying aircraft are justifiable.

19-04 Possession of air-space over leased land Whether under a lease of the surface the possession of the air-space will pass, so as to render the lessee the proper person to sue for a trespass upon it, depends on the construction of the lease. In *Gifford v Dent*,[17] it was held that the tenant of the forecourt had possession so as to sue for a trespass committed by the tenant of the second floor in hanging a sign which projected over the forecourt. And in *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd*, McNair J could "find nothing in this lease which displaces the prima facie conclusion which one would otherwise reach that the air-space above the demised premises is part of the premises conveyed".[18]

[1970] Ch. 495. The Housing Act 1988 ss.27–29, gives a prescribed measure of damages for unlawful eviction and extends the offence of harassment.

5 *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2011] EWCA Civ 607; [2011] H.L.R. 42.

6 See paras 19-16 and 19-70.

7 *Simpson v Weber* (1925) 41 T.L.R. 302.

8 *British Waterways Board v Severn Trent Water Ltd* [2001] EWCA Civ 276; [2002] Ch. 25. See paras 19-08 and 20-02 for the difference between trespass and nuisance.

9 *Hillen v ICI (Alkali) Ltd* [1936] A.C. 65.

10 *Holmes v Wilson* (1839) 10 A. & E. 503; *Konskier v Goodman Ltd* [1928] 1 K.B. 421.

11 See ; *Laiqat v Majid* [2005] EWHC 1305 (QB); [2005] N.P.C. 81.

12 *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* (1987) 2 E.G.L.R. 173.

13 [1957] 2 Q.B. 334.

14 If damage and interference with user can be proved, the wrong may be an actionable nuisance.

15 cf. *Tollemache & Cobbold Breweries v Reynolds* (1983) 268 E.G. 52 (injunction to remove eaves refused, but declaration given that the complainant could carry out remedial work at his own cost).

16 *Bernstein v Skyviews and General Ltd* [1978] Q.B. 479.

17 [1926] W.N. 336.

18 [1957] 2 Q.B. 334 at 341. See also *Davies v Yadegar* (1990) 22 H.L.R. 232.

Aircraft Section 76(1) of the Civil Aviation Act 1982 provides that no action shall lie in respect of trespass by reason only of the flight of aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or of the ordinary incidents of such flight. Section 76(2) further provides that where material loss or damage[19] is caused to any person or property on land or water by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off[20] or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action as if the loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft. This part of the Act applies only to liability for civil (not military) aircraft.[21] **19-05**

Intention or negligence in the defendant It is no defence that the trespass was due to a mistake of law or fact, provided the physical act of entry was voluntary. Thus there will be liability where the boundary between the claimant's and the defendant's land is ill-defined and the defendant, in mowing his own grass by mistake mows some of the claimant's,[22] and when a master of hounds' pack enters prohibited ground where, knowing of the risk of entry, the master negligently failed to prevent an entry.[23] In short, as Aikenhead J has made clear, "a negligent incursion on to, and damage of, a claimant's land or property can in law be a trespass".[24] **19-06**

Entry without intention or negligence If the entry is involuntary—that is, if it is committed unintentionally and without negligence—no liability is incurred.[25] Thus, the High Court of Australia has held that falling onto railway tracks in an epileptic fit is no trespass.[26] **19-07**

Trespass distinguished from nuisance Trespass differs from nuisance in that it is a direct as opposed to a consequential infringement of another's right, and is actionable without proof of damage, whereas damage must be proved in nuisance.[27] Thus, if a defendant throws rubbish onto the land of another, or if he sends the stinking water in his yard into his neighbour's cellar,[28] these are acts of trespass. But if a defendant causes such material to pass on the claimant's land merely as the result of the exercise of his own rights of property, as where he fixes a spout on his roof, **19-08**

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19 Which includes, in relation to persons, loss of life and personal injury: s.105.

20 This seems only to include that period after the aircraft has come to its take-off position: *Blankley v Godley* [1952] 1 All E.R. 436.

21 Civil Aviation Act 1982, Part III.

22 *Basely v Clarkson* (1682) 3 Lev. 37.

23 *League Against Cruel Sports Ltd v Scott* [1986] Q.B. 240. A pack master is also liable vicariously for other members of the hunting party. However, if an owner does not prohibit entry, there may be an implied licence. See para.19-54 for licence coupled with interest, e.g., to kill and take deer.

24 *Network Rail Infrastructure Ltd v Conarken Group Ltd* [2010] EWHC 1852 (TCC); [2010] B.L.R. 601 at [67] (affirmed in relation to the negligence issue also raised: [2011] EWCA Civ 644; [2011] B.L.R. 462).

25 *Smith v Stone* (1647) Style 65.

26 *Public Transport Commission of NSW v Perry* (1977) 14 A.L.R. 273.

27 See para.20-02. But if damage is caused, it may make no difference if the action is framed in trespass or nuisance: *Home Brewery Co v William Davis & Co (Loughborough) Ltd* [1987] Q.B. 339.

28 *Preston v Mercer* (1656) Hardr. 61.

whereby the rain-water is discharged on to the claimant's land,[29] or allows the branches or roots of his trees to spread over his boundary,[30] or a game of cricket results in the escape of balls hit over the boundary,[31] these are acts of nuisance, not trespass. Equally, in *British Waterways Board v Severn Trent Water Ltd*[32] the Court of Appeal made it clear that a trespass action may be brought by the riparian right owner in respect of the direct fouling of a river, notwithstanding that an action would not lie in respect of the fouling of adjoining land, the crucial element being the directness of the invasion.

19-09 **Trespass lies without damage** To support an action of trespass it is not necessary that there should have been any actual damage.[33] The fact that trespass is actionable per se has enabled the action of trespass to be used for the purpose of settling title through actions of ejectment, though today such questions may also be decided by a declaratory judgment. The reason for this principle seems to be that acts of direct interference with another's possession are likely to lead to breaches of the peace and the policy of the law therefore demands that the claimant be relieved from the requirement of proving damage. So where the owners of an industrial enterprise anticipate the commission of trespass by environmental protestors they can be granted an interim injunction to prevent such trespass.[34] Where entry is merely threatened, a quia timet injunction is the appropriate remedy.[35] Equally, where a potential threat is posed by something growing on the claimant's land which was planted there by the defendant, the claimant may seek a mandatory injunction to have the defendant remove it.[36] It is reasonable to anticipate a future trespass where protestors who have trespassed in the past have only modified the nature of their protests. Accordingly, injunctive relief for a prolonged period of time may be granted in such circumstances.[37]

2. WHO MAY SUE FOR TRESPASS

19-10 **Person in possession** Trespass is actionable at the suit of the person in possession of land, who can claim damages or an injunction,[38] or both. A tenant in occupation can sue, but not a landlord, except in cases of injury to the reversion.[39]

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29 *Reynolds v Clarke* (1725) 2 Ld. Ray. 1399.
30 *Smith v Giddy* [1904] 2 K.B. 448; *Lemmon v Webb* [1895] A.C. 1.
31 *Miller v Jackson* [1977] Q.B. 966.
32 [2001] EWCA Civ 276; [2002] Ch. 25.
33 See, e.g., *Anchor Brewhouse Developments v Berkley House (Docklands Developments) Ltd* (1987) 2 E.G.L.R. 173. Nor is the trifling nature of the trespass any defence: *Yelloly v Morley* (1910) 27 T.L.R. 20.
34 *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator* [2003] EWHC 1738 (Ch); [2004] Env. L.R. 9.
35 *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator* [2003] EWHC 1738 (Ch); [2004] Env. L.R. 9.
36 *Nelson v Nicholson, The Independent*, 22 January 2001.
37 See *Wensley v Persons Unknown* [2014] EWHC 3702 (Ch) (granting a two-year injunction to restrain anti-fracking protestors from trespassing on rural land in Lancashire.)
38 e.g. *John Trenberth v National Westminster Bank* (1980) 39 P. & C.R. 104. But the award of an injunction is subject to judicial discretion. Cf. *Charrington v Simons & Co Ltd* [1971] 1 W.L.R. 598 at 603, per Russell LJ; *Patel v WH Smith (Eziot) Ltd* [1987] 1 W.L.R. 853. An injunction is prima facie available even if there is no damage.
39 See para.19-26.

Similarly, a person in possession can sue although he is neither the owner nor derives title from the owner, and indeed may be in possession adverse to the owner.

Concurrent possession For the purposes of the tort of trespass to land, and for the purposes of possession, land and its subsoil and superstructures may be divided in horizontal layers, as with apartment flats,[40] or where A possesses the pasturage on the surface while B possesses the peat beneath the surface.[41] A third person, C, could even be in possession of the minerals below the peat. Indeed, even this last possession may be sub-divided into separate possession of the upper and lower seams of the minerals.[42] Each of such parties will be entitled to sue in trespass or expel by force a stranger trespassing on the subject matter of his possession.[43] Anything attached to the soil, such as the herbage,[44] trees, underwood, etc. may be the subject of a separate possession, and the owner can maintain an action of trespass in respect of it. Movable fees are also known to the law of real property and freehold may exist subject to moving boundaries.[45] But the law of trespass is not confined to the protection of freehold and real property. Thus where statute has conferred exclusive rights over reserved burial plots and declared those rights to be personal estate, it has been held that an infringement of such a right is actionable as a trespass, including encroachments upon the surface of the plot in which there is such a right of property.[46] **19-11**

Owner of profit à prendre The owner[47] of a profit à prendre can sue in trespass for any interference with the subject matter of his *profit*. So, the owner of an exclusive right of fishing can sue in trespass anyone who fishes in his fishery or otherwise interferes with it.[48] On the other hand, "an easement differs from a profit à prendre" and "although both may be classed under the head of servitudes, the owner of an easement cannot maintain trespass, the only remedies available to him for disturbance being by abatement or by an action for nuisance."[49] **19-12**

Evidence of possession Possession means generally the occupation or physical control of land. The degree of physical control necessary to constitute possession may vary from one case to another, for "by possession is meant possession of that character of which the thing is capable".[50] "The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated there is little which can be done on the land to **19-13**

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40 *Ramroop v Ishmael* [2010] UKPC 14.
41 *Wilson v Mackreth* (1766) 3 Bur. 1824.
42 As, e.g., in *Butterley Co v New Hucknall Colliery* [1910] A.C. 381.
43 *Cox v Glue* (1848) 5 C.B. 533.
44 *Richards v Davies* [1911] 1 Ch. 90. Note that cultivated crops are treated as mere chattels: *Evans v Roberts* (1826) 5 B.C. 829.
45 *Baxendale v Instow Parish Church* [1982] Ch. 14 (a moveable fee is an estate in land which from time to time changes its position, such as, in this case, the foreshore changed by recession or encroachment of sea).
46 *Reed v Madon* [1989] Ch. 408.
47 A possessory title probably suffices: *Mason v Clarke* [1955] A.C. 778 at 794, per Lord Simonds; but see at 806, per Lord Keith; and see *Lowe (Inspector of Taxes) v JW Ashmore* [1971] Ch. 545.
48 *Holford v Bailey* (1849) 13 Q.B. 426; *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch. 84.
49 *Paine & Co Ltd v St Neots Gas & Coke Co* [1939] 3 All E.R. 812 at 823, per Luxmoore LJ.
50 *Lord Advocate v Young* (1887) 12 App. Cas. 544 at 556, per Lord Fitzgerald.

indicate possession".[51] In the case of a building, possession is evidenced by occupation, or, if the building is unoccupied, by possession of the key or other method of obtaining entry.[52] In the case of land without buildings, possession is shown by "acts of enjoyment of the land itself",[53] such as by building a wall upon it,[54] or taking grass from it.[55] The same is true where what is claimed is possession of the river bed or foreshore in tidal waters to which a boat has been moored, so long as the mooring can be shown to be sufficiently secure and that the boat would not float away by reason of wind or tide.[56] However, where there is a public right of way over the land in question, no adverse possession can be claimed (e.g. by stationing one's caravan and associated structures there for the requisite period of 12 years[57]). Evidence of possession of part of the land in question may be evidence of possession of the whole. "If you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood."[58]

19-14 In *Nata Lee Ltd v Abid*[59] the Court of Appeal emphasised the importance of a court taking a properly balanced approach to the assessment of whether a trespass has occurred. In this case, on the first day of the trial the judge had, by way of a case-management decision, excluded evidence garnered by the appellant's surveyor. He had done so largely for reasons associated with the late submission of this evidence. The question that arose was whether the decision to exclude the evidence fell within the case-management discretion enjoyed by first instance judges. In deciding that the decision to exclude the evidence fell outside this discretion, Briggs LJ did not dismiss as irrelevant the lateness of submission. Rather, he preferred to think in terms of the fact that, without this evidence, there was a "vitiating lack of balance in the judge's assessment" of evidence in the case such that "while the delay was serious and not satisfactorily explained, the balance ought to have come down in favour of admitting Mr Shattock's factual evidence".[60] This commitment to having proper evidence supplied by both parties on the question of whether a trespass has occurred, reflects closely the courts' commitment to hearing evidence from both sides on the often related question of whether a defendant has been in adverse possession.[61]

19-15 Proof of ownership is prima facie proof of possession.[62] That is, the presumption is that the person holding title to the land is in possession.[63] Yet even a long continued assertion of title, without proof of title, can be significant.[64] What is also

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51 *Wuta-Ofei v Mabel Danquah* [1961] 1 W.L.R. 1238 at 1243; *Ocean Estates v Norman Pinder* [1969] 2 A.C. 19.

52 *Jewish Maternity Society's Trustees v Garfinkle* (1926) 95 L.J.K.B. 766.

53 *Jones v Williams* (1837) 2 M. & W. 326 at 331.

54 *Every v Smith* (1857) 26 L.J. Ex. 344.

55 *Harper v Charlesworth* (1825) 1 B.C. 574.

56 *Port of London Authority v Ashmore* [2010] EWCA Civ 30; [2010] 1 All E.R. 1139 at [26], per Sir John Chadwick.

57 *R. (on the application of Smith) v Land Registry* [2010] EWCA Civ 200; [2011] Q.B. 413.

58 *Jones v Williams* (1837) 2 M. & W. 326 at 331, per Parke B. And see *Higgs v Nassauvian Ltd* [1975] A.C. 464.

59 [2014] EWCA Civ 1652; [2015] 2 P. & C.R. 3.

60 [2014] EWCA Civ 1652; [2015] 2 P. & C.R. 3 at [71].

61 See further, para.19-79.

62 *Hebbert v Thomas* (1835) 1 C.M. & R. 861 at 864, per Parke B.

63 *Jones v Chapman* (1847) 2 Ex. 803 at 821; *Lows v Telford* (1876) 1 App. Cas. 414 at 426.

64 *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 Q.B. 618 at 849 and 853–854, per Russell and Willmer LJJ.

of significance in this context is the facility within the Land Registration Act 2002[65] whereby a squatter may, after ten years adverse possession, apply to be registered as the legal proprietor of the land in question.[66] That said, if the squatter only secures such registration by virtue of a fraudulent application, or an application based on an innocent but erroneous claim about having satisfied the adverse possession requirements, then the register can be restored to its former state, once again recording the original proprietor's title.[67]

Possession of minerals Possession of the surface of land prima facie includes possession of the subjacent minerals also,[68] even though they be unopened, for possession of the surface prima facie operates to exclude others from access to the minerals. But that presumption is always liable to be rebutted by showing that the possession of the minerals is in fact in somebody else, for the minerals may be worked from the adjoining land, and apparently even a wrongdoer may, in the absence of fraud,[69] by driving levels through a whole seam of coal, acquire possession of the unworked coal within the limits to which the levels extend.[70] But the mere wrongful getting of neighbouring coal by a mine owner is not such a possession of the seam as to confer a title under the Statute of Limitations.[71] **19-16**

De facto possession A person claiming as against the true owner cannot be said to have possession unless the true owner has been dispossessed.[72] In order to determine whether the acts of user do or do not amount to dispossession of the owner, the character of the land, the nature of the acts done on it and the intention of the squatter all fall to be considered.[73] Moreover, to found a claim in trespass, possession must be exclusive.[74] Accordingly, pasturing cattle on strips of grass at the side of a private road does not give the owner of the cattle possession of the strips, because the right of passage exercised by other persons prevents his possession from being exclusive.[75] In *Fowley Marine (Emsworth) Ltd v Gafford*,[76] the **19-17**

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[65] Sch.6 para.1(1).

[66] Note that it is for the Land Registry, not the County Court, to decide in the first instance whether adverse possession has been acquired: *Swan Housing Association Ltd v Gill* [2012] EWHC 3129 (QB); [2013] 1 W.L.R. 1253 at [15], per Eady J.

[67] *Baxter v Manion* [2011] EWCA Civ 120; [2011] 1 W.L.R. 1594. As to the power more broadly to rectify errors on the register, see Land Registration Act 2002 Sch.4.

[68] *Smith v Lloyd* (1854) 9 Exch. 562 at 574, per Parke B. See *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35; [2011] 1 A.C. 380. Common law reserves to the Crown all gold and silver in mines: *The Case of Mines* (1567) 1 Plowd. 310.

[69] *Bulli Coal Mining Co v Osborne* [1899] A.C. 351; *Oelkers v Ellis* [1914] 2 K.B. 139.

[70] See *Ashton v Stock* (1877) 6 Ch. D. 719 at 726, per Hall VC.

[71] *Ashton v Stock* (1877) 6 Ch. D. 719; *Thompson v Hickman* [1907] 1 Ch. 550.

[72] See para.19-79.

[73] *Buckinghamshire CC v Moran* [1990] Ch. 623. Slade LJ stressed that although the intention of the squatter is material to the question of dispossession, the intention of the owner as to future possible use is generally not material except to the extent that the squatter's knowledge of the owner's intention may bear on his *animus possidendi*: *Buckinghamshire CC v Moran* [1990] Ch. 623 at 639–640.

[74] In *Marsden v Miller* (1992) 64 P.C.R. 239, the mere erection of a fence round an area of disputed land had failed to exclude all others from the land and was held not to give rise to such possession as was necessary to support an action for trespass.

[75] *Coverdale v Charlton* (1878) 4 Q.B.D. 104. The same principle applies where the land in question is subject to a public right of way. The ongoing existence of this right of way will defeat any claim that the possession gained was exclusive: *R. (on the application of Smith) v Land Registry* [2010] EWCA Civ 200; [2011] Q.B. 413.

Court of Appeal held that the claimants had exclusive possession in a tidal creek and that the unpermitted acts of boat owners in mooring their craft in the creek did not amount to acts of concurrent possession, since those acts were not shown to be done with the intention to take possession.[77] In terms of understanding what is required by way of the trespasser's intention, the law has now been clarified by the decision of the House of Lords in *JA Pye (Oxford) Ltd v Graham*.[78] In that case, Lord Browne-Wilkinson indicated that possession requires two elements: factual possession and the intention to possess. In relation to the former he was clear that "an appropriate degree of physical control" suffices,[79] while with respect to the intention to possess he expressly approved[80] the dictum of Slade J in *Powell v McFarlane*[81] that there must be "intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow". The qualification that the intention to dispossess need only be an intention to exclude the world "so far as is reasonably practicable" is an important one. Thus, in one case in which A intended to dispossess B, while acknowledging that if B required him to leave he would have to do so, it was nonetheless held that his intention fell within the test.

19-18 **Defence of jus tertii** A de facto possession gives a right to retain the possession and undisturbed enjoyment as against all wrongdoers. It is not, however, sufficient as against the lawful owner. And one who alleged that he had an oral tenancy had, by virtue of s.40 of the Law of Property Act 1925[82] (which prevented him from proving his oral tenancy),[83] to respect the title of the owner. He who has such a possession may, just as may the lawful owner, use a reasonable degree of force in its defence.[84] He may sue in trespass anyone who disturbs his possession, and in such an action it is no answer for the defendant to show that the title and right to possession is in another person. *Jus tertii* is no defence to the action unless the defendant can show that the act complained of was done by the authority of the true owner.[85] Nor does it matter how recently the possession was acquired.[86] Where a trespass action is brought by a bare possessor, *jus tertii* cannot be raised to mitigate the damages payable. This is because possession is, as against a wrongdoer, prima facie

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76 [1968] 2 Q.B. 618.

77 [1968] 2 Q.B. 618 at 638, per Willmer LJ.

78 [2002] UKHL 30; [2003] 1 A.C. 419.

79 [2002] UKHL 30; [2003] 1 A.C. 419 at [41]. For these purposes, there is no fixed notion of an appropriate degree of control. Each case needs to be adjudged "bearing in mind the nature of the land": *Greenmanor Ltd v Laurence Pilford* [2012] EWCA Civ 756 at [27], per Etherton LJ; cf. *Chambers v Havering LBC* [2011] EWCA Civ 1576; [2012] 1 P. & C.R. 17.

80 [2002] UKHL 30; [2003] 1 A.C. 419 at [42].

81 (1979) 38 P. & C.R. 452.

82 See now the Law of Property (Miscellaneous Provisions) Act 1989 s.2.

83 *Delaney v TP Smith Ltd* [1946] 1 K.B. 393.

84 *Green v Goddard* (1704) 2 Salk. 641; *Weaver v Bush* (1798) 8 T.R. 78.

85 *Graham v Peat* (1801) 1 East 244; *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch. 84. In the case of Crown land *jus tertii* is available to intruders unless the claimant shows he is in occupation with the consent and privity of the Crown or that the title has passed to him by adverse possession: *Harper v Charlesworth* (1825) 4 B.C. 574 at 586–590.

86 *Catteris v Cowper* (1812) 4 Taunt. 547.

evidence of title, and it cannot be displaced merely by showing that the possession was of recent origin and was not derived from any person who had title.[87]

Trespasser A trespasser who enters and expels the person in possession does not obtain possession so as to enable him to maintain trespass against the evicted person seeking repossession unless the person expelled has submitted to the expulsion by delaying to re-expel the intruder within a reasonable time. In the absence of submission and until the expiry of a reasonable time, expulsion by a mere trespasser does not divest the lawful occupier of possession.[88] **19-19**

Self-help by rightful owner What will be considered to be without delay must depend upon all the circumstances of the case. In *Browne v Dawson*, a ten day delay was considered to be a reasonable time. In *McPhail v Persons Unknown*,[89] it was said that "a trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner". But acquiescence may be inferred from delay, and self-help is a remedy to be safely employed only when the rightful owner acts as soon as he is aware of the wrongful intrusion.[90] One remedy, then, which a possessor has for an expulsion by a trespasser is at once to turn out the intruder and reinstate himself, but it is unlikely that the landowner may use force to this end.[91] He may break open the outer door, or use such force as is reasonably necessary (and not excessive) to effect an entry. Such an entry by the possessor is to be treated as if it were a forcible resistance of an intrusion upon a possession which he had never lost. But except in cases of emergency, the use of force will usually be inadvisable since legal process by order for possession is available with a minimum lapse of five days from service on unlawful occupiers, and in case of urgency a court may give leave for issue of an order within a lesser period of time.[92] One matter that requires clarification is whether art.8 of the European Convention on Human Rights has any bearing on applications by *private landowners* for possession orders. Clearly, squatters' living conditions, and therefore their private lives, will inevitably be affected **19-20**

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87 *Eastern Construction Co v National Trust Co* [1914] A.C. 197; *Glenwood Lumber Co v Phillips* [1904] A.C. 405. The possessor may have to account to the true owner for the damages recovered: *Eastern Construction Co v National Trust Co* [1914] A.C. 197 at 210.

88 *Browne v Dawson* (1840) 12 A. & E. 624. In such a case the burden of proof is on the intruder to show that he is not a trespasser when the claimant asserts title and intention to resume possession: *Portland Managements Ltd v Harte* [1977] Q.B. 306.

89 [1973] Ch. 447 at 456.

90 cf. *Burton v Winters* [1993] 1 W.L.R. 1077 ("self-redress is a summary remedy which is justified only in clear and simple cases, or in an emergency": per Lloyd LJ at 1082). On the other hand, in cases where self-help would entail an act by the claimant that is prohibited by a restrictive covenant, the appropriate remedy is a mandatory injunction requiring the defendant to take the necessary remedial action: *Nelson v Nicholson, The Independent*, 22 January 2001.

91 In *Malik v Fassenfelt* [2013] EWCA Civ 798; [2013] 3 E.G.L.R. 99 at [25] Sir Alan Ward noted, obiter, that "the landowner has the remedy of self-help but the Criminal Law Act 1977 has prevented the use of force to evict an occupier". As such, "[h]is opportunity to obtain immediate relief by resorting to self-help may be curtailed if the squatters refuse to leave without a fight."

92 See the Civil Procedure Rules 1998 (SI 1998/3132) r.55. The position of an owner seeking to recover possession after expiration of a tenancy is very different. Generally he must proceed by court order. By the Protection from Eviction Act 1977 s.2, any right of re-entry or forfeiture can only be enforced by court order "while any person is lawfully residing in the premises or part of them".

by the grant of a possession order. In *Malik v Fassenfelt*,[93] it was simply assumed on appeal that art.8 was relevant. But since the point was not directly contested, Lord Toulson cautioned: "I do not think that it would be right in these circumstances to decide whether the judge was correct about the availability of article 8 as a potential defence to the claim [for a possession order]".[94] Lloyd LJ expressed a very similar view.[95]

19-21 Exclusive possession The leading case in this area is *Street v Mountford*.[96] Generally speaking, the intention of the parties to give exclusive possession to the occupant is evidenced by the terms of their agreement (unless the written agreement is a sham[97] and such a letting of residential premises for a term of time, normally at a rent, ordinarily gives rise to a tenancy.[98] The question is not whether the parties or one of them were minded to give and take exclusive possession but whether the effect of their transaction is in fact the giving of exclusive possession.[99] The general effect of subsequent decisions of the House of Lords is that a tenancy is necessarily created where exclusive possession is in fact conferred, and the fact of such possession does not depend on what they say or how they describe the transaction but on the effect of their arrangement.[100] Where the agreement signed purports to evade the Rent Acts and avoids the language of "tenancy" the courts will simply look at whether, on its true construction, the agreement creates a right of exclusive possession.[101] An exception exists where access is reserved for genuine purposes, such as attendance or servicing.[102] A homeless person occupying temporary accommodation does not have exclusive occupation so as to give rise to a tenancy.[103] The same applies to hotel guests[104] and those who stay at a charitable almshouse: they are mere licensees whose occupation is a personal privilege as beneficiaries of the charity.[105]

19-22 Lodgers and sub-tenants A lodger in a private house cannot sue in trespass, because possession remains in the landlord.[106] By contrast, a sub-tenant is one to whom rooms in a house are demised so that he becomes the actual tenant of those rooms. He therefore has possession and can sue in trespass.[107] The question of exclusive possession is one of fact to be decided according to the circumstances.

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93 [2013] EWCA Civ 798; [2013] 3 E.G.L.R. 99.
94 [2013] EWCA Civ 798; [2013] 3 E.G.L.R. 99 at [42].
95 [2013] EWCA Civ 798; [2013] 3 E.G.L.R. 99 at [51].
96 [1985] A.C. 809. The same principles apply to business premises: *London & Associated Investment Trust Plc v Calow* (1987) 53 P.C.R. 340.
97 See, e.g., *Skipton Building Society v Clayton* (1993) 66 P.C.R. 223.)
98 The presumption of tenancy may be displaced by a declared intention not to create a legal relationship at all (see, e.g., *Colchester BC v Smith* [1991] Ch. 448; affirmed on other grounds: [1992] Ch. 421), or by circumstances, as where occupation is granted pursuant to a contract of employment (see, e.g., *Norris v Checksfield* [1991] 1 W.L.R. 1241).
99 *AG Securities v Vaughan; Antoniades v Villiers* [1990] 1 A.C. 417 at 458.
100 See *Bruton v London and Quadrant Housing Trust* [2000] 1 A.C. 406.
101 *Antoniades v Villiers* [1990] 1 A.C. 417; cf. *Mikeover Ltd v Brady* [1989] 3 All E.R. 618.
102 *AG Securities v Vaughan* [1990] 1 A.C. 417. See also *Stribling v Wickham* [1989] 27 E.G. 81.
103 *Westminster City Council v Clarke* [1992] 2 A.C. 288.
104 *Smith v Overseers of St Michael's, Cambridge* (1860) 3 E. & E. 383.
105 *Gray v Taylor* [1998] 1 W.L.R. 1093.
106 *Allan v Liverpool* (1874) L.R. 9 Q.B. 180 at 191, per Blackburn J; *Appah v Parncliffe Investments Ltd* [1964] 1 W.L.R. 1064.
107 *Lane v Dixon* (1847) 3 C.B. 776.

Such factors as the access of the landlord's servants or the landlord's control of the outer door will be relevant. It is probable that the only practicable test is the exclusiveness of the occupier's possession.

Licensees and third parties It would seem that exclusive possession as against the landlord is not conclusive of the tenant's possessory interest vis-à-vis third parties.[108] The terms of an occupational licence may give the licensee such control over access as to entitle him to the protection of the law of trespass against intruders. The typical lodger with non-exclusive possession has to be distinguished from the typical modern occupational licensee, since nowadays "a person who has no more than a licence may yet have possession of the land",[109] and the terms of the licence may confer a sufficient right of possession. In *Manchester Airport Plc v Dutton*,[110] the Court of Appeal held, by a majority, that the court had jurisdiction to grant a licensee an order for possession against trespassers even before the licensee was in de facto possession, if such an order was necessary in order to give effect to the licensee's right to occupy under the contract with the licensor. **19-23**

Servants In the absence of an intention on the part of the owner to treat the occupier as a tenant, mere occupation of premises by those such as servants does not amount to possession even if their occupation is exclusive.[111] This presumption against exclusive possession by a servant may be compared with a bailee at will or a servant using his employer's movable property.[112] But it is only a presumption: an expression of contrary intention or the circumstances of the case may displace it. **19-24**

Public bodies Whether public bodies authorised by commission or statute to construct and, from time to time, repair public works, or to control and regulate the repair of public highways, thereby acquire an interest in the soil of such works or highways, so as to entitle them to sue a trespasser causing physical damage thereto, is simply a question of intention to be deduced from the language of the commission or statute, as the case may be.[113] **19-25**

Reversioner Although, in general, the only person who can sue for a trespass is the person who was in actual or constructive possession at the time of the trespass committed, an exception exists where the trespass has caused a permanent injury to the land affecting the reversionary interest. The reversioner may sue at once without waiting until his future estate falls into possession.[114] He may sue for any act involving a partial destruction of the freehold. But for an ordinary continuing trespass, even though committed under a claim of a right of way, the reversioner cannot sue.[115] He cannot sue for the erection of a temporary structure on his land, **19-26**

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[108] See para.19-57.
[109] *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch. 233 at 257, per Megarry J.
[110] [2000] Q.B. 133.
[111] *White v Bayley* (1861) 10 C. & B. (N.S.) 227; *Goudge v Broughton* [1929] 1 K.B. 103. See also para.19-91.
[112] See para.17-56 onwards.
[113] cf. *Duke of Newcastle v Clark* (1818) 8 Taunt. 602 with *Coverdale v Charlton* (1878) 4 Q.B.D. 104 and *Rolls v St George, Southwark* (1880) 14 Ch. D. 785.
[114] *Jones v Llanrwst Urban DC* [1911] 1 Ch. 393; *Mayfair Property Co v Johnston* [1894] 1 Ch. 508.
[115] *Baxter v Taylor* (1832) 4 B. & Ad. 72.

such as a hoarding erected to obstruct a window on his property for a year.[116] He can, however, sue for acts of trespass which, if acquiesced in, would result in the loss or gain of an easement.[117]

19-27 **Co-owners** One co-owner of land can only bring an action in trespass against the other if the latter has actually been ousted or dispossessed.[118] Each co-owner is entitled to possession of the whole land, so that if one turns the other off the land or part of it, it is a trespass.[119] If the common property or part of it is destroyed, there is an ouster. So, trespass lies by one co-owner against another who digs and carries away the soil.[120] It is not trespass, however, if one co-owner uses the land in the ordinary and natural way, as by cutting grass and making it into hay,[121] or working a coal mine.[122] In such a case the owner making the hay or working the mine must account for the profits. When there are co-owners of a wall, such as a party wall,[123] one owner can maintain trespass against the other if there is a simple destruction of the wall.[124] But if the wall has been destroyed with the intention of rebuilding it,[125] or the foundations have been temporarily removed with the object of replacing them,[126] there is no trespass. Trespass will only lie if one owner is ousted from possession of the wall, for example, if the wall is heightened and a building is placed so as to occupy the whole width of the top.[127] Special statutory procedures exist to facilitate the repair of party structures and the swift resolution of disputes relating to them.[128]

3. TRESPASS BY RELATION

19-28 **Trespass by relation** Historically, actual possession was for many purposes more highly favoured than property or the legal right to possession. Where, at the time of the commission of any trespass upon land, the owner happened to be out of possession, either by reason of his having been wrongfully ousted or by reason of his having neglected to enter into possession upon the accrual of his title, he was without remedy for such trespass. Over time, the injustice of not extending to the right to possession the remedies granted to those with bare possession were recognised, and a legal fiction was introduced whereby the party having the right to possession was, upon entry, deemed to have been in possession from the date when his right of entry accrued. This doctrine of possession by relation gradually

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116 *Cooper v Crabtree* (1828) 20 Ch. D. 589.

117 See para.20-85.

118 Though trespass depends on ouster by a co-owner, other illegitimate uses short of ouster may give rise to other liabilities, e.g., accounting for net profits received from a stranger.

119 *Murray v Hall* (1849) 7 C.B. 441; *Jacobs v Seward* (1872) L.R. 5 H.L. 464: putting a lock on a gate (not kept locked) is not enough.

120 *Wilkinson v Haygarth* (1846) 12 Q.B. 837.

121 *Jacobs v Seward* (1872) L.R. 5 H.L. 464; *Bull v Bull* [1955] 1 Q.B. 234 at 237.

122 *Job v Potton* (1875) L.R. 20 Eq. 84.

123 See Law of Property Act 1925 s.38, Sch.1, Pt V.

124 *Jones v Read* (1876) I.R. 10 C.L. 315.

125 *Cubitt v Porter* (1828) 8 B. & C. 257.

126 *Standard Bank of British South America v Stokes* (1878) 9 Ch. D. 68.

127 *Stedman v Smith* (1857) 8 E. & B. 1.

128 See the Party Wall, etc. Act 1996 and the London Building Acts (Amendment) Act 1939. The legislation does not apply to disputes about ownership.

Hilary Term
[2014] UKSC 13
On appeal from: [2012] EWCA Civ 26

JUDGMENT

Coventry and others (Respondents) *v* Lawrence and another (Appellants)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

26 February 2014

Heard on 12, 13 and 14 November 2013

AUTH069

Appellant
Stephen Hockman QC
William Upton
(Instructed by Richard Buxton Environmental and Public Law)

Respondent
Robert McCracken QC
Sebastian Kokelaar
(Instructed by Pooley Bendall Watson)

LORD NEUBERGER

The issues raised by this appeal

1. This appeal raises a number of points in connection with the law of private nuisance, a common law tort. While the law also recognises public nuisance, a common law offence, this appeal is only concerned with private nuisance, so all references hereafter to nuisance are to private nuisance. It should also be mentioned at the outset that the type of nuisance alleged in this case is nuisance in the sense of personal discomfort, in particular nuisance by noise, as opposed to actual injury to the claimant's property (such as discharge of noxious material or removal of support).

2. As Lord Goff of Chieveley explained in *Hunter v Canary Wharf Ltd* [1997] AC 655, 688, "[t]he term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land", quoting from Newark, *The Boundaries of Nuisance* (1949) 65 LQR 480. See also per Lord Hoffmann at pp 705-707, where he explained that this principle may serve to limit the extent to which a nuisance claim could be based on activities which offended the senses of occupiers of property as opposed to physically detrimental to the property.

3. A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land. As Lord Wright said in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society".

4. In *Sturges v Bridgman* (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out.

5. As Lord Goff said in *Cambridge Water Company v Eastern Counties Leather plc* [1994] 2 AC 264, 299, liability for nuisance is "kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which '... those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action': see *Bamford v Turnley* (1862) 3 B & S 62, 83, *per* Bramwell B". I agree with Lord Carnwath in para 179 below that reasonableness in this context is to be assessed objectively.

6. The issues raised on this appeal are as follows:

- The extent, if any, to which it is open to a defendant to contend that he has established a prescriptive right to commit what would otherwise be a nuisance by means of noise;

- The extent, if any, to which a defendant to a nuisance claim can rely on the fact that the claimant "came to the nuisance";

- The extent, if any, to which it is open to a defendant to a nuisance claim to invoke the actual use of his premises, complained of by the claimant, when assessing the character of the locality;

- The extent, if any, to which the grant of planning permission for a particular use can affect the question of whether that use is a nuisance or any other use in the locality can be taken into account when considering the character of the locality;

- The approach to be adopted by a court when deciding whether to grant an injunction to restrain a nuisance being committed, or whether to award damages instead, and the relevance of planning permission to that issue.

A summary of the substantive facts

7. In February 1975, planning permission was granted to Terence Waters for the construction of a stadium ("the Stadium") some three miles west of Mildenhall Suffolk, on agricultural land which he owned. The planning permission permitted the Stadium to be used for "speedway racing and associated facilities" for a period of ten years. Speedway racing involves racing speedway motorcycles over several laps of a circuit.

8. The Stadium was constructed during the ensuing year, and thereafter it was used for the permitted purpose by a company called Fen Tigers Ltd, Terence Waters' licensee or lessee of the Stadium. The planning permission was renewed on a permanent basis in 1985, although it was made personal to Mr Waters. Stock car and banger racing started at the Stadium in 1984. Such uses were not permitted under the planning permission, but after ten years of such use, it was contended that they had become immune from planning control enforcement, pursuant to section 191 of the Town and Country Planning Act 1990, as substituted by section 10(1) of the Planning and Compensation Act 1991, and Mr Waters applied for a Certificate of Lawfulness of Existing Use or Development (a "CLEUD"), pursuant to section 191 in early 1995. In July 1997, a CLEUD was issued by the planning authority confirming that, for a period of ten years, there had been 20 stock car and banger racing events (at specified hours of the day) at the Stadium each year, so that such a use had become lawful in planning terms. In addition, greyhound racing has been going on at the Stadium since 1992.

9. To the rear of the stadium is a motocross track ("the Track"), an undulating track on which this particular type of motorbike racing and practice takes place. The Track was constructed and used pursuant to a personal planning permission for motocross events, which was granted in May 1992 for a year, and renewed from time to time thereafter, always subject to conditions which sought to control the frequency of events, and the amount of sound which was emitted during such events. Eventually, in 2002, a permanent personal planning permission was granted for this use, subject to similar conditions, including one which limited the use of the Track to a limited number of days within prescribed hours, and another which imposed a maximum noise level of LAeq 85 dB over any hour at the boundary of the Track.

10. In August 2005, the Stadium was acquired from Mr Waters by his son, James Walters, and he leased it a month later to Carl Harris, who entered into an arrangement whereby the business at the Stadium was operated by David Coventry. David Coventry and his brother later took on the lease and then acquired the Stadium in April 2008. They have owned and operated it since then. Fen Tigers Ltd itself continued to promote speedway racing at the Stadium until it went into liquidation in July 2010. Terence Waters is also one of the three joint owners of the Track, and, in September 2003, he and his co-owners granted a lease of the track for ten years to Moto-Land UK Ltd ("M-LUK"), who since then have operated the activities on the Track.

11. The trial judge, His Honour Judge Richard Seymour QC (sitting as a Deputy Judge of the High Court), found that, between 1975 and 2009, the Stadium had been used for speedway racing between 16 and 35 times per year, save that for six years (1990, 1991, 1993 1994, 1997 and 2000) it was not used at all for speedway. As for stock car racing, the judge found that it had occurred at the Stadium between 16 and 27 times a year between 1985 and 2009, save that there was no stock car racing in

1991 or 1992. The judge also found that the Track had been "used for motocross to the full extent permitted" by the relevant planning permission (para 76). As he also mentioned, in 1995, this activity had resulted in the service of noise abatement notices, under section 80 of the Environmental Protection Act 1990, which were then the subject of inconclusive proceedings.

12. Across open fields, about 560 metres from the Stadium and about 860 metres from the Track, is a bungalow called "Fenland", which was built in the 1950s. It stands in about 0.35 hectares of garden, and is otherwise surrounded by agricultural land. The nearest residential property to Fenland appears to be about half a mile away, and the small village of West Row is about 1.5 miles to the south-east of Fenland (and about one mile to the south east of the Stadium).

13. In January 2006, Katherine Lawrence and Raymond Shields ("the appellants") purchased and moved into Fenland; their vendors were a Mr and Mrs Relton, who had owned and lived in Fenland since 1984. By April 2006, the appellants had become concerned about the noise coming from the motocross events on the Track. They complained about this to the local council in and after April 2006, and they also wrote to Mr Coventry and M-LUK, and to Terence and James Waters, threatening proceedings. The complaints to the council eventually resulted in the service of further noise abatement notices, required the carrying out of works to mitigate the noise emanation ("the attenuation works"). These notices were served during December 2007 on Mr Coventry, his brother, M-LUK and Fen Tigers Ltd, and stated that the activities at the Stadium and on the Track each constituted a statutory nuisance. The attenuation works were carried out, albeit later than they should have been, by January 2009.

14. Meanwhile, the appellants had also been pursuing their contention that both the Stadium and the Track were being used in such a way as to constitute a nuisance. As discussions did not produce what they considered to be an acceptable outcome, the appellants issued proceedings against Mr Coventry, M-LUK and Terence and James Waters ("the respondents") in the High Court for an injunction to restrain the nuisance in early 2008. In those proceedings, the appellants contended that the activities at the Stadium and on the Track constituted a nuisance individually, or in the alternative cumulatively. They maintained this contention following the completion of the attenuation works. The respondents filed a joint Defence in December 2009 denying nuisance.

15. In April 2010, Fenland suffered a serious fire, which caused extensive damage and rendered it uninhabitable. Since then, no-one has lived there, as it has yet to be rebuilt. Meanwhile, the proceedings came on before Judge Seymour on 26 January, and he heard them over 11 days.

The judgments below

16. The judge gave his decision on 4 March 2011, and his judgment runs to 325 paragraphs and over 110 pages - [2011] EWHC 360 (QB) (reported in part [2011] 4 All ER 1314). It is unnecessary to attempt to explain it in any detail for the purposes of this appeal. There are some parts which are difficult to follow, and there are one or two findings which he should have made, but did not make (in particular whether the appellants knew of the planning permissions when they purchased Fenland).

17. Particularly where there has been a relatively long and expensive hearing, it is important that the judge (i) clearly identifies for his own benefit as well as that of the parties, all the issues of fact and expert opinion that are in issue, and (ii) resolves in clear terms all such issues which are relevant on his view of the law, and, at least often, those issues which would be relevant if his view of the law turns out to be wrong. Otherwise, there is a real risk of a complete or partial rehearing being ordered, which would be very unfair on the parties, and would bring the administration of law into disrepute.

18. Reverting to Judge Seymour's judgment, he began by summarising the relatively uncontroversial history, and then turned to the "nature of the locality". He described the immediate locality which was generally rural, but included some houses and a small village, West End, and also a US Air Force base at RAF Mildenhall, which, at its nearest point, is about a mile to the east of the Stadium, the Track and Fenland, and is also about a mile to the north of West Row. The judge described the terms of the various planning permissions, and then turned to the question whether the planning permissions for the uses of the Stadium and the Track should have any bearing on the issue of whether those uses constituted a nuisance. He concluded in para 66 that they should not, because of the personal nature of the permissions, and the fact that they limited the permitted uses to a maximum number of days a year and to specified hours of the day.

19. Judge Seymour next discussed the extent to which the Stadium and the Track had been used over the years. He then set out (at paras 96-206) the oral and documentary evidence which he had read and heard in relation to the level of noise emanating from the Stadium and the Track. This evidence consisted of (i) letters, mostly of support, sent to the planning authorities in connection with the applications for, and renewals of, the planning permissions for the use of the Stadium and the Track for the activities described above, (ii) the advices given in connection with those applications and permissions by planning officers to planning committees, (iii) the planning permissions themselves, (iv) letters sent to the local authority between 1992 and 2010, complaining of the noise, (v) records kept, and letters sent, by the local Environmental Health Officers, (vi) the oral evidence of the appellants, four other residents in the locality on behalf of the appellants, and Mrs

Relton and at least five other residents for the respondents, (vii) one expert acoustic witness for each side, (viii) reports on noise levels from various public bodies including the World Health Organisation, the Department of the Environment, the National Physical Laboratory, and the Institute of Sound and Vibration Research.

20. When considering the expert evidence, the judge (at para 158) raised the question "whether it was appropriate, in assessing whether the noise generated by the activities [of the defendant] was capable of causing a … nuisance, to take into account as one of the noise characteristics of the locality the noise generated by those very activities". As Jackson LJ said in the Court of Appeal [2012] 1 WLR 2127, para 72, the judge does not appear to have answered that question expressly, but he appears to have held that the answer was no.

21. The judge said that, when the Stadium was being used for speedway, stock car, and banger racing from 1984, and also when the Track was being used for motocross from 1992, the noise was "sometimes … sufficiently intrusive to generate complaints, and sometimes not". Accordingly, he concluded that "it was possible so to organise activities at the Stadium or at the Track as not to produce intrusive noise affecting those residing nearby" - para 95.

22. The judge also concluded at para 207 that "the operation of activities at the Stadium both before and after the [attenuation] works constituted a nuisance, by reason of the noise generated, to [the appellants]", and he immediately went on to make the same finding about "the activities at the Track".

23. The judge then considered and rejected the respondents' contention that they had acquired a right to create what would otherwise have been a nuisance by noise, as a result of the use of the Stadium for speedway, stock car, and banger racing for more than 20 years. First, he held that no such right could be acquired as a matter of law; secondly, he held that, even if that was wrong, the interruption in use, especially in respect of stock car and banger racing in 1991 and 1992, would have been fatal to a prescriptive claim.

24. Finally, having concluded that the appellants had established a claim in nuisance, the judge turned to the question of remedies. He stated at paras 243-245 that he was minded to grant an injunction to restrain the respondents from carrying on activities at the Stadium or at the Track which emitted more than a specified level of noise, which he had in mind to fix at specific levels which he identified. He explained at para 243 that he had arrived at those levels by reference to the quantum of noise emitted from various motor racing circuits across the United Kingdom, a topic on which he had heard evidence from one of the expert witnesses, and also stated that there should be a lower level of noise permitted during the evening and

at night. He recorded at para 244 that the respondents did not challenge the notion that he should grant an injunction if he concluded that their activities had caused "continuing nuisance". At para 245, he provisionally indicated the decibel limits he had in mind, and added that, as Fenland was unoccupied, it may be appropriate to suspend any injunction. The judge then dealt with damages for past nuisance.

25. After he had handed down his judgment, a further hearing took place before the judge, pursuant to which he made an order which was a little more generous to the respondents than he had provisionally suggested, in that the injunction he granted permitted them to emit somewhat higher noise levels on up to 12 weekends each year. He gave the respondents time to reorganise their affairs by providing that the injunction would only take effect on 1 January 2012, or (if later) when Fenland was ready for residential occupation (which has not yet happened). The terms of the order also gave either party permission to apply to vary the terms of the injunction, but not earlier than 1 October 2011.

26. The respondents appealed against the decision. The Court of Appeal reversed Judge Seymour's decision, holding that the appellants had failed to establish that the respondents' activities at the stadium and the Track constituted a nuisance: [2012] 1 WLR 2127. Jackson LJ, who gave the main judgment, with which Mummery and Lewison LJJ agreed, held that the judge had gone wrong in holding that the actual use of the Stadium and the Track over a number of years, with planning permission, or a CLEUD, could not be taken into account when the assessing the character of the locality for the purpose of determining whether an activity is a nuisance – paras 74 and 76. In those circumstances, it was unnecessary for the Court of Appeal to consider any other issue, although Lewison LJ expressed a provisional view that, contrary to the judge's conclusion, it is possible to obtain by prescription a right to commit what would otherwise be a nuisance: paras 88-91.

27. The appellants now appeal to the Supreme Court. As indicated at the start of this judgment, the appeal raises a number of points relating to the law of nuisance, and it is convenient to consider them in principle before applying them to the facts and arguments in this appeal.

Acquiring a right to commit what would otherwise be a nuisance by noise

28. There is no doubt that a defendant can have a right to carry on an activity which would otherwise be a nuisance. For instance, in common law, a claimant may have bindingly agreed to the activity being carried on and to the consequent nuisance, or a claimant may somehow be estopped from objecting to the activity on the ground that it constitutes a nuisance; and, under a statute, certain activities in

certain circumstances may be accorded immunity from a claim in nuisance – see eg section 76 of the Civil Aviation Act 1982 and section 158 of the Planning Act 2008.

29. It is well established that an easement (that is, a right in favour of the so-called "dominant" land over the so-called "servient" land, such as a right of way, a right to light, a right of support, or a right of drainage) can be acquired by prescription as well as by express grant. Prescription is a form of deemed grant and arises as a result of long use.

30. Prescription was initially introduced and developed by the judges. It has been complicated by the facts that (i) as originally developed, it was subject to some rather technical, and impractical, rules (and in particular a requirement of at least an inference of enjoyment since 1189), (ii) the courts have developed another prescriptive principle, that of lost modern grant (which is not subject to so much technicality), (iii) it has been the subject of a large number of judicial decisions, many of which are hard to understand or reconcile, (iv) Parliament enacted the ill-drafted Prescription Act in 1832 (2 & 3 Will 4, c 71), so that (v) there are now two types of common law prescription, together with statutory prescription.

31. The essential feature of prescription for present purposes is that, in order to establish a right by prescription, a person must show at least 20 years uninterrupted enjoyment as of right, that is *nec vi, nec clam, nec precario* ("not by force, nor stealth, nor with the licence of the owner"), as Lord Walker put it in *R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70, para 20), of that which he now claims to be entitled to enjoy by right.

32. An issue in the present appeal is whether the right to commit a nuisance by noise can be acquired by prescription. For this purpose, I do not think that it strictly matters whether the right to make a noise which would otherwise be a nuisance can be an easement or not. As Lord Sumner said in *Pwllbach Colliery Co Ltd v Woodman* [1915] AC 634, 649, a right in favour of a property owner over neighbouring land (in that case, to spread coal dust emanating from the property owner's land over adjoining land) may be too indeterminate to be an easement, but it can still be the subject of a perfectly valid grant. Accordingly, it seems to me that there is no inherent reason why a right to spread coal dust, or to make a noise which would otherwise be a nuisance, should not be established by prescription.

33. Having said that, I am of the view that the right to carry on an activity which results in noise, or the right to emit a noise, which would otherwise cause an actionable nuisance, is capable of being an easement. The fact that the noise from an activity may be heard in a large number of different properties can fairly be said to render it an unusual easement, but, as Mr McCracken QC for the respondents

said, whether or not there is an easement is to be decided between the owner of the property from which the noise emanates and each neighbouring property-owner. Equally, as Lewison LJ said at [2012] 1 WLR 2127, para 88, the fact that a right is only exercisable at specified times does not prevent it from being an easement. As he also pointed out at para 89, one can characterise a right to emit noise in relatively conventional terms in the context of easements, namely as "the right to transmit sound waves over" the servient land. Lord Parker of Waddington clearly assumed that the right to emit noise could be an easement in *Pwllbach* [1915] AC 634, 646, referring to *Lyttleton Times Co Ltd v Warners Ltd* [1907] AC 476. Furthermore, where there is an express grant, it should normally be reasonably easy to identify the level of permitted noise, the periods when it may be emitted, and the activities which may produce the noise.

34. Subject to questions of notice and registration, the benefit and burden of an easement run with the land, and, therefore, if a right to emit noise which would otherwise be a nuisance is an easement, it would bind successors of the grantor, whereas it is a little hard to see how that would be so if the right were not an easement. Given the property-based nature of nuisance, and given the undesirable practical consequences if the benefit and burden of the right to emit a noise would not run with the relevant land, it appears to me that both principle and policy favour the conclusion that that a right to create what would otherwise be a nuisance by noise to land can be an easement.

35. Greater difficulties arise when one comes to consider whether, and if so how, a right to commit a nuisance has been obtained by prescription. It has been suggested that is not possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise, vibration, smoke or smell – see the discussion in *Clerk and Lindsell on Torts* 20th ed (2010), para 20-85.

36. As that discussion suggests, there appear to be three possible problems with the notion that such a right could be obtained by prescription. The first is that the 20 years can only run when the noise amounts to a nuisance. As Thesiger LJ giving the judgment of the Court of Appeal, agreeing with Sir George Jessel MR, put it in *Sturges* at 11 Ch D 852, 863-864, "[c]onsent or acquiescence of the owner of the servient tenement lies at the root of prescription, and … an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence." So, during such time as the noise is at such a level that it does not amount to a nuisance, time will not run: while it is not a nuisance there can be no question of the claimant being able to stop it. Secondly, there could obviously be difficulties in identifying the extent of the easement obtained by prescription: even if the level of noise can be shown to have amounted to a nuisance for more than 20 years, it will often have varied in intensity and frequency (in the sense of both timing and pitch). Thirdly, there could also be a connected problem of deciding how much, if any, more noise could be emitted pursuant to the acquired right than had been emitted during the 20 years.

37. In my view, these problems should not stand in the way of a continuing nuisance by noise being able to give rise to a prescriptive right to transmit sound waves over servient land. The first two problems are, at least largely, practical in nature, and could often present the owner of the alleged dominant land with difficulties in making out his case, but that is not a good reason for holding that he should not be entitled to do so on appropriate facts. Further, the extent of the two problems is mitigated by the fact that, to justify a prescriptive right, the 20 years use does not have to be continuous: see *Carr v Foster* (1842) 3 QB 581, 586-588, per Lord Denman CJ, and Patteson and Williams JJ. It is worth noting that Patteson J was prepared to accept that an interruption of even seven years might not destroy the claim to have acquired a right by prescription over 20 years.

38. As for the third problem, it is not dissimilar from the question of the extent of some other easements obtained by prescription, such as a right of way or a right to discharge polluted water. The precise extent of a right to transmit sound waves obtained by prescription must be highly fact-sensitive, and may often depend not only on the amount and frequency of the noise emitted, but also on other factors including the character of the neighbourhood and the give and take referred to by Lord Goff in *Cambridge Water* [1994] 2 AC 294, 299.

39. Given the potential effect on the enjoyment of the servient land of an increase in the level or frequency of noise, it seems to me that the dominant owner cannot, or at least could only very rarely, be accorded the degree of latitude available to someone with a right of way or a right of drainage obtained by prescription, as discussed in *McAdams Homes Ltd v Robinson* [2004] 3 EGLR 93, paras 24-47 and 79-84. The position is closer to a case where a right to pollute the servient owner's watercourse is obtained by prescription. Thus, in *Baxendale v McMurray* (1867) 2 Ch App 790, 795, Lord Cairns LJ indicated that, albeit in a case where a change of materials had been involved in the business of the dominant owner, the servient owner had cause for complaint if he could show "a greater amount of pollution and injury arising from the use of this new material" in order to establish a breach of his rights.

40. So far as previous cases on noise and the like are concerned, as Lewison LJ said below at para 91, Tindal CJ clearly assumed that a right to emit "noxious vapours and smells" could be acquired by prescription in *Bliss v Hall* (1838) 4 Bing NC 183, 186, and in *Sturges v Bridgman* 11 Ch D 852, 863-865, it was also clearly assumed by the Court of Appeal that a right to emit noise and vibration which would otherwise be a nuisance can be acquired by prescription. So, too, in *Crump v Lambert* (1867) LR 3 Eq 409, 413, Lord Romilly MR said that "the right of … sending smoke or noise" over a neighbour's land could be obtained if the neighbour "has not resisted for a period of 20 years". Finally in this connection, I note that in another well known nuisance case, *St Helen's Smelting Co v Tipping* (1865) 11

HLCas 642, 652, Lord Westbury LC referred to "cases where any prescriptive right has been acquired by a lengthened user of the place".

41. In these circumstances, I conclude that, in the light of the relevant principles, practical considerations and judicial dicta, it is possible to obtain by prescription a right to commit what would otherwise be a nuisance by noise, or, to put it another way, to transmit sound waves over neighbouring land.

42. Before leaving this topic, I should mention that, in the Court of Appeal, Lewison LJ at para 91 raised the possibility that all that the owner of the dominant land needed to establish in order to show a prescriptive right was that the sound waves (at a certain volume) have been passing over the servient land for a period of over 20 years irrespective of whether they constituted a nuisance during any part of that period. So far as practicalities are concerned, this approach would have the advantage of avoiding the first of the three problems identified in para 36 above, but the other two problems would remain.

43. However, this approach was not adopted by the respondents on this appeal, and I am inclined to think that they were right. The approach was considered and rejected both by Sir George Jessel and the Court of Appeal in *Sturges* 11 Ch D 852, as explained in para 36 above, on the ground that time does not run for the purposes of prescription unless the activities of the owner (or occupier) of the putative dominant land can be objected to by the owner of the putative servient land. The notion that an easement can only be acquired by prescription if the activity concerned is carried on "as of right" for 20 years, ie *nec vi*, *nec clam*, *nec precario*, would seem to carry with it the assumption that it would not assist the putative dominant owner if the activity was carried on "of right" for 20 years, as no question of force, stealth or permission could apply.

44. Lord Walker of Gestingthorpe's observations in *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, para 30 give some support for this view. He approved as a "general proposition" that if a right is to be obtained by prescription, the persons claiming that right "must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him."

45. It is true that this would not apply to a right to receive light, but the right to light is an "anomalous" easement, as Lord Hoffmann pointed out in *Hunter* [1997] AC 655, 709. In a passage which supports the view expressed in the preceding two paragraphs, he said that "[i]n the normal case of prescription, the dominant owner will have been doing something for the period of prescription (such as using a

footpath) which the servient owner could have stopped. But one cannot stop a neighbour from erecting a building with windows."

46. In any event, the right to emit noise (or smoke or smells) over neighbouring land must be a positive easement, as opposed to a negative easement such as the right to receive light, support, air or water – see *Gale on Easements* 19th ed (2012), para 1-01 and footnote 3. (It is suggested in the text that the right to emit noise etc represent a third category of easement, because they merely involve actions on the dominant land, but, as the footnote states, the easement is not to carry on the activity on the dominant land but to emit noise over or into the servient land, which is a positive easement). In every case that I can conceive, the acquisition of a positive easement can only arise from the owner or occupier of the putative dominant land doing something which would be a wrong against the owner or occupier of the putative servient land – normally trespassing: see the list of positive easements in *Gale*, para 1-74.

"Coming to the nuisance"

47. For some time now, it has been generally accepted that it is not a defence to a claim in nuisance to show that the claimant acquired, or started to occupy, her property after the nuisance had started – ie that it is no defence that the claimant has come to the nuisance. This proposition was clearly stated in *Bliss* 4 Bing NC 183, 186 per Tindal CJ. Coming to the nuisance appears to have been assumed not to be a defence in *Sturges v Bridgman* 11 Ch D 852. And in *London, Brighton and South Coast Railway Co v Truman* (1885) LR 11 App Cas 45, 52, Lord Halsbury LC described the idea that it was a defence to nuisance as an "old notion … long since exploded" and he also said that "whether the man went to the nuisance or the nuisance came to the man, the rights are the same" in *Fleming v Hislop* (1886) LR 11 App Cas 686, 697.

48. More recently, in *Miller v Jackson* [1977] 1 QB 966, 986-987, the majority of the Court of Appeal held that the principle was well-established. However, Lord Denning MR, in the minority, considered that the proper approach was for court to "balance the right of the cricket club to continue playing cricket on their cricket ground", as they had done for 70 years, "as against the right of the householder", whom he described as "a newcomer" who had built "a house on the edge of the cricket ground which four years ago was a field where cattle grazed": see pp 976 and 981. He held that there was no nuisance given that the cricket club had "spent money, labour and love in the making of [the pitch]: and they have the right to play upon it as they have done for 70 years", and answered with a resounding no his own rhetorical (in both senses of the word) question whether this was "all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it?": see p 978.

49. Geoffrey Lane LJ (with whom Cumming-Bruce LJ agreed) accepted, albeit with some regret, that it was not for the Court of Appeal "to alter a rule which has stood for so long", namely "that it is no answer to a claim in nuisance for the defendant to show that the plaintiff brought the trouble on his own head by building or coming to live in a house so close to the defendant's premises that he would inevitably be affected by the defendant's activities, where no one had been affected previously": p 987. Accordingly, he concluded that the claim in nuisance was made out.

50. The respondents suggest that there is authority prior to the decision in *Bliss* 4 Bing 183, which supports the contention that the law was somewhat different in earlier times. *Leeds v Shakerley* (1599) Cro Eliz 751 was cited as an authority for the proposition that coming to the nuisance was a defence, but it may well be explained on the ground that the wrong complained of was the single act of diverting a watercourse, as opposed to the continuing loss of the watercourse. In his *Commentaries on the Laws of England* 1st ed, (1765-1769), Vol II Chap 26, p 403, Blackstone, after explaining that a defendant can be liable in nuisance for setting up a tannery near my home, continues "but if he is first in possession of the air and I fix my habitation near him, the nuisance is of my own seeking, and must continue". And in the criminal, public nuisance, case of *R v Cross* (1826) 2 Car & P 483, 484, Abbott CJ said that a defendant whose trade was said to be a nuisance to a householder or a user of a road "would be entitled to continue his trade [if] his trade [had been] legal before the erection of the houses in the one case, and the making of the road in the other".

51. In my view, the law is clear, at least in a case such as the present, where the claimant in nuisance uses her property for essentially the same purpose as that for which it has been used by her predecessors since before the alleged nuisance started: in such a case, the defence of coming to the nuisance must fail. For over 180 years it has been assumed and authoritatively stated to be the law that it is no defence for a defendant to a nuisance claim to argue that the claimant came to the nuisance. With the dubious 16th century exception of *Leeds* Cro Eliz 751, there is no authority the other way, as the observations of Blackstone and Abbott CJ were concerned with cases where the defendant's activities had originally not been a nuisance, and had only become an arguable nuisance as a result of a change of use (due to construction works) on the claimant's property.

52. Furthermore, the notion that coming to the nuisance is no defence is consistent with the fact that nuisance is a property-based tort, so that the right to allege a nuisance should, as it were, run with the land. It would also seem odd if a defendant was no longer liable for nuisance owing to the fact that the identity of his neighbour had changed, even though the use of his neighbour's property remained unchanged. Quite apart from this, the concerns expressed by Lord Denning in *Miller* [1977] 1 QB 966 would not apply where a purchasing claimant has simply continued

with the use of the property which had been started before the defendant's alleged nuisance-causing activities started.

53. There is much more room for argument that a claimant who builds on, or changes the use of, her property, after the defendant has started the activity alleged to cause a nuisance by noise, or any other emission offensive to the senses, should not have the same rights to complain about that activity as she would have had if her building work or change of use had occurred before the defendant's activity had started. That raises a rather different point from the issue of coming to the nuisance, namely whether an alteration in the claimant's property after the activity in question has started can give rise to a claim in nuisance if the activity would not have been a nuisance had the alteration not occurred.

54. The observations I have quoted from Blackstone and Abbot CJ were in the context of cases where the defendant's activity only becomes a potential nuisance after a change of use or building work on the claimant's property, and they therefore provide some support for the defendant in such a case. However, in both *Sturges* and *Miller*, it appears clear that the defendant's activities pre-dated the plaintiff's construction work, and it was only as a result of that work and the subsequent use of the new building that the activities became a nuisance. However, *Miller* was not concerned with damage to the senses, but with physical encroachment on, and potential physical damage to, the plaintiffs and their property (through cricket balls). In *Sturges*, the only issue raised by the unsuccessful defendant was prescription, the nuisance at least arguably involved more than offence to the senses, and the plaintiff's construction work merely involved an extension to an existing building (see at 11 Ch D 852-853, 854, 860-861).

55. It is unnecessary to decide this point on this appeal, but it may well be that it could and should normally be resolved by treating any pre-existing activity on the defendant's land, which was originally not a nuisance to the claimant's land, as part of the character of the neighbourhood – at least if it was otherwise lawful. After all, until the claimant built on her land or changed its use, the activity in question will, *ex hypothesi*, not have been a nuisance. This is consistent with the notion that nuisance claims should be considered by reference to what Lord Goff referred to as the "give and take as between neighbouring occupiers of land" quoted in para 5 above (and some indirect support for such a view may be found in *Sturges*, at pp 865-866).

56. On this basis, where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that (i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land, (ii) it was not a nuisance before the building or change of use of the claimant's land, (iii) it is and has been, a

reasonable and otherwise lawful use of the defendant's land, (iv) it is carried out in a reasonable way, and (v) it causes no greater nuisance than when the claimant first carried out the building or changed the use. (This is not intended to imply that in any case where one or more of these requirements is not satisfied, a claim in nuisance would be bound to succeed.)

57. It would appear that the Court of Appeal adopted this approach in *Kennaway v Thompson* [1981] QB 88. In that case, Lawton LJ seems to have assumed that the noise made by the defendant's motorboats on the neighbouring lake should not be treated as a nuisance in so far as it was at the same level as when the plaintiff built her house nearby, and was a reasonable use reasonably carried out. However, a subsequent and substantial increase in the level of noise (due to larger boats and increased proximity to the plaintiff's house) and in the frequency of activity did constitute a nuisance.

58. Accordingly, it appears clear to me that it is no defence for a defendant who is sued in nuisance to contend that the claimant came to the nuisance, although it may well be a defence, at least in some circumstances, for a defendant to contend that, as it is only because the claimant has changed the use of, or built on, her land that the defendant's pre-existing activity is claimed to have become a nuisance, the claim should fail.

Reliance on the defendant's own activities in defending a nuisance claim

59. The assessment of the character of the locality for the purpose of assessing whether a defendant's activities constitute a nuisance is a classic issue of fact and judgment for the judge trying the case. Sometimes, it may be difficult to identify the precise extent of the locality for the purpose of the assessment, or the precise words to describe the character of the locality, but any attempt to give general guidance on such issues risks being unhelpful or worse.

60. However, such questions can give rise to points of principle on which an appellate court can give guidance. Thus, the concept of "the character" of the locality may be too monolithic in some cases, and a better description may often be something like "the established pattern of uses" in the locality.

61. In this case, the ground on which the Court of Appeal overturned the judge's decision was that he had wrongly failed to take into account the respondents' activities at the Stadium and the Track when considering the character of the locality. The appellants contend that the judge was right to disregard those activities.

62. The issue therefore is whether, and if so to what extent, the use to which the defendant actually puts his property can or should be relied on when assessing the character of the locality for the purpose of assessing whether the claimant has made out her case that those activities constitute a nuisance.

63. It seems clear that the character of the locality must be assessed by reference to the position as it is as a matter of fact, save to the extent that any departure from reality, or artificial assumption, should be made as a matter of logic or legal requirement (the presumption of reality). Accordingly, in a nuisance claim, I accept that one starts, as it were, with the proposition that the defendant's activities are to be taken into account when assessing the character of the locality.

64. This approach accords with what was said by Lord Westbury in *St Helen's Smelting* 11 HL Cas 642, 650, namely:

> "[A]nything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop."

65. Where I part company with the Court of Appeal is on the issue of whether one ignores the fact that those activities may constitute a nuisance to the claimant. In my view, to the extent that those activities are a nuisance to the claimant, they should be left out of account when assessing the character of the locality, or, to put it another way, they should be notionally stripped out of the locality when assessing its character. Thus, in the present case, where the judge concluded that the activities at the Stadium and the Track were actually carried on in such a way as to constitute a nuisance, although they could be carried on so as not to cause a nuisance, the character of the locality should be assessed on the basis that (i) it includes the Stadium and the Track, and (ii) they could be used for speedway, stockcar, and banger racing and for motocross respectively, but (iii) only to an extent which would not cause a nuisance.

66. In so far as the respondents' activities at the Stadium and the Track cause no nuisance, they are lawful. There is therefore no reason to disregard them when assessing the character of the neighbourhood. Indeed, it would be unrealistic, and indeed unfair on the respondents, if those activities were disregarded. However, in so far as the activities are unlawful, in particular in so far as they constitute a nuisance to the appellants, it would seem to me to be illogical, as well as unfair to the appellants, to take those activities into account. It would involve the respondents invoking their own wrong against the appellants in order to justify their continuing to commit that very wrong against the appellants.

67. The Court of Appeal appears to have accepted at para 75 of Jackson LJ's judgment that, if the respondents had used the Stadium or the Track in breach of planning conditions, a claim in nuisance may well have been made out. But the reason for that must be that a use in breach of planning law is unlawful and should therefore not be taken into account when assessing the character of the locality (unless, perhaps, it was shown that planning permission was likely to be forthcoming). It appears to me that the same conclusion should, as a matter of logic, indeed perhaps *a fortiori*, apply to a use which constitutes the very nuisance of which the appellants are complaining.

68. The respondents rely on the fact that the activities carried on at the Stadium and the Track had been going on for many years before the judge made his assessment of the character of the neighbourhood. As Jackson LJ put it [2012] 1 WLR 2127, paras 69 and 72, these activities were "an established feature, indeed a dominant feature, of the locality" and "one of the noise characteristics of the locality" by the time that the appellants brought their claim. However, in so far as those activities were being carried on unlawfully, for instance because they give rise to a nuisance to the claimants making the nuisance claim, they should not be taken into account when assessing the character of the locality, whether they have been going on for a few days or many years.

69. Of course, once the nuisance has been going on for 20 years, the position may be different, as the respondents may well have obtained a right to cause what would otherwise be a nuisance. I should perhaps add that if a defendant's actual activities have been held to be a nuisance by the court, but the court has then decided to refuse an injunction and award damages instead, then, whether or not the activities can be described as "lawful", it would in my view be proper to take them into account as part of the character of the locality: they have effectively been sanctioned by the court.

70. I do not consider that this conclusion is inconsistent with the reasoning of the Court of Appeal in *Rushmer v Polsue & Alfieri Ltd* [1906] 1 Ch 234, affirmed [1907] AC 121. In my view, the brief opinion of Lord Loreburn LC at pp 122-123,

encapsulates the effect of the judgments of Stirling and Cozens-Hardy LJJ in the Court of Appeal, namely that (i) whether an activity gives rise to a nuisance may depend on the character of the particular locality, (ii) the trial judge rightly directed himself as to the law, and (iii) there was no reason to think that he had not applied his own directions to the facts of the case (and I think that the rather discursive judgment of Vaughan Williams LJ is to much the same effect). The only relevant point for present purposes which I can discern from the reasoning of the Court of Appeal is that an activity can be a nuisance even if it conforms to the character of the locality – a point made by all three members of the court, perhaps most clearly by Cozens-Hardy LJ at pp 250-251. But that is entirely consistent with the above analysis.

71. It must be acknowledged, however, that there appears to be an element of circularity in the notion that, when assessing the character of the locality, one has to ignore the defendant's activities if, or to the extent that, they constitute a nuisance, given that the point one is ultimately seeking to decide is whether the defendant's activities amount to a nuisance. However, it seems to me that there should be no real problem in this connection. In many cases, it is fairly clear whether or not a defendant's activities constitute a nuisance once one has established the facts, and nice questions as to the precise identification of the locality or its character do not have to be addressed. In those cases where the precise character of the locality is of importance, the point should not cause much difficulty either. In this case, for example, the question for the judge was the extent to which the noise levels from the Stadium and the Track were or would be acceptable in what was a sparsely populated area, with a couple of small villages and a military airfield between a mile and two miles away, and he answered it by taking the noise levels at other well-established racing circuits elsewhere in the country.

72. However, in some cases, there will be an element of circularity. In such cases, the court may have to go through an iterative process when considering what noise levels are acceptable when assessing the character of the locality and assessing what constitutes a nuisance. Nonetheless, the circularity involved in my conclusion does give cause for concern.

73. The concern is, however, allayed once one considers the two other possible approaches. Either one ignores the activity in question altogether when assessing the character of the locality. That may often be the simplest and fairest way of dealing with the issue but, at least in some cases, it could be unfair on a defendant in a nuisance case. Or one adopts a solution which is both even more circular than the one which I prefer, and surprising in its consequences, namely the approach taken by the Court of Appeal. If the activity which causes the alleged nuisance is taken into account, without modification, as part of the character of the locality, it would mean that there could rarely be a successful claim for nuisance, as I see it. If the matters complained of by the claimant are part of the character of the locality, then

it is hard to see how they could be unacceptable by a standard which is to be assessed by reference to that very character. Furthermore, to the extent that the defendant's activities constitute a nuisance, it seems wrong that he should be able to have them taken account when assessing the character of the locality: he would be relying on his own wrong against the claimant.

74. Accordingly, I conclude that a defendant, faced with a contention that his activities give rise to a nuisance, can rely on those activities as constituting part of the character of the locality, but only to the extent that those activities do not constitute a nuisance – and to avoid any misunderstanding, if the activities couldn't be carried out without creating a nuisance, then they would have to be entirely discounted when assessing the character of the neighbourhood.

75. Similarly, any other activity in the neighbourhood can properly be taken into account when assessing the character of the neighbourhood, to the extent that it does not give rise to an actionable nuisance or is otherwise unlawful. There will, no doubt, frequently be many uses which may not have obtained a specific sanction (through being agreed to by the claimant, through a prescriptive right or through the court refusing an injunction), but which are unobjectionable as a matter of law, and may therefore properly be taken into account.

76. In addition, as Lord Carnwath says at para 185 below, the fact that it is not open to a neighbouring claimant to object to the defendant's activities simply because they emit noise does not mean that the defendant is free to carry on those activities in any way he wishes. The claimant is entitled to expect the defendant to take all reasonable steps to ensure that the noise is kept to a reasonable minimum, consistent with what was said by Bramwell B in *Bamford* 3 B & S 62 (see para 5 above). This is consistent with the approach taken by the court in relation to the noise temporarily caused by building works - see eg *Andreae v Selfridge & Co Ltd* [1938] 1 Ch 1, 7.

The effect of planning permission on an allegation of nuisance

77. The interrelationship of planning permission and nuisance has been considered in a number of cases, and has been discussed in a number of articles and books. The grant of planning permission for a particular use is potentially relevant to a nuisance claim in two ways. First, the grant, or terms and conditions, of a planning permission may permit the very noise (or other disturbance) which is alleged by the claimant to constitute a nuisance. In such a case, the question is the extent, if any, to which the planning permission can be relied on as a defence to the nuisance claim. Secondly, the grant, or terms and conditions, of a planning permission may permit the defendant's property or another property in the locality

to be used for a certain purpose, so that the question is how far that planning permission can be relied on by the defendant as changing the character of the locality.

78. As explained in para 18 above, the judge effectively by-passed these issues by concluding that the grant of planning permission should not be taken into account when assessing whether the respondents' activities at the Stadium or the Track constituted a nuisance, for two reasons. The first reason was that the permissions in question were personal, and the second was that they only permitted those activities at certain times. I find the first reason largely unconvincing and the second reason baffling.

79. The fact that a planning permission for a particular use is personal does not alter the fact that it removes the bar which would otherwise exist on that use, and that the use is acceptable in planning terms at least if carried on by, or on behalf of, the very person who is carrying it on. However, there is something in the point that, by granting a permission which was both permanent and personal, the planning authority was, as it were, hedging its bets – a view supported by the fact that the question whether to grant planning permission was controversial. Nonetheless, the fact remains that the use in question did have planning permission.

80. I fail to understand why the restriction as to number of days and the time limitations contained in an otherwise relevant planning permission should invalidate its relevance to the issue of nuisance. Apart from the inherent illogicality of the judge's conclusion, such restrictions and limitations were no doubt imposed, at least in part, in the interests of those in the neighbourhood of the Stadium and Track. Accordingly, I agree with the Court of Appeal that the judge's reasons for refusing to take into account the fact that planning permissions had been granted for the activities carried on by the respondents are unsupportable.

81. However, that leaves open the question as to what weight, if any, should be given to the fact that planning permission has been granted for the very activities which a claimant contends give rise to a nuisance by noise. More particularly, what weight, if any, should be given to the fact that there is a planning permission for a use which will inevitably give rise to the noise which is said to constitute a nuisance, and/or which contains terms or conditions which specifically allow the emission of the noise which is said by a claimant to constitute a nuisance?

82. The implementation of a planning permission can give rise to a change in the character of the locality, but, subject to one possible point, it is no different from any other building work or change of use which does not require planning permission. Thus, if the implementation of a planning permission results in the

creation of a nuisance to a claimant, then, subject to one possible point, it cannot be said that the implementation has led to a change in the character of the locality - save, as explained above, (i) to the extent that the implementation could have been effected in a way which would not have created a nuisance, or (ii) if the defendant can show a prescriptive right to create the nuisance, or (iii) the court has decided to award the claimant damages rather than an injunction in respect of the nuisance.

83. I have described the conclusions in the preceding paragraph as being "subject to one possible point". That point is the extent, if any, to which a defendant, in seeking to rebut a claim in nuisance, can rely on the fact that the grant, or terms and conditions, of a planning permission permit the very noise (or other disturbance) which is alleged by the claimant to constitute the nuisance (or which is relied on by the defendant as forming part of the character of the locality).

84. In the Court of Appeal, Jackson LJ discussed the cases in which the relationship between planning decisions and claims in nuisance had been considered. In *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343, 359, Buckley J accepted that "planning permission is not a licence to commit a nuisance", but he went on to say that "a planning authority can, through its development plans and decisions, alter the character of a neighbourhood". As Jackson LJ explained [2012] 1 WLR 2117, para 57, even though the implementation of the planning permission in *Gillingham* resulted in "noise, vibration, dust and fumes [which] caused serious disturbance local residents, … Buckley J dismissed the claim for public nuisance". In the following paragraph of his judgment, having described that as a "[h]arsh … outcome", Jackson LJ said it was nonetheless a correct outcome, as the planning authority "had made a decision in the public interest and the consequences had to be accepted."

85. Jackson LJ seems to have concluded that the same reasoning applied in *Hirose Electrical UK Ltd v Peak Ingredients Ltd* [2011] Env LR 680: see para 62. However, he also accepted in para 59 that it was not open to a defendant in a nuisance claim to be able to rely on a planning permission for "a change of use of a very small piece of land", which was the basis of the decision of the Court of Appeal in *Wheeler v JJ Saunders Ltd* [1996] Ch 19. In that case, Staughton LJ suggested that only "a strategic planning decision affected by considerations of public interest" would assist a defendant in a nuisance claim, and Peter Gibson LJ, while plainly dubious about the reasoning in *Gillingham*, suggested that it could only apply in relation to a "major development": see pp 30 and 35. Further, as I read the analysis of Jackson LJ at para 66, he also thought that that reason justified the decision of the Court of Appeal in *Watson v Croft Promosport Ltd* [2009] 3 All ER 249.

86. It seems to me that the effect of Jackson LJ's analysis is that, where the planning permission is granted for a use of the defendant's property which inevitably

results in, or specifically permits, what would otherwise be a nuisance to the claimant, that use is to be treated as part of the character of the locality, if the permission relates to a large area, but not if it relates to a small area. Further, as is apparent from the contrasting outcomes in *Gillingham* and *Hirose*, as against *Wheeler* and *Watson*, where the planning permission for the nuisance-making activity is "strategic" in nature or relates to a "major development", it would defeat the claim for nuisance, whereas where it is for a small area, it would have no effect on the nuisance claim. As mentioned in para 73 above, that is scarcely surprising, as once one accepts that the noise complained of forms part of the character of the locality for the purpose of considering what constitutes a nuisance, it is hard to see how that very noise could be held to be a nuisance.

87. In my judgment, the conclusion reached by the Court of Appeal on this issue is unsatisfactory, both in principle and in practice, although it is only fair to add that they may understandably have considered that their hands were tied by the decisions mentioned in paras 84-86 above. Logically, the fact that the alleged nuisance arising from the defendant's property is permitted by the planning authority should be a decisive factor, a relevant factor, or an irrelevant factor when assessing whether it is a nuisance. Which of those three possibilities applies should not depend on whether the permission relates to a large or small area of land. Furthermore, while Jackson LJ was at pains to emphasise that the grant of planning permission would not defeat a nuisance claim, it seems to me that that was precisely the effect of a planning permission for a large area, according to the reasoning of Buckley J in *Gillingham*, of the Court of Appeal in *Watson*, and of Jackson LJ in this case.

88. It also would be somewhat paradoxical if the greater the likely disagreeable impact of a change of use permitted by the planning authorities, the harder it would be for a claimant to establish a claim in nuisance. Yet that seems to be the effect of Jackson LJ's analysis, as the greater the area covered by the planning permission, (i) the more likely it is to provide a defence to a claim in nuisance, and (ii) the more intrusive any noise or other intrusion is likely to be. Quite apart from this, it is hard to know what is meant by a large area.

89. The grant of planning permission for a particular development does not mean that that development is lawful. All it means is that a bar to the use imposed by planning law, in the public interest, has been removed. Logically, it might be argued, the grant of planning permission for a particular activity in 1985 or 2002 should have no more bearing on a claim that that activity causes a nuisance than the fact that the same activity could have occurred in the 19th century without any permission would have had on a nuisance claim in those days.

90. Quite apart from this, it seems wrong in principle that, through the grant of a planning permission, a planning authority should be able to deprive a property-

owner of a right to object to what would otherwise be a nuisance, without providing her with compensation, when there is no provision in the planning legislation which suggests such a possibility. This point is reinforced when one turns to sections 152 and 158 of the Planning Act 2008: section 158 expressly excludes claims in nuisance by neighbours as a result of the use of a property consequent upon a ministerial order permitting that use, and section 152 provides for appropriate compensation where a neighbour would, but for section 158, have had a claim in nuisance. It is also to be noted that section 76 of the Civil Aviation Act 1982 expressly excludes an action for nuisance owing to aircraft, but section 1 of the Land Compensation Act 1973 provides for compensation for neighbours (including in respect of nuisance by noise attributable to aircraft) when land is developed as an "aerodrome".

91. As for practical considerations, I am not impressed by the suggested difference between "a strategic planning decision affected by considerations of public interest" (or a planning decision relating to a "major development") and other planning decisions. No doubt all planning applications take into account the public interest, and the difference between a "strategic" planning permission (or a planning permission for a "major development"), and other planning permissions seems to me to be a recipe for uncertainty.

92. In my view, therefore, Carnwath LJ was right when he said in *Barr v Biffa Waste Services Ltd* [2013] QB 455, para 46(ii), that

> "The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should 'march with' a statutory scheme covering similar subject matter. Short of express or implied statutory authority to commit a nuisance…, there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights."

93. Peter Gibson LJ expressed much the same view in *Wheeler* at 35, where he suggested that "[t]he court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge". In an observation that also relates to the final topic raised on this appeal, he added that, where "a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted", he could "well see that in such a case the public interest must be allowed to prevail and that it would be inappropriate to grant an injunction (though whether that should preclude any award of damages in lieu is a question which may need further consideration)".

94. Accordingly, I consider that the mere fact that the activity which is said to give rise to the nuisance has the benefit of a planning permission is normally of no assistance to the defendant in a claim brought by a neighbour who contends that the activity cause a nuisance to her land in the form of noise or other loss of amenity.

95. A planning authority has to consider the effect of a proposed development on occupiers of neighbouring land, but that is merely one of the factors which has to be taken into account. The planning authority can be expected to balance various competing interests, which will often be multifarious in nature, as best it can in the overall public interest, bearing in mind relevant planning guidelines. Some of those factors, such as many political and economic considerations which properly may play a part in the thinking of the members of a planning authority, would play no part in the assessment of whether a particular activity constitutes a nuisance – unless the law of nuisance is to be changed fairly radically. Quite apart from this, when granting planning permission for a change of use, a planning authority would be entitled to assume that a neighbour whose private rights might be infringed by that use could enforce those rights in a nuisance action; it could not be expected to take on itself the role of deciding a neighbour's common law rights.

96. However, there will be occasions when the terms of a planning permission could be of some relevance in a nuisance case. Thus, the fact that the planning authority takes the view that noisy activity is acceptable after 8.30 am, or if it is limited to a certain decibel level, in a particular locality, may be of real value, at least as a starting point as Lord Carnwath says in para 218 below, in a case where the claimant is contending that the activity gives rise to a nuisance if it starts before 9.30 am, or is at or below the permitted decibel level. While the decision whether the activity causes a nuisance to the claimant is not for the planning authority but for the court, the existence and terms of the permission are not irrelevant as a matter of law, but in many cases they will be of little, or even no, evidential value, and in other cases rather more.

97. The evidence before the planning authority when it was deciding to grant planning permission may also be before the court when deciding a nuisance claim. This evidence will often consist of letters or other submissions from neighbours (sometimes including the claimant), expert assessments, and advice from planning officers. The weight to be given to this sort of evidence obviously depends very much on the facts of the particular case, but, in a nuisance case with live witnesses, it will be likely to be of significantly less value if the people who produced the documents are not available to be cross-examined.

98. It should be added that I am very dubious about the notion that it would always be safe to assume that the reasons given by planning officers for recommending that planning permission be granted were the actual reasons which

the planning authority had in mind when granting planning permission. While the planning officers' reasons would normally feature large in the minds of members of the planning committee, it would be little short of naïve to assume that even the majority of those members who were in favour of granting permission agreed with all those reasons, or had no other reasons. Where a planning authority is defending a public law attack on the grant of a planning permission, and the only positive evidence of its reasons for the grant of the permission are those contained in the planning officer's advice, and the authority has adduced no evidence to suggest that it had not accepted those reasons (and there is no other evidence to suggest otherwise), I can see some ground for making the assumption. However, where the issue arises in private law proceedings in which the planning authority is not a party and the planning permission itself is not under attack, and in which there is normally oral evidence, I do not think it would be necessarily correct to make such an assumption. Whether it would be right to make the assumption in a particular case would depend on the evidence, including the contemporary documentation and possibly expert evidence, as well as on the arguments.

99. It is right to add that I should not be taken as necessarily suggesting that the actual decision that there was no liability in nuisance in *Gillingham* [1993] QB 343 was wrong, although much of Buckley J's reasoning, despite the fact that it was approved in the dissenting judgment of Lord Cooke of Thorndon in *Hunter* [1997] AC 655, 722, cannot stand. As Lord Carnwath points out in para 203 below, the alternative basis for the decision in *Gillingham*, which was based on discretion, was probably right.

The award of damages instead of an injunction

100. As explained in paras 24-25 above, in addition to awarding the appellants damages for the nuisance by noise which they had suffered in the past, the judge granted them an injunction limiting the levels of noise which could be emitted from the Stadium and the Track, and he also gave liberty to apply. He was not invited to award the appellants damages instead of an injunction. On this appeal, however, the respondents contend that, if the judge was right in concluding that their activities at the Stadium and the Track constituted a nuisance, then this was a case where he ought to have awarded damages instead of an injunction.

101. Where a claimant has established that the defendant's activities constitute a nuisance, *prima facie* the remedy to which she is entitled (in addition to damages for past nuisance) is an injunction to restrain the defendant from committing such nuisance in the future; of course, the precise form of any injunction will depend very much on the facts of the particular case. However, ever since Lord Cairns' Act (the Chancery Amendment Act 1858 (21 & 22 Vict c 27)), the court has had power to award damages instead of an injunction in any case, including a case of nuisance -

see now section 50 of the Senior Courts Act 1981. Where the court decides to refuse the claimant an injunction to restrain a nuisance, and instead awards her damages, such damages are conventionally based on the reduction in the value of the claimant's property as a result of the continuation of the nuisance. Subject to what I say in paras 128-131 below, this is clearly the appropriate basis for assessing damages, given that nuisance is a property-related tort and what constitutes a nuisance is judged by the standard of the ordinary reasonable person.

102. The question which arises is what, if any, principles govern the exercise of the court's jurisdiction to award damages instead of an injunction. The case which is probably most frequently cited on the question is *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, but there has been a substantial number of cases in which judges have considered the issue, some before, and many others since. For present purposes, it is necessary to consider *Shelfer* and some of the subsequent cases, which were more fully reviewed by Mummery LJ in *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135, paras 35-59.

103. In *Shelfer*, the Court of Appeal upheld the trial judge's decision to grant an injunction to restrain noise and vibration. Lindley LJ said at pp 315-316:

> "[E]ver since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the legislature intended to turn that court into a tribunal for legalising wrongful acts; or in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (eg, a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed."

104. A L Smith LJ said at 322-323, in a frequently cited passage:

> "[A] person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.

> There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution. … In my opinion, it may be stated as a good working rule that - (1) If the injury to the plaintiff's legal rights is small, (2) And is one which is capable of being estimated in money, (3) And is one which can be adequately compensated by a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction - then damages in substitution for an injunction may be given."

105. Significant *obiter* observations were subsequently made on the question in *Colls v Home & Colonial Store Ltd* [1904] AC 179, where the House of Lords reversed the courts below who had concluded that the defendant had infringed the plaintiff's right to light (and had awarded an injunction). Lord Macnaghten said at p 192 that he had "some difficulty within following out [the] rule" that "an injunction ought to be granted when substantial damages would be given at law". He added at p 193 that "if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit", then he was "disposed to think that the court ought to incline to damages rather than to an injunction". Lord Lindley (as he had by then become), at pp 212-213, after reviewing some of the previous cases on the topic, including *Shelfer*, described "the result of the foregoing review of the authorities" as "not altogether satisfactory", and adding that "there is the uncertainty as to whether the proper remedy is an injunction or damages", but that "the good sense of judges and juries may be relied upon for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other".

106. In *Kine v Jolly* [1905] 1 Ch 480, the Court of Appeal discharged an injunction restraining an interference to a right to light. At p 504, Cozens-Hardy LJ said he thought that "the tendency of the speeches in the House of Lords in *Colls*" was to go "a little further than was done in *Shelfer*", and indicated that "as a general rule the court ought to be less free in granting mandatory injunctions than it was in years gone by". Vaughan Williams LJ appears to have thought that the two cases involved different approaches, but concluded that each approach yielded the conclusion that there should be no injunction. Romer LJ, dissenting on the issue of liability, did not need to decide the point, and did not indicate which he preferred.

107. In the subsequent decision of *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475, which was also concerned with an interference with the plaintiff's right to light, all three members of the Court of Appeal (Sir Ernest Pollock MR, and Warrington and Sargant LJJ) considered that nothing in *Colls* served to undermine the "good working rule" of A L Smith LJ in *Shelfer*, although they discharged a *quia timet* injunction and ordered an inquiry as to damages.

108. In *Fishenden v Higgs & Hill Ltd* (1935) 153 LT 128, another rights of light case, the Court of Appeal adopted a rather different approach, when allowing an appeal against Crossman J's refusal to award damages instead of an injunction. Lord Hanworth MR (as Sir Ernest Pollock had become) observed that his judgment in *Slack* should not be read as saying that A L Smith LJ's four tests "by themselves were now prescribed as the guiding tests for the court". Indeed, he observed at p 139 that "we ought to incline against an injunction if possible".

109. Romer LJ said at p 141 that A L Smith LJ's four tests "were not intended to be a fetter on the exercise of the court's discretion", and suggested that, while it was true that an injunction should be refused if those tests were satisfied, "it by no means follow[ed]" that an injunction should be granted if they were not. In deciding to overturn the injunction, Romer LJ was strongly influenced by the fact that the defendants had "acted fairly [and] in a neighbourly spirit" as well as by the conduct of the plaintiff. At p 144, Maugham LJ said that "the working rule laid down by A L Smith LJ" was not "a universal or even a sound rule in all cases of injury to light", and said he preferred the approach of Lord Lindley in *Shelfer* and *Colls.*

110. In more recent times, the Court of Appeal seems to have assumed that the approach of Lindley and A L Smith LJJ in *Shelfer* represents the law, and indeed that the four tests suggested by A L Smith LJ are normally to be applied, so that, unless all four tests are satisfied, there was no jurisdiction to refuse an injunction. That seems to have been the approach of Geoffrey Lane LJ in *Miller* [1977] 1 QB 966 (discussed in paras 48-49 above), and of Lawton LJ in *Kennaway* [1981] QB 88 (discussed in para 57 above).

111. *Jaggard v Sawyer* [1995] 1 WLR 269, was a case where the Court of Appeal upheld the trial judge's decision to award damages instead of an injunction restraining the defendant trespassing on the plaintiff's land. In so doing, the judge effectively gave the defendant a right of way to his house over the plaintiff's land, against the plaintiff's will, in return for a capital payment from the defendant to the plaintiff (see pp 286-287).

112. At pp 282-283, Sir Thomas Bingham MR (with whom Kennedy LJ agreed), specifically tested the trial judge's decision to award damages by reference to A L Smith LJ's four tests, and emphasised that "the test is one of oppression, and the court should not slide into application of a general balance of convenience test". He held that the judge had rightly concluded that the four tests were satisfied.

113. Millett LJ said at p 287 that "A L Smith LJ's checklist has stood the test of time", but emphasised that "it is only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded

instead of an injunction". As he immediately went on to emphasise on the next page, the decision whether or not to award damages instead of an injunction is a discretion. Accordingly, he said, the cases where judges have awarded or refused to award damages can be no more than "illustrations of circumstances in which particular judges have exercised their discretion". He also suggested that "[t]he outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is prima facie entitled?" He then went on to refer to the significance of the defendant's state of mind, including openness, good faith, and understanding.

114. Some seven years ago, in *Regan* [2007] Ch 135, the Court of Appeal rejected the trial judge's view that, where the defendant's building interfered with the claimant's right to light, the onus was on the claimant to show that damages were not an adequate remedy. In his judgment, Mummery LJ then effectively decided that an injunction should be granted on the basis that three of A L Smith LJ's tests were not satisfied: see paras 70-73.

115. In *Watson* [2009] 3 All ER 249, the Court of Appeal reversed the trial judge's decision to award damages instead of an injunction in a case where the nuisance was very similar in nature and cause to that alleged in this case. At para 44, Sir Andrew Morritt C described "the appropriate test" as having been "clearly established by the decision of the Court of Appeal in *Shelfer*", namely "that damages in lieu of an injunction should only be awarded under 'very exceptional circumstances'". He also said that *Shelfer* "established that the circumstance that the wrongdoer is in some sense a public benefactor is not a sufficient reason for refusing an injunction", although he accepted at para 51 that "the effect on the public" could properly be taken into account in a case "where the damage to the claimant is minimal".

116. It seems to me that there are two problems about the current state of the authorities on this question of the proper approach for a court to adopt on the question whether to award damages instead of an injunction.

117. The first is what at best might be described as a tension, and at worst as an inconsistency, between two sets of judicial dicta since *Shelfer*. Observations in *Slack*, *Miller*, *Kennaway*, *Regan*, and *Watson* appear to support the notion that A L Smith LJ's approach in *Shelfer* is generally to be adopted and that it requires an exceptional case before damages should be awarded in lieu of an injunction, whereas the approach adopted in *Colls*, *Kine*, and *Fishenden* seems to support a more open-minded approach, taking into account the conduct of the parties. In *Jaggard*, the Court of Appeal did not need to address the question, as even on the stricter approach it upheld the trial judge's award of damages in lieu, although Millett LJ seems to have tried to reconcile the two approaches.

118. The second problem is the unsatisfactory way in which it seems that the public interest is to be taken into account when considering the issue whether to grant an injunction or award damages. The notion that it can be relevant where the damages are minimal, but not otherwise, as stated in *Watson*, seems very strange. Either the public interest is capable of being relevant to the issue or it is not. As part of this second problem, there is a question as to the extent to which it is relevant that the activity giving rise to the nuisance has the benefit of a planning permission.

119. So far as the first problem is concerned, the approach to be adopted by a judge when being asked to award damages instead of an injunction should, in my view, be much more flexible than that suggested in the recent cases of *Regan* and *Watson*. It seems to me that (i) an almost mechanical application of A L Smith LJ's four tests, and (ii) an approach which involves damages being awarded only in "very exceptional circumstances", are each simply wrong in principle, and give rise to a serious risk of going wrong in practice. (Quite apart from this, exceptionality may be a questionable guide in any event – see *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2011] 2 AC 104, para 51).

120. The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in *Regan* and *Watson*. And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millett LJ in *Jaggard* [1995] 1 WLR 269, 288, where he said:

> "Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently."

121. Having approved that statement, it is only right to acknowledge that this does not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion to award damages in lieu. Indeed, it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible. I would accept that the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it

should not. And, subject to one possible point, I would cautiously (in the light of the fact that each case turns on its facts) approve the observations of Lord Macnaghten in *Colls* [1904] AC 179, 193, where he said:

> "In some cases, of course, an injunction is necessary - if, for instance, the injury cannot fairly be compensated by money - if the defendant has acted in a high-handed manner - if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."

122. The one possible doubt that I have about this observation relates to the suggestion in the antepenultimate sentence that the court "ought to incline to damages" in the event he describes. If, as I suspect, Lord Macnaghten was simply suggesting that, if there was no prejudice to a claimant other than the bare fact of an interference with her rights, and there was no other ground for granting an injunction, I agree with him. However, it is right to emphasise that, when a judge is called on to decide whether to award damages in lieu of an injunction, I do not think that there should be any inclination either way (subject to the legal burden discussed above): the outcome should depend on all the evidence and arguments. Further, the sentence should not be taken as suggesting that there could not be any other relevant factors: clearly there could be. (It is true that *Colls*, like a number of the cases on the issue of damages in lieu, was concerned with rights of light, but I do not see such cases as involving special rules when it comes to this issue. *Shelfer* itself was not a right to light case; nor were *Jaggard* and *Watson*. However, in many cases involving nuisance by noise, there may be more wide-ranging issues and more possible forms of relief than in cases concerned with infringements of a right to light.)

123. Where does that leave A L Smith LJ's four tests? While the application of any such series of tests cannot be mechanical, I would adopt a modified version of the view expressed by Romer LJ in *Fishenden* 153 LT 128, 141. First, the application of the four tests must not be such as "to be a fetter on the exercise of the court's discretion". Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if

those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted.

124. As for the second problem, that of public interest, I find it hard to see how there could be any circumstances in which it arose and could not, as a matter of law, be a relevant factor. Of course, it is very easy to think of circumstances in which it might arise but did not begin to justify the court refusing, or, as the case may be, deciding, to award an injunction if it was otherwise minded to do so. But that is not the point. The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood, although in many cases that may well not be sufficient to justify the refusal of an injunction. Equally, I do not see why the court should not be entitled to have regard to the fact that many other neighbours in addition to the claimant are badly affected by the nuisance as a factor in favour of granting an injunction.

125. It is also right to mention planning permission in this context. In some cases, the grant of planning permission for a particular activity (whether carried on at the claimant's, or the defendant's, premises) may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction. Accordingly, the existence of a planning permission which expressly or inherently authorises carrying on an activity in such a way as to cause a nuisance by noise or the like, can be a factor in favour of refusing an injunction and compensating the claimant in damages. This factor would have real force in cases where it was clear that the planning authority had been reasonably and fairly influenced by the public benefit of the activity, and where the activity cannot be carried out without causing the nuisance complained of. However, even in such cases, the court would have to weigh up all the competing factors.

126. In some such cases, the court may well be impressed by a defendant's argument that an injunction would involve a loss to the public or a waste of resources on account of what may be a single claimant, or that the financial implications of an injunction for the defendant would be disproportionate to the damage done to the claimant if she was left to her claim in damages. In many such cases, particularly where an injunction would in practice stop the defendant from pursuing the activities, an injunction may well not be the appropriate remedy.

127. Since writing this, I have read with interest Lord Sumption's suggestions as to how the law on the topic of damages instead of an injunction in nuisance cases might develop. At any rate on the face of it, I can see much merit in the proposals which he proffers. However, it would be inappropriate to go further than I have gone

at this stage, in the light of the arguments which were raised on this appeal. There may well be objections, qualifications, and alternatives which could be made in relation to Lord Sumption's suggested approach, and they should be considered before the law on this topic is developed further. In that connection, I see real force in what Lord Mance says in para 168.

128. A final point which it is right to mention on this issue is the measure of damages, where a judge decides to award damages instead of an injunction. It seems to me at least arguable that, where a claimant has a *prima facie* right to an injunction to restrain a nuisance, and the court decides to award damages instead, those damages should not always be limited to the value of the consequent reduction in the value of the claimant's property. While double counting must be avoided, the damages might well, at least where it was appropriate, also include the loss of the claimant's ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction.

129. Support for such an approach may be found in the reasoning in *Jaggard* [1995] 1 WLR 269, which suggests that this is a proper approach to damages where an injunction is refused to restrain a trespass, and damages were awarded instead. Sir Thomas Bingham MR said this at pp 281-282, when explaining and approving an earlier case where a judge had assessed damages for breach of a restrictive building covenant, which he then applied to the claim in *Jaggard*:

> "The defendants had committed a breach of covenant, the effects of which continued. The judge was not willing to order the defendants to undo the continuing effects of that breach. He had therefore to assess the damages necessary to compensate the plaintiffs for this continuing invasion of their right. He paid attention to the profits earned by the defendants, as it seems to me, not in order to strip the defendants of their unjust gains, but because of the obvious relationship between the profits earned by the defendants and the sum which the defendants would reasonably have been willing to pay to secure release from the covenant."

130. To the same effect, Millett LJ said this at p 292 in *Jaggard:*

> "In my view there is no reason why compensatory damages for future trespasses and continuing breaches of covenant should not reflect the value of the rights which she has lost, or why such damages should not be measured by the amount which she could reasonably have expected to receive for their release."

131. However, there are factors which support the contention that damages in a nuisance case should never, or only rarely, be assessed by reference to the benefit to the defendant in no injunction being granted, as pointed out by Lord Carnwath in para 248 below. For that reason, as well as because we have not heard argument on the issue, it would be inappropriate for us to seek to decide on this appeal whether, and if so in what circumstances, damages could be recoverable on this basis in a nuisance claim.

132. There are differences between the various members of the Court on this final issue. Most, probably all, of these differences are ones of emphasis and detail rather than of principle, but I nonetheless accept that we are at risk of introducing a degree of uncertainty into the law. The nature of the issue, whether to award damages in lieu of an injunction, is such that a degree of uncertainty is inevitable, but that does not alter the fact that it should be kept to a reasonable minimum. Given that we are changing the practice of the courts, it is inevitable that, in so far as there can be clearer or more precise principles, they will have to be worked out in the way familiar to the common law, namely on a case by case basis.

The resolution of this appeal

133. Having dealt with the points of principle raised on this appeal, I can now turn to the application of those principles to the facts of this appeal.

134. First, there is no question of the respondents being able to rely on the fact that the appellants came to the nuisance, or any other similar argument. The appellants used their property, Fenland, as a residence, which was the same purpose to which it had been put ever since before the activities currently carried on at the Stadium and the Track had started.

135. Secondly, there is the relevance of the planning situation in relation to the appellants' nuisance claim. As already explained (paras 77-79 above) the judge was wrong to hold that (i) the planning permission granted in 1985 and the CLEUD issued in 1997 in relation to the use of the Stadium, and (ii) the planning permission granted in 2002 for the use of the Track, were irrelevant for the purposes of the appellants' nuisance claim on the ground that the planning permissions were personal and they and the CLEUD were for discontinuous periods. Accordingly, the two permissions and the CLEUD were, at least in principle, evidence which could have been taken into account.

136. However, I do not consider that the judge's failure to take them into account can fairly be said to undermine his conclusion that the respondents' activities at the

Stadium and the Track constituted a nuisance. The CLEUD was of no relevance, other than as evidence which supported the argument that the activities to which it related had been going on for ten years before it had been applied for. The planning permissions showed that the planning authority considered that at least most of the uses of which the appellants complained were acceptable in planning terms, and turned their minds to some extent to noise pollution by limiting the frequency and the times of the activities.

137. Further, the judge's failure to give any weight to the planning permissions or the CLEUD on the issue of nuisance does not call into question his ultimate conclusion on that issue in favour of the appellants. It was not the appellants' case, nor was it the judge's conclusion, that the current use of the Stadium and the Track was by any means necessarily inappropriate: the concern was over the level of noise, which was not a matter specifically covered by the planning permissions or the CLEUD (save the 2002 permission for the motocross activities on the Track). This is best illustrated by the judge's concern to make an order which enabled the business at the Stadium and the Track to continue.

138. Quite apart from this, as already explained, the fact that a particular use has been granted planning permission is not normally a matter of much weight, and there was no reason to think that this was an exceptional case. On the contrary. The evidence showed that it was not an easy decision whether to grant the planning permissions, as was demonstrated by the initial temporary permissions, and the cautious nature of the planning officers' recommendation. Further, the background documents to the planning permissions (including letters of support and opposition, and the planning officers' reports) were available to the judge, and he took them into account, and there was a wealth of other evidence available to the judge at the trial, and that evidence was subject to cross-examination, and he took it all into account.

139. As I have already explained, the Court of Appeal took the view that the 1985 and 2002 planning permissions, given that they had been implemented, were highly relevant to, indeed effectively determinative of, the appellants' claim in nuisance. For the reasons which I have given in paras 80-98 above, that was wrong (although understandable in the light of earlier decisions of the Court of Appeal), and, as I have just explained, although the Judge also went wrong on the issue of the relevance of the permissions, I do not think that his error justified interfering with his conclusion.

140. The third question is whether the Judge went wrong in holding that the respondents had failed to establish a right by prescription to create what would otherwise be a nuisance of noise at the Stadium. On that topic, I consider that the judge was right for the wrong reason. I do not consider that he was entitled to hold that the interruption for two years prevented the respondents obtaining the right to

create what would otherwise be a nuisance of noise if they had otherwise satisfied the requirements for establishing such a right. If a person regularly causes a nuisance by noise through holding motocross events more than 20 times a year for a period of 20 years, save that during two years of that period, there are no such events, I consider that the requirements of a prescriptive right would be satisfied (subject, of course, to there being any of the normal defences).

141. In that connection, I have already referred in para 37 above to the judgments in *Carr v Foster* 3 QB 581. Mere non-use, or inactivity, for two out of 20 years, at least in the absence of other evidence, would be insufficient to justify a court concluding that an action which has been carried out for the other 18 years fairly consistently and to a significant extent in each of those years failed to justify the conclusion that a prescriptive right had been established. It is a question of degree, and that is shown by contrasting the facts of the present case and of *Carr* with those of *White v Taylor (No 2)* [1969] 1 Ch 160, where non-use for two periods, each more than five years, did defeat a prescription claim.

142. The essential question in a prescription case has been said to be whether the nature and degree of the activity of the putative dominant owner over the period of 20 years, taken as a whole, should make a reasonable person in the position of the putative servient owner aware that a continuous right to enjoyment is being asserted and ought to be challenged if it is intended to be resisted (see *Gale op cit*, para 4.54, and per Lord Walker in *Lewis* [2010] 2 AC 70, para 30). This somewhat circular and hypothetical test appears to involve questions of degree and judgment. However, one must take as a starting point the somewhat arbitrary, but at least clear, proposition that, where the use or activity in question has been carried on as of right for 20 years or more, then, absent special facts, the dominant owner gets a right to carry on the use or activity. Accordingly, the answer to my mind on the facts of this case is plain: assuming that the activities at the stadium and the Track had caused a nuisance over a period of at least 20 years, the putative servient owner should have appreciated what was being claimed. Given the consistent and substantial activities at the Stadium for all but two of those 20 or more years the two years' interruption should not be capable of being a problem for the respondents' prescriptive claim.

143. However, the reason why, in my view, the respondents fail to establish a prescriptive right to create what would otherwise be a nuisance in this case, is that, even allowing for the fact that gaps such as that discussed in the preceding two paragraphs would not be fatal to their claim, they did not show that their activities during a period of 20 years amounted to a nuisance. As explained in paras 35-37 above, in order to justify the establishment of a right to create a noise by prescription, it is not enough to show that the activity which now creates the noise has been carried on for 20 years. It is not even enough to show that the activity has created a noise for 20 years. What has to be established is that the activity has (or a combination of activities have) created a nuisance over 20 years. Otherwise, it could not be said that

the putative servient owner had the opportunity to object to the nuisance, or could be said notionally to have agreed to it.

144. As acknowledged in paras 35-39 above, this requirement will often present evidential problems for a person seeking to establish by prescription a right to commit what would otherwise be a nuisance. Of course, the strictness of this requirement is mitigated by the fact that the nuisance does not need to have occurred anything like every day during the 20 years, as just explained.

145. In the present case, it seems to me that, on the findings made by the judge, and the evidence as explained by him, fell well short of establishing that the activities had caused a nuisance to Fenland for a continuous period of 20 years (even allowing for periods of no nuisance as in *Carr*) at any time between the commencement of the use of the Stadium in 1976 and the date on which these proceedings were issued in 2008.

146. Mr Relton (the appellants' predecessor in title) apparently first formally complained of noise to the council in 1992 (only 16 years before the proceedings were brought), and this resulted in the abatement notices referred to in para 11 above. At least as recorded in the judgment, no witness appears to have suggested, through either first hand or hearsay evidence, either expressly or inferentially, that there was nuisance by noise to Fenland much before 1994. The appellants' witnesses seem to have come to the area after 1990, and (with the exception of Mrs Relton) the respondents' witnesses seem to have been in a similar position, and Mrs Relton denied that there was a significant noise problem (and indeed described her husband as over-sensitive to noise).

147. There is also an argument that the judge did not properly approach the question whether the respondents caused a nuisance by noise on the right basis, as he decided that Fenland was to be treated as being in a purely agricultural environment, rather than in an environment which included the Stadium and the Track used for activities which did not create a nuisance (as explained in para 65 above). There are passages in his judgment which suggest that he may have approached the issue on this basis. However, it is clear that he did not do so, as, in para 243 of his decision, he fixed the acceptable level of noise from the Stadium and Track by reference to the levels of noise emitted from land used for similar activities (see para 24 above).

148. The consequence of these conclusions is that, subject to a final point, the injunction granted by the judge should be restored (together with all the other terms, including the permission to apply).

149. The final point is whether the judge should have awarded damages rather than an injunction. Given that he was not asked to do so, it is scarcely surprising that he did not address this issue. Further, it is not an issue which an appellate court should determine when the trial judge was not asked to do so, save in the most exceptional circumstances. The decision whether to award damages instead of an injunction can be dependent on a number of issues, including the behaviour and attitude of the parties. It is therefore a matter on which the trial judge is particularly well positioned to assess in a case such as this, where there was substantial oral evidence. Further, a defendant who wishes to argue that the court should award damages rather than an injunction should make it clear that he wishes to do so well in advance of the hearing, not least because the claimant may wish to adduce documentary or oral evidence on that issue which she would not otherwise consider relevant. The appellants were not afforded such an opportunity in this case.

150. However, as Lord Clarke said in argument, it would be wrong to be very critical of the respondents for not raising the point at or before the trial as the decisions in *Regan* and *Watson* would have precluded the trial judge from awarding damages in lieu of an injunction, although it is right to add that the respondents should ideally have reserved their position on the point.

151. In my judgment, the fairest way to deal with the point that the judge should have awarded damages instead of an injunction is to refuse the respondents permission to raise it, but to hold that they should be free to raise the argument that the injunction granted by the judge should be discharged, and damages awarded instead under the provision in the judge's order giving the parties permission to apply.

152. I should emphasise that, if such an application were made by the respondents, I am not in any way seeking to fetter the judge's discretion when deciding whether to award damages instead, or seeking to suggest how that discretion might be exercised. No doubt the judge will carefully consider the effect of, and give such appropriate weight as he sees fit to, all the circumstances, including the evidence and arguments which he has already received, and any fresh evidence and argument which he sees fit to receive, in the light of the points made in paras 119-130 above.

Conclusion

153. As the first, second and fifth issues set out in para 6 above were raised by the respondents, and the third and fourth issues were raised by the appellants, the effect of this decision is that the appeal is allowed, and the order of Judge Seymour QC is restored.

LORD SUMPTION

154. I agree that this appeal should be allowed for the reasons given by Lord Neuberger.

155. It is, I think, worth pointing out that the question what impact the grant of planning permission should have on liability in tort for private nuisance and the question what remedies should be available for a nuisance are closely related. They both raise a broader issue of legal policy of some importance, namely how is one to reconcile public and private law in the domain of land use where they occupy much the same space?

156. I agree with Lord Neuberger that the existence of planning permission for a given use is of very limited relevance to the question whether that use constitutes a private nuisance. It may at best provide some evidence of the reasonableness of the particular use of land in question. But planning authorities are concerned with the public interest in development and land use, as that interest is defined in the planning legislation and any relevant development plans and policies. Planning powers do not exist to enforce or override private rights in respect of land use, whether arising from restrictive covenants, contracts, or the law of tort. Likewise, the question whether a neighbouring landowner has a right of action in nuisance in respect of some use of land has to be decided by the courts regardless of any public interest engaged.

157. What saves, or could save the law from anomaly and incoherence is the court's discretion as to remedies. An injunction is a remedy with significant side-effects beyond the parties and the issues in the proceedings. Most uses of land said to be objectionable cannot be restrained by injunction simply as between the owner of that land and his neighbour. If the use of a site for (say) motocross is restrained by injunction, that prevents the activity as between the defendant and the whole world. Yet it may be a use which is in the interest of very many other people who derive enjoyment or economic benefits from it of precisely the kind with which the planning system is concerned. An injunction prohibiting the activity entirely will operate in practice in exactly the same way as a refusal of planning permission, but without regard to the factors which a planning authority would be bound to take into account. The obvious solution to this problem is to allow the activity to continue but to compensate the claimant financially for the loss of amenity and the diminished value of his property. In a case where planning permission has actually been granted for the use in question, there are particularly strong reasons for adopting this solution. It is what the law normally provides for when a public interest conflicts with a proprietary right.

158. The main question, as it seems to me, is not whether the judge in deciding on the appropriate remedy should take account of the public interest or, more generally, of interests which are not before the court. He will usually lack the information to do so effectively, and is in danger of stepping outside his main function of deciding the issue between the parties. The main question is whether the current principles of law governing the availability of injunctions are consistent with the public interest reflected in the successive and increasingly elaborate legislative schemes of development control which have existed in England since 1947.

159. The ordinary principle is that the court does not grant an injunction in a case where there is an adequate legal remedy. In particular, it does not do so where damages would be an adequate remedy. Where an injunction is granted, it is usually because the injury to the Claimant is "irreparable", in the sense that money cannot atone for it. However, this principle has never been consistently followed in cases of nuisance. The leading case is *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 which created a strong presumption in favour of an injunction, to be displaced only in the four narrowly defined categories identified by AL Smith LJ at pp 322-323. The exceptions applied only to cases where the injury to the claimant was small and the grant of an injunction would be oppressive. In *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 192, Lord Macnaghten wondered why an injunction should be granted "when substantial damages would be given at law", and there were subsequent attempts to widen the discretion. But the courts have not taken the hint. In *Regan v Paul Properties DPF No 1 Ltd* [2007] Ch 135 and *Watson v Croft Promosport Ltd* [2009] 3 All ER 249 the Court of Appeal have reverted to substantially the same position as the Court of Appeal in *Shelfer* more than a century before.

160. The courts might have defended the special treatment of nuisance by pointing to the traditional attitude of equity to land as being unique, an approach which is exemplified in its willingness to grant specific performance of contracts for the sale of land. From this, it might have been concluded that paying the claimant enough to buy a comparable property elsewhere where there was no nuisance was not equivalent to letting him use his existing land free of the nuisance. In fact the *Shelfer* principle was based mainly on the court's objection to sanctioning a wrong by allowing the defendant to pay for the right to go on doing it. This seems an unduly moralistic approach to disputes, and if taken at face value would justify the grant of an injunction in all cases, which is plainly not the law. In his dissenting judgment in the Court of Appeal in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch 286, 304 (subsequently upheld in the House of Lords [1998] AC 1), Millett LJ said:

> "The competing arguments in the present case, and the difference in the views of the members of this court, reflect a controversy which has persisted since the dispute between Sir Edward Coke and Lord

> Ellesmere LC. Sir Edward Coke resented the existence of an equitable jurisdiction which deprived the defendant of what he regarded as a fundamental freedom to elect whether to carry out his promise or to pay damages for the breach. Modern economic theory supports Sir Edward Coke; an award of damages reflects normal commercial expectations and ensures a more efficient allocation of scarce economic resources. The defendant will break his contract only if it pays him to do so after taking the payment of damages into account; the plaintiff will be fully compensated in damages; and both parties will be free to allocate their resources elsewhere. Against this there is the repugnance felt by those who share the view of Fuller CJ in *Union Pacific Railway Co v Chicago, Rock Island and Pacific Railway Co* (1896) 163 US 564, 600 that it is an intolerable travesty of justice that a party should be allowed to break his contract at pleasure by electing to pay damages for the breach. English law has adopted a pragmatic approach in resolving this dispute... The leading principle is usually said to be that equitable relief is not available where damages are an adequate remedy. In my view, it would be more accurate to say that equitable relief will be granted where it is appropriate and not otherwise; and that where damages are an adequate remedy it is inappropriate to grant equitable relief."

161. In my view, the decision in *Shelfer* is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area will need one day to be reviewed in this court. There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission. However, at this stage, in the absence of argument on these points, I can do no more than identify them as calling for consideration in a case in which they arise.

LORD MANCE

162. I agree that the appeal should be allowed for the reasons given by Lord Neuberger.

163. In addition to their reasons for allowing this appeal, the judgments prepared by Lord Neuberger, Lord Sumption and Lord Carnwath address a number of wider issues which were argued before us. For the most part, I also agree with the way in which Lord Neuberger addresses these issues in his judgment.

164. It is common ground that a change in the intensity of a previous activity may, just as much as the introduction of a new activity, give rise to a nuisance. The fact that the nuisance is already being committed cannot make it part of the character of the locality (see Lord Neuberger's judgment paragraphs 65 to 76). But Lord Neuberger (paragraphs 72 and 74) and Lord Carnwath (paragraph 187) suggest, as I see it, that such a change or the introduction of a new activity may in some circumstances and to some degree be compatible with the existing character of the locality, and to that extent not involve the creation of a nuisance. With or without planning permission, the character of an area may be susceptible over time to gradual change and development. Each step in the process may be said by itself to fit with the existing character and be largely imperceptible, though, ultimately, the difference resulting from the totality of all the steps may be considerable. In the meantime, those occupying property, living or working, in the area, will have had time to adapt. That is a quite different process from one brought about by an activity increased in intensity or introduced for the first time and bringing about a radical change over a relatively short period. In the latter case and to the extent that the increased or new activity goes beyond anything which would fit with the existing character of the locality, an aggrieved occupier can have cause for complaint about a resulting nuisance, unless and until the increased or new activity is allowed to continue as a nuisance either for 20 years without proceedings being issued or by a court by refusal of an injunction.

165. With regard to the significance of planning permission, I agree with what Lord Neuberger says in paragraphs 77 to 97 and 99. The reasoning in *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd* [1993] QB 343 suggests that a development plan or a "strategic" planning decision adopted in the public interest can of itself bring about a corresponding major alteration in the character of a neighbourhood without any need to compensate for any private nuisance thereby caused. I regard that as unsustainable in principle and fairness. If the increase in an existing activity or the introduction of a new activity constitutes a nuisance in relation to the previously existing character of the locality, I see no basis for treating differently a decision to permit such an increase or new activity taken in the public interest by a development or planning authority. The general public interest may have led to a particular private interest being overlooked or overridden. If it is to be acceptable to permit this, then it should at least be permitted on a basis that affords compensation.

166. That is not to suggest that the grant, terms and conditions of a planning permission may not have some relevance in some nuisance cases, as Lord Neuberger

indicates in his paragraphs 96 to 97 and also (in relation to remedy) in paragraph 118. As to the reliance which might be placed on planning officers' reports, on which Lord Neuberger touches in paragraph 98, it seems to me that it must all depend on the nature of the decision and of the debate before the planning committee and so on all the circumstances (as I understand Lord Neuberger also to say in the last sentence of paragraph 98), and I prefer myself to say no more without rather more information about these in a specific case.

167. With regard to remedy, I am broadly in agreement with Lord Neuberger. However, I would adopt the qualifications made by Lord Carnwath in his paragraphs 246 and 247. I do not think that a grant of planning permission can give rise to any presumption that there should be no injunction, and, while I would, in a case where it was relevant, like to hear argument on this, I am not at present persuaded that cases on the right to light involve the same considerations as those arising, or are therefore necessarily helpful, where the question is the appropriate remedy in respect of a nuisance of the present different nature.

168. I would only add in relation to remedy that the right to enjoy one's home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of money. With reference to Lord Sumption's concluding paragraph, I would not therefore presently be persuaded by a view that "damages are ordinarily an adequate remedy for nuisance" and that "an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests" – a suggested example of the latter being given as a case where a use of land has received planning permission. I would see this as putting the significance of planning permission and public benefit too high, in the context of the remedy to be afforded for a private nuisance. As already indicated, I agree with Lord Neuberger's nuanced approach.

LORD CLARKE

169. I agree with the conclusions and reasoning of Lord Neuberger subject to one or two points. First, I agree that the fact that planning permission has been granted is capable of being relevant to an action in nuisance in a number of respects but, as Lord Carnwath has shown, the facts of such cases are so varied that it is difficult to lay down hard and fast rules. As so often, all depends upon the circumstances. However, I agree with Lord Neuberger, Lord Sumption and Lord Carnwath that the existence of planning permission for the activity complained of may well be of particular relevance to the remedy to be granted.

170. Secondly, I agree with Lord Neuberger at para 120 that the court's power to award damages in lieu of an injunction involves a classic exercise of discretion which should not as a matter of principle be fettered. In these circumstances, in the absence of submissions on the point, I would wish to reserve the question upon whom the burden of proof should be placed on the question how that discretion should be exercised.

171. Thirdly, as I see it, the most important aspect of this case relates to the correct approach to remedies. In particular I agree with the views of Millett LJ in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Limited* [1996] Ch 286 at 305, which was a dissenting judgment but was subsequently upheld by the House of Lords at [1986] AC 1. He concluded that the general principle is or should be that equitable relief will be granted where it is appropriate and not otherwise and that, where damages are an adequate remedy, it is inappropriate to grant equitable relief. Lord Sumption set out Millett LJ's views at his para 160, as I read it, with approval. I entirely agree with Lord Sumption (at para 161) that the decision in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 is out of date and that it is unfortunate that it has been followed so recently and so slavishly. Indeed, I would so hold now in this appeal, although (in the absence of submissions) I would not now lay down precise principles which should be followed in the future. They must be developed on a case by case basis and in each case all will depend upon the circumstances. I agree with Millett LJ's general approach.

172. Fourthly, I would leave open the question how damages should be assessed. The traditional approach had been to assess the loss of value of the property caused by the nuisance. There may also be scope for an award of general damages: see eg, in the context of noise, *Farley v Skinner* [2002] 2 AC 732. Although the claim was in contract, Lord Steyn, who gave the leading speech, would have reached the same conclusion if the claim had been in nuisance: see para 30. It may however be that, in the light of the views expressed by Lord Hoffmann in H*unter v Canary Wharf* [1997] 1 AC 655 at 706, such damages could only be awarded in nuisance as loss of the amenity value of the land. This could be in the form of general damages if it is not possible to prove a specific loss of value, rather as in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 244, which is referred to by Lord Hoffmann at page 706F.

173. Finally, I would leave open the question whether it may in some circumstances be appropriate to award what have been called gain-based damages in lieu of an injunction. I appreciate the possible problems identified by Lord Neuberger and Lord Carnwath but it does seem to me that, where a claimant is seeking an injunction to restrain the noise which has been held to amount to a nuisance, it is at least arguable that there is no reason in principle why a court considering whether or not to award damages in lieu of an injunction should not be able to award damages on a more generous basis than the diminution in value caused

by the nuisance, including, for example, an award which represented a reasonable price for a licence to commit the nuisance. So, for example, as Lord Neuberger notes at para 111, in *Jaggard v Sawyer* [1995] 1 WLR 269 the Court of Appeal awarded damages for trespass in lieu of an injunction which in effect gave the defendant a right of way over the plaintiff's land in return for a capital sum. If that can be done in trespass I do not at present see why it should not in principle be done in nuisance in a case like this, where a similar payment would give the respondents the right to commit what would otherwise be a nuisance by noise. Moreover, as Lord Neuberger observes at para 128, there may be scope for assessing the claimant's loss by reference to the benefit to the defendant of not suffering an injunction. However, these are all matters for the future and I recognise that before reaching final conclusions it would be necessary to consider the relevant authorities and to receive appropriate submissions.

174. I agree with Lord Neuberger's proposals as to the resolution of the appeal. In particular, as to the future, I agree with his paras 148 to 151, especially 150 and 151. Thus, while I naturally hope that issues of remedy can now be resolved by agreement, some of the questions raised by Lord Neuberger and the other judgments in this appeal may fall for decision in this very case.

LORD CARNWATH

Basic principles

175. The present appeal raises important issues relating to an area of the law which has received little attention at the highest level, that is "nuisance by interference with enjoyment" (as distinct from "nuisance by encroachment or damage": see *Clerk & Lindsell on Torts* 20th ed (2010), para 20-07, -09). Although many of the relevant principles are treated by the textbooks as long-settled, the authorities are generally in the Court of Appeal and below. Particular aspects of the law of nuisance, notably the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, have received recent attention in the House of Lords (*Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 and *Transco plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1), and some of the speeches have commented on more general principles. But for authoritative statements at the highest level on this area of the law one has to go back almost 150 years, to the landmark case of *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, long before the advent of modern planning control.

176. Ben Pontin in his valuable recent book *Nuisance Law and Environmental Protection* (2013) shows how since the middle of the 19th Century common law nuisance has played an important complementary role to regulatory controls, on the

one hand stimulating industry to find better technical solutions to environmental problems, and, on the other, stimulating the legislature to fill gaps in the regulatory system. He sees the present appeal as an important opportunity for the Supreme Court to review the proper role of this part of the law of nuisance in the modern world (p 184).

177. Lord Neuberger has highlighted five particular issues raised by the appeal, in summary:

i) Prescriptive right

ii) "Coming to the nuisance"

iii) The defendant's activity as part of the "character of the area"

iv) Relevance of planning permission

v) Remedies

178. On the first two issues I agree respectfully with Lord Neuberger and have nothing to add. On the others, although I agree with his overall conclusions, I prefer to explain my reasoning in my own words.

"Reasonable user"

179. It is important at the outset to identify the test to be applied in determining what amounts to a nuisance. In his introduction (para 5), Lord Neuberger quotes without comment a passage in *Cambridge Water Company v Eastern Counties Leather plc* [1994] 2 AC 264, 299, in which Lord Goff referred to the "controlling" principle of "reasonable user – the principle of give and take…". As I explained in *Barr v Biffa Waste Services Ltd* [2013] QB 455, paras 60-72, Lord Goff was not seeking to lay down a general rule, and the concept is not without its problems. The criterion of "reasonableness" has also been strongly criticised by some academics. (See for example, Allan Beever *The Law of Nuisance* (2013) p 9ff: "it is presented as an explanation of the operation of the law, but it does not, cannot, explain anything".) In *Barr v Biffa Waste Services Ltd* (para 72), I referred to Tony Weir's qualification of the reasonableness test:

> "Reasonableness is a relevant consideration here, but the question is neither what is reasonable in the eyes of the defendant or even the claimant (for one cannot by being unduly sensitive, constrain one's neighbour's freedoms), but what objectively a normal person would find it reasonable to have to put up with." (Weir *An Introduction to Tort Law*, 2nd ed (2006), p 160)

"The character of the locality"

180. Another important question is the context in which the reasonableness test is to be applied. Traditionally the acceptability of the defendant's activity is to be judged by reference to "the character of the locality", a concept which dates back at least to *Sturges v Bridgman* (1879) 11 Ch D 852. At that time the mix of uses in an area would have been the result largely of unrestrained market forces, and the degree of regulatory control was very limited. Although the same principle has survived into the modern law, it is unrealistic to leave out of account the many factors which influence the character of an area in the modern world, including the impact of planning control. In *Hunter v Canary Wharf Ltd* [1997] AC 655, Lord Cooke (dissenting on this part of the case) highlighted these changes:

> "…the lineaments of the law of nuisance were established before the age of television and radio, motor transport and aviation, town and country planning, a 'crowded island', and a heightened public consciousness of the need to protect the environment. All these are now among the factors falling to be taken into account in evolving the law…." (p 711 D-E)

Lord Hoffmann, in the majority, also commented on the significance of the introduction of modern planning control, which he saw as an argument against further extending the law of nuisance:

> "In a case such as this, where the development is likely to have an impact upon many people over a large area, the planning system is, I think, a far more appropriate form of control, from the point of view of both the developer and the public, than enlarging the right to bring actions for nuisance at common law. …" (p 710B-D)

181. Against that background, in areas where conflicts may arise, the character of any locality may not conform to a single homogeneous identity, but rather may consist of a varied pattern of uses all of which need to coexist in a modern society. Due account also needs to be taken of the process by which the pattern of uses has

developed. The impact of general planning control since 1948, which includes development plan allocations as well as decisions on individual planning applications, will have played a major part in ensuring, as Lord Hoffmann said, an appropriate balance between developers and the public.

182. However planning control is only part of the story. The pattern of uses will include, not only uses approved under modern planning permissions, but also other lawful uses – lawful either because they began before 1948, or because they have become established in law since then (such as stock car racing in this case). Potentially unneighbourly uses, even if not subject to specific planning permission, are likely to have been subject to other regulatory controls to ensure their acceptability within their particular environment. Other activities may have been encouraged to relocate, with or without threats of discontinuance orders, or financial incentives.

183. After more than 60 years of modern planning and environmental controls, it is not unreasonable to start from the presumption that the established pattern of uses generally represents society's view of the appropriate balance of uses in a particular area, taking account both of the social needs of the area and of the maintenance of an acceptable environment for its occupants. The common law of nuisance is there to provide a residual control to ensure that new or intensified activities do not need lead to conditions which, within that pattern, go beyond what a normal person should be expected to put up with.

184. This analysis seems to me consistent with that of the Lord Westbury LC in *St Helens* case in the different circumstances of the Victorian world. In the passage quoted by Lord Neuberger (para 64), Lord Westbury spoke of the need for a person living in a town to subject himself to consequence of trade operations in his locality which are "necessary for trade and commerce… and for the benefit of the inhabitants of the town and of the public at large": 11 HL Cas 642, 650. There is no reason why, in a modern context, the same analysis should not apply to activities other than trade which contribute to the ordinary life of a modern community, and which need to be accommodated within the urban fabric.

185. An example mentioned in argument was a major football stadium. Significant disturbance on match days may be regarded as a necessary price for an activity regarded as socially important, provided it is subject to proper controls by the public authorities, including the police, to ensure that the disturbance is contained as far as reasonably practicable. In those circumstances, if someone buys a house next to such a stadium, he should not be able to sue for nuisance, even though the noise may be highly disturbing to ordinary home life on those days. This is not because he came to the nuisance, nor (necessarily) because it has continued for 20 years. Rather it is because it is part of the established pattern of uses in the area, and society attaches

importance to having places for professional football within urban areas. He can however sue if there is something about the organisation, or lack of it, which takes the disturbance beyond what is acceptable under the reasonableness test.

186. Nor is there any reason why this approach should be confined to urban areas. As the present case illustrates, similar patterns of potentially conflicting uses may arise in the country as much as in the town.

Relevance of the defendant's activity

187. The above analysis seems to me to provide the answer to Lord Neuberger's third issue, concerning the relevance of the actual use complained of by the claimant. An existing activity can in my view clearly be taken into account if it is part of the established pattern of use. That is clear from many of the reported cases which proceed on the basis that the defendant's activity contributes to the character of the locality against which the new or intensified use is to be considered.

188. So in *Rushmer v Polsue & Alfieri Ltd* [1906] 1 Ch 234 (approved by the House of Lords [1907] AC 121) the Court of Appeal specifically rejected an argument that because the defendant's activities conformed to the character of the area, there could not be a nuisance when a new more intrusive element was introduced. Similarly, in *Halsey v Esso Petroleum* [1961] 1 WLR 683, Veale J started from the position of the "ordinary man" -

> "… who may well like peace and quiet but will not complain, for instance, of the noise of traffic if he chooses to live on a main street in an urban centre, nor of the reasonable noises of industry, if he chooses to live alongside a factory" (p 692).

Thus the defendant's activities, at their previous level, were accepted as part of the established pattern of uses in the area, also reflected in the development plan zoning (p 688), and thus as the starting point for consideration of the alleged nuisance.

189. In *Kennaway v Thompson* [1981] QB 88 it was common ground that the plaintiff could not complain of noise of motor boats at the levels accepted by her as tolerable when she built her house (p 94B). The terms of the injunction were designed to protect the defendant's activities at that level, with a limited number of days for noisier boats (p 94F-95A). Similarly in *Watson v Croft Promosport Ltd* [2009] 3 All ER 249 the injunction, even as modified by the Court of Appeal, did not stop the defendant's activity altogether, but sought to define the level of acceptable use, by limiting numbers of days and defining noise limits (paras 53-54).

190. In none of these cases did the court find it necessary to undertake an "iterative process" as proposed by Lord Neuberger (para 72). The judges proceeded on the basis that a change in the intensity or character of an existing activity may result in a nuisance, no less than the introduction of a new activity. It was a matter for the judge, as an issue of fact and degree, to establish the limits of the acceptable, and if appropriate to make an order by reference to the limits so defined.

Planning control

The problem

191. The most difficult problem raised by the present appeal, in my view, is the fourth of Lord Neuberger's issues, that is the relevance of the planning history of the defendant's activity.

192. Modern planning legislation dates from the coming into force in 1948 of the Town and Country Planning Act 1947. More limited regulatory controls of activities on land had existed since around the mid-19th century, but until the 1947 Act there was no attempt to provide a comprehensive system for the allocation of land use and development. Decisions made by local planning authorities and planning inspectors reflect, or should reflect, an attempt by the authorities consciously to balance the likely benefits of a proposed development against any potential adverse consequences. That process often involves consideration of the interests of neighbouring property owners, including the impact of noise. Thus, national planning advice encourages planning authorities to restrict new development which could give rise to significant adverse impacts from noise; but emphasises that planning is concerned with the acceptability of the use in principle, rather than control of processes or emissions which are subject to other regulatory controls (National Planning Policy Framework (2012), paras 122-123).

193. The law of private nuisance, of far greater antiquity than modern planning legislation, also fulfils the function of protecting the interests of property owners. There is, however, a fundamental difference between planning law and the law of nuisance. The former exists to protect and promote the public interest, whereas the latter protects the rights of particular individuals. Planning decisions may require individuals to bear burdens for the benefit of others, the local community or the public as a whole. But, as the law stands, it is generally no defence to a claim of nuisance that the activity in question is of benefit to the public.

194. Thus planning controls and the law of nuisance may pull in opposite directions. A development executed in accordance with planning permission may

nevertheless cause a substantial interference with the enjoyment of neighbouring properties. Should a property owner be able in effect to undermine the planning process by bringing a claim of nuisance against the developer and securing not only damages but also an injunction prohibiting the activity in question, regardless of its public significance?

195. This is not a problem which arises if the project is authorized by statute. In the 19th century, long before modern planning control, railways were built under private acts which not only conferred the necessary powers to acquire or interfere with private property interests, but also conferred effective immunity from actions for nuisance. The same principle has provided protection for more modern activities, such as oil refineries. But, as Lord Wilberforce explained in *Allen v Gulf Oil Refining Ltd* [1981] AC 1001 the defence applies only where Parliament has "by express direction or by necessary implication" authorised the activity in question and the alleged nuisance is the inevitable consequence of that activity (pp 1011F, 1013F).

196. The Planning Act 2008 has adopted the same solution for nationally significant infrastructure projects, such as airports and power stations. The Act is designed to provide a more efficient method for securing planning and other approvals necessary for such projects, within the context of a policy framework approved by Parliament. Section 158 of the 2008 Act provides statutory immunity from liability for private or public nuisance for activities authorised by an order granting development consent under the Act, subject to any contrary provision contained in the order. By section 152 compensation is payable to any person whose land is injuriously affected by the carrying out of the works (within the relatively narrow limits defined by section 10 of the Compulsory Purchase Act 1965 and Part I of the Land Compensation Act 1973: section 152(5)(7)). There is no equivalent statutory protection for other forms of development authorised under ordinary planning procedures, whether by the local planning authority or the Secretary of State following a public inquiry.

197. In *Barr v Biffa Waste Services Ltd* [2013] QB 455, para 46, a case relating to waste disposal under an environmental licence, in a passage quoted by Lord Neuberger (para 91), I pointed out that the common law of nuisance had co-existed with statutory controls since the 19th century without the latter being treated as a reason for cutting down private law rights. However, the context is important. I was speaking about environmental regulation rather than planning control, which was not in issue.

198. Further, while my statement was an accurate reflection of the historical position, it is open to the criticism that as a blueprint for the future development of the law it was unduly simplistic. In a perceptive article on the decisions of the Court

of Appeal in the present case and in *Barr v Biffa Waste Services Ltd*, Maria Lee concludes:

> "It is not realistic to look for a single, across the board response to the complicated relationship between tort and regulation, or even just nuisance and planning permission… Courts are not generally in a position to assess the substantive quality of regulation…" (*Nuisance and Regulation in the Court of Appeal* [2013] JPEL 277, 284)

She suggests that an examination of the process followed by the regulation could help the court to determine how much authority the external assessment of the public interest should have, but that no single process issue could be decisive (p 284).

Gillingham Docks and subsequent cases

199. The issue has attracted particular attention over the last 20 years, since the judgment of Buckley J in the *Gillingham Docks* case (*Gillingham Borough Council v Medway (Chatham) Dock Co* Ltd [1993] QB 343). That has been considered by the Court of Appeal in two cases before the present judgment (*Wheeler v JJ Saunders Ltd* [1996] Ch 19 and *Watson v Croft Promosport* [2009] 3 All ER 249) and once in the House of Lords (*Hunter v Canary Wharf Ltd* [1997] AC 655).

200. The facts of the Gillingham Docks case were unusual. The council as local planning authority had granted planning permission to the defendant to develop part of the historic Chatham Royal Naval Dockyard as a commercial port. It had been clear to both the council and local residents at the time that the port would be operated on a 24-hour basis, and that the only access to the port for vehicles would be via two residential roads. In spite of strong objections by local residents the council decided that the promised economic benefits outweighed the inevitable disturbance of local residents.

201. Several years later, the priorities of the council changed and they brought an action in public nuisance seeking to restrain the use of the residential roads by heavy goods vehicles at night. Modifying the planning permission to achieve the same effect would have involved the payment of compensation. The judge rejected the claim. Although he accepted that the principle of statutory immunity had no direct application, he attached weight to the fact that Parliament had delegated to the local planning authority the task of balancing the likely pros and cons of a proposed development, under a procedure which enabled local residents to object. He said:

> "It has been said, no doubt correctly, that planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood. That may have the effect of rendering innocent activities which prior to the change would have been an actionable nuisance..." (p 359)

202. The grant of planning permission for the dock had authorised a change to the character of the neighbourhood, against which the reasonableness of the use was to be judged. The dock company was not operating the port other than as a normal commercial undertaking, and it could not operate a commercial port without disturbing nearby residents. It would not, he thought, be realistic to attempt to limit the amount of trade at the port:

> "It would be a task for which a court would be ill equipped, involving as it would the need to consider the interests of the locality as a whole and the plaintiff's and county council's plans in respect of it. In some cases even the national interest would have to be considered. These are matters to be decided by the planning authority and, if necessary, the minister and should be subject only to judicial review." (pp 360-361)

203. There was an alternative public law challenge based on the unreasonableness of the council's action in bringing public nuisance proceedings in respect of a project which it had itself authorised on public interest grounds, and where there was available the alternative of modification of the permission or discontinuance accompanied by compensation (see pp 350-351). The judge found it unnecessary to consider how those arguments would have been resolved in judicial review proceedings. However, he indicated that, even if he had held otherwise on liability, he would have refused an injunction as matter of discretion, having regard to the history and the damage to the dock undertaking, leaving it to the authority to resolve the "planning problem" using its statutory powers (p 364A-C).

204. That judgment was considered by the Court of Appeal, some three years later, in *Wheeler v JJ Saunders Ltd* [1996] Ch 19. Again the facts were unusual. Dr Wheeler was a veterinary surgeon specialising in pigs. He had earlier been involved in the management of a pig farm operated by the defendant company close to his home. But the relationship broke down and the business was subsequently conducted without his involvement. In 1988 and 1989, the company obtained planning permission to construct two new buildings to house their pigs (some 800 in total), one of which was only 11 metres from a holiday cottage owned by Dr

Wheeler and his wife. Government guidelines recommended a normal separation distance of at least 100 metres from the nearest dwelling house.

205. Dr Wheeler and his wife succeeded in their action for damages and an injunction restraining the use of the new pig sheds, notwithstanding that they had been erected and used in accordance with planning permission. Staughton LJ noted that the company had given the council the misleading impression that the planning applications were merely to continue an activity which had been tolerated in the past, and that nothing much would change as regards the number of pigs on the farm or the conditions in which they were to be kept. Also, the local planning authority had failed to consult the council's environmental health department. Peter Gibson LJ described the grant as "incomprehensible" (p 36).

206. It was held that the reasoning in *Gillingham Docks* had no application to the facts of this case. The planning permission had not changed the character of the neighbourhood, which remained a pig farm but with an intensified use of part of it. In the words of Staughton LJ, the planning permission was not "a strategic planning decision affected by considerations of public interest" (p 30). Peter Gibson LJ said:

> "Prior to the *Gillingham* case the general assumption appears to have been that private rights to claim in nuisance were unaffected by the permissive grant of planning permission, the developer going ahead with the development at his own risk if his activities were to cause a nuisance. The *Gillingham* case, if rightly decided, calls that assumption into question, at any rate in cases, like *Gillingham* itself, of a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted. I can well see that in such a case the public interest must be allowed to prevail and that it would be inappropriate to grant an injunction (though whether that should preclude any award of damages in lieu is a question which may need further consideration). But I am not prepared to accept that the principle applied in the *Gillingham* case must be taken to apply to every planning decision. The Court should be slow to acquiesce in the extinction of private rights without compensation as a result of administrative decisions which cannot be appealed and are difficult to challenge." (p 35)

207. In the meantime, the *Gillingham Docks* case had been considered by the House of Lords in *Hunter v Canary Wharf* [1997] AC 655. The case involved a claim for nuisance, brought by local residents in relation to interference with television signals due to the construction of a tower as part of the Canary Wharf development. The development had been carried out under planning permission

granted under a special procedure by the London Docklands Development Corporation. There was no appeal from the Court of Appeal's decision that the grant of planning permission could not itself provide immunity from liability for nuisance. In the House of Lords, Lord Cooke of Thorndon, who alone thought that there could be liability in principle, endorsed the *Gillingham Docks* judgment as directly relevant to the circumstances of Canary Wharf. He contrasted *Wheeler* in which there had been "an injudicious grant of planning consent, procured apparently by the supply of inaccurate and incomplete information" (p 722). By contrast, the Canary Wharf Tower had been built in an enterprise zone in an urban development area and authorised under the special procedure designed to encourage regeneration:

> "The Canary Wharf project in general, and the tower at One Canada Square in particular, were obviously of a scale totally transforming the environment… In these circumstances, to adopt the words of Staughton L.J. in *Wheeler v J J Saunders Ltd*, at p 30, the tower falls fairly within the scope of 'a strategic planning decision affected by considerations of public interest'." (p 722E)

208. Of the *Gillingham Docks* case itself he said:

> "… the judge held that, although a planning consent could not authorise a nuisance, it could change the character of the neighbourhood by which the standard of reasonable user fell to be judged. This principle appears to me to be sound and to apply to the present case as far at least as television reception is concerned. Although it did interfere with television reception the Canary Wharf Tower must, I think, be accepted as a reasonable development in all the circumstances." (p 722F-G)

209. More recently, the issue arose again, in circumstances much closer to those of the present case, in *Watson v Croft Promosport Ltd* (2009) 3 All ER 249. A World War II aerodrome had been turned into a motor racing circuit, pursuant to planning permission granted in 1963 after a public inquiry. Although there were no planning restrictions on the levels of activities, its use was relatively limited until 1994 (there were no more than 10 meetings a year between 1982 and 1994), and appears to have caused little disturbance to local residents. In that year, after the circuit had changed ownership, an application was made for more extensive use, involving 37 race days, 24 exclusive test days and 120 days when the track would be used for other purposes. Permission was granted by the local authority in July 1995.

210. In 1998, following a period of disputes with local residents, and an adjourned planning inquiry, the owner made a further application for planning permission on

the basis that he was prepared to enter into an enforceable planning obligation under section 106 of the Town and Country Planning Act 1990 to set limits to the amount of noise from racing on the circuit. The proposed agreement contained a detailed set of measurement criteria by which noise from the circuit would be assessed and monitored, and prescribed the racing activities which could be undertaken, and when quiet and rest days were to be held. The activities were divided into N1 to N5 activities, according to the noise levels which were generated.

211. Permission was granted by the inspector on this basis. He accepted that "the Development Plan policies weigh heavily against the project" and that the noise had at times "been of such character, duration and intensity and tone as to seriously harm the amenity to which residents reasonably feel they are entitled"; but that had to be weighed against the existing planning permission which allowed uncontrolled use of the circuit. Bearing in mind "the very wide planning use rights which the site now enjoys", he considered that the agreement would strengthen significantly the ability of the local planning authority to control noise at the circuit.

212. Local residents brought an action claiming that, even within the constraints set by the agreement, the activities constituted a nuisance. Simon J [2008] EWHC 759 (QB) noted that their objections were not to the car and motor-bicycle racing fixtures, amounting to about 20 (N1 and N2) events each year (over approximately 45-50 days), but to the noise from other activities, in particular Vehicle Testing Days and Track Days (when members of the public drive vehicles at speed all day) at noise levels which reach N2-N4 levels. He held that the character of the locality had been "essentially rural", and that the circuit "could be, and was, run in a way that was consistent with its essentially rural nature" (para 55). He declined to accept the 1998 planning permission as an indication (in Lord Hoffmann's terms) of the appropriate balance between developer and public, since the limits had in effect been dictated by the owners (paras 55-56). He held that there was an actionable nuisance.

213. The claimants had argued that the N1-N4 noise from the circuit should be confined to 20 days, as representing the "the threshold of the nuisance", and that 40 days would be acceptable only upon the payment of compensation for the difference between 20-40 days. This, they submitted, would accommodate "the core" activities of the circuit. The judge regarded the proposed threshold as too low. Striking "a proper balance between the respective legitimate interests of the parties, in the light of the past and present circumstances", he held that the threshold should be set at 40 N1-N4 days.

214. However he declined to grant an injunction, awarding damages instead (based on the diminution in value of the claimant's properties). He took account of the delay in bringing the proceedings, and the claimant's willingness to accept damages for at least part of the nuisance. He also took account of his perception of

the social value of the activity, and the limited number of sites on which it could take place (paras 87-88).

215. The finding of nuisance was upheld by the Court of Appeal. The court accepted that the implementation (not the mere grant) of planning permission might so alter the character of a neighbourhood as to render innocent an activity which would otherwise have been a nuisance (paras 32-3). Whether it did so was a question of fact and degree. In this case the planning permissions had not changed the character of the local neighbourhood, which remained essentially rural, nor could they be regarded as "strategic" (para 34).

216. Further, the Court of Appeal held that the judge had been wrong to refuse an injunction. Applying the principles established in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, the circumstances of the case were held not to be sufficiently exceptional to justify the refusal of an injunction. The court accepted that, in a marginal case where the damage to the claimant is minimal, the social value of the activity in question could be taken into account consistently with *Shelfer*. However, the existence of a public benefit could not alone negate the requirement of exceptional circumstances or oppression of the defendant (para 51).

Relevance of planning history

217. I have reviewed these cases is some detail, because they illustrate the wide variety of circumstances in which planning decisions may be made, and the danger of laying down any general propositions about their relevance to the application of the reasonableness test in any particular case.

218. They suggest that a planning permission may be relevant in two distinct ways:

i) It may provide evidence of the relative importance, in so far as it is relevant, of the permitted activity as part of the pattern of uses in the area;

ii) Where a relevant planning permission (or a related section 106 agreement) includes a detailed, and carefully considered, framework of conditions governing the acceptable limits of a noise use, they may provide a useful starting point or benchmark for the court's consideration of the same issues.

219. Before considering those alternatives, I should note my respectful disagreement with Lord Neuberger's reservations (para 98) about the potential utility of planning officer's reports as evidence of the reasoning of the planning authority itself. Judged by my own experience in practice and on the bench over some 40 years, I have found that a planning officer's report, at least in cases where the officer's recommendation is followed, is likely to be a very good indication of the council's consideration of the matter, particularly on such issues as public interest and the effect on the local environment. The fact that not all the members will have shared the same views on all the issues does not detract from the utility of the report as an indication of the general thrust of the council's thinking. That is illustrated by some of the planning reports in this case (as Lord Neuberger implicitly recognises, when relying on the "cautious" nature of the planning officer's recommendations – para 138). In any event, in so far as the focus is on the evidence before the planning authority (to which Lord Neuberger refers in para 138), rather than the decision itself, the planning officer's report is likely to offer the most comprehensive summary of the relevant material.

(i) Relative importance

220. The first alternative begs the question whether the relative importance of an activity to the public is relevant at all. In *Miller v Jackson* [1977] QB 966 the Court of Appeal held by a majority that public benefit was not relevant to liability, but (by a different majority) that it may be relevant to remedies. In *Kennaway v Thompson* [1981] QB 88 the court declined to follow the latter view, holding that public benefit was not relevant at either stage.

221. Clerk & Lindsell para 20-107 notes the position as apparently established by those cases, but adds that since a finding of nuisance "necessarily involves the balancing of competing interests", public interest, while not itself a defence, should be "a factor in assessing reasonableness of user". The only case cited *Dennis v Ministry of Defence* [2003] Env LR 741 (noise from military aircraft) does not directly support the proposition, since Buckley J held there to be a nuisance, but awarded damages in lieu of a declaration or injunction because of the public interest in the activity (paras 48, 80).

222. In agreement with Peter Gibson LJ in *Wheeler* [1996] Ch 19, 35, I think there should be a strong presumption against allowing private rights to be overridden by administrative decisions without compensation. The public interest comes into play in the limited sense accepted by Lord Westbury 11 HL Cas 642, 650, as discussed above, that is in evaluating the pattern of uses "necessary… for the benefit of the inhabitants of the town and of the public at large", against which the acceptability of the defendant's activity is to be judged. Otherwise its relevance generally in my view should be in the context of remedies rather than liability.

223. I would accept however that in exceptional cases a planning permission may be the result of a considered policy decision by the competent authority leading to a fundamental change in the pattern of uses, which cannot sensibly be ignored in assessing the character of the area against which the acceptability of the defendant's activity is to be judged. I read Staughton LJ's use of the word "strategic" as equivalent to Peter Gibson LJ's reference to "a major development altering the character of a neighbourhood with wide consequential effects such as required a balancing of competing public and private interests before permission was granted". For this reason, in my view (differing respectfully from Lord Neuberger on this point) the reasoning of the judge in *Gillingham Docks* can be supported. Similarly, the Canary Wharf development was understandably regarded by Lord Cooke as strategic in the same sense. But those projects were exceptional both in scale and the nature of the planning judgements which led to their approval. By contrast, in neither *Wheeler v Saunders* and nor *Watson v Croft Promosport Ltd* did the relevant permissions result in a significant change in the pattern of uses in the area, let alone one which could be regarded as strategic; and for the reasons noted above neither decision could be regarded as reflecting a considered assessment by the authorities concerned of the appropriate balance between public and private interests.

(ii) Benchmark

224. Apart from such strategic cases, a planning permission may also be of some practical utility in a different way. As many of the cases show, a major problem when dealing with nuisance by noise is to establish any objective and verifiable criteria by which to judge either the existence of a nuisance or the limits of any injunction. In some cases there may have been a single planning permission which established, by condition or by a linked section 106 agreement, a framework of noise levels and time limits, which can be taken as representing the authority's view, with the benefit of its expert advisers, of the acceptable limits. Lord Neuberger makes a similar point in paragraph 96.

225. *Watson v Croft Promosport Ltd* offers one example of such a framework, in the form of a unilateral undertaking incorporating a relatively sophisticated set of noise criteria. As has been seen, that did not purport to be an assessment of what was seen by the planning inspector as objectively reasonable, but rather an attempt to control the uncontrolled. However, some of the noise criteria found in the agreement were used by the judge in setting the threshold of the acceptable, and by the Court of Appeal in framing the limits of their injunction.

226. Where the evidence shows that a set of conditions has been carefully designed to represent the authority's view of a fair balance, there may be much to be said for the parties and their experts adopting that as a starting-point for their own consideration. It is not binding on the judge, of course, but it may help to bring some

order to the debate. However, if the defendant seeks to rely on compliance with such criteria as evidence of the reasonableness of his operation, I would put the onus on him to show compliance (see by analogy *Manchester Corpn v Farnworth* [1930] AC 171, relating to the onus on the defendant to prove reasonable diligence under a private Act). By contrast, evidence of failure to comply with such conditions, while not determinative, may reinforce the case for a finding of nuisance under the reasonableness test.

227. The present case is illustrative of the opposite case, where the conditions of the planning permissions, such as they were, were of little help to the judge. It is perhaps unfortunate that the authority did not at some stage attempt to secure an overall agreement relating to the operation of activities on the combined sites. The permission for the stadium contained no noise-limits, other than some limits on days and hours of use. Three breach of condition notices served by the planning authority between 2007 and 2009 related to apparently isolated breaches of those limits. The established use certificate contained some limitation of hours, but it is unclear how if at all they could be enforced. In relation to the noise limit of 85dB LAeq over one hour at the boundary of the site, set by the 1997 permission for the motocross site, the most recent evidence we were shown of compliance was in a planning report of December 2001.

228. With the help of its own expert advice, the council did attempt in 2008 to impose some overall control by use of their statutory nuisance powers ([2011] EWHC 360 (QB), paras 115-117). That may be an uncertain guide in the context of the common law, given the statutory defence of "best practicable means". (Thus, as Lord Neuberger says, the 1995 noise abatement proceedings had been "inconclusive", not because of their result which was in favour of the owners, but because it was not possible to say whether the justices held that there was no nuisance, or merely that the owners were using best practicable means.) In any event, although the authority's expert's report was available, he was not called as a witness, his approach was strongly criticised by the claimant's expert, and the judge was unimpressed by the council officer's evidence that the abatement works had solved the problem (para 207).

229. In those circumstances, the judge was entitled to regard the conditions in the planning permissions and the terms of the abatement notices as of very little assistance in establishing the appropriate noise limits of the defendant's activity.

The judgment of the Court of Appeal

230. Against that background, I turn to the reasoning of Jackson LJ in the present case. Dealing with what he called "the planning permission issue", he reviewed the

sequence of cases since *Gillingham Docks* and summarised their effect in the following propositions:

> "(i) A planning authority by the grant of planning permission cannot authorise the commission of a nuisance.
>
> (ii) Nevertheless the grant of planning permission followed by the implementation of such permission may change the character of a locality.
>
> (iii) It is a question of fact in every case whether the grant of planning permission followed by steps to implement such permission do have the effect of changing the character of the locality.
>
> (iv) If the character of a locality is changed as a consequence of planning permission having been granted and implemented, then:
>
> > (a) the question whether particular activities in that locality constitute a nuisance must be decided against the background of its changed character;
> >
> > (b) one consequence may be that otherwise offensive activities in that locality cease to constitute a nuisance." (para 65).

231. He held that the appeal should be allowed. I should quote the relevant passage in full (paras 71-75):

> "71. The judge, at para 158, identified the following question as an important issue in the case:
>
> > 'whether it was appropriate, in assessing whether the noise generated by the activities at the stadium and at the track was capable of causing a reasonable person annoyance to a degree amounting to a nuisance, to take into account as one of the noise characteristics of the locality the noise generated by those very activities.'

72. The judge did not immediately state his answer to that question. It is clear, however, from the later passages, as Mr Peter Harrison for the claimants concedes, that the judge's answer to that question is 'no'. In my view, that is the wrong answer. Throughout the period when the claimants were living at Fenland the noise generated from time to time by motor sports was 'one of the noise characteristics of the locality'.

73. The judge, at para 203, stated his conclusion as follows:

> 'What was clear from Mr Sharps's measurements, and was borne out by the recordings of measurements annexed to the second report of Mr Stigwood, was that noise from the activities at the stadium and at the track, after the completion of the works undertaken in 2008-2009, was intermittently much louder, typically by 10 dB, than the ambient noise level leaving out of account those activities. It is, in my judgment, those dramatic increases in loudness which really constitute the nuisance in the present case, in other words the contrast between the loud levels and the noise levels prevailing when there was nothing going on at the stadium or at the track.'

74. In my view that conclusion is flawed. The noise of motor sports emanating from the track and the stadium are an established part of the character of the locality. They cannot be left out of account when considering whether the matters of which the claimants complain constitute a nuisance.

75. I quite accept that if the second and third defendants had ignored the breach of condition notices and had conducted their business at noise levels above those permitted by the planning permissions, the claimants might have been able to make out a case in nuisance. It appears, however, that this was not the case. Abatement works were carried out in 2008 to the satisfaction of Forest Heath District Council. No breach of condition notices have been served since then, apart from one which did not relate to noise level."

232. It will be apparent from my discussion of the *Gillingham Docks* case that I regard that case as of no relevance to the present. It has not been argued that the change resulting from the various permissions was "strategic", and the Court of Appeal rightly did not so find. That, however, did not detract from the relevance of the permitted or established uses as part of the established pattern of uses in the area.

The Court of Appeal were right to regard them as matters to be taken into account in judging the acceptability of the current use.

233. However, like Lord Neuberger, and in respectful disagreement with the Court of Appeal, I do not consider that the judge's essential reasoning is open to challenge on this basis. Admittedly, as Lord Neuberger has pointed out (paras 77-79), the judge's reasons for discounting the particular permissions (his para 66) seem unconvincing. However, he was entitled in my view on the facts of this case to approach the matter on the basis (his para 67) that it was more relevant to look, not so much at the permissions as such, as at their practical effects on the locality. This led to his conclusion (para 95) that the activities at the stadium and track were part of the character of the area, but only intermittently, and even then not necessarily involving a noise amounting to a nuisance. I find that conclusion hard to criticise.

234. Furthermore, para 158, on which the Court of Appeal relied, seems to me to have been taken by them out of context (albeit apparently with the acquiescence of counsel then appearing for the claimant). As I read it, the second part of para 158 was not raising an issue of law as to the relevance of the defendant's existing activities. The judge had already made clear his view on that issue in dealing with the character of the area (see above).

235. Rather para 158, though perhaps not very clearly expressed, was his introduction to the discussion of the respective expert views on the appropriate methods of assessment of noise. It would serve no purpose in this judgment to review the noise evidence in any detail, particularly as the judge's task was complicated by the failure of the experts to agree a common methodology. However, it is clear that there was a significant difference of approach. The defendants' expert favoured comparison with what he called "fixed benchmark values", which he saw as appropriate for a situation where "the noise from the stadium and motocross track are part of the background noise level of the area" (see especially judgment paras 164, 188). By contrast, the claimant's expert favoured comparison with the background noise levels in the absence of the relevant noise source, noting differences on occasion of at least 10dBA over those levels. The judge preferred the latter approach, because it was those "dramatic" differences which constituted the real nuisance (para 203, 243).

236. The judge's treatment of the noise evidence cannot in my view be equated (as the Court of Appeal seemed to think) with "leaving out of account" the noise from the existing activities. It simply reflected his reasonable assessment, preferring on this point the expert evidence for the claimant, that the impact of the extreme events which were the real cause of the nuisance was not mitigated by the more acceptable noise levels experienced on other days or at other times. This was not a conclusion of law, but one of factual judgement properly based on the evidence before him.

237. Finally, while I agree with Jackson LJ as to the potential relevance of evidence of a substantial failure to comply with planning conditions, there was nothing in the evidence in this case which should have led to any assumption in that respect in favour of the defendant. Regardless of any specific enforcement action by the authority, it was for the defendant, if he wished to rely on any planning conditions, to prove not only compliance with them but also their significance to the judge's assessment of nuisance. On the facts of this case, as I have said, the judge was entitled to give very little weight to that factor.

Remedies

238. On the way the case has been argued in the lower courts, the final issue addressed by Lord Neuberger does not strictly arise. As the judge recorded, it was accepted that if a nuisance was established an injunction should follow, the only issue being its terms. The defendants have sought to open the issue in this court for the first time, on the basis that in the lower courts having regard to the authorities such an argument would have been doomed to failure. However, the result is that we have no relevant findings, either as to how the judge would have exercised his discretion if he been able to do so, or as to how he would have assessed future damages, had he decided on that course. In those circumstances, we should approach the issue with caution, conscious that anything we say can be no more than guidance.

239. With that caveat, I agree with Lord Neuberger and the rest of the court that the opportunity should be taken to signal a move away from the strict criteria derived from *Shelfer* [1895] 1 Ch 287. This is particularly relevant to cases where an injunction would have serious consequences for third parties, such as employees of the defendant's business, or, in this case, members of the public using or enjoying the stadium. In that respect, in my view, the Court of Appeal in *Watson* [2009] 3 All ER 249 was wrong to hold that the judge had no power to make the order he did, and to limit public interest considerations to cases where the damage to the claimant is "minimal".

240. As has been seen, Peter Gibson LJ in *Wheeler* [1996] Ch 19 saw more flexible remedial principles as a possible answer to the public interest aspect of cases such as *Gillingham Docks*, rather than creating an exception to the law of nuisance. Commenting on the restrictive view taken by the Court of Appeal in *Watson*, Maria Lee has said:

> "The fact that something should go ahead in the public interest does not tell us where the costs should lie; we need not assume that injured parties should bear the burden associated with broader social benefits… The continued strength of private nuisance in a regulatory

> state probably depends on a more flexible approach to remedies…" (*Tort Law and Regulation: Planning and Nuisance* (2011) 8 JPL 986, 989-990)

I agree.

241. The practice of other common law countries has varied. For example, the Australian courts have generally followed the *Shelfer* principles (see eg *Munroe v Southern Dairies* [1955] VLR 332. So also in New Zealand: see *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525, where Hardie Boys J said (p 535):

> "To the extent that this is an appeal to set the public interest ahead of the private interests of the plaintiffs, then I regret that authority requires me to close my ears to it."

So also in Ireland, in the leading case of *Bellew v Cement Ltd* [1948] Ir R 61, the majority adopted a strict *Shelfer* approach. Maguire CJ said:

> "I am of the opinion that the court is not entitled to take the public convenience into consideration when dealing with the rights of private parties. This matter is a dispute between private parties, and I think that the court should be concerned, only, to see that the rights of the parties are safeguarded." (p 64)

242. In Canada by contrast the Supreme Court has allowed a more flexible approach. Thus in *Canada Paper Co v Brown* (1922) 63 SCR 243 the court adopted *Shelfer* principles, but Duff J added:

> "An injunction will not be granted where, having regard to all the circumstances, to grant it would be unjust; and the disparity between the advantage to the plaintiff to be gained by the granting of that remedy and the inconvenience and disadvantage which the defendant and others would suffer in consequence thereof may be a sufficient ground for refusing it." (para 252)

Similarly, in *Bottom v Ontario Leaf Tobacco Co.* [1935] 2 DLR 699, in refusing an injunction to close a factory, the court gave weight to the fact that closure would cause unemployment which would be disastrous to a small community. Riddell JA said (para 3):

> "The public good can never be absent from the mind of the Court when dealing with a matter of discretion."

243. A more flexible approach has also been adopted in the United States. A leading case is *Boomer v Atlantic Cement Company* (1970) 26 NY 2d 219, in the New York Court of Appeal. The case has been described as "a staple of the [US] law school curriculum and a constant preoccupation of [US] legal scholars" (Farber, D.A. *The Story of Boomer – Pollution and the Common Law* (2005) 32 Ecology LQ 113). A nuisance had been caused to local residents by the operation of a cement factory but the court refused to grant an injunction requiring the closure of the plant, taking account of the facts that it had cost $45 m to construct and employed more than 300 local people. As Justice Bergan said at p 223, the total damage to the plaintiffs' properties was "relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek". The court accordingly permitted the defendant company to continue operating the factory on payment of damages in lieu of an injunction, to be assessed by the lower court.

244. Further support for a more flexible approach can be found in a number of academic writings, most recently by Mark Wilde in *Nuisance Law and Damages in Lieu of an Injunction: Challenging the Orthodoxy of the Shelfer Criteria* (in *Tort Law: Challenging Orthodoxy* ed Stephen Pitel and others (2013) cap 12).

245. While therefore I agree generally with the observations of Lord Neuberger and Lord Sumption on this aspect, I have three particular reservations.

246. First, I would not regard the grant of planning permission for a particular use as in itself giving rise to a presumption against the grant of an injunction. As I have said, the circumstances in which permissions may be granted differ so much as to make it unwise to lay down any general propositions. I would accept however that the nature of, and background to, a relevant planning permission may be an important factor in the court's assessment.

247. Secondly, I would be cautious of too direct a comparison with cases relating to rights of light, particularly where (as in *Kine v Jolly* [1905] 1 Ch 480) the court was asked to make a mandatory injunction to demolish a house built in good faith (see also Wilde *op cit* p 372, citing Sargant LJ in *Slack v Leeds Industrial Co-operative Society* [1924] 2 Ch 475, 496). Cases such as the present are not concerned with such drastic alternatives. The judge is not asked to bring the defendant's activity to an end altogether, but to set reasonable limits for its continuation. In so doing he should take into account not only the claimant's environment but also the viability of the defendant's business. In some cases it may be appropriate to combine

an injunction with an award of damages (as happened at first instance in *Watson v Croft Promosport*). I also agree with Lord Mance that special importance should attach to the right to enjoy one's home without disturbance, independently of financial considerations.

248. Thirdly, without much fuller argument than we have heard, I would be reluctant to open up the possibility of assessment of damages on the basis of a share of the benefit to the defendants. The issues are complex on any view (for a detailed academic discussion of the recent authorities, see Craig Rotherham "*Gain-based relief in tort after A-G v Blake*" (2010) 126 LQR 102). *Jaggard v Sawyer* [1995] 1 WLR 269, to which Lord Neuberger refers, gives Court of Appeal support for an award on that basis for trespass or breach of a restrictive covenant, but the same approach has not hitherto been extended to interference with rights of light (see *Forsyth-Grant v Allen* [2008] Env LR 877). In cases relating to clearly defined interference with a specific property right, it is not difficult to envisage a hypothetical negotiation to establish an appropriate "price". The same approach cannot in my view be readily transferred to claims for nuisance such as the present relating to interference with the enjoyment of land, where the injury is less specific, and the appropriate price much less easy to assess, particularly in a case where the nuisance affects a large number of people. Further, such an approach seems to represent a radical departure from the normal basis regarded by Parliament as fair and appropriate in relation to injurious affection arising from activities carried out under statutory authority.

Conclusion

249. For all these reasons, I agree with the disposal of the appeal proposed by Lord Neuberger.

A House of Lords

Cream Holdings Ltd and others *v* Banerjee and another

[2004] UKHL 44

2004 June 14, 15; Oct 14 — Lord Nicholls of Birkenhead, Lord Woolf CJ, Lord Hoffmann, Lord Scott of Foscote and Baroness Hale of Richmond

Confidential information — Breach of confidence — Injunction — Claimants seeking interim injunction to restrain publication of confidential information supplied by former employee — Whether claimants "likely" to establish that publication should not be allowed — Whether interim injunction to be granted — Human Rights Act 1998 (c 42), s 12(3)

The claimants sought an interim injunction to restrain the publication of confidential information obtained without permission by the first defendant, a former employee of the claimants, who had supplied it to the second defendants, the publishers of a local newspaper with a reputation for investigating stories of local public interest, to support her allegations of financial irregularities. The judge granted an injunction restraining the defendants until trial or further order from publishing, disclosing or using certain confidential information as defined in a confidential schedule save to certain specified bodies, on the ground that the claimants had a real prospect of successfully establishing at trial that publication should not be allowed. The defendants appealed on the ground that when considering whether the claimant was "likely", within the meaning of section 12(3) of the Human Rights Act 1998[1], to establish at trial that publication should not be allowed, the judge had erred in applying the test of "a real prospect of success" rather than the test of "more likely than not". The Court of Appeal held that the judge had applied the correct test and by a majority dismissed the appeal.

On the defendants' appeal—

Held, (1) that the principal purpose for which section 12(3) was enacted was to buttress the protection afforded to freedom of speech at the interlocutory stage by setting a higher threshold for the grant of interlocutory injunctions against the media than the previous test of a real prospect of succeeding at trial in the claim for a permanent injunction; but that to construe "likely" in the subsection as meaning "more likely than not" in all situations would be to set the test too high; that there could be no single rigid standard governing all applications for interim restraint orders and some flexibility was essential; that Parliament's intention was that "likely" should have an extended meaning which set as a normal pre-requisite to the grant of an interlocutory injunction a likelihood of success at trial which was higher than the previous test but which permitted the court to dispense with that higher test where particular circumstances made it necessary; that on its proper construction the effect of section 12(3) was that the court should not make an interim restraint order unless it was satisfied that the applicant's prospects of success at trial were sufficiently favourable to justify the order being made in the light of all the other circumstances of the case; that in general the threshold that the applicant had to cross before the court embarked on exercising its discretion was to satisfy the court that he would probably succeed at the trial; but that there could be cases where it was necessary for the court to depart from that general approach and a lesser degree of likelihood would suffice as a prerequisite; that the weight to be given to the likelihood of success at trial when deciding whether to grant the application depended on all the other circumstances and that approach gave effect to the parliamentary intention that the courts should have particular regard to the importance of the right to freedom of

[1] Human Rights Act 1998, s 12(3): see post, para 1.

expression and at the same time was sufficiently flexible to give effect to countervailing Convention rights (post, paras 15, 16, 20–23, 27–30).

(2) Allowing the appeal, that from the content of the confidential information contained in the private judgments of the courts below it was clear that the judge had misdirected himself in a material respect when exercising his discretion, and since the Court of Appeal had not exercised its discretion afresh it fell to their Lordships to do so; that, given that the disclosures the defendants wished to publish were clearly matters of serious public interest, the claimants' prospects of success at trial were not sufficiently likely to justify making an interim restraint order; and that, accordingly, the injunction was discharged so far as it related to the information already supplied by the first defendant to the second defendants (post, paras 24, 25, 27–30).

Decision of the Court of Appeal [2003] EWCA Civ 103; [2003] Ch 650; [2003] 3 WLR 999; [2003] 2 All ER 318 reversed.

The following cases are referred to in the opinions of their Lordships:

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504, HL(E)
H (Minors) (Sexual Abuse: Standard of Proof), In re [1996] AC 563; [1996] 2 WLR 8; [1996] 1 All ER 1, HL(E)
Harris Simons Construction Ltd, In re [1989] 1 WLR 368
Primalaks (UK) Ltd, In re [1989] BCLC 734

The following additional cases were cited in argument:

Attorney General v Parry [2002] EWHC 3201 (Ch); [2004] EMLR 223
Bladet Tromsø v Norway (1999) 29 EHRR 125
Bonnard v Perryman [1891] 2 Ch 269, CA
Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] 2 All ER 995, HL(E)
Douglas v Hello! Ltd [2001] QB 967; [2001 2 WLR 992, [2001] 2 All ER 289, CA
Imutran Ltd v Uncaged Campaigns Ltd [2001] 2 All ER 385
Observer, The, and The Guardian v United Kingdom (1991) 14 EHRR 153
Reynolds v Times Newspapers Ltd [2001] 2 AC 127; [1999] 3 WLR 1010; [1999] 4 All ER 609, HL(E)

APPEAL from the Court of Appeal

By leave of the House of Lords (Lord Bingham of Cornhill, Lord Hoffmann and Lord Millett) granted on 20 May 2003, the defendants, Chumki Banerjee and The Liverpool Daily Post and Echo Ltd, appealed from a decision of the Court of Appeal (Simon Brown, Sedley and Arden LJJ) on 13 February 2003 dismissing the defendants' appeal from a decision of Lloyd J on 5 July 2002 granting an application by the claimants, Cream Holdings Ltd, Chadmead Ltd, Cream Liverpool Ltd, CI Events Ltd, Cream Events Ltd, Gridstone Ltd and Harvey Recordings Ltd, for an injunction restraining the defendants, until trial or further order, from publishing, disclosing or using certain confidential information as defined in a confidential schedule save to certain specified bodies.

The facts are stated in the opinion of Lord Nicholls of Birkenhead.

Richard Spearman QC and *Catrin Evans* for the defendants. The legislative intention underlying section 12 of the Human Rights Act 1998 is to enhance or buttress the Convention right to freedom of expression. In particular the legislative intention of section 12(3) is to raise the threshold for the grant of prior restraint against publication and/or to make the grant

A of relief before trial more difficult in cases where it might affect the exercise of the Convention right to freedom of expression than in other cases. The use of the word "publication" shows that the section applies to, but is not restricted to, the media.

The legislative intention is met by giving the word "likely" in section 12(3) its primary meaning of "probable" or "more likely than not". That intention would not be met and on the contrary would be thwarted by giving the word B "likely" the meaning of "real prospect of success". There is no compelling reason why "likely" should be read down to mean "real prospect of success".

The pre-Human Rights Act case law does not suggest that free speech enjoys automatic priority over all other rights. That case law makes clear that the test for granting an injunction is higher than the test in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and that it is a test of necessity. C Even if the Court of Appeal's construction of section 12(3) requires the court, when evaluating whether a claimant has a real prospect of success, to undertake some fuller evaluation than the *American Cyanamid* approach, that does not reflect any enhancement or buttressing of the Convention right to freedom of expression in comparison to the pre-Human Rights Act state of the law. The effect of the Court of Appeal's approach is to lower rather than to raise the threshold for the interim restraint on freedom of speech in D comparison to the pre-Human Rights Act state of the law. That approach renders section 12(3) nugatory. [Reference was made to *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127; *Douglas v Hello! Ltd* [2001] QB 967; *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All ER 385; *Attorney General v Parry* [2004] EMLR 223; *Campbell v MGN Ltd* [2004] 2 AC 457 and *In re Harris Simons Construction Ltd* [1989] 1 WLR 368.]

E The judge accepted that on the evidence there was a breach of confidence and a defrauding of the revenue. In deciding whether a given interference with freedom of expression is necessary in a democratic society the court is faced with the principle of freedom of expression which is subject to exceptions which must be narrowly interpreted. In a case involving the media, the court must take into account the essential function that the press fulfils in a democratic society to inform the public of matters of genuine F public interest. The press performs a very different role from that undertaken by regulatory bodies and the police. The press should not be an arm of the law or government and is entitled to communicate directly with the public. If the only function of the press were to investigate and pass on its findings to the relevant authorities, the vital role of the press as the public watchdog would be undermined and the public interest would be damaged.

G Any interference with the freedom of the press has to be justified, even when there is no public interest in publication, because it inevitably has some effect on the ability of the press to perform its role in society. The existence of a free press is in itself desirable and prima facie the court should not interfere with publication. The existence of a public interest in publication strengthens the case for not granting an injunction. Whether a public figure has courted publicity or not, he may be the legitimate subject of public H attention. Moreover, where the image projected is untrue or incomplete the media is generally entitled to set the record straight (*Campbell v MGN Ltd* [2004] 2 AC 457). Although the appellants are entitled to succeed on their other arguments without relying on the contention that the respondents have deliberately fostered a false public image such that there is a public interest

in it being corrected, in fact the appellants are entitled to rely upon that point as well, because that is what the respondents did. A

It is an important right and function of the press to express criticism of companies such as the claimants where that is warranted by their conduct. There is a strong public interest in members of society obeying the law and being publicly exposed if they do not. While the right to confidence is a recognised exception to article 10(1) of the Convention the onus of proving that freedom of expression must be restricted is on the applicant seeking the relief. B

Edward Bartley Jones QC and *Kelly Pennifer* for the claimants. Section 12 was formulated as a threshold clause and section 12(3) has to be construed as a threshold clause. Section 12(3) involves two elements. First, the court must be "satisfied" of a postulate. Second, the postulate of which the court must be satisfied is that the applicant is "likely" to establish that publication should not be allowed. As to the first element, the court can only be satisfied on a balance of probabilities. Anything less does not involve satisfaction. If therefore a balance of probabilities is introduced into the first element it is difficult to see why "likely" should mean "more likely than not" in the second. The reality must be that "likely" does not mean "more likely than not". Although section 12(3) looks forward to what will occur at trial, the court will no doubt carefully scrutinise and consider, at the interim stage, all relevant factors, including the importance of the rights under article 10(1) of the Convention to freedom of expression. C D

The primary remedy for breach of confidence should be an injunction. The 1998 Act is a constitutional instrument and must be given a generous and purposive interpretation, suitable to give individuals the full measure of the fundamental rights and freedoms guaranteed by the Convention. A generous and purposive approach to the true construction of the 1988 Act would involve recognition and justification of all Convention rights and not merely article 10(1) as interpreted by the Strasbourg jurisprudence. Overly concentrating on the pre-1998 Act cases is of little use. Some of the earlier cases have to be reassessed. Freedom of expression is only a qualified right and is subject to judicial control. In performing the balancing exercise the court must look at the distinction between the public interest and what interests the public. There is nothing in the Strasbourg jurisprudence which supports the interpretation of section 12(3) as contended for by the defendants. [Reference was made to *Bladet Tromsø and Stensaas v Norway* (1999) 29 EHRR and *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153.] E F G

The rule in *Bonnard v Perryman* [1891] 2 Ch 269 applies to trade libel, injurious falsehood and related claims but does not apply to other causes of action, in particular breach of confidence. The rule itself is in no way in conflict with section 12(3) and simply affords an additional reason why interim relief should be refused. The rule does not require section 12(3) to be construed as the defendants contend. "Likely" means "a real prospect of success". H

There are no grounds for discharging the interim injunction granted by the judge or for reversing the decision of the Court of Appeal. The judge adequately took into account the question whether damages would be an

adequate remedy for either side and what the consequences would be to either side were he to grant or refuse the interim injunctive relief sought.

If it is held that the judge misdirected himself as to the interpretation of "likely" in section 12(3) then the discretion becomes available for the appellate court to exercise.

The documents taken from the claimants and handed to the newspaper were obviously confidential documents and hence there was, prima facie, a major breach of confidence by an employee who had a high level of duty of confidence. The issue for the court when deciding whether to grant an injunction was whether the employee, in the role of a whistle blower, was acting in good faith. The employee never went to the Custom and Excise or to the revenue authorities, and any suggestion of wrongdoing after the employee left is pure speculation. All dealings between the claimants and the revenue were confidential. If the claimants are entitled to confidentiality as against the Revenue they must be entitled to a duty of confidentiality as against their employee. The mere fact that a claimant is a public company does not mean that all its affairs are matters of public interest.

Spearman QC replied.

Their Lordships took time for consideration.

14 October. **LORD NICHOLLS OF BIRKENHEAD**

1 My Lords, the Human Rights Act 1998 introduced into the law of this country the concept of Convention rights. Section 12 made special provision regarding one of these rights: the right to freedom of expression. When considering whether to grant relief which, if granted, might affect the exercise of the Convention right to freedom of expression the court must have particular regard to the importance of this right: section 12(4). Additionally, section 12(2) set out a prerequisite to the grant of relief against a person who is neither present nor represented. The court must be satisfied the applicant has taken all practicable steps to notify the respondent or that there are compelling reasons why the respondent should not be notified. Further, section 12(3) imposed a threshold test which has to be satisfied before a court may grant interlocutory injunctive relief:

> "No such relief [which might affect the exercise of the Convention right to freedom of expression] 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."

2 On this appeal your Lordships' House is concerned with the meaning and application of the word "likely" in this provision.

The factual context

3 The context in which this question arises on this appeal is as follows. The plaintiffs in this action are the Cream group of companies. These companies began as the Cream nightclub in Liverpool in 1992 and then expanded and diversified their business. They opened other clubs elsewhere and began to stage large events such as dance festivals. Now they also carry on a substantial business franchising their brand name and logo and merchandising clothes and other items. They are an important business in

Liverpool featuring both on general news pages and financial pages of newspapers.

4 The first defendant, Chumki Banerjee, is a chartered accountant. She was the financial controller of one of the companies in the Cream group for three years from February 1998 to January 2001. Before then Ms Banerjee worked for a firm of accountants and was responsible for dealing with the Cream group's financial affairs between 1996 and 1998. The second defendant, which I shall refer to simply as the "Echo", is the publisher of Merseyside's two long-established and leading daily newspapers, the "Daily Post" and the "Liverpool Echo".

5 In January 2001 Cream dismissed Ms Banerjee. When she left she took with her copies of documents she claims show illegal and improper activity by the Cream group. She passed these to the "Echo" with additional information. She received no payments for this. On 13 and 14 June 2002 the "Echo" published articles about alleged corruption involving one director of the Cream group and a local council official. On 18 June 2002 the Cream group sought injunctive relief to restrain publication by the newspaper of any further confidential information given it by Ms Banerjee.

The proceedings

6 The defendants admitted the information was confidential. Their defence was that disclosure was in the public interest. Lloyd J held there were seriously arguable issues both ways on whether this defence would succeed. Cream had established the "necessary likelihood" of a permanent injunction for the purposes of section 12(3): "I do not say it is more likely than not, but there is certainly a real prospect of success." The balance of convenience test favoured the grant of an interim injunction. Cream was likely to suffer irreparable loss of an unquantifiable nature if the story were published. Restraint of publication would delay the "Echo's" story but not necessarily preclude its publication altogether. Given the undoubted obligation of confidentiality inherent in Ms Banerjee's employment contract, the disputes of fact on some matters, and the possibility that Ms Banerjee's complaints of defaults by the Cream group might be met adequately by disclosure to certain regulatory authorities as distinct from publication at large by the press, the right course was to freeze the position and direct a speedy trial if desired. On 5 July 2002 Lloyd J granted an interlocutory injunction prohibiting the defendants until trial from publishing, disclosing or using information defined as confidential information in a confidential schedule. In order to prevent the immediate loss of confidentiality Lloyd J set out part of his judgment in a private appendix.

7 The defendants appealed. The judge, they said, had applied the wrong test under section 12(3), that of a "real prospect of success" rather than "more likely than not". Further, on the basis of his factual conclusions the judge erred in deciding Cream was likely to succeed at the trial.

8 The Court of Appeal, comprising Simon Brown, Sedley and Arden LJJ, dismissed the appeal: [2003] Ch 650. Sedley LJ dissented. Again, in order to maintain privacy for the information separate confidential judgments were delivered by two members of the court.

9 All three Lords Justices agreed the judge was correct in his interpretation of "likely" in section 12(3), although they differed in their reasoning. As to the facts, Simon Brown LJ held the judge was entitled to

A conclude Cream has a real prospect of success at the trial. The judge was also entitled to decide that in all the circumstances he should exercise his discretion in favour of making an order involving prior restraint. Simon Brown LJ, however, expressed reservations about the latter point. Not every judge would necessarily have reached the same conclusion as Lloyd J, and he himself might well not have done so. Arden LJ was also lukewarm in her view of the judge's decision, noting that in all the circumstances it could not B be said to be perverse.

10 On this point Sedley LJ dissented. Lloyd J erred in his conclusion that there is likely to be no public interest justification for the disclosure of the story which Miss Banerjee gave the "Echo" and the "Echo" wishes to publish. The principal matter the "Echo" wishes to publish is "incontestably" a matter of serious public interest. The essential story was C one which, whatever its source, no court could properly suppress.

11 Ms Banerjee and the "Echo" appealed to your Lordships' House, raising arguments along the same lines as those they presented to the Court of Appeal.

Section 12(3) and "likely"

D **12** As with most ordinary English words "likely" has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from "more likely than not" to "may well". In ordinary usage its meaning is often sought to be clarified by the addition of qualifying epithets as in phrases such as "very likely" or "quite likely". In section 12(3) the context is that of a E statutory threshold for the grant of interim relief by a court.

13 The legal background against which this statutory provision has to be interpreted is familiar. In the 1960s the approach adopted by the courts to the grant of interlocutory injunctions was that the applicant had to establish a prima facie case. He had to establish this before questions of the so-called "balance of convenience" fell to be considered. A prima facie case was understood, at least in the Chancery Division, as meaning the applicant F must establish that as the evidence currently stood on the balance of probability he would succeed at the trial.

14 The courts were freed from this fetter by the decision of your Lordships' House in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. Lord Diplock said, at pp 407–408, that the court must be satisfied the claim "is not frivolous or vexatious; in other words, that there is a serious question G to be tried". But it is no part of the court's function at this stage of litigation to try to resolve conflicts of evidence on affidavit nor to decide difficult questions of law calling for detailed argument and mature consideration. Unless the applicant fails to show he has "any real prospect of succeeding in his claim for a permanent injunction at the trial", the court should proceed to consider where the balance of convenience lies. As to that, where other H factors appear to be evenly balanced "it is a counsel of prudence" for the court to take "such measures as are calculated to preserve the status quo".

15 When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on the freedom of the press. Article 8 of the European Convention, guaranteeing the right to respect for private life, was among the Convention rights to

which the legislation would give effect. The concern was that, applying the conventional *American Cyanamid* approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a "serious question to be tried" or a "real prospect" of success at the trial.

16 Against this background I turn to consider whether, as the "Echo" submits, "likely" in section 12(3) bears the meaning of "more likely than not" or "probably". This would be a higher threshold than that prescribed by the *American Cyanamid* case. That would be consistent with the underlying parliamentary intention of emphasising the importance of freedom of expression. But in common with the views expressed in the Court of Appeal in the present case, I do not think "likely" can bear this meaning in section 12(3). Section 12(3) applies the "likely" criterion to all cases of interim prior restraint. It is of general application. So Parliament was painting with a broad brush and setting a general standard. A threshold of "more likely than not" in every case would not be workable in practice. It would not be workable in practice because in certain common form situations it would produce results Parliament cannot have intended. It would preclude the court from granting an interim injunction in some circumstances where it is plain injunctive relief should be granted as a temporary measure.

17 Take a case such as the present: an application is made to the court for an interlocutory injunction to restrain publication of allegedly confidential or private information until trial. The judge needs an opportunity to read and consider the evidence and submissions of both parties. Until then the judge will often not be in a position to decide whether on balance of probability the applicant will succeed in obtaining a permanent injunction at the trial. In the nature of things this will take time, however speedily the proceedings are arranged and conducted. The courts are remarkably adept at hearing urgent applications very speedily, but inevitably there will often be a lapse of some time in resolving such an application, whether measured in hours or longer in a complex case.

18 What is to happen meanwhile? Confidentiality, once breached, is lost for ever. Parliament cannot have intended that, whatever the circumstances, section 12(3) would preclude a judge from making a restraining order for the period needed for him to form a view on whether on balance of probability the claim would succeed at trial. That would be absurd. In the present case the "Echo" agreed not to publish any further article pending the hearing of Cream's application for interim relief. But it would be absurd if, had the "Echo" not done so, the court would have been powerless to preserve the confidentiality of the information until Cream's application had been heard. Similarly, if a judge refuses to grant an interlocutory injunction preserving confidentiality until trial the court ought not to be powerless to grant interim relief pending the hearing of an interlocutory appeal against the judge's order.

A **19** The matter goes further than these procedural difficulties. Cases may arise where the adverse consequences of disclosure of information would be extremely serious, such as a grave risk of personal injury to a particular person. Threats may have been made against a person accused or convicted of a crime or a person who gave evidence at a trial. Disclosure of his current whereabouts might have extremely serious consequences. Despite the potential seriousness of the adverse consequences of disclosure, B the applicant's claim to confidentiality may be weak. The applicant's case may depend, for instance, on a disputed question of fact on which the applicant has an arguable but distinctly poor case. It would be extraordinary if in such a case the court were compelled to apply a "probability of success" test and therefore, regardless of the seriousness of the possible adverse consequences, refuse to restrain publication until the C disputed issue of fact can be resolved at the trial.

20 These considerations indicate that "likely" in section 12(3) cannot have been intended to mean "more likely than not" in all situations. That, as a test of universal application, would set the degree of likelihood too high. In some cases application of that test would achieve the antithesis of a fair trial. Some flexibility is essential. The intention of Parliament must be taken to be that "likely" should have an extended meaning which sets as a normal D prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of "real prospect" but permits the court to dispense with this higher standard where particular circumstances make this necessary.

21 Similar problems have arisen with other statutory provisions imposing a statutory threshold on the grant of relief by a court. Two E instances may be mentioned. A prerequisite to making a care order under section 31 of the Children Act 1989 is that the child in question is suffering or "is likely to suffer" significant harm. Your Lordships' House has held that in this context "likely" is used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case: see *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 585. So the degree of likelihood differed F according to the circumstances of the case. Again, a prerequisite to making an administration order under section 8(1) of the Insolvency Act 1986 is that the court considers making such an order "would be likely to achieve" one of the statutory purposes. Following the lead given by Hoffmann J in *In re Harris Simons Construction Ltd* [1989] 1 WLR 368, in *In re Primlaks (UK) Ltd* [1989] BCLC 734, 742, Vinelott J held this required the court to be G satisfied there is a "prospect sufficiently likely in the light of all the other circumstances of the case to justify making the order".

22 In my view section 12(3) calls for a similar approach. Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no H single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what

degree of likelihood makes the prospects of success "sufficiently favourable", the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.

23 This interpretation achieves the purpose underlying section 12(3). Despite its apparent circularity, this interpretation emphasises the importance of the applicant's prospects of success as a factor to be taken into account when the court is deciding whether to make an interim restraint order. It provides, as is only sensible, that the weight to be given to this factor will depend on the circumstances. By this means the general approach outlined above does not accord inappropriate weight to the Convention right of freedom of expression as compared with the right to respect for private life or other Convention rights. This approach gives effect to the parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression and at the same time it is sufficiently flexible in its application to give effect to countervailing Convention rights. In other words, this interpretation of section 12(3) is Convention-compliant.

The instant appeal

24 In the instant case it is not necessary or helpful to analyse the judge's careful judgment line by line to see whether in substance his interpretation of section 12(3) differed from that set out above. This is so because I am satisfied that in one particular respect the judge fell into error in any event. The error was identified by Sedley LJ and sufficiently explained by him at para 88 of his judgment [2003] Ch 650, 677, and para 1 of his "private" judgment. I agree with him that the principal happenings the "Echo" wishes to publish are clearly matters of serious public interest. The graduated protection afforded to "whistleblowers" by sections 43A to 43L of the Employment Rights Act 1996, inserted by the Public Interest Disclosure Act 1998, section 1, does not militate against this appraisal. Authorities such as the Inland Revenue owe duties of confidentiality regarding the affairs of those with whom they are dealing. The "whistleblower" provisions were intended to give additional protection to employees, not to cut down the circumstances where the public interest may justify private information being published at large.

25 Since Lloyd J misdirected himself in a material respect when exercising his discretion and the Court of Appeal did not exercise this discretion afresh, it falls to your Lordships' House to do so. I would allow this appeal. Given the public interest mentioned above I am firmly of the view that the Cream group's prospects of success at trial are not sufficiently

likely to justify making an interim restraint order in this case. On the evidence the Cream group are more likely to fail than succeed at the trial, and the Cream group have shown no sufficient reason for departing from the general approach applicable in that circumstance. I would discharge the judge's injunction so far as it relates to information already supplied by Ms Banerjee to the "Echo". The defendants were content that the injunction should otherwise remain in force.

26 I recognise that without reference to the content of the confidential information this conclusion is necessarily enigmatic to those who have not read the private judgments of the courts below. But if I were to elaborate I would at once destroy the confidentiality the Cream group are seeking to preserve. Even if the House discharges the restraint order made by the judge, it would not be right for your Lordships to make public the information in question. The contents of your Lordships' speeches should not pre-empt the "Echo's" publication, if that is what the newspaper decides now to do. Nor should these speeches, by themselves placing this information in the public domain, undermine any remedy in damages the Cream group may ultimately be found to have against the "Echo" or Ms Banerjee in respect of matters the Echo may decide to publish.

LORD WOOLF CJ

27 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

LORD HOFFMANN

28 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

LORD SCOTT OF FOSCOTE

29 My Lords, the issue raised by this appeal, namely, the proper judicial approach to section 12(3) of the Human Rights Act 1998, is one of great importance. This is particularly so for cases like this in which the disclosure which is sought to be prevented is, if the information in question is true, disclosure of iniquity by any standards. I have, however, had the advantage of reading in advance the opinion of my noble and learned friend, Lord Nicholls of Birkenhead, and am in complete agreement with the guidance he has given in para 22 of his opinion and with the reasons he has given for concluding that this appeal should be allowed. I, too, would make the order he has suggested.

BARONESS HALE OF RICHMOND

30 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

Appeal allowed with costs.

Solicitors: Brabners Chaffe Street, Liverpool; Wacks Caller, Manchester.

S H

CHAPTER 13

WHAT AMOUNTS TO A DISTURBANCE

TABLE OF CONTENTS

1. THE CAUSE OF ACTION

(1) The Nature of the Cause of Action

Nuisance and disturbance compared

13-01 Because the owner of an easement is not in any sense in possession of the servient tenement, his action for interference with his easement cannot be in trespass, since that is a cause of action which can only be maintained by a person in possession. His only remedies are abatement or an action for nuisance.[1] There is a distinction as to the foundation of the right of action for a private nuisance, properly so called, and an action for the disturbance of an easement. No proof of any right in addition to the ordinary right of property is required in the case of the former; for example, where an action is brought for polluting the air, or establishing an offensive trade.

On the other hand, to maintain an action for a disturbance of an easement to receive air by a window, proof of the accessorial right must be given.[2] Yet the

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1 *Paine & Co Ltd v St Neots Gas & Coke Co* [1939] 3 All E.R. 812 at 823–824, per Luxmoore LJ, citing *Aldred's Case* (1610) 9 Co. Rep. 57 and *Higgins v Betts* [1905] 2 Ch. 210.

2 *Paine & Co Ltd v St Neots Gas and Coke Co Ltd* [1938] 4 All E.R. 492; [1939] 3 All E.R. 812.

incidents of the two classes of rights, as far as concerns the remedies for any infringement of them, are similar, and in many cases an action may be founded on both; thus, in *Aldred's Case*[3] the plaintiff complained of the stoppage of his windows, and that the defendant had erected a wooden building and kept hogs in it, by means of which his easement of light was obstructed, and his enjoyment of his property diminished by the smell of the hogs. Both injuries are called nuisances, and the same principles as to the nature of the remedies for them apply indiscriminately to both.[4]

Need for sensible diminution of enjoyment

13-02 It is not every interference with the full enjoyment of an easement that amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total destruction of the easement. The injury complained of must be of a substantial nature, in the ordinary apprehension of mankind, and not one arising merely from the caprice or peculiar physical constitution of the party aggrieved.[5]

13-03 To establish his cause of action, therefore, the claimant has to prove:

(1) his title to the easement by express or implied grant or reservation or prescription;

(2) the scope of the easement, which in the case of an express easement will depend on the construction of the grant, in the case of an implied easement, on the circumstances giving rise to the implication and, in the case of prescription on the nature of the use made of the servient land at the beginning of and throughout the period relied upon;

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3 *Aldred's Case* (1610) 9 Co. Rep. 57.

4 This statement of principle in the 14th edn of this book was approved by Stamp LJ delivering the judgment of the Court of Appeal in *Saint v Jenner* [1973] Ch. 275 at 280. An interference with an easement was given as an example of a nuisance in *Williams v Network Rail Infrastructure Ltd* [2018] EWCA Civ 1514; [2019] Q.B. 601 at [40] and *Fearn v Tate Gallery* [2020] EWCA Civ 104; [2020] 2 W.L.R. 1081 at [31].

5 In *Leon Asper Amusements Ltd v Northmain Carwash* (1966) 56 D.L.R. (2d) 173, the plaintiff, who owned a theatre, had an easement which permitted theatre patrons to park after 18.00 on the servient tenement; the owners of the servient tenement attempted to direct patrons as to where they should park; it was held that this was an interference with the easement. In *Jackson v Mulvaney* [2002] EWCA Civ 1078; [2003] 1 W.L.R. 360, the dominant owner had a right to use the servient land as a communal garden for recreational and amenity purposes. The servient owner removed a flower bed in the garden without notice and without giving the dominant owner an opportunity to recreate or relocate it or its contents elsewhere. This was held to be an interference with the right.

(3) that there has been a substantial interference with the right to which he is entitled.

2. DISTURBANCE OF EASEMENTS

(1) The Various Easements

Watercourses

Interference with the watercourse of another

The following acts have been held to be actionable interferences with a right to a watercourse: **13-04**

(1) polluting the water in the watercourse[6];
(2) diverting the water so that there is no longer sufficient water for a mill,[7] even if the stream is already choked and obstructed[8];
(3) attaching a small pipe to a larger one so as to take water from it[9];
(4) opening a drain into a sewer on the servient land[10];
(5) any act which prevents the dominant owner drawing water from a spring.[11]

Interference with land of another by alterations to watercourse

If an owner of land for his own convenience diverts or interferes with the course of a stream, he must take care that the new course provided for it is sufficient to prevent mischief from an overflow to his neighbour's land.[12] He will be liable if such an overflow takes place.[13] Liability will be strict if the possibility of flooding was foreseeable. It is not a defence to say that something was not a nuisance when constructed. If a person constructs a culvert to carry a natural stream, he is under a high obligation to see that the stream continued to flow and must enlarge the culvert if it later proves inadequate, albeit due to factors which are not of his making.[14] This may be so even if it is necessary to acquire extra land in order to abate the nuisance.[15] **13-05**

Private rights of way

As regards the disturbance of private rights of way, it has been laid down that whereas in a public highway any obstruction is a wrong if appreciable, in the case **13-06**

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6 *Aldred's Case* (1610) 9 Co. Rep. 57 at 59a.
7 2 Rolle, pl. 8, 9.
8 *Bower v Hill* (1835) 1 Bing. N.C. 549.
9 *Moore v Browne* (1572) Dyer 319b, pl. 17.
10 *Lee v Stevenson* (1858) E.B. & E. 512.
11 "If one does something to prevent another from going to a spring, etc., or from drawing from a spring, such persons may fall to the assize" Bracton Lib. 4, f. 233.
12 *Sedleigh Denfield v O'Callaghan* [1940] A.C. 880 at 888, per Viscount Maugham.
13 *Greenock Corp v Caledonian Railway* [1917] A.C. 556.
14 *Bybrook Barn Centre Ltd v Kent CC* [2001] B.L.R. 55.
15 *Marcic v Thames Water Utilities Ltd* [2002] EWCA Civ 64; [2002] 2 All E.R. 55 at [91], reversed on appeal at [2003] UKHL 66; [2004] 2 A.C. 42.

A

[COURT OF APPEAL]

HOOPER *v.* ROGERS

1974 May 1, 2; June 10

Russell, Stamp and Scarman L.JJ.

B

Injunction—Mandatory injunction—Jurisdiction to grant—Quia timet injunction—Excavation causing process of soil erosion—Proven probability of eventual damage to nearby house—Whether injunction premature—Degree of future injury—Principles to be applied—Whether jurisdiction to make order

C

The plaintiff and the defendant were owners of adjacent farmhouses and owners and occupiers in common of the immediately surrounding land, which sloped steeply down from the plaintiff's farmhouse. The defendant, using a bulldozer, deepened a track, which cut across the slope, thereby interfering with its natural angle of repose and exposing it to a process of soil erosion which would eventually deprive the footings of the plaintiff's farmhouse of support and cause it to collapse. The plaintiff brought a successful action in the

D

county court, inter alia, for damages in lieu of an injunction ordering the defendant to reinstate the natural angle of repose of the slope.

On appeal by the defendant contending that the judge had no jurisdiction to grant a mandatory quia timet injunction:—

Held, dismissing the appeal, that as there was no evidence that any step other than that sought by way of the mandatory injunction would avoid the proven probability of damage to

E

the plaintiff's farmhouse, an injunction would not be premature (post, p. 49E–F); that the degree of future injury was not an absolute standard but justice should be done between the parties having regard to all the relevant circumstances; and that, in the circumstances of the present case, it was open to the judge to hold that he could have made the mandatory order and to grant damages in lieu (post, p. 50C–D).

Earl of Ripon v. *Hobart* (1834) 3 My. & K. 169 and

F

Fletcher v. *Bealey* (1885) 28 Ch.D. 688 considered.

Per Scarman L.J. The plaintiff's position, as co-occupier of the land where the act he complains of was done, is an irrelevant coincidence unless it can be used to raise a defence of contributory negligence or volenti non fit injuria (post, p. 51D–E).

The following cases are referred to in the judgments:

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Fletcher v. *Bealey* (1885) 28 Ch.D. 688.

Hall v. *Beckenham Corporation* [1949] 1 K.B. 716; [1949] 1 All E.R. 423.

Laugher v. *Pointer* (1826) 5 B. & C. 547.

Ripon (Earl of) v. *Hobart* (1834) 3 My. & K. 169.

The following additional cases were cited in argument:

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Attorney-General v. *Nottingham Corporation* [1904] 1 Ch. 673.

Lemos v. *Kennedy Leigh Development Co. Ltd.* (1961) 105 S.J. 178, C.A.

Morris v. *Redland Bricks Ltd.* [1970] A.C. 652; [1969] 2 W.L.R. 1437; [1969] 2 All E.R. 576, H.L.(E.).

West Leigh Colliery Co. Ltd. v. *Tunnicliffe & Hampson Ltd.* [1908] A.C. 27, H.L.(E.).

APPEAL from Judge Chope at Launceston County Court.

On March 9, 1972, the plaintiff, Albert Edgar Hooper, as owner of Pengold Farm, Crackington Haven, Cornwall, brought proceedings for an injunction and damages against the defendant, Digory Arthur Rogers, alleging that track-excavating operations carried out by the defendant in December 1971 constituted a nuisance and/or an unlawful interference with the plaintiff's rights and property. The plaintiff claimed, inter alia, (1) an injunction restraining the defendant from carrying out further work; (2) a mandatory injunction requiring the defendant, inter alia, to replace and consolidate the excavations with quarry rubble; and (3) damages not exceeding £750. On July 20, 1973, Judge Chope gave judgment for the plaintiff for £750. The defendant appealed on the grounds (1) that the principles upon which a quia timet mandatory injunction may be granted, or damages awarded in lieu, are that (a) there is a very strong probability that grave damage will occur, and (b) such damage is imminent; (2) that the evidence did not show that there was a very strong probability of grave damage to the plaintiff's farmhouse, or that such damage was imminent; and (3) that there was no ground in law or fact upon which the judge could properly award an injunction or damages in lieu.

The facts are stated in the judgment of Russell L.J.

Bruce Maddick for the defendant. The plaintiff failed to show that damage to his farmhouse was imminent; and it is necessary for the making of a quia timet injunction for damage to be certain and imminent, a fear that damage will occur in the future is not sufficient. *Earl of Ripon* v. *Hobart* (1834) 3 My. & K. 169, 172, 176–177, established the requirements of certainty and imminency in the granting of a quia timet injunction. Reliance is also put on *Fletcher* v. *Bealey* (1885) 28 Ch.D. 688, *per* Pearson J. at p. 698.

In *Lemos* v. *Kennedy Leigh Development Co. Ltd.* (1961) 105 S.J. 178 the Court of Appeal upheld a finding that in 1959 a danger which might occur in 1962 was not sufficiently imminent, though there was a definite future risk if nothing was done.

For the purposes of the appeal the court should view the case as though it were an action for support. Certainly, the parties are tenants in common of the track and the defendant was wrong to remove part of the bank, but the case was not concerned simply with damage to the bank but principally with future damage to the plaintiff's farmhouse which brings the case within the support type of action.

The damages awarded were based on the cost of preventing potential danger to the farmhouse, but the plaintiff's loss is not the cost of preventing damage to the farmhouse by infilling. If the damages are to be regarded as common law damages, the defendant's answer is that there is no tort until damage has been sustained.

The plaintiff could not succeed at common law because he has suffered no damage to his house. In an action in nuisance based upon deprivation of support it is necessary to show actual damage, even

A future certain damage is not enough. [Reference was made to *Winfield and Jolowicz on Tort*, 9th ed. (1971), pp. 563–564; and *West Leigh Colliery Co. Ltd.* v. *Tunnicliffe & Hampson Ltd.* [1908] A.C. 27.]

[SCARMAN L.J. Would you accept that although at common law no damages can be recovered where injury is merely threatened, where injury has already occurred compensation can be recovered for damage which would occur in the future?]

B Generally that must be so, but the present is a very special case because no tort has been committed against the plaintiff in regard to the house. It would put the matter in a different light if a trespasser had taken the defendant's action rather than a tenant in common. [Reference was made to *Morris* v. *Redland Bricks Ltd.* [1970] A.C. 652.]

C *Graham Neville* for the plaintiff. The defendant has wrongly used his ownership of the land so as to cause a substantial interference with the plaintiff's rights as joint owner of the land. The tort, be it in nuisance or negligence, is the interference with the rights of the plaintiff by moving the earth about without consent in such a way as to interfere with the plaintiff's enjoyment of his land. The plaintiff has established that that tort caused damage, part of the damage flowing as a result being D the future damage to the house. The support cases are different because they rely on damage to constitute the tort, a cause of action not arising until damage occurs and there can be no claim in respect of prospective damage.

A joint owner can certainly commit a nuisance against another joint owner if he uses the land in such a way as to interfere with that other's enjoyment of the land, but damage has to be proved before the cause E of action arises.

If the plaintiff cannot establish any right to damages at common law in regard to the house, he must rely on a quia timet application, the question then being whether the case is one in which the court would have jurisdiction to order the defendant to restore the angle of the bank. It is clear on authority that damages can be awarded in lieu of a quia F timet injunction. The judge found a very real probability of damage and reliance is made on *Fletcher* v. *Bealey*, 28 Ch.D. 688, 698. That case had rather different facts, the onset of the damage there being of such a nature that the plaintiff would receive sufficient warning to enable him to bring an action in time. The present case comes within the second leg of Pearson J.'s observations at p. 698. It was not necessary to take any particular step at the time the action was brought in *Fletcher*, G whereas in the present case the erosion must be stopped now or very soon, there being no further remedy which is likely to be of assistance in the future.

In *Attorney-General* v. *Nottingham Corporation* [1904] 1 Ch. 673, which was a public nuisance case, there was no use of the word "imminent."

H *Lemos* v. *Kennedy Leigh Development Co. Ltd.*, 105 S.J. 178, was a very different case on its facts; there was an assurance by the defendant that he would take all possible precautions to avoid the risk of damage.

In *Morris* v. *Redland Bricks Ltd.* [1970] A.C. 652 reliance is made on

the use of the words "grave damage will accrue to him in the future," in Lord Upjohn's first general principle at p. 665. His third principle, at p. 666, seems to relate only to measure of damages and really seems to be aimed at a situation of someone asking for a quia timet injunction where to repair would cost half a million pounds while the damage to the plaintiff does not exceed £2,000. In such a case the court would not make an order to repair, but this point does not really come into the present case except in the sense of being something which the court should take into account when ordering damages.

Maddick in reply. An example of the sort of situation envisaged in the passage in *Fletcher*, 28 Ch.D. 688, 698, would be the case of a plaintiff with a house next to a factory chimney which he alleges is in danger of falling; the chimney would fall in seconds, and, accordingly, it would be impossible for the plaintiff to protect himself against future damage. The present is not such a case.

In *Attorney-General* v. *Nottingham Corporation* [1904] 1 Ch. 673 and *Morris* v. *Redland Bricks Ltd.* [1970] A.C. 652 imminence was not in question and there was no need to mention it.

[RUSSELL L.J. A mandatory injunction is relevant in a now or never type of case, is it not?]

It is relevant in a now or probably never type of case. In any event the plaintiff has the right to infill himself as a co-occupier of the track though it is conceded that in so far as he incurred expense in so doing he would be entitled to claim therefor against the defendant. But on the present action the plaintiff is not entitled to recover against the defendant.

Cur. adv. vult.

June 10. The following judgments were read.

RUSSELL L.J. This appeal from Launceston County Court arises out of an episode in December 1971, when the defendant procured the levelling and deepening of a track on a piece of land known as Town Place. He did this without warning to the plaintiff and in a most high-handed manner. In about the centre of this land are two semi-detached buildings. The one to the east, Pengold farmhouse, belongs to the plaintiff, the other belongs to the defendant and is not occupied. The title to the rest of Town Place was not very closely investigated below, but I think that we must proceed upon the assumption that it was and is beneficially owned and occupied by the parties in common. The lie of the land is that it descends towards the east from the plaintiff's farmhouse fairly steeply. The track in question goes north from the north-east corner of the plaintiff's farmhouse for some 100 feet or so, turns hairpin right and continues south-east for some 250 feet and turns hairpin left slightly east of north steeply down to a stream which is the boundary between Town Place and some of the defendant's fields. From this description it will appear that the middle stretch of the track cuts across a steep slope, the west edge being at its nearest point some 80 feet from the farmhouse. The gouging out by bulldozer and deepening of the track in this middle section withdrew support from the

west bank of the track. Below, the judge concluded that the defendant had been guilty of a nuisance by his activities, causing damage totalling some £40 under two heads, both related to the effect of those activities on the occupation of the plaintiff of Town Place. There is no appeal in respect of that finding; it was not suggested below that an action laid in nuisance was not sustainable in law by one co-owner in occupation against another co-owner in occupation, and I do not propose to examine that matter.

The most serious complaint by the plaintiff was based upon the threat to the support of his farmhouse which on the evidence was created by withdrawal of support from the west edge of the track, or perhaps, to put it more correctly, by the interference by the defendant's activities with the natural angle of repose of the hillside. What was forecast was erosion of the soil in an easterly direction, starting at the west edge of the track, continuing backwards up the hill towards the plaintiff's farmhouse, depriving some trees between the track and the farmhouse of their root hold until they would fall over and no longer help to bind the soil on the slope, with the process ending in the footings of the farmhouse being deprived of earth support and the building being damaged and collapsing: all this, it was said, being aided by the nature of the terrain and the prevailing westerly gales and rain. The judge awarded damages under this head based on the cost of reinstating the track to its former condition by replacing the cubic yardage of soil removed and consolidating it: this would be considerably more than the £750 limit, and judgment was accordingly given for £750. The defendant appeals on the ground that no damages based upon the threat to the support of the farmhouse could be awarded.

It is, I apprehend, clear that in respect of the support of the farmhouse no damages at common law could have been awarded. It is established by authority binding upon this court (a) that damage is the gist of the action in nuisance, (b) that in an action for damages based upon deprivation of support to land or buildings it is necessary to establish that the land or buildings have been physically damaged by the withdrawal of support, and (c) that damages cannot be awarded at common law in a case of probable or even certain future physical damage to the land or buildings from loss of support based upon a present decline in the market value of the land due to such probable or certain future physical damage. But this is a case in which a mandatory order was sought upon the defendant to take such steps as were necessary to reinstate the excavated track to its former condition so as to restore to the slope the angle of repose of the soil and thus avert the threat of future removal of support to the farmhouse. The award of damages could only be supported as equitable damages under the Chancery Amendment Act 1858 (Lord Cairns's Act) in lieu of such an injunction. The injunction, mandatory in character, would be quia timet, as preventing an apprehended legal wrong, the legal wrong requiring in this case physical damage to the farmhouse for its constitution or (save the mark) perfection.

In this connection I would observe that, in so far as there may be an argument in respect of any effect on Town Place itself that an action in nuisance would not lie by one occupying co-owner against the other, it does not seem to me that any such difficulty should lie in the plaintiff's path in

relation to his wholly-owned farmhouse, even if the point of law were open to the defendant in this court, which it is not. A

The case in this court therefore boils down to the question whether it is one in which the judge could have (however unwisely in the context of the relationship of unremitting hostility between the parties) made a mandatory order for the reinstatement of the natural angle of repose of the slope, having regard to the evidence of the probable ultimate outcome, in terms of removal of support to the farmhouse, of the defendant's interference B with that natural angle of repose. The whole contention of counsel on behalf of the defendant is that there was here no case on which a mandatory order could have been made—quia timet: and, consequently, there was no scope for an award of equitable damages in lieu under Lord Cairns's Act. I observe that it was, at least tentatively, conceded that if the plaintiff expended £750 (or even more) on infilling and consolidating the track, the C plaintiff as co-owner would be entitled in a separate action to claim against the defendant as co-owner contribution to the cost of certainly 50 per cent. and perhaps 100 per cent. I do not think it right to assume against the defendant that this must be so: we have not sufficiently examined the situation in law between co-owners in common occupation. Accordingly, I do not think that this case should be decided against the plaintiff upon the assumption that he is entitled in right of his co-ownership to reinstate D the track and recover in other proceedings the cost of so doing. It might even be that to the co-owned land the acts of the defendant were beneficial.

Before considering authority related to the circumstances in which injunctions quia timet, and mandatory injunctions in particular, may be ordered, I would refer to the evidence of the situation in this case. I have already described in general terms the lie of the land and the threat to the E farmhouse.

Mr. Borton, a surveyor, inspected the site on behalf of the plaintiff in January 1972. He inspected again in January and June 1973, and observed erosion from the west of the track. He considered that there was a long-term danger to the plaintiff's farmhouse by the process that I have already described. He said that if (as had been done) you dig out the bottom, the top follows. He could not give a time when the erosion would F reach the farmhouse. His remedy was either to fill back the track and consolidate or (more expensively) build a retaining wall on the west edge of the track as dug out.

The judgment contains these passages:

> "The evidence of Mr. Borton, which I accept, is that there is a real probability, not just a possibility—a real probability—of prejudice to G the plaintiff's house if nothing is done. He says that when you take out the bottom, then the top follows. . . . The trees at the top of the bank will be in jeopardy with the continual erosion, and there is a long-term danger to the building. . . . I do not agree that it is all speculative. I am satisfied that unless something is done, judging by what has happened already since December 1971, particularly with H regard to the terrain, the trees on the bank to the west of the track will certainly be in jeopardy as continuing falls of soil and shillet occur and continuing erosion occurs, and that unless the soil on that

A bank is retained there is, as Mr. Borton says, a probability in the course of time that the plaintiff's premises will be in jeopardy. . . . I accept the evidence of Mr. Borton as to the reality of the risk, and I find there is a real risk."

The situation is, therefore, as found by the judge, that there is a real probability that in time the activities of the defendant will result in actual B damage to the plaintiff's house by removal of support unless the activities are prevented from having that effect by infilling the track and consolidating. No evidence was called to suggest that at a later stage, when the threat became more imminent in point of time, preventive measures would be available higher up the slope nearer to the farmhouse. In those circumstances, was there jurisdiction to make a mandatory order on the defendant to take those steps had the judge in his discretion decided to do so? The C defendant contends not. For the defendant it was contended that a mandatory injunction could not have been ordered because the injury to the farmhouse was, on the evidence, neither certain nor "imminent." Reliance was placed upon passages in the judgment of Brougham L.C. in *Earl of Ripon* v. *Hobart* (1834) 3 My. & K. 169, in particular at pp. 176 and 177, as showing that imminence was a requirement. That was an application on affidavit evidence for an interlocutory injunction to restrain the defendants D from operating a steam engine to drain certain lands on the ground that its operation would throw so much water into the River Witham that it would damage the banks: there was voluminous and conflicting evidence on whether damage would result. I do not regard the use of the word "imminent" in those passages as negativing a power to grant a mandatory injunction in the present case: I take the use of the word to indicate that E the injunction must not be granted prematurely. But here the operation has been performed, and there was no evidence that any other step would avoid the proven probability of damage to the farmhouse than the step sought by way of mandatory injunction: it could not be said to be premature.

Our attention was next drawn to *Fletcher* v. *Bealey* (1885) 28 Ch.D. F 688, a decision of Pearson J. A paper manufacturer was anxious lest a deposit of vat waste from alkali works on land upstream should leak into the river and pollute the water which the plaintiff used in his manufacture. At the trial he sought an injunction quia timet to restrain the dumping of vat waste. The decision, as summarised in the headnote, was as follows:

G "*Held*, that, it being quite possible by the use of due care to prevent the liquid from flowing into the river, and it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, and must be dismissed with costs. But the dismissal was expressly declared to be without prejudice to the right of the plaintiff to bring another action hereafter, in case of actual injury or imminent danger."

H Pearson J. said, at p. 698:

"There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage

will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the damage is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a quia timet action."

Again it seems to me that "imminent" is used in the sense that the circumstances must be such that the remedy sought is not premature; and again I stress that there is no suggestion that in the present case any other step than reconstituting the track will be available to save the farmhouse from the probable damage.

In different cases differing phrases have been used in describing circumstances in which mandatory injunctions and quia timet injunctions will be granted. In truth it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances. I am not prepared to hold that on the evidence in this unusual case the judge was wrong in considering that he could have ordered the defendant to fill in and consolidate the road at the suit of the plaintiff as owner of the farmhouse, or that he was wrong in ordering damages in lieu of such an order. I would dismiss the appeal.

STAMP L.J. I entirely agree with the judgment which has been delivered, and I too would dismiss the appeal.

SCARMAN L.J. I agree with the judgment delivered by Russell L.J. I wish, however, to add a few words on the topic which was not canvassed below but is basic to the case the plaintiff seeks to establish. He has to prove that the threat of damage to his land arises from acts or omissions of the defendant on his, the defendant's, land. In *Salmond on Torts*, 16th ed. (1973), p. 52, one finds this passage:

> "As nuisance is a tort arising out of the duties owed by neighbouring occupiers, the plaintiff cannot succeed if the act or omission complained of is on premises in his occupation. The nuisance must have arisen elsewhere than in or on the plaintiff's premises."

The plaintiff is certainly the occupier of the threatened farmhouse; but he is also, together with the defendant, in occupation of the land where occurred the act complained of. Does his occupation of the land where the excavations were done destroy the possibility of a cause of action in nuisance? Indeed, if the occupier of the farmhouse had been somebody other than the plaintiff, could not such a person have established a cause of action against the plaintiff himself? The reason for an occupier's liability for nuisance created on his land was concisely stated by Finnemore J. in *Hall* v. *Beckenham Corporation* [1949] 1 K.B. 716. Finnemore J. there said, at p. 724: ". . . an owner of private property can prevent people from coming on to his land and committing a nuisance there."

Sir Charles Abbott C.J. in *Laugher* v. *Pointer* (1826) 5 B. & C. 547, 576, 100 years earlier put it thus:

> "I have the control and management of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another."

Whatever may be the rights and duties inter se of co-occupiers of land, neither can prevent the other from coming on to the land; and the plaintiff would have needed instant and extraordinary legal skill as well as a preternatural foresight of the defendant's intentions to have prevented the excavations complained of by the exercise of his authority as co-occupier: in fact he did try, and failed.

The truth is that, without notice to, or the consent of, the plaintiff, the defendant exercised his authority as occupier so as to do the work which constituted the threat to the plaintiff's farmhouse. If it be said that the plaintiff can now come upon the land and abate the nuisance, that is also a right possessed by a stranger whose land has been subjected to nuisance. Since the availability to a stranger of the extra-judicial remedy of abatement does not deprive him of the right to come to court, I see no reason why on this account the plaintiff should be non-suited.

In my view, the plaintiff's position, as co-occupier of the land where the act he complains of was done, is an irrelevant coincidence unless it can be used to raise a defence of contributory negligence or volenti non fit injuria, neither of which is to be found in this case. He has only to show that land of which he is the occupier is damaged, or threatened, by a wrongful act done upon land of which the defendant is an occupier, and either created, continued or adopted by the defendant, to establish his cause of action. In the present case he has established a threat of harm created by the defendant: and, for the reasons given by Russell L.J. that is enough to entitle him to the relief he seeks.

Appeal dismissed with costs.

Solicitors: *Boxall & Boxall for Blight, Broad & Skinnard, Callington; Peacock & Goddard for Peter, Peter & Sons, Bude.*

C. N.

Easter Term
[2021] UKSC 15

JUDGMENT

Her Majesty's Attorney General (Applicant) *v* Crosland (Respondent)

before

Lord Lloyd-Jones
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

10 May 2021

Heard on 10 May 2021

Applicant	*Respondent*
Aidan Eardley (Instructed by The Government Legal Department)	Timothy Crosland

JUDGMENT OF THE COURT:

1. This application by Her Majesty's Attorney General for permission to pursue an application for committal for contempt concerns an alleged breach of an embargo on publication of a judgment of the Supreme Court in *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52; [2021] PTSR 190 by Mr Timothy Crosland, an unregistered barrister who represented the charity Plan B Earth in those proceedings. That appeal concerned the lawfulness of the Airports National Policy Statement, ("the ANPS"), and its accompanying environmental report. The ANPS was designated as national policy on 26 July 2018 by the Secretary of State for Transport. The ANPS is the national policy framework which governs the construction of a third runway at Heathrow Airport. Any future application for development consent to build this runway will be considered against the policy framework in the ANPS. The ANPS does not grant development consent in its own right.

2. The alleged breach of embargo was referred by Lord Reed, President of the Supreme Court, to the Attorney General and the Attorney General decided to apply for permission to pursue proceedings against the respondent, Mr Crosland, seeking his committal or such other penalty as the court considers appropriate for contempt of court. This application is being heard by a different panel of the Supreme Court from that which sat on the Heathrow Airport case.

3. This hearing is not concerned with the substance of the judgment of the Supreme Court in the Heathrow Airport case. That judgment has been handed down by the Supreme Court and, as with all judgments in all courts in this country, members of the public are free to subject it to the closest scrutiny and to express their views on the decision. The present proceedings are about a distinct and very limited matter: the conduct of Mr Crosland in disclosing the result of the appeal in breach of the embargo before it was made public by the Supreme Court and whether that constitutes a contempt of court.

<u>The grounds of committal</u>

4. The grounds of committal relied on by the Attorney General are as follows:

> The applicant applies for the committal of the respondent or such other penalty as the court considers appropriate for his contempt of court on the following grounds:

"1. On 7 and 8 October 2020 the court heard an appeal in the case of *R (Friends of the Earth Ltd) v Heathrow Airport Ltd*. The respondent to this application represented the second respondent to the appeal, Plan B Earth, in his capacity as director of that organisation.

2. On 9 December 2020, a copy of the court's draft judgment in the appeal was circulated to the parties' representatives in accordance with paragraphs 6.8.3 to 6.8.5 of Practice Direction 6. The draft was marked 'in confidence'. The rubric on the title page stated that those to whom the content of the draft are disclosed must take all reasonable steps to preserve their confidentiality and that any breach of these obligations may be a contempt of court. The covering email via which the draft judgment was circulated repeated that the draft was strictly confidential.

3. On the morning of 15 December 2020, the day before judgment in the appeal was due to be handed down, the respondent sent an email to the Press Association, and, it is to be inferred, other persons unknown, containing a personal statement in which he disclosed the outcome of the appeal. The said statement included the words, 'I have taken the decision to break the embargo on that decision as an act of civil disobedience. This will be treated as "contempt of court" and I am ready to face the consequences'.

4. At around 12.41 pm on 15 December 2020 the respondent published the same statement on Twitter via the account of Plan B Earth (@PlanB_earth). The said account has some 3,585 followers.

5. At all material times the respondent was aware that he had been sent the draft judgment in confidence and that he was prohibited from disclosing its contents to the public prior to the judgment being handed down.

6. As a result of the publication of the said statement by the respondent, and as he intended or was reasonably foreseeable, the outcome of the appeal was widely publicised online in the national media on 15 December and the morning of 16 December prior to the judgment being handed down at

> 09.45 am on 16 December 2020 by Reuters, City AM, The Independent, the Daily Telegraph and the Mail Online. The statement was also re-tweeted in advance of the judgment being handed down by followers of Plan B Earth, including the organisation Extinction Rebellion, which itself had some 55,600 followers at the time.
>
> 7. By disclosing the outcome of the appeal to the public as set out above, knowing that such was prohibited by the court, the respondent interfered with or created a real risk of interference with the administration of justice and thereby committed contempt of court."

Permission

5. We consider that the application discloses a reasonable basis for seeking the committal of the respondent and that it is in the public interest that the application should be heard; see *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB); [2020] 3 All ER 477, paras 23 and 98 to 101. The conduct alleged to constitute the contempt is not disputed and, if established, the contempt would be a serious one. Accordingly, we grant permission.

The rubric

6. It is necessary to refer to the relevant events in a little more detail. The draft judgment in the Heathrow appeal was circulated in confidence to the parties' representatives, including the respondent on 9 December 2020. The rubric on the draft judgment read:

> "IN CONFIDENCE
>
> This is a judgment to which paragraphs 6.8.3 to 6.8.5 of Practice Direction 6 apply. The contents of this draft are confidential initially to the parties' legal representatives and, when disclosed to the parties in the 24 hours prior to delivery, also to the parties themselves. Those to whom the contents are disclosed must take all reasonable steps to preserve their confidentiality. No action is to be taken in response to them before judgment is formally pronounced unless this has been authorised by the court. A breach of any of these obligations may be treated as a contempt of court."

7. The email from the judgments clerk sent with the draft judgment invited corrections to the draft judgment. It continued:

> "The judgment is strictly confidential until given. The contents of these documents are not for publication, broadcast or use on club tapes before judgment has been promulgated. The documents are issued in advance by the Justices of the Supreme Court on the understanding that no approach is made to any organisation or person about their contents before judgment is given (see paragraph 6.8.3 to 6.8.5 of Practice Direction 6)."

8. The Practice Direction states in relevant part:

> "6.8.3 The judgment of the Court is made available to certain persons before judgment is given. When, for example, judgment is given on a Wednesday morning, it is made available to counsel from 10.30 am on the previous Thursday morning. In releasing the judgment, the Court gives permission for the contents to be disclosed to counsel, solicitors (including solicitors outside London who have appointed London agents) and in-house legal advisers in a client company, Government department or other body. The contents of the judgment and the result of the appeal may be disclosed to the client parties themselves 24 hours before the judgment is to be given unless the Court or the Registrar directs otherwise. A direction will be given where there is reason to suppose that disclosure to the parties would not be in the public interest.
>
> 6.8.4 It is the duty of counsel to check the judgment for typographical errors and minor inaccuracies. In the case of apparent error or ambiguity in the judgment, counsel are requested to inform the Judicial Support section as soon as possible. This should be done by email to Judicial Support no later than two working days before the date judgment is to be given. The purpose of disclosing the judgment is not to allow counsel to re-argue the case, and attention is drawn to the opinions of Lord Hoffmann and Lord Hope in *R (Edwards) v Environment Agency* [2008] UKHL 22; [2008] 1 WLR 1587.
>
> 6.8.5 Accredited members of the media may on occasion also be given a printed copy of the judgment in advance by the Court's communications team. The contents of this document

> are subject to a strict embargo and are not for publication, broadcast or use on club tapes before judgment has been delivered. The documents are issued in advance solely at the Court's discretion, and in order to inform later reporting, on the strict understanding that no approach is made to any person or organisation about their contents before judgment is given."

Events following the circulation of the draft judgment

9. There is no substantial disagreement between the parties as to the primary facts. Documents before this court show that, following circulation of the draft judgment, the respondent sent emails to the court in which he contended that there were inaccuracies in the draft judgment and sought permission to discuss them with external lawyers prior to hand down. In those emails, the respondent maintained that the Secretary of State for Transport had in June 2018 assessed the ANPS against the historic global temperature limit of 2 degrees Centigrade, a standard which by that date had been rejected by the UK Government and by the wider international community. The respondent said that the fact that this standard had been applied had only come to light through the disclosure process in the Heathrow litigation.

10. The respondent's request to discuss the implications of this with external lawyers prior to hand down was refused.

11. On 14 December 2020, the respondent was informed that the draft judgment would be amended to acknowledge an argument he had advanced but that there would be no substantive change to the judgment. At 11.22 on 15 December 2020, the respondent published his personal statement in which he disclosed the outcome of the appeal in an email sent to the Press Association and possibly to other media organisations. He issued a statement in similar terms on Plan B's Twitter account at 12.41. He also emailed the Supreme Court judgments clerk in similar terms at 13.55.

12. At about 11.35 on 15 December 2020, the Supreme Court's Communications Team was notified of the statement through a telephone call from the Press Association. It issued a statement to the Press Association and from 11.50 the Supreme Court began notifying media organisations of the breach of embargo. However, by that time publication had been made by various organisations, including Reuters, City AM, The Independent, The Daily Telegraph and the Mail Online. Some of these withdraw their articles but The Independent and the Mail Online did not. The Independent article was removed after the judgment had been handed down.

13. At 16.36 on 15 December 2020, the Supreme Court requested the respondent to remove the statement he had shared on Twitter until 9.45 the next day as it was in breach of the embargo. The respondent did not respond to the email and the tweet was not deleted. Plan B's Twitter account had 3,585 followers. It was re-tweeted at least 406 times by other Twitter users, including Extinction Rebellion UK, which had 55,600 followers at that time. The judgment was handed down by the Supreme Court at 9.45 am on 16 December 2020.

14. On 16 December a link to the respondent's statement was posted on Plan B's website.

15. The respondent wrote an article for The Independent which was published online on 17 December 2020. It was published under the title "I am the lawyer who committed contempt of court over Heathrow's expansion plans - this is why I did it". We note that the respondent states that he in fact submitted the article under the title "Why I broke the court embargo on the Heathrow judgment" and that the title was changed by the editor at The Independent. We also note that the respondent appears to have made no objection at the time to the amended title under which it was published, that that title reflected what was said in the last paragraph of the article, and that in his blog post entitled "Barrister who breached Supreme Court embargo: I felt I had no choice" the respondent referred to "my contempt of court in breaking the embargo on the Heathrow judgment".

The issues for decision

16. The principal issues that we have to decide are (1) whether the respondent was responsible for disclosing to the public the outcome of the Supreme Court's judgment in the Heathrow Airport case prior to the Supreme Court handing down its judgment in breach of an embargo on disclosure; and, if so, (2) whether, when he did so, he was aware of the embargo on disclosure; (3) whether in all the circumstances the respondent's actions were or created a risk of an interference with the administration of justice that was sufficiently serious to amount to the *actus reus* of criminal contempt; and (4) whether the respondent had a specific intention to interfere with the administration of justice. If the contempt of court is proved to the criminal standard, it will be necessary to consider questions relating to penalty and costs.

Findings of fact

17. We make the following findings of fact which we find proved to the criminal standard.

18. First, the respondent was responsible for the disclosure. On the morning of 15 December at 11.22 the respondent sent an email to the Press Association containing his personal statement in which he disclosed the outcome of the appeal. It stated in terms, "Tomorrow the Supreme Court will overturn the Court of Appeal's judgment in Heathrow's favour and rule that Mr Grayling acted lawfully". Just over an hour later at 12.41 he posted a similar statement on Plan B's Twitter account. The respondent has not denied that he made these publications. On the contrary, he has admitted them.

19. Secondly, when the respondent made the disclosures, he was aware of the embargo. Once again, this was admitted by the respondent. The personal statement sent to the Press Association at 11.22 stated that he had taken the decision to break the embargo as an act of civil disobedience. The statement posted on Plan B's Twitter account at 12.41 stated, "I am breaking the court embargo on Heathrow to protest against the injustice of the verdict, which is a betrayal of the younger generation and those on the frontline of the crisis in the UK and around the world."

20. The respondent here points to the sentence in the rubric which states "A breach of any of these obligations may be treated as a contempt of court". He suggests that there is uncertainty in this statement. There is no substance in this submission. First, the rubric made it abundantly clear that there was a prohibition on publication of the judgment or any part of it prior to hand down. What matters here is that, when he made the disclosure, the respondent was aware of the embargo. Secondly, the prohibition on publication was reinforced by the express warning in the email from the judgments clerk which enclosed the draft judgment. Thirdly, the respondent was in no doubt that his conduct would be likely to be treated as a contempt of court. In his personal statement he stated at the outset, "This will be treated as a contempt of court and I am ready to face the consequences". We find that these acts of publication were deliberate and calculated breaches of the embargo.

21. Furthermore, the respondent's suggestion that it was because of some doubt as to the confidentiality of the judgment that he sought leave of the court to obtain independent legal advice is contradicted by what he said at the time. The request that he be permitted to discuss the draft judgment with external lawyers made by email at 11.15 on 11 December gave as the reason that "We need legal advice on what we can and cannot say <u>following the judgment</u>, depending on its final form" (emphasis added).

Civil or criminal contempt?

22. The next question for consideration is whether the respondent's conduct was or created a risk of an interference with the administration of justice that was sufficiently serious to amount to a criminal contempt.

23. In the words of Lord Toulson in *Director of the Serious Fraud Office v O'Brien* [2014] UKSC 23; [2014] AC 1246, para 39: "A criminal contempt is conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice". The present case is not a case involving a breach of an order by a party to litigation where the order has been made at the instance of an opposing party and its purpose is simply to protect the private rights of that other party. Rather the order was made in order to protect the administration of justice and its breach involves a general interference from which the administration of justice must be safeguarded; see, for example, *Attorney General v Yaxley-Lennon* [2019] EWHC 1791 (QB); [2020] 3 All ER 477, para 54; *Attorney General v Dallas* [2012] EWHC 156 (Admin); [2012] 1 WLR 991; *Solicitor General v Cox (Contempt of Court: Illegal Photography)* [2016] EWHC 1241 (QB); [2016] 2 Cr App R 15, para 73. Furthermore, the requirement of confidentiality was imposed directly by the court on the respondent, who was a representative of a party to the litigation. The strictly confidential basis upon which draft judgments are provided to parties is well established, as are the reasons underpinning the duty of confidentiality in this context; see, for example, *Director of Public Prosecutions v P (No 2)* [2007] EWHC 1144 (Admin); [2008] 1 WLR 1024, paras 2 and 10 per Smith LJ; *R v Noshad Hussein* [2013] EWCA Crim 990, paras 1 to 2 per Treacy LJ. The potential damage to the administration of justice which breaches of this duty of confidentiality may cause has also been emphasised; see, for example, *P (No 2)* at para 10 per Smith LJ. A critical point here is that the respondent has interfered with the court's control of its own proceedings. We accept the submission on behalf of the Attorney General that the publication of the outcome of the appeal in breach of the embargo was an interference with the proper administration of justice.

24. Moreover, we accept the submission on behalf the Attorney General that the threshold of seriousness is passed in this case. First, it is vital for the authority of the court and in the interests of legal certainty that its judgments should be delivered at a time of its choosing and in a definitive form. Published judgments must be accurate, complete and in final form. Leaks of draft judgments could undermine the authority of the court and its judgments.

25. Secondly, the Attorney General has correctly referred to the powerful public interest in the court's being able to circulate draft judgments confidentially among the parties prior to their being handed down in complex and important cases so that

typographical mistakes and other errors can be addressed and a final definitive version of the judgment can be handed down, so that the parties can prepare submissions on consequential matters and so that the parties can prepare themselves for the consequences of the judgment becoming public. These are matters of importance to the administration of justice. If the confidentiality of the process is not respected, it will have to be abandoned and these benefits will be lost. In this regard we also note that in October 2020 the Attorney General had cause to issue a media advisory notice drawing attention to the importance of this confidentiality. In our view, this reflects the importance of the procedure and the need to protect it from abuse.

26. Thirdly, the outcome of the appeal and the respondent's comments on it were published very widely before hand down. It was clearly the intention of the respondent to publish the result and his comments on it as widely as possible.

27. Fourthly, the respondent's statements were in terms which defied the authority of the court and which could encourage others to disobey the prohibition on publication and to disclose this or other draft judgments.

28. So far as the *mens rea* of a criminal contempt of court is concerned, we are satisfied to the criminal standard that the respondent's breach of confidentiality was deliberate and in breach of a court order of which the respondent was well aware. In our view, that is sufficient for present purposes (see *Solicitor General v Cox* at paras 69 and 73) and it is not necessary for the applicant to prove an ulterior intention to interfere with the administration of justice. However, in any event, we are also satisfied to the criminal standard that in publishing the judgment in breach of the embargo the respondent did have a specific intention to interfere with the administration of justice. Such an intention may be readily inferred here. The respondent is a barrister who would have been well aware of the purpose of the condition of confidentiality attaching to draft judgments and the significance of its breach. He knew that the prohibition on publication was intended to serve the interests of justice. Nevertheless, as he stated in his personal statement, he took the deliberate decision to break the embargo as an act of civil disobedience, knowing that it would be likely to be treated as a contempt of court. He wanted to demonstrate his deliberate defiance of the prohibition and to bring this to the attention of as large an audience as possible.

<u>The respondent's case on liability</u>

29. The respondent accepts that he was aware that he was breaking the court's confidentiality and that in practice the authorities were likely to pursue him for contempt of court. However, he submits that, at all times, he considered his action

to be lawful. The respondent submits that the court should have regard to his intentions, beliefs and motivations in disclosing the result of the appeal. He submits that he was justified in doing so in breach of the order because this was a reasonable and proportionate measure to prevent harm to the public as a result of the catastrophe which he believes would be caused by global warming. To that end he has placed before this court material which we have read relating to what he sees as the erroneous approach of the Supreme Court and the consequences to which it will lead.

30. In our view, these matters do not assist the respondent in relation to the issue whether there has been a contempt of court.

31. First, the respondent submits that in order to prove contempt the applicant must prove a breach of confidence which cannot be made out here because there was an overriding public interest in disclosure which defeated the obligation of confidentiality. However, we are not concerned here with a contractual or equitable duty of confidentiality owed by the respondent. The respondent had been given a direction by the court not to disclose the draft judgment and he was bound to obey it unless there was a successful application to the court to vary it.

32. Secondly, for the same reason, this was an obligation prescribed by law in accordance with article 10(2) of the European Convention on Human Rights ("ECHR"). In any event, we have already referred to the fact that the respondent fully appreciated that his conduct would be likely to be treated as a contempt of court.

33. Thirdly, the respondent submits that he cannot have had the requisite *mens rea* to be in contempt of court because he was acting for the purpose of preventing serious harm to the public. There is, however, no defence available to the respondent arising out of his concerns or fears as to the consequences of the Supreme Court's decision. There is here no defence of public interest. There is no such thing as a justifiable contempt of court; see *Attorney General v Times Newspapers Ltd* [1974] AC 273, 302 per Lord Morris of Borth-y-Gest. The respondent was bound to observe the confidentiality attaching to the Supreme Court decision irrespective of any such belief. In particular, it is clear on the authorities that a person may have an intention to interfere with the administration of justice even if he or she acts with the motive of securing what he or she considers to be a just outcome overall; see *Connolly v Dale* [1996] QB 120; *Attorney General's Reference No 1 of 2002* [2002] EWCA Crim 2392.

34. It was, in any event, not necessary for the respondent to disclose the result of the appeal in breach of the embargo, in order to permit or facilitate public scrutiny

or criticism of the judgment which was to be handed down the following day. Once the judgment had been handed down, the parties, the media and the public were all free to scrutinise the judgment and to comment on it. On any view, the respondent's conduct in disclosing the outcome of the appeal cannot reasonably be considered, as he suggests, "reasonable and proportionate action to prevent mass loss of life".

35. Fourthly, the respondent submits that he was entitled to act as he did because he believed it was reasonably necessary to do so in order to protect the right to life in accordance with article 2 ECHR. In this regard he refers to the positive obligation on States to protect life under article 2. This submission was not entirely clearly formulated. If the respondent's case is that the Supreme Court judgment violated article 2, then that could be tested in proceedings against the United Kingdom in Strasbourg. But, in any event, as we have explained, there was no rational connection between any breach of the embargo and the harm the respondent says he wished to prevent.

36. Fifthly, the respondent relies on the interpretative obligation under section 3 of the Human Rights Act 1998. The short answer to this submission is that we are not concerned here with any statutory obligations, including the provisions of the Contempt of Court Act 1981, but with contempt at common law.

37. Sixthly, the respondent relies on the criminal defence of necessity or duress of circumstances. We are of the clear view that there is no scope for the operation of the defence here, in circumstances where there was no requirement for action to be taken between the circulation in confidence of the draft judgment and the hand down of the final judgment.

38. Seventh and finally, the respondent submits that it was at all material times his belief that, had the Supreme Court properly understood the implications of its judgment on Heathrow expansion, it would have consented to the respondent's course of action. This submission is entirely unrealistic. It had been made clear to the respondent that he was required not to disclose the outcome of the appeal until the judgment had been handed down. Moreover, hand down occurred the following day and thereafter the respondent, the media and all members of the public were free to criticise the judgment and it was open to the respondent to raise all of the issues which concerned him.

Article 10 ECHR

39. Section 12 of the Human Rights Act 1998 provides that the court must have particular regard to the importance of the Convention right of freedom of expression

when considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression. We have taken full account of section 12. We have also given consideration to whether a finding of criminal contempt in this case is compatible with article 10 of the European Convention on Human Rights which provides in relevant part:

> "(1) Everyone has the right of 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 ...
>
> (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."

40. A permissible interference with freedom of expression must therefore be prescribed by law, must pursue one or more of the legitimate objectives in article 10(2) and must be necessary in a democratic society for the achievement of that aim. The last limb requires an assessment of the proportionality of the interference to the aim pursued.

41. In the present case, the prohibition on publication of the judgment of the Supreme Court prior to hand down did amount to a restriction on the disclosure of information. However, it was for a limited period only, from 9 December 2020, when the judgment was sent to the parties in draft in confidence, until hand down at 9.45 on 16 December 2020. Furthermore, it was for the specific purposes of enabling the parties to make suggestions for the correction of errors, prepare submissions on consequential matters and to prepare themselves for the publication of the judgment. It is important that the published text of a judgment of the court should be accurate, complete and in its final form. This restriction was clearly necessary in order to achieve the legitimate objective of maintaining the authority of the judiciary and judicial decisions and was a proportionate means of achieving that result.

Conclusion on liability

42. For these reasons, we are satisfied that the conduct of the respondent constitutes a criminal contempt of court.

Penalty

43. We turn therefore to consider what penalty is appropriate. The available penalties for an individual found in contempt of court are a term of imprisonment of up to two years (section 14, Contempt of Court Act 1981) or an unlimited fine. A sentence of imprisonment may be suspended.

44. General guidance as to the approach to penalty is provided in the Court of Appeal decision in *Liverpool Victoria Insurance Co Ltd v Khan* [2019] EWCA Civ 392; [2019] 1 WLR 3833, paras 57 to 71. That was a case of criminal contempt consisting in the making of false statements of truth by expert witnesses. The recommended approach may be summarised as follows:

> 1. The court should adopt an approach analogous to that in criminal cases where the Sentencing Council's Guidelines require the court to assess the seriousness of the conduct by reference to the offender's culpability and the harm caused, intended or likely to be caused.
>
> 2. In light of its determination of seriousness, the court must first consider whether a fine would be a sufficient penalty.
>
> 3. If the contempt is so serious that only a custodial penalty will suffice, the court must impose the shortest period of imprisonment which properly reflects the seriousness of the contempt.
>
> 4. Due weight should be given to matters of mitigation, such as genuine remorse, previous positive character and similar matters.
>
> 5. Due weight should also be given to the impact of committal on persons other than the contemnor, such as children of vulnerable adults in their care.

6. There should be a reduction for an early admission of the contempt to be calculated consistently with the approach set out in the Sentencing Council's Guidelines on Reduction in Sentence for a Guilty Plea.

7. Once the appropriate term has been arrived at, consideration should be given to suspending the term of imprisonment. Usually the court will already have taken into account mitigating factors when setting the appropriate term such that there is no powerful factor making suspension appropriate, but a serious effect on others, such as children or vulnerable adults in the contemnor's care, may justify suspension.

45. Turning to the present case, in terms of culpability this was an interference with the administration of justice sufficiently serious to constitute a criminal contempt of court. The embargo on publication was intended to protect the operation of the legal system. The breach of the embargo was carried out intentionally and in full knowledge of the prohibition on disclosure. The respondent admitted in the contemporaneous documents that the breach of embargo was a considered act on his part. In addition, there was a clear intention to interfere with the administration of justice. The conduct in question was intended to attract publicity to conclusions in the judgment with which the respondent fundamentally disagreed. The respondent was deliberately disobeying the court's embargo and abusing the court's judgment hand down procedure in order to gain publicity.

46. In terms of harm, as a result of the respondent's conduct the outcome of the appeal was published very widely on social media in advance of the hand down. This was as the respondent intended. This risks undermining respect for the confidential nature of the court's judgment hand down procedure and may encourage others, dissatisfied by the impending outcome of the case, to do likewise. Deterrence is a relevant consideration in sentencing in such a case. It appears that little direct harm was caused as a result of the publication. It has not been suggested, for example, that this was a case where market-sensitive information was released prematurely to the public. The Attorney General accepts that the direct adverse consequences were limited. Nevertheless, the respondent's conduct was damaging to the system whereby judgments are made available to the parties in advance of hand down, a system which is beneficial to the parties to civil litigation and to the courts.

47. The respondent was motivated by his concerns and fears relating to the consequences of global warming and his disagreement with the decision of the Supreme Court. However, this does not begin to justify his conduct. There is no principle which justifies treating the conscientious motives of a protester as a licence to flout court orders with impunity. It was, moreover, a futile gesture as the judgment would in any event have been available some 22 hours later for scrutiny and

criticism by the media and the public. However, we do accept that greater clemency is normally required to be shown in cases of civil disobedience than in other cases; see *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 and *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357.

48. At 16.36 on 15 December 2020 the respondent was asked by the Registrar of the Supreme Court to remove the tweet which shared his statement until after the embargo was lifted the following morning. The respondent did not respond to the email. The tweet was not deleted. The respondent has not made any attempt to mitigate his conduct by admitting his contempt or by apology. On the contrary, he has remained unrepentant, save that he apologised for the inconvenience he had caused to the staff at the Supreme Court.

49. In considering what penalty to impose, we are mindful of article 10 ECHR. We have already referred to the governing principles and we have been referred helpfully to the judgment of the European Court of Human Rights in *Cumpana & Mazare v Romania* (2005) 41 EHRR 200, which we take fully into account.

50. Any penalty imposed must be necessary for the legitimate objective of maintaining the authority and impartiality of the judiciary and must be proportionate for that purpose. As a result, we have had regard to the extent of the interference with article 10 rights and the likely deterrent effect on the future exercise of article 10 rights. The sentence we propose to impose is, in our view, a necessary and proportionate penalty for the purpose of maintaining the authority of the judiciary and its judgments.

51. We also take into account that the respondent is of positive good character.

52. In these circumstances, we propose to deal with this matter by the imposition of a fine. In coming to a conclusion as to the appropriate level of fine, we have taken account of the fact that the respondent faces disciplinary proceedings before his professional body. We have also taken account of what the respondent has told us about his income. We therefore impose a fine of £5,000. That fine will be enforceable in like manner to a judgment of the High Court for the payment of money under section 16(1)(a) of the Contempt of Court Act 1981.

Case No: B2/2011/0755

Neutral Citation Number: [2012] EWCA Civ 56
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CLERKENWELL AND SHOREDITCH COUNTY COURT
HIS HONOUR JUDGE MITCHELL
9EC02371

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st February 2012

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE PATTEN
and
LADY JUSTICE RAFFERTY

- -

Between :

LONDON BOROUGH OF ISLINGTON	**Appellant/ Defendant**
- and -	
(1) MARGARET ELLIOTT **(2) PETER MORRIS**	**Respondents/ Claimants**

- -

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Official Shorthand Writers to the Court)

- -

Mr S Butler (instructed by **Legal Services**) for the **Appellants**
Mr R. Duddridge (instructed by **Bishop & Sewell LLP**) for the **Respondents**

Hearing date : 5th December 2011

- -

Judgment

As Approved by the Court

Lord Justice Patten :

Introduction

1. This is an appeal by the London Borough of Islington ("the Council") with the leave of the court against an order of His Honour Judge Mitchell made in the Clerkenwell and Shoreditch County Court on 14th February 2011. The judge ordered the Council, which was the defendant in the action, to pay to the claimants their costs of the claim up to 6th March 2009; one half of their costs from 7th March up to and including 20th March 2009; and the whole of their costs thereafter.

2. The appeal is therefore one against an order for costs but in substance it is a challenge to the way in which the judge assessed the claimants' prospects of success in relation to the grant of a *quia timet* injunction which they had sought in the proceedings in order to compel the Council to remove a number of Ash trees from the garden of a property at 47, Balfour Road, London N5 ("Number 47") of which the Council is the freehold owner. The basis of the claim was an allegation that the roots of the trees constituted an actual or potential nuisance to the claimants' adjoining property at 49 Balfour Road ("Number 49") but in its defence (served on 28th April 2009) the Council confirmed that a works order to remove the trees had been issued to its contractors on 10th December 2008 and on 23rd June 2009 the trees were actually removed.

3. The action continued only because the parties were unable to resolve their differences about costs and the judge had the unenviable task of having to try the action in order to decide what costs order to make. Although lamentable, this proved to be unavoidable and neither party to this appeal has suggested that the judge was wrong in principle to take this course as opposed to resolving the issue on a summary basis. The issue of principle which the judge had therefore to consider and which justified the grant of permission to appeal in this case is whether a claim to a *quia timet* injunction to prevent a nuisance can succeed when the alleged nuisance (in this case the tree roots) has at the date of the trial caused no physical damage to the claimants' property but is likely ultimately to do so unless prevented by an order of the court. In short, the question is how proximate and likely does the occurrence of physical damage have to be before the court will intervene.

The facts

4. Number 47 is owned by the Council and is let to tenants on short-term tenancies. The contemporary photographs show that the gardens were not well maintained and that a number of saplings and small trees had been allowed to grow unchecked. The judge found that there were six Ash trees in the rear garden and about three in the front. One of the Ash trees in the rear garden was about one metre from the boundary fence with number 49 and some two metres from the rear wall of that house. When a plan was prepared in October 2008 this tree was already four metres in height with a girth

of 150 mm. One of the Ash trees in the front garden was about four metres away from the front wall of Number 49; was four to five metres in height and had a girth of between 150 and 200 mm. All these trees were self-sown. It was also the view of the expert witnesses called to give evidence that Ash trees are unsuitable (due to their size and rate of growth) for planting in a small garden of this kind.

5. In May 2004 Ms Elliott wrote to the Council expressing concern that the trees growing in the garden of Number 47 might undermine the foundations of her house if allowed to grow unchecked. The Council appear to have written to its tenant about this but no further action was taken. In October 2004 Ms Elliott wrote again to complain that the trees had grown by several feet and were now obstructing the light to her first floor windows. This was followed by further correspondence in January and November 2005 all directed to the rate of growth of the trees. It was made clear to the Council that the tenants of Number 47 made minimal use of the garden and had taken no steps to cut back or remove the trees. It was therefore clear that the Council would have to take responsibility for this.

6. By November 2006 the position remained unchanged but on 13th November an officer in the Tenancy Management section wrote to the claimants' ward councillor saying that instructions had been given to deal with the problem but that, due to an oversight, nothing had been done. However, she assured the councillor that the matter would now be dealt with promptly.

7. Again this proved to be a false hope because by September 2007 no steps had been taken to reduce the size of the trees or to remove them. The claimants, who by now were understandably exasperated by the lack of progress, instructed solicitors (Messrs Bishops & Sewell LLP) and they wrote to the Council on 11th September 2007 about the problems emanating from Number 47. The first was water penetration which was thought to be due to a problem with the kitchen or a shower unit at Number 47. This is unconnected to the second problem which was the trees. They said in the letter that the overhanging branches were now blocking out the light to Number 49 and that the roots "may be causing damage to [the claimants'] property".

8. The Council was asked to take steps to remedy these problems failing which the claimants would have no alternative but to institute proceedings. This did provoke a response from the Council. An officer wrote on 28th September asking for more information about the water leak but said that the Council had no obligation to maintain the gardens on behalf of the tenants. It would, however, arrange for Greenspace (a division of the Council's Environmental and Conservation Department) to carry out an inspection of the overhanging branches to decide whether further action needed to be taken. This might, however, take some time due to lack of resources.

9. In relation to the tree roots, the letter stated that it would be necessary for root samples to be taken:

> "so it can conclusively be determined that the trees are in fact the cause of any damage ….. As your clients are making these claims then the onus is on them to provide any report".

10. It looks as if this letter may not have been received by the claimants' solicitors because they wrote again on 28th November repeating their complaints about the tree roots and saying that there were signs of cracking in the concrete patio at the rear of Number 49 which might be attributable to the tree roots. The Council replied on 17th December and explained that due to a change in the tenants of Number 47 and associated problems of access, an inspection by Greenspace would not take place until the New Year. It would, however, still be necessary for the root samples to be taken to establish any alleged encroachment by the trees. This would be a matter for the claimants to arrange.

11. In these circumstances, the claimants instructed Mr George Mathieson, a civil engineer, to inspect their property and report. He did so early in 2008 and wrote a letter of advice to the claimants dated 12th March 2008 setting out his preliminary findings. He explained that due to their high water demand, trees such as the Ash should not be planted within 15-20 m from the nearest house and should be regularly pruned. His letter went on:

> "While the Ash saplings in the garden bordering onto yours have not yet caused any damage to your property, they need to be dealt with as a matter of urgency so as to prevent them from causing inevitable damage in the short to medium term."

12. The claimants' solicitors wrote to the Council on 18th March 2008 saying that the damp problem was continuing and, that in relation to the trees, Mr Mathieson had advised that there was an urgent need to deal with the Ash saplings adjacent to Number 49. They asked for the work to be carried out in four weeks without the need for an application to be made for an injunction. The letter of advice from Mr Mathieson was forwarded to the Council on 7th April together with recommendations from a builder as to how to deal with the damp problem.

13. In the meantime, the Council had written to Bishop & Sewell on 3rd April stating that Greenspace had taken soil samples from the Ash tree near the fence and their comments were awaited. On 23rd April the Council wrote a further letter to the claimants' solicitors which indicated that they should direct their complaints about the trees to Greenspace who were responsible for deciding whether trees in the Borough should be lopped or removed. Accordingly on 1st May the solicitors did just that. They sent a copy of Mr Mathieson's letter to Greenspace and asked to be informed about the results of the soil samples taken. They also asked for an undertaking that the Ash trees would be removed and the other trees kept regularly pruned.

14. The reply from Mr James Chambers, the Council's Senior Tree Officer, was not encouraging and also disclosed a state of internal confusion about who (if anybody) had been instructed to deal with the tree issue on behalf of the Council. He said in his letter that he had no record of receiving any request to inspect the trees at Number 47 and did not intend to do so until the "required documents are received". But in relation to the complaint about the tree roots, he said this:

> "… I note you have also provided a copy of a letter from a 'George Mathieson Associates' offering some opinions on trees in the area. This letter does clearly state that there is no damage to no. 49 at this time.

> No tree removal will be undertaken in relation to Alleged Tree Root Damage (ATRD) claims unless and until detailed and extensive evidence that directly implicates a tree as a major causal factor in significant damage to a building, and where no other alternative remains.
>
> Trees will certainly not be removed on the grounds that they may hypothetically cause damage at some point in the future. Any necessary tree work can only be determined through a tree inspection, which you can request as mentioned above."

15. The claimants' solicitors responded on 2nd June saying that their client was frustrated by the lack of progress and that she reserved her right to issue proceedings for an injunction to compel the Council to abate the nuisance. They received a reply from the Council on 4th June saying that Greenspace were now arranging an inspection of the trees but that it would be for the claimants to provide the root samples in order to substantiate their claim that damage was being caused. In fact the statement in this letter about an inspection being arranged was incorrect. The Council's evidence at the trial in the form of a witness statement from Mr Chambers was that the Tree Service was first asked to inspect the trees at Number 47 in November 2008 and that a works order was issued to remove the saplings on 3rd December 2008. As mentioned earlier (due, it is said, to access difficulties), the work was not carried out until 23rd June 2009.

16. The claimants' position as of June 2008 was that they had reached something of an impasse. The Council's position (as communicated in the letter from Mr Chambers) was that the trees would not be removed unless and until they could be proved to be causing significant damage to Number 49. The claimants therefore sought further advice from Mr Mathieson. His recommendation was that the taking of soil samples would be expensive and was unnecessary because it was obvious that the trees were growing rapidly and would, if unchecked, inevitably lead to damage being caused to both properties. The trees should therefore be removed immediately and at relatively little cost instead of being allowed to grow and cause potentially extensive damage in the future which could only be remedied at considerable expense.

17. Accordingly Bishop & Sewell wrote to the Council on 26th June enclosing a copy of Mr Mathieson's recent letter of advice. The letter concluded by saying that:

> "In a final attempt to avoid the issue of court proceedings, our client requires that the trees in the front and rear gardens are properly lopped in accordance with our client's expert's report by close of business on Thursday 10 July 2008. If this is not done by this date, then our client will have no alternative but to make an application to the court to compel you to abate this nuisance".

18. The Council then wrote to Bishop & Sewell stating that a tree referral request had been sent to the Tree Service. As mentioned earlier, this was untrue but in November the request was made with the consequences I have outlined. Bishop & Sewell were not, however, informed of this. They instructed Mr Mathieson to produce a detailed report which could be used in court proceedings which he did based on inspections of

the property in February and September 2008. In his report dated 30th November 2008 he concluded that there was no evidence of actual root intrusion and damage in respect of the drains and foundations of Number 49 but that damage of this kind was in time inevitable absent the pruning and removal of the trees. He estimated that significant damage would probably begin to appear within about five years.

19. Between July 2008 and March 2009 there was no further correspondence between the parties about the possibility of the claimants seeking injunctive relief and had the Council communicated its intention to remove the trees that would have been the end of the matter. On 3rd March 2009 Bishop & Sewell wrote again to the Council but this letter does not refer to the issue about tree roots. It was all about the damp problem which they said had recurred and needed to be remedied failing which proceedings would be commenced. The Council replied to this letter on 16th March promising action but again there is no mention of the trees.

20. The position therefore is that there was no further communication between the parties on the issue of nuisance from trees after the correspondence in June 2008. The claimants had put the Council on notice that unless the trees were lopped or removed, proceedings for an injunction would be instituted and had imposed a deadline of 10th July. But this was allowed to pass without action being taken. The Council had subsequently decided to remove the trees but had not informed the claimants of this or carried out the work by the time that the proceedings were issued on 20th March 2009.

21. Had Bishop & Sewell taken the precaution of writing a formal letter before action to the Council before instituting the claim then it seems likely that they would have been told of what was planned. But they did not do that. The claim form was issued seeking damages and an injunction and the particulars of claim alleged that if the Ash trees were not appropriately maintained or cut back they threatened to cause damage to Number 49 by encroaching roots and the extraction of water from the foundations which was likely to be disruptive and expensive to repair.

22. In the defence served on 28th April 2009 the allegation that the Ash trees constituted an actual or potential nuisance was denied as was the claimants' entitlement to a *quia timet* injunction. But in paragraph 3 the Council pleaded that a works order had been issued on 10th December 2008 to remove the trees and that the work would be carried out within a reasonable period of time.

23. As already stated, the removal of the trees took place on 23rd June. On 12th August Bishop & Sewell proposed the making of a consent order in *Tomlin* form staying the proceedings on terms that the Council should carry out regular inspections of Number 47; should take any necessary steps to reduce the growth of any remaining trees; and should undertake to pay the reasonable costs of any repairs to Number 49 caused by past or future tree growth. The *Tomlin* order also provided for the Council to pay the costs of the action.

24. The action was stayed on 2nd September 2009 to allow for settlement but the Council declined to agree to the terms proposed. I should mention that at that stage the claimants' costs were stated to be some £24,251 which included an After the Event insurance premium of £7,875 and solicitors' profit costs of £9,550. The claimants modified their terms of settlement by offering simply to discontinue on the payment

by the Council of £22,000 towards their costs. But this was not acceptable and the action therefore proceeded to trial.

25. The judge heard expert evidence from Mr Mathieson and from Ms Fiona Critchley, an arboriculturalist instructed on behalf of the Council. They had met in the usual way before the trial and had reached agreement on a number of matters. Trees more than 10 metres from Number 49 were unlikely to have any significant effect on the building. The growth rate of the relevant trees and their rooting patterns could not be predicted. It was therefore impossible to say precisely how and when damage would occur. What they disagreed on was how imminent the risk of significant and serious damage was. Mr Mathieson (as foreshadowed in his reports) thought that the risk was impending and that such damage was likely to occur to the drainage system within 5 years. Ms Critchley considered that it was impossible to predict if or when the closest trees would cause damage or what its nature would be. The judge set out his conclusions on this issue in paragraphs 43-46 of his judgment:

> "43. I conclude from this evidence that there are a number of areas of uncertainty in this case; uncertainty about the nature of the soil (Is it gravel? Is it clay?); about the depth of the foundations; whether or not there are drains present in the backgarden under the patio and uncertainty about the rate of growth of the trees.
>
> 44. The evidence shows that the work could be carried out in early 2010 without great expense or effort. The evidence I have had from Mr. Chambers is that it would have cost £500 to cut down the 8 saplings and to treat them with poison. It would require much greater work and expense the larger the trees.
>
> 45. I am also satisfied that both experts were satisfied that there was a risk that trees 1 and 10 would penetrate drains and affect the foundations, but the effects could not be seen possibly because damage would not occur after some years - possibly three or five years or more. I would add this to the experts' conclusions. The uncertainties that I have listed could not be resolved without expense which was out of all proportion to the cost of the works (for example the drains under the patio, taking soil samples and so forth). I note that Mr. Chambers did not consider that it was necessary to take root samples before he cut down the Ash-saplings.
>
> 46. I also conclude that, unless cracking was caused in the patio, it was unlikely that more evidence of the risk increasing or becoming more imminent could be obtained before serious damage was done to the property."

26. The judge was obviously right to conclude that damage to Number 49 could well occur before there was any physical sign of it above ground level. He was also clearly right that the cost and trouble of removing the trees at an early stage would be considerably less than if they were allowed to grow unchecked for several more years. Any prudent landowner would therefore take the course recommended by

Mr Mathieson in this case. It would also have been no more than good neighbourliness for the Council to have recognised the concerns of the claimants at an early stage and that the problem caused by the Ash trees was due to the neglect of the gardens of Number 47 by the tenants of that property. The trees were self-sown and entirely unsuitable for the location where they had been allowed to grow. Even a properly cautious policy of preservation and environmental conservation should have recognised this.

27. But this appeal is not about the reasonableness of the Council's position at the time. As the judge himself recognised, damage is the essential component of any claim in nuisance and the claimants had no cause of action unless they could prove either that their property had already suffered physical damage due to the encroachment by the trees or that the prospect of such damage was sufficiently imminent and certain as to justify the grant of *quia timet* relief.

28. On the judge's findings, actual damage was not established and the success of the claim (and therefore the costs outcome) depended on the claimants' proving the existence of a real and substantial risk of damage of an imminent kind.

Quia timet relief

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.

30. A much-quoted formulation of this principle is set out in the judgment of Pearson J in *Fletcher v Bealey* (1884) 28 Ch D 688 at 698 where he first quotes from Mellish LJ in *Salvin v. North Brancepeth Coal Company* (1874) LR 9 Ch App 705 and then adds his own comments that:

> "… it is not correct to say, as a strict proposition of law, that, if the plaintiff has not sustained, or cannot prove that he has sustained, substantial damage, this Court will give no relief; because, of course, if it could be proved that the plaintiff was certainly about to sustain very substantial damage by what the defendant was doing, and there was no doubt about it, this Court would at once stop the defendant, and would not wait until the substantial damage had been sustained. But in nuisance of this particular kind, it is known by experience that unless substantial damage has actually been sustained, it is impossible to be certain that substantial damage ever will be sustained, and, therefore, with reference to this particular

> description of nuisance, it becomes practically correct to lay down the principle, that, unless substantial damage is proved to have been sustained, this Court will not interfere. I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the Plaintiff to protect himself against it if relief is denied to him in a *quia timet* action."

31. More recently in *Lloyd v Symonds* [1998] EWCA Civ 511 (a case involving nuisance caused by noise) Chadwick LJ said that:

> "On the basis of the judge's finding that the previous nuisance had ceased at the end of May 1996 the injunction which he granted on 7th January 1997 was *quia timet*. It was an injunction granted, not to restrain anything that the defendants were doing (then or at the commencement of the proceedings on 20th June 1996), but to restrain something which (as the plaintiff alleged) they were threatening or intending to do. Such an injunction should not, ordinarily, be granted unless the plaintiff can show a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm -- that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages. There will be cases in which the court can be satisfied that, if the defendant does what he is threatening to do, there is so strong a probability of an actionable nuisance that it is proper to restrain the act in advance rather than leave the plaintiff to seek an immediate injunction once the nuisance has commenced. "Preventing justice excelleth punishing justice" -- see Graigola Merthyr Co Ltd v Swansea Corporation [1928] Ch 235 at page 242. But, short of that, the court ought not to interfere to restrain a threatened action in circumstances in which it is satisfied that it can do complete justice by appropriate orders made if and when the threat of nuisance materialises into actual nuisance (see Attorney-General v Nottingham Corporation [1904] 1 Ch 673 at page 677).
>
> ….
>
> In the present case, therefore, I am persuaded that the judge approached the question whether or not to grant a permanent

> injunction on the wrong basis. He should have asked himself whether there was a strong probability that, unless restrained by injunction, the defendants would act in breach of the Abatement Notice served on 22nd April 1996. That notice itself prohibited the causing of a nuisance. Further he should have asked himself whether, if the defendants did act in contravention of that notice, the damage suffered by the plaintiff would be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at that stage) to restrain further occurrence of the acts complained of, a remedy in damages would be inadequate. Had the judge approached the question on that basis, I am satisfied that he could not have reached the conclusion that the grant of a permanent injunction *quia timet* was appropriate in the circumstances of this case."

32. In this case there is, I think, no real dispute that if the roots of the Ash tree had in time extended under the drains and foundations of Number 49, serious and substantial damage was likely to result. Nor would damages in those circumstances have been an adequate remedy. Had it been established that there was an imminent likelihood of such damage occurring, the court's equitable jurisdiction to prevent an apprehended infringement of property rights would undoubtedly be exercised so as to prevent the claimants from having to suffer the disruption which would be involved. Inevitably there will be cases where other discretionary considerations require to be taken into account. If the offending tree was particularly rare or valuable in terms of its appearance, one would expect the court to attempt to strike a balance which might involve less drastic action being taken than the complete removal of the tree. But this is not that kind of case. Here the determining issue was whether (absent an injunction) there was imminent danger of actual damage.

33. In *Hooper v Rogers* [1973] 1 Ch 43 the defendant had cut a track across a steep slope which provided the foundation of the plaintiff's farmhouse. The evidence was that this had exposed the slope to a process of soil erosion which would eventually undermine the farmhouse and cause it to collapse. The judge at first instance found that this constituted a real risk of damage and granted a mandatory injunction requiring the slope to be re-instated. In the Court of Appeal the grant of the injunction was challenged on the basis that the test of imminent danger set out by Pearson J in *Fletcher v Bealey* (supra) was not satisfied. Russell LJ (at p. 30) addressed that issue in these terms:

> "Again it seems to me that "imminent" is used in the sense that the circumstances must be such that the remedy sought is not premature; and again I stress that there is no suggestion that in the present case any other step than reconstituting the track will be available to save the farmhouse from the probable damage.
>
> In different cases differing phrases have been used in describing circumstances in which mandatory injunctions and quia timet injunctions will be granted. In truth it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties,

> having regard to all the relevant circumstances. I am not prepared to hold that on the evidence in this unusual case the judge was wrong in considering that he could have ordered the defendant to fill in and consolidate the road at the suit of the plaintiff as owner of the farm-house, or that he was wrong in ordering damages in lieu of such an order."

34. The question therefore is one of assessing the likelihood of the damage occurring at all and (if that is established) the probable timescale. The judge's conclusions on those issues are set out in paragraphs 49-50 of his judgment:

> "49. Examining the matter in relation to the *quia timet* injunction, I am satisfied that there was a real likelihood of harm at some stage - that is a harm which could not sensibly be ignored. The likely extent of the harm would be damage to the drains resulting in seepage, possibly of sewage or other waste water, and/or the foundations including cracking of walls and settlement. Harm of either kind would raise concern about the other kind of harm. There would be the risk of increased insurance cover and difficulties, possibly, in selling the property. The costs or effort required by the defendant to remove the harm was minimal. There was no likelihood, in my judgment, of other methods of reducing the harm becoming available before the damage occurred. The same steps would be needed; the trees would have had to have been cut down. But I have to ask myself, however, would there be a need for an order? While there was no imminent harm in the sense of something happening within a three to five year period, there was a likelihood that in some years the work would needed to have been done to avoid damage. There was no reason for delaying the work. Delay would only increase costs.
>
> 50. Given the Local Authority's history of dealing with the claimants' reasonable complaints, I am not satisfied that they would have done the work without an order. It was reasonable, in my judgment, for the claimants to commence the action when they did rather than wait. As has been pointed out, it has taken two years for this case to come onto trial even after the claim was issued. I am satisfied therefore that, if the work had not been carried out, the claimants would have been successful in obtaining their injunction. Therefore, the general rule should apply in relation to costs."

35. Mr Butler, on behalf of the Council, submits that, on the basis of a finding that no damage was likely to be caused in less than 3 years, it could not be said that there was any imminent danger of such damage at the time when the injunction was granted. It was therefore premature. Mr Duddridge, for the claimants, relies on the judge's findings that damage to Number 49 by the trees was likely to occur. In these circumstances, the judge was entitled (as in *Hooper v Rogers*) to conclude that an actionable nuisance was inevitable and to require the trees to be removed at minimal cost and inconvenience to both parties.

36. The question whether this was an appropriate case for the grant of *quia timet* relief has, I think, to be considered in the light of all the relevant circumstances known at the trial and not merely by reference to the narrower question of whether the tree roots were likely to cause physical damage to Number 49 within a particular period of time. The wider consideration of relevant factors had, in my view, to take into account the issues of the relative cost of removing the trees (which the judge did consider) and also the likelihood of the potential source of nuisance being controlled by action taken by the Council in the intervening period of 3 years before any actual damage occurred.

37. In *Hooper v Rogers* the inevitability of subsidence attributable to the new track was such that nothing short of its removal would cure the problem. It was therefore realistic for the judge in that case to have taken the view that an injunction should be granted as the only means of preventing that risk from materialising. Questions of timing were less significant because the defendant landowner was not prepared to restore the slope underpinning the plaintiff's property unless compelled to do so by an order of the court.

38. But cases involving damage caused by trees are not necessarily so stark. Where, as in this case, the experts have identified an appreciable period of time before any actual damage is likely to occur, the judge must take into account the ability and willingness of the defendant to prevent such damage occurring by taking steps in the meantime to control the growth of the trees on his land. The claimant has to show that an injunction is necessary in order to prevent the occurrence of the nuisance. The defendant is entitled to rely on his own rights and obligations as an adjoining landowner to cure the problem and it ought therefore in principle to be only in cases where the risk of damage is so imminent and the intransigence of the defendant so obvious that the court should ordinarily be prepared to grant an injunction in order to prevent a nuisance which does not yet exist. Mandatory injunctions of this kind are not justified merely on the ground that if nothing is done a tree on adjoining land may at some point in the future begin to cause damage to the claimant's property.

39. Judge Mitchell expressed the view that the Council would not have done the work without an order and that the claimants would have obtained an injunction had the work not been carried out. The judge gives no reasons for this conclusion and it is difficult to reconcile that with his earlier finding of fact that on 10th December 2008 a works order was in fact signed for the removal of the trees. Nor was there any challenge to the pleading in the Council's defence that it intended to carry those works out.

40. In these circumstances, it was not open to the judge in my view to hold that the injunction was necessary in order to prevent the potential nuisance from becoming an actual one. Although the claimants had initially to face a combination of delay and misleading information from the Council, it had by December 2008 at the latest resolved to remedy the problem by removing the trees. There was therefore no necessity for the grant of *quia timet* relief at the trial and the plea that the Council intended to carry out the work was a complete answer to the claim. If the appropriate rule to apply was that costs should follow the event then the judge should have dismissed the claim with costs.

The costs order

41. The judge's order was split into three periods in order to incorporate a discount for the 14 day period between 3rd March 2009 when the letter was sent by the claimants' solicitors complaining about the leak and the issue of the claim form on 20th March. The judge explained the thinking behind his order as follows:

> "51. I also have regard to the defendants' litigation conduct. There has been a failure by the defendants over five years until November 2009, to do anything at all. Opportunities were missed when the property was vacant in 2006 and 2008. Assurances that the works would be done in 2006 were not met. Misleading or false information was provided in April 2008. In June 2008, even if the claimants are not entitled under the general rule to costs, in my judgment, the defendants' conduct was such as to lead to only one conclusion, namely that the claimants were acting reasonably in commencing their action. The defendant's did not act reasonably and they should pay the claimants' costs.
>
> 52. But that is subject to one proviso. Letters before action were written on 1st May 2008, 2nd June 2008 and 26th June 2008. Nothing was thereafter written until March 2009 - a considerable gap. Despite the lamentable history, in my judgment, it would have been reasonable to expect the claimants to send one further letter. That might have resulted in their being told the work was in hand and, therefore, the claim did not need to be issued. But, given the history, they might not have been told that. They must therefore bear some responsibility, but the greater responsibility by far is that of the defendants.
>
> 53. Therefore, I shall make an order that the defendants are to pay the costs up to and including 2nd March 2009 - that is 14 days before the claim commenced - but, thereafter, only one half of the costs between 2nd March 2009 and up to and including the issue of the claim. The half costs cover the 14 day period, when a letter before action should have been written and considered and is calculated to take into account the real possibility that the defendants would not have notified the claimants that there was no need to commence the action."

42. Because I consider that the judge was wrong in his assessment of whether an injunction was needed in this case to prevent the potential nuisance, it is for this court to re-consider how the discretion under CPR 44 should be exercised. Neither side wished the matter to be remitted to the County Court for that purpose.

43. The judge's alternative basis for his costs order was that the claimants had acted reasonably in commencing the action because assurances given much earlier that the

work would be done were not carried out and false and misleading information was given in 2008. The history does, however, have to be examined in more detail than that. The assurance given to the claimants' ward councillor in November 2006 was certainly not acted on but the Council's response to Bishop & Sewell's letter of 28th September 2007 was that it had no obligation to maintain the garden of Number 47. The most that was promised was an inspection by Greenspace. It was for the claimants to produce evidence of the incursion of tree roots.

44. Mr Mathieson was instructed for this purpose and produced the reports I have referred to but the Council's response to this was that any risk of damage was still some years away. The information about the date of inspections by Greenspace in 2008 was misleading but it did not initially affect the claimants because they assumed that the inspections were taking place. When the 10th July deadline passed it was reasonable for them to have assumed that nothing was about to be done but the decision to wait until March before issuing proceedings could also be taken as an indication that proceedings were still not in contemplation.

45. The gap in the correspondence between July 2008 and March 2009 covers the period in which the Council did finally inspect and decide to remove the trees. It had received the threat of proceedings in June 2008 but the decision to remove the trees (if carried out) really brought the possibility of a successful action for an injunction to an end.

46. It is misleading to regard the letter of 3rd March 2009 as the resumption of the earlier correspondence. It makes no mention of the tree problem but was directed solely to the continuing issue of the damp. The Council dealt with it on that basis. The first it knew of the proceedings was when it was served with the claim form. The judge was therefore right to take the absence of a further letter before action into account but was, I think, wrong merely to reduce the costs awarded to the claimants for the 14 days before the claim was commenced. Given that there had been no further correspondence in relation to the trees before June 2008, the claimants should have written a letter before action prior to the issue of the claim form to make it clear that they did intend to go ahead with the action. This would have led to their being informed about the works order and the proceedings could have been avoided.

47. But at the same time I recognise the uncertainty which may have been created by the promises of an inspection in 2008 followed by silence on the part of the Council as to whether it intended to carry out any work to the trees. Although this is likely to have been cleared up by the sending of a letter before action, some allowance should be made for the Council's own failure to respond substantively to the June 2008 letter once it had decided to remove the trees.

48. It seems to me therefore that the right order is that there should be no order for costs in relation to the period up to and including the service of the defence. From that moment on it was apparent that the claim must fail and the Council is entitled to its costs of the action after that date. Neither of the offers of settlement made by the claimants accurately reflects their position in the litigation.

Conclusion

49. I would therefore allow the appeal and make an order in the terms referred to above.

Lady Justice Rafferty:

50. I agree.

Lord Justice Longmore:

51. I also agree.

*133 Manchester Airport Plc. v Dutton and Others

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
23 February 1999

Report Citation
[1999] 3 W.L.R. 524
[2000] Q.B. 133

ICLR

Court of Appeal

Kennedy , Chadwick and Laws L.JJ.

1999 Feb. 5; 23

Practice—Possession of land—Summary proceedings—Licensee having right of occupation but not exclusive possession—Trespassers entering land before licence granted—Whether licensee having sufficient interest to obtain possession order— R.S.C. , Ord. 113, r. 1

The plaintiff was granted a licence by the landowner to occupy a wood for the purpose of carrying out works in connection with the construction of an airport runway. The works involved the felling and lopping of certain trees so as to reduce the height of obstacles in the flight path. Three days before the grant of the licence the defendants, who were opposed to the works, entered the wood without permission with the intention of making it difficult or impossible for the works to be carried out. The district judge granted the plaintiff an order for possession of the wood under R.S.C., Ord. 113. [1] An appeal by the defendants on the *134 ground that the plaintiff did not have a sufficient interest in the wood to seek an order for possession since the licence granted did not give it exclusive possession of the land was dismissed.

On appeal by the defendants: -

Held, dismissing the appeal (Chadwick L.J. dissenting), that a licensee with a right to occupy land, whether or not he was in actual occupation, was entitled to bring an action for possession against a trespasser in order to give effect to the rights under the licence; that an estate in or a right to exclusive possession of the land was not required before an order under the summary procedure in R.S.C., Ord. 113 could be obtained, but a licensee's remedy was strictly limited to enforcement of the rights he enjoyed under the licence; that the plaintiff's right to occupy the wood for the purpose of carrying out the specified works gave rise to a sufficient interest for the purposes of Order 113; and that, accordingly, the plaintiff was entitled to possession as against the defendants (post, pp. 147C-E, 149H-150C, 151C-D).

Decision of Steel J. affirmed.

The following cases are referred to in the judgments:

Allan v. Liverpool Overseers (1874) L.R. 9 Q.B. 180
Appah v. Parncliffe Investments Ltd. [1964] 1 W.L.R. 1064; [1964] 1 All E.R. 838, C.A. .
Danford v. McAnulty (1883) 8 App.Cas. 456, H.L.(E.) .
Hounslow London Borough Council v. Twickenham Garden Developments Ltd. [1971] Ch. 233; [1970] 3 W.L.R. 538; [1970] 3 All E.R. 326
Manchester Corporation v. Connolly [1970] Ch. 420; [1970] 2 W.L.R. 746; [1970] 1 All E.R. 961, C.A. .
National Provincial Bank Ltd. v. Hastings Car Mart Ltd. [1965] A.C. 1175; [1965] 3 W.L.R. 1; [1965] 2 All E.R. 472, H.L.(E.) .
Radaich v. Smith (1959) 101 C.L.R. 209
Street v. Mountford [1985] A.C. 809; [1985] 2 W.L.R. 877; [1985] 2 All E.R. 289, H.L.(E.) .
University of Essex v. Djemal [1980] 1 W.L.R. 1301; [1980] 2 All E.R. 742, C.A. .
Wiltshire County Council v. Frazer (1983) 82 L.G.R. 313, C.A. .
Wykeham Terrace, Brighton, Sussex, In re, Ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East *[1971] Ch. 204; [1970] 3 W.L.R. 649*

The following additional cases were cited in argument:

Pasmore v. Whitbread & Co. Ltd. [1953] 2 Q.B. 226; [1953] 2 W.L.R. 359; [1953] 1 All E.R. 361, C.A. .
Philipps v. Philipps (1878) 4 Q.B.D. 127, C.A. .

The following cases, although not cited, were referred to in the skeleton arguments:

Ashburn Anstalt v. Arnold [1989] Ch.1; [1988] 2 W.L.R. 706; [1988] 2 All E.R. 147, C.A. .
Delaney v. T. P. Smith Ltd. [1946] K.B. 393; [1946] 2 All E.R. 23, C.A. .
Devon Lumber Co. Ltd. v. MacNeill (1987) 45 D.L.R. (4th) 300

Hull v. Parsons [1962] N.Z.L.R. 465
Lows v. Telford (1876) 1 App.Cas. 414, H.L.(E.) .
Lyons v. The Queen (1984) 14 D.L.R. (4th) 482
Malone v. Laskey [1907] 2 K.B. 141, C.A. . ****135***
Marcroft Wagons Ltd. v. Smith [1951] 2 K.B. 496; [1951] 2 All E.R. 271, C.A. .
Marsden v. Miller (1992) 64 P. & C.R. 239, C.A. .
Mehta v. Royal Bank of Scotland Plc. , The Times, 25 January 1999
Moore v. MacMillan [1977] 2 N.Z.L.R. 81
Oldham v. Lawson (No. 1) [1976] V.R. 654
Portland Managements Ltd. v. Harte [1977] Q.B. 306; [1976] 2 W.L.R. 174; [1976] 1 All E.R. 225, C.A. .
Simpson v. Knowles [1974] V.R. 190

Appeal from Steel J.

By an originating summons under R.S.C., Ord. 113 dated 7 August 1998 the plaintiff, Manchester Airport Plc., applied for an order against the defendants, Lee Dutton, Neville Longmire, Lance Crooks, Philip Benn, Norman Stoddard, Maxine Radcliffe and persons unknown, to recover possession of land known as part of Arthur's Wood, Styal, in the county of Cheshire, on the ground that they were entitled to possession and that the persons in occupation were in occupation without licence or consent. On 18 September 1998 District Judge Freeman in the Manchester District Registry joined Christopher Maile as a defendant, dismissed Lance Crooks, Philip Benn and Maxine Radcliffe as defendants and made the order for possession. An appeal by the defendants was dismissed by Steel J. on 26 October 1998.

By a notice of appeal dated 19 January 1999 the defendants sought an order that the plaintiff be refused possession of Arthur's Wood, Styal on the grounds, inter alia, that the judge was wrong in law in finding that the licence granted to the plaintiff by the National Trust gave it a title to the land sufficient for it to make an application for summary possession against the defendants by way of the special procedure in Order 113; that the judge ought to have taken more account of the facts that the plaintiff had never been in occupation of the land, that the licence granted to the plaintiff did not grant it exclusive possession of the land and that the National Trust was prevented in law from so granting exclusive possession; that the judge placed excessive reliance on the commercial interests of the plaintiff by fully taking into account the argument that it was wrong to expect the onus of seeking possession to fall back on the title holder of the land; that the judge ought to have taken more account of the obligations placed by Parliament on the licensor to prevent by all lawful means the encroachment on land in its care, and to protect and preserve such land, and the resulting question on the lawfulness of the licence granted to the plaintiff; and that having regard to the fact that the plaintiff clearly had no title to the land and had never been in possession of the land the judge ought to have ruled that the plaintiff had no locus standi to seek possession against the defendants.

The facts are stated in the judgment of Chadwick L.J.

Christopher Maile, in person for all the defendants. The licence granted to the plaintiff by the National Trust was limited to carrying out works on the land. The plaintiff had no interest in the land and, therefore, no right to take possession proceedings against trespassers: see *Street v. Mountford [1985] A.C. 809* . Since the defendants were on the land before the licence was granted, the plaintiff cannot claim as occupier but must rely on the ***136** title. To obtain an injunction against a trespasser a licensee needs total control of the land: see *Hounslow London Borough Council v. Twickenham Garden Developments Ltd. [1971] Ch. 233* . R.S.C., Ord. 113 requires absolute title and exclusive possession. There is no case where a licensee has obtained possession under that Order. *Philipps v. Philipps (1878) 4 Q.B.D. 127* set the criteria for possession cases: a title to the land needs to be established with documentary evidence.

By the National Trust Act *1907 (7 Edw. 7* , c. cxxxvi) the Trust's land is inalienable. The Trust can only grant a limited licence. It cannot give exclusive possession to anyone. The plaintiff cannot claim as successor to the National Trust since to claim through a predecessor in title the same title must continue: *Pasmore v. Whitbread & Co. Ltd. [1953] 2 Q.B. 226* . A licensee therefore has no locus standi to apply for summary possession against a trespasser who was on the land before the licence was granted.

Timothy King Q.C. and *Mark J. Forte* for the plaintiff. Order 113 is available to any party with sufficient interest in land to justify a claim to possession under general principles of law. Order 113 was designed to deal with squatters and other people occupying land and does not demand that the plaintiff has a good title. The Order is purely procedural, providing a summary vehicle for obtaining possession.

Historically the right to sue for possession lay only with those with absolute title to the land or with a lesser title derived from the absolute title. The right of a legal tenant to sue for possession against a landlord has developed to include the rights of a licensee to sue in trespass where he enjoys exclusive possession: see Clerk & Lindsell on Torts, 17th ed. (1995), p. 843, para. 17-12, pp. 846-848, paras. 17-16, 17-17, 17-18, p. 869, para. 17-57. The concept of "exclusive possession" is a developing concept. The test whether a licensee may sue a licensor in trespass should not be the same test as that where the licensee sues trespassers with no interest in the land. A licensee may have possession of the land: see *Hounslow London Borough Council v. Twickenham Garden Developments Ltd. [1971] Ch. 233* . The right to possession is relative: see *National Provincial Bank Ltd. v. Hastings Car Mart Ltd. [1965] A.C. 1175* .

The plaintiff has a right against all the world except the National Trust, which has no objection to the proceedings. The licence gives the plaintiff the right to enter and occupy the land which confers a sufficient interest in the land to entitle the plaintiff to take possession proceedings. Since the grant of the licence the plaintiff has been in occupation of the land: contrast *University of Essex v. Djemal [1980] 1 W.L.R. 1301* and *Wiltshire County Council v. Frazer (1983) 82 L.G.R. 313* . Even if he had never entered into occupation, the licence gives him a sufficient right to immediate possession as against bare trespassers who claim no interest in the land.

Maile replied.

Cur. adv. vult.

23 February. The following judgments were handed down

Chadwick L.J.

This is an appeal against an order made on 26 October 1998 by Steel J. in the Manchester District Registry. By her **137* order the judge dismissed an appeal by four of the six named defendants to these proceedings, as originally constituted, against an order for possession made by the district judge on 18 September 1998 under R.S.C., Ord. 113, r. 6. The district judge had ordered that the plaintiff, Manchester Airport Plc. ("the airport company"), do recover possession of a piece of land forming part of Arthur's Wood, Styal, Cheshire, in which the named defendants and other persons unknown were said to be encamped.

The property known as Arthur's Wood was conveyed to the National Trust for Places of Historic Interest or Natural Beauty ("the National Trust") by a conveyance dated 5 August 1980. It has been common ground in these proceedings that the National Trust thereby became, and has remained, the owner of that property. The wood is situate at or near to the proposed second runway for Manchester Airport. In order to comply with conditions which will govern the operation of the proposed second runway (when completed) the airport company - as the operator of Manchester Airport - needs to create an obstacle limitation surface ("O.L.S."). That requires, as I understand it, a reduction in height of obstacles within the flight path. For that purpose the airport company need to carry out certain works ("the O.L.S. works") within Arthur's Wood. Put shortly, the O.L.S. works appear to involve the lopping, or in some cases the felling, of trees. The defendants are opposed to the carrying out of those works on environmental and, I think, ecological grounds.

On or about 19 June 1998 the defendants or others entered Arthur's Wood and set up encampments - including tree-houses, ropewalks and a tunnel. It is accepted that they did so without licence or permission from the National Trust; and that as against the National Trust they are trespassers. It may, I think, be inferred that it was, and remains, the defendants' intention that their occupation will make it difficult or impossible for the airport company to carry out the O.L.S. works.

On 22 June 1998, very shortly after the defendants had taken up occupation within Arthur's Wood, the National Trust granted a licence to the airport company. So far as material the terms of that licence are contained within the first three clauses:

> "1. In consideration of the agreements on behalf of [Manchester Airport Plc.] hereinafter contained [the National Trust] gives [Manchester Airport Plc.] and its contractors and agents licence to enter and occupy that part of Arthur's

> Wood Styal Cheshire shown edged red on the attached plan ('the land') for the purpose set out in this agreement.
>
> "2. The purpose for which the licence is granted is to enable the works agreed between the parties and set out in the document appended hereto and titled 'Trees affected by Obstacle Limitation Surface - Arthur's Wood' ('the works') to be carried out. [The National Trust] gives no warranty that the premises are legally or physically fit for the purposes specified in this clause.
>
> "3. This licence shall subsist from the date hereof until 31 March 1999 provided that if the works have not been completed to the satisfaction of the parties by this date this licence shall be extended by such reasonable period for the completion of the works as the parties shall agree."

***138** The document which is said, in clause 2, to be appended to that licence has not been put in evidence; but the description in clause 2 suggests that the O.L.S. works are restricted to the topping, lopping or felling of trees. Clause 5 provides that the licence is personal to the airport company and that the rights granted shall only be exercised by the airport company, its contractors and agents.

It was in those circumstances that the airport company commenced these proceedings on 7 August 1998 by the issue of an originating summons. The defendants were, as I have indicated, six named individuals and "persons unknown." The summons is expressed to be a summons under Order 113 . The airport company, as plaintiff, sought an order that it recover possession of the land edged red on the plan annexed to the summons (being a copy of the plan attached to the licence of 22 June 1998) "on the ground that they are entitled to possession and that the persons in occupation are in occupation without licence or consent."

Order 113, r. 1 is in these terms:

> "Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."

The district judge made the order sought. Four of the six named defendants appealed from that order. The appeal came before Steel J., sitting in Manchester. Their case was presented to her, as it was in this court, by the fourth named defendant, Christopher Maile, in person. Steel J. recorded his principal submission in these terms:

> "The appellant submits that [Ord. 113, r. 1] is very specific in its terms, and Manchester Airport, the plaintiff in this case, has no locus standi to apply for such an order [for possession]. A person who is entitled to claim possession under this Order has to have a title, has to have an absolute title and exclusive possession, and a licence to occupy which was granted to the respondents in this case, submits Mr. Maile, from 21 June 1998 does not give exclusive possession to the airport authority. The plaintiff, Manchester Airport, as a licensee concede in this case that they have no absolute title to the land which is the subject of this application. They have no exclusive possession to that land, but on behalf of the plaintiff it is submitted that they do have the locus standi to claim possession under Ord. 113, rr. 1 and 6. The appellant limits his case to this comparatively narrow issue of law, that the whole proceedings have been misconceived."

The judge described Mr. Maile's submission as a narrow but important proposition of law. She expressed her conclusion in these terms:

> "I am satisfied, as was the district judge, that as a licensee, although they have no absolute title or exclusive possession, in this case the plaintiff has the locus standi to bring these proceedings, and that is determined by the nature of the rights which were granted to the plaintiff, a right to occupy. The licence gives the right of possession ***139** and this is, I am satisfied, a right of possession which does not give an absolute title, but it does nevertheless give a power against trespassers. That is very different from the position of proving possession against those with an interest in the property. It is not in issue that the defendant and others in this case are trespassers on this land. They do not in this case claim an interest in the property. I am satisfied that this licence gives the respondent power to seek possession against trespassers. Also that the Order 113 procedure by originating summons was the correct means by which the plaintiff sought to claim that power."

The judge dismissed the appeal. It is from that order that the four defendants appeal to this court. The issue, as defined by the grounds set out in the notice of appeal, is in substance the same as that before the judge: whether the licence granted to the airport company by the National Trust on 22 June 1998 gave to the airport company an interest in the land sufficient to enable it to seek an order for possession under the summary procedure contained in R.S.C., Ord. 113.

Order 113 was introduced in 1970 by the Rules of the Supreme Court (Amendment No. 2) Order 1970 (S.I. 1970 No. 944) , shortly after the decision of this court in *Manchester Corporation v. Connolly [1970] Ch. 420* . It had been held in that appeal that the court had no power to make an interlocutory order for possession. Order 113 provides a summary procedure by which a person entitled to possession of land can obtain a final order for possession against those who have entered into or remained in occupation without any claim of right - that is to say, against trespassers. The Order does not extend or restrict the jurisdiction of the court. In *University of Essex v. Djemal [1980] 1 W.L.R. 1301* , 1304 Buckley L.J. explained the position in these terms:

> "I think the Order is in fact an Order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession."

As that passage makes clear, Buckley L.J. made those remarks in the context of a claim by the owner of the relevant property. The question, in *University of Essex v. Djemal* , was whether the university could obtain an order excluding those involved in a student protest from the whole of the campus, or only from such part of the campus actually in their occupation, as the judge had held in the court below. He was not addressing the question which arises in the present case: whether the plaintiff had a right to possession at all. But, it is plain from his remarks that he would have taken the view that that was a question which had to be determined under the general law. If the right does not exist under the general law, there is nothing in the new procedure introduced in Order 113 which can have the effect of conferring that right.

An order for possession, if made under Order 113, must be in the form prescribed by rule 6(2) - that is to say in Form 42A in R.S.C., Appendix A. ***140** The court orders that the plaintiff do recover possession of the land described in the originating summons. An order in that form is an order in rem, enforceable by a writ of possession. The nature of a writ of possession was explained by Lord Diplock in *Manchester Corporation v. Connolly [1970] Ch. 420* , 428-429:

> "The writ of possession was originally a common law writ (though it is now regulated, as I say, by Ord. 45, r. 3) under which it was ordered that the plaintiff recover possession of the land. Like other common law remedies it did not act in personam against the defendant. It authorised the executive power as represented by the sheriff to do certain things, perform certain acts, in this particular case to evict from land persons who are there and to deliver possession of the land to the plaintiff."

A writ of possession to enforce an order made under Ord. 113, r. 6 must be in Form 66A of the prescribed forms: see Ord. 113, r. 7(2) . The writ is addressed to the sheriff; it recites that it has been ordered that the plaintiff do recover possession of the land; and it commands the sheriff "that you enter the said land and cause [the plaintiff] to have possession of it." A writ in that form has been issued in the present proceedings, but is stayed pending the outcome of this appeal.

It is against that background that I consider the question whether the airport company has shown that it has a right to possession of the relevant part of Arthur's Wood which is of the quality necessary to support the order for possession made in these proceedings and the writ of possession issued consequent upon that order. It is essential to keep in mind that it is not contended by the airport company that it is, or ever has been, in actual possession of the wood (or of any part of it) to the exclusion of the defendants. It has been common ground that the defendants had entered the wood and encamped there before the licence of 22 June 1998 was granted. This is not a case in which the plaintiff can rely on its own prior possession to recover possession of land from which it has been ousted. The airport company must rely on the title (if any) which it derives under the licence.

It is relevant, also, to have in mind that it has not been contended by the defendants that, in appropriate circumstances, the airport company might not be entitled to a personal remedy against one or more of them; for example, a remedy by way of injunction to restrain them, individually, from interfering with the carrying out of the O.L.S. works under the terms of the licence. There have been no claims for injunctions in the present proceedings - for reasons which are understandable in the circumstances - and the availability or otherwise of remedies in personam is not in issue on this appeal. The issue is whether the rights which the airport company acquired under the licence of 22 June 1998 enable it to evict the defendants from the wood with the assistance of the sheriff under a writ of possession.

It is necessary to consider, first, the powers of the National Trust in relation to the grant of that licence. The National Trust is a statutory corporation, established by the National Trust Act 1907 (7 Edw. 7, c. cxxxvi), for the purposes of promoting the permanent preservation for ***141** the benefit of the nation of lands and buildings of beauty or historic interest and, as regards lands, the

preservation (so far as practicable) of their natural aspect, features and animal and plant life: see section 4 of that Act. The power of the National Trust to acquire land must, in the absence of some specific power such as that conferred by section 4 of the National Trust Act 1937 (1 Edw. 8 & 1 Geo. 6, c. lvii) (power to acquire land to hold for investment purposes), be a power to acquire that land for the purposes of promoting its permanent preservation for the benefit of the nation. That is the statutory objective to which, prima facie, the power to acquire land is ancillary. There has been no suggestion in the present case that Arthur's Wood was acquired for any purpose other than its permanent preservation for the benefit of the nation. Land which is acquired for that purpose is inalienable: see section 21(2) of the Act of 1907.

Section 12 of the National Trust Act 1939 (2 & 3 Geo. 6, c. lxxxvi) is in these terms, so far as material:

> "Notwithstanding anything in section 21 . . . of the Act of 1907 . . . the National Trust may grant any easement or right (not including a right to the exclusive possession of the surface) over or in respect of any property made inalienable by or under the said section . . ."

It is plain, therefore, that the licence of 22 June 1998, whatever its terms, could not confer on the airport company a right to exclusive possession of the surface of Arthur's Wood. It could not do so because the National Trust had no power to grant such a right. The airport company do not contend otherwise. In those circumstances the question is whether some right enjoyed by the airport company under the licence of 22 June 1998 (being a right less than a right to exclusive possession) can be the basis for an order for possession - that is to say, for an order in rem - made under Order 113.

It has long been understood that a licensee who is not in exclusive occupation does not have title to bring an action for ejectment. The position of a non-exclusive occupier was explained by Blackburn J. in *Allan v. Liverpool Overseers (1874) L.R. 9 Q.B. 180* , 191-192, in a passage cited by Davies L.J. in this court in *Appah v. Parncliffe Investments Ltd. [1964] 1 W.L.R. 1064* , 1069-1070 and by Lord Templeman in the House of Lords in *Street v. Mountford [1985] A.C. 809* , 818. The question in *Allan v. Liverpool Overseers* was whether a steamship company was liable to be rated in respect of its occupation of certain sheds which it occupied under licence from the Mersey Docks and Harbour Board. As Blackburn J. pointed out, liability for rates fell on a person who had exclusive occupation:

> "The poor-rate is a rate imposed by the statute on the occupier, and that occupier must be the exclusive occupier, a person who, if there was a trespass committed on the premises, would be the person to bring an action of trespass

> for it. A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and although his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case ***142** of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass quare clausum fregit, the maintenance of the action depending on the possession; and he is not rateable."

That passage, as it seems to me, provides clear authority for the proposition that an action for ejectment - the forerunner of the present action for recovery of land - as well as an action for trespass can only be brought by a person who is in possession or who has a right to be in possession. Further, that possession is synonymous, in this context, with exclusive occupation - that is to say occupation (or a right to occupy) to the exclusion of all others, including the owner or other person with superior title (save in so far as he has reserved a right to enter).

The position of a licensee has received attention in the context of the statutory protection afforded to residential occupiers. Mr. Maile referred us to well known passages in the speech of Lord Templeman in *Street v. Mountford [1985] A.C. 809* . The question, in that case, was whether the rights conferred on the occupier of rooms by an agreement described as a licence were such that the occupier had a tenancy protected by the Rent Acts. Lord Templeman referred to what he described as the traditional view, at p. 816:

> "The traditional view that the grant of exclusive possession for a term at a rent creates a tenancy is consistent with the elevation of a tenancy into an estate in land. The tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair. A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in the land. The licence does not create an estate in the land to which it relates but only makes an act lawful which would otherwise be unlawful."

He went on to give an example germane to the facts in the present case:

> "My Lords, there is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession. In some cases it was not clear at first sight whether exclusive possession was in fact granted. For example, an owner of land could grant a licence to cut and remove standing timber. Alternatively the owner could grant a tenancy of the land with the right to cut and remove standing timber during the term of the tenancy. The grant of rights relating to standing timber therefore required careful consideration in order to decide whether the grant conferred exclusive possession of the land for a term at a rent and was therefore a tenancy or whether it merely conferred a bare licence to remove the timber."

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In the present case the question is not whether the agreement of 22 June 1998 creates a tenancy or a licence. It does not create a tenancy, for it is a gratuitous agreement under which no rent is payable. Nor, in the present case, is the question whether the airport company, as occupier under a licence, has exclusive possession or a right to exclusive possession. That question is determined by the inability of the National Trust, in the exercise of its statutory powers, to grant a right to exclusive possession. The question is whether a person who has a right to occupy under a licence but who does not have any right to exclusive possession can maintain an action to recover possession. But, in that context, the observations of Windeyer J. in the High Court of Australia, in *Radaich v. Smith (1959) 101 C.L.R. 209* , 222, adopted with approval by Lord Templeman in *Street v. Mountford [1985] A.C. 809* , 827, are of relevance:

> "What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives . . . A right of exclusive possession is secured by the right of a lessee to maintain ejectment and, after his entry, trespass . . . All this is long established law: see *Cole on Ejectment* (1857), pp. 72, 73, 287, 458."

The lessee, having a right to exclusive possession, could, before entry into possession, maintain an action for ejectment. A licensee, if he did not have a right to exclusive possession, could not bring ejectment. A tenant or a licensee who was in actual possession - that is to say, in occupation in circumstances in which he had exclusive possession in fact - could maintain an action for trespass against intruders; but that is because he relied on the fact of his possession and not on his title.

The licence in the present case, as it seems to me, is a clear example of a personal permission to enter the land and use it for some stipulated purpose. In my view, it would be contrary to what Windeyer J. described as "long established law" to hold that it conferred on the airport authority rights to bring an action in rem for possession of the land to which it relates.

Faced with what may be stigmatised as the traditional view, Mr. King, on behalf of the airport company, sought to persuade us that the law as to the recovery of possession was in a state of change or development. He submitted that it was no longer necessary to establish a right to exclusive possession in order to maintain an action for ejectment. There was now a concept of "relative possession." He referred to the view expressed by the editors of *Clerk & Lindsell on Torts* , 17th ed. (1995), when commenting upon the passage in the judgment of Blackburn J. in *Allan v. Liverpool Overseers, L.R. 9 Q.B. 180* , 191-192 which I have set out. They observe, at p. 848, para. 17-18:

> "The typical Victorian lodger described above by Blackburn J. as having a non-exclusive possession has to be distinguished from the typical modern occupational licensee, for 'in recent years it has been ***144** established that a person who has no more than a licence may yet have possession of the land,' and the terms of the licence may confer a sufficient right of possession."

The quotation is from the judgment of Megarry J. in *Hounslow London Borough Council v. Twickenham Garden Developments Ltd. [1971] Ch. 233* , 257, to which I shall return. But it is important to set the passage which I have just cited in context. The question addressed in that passage is not the question in this case. The question there addressed is whether a licensee who is in actual occupation may have the protection of the law of trespass against intruders; not whether a licensee who is not in occupation can evict a trespasser who is already on the property. This appears from the first two sentences of paragraph 17-18:

> "It would seem that exclusive possession against the landlord as a test for the nature of the occupant's interest is not conclusive as to the occupant's possessory interest vis-à-vis third parties. The terms of an occupational licence may give the licensee such a degree of control over access as to entitle him to the protection of the law of trespass against intruders."

It is this concept which, as it seems to me, Lord Upjohn had in mind when he said, in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd. [1965] A.C. 1175* , 1232:

> "Furthermore . . . the [deserted] wife's occupation is not exclusive against the deserting husband for he can at any moment return and resume the role of occupier without the leave of the wife. Nevertheless, I cannot seriously doubt that in this case in truth and in fact the wife at all material times was and is in exclusive occupation of the home. Until her husband returns she has dominion over the house and she could clearly bring proceedings against trespassers; so I shall for the rest of this opinion assume that the wife was and is in exclusive occupation of the matrimonial home at all material times."

Mr. King placed much reliance on that passage; but, to my mind, it is of no assistance to his argument. I would accept, without hesitation, that a deserted wife who has remained in occupation of the former matrimonial home after the departure of her husband has exclusive occupation in the sense required to bring an action against intruders; but that is because her occupation has the necessary possessory quality and she does not need to rely upon her title. I would not accept - and I do not think that Lord Upjohn was intending to suggest - that a deserted wife who goes out of occupation upon or after the departure of her husband has title to bring an action to recover possession against a squatter who goes into occupation of the empty house.

Nor do I think that the airport company gains assistance from the decision of Megarry J. in *Hounslow London Borough Council v. Twickenham Garden Developments Ltd. [1971] Ch. 233* . The defendant, a building contractor, had been allowed into occupation of a site owned by the plaintiff council under a building contract. The council had sought to determine the contract by notice under its terms. The contractor refused to vacate the site. The council brought proceedings for injunctions ***145*** restraining the contractor from "entering, remaining or otherwise trespassing" on the site. Megarry J. explained the position, at p. 268:

> "The contractor is in de facto control of the site, and whether or not that control amounts in law to possession, the injunction would in effect expel the contractor from the site and enable the borough to re-assert its rights of ownership."

Megarry J. refused to grant what he regarded as a mandatory injunction on an interlocutory application because he was not satisfied that the council had made out a sufficiently strong case for that remedy in advance of trial. But, in the course of his judgment, he considered a submission that the contractor was in possession of the site - in which case the injunctions sought would, clearly, have been inappropriate. In that context he said, at p. 257:

> "I do not think that I have to decide these or a number of other matters relating to possession. First, I am not at all sure that the matter is determined by the language of the contract. It is in a standard form" - containing R.I.B.A. conditions - "and may be used in a wide variety of circumstances. In some, the building owner may be in manifest possession of the site, and may remain so, despite the building operations. In others, the building owner may de facto, at all events, exercise no rights of possession or control, but leave the contractor in sole and undisputed control of the site. Second, in recent years it has been established that a person who has no more than a licence may yet have possession of the land. Though one of the badges of a tenancy or other interest in land, possession is not necessarily denied to a licensee."

The reference, in a judgment delivered in 1971, to the fact that "in recent years it has been established that a person who has no more than a licence may yet have possession of the land" was, I think, a reference to the dichotomy, finally put to rest by the decision of the House of Lords in *Street v. Mountford [1985] A.C. 809* , between "licence" and "tenancy" in the context of the Rent Acts. There is no doubt that a licensee may have a right to exclusive possession without thereby becoming a tenant - for example where the licence is gratuitous - but that will depend on the terms of the licence. In any event, that is not this case. The licence of 22 June 1998 does not confer any right to exclusive possession. Further, a contractor who enters a site under a building contract may, on the facts, take possession of the site; but, as Megarry J. held, that will require an examination of the facts.

The National Trust is not party to these proceedings and has taken no direct part in them. But the airport company has put in evidence (i) a letter dated 15 August 1998 from George Davies & Co., solicitors for the National Trust, and (ii) an affidavit sworn on 24 September 1998 by the area manager, Cheshire and Greater Manchester, of the National Trust. The letter of 15 August 1998 refers to the licence of 22 June 1998 and continues in these terms:

> "We also confirm that it has been agreed that Manchester Airport Plc. will be responsible for the provision of security measures including ***146** security, fencing and patrols in relation to Arthur's Wood to prevent the intrusion by protesters or other trespassers and for the eviction of any such protesters or trespassers. In addition, Manchester Airport Plc. are entitled to control access and egress to the part of Arthur's Wood as licensed."

The area manager deposes:

> "The licence itself clearly gives the airport a right to occupy as well as enter the specified site. The terms of occupation have always been understood to mean the control of access and egress to and from the site. The National Trust does not at present nor does it intend to play any part in the day to day works or the ground control of the site although reserve the right as licensor to enter should the need arise. Such control is presently effected by Manchester Airport Plc. and shall be for the duration of the licence, subject to extension."

If the letter of 15 August 1998, and the subsequent affidavit, are intended to do no more than set out the National Trust's views as to the legal effect of the licence dated 22 June 1998, they are, as it appears to me, of no assistance. The legal effect of a written document is a matter for the court which has to give effect to its terms. The "right as licensor to enter should the need arise" is not reserved in any express term of the licence; it exists, in my view, because the licence grants no right of possession which would enable the airport company to exclude the National Trust. The right to control access to and egress from the site is not mentioned in the licence; nor is there, in the licence, any mention of responsibility for security measures. It is, I think, to be inferred that these are matters which are said to have been agreed between the National Trust and the airport company subsequent to the grant of the licence. It may be that they owe something to the solicitors' researches into *Clerk & Lindsell* after the present problems first arose. But I do not, myself, find it possible to give them any weight. They are, as it seems to me, equivocal. They are consistent with an arrangement under which the airport company is to act as the agent of the National Trust in relation to the security of the site. They are not, of themselves, evidence as to the existence of any right to possession, or title, having been granted to the airport company; a fortiori, in circumstances in which the power of the National Trust to grant such a right is circumscribed by statute.

There was no material, in the present case, on which the judge could reach the conclusion that the airport company was in de facto possession of the relevant part of Arthur's Wood; and, for my part, I do not think that she did reach that conclusion. She treated the question as one which turned on the construction of the licence. In my view the judge was in error when she held, in a passage in her judgment to which I have already referred, that:

> "The licence gives the right of possession and this is, I am satisfied, a right of possession which does not give absolute title, but it does nevertheless give a power against trespassers."

She did not make the distinction, essential in cases of this nature, between a plaintiff who is in possession and who seeks protection from those who **147* interfere with that possession, and a plaintiff who has not gone into possession but who seeks to evict those who are already on the land. In the latter case (which is this case) the plaintiff must succeed by the strength of his title, not on the weakness (or lack) of any title in the defendant.

I would have allowed this appeal.

Laws L.J.

I gratefully adopt the account of the facts set out in the judgment of Chadwick L.J. As there appears, the defendants or others (to whom I will compendiously refer as "the trespassers") entered Arthur's Wood and set up their encampments before the grant of the licence by the National Trust to the airport company. Moreover it appears (and I will assume it for the purpose of the appeal) that the airport company has not to date gone into occupation of the land under the licence.

In those circumstances, the question which falls for determination is whether the airport company, being a licensee which is not de facto in occupation or possession of the land, may maintain proceedings to evict the trespassers by way of an order for possession. Now, I think it is clear that if the airport company had been in actual occupation under the licence and the trespassers had then entered on the site, the airport company could have obtained an order for possession; at least if it was in effective control of the land. Clause 1 of the licence confers a right to occupy the whole of the area edged red on the plan. The places where the trespassers have gone lie within that area. The airport company's claim for possession would not, were it in occupation, fall in my judgment to be defeated by the circumstance that it enjoys no title or estate in the land, nor any right of exclusive possession as against its licensor (which the National Trust had no power to grant). This, as it seems to me, is in line with the passage in Lord Upjohn's speech in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd. [1965] A.C. 1175* , 1232 which Chadwick L.J. has already cited, and is supported by the judgment of Megarry J. in *Hounslow London Borough Council v. Twickenham*

Garden Developments Ltd. [1971] Ch. 233 ; and it is clearly consonant with the view of the editors of Clerk & Lindsell on Torts, p. 848, para. 17-18. Nor, I think, would such a claim be defeated by the form of possession order required in Order 113 proceedings (Form 42A) or by the prescribed form of the writ of possession (Form 66A). As Chadwick L.J. has said, the writ commands the sheriff " *that you enter the said land and cause* [the plaintiff] *to have possession of it* ." If the airport company was in de facto occupation of the site, such an order would be perfectly appropriate as against the trespassers, notwithstanding that the order for possession is said to be a remedy in rem.

But if the airport company, were it in actual occupation and control of the site, could obtain an order for possession against the trespassers, why may it not obtain such an order *before* it enters into occupation, so as to evict the trespassers and enjoy the licence granted to it? As I understand it, the principal objection to the grant of such relief is that it would amount to an ejectment, and ejectment is a remedy available only to a party with title to or estate in the land; which as a mere licensee the airport company plainly lacks. It is clear that this was the old law: see the passages from Cole on Ejectment cited in the High Court of Australia by ***148** Windeyer J. in *Radaich v. Smith, 101 C.L.R. 209* , 222, in a passage agreed to by Lord Templeman in *Street v. Mountford [1985] A.C. 809* , 827, to which Chadwick L.J. has made reference.

However, in this I hear the rattle of mediaeval chains. Why was ejectment only available to a claimant with title? The answer, as it seems to me, lies in the nature of the remedy before the passing of the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76). Until then, as Cole vividly describes it in *Cole on Ejectment* (1857), ch. 1, pp. 1-2:

> "actions of ejectment were in point of form pure fictions . . . The action was commenced . . . by a declaration, every word of which was untrue: it alleged a *lease* from the claimant to the nominal plaintiff (*John Doe*); an *entry* by him under and by virtue of such lease; and his subsequent *ouster* by the nominal defendant (*Richard Roe*): at the foot of such declaration was a notice addressed to the tenants in possession, warning them, that, unless they appeared and defended the action within a specified time, they would be turned out of possession. This was the only comprehensible part to a non-professional person . . . and (curiously enough) the only matter in issue was a fact or point *not alleged in the declaration* , viz. whether the claimant on the day of the alleged demise, and from thence until the service of the declaration, was *entitled to demise* the property claimed or any part thereof; i.e. whether he was himself then legally entitled to actual possession, and consequently to dispose of such possession: if not, it is obvious that the defendants might very safely admit that he did *in fact* make the alleged demise . . .
>
> "The whole proceeding was an ingenious fiction, dextrously contrived so as to raise in every case the only real question, viz. the claimant's title or right of possession . . . and whereby the delay and expense of special pleadings

> and the danger of variances by an incorrect statement of the claimant's title or estate were avoided. But it was objectionable, on the ground that fictions and unintelligible forms should not be used in courts of justice; especially when the necessity for them might be avoided by a simple writ so framed as to raise precisely the same question in a true, concise, and intelligible form. This has been attempted with considerable success in the Common Law Procedure Act 1852."

The Act of 1852 introduced a simplified procedure without fictions. The form of writ prescribed by sections 168 to 170 of the Act required an allegation that the plaintiff was "entitled [to possession], and to eject all other persons therefrom." Section 207 , however, provided: "The effect of a judgment in an action of ejectment under this Act shall be the same as that of a judgment in the action of ejectment heretofore used."

Blackstone's Commentaries , 1st ed., Book III (1768), ch. 11, pp. 202-203 confirms the earlier fictional character of the procedure:

> "as much trouble and formality were found to attend the actual making of the lease, entry, and ouster, a new and more easy method of trying titles by writ of ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago, by Rolle C.J., who then sat in the court of upper ***149*** bench; so called during the exile of King Charles the Second. This new method entirely depends upon a string of legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title."

The lesson to be learnt from these ancient forms is that the remedy by way of ejectment was *by definition* concerned with the case where the plaintiff asserted a better title to the land than the defendant; and the fictions, first introduced in the latter half of the 16th century and in effect maintained until 1852, were designed to cut out the consequences of pleading points that might be taken if the plaintiff did not plead his case as to the relevant legal relationships with complete accuracy. Rolle C.J.'s manoeuvre, and more so the Act of 1852, were in their way ancestors of the Access to Justice reforms to civil procedure which will come into effect on 26 April 1999.

In my judgment the old learning demonstrates only that the remedy of ejectment was simply not concerned with the potential rights of a licensee: a legal creature who, probably, rarely engaged the attention of the courts before 1852 or for some time thereafter. It is no surprise that Blackburn J. in *Allan v. Liverpool Overseers, L.R. 9 Q.B. 180* , dealing with a question whether a licensee of docks premises was liable to rates, stated, at pp. 191-192:

> "A lodger in a house . . . is not in exclusive occupation . . . because the landlord is there for the purpose of being able . . . to have his own servants to look after the house . . . Such a lodger could not bring ejectment or trespass quare clausum fregit, the maintenance of the action depending on the possession; and he is not rateable."

As one might expect this is wholly in line with the old law. But I think there is a logical mistake in the notion that because ejectment was only available to estate owners, possession cannot be available to licensees who do not enjoy de facto occupation. The mistake inheres in this: if the action for ejectment was by definition concerned *only* with the rights of estate owners, it is necessarily silent upon the question, what relief might be available to a licensee. The limited and specific nature of ejectment means only that it was not available to a licensee; it does not imply the further proposition that *no* remedy by way of possession can now be granted to a licensee not in occupation. Nowadays there is no distinct remedy of ejectment; a plaintiff sues for an order of possession, whether he is himself in occupation or not. The proposition that a plaintiff not in occupation may only obtain the remedy if he is an estate owner assumes that he must bring himself within the old law of ejectment. I think it is a false assumption.

I would hold that the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence. If, as here, that requires an order for possession, the spectre of history (which, in the true tradition of the common law, ought to be a friendly ghost) does not stand in the way. The law of ejectment has no ***150** voice in the question; it cannot speak beyond its own limits. Cases such as *Radaich v. Smith, 101 C.L.R. 209* and *Street v. Mountford [1985] A.C. 809* were concerned with the distinction between licence and tenancy, which is not in question here.

In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys. This is the same principle as allows a licensee who is in de facto possession to evict a trespasser. There is no respectable distinction, in law or logic, between the two situations. An estate owner may seek an order whether he is in possession or not. So, in my judgment, may a licensee, if other things are equal. In both cases, the plaintiff's remedy is strictly limited to what is required to make good his legal right. The principle applies although the licensee has no right to exclude the licensor himself. Elementarily he cannot exclude

any occupier who, by contract or estate, has a claim to possession equal or superior to his own. Obviously, however, that will not avail a bare trespasser.

In this whole debate, as regards the law of remedies in the end I see no significance as a matter of principle in any distinction drawn between a plaintiff whose right to occupy the land in question arises from title and one whose right arises only from contract. In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment. If they do, and (as here) an order for possession is the only practical remedy, the remedy should be granted. Otherwise the law is powerless to correct a proved or admitted wrongdoing; and that would be unjust and disreputable. The underlying principle is in the Latin maxim (for which I make no apology), "ubi jus, ibi sit remedium."

In all these circumstances, I consider that the judge below was right to uphold the order for possession. I should add that in my view there is as a matter of fact here no question of the writ of possession interfering with the prior rights of the National Trust; so much is demonstrated by the letter from the Trust's solicitors of 15 August 1998 and the affidavit of the Trust's area manager of 24 September 1998. These materials have already been set out by Chadwick L.J. With deference to his contrary view I would attach some importance to them. I agree, of course, that they do not qualify the terms of the licence; but they seem to me to show as a matter of evidence that execution of the writ of possession granted in the airport company's favour would not on the facts infringe any claims or obstruct any acts on the land by the licensor or anyone claiming under it.

For all the reasons I have given, I would dismiss this appeal.

Kennedy L.J.

The wording of Order 113 and the relevant facts can be found in the judgment of Chadwick L.J. In *Wiltshire County Council v. Frazer (1983) 82 L.G.R. 313* , 320 Stephenson L.J. said that for a party to avail himself of the Order he must bring himself within its words. If he does so the court has no discretion to refuse him possession. Stephenson L.J. went on, at p. 321, to consider what the words of the rule require. They require: ***151**

> "(1) Of the plaintiff, that he should have a right to possession of the land in question and claim possession of land which he alleges to be occupied solely by the defendants. (2) That the defendants, whom he seeks to evict from [the land], should be persons who have entered into or have remained in occupation of it without his licence or consent [or that of any predecessor in title of his]."

In my judgment those requirements are met in this case. The plaintiff does have a right to possession of the land granted to it by the licence. It is entitled "to enter *and occupy* " (my emphasis) the land in question. The fact that it has only been granted the right to enter and occupy for a limited purpose (specified in clause 2 of the licence) and that, as I would accept, the grant does not create an estate in land giving the plaintiff a right to exclusive possession does not seem to me to be critical. What matters, in my judgment, is that the plaintiff has a right to possession which meets the first of the requirements set out by Stephenson L.J., and the defendants have no right which they can pray in aid to justify their continued possession. If it is said that such an approach blurs the distinction between different types of right and different types of remedy it seems to me that is the effect of the wording of Order 113, and the understandable object of the law has always been to grant relief to a plaintiff seeking possession who can rely on a superior title. In *Danford v. McAnulty (1883) 8 App.Cas. 456* , 462 Lord Blackburn said that:

> "in ejectment, where a person was in possession those who sought to turn him out were to recover *upon the strength of their own title* ; and consequently possession was at law a good defence against any one, and those who sought to turn the man in possession out must show a superior legal title to his." (Emphasis added.)

That case was not, of course, concerned with a licence to occupy for a limited purpose but the emphasis on giving a remedy to the party who has a better right seems to me to be instructive.

The decision in In re Wykeham Terrace, Brighton, Sussex, Ex parte Territorial Auxiliary and Volunteer Reserve Association for the South East *[1971] Ch. 204* demonstrated the weakness of the procedure prior to the existence of Order 113. On an ex parte application the court was unable to enter judgment or make a final order against unnamed squatters who were not a party to the proceedings. Stamp J., at p. 212, observed that:

> "No doubt a different, and perhaps a better process . . . could be provided to meet particular cases and more particularly a case where unknown persons are in occupation of land claimed by the plaintiff."

Order 113 was then drafted and came into operation on 20 July 1970. As I have already said it does not in my judgment require of a plaintiff that he demonstrate a right to exclusive possession and therefore, as it seems to me, it need not be confined to giving protection to those who can demonstrate that they possess an estate in land. If it is approached in that way then, as it seems to

me, decisions such as *Street v. Mountford [1985] A.C. 809* , on which Mr. Maile relied, no longer give rise to any difficulty, ***152** and the court is able to give a remedy in a situation in which a remedy plainly ought to be provided.

For those reasons, in addition to those set out in the judgment of Laws L.J., I would dismiss this appeal.

Representation

Solicitors: Legal Department, Manchester Airport Plc., Manchester .

Petition: 28 June 1999. The Appeal Committee of the House of Lords (Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Hope of Craighead) dismissed a petition by the defendant, Christopher Maile, for leave to appeal. ([Reported by Susan Denny, Barrister])

Footnotes

1 R.S.C., Ord. 113, r. 1: see post, p. 138C-D.

Privy Council

*National Commercial Bank Jamaica Ltd *v* Olint Corpn Ltd

Practice Note

[2009] UKPC 16

2009 Jan 26; April 28

Lord Hoffmann, Lord Rodger of Earlsferry, Lord Carswell, Lord Brown of Eaton-under-Heywood, Lord Mance

Injunction — Interlocutory — Application — Requirement of notice — Notice required unless giving notice would enable steps to be taken to defeat purpose of injunction or there were no time to give notice before injunction required — Short or informal notice to be given wherever possible if too late to give notice required by rules — Matters to be taken into account when determining application — Same principles applying whether injunction prohibitory or mandatory

A judge should not entertain an application for an injunction of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. Cases in the latter category will be rare, because even in cases in which there has been no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none (post, para 13).

In deciding at the interlocutory stage whether granting or withholding an injunction is more likely to produce a just result, the basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. That applies whether the injunction is prohibitory or mandatory. Among the matters which the court may take into account are the prejudice which the claimant may suffer if an injunction is not granted or which the defendant may suffer if it is, the likelihood of such prejudice actually occurring, the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking, the likelihood of either party being able to satisfy such an award, and the likelihood that the injunction will turn out to have been wrongly granted or withheld: that is to say, the court's opinion of the relative strength of the parties' cases. Arguments over whether the injunction should be classified as prohibitive or mandatory are barren: what matters is what the practical consequences of the actual injunction are likely to be (post, paras 17–20).

American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL(E) applied.

The following cases are referred to in the opinion of the Board:

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504, HL(E)

Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670; [1986] 3 All ER 772

OBG Ltd v Allan [2007] UKHL 21; [2008] AC 1; [2007] 2 WLR 920; [2007] Bus LR 1600; [2007] 4 All ER 545, HL(E)

R v Secretary of State for Transport, Ex p Factortame Ltd (No 2) (Case C-213/89) [1991] 1 AC 603; [1990] 3 WLR 818; [1991] 1 All ER 70, HL(E)

Shepherd Homes Ltd v Sandham [1971] Ch 340; [1970] 3 WLR 348; [1970] 3 All ER 402

Smith v National Commercial Bank Ltd (unreported) 3 September 2008, Supreme Court of Jamaica
World Wise Partners Ltd v RBTT Bank Jamaica Ltd (unreported) 13 June 2008, Supreme Court of Jamaica

No additional cases were cited in argument.

APPEAL from the Court of Appeal of Jamaica

On 11 January 2008 Pusey J granted an ex parte application by the claimant company, Olint Corpn Ltd, for an interlocutory injunction restraining the defendant, National Commercial Bank Jamaica Ltd, from, inter alia, closing the company's bank accounts pending trial of its claim for declarations that the bank, by threatening to close the accounts and refusing to supply services, had acted maliciously, contrary to its statutory obligations under the Banking Act and the Fair Competition Act, and with the intention of inducing breaches of contract between the company and members of an investment club which it ran and whose moneys had been deposited in the bank. On 18 April 2008 Jones J refused to extend the injunction and the company appealed. On 18 July 2008, the Court of Appeal of Jamaica (Panton P, Cooke and Morrison JJA) allowed the company's appeal and granted the injunction until trial. The bank appealed to the Privy Council. With the appeal pending, the company, by letter dated 17 December 2008, withdrew from the appeal.

At the end of the hearing the Board announced that it would advise Her Majesty that the appeal be allowed.

B St Michael Hylton QC, *Carlene C Larmond* and *Kalaycia D Clarke* (all of the Jamaican Bar) (instructed by *Fletcher & Gordon* for *Michael Hylton & Associates, Kingston, Jamaica*) for the bank.

The Board took time for consideration.

28 April 2009. **LORD HOFFMANN** delivered the following opinion of the Board.

1 The chief issue in this appeal, as formulated by Panton P in the Court of Appeal, is whether a bank, "by merely giving reasonable notice", can lawfully close an account that is not in debit, where there is no evidence of that account being operated unlawfully. Their Lordships have no doubt that in the absence of express contrary agreement or statutory impediment, a contract by a bank to provide banking services to a customer is terminable upon reasonable notice: *Paget's Law of Banking*, 13th ed (2007), p 153.

2 Olint Corpn Ltd ("the company") carries on the business of providing administrative and other services to an investment club which appears to have offered its members very high returns, allegedly derived from profits made in foreign exchange trading. In 2005 it opened two accounts with the National Commercial Bank Jamaica Ltd ("the bank") and a third account in 2007. Towards the end of 2006 the company attracted a good deal of unfavourable publicity in the press. There were allegations that it was, not to put too fine a point upon it, a pyramid or Ponzi scheme in which the returns to investors were paid out of the money subscribed by new investors attracted by the prospect of high returns. In August 2007 the bank asked to see the company's audited accounts (as it is required to do under guidance issued by the Bank of Jamaica for the purpose of countering money-laundering and terrorist financing) but they were not forthcoming.

3 On 14 November 2007 the bank, no doubt apprehensive that if the rumours turned out to be true, it might at best suffer some damage to its reputation and at worst find itself on the receiving end of a claim for negligence or dishonest assistance in paying away money derived from club members, decided that it did not want to continue to be the company's banker. It wrote saying that it intended to close the

company's accounts on 17 December and, in the absence of other instructions, would send the company a draft for its net credit balance. That was 32 days notice.

4 On 21 November 2007 the company asked that the period of notice be extended to 14 March 2008. The bank said that this was too long but agreed to an extension until 14 January 2008. It said that the company had given no information which could justify a longer period.

5 On 11 January 2008 the company, without any notice formal or informal to the bank, successfully applied ex parte for an injunction restraining the bank from closing its accounts until 25 January or further order. The application came before Jones J inter partes on 17 and 18 March. On 18 April he dismissed it. The company appealed and on 18 July 2008, the Court of Appeal granted the injunction until trial.

6 There is no allegation in the particulars of claim served on behalf of the company that the extended period of notice was unreasonably short. Instead, it is alleged that the bank was acting maliciously, contrary to its statutory obligations under the Banking Act (No 17 of 1992) and the Fair Competition Act (No 9 of 1993) and with the intention of inducing breaches of contract between the company and members of the investment club whose moneys had been deposited. Their Lordships will consider each of these causes of action.

7 First, it was argued that the bank's contractual right to terminate the banking relationship by reasonable notice has been modified by section 4(3)(c) of the Banking Act. That paragraph is part of a general requirement, contained in section 4, that a licence to carry on a banking business should be granted only to companies which the Bank of Jamaica recommends as having fit and proper persons as their directors, managers and major shareholders. Section 4(3)(c) says what is meant by a fit and proper person: he must be of sound probity, competent, diligent and so on. Their Lordships are unable to see what these provisions have to do with the terms of the contract between the bank and its customers. In the Court of Appeal, Morrison JA criticised the judge for deciding this matter by way of a "mini-trial" and held that it gave rise to a serious issue which ought to be tried. But he did not explain what that issue would be and their Lordships consider that one has only to read section 4(3)(c) to see that it is irrelevant to any issue in this case.

8 The claims under the Fair Competition Act appear to their Lordships to be equally unpromising. First, it is said that, by closing the account, the bank was abusing a dominant position in the market. There appears to have been no evidence to suggest that the bank occupied a dominant position—defined in section 19 as "such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors"—in the market for banking services in Jamaica. The bank is the second largest in Jamaica, with 34–37% of total loans and 30–35% of total deposits, but the Bank of Nova Scotia is larger and there are four other commercial banks in Jamaica, to say nothing of foreign banks. They are all in competition with each other. It is not easy to acquire a dominant position in the banking market. However, even if the bank did occupy a dominant position, their Lordships cannot see how a refusal to be the company's banker can be an abuse of that position. Abuse of a dominant position is normally with a view to securing some advantage in the market. Section 20 defines such abuse as impeding the "maintenance or development of effective competition". It does not appear to their Lordships that the bank's action could have any effect on competition between banks. On the contrary, it enabled competitors to pick up another customer if they felt inclined to do so.

9 Secondly, under the Fair Competition Act, it was argued that the bank was in breach of section 34(1)(b), by refusing to supply services to the company. Read literally, this subsection could mean that a refusal to supply goods or services to anyone, for whatever reason, was an offence under the Act. Section 34 has the side-note "Price Fixing" and their Lordships suspect that paragraph (b) of subsection (1) is the result of a slip in the legislative process, because it covers exactly the same ground in exactly the same words as paragraph (c), without the qualifying words "because of the low pricing policy of that other person". It must be read in its context as confined

to discrimination for the purpose of maintaining prices, which has nothing to do with this case.

10 The third complaint under the Fair Competition Act was that, contrary to section 35, the bank colluded with other banks to restrain or injure competition. The only evidence of such collusion is that at least one other bank has also closed the company's accounts. But there is nothing to suggest that this action, which took place more than a year earlier, was in collusion with the bank, still less that it was for anti-competitive purposes. No doubt it was for much the same reasons as the bank decided that it did not want the company as a customer, but that is hardly an anti-competitive act.

11 The final alleged cause of action was inducement of breaches of contract with members of the investment club. Their Lordships consider this to be a hopeless proposition. Inducement of breaches of contract is a tort which requires the bank to know that it will cause the breach of a contract between the company and the members and to intend to cause that breach: see, most recently, *OBG Ltd v Allan* [2008] AC 1. There was no evidence that the bank knew anything about the relationship between the company and the members (indeed, that was one of its complaints) or that it intended to cause a breach of contract.

12 Their Lordships therefore consider that Jones J was right to have held that there was no triable issue and to have refused an injunction on that ground. In those circumstances it is unnecessary for their Lordships to consider whether, if there had been a triable issue (such as whether the period of notice had been too short) it would have been proper to grant an interlocutory injunction or whether the company should have been left to pursue its remedy in damages. Nevertheless, their Lordships wish to draw attention to two features of this case.

13 First, there appears to have been no reason why the application for an injunction should have been made ex parte, or at any rate, without some notice to the bank. Although the matter is in the end one for the discretion of the judge, audi alterem partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Supreme Court of Jamaica Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.

14 In this case, the applicants were told on 22 November 2007 that their accounts would be closed on 14 January 2008 and a request for a further extension was refused on 24 December 2007. No explanation has been given for why it was not possible for the bank to be given notice of the application to the court made on 11 January 2008. Their Lordships were told that such last-minute ex parte applications have become common practice in Jamaica. In *World Wise Partners Ltd v RBTT Bank Jamaica Ltd* (unreported) 13 June 2008 the bank wrote on 28 February 2008 to the plaintiff saying that their accounts would be closed on 15 May 2008. On that day, the plaintiff applied ex parte for an injunction which was granted and not discharged until after an inter partes hearing on 13 June 2008. In *Smith v National Commercial Bank Ltd* (unreported) 3 September 2008 the bank notified the plaintiffs that their accounts would be closed on 14 April 2008 and they applied for an injunction ex parte on 14 April 2008. Following the decision of the Court of Appeal in this case, that injunction has been extended until trial.

15 These cases appear to show a disregard of rule 17.4(4) for which no justification is offered. If the rule is not generally enforced, plaintiffs will be encouraged to make a tactical use of the legal process which should not be allowed.

A **16** The second feature is the basis upon which Jones J decided to refuse an interlocutory injunction and the Court of Appeal decided to grant one. It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the B chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be C prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17 In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should D not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to E suggest the relative weight to be attached to them."

18 Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, F the court's opinion of the relative strength of the parties' cases.

19 There is however no reason to suppose that, in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) G [1991] 1 AC 603, 682–683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it H appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that the injunction was rightly granted".

20 For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see *Films Rover* [1987] 1 WLR 670, 680. What matters is what the practical consequences of the actual injunction are likely to be. It seems to me that both Jones J and the Court of Appeal proceeded by first deciding how the injunction should be classified and then applying a rule that if it was mandatory, a "high degree of assurance" was required, while if it was prohibitory, all that was needed was a "serious issue to be tried". Jones J thought it was mandatory and refused the injunction while the Court of Appeal thought it was prohibitory and granted it.

21 Their Lordships consider that this type of box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction. Factors which the court might have taken into account in this case if there had been a triable issue were, first, that the injunction required the bank to continue against its will to provide confidential services for the plaintiffs; secondly, that the injunction would require the bank to continue to incur reputational risks and possible exposure to legal action; thirdly, that it was by no means clear that the plaintiffs would be able to satisfy a claim under the cross-undertaking in damages; fourthly, that the plaintiffs' case was, even if not (as their Lordships think) hopeless, certainly very weak; and fifthly, that the plaintiffs could no doubt have obtained alternative banking services from any bank whom they could persuade that they were not running a fraudulent scheme. It is unnecessary to say what should have been the outcome of a weighing of these factors because that was a matter for the discretion of the judge but they suggest that, even if there had been a serious issue to be tried, it is by no means obvious that Jones J was wrong to refuse an injunction.

22 For these reasons, their Lordships announced at the conclusion of argument that they would humbly advise Her Majesty that the appeal should be allowed with costs before the Board and in the Court of Appeal and the judgment of Jones J restored.

CTB

Neutral Citation Number: [2021] EWHC 3081 (QB)

Claim No: QB-2021-003977

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Law Courts
50 West Bar
Sheffield S3 8PH

Date: 17 November 2021

Before:

MR JUSTICE LAVENDER

- -

Between:

National Highways Limited

Claimant

- and -

Persons unknown deliberately causing the blocking, slowing down, obstructing or otherwise interfering with the flow of traffic onto or off or along the strategic road network for the purpose of protesting and Others

Defendants

- -
- -

Saira Kabir Sheikh QC and Charles Merrett (instructed by the **Government Legal Department**) for the **Claimant**

The following Defendants in Person: **Dr Diana Lewen Warner** (27th), **Jerrard Mark Latimer** (44th), **Liam Norton** (54th), **Michael Brown** (67th), **Rob Stuart** (83rd), **Stephen Gower** (95th), **Tim Speers** (105th), **Victoria Anne Lindsell** (110th) and **Andria Efthimious-Mordaunt** (123rd)

Owen Greenhall (instructed by **Hodge Jones Allen**) for **Jessica Branch** and **Caspar Hughes**

Hearing date: 11 November 2021

- -

JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. The purpose of this judgment is to set out the reasons for the decision which I announced at the conclusion of the hearing in the Royal Courts of Justice on 11 November 2021, which was that I would not set aside the ex parte interim injunction made by Linden J on 25 October 2021.

2. In that hearing, I was also invited to vary Linden J's injunction, if I did not set it aside altogether, and, in some respects, it was conceded that I should do so. Insofar as there were disputed issues about the terms of Linden J's injunction, I decided those issues at the hearing for the reasons which I gave then, which I will not rehearse.

3. In effect, I varied Linden J's injunction, although the means by which I achieved that end was to discharge his order with effect from 11 November 2021 and to make a differently worded injunction in its place.

4. For the purposes of this judgment, it is only necessary to refer to paragraphs 3.1 and 3.2 of the injunction which I made on 11 November 2021, which is in the following terms:

> With immediate effect and until the earlier of (i) Trial; (ii) Further Order; or (iii) 23.59 pm on 31 December 2021, the Defendants and each of them are forbidden from deliberately undertaking the activities prohibited in paragraphs 3.1, 3.2, 3.3 and 3.4 below:
>
> 3.1 Blocking, slowing down, obstructing or otherwise interfering with the flow of traffic onto or along or off the SRN for the purpose of protesting.
>
> 3.2 Blocking, slowing down, obstructing or otherwise interfering with access to or from the SRN, including doing so by any activity on any adjacent slip roads or roundabouts which are not vested in the Claimant, for the purpose of protesting which has the effect of slowing down or otherwise interfering with the flow of traffic onto or along or off the SRN.

5. This injunction applies to the whole of the Strategic Road Network ("the SRN"), except those parts covered by the earlier injunctions which I will mention later.

(2) Background

(2)(b) The Insulate Britain Protests

6. There have in recent months been a number of well-publicised protests by individuals associated with a movement called "Insulate Britain". I will call these the "Insulate Britain protests". It is not suggested that Insulate Britain is either a legal entity or the sort of unincorporated association against which an order could properly be made. The first five Insulate Britain protests were on 13 September 2021, at various locations on the M25 motorway. By the date of the hearing, there had been many more Insulate Britain protests, including:

(1) five protests on the M25 on 15 September 2021;

(2) three protests on the M25 on 17 September 2021;

(3) protests on the M3 at Junction 1 and the M11 at Junction 8 on 17 September 2021;

(4) a protest on the M25 and one on the A1M at Junction 4 (Hatfield) on 20 September 2021;

(5) two protests on the M25 on 21 September 2021;

(6) a protest on the A20 near Dover on 24 September 2021;

(7) protests on the M25 on 27, 29 and 30 September 2021;

(8) protests on the M25 and on the M1 at Junction 1 (Brent Cross) and the M4 at Junction 3 (Heathrow Airport) on 1 October 2021;

(9) four protests on roads in London which are not part of the SRN on 4 October 2021;

(10) a protest on the M25 on 8 October 2021 (which is the subject of committal applications currently being heard by the Divisional Court);

(11) a protest on the M25 on 13 October 2021;

(12) protests on roads in London on 25 October 2021;

(13) protests on the M25 and, outside the SRN, on the A206 and the A40/4000 on 27 October 2021;

(14) two protests on the M25 on 29 October 2021;

(15) protests on the M25 and, outside the SRN, on the A538 (in Manchester) and the A4400 (in Birmingham) on 2 November 2021; and

(16) a protest in Parliament Square, London on 2 November 2021.

7. The protestors who appeared before me on 11 November 2021 and on earlier occasions made clear that it was their intention to continue protesting in this way and, indeed, that they considered themselves obliged to do so. That is consistent with press releases and statements by other protestors reported in the media.

8. The aims of the protestors are, in summary, to draw attention to what they consider to be failings in government policy in relation to the likely consequences of climate change resulting from global warming and to promote changes in that policy, notably the introduction of a new policy for insulating all homes in Britain.

9. The protestors block traffic on the road where they are protesting and continue to do so until they are removed. In addition to sitting on the road, they also glue themselves to the road or to police vehicles. The protests can last for several hours, with the longest of which I am aware having lasted for seven and a quarter hours. No warnings are given to allow drivers to choose a different route so as to avoid the protest.

10. The protestors are non-violent. They are usually removed by the police, but some drivers have taken it upon themselves to remove protestors or to drive slowly into them in an attempt to force them out of the way.

(2)(b) The Strategic Road Network and National Highways Limited

11. Many, but not all, of the Insulate Britain protests have taken place on motorways or other parts of the SRN, which consists of 4,300 miles of motorways and major A roads. The roads forming the SRN are illustrated on maps attached to Linden J's and my order and are more precisely identified in a 249-page list attached to those orders. The SRN is of considerable importance to the economy of this country. Individuals use it daily to get to work and for a host of other purposes. It carries 69% of lorry traffic in England. In 2016 it carried 126 billion vehicle miles. That is equivalent to an average of about 29 million vehicle miles per mile of road per year, or about 80,000 vehicle miles per mile of road per day.

12. The claimant, National Highways Limited (known until 8 September 2021 as Highways England Company Limited), was appointed as a strategic highways company and as the highway authority for the SRN pursuant to section 1 of the Infrastructure Act 2015 by the Appointment of a Strategic Highways Company Order 2015 (SI 2015/376). Title to the SRN was vested in National Highways pursuant to section 263 of the Highways Act 1980 and a Transfer Scheme made pursuant to section 15 of the Infrastructure Act 2015.

13. The claimant has, inter alia, the following duties:

    (1) The claimant maintains the SRN pursuant to a licence dated 1 April 2015 which obliges it, inter alia, to seek to minimise disruption to road users which might reasonably be expected to occur as a result of unplanned disruption to the network.

    (2) Section 5(2)(b) of the Infrastructure Act 2015 provides that the claimant must, in exercising its functions, have regard to the effect of the exercise of those functions on the safety of users of highways.

    (3) Section 130 of the Highways Act 1980 provides that it is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority.

(2)(c) The Injunctions

14. The claimant contends that the Institute Britain protests:

    (1) constitute trespasses and nuisances;

    (2) have caused widespread and serious disruption to road users, considerable economic damage, considerable public expense and anxiety, inconvenience and distress for road users; and

    (3) create an immediate threat to the lives of the protestors and road users, including those reliant on the movement of emergency services vehicles.

15. The claimant has obtained four injunctions against "Persons unknown causing the blocking, slowing down, obstructing or otherwise interfering with the flow of traffic onto or off or along" relevant roads, as follows:

    (1) On 21 September 2021 I granted an interim injunction which applied to the M25 motorway ("the M25 injunction": claim number QB-2021-003576).

    (2) On 24 September 2021 Cavanagh J granted an interim injunction which applied to the A2, A20, A2070, M2 and M20: claim number QB-2021-003626.

    (3) On 2 October 2021 Holgate J granted an interim injunction covering various access roads to London: claim number QB-2021-003737.

    (4) On 25 October 2021 Linden J made the injunction which on 11 November 2021 I effectively varied, but refused to set aside, and which applies to the whole of the SRN, except those roads covered by the first three injunctions.

16. It is relevant to note that Transport for London has also obtained two similar injunctions, covering various significant roads in London.

17. The only defendants to the M25 injunction were "Persons unknown", but individual defendants have been named in subsequent injunctions, in part as a result of orders made against relevant chief constables requiring them to provide to the claimant the names of protestors who are arrested at Insulate Britain protests. There were 122 individuals named as defendants in a schedule to Linden J's injunction. 13 more have been added. Orders have also been made in each case for alternative service on individuals by posting copies of the injunction and associated documents through their letterbox or leaving them in a separate mailbox or affixing them to the front door.

(2)(d) The Hearing

18. A number of named defendants attended the return date hearing for Linden J's injunction on 28 October 2021. At their request, I adjourned the hearing to 11 November 2021, both to enable them to instruct counsel and to allow time for others who were affected by Linden J's injunction, but who were not involved in the Insulate Britain protests, to consider their position.

19. In the event, the defendants did not instruct counsel. Instead, nine of them attended the hearing and eight of them addressed me. Their submissions primarily concerned the reasons why they had joined the protests and, especially, their concerns at the potential consequences of global warming, if it is not properly addressed. They submitted that the Insulate Britain protests were necessary, targeted, proportionate and effective and that these proceedings were not in the public interest. Indeed, they submitted that they were acting to prevent to overthrow of institutions such as the court, which they contended would be the outcome of global warming, if not properly addressed.

20. Mr Greenhall was instructed by two individuals, Jessica Branch and Caspar Hughes, who contended that they were affected by Linden J's injunction, although they have not taken part in the Insulate Britain protests. Ms Branch attends demonstrations organised by Extinction Rebellion and Mr Hughes attends demonstrations organised by Stop Killing Cyclists, who hold protests to mark the death of cyclists in road traffic accidents.

21. Mr Greenhall provided helpful written and oral submissions, but those submission were primarily directed at the terms of the injunction. In particular, he submitted, and I accepted, that I should discharge the provision of Linden J's injunction which provided that service of the injunction on all "Persons unknown" could be effected by sending a copy of the injunction by email to the Insulate Britain email address, since that was not likely to bring the injunction to the attention of people who were not associated with Insulate Britain, but who might fall within the definition of "Persons unknown".

22. I also accepted many of Mr Greenhall's submissions as to the operative terms of the injunction, some of which, as I have said, were not opposed. I asked him to consider over the short adjournment whether there was any way of amending paragraph 3.1 of the injunction so as to make it more focused on the activities which the claimant contends constitute torts by the Insulate Britain protestors. Other than suggesting the insertion of the word "deliberately" in paragraph 3.1 and in the definition of "Persons unknown2, a suggestion which I accepted, he did not suggest any other change to paragraph 3.1.

(3) Injunction against Persons Unknown

23. Linden J's injunction was made against 122 named defendants as well as "Persons unknown". The named defendants included eight of the nine individuals who attended the hearing before me. The ninth individual has now been added as a named defendant. Nevertheless, it is appropriate to consider the guidance recently given by the Court of Appeal as to injunctions against "Persons unknown" in paragraph 82 of its judgment in *Canada Goose UK Limited v Persons Unknown* [2020] 1 WLR 2802:

> "Building on *Cameron* [2019] 1 WLR 1471 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 protestor 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 are 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. …"

24. As to these seven points:

(1) The 122 defendants whose names were known were added as individual defendants when the proceedings were commenced.

(2) I have already set out the definition of "Persons unknown" in the present case.

(3) Paragraph 82(3) identifies what I consider to be the central issue for me to decide. I will return to this issue.

(4) As I have said, 122 defendants were named in the order. The "Persons unknown" are capable of being identified, as attested to by the fact that more defendants have been added.

(5) Especially in the light of the changes made at the hearing, I consider that the prohibited acts correspond as closely as is reasonably possible to the allegedly tortious acts which the claimant seeks to prevent.

(6) Likewise, I consider that the terms of the injunction are sufficiently clear and precise to enable persons potentially affected to know what they must not do. There are references to intention both in the word "deliberately" and in the words "for the purposes of protesting", but "deliberately" was included at Mr Greenhall's suggestion to protect people in the position of his clients and "for the purposes of protesting" serves to distinguish protestors from others who might block or slow down the flow of traffic, perhaps merely as a result of poor driving.

(7) I consider that the injunction has clear geographic and temporal limits. The geographic 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. Thus:

(a) I granted the M25 injunction on 21 September 2021 and the next Insulate Britain protests, on 24 September 2021, were in Kent.

(b) More recently, there have been protests in Manchester and Birmingham as well as Parliament Square in London. These protests were not on parts of the SRN, but they demonstrate that Insulate Britain protests can be held throughout the country.

(c) 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. (I note, although this did not form part of my decision, that, at a hearing on 12 November 2021 in relation to the second injunction obtained by Transport for London, one of the protestors complained of the sheer volume of documents being served pursuant to the six injunctions now in place.)

(4) The Lawfulness (or Otherwise) of the Insulate Britain Protests

25. As I have said, the central issue for me to determine is whether there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief. As to that, it was effectively common ground that there is a real and imminent risk of more Insulate Britain protests taking place. As I have said, the protestors regard themselves as obliged to continue with their protests. There is a dispute, however, whether the protests involve the commission of the torts of trespass and nuisance. In effect, the defendants contend that, by conducting the Insulate Britain protests, they are exercising their rights to freedom of expression and freedom of assembly.

26. It is not, of course, for the claimant to prove its case on an application for an interim injunction. According to the principles established in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (which Morgan J held in paragraph 91 of his judgment in *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch) apply to an application for an interim quia timet injunction), it is sufficient for the claimant to show that there is at least a serious issue to be tried. However, I bear in mind that section 12(4) of the Human Rights Act 1998 requires that the court must have particular regard to the importance of the Convention right to freedom of expression if the court is considering whether to grant any relief which, if granted, might affect the exercise of that right.

27. Not every protest on a highway constitutes a trespass. That was decided by a majority of the House of Lords in *DPP v Jones* [1999] 2 AC 240. More recently, in *DPP v Ziegler* [2021] 3 WLR 179, the Supreme Court has considered the extent to which a protest which involved obstructing the highway may be lawful by reasons of articles 10 and 11 of the European Convention on Human Rights.

28. *Ziegler* was a criminal case. The defendants were charged with obstructing the highway, contrary to section 137 of the Highways Act 1980. They accepted that they had obstructed the highway, since they had lain in the middle of the approach road to

the conference centre where the arms fair against which they were protesting was taking place and had blocked traffic approaching the centre for 90 minutes. They contended, however, that they had not acted "without lawful .. excuse". The district judge acquitted them, on the basis that the prosecution had not proved that they acted without lawful excuse. The Divisional Court allowed an appeal by the prosecution, but the Supreme Court reversed the Divisional Court's decision.

29. Although *Ziegler* was a criminal case, the submissions of both Miss Sheikh and Mr Greenhall proceeded on the basis that what was said in that case was applicable to the question whether the obstruction of the highway by protestors constituted the tort of trespass or nuisance. I agree.

30. In paragraph 58 of their judgment, Lords Hamblen and Stephens JSC agreed with the Divisional Court that the issues which arise under articles 10 and 11 require consideration of the following five 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?

31. In the present case, the answers to the first four questions are as follows:

(1) By participating in the Insulate Britain protests, the defendants are exercising their rights to freedom of expression and freedom of assembly in articles 10 and 11.

(2) The application for, and the grant of, an injunction to prevent the defendants continuing with the Insulate Britain protests on the SRN is an interference with those rights by a public authority.

(3) That interference is "prescribed by law", namely section 37 of the Senior Courts Act 1981 and the cases which have decided how the discretion to grant an interim quia timet injunction should be exercised, together with section 130 of the Highways Act 1980.

(4) The interference is also in pursuit of a legitimate aim, namely the protection of the rights of other road users and the promotion of safety on the SRN.

32. Turning to the question whether the interference is "necessary in a democratic society", I note that the Divisional Court in *Ziegler* said as follows in paragraph 64 of its judgment ([2020] QB 253):

> "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?"

33. The question whether an interference with a Convention right is "necessary in a democratic society" can also be expressed as the question whether the interference is proportionate. In *Ziegler*, Lords Hamblen and Stephens JSC stated in paragraph 59 of their judgment that:

> "Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case."

34. Lords Hamblen and Stephens JSC quoted, inter alia, paragraphs 39 to 41 of Lord Neuberger MR's judgment in *City of London Corpn v Samede* [2012] PTSR 1624:

> "39. As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful assembly and protest on the highway] is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.
>
> 40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: 'it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command … the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention … the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'
>
> 41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is

> being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance': para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Kuznetsov v Russia*, para 45: 'any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles—however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means …' The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

35. I have set this passage out in full because, given the nature of the submissions which the defendants made to me, I want them to understand that, while I can acknowledge, and I readily do acknowledge, that, by the Insulate Britain protests, they are expressing sincere and strongly held views on very important issues, it would be wrong for me to express either agreement or disagreement with those views. Many of the submissions made to me consisted of an invitation to me to agree with the defendants' views and to decide the case on that basis. That is something which I cannot do, just as I could not decide this case on the basis of disagreement with their views.

36. It is permissible for me to observe that, insofar as the defendants assert that something should be done about the prospect of climate change, they are in agreement with the government. Where they disagree with the government is on what should be done about the prospect of climate change. The hearing took place during the 26th Conference of the Parties, also known as CoP26, which has demonstrated that there are many different views on that subject, a fact which is hardly surprising, since it is a very important political issue.

37. Moreover, the specific objective of the Insulate Britain protests, namely a change in government policy in relation to the insulation of homes in the United Kingdom, concerns a very particular aspect of government policy in this field. Again, CoP26 has demonstrated that many measures contribute to the efforts which are being made to limit global warming. Whether to emphasise one policy response or another to a perceived threat is a quintessentially political issue.

38. Lords Hamblen and Stephens JSC reviewed in paragraphs 71 to 86 of their judgment the factors which may be relevant to the assessment of the proportionality of an interference with the article 10 and 11 rights of protestors blocking traffic on a road.

Disagreeing with the Divisional Court, they held that each of the eight factors relied on by the district judge in that case were relevant. Those factors were, in summary:

(1) The peaceful nature of the protest.

(2) The fact that the defendants' action did not give rise, either directly or indirectly, to any form of disorder.

(3) The fact that the defendants did not commit any criminal offences other than obstructing the highway.

(4) The fact that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles heading to the arms fair.

(5) The fact that the protest related to a "matter of general concern".

(6) The limited duration of the protest.

(7) The absence of any complaint about the defendants' conduct.

(8) The defendants' longstanding commitment to opposing the arms trade.

39. This list of factors is not definitive, but it can serve as a useful checklist. In the present case:

(1) The Insulate Britain protests have been peaceful. Although some protestors have glued themselves to the road, it has not been suggested that there has been any instance in which a protestor has offered physical or violent resistance to being removed from the road.

(2) The Insulate Britain protests have, so far, not given rise to any form of disorder. However, other road users have increasingly taken steps themselves to remove the protestors from the road. On one occasion, this resulted in a protestor being tied up with his own banner. The risk of disorder is increasing.

(3) It is not suggested that the Insulate Britain protestors committed any offences other than obstructing the highway.

(4) The Insulate Britain protests are not targeted in any way at those against whom the protestors are protesting. Insofar as they are protesting about government policy, the protests (save perhaps for the recent protest in Parliament Square) are not targeted at government.

(5) I accept that the Insulate Britain protests relate to a "matter of general concern", in that they relate to what the government acknowledge to be an important issue. However, insofar as they seek to pursue the specific objective of changing government policy about home insulation, the protests could be said to relate to a rather more specific issue.

(6) The Insulate Britain protests are many in number and are not limited in duration. The disruption which they have caused to users of the SRN is considerable.

(7) It is abundantly clear from press reports that many members of the public object to the Insulate Britain protests. At least one press report suggested than an ambulance was held up at one protest, but the defendants deny this.

(8) As I have already said, I accept that the defendants are expressing genuine and strongly held views.

40. Looking at the four questions identified in paragraph 64 of the Divisional Court's judgment in *Ziegler*:

(1) By protesting on the SRN, the defendants are obstructing a road network which is important both for very many individuals and for the economy of England and Wales. In that context, it is strongly arguable that the aim pursued by the claimant is sufficiently important to justify interference with a fundamental right. I base that conclusion primarily on the considerable disruption caused by the Insulate Britain protests and less on the risk to safety, which, thankfully, has not yet resulted in any injuries being inflicted at any of the protests.

(2) I also accept that it is strongly arguable that there is a rational connection between the means chosen by the claimant and the aim in view. The aim is to allow road users to make use of the SRN, which is their right. Prohibiting the blocking of those road users' exercise of their rights is directly connected to that aim.

(3) There are no less restrictive alternative means available to achieve that aim. As to this:

(a) An action for damages would not prevent the disruption caused by the protests. The claimant is suing to enforce the rights of others and so could not claim damages for their loss. The loss caused by the protests would be difficult, if not impossible, to quantify. Several of the defendants told me that they did not have much money, so they may well be unable to pay substantial damages. The threat of having to pay damages does not appear in the circumstances to be likely to have any deterrent effect.

(b) It might be said that prosecutions for the offence of obstructing the highway would be a sufficient response to the Insulate Britain protests. However, all of the named defendants have been arrested and some of them have told me that they will continue to protest and they are willing to give up their liberty.

(c) By contrast, there is some evidence that injunctions do affect the protestors' behaviour. For instance, it may be that the M25 injunction was the reason why the next Insulate Britain protest was in Kent, rather than on the M25. More recent protests have been on roads which are not part of the SRN. Moreover, the M25 injunction has already led to committal applications, which, if successful, may prevent some protestors from continuing their protests during the period of their committal.

(4) Taking account of all of the factors which I have identified in this judgment, I consider that it is strongly arguable that the injunction granted by Linden J strikes a fair balance between the rights of the individual protestors and the general interest of the community, including the rights of others. As to this:

(a) On the one hand, the injunction only prohibits the defendants from protesting in a particular way. I do not accept the defendants' claim that it was necessary for them to protest in this way. There are many other ways of protesting. Moreover, as I have already noted, unlike the protest in *Zeigler*, the Insulate Britain protests on the SRN are not directed at a specific location which is the subject of the protests.

(b) On the other hand, the Insulate Britain protests have caused repeated, prolonged and serious disruption to the activities of many individuals and businesses and have done so on roads which are particularly important to the population and economy of this country. The protestors choose where to protest, but they deprive other road users of any choice to avoid the protests and to avoid being held up for long periods of time, with all of the personal or economic consequences which may follow.

41. Finally, looking at the same matters in terms of the *American Cyanamid* principles:

(1) There is a serious issue to be tried whether the Insulate Britain protests involve the commission of the torts of trespass and nuisance on the SRN. Indeed, although section 12(3) of the Human Rights Act 1998 is not applicable, I consider that the test which it imposes is met and that the claimant is likely to establish at trial that the Insulate Britain protests involve the commission of the torts of trespass and nuisance on the SRN.

(2) Damages would not be an adequate remedy for either party. I have already dealt with the position of the claimant. It would be difficult to quantify the loss to the defendants if they were wrongly prohibited from carrying on a lawful protest.

(3) For reasons which I have already given, the balance of convenience strongly favours the continuation of the injunction.

(5) Conclusion

42. For all of these reasons, I concluded that it was appropriate not to set aside Linden J's injunction.

Michaelmas Term
[2009] UKSC 11
On appeal from: [2008] EWCA Civ 903

JUDGMENT

Secretary of State for Environment, Food, and Rural Affairs (Respondent) *v* Meier and another (FC) (Appellant) and others and another (FC) (Appellant) and another

before

Lord Rodger
Lord Walker
Lady Hale
Lord Neuberger
Lord Collins

JUDGMENT GIVEN ON

1 December 2009

Heard on 10 and 11 June 2009

Appellant
Richard Drabble QC
Marc Willers
(Instructed by Community Law Partnership)

Respondent
John Hobson QC
John Clargo
(Instructed by Whitehead Vizard)

LORD RODGER

1. If a group of people come on to my land without my permission, I shall want the law to provide a speedy way of dealing with the situation. If they leave but come back repeatedly, depending on the evidence, I shall be able to obtain an interlocutory and final injunction against them returning. But they may come on to my land and set up camp there. Again, depending on the evidence, I shall be able to obtain an injunction (interlocutory and final) against them remaining and also against them coming back again once they leave as required by the injunction. Similarly, if the evidence shows that, once they leave, they are likely to move and set up camp on other land which I own, the court can grant an injunction (interlocutory and final) against them doing that. If authority is needed for all this, it can be found in the judgment of Lord Diplock in the Court of Appeal in *Manchester Corporation v Connolly* [1970] Ch 420.

2. Of course, it is quite likely that I won't know the identities of at least some of the trespassers. If so, Wilson J regarded an injunction as "useless" since "it would be wholly impracticable for the claimant to seek the committal to prison of a probably changing group of not easily identifiable travellers, including establishing service of the injunction and of the application": *Secretary of State for the Environment v Drury* [2004] 1 WLR 1906, 1912, para 19. That may well have been an unduly pessimistic assessment. Certainly, claimants have used injunctions against unnamed defendants. And Sir Andrew Morritt V-C was satisfied that the procedural problems could be overcome. Admittedly, the circumstances in the first of his cases, *Bloomsbury Publishing Group Ltd and J K Rowling v News Group Newspapers Ltd and a Person or Persons Unknown* [2003] EWHC 1205 (Ch), were very different from a situation involving trespassers. But trespassing protesters were the target of the interlocutory injunction which he granted in *Hampshire Waste Services Ltd v Persons Intending to Trespass and/or Trespassing upon Incinerator Sites* [2003] EWHC 1738 (Ch). Similarly, in *South Cambridgeshire DC v Persons Unknown* [2004] EWCA Civ 1280 the Court of Appeal (Brooke and Clarke LJJ) granted an injunction against persons unknown "causing or permitting hardcore to be deposited, caravans, mobile homes or other forms of residential accommodation to be stationed, or existing caravans or other mobile homes to be occupied on land" adjacent to a gypsy encampment in rural Cambridgeshire. Brooke LJ commented, at para 8: "There 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." See the discussion of such injunctions in Jillaine Seymour, "Injunctions Enjoining Non-Parties: Distinction without Difference" (2007) 66 CLJ 605-624.

3. The present case concerns travellers who set up camp on the Forestry Commission's land at Hethfelton. Lord Neuberger has explained the circumstances. The identities of some, but not all, of those involved were known to the Commission. So the defendants included "persons unknown". Despite this, the Commission sought an injunction against all the defendants, including those described as "All persons currently living on or occupying the claimant's land at Hethfelton." The recorder declined to grant

an injunction on the view that it would be disproportionate. But the Court of Appeal, by a majority, reversed the recorder on this point and granted an order that

> "The respondents, and each of them, be restrained from entering upon, trespassing upon, living on, or occupying the parcels of land set out in the Schedule hereto, and, for the avoidance of doubt, the 4th respondent shall mean 'those people trespassing on, living on, or occupying the land known as Hethfelton Wood on any date between 13th February 2007 and 3rd August 2007 save for those specifically identified as 1st, 2nd, 3rd, 5th and 6th respondents.'"

In my view, for the reasons given by Lord Neuberger, the majority were right to grant the injunction. In any event, Mr Drabble QC, who appeared for the travellers, did not suggest that this injunction had been incompetent or defective for lack of service or in some other respect. Even Wilson LJ, who dissented on the injunction point in the Court of Appeal, did not go so far as to suggest that it was inherently useless: he simply took the view that it added nothing of value to the order for possession and, therefore, the recorder would have been entitled to exercise his discretion to refuse it on that basis: [2008] EWCA Civ 903, para 76.

4. This brings me to the order for possession which lies at the heart of the appeal. If people not only come on to my land but oust me from it, I can bring an action for recovery of the land. That is what the Commission did in the present case: they raised an action in Poole county court for recovery of "land at Hethfelton nr Wool and all that land described on the attached schedule all in the County of Dorset." In effect, the Commission were asking for two things: to be put back into possession of the land on which the defendants were camped at Hethfelton, and to be put into possession of the other specified areas of land which they owned, but on which, they anticipated, the defendants might well set up camp once they left Hethfelton.

5. The Court of Appeal granted an order for possession in respect both of the land at Hethfelton and of the other parcels of land situated some distance away. As regards the competency of granting an extended order of this kind, the court was bound by the decision in *Secretary of State for the Environment v Drury* [2004] 1 WLR 1906. The central issue in the present appeal is whether that case was rightly decided. In my view it was not.

6. Most basically, an action for recovery of land presupposes that the claimant is not in possession of the relevant land: the defendant is in possession without the claimant's

permission. This remains the position even if, as the Court of Appeal held in *Manchester Airport v Dutton* [2000] QB 133, the claimant no longer needs to have an estate in the land. See Megarry & Wade, *The Law of Real Property* (7th edition, 2008), para 4-026. To use the old terminology, the defendant has ejected the claimant from the land; the claimant says that he has a better right to possess it, and he wants to recover possession. That is reflected in the form of the order which the court grants: "that the claimant do forthwith recover" the land - or, more fully, "that the said AB do recover against the said CD possession" of the land. See Cole, *The Law and Practice in Ejectment* (1857), p 786, Form 262. The fuller version has the advantage of showing that the court's order is not in rem; it is in personam, directed against, and binding only, the defendant. Of course, if the defendant refuses to leave and the court grants a writ of possession requiring the bailiff to put the claimant into possession, in principle, the bailiff will remove all those who are on the relevant land, irrespective of whether or not they were parties to the action: *R v Wandsworth County Court ex parte Wandsworth LBC* [1975] 1 WLR 1314. So, in that way, non-parties are affected. But, if anyone on the land has a better right than the claimant to possession, he can apply to the court for leave to defend. If he proves his case, then he will be put into possession in preference to the claimant. But the original order for possession will continue to bind the original defendant. See Stamp J's lucid account of the law in *In re Wykeham Terrace* [1971] Ch 204, 209D-210B.

7. *In re Wykeham Terrace* and *Manchester Corporation v Connolly* [1970] Ch 420 showed the need for some reform of the procedures used in actions for recovery of land. The twin problems of unidentifiable defendants and the lack of any facility for granting an interim order for possession were tackled by a new Order 113, the provisions of which, with some alteration of the details, have been incorporated into the current Rule 55 of the CPR. In the present case no issue arises about the wording of Rule 55. But I would certainly not interpret "occupied" in Rule 55.1(b) as preventing the use of the special procedure in a case like *University of Essex v Djemal* [1980] 1 WLR 1301 where some protesters were excluding the university from one part of its campus, but many students and members of staff were legitimately occupying other parts.

8. The intention behind the relevant provisions of Rule 55 remains the same as with Order 113: to provide a special fast procedure in cases which only involve trespassers and to allow the use of that procedure even when some or all of the trespassers cannot be identified. These important, but limited, changes in the rules cannot have been intended, however, to go further and alter the essential nature of the action itself: it remains an action for recovery of possession of land from people who are in wrongful possession of it. I should add that in the present case the defendants do not dispute that they are – or, at least, were at the relevant time - in possession, rather than mere occupation, of the Commission's land at Hethfelton. Wonnacott, *Possession of Land* (2006), p 27, points out that defendants rarely dispute this. But here, in any event, the defendants' possession is borne out by their offer to co-operate to allow the Commission's ordinary activities on the land not to be disrupted. This is inconsistent with the Commission being in possession. So the preconditions for an action for recovery of land are satisfied.

9. By contrast, the Forestry Commission were at all relevant times in undisturbed possession of the parcels of land listed in the schedule to the Court of Appeal's order. That being so, an action for the recovery of possession of those parcels of land is quite inappropriate. The only authority cited by the Court of Appeal in *Secretary of State for the Environment v Drury* [2004] 1 WLR 1906 for granting such an order was the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1990) 59 P & CR 48. But in that case the defendant trespassers were not represented and so the point was not fully argued.

10. Saville J referred to the decision of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301, which I have just mentioned. That decision is clearly distinguishable, however. The defendant students, who had previously taken over, and been removed from, certain administrative offices of the University of Essex, had been occupying another part of the university buildings known as "Level 6". The Court of Appeal made an order for possession extending to the whole property of the university - in effect, the whole campus. This was justified because the university's right to possession of its campus was indivisible: "If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises": [1980] 1 WLR 1301, 1305C-D, per Shaw LJ. In the *Heyman* case, by contrast, the Ministry's right to possession of its land at Grovely Woods was not violated in any way by the trespassers' adverse possession of its other land two or three miles away at Hare Wood. In my view, *Heyman* was wrongly decided and did not form a legitimate basis for the Court of Appeal's decision in *Drury*.

11. Mummery LJ described Wilson J's approach in *Drury* as "pragmatic": [2004] 1 WLR 1906, 1916, para 35. And, of course, the common law does evolve by making pragmatic incremental developments. But, if they are to work, they must be consistent with basic principle and they must make sense.

12. I would not put undue emphasis on the supposed practical difficulties in providing for adequate service by attaching notices to stakes etc on these remoter areas of land. Doubtless, adequate arrangements could be worked out, if extended orders were otherwise desirable. The real objection is that the Court of Appeal's extended order that "the [Commission] do recover the parcels of land set out in the Schedule hereto" is inconsistent with the fundamental nature of an action for recovering land because there is nothing to recover: the Commission were in undisturbed possession of those parcels of land. And the law is harmed rather than improved if a court grants orders which lay defendants, knowing the facts, would rightly find incomprehensible. How, the defendants could well ask, can the Commission "recover" parcels of land which they already possess? How, too, are the defendants supposed to comply with the order? Only a lawyer could understand and explain that the order "really" means that they are not to enter and take over possession of the other parcels of Commission land. This is, of course, what the injunction already says in somewhat old-fashioned, but tolerably clear, language.

13. Doubtless, the wording could in theory be altered, but this would really be to change the nature of the action and turn the order into an injunction, so creating parallel injunctions, one leading to the possible intervention of the bailiff and the other not.

14. The claimed justification for granting an extended order for possession of this kind is indeed that it is the only effective remedy against travellers, such as the present defendants, since it can ultimately lead to them being removed by a bailiff under a warrant for possession. Moreover, unless the Commission can obtain an extended order, they will be forced to come back to court for a new order each time the defendants move to another of their properties. An injunction is said to be a much weaker remedy in a case like the present since, if the defendants fail to comply with it, all that can be done is to seek an order for their sequestration or committal to prison. Sequestration is an empty threat, the argument continues, against people who have few assets, while committal to prison might well be inappropriate in the case of defendants who are women with young children.

15. Plainly, the idea of the Commission having to return to court time and again to obtain a fresh order for possession in respect of a series of new sites is unattractive. But the scenario presupposes that the defendants would, with impunity, disobey the injunction restraining them from entering the other parcels of land. So this point is linked to the contention that the injunction would not work.

16. I note in passing that there is actually no evidence that these defendants would fail to comply with the injunction in respect of the other parcels of land. So there is no particular reason to suppose that the Court of Appeal's injunction will prove an ineffective remedy in this case. On the more general point about the alleged ineffectiveness of injunctions in cases of this kind, *South Buckinghamshire DC v Porter* [2003] 2 AC 558 is of some interest. There the council wanted to obtain an injunction against gypsies living in caravans in breach of planning controls because an injunction was thought to be a potentially more effective weapon than the various enforcement procedures under the planning legislation. This is in line with the thinking behind the application for an injunction in *South Cambridgeshire DC v Persons Unknown* [2004] EWCA Civ 1280 which I mentioned in para 2.

17. Admittedly, if the present defendants did fail to comply with the injunction, sequestration would not be a real option since they are unlikely to have any substantial assets. And, of course, there are potential difficulties in a court trying to ensure compliance with an injunction by committing to prison defendants who are women with young children. Nevertheless, as Lord Bingham of Cornhill observed in *South Buckinghamshire DC v Porter* [2003] 2 AC 558, 580, para 32, in connexion with a possible injunction against gypsies living in caravans in breach of planning controls:

> "When granting an injunction the court does not contemplate that it will be disobeyed….Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent."

Taking that approach, we should, in my view, be slow to assume that an injunction is a worthless remedy in a case like the present and that only the intervention of a bailiff is likely to be effective. If that is indeed the considered consensus of those with experience in the field, then consideration may have to be given to changing the procedures for enforcing injunctions of this kind.

18. But any such reform would raise far-reaching issues which are not for this court. In particular, travellers are by no means the only people without means whose unlawful activities the courts seek to restrain by injunction and where the assistance of a bailiff might be attractive to claimants. Especially when Parliament has intervened from time to time to regulate the way that the courts should treat travellers, the need for caution in creating new remedies is obvious. At the very least, the matter is one for the Master of the Rolls and the Rules Council who have the leisure and facilities to consider the issues.

19. For these reasons I would allow the defendants' appeal to the extent proposed by Lord Neuberger.

LORD WALKER

20. I agree with all the other members of the Court that this appeal should be allowed to the extent of setting aside the wider possession order. In *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] 1 WLR 1906 the Court of Appeal went too far in trying to achieve a practical solution. The decision cannot be seen as simply an extension of *University of Essex v Djemal* [1980] 1 WLR 1301, in which the facts were very different. I respectfully agree with the observations on injunctive relief made by Lord Rodger at the end of his judgment.

LADY HALE

21. Two questions are before us. First, can the court grant a possession order in respect of land, no part of which is yet occupied by the defendant, because of the fear that she will do so if ejected from land which she currently does occupy? Second, should the court grant an injunction against that feared trespass? The Court of Appeal unanimously answered the first question in the affirmative, following the reasoning of that Court in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] EWCA Civ 200, [2004] 1 WLR 1906, CA, and the decision of Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48. The majority also answered the second question in the affirmative; Wilson LJ dissented but only because he thought the wider possession order a sufficient remedy in the circumstances.

22. The approach in *Drury* and *Heyman* was rightly described by Mummery LJ in *Drury* as "pragmatic" (para 35), depending as it did upon the comparative efficacy of possession orders and injunctions. A possession order gives the claimant the right to call upon the bailiffs or the sheriff physically to remove the trespassers from his land, which is what he wants. An injunction can only be enforced by imposing penalties upon those who disobey. Mummery LJ considered it a "legitimate, incremental development" of the ruling of the Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301, that a possession order can cover a greater area of the claimant's land than that actually occupied by the trespassers.

23. The situation in *Djemal* was very like the situation in this and no doubt many other cases. The University of Essex consists (mainly) of some less than beautiful buildings erected in the 1960s upon a beautiful campus at Wivenhoe Park near Colchester. The students had occupied a small part of the University buildings. The University wanted an order covering the whole of the University premises. The judge had given them an order covering only the part actually occupied by the students. The Court of Appeal made the wider order sought by the University, holding that there was jurisdiction to cover "the whole of the owner's property in respect of which *his right of occupation has been interfered with*" (per Buckley LJ at p 1304E, emphasis supplied). Shaw LJ reasoned that the right of the University to possession of the site and buildings was "indivisible. If it is violated by adverse occupation of any part of the premises, that violation affects the *right of possession* of the whole of the premises" (p 1305D, emphasis supplied). These were extempore judgments in a case where the students had already decided to call off their direct action, but it will noted that Buckley LJ spoke of interference with a right of occupation, while Shaw LJ spoke of violation of a right of possession.

24. The defendants in this case are occupying only part of Hethfelton Wood. We can, I think, assume that the Forestry Commission are occupying the rest. They are carrying on their forestry work as best they can – indeed, one of their problems is that they are

impeded from doing it because of the risk of harm to the vehicles and their occupants. Yet Mr Drabble, for the defendant appellants, has never resisted an order covering the whole of Hethfelton Wood, nor does he invite us to disagree with *Djemal*. Being a sensible man, he recognises that we would be disinclined to hold that if trespassers set up camp in a large garden the householder can obtain an order enabling them to be physically removed only from that part of the garden which they have occupied, even if it is clear that they will then simply move their tents to another part of the garden.

25. The questions raised by this case and *Djemal* should be seen as questions of principle rather than pragmatism or procedure. Still less should they be answered by reference to the forms of action which were supposedly abolished in 1876. The underlying principle is *ubi ius, ibi remedium*: where there is a right, there should be a remedy to fit the right. The fact that "this has never been done before" is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted. So the questions are: what is the right to be protected? And what is the appropriate remedy to fit it?

26. If we were approaching this case afresh, without the benefit and burden of history, we might think that the right to be protected is the right to the physical occupation of tangible land. A remedy should be available against anyone who does not have that right and is interfering with it by occupying the land. That remedy should provide for the physical removal of the interlopers if need be. The scope of the remedy actually granted in any individual case should depend upon the scope of the right, the extent of the actual and threatened interference with it, and the adequacy of the procedural safeguards available to those at risk of physical removal.

27. In considering the nature and scope of any judicial remedy, the parallel existence of a right of self help against trespassers must not be forgotten, because the rights protected by self help should mirror the rights that can be protected by judicial order, even if the scope of self help has been curtailed by statute. No civil wrong is done by turning out a trespasser using no more force than is reasonably necessary: see *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720. In *Cole on Ejectment* (London, Sweet, 1857), a comprehensive textbook written after the Common Law Procedure Act 1852, there is considerable discussion (in ch VII) of the comparative merits of self help and ejectment. Any person with a right to enter and take possession of the land might choose simply to do that rather than to sue in ejectment. But this was not advised where the right of entry was not clear and beyond doubt, or where resistance was to be expected. The effect of the criminal statutes against forcible entry was "by no means clear": whether no force at all, or only reasonable force, might be used against the trespasser. Cole was not as sanguine as was Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, 456. Lord Denning took the view that the statutes against forcible entry did not apply to the use of reasonable force against trespassers. Those statutes have now been replaced by section 6 of the Criminal Law Act 1977. This prohibits the use or threat of violence against person or property for the purpose of securing entry to any premises without

lawful excuse. But it also provides that a right to possession or occupation of the premises is no excuse, although there is now an exception for a "displaced residential occupier" or "protected intending occupier". This does not include the Forestry Commission, although it is not impossible that they would be able to evict the travellers without offending against the criminal law. But in any event, the use of self help, even if it can be lawfully achieved, is not encouraged because of the risk of disorder that it may entail.

28. Lord Denning considered that the statutes of forcible entry did not apply because the trespassing squatters in *McPhail* were not in possession of the land at all. He quoted Pollock on Torts (15th ed 1951, p 292):

> "A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner."

A trespasser who merely interferes with the right to possession or occupation of the property may also be ejected with the use of reasonable force: one does not need to go to court, or even call the police, to eject a burglar or a poacher from one's property.

29. Although Cole contemplated that self help might be used against a tenant who had wrongfully continued in occupation after the end of his tenancy, tenants are clearly now in a different position from squatters. Lord Denning thought that the statutes of forcible entry did apply to protect them (although Cole says that the authorities on which he relied had later been overruled). Most, but not all, residential tenants are now protected by statute against eviction otherwise than by court order. This is a complicated area which need not concern us now as we are dealing with people who have never been granted any right to be where they are.

30. However, Lord Denning's basic point is important here. "In a civilised society, the courts should themselves provide a remedy which is speedy and effective: and thus make self-help unnecessary" (*McPhail*, p 457C). It seems clear that the right of self help has never been limited to those who have actually been dispossessed of their land: in fact on one view it is limited to those who have not been so dispossessed. There is no reason in principle why the remedy of physical removal from the land should only be available to those who have been completely dispossessed. It should not depend upon the niceties of whether the person wrongfully present on the land was or was not in "possession" in whatever legal sense the word is being used. Were the students in *Djemal* in possession of the University's premises at all? Lord Denning, supported by Sir Frederick Pollock, would not think so: see *McPhail* at 456F. Were these new travellers in possession of

Hethfelton Wood at all? Again, Lord Denning would not think so. They had parked their vehicles there, but the work of the Forestry Commission was going on around them as best it could.

31. If we accept that the remedy should be available to a person whose possession or occupation has been interfered with by the trespassers, as well as to a person who has been totally dispossessed, a case like *Djemal* becomes completely understandable, as does the order for possession of the whole of Hethfelton Wood in this case. Nor need we be troubled by the form of the order, that the claimant "recover" the land. His occupation of the whole has been interfered with and he may recover his full control of the whole from those who are interfering with it.

32. As is obvious from the above, a great deal of confusion is caused by the different meanings of the word "possession" and its overlap with occupation. As Mark Wonnacott points out in his interesting monograph, *Possession of Land* (Cambridge University Press, 2006), the term "possession" is used in three quite distinct senses in English land law: "first, in its proper, technical sense, as a description of the relationship between a person and an estate in land; secondly, in its vulgar sense of physical occupation of tangible land" (the third sense need not concern us here). Possession, in its first sense, he divides into a relationship of right, the right to the legal estate in question, and a relationship of fact, the actual enjoyment of the legal estate in question; a person might have the one without the other. Possession of a legal estate in fact may often overlap with actual occupation of tangible land, but they are conceptually distinct: a person may be in possession of the head-lease if he collects rents from the sub-tenants, but he will not be in physical occupation of tangible land.

33. The modern action for the possession of land is the successor to the common law action of ejectment (and some statutory remedies developed for use in the county and magistrates' courts in the 19th century). The ejectment in question was not the ejectment sought by the action but the wrongful ejectment of the right holder. Its origins lay in the writ of trespass, an action for compensatory damages rather than recovery of the estate. But the common law action to recover the estate was only available to freeholders and not to term-holders (tenants). So the judges decided that this form of trespass could be used by tenants to recover their terms. Trespass was a more efficient form of action than the medieval real actions, such as novel disseisin, so this put tenants in a better position than freeholders. As is well known, the device of involving real people as notional lessees and ejectors was used to enable freeholders to sue the real ejectors. These were then replaced by the fictional characters John Doe and Richard Roe. Eventually the medieval remedies were (mostly) abolished by the Real Property Limitation Act of 1833; the fictional characters of John Doe and Richard Roe by the Common Law Procedure Act 1852; and the forms of action themselves by the Judicature Acts 1873-75 (see AWB Simpson, *A History of the Land Law*, Oxford, Clarendon Press, 2nd edition 1986, ch VII).

34. The question for us is whether the remedy of a possession action should be limited to deciding disputes about "possession" in the technical sense described by Wonnacott. The discussion in Cole on *Ejectment* concentrates on disputes between two persons, both claiming the right to possession of the land, one in occupation and the other not. Often these are between landlords and tenants who have remained in possession when the landlord thinks that their time is up. But it is clear that in reality what was being protected by the action was the right to physical occupation of the land, not the right to possession of a legal estate in land. The head lessee who was merely collecting the rents would not be able to bring an action which would result in his gaining physical occupation of the land unless he was entitled to it.

35. It seems clear that the modern possession action is there to protect the right to physical occupation of the land against those who are wrongfully interfering with it. The right protected, to the physical occupation of the land, and the remedy available, the removal of those who are wrongfully there, should match one another. The action for possession of land has evolved out of ejectment which itself evolved out of the action for trespass. There is nothing in CPR Part 55 which is inconsistent with this view, far from it. The distinction is drawn between a "possession claim" which is a claim for the recovery of *possession of land* (r 55.1.(a)) and a "possession claim against trespassers" which is a claim for the *recovery of land* which the claimant alleges is "occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land . . . " The object is to distinguish between the procedures to be used where a tenant remains in occupation after the end of his tenancy and the procedures to be used where there are squatters or others who have never been given permission to enter or remain on the land. That, to my mind, is the reason for inserting "only": not to exclude the possibility that the person taking action to enforce his right to occupy is also in occupation of it. There is then provision for taking action against "persons unknown". But the remedy in each case is the same: an order for physical removal from the land.

36. It was held in *R v Wandsworth County Court, ex parte Wandsworth London Borough Council* [1975] 1 WLR 1314, that a bailiff executing a possession warrant is entitled to evict anyone found on the premises whether they were party to the judgment or not. However, there is nothing to prevent the order distinguishing between those who are and those who are not lawfully there, provided that some means is specified of identifying them. No-one would suggest that an order for possession of Hethfelton Wood would allow the removal of Forestry Commission workers or picnickers who happened to be there when the bailiffs went in. In principle, court orders should be tailored to fit the facts and the rights they are enforcing rather than the other way around.

37. This does not, however, solve the principal question before us. What is the extent of the premises to which the order may relate? As Mummery LJ suggested in *Drury*, at para 31, the origin was in an action to recover a term of years. The land covered by the term would be defined in the grant. It would not extend to all the land anywhere in the lawful possession of the claimant. Equally, however, as discussed earlier, the remedy can be granted in respect of land to which the claimant is entitled even though the trespasser

is not technically in possession of it. This suggests that the scope may be wider than the actual physical space occupied by the trespasser, who may well move about from time to time. In any event, the usual rule is that possession of part is possession of the whole, thus begging the question of how far the "whole" may extend. It was suggested during argument that it might extend to all the land in the same title at the Land Registry. This could be seen as the modern equivalent of the "estate" from which the claimant had been unlawfully ousted. But this is artificial when a single parcel of land may well be a combination of several different registered titles.

38. The main objection to extending the order to land some distance away from the parcel which has actually been intruded upon is one of natural justice. Before any coercive order is made, the person against whom it is made must have an opportunity of contesting it, unless there is an emergency. In the case of named defendants, such as the appellants here, this need not be an obstacle. They have the opportunity of coming to court to contest the order both in principle and in scope. The difficulty lies with "persons unknown". They are brought into the action by the process of serving notice not on individuals but on the land. If it were to be possible to enforce the physical removal of "persons unknown" from land on which they had not yet trespassed when the order was made, notice would also have to be given on that land too. That might be thought an evolution too far. Whatever else a possession order may be or have been, it has always been a remedy for a present wrongful interference with the right to occupy. There is an intrusion and the person intruded upon has the right to throw the intruder out.

39. Thus, while I would translate the modern remedy into modern terms designed to match the remedy to the rights protected, and would certainly not put too much weight on the word "recover", I would hesitate to apply it to quite separate land which has not yet been intruded upon. The more natural remedy would be an injunction against that intrusion, and I would not be unduly hesitant in granting that. We should assume that people will obey the law, and in particular the targeted orders of the court, rather than that they will not. We should not be too ready to speculate about the enforcement measures which might or might not be appropriate if it is broken. But the main purpose of an injunction would be to support a very speedy possession order, with severely abridged time limits, if it is broken.

40. However, I would not see these procedural obstacles as necessarily precluding the "incremental development" which was sanctioned in *Drury*. Provided that an order can be specifically tailored against known individuals who have already intruded upon the claimant's land, are threatening to do so again, and have been given a proper opportunity to contest the order, I see no reason in principle why it should not be so developed. It would be helpful if the Rules provided for it, so that the procedures could be properly thought through and the forms of order properly tailored to the facts of the case. The main problem at the moment is the "scatter-gun" form of the usual order (though it is not one prescribed by the Rules).

41. It is for that reason, and that reason alone, that I would allow this appeal to the extent of setting aside the wider possession order made in the Court of Appeal.

LORD NEUBERGER

42. There is an acute shortage of sites in this country to satisfy the needs of travellers, people who prefer a nomadic way of life. Thus, in the county in which the travellers in this case pitched their camp, Dorset, it has been estimated that over 400 additional pitches are required. The inevitable consequence is that travellers establish their camps on land which they are not entitled to occupy, normally as trespassers, and almost always in breach of planning control. Proceedings seeking to prevent their occupation have led to human rights issues being raised before domestic courts (for instance, in the House of Lords, *Doherty v Birmingham City Council* [2008] UKHL 57), and before the European Court of Human Rights (for instance, *Connors v United Kingdom* (2005) 40 EHRR 9). The present appeal, however, raises issues of purely domestic law, namely the permissible physical ambit of any possession order made against trespassing travellers, and the appropriateness of granting an injunction against them.

The facts and procedural history

43. Travellers often set up their camps in wooded areas. Many woods and forests in this country are managed by the Forestry Commission ("the Commission") and owned by the *Secretary of State for the Environment, Food and Rural Affairs*. The functions of the Commission are "promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products …" – section 1 of the Forestry Act 1967. The Commission runs its woods and forests commercially, although it affords members of the public relatively free and unrestricted access to such areas.

44. All undeveloped land in the United Kingdom is susceptible to unauthorised occupation by travellers, and much of such land is vested in public bodies. But land managed by the Commission is particularly vulnerable to incursion by travellers. As the Recorder who heard this case at first instance said, "[g]iven the public access that it affords to its land and its needs for access for forestry vehicles, it is not protected and barricaded in the same way as much of the other land in private and local authority ownership in Dorset is now protected".

45. In 2004, the Office of the Deputy Prime Minister issued "Guidance on Managing Unauthorised Camping" ("the 2004 Guidance"). This suggests that local authorities and other public bodies distinguish between unauthorised encampment locations which are "unacceptable" (for instance, because they involve traffic hazard or public health risks) and those which are "acceptable". It further recommends that the "management of unauthorised camping must be integrated", and states that "each encampment location must be considered on its merits". The 2004 Guidance also indicates that specified welfare enquiries should be undertaken in relation to the travellers and their families in any unauthorised encampment before any decision is made as to whether to bring proceedings to evict them. The Secretary of State has accepted throughout these proceedings that the Commission should comply with the terms of the 2004 Guidelines before possession proceedings are brought against any travellers on land it manages, and that failure to do so may invalidate such proceedings.

46. One of the woods managed by the Commission is Hethfelton Wood ("Hethfelton"), near Wool, where, at the end of January 2007, a number of new travellers established an unauthorised camp. After the Commission had carried out the enquiries recommended by the 2004 Guidance, the Secretary of State issued the current proceedings, a possession claim against trespassers within CPR 55.1(b), and an application for an injunction, in the Poole County Court, on 13 February 2007. The original defendants were Natalie Meier, Robert and Georgie Laidlaw, Sharon Horie and "Persons Names Unknown". Ms Meier travels and lives in a vehicle with her two children, having done so since 2002. Mr Laidlaw sadly died before the hearing, and, unsurprisingly in the circumstances, Mrs Laidlaw appears to have played no part in the proceedings. Ms Horie has pursued a nomadic way of life since about 1982, and lives in vehicles together with her three children. Lesley Rand (who has been a traveller since about 1996, and lives together with her severely disabled nine year old daughter in a specially adapted vehicle) and Kirsty Salter (who was pregnant at the time, and has been a traveller for ten years) were subsequently added as defendants.

47. Two of the defendants had previously been encamped on another area of woodland, some five miles from Hethfelton, called Moreton Plantation ("Moreton"), which was also managed by the Commission. Following the issue of possession proceedings in relation to Moreton, a compromise was agreed on 9 January 2007, which provided that the Secretary of State should recover possession on 29 January 2007. It was on that day that a number of the defendants moved from Moreton to Hethfelton. Some of the other defendants had previously occupied another wood managed by the Commission, Morden Heath ("Morden"), which had also been subject to proceedings brought by the Secretary of State, which had resulted in a possession order which was due to be executed on 5 February 2007. In anticipation of the execution of that order, those other defendants moved from Morden to Hethfelton.

48. In the claim form in the instant proceedings, the Secretary of State sought possession not only of Hethfelton, but also of "all that land described on the attached schedule all in the county of Dorset". That schedule set out more than fifty separate

woods, which were owned by the Secretary of State and managed by the Commission, and which were marked on an attached plan. The number of woods of which possession was sought in addition to Hethfelton was subsequently reduced to thirteen, and the plan showed that those thirteen woods ("the other woods") were spread over an area of Dorset around twenty-five miles east to west and ten miles north to south. In the injunction application, the Secretary of State sought an order against the same defendants (including "Persons Names Unknown") restraining them "from re-entering [Hethfelton] or from entering [the other woods]". Copies of the claim form seeking possession were served on the named defendants and at Hethfelton in accordance with the provisions of CPR 55.6, together with copies of the injunction application.

49. The evidence established that all the occupiers of the camp at Hethfelton were new travellers, living and travelling in motor vehicles, mostly with children and often with animals. The evidence also indicated that the camp was relatively tidy, and did not involve any antisocial conduct on the part of any of the occupants. However, the presence of children and animals caused the Commission to avoid the use of heavy plant or the carrying out of substantial work, which might otherwise have occurred, in the surrounding area. The Commission's evidence showed that other areas in Dorset managed by the Commission, in addition to Hethfelton, including Moreton, and Morden, had been occupied by travellers as unauthorised camps, sometimes by one or more of the named defendants.

50. The claim came before Mr Recorder Norman, who gave a full and careful judgment on 3 August 2007. He had to resolve three issues. The first was whether to grant an order for possession against the defendants in respect of Hethfelton. The second issue was whether to grant an order for possession in respect of any or all of the other woods. The third issue was whether to grant an injunction restraining the defendants from entering on to all or any of the other woods.

51. The Recorder decided to grant an order for possession against the defendants in respect of Hethfelton. However, he refused to make any wider order for possession, or to grant the injunction sought by the Secretary of State. Although he accepted that he had jurisdiction to make such orders, he considered it inappropriate to do so primarily because the Commission had failed to consider the matters suggested by the 2004 Guidance before the current proceedings were begun, and because the Commission was not prepared to assure the Recorder that consideration would be given to that guidance before any wider order for possession or any injunction was enforced. Paragraph 1 of the order drawn up to reflect this decision provided that "[t]he claimant do forthwith recover the land known as Hethfelton Wood".

52. The defendants did not appeal against this order for possession. However, the Secretary of State appealed against the Recorder's refusal to grant an order for possession in relation to the other woods (which I will refer to as a "wider order for possession") and

the injunction, and the Court of Appeal allowed the appeal – [2008] EWCA Civ 903, [2009] 1 WLR 828. The order made by the Court of Appeal ordered that the Secretary of State "do recover" the other woods, and that each of the defendants "be restrained from entering upon, trespassing upon, living on, or occupying" any of the other woods.

53. In her judgment, Arden LJ followed and applied the reasoning of the Court of Appeal in the earlier decision of *Secretary of State v Drury* [2004] EWCA Civ 200, [2004] 1 WLR 1906, under which it had been held that an order for possession, at least when made pursuant to a possession claim against trespassers, could, in appropriate cases, extend to land not forming part of, or contiguous with, or even near, the land actually occupied by the trespassers. She concluded that the evidence demonstrated that at least some of the defendants had set up unauthorised encampments on woods managed by the Commission in Dorset, and that there was a substantial risk that at least some of the defendants would move onto other such woods once an order for possession was made in relation to Hethfelton.

54. Arden LJ also said, in disagreement with the Recorder, that any failure on the part of the Commission to consider the matters recommended by the 2004 Guidance before issuing the proceedings for possession of the other woods did not justify refusing to make such a wider order. This was essentially on the basis that, if there was any such failure, it could be considered at the time the wider order for possession was sought to be enforced. Pill and Wilson LJJ agreed. Arden LJ also considered that, for the same reasons, the Recorder had been wrong to refuse the injunction sought by the Secretary of State, and again Pill LJ agreed. However, Wilson LJ dissented on this point, on the ground that the Recorder had been entitled to refuse an injunction on the additional ground which he had mentioned, namely that, if he had made a wider order for possession, it would have been disproportionate to grant an injunction as well.

55. The instant appeal is brought by Ms Horie and Ms Rand, and it raises two principal issues. The first is the extent to which an order for possession can be made in favour of a claimant in respect of land not actually occupied by a defendant. The second issue concerns the circumstances in which an injunction restraining future trespass can and should be granted; this raises two points: (a) whether an injunction against travellers is generally appropriate, and (b) the point on which the Court of Appeal differed from the Recorder, namely the effect of the 2004 Guidance. I shall consider these two issues in turn and then briefly review the implications of my conclusions.

An order for possession of land not occupied by the defendants

56. In *Drury* [2004] 1 WLR 1906, the facts were similar to those here, except the Court of Appeal held that there was no evidence establishing that the travellers in that

case had occupied, or threatened to occupy, other property managed by the Commission. Accordingly, the order for possession was in the normal form, limited, like the order made by the Recorder in this case, to the wood occupied by the travellers. However, the Court of Appeal decided that an order for possession could be granted, not merely in respect of land which the defendant occupied, but also in respect of other land which was owned by the claimant, and which the defendant threatened to occupy.

57. The essence of the Court of Appeal's reasoning was that (a) the law recognises that an anticipated trespass can give rise to a right of action, (b) an injunction would be of limited, if any, real use, (c) in those circumstances, the law should provide another remedy, (d) a wider order for possession would be of much more practical value than an injunction, (e) such an order for possession was justified by previous authority and in the light of the court's jurisdiction to grant *quia timet* injunctions; and (f) accordingly, such an order could be made; but (g) it should only be made in relatively exceptional circumstances – see at [2004] 1 WLR 1906, paras 20-24, 34-36, and 42-46, per Wilson J, Mummery LJ and Ward LJ respectively.

58. Particularly with the advent of the Civil Procedure Rules, it is clear that judges should strive to ensure that court procedures are efficacious, and that, where there is a threatened or actual wrong, there should be an effective remedy to prevent it or to remedy it. Further, as Lady Hale points out, so long as landowners are entitled to evict trespassers physically, judges should ensure that the more attractive and civilised option of court proceedings is as quick and efficacious as legally possible. Accordingly, the Court of Appeal was plainly right to seek to identify an effective remedy for the problem faced by the Commission as a result of unauthorised encampments, namely that, when a possession order is made in respect of one wood, the travellers simply move on to another wood, requiring the Commission to incur the cost, effort and delay of bringing a series or potentially endless series of possession proceedings against the same people.

59. Nonetheless, however desirable it is to fashion or develop a remedy to meet a particular problem, courts have to act within the law, and their ability to control procedure and achieve justice is not unlimited. Judges are not legislators, and there comes a point where, in order to deal with a particular problem, court rules and practice cannot be developed by the courts, but have to be changed by primary or secondary legislation – or, in so far as they can be invoked for that purpose, by Practice Directions. In my view, it is simply not possible to make the sort of enlarged or wider order for possession which the Court of Appeal made in this case, following (as it was, I think, bound to do) the reasoning in *Drury* [2004] 1 WLR 1906.

60. The power of the County Court for present purposes derives from section 21(1) of the County Courts Act 1984, which gives it "jurisdiction to hear and determine any action for the recovery of land". The concept of "recovery" of land was the essence of a possession order both before and after the procedure was recast by sections 168ff of the

Common Law Procedure Act 1852, although, until the Supreme Court of Judicature Act 1875, the action lay in ejectment rather than in recovery of land - see per Lord Denning MR in *McPhail v Persons, Names Unknown* [1973] Ch 447, 457-8. Nonetheless, the change of name did not involve a change of substance, and the essence of an order for possession, whether framed in ejectment or recovery, is that the claimant is getting back the property from the defendant, whether by recovering the property from the defendant or because the claimant had been wrongly ejected by the defendant. As stated by Wonnacott, in *Possession of Land* (2006), page 22, "an action for recovery of land (ejectment) is an action to be put into possession of an estate of land. The complaint is that the claimant is not currently 'in' possession of it, and … wants … to be put 'in' possession of it." See also Simpson, *A History of the Land Law* (2nd edition), pages 144-5 and *Gledhill v Hunter* (1880) 14 Ch D 492, 496 per Sir George Jessel MR.

61. As Sir George Jessel explained, an action for ejectment and its successor, recovery of land, was normally issued "to recover possession from a tenant" or former tenant. An action against a trespasser, who did not actually dispossess the person entitled to possession, was based on *trespass quare clausum fregit*, physical intrusion onto the land. Nonetheless, where a trespasser exclusively occupies land, so as to oust the person entitled to possession, the cause of action must be for recovery of possession. (Hence, if such an action is not brought within twelve years the ousting trespasser will often have acquired title by "adverse possession".) Accordingly, in cases where a trespasser is actually in possession of land, an action for recovery of land, i.e. for possession, is appropriate, as Lord Denning implicitly accepted in *McPhail* [1973] Ch 447, 457-8.

62. This analysis is substantially reflected in the provisions of the CPR and in the currently prescribed form of order for possession. CPR 55 is concerned with possession claims, and CPR 55.1 provides:

> "(a) 'a possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings);
>
> (b) 'a possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or sub-tenant whether his tenancy has been terminated or not; …"

The special features of a possession claim against trespassers are that the defendants to the claim may include "persons unknown", such proceedings should be served on the land as well as on the named defendants, and the minimum period between service and hearing

is 2 days (or 5 days for residential property) rather than the 28 days for other possession claims - see CPR 55.3(4), 55.6, and 55.5(2) and (3).

63. The drafting of CPR 55(1) is rather peculiar in that, unlike that in CPR 55(1)(a), the definition in CPR 55(1)(b) does not include the word "possession". Given that, since 1875, the cause of action has been for recovery of land, the oddity, as Lord Rodger has pointed out, is the inclusion of the word "possession" in the former paragraph, rather than its exclusion in the latter. However, in so far as the point has any significance, the definition of "a possession claim", like the definition of "land", in CPR 55(1)(a) may well be carried into CPR 55(1)(b). In any event, the important point, to my mind, is that a possession claim against trespassers involves the person "entitled to possession" seeking "recovery" of the land. Form N26 is the prescribed form of order in both a simple possession claim and a possession claim against trespassers (see CPR Part 4 PD Table 1). That form orders the defendant to "give the claimant possession" of the land in question. Although the orders at first instance (as drafted by counsel), and in the Court of Appeal, direct that the claimant do "recover" the land in question from the defendants, that is the mirror image of ordering that the defendants "give" the claimant possession.

64. The notion that an order for possession may be sought by a claimant and made against defendants in respect of land which is wholly detached and separated, possibly by many miles, from that occupied by the defendants, accordingly seems to me to be difficult, indeed impossible, to justify. The defendants do not occupy or possess such land in any conceivable way, and the claimant enjoys uninterrupted possession of it. Equally, the defendants have not ejected the claimant from such land. For the same reasons, it does not make sense to talk about the claimant recovering possession of such land, or to order the defendant to deliver up possession of such land.

65. This does not mean that, where trespassers are encamped in part of a wood, an order for possession cannot be made against them in respect of the whole of the wood (at least if there are no other occupants of the wood), just as much as an order for possession may extend to a whole house where the defendant is only trespassing in one room (at least if the rest of the house is empty).

66. However, the fact that an order for possession may be made in respect of the whole of a piece of property, when the defendant is only in occupation of part and the remainder is empty, does not appear to me to assist the argument in favour of a wider possession order as made by the Court of Appeal in this case. Self-help is a remedy still available, in principle, to a landowner against trespassers (other than former residential tenants). Where only part of his property is occupied by trespassers, a landowner, exercising that remedy through privately instructed bailiffs, would, no doubt, be entitled to evict the trespassers from the whole of his property. Similarly, it seems to me, bailiffs (or sheriffs), who are required by a warrant (or writ) of possession to evict defendants from part of a property owned by the claimant, would be entitled to remove the

defendants from the whole of that property. But that does not mean that the bailiffs, whether privately instructed or acting pursuant to a warrant, could restrain the trespassers from moving onto another property, perhaps miles away, owned by the claimant.

67. Further, the concept of occupying part of property (the remainder of which is vacant) effectively in the name of the whole is well established - see for example, albeit in a landlord and tenant context, *Henderson v Squire* (1868-69) LR 4 QB 170, 172. However, that concept cannot be extended to apply to land wholly distinct, even miles away, from the occupied land. So, too, the fact that one can treat land as a single entity if it is divided by a road or river (in different ownership from the land) seems to me to be an irrelevance: as a matter of law and fact, the two divisions can sensibly be regarded as a single piece of land. Accordingly, I have no difficulty with the fact that the possession order made at first instance in this case extended to the whole of Hethfelton, even though the defendants occupied only a part of it.

68. The position is more problematical where a defendant trespasses on part of land, the rest of which is physically occupied by a third party, or even by the landowner. Particular difficulties in this connection are, to my mind, raised in relation to a wide order for possession in a claim within CPR 55.1(b). Such "a claim" may be brought "for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without … consent …". Given that such a claim is limited to "land … occupied only by" trespassers, it is not immediately easy to see how it could be brought, even in part, in relation to land occupied by persons who are not trespassers. And it is fundamental that the court cannot accord a claimant more relief than he seeks (although it is, of course, possible, in appropriate circumstances, for a claimant to amend to increase the extent of his claim, but that is not relevant here).

69. The Court of Appeal in *University of Essex v Djemal* [1980] 1 WLR 1301 nonetheless decided that a University could be granted a possession order under RSC Order 113 rule 1, which was (in relation to the issue in this case) in similar terms to CPR 55(1)(b), in respect of its whole campus, against trespassers who were squatting in a relatively small part, even though the remainder of the campus was lawfully occupied by academics, other employees, and indeed students. This was a thoroughly practical decision arrived at to deal with a fairly widespread problem at the time, namely student sit-ins. There was an obvious fear that, if an order for possession was limited to the rooms occupied by the student trepassers, they would simply move to another part of the campus.

70. As already mentioned, given that there is the alternative remedy of self-help, the court should ensure that its procedures are as effective as lawfully possible. Nonetheless, there is obviously great force in the argument that the fact that areas of the campus in that case was lawfully and exclusively occupied by academic staff, employees and students

should have precluded a claim and an order for possession in respect of those areas, both in principle and in the light of the wording of RSC Order 113 rule 1.

71. However, this is not the occasion formally to consider the correctness of the decision in *Djemal* [1980] 1 WLR 1301, which was not put in issue by either of the parties, as the Secretary of State (like the Court of Appeal in *Drury* [2004] 1 WLR 1906) relied on it, and the appellants were content to distinguish it. Accordingly, the implications of overruling or explaining the decision, which may be far-reaching in terms of principle and practice, have not been debated or canvassed.

72. The Court of Appeal's conclusion in *Drury* [2004] 1 WLR 1906, that the court could make a wider order for possession such as that in the instant case, rested very much on the reasoning in *Djemal* [1980] 1 WLR 1306, and in the subsequent first instance decision of *Ministry of Agriculture, Fisheries and Food v Heyman* 59 P&CR 48, which represented an "incremental development of the ruling in [*Djemal* [1980] 1 WLR 1306]", as Mummery LJ put it at [2004] 1 WLR 1906, para 35. However, it seems to me that the decision in *Drury* [2004] 1 WLR 1906 was an illegitimate extension of the reasoning and decision in *Djemal* [1980] 1 WLR 1306. The fact that an order for possession can be made in respect of a single piece of land, only part of which is occupied by trespassers, does not justify the conclusion that an order for possession can be made in respect of two entirely separate pieces of land, only one of which is occupied by trespassers, just because both pieces of land happen to be in common ownership. As already mentioned, bailiffs, whether acting on instructions from a landowner exercising the right of self-help to evict a trespasser or acting pursuant to a warrant of possession, can remove the trespasser on part of a piece of property from the whole of that property, but they cannot prevent him from entering a different property, possibly many miles away. Similarly, while it is acceptable, at least in some circumstances, to treat occupation of part of property as amounting to occupation of the whole of that property, one cannot treat occupation of one property as amounting to occupation of another, entirely separate, property, possibly miles away, simply because the two properties are in the same ownership.

73. Having said all that, I accept that the notion of a wider, effectively precautionary, order for possession as made in *Drury* [2004] 1 WLR 1906 has obvious attraction in practice. As the Court of Appeal explained in that case, the alternative to a wider possession order, namely an injunction restraining the defendant from camping in other woods in the area, would be of limited efficacy. An order for possession is normally enforced in the County Court by applying for a warrant of possession under CCR Order 26, which involves the occupiers being removed from the land by the bailiffs. (The equivalent in the High Court is a writ of possession executed by the Sheriff under RSC Order 45 rule 3). This is a procedurally direct and simple method of enforcement. An injunction, however, "may be enforced", and that was treated by the court in *Drury* [2004] 1 WLR 1906 as meaning "may only be enforced", by sequestration or committal – see RSC Order 45 rule 5(1), and, in relation to the County Court, CCR 29 and section 38 of the County Courts Act 1984. Given that the claimant's aim is to evict the travellers, those are unsatisfactory remedies compared with applying for a warrant of possession.

They are not only indirect, but they are normally procedurally unwieldy and time-consuming, and, in any event, they are of questionable value in cases against travellers, as explained in the next section of this opinion.

74. There is also some apparent force as a matter of principle in the notion that the Courts should be able to grant a precautionary wider order for possession. If judges have developed the concept of an injunction which restrains a defendant from doing something he has not yet done, but is threatening to do, why, it might be asked, should they now not develop an order for possession which requires a defendant to deliver up possession of land that he has not yet occupied, but is threatening to occupy? The short answer is that a wider or precautionary order for possession, whether in the form granted in this case or in the prescribed Form N26, requires a defendant to do something he cannot do, namely to deliver up possession of land he does not occupy, and purports to return to the claimant something he has not lost, namely possession of land of which already he has possession.

75. What the claimant is really seeking in the present case is an order that, if the defendant goes onto the other woods, the claimant should be entitled to possession. That is really in the nature of declaratory or injunctive relief: it is not an order for possession. A declaration identifies the parties' rights and obligations. A *quia timet* injunction involves the court forbidding the defendant from doing something which he may do and which he would not entitled to do. Both those types of relief are different from what the Court of Appeal intended to grant here, namely a contingent order requiring the defendant to do something (to deliver up possession) if he does something else (trespassing) which he may do and which he would not be entitled to do. I describe the Court of Appeal as intending to grant such an order, because, as just explained, the actual order is in the form of an immediate order for possession of the other woods, which, as I have mentioned, is also hard to justify, given that the defendants were not in occupation of any part of them.

76. Further, while it would be beneficial to be able to make a wider possession order because of the relative ease with which it could be enforced in the event of the defendants trespassing on other woods, such an order would not be without its disadvantages and limitations. An order for possession only binds those persons who are parties to the proceedings (and their privies), although the bailiffs (and sheriffs) are obliged to execute a warrant (or writ) of possession against all those in occupation – see *In re Wykeham Terrace, Brighton, Sussex* [1971] Ch 204, 209-10, *R v Wandsworth County Court ex p Wandsworth London Borough Council* [1975] 1 WLR 1314, 1317-9, *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 1431-2, and the full discussion in *Wonnacott* op cit at pages 146-52. It would therefore be wrong in principle for the court to make a wider order for possession against trespassers (whether named or not) in one wood with a view to its being executed against other trespassers in other woods. Nonetheless, because the warrant must be executed against anyone on the land, there is either a risk of one or more of the occupiers of another wood being evicted without having the benefit of due process, or room for delay while such an occupier applies to the court and is heard before a warrant is executed against him.

77. Quite apart from this, a warrant of possession to execute an order for possession made in the County Court in a claim for possession against trespassers can only be issued without leave within three months of the order – CCR Order 24 rule 6(2). So, after the expiry of three months, a wider possession order does not obviate the need for the claimant applying to the court before he can obtain possession of any land the subject of the order. Further, as pointed out by Wilson J in *Drury* [2004] 1 WLR 1906, para 22, it seems rather arbitrary that only a person who owns land which is being unlawfully occupied can obtain a wider order for possession protecting all his land in a particular area.

78. In conclusion on this issue, while there is considerable practical attraction in the notion that the court should be able to make the wide type of possession order which the Court of Appeal made in this case, following *Drury* [2004] 1 WLR 1906, I do not consider that the court has such power. It is inconsistent with the nature of a possession order, and with the relevant provisions governing the powers of the court. The reasoning in the case on which it is primarily based, *Djemal* [1980] 1 WLR 1301, cannot sensibly be extended to justify the making of a wider possession order, and there are aspects of such an order which would be unsatisfactory. I should add that I have read what Lord Rodger has to say on this, the main, issue, and I agree with him.

Should an injunction be refused as it will probably not be enforced?

79. That brings me to the question whether an injunction restraining travellers from trespassing on other land should be granted in circumstances such as the present. Obviously, the decision whether or not to grant an order restraining a person from trespassing will turn very much on the precise facts of the case. Nonetheless, where a trespass to the claimant's property is threatened, and particularly where a trespass is being committed, and has been committed in the past, by the defendant, an injunction to restrain the threatened trespass would, in the absence of good reasons to the contrary, appear to be appropriate.

80. However, as Lord Walker said during argument, the court should not normally make orders which it does not intend, or will be unable, to enforce. In a case such as the present, if the defendants had disobeyed an injunction not to trespass on any of the other woods, it seems highly unlikely that the two methods of enforcement prescribed by CCR 29 and section 38 of the County Courts Act 1984 (RSC Order 45 rule 5(1) in the High Court) would be invoked. The defendants presumably have no significant assets apart from their means of transport, which are also their homes, so sequestration would be pointless or oppressive. And many of the defendants are vulnerable, and most of them have young children, so imprisonment may very well be disproportionate. In *South Bucks District Council v Porter* [2003] UKHL 26, [2003] 2 AC 558, local planning authorities were seeking injunctions to restrain gypsies from remaining on land in breach of planning law, and at para 32, Lord Bingham of Cornhill said that "[t]he court should ordinarily be

slow to make an order which it would not … be willing, if need be, to enforce by imprisonment".

81. On the other hand, in the same paragraph of his opinion, Lord Bingham also said that "[a]pprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate". A court may consider it unlikely that it would make an order for sequestration or imprisonment, if an injunction it was being invited to grant were to be breached, but it may nonetheless properly decide to grant the injunction. Thus, the court may take the view that the defendants are more likely not to trespass on the claimant's land if an injunction is granted, because of their respect for a court order, or because of their fear of the repercussions of breaching such an order. Or the court may think that an order of imprisonment for breach, while unlikely, would nonetheless be a real possibility, or it may think that a suspended order of imprisonment, in the event of breach, may well be a deterrent (although a suspended order should not be made if the court does not anticipate activating the order if the terms of suspension are breached).

82. It was suggested in argument that, if a defendant established an unauthorised camp in a wood which, in earlier proceedings, he had been enjoined from occupying, the court would be likely to be sympathetic to an application by the Commission to abridge even the short time limits in CPR 55.5.2. However, as Lord Rodger observed, if the court were satisfied that a defendant was moving from unauthorised site to unauthorised site on woods managed by the Commission, an abridgement of time limits might be thought to be appropriate anyway. Quite apart from this, if the only reason for granting an injunction restraining a defendant from trespassing in other woods was to assist the Commission in obtaining possession of any of those other woods should the defendant camp in them, it seems to me that this could be catered for by declaratory relief. For instance, the court could grant a declaration that the Commission is in possession of those other woods and the defendant has no right to dispossess it.

83. In some cases, it may be inappropriate to grant an injunction to restrain a trespassing on land unless the court considers not only that there is a real risk of the defendants so trespassing, but also that there is at least a real prospect of enforcing the injunction if it is breached. However, even where there appears to be little prospect of enforcing the injunction by imprisonment or sequestration, it may be appropriate to grant it because the judge considers that the grant of an injunction could have a real deterrent effect on the particular defendants. If the judge considers that some relief would be appropriate only because it could well assist the claimant in obtaining possession of such land if the defendants commit the threatened trespass, then a declaration would appear to me to be more appropriate than an injunction.

84. In the present case, neither the Recorder nor the Court of Appeal appears to have concluded that an injunction should be refused on the ground that it would not be enforced by imprisonment or because it would have no real value. Although it may well

be that a case could have been (and may well have been) developed along those lines, it was not adopted by the Recorder, and clearly did not impress the Court of Appeal. In those circumstances, it seems to me that it is not appropriate for this Court to set aside the injunction unless satisfied that it was plainly wrong to grant it, or that there was an error of principle in the reasoning which led to its grant. It does not appear to me that either of those points has been established in this case.

The effect of the 2004 Guidance on the grant of an injunction

85. The Recorder considered that it was inappropriate to grant an injunction in favour of the Secretary of State because the Commission had not complied with the 2004 Guidance in relation to the other woods before issuing the proceedings, and would not give an assurance that it would comply with the 2004 Guidance before it enforced the injunction. The Court of Appeal considered that the injunction could nonetheless be granted, as the issue of the Commission's compliance with the 2004 Guidance could be considered before the injunction was enforced.

86. As I have already mentioned, it has been conceded by the Secretary of State throughout these proceedings that the Commission is obliged to comply with the 2004 Guidance, and that failure to do so may vitiate its right to possession against travellers trespassing on land it manages. On that basis, there is some initial attraction in the appellants' argument that, if the 2004 Guidance ought to be complied with before the injunction is enforced, it would be inappropriate to grant the injunction before the Guidance was complied with. After all, now the injunction has been granted, the defendants would be in contempt of court and prone to imprisonment (once the appropriate procedures had been complied with) if they encamped on any of the other woods.

87. However, I am of the opinion that the Court of Appeal was right to conclude that, even in the light of the Secretary of State's concession, the 2004 Guidance did not present an obstacle to the granting of an injunction in this case. The Guidance is concerned with steps to be taken in relation to existing unauthorised encampments: it is not concerned with preventing such encampments from being established in the first place. The recommended procedures in the 2004 Guidance were relevant to the question of whether an order for possession should be made against the defendants in respect of their existing encampment on Hethfelton. However, quite apart from the fact that they are merely aspects of a non-statutory code of guidance, those recommendations are not directly relevant to the issue of whether the defendants should be barred from setting up a camp on other land managed by the Commission. Accordingly, I do not see how it could have justified an attack on the lawfulness of the Secretary of State seeking an injunction to restrain the defendants from setting up such unauthorised camps. At least on the basis of the concession to which I have referred, I incline to the view that the existence and provisions of the 2004 Guidance could be taken into account by the Court when

considering whether to grant an injunction and when fashioning the terms of any injunction. However, I prefer to leave the point open, as it was, understandably, not much discussed in argument before us.

88. Even if the 2004 Guidance was of relevance to the issue of whether the injunction should be granted, it seems to me that it could not be decisive. Otherwise, it would mean that such an injunction could never be granted, because it would not be possible to carry out up-to-date welfare enquiries in relation to defendants who might not move onto a wood which they were enjoined from occupying for several months, or, conceivably, even several years, after the order was made. As Arden LJ held, particularly bearing in mind that it purports to be no more than guidance, the effect and purpose of the 2004 Guidance is simply not strong enough to displace the Secretary of State's right to seek the assistance of the court to prevent a legal right being infringed. Further, the fact that welfare enquiries were made in relation to the defendants' occupation of Hethfelton by social services means that the more significant investigations required by the 2004 Guidance had been carried out anyway.

89. Following questions from Lady Hale, it transpired for the first time in these proceedings that, at the time of the issue of the claim, the Commission had (and has) a detailed procedural code which is intended to apply when there are travellers unlawfully on its land, and that this code substantially followed the 2004 Guidance. It therefore appears that the Commission has considered the 2004 Guidance and promulgated a code which takes its contents into account. On that basis, unless it could be shown in a particular case that the code had been ignored, it appears to me that the Commission's decision to evict travellers could not be unlawful on the ground relied on by the appellants in this case. However, it appears to me that failure to comply with non-statutory guidance would be unlikely to render a decision unlawful, although failure to have regard to the guidance could do so.

90. If the defendants were to trespass onto land covered by the injunction, the Commission would presumably comply with its code before seeking to enforce the injunction. If it did not do so, then, if justified on the facts of a particular case, there may (at least if the Commission's concession is correct) be room for argument that, in seeking to enforce the injunction against travellers who have set up a camp in breach of an injunction, the Secretary of State was acting unlawfully. It is true that this means that, in a case such as this, a defendant who trespasses in breach of an injunction may be at risk of imprisonment before the Commission has complied with the 2004 Guidance. However, where imprisonment is sought and where it would otherwise be a realistic prospect, the defendant could argue at the committal hearing that the injunction should not be enforced, even that it should be discharged, on the ground that the recommendations in the 2004 Guidance have not been followed.

91. Accordingly, on this point, I conclude that, even assuming (in accordance with the Secretary of State's concession) that the Commission's failure to comply with the 2004 Guidance may deter the court from making an order for possession against travellers, it should not preclude the granting of an injunction to restrain travellers from trespassing on other land. However, at least in a case where it could be shown that the claimant should have considered the 2004 Guidance, but did not do so, the Guidance could conceivably be relevant to the question whether an injunction should be granted (and if so on what terms), and, if the injunction is breached, to the question of whether or not it should be enforced (and, if so, how). In the event, therefore, the grant of an injunction was appropriate as Arden and Pill LJ concluded (and the only reason Wilson LJ thought otherwise, namely the existence of the wider possession order, no longer applies).

The implications of this analysis

92. As I have explained, the thinking of the Court of Appeal in *Drury* [2004] 1 WLR 1906 proceeded on the basis that an injunction restraining trespass to land could only be enforced by sequestration or imprisonment. In the light of the terms of RSC Order 45 rule 5(1), this may very well be right. Certainly, in the light of the contrast between the terms of that rule and the terms of RSC Order 45 rule 3(1) and CCR 26 rule 16(1) (which respectively provide for writs and warrants of possession only to enforce orders for possession), it is hard to see how a warrant of possession in the County Court or a writ of possession in the High Court could be sought by a claimant, where such an injunction was breached.

93. However, where, after the grant of such an injunction (or, indeed, a declaration), a defendant entered onto the land in question, it is, I think, conceivable that, at least in the High Court, the claimant could apply for a writ of restitution, ordering the sheriff or bailiffs to recover possession of the land for the benefit of the claimant. Such a writ is often described as one of the "writs in aid of" other writs, such as a writ of possession or a writ of delivery –see for instance RSC Order 46 rule 1. Restitution is normally the means of obtaining possession against a defendant (or his privy) who has gone back into possession after having been evicted pursuant to a court order. It appears that it can also be invoked against a claimant who has obtained possession pursuant to a court order which is subsequently set aside (normally on appeal) – see sc46.3.3 in Civil Procedure, Vol 1, 2009. Historically at any rate, a writ of restitution could also be sought against a person who had gone into possession by force: see Cole on *Ejectment* (1857) pp 692-4. So there may be an argument that such a writ may be sought by a claimant against a defendant who has entered onto the land after an injunction has been granted restraining him from doing so, or even after a declaration has been made that the claimant is, and the defendant is not, entitled to possession. It may also be the case that it is open to the County Court to issue a warrant of restitution in such circumstances.

94. Whether a writ or warrant of restitution would be available to support such an injunction or declaration, and whether the present procedural rules governing the enforcement of injunctions against trespass on facts such as those in the present case are satisfactory, seem to me to be questions which are ripe for consideration by the Civil Procedure Rules Committee. The precise ambit of the circumstances in which a writ or warrant of restitution may be sought is somewhat obscure, and could usefully be clarified. Further, if, as I have concluded, it is not open to the court to grant a wider order for possession, as was granted by the Court of Appeal in *Drury* [2004] 1 WLR 1906 and in this case, then it appears likely that there may very well be defects in the procedural powers of the courts of England and Wales. Where a person threatens to trespass on land, an injunction may well be of rather little, if any, real practical value if the person is someone against whom an order for sequestration or imprisonment is unlikely to be made, and an order for possession is not one which is open to the court. In addition, it seems to me that it may be worth considering whether the current court rules satisfactorily deal with circumstances such as those which were considered in *Djemal* [1980] 1WLR 1306.

Disposal of this appeal

95. Accordingly, it follows that, for my part, I would allow the defendants' appeal to the extent of setting aside the wider possession order made by the Court of Appeal, but dismiss their appeal to the extent of upholding the injunction granted by the Court of Appeal.

LORD COLLINS

96. At the end of the argument my inclination was to the conclusion that in *Secretary of State for the Environment, Food and Rural Affairs v Drury* [2004] EWCA Civ 200, [2004] 1 WLR 1906 the Court of Appeal had legitimately extended *University of Essex v Djemal* [1980] 1 WLR 1301 to fashion an exceptional remedy to deal with cases of the present kind. I was particularly impressed by the point that an injunction might be a remedy which was not capable of being employed effectively in cases such as this. But I am now convinced that there is no legitimate basis for making an order for possession in an action for the recovery of wholly distinct land of which the defendant is not in possession.

97. But in my opinion *University of Essex v Djemal* [1980] 1 WLR 1301 represented a sensible and practical solution to the problem faced by the University, and was correctly decided. I agree, in particular, that it can be justified on the basis that the University's right to possession of its campus was indivisible, as Lord Rodger says, or that the remedy

is available to a person whose possession or occupation has been interfered with, as Lady Hale puts it. Where the defendant is occupying part of the claimant's premises, the order for possession may extend to the whole of the premises. First, it has been pointed out, rightly, that the courts have used the concept of possession in differing contexts as a functional and relative concept in order to do justice and to effectuate the social purpose of the legal rules in which possession (or, I would add, deprivation of possession) is a necessary element: Harris, *The Concept of Possession in English Law*, *in Oxford Essays in Jurisprudence* (ed Guest, 1961) 69 at 72. Secondly, the procedural powers of the court are subject to incremental change in order to adapt to the new circumstances: see, e.g. in relation to the power to grant injunctions, *Fourie v Le Roux* [2007] UKHK 1 [2007] 1 WLR 320, at [30]; *Masri v Consolidated Contractors International (UK) Ltd (No.2)* [2008] EWCA Civ 303, [2009] 2 WLR 621, at [182].

98. I would therefore allow the appeal to the extent of setting aside the wider possession order.

Neutral Citation Number: [2020] EWHC 671 (Ch)

Case No: 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

Priory Courts, 33 Bull Street
Birmingham
Date: 20/03/2020

Before :

THE HONOURABLE MRS JUSTICE ANDREWS DBE

Between :

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

(2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON LAND AT CRACKLEY WOOD, BIRCHES WOOD AND BROADWELLS WOOD, KENILWORTH, WARWICKSHIRE
(3) MATTHEW BISHOP
(4) JOE RUKIN

Defendants

Tom Roscoe (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimants**
Adam Wagner (instructed by **Harrison Grant**) for the **Third Defendant**
Paul Powlesland (instructed on direct access) for the **Fourth Defendant**
The First and Second Defendants did not appear and were not represented.

Hearing date: 17 March 2020

Approved Judgment

AUTH267

Mrs Justice Andrews:

INTRODUCTION

1. This is a claim brought by the Secretary of State for Transport and High Speed Two (HS2) Limited for relief in respect of unlawful protest camps and related activities on two parcels of land referred to in these proceedings as "the Cubbington Land" (which is shown on Plan A annexed to the Particulars of Claim), and "the Crackley Land" (which is shown on Plan B). The two parcels of land are geographically close to each other. Ancient woodlands form a part of each parcel of land and are also nearby. The evidence indicates that there appears to be a connection between the two sites, with occupants moving from one to the other, though the camps have not been continuously occupied.

2. The claim is brought against "persons unknown" entering or remaining without the consent of the Claimants on the Cubbington Land and the Crackley Land respectively. However, there are also two named individual defendants, Mr Matthew Bishop and Mr Joe Rukin. They have each served witness statements and appeared at the hearing represented by counsel, Mr Wagner on behalf of Mr Bishop and Mr Powlesland on behalf of Mr Rukin. Mr Wagner also assisted the Court by drawing attention to points that he considered might have been made by the "persons unknown" trespassing on the Cubbington Land and Crackley Land respectively, who are named as the First and Second Defendants and who were not represented at the hearing. I am grateful to both defence counsel and to Mr Roscoe, who appeared on behalf of the Claimants, for their lucid and focused arguments.

3. The relief that is sought falls under three heads: first, a claim for possession of the land, secondly, declaratory relief, and thirdly an interim injunction to restrain future trespasses upon the land. Having heard submissions on 17 March 2020, I stated that I would grant the Claimants relief in substantially the terms in which it was sought, subject to certain amendments discussed with counsel, but I refused to grant an injunction against Mr Bishop or Mr Rukin and awarded each of them the costs of their counsel's attendance at the hearing. I also stated that I would set out my reasons in a reserved judgment which would be handed down in due course. This is that judgment.

BACKGROUND

4. I am satisfied on the evidence adduced by the Claimants that they have the status to pursue a claim for trespass on the land; the means by which they became entitled to possession is immaterial for those purposes. Indeed, the contrary was not argued by Mr Wagner or Mr Powlesland. There was no dispute before me that the Claimants are either the owners of the land or, in the case of HS2, they have taken temporary possession of the land pursuant to their statutory powers under the High Speed Rail (London-West Midlands) Act 2017 ("the 2017 Act") for the purpose of carrying out "Phase One" works authorised by the Act in respect of the High Speed Two ("HS2") railway project.

5. This is a controversial and high-profile project that is specifically authorised by the 2017 Act. It has raised genuine concerns and deep-rooted opposition in many quarters, particularly on environmental and ecological grounds.

6. As in an earlier case involving a claim in respect of trespass by protesters against the HS2 project, *Secretary of State for Transport and High Speed Two (HS2) Limited v Persons Unknown* [2019] EWHC 1437 (Ch), on each of the two affected parcels of land there are three categories of land shaded blue, pink and green on the plans. The blue land is land of which the Secretary of State is the freehold owner. The pink land is land that has been acquired by the Secretary of State pursuant to his powers of compulsory purchase under the 2017 Act. The green land is land in the possession of HS2 by reason of the exercise of its powers under section 15 and Schedule 16 of the 2017 Act. The outer boundary of the whole of the land on each of the two affected areas is edged in red on the plans.

7. The plans indicate that on the Cubbington site there are two protest camps which have been set up in a blue area. The site of the upper camp is close to an unofficial footpath through the ancient woodland which is the continuation of an existing public right of way. The Claimants have power under the 2017 Act to close and divert public highways, but they have not yet exercised it in respect of that footpath. A public footpath closer to the site of the lower camp has been closed, and the Claimants believe that the protesters initially entered the site from this path by moving the Heras fencing that closed it off on or about 29 September 2019.

8. The protest camp on the Crackley site is on a much smaller parcel of blue land that is roughly the shape of an isosceles triangle on Plan B. At the time when the camp was erected on 12 October 2019, Mr Rukin believed that land belonged to a Mrs Shanks. He has asserted in his evidence that the freehold was not acquired by the Secretary of State until 26 November 2019. In fact it would appear that Mr Rukin is mistaken in that regard, because although Mrs Shanks was the registered owner of land with the title number EX42259, a portion of that land (edged in green on the title plan) was removed in November 2018 and registered as part of title No WK501441. The Secretary of State has been the registered freehold owner of the latter, including the area on which the camp was erected, since November 2018. In any event, even if Mrs Shanks had owned the land at the time when the camp was initially set up, it does not affect the Secretary of State's present right to possession of the land, about which there can be no dispute. The protesters have had plenty of time since 27 November 2019 in which to dismantle their tents and leave, but they have not yet done so.

9. The court was told by Mr Bishop, the spokesman for the protestors on the Cubbington land, that the protesters with whom he is associated are local residents, normally law-abiding citizens, whose main concern is to ensure that the contractors working on the project adhere to the promises and assurances that they have given in respect of the preservation of the ancient woodland, and in particular that they do not act unlawfully by, for example, felling trees that are outside the published construction zones, or disregarding protected species of wildlife.

10. The Cubbington protestors say that their sole purpose in trespassing on the land is to monitor and take photographs or film the activities of the contractors in order to preserve evidence of alleged wrongdoing. They have no intention of disrupting the contractors going about their lawful business and were committed to ensuring that their protest was peaceful. To that end, Mr Bishop drew up a Camp Code of Conduct to which all the protestors who stayed in the two camps on the Cubbington Land subscribed.

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 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 Corvin-Czarnodolski ("Mr Corvin") 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.

14. Moreover, as Mr Roscoe rightly pointed out, and as Mr David Holland QC held in the previous HS2 case to which I have referred, however laudable the motives of a trespasser may appear to be, it is no defence to a claim in trespass for the trespasser to say they are only on the land to prevent or obtain evidence of unlawful activities which might otherwise go undetected.

Service of the proceedings

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 Bishop and Mr Rukin were able to respond to the claim and instruct counsel to represent them.

16. The Claimants have made an application, to the extent that the 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.

17. I am also satisfied that this is a case in which it was appropriate to bring the proceedings in the High Court.

The law

18. I was referred to three recent cases in the Court of Appeal which concerned claims for injunctive and other relief against protesters whose identities were unknown, namely, *Boyd and Corré v Ineos Upstream Ltd and others* ("*Ineos*") [2019] EWCA Civ 515; *Cuadrilla Bowland Ltd and others v Persons Unknown* ("*Cuadrilla*") [2020] EWCA (Civ) 9 and *Canada Goose UK Retail Limited and another v Persons Unknown ("Canada Goose")* [2020] EWCA Civ 303. I need only refer in this judgment to *Canada Goose,* as the Court of Appeal in that case addressed and confirmed the principles set out in *Ineos* and *Cuadrilla* and laid down, at [82], a set of procedural guidelines applicable to proceedings for interim relief against "persons unknown" in protester cases.

19. Importantly, the Court of Appeal concluded 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 – for example, protesters who join the protest group after the hearing for interim relief. An interim injunction, however, may be granted against "persons unknown" for such a period as will enable the claimant to identify wrongdoers either by name, or as anonymous but identifiable persons who have been served with the proceedings (thereby falling within Category 1 of the categories of unknown defendants referred to by Lord Sumption in *Cameron v Liverpool Insurance Co Ltd* [2019] UKSC 6, [2019] 1 WLR 147). Such an injunction must be subject to reasonable temporal and geographic limits and contain sufficient provision for anyone adversely affected by it to apply to the court to vary or discharge it.

20. The only other authority to which I need refer is *Secretary of State for the Environment v Meier* [2009] UKSC 11, in which the Supreme Court considered the extent to which an order for possession can be made in favour of a claimant in respect of land not actually occupied by a defendant. That is relevant in the present case because, particularly as regards the Crackley site, the protest camp has been set up in one distinct area, and much of the Crackley Land is currently unaffected. Lord Neuberger said at [64] that:

> "*the notion that an order for possession may be sought by a claimant and made against defendants in respect of land which is wholly detached and separated, possibly by many miles, from that occupied by the defendants, accordingly seems to me to be difficult, indeed impossible, to justify. The defendants do not occupy or possess such land in any conceivable way, and the claimant enjoys uninterrupted possession of it. Equally, the defendants have not ejected the claimant from such land. For the same reasons, it does not make sense to talk about the claimant recovering possession of such land, or to order the defendant to deliver up possession of such land.*"

21. However, he went on to say at [65] that this did not mean that, where trespassers are encamped in part of a wood, an order for possession cannot be made against them in respect of the whole of the wood, just as much as an order for possession may extend to a whole house where the defendant is only trespassing in one room (at least if the rest of the house is empty). An order for possession may be made in respect of the

whole of a piece of land when the defendant is only in occupation of part of it and the remainder is empty.

22. The present case is different from the situation in *Meier* in that both plots are contiguous open countryside and woodland to which the Claimants have an entitlement to possession as part of one scheme of works. In *Meier* there were disparate plots of land situated some distance away from the land which was currently under occupation. Mr Corvin's evidence and Ms Jenkin's second witness statement establishes that there have been trespassers on the land in areas other than where the camps are situated or their immediate vicinity. The Claimants' possession of the land is not undisturbed so long as persons are wandering on it at will without permission. I am satisfied on the evidence that the Claimants need possession of the whole of each site to enable the works to be carried out in a practical and safe manner, and there is a degree of urgency because some of the essential preparatory work needs to be carried out before the bat mating season in April.

23. With the principles in those authorities in mind, I turn to consider the three heads of relief that were sought in the present case.

THE CLAIM FOR POSSESSION

24. The Claimants are undoubtedly entitled to possession of the land identified on the two plans. The Defendants (including anyone presently in occupation) are not entitled to be there. Realistically neither Mr Wagner nor Mr Powlesland sought to offer any defence to this aspect of the claim.

THE CLAIM FOR A DECLARATION

25. Mr Roscoe drew my attention to *Meier* at [93] and [94] where Lord Neuberger suggested that a declaration of entitlement to possession of the relevant parcel of land might facilitate the speedy removal of future trespassers by means of a writ of restitution, without the need for the landowner (or other person entitled to possession) to start fresh proceedings. He submitted that declaratory relief was therefore potentially of greater practical utility to his clients than an injunction, as the only recourse if an injunction were breached would be to bring proceedings for contempt of court against the individual(s) concerned.

26. Mr Powlesland and Mr Wagner cautioned against granting ancillary relief in a form that might cast the net too wide and potentially have an adverse effect on the legitimate interests of persons who were not served with the proceedings and who were not represented in court. They pointed out that the areas currently occupied by the protesters fell squarely within blue areas, denoting land belonging to the Secretary of State and within a relatively narrow corridor through the woodland, quite some distance from the green areas occupied by HS2.

27. Mr Powlesland submitted that if, for example, private landowners whose land had been completely surrounded by land requisitioned for the HS2 project might be affected by an order in favour of the Claimant, they should be served with the proceedings and have the right to be heard. He raised the prospect that there might be some issue, for example, as to whether the section 15 and Schedule 16 powers to take possession of land belonging to third parties had been properly exercised in the first

place and therefore whether the owners of that land might contest that HS2 were entitled to a declaration that they were entitled to possession of it for the purposes of the works. Those points of course merit serious consideration, but I would have thought that if any local landowner was going to protest about the exercise by HS2 of its powers under the 2017 Act they would have done so by now. The Claimants have not come rushing to court to seek this relief.

28. Nevertheless, it is important that any injunctive or declaratory relief is framed in such a way as to make it plain that any existing rights of third parties or the general public – such as rights of way, or private rights such as easements over the land that have not been removed by the 2017 Act (or powers exercised under the 2017 Act) are preserved. Matters of that type should be capable of being addressed in the drafting of any court order, and of course there should also be a general permission to any person adversely affected by the order to apply to the court to vary or discharge it.

29. Whilst there may be cases in which it would be appropriate to do so, I could see no principled reason in the present case for granting declaratory relief that was narrower in scope than the order for possession, for example by confining the declaration to the freehold land owned by the Secretary of State. Both types of relief arise in consequence of the Claimants collectively being entitled to possession of the whole of the two parcels of land. Given that Mr Roscoe has persuaded me that granting a declaration would serve a useful purpose in preventing future trespasses on land needed for the Phase One works, that purpose will only be served if I grant a declaration in the terms sought by the Claimants to the effect that they are entitled to possession of the whole of the Cubbington Land and the Crackley Land.

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 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.

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 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, 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 both 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 Cubbington Land and 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 the 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 trucks 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 Powlesland 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. Some were 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 protestors 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 focused way that would specifically address the type of objectionable (and tortious) behaviour which is a particular cause for concern – breaking down fencing, for example. However, leaving aside the difficulties 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 purposes of replanting, for example. The concept of interference with the work of contractors 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 no 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 years 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 give 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.

COSTS

45. Finally, there is the matter of costs. Mr Roscoe told the court that his clients did not seek their costs against either of the named defendants. Mr Wagner and Mr Powlesland sought orders for costs on the basis that the Claimants persisted in seeking injunctive relief against their clients, despite the evidence in their witness statements, and they failed to obtain it. Whilst they had admittedly trespassed on the land in the past, neither of these defendants resisted the claim for possession of the land or for declaratory relief. However, the Claimants still had to come to court to obtain that relief against the First and Second Defendants.

46. Mr Bishop and Mr Rukin only needed to attend the hearing in order to resist the claims for future injunctive relief made against them personally, which they did. It would not be fair to the Claimants to make them bear all the costs incurred by Mr Bishop and Mr Rukin, who had to put in evidence come what may; but in the light of the fact that the Claimants could and should have appreciated when they received their witness statements that there was insufficient evidence to justify seeking future injunctive relief against them, I consider that they should be awarded the reasonable costs of their counsel's attendance at the hearing. Mr Rukin instructed counsel on direct access; Mr Bishop instructed counsel and solicitors. Whilst it was reasonable to instruct both, it is not necessarily appropriate to make the unsuccessful party pay for the costs of both attending. In this case there was nothing special about the claim for injunctive relief that required a solicitor as well as counsel to be present in court. That is why I have restricted the recoverable costs to counsel's fees for attending the hearing.

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.

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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:

[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.

[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:

---

[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 invitiation, 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]

---

[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."

[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

[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.
>
> 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, of itself, 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 did enter the Crackley Land without the consent of the Claimants, he became a Second Defendant at that instant provided 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) Assuming 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 should 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:

[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 two 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."

[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

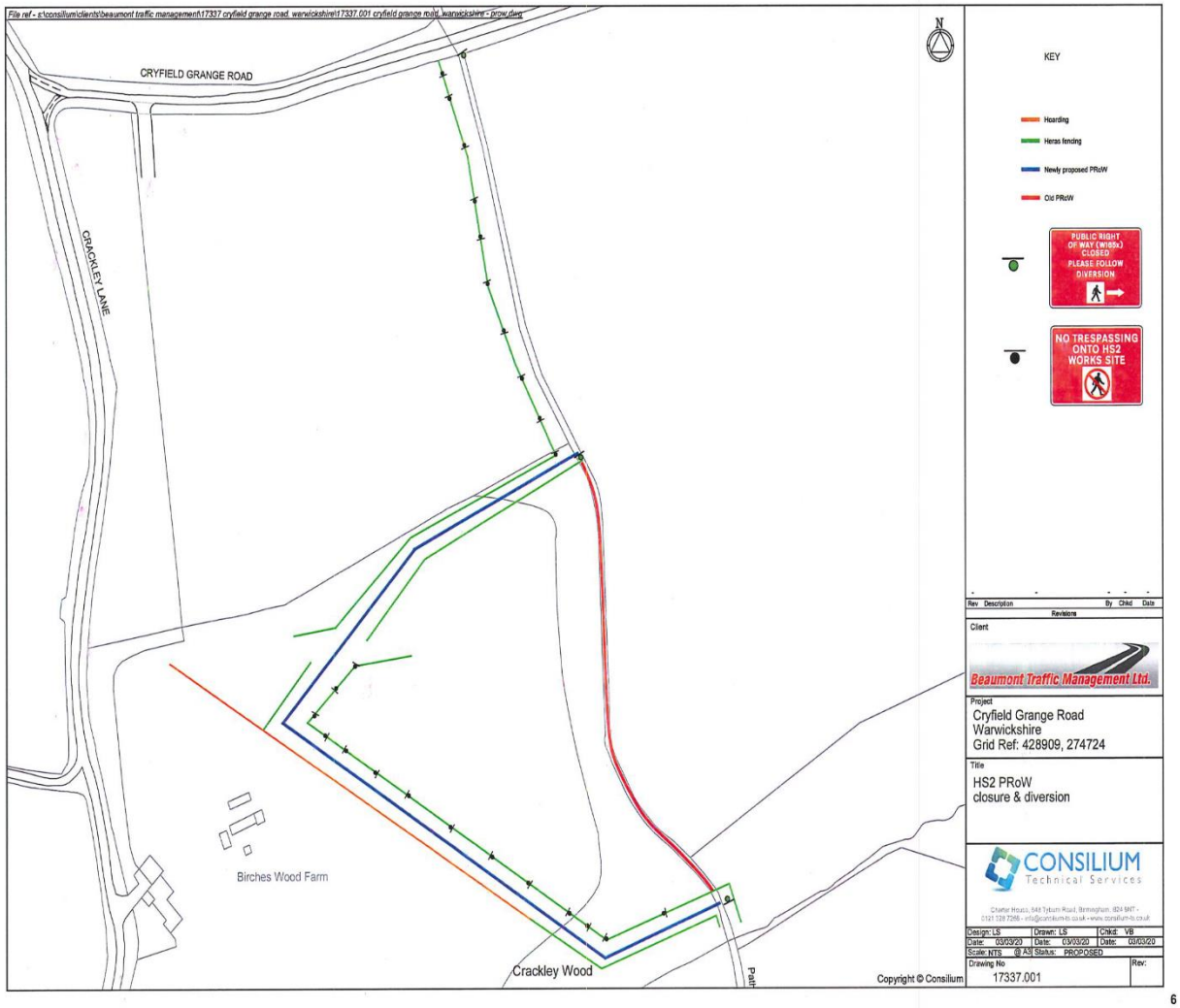
"PLAN B" MARKED UP FOR THE PURPOSE OF THIS JUDGMENT

(paragraph 86 in the judgment)

ANNEX 4

THE PLAN SHOWING THE INTENDED DIVERSION OF PROW165X TO A TPROW

(paragraph 93(4) in the judgment)



Claim No: PT-2018-000098

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

PROPERTY, TRUSTS AND PROBATE LIST (ChD)

BEFORE DAVID HOLLAND QC (Sitting as a Deputy Judge of the Chancery Division)

B E T W E E N:

(1) THE SECRETARY OF STATE FOR TRANSPORT

(2) HIGH SPEED TWO (HS2) LTD

Claimants/Applicants

-and-

(1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON LAND AT HARVIL ROAD, HAREFIELD IN THE LONDON BOROUGH OF HILLINGDON SHOWN COLOURED GREEN, BLUE AND PINK AND EDGED IN RED ON THE PLANS ANNEXED TO THE RE-AMENDED CLAIM FORM

(2) PERSONS UNKNOWN SUBSTANTIALLY 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 OR FROM THE LAND AT HARVIL ROAD SHOWN COLOURED GREEN, BLUE AND PINK AND EDGED IN RED ON THE PLANS ANNEXED TO THE RE-AMENDED CLAIM FORM

(3) TO (35) THE NAMED DEFENDANTS LISTED IN THE SCHEDULE TO THE ORDER OF MR DAVID HOLLAND QC DATED 22 JUNE 2020

(36) 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 HARVIL ROAD SITE, OR DAMAGING, APPLYING ANY SUBSTANCE TO OR INTEFERING WITH ANY LOCK OR ANY GATE AT THE PERIMETER OF THE HARVIL ROAD SITE WITHOUT THE CONSENT OF THE CLAIMANTS

Defendants / Respondents

Representation:

Tom Roscoe and **Daniel Scott** (instructed by Eversheds Sutherland LLP) for the Claimants.

Paul Powlesland (instructed under the Public Access scheme) for the Fourth Defendant.

The Eighth, Ninth, Tenth, Thirteenth, Eighteenth, Twenty Second, Twenty Third, Twenty Fifth, Twenty Sixth, Twenty Seventh, Twenty Eight, Thirty First and Thirty Second Defendants appeared in person.

APPROVED JUDGMENT

David Holland QC

Introduction and background

1. This is the Claimants' application issued on 15th June 2020 to continue injunctive relief to prevent what they assert is unlawful protest action against the High Speed 2, or HS2, railway project at a site off the Harvil Road in Hillingdon, West London.

2. The First Claimant is the Secretary of State for Transport. The Second Claimant ("HS2") is the statutory undertaker under the High Speed Rail (London-West Midlands) Act 2017 ("the Act") responsible for the implementation of the HS2 project.

3. This is the second hearing of that application. This hearing was listed pursuant to paragraph 21 of an order made by myself on 22nd June 2020. I have to consider:

   (i) whether interim injunctive relief should be continued;

   (ii) the appropriate temporal limit for such continued injunctive relief; and

   (iii) the exact form of that relief in terms of the geographical coverage of the injunction.

4. The Claimants, in short, seek the continuation of interim injunctive relief in materially the same form as that granted by me on 22nd June 2020. This, in summary, prevents trespass on and obstruction of access to the Site. They seek such relief for a further period of two years. They say that the totality of the development site is now slightly larger than it was when I granted the injunction on 22 June 2020. The Claimants therefore ask that any continued injunction also now apply to the totality of the site including this land ("the Additional Land") at the date of this hearing.

5. The land which is currently covered by the injunction granted on 22nd June 2020 ("the Land") is shown on the plan at page [D973] of the hearing bundles. The new land the right to possession of which has been acquired by HS2 since 22nd June 2020 and is not currently covered by the injunctive relief ("the Additional Land"), is shown on the plan

at page [D974]. A composite plan shown the Land and the Additional Land ("the Site") is at [D975].

6. Hereafter where I refer in general terms to the land in the vicinity of Harvil Road which is in the possession of the Claimants and on which construction work is or has been taking place I will refer "the Harvil Road Site". I shall refer to individual Defendants as "D" followed by the number given to them in the Schedule attached to my order of 22nd June 2020. Hence Mr Kier will be referred to as "D4".

7. The hearing took place remotely via Skype.

The Claimants and their evidence

8. I heard from Mr Roscoe leading Mr Scott on behalf of the Claimants.

9. I read the following witness statements filed on behalf of the Claimants:

   (i) First Statement of Shona Ruth Jenkins dated 18th May 2020;

   (ii) Second statement of Rohan Perinpanayagam dated 15th June 2020 (RP2)

   (iii) Second statement of Richard Joseph Jordan dated 15th June 2020 (Jordan 2)

   (iv) Third statement of Rohan Perinpanayagam dated 27th July 2020 (RP3)

   (v) Third statement of Richard Joseph Johnson dated 27th July 2020 (Jordan 3)

   (vi) Fourth Statement of Rohan Perinpanayagam dated 13th August 2020 (RP4)

The Defendants

10. There is a Schedule of the various Defendants named and unnamed annexed as a Schedule to the order dated 22nd June 2020.

11. As will be apparent, D1, D2 and D36 are Persons Unknown of various descriptions.

12. Ms Green (D3) had previously been engaged in these proceedings. However, the Claimants reached an accommodation with her and, at the outset of the hearing on 24th August 2020, I approved a signed consent order dated 17th August 2020 by which she ceased to be a party on terms. Nevertheless I read three statements that she had produced dated 1st June 2020, 17th June 2020 and 13th July 2020.

13. So far as the remaining Defendants are concerned:

    (i) D4, Mr Kier, made an undated statement and was represented at the hearing by Mr Powlesland of counsel who made submissions to me.

    (ii) D8, Mr Mordechaj, sent an email to the court dated 2nd June 2020 and addressed me;

    (iii) D9, Mr Oliver, sent an email to the court dated 2nd June 2020 and addressed me;

    (iv) D10, Mr Curcuirean, addressed me;

    (v) D13, Mr Breen, addressed me;

    (vi) D18, Victoria Zieniuk, sent an email to the court dated 24th August 2020 and addressed me;

    (vii) D22, Dr Maxey, provided an email to the court dated 21st August 2020 and addressed me;

    (viii) D23, Sebastian Roblyn Maxey (D22's son) addressed me.

    (ix) D25, Ms Dorton, provided an email dated 21st August 2020 and addressed me;

(x) D26, Mr Collins addressed me.

(xi) D27, Sam Goggin, relied on the evidence supplied by Ms Green (formerly D3) and provided two written documents as well as a report from a Mr Talbot at [D1383] and addressed me.

(xii) D28, Ms Pitwell, provided an undated statement and addressed me.

(xiii) D31, Ms Farbrother, addressed me;

(xiv) D32, Ms Smithson, provided a written statement which I read.

14. I allowed each of the named and unrepresented Ds to address me orally even if they had failed to comply with the directions in paragraphs 23 and/or 24 of the Order dated 22nd June 2020. Given their number, in the interest of case management I felt the need to limit the time allocated to each for their oral address. No doubt there are some who feel that they could have said more and would have done if they had been allowed to do so. However I believe that I have listened to and understood the arguments which each of the Defendants who addressed me raised (many of which were similar if not identical to those raised by many others).

15. In addition I allowed Mr Powlesland to speak last in order that he, as counsel, could amplify and expand upon any argument raised by any of the other Defendants.

16. No doubt the Claimants felt constrained by the guidance given by the Court of Appeal in CANADA GOOSE V PERSONS UNKNOWN [2020] EWCA Civ 303 ("Canada Goose") at para 82 to join as many named Defendants as they could. The problem with that guidance is that, in a case such as this, there is a distinct risk that, unless carefully

and strenuously case managed, the hearing of any application becomes unwieldy and disproportionately long.

Procedural History

17. This is at least the sixth occasion in which protest action at the Harvil Road Site has been the subject of a hearing before this court. The Claimants have been the same on each occasion as have some of the named Defendants.

18. Injunctive relief has been in place to protect the Claimants and their site from unlawful protest activity since February 2018. It has been renewed from time-to-time as earlier, temporally-limited, injunctive relief was due to expire as the evidence showed that a risk of unlawful conduct continued. As the Claimants point out, many of the issues which the Defendants have raised before me at this hearing have already been considered in the earlier hearings.

19. Briefly:

    (i) Injunctive relief was first granted by Mr Justice Barling on 19 February 2018 for the reasons set out in his judgment of that date ([2018] EWHC 1404 Ch-"the Barling judgment"). The relief he granted was time-limited to 1st June 2019, with liberty to apply.

    (ii) Pursuant to those liberty to apply provisions, the Claimants successfully applied to extend the injunction for a further year (and to encompass further land). That extended relief was granted by me in a judgment that I gave on 16th May 2019 ([2019] EWHC 1437 Ch-"my first judgment"). The interim relief granted was to last until 1st June 2020, again with liberty to apply ("the 2019 Injunction").

(iii) During the currency of the 2019 Injunction, separate possession proceedings were brought by HS2 alone to recover possession of part of (what is now) the Land from protestors who were in occupation of it. Those proceedings were determined in the Claimant's favour by me for the reasons set out in my judgment of 28 November 2019 ("my second judgment"). An approved transcript of my second judgment was before the court at this hearing but it has not yet been allocated a neutral citation number.

(iv) The Claimants wished to seek the further renewal of the 2019 Injunction, but were not in a position to do so substantively before 1st June 2020. To avoid the 2019 Injunction lapsing without any form of replacement, an "Extension Application" was issued on 18 May 2020 to seek a temporary extension of the 2019 Injunction to allow this application to be brought (as it now has been). That application was granted by Fancourt J on 21st May 2020, for the reasons recorded in a judgment a brief (and unapproved) note of which is in the hearing bundles. By Fancourt J's judgment, a significant number of Named Defendants were added to the proceedings – to reflect the importance of naming defendants where their identity can be established following the Court of Appeal's recent guidance in Canada Goose.

(v) The return date of that Extension Application was listed before me on 22 June 2020. By the date of that hearing, this Application had also been issued. At that hearing, I continued injunctive relief to the date of this hearing but expanded the geographical scope of the injunction to cover the whole of the Land.

20. Many of the procedural and case management directions sought by the substantive Amendment Application were dealt with by me in the Current Injunction Order dated 22nd June 2020.

21. It is also worth noting two other court hearings which have dealt with protests at or near the Harvil Road Site.

22. On 13th May 2020 Stuart Ackroyd and Wiktoria Zieniuk (D18 in this case), as Claimants, brought proceedings against HS2 and its appointed security contractor High Court Enforcement Group Ltd T/A National Eviction Team ("NET"), as Defendants, in the Queen's Bench Division of the High Court seeking injunctive relief to prevent HS2 from evicting those Claimants and others from a building on the Harvil Road Site known as RMC or Ryall's Garage where some of those opposed to HS2 had apparently been living. The Claimants in that case were represented by Mr Powlesland: the Defendants by Mr Roscoe. That application came before Swift J on 13th May 2020 who, in a judgment given on that day ([2020] EWHC 1460 QB-"the Swift judgment"), dismissed it.

23. In the meantime proceedings were issued by the London Borough of Hillingdon against Persons Unknown and 23 named Defendants (including Mr Kier, Dr Maxey, Sebastian Roblyn Maxey, Ms Dorton, Mr Mordechaj, and Mr Goggin who are Defendants before me) seeking injunctive relief in respect of an area of land owned by Hillingdon adjacent to the Harvil Road Site. On 13th July 2020 Kerr J granted injunctive relief to prevent the Defendants in that case from: camping overnight on the relevant land; carrying on obstructive behaviour or making excessive noise.

24. The nature of the continued relief which the Claimants submit it is appropriate for the Court to make at this hearing is as set out in the Draft Order provided by them and contained in the Hearing Bundles.

The Harvil Road site and the HS2 works

25. As stated, the Site, in respect of which injunctive relief is now sought, is shown on the Plan at [D975].

26. By dint of the High Speed Rail (London-West Midlands)(Nomination) Order 2017, from 24th February 2017, HS2 is the "nominated undertaker" under section 45 of the Act.

27. The Harvil Road Site was described in paragraphs 2 and 7 of my first judgment. It consists of a large site required for the purposes of construction of the HS2 scheme. It is notorious that the HS2 scheme is a controversial project and that there are many people who would much prefer if it was not built. As will have been apparent from the procedural history described above, the Harvil Road Site in particular has attracted protesters concerned at the potential environmental damage which the works proposed at that site might cause.

28. In paragraph 7 of my first judgment I identified three different categories of land over which the injunction was sought (and granted). Those three categories continue to apply. First of all, there is land within the freehold ownership of the First Claimant that is coloured blue on the plans referred to above, and is referred to as "the blue land". Secondly, there is land acquired by the First Claimant pursuant to its compulsory purchase powers in the Act. That land is coloured pink on the various plans and is referred to as "the pink land". Thirdly, there is land in the temporary possession of HS2 by reason

of the exercise of its powers pursuant to section 15 and Schedule 16 of the Act. That land is coloured green on the plans and is referred to as "the green land".

29. I set out the relevant provisions of the Act in paragraphs 42 to 52 of my second judgment. I shall not recite them separately in this judgment.

30. I note the following features from the various Plans at [D973-975]:

(i) Harvil Road runs approximately north / south just to the left of centre of the plan.

(ii) "Dews Lane" is a private road which adjoined the Harvil Road to the west. The 2019 Injunction did not seek to prevent persons from using that lane (even though it might otherwise have constituted trespass).

(iii) There were three entrances to the Harvil Road Site off the Harvil Road, then known as "West Gate 3 Entrance", "North Compound Entrance" and "South Compound Entrance".

(iv) Opposite the North Compound Entrance there is shown a "Protestor Encampment". At the time, that encampment was both on the verge of the public highway (i.e. the part that is shown on the plans as the "roadside camp"), but also spilled onto the field behind which was – at the time of my first judgment – not part of the Site but is now.

(v) Running parallel to the northern edge of a field (just in the field marked C111_112) there is a path marked by a single black line. That is footpath U34, which featured in my second judgment. As I found in that judgment, that footpath had by that date been closed.

31. Since the date of my first judgment, further land had been brought into the Claimants' possession for the purposes of the works on the Harvil Road Site. At the 22nd June 2020 hearing, I extended the geographical scope of the injunction to cover the relevant additional land which had been brought into the Site at that time: that land is described in RP 2 at paragraphs 23 to 28. That is the Land as set out in the plan at [D973]. In particular:

(i) A new "Gate 4" has been added for access to the northern part of the site off the Harvil Road.

(ii) There are now entrances to the east and west sides of Dews Lane ("Fusion Dews Lane Compound HQ", off the Harvil Road, and "Dews Lane West", off adjacent land owned by Hillingdon Council).

(iii) The North and South Compound entrances have now been re-named Gate 2 and Gate 1 respectively.

(iv) The "Ryall's Garage" camp or building referred to in the evidence was just to the south of Dews Lane on land which was not, but is now, part of the Site.

32. As stated, since the date of my order on 22nd June 2020 possession of yet further land has been acquired by HS2 under the statutory scheme (thus it is green land). I have referred to this as the Additional Land and it is shown on the plan at [D974].

33. I described the nature of the works which are currently being carried out and are proposed to be carried out at the Harvil Road Site in paragraph 26 of my second judgment. A more up to date description is set out in at paragraphs 49 to 51 of RP 2. These works include not only site clearance, preparatory and survey/investigation works but also: the installation of a new high pressure gas main; the decommissioning of an existing

overhead power line and the installation of a new and diverted overhead power line; the construction of new utility conduits; the realignment of Harvil Road and Dews Lane; the construction of a viaduct to carry the new railway line; the construction of part of a tunnel also to carry the new railway line.

34. These are complex works, involving teams of different contractors and, according to the Claimants, due to certain restraints (including ecological constraints) they must be carried out pursuant to a quite regimented timetable, with delays having serious onward consequences. Many of the works require the use of heavy machinery, such that the presence of unauthorised persons on the site necessarily prevents works. The current works timetable extends to 2024 (see paragraphs 49 of RP 2 and the Schedules at [D685-686]). In paragraphs 53 and 54 of RP 2 he says this:

> *It is imperative that the Claimants and their contractors have uninterrupted use of the Harvil Road Site without obstruction in order that can work in accordance with and maintain their programme and ultimately the Scheme timetable. To date, protester action has caused considerable impact (and cost) to the Scheme. My colleagues and I have sought to put together a broad estimate of the* ***additional*** *cost of the development at the Harvil Road Site by reason of the delays and additional security expenses caused by protest activity at the site (aside from legal costs). These come to almost £16 million, and are broken down in a short schedule with more detailed narrative comments at p.71. I should indicate that these are necessarily relatively broad estimates, but indicate that the protest activities at the site are causing very serious detail and financial impact - which is ultimately being paid for by the public.*

At paragraph 17(i) of Jordan 2 Mr Jordan states

> *The HS2 Site is an active construction works site. The works time-table requires coordination between numerous different contractors and subcontractors of different specialisations. The mere presence of unauthorised protestors on the Harvil Road Site is unsafe when heavy works are planned, and usually requires those works to be paused. Where, as is often the case, protestors actively interfere with works, the problem is even more acute. The knock-on effect and cumulative effect of these delays is severe. They serve to increase costs, and require increased security and legal costs. All of these costs are ultimately borne by the public purse.*

The Claimants' submissions

35. The Claimants submit that, whilst the HS2 project is controversial, it has been authorised by the Act following considerable public consultation.

36. The Parliamentary process which lead to the Act is set out in more detail in my first judgment at paragraphs 15 to 23.

37. A further description of both the Parliamentary procedure and the overall scheme of the Act is at paragraphs 7 to 17 of the judgment of the Administrative Court in the case of R (OAO PACKHAM) V SECRETARY OF STATE FOR TRANSPORT [2020] EWHC 829 (Admin) and in paragraphs 12 to 19 of the judgment of the Court of Appeal in the same case ([2020] EWCA Civ 1004) ("the Packham case").

38. The powers given to the Claimants under the Act, as I have stated, include powers to take temporary possession of land and acquire land permanently.

39. Details as to the rights of the Claimants over the Land and the Additional Land are set out as follows:

    (i) so far as the Land is concerned, in paragraphs 20 to 27 of RP 2;

    (ii) so far as the Additional Land is concerned, paragraphs 5 to 9 of RP 4.

    In addition there are exhibited to these statements Schedules (at pages [D663] and [D976] of the bundles) which set out the various dates on which HS2 is deemed to have taken possession of the various tracts of green land under Schedule 16 of the Act. I also note the assertion made in paragraph 63 of Jordan 2 relating to the Claimants' rights over the Additional Land at the dates of the various incidents.

40. So far as the Land is concerned, I have of course already held in my first judgment that the Claimants are entitled to possession of large parts of it.

41. However, so far as both the Land and the Additional Land are concerned, I accept the evidence set out in RP2 and RP4 (which was not seriously challenged) and hold that the Claimants are, as a matter of law, entitled to apply for possession of, or to bring a claim for trespass in respect of, all three categories of land as shown on the plan at [D975].

42. I say that the evidence was not seriously challenged but Dr Maxey, in his oral address to me, pointed to what he said were certain inaccuracies in the account of certain events and urged on me that the evidence in RP2 and RP4 as to ownership was not to be accepted at face value. I reject that challenge. I see no reason to doubt the assertion of the Claimants as to their rights over the Land and the Additional Land.

43. As I described in my first judgment, the Claimants claims are put in trespass, in respect of unauthorised incursions into and onto the Land and the Additional Land, and in private nuisance in respect of obstruction on the public highway of entrance into and exit from the Land and the Additional Land. Again there was no challenge to the Claimants assertion that, as a matter of law, if they proved that they had the rights they claimed over the Land and the Additional Land, then they were entitled to bring such claims. I hold that they are.

44. Mr Roscoe submitted that the names of all the persons engaged in unlawful protest activities were not, and are still not, known. That is why three categories of "persons unknown" have been named as Defendants: D1, D2 and D36 (with D36 being added as a new category of defendant by me on 22nd June 2020, to address the particular problem of protestors damaging security fencing on the site). Those categories, he submitted, reflect the two categories of tortious conduct: trespass (D1); and the nuisance of

obstruction of access (D2) whilst D36 is an amalgam of both. That was and remains, he said, an appropriate means of seeking relief against unknown categories of people in circumstances like this. He cited the Court of Appeal's judgment in BOYD & ANOR V INEOS UPSTREAM LTD & ORS [2019] EWCA Civ 515 at [18]-[34]. No one suggested that these submissions were wrong or that the three categories of Persons Unknown were inappropriate or insufficiently precise. I agree with Mr Roscoe on this point.

45. So far as service was concerned, Mr Roscoe noted the application of section 12 of the Human Rights Act 1998 (cited at paragraph 121 of my first judgment). This 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."*

46. There was no difficulty, he said, in giving notice of an injunction to the three categories of persons unknown: it could and has been publicised at the site and online, and orders to this effect have been made in all of the preceding injunctions in these proceedings. He submitted that the Claimants had taken all practicable steps to notify these Defendants. No one suggested otherwise and I agree.

47. It is the Claimants' case that, since the date of the 2019 injunction, and in spite of it, incidents of incursion and obstruction have continued. The various incidents relied on are set out in paragraphs 9 and following of Jordan 2 and paragraphs 11 and following of RP4. In paragraph 14 of Jordan 2, Mr Jordan states that, between the grant of the 2019 injunction and 31st May 2020 there were 35 incidents of incursion and/or obstruction in relation to the Land and 31 incidents of incursion and/or obstruction in relation to the

Additional Land. He describes the various incidents in relation to the Land in paragraphs 30 to 62 of Jordan 2 and those in relation to the Additional Land in paragraphs 63 to 100 of Jordan 2.

48. In addition, in paragraphs 11 to 32 of RP4, there are described further incidents of incursion and obstruction which have taken place in relation to the Land and the Additional Land since 31st May 2020 and up to 31st July 2020.

49. There is neither the time nor the need to set out the details of these various incidents in this judgment. There is not the need because, although several of the named Defendants sought to contradict the account put forward by the Claimants' witnesses of certain of the incidents in certain respects, no one sought to deny that any of the incidents had in fact occurred or that the description of any of them was wholly inaccurate.

50. To give a flavour, the various incidents have involved: climbing over or cutting through the fences at the Harvil Road Site; unauthorised incursions into the Site by individuals, small groups, or larger groups of 12-15 people; obstruction by one or more people of the "bellmouths" between the various gates and the public highway to prevent vehicular access into or out of the Site; damage to locks on the various gates to prevent their being opened; the placing of padlocks and chains around the gates to prevent their being opened; people sitting on or in front of machinery on the Site to prevent its operation; people attempting to lock themselves onto gates and machinery to prevent opening or operation; walking slowly in front of vehicles on the Harvil Road to prevent vehicular passage; the climbing of trees both on and in the vicinity of the Site and the construction of tree platforms; the rigging of lines between trees on and off the Site.

51. In addition to the constant presence of private security guards, NET, at the Harvil Road Site, the police have been called out on numerous occasions.

52. Just as importantly, it is clear from the evidence that many of these incidents have been accompanied by threats and aggressive behaviour. There are allegations that protesters have assaulted HS2 and NET employees. At the very least the constant presence of protesters at and around the Harvil Road Site and the constant prospect of incursions and obstructions must render the job of those carrying out works on the site much less pleasant.

53. In paragraphs 15 and 17 (ii) to (v) of Jordan 2 Mr Jordan states:

> *On average, the number of protesters on or in the vicinity of the Harvil Road Site who are visibly opposed to the HS2 Scheme range between about five and 25 a day, and since the establishment of the camp at the west end of Dews Lane, numbers have increased to approximately 35 to 40. These persons, when not engaged in protest activities elsewhere on the site, are in occupation of the various protest camps mentioned above…*
> *(ii) The acts of trespass and obstruction are often accompanied by incidents of verbal harassment and physical intimidation of contractors including some violent acts.*
> *(iii) Very considerable police resources have been required to assist with incidents on the Harvil Road Site, again at considerable public expense.*
> *(iv) Attempts to maintain order at the Harvil Road Site are further hindered by the fact that temporary metal Heras-style fencing is regularly moved, damaged or tampered with – and the Court-mandated notices warning of the existence of the 2019 Injunction are regularly defaced or torn down.*
> *(v) The Covid-19 pandemic has not noticeably reduced the level of protest at the site. It has, however, made it difficult for the Claimants' security contractors to seek to engage constructively with trespassers and ask them to leave – as protestors are often complaining about the lack of "social distancing" by the security personnel in those circumstances.*

54. In paragraph 36.3(i) and (ii) of his Opening Skeleton Mr Roscoe says this:

> *The Court is invited to review this full account of that position on the ground. Such is the volume of incidents, any attempt to summarise it would omit the important impression to be gained from the scale of events. This is not a case about protests from time-to-time which inevitably cause a degree of disruption to the wider public: such protests are part and parcel of a democratic society, and must of course be tolerated. This is an attempt, not to articulate views, but a hard-fought and continuous campaign to try to compel the Claimants to stop the work they are mandated to do by an Act of Parliament. It is no exaggeration to say that the protestors appear to be seeking to engage in a war of attrition with the*

Claimants – of which the security personnel at the Site are at the front line. The very considerable deployment of police resources has also been required.

Nothing said by or on behalf of any of the Defendants sought to contradict this submission. Nothing in what I have seen or heard falsifies it. Indeed Mr Powlesland accepted the description that this was a "war of attrition" between HS2 and the protesters.

55. Thus it is quite clear to me that, whatever the nature of the protests at the Harvil Road Site at the outset of the works in 2018, the protests have now developed into a concerted and long-running campaign by, at the very least, a core group of protesters who are in the vicinity of the site on virtually a full-time basis. The aim of this campaign is not only to draw attention to what the protesters see as the environmental damage caused by the work at the site and by the HS2 project in general but is also to attempt to hinder or prevent work at the site as frequently as possible.

56. Mr Roscoe submits that the evidence illustrates a serious ongoing risk of both trespass and obstruction of access to the Site. Whilst there are people who continue to defy the injunctions currently in place, the clear inference is that, absent injunctive relief, the unlawful direct-action protests at the Site would become considerably worse. I agree.

57. He also submitted, and I agree, that the protests at the Harvil Road Site will probably continue until the HS2 scheme of works at Hillingdon is complete. The current works time-table extends to at least 2024 (see paragraph 49 of RP 2).

58. Mr Roscoe sought an extension of the injunctive relief to cover the Site and for further period of two years.

The arguments of the Defendants

59. Given the number of Defendants, it would make this judgment overly long to attempt to set out in detail the points they made to me individually. There is no need to do so however as there are overarching common themes.

60. The first theme or argument is that the Earth faces a "climate emergency" due to the increasingly rapid onset of Climate Change. The construction and operation of the HS2 project will only serve to increase carbon emissions and thus it ought to be stopped. This point was made most eloquently and forcibly by Dr Maxey who told me that the planet was facing what he called the 6th mass extinction and that there was a real danger of imminent societal collapse. He quoted the Chair of the UN IPCC in that regard. HS2 was, he said, the most environmentally destructive scheme ever embarked upon in the UK and it had to be stopped.

61. The second theme echoes the first. Virtually all of the Defendants who addressed me emphasized how destructive HS2 as a whole was to the natural environment and how, in particular, the works at the Harvil Road Site were destructive of the flora and fauna in the area. Concern was expressed particularly for ancient woodland, bats and newts which were said to be at or around the site.

62. Many of the Defendants emphasised their clear belief that HS2 was carrying out environmentally destructive works illegally without obtaining proper licences and without proper supervision. Echoing a point made to me previously by Mr Powlesland and considered in my second judgment (at paragraphs 88-9 and 137-146) it was said that it is vital that concerned members of the public such as the protesters here be permitted to monitor what is being done in the interests of the wider public.

63. Insofar as what was being done by the protesters was a trespass or a nuisance vis-a-vis the Claimants, then it was argued that this was justifiable as an act of peaceful civil disobedience. Dr Maxey drew my attention to the speech of Lord Hoffmann in R V JONES [2007] 1 AC 136 in which he said (at paragraph 89) that "civil disobedience on conscientious grounds has a long and honourable history". A number of the Defendants suggested that, in relation to significant issues such as slavery, emancipation of women and racial discrimination, those who carried out acts of civil disobedience had proved to be on the "right side of history". This was another one of those occasions they said.

64. Almost all the Defendants emphasised to me how unpopular the HS2 scheme was with the public in general and the local people in particular. They were, they said, by their actions simply reflecting popular opinion.

65. Many of the Defendants were also highly critical of the Parliamentary procedure which led to the Act and the more recent Notice to Proceed with the project given by HM Government following the Oakervee Review (details of which are set out in paragraphs 18 to 31 of the Packham case in the Administrative Court and in paragraphs 21 to 38 of the Court of Appeal judgment in that case). There had been, it was said, an almost complete lack of public consultation and transparency. The process was, they said, fundamentally undemocratic. Some went so far as to urge this court to ignore Parliament and follow "the clear will of the people".

66. Many of the Defendants were also bitterly critical of the actions of NET. There was a litany of complaints: their employees did not have the appropriate statutory licences (under the Private Security Industries Act 2001 and the Private Security Industry Act 2001 (Designated Activities) Order 2005/234); they had pretended to be High Court Enforcement Officers when they were not actually enforcing High Court orders; they had

repeatedly assaulted protesters and used unnecessary force and violence; they had confiscated and unlawfully refused to return protesters belongings (including Mr Mordechaj's Hungarian identity papers and plane ticket). They had in short abused any powers they had.

67. It was constantly said that, if I granted the injunction sought, not only would it give the court's stamp of approval to the HS2 project but it would legitimise the violent and unlawful conduct of NET and embolden its employees to carry out further wrongful acts.

68. Particular complaint was made by a number of the Defendants about the eviction of a number of the protesters from the Ryall's Garage compound on the Land, which of course formed the backdrop to the Swift Judgment. It was said that there had been a clear breach of section 6 of the Criminal Law Act 1977 by NET and HS2. This, so far as is relevant, reads as follows:

> *(1) Subject to the following provisions of this section, any person who, without lawful authority, uses or threatens violence for the purpose of securing entry into any premises for himself or for any other person is guilty of an offence, provided that—*
> *(a) there is someone present on those premises at the time who is opposed to the entry which the violence is intended to secure; and*
> *(b) the person using or threatening the violence knows that that is the case.*
>
> *(2) Subject to subsection (1A) above, the fact that a person has any interest in or right to possession or occupation of any premises shall not for the purposes of subsection (1) above constitute lawful authority for the use or threat of violence by him or anyone else for the purpose of securing his entry into those premises.*
> *(4) It is immaterial for the purposes of this section—*
> *(a) whether the violence in question is directed against the person or against property; and*
> *(b) whether the entry which the violence is intended to secure is for the purpose of acquiring possession of the premises in question or for any other purpose.*
> *(5) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.*

Mr Powlesland went so far as to describe NET employees on this occasion as acting as "lawless thugs".

69. Mr Powlesland, Dr Maxey and others also pointed to incidents on 23rd and 24th July 2020 when it was said that NET operatives had injured and endangered the lives of peaceful protesters who had climbed trees by seeking to bring these people to the ground by wholly unsafe means. This was yet another example of unlawful conduct by NET, it was said, which would be seen to be sanctioned if I granted the injunction sought.

70. Ms Zieniuk and Mr Goggin also pointed to the material filed by Ms Green before she ceased to be a named Defendant. These arguments were the same as those she made to me and are recited in paragraphs 86 to 89 of my first judgment and paragraphs 80 to 81 of my second judgement. In short there is a significant risk that the pile driving works on part of the Harvil Road Site will damage an important aquifer and expose it to toxic pollutant from a nearby landfill site.

71. Mr Powlesland for D4 also made the following points.

72. Accepting, as the court had stated in exchanges, that we live in a parliamentary democracy, I should not second guess Parliament by ordering an injunction to prevent a civil wrong the breach of which was potentially punishable by committal to prison for up to two years. Parliament had seen fit to enact specific statutes to criminalise certain acts in certain circumstances allotting specific criminal penalties. He drew attention to the offence of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994 and the offence under section137 of the Highways Act 1980. No such specific offence had been enacted by Parliament to deal with the situations which arise here. The power to grant an injunction under section 37 of the Senior Courts Act 1980 was a wide one but, he said, the court should not effectively and by means of the grant of an injunction punishable by up to two years in prison for contempt of court, seek to add to

the "quasi-criminal arsenal" of a private landowner in circumstances in which Parliament has chosen not to legislate.

73. He also pointed out that due to the many instances of unlawful conduct on the part of its agents NET, HS2 did not come to court "with clean hands" and an injunction should on that ground alone be refused.

Discussion and conclusions

74. I begin this section by repeating two points that I made in both my first and second judgments.

75. As I emphasised in paragraph 108 of my first judgment, both the named and unnamed Defendants are protesting against the activities on the Land and the Additional Land, not from any immediate self-interest but, rather, because of their genuine and passionate concern for the environment and their genuine fear that the activities of the Claimants on the Site risk causing irreparable harm to it. My impression is that they are intelligent and articulate people many of whom have given up much to pursue what they see as a just cause in respect of which urgent action is necessary.

76. However, as I also emphasised in both my previous judgments, this court is not here to give a view on the merits or demerits of HS2. No doubt it remains highly controversial. As far as this court is concerned, however, it is a lawful scheme mandated by statute which statute was passed, as both the Administrative Court and the Court of Appeal in the Packham case have outlined, after a lengthy Parliamentary procedure during which those who objected had a chance to explain their reasons.

77. When considering whether to grant an interim injunction, as is sought here, the court will usually apply the well-established test from AMERICAN CYANAMID CO V

ETHICON LTD [1975] AC 396: (a) Is there a serious issue to be tried? (b) Would damages be an adequate remedy? (c) Does the balance of convenience favour the grant of an injunction?

78. However, a more exacting test is required in this type of case. Where the injunction sought may interfere with freedom of expression, the test is not that under *American Cyanamid* but that provided in section 12(3) of the 1998 Act (which I have already set out) namely: is the court satisfied that the applicant is likely to establish that publication should not be allowed?

79. "Likely" in section 12(3) means "more likely than not": CREAM HOLDINGS LTD V BANERJEE [2005] 1 AC 253. In YXB v TNO [2015] EWHC 826 (QB*)* Warby J summarised the position for the court at the interim stage (at paragraph at 9):

> *"The test that has to be satisfied by the claimant on any application for an injunction to restrain the exercise of free speech before trial is that he is 'likely to establish that publication should not be allowed': Human Rights Act ('HRA'), section 12(3). This normally means that success at trial must be shown to be more likely than not: Cream Holdings … ordinarily a claimant must show that he will probably succeed at trial, and the court will have to form a provisional view of the merits on the evidence available to it at the time of the interim application."*

80. In paragraphs 122 to 127 of my first judgment I adopted a test of whether the threat of further trespass and obstruction was "imminent and real".

81. Having considered all the evidence in these proceedings, it is clear that:

    (i) The Defendants (both unnamed and named) have committed acts of trespass and nuisance by way of obstruction on (collectively) a very significant number of occasions in the past.

    (ii) That course of conduct continues.

(iii) As stated, there is in my view now at the Harvil Road Site a group of protesters who are determined to continue to wage a ceaseless campaign against what they see as the pernicious effects of the HS2 project.

(iv) That campaign has involved, and in my view will continue to involve, acts of trespass and nuisance as described. Its aim is not only to express disapproval of the HS2 project but also to seek by acts of "civil disobedience" to hinder or delay it.

(v) Nothing has changed since the grant of relief in 2018, 2019 or 2020 which would tend to make it *less* likely that the Claimants would be granted relief at trial. Quite the opposite.

(vi) The final words of Mr Collins D26 when he addressed me were *"You can stick your injunction up your arse"*. However amusing he might have thought those words were, they are clearly indicative of a determination on the part of the protesters to keep up their present activities come what may.

82. Thus I am clear that the risk of further acts of trespass and nuisance is imminent and real.

83. Further, not only do I think it is likely that the Claimants will establish their case for a final injunction at trial, at the moment, I cannot see that the Defendants have any valid defence at all.

84. At common law, a landowner whose title is not disputed (such as the Claimants here) is prima facie entitled to an injunction to restrain a threatened or apprehended trespass on his land even if the trespass will not harm him or cause him loss (see PATEL V WH SMITH (EZIOT) LTD [1987] 1 WLR 853).

85. It is not said by any of the Defendants that they somehow have a better title to any part of the Land or the Additional Land than the Claimants. Nor could it be. Many have effectively or actually admitted that they have been trespassers.

86. So far as there being breaches by HS2 of environmental laws or requirements and the consequences, it is worthwhile reading certain passages from the judgments in the Packham case. That was an attempt, by the well-known naturalist and television presenter Chris Packham, to judicially review the decision of the Secretary of State to give the Notice to Proceed in respect of the HS2 scheme. Of course, the Administrative Court is if anything a more appropriate forum than this court for challenging the validity or lawfulness of the HS2 scheme. The challenge failed on all grounds. In their judgment, in the course of describing the statutory scheme under the Act, the Court of Appeal said this (at paragraphs 16 to 19):

> *16. Section 68(5)(a) of the 2017 Act refers to a "statement deposited" in connection with the Phase One Bill in November 2013 under Standing Order 27A of the Standing Orders of the House of Commons "relating to private business (environmental assessment)". Section 68(5)(b) refers to "statements containing additional environmental information" published in connection with the Phase One Bill – supplementary environmental statements – in 2014 and 2015. Both the environmental statement and the supplementary environmental statements were subject to public consultation in accordance with Standing Order 224A. A report prepared by an "independent assessor" under Standing Order 224A, summarising the issues raised by comments made on the environmental statement, was presented to MPs before the Second Reading of the Bill in the House of Commons, and, in the case of the supplementary environmental statements, before the Third Reading.*
>
> *17. Both the environmental statement and the supplementary environmental statements contained detailed descriptions and assessment of the environmental effects of the Phase One works – for example, their effects on wildlife, including European Protected Species and their habitats, and on designated ancient woodlands and other areas of woodland affected by the works authorised by the 2017 Act. Both set out detailed arrangements for the mitigation of those effects where they could not be avoided, and for compensation – for example, by extensive tree planting – where they could not be fully mitigated. Their content was the subject of petitions to both Houses. Among the petitioners were local authorities, and many organisations*

concerned with the environment – for example, national and local wildlife trusts and the Woodland Trust. The environmental statement also provided an assessment of the performance of Phase One, as proposed to be authorised under the Bill, against the then current legislative, regulatory and policy requirements and objectives relating to climate change.

18. As nominated undertaker for Phase One of the project, HS2 Ltd. is under a contractual duty in the HS2 Phase One Development Agreement to comply with the published Environmental Minimum Requirements ("EMRs") for construction of Phase One of HS2. The EMRs are intended to ensure that Phase One is delivered in accordance with the deemed planning permission granted under section 20 of the 2017 Act, with the environmental statement and supplementary environmental statements, and with the requirements of Parts 3 and 4 of the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations").

19. The HS2 Phase One Code of Construction Practice, issued in February 2017, is a component of the EMRs. Section 9 of the Code of Construction Practice imposes obligations on HS2 Ltd. for the protection of ecological interests, including protected species, statutorily protected habitats, and other habitats and features of ecological importance – such as ancient woodlands. HS2 Ltd. also published, in August 2017, an Ancient Woodland Strategy for Phase One, setting out detailed arrangements for managing the impact of the construction of Phase One on the areas of designated and other ancient woodland in which works are authorised under the 2017 Act.

87. In considering the challenge brought by Mr Packham on the ground that "the Governments decision [was] flawed by a failure to consider environmental effects" (referred to as "ground 2"), the Court of Appeal said this (at paragraphs 54, 55, 58 and 61-63):

54. Before the Divisional Court it was common ground that the Phase One works were lawful. They had been authorised under the 2017 Act. An environmental impact assessment of that phase had been undertaken, in accordance with EU and domestic legislation, including public consultation, during the process of Parliamentary scrutiny. Petitions against the Bill had been brought by local authorities and by national and local wildlife and woodland trusts, and had been heard by Select Committees appointed by each House. The works were subject to regulation by Natural England as competent authority through the operation of the licensing procedures in Parts 3 to 5 of the Habitats Regulations. And they had to be carried out in accordance with the published HS2 Phase One Code of Construction Practice.

55. The Divisional Court regarded these propositions as "self-evidently correct" (paragraph 47 of the judgment)…

58. Specifically on ground 2 of the claim, the Divisional Court said it would be impossible to construct a project on the scale of HS2 Phase One without causing "interference with and loss of significant environmental matters, such as ancient

woodland", and this had been authorised in the 2017 Act (paragraph 81). The environmental impacts of Phase One had been assessed in detail in the Parliamentary process…

61…We agree with the conclusions of the Divisional Court. We do not accept that it misunderstood Mr Wolfe's submissions, but in any event we see no merit in the argument as it was presented to us.

62. HS2 is an infrastructure project of national significance, with a long and well-publicised history. When the Government made its decision to proceed with the project in February 2020, the factual context in which the Oakervee review had come to be set up in August 2019 was a matter of record. Phase One of the project had passed through a lengthy process of consultation, assessment – including environmental impact assessment – and statutory approval. The process had been punctuated by challenges in the courts, and its lawfulness had been confirmed. Statutory authorisation for Phase One was embodied in the 2017 Act, which referred in several of its provisions to the environmental impact assessment that had been carried out. The Parliamentary process was well advanced for Phase 2a, and would soon begin for Phase 2b.

63. The deemed planning permission for Phase One of the project depended on the assessment of environmental impacts and mitigation and compensation measures set out in the environmental statement and the supplementary environmental statements. HS2 Ltd., as nominated undertaker, was under a contractual duty to comply with the EMRs and to ensure that both the construction and operation of Phase One were controlled in accordance with that assessment. It was an appropriately extensive and thorough assessment. Matters raised in representations in the course of the Oakervee review, and to which Mr Packham refers in these proceedings – such as the effects of tunnel boring on water quality and water supply and the possible dewatering of the River Misbourne and Shardeloes Lake, and ecological effects of various kinds – had already been raised in petitions against the Bill. Such effects were addressed in the environmental statement and controlled under the EMRs. These are merely a few examples. But they serve to illustrate the comprehensive coverage of environmental impacts within the approval process.

88. These passages serve to emphasise the points which I have made (albeit in much less detail) in my previous judgments. So far as this Court is concerned, HS2 is a lawful scheme mandated by the Act. The works carried out under the HS2 scheme by HS2 are lawfully carried out. Parliament carefully considered the likely environmental impacts of the scheme before it sanctioned the works by means of the Act. There are environmental safeguards mandated by Parliament and built into the scheme which Parliament has deemed to be sufficient to avoid or mitigate any environmental damage caused.

89. Thus any challenge to HS2 or the works being carried out on the grounds that they are somehow in breach of UK or EU environmental legislation or have not been the subject of adequate Parliamentary scrutiny, is bound in my view to fail.

90. I have already rejected a submission to the effect that the Defendants' Article 10 or 11 rights include a right to stand on a public highway to monitor HS2's activities on its own land (see paragraphs 88 and 141-147 of my second judgement). I see no reason to change my mind on that point. Further, having rejected the argument in relation to the Defendants standing on a public right of way (onto which, a fortiori, they are lawfully permitted to go) my rejection becomes all the more emphatic when, as now, it is sought to say that this alleged right extends to monitoring by trespassing on private land such as the Harvil Road Site.

91. Further, as the courts pointed out in the Packham case, there is built into the Parliamentary scheme what Parliament regards as sufficient environmental safeguards and it is not for interested members of the public to seek to second-guess what Parliament has decreed to be adequate.

92. Further, as Mr Roscoe was at pains to point out, it is the Claimants' case that all the relevant environmental requirements have been complied with and all the relevant permits and licences obtained. He pointed me to various licences relating to water and bats at the following pages in the hearing bundles [D692], [D782], [D789], [D820], [D827] and [D833] and to paragraphs 55-59 of RP2.

93. Further, even if it was to be established that HS2 was breaking the law in some way (and I hasten to add that it has not been established) I do not see how this could amount to a defence to a claim in trespass and nuisance as advanced by the Claimants against the

Defendants. I venture to repeat the points I made at paragraphs 132 to 135 of my second judgment.

94. I do not accept any submission made by the Defendants to the effect that the risk or prospect of the Claimants committing a criminal offence or breach of statutory provision if the injunction is granted, could possibly amount to a defence. This is for a number of reasons:

(i) Firstly, on the facts, there is is no clear proof that any criminal offence or breach of statute will occur if the injunction is granted. The Claimants deny that it will. The Defendants assert that it will. However, the Defendants have not produced any formal statements or specifically prepared expert reports and none of them are experts. I do not therefore accept that there is any strong evidence to the effect that the Claimants are likely to commit any crime or breach of statutory provision if the injunction is granted.

(ii) Further, even if I was to accept that the evidence showed that there **was** a risk or even a likelihood that the Claimants would carry out some unlawful activity if the injunction was granted, I would not hold that this was a defence to a claim for injunctive relief. As set out above, the Claimants are entitled, by reason of statute, to possession of the Land and the Additional Land. There was, and is, nothing unlawful about the acquisition of the Claimants' rights. The Defendants cannot and do not assert any countervailing right to possession of the Land or the Additional Land. There is no necessary connection between the grant of an injunction to protect the Claimant's rights over the Site and the subsequent commission on the Site of any crime or breach of statutory provision: the latter is not the inevitable consequence of the former.

(iii) In the words of Lord Toulson in PATEL V MIRZA [217] AC 467, the public interest in maintaining the integrity of the justice system does not, in my view, result in the denial of the remedy which the Claimants seek in these circumstances. If, following the grant of an injunction, the Claimants carry out unlawful activities on the Site, then there are sufficient other remedies available to the law.

95. So far as concerns the submission to the effect that I should refuse to grant an injunction in recognition of the fact that the Defendants are engaged in a principled form of so-called "civil disobedience", that argument is doomed to failure.

96. It is quite true that in paragraph at paragraph 89 in R v Jones Lord Hoffmann did say that "civil disobedience on conscientious grounds has a long and honourable history". However that quote must not be taken out of context. In that case demonstrators against the Iraq war sought to justify the commission of criminal acts by their opposition to what they asserted was an illegal war. At paragraph 78 of his judgment in that case Lord Hoffmann said this:

> *In principle, therefore, the state entrusts the power to use force only to the armed forces, the police and other similarly trained and disciplined law enforcement officers. Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands. In Southwark London Borough Council v Williams [1971] Ch 734 , 745 Edmund Davies LJ said: "the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances."*

He continued at paragraphs 83 to 86:

> *83. The right of the citizen to use force on his own initiative is even more circumscribed when he is not defending his own person or property but simply wishes to see the law enforced in the interests of the community at large. The law will not tolerate vigilantes. If the citizen cannot get the courts to order the law enforcement authorities to act (compare R v Comr of Police of the*

Metropolis, Ex p Blackburn [1968] 2 QB 118) then he must use democratic methods to persuade the government or legislature to intervene.

84. Often the reason why the sovereign power will not intervene is because it takes the view that the threatened action is not a crime. In such a case too, the citizen is not entitled to take the law into his own hands. The rule of law requires that disputes over whether action is lawful should be resolved by the courts. If the citizen is dissatisfied with the law as laid down by the courts, he must campaign for Parliament to change it. So in Monsanto v Tilly [2000] Env LR 313 a landowner claimed an injunction against protesters who threatened to trespass upon his land and dig up genetically modified crops. They claimed to be acting in the public interest and to protect third parties from damage which the crops might cause. The Court of Appeal said that this was no defence. Mummery LJ said, at p 338:

> *"trespass by the individual, in the absence of very exceptional circumstances, cannot be justified as necessary or reasonable, if there exists a public authority responsible for the protection of the relevant interests of the public. In this case the Department of the Environment has that responsibility. In such cases the right of the individual to trespass out of necessity, whether as defender of his own or a third party's interest or as champion of the public interest, without attempting to enlist the assistance of the public authority, is obsolete."*

85. It was clear that the department, if called upon, would have done nothing to stop the growing of the genetically modified crops. It had granted Monsanto a licence under the relevant legislation for the specific purpose of enabling them to be grown. But, as Stuart-Smith LJ pointed out, at p 329, the protesters' remedy, if any, was to challenge the legality of the licence by judicial review. Or, if that failed, they could seek to have the law changed. But that must be effected by lawful means. Whatever the honest apprehension of danger to the community, it is not reasonable to resort to force.

86. My Lords, to legitimate the use of force in such cases would be to set a most dangerous precedent. As Lord Prosser said in Lord Advocate's Reference (No 1 of 2000) 2001 JC 143 , 160:

> *"What one is apparently talking about are people who have come to the view that their own opinions should prevail over those of others ... They might of course be persons of otherwise blameless character and of indubitable intelligence. But they might not. It is not only the good or the bright or the balanced who for one reason or another may feel unable to accept the ordinary role of a citizen in a democracy."*

The quote relied on by Dr Maxey is at paragraph 89. However that is then followed by this (at paragraph 90 to 93):

The protesters claim that their honestly held opinion of the legality or dangerous character of the activities in question justifies trespass, causing damage to property or the use of force. By this means they invite the court to adjudicate upon the merits of their opinions and provide themselves with a platform from which to address the media on the subject. They seek to cause expense and, if possible,

embarrassment to the prosecution by exorbitant demands for disclosure, such as happened in this case.

91. In Hutchinson v Newbury Magistrates' Court (2000) 122 ILR 499 , where a protester sought to justify causing damage to a fence at Aldermaston on the ground that she was trying to halt the production of nuclear warheads, Buxton LJ said, at p 510:

> *"there was no immediate and instant need to act as Mrs Hutchinson acted, either [at] the time when she acted or at all: taking into account that there are other means available to her of pursuing the end sought, by drawing attention to the unlawfulness of the activities and if needs be taking legal action in respect of them. In those circumstances, self-help, particularly criminal self-help of the sort indulged in by Mrs Hutchinson, cannot be reasonable."*

92. I respectfully agree. The judge then went on to deal with Mrs Hutchinson's real motive, which ("on express instructions") her counsel had frankly avowed. It was to "bring the issue of the lawfulness of the Government's policy before a court, preferably a Crown Court". Buxton LJ said, at p 510:

> *"in terms of the reasonableness of Mrs Hutchinson's acts, this assertion on her part is further fatal to her cause. I simply do not see how it can be reasonable to commit a crime in order to be able to pursue in the subsequent prosecution, arguments about the lawfulness or otherwise of the activities of the victim of that crime."*

93. My Lords, I do not think that it would be inconsistent with our traditional respect for conscientious civil disobedience for your Lordships to say that there will seldom if ever be any arguable legal basis upon which these forensic tactics can be deployed.

His judgment ends with the follow passage (at paragraph 94):

> *In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury. Evidence to support the opinions of the protesters as to the legality of the acts in question is irrelevant and inadmissible, disclosure going to this issue should not be ordered and the services of international lawyers are not required*

97. Thus, far from setting the seal of approval on unlawful acts carried out on conscientious grounds, Lord Hoffmann and the rest of the House of Lords were emphasising the **illegality** of such acts and the dangerous precedent it would set in a Parliamentary democracy for the courts to be seen to condone them. The quoted remarks of Mummery LJ in the Tilley case are particularly apt here. It is not for this, or any Court, to adopt a moral attitude and to pick and choose which Acts of Parliament or aspects of the civil law it will or will not enforce.

98. These passages from the Jones case seem to me to deal a fatal blow to most of the points made by the Defendants.

99. So far as the actions of NET are concerned, I cannot at this stage of the proceedings, make any findings as to whether any of the allegations made by the Defendants are true.

100. I will note however that the courts have repeatedly recognised a right on the part of a landowner to use reasonable force by way of self-help in order to prevent a trespass on his land. In MEIER V ENVIRONMENT SECRETARY [2009] 1 WLR 2788 Lady Hale said this (at paragraph 27):

> *In considering the nature and scope of any judicial remedy, the parallel existence of a right of self-help against trespassers must not be forgotten, because the rights protected by self-help should mirror the rights that can be protected by judicial order, even if the scope of self-help has been curtailed by statute. No civil wrong is done by turning out a trespasser using no more force than is reasonably necessary: see Hemmings v Stoke Poges Golf Club [1920] 1 KB 720. In Cole on Ejectment (1857), a comprehensive textbook written after the Common Law Procedure Act 1852 (15 & 16 Vict c 76), there is considerable discussion (in chapter VII) of the comparative merits of self-help and ejectment. Any person with a right to enter and take possession of the land might choose simply to do that rather than to sue in ejectment*

Thus there is nothing wrong with HS2 through the agency of NET seeking to evict trespassers from its land without resorting to the Courts provided that no more than reasonable force is used.

101. I am not in a position to come to any view as to whether more than reasonable force has been used on any particular occasion.

102. However, if, by granting injunctive relief, I can discourage persons from trespassing in the first place then it seems to me that this will at least go some way to avoiding any such arguments in the future.

103. So far as NET being in breach of section 6 of the CLA 77 is concerned, I note the following:

(i) The civil injunction action failed not least because the court held that a breach of section 6 gave rise to no civil remedy (see paragraph 6 of the Swift judgment).

(ii) It was accepted by both sides in front of Swift J that the Police were in fact present during the eviction of the protesters from Ryall's Garage (see paragraph 14 of the Swift judgment).

(iii) There is, and has been, no criminal prosecution of HS2 or NET for a section 6 offence and they are entitled to rely on the presumption of innocence.

104. Further even if NET **had** been guilty of using unreasonable force or of an offence under section 6 of the CLA 1977 or have not been lawfully licensed pursuant to statue, I do not see how that can possibly constitute a defence to an otherwise clear claim for injunctive relief to prevent trespass and nuisance. I repeat what has been set out above about illegality. Further, as Mr Roscoe points out, the actions of NET as instructed by HS2

derive from the common law right of self-help. They do not derive from the injunction, the remedy for breach of which is committal for contempt. If I refused to grant an injunction, then HS2 and its agents, NET, would still be entitled to seek to use self-help. Indeed I am convinced that, should I refuse an injunction, then it would render it much more likely that they would have to do so.

105. Thus I decline to refuse the grant of an injunction for that reason.

106. I also decline to accept the argument that I should refuse to grant an injunction because the Claimants do not come to equity "with clean hands". This principle is tightly circumscribed and is not a "magic wand" which can be waved by a Defendant to a claim for an injunction who can identify any type of wrong done by the Claimant. In ROYAL BANK OF SCOTLAND V HIGHLAND FINANCIAL PARTNERS [2013] EWCA Civ 328 (at paragraph 159) Aikens LJ said this:

> *It was common ground that the scope of the application of the "unclean hands" doctrine is limited. To paraphrase the words of Lord Chief Baron Eyre in Dering v Earl of Winchelsea the misconduct or impropriety of the claimant must have "an immediate and necessary relation to the equity sued for". That limitation has been expressed in different ways over the years in cases and textbooks…Spry: Principles of Equitable Remedies, suggests that it must be shown that the claimant is seeking "to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief". Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought*

107. As I have stated, there is nothing unlawful about the work being carried out by HS2 at the Site. The behaviour said to disentitle the Claimants from obtaining the relief they seek is the alleged violent conduct on the part of NET. However, even if it was proved, I do not think that, in all the circumstances, any such violent conduct on the part of NET would persuade me to refuse the grant of an injunction. The Claimants' right to an injunction stems from the trespass and nuisance being committed by the Defendants. An

argument by those committing trespass and nuisance that the applicant for an injunction to prevent these torts has exercised its remedy of self-help using unreasonable force ought, it seems to me, to incline the Court towards the grant rather than the refusal of injunctive relief. Given the inadequacy of damage as a remedy in this case, to refuse relief in these circumstances would effectively leave the Claimants without any remedy at all.

108. So far as Mr Powlesland's point on the absence of a specific statutory offence, I think that it is unsustainable. I note that in Bennion on Statutory Interpretation (7th edition) the following principle is enunciated at section 25.1:

> *An Act must be read and applied in the context of the general body of law into which it is assimilated. Ordinary rules and principles of the common law will generally apply to, and may impliedly qualify, the express statutory provisions. Moreover in appropriate circumstances the common law may be used to supplement an Act that is found lacking in some respect.*

This is supported by a quotation from the judgment of Lord Hope in the case of WISELY V FULTON, WADEY V SURREY CC [2000] 2 All ER 545 (at 548):

> *As a general rule Parliament must be taken to have legislated against the background of the general principles of the common law. It may be found on an examination of the statute that Parliament has decided not to follow the common law. In that situation the common law must give way to the provisions of the statute. But an accurate appreciation of the relevant common law principles is nevertheless a necessary part of the exercise of construing the statute.*

In section 25.6 the following principle is stated:

> *(1) In accordance with the doctrine of Parliamentary sovereignty, Parliament may abolish, modify or displace any existing common law rule.*
>
> *(2) But there remains a general presumption that Parliament does not intend to make changes to the common law.*

This is in turn is supported by a quotation from Lord Browne-Wilkinson in R V SECRETARY OF STATE FOR THE HOME DEPARTMENT (EX PARTE PIERSON) [1998] AC 539 (at 573):

> *It is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions. Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication.*

109. Thus statutes are enacted against the background of the common law. Unless a statute expressly or impliedly alters or abrogates the common law, it remains in force. Here the common law (fused with equity) grants injunctive relief at the suit of a landowner to prevent trespass or nuisance. That position has been neither altered nor abrogated by any statute. There is absolutely no warrant for the court refusing to grant an injunction to prevent trespass or nuisance in one set of circumstances simply because Parliament has decreed that certain types of trespass or trespasses in other circumstances are criminal offences as well as torts.

110. Finally there is an argument that I should not grant an injunction because its terms will be ignored as, indeed, it is clear that the terms of the previous and indeed the existing injunctions have been ignored by certain, if not all, of the Defendants.

111. In paragraph 141 of my first judgment I quoted from the speech of Lord Rodger in the Meier case where he said this (at paragraph 17):

> *Nevertheless, as Lord Bingham of Cornhill observed in South Bucks District Council v Porter [2003] 2 AC 558 , at para 32, in connection with a possible injunction against gipsies living in caravans in breach of planning controls:*
>
> > *"When granting an injunction the court does not contemplate that it will be disobeyed … Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there*

is not one law for the law-abiding and another for the lawless and truculent."

I note also that Lord Neuberger in the same case said this (at paragraphs 79 to 81 and 83):

Obviously, the decision whether or not to grant an order restraining a person from trespassing will turn very much on the precise facts of the case. None the less, where a trespass to the claimant's property is threatened, and particularly where a trespass is being committed, and has been committed in the past, by the defendant, an injunction to restrain the threatened trespass would, in the absence of good reasons to the contrary, appear to be appropriate.

80. However, as Lord Walker said during argument, the court should not normally make orders which it does not intend, or will be unable, to enforce. In a case such as the present, if the defendants had disobeyed an injunction not to trespass on any of the other woods, it seems highly unlikely that the two methods of enforcement prescribed by CPR Sch 2 , CCR Ord 29 and section 38 of the County Courts Act 1984 (RSC Ord 45, r 5(1) in the High Court) would be invoked. The defendants presumably have no significant assets apart from their means of transport, which are also their homes, so sequestration would be pointless or oppressive… in the same paragraph of his opinion, Lord Bingham also said that "[a]pprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate". A court may consider it unlikely that it would make an order for sequestration or imprisonment, if an injunction it was being invited to grant were to be breached, but it may none the less properly decide to grant the injunction. Thus, the court may take the view that the defendants are more likely not to trespass on the claimant's land if an injunction is granted, because of their respect for a court order, or because of their fear of the repercussions of breaching such an order. Or the court may think that an order of imprisonment for breach, while unlikely, would nonetheless be a real possibility, or it may think that a suspended order of imprisonment, in the event of breach, may well be a deterrent (although a suspended order should not be made if the court does not anticipate activating the order if the terms of suspension are breached).

In some cases, it may be inappropriate to grant an injunction to restrain a trespassing on land unless the court considers not only that there is a real risk of the defendants so trespassing, but also that there is at least a real prospect of enforcing the injunction if it is breached. However, even where there appears to be little prospect of enforcing the injunction by imprisonment or sequestration, it may be appropriate to grant it because the judge considers that the grant of an injunction could have a real deterrent effect on the particular defendants. If the judge considers that some relief would be appropriate only because it could well assist the claimant in obtaining possession of such land if the defendants commit

the threatened trespass, then a declaration would appear to me to be more appropriate than an injunction.

112. In this context, I note from the evidence at RP 2 para 61 to 64, the following is stated:

> *61. As well as the impact to the scheme of works I outline above, the constant presence of protestors continues to make for an unpleasant and far from ideal working environment for the Claimants and their contractors. This has continued now for some years. The Claimants' contractors face verbal abuse and taunts on almost a daily basis and the presence of the protesters detracts them from their day to day activities. In addition, the Claimants' contractors face increasing physical abuse including prevention of their coming and going from the land, spitting and having unknown liquids thrown in their face.*
> *62. Whilst the Claimants consider there to have been a number of breaches of the 2019 Injunction Order (which the Claimants are considering further with their legal team though privilege is not waived), the 2019 Injunction Order has still been - for the most part - effective. There has been a noticeable reduction in trespass and obstruction to the Land since the injunctions have been made, and the trespass to the Additional Land (not subject to the injunction) is greater than trespass to the Land.*
> *63. I therefore believe that this shows that, should the 2020 Injunction not be continued and extended as set out in the draft order for this Substantive Application, there is likely to be an increase in incidents of this type which would adversely impact the works required at site in order to implement a scheme which has been mandated by Parliament.*
> *64. Moreover, as mentioned above, now that 'Notice to Proceed' has been issued by the Second Claimant to its suppliers who will be undertaking the remaining construction works in due course, the Second Claimant considers it is likely that this may result in increased levels of protest and activity against any works which will be taking place at the site in the shorter term.*

I do not see why I should not accept this evidence and I do.

113. Thus not only am I disinclined to refuse an injunction to restrain a clear trespass and nuisance simply because there is a risk that certain people will disobey it, it appears that the previous orders have had a noticeable effect and there is no reason to suppose that a further injunction would not be similarly efficacious. Besides, I am convinced, having

heard from many of the Defendants, that a refusal of an injunction would be regarded by them as a "green light" to increase the level of incursions and obstructions.

114. So far as damages being an adequate remedy is concerned, my view remains as I originally expressed it in paragraph 119 of my first judgment that damages would not be an adequate remedy in this case. The continuing incursions and obstructions have as their effect and, it seems to me, their intention, the delay of a major national infrastructure project which has been permitted by an Act of Parliament. The present cost of such disruption and delay has been quantified in a rough and ready way at nearly £16 million. That will only increase. There is absolutely no evidence that any of the Defendants would be able to pay any substantial damages. What I have seen and heard seems to me to suggest that most, if not all, of them have no assets at all. Further, as I have set out already, the estimated costs does not take into account the risk of further aggressive and violent confrontations which risk would in my view substantially increase if I refused to grant the injunction sought.

115. I accept that the Defendants' rights under articles 10 and 11 of ECHR are potentially affected here.

116. Article 10 provides:

> *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 enterprise.*
>
> *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."

117. Article 11 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 exercise of these rights by members of the armed forces, of the police or of the administration of State."*

118. However the Defendants' rights have to be balanced against the Article 1 Protocol 1 rights of the Claimants. This reads:

> *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.*

119. Given that the Defendants' Article 10 and 11 rights are not absolute, a balancing exercise has to be carried out in every case. However, the authorities show that only in exceptional circumstances will the Article 10 and/or 11 rights of one person "trump" the A1 P1 rights of another such as to deny a landowner possession of land to which he might otherwise be entitled.

120. The authorities were reviewed by His Honour Judge Pelling QC in the case of MANCHESTER SHIP CANAL DEVELOPMENTS LTD & ANR V PERSONS UNKNOWN & ORS [2014] EWHC 645 (Ch) in the context of a claim for possession

against protesting trespassers. He considered a number of authorities including: APPLEBY V UK [2003] 38 EHRR 783; CITY OF LONDON V SAMEDE AND OTHERS [2012] EWCA Civ 160; SOAS V PERSONS UNKNOWN [2010] 25 November (Unreported); UNIVERSITY OF SUSSEX V PERSONS UNKNOWN AND OTHERS [2013] EWHC 862 (Ch); SUN STREET PROPERTY LIMITED V PERSONS UNKNOWN [2011] EWHC 3432 (Ch). He said as follows at paragraphs 33 to 37:

> *33. The final authority that I need to refer to at this stage is Sun Street Property Limited v Persons Unknown [2011] EWHC 3432 (Ch). I understand that permission to appeal from this decision was granted but not exercised. I accept that it must be read subject to the decision of the Court of Appeal in Samede (ante). Sun Street (ante) was concerned with an application made by the Defendants to set aside a possession order made against them following their occupation of a large complex of buildings in the City of London. The Defendants relied on Articles 10 and 11. Having recited the relevant Articles, Roth J referred to Appleby (ante) at page 29, to SOAS and then to an argument on behalf of the Defendants that each case was fact sensitive and that in that case the occupiers' rights should prevail because the property was unoccupied, and the location was '... absolutely integral ...' to the protesters' message. Roth J rejected that submission in these terms:*
>
> > *Those submissions confuse the question of whether taking over the bank's property is a more convenient or even more effective means of the Occupiers expressing their views with the question of whether if the bank ... recovered possession, the Occupiers would be prevented from exercising any effective exercise of their freedom to express their views so that, in the words of the Strasbourg Court, the essence of their freedom would be destroyed. When the correct question is asked, it admits of only one answer. The individuals ... currently in the property can manifestly communicate their view about waste of resources or the practices of one or more banks without being in occupation of this building complex. ... I need hardly add that the fact that the occupation gives them a valuable platform for publicity cannot in itself provide a basis for overriding the respondent's own right as regards its property.'*
>
> *These comments are perhaps rather starker than those contained in Samede (ante) and to the extent that they suggest that a full fact sensitive analysis is not required in the circumstances may be wrong. Nonetheless in my judgment it is reflective of the effect of Appleby (ante).*

34. In my judgment Articles 10 and 11 do not even arguably provide the 2nd and 5th Defendants with a defence to the Claimants' possession claim. My reasons for reaching that conclusion are as follows. First, the land in respect of which possession is claimed is land owned otherwise than by a public authority. To permit the Defendants to occupy that property would be a plain breach of domestic law, because neither defendant has the licence or consent of the Claimants to be or remain on the land. It is also an interference with the Claimants' Article 1 Protocol 1 rights in relation to their property. Although Mr Johnson submitted that this factor was circular and had the effect of defeating the Defendants' Article 10 and 11 rights, I reject that argument. I do not regard the points as being of themselves decisive. They are two factors that have to be weighed in the balance with others. Nonetheless they are powerful factors because if effect is not given to them then the result will be to deprive a property owner of its entitlement to enjoy its property without interference. As Appleby (ante) demonstrates, it will only be in exceptional circumstances in which such an outcome could be justified, particularly in relation to privately owned land.

35. Secondly, the continued presence of the Defendants and, more importantly, all those others coming within the scope of the phrase 'Persons Unknown' is a source of interference with other legitimate users of the land concerned. …

36. Thirdly, the protest has been ongoing and escalating since last November. The length of the protest is a relevant consideration as Sales J demonstrated in University of Sussex v Persons unknown and Others (ante). Whilst this factor may not be a particularly weighty one it is nonetheless of importance when considered with the others I have so far mentioned.

37. The final and key point is that there is absolutely nothing to prevent the protesters from carrying on their protest elsewhere and/or by other means that does not involve interfering with the Article 1 Protocol 1 rights of the Claimants, their licensees and visitors. There is no evidence offered by the Defendants on this issue."

121. In my view the balancing exercise leads me, as it did in both my first and my second judgments, to the conclusion that I ought to grant the injunctions sought. In particular:

(i) The Claimants wish to prevent the Defendants from trespassing on and obstructing access into the Site to which they are lawfully entitled to possession and on which they are carrying out substantial works.

(ii) Those works are not only lawful but they are part of a statutorily mandated national infrastructure project.

(iii) In my view the intention behind and intended effect of the incursions and obstructions sought to be injuncted is not only to protest at the HS2 project but is also physically to hinder or prevent the works being carried out. Thus these activities go beyond the expression and communication of views and segue into deliberately obstructive activity which goes beyond the expression of views and imparting of information.

(iv) The Defendants have been on or around the Harvil Road Site protesting for some years now. They have had ample opportunity to express their opposition to the HS2 project.

(v) Most importantly the grant of the injunctive relief sought will not prevent the Defendants from protesting against HS2 or even from protesting against HS2 in the vicinity of the Harvil Road Site. They can still protest on the public highway at Harvil Road; they can still occupy the roadside camp which, if anything, is that part of their protest which is most visible to other members of the public.

122. I therefore propose to grant the injunction sought in the terms sought over the Land and the Additional Land as sought. In doing so I have also been mindful of the conditions set out in paragraph 82 of Canada Goose which, save as set out below, I believe are fulfilled by the terms of the injunction sought in these circumstances.

123. For the avoidance of doubt, I decline the invitation from Mr Powlesland to make any order or condition in relation to NET or its future conduct or involvement. Given that I have made no findings of fact in relation to the conduct of NET or its employees, it would be wholly wrong of me to do so.

The temporal limit of any injunction

124. In paragraph 82 (7) of Canada Goose the Court of Appeal states that any interim injunction should have "clear temporal limits".

125. Mr Roscoe on behalf of the Claimants states that they want the further injunction to last until trial or further order or for a period of 2 years (whichever is the earlier).

126. In his Skeleton argument and indeed in his oral submissions Mr Roscoe submitted that:

(i) Works at the Site will continue until at least 2024.

(ii) A one-year injunction would be too short because hearings such as the present to review the appropriateness of continued injunctive relief are expensive, and there is no realistic prospect of the Claimants recovering those costs from other parties. Such applications also require substantial Court resources.

(iii) There are, he said, safeguards to those who may (improperly) be affected by the continuation of an injunction in the meantime: (i) a cross-undertaking in damages continues to be offered by the Claimants; and (ii) any person affected by the injunction may apply to vary it or set it aside on short notice in the meantime.

(iv) Should the position on the ground change materially, the Claimants would themselves wish to, and indeed could, apply for further amendments to the

injunction to ensure that the relief was tailored to the particular risk on the ground. That is, in practice, a further safeguard.

127. However, he recognised that the Claimants have sought, and continue to seek, sequential interim injunctions which fall to be reconsidered from time-to-time. He accepted that so far as the Claimants were concerned, in the light of Canada Goose, continued interim relief is preferable to proceeding to trial and obtaining final injunctive relief. Indeed the impression I gained is that, were I to do nothing, then the Claimants would be content for these proceedings never to come to trial at all.

128. I can see why the Claimants would be reluctant for this case to come to trial and indeed why that course of action might be preferable for the Court:

(i) Preparation for and attendance at any trial would be hugely time consuming and expensive for the Claimants.

(ii) It is highly unlikely that they would recoup any of their costs from any of the Defendants who, as set out above, are likely to have no assets.

(iii) Given the number of named Defendants and their attitude to the HS2 project, it is likely that many of them would wish to participate fully at the trial which, of course, they would be perfectly entitled to do but this would involve them in immense effort if not cost.

(iv) Unless it was very carefully case managed, given the nature of the submissions made to me in the four hearings I have now tried, it is in my view highly likely that the Defendants would attempt to turn any hearing into a trial on the merits of the HS2 scheme. That would be illegitimate but risks being inevitable.

(v) Any trial would be lengthy and the trial, together with the inevitable case management hearings, would involve a large amount of Court time and resources.

129. However the problem with the position advocated by the Claimants is that there are clear dicta which indicate that this is not a legitimate course of action. In Canada Goose (at paragraphs 92 and 93) the Court of Appeal said this:

> *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 protestors. 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 protestors. 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 [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.

In the recent case of HACKNEY LBC V PERSONS UNKNOWN [2020] EWHC 1900 (QB) (a case in which a local authority sought injunctive relief to prevent unlicensed music events on its land) Linden J (although he granted the relief sought) said this (at paragraph 40):

> *I was willing to grant the interim injunction which is set out in my Order but only on the basis that there would be a trial and that this would take place in the near future. There would also be a right to apply to discharge the Order in the intervening period. Interim injunctions are not an end in themselves and should not be granted as a way of solving a problem without finally resolving the issues in a Claim. I therefore was not prepared to grant an interim injunction for a year, as requested, and I listed the trial and gave directions as appears from my Order*.

130. Mr Roscoe sought to distinguish the passages from the Canada Goose case in a number of ways. However, in my view and despite the very different circumstances of the cases, they are applicable here.

131. Mr Roscoe submitted that simply to grant a further injunction for two years was well within the scope of the Court's case-management powers, and is the just and convenient way to deal with a situation such as the present. There is some support for the court having a flexible attitude in these circumstances. In the Meier case (at paragraph 58) Lord Neuberger said this:

> *Particularly with the advent of the CPR , it is clear that judges should strive to ensure that court procedures are efficacious, and that, where there is a threatened or actual wrong, there should be an effective remedy to prevent it or to remedy it. Further, as Lady Hale points out, so long as landowners are entitled to evict trespassers physically, judges should ensure that the more attractive and civilised option of court proceedings is as quick and efficacious as legally possible. Accordingly, the Court of Appeal was plainly right to seek to identify an effective remedy for the problem faced by the Commission as a*

> *result of unauthorised encampments, namely that, when a possession order is made in respect of one wood, the travellers simply move on to another wood, requiring the Commission to incur the cost, effort and delay of bringing a series or potentially endless series of possession proceedings against the same people.*

However he then added this (at paragraph 59):

> *None the less, however desirable it is to fashion or develop a remedy to meet a particular problem, courts have to act within the law, and their ability to control procedure and achieve justice is not unlimited. Judges are not legislators, and there comes a point where, in order to deal with a particular problem, court rules and practice cannot be developed by the courts, but have to be changed by primary or secondary legislation-or, in so far as they can be invoked for that purpose, by practice directions*.

132. Mr Roscoe pointed out, in particular, that:

(i) The interim relief against "persons unknown" covers "newcomers", i.e. those who are not currently within the definition of D1-2 and/or D36, but who might come within the definition in future. When it comes to *final* injunctive relief granted at trial, however, the class of persons whom the injunction can bind must then close, preventing it from 'biting' on so-called newcomers in future.

(ii) Thus, interim relief is an inherently more flexible and desirable tool from the perspective of the Claimants, not least because of its ability to catch such "newcomers".

(iii) The fact that the relief is interim does not put the Defendants at a disadvantage because an interim injunction must be time-limited and is subject to variation or discharge by interested parties. Further, the 'price' of interim injunctive relief is the Claimants' cross-undertaking in damages.

(iv) Further, any named Defendant who sought finality against themselves one way or the other could compel a trial of the claim against them by filing a defence (as

permitted by the Current Injunction, and the proposed continued injunction), but none has done so.

133. Thus he submitted that the continuation of interim relief was a neat mechanism which balances: (i) the interests of the Claimants to have workable relief; (ii) the rights of those affected by the relief to proceed to full trial or challenge the injunction at any time should they wish to; (iii) the interests of the Claimants and the Court in not expending time and resources considering the merits of the claim further in unopposed proceedings; and (iv) the interests of all in providing a mechanism for the relief to be revisited, re-tailored or re-considered if the circumstances require it.

134. Despite Mr Roscoe's submissions and however sympathetic to his position I might be, I do not think that, in the light of the Canada Goose case, I can contemplate a situation in which I grant a further interim injunction and give no directions for the conduct of the proceedings to trial.

135. Thus I am prepared to grant the injunctions sought in the terms sought over the Site. I am prepared to grant relief until trial or further order or for a period of two years (whichever is the lesser period).

136. However I shall give the following directions:

(i) I will direct that any Defendant who wishes to defend the claim must serve an Acknowledgment of Service pursuant to CPR Part 8.3 within 28 days.

(ii) I will direct that there is to be a Case Management Hearing before a High Court Judge listed with a time estimate of 1 day on a date to be fixed after 56 days. Such a hearing is listed to consider the directions required for the further conduct of these proceedings and is not to be a reconsideration of the grant of injunctive relief.

(iii) Details of the hearing are to be published and served in the same way as directed by my order of 22nd June 2020.

(iv) I will also direct that the Claimants are to serve a list of the directions which they seek on every named Defendant who has served an Acknowledgment of Service at least 14 days before the hearing and every such Defendant is to counter serve a list of directions which they will seek on the Claimants at least 7 days before the hearing.

137. I hope that the parties will be able to agree a form of order. If there are disagreements about any part of the order or on any consequential matters, I will either decide such matters on paper without a hearing or give directions for another brief hearing to deal with any matters which remain in issue.

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
[2021] EWHC 822 (Ch)

No. PT-2021-000132

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 22 February 2021

Before:

MR JUSTICE MANN

B E T W E E N :

(1) SECRETARY OF STATE FOR TRANSPORT & HS2 LTD
(2) HIGH SPEED 2 (HS2)

Claimants

- and -

PERSONS UNKNOWN

Defendants

MS S. KABIR SHEIKH QC (instructed by the Government Legal Department) appeared on behalf of the Claimants.

Mr FREDERICK SHEPHERD of Edwin Coe LLP for the second defendant Dr Maxey (appearing by permission of the court).

(Via Teams)

J U D G M E N T

AUTH395

MR JUSTICE MANN:

1 This is my judgment on the resumed hearing of this matter. My judgment of Friday ([2021] EWHC 821 (Ch)) morning reflects the fact that I was not satisfied as to HS2's right to possession but also not satisfied that the point had been properly addressed, and so I gave HS2 a chance to further re-address the matter and have had the hearing restored this afternoon at two o'clock. Because of the urgency of the matter and because of my unavailability later in this week it was unfortunately the case that it had to be resumed at two o'clock despite the fact that Mr John Cooper QC, who had previously appeared for the only defendant appearing, had indicated that he was already committed elsewhere, a commitment which I fully accept he had to fulfil. His junior was also not available.

2 Fortunately, Mr Maxey, who was the represented defendant, has retained the services of Edwin Coe and Mr Frederick Shepherd of that firm has sought to raise various points before me for Dr Maxey despite the fact, as will appear in a moment, he is no longer in the tunnels. Mr Shepherd is a Canadian lawyer and he does not have English higher rights of audience but nonetheless, in my discretion, I allowed him to address me. That, in my view, was an inevitable fairness to be extended to Dr Maxey, bearing in mind that the short notice of this hearing meant that his normal legal team would not be available. Mr Shepherd has been very helpful and I am grateful for his submissions.

3 The claimants today were represented again by Ms Sheikh QC and she and her juniors have put together a number of submissions which are helpful to me and which I acknowledge arrived well ahead of the deadline which I imposed as today at 11 am.

4 Two significant changes of fact have occurred since the last hearing The first is that Dr Maxey has emerged from the tunnel and is no longer down there and indeed, I assume, since he will have been hustled away from the land, is no longer on the land. In those circumstances, Ms Sheikh tells me that her clients do not pursue either a possession order or a costs order against Dr Maxey. They do not pursue the first because he is not there and the second is because they acknowledge that it would be a waste of time getting a costs order which is highly unlikely ever to be complied with, bearing in mind that he has not yet complied with previous costs orders.

5 The other relevant event is that the individual thought to be a minor last week, and referred to as such in my judgment, has turned out not to be a minor, since her date of birth has been established as being in 2002. She is, therefore, 18 and, therefore, not a minor. It will, therefore, not be necessary to make any of the special orders that I indicated would have to be made in these proceedings were I to make a possession order, but I make it plain that if in fact the latest understanding turns out to be wrong, then those orders will in fact fall to be made.

6 The point which Ms Sheikh and her team were invited to address was whether or not occupiers of the land ought to have been given notice under Schedule 16(4) of what I will call the HS2 Act. My previous judgment reveals how the point arises and I will not repeat it here. Ms Sheikh has sought to address that point although it appears from her skeleton argument and her argument before me today that to some degree she misunderstands what the point was in relation to the service of a notice. I will come to that in due course.

7 The problem, if there is one, arises because para.4 on its face seems to require notice to be given to occupiers, and no attempt was made, subject to some evidential points which I will

come to, and certainly it was not apparent on Friday, to give notice to occupiers despite the availability of section 65 of the HS2 Act which provides for notices to be served on the land if owners or occupiers cannot be identified.

8 One of the questions that arises in relation to that which Ms Sheikh put forward as an answer today as she did on Friday, is whether occupiers does can mean occupiers with no title; in other words, whether occupiers does not include trespassers. She renewed that argument today and I have had a chance to consider it further. It seems to me, having considered the matter carefully over the weekend and during the course of submissions, that my *prima facie* view from Friday is the correct view. I consider that occupiers means what it says. It does not mean only lawful occupiers, or occupiers with title, or anything so limited.

9 In support of her position to the contrary, Ms Sheikh cited various authorities from different contexts. She cited the definition of occupier in the *Greater Manchester (Light Rapid Transit System) (Land Acquisition) Order 2001* case which provided that an occupier meant a person occupying land under a tenancy for a period of more than one month. She cited *Wheat v E Lacon & Company Limited* [1966] A.C. 552 which went to the question of whether and to what extent an occupier needed to have control.

10 I fully accept that in different contexts occupiers may have a meaning which connotes some sort of lawful entitlement to occupy. However, the word "occupier" is capable of having various meanings and it takes its meaning from its particular context, in my view, and in the context of this Act, "occupier" means an occupier without any further qualification.

11 It is true that the word "occupier" is not defined in the Act but the word "owner" is. In section 68, which is the interpretations section, an "owner" in relation to any land:

> "... has the same meaning as in part 1 of the Acquisition of Land Act 1981 ..."

12 Turning to that Act, the definition of "owner" there is as follows:

> " ... 'owner' in relation to any land, means a person, other than a mortgagee not in possession, who is for the time being entitled to dispose of the fee simple of the land, whether in possession or in reversion, and includes also a person holding or entitled to the rents and profits of the land under a lease or agreement, the unexpired term whereof exceeds three years ..."

13 That definition does not necessarily assist a lot because it is equivocal. It leaves room for the meaning of "occupier" to be someone with an interest in land which is less than where three year remain on a tenancy. However, it certainly does not support any suggestion that "occupier" should be given anything other than its normal literal meaning.

14 A slightly more helpful indication appears in section 65(5) of the HS2 Act which deals with the service of notices. Subsection 5 provides as follows:

> "Subsection 6 applies where (a) a document is required or authorised to be given to a person for the purposes of this Act as the owner of an interest in, or occupier of, any land ..."

15 The words "of an interest in" do not appear in the reference to "owner" in para.4. However, they do tend to support the idea that the Act was contemplating two things. First of all, people with an interest in the land who are described as "owners" and occupiers of the land who are people without an interest in land. Again that is not conclusive but it is certainly something which in no way supports a limitation of the meaning of the word "occupier" in para.4.

16 The other matter prayed in aid by Ms Sheikh both today and on Friday is the fact that, as she submits, Schedule 16 is concerned with compensation more than possession. A trespasser would not be entitled to compensation; therefore, she says, the word "occupier" cannot include a trespasser because an occupying trespasser would not be entitled to the compensation provided for. I see Ms Sheikh's point but I do not accept it. I consider that Schedule 16 deals with both possession and compensation.

17 Section 15 of the Act is the section which introduces Schedule 16 and it provides as follows:

> "Schedule 16 contains provisions about temporary possession and use of land in connection with the works authorised by this Act."

The introductory section, therefore, treats Schedule 16 as being about possession and does not refer to compensation at all. That supports, in my view, an interpretation of an occupier which is literal and which would include trespassers. I, therefore, reject the notion that the fact that because there is a reference to compensation that somehow that limits the meaning of the word "occupier."

18 The way the Schedule works, in my view, is as appears below. It is necessary to consider this in order to deal with another submission of Ms Sheikh. Ms Sheikh submitted that para.1, which I have already set out in my previous judgment, gives effectively an unqualified right to possession which is not really affected by the notice provisions in para.4 which is (as I think she would put it, although it was not her word) of a more administrative nature and does not detract from the right to possession in para.1. It would follow from her submissions, as I understand them, that the right to possession in para.1 could be enforced without going through the notice provisions in para.4. Ms Sheikh did not accept that as such but I think it would follow logically from her submissions. I do not in fact think that that works in accordance with the logic of Schedule 16.

19 It is true that para.1 gives a right to enter upon and take possession of the land. If the matter had stopped there, then that could be enforced in the normal way by a claim form. There would no doubt be a debate as to whether or not some notice should be given before a claim form is issued. However, that point does not arise because the Schedule provides for precisely that requirement. At para.41 it provides for the giving of not less than 28 days' notice when it says:

> ".. not less than 28 days before entering upon and taking possession of land under para.1(1) or (2), the nominated undertaker must give notice to the owners and occupiers of the land of its intention to do so."

20 Thus the Act provides a *sine qua non* of the enforcement of a right to possession. Not only is it an important precursor to the right of possession but it is also an important precursor of the right to have a warrant under the provisions referred to in my previous judgment. In those circumstances, therefore, is seems to me that occupiers are entitled to notice in

Schedule 4 even if they are lawful occupiers, for example, people with less than three years left on a tenancy who cannot be an owner, or if they are unlawful occupiers. That, in my view, is how the Act works.

21 Putting it shortly, para.4 qualifies the right to possession in para.1. Paragraph 4, therefore, serves two purposes - it is a necessary precursor to taking possession and, therefore, to the right of possession arising; and it *de facto* triggers the right to compensation. If the occupier has no compensatable right, then he or she will receive no compensation.

22 Ms Sheikh sought to submit that this analysis would be unworkable. She said that HS2 had little pieces of land, and perhaps bigger pieces of land, all over the country and it would be unworkable if HS2 had to go around working out whether there were any occupiers who needed notice and if there were, giving them receive notice under section 65. I do not consider that it makes the Act unworkable in that manner at all. HS2 have the statutory privilege of being able to enter into possession of certain land for the purposes of their activities. It is for them to secure the land in whatever way is appropriate, but one would have thought that they would in the normal course of things wish to check before they started to take possession whether there was anybody in occupation of the land, particularly now perhaps in the light of this judgment. If there is not, then they need give notice only to the owners. If there are occupiers, then according to the Act they must give notice to them. If they cannot identify them, section 65 provides a familiar means for giving notice to occupiers by placing notices on the land. It may be tiresome but it is not unworkable.

23 The next question which arises from Ms Sheikh's submissions is whether there were in fact occupiers on the land within the meaning of the Act at any relevant time for the purposes of these proceedings. She has sought to submit that there were no occupiers as such and that there was merely a floating population of people who came and went and they did not amount to occupiers. She also submitted that there was no evidence that the individuals who still currently occupy the property were occupiers at the time and it would be unreasonable to require that those individuals be given notice now. That is a theme to which I shall have to return.

24 I am afraid I cannot accept that submission of Ms Sheikh. Her own pleading pleads that there were occupiers from August last year. Her own evidence refers to the fact that HS2 had dealings with Camden over the occupiers and what Camden might be going to do in order to effect some sort of liaison with the occupiers, that liaison being unspecified on the evidence before me. It is clear that there were occupiers and it is clear that HS2 knew about them and had certain concerns about them, but I am afraid I fail to understand how it can be said that there were no occupiers at a time before the enforcement officer went in on 27 January, or at a time when the notices were given to the persons with legal rights on the land on 18 December last year. On the evidence there were people who fell into the position or description of occupiers. On the evidence, and on the face of it, it is accepted by Mr Shepherd there were structures on the land and the land was a temporary home for the homeless. Those people are occupiers. Accordingly, I find that there were plainly occupiers on the land.

25 Ms Sheikh's next submission was that in fact an appropriate form of notice was given to those occupiers. She relies on two things for these purposes; first, she relies on communications with Camden which she says were intended to be and were for onward transmission to the occupiers, and she relies on communications with the local community about the project. I will deal with the latter before the former.

26 I have been given links to the communications with the local community about the project and it is clear that HS2 has done its best to inform the local community (by which I mean those living in and around the area) of their general plans from time to time. However, those plans do not involve a clear indication that possession was going to be taken on any given date and that there were going to be evictions. There was nothing in those communications that I have seen amounts to anything like a 28 day notice to be conveyed to the occupiers. They are much more in the nature of public relations communications as to the general state of the project and the sort of works that HS2 was going to carry out; thus, for example, one of the communications indicates that work was going to be starting on the land in order to convert it into a temporary taxi rank so that the existing taxi rank could be used for other purposes. That is not sufficient notice within para.4 and, with all due respect, does not even come close.

27 The other route by which it is said that the occupiers received notice is via communications with Camden. In this respect, Ms Sheikh relies on a paragraph in a second witness statement of Mr Jim McAvan who is a solicitor employed by HS2 and its legal team and who is intimately concerned with this project. In para.23 of this witness statement he says as follows:

> "We did not know the identity of the trespassers but we knew the council were the lawful resident or persons employed on the land at ESG and we left notices with them and asked them to inform those in the camp."

"ESG" is shorthand for the land in question.

28 I have seen the notices left with Camden. The notices left with Camden are the formal notices which are required by para.4. There is no suggestion in those notices or in the letter which obviously accompanied it that somehow HS2 was relying on Camden to convey an equivalent notice on its behalf to the occupiers.

29 Ms Sheikh submitted that the statement about information being given to those "in the camp" was a statement by a solicitor verified by a statement of truth and should be taken to mean what it says. I in no way challenge the veracity and integrity of Mr McAvan but if he is to make averments which amount effectively to an expectation that Camden would give notice on behalf of HS2, I would have expected to see that evidence in some form of correspondence. It is not evidenced in correspondence. There is some further email traffic with Camden but that does not go so far as to suggest that HS2 is expecting Camden to fulfil its obligations about giving notice to the occupiers, much less that Camden did so. It is much more consistent with HS2 expecting Camden to make sure that those on the land were fairly dealt with so far as it fell within the powers of a local authority to provide such fair dealings.

30 Accordingly, I reject Ms Sheikh's submissions to the effect that if notice was required, which, in my view, it was, then it has been given via Camden or through any other route. That does not work for her.

31 Ms Sheikh in her skeleton argument raised various other points with which I should deal briefly. The third point she took in her skeleton argument, which is very helpfully divided up into clear and distinct points, which are said to be answers to my concerns, is described as follows:

> "If the defendants were in secret occupation, that would not invalidate Schedule 16 notices properly served on owners and occupiers."

32 As a proposition that is, in my view, entirely correct. However, this submission betrays a misunderstanding of what the problem is. The problem is not that the notice was not given to these individuals in the tunnels *per se* but the problem is that HS2 did not give notice to occupiers in accordance with para.4 at all. The way the mechanism ought to have worked is that HS2 ought to have given notice to those with a legal interest and at the same time or thereafter it ought to have given notice to occupiers either by serving them properly, which was obviously impractical in this case, or by leaving notices on the land in accordance with section 65. That is entirely practical. If that had been done at the outset (and by "the outset" I mean at the same time as the legal owners received their notice) then the occupiers on the land in question at the time of the notices would have received notice and that would have sufficed for any further occupiers who might come in later. A later occupier could no more complain about a failure to receive notice than a transferee of a legal interest of a legal owner who had received notice. Once notice has been given to occupiers that suffices. It does not close the door after 28 days to HS2's implementing their right to possession under para.1. The secret occupation of those in the tunnel (and I accept that it was secret) was perhaps not in existence at the time of the notice but that does not matter. There were some occupiers.

33 Her point 5 is as follows:

> "If the defendants did not receive notice, notice in accordance with the HS2 Act would not have provided actual notice."

That again proceeds on a misunderstanding of what notice was required. It would not matter if the particular defendants had established that they themselves had not received actual notice; all HS2 had to do was to give notice to the occupiers at some point in time at least 28 days before they then exercised their right of possession. They could give that notice in accordance with the mechanism of section 65.

34 Thus far, therefore, I am afraid that Ms Sheikh and her arguments fail. She has not satisfied me that HS2 should not have served notice or that they did give notice. However, having reflected on the matter myself over the weekend and before the hearing this afternoon, it seems to me that there is another analysis on the strange facts of this case which does entitle HS2 to seek possession as against these individuals in the tunnels.

35 It is incontestable that proper notice was given to the other owners, that is to say Network Rail, the freeholder, and the London Borough of Camden as leaseholder of the area in question. That means that as regards Network Rail and Camden, HS2 is entitled to possession. Neither of those entities has challenged the notice. A warrant has been issued directing the enforcement officer to enter into and to give possession of the land. That recites that the notices had expired but:

> "…the owners, occupiers and/or other unauthorised occupiers who refuse to give up possession of the land ..."

There is a bit of a problem with that in that whilst it is true that the occupiers have refused to give up possession, the person to whom the prior notices were directed did not refuse.

Network Rail and Camden did not refuse to give up possession. The warrant itself, therefore, may not be entirely justifiable but I do not need to rule on that.

36 Nonetheless, the warrant was implemented by the enforcement officer who entered into the land on 27 January 2021. The protesters were cleared from the surface over the next three days and possession was effectively given to HS2. HS2, as I understand it, is now incontestably in possession of at least the surface and is in that possession without opposition from the legal owners who have been served with the relevant notice. HS2 has, therefore, got possession of that area with sufficient rights to be able to resist allcomers. In my view, any defects in the procedure will not avail any newcomers.

37 The point that therefore arises is whether the possession which HS2 now has can be invoked against the protestors in the tunnels. The possession that HS2 now has can be given a lawful source in Schedule 16(1). It is then realistic in legal terms to regard HS2 as having a right to possession which is of the same quality as the legal owners. It is true that the legal owners have not consented to possession because the statutory mechanism was invoked, not a process of consent, but now that HS2 has entered the land without challenge from the legal owners and ultimately has a statutory right to possession, it seems to me that its right to possession should, in the present unusual circumstances, be treated as clothed with the same status as that of the legal owners of the land.

38 HS2 have thus been given and have taken lawful possession of the surface of the land with the possession being of the quality just described. There is no problem about the surface and there is no problem with that with which they have got possession of other than the very small part occupied by the tunnels which I am told are under less than ten per cent of the surface area, though it should be also observed that if further tunnelling has taken place as alleged, that would undoubtedly impinge on the newly taken possession of HS2. The question is whether that now gives HS2 a proper legal claim against those who would undoubtedly have been trespassers as against the legal owners.

39 In my view, it should. HS2 has managed to get possession of the surface of the land and there is no way that protestors could now regain possession of the land on the footing of the absence of notices. That possession falls to be treated as rightful now. In substance, the position is that HS2 has acquired possession of the surface of the land lawfully and should be entitled to have possession of the entirety of the subsurface, too. That is in accordance with the normal legal principles in which ownership or possession of the surface carries ownership or possession of the subsurface. That gives them the necessary possession rights which they can assert against the tunnellers. Looking at it another way, HS2 have now entered via the rights of those with higher rights of possession and thus can evict, or require the eviction of, trespassers to the same extent as those with higher right of possession can.

40 The rights of the legal owner are good enough against the trespassers and there is no reason why the possession of HS2 in the position in which it now finds itself should have any lesser quality. That gives them a higher right of possession than the tunnellers. I therefore conclude that I can and should make a possession order which will go against the named defendants other than the second, fourth and fifth named defendants who have all now come out of the tunnel. I should also make an order for possession against persons unknown in case there are such individuals in the property.

41 I should deal with one argument advanced by Mr Shepherd on behalf of Dr Maxey. Mr Shepherd relied on the fact that there seemed to be an unrevoked licence in favour of the public which affects this land. He said in his written argument, and repeated in his oral

argument, that before all this happened the land was being used as a public park and that is no doubt why it was vested in Camden for Camden's purposes. He submits, as I understand it, that members of the public have a licence to use it as a public park and that licence has never been terminated. He somehow seeks to invoke that as a reason for saying that a possession order should not be made.

42 I do not think that that argument avails Mr Shepherd or his client. There may or may not have been a licence in favour of the public to use the property as a public park but that licence has probably been terminated as a result of the exercise of HS2 's rights to take possession as against Camden, or it would been terminated once that right of possession is invoked. It cannot possibly survive that revocation.

43 Furthermore, even if there is some theoretical problem about that, it does not seem to me that the tunnellers can conceivably invoke that right in their favour. Whatever they are or are not doing, they are not using any part of the property as a public park. They are using it for rather different purposes. To be fair to Mr Shepherd, he disclaimed the notion that the erecting of temporary structures on the land or tunnelling under it could be treated as being use as a public park. He is right to say that and that means that any theoretical licence that may have existed and that may or may not have been satisfactorily disposed of is not a licence of which the tunnellers can avail themselves.

44 In all those circumstances, therefore, I have decided that it is right that there should be a possession order forthwith against the tunnellers and I shall so order.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Senior Courts Act 1981

1981 CHAPTER 54

PART II

JURISDICTION

THE HIGH COURT

Powers

37 Powers of High Court with respect to injunctions and receivers.

(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.

(3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

(4) The power of the High Court to appoint a receiver by way of equitable execution shall operate in relation to all legal estates and interests in land; and that power—

(a) may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under section 1 of the [M1]Charging Orders Act 1979 for the purpose of enforcing the judgment, order or award in question; and

(b) shall be in addition to, and not in derogation of, any power of any court to appoint a receiver in proceedings for enforcing such a charge.

(5) Where an order under the said section 1 imposing a charge for the purpose of enforcing a judgment, order or award has been, or has effect as if, registered under section 6

of the [M2]Land Charges Act 1972, subsection (4) of the said section 6 (effect of non-registration of writs and orders registrable under that section) shall not apply to an order appointing a receiver made either—

(a) in proceedings for enforcing the charge; or

(b) by way of equitable execution of the judgment, order or award or, as the case may be, of so much of it as requires payment of moneys secured by the charge.

[[F1](6) This section applies in relation to the family court as it applies in relation to the High Court.**]**

Textual Amendments

F1 S. 37(6) inserted (22.4.2014) by Crime and Courts Act 2013 (c. 22), s. 61(3), **Sch. 10 para. 58**; S.I. 2014/954, art. 2(d) (with art. 3) (with transitional provisions and savings in S.I. 2014/956, arts. 3-11)

Marginal Citations

M1 1979 c, 53.

M2 1972 c. 61.

Changes to legislation:
Senior Courts Act 1981, Section 37 is up to date with all changes known to be in force on or before 18 March 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 18(da) inserted by 2020 c. 11 Sch. para. 46
- s. 31(3)(a) word inserted by 2015 c. 2 s. 85(1)(a)
- s. 31(3)(a) word inserted by 2015 c. 2 s. 85(1)(a)
- s. 31(3)(b) and word inserted by 2015 c. 2 s. 85(1)(b)
- s. 31(3)(b) and word inserted by 2015 c. 2 s. 85(1)(b)
- s. 31(3A)(3B) inserted by 2015 c. 2 s. 85(2)
- s. 31(3A)(3B) inserted by 2015 c. 2 s. 85(2)

discretionary, the defendant may avoid the grant of an injunction if able to establish an equitable defence. A defendant may raise a number of considerations why an injunction should be refused, even though those considerations would not amount to a defence at law (so that the defendant may still be liable in damages to the claimant).

(a) *The risk of future interference with the claimant's rights.* It will not be appropriate to grant injunctive relief unless the court is satisfied that there is an appreciable risk that (absent an injunction) the defendant will interfere with the claimant's rights in the future: whether by leaving undone those things which ought to be done, or by doing those things which ought not to be done. **18–027**

(1) THE RELEVANCE OF PAST INTERFERENCE. In cases where the defendant has already infringed the claimant's rights, it will normally be appropriate to infer that the infringement will continue unless restrained: a defendant will not avoid an injunction merely by denying any intention of repeating wrongful acts.[187] Where there has been an infringement, but the infringement has been interrupted prior to trial, the reason for the interruption will be relevant when considering the risk that the infringement will be resumed. However, there are limited circumstances in which an injunction will be refused on the grounds that it is unnecessary. **18–028**

If the injury complained of has ceased before trial[188] or is merely temporary,[189] and there is no intention of renewing it,[190] the court may refuse an injunction.[191] But an injunction was granted where, after proceedings were commenced, the injury had ceased because of the financial difficulties and resulting voluntary liquidation of the defendant company.[192]

If the defendant gives an undertaking to the court to abstain from the acts of which the claimant complains,[193] or even to give sufficient notice before attempting to act,[194] an injunction may be refused. Such an undertaking is equivalent to an injunction, and a breach may be punished in the same way as a breach of an injunction.[195]

An injunction may also be refused where the claimant has a remedy available in his own hands, *e.g.* by refusing to supply goods to defendants who were dealing with them in breach of contract.[196]

[187] *Proctor v Bayley* (1889) 42 Ch.D. 390 at [399], [400].
[188] *Barber v Penley* [1893] 2 Ch. 447 (crowds waiting to see Charley's Aunt, eventually regulated by police); *Proctor v Bayley* (1889) 42 Ch.D. 390.
[189] *Leader v Moody* (1875) L.R. 20 Eq. 145 (breach of covenant for quiet enjoyment).
[190] *Fielden v Cox* (1906) 22 T.L.R. 411; *Wilcox v Steel* [1904] 1 Ch. 212.
[191] And see above para.18–012.
[192] *Dean and Chapter of Chester v Smelting Corp Ltd* (1901) 85 L.T. 67.
[193] *Jenkins v Hope* [1896] 1 Ch. 278.
[194] *Lord Cowley v Byas* (1877) 5 Ch.D. 944; *Smith v Baxter* [1900] 2 Ch. 138.
[195] See *Neath Canal Co v Ynisarwed Resolven Colliery Co* (1875) 10 Ch.App. 450; *Biba Ltd v Stratford Investments Ltd* [1973] Ch. 281.
[196] *Elliman Sons & Co v Carrington & Son Ltd* [1901] 2 Ch. 275.

A

Court of Appeal

*United States of America *v* Abacha and others

[2014] EWCA Civ 1291

2014 May 15; Oct 9

B

Beatson, Gloster LJJ, Sir Colin Rimer

Injunction — Interlocutory — Freezing order — United States authorities bringing proceedings in USA to forfeit assets involved in money laundering offences — United Kingdom authorities declining to take statutory enforcement measures against assets in United Kingdom — High Court granting freezing injunction in respect of assets in United Kingdom owned by persons outside in personam jurisdiction of United Kingdom — Whether any judgment in US proceedings enforceable against such persons at common law — Whether grant of freezing injunction "inexpedient" — Civil Jurisdiction and Judgments Act 1982 (c 27), s 25 (as amended by Civil Jurisdiction and Judgments Act 1991 (c 12), s 3, Schs 2, 4, Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929), Sch 2(IV), para 10(a)(i), Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131), reg 17, Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 (SI 2011/1484), Sch 4, para 6) — Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181), Pts 4A, 5 (as inserted by Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2013 (SI 2013/2604), s 3)

C

D

In the exercise of its sovereign authority the claimant, the United States of America, brought proceedings in the United States to forfeit assets which had allegedly been involved in money laundering offences within its jurisdiction. Since the United Kingdom authorities had indicated that they would not, at that time, be able to assist in respect of assets in the United Kingdom by taking measures under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005[1], the claimant applied in the High Court for a freezing injunction against such assets. On the claimant's without notice application Teare J granted the order sought, pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982[2]. The fifth and sixth defendants, companies incorporated under the laws of Singapore who held assets which were subject to the freezing injunction, resisted its continuation. Field J nevertheless continued the injunction, holding that (i) a judgment in the US proceedings would not be enforceable in England and Wales at common law, whether in rem or in personam; but (ii) it would nevertheless not be "inexpedient" within section 25(2) of the 1982 Act to grant the interim relief sought in order to hold the ring until such a judgment could be lawfully enforced under the 2005 Order.

E

F

On the appeal—

Held, (1) that the grant of an injunction under section 25 of the Civil Jurisdiction and Judgments Act 1982 which would not support or otherwise assist, whether by means of enforcement or otherwise, the substantive proceedings taking place in the foreign jurisdiction would be "inexpedient" within section 25(2); that, therefore, the judge had been correct to address the question of whether any judgment obtained at the suit of the claimant in the US proceedings would be enforceable in this jurisdiction; that the US proceedings were clearly proceedings in rem, rather than in personam proceedings, with the result that any judgment obtained in those proceedings would not be enforceable at common law in England and Wales, being a judgment in rem relating to property situated outside the territorial jurisdiction of the

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H

[1] Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, Pts 4A, 5: see post, paras 42–47.

[2] Civil Jurisdiction and Judgments Act 1982, s 25, as amended: see post, para 27.

US courts; that, in any event, even if any judgment in the US proceedings could be characterised for the purposes of enforcement at English common law as a judgment in personam, it would still not be enforceable at common law in England and Wales because it would amount to the enforcement of a foreign penal law; and that, accordingly, any judgment obtained at the suit of the claimant in the US proceedings would be unenforceable in England and Wales at common law (post, paras 60–61, 63–64, 65, 71, 73–74, 75, 78, 89, 90).

Crédit Suisse Fides Trust SA v Cuoghi [1998] QB 818, CA considered.

(2) Allowing the appeal, that the Proceeds of Crime Act 2002 and Parts 4A and 5 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 provided a detailed and comprehensive statutory regime to enable the United Kingdom enforcement authorities to obtain from the High Court prohibition and recovery orders to give effect to external requests by foreign authorities to secure the recovery of assets located in the United Kingdom necessary to implement orders made in foreign proceedings in relation to the recovery of the proceeds of crime; that any attempt by a foreign authority to circumvent that statutory scheme, with its relevant constraints and restrictions, and apply off its own back for relief under section 25 of the 1982 Act would not be within the intended statutory purpose of that section; that, therefore, given the absence of any jurisdiction justifying the making of a freezing injunction to support the US proceedings, other than that purportedly conferred by section 25, it was clearly "inexpedient" within section 25(2) of the 1982 Act to make an order under that section in circumstances where not only were there no proposed proceedings under Part 4A of the 2005 Order but the UK enforcement authorities had expressly declined to make any application under the 2005 Order; and that, accordingly, there had been no jurisdiction to grant the freezing injunction, which would be discharged (post, paras 84, 85, 86–88, 89, 90).

Decision of Field J [2014] EWHC 993 (Comm) reversed.

The following cases are referred to in the judgment of Gloster LJ:

Attorney General of New Zealand v Ortiz [1984] AC 1; [1983] 2 WLR 809; [1983] 2 All ER 93; [1983] 2 Lloyd's Rep 265, HL(E)

Crédit Suisse Fides Trust SA v Cuoghi [1998] QB 818; [1997] 3 WLR 871; [1997] 3 All ER 673, CA

Deichland, The [1990] 1 QB 361; [1989] 3 WLR 478; [1989] 2 All ER 1066; [1989] 2 Lloyd's Rep 113, CA

Iran (Government of the Islamic Republic of) v The Barakat Galleries Ltd [2007] EWCA Civ 1374; [2009] QB 22; [2008] 3 WLR 486; [2008] 1 All ER 1177; [2008] 2 All ER (Comm) 225, CA

Motorola Credit Corpn v Uzan (No 2) [2003] EWCA Civ 752; [2004] 1 WLR 113, CA

Pattni v Ali [2006] UKPC 51; [2007] 2 AC 85; [2007] 2 WLR 102; [2007] 2 All ER (Comm) 427, PC

Royal Bank of Scotland plc v FAL Oil Co Ltd [2012] EWHC 3628 (Comm); [2013] 1 Lloyd's Rep 327

S-L (Restraint Order: External Confiscation Order), In re [1996] QB 272; [1995] 3 WLR 830; [1995] 4 All ER 159, CA

United States Securities and Exchange Commission v Manterfield [2009] EWCA Civ 27; [2010] 1 WLR 172; [2009] Bus LR 1593; [2009] 2 All ER 1009; [2009] 2 All ER (Comm) 941; [2009] 1 Lloyd's Rep 399, CA

The following additional case was cited in argument:

House of Spring Gardens Ltd v Waite [1991] 1 QB 241; [1990] 3 WLR 347; [1990] 2 All ER 990, CA

APPEAL from Field J

By an ex parte application made on 25 February 2014 the claimant, the United States of America, applied for and obtained an interim freezing injunction to freeze the assets belonging to the defendants, (1) Mohammed Sani Abacha, (2) Abubakar Atiku Bagudu, (3) Mecosta Securities, Inc, (4) Ridley Group Ltd, (5) Blue Holding (1) Pte Ltd, (6) Blue Holding (2) Pte Ltd, (7) Standard Bank plc, (8) HSBC Bank plc, (9) HSBC Life (Europe) Ltd, (10) Waverton Investment Management Ltd and (11) James Hambro & Partners LLP, as an aid to the foreign proceedings of the claimant issued in and accepted by the US District Court for the District of Columbia on 18 November 2013 to forfeit certain assets held by certain of the defendants on the basis that those assets were derived from the proceeds of corrupt misappropriations carried out by the former President of Nigeria, General Abacha, and certain of his relatives and associates and thus were liable to forfeiture under 18 US Code § 981—Civil forfeiture, by reason of having been involved in money laundering within the jurisdiction of the United States. The application was adjourned for full hearing on 28 March 2014 to decide whether the freezing injunction should be continued. When the fifth to eleventh defendants appeared for that hearing they contended that the court had no jurisdiction either in common law or under section 25 of the Civil Jurisdiction and Judgments Act 1982 to grant an interim freezing injunction. In a reserved judgment [2014] EWHC 993 (Comm) handed down on 8 April 2014 the judge held that it was permissible for an interim freezing injunction to be granted under section 25 in support of foreign proceedings brought in the exercise of its sovereign authority by the foreign state as an expedient way of holding the ring against the possibility that the relevant United Kingdom enforcement authorities might in the future bring proceedings under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, after obtaining a judgment from a United States court.

By an appellant's notice filed on 15 April 2014 and pursuant to permission granted by the Court of Appeal (Beatson LJ) on 17 April 2014, the fifth and sixth defendants, who were corporations incorporated under the laws of Singapore, appealed on the grounds that (1) the US proceedings were clearly non-compensatory in character and the enforcement of any judgment from the US would amount to the enforcement of a foreign penal law; and (2) that the fact that the court had no jurisdiction, apart from section 25 of the 1982 Act, in relation to the subject matter of the proceedings made it "inexpedient" for the court to grant or continue the freezing injunction.

The facts are stated in the judgment of Gloster LJ.

Christopher Butcher QC and *David Peters* (instructed by *Byrne & Partners LLP*) for the fifth and sixth defendants.

Tom Leech QC (instructed by *Herbert Smith Freehills LLP*) for the claimant.

The other defendants did not appear and were not represented.

The court took time for consideration.

9 October 2014. The following judgments were handed down.

GLOSTER LJ

Introduction

1 This is an appeal by the fifth and sixth defendants to the action ("the English proceedings"), Blue Holding (1) Pte Ltd ("D5") and Blue Holding (2) Pte Ltd ("D6"), against the order of Field J made on 15 April 2014 following his judgment handed down on 8 April 2014. By the order Field J continued a freezing injunction originally granted by Teare J ex parte on 25 February 2014 on the application of the claimant in the English proceedings, the United States of America, pursuant to section 25 of the Civil Jurisdiction and Judgments Act 1982, against certain assets owned by D5 and D6 ("the frozen assets"). Permission to appeal was given by Beatson LJ on 17 April 2014.

2 The appeal raises the question whether it is permissible for an interim freezing injunction to be granted under section 25 in support of foreign proceedings brought, as the judge put it, "in the exercise of its sovereign authority" by a foreign state, which, by those foreign proceedings, seeks to forfeit assets which are in England and Wales, and which are owned by persons who are not subject to the in personam jurisdiction of England and Wales. Field J held that this was permissible as an "expedient" way of "holding the ring" against the possibility that the relevant United Kingdom enforcement authorities (not the claimant) might in the future bring proceedings under the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, following a judgment by a United States court.

Background

3 The following summary of the background is largely taken from the judgment and the respective skeleton arguments of the parties.

4 The foreign proceedings in aid of which the claimant sought the freezing order was an in rem forfeiture claim brought by it in the US against certain assets held by certain of the defendants to the English proceedings, as well as against certain other property ("the US proceedings"). The claimant alleges that these assets were derived from the proceeds of corrupt misappropriations carried out by the former President of Nigeria, General Abacha, and certain of his relatives and associates, and that such assets are liable to forfeiture under 18 USC § 981 by reason of such assets having been involved in money laundering from the mid-to-late 1990s to at least 2006 within the jurisdiction of the US.

5 The decision to bring the US proceedings was part of the US Kleptocracy Asset Recovery Initiative and was apparently taken at a high level in the US with the approval of the US Assistant Attorney General for the Criminal Division, following a request made on 28 August 2012 by the Federal Republic of Nigeria ("the FRN") pursuant (or, as D5 and D6 contend, purportedly pursuant) to articles 54 and 55 of the UN Convention against Corruption ("UNCAC") to the US Department of Justice to order the confiscation of property allegedly corruptly acquired by General Abacha. The US proceedings were accepted (i e issued) by the US District Court for the District of Columbia on 18 November 2013.

A 6 The principal allegation of corruption made in the US proceedings is described as the "security votes fraud", which allegedly involved the theft of more than US$2bn from the Central Bank of Nigeria under cover of instructions approved by General Abacha, which were issued on the false basis that the money was required for emergency security purposes. It is alleged that the money so obtained was then laundered through the purchase B of Nigerian Par Bonds ("NPBs"), US dollar-denominated securities whose interest payments were guaranteed by the US Treasury. This type of security was created as part of the Brady Bond programme to help developing countries holding substantial debt to restructure their debt into bonds.

7 The first defendant to the English action, Mohammed Sani Abacha ("D1"), is the second son of General Abacha. The second defendant, Abubakar Atiku Bagudu ("D2"), was an associate of General Abacha and, C according to the unchallenged evidence on the application before Field J, remains an associate of D1. He continues to be a member of the Nigerian Senate. The claimant alleges that: D1 and D2 misappropriated assets belonging to Nigeria acting on their own behalf and/or on the instructions of General Abacha and transported the stolen assets out of Nigeria; that the proceeds were then illegally laundered in the US, giving rise to the D commission of money-laundering offences there; and that D1 and D2 control the assets which are the subject of the forfeiture claims.

8 The third and fourth defendants to the English action ("D3" and "D4") and D5 and D6 are companies owned and/or controlled by D1 and/or D2 and used by them to hold assets, as to which Field J held that there was a good arguable case that they were stolen from the FRN in the manner alleged in the US proceedings. D3 and D4 as corporate entities (together E with their assets) are themselves and their assets subject to forfeiture claims in the US proceedings; they are BVI companies that have been struck off the BVI Companies Register for non-payment of statutory fees.

9 D1, D3 and D4 were served with the claim form, the freezing injunction granted by Teare J and related documents in the English proceedings but they did not acknowledge service, did not appear and were F not represented at the hearing before Field J. Various unsuccessful attempts had been made to serve the pertinent documents on D2 in Nigeria. There was, however, no doubt that he was well aware of the proceedings before Field J, since the evidence included an affidavit sworn by his brother, Mr Ibrahim Bagudu, which made this abundantly clear.

10 D5 and D6 are companies incorporated under the laws of Singapore, G whose shares are owned by the trustees of discretionary trusts for the benefit of D2's family. D2's brother, Mr Ibrahim Bagudu, was, until 25 April 2014, when he was removed from office, a director of both D5 and D6 and they have been served with the pertinent documents. It was not in dispute before Field J or before this court that there was a good arguable case that proceeds from the security votes fraud could be traced into the assets held by D5 and D6. Whilst D5 and D6 were not defendants to the US proceedings, assets H held in certain of their investment portfolios are subject to the in rem claims made in those proceedings. As a result of disclosure given by D5 and D6 in the English proceedings, it appears: that the tenth defendant to the English proceedings, Waverton Investment Management Ltd ("D10"), holds a portfolio of assets of approximately €7m for D5 and a portfolio of assets of

approximately €23,000,004 for D6; and that the eleventh defendant to the English proceedings, James Hambro & Partners LLP ("D11"), holds a portfolio of assets of approximately €12m for D5 and a portfolio of assets of approximately €65m for D6.

11 Originally D5 and D6 contested the jurisdiction of the court by appropriately ticking the box on the acknowledgement of service forms. They did so on the basis that there was not a good arguable case against them for a freezing injunction to be made. There was no separate basis for any challenge to the jurisdiction of the English courts.

12 For the purposes of the application before Field J, and this appeal, it was not disputed by D5 and D6 that there was a sufficiently arguable case to support the allegations of fraudulent misappropriation and money laundering made by the claimant in the English proceedings and in the US proceedings.

13 However, the evidence sworn on the application by D2's brother, Mr Ibrahim Bagadu, referred to the fact that the allegations of fraudulent misappropriation against General Abacha and his associates had resulted in various and protracted proceedings between the FRN and a number of individuals and companies (including D2 and companies controlled by him) in a number of different jurisdictions, including the United Kingdom, Switzerland, Liechtenstein, Luxembourg and Jersey. These proceedings had been ongoing during the period 1999–2003. They included proceedings brought by the FRN in July 2001 in the Chancery Division, under case number HC01 C03260, against certain defendants including D2 asserting a proprietary claim in respect of moneys that were alleged to have been corruptly taken from the Central Bank of Nigeria in the course of the security votes fraud. In the course of this action a freezing injunction was granted by Hart J on 25 September 2001 and, pursuant to that order, D2 swore a further affidavit disclosing his assets and explaining his understanding of the flow of funds from the security votes transfers to the assets then held by a company called Ridley Group Ltd. That freezing injunction defined "security votes moneys" as meaning "the moneys withdrawn from the Central Bank of Nigeria listed in Annex 1".

14 On or about 21 August 2003, a settlement agreement signed on behalf of the FRN by the Nigerian Attorney General was concluded between the FRN and D2 on behalf of himself and his "affiliates" (widely defined to include AB's nominees and trustees, and trusts, anstalts and foundations in which D2 "has, had or is alleged to have had an interest", and companies in which D2 "has, had or is alleged to have had any beneficial interest") and "named affiliates". The matters resolved under the settlement included the claims made by the FRN in relation to the security votes fraud proceedings and claims made by the FRN in other Commercial Court proceedings. It was also provided that D2's affiliates should have the full benefit of the release granted by the settlement. The settlement also provided for the transfer by D2 of sums held in variously named accounts for the benefit of the FRN and for the renouncement by the FRN of any interest whatsoever in certain scheduled assets that would be held by D2 free from any claims by the FRN. Included in those scheduled assets were assets the forfeiture of which the claimant seeks in the US proceedings. A Swiss lawyer, Mr Enrico Monfrini,

A then of the firm Monfrini Bottge & Associates, acted on behalf of the FRN in connection with the settlement agreement in various capacities.

15 Clause 3A of the settlement agreement provided:

> "This *agreement* finally resolves and releases all claims and liabilities of any kind which may exist against [D2] in favour of the *FRN* (the *resolved matters*) save as expressly provided. The *resolved matters* include all civil
B claims, all administrative claims, all claims arising out of, derived from or associated with criminal proceedings, the claims made by the FRN in relation to security votes (London High Court, No HC01 C03260) ('the *security votes proceedings*'), Ajaokuta (London High Court, 1999 Folio No 831), Ferrostal, vaccines, the Imo River dredging contract and other government contracts. This *agreement* also resolves and releases all civil
C claims which [D2] has against the *FRN*. In entering into this *agreement* neither party has relied on any representation made by or on behalf of the other party or on disclosures or duties to make disclosure by any party."

16 The settlement agreement was performed in full by all parties with the result that "final implementation" as defined thereunder was achieved by around November 2003. Clause 7.8(b) provided that, upon final
D implementation:

> "The *FRN* shall renounce any interest whatsoever whether of a legal or beneficial nature to the assets set out in schedule 6 of this *agreement* (the *AB assets*). No claim of any kind at all will attach to the *AB assets* and they will be held by [D2] free from any claims existing or future, direct or indirect contemplated or otherwise by the *FRN* or in whole or part at its
E behest or on its behalf or for its benefit."

17 Pursuant to the terms of the settlement agreement, on 18 November 2003 a Tomlin order was made by consent by Lewison J in the security votes fraud proceedings, HC01 C03260. It provided inter alia that, pursuant to the parties' obligations under the settlement agreement, further proceedings in the action were stayed against D2 upon the terms set out in that agreement
F and that the various injunctions made in the proceedings were discharged.

18 The assets set out in schedule 6 to the settlement agreement (and which therefore fell within the scope of clause 7.8(b)) included: (1) any and all accounts in the name of Ridley Group Ltd at Crédit Agricole Indosuez, London; and (2) any money transferred under AB's direction under the escrow agreement.

19 According to Mr Ibrahim Bagudu's evidence, in or about August
G 2010, moneys held in the accounts of Ridley Group Ltd at Crédit Agricole Indosuez (and which therefore were "AB assets" for the purposes of the settlement agreement) were transferred into the ownership of D5 and D6. It is these assets which are subject to the freezing injunction, and which are now the target (so far as D5 and D6 are concerned) of the US proceedings.

20 The judge accepted that this was the case for the purposes of his
H judgment. He said, at para 26:

> "The settlement also provided for the transfer by D2 of sums held in variously named accounts for the benefit of FRN and for the renouncement by FRN of any interest whatsoever in certain scheduled assets that would be held by D2 free from any claims by FRN. Included in

those scheduled assets are assets the forfeiture of which the claimant seeks in the US proceedings."

21 According to D5 and D6's evidence, matters rested there for many years. However, on 28 August 2012, the FRN (acting by its Attorney General) submitted a letter of request to the US Government. That letter was submitted (or, as D5 and D6 contend, purportedly submitted) pursuant to UNCAC and asked that the US Government: (1) take steps to confiscate property beneficially owned by "Mohammed Sani Abacha, Abbi Sani Abacha, their accomplices and other members of their criminal organisation"; and (2) "give priority consideration to returning the confiscated property to [the FRN] as requesting state party and also as a victim of the crimes (article 57(3)(c) of the Convention)".

22 The letter of request did not contain any details of the property which the FRN was seeking to recover. However, it identified Mr Monfrini (the same lawyer who had acted for the FRN in relation to the settlement agreement), who by this date was a member of the firm Monfrini Crettol & Partners, as the person who was responsible for coordinating recovery proceedings outside the FRN, and had full authority to represent the FRN in connection with the letter of request. The letter of request stated that he would: "Provide the designated US authorities with evidence obtained in Nigeria, Switzerland, the United Kingdom, Liechtenstein and Jersey demonstrating the existence of the above mentioned offences, the means used to launder their proceeds and their current location."

23 At para 27 of the judgment Field J said:

> "It is pertinent to note that: (1) although the Nigerian request for mutual assistance addressed to the US Department of Justice under the UN Convention against Corruption stated that proceeds of crimes committed by the Abacha criminal organisation have been frozen and a total exceeding US$1·2bn had been recovered by the FRN following judgments or voluntary restitution, it made no mention of the fact that under the settlement with D2 he and his affiliates were permitted to retain free from any claim by the FRN the scheduled assets; and (2) the claimant was unaware that the FRN had agreed that D2 and his affiliates could retain the scheduled assets until after these proceedings for relief under section 25 of the 1982 Act were begun."

24 During the period from January 2013 through until November 2013, and prior to the issue of the US proceedings on 18 November 2013, the claimant had had discussions with the United Kingdom Home Office regarding a possible request for assistance. The options under consideration were either a restraint order, pursuant to Part 2 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, or a property freezing order pursuant to Part 5 of the 2005 Order freezing D5's and D6's assets. However, those authorities indicated that, having taken advice, they would not be able to provide such assistance. According to a later letter to the claimant dated 24 March 2014 from a Mr Stephen Goadby at the Strategic Centre for Organised Crime at the Home Office, the reason for such refusal was:

> "As a short explanation as to why the UK is unable to assist, the domestic legislative framework under which external requests for an

A interim freezing order were dealt with until last year did not supply or extend our domestic civil limitation periods. This meant that the property acquired more than six years before the request could not be frozen. This applies to when the property was first acquired and does not include any subsequent conversions of that property. We have since changed our legislation to extend our domestic limitation periods in B relation to external requests when interim freezing order. Importantly, however, we are not able to bring property where the limitation period had expired under the old provisions, backward in time under the new provisions."

25 A further e-mail from Mr Goadby dated 28 March 2014 confirmed that the UK would seek to enforce any civil forfeiture order made by the US C courts forwarded to the Home Office and would return the money recovered to the US on confirmation that the US would in principle seek to return the funds to Nigeria.

26 It was in those circumstances that the claimant commenced the US proceedings and made its application under section 25 of the 1982 Act.

D *Section 25 of the 1982 Act*

27 So far as is material for present purposes, section 25 of the 1982 Act (as amended) provides:

"*Interim relief in England and Wales and Northern Ireland in the absence of substantive proceedings*

E "(1) The High Court in England and Wales or Northern Ireland shall have power to grant interim relief where— (a) proceedings have been or are to be commenced in a Brussels contracting state or a state bound by the Lugano Convention or a Regulation state or a Maintainance Regulation state other than the United Kingdom or in a part of the United Kingdom other than that in which the High Court in question exercises F jurisdiction; and (b) they are or will be proceedings whose subject matter is within the scope of the Regulation as determined by article 1 of the Regulation . . . (whether or not the Regulation, the Maintainance Regulation or the Lugano Convention has effect in relation to the proceedings).

"(2) On an application for any interim relief under subsection (1) the G court may refuse to grant that relief if, in the opinion of the court, the fact that the court has no jurisdiction apart from this section in relation to the subject matter of the proceedings in question makes it inexpedient for the court to grant it.

"(3) Her Majesty may by Order in Council extend the power to grant interim relief conferred by subsection (1) so as to make it exercisable in relation to proceedings of any of the following descriptions, namely— H (a) proceedings commenced or to be commenced otherwise than in a Brussels contracting state or a state bound by the Lugano Convention or a Regulation state or a Maintainance Regulation state; (b) proceedings whose subject matter is not within the scope of the Regulation as determined by article 1 of the Regulation . . ."

28 Section 1(1) of the 1982 Act provides that: " 'the Regulation' means Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters."

29 By virtue of paragraph 2 of the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, the High Court of England and Wales now has power to grant interim relief under section 25(1) in a case like the instant action where foreign proceedings have been commenced otherwise than in a Brussels or Lugano contracting state or a Regulation state, or where the subject matter of the foreign proceedings is not within the scope of the Regulation as determined by article 1 of the Regulation. This provides so far as material:

> "1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
>
> "2. The Regulation shall not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; (d) arbitration."

30 It was common ground between the parties, both below and in this court, that, as the judge stated in para 34 of the judgment, an applicant for a freezing order under section 25 must satisfy the court that: (i) the relief sought is in respect of civil proceedings brought outside the jurisdiction; (ii) the applicant has a good arguable case in those proceedings; (iii) there is a real risk that in the absence of a freezing order the assets sought to be frozen will be dissipated so that a judgment in the foreign proceedings will go unsatisfied; and (iv) it is not inexpedient for the relief sought to be granted. I record that no argument was raised before us to the effect that, in the light of the amendment made by article 2 of the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997, disapplying the condition that the subject matter of the foreign proceedings had to be within the scope of the Regulation, there was no longer any requirement for the foreign proceedings to be "civil proceedings".

The issues in contention before Field J and his judgment

31 As the judge stated at para 37 of the judgment, he was satisfied that the claimant had satisfied requirements (ii) and (iii) (namely that the applicant had a good arguable case in the foreign proceedings and that there was a real risk that, in the absence of a freezing order, the assets sought to be frozen would be dissipated so that a judgment in the foreign proceedings would go unsatisfied). Indeed, as he pointed out, the contrary was not argued by D5 and D6. The argument put forward by Mr Paul Stanley QC, leading counsel then acting on behalf of D5 and D6, was that requirements (i) and (iv) had not been established by the claimant and for those reasons the freezing injunction ought not to be continued against D5 and D6.

32 As to (i), Mr Stanley submitted that the US proceedings were criminal, not civil proceedings, having regard to the fact that the claimant

had to prove that the criminal offences relied on in the US complaint had been committed before the arrested assets could be forfeited under 18 USC § 981. The judge rejected that submission at para 38 of the judgment in the following terms:

> "Looking at the substance of the claim, although the claimant must prove that the pleaded offences were committed before a forfeiture order can be made, the US claim does not involve the prosecution and sentencing of any individual in a criminal court which are the hallmarks of criminal proceedings. Instead, the US claim is a claim for the vesting in the US Government of property used in or resulting from certain crimes and as such it is in my view a civil proceeding within section 25(1)(a)."

33 Mr Christopher Butcher QC and Mr David Peters, counsel appearing on behalf of D5 and D6 on this appeal, did not repeat or rely upon Mr Stanley's argument before this court. Mr Butcher's argument in relation to the correct characterisation of the US proceedings, which I refer to in greater detail below, was based upon the effect of the settlement agreement and the question as to whether it was, in the light of that agreement, which he submitted had the result that the US proceedings were clearly non-compensatory in character, inexpedient to grant relief under section 25.

34 As to requirement (iv), Mr Stanley presented the following submissions to Field J.

(i) The ultimate purpose of any freezing order granted under section 25 was the preservation of assets against which any judgment in the foreign proceedings may ultimately be enforced: see *Motorola Credit Corpn v Uzan (No 2)* [2004] 1 WLR 113, para 130.

(ii) A judgment in the US proceedings would not be enforceable in England at common law whether in rem or in personam and accordingly, in those circumstances, it could not be expedient to grant a freezing order in aid of the US proceedings. (a) A judgment in the US proceedings would not be enforceable in rem because the property to be forfeited was outside the US and a foreign judgment in rem is enforceable at common law only if the subject matter of the proceedings was situate within the jurisdiction of the foreign court at the time of the proceedings: see *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2014) ("*Dicey*"), 14R-108. (b) A judgment in personam against D5 and D6 would not be enforceable at common law because: (i) rule 43 in *Dicey* would not be satisfied; and/or (ii) the English court had no jurisdiction to entertain an action for enforcement, either directly or indirectly, of a penal or other public law: see *Dicey*, para 5R-019.

(iii) Whilst Mr Stanley accepted that the machinery in Part 5 of the 2005 Order for the enforcement of an external order was a lawful statutory exception to the common law rules concerning the enforcement of a foreign judgment, he submitted that it was not enough for the purpose of satisfying the requirement of expediency that a judgment in the US proceedings could and would ultimately be lawfully enforced by the UK enforcement authority. The whole structure of the 2005 Order was explicit and clear in placing all enforcement activity in the hands of the UK authorities, not foreign sovereigns. If the enforcement machinery provided under the 2002 Act was unavailable for some reason, a claimant ought not to be permitted to proceed in its own right under section 25 of the 1982 Act.

(iv) Mr Stanley further argued that it was inexpedient to continue the freezing injunction because it would be quite wrong for the assets of D5 and D6 to be forfeit to the US for the purpose of being returned to the Nigerian people when this would be wholly inconsistent with the settlement entered into with D2 by the FRN for and on behalf of the people of Nigeria.

(v) Finally, Mr Stanley argued that the claimant had failed to make full and frank disclosure to Teare J when successfully submitting that it was inappropriate to require the claimant to give a cross-undertaking in damages. Teare J should have been told that under the statutory machinery for enforcing external orders there were provisions that allowed for compensation where damage is suffered by reason of an order that ought not to have been made under the 2005 Order. Mr Stanley argued that if it had been made clear to the judge, as it should have been, that he was being asked to make an order which was in all material respects tantamount to an order under the 2005 Order but at the instance of a person not entitled to apply for such an order and without provision for compensation, Teare J might well have reached a different conclusion than he did on whether the order should contain a cross-undertaking in damages.

35 *Dicey's* rule 43, upon which Mr Stanley relied, is in the following terms:

> "Subject to rules 44 to 46, a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases: *First Case*—If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country. *Second Case*—If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court. *Third Case*—If the person against whom the judgment was given, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings. *Fourth Case*—If the person against whom the judgment was given, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country."

36 In relation to these arguments, the judge concluded, at paras 44–48 of the judgment as follows:

> "*Discussion and decision*
>
> "44. I deal first with Mr Stanley's arguments founded on the FRN and D2 settlement agreement and material non-disclosure which were not in the forefront of his submissions in opposition to the continuation of Teare J's order.
>
> "45. In my view, the settlement agreement does not render it inexpedient to continue the freezing injunction in order to hold the ring pending the determination of the US claim. The claimant is not an assignee of the FRN's rights to the proceeds of the corrupt practices relied on and nor was it a party to the settlement agreement or the proceedings thereby settled. Whether, notwithstanding these matters, the settlement is a defence or is otherwise relevant to the US claim is a matter for the US court and it would not be appropriate in my judgment to pre-empt the US

court on this issue by refusing to continue the freezing injunction in light of the settlement.

"46. As to Mr Stanley's full and frank disclosure argument, in my judgment the way in which the cross-undertaking point was dealt with before the judge involved no failure to make proper disclosure to the court. As the judge appreciated, the application was being made under section 25 of the 1982 Act because the statutory machinery was unavailable and that being so, the relevant authorities were cited to him and there was no necessity to refer to the compensation provisions in the POCA statutory scheme.

"47. I turn then to Mr Stanley's principal contentions. In my judgment, he is correct to submit that a judgment in the US claim would not be enforceable in rem in England at common law for the reasons he advanced. His submission that a judgment in the US claim would not be enforceable at common law in personam because of a failure to comply with rule 43 is also correct and I shall assume, without deciding the point, that such a judgment would additionally be unenforceable at common law on the ground that to enforce it would involve the court in enforcing directly or indirectly a foreign penal or other foreign public law.

"48. Attractively presented as they were, I decline to accept these submissions. This application under section 25 is not an application to enforce a foreign judgment but to continue an order designed to hold the ring until a judgment in the US claim can be lawfully enforced under the 2005 Order, and in my opinion the fact that the application is made by the US in the exercise of its sovereign authority rather than under the 2005 Order is not a reason for concluding that it would be inexpedient to continue the freezing injunction. Indeed, I have come to clear view that it is unquestionably expedient for this court to render the assistance sought by the claimant in aid of the US claim. Corruption, like other types of fraud, is a global problem and it and its consequences are only going to be dealt with effectively if there is co-operation and assistance not only between the governments of states but also between the courts of different national jurisdictions. Orders enforcing US arrest warrants issued in the US claim against property in Jersey and France have been made in those jurisdictions and I have no doubt that this court should follow suit and continue the freezing injunction ordered by Teare J on 25 February 2014."

37 In other words the judge accepted (or assumed) that a judgment obtained by the claimant in the US proceedings would not be enforceable at common law (or in any way at the suit of the claimant), but none the less rejected D5 and D6's submission that in those circumstances it would be inexpedient to grant, or continue, the freezing injunction under section 25. Accordingly, he continued the freezing injunction against D5 and D6 originally granted by Teare J. He also refused, contrary to Mr Stanley's submission, to require the claimant to give any cross-undertaking in damages on the grounds that the claimant was a public regulatory authority seeking to enforce the law in the interests of the public generally. The order thus contained the statement in schedule B that "no undertaking is given by the applicant to compensate any of the respondents or any third party for any loss caused with this order".

The regime for the enforcement of "external orders" under POCA, under Part 5 of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 and under Part 4A of the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, as amended by the Proceeds of Crime Act 2002 (External Requests and Orders) (Amendment) Order 2013

38 Before turning to consider the respective submissions of the parties in this court, it is necessary to set out in summary the regime for the enforcement of "external orders" under the Proceeds of Crime Act 2002 ("POCA") and the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005, since Mr Butcher's arguments in relation to inexpediency were firmly based on the contention that the exclusive route by which the claimant could achieve an interim freezing order of D5 and D6's assets was by means of the statutory scheme provided by Parts 4A and 5 of the 2005 Order. (I am grateful to counsel for both parties for their respective summaries of the statutory provisions from which this summary is adapted.)

39 Subject to the question of enforcement at common law (which is considered below), an order for forfeiture made pursuant to the US proceedings would be enforceable under POCA and the 2005 Order. Section 444(1) of POCA provides:

> "Her Majesty may by Order in Council— (a) make provision for a prohibition on dealing with property which is the subject of an external request; (b) make provision for the realisation of property for the purpose of giving effect to an external order."

40 The term "external request" is defined by section 447(1) as "a request by an overseas authority to prohibit dealing with relevant property which is identified in the request". The term "external order" is defined by section 447(2) as an order which:

> "(a) is made by an overseas court where property is found or believed to have been obtained as a result or in connection with criminal conduct, and (b) is for the recovery of specified property or a specified sum of money."

Relevant property is defined by section 447(7): "Property is relevant property if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or which may be made."

41 The Government's Explanatory Notes to section 447 state:

> "Section 447(2) makes an external order, which is made in relation to the recovery of the proceeds of crime, enforceable in the United Kingdom regardless of the form it takes. It could be an order made against a person (an 'in personam' order) or an order made against property (an 'in rem' order, as in civil forfeiture proceedings in the USA). It could be a forfeiture order (an order changing the title of property), an order to a person to pay a sum of money or some other kind of order. The external order must have been made by an overseas court (as defined by subsection (10)). It is immaterial what kind of court proceedings the external order is made in. It could be made in criminal proceedings, civil proceedings or some other court proceedings. However, non-court

A orders such as 'administrative' confiscation orders made by police officers and similar authorities are excluded from this scheme."

It was common ground that a final order for confiscation in the US proceedings might be "an external order".

42 Part 5 of the 2005 Order is headed: "Giving effect in the United Kingdom to external orders by means of civil recovery." Article 142(2) B provides:

> "This Part has effect for the purpose of enabling the enforcement authority to realise recoverable property (within the meaning of article 202) in civil proceedings before the High Court or the Court of Session for the purpose of giving effect to an external order."

C **43** Part 5 sets out the process by which the UK authorities may seek to recover property pursuant to the registration of an "external order" for the purpose of giving effect to such order. In summary:

(i) The 2005 Order provides for proceedings to be brought by an enforcement authority, which in England and Wales is now either the National Crime Agency, the Director of Public Prosecutions or the Director D of the SFO: see article 213(1).

(ii) Article 142 provides that the Secretary of State may forward an external order to the relevant UK enforcement authorities. Article 143(1) then provides that those authorities may take proceedings for a recovery order pursuant to the registration of the external order by issue of a claim form in the High Court against "any person who the authority thinks holds recoverable property": see article 143(1); and the claim form can be served E on any other person which the UK authorities consider to be holding "associated property": see article 143(2). As Mr Butcher pointed out, there are thus two levels of discretion which must be exercised before any UK recovery proceedings in respect of a foreign confiscation order are issued. But the foreign authorities who obtained the relevant external order are not persons on whom any recovery proceedings are to be served. The F 2005 Order therefore envisages that they will not be parties to those proceedings.

(iii) Article 177 of the 2005 Order provides:

> "*Recovery orders*
>
> "(1) The court must decide to give effect to an external order which falls within the meaning of section 447(2) of the Act by registering it and G making a recovery order if it determines that any property or sum of money which is specified in it is recoverable property.
>
> "(2) In making such a determination the court must have regard to— (a) the definitions in subsections (2), (4), (5), (6), (8) and (10) of section 447 of the Act, and (b) articles 202 to 207.
>
> "(3) The recovery order must vest the recoverable property in the H trustee for civil recovery.
>
> "(4) But the court may not make in a recovery order— (a) any provision in respect of any recoverable property if each of the conditions in paragraph (5) or (as the case may be) (6) is met and it would not be just and equitable to do so, or (b) any provision which is incompatible with

any of the Convention rights (within the meaning of the Human Rights Act 1998).

"(5) In relation to a court in England and Wales or Northern Ireland, the conditions referred to in paragraph (4)(a) are that— (a) the respondent obtained the recoverable property in good faith, (b) he took steps after obtaining the property which he would not have taken if he had not obtained it or he took steps before obtaining the property which he would not have taken if he had not believed he was going to obtain it, (c) when he took the steps, he had no notice that the property was recoverable, (d) if a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to him."

(iv) Although this article is couched in mandatory terms, the English court's obligation to give effect to the external order is only triggered if it has made its own substantive determination that the property/money amounts to recoverable property as defined in articles 202 to 208 of the 2005 Order and falls within the definitions in subsections (2), (4), (5), (6), (8) and (10) of section 447 of POCA. Moreover, article 177(4) provides that the court may not make a recovery order if, in effect, the respondent to the application was a bona fide purchaser for value without notice and it would not be just and equitable to make a recovery order. In other words, the English court is not simply being asked to enforce the order obtained by the foreign authorities. Instead, it is required to decide for itself whether the relevant property is recoverable property as a matter of English law. In this context, it should be noted that the relevant provisions of article 177(1) are materially identical to the corresponding section of POCA (namely section 266) which applies to claims for recovery orders brought by the UK authorities in a purely domestic context. In making recovery orders based on an external order, the English court is therefore required to conduct an exercise identical to that which it would have to conduct in a domestic claim for a recovery order. Likewise, articles 202 to 208 contained detailed provisions as to what is recoverable property and what is traceable in circumstances where the original property has passed into the hands of third parties or has changed its character. Thus article 202(3) for example provides: "But if property (including money) which is specified in the external order has been disposed of (since it was so obtained), it is recoverable property only if it is held by a person into whose hands it may be followed."

(v) There is no suggestion in the 2005 Order that a respondent may reopen the merits of the external order or the jurisdiction of the foreign court to make it. The court must, however, be satisfied that the criminal conduct is conduct which would either constitute an offence in any part of the United Kingdom or would have constituted an offence in any part of the United Kingdom if it had been committed here: see section 447(8) of POCA.

(vi) Article 178 provides that a recovery order is enforced by the appointment of a trustee for civil recovery who gets in, and then distributes, the property which is subject to that order. Article 191 sets out a detailed regime as to how that property is to be distributed and what payments or other deductions the trustee is to pay out of the property. For example, he has to pay certain costs and expenses (which do not include any expenses incurred by the relevant foreign authorities in seeking the external order or attempting to persuade the UK authorities to take proceedings on the basis

A thereof). Finally, the trustee is required to remit any balance of the recovered property to the UK authorities. This means that the last step in proceedings under the 2005 Order is the forfeiture of the recovered property to the UK authorities. The 2005 Order does not impose any limitations on the use which the UK authorities may make of that property, nor does it impose any obligation on them to return it to the foreign authorities that B obtained the external order. Any such obligation would rest on the United Kingdom itself pursuant to its treaty obligations with the foreign state whose authorities requested the assistance.

44 Part 5 of the 2005 Order, before its amendment, contained a lacuna. Article 147 permitted an enforcement authority to apply for a property freezing order (whether before or after starting recovery order proceedings) but only where the High Court had already registered an external order. It C provided:

> "*Application for property freezing order*
>
> "(1) Where the enforcement authority may take proceedings for a recovery order pursuant to the registration of an external order in the High Court, the authority may apply to the court for a property freezing order (whether before or after starting the proceedings).
>
> D "(2) A property freezing order is an order that— (a) specifies or describes the property to which it applies, and (b) subject to any exclusions (see article 149(1)(b) and (2)), prohibits any person to whose property the order applies from in any way dealing with property.
>
> "(3) An application for a property freezing order may be made without notice if the circumstances are such that notice of the application would E prejudice any right of the enforcement authority to obtain a recovery order in respect of any property.
>
> "(4) The court may make a property freezing order on an application if it is satisfied that the condition in paragraph (5) is met and, where applicable, that the condition in paragraph (6) is met.
>
> "(5) The first condition is that there is a good arguable case— (a) that F the property to which the application for the order relates is or includes recoverable property, and (b) that, if any of it is not recoverable property, it is associated property.
>
> "(6) The second condition is that, if— (a) the property to which the application for the order relates includes property alleged to be associated property, and (b) the enforcement authority has not established the identity of the person who holds it, the authority has taken all reasonable G steps to do so."

45 It was, therefore, impossible for an enforcement authority to apply to court for a property freezing order before the foreign agency had obtained an external order and the English court had registered it. In substance, therefore, an enforcement authority could only obtain a property freezing order in aid of execution. This gap was filled by the Proceeds of Crime Act H 2002 (External Requests and Orders) (Amendment) Order 2013 which, by article 3, inserted a new Part 4A of the 2005 Order after article 141. The 2013 Order came into force on 11 November 2013. It enables an enforcement authority to apply for a prohibition order in relation to property in England and Wales which is the subject of an external request:

see article 141A. Like the regime under Part 5, the decision on the part of the Secretary of State to refer to an enforcement authority an external request to prohibit dealing with relevant property in England and Wales is discretionary; and likewise so is the decision on the part of the enforcement authority to make an application for a prohibition order: see article 141B. Article 141D provides that following an external request:

> "(1) The High Court may make a prohibition order in relation to property if the High Court is satisfied that— (a) it is relevant property identified in an external request, and (b) proceedings have not been taken in relation to the property under Chapter 2 of Part 5 of this Order.
>
> "(2) A prohibition order is an order that— (a) specifies or describes the property to which it applies, and (b) subject to any exclusions (see article 141G(1)(b) and (2)), prohibits any person to whose property the order applies from in any way dealing with the property."

46 Once again, however, like the procedure under Part 5, a prohibition order may not be made in relation to property that has been acquired by a transferee in good faith, for value and without notice that it is relevant property. Importantly there is also a restriction on making a prohibition order in circumstances where there has been a previous payment by the defendant in respect of relevant property. Thus article 141F(1)(3) provide:

> "*General exceptions*
>
> "(1) If— (a) a person disposes of relevant property, and (b) the person who obtains it on the disposal does so in good faith, for value and without notice that it is relevant property, a prohibition order may not be made in respect of the relevant property."
>
> "(3) If— (a) in pursuance of a judgment in civil proceedings (whether in the United Kingdom or elsewhere), the defendant makes a payment to the claimant or the claimant otherwise obtains property from the defendant, (b) the claimant's claim is based on the defendant's criminal conduct, and (c) the sum received, or the property obtained, by the claimant is relevant property, a prohibition order may not be made in respect of the relevant property."

In the present case, accordingly, issues might arise as to whether, in the context of the settlement agreement reached between D2 and the FRN, a prohibition order could be made at all.

47 Article 141N also provides that, in circumstances where property ceases to be subject to a prohibition order because it is set aside or varied to exclude the property from the order, the person whose property it is may make an application to the High Court for compensation. In that event article 141N(3)(4)(6) provide:

> "(3) If the High Court is satisfied that— (a) no proceedings under Chapter 2 of Part 5 of this Order have been brought in relation to the property, (b) it is unlikely that such proceedings will be brought, and (c) the applicant has suffered loss as a result of the prohibition order, it may require the enforcement authority which obtained the prohibition order to pay compensation to the applicant.

A "(4) The amount of compensation to be paid under this article is the amount the High Court thinks reasonable, having regard to the loss suffered and any other relevant circumstances."

"(6) If any proceedings under Chapter 2 of Part 5 of this Order are brought in relation to the property, article 194 (compensation where such proceedings unsuccessful) applies in relation to the prohibition order as it applies in relation to a property freezing order."

B

48 Article 4 of the 2013 Order also amended the Limitation Act 1980 by adding a new section 27AB to that Act. It provides for a limitation period in relation to prohibition proceedings under Part 4A of the 2005 Order of 20 years from the date on which the relevant person's cause of action accrued in respect of the relevant property. That is defined as the date on which the C relevant property was obtained "as a result of or in connection with criminal conduct". This mirrors the 20-year limitation period in section 27B of the 1980 Act (as amended by the Policing and Crime Act 2009 as from 25 January 2010). Previously, prior to the amendment, the time limit for bringing a claim for a recovery order had been 12 years.

49 In these circumstances the reference to a six-year limitation period in the Home Office's letter to the claimant dated 24 March 2014 is somewhat D puzzling. However it is not necessary for this court to consider any questions of limitation as it was not argued on D5 and D6's behalf, either before Field J or before this court, that the DPP or the Director of the SFO were precluded on limitation grounds from bringing proceedings for a prohibition order from a date after 11 November 2013 (when the 2013 Order came into force). Whatever the reasoning of the Home Office E for not referring the matter to the DPP or the Director of the SFO to consider an application for a prohibition order, Mr Butcher did not suggest that it would not have been possible for an enforcement agency to obtain a prohibition order either at the date of the application before Field J or at the date of the hearing of the appeal before this court. Indeed, the thrust of D5 and D6's submissions both before Field J and this court was that such an F application was the correct statutory route rather than an application under section 25 of the 1982 Act.

The subsequent prohibition order obtained by the National Crime Agency on 2 July 2014

50 After the hearing of this appeal the court was informed by the parties G that the National Crime Agency ("the NCA") had obtained a prohibition order against D5 and D6 in respect of the frozen assets pursuant to article 141D of Part 4A of the 2005 Order. The order was made by Foskett J on 2 July 2014 on short notice to the solicitors acting for D5 and D6 and others. The order was stated to take effect upon the discharge of the freezing injunction made by Teare J on 25 February 2014, as continued by Field J on 8 April 2014.

H **51** Both parties submitted that it was none the less necessary for this court to give its judgment on the appeal since, not only did such decision have significant cost implications, but also it raised important points of principle. Neither party sought to make any further submissions in the light of Foskett J's prohibition order. Both parties accepted that the fact that an

order had subsequently been made did not alter the fact that, at the time the injunction against D5 and D6 was granted, and then continued by Field J, the relevant UK authorities were not prepared to apply for a prohibition order.

The parties' submissions before this court

D5 and D6's submissions

52 The primary contention of Mr Butcher, on behalf of D5 and D6, was that the fact that the court had no jurisdiction apart from section 25 of the 1982 Act in relation to the subject matter of the proceedings made it inexpedient for the court to grant or continue the freezing injunction.

53 In support of this contention he submitted, in summary:

(i) The ultimate purpose of any freezing order granted under section 25 was the preservation of assets against which any judgment in the foreign proceedings might ultimately be enforced: see *Motorola Credit Corpn v Uzan (No 2)* [2004] 1 WLR 113, 130.

(ii) A judgment obtained by the claimant in the US proceedings would not be enforceable at common law (or in any way at the suit of the claimant). That was for the following reasons. (a) The US proceedings were proceedings in rem. Therefore any judgment in the US proceedings would be a judgment in rem relating to property situated outside the territorial jurisdiction of the US courts. Such a judgment would not be enforceable in England and Wales: see *Dicey*, 14R-108. It was common ground that, at all material times, the frozen assets had been located in England. The judge correctly accepted this argument at para 47 of his judgment. (b) In the alternative, if that argument were rejected, and the court were to conclude instead that any judgment in the US proceedings would be a judgment in personam, then such judgment would not be enforceable at common law in England and Wales because: (i) D5 and D6 were not present in the US when the proceedings were instituted; (ii) they had not claimed or counterclaimed in the US; (iii) they had not voluntarily appeared in the US proceedings; and (iv) they had not, prior to the commencement of the US proceedings, agreed to submit to the jurisdiction of the US court in respect of the subject matter of those proceedings: see *Dicey*, para 14R-054. Again, the judge accepted this argument at para 47 of his judgment. (c) In a further alternative, if, contrary to the argument at (b) above, the court were to conclude that D5 and D6 had personally submitted to the jurisdiction of the US courts, none the less no in personam judgment given in the US courts would be entitled to recognition or enforcement here, because it would amount to the enforcement of a foreign penal law: see *Dicey*, para 14-022 and *Attorney General of New Zealand v Ortiz* [1984] AC 1, 20–21, 24 and 34. The claimant contested this in reliance upon *United States Securities and Exchange Commission v Manterfield* [2010] 1 WLR 172, but the judge appeared to have proceeded on the basis that D5 and D6's contention in that respect was correct, as indeed it was.

(iii) There was a fundamental inconsistency in the claimant's case. When D5 and D6 characterised the US proceedings as penal, the claimant's answer was that they were essentially compensatory (because their principal purpose was the recovery of moneys for the benefit of Nigeria). That characterisation of the US proceedings was critical to the claimant's attempt

A to rely on the *Manterfield* decision, which was authority for the proposition that a judgment in favour of a foreign public authority might be enforced if, in substance, it was a judgment requiring the disgorgement of the proceeds of fraud for the purposes of their return to the private persons who were victims of the relevant fraud. However, when D5 and D6 pointed out that, by reason of the settlement agreement, the FRN had no right to such
B compensation (and would be contractually obliged to remit any part of the frozen assets which it received from the claimant back to D2 and/or D5 and D6) the claimant shifted its ground and asserted that the settlement agreement was no answer to the claimant's entitlement to claim that the frozen assets ought to be forfeit pursuant to its money laundering legislation.

(iv) By this shift in its arguments, the claimant had sought to avoid what was the obvious conclusion. To the extent that the US proceedings were
C pursued for the purpose of compensating the FRN, the settlement agreement rendered them completely pointless. To the extent that they were pursued for the purpose of exacting a criminal penalty on D5 and D6 (in the form of forfeiture of property to a foreign state), then any judgment would be unenforceable in England. In either case, the conclusion under section 25 ought to be the same—the grant of a freezing order in support of the US
D proceedings was inexpedient. The judge correctly accepted that, applying ordinary common law principles, a judgment in the US proceedings would not be enforceable in the UK. That was not a promising starting point for an application under section 25.

(v) The relevant parts of the judge's judgment correctly did not identify any foreign proceedings in support of which an injunction under section 25
E could properly be granted. Instead, the judge wrongly purported to grant the freezing order in support of a possible application by the UK enforcement authorities pursuant to Part 5 of the 2005 Order in circumstances where (a) such proceedings could only be brought by the relevant UK authorities (who were not a party to this claim); and (b) those authorities had not to date commenced any such proceedings, and might well never have done so. The judge's decision to adopt this course was
F contrary to the basic principles governing the grant of injunctive relief under section 25. This raised a point of construction in relation to the English court's jurisdiction to grant interim relief under section 25.

(vi) The 2005 Order itself contained a detailed regime governing how UK authorities dealt with requests for assistance from foreign states in respect of matters relating to proceeds of crime. It included provision for the obtaining
G by the UK authorities of interim prohibition orders in support of foreign proceedings in which judgment had yet to be entered and for the payment of compensation in circumstances where such orders were set aside. By continuing the freezing injunction under section 25 of the 1982 Act, the judge permitted the claimant to circumvent this code, and thereby proceed without reference to the UK authorities and without any provision for
H compensation. Such an approach was contrary to the scheme of the 2005 Order, which by necessary implication precluded a foreign state from making a separate application to enforce its penal laws, and ought not to have been permitted.

(vii) In all these circumstances, the freezing order was plainly inexpedient, and therefore ought not to have been granted under section 25.

(vii) Further or alternatively, the judge exercised his discretion under section 25 unreasonably in that he: (a) failed to take any or adequate account of the penal nature of the US proceedings and the principle that the English court does not lend support to the direct or indirect enforcement of a foreign penal law; and/or (b) failed to take any or adequate account of the terms of the 2005 Order and the limitations imposed thereby; and/or (c) failed to take any or adequate account of the fact that the overall purpose of the US proceedings (and of any potential proceedings under Part 5 of the 2005 Order) would be to confiscate the frozen assets from their lawful owners and return them to a person (the FRN) which has renounced any claim over them and whose action in instigating the US proceedings was wrongful; and/or (d) failed to take any or adequate account of the fact that if the assets were to be recovered and returned to the FRN, that state would be obliged to return them to D5 and D6.

The claimant's submissions

54 Mr Tom Leech QC, leading counsel appearing on behalf of the claimant, submitted that the judge's approach to the exercise of his discretion under section 25 could not be faulted. In summary he submitted:

(i) The judge correctly held that there was a good arguable case that the funds held by D10 and D11 on behalf of D5 and D6 contained funds traceable to the security votes fraud. There was no appeal against that finding. He also held that there was a real risk of dissipation: see para 37. There was no appeal against that finding.

(ii) He also held that the proceedings were civil proceedings: see para 38 of the judgment. Again, there was no appeal against that finding.

(iii) He considered the question whether it was "not inexpedient" to make the freezing injunction and correctly concluded that it was not inexpedient to do so. He took into account the fact that the application was being made by the US rather than the enforcement authority, which would bring proceedings for a recovery order under the 2005 Order; he correctly concluded that this was not a reason for refusing to make the freezing injunction under section 25 because it was designed to "hold the ring".

(iv) He also took into account the fact that orders enforcing the arrest warrants made by the US court had been made in both Jersey and France and the importance of co-operation and assistance between the courts of different national jurisdictions: see para 48 of the judgment.

(v) Whilst D5 and D6 sought to argue that the judge made an error of law, in fact the judge's decision was an exercise of the court's discretion (as the judge stated when he dealt with the application for permission to appeal). The real issue on the appeal was whether the judge erred in principle or made a decision with which this court not only disagreed but which was outside the boundaries where reasonable disagreement was possible: see the formulation in the *Manterfield* case [2010] 1 WLR 172, para 10; see also *Motorola Credit Corpn v Uzan (No 2)* [2004] 1 WLR 113 where the Court of Appeal accepted that considerations of expediency were ultimately matters for the judge's discretion: see para 106.

(vi) Proceedings under the 2005 Order clearly entailed "enforcement" of any order made in the US proceedings. The statutory purpose of Part 5 of the 2005 Order was to "give effect" to external orders: see section 444(1) of

A POCA, the heading to Part 5 of the Order and article 142(2). The explanatory notes even used the word "enforceable" and gave as an example "an in rem order, as in civil forfeiture proceedings in the USA". D5 and D6 described an external order as "a factual trigger for the commencement of proceedings under the 2005 Order" but denied that proceedings under the 2005 Order were by way of enforcement. That was playing with words. B The purpose of the 2005 Order was to provide a mechanism for enforcing any order made in the US proceedings by means of mutual legal assistance.

(vii) Furthermore, D5 and D6's argument assumed that it was a requirement of section 25 that any judgment obtained by a claimant in foreign proceedings must be capable of recognition or enforcement under English law. There was no authority for that proposition and none was cited in D5 and D6's skeleton argument. But if that proposition were correct, it C would not be possible for the court to grant a worldwide freezing injunction in aid of foreign proceedings. The court often made orders which might not result in enforcement in this jurisdiction. For instance, where the defendant was resident or domiciled within the jurisdiction, the court might grant an injunction freezing assets in one foreign jurisdiction in aid of enforcement in another. Moreover, there might be rare cases in which the court granted a D freezing injunction against a defendant resident or domiciled in one foreign jurisdiction in aid of proceedings in a second with a view to enforcement in a third: see, for example, *Royal Bank of Scotland plc v FAL Oil Co Ltd* [2013] 1 Lloyd's Rep 327, paras 41–47.

(viii) It was in this context that the court formulated the five propositions in the *Motorola* case [2004] 1 WLR 113, 115 (set out by the judge in the judgment at para 36). In that case the claimant had brought proceedings in E the USA against four defendants of whom only D1 was resident in the jurisdiction and only D1 and D4 had assets here. The court granted worldwide freezing injunctions against all four but on appeal the Court of Appeal discharged the injunctions against D2 and D3 but upheld the injunctions against D1 and D4. The decision involved a full review of all of the authorities. But it did not suggest that there was any legal requirement F that any judgment obtained by the claimant in a foreign jurisdiction must be recognised or enforceable by the English court. The question was simply one of expediency: see the discussion at paras 112–114.

(ix) Accordingly, even if the court were to conclude that proceedings for a recovery order under the 2005 Order should not be regarded "as proceedings by way of enforcement" of any judgment made by the US court, G that did not make it inexpedient to grant a freezing injunction in aid of those proceedings. D10 and D11 are subject to the jurisdiction of the English court and the reach of the freezing order did not go beyond the assets held by them. Moreover, the freezing order served a valuable purpose pending the determination of the US proceedings. It prevented D5 and D6 from dissipating those assets in order to avoid a recovery order. There was no possibility of conflict with the laws of any other jurisdiction and the court H could take into account the importance of assisting the courts of other jurisdictions: see the *Motorola* case, at para 114. The court had obviously taken into account the fact that the US did not have control over proceedings under the 2005 Order but the judge clearly considered this point in reaching his conclusion that it was not inexpedient to make the freezing injunction.

(x) D5 and D6 had not raised any substantive defence or argument to suggest that the NCA or the SFO would not be entitled to obtain a prohibition or recovery order under the 2005 Order. There was no suggestion, for example, that D5 and D6 were bona fide purchasers for value without notice. They were the corporate assets held by family trusts for the family of D2. Furthermore, there was no suggestion that they would be entitled to raise a limitation defence to a recovery order. Nor could there be so.

(xi) D5 and D6's objection to the continuation of the freezing injunction was, therefore, a matter of form not substance. They did not suggest that there was no jurisdiction to freeze the assets held by D10 and D11 on their behalf pending the determination of the US proceedings or that the court would not have granted a prohibition order, if the enforcement authorities had applied for one. Their objection was that, because the claimant had used section 25, rather than persuaded the Office for Security and Counter-Terrorism ("OSCT") to make an application under the 2013 Order, or sought judicial review of its decision not to do so, the freezing injunction should be discharged.

(xii) D5 and D6's argument that the 2005 Order prohibited the claimant from making an application under section 25 was ill-founded. There was no express statutory prohibition (whether limited to section 25 or otherwise) which prevented such an application and such a prohibition could not be implied from the provisions of the 2005 Order as a whole.

(xiii) So far as the settlement agreement was concerned, D5 and D6 did not argue that it bound the claimant or that it would otherwise provide a defence to the forfeiture claim in the US proceedings. Nor did they suggest that it would provide a defence to the making of a recovery order under article 177 of the 2005 Order. This would require them to demonstrate that they obtained the assets held by D10 and D11 in good faith: see article 177(5). They put forward no positive case and adduced no evidence in support of such a defence and did not advance one now. Furthermore, it would not have been possible for the court to have determined on the application under section 25 whether such a defence was likely to succeed.

(xiv) D5 and D6 were left saying, therefore, that they would be entitled to enforce the settlement agreement in separate proceedings against the FRN. But it was not obvious or self-evident that the FRN would be in breach of the settlement agreement if the US were to obtain forfeiture of assets subject to the agreement on the basis of US money-laundering offences. The FRN would not be asserting title to them or relying on any civil (or other) claims which it may have released. Neither D2 nor the FRN were before the court and as yet D2 had formulated no claim.

(xv) But the fact that D2 might have a potential claim against the FRN was not a reason for refusing to continue the freezing injunction. Further, such a claim would not have prevented the claimant from obtaining an order for forfeiture in the US proceedings or an enforcement authority in England from obtaining a recovery order. The claimant accepted that the settlement agreement was a matter which was relevant to the question of expediency under section 25(2). But the fact was that the judge took it into account: see the judgment at para 45. The Court of Appeal might reach a different conclusion about the weight to be attached to it. But it cannot be said that

A the judge's decision was "outside the boundaries where reasonable disagreement is possible".

(xvi) The fact that the ultimate judgment in the US proceedings might be penal and not enforceable in this jurisdiction was no reason for refusing relief: see *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22.

B (xvii) Finally, if this court were of the view that the appeal should succeed, the claimant relied on the additional ground set out in its respondent's notice dated 2 May 2014, namely that it had a good arguable case that any judgment it obtained in the US proceedings would be enforceable at common law. That was on the basis that effectively any judgment obtained in the US proceedings would be regarded additionally as C proceedings in personam and would be enforceable in this jurisdiction at common law.

(xviii) Whilst the claimant accepted that 18 USC § 981 provided for forfeiture in rem under US law, it did not follow that the English court should characterise the US proceedings in the same way. In *In re S-L (Restraint Order: External Confiscation Order)* [1996] QB 272, the Court of D Appeal construed the expression "proceedings against the defendant" in section 7 of Schedule 3 to the Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990 as including proceedings in rem in which the standing of the persons with a financial interest in the outcome was recognised: see p 280C–D (Pill LJ with whom Otton LJ agreed); and also, p 282D–F, where Evans LJ was influenced by the fact that "persons interested in the property should be notified of them and given the E opportunity to appear in them". The present case was analogous. The procedural provisions of the Federal Rules of Civil Procedure and Rule G provided for D5 and D6 to be notified of the US proceedings and they have the opportunity to appear in them.

(ixx) Mr Ibrahim Bagudu, who was a director of both D5 and D6, and claims to be a beneficiary of the Blue Trusts has now served a verified claim F and statement of interest in the US proceedings asserting a claim to (and interest in) the frozen assets together with nine other individuals (some of whom are minors). By doing so they have voluntarily appeared in the US proceedings (or arguably so) and any judgment obtained by the claimant in those proceedings is likely to be enforceable at common law against them and their privies, which include D5 and D6.

G

Discussion and determination

Should this court determine the issues arising on the appeal in the light of the prohibition order made by Foskett J?

55 I accept the submissions of both parties that, despite the making of the prohibition order by Foskett J under article 141D of the 2005 Order, it H none the less is appropriate for this court to adjudicate on the issues arising on this appeal. The appeal not only raises important points of principle but also has considerable costs implications for the parties. Moreover, Foskett J's order is expressed only to take effect on the discharge of the order made by Field J.

The guidance of the relevant cases as to the exercise of the jurisdiction under section 25

56 The jurisdiction under section 25 of the 1982 Act is a broadly-based jurisdiction and no criterion or guideline is provided as to the test to be applied by the court in considering whether it is inexpedient to grant an order. As Millett LJ said in *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, 825:

> "The wording of section 25(2) is inelegant and is perhaps not readily susceptible to close textual analysis, but its meaning is tolerably plain. On an application for interim relief under subsection (1), the court is not bound to grant relief, but may decline to do so if in its opinion the fact that it is exercising an ancillary jurisdiction in support of substantive proceedings elsewhere makes it inexpedient to grant it. It is the ancillary or subordinate nature of the jurisdiction rather than its source which is material, and the test is one of expediency. The structure of subsections (1) and (2) and the way in which their scope has been progressively widened indicate to my mind an intention on the part of Parliament that the English court should in principle be willing to grant appropriate interim relief in support of substantive proceedings taking place elsewhere, and that it should not be deterred from doing so by the fact that its role is only an ancillary one unless the circumstances of the particular case make the grant of such relief inexpedient."

57 The guidance provided in the later *Motorola* case [2004] 1 WLR 113 is of little assistance in the present case. In the *Motorola* case the Court of Appeal said, at paras 113–115:

> "113. Mr Leggatt QC for the claimant has stressed the very wide discretion available to the court under section 25 and has argued in support of the reasons given by the judge.
>
> "114. The issue in this case arises because, on the face of it, the only fetter placed upon the otherwise apparently unlimited powers which the court has as a result of the combination of section 37 of the Supreme Court Act, section 25 of the CJJA, and rule 6.20 of the CPR is its power to refuse to grant relief if its absence of jurisdiction apart from section 25 makes such grant 'inexpedient'. It is plain that, in relation to the grant of worldwide relief, the jurisdiction is based on assumed personal jurisdiction; as such it has the potential for extraterritorial effect in the case of non-residents with assets abroad. Thus it is likely that the jurisdiction will prove extremely popular with claimants anxious to obtain security against defendants in disputes yet to be decided where they cannot obtain it in the court of primary jurisdiction or the court of the defendants' residence or domicile, which courts are the natural fora in which to make such applications. There is thus an inherent likelihood of resort to the English jurisdiction as an 'international policeman', to use the phrase employed by Moore-Bick J, in cases of international fraud. We would do nothing to gainsay, and indeed would endorse, the observations of Millett LJ in *Cuoghi* case to the effect that international fraud requires courts, within the limits of comity, to render whatever assistance they properly can without the need for express provision by an international

convention requiring it. However, even in the case of article 24 of the Brussels Convention it has been made clear that: 'the granting of provisional or protective measures on the basis of Article 24 is conditional on, inter alia, the existence of a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the contracting state of the court before which those measures are sought'. see (*Van Uden Maritime BV v Kommanditgesellschaft In Firma Deco-Line* [1999] QB 1225, [1999] 2 WLR 1181 at 1210 para 40). Further, in so far as 'police' action is concerned, policing is only practicable and therefore expedient if the court acting in that role has power to enforce its powers if disobeyed. In that respect the principle in *Derby v Weldon* already quoted plainly has application and is apt to be applied in cases of this kind.

"115. As the authorities show, there are five particular considerations which the court should bear in mind, when considering the question whether it is inexpedient to make an order. First, whether the making of the order will interfere with the management of the case in the primary court e g where the order is inconsistent with an order in the primary court or overlaps with it. That consideration does not arise in the present case. Second, whether it is the policy in the primary jurisdiction not itself to make worldwide freezing/disclosure orders. Third, whether there is a danger that the orders made will give rise to disharmony or confusion and/or risk of conflicting inconsistent or overlapping orders in other jurisdictions, in particular the courts of the state where the person enjoined resides or where the assets affected are located. If so, then respect for the territorial jurisdiction of that state should discourage the English court from using its unusually wide powers against a foreign defendant. Fourth, whether at the time the order is sought there is likely to be a potential conflict as to jurisdiction rendering it inappropriate and inexpedient to make a worldwide order. Fifth, whether, in a case where jurisdiction is resisted and disobedience to be expected, the court will be making an order which it cannot enforce."

58 None of the five particular considerations referred to in the *Motorola* case is in play in the present case. There is no dispute that the frozen assets are located here and are amenable to an injunction of the English court. No arguments were put forward on behalf of D5 and D6 to the effect that the fact that they had no presence within the jurisdiction was a factor which the court should take into account in declining jurisdiction to make any order against them. The only basis on which D2 and D5 and D6 challenged the jurisdiction of the English court was that there was no good arguable case for a freezing injunction to be granted under section 25; no separate basis was put forward for any jurisdictional challenge: see page 25 of the transcript of the hearing before Field J on 11 April 2014.

The relevance of the enforceability of any judgment in the US proceedings under English common law

59 Field J appears to have assumed that whether or not any order obtained by the claimant in the US proceedings would be capable of enforcement or recognition in this jurisdiction was, or might, prima facie be

relevant to the issue of expediency, but went on to decide that the claimant's application under section 25 was "not an application to enforce a foreign judgment but to continue an order designed to hold the ring until a judgment in the US claim can be lawfully enforced under the 2005 Order": see paras 47 and 48 of the judgment.

60 In my judgment, if one were to approach the question of expediency under section 25 on the hypothetical basis that there was no machinery such as that provided by section 444(1) of POCA and Parts 4A and 5 of the 2005 Order for the making of prohibition orders (whether on an interim or final basis) or for the making of recovery orders for the purpose of giving effect to external order, it would clearly be relevant to consider whether any judgment obtained by the claimant in the US proceedings was capable of recognition or enforcement under English law.

61 As the cases make clear, it is the ancillary or subordinate nature of the jurisdiction, rather than its source, which is material. It is difficult to see how, on the hypothesis stated above, a freezing injunction could possibly be said to be "in support of" or "ancillary to" US forfeiture proceedings in circumstances where any judgment obtained in those proceedings could not be enforced or recognised in this jurisdiction, or there would be no other utility (such as, for example, enabling the enforcement of any order obtained in the US proceedings against assets in another, third, jurisdiction). In such circumstances it is difficult to see how such an injunction could be regarded as expedient. Thus I reject Mr Leech's submission that it is not relevant to consider whether or not any order obtained in the US proceedings would be capable of enforcement in this jurisdiction.

62 I accept that there may be situations in which it is appropriate for the court to grant relief under section 25 which might not result in enforcement in this jurisdiction. For instance, there might be rare cases in which the court granted a freezing injunction against a defendant resident or domiciled in one foreign jurisdiction in aid of proceedings in a second with a view to enforcement in a third. In *Royal Bank of Scotland plc v FAL Oil Co Ltd* [2013] 1 Lloyd's Rep 327, for example, I myself granted such an injunction. Indeed Mr Butcher did not contend for any such blanket rule that the inability to enforce the foreign judgment in England precluded the grant of interim relief under section 25.

63 However, on any basis, there has in my view to be some utility in the grant of the injunction under section 25 which is related and ancillary to the proceedings in the foreign jurisdiction; that is because, as Millett LJ emphasised in *Cuoghi's* case [1998] QB 818, the raison d'être of the interim section 25 relief is that it is supportive of the substantive proceedings taking place in the foreign jurisdiction. But in circumstances where the grant of an injunction pursuant to section 25 in England would not "support" or otherwise assist, whether by means of enforcement or otherwise, the substantive proceedings taking place in the foreign jurisdiction it is impossible to my mind to regard such relief as "expedient" or "ancillary".

64 For that reason I consider that Field J was correct to address, in the first instance, whether any judgment obtained at the suit of the claimant in the US proceedings would be enforceable in this jurisdiction.

A *Would any judgment in the US proceedings be enforceable under English common law?*

65 My approach to the analysis as to why a judgment in the US proceedings would not be enforceable in England at common law as a judgment in rem or in personam is somewhat different from that of the judge. First, I accept Mr Butcher's submission that the US proceedings are
B clearly proceedings in rem for the purposes of a consideration as to whether they are enforceable at common law in this jurisdiction. My reasons for this conclusion are:

(i) The title to the complaint in the US proceedings is: "Verified complaint for forfeiture in rem." It identifies as "defendants" to those proceedings various assets and five corporate entities, together with their assets, only two
C of which (namely D3 and D4) are defendants to the English proceedings. No individuals are named as personal defendants to the US proceedings; in particular D5 and D6 are not so named.

(ii) Para 1 of the complaint recites:

> "This is an *action in rem to forfeit* five corporate entities and more than $500m in other assets involved in an international conspiracy to launder
D the proceeds of corruption . . . *The defendants in rem are subject to forfeiture as property* involved in money-laundering offences in violation of US law." (My emphasis.)

(iii) Likewise, para 4 of the complaint states: "By this complaint, the United States seeks forfeiture of all right, title and interest in the following *property*: . . ." (my emphasis) and then goes on specifically to identify "the
E defendants in rem".

(iv) Para 6 states that the US court has "in rem jurisdiction over the named defendant properties" by reference to certain statutory provisions.

(v) The relief in the US proceedings consists of five claims for forfeiture. In each of the five claims, the operative paragraph of the claim for relief contains the following wording: "The following defendants in rem constitute property involved in money laundering transactions and
F attempted money laundering transactions . . . and therefore are subject to forfeiture . . ." This wording is then followed by a list of specific assets. There is no claim for any in personam relief against any of the corporate defendants or any other person.

(vi) In her witness statement in support of the interim section 25 relief sought by the claimant, Ms Debra Lynn LaPrevotte, a supervisory special
G agent for the Federal Bureau of Investigation, US Department of Justice, stated that the English proceedings were brought "in support of in rem civil proceedings for forfeiture . . . in the United States", and that "If the civil forfeiture action is successful, the current titleholders' interest in the assets will be extinguished in favour of the US Government".

(vii) Thus, in the US proceedings, the claimant brings claims against assets, and seeks relief specifically targeted at such assets. What the claimant
H is seeking in the US proceedings is a determination, not merely as to the rights of the parties, but as to the disposition of the thing itself; the US court is being asked to give a decision which adjudicates on the title or disposition of the property against the world. As Mr Butcher submitted, that is clearly an action in rem: see *Pattni v Ali* [2007] 2 AC 85, 97, paras 20–21.

66 I reject Mr Leech's submissions, based on *In re S-L (Restraint Order: External Confiscation Order)* [1996] QB 272, that the US proceedings in the present case can be characterised for the purposes of enforcement at common law in this jurisdiction as in personam proceedings, simply because the procedural provisions of the US Federal Rules of Civil Procedure and Rule G provide that D5 and D6 were to be notified of the US proceedings and that they have an opportunity to appear in them.

67 The issue in *In re S-L* was a question of statutory construction as to whether a restraint order in relation to bank accounts could be made pursuant to section 8(1) of Schedule 3 to the Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990. The relevant question was one of construction of section 7 of the 1990 Order, which provided:

> "(1) The powers conferred on the High Court by sections 8(1) and 9 (1) of this Act or exercisable where— (a) proceedings have been instituted against the defendant in a designated country, (b) the proceedings have not been concluded, and (c) either an external confiscation order has been made in the proceedings or it appears that there are reasonable grounds for believing that such an order may be made in them.
>
> "(2) Those powers are also exercisable where it appears to the High Court that proceedings are to be instituted against the defendant in a designated country and that there are reasonable grounds for believing that an external confiscation order may be made in them."

Section 8 provided: "The High Court may by order (in this Act referred to as a 'restraint order') prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order." Section 1 of Schedule 3 to the 1990 Order provided:

> "(1) An order made by a court in a designated country for the purpose of recovering payments or other rewards received in connection with drug trafficking or their value is referred to in this Act as an 'external confiscation order'.
>
> "(2) In subsection (1) above the reference to an order includes any order, decree, direction or judgment, or any part thereof, however described.
>
> "(3) A person against whom an external confiscation order has been made, or a person against whom proceedings may result in an external confiscation order being made have been, or are to be, instituted in a court in a designated country, is referred to in this Act as 'the defendant'."

68 The relevant foreign order was a US civil judgment in rem forfeiting various funds on deposit at various bank accounts, including an account in London in the name of S-L's then wife's parents, on the basis that they represented the proceeds of S-L's drug trafficking activities in the US. In the US judgment the forfeited assets were described as the "defendants". The putative criminal, S-L, was never going to face criminal proceedings in the US as he had fled to Columbia. The argument on behalf of the London bank account holders was that, in the absence of any individual personal defendant being named in the US judgment, within the meaning of the term "defendant" in the 1990 Order, the English court had no power under

A section 8 to make a restraint order; the wording of section 7 and subsection 1(3) required there to be proceedings instituted against an individual defendant.

69 The Court of Appeal rejected this argument and held that the statutory test had been satisfied, notwithstanding that the particular US proceedings were indeed proceedings in rem. Pill LJ, with whom Otton and Evans LJJ agreed, said, at pp 279–280:

B

> "I have come to the conclusion that the power to make a restraint order can, on the wording of section 7 in Schedule 3, be exercised. There is no doubt that an external confiscation order, as defined in section 1(1), has been made. The question is whether it has been made 'in the proceedings', as contemplated in section 7(1)(c), when section 7(1)(a) C requires proceedings to have been instituted 'against the defendant'. In my judgment the statement in section 1(3) that a person against whom an external confiscation order has been made is 'referred to in this Act as "the defendant" ' does not of itself exclude the possibility of such an order being made under section 1(1) without there being 'a person' named as defendant. Had that been the intention I would have expected an entry in D the interpretation section, section 38(1), reading 'In this Act "the defendant" means the person against whom . . .' Other entities may also be defendants. Even allowing for the presence of section 1(3), the word 'defendant' in section 7(1)(a) is not limited to defendants who are persons. The description in section 1(3) is necessary to identify the person intended by the word 'defendant', for example in section 5(9). It does not in my judgment provide an exclusive definition of 'defendant' for all E purposes of the Act. Section 7 is concerned to identify the stage of proceedings, instituted to obtain an external confiscation order, at which a restraint order may be made. I do not read it as requiring a particular form of proceedings or as using 'the defendant' in the limited sense described in section 1(3).
>
> "Weight must be given to the purpose of the Order of 1990 and, in that F context, the word 'defendant' in section 7(1)(a) should not be construed as requiring proceedings in personam. As in *The Deichland* [1990] 1 QB 361, the court should have regard to the substance of the proceedings and not the form.
>
> "The New York order did recognise that the persons who were or may be interested in the relevant funds had an opportunity to intervene. In G those proceedings, the persons known or thought to have an interest in the defendant funds were clearly in the contemplation of the court when the order was made. It was noted in the order that E. had chosen not to oppose the motion and it was ordered that 'all persons other than [E] known or thought to have an interest in or claim to the defendant funds and all proceeds traceable thereto, having been given due notice of these proceedings, the default of all such other persons claiming or having any H interest in the defendant funds and all proceeds traceable thereto is noted'. That being so, I would construe the expression 'proceedings against the defendant' so as to include proceedings in rem in which the standing of persons with a financial interest in the outcome is, as in the New York proceedings, plainly recognised."

70 It is clear from Pill LJ's judgment, and that of Evans LJ at p 282, that the issue in question was one of interpretation of the requirement in section 7(1)(a) of the 1990 Order that there should have been proceedings instituted in another country "against the defendant", defined in section 1(3) as "a person against whom an external confiscation order has been made". But the court was not addressing, and did not purport to decide, the issue whether, for the purposes of enforcement at common law, a judgment in rem forfeiting certain specified assets could be characterised as in personam, merely because the foreign rules of court provided for notice to be given to persons potentially interested in such assets and for them to have a right of appearance.

71 Accordingly I derive no assistance from *In re S-L* [1996] QB 272. Whilst there may in some cases be scope for argument over whether proceedings are in rem, in personam, or possibly contain elements of both, the present case is not such a case. It is clear from the form and content of the US proceedings that they are proceedings exclusively in rem in the strictest sense possible. On the basis of this characterisation it follows that any judgment in the US proceedings would be a judgment in rem relating to property situated outside the territorial jurisdiction of the US courts, and as such would not be enforceable in England and Wales in accordance with the well-established principles set out in *Dicey*.

72 Nor do I accept Mr Leech's alternative submission that somehow any future forfeiture order of the US court will, as facts stand at the present time, be characterised under English common law as a judgment in personam for the purposes of enforcement against D5 and D6. D5 and D6 have not made any voluntary appearance in the US proceedings and have not submitted to the jurisdiction of the US courts. The fact that certain beneficiaries of the discretionary trusts, subject to which the shares in D5 and D6 are held, have submitted "verified claims and statements of interest" in the US proceedings expressly "without waiving any rights to contest jurisdiction in this matter" does not amount to submission to the US jurisdiction on the part of D5 and D6, let alone operate to transform the US proceedings into in personam, as opposed to in rem, proceedings. Mr Ibrahim Bagudu's claim in the US proceedings under the relevant procedural rules was made in his capacity as a beneficiary, not in his capacity as a director of D5 and D6; at the time he made it on 1 May 2014 he was no longer a director.

73 But even if I were to be wrong in this conclusion, and the correct analysis were that any forfeiture order in the US proceedings would be characterised for the purposes of enforcement at English common law as a judgment in personam, none the less such judgment would not be enforceable at common law in England and Wales. That is because, as the judge was prepared to assume (but not actually decide), no in personam judgment given in the US courts would be entitled to recognition or enforcement here, because it would amount to the enforcement of a foreign penal law: see *Dicey*.

74 In my judgment the judge's assumption was correct. Both below and before this court, Mr Leech sought to contest this conclusion in reliance upon *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22 and the *Manterfield* case [2010] 1 WLR 172. He sought

A to suggest that, whilst the US proceedings were penal in form, they were ultimately compensatory in character, or that this court could not be sure at this stage whether any judgment in the US proceedings would be penal or compensatory; accordingly it could not reach a firm conclusion that such a judgment would be unenforceable as a penal judgment.

75 In my judgment this attempted characterisation of the US B proceedings as compensatory, or potentially compensatory, had no foundation in reality. It is correct that there are various statements in Ms Laprevotte's affidavits to the effect that the proceeds of any recovery could be used for "the benefit of the people of Nigeria" or that "the current proceedings seek the civil forfeiture of stolen moneys with a view to their recovery for the benefit of the people of the nation harmed by the abuse of office" etc: see, for example, paras 25, 85 and 91 of her affidavit dated C 24 February 2014 and para 26 of her affidavit dated 26 March 2014.

76 But in reality this is not a case in any way analogous to *Manterfield's* case. In that case, the public authority in question, the Securities and Exchange Commission ("the SEC") (unlike the US authorities bringing these proceedings) was not a prosecuting authority. It was a public authority acting pursuant to a statutory power for the benefit of a class of investors D generally, and effectively standing in their shoes, thus obviating the need for each individual investor to bring his or her own claim for compensation by way of separate proceedings. In order to succeed in its claim in that case, the SEC did not need to show criminal wrongdoing on the part of the defendant. On the contrary, the essence of its action was demonstrating civil wrongdoing for the purpose of obtaining relief (in the form of disgorgement) which was also available to private persons in ordinary civil proceedings. As E Mr Butcher submitted, the contrast with the present case is stark. The US proceedings do indeed require the claimant to prove the existence of criminal wrongdoing. Moreover, the relief sought consists of the forfeiture to the US Government of a wide class of assets (including assets which may only be associated with assets said to be the proceeds of crime). The justification of the present proceedings is clearly penal (namely allegedly F illegal money laundering in the US) and their basis is not compensatory. The fact that ultimately the US may in its absolute discretion decide (and its current intentions are not transparent, to say the least) whether, pursuant to its treaty obligations or otherwise, to remit moneys derived from the forfeited assets to the FRN is irrelevant to the correct characterisation of the US proceedings.

G 77 Nor was Mr Leech's reliance on *Government of the Islamic Republic of Iran v The Barakat Galleries Ltd* [2009] QB 22 any surer foundation for his submission that any in personam judgment in the US proceedings would be enforced in this jurisdiction at common law. In that case the claimant, the Government of the Islamic Republic of Iran, enjoyed both title to, and an immediate right to possession of, the antiquities which were the subject matter of the dispute, sufficient to found a claim in conversion in England. H Again, there can be no suggestion in the present case that the claimant can claim any proprietary title to the funds in question.

78 Accordingly, I have no hesitation in concluding that the US proceedings are penal in nature and that, irrespective of any impact of the settlement agreement, they cannot be characterised as compensatory. For

the above reasons, I accept Mr Butcher's submissions that any judgment in the US proceedings forfeiting the frozen assets would not be enforceable in England under common law.

Was the judge none the less right to conclude that it was not inexpedient to grant relief under section 25 in order to "hold the ring until a judgment in the US claim can be lawfully enforced under the 2005 Order"?

79 I turn now to consider the question whether, on the assumption that the judge was correct, as I believe he was, to conclude that any in rem or in personam judgment in the US proceedings would not be enforceable in this jurisdiction at common law, none the less it was appropriate to grant, or continue, relief under section 25 of the 1982 Act in order to "hold the ring until a judgment in the US claim can be lawfully enforced under the 2005 Order", despite the fact that, at the date of the hearing before the judge, the UK enforcement authorities had declined to apply for any orders under the 2005 Order.

The relevance of the settlement agreement

80 In my judgment, Mr Butcher's submission that the terms of the settlement agreement as between D2 and the FRN should have persuaded the judge not to grant, or continue, any relief under section 25 was not, taken as a reason on its own, compelling. The judge clearly addressed the issue of the relevance of the settlement agreement in para 45 of his judgment, as quoted above. In my judgment, he rightly concluded:

> "Whether, notwithstanding these matters, the settlement is a defence or is otherwise relevant to the US claim is a matter for the US court and it would not be appropriate in my judgment to pre-empt the US court on this issue by refusing to continue the freezing injunction in light of the settlement."

Does the machinery under the 2005 Order provide an exclusive code so as to exclude any recourse by a foreign authority to section 25 of the 1982 Act?

81 In my judgment, the critical issue on this appeal is whether the machinery provided under the 2005 Order (as amended) provides an exclusive code whereby foreign authorities can achieve, through the instrumentation of English enforcement authorities, orders (whether on an interim or final basis) prohibiting dealings with specified property, or whether the foreign authorities are, despite the potential availability of such machinery, none the less free to have recourse to section 25.

82 I have found this a difficult question. Contrary to Mr Butcher's submissions, I do not consider that the answer depends on whether an order pursuant to Part 4A or Part 5 of the 2005 Order can be said to be an "enforcement" of any order in the US proceedings. That seems to me to be a semantic argument. The freezing of property in the UK, which may be needed to satisfy overseas orders in relation to the recovery of criminal proceeds, and for the enforcement of such orders by the realisation of property in the UK, for which POCA and the 2005 Order provide, seems to

A me necessarily to constitute "enforcement", or at the least measures facilitating the possibility for enforcement, of such foreign orders.

83 I can also understand the logic of the judge's reasoning that the making of an order under section 25 would indirectly support, or be ancillary to, the US proceedings, in the sense that it would hold the ring until an order could, or might, be made under the 2005 Order and therefore fall
B within the statutory intendment of section 25.

84 However the real, and indeed only, issue in this case, as it seems to me, is whether, given that POCA and Part 4A and Part 5 of the 2005 Order provide for a detailed and comprehensive statutory regime to enable the English enforcement authorities to obtain from the High Court prohibition and recovery orders in relation to specified assets which are the subject of an external request from overseas authorities, it could be said to be
C "inexpedient" to make an order at the suit of the overseas authority under section 25, in circumstances where, as at the date of the application under section 25, the English enforcement authorities had (for whatever reason) expressly declined to make any application under the 2005 Order.

85 In my judgment, it clearly was inexpedient within the meaning of section 25(2) to make such an order. POCA and the 2005 Order provide a
D comprehensive regime for the application by UK enforcement authorities for prohibition and recovery orders to give effect to external requests by foreign authorities to secure the recovery of assets located in the UK necessary to implement foreign forfeiture, confiscation and other orders made in foreign proceedings in relation to the recovery of proceeds of crime. This statutory scheme overrides, or provides an exception to, the well-established common law rules that overseas orders or judgments of a penal or confiscatory nature
E are not enforceable in this jurisdiction. As Mr Butcher submitted, the statutory scheme provides for extensive safeguards to protect the position of persons and assets affected by any order sought. The applicant for a prohibition or a recovery order can only be a UK enforcement authority, which has a discretion as to whether to make any such application, and, if so, in what terms: see for example article 141E of Part 4A of the 2005 Order.
F The mere fact that an external request has been made by a foreign authority does not predicate that any such application will in fact be made by a UK enforcement authority. The High Court itself has a broad discretion as to whether to make a prohibition order: see articles 141C and 141D. The 2005 Order stipulates certain situations in which the High Court is not entitled to make a prohibition order in respect of relevant property: see for
G example article 141F. In the present case, given the existence of the settlement agreement, article 141F(3) might theoretically have been brought into play to prevent any such order being made. Importantly, article 141N confers an absolute right on a person whose property is subject to a prohibition order to apply to the High Court for compensation, in circumstances where a property ceases to be subject to a prohibition order, and gives the High Court a discretionary power to require the UK
H enforcement authority which obtained the prohibition order to pay compensation.

86 In my judgment any attempt by a foreign authority to circumvent the detailed statutory scheme of POCA and the 2005 Order, with its relevant constraints and restrictions, and to apply off its own back for relief under

section 25 of the 1982 Act, cannot be regarded as within the intended statutory purpose of that section. That is particularly so in circumstances where the foreign authority declines to give any cross undertaking in damages.

87 Accordingly I conclude that the judge made an error of law in concluding that it was "not inexpedient" for an order to be made under the section. It was not simply a matter for his discretion. On any basis, given the absence of any jurisdiction justifying the making of a freezing order to support the US proceedings, other than that purportedly conferred by section 25, it was in my judgment clearly inexpedient for an order to be made pursuant to that section in circumstances where not only were there no proposed proceedings under Part 4A of the 2005 Order, but the UK enforcement authorities had expressly stated that they were not prepared to make an application for a prohibition order under Part 4A. Indeed in my view, although the situation does not arise in this case, even if the UK enforcement authorities had not, as at the date of the section 25 application, made up their minds whether to apply for a prohibition order under Part 4A, it would still be inexpedient to make an order under this section to preserve the status quo. The statutory scheme clearly confers the power and the discretion to apply for a freezing order on the UK enforcement authorities.

Disposition

88 For the above reasons, I would allow the appeal and discharge the freezing injunction.

BEATSON LJ

89 I agree.

SIR COLIN RIMER

90 I also agree.

Appeal allowed.

KEN MYDEEN, Barrister

WEST v. SHARP

COURT OF APPEAL (Mummery L.J. and Colman J.): April 29, 1999

Real property—Easements—Express grant of right of way—Extent of right of way—Whether interference with right—Whether equitable remedies and/or damages available—Whether interference substantial

The first plaintiff owned a cottage in which she had lived with her husband, the second plaintiff, since 1961. A roadway ran along the south side of the cottage on land owned by the defendant and joined the public highway. A 1935 conveyance of the site of the cottage contained an express grant of a right of way for the purchaser and her successors in title "over and along the piece of land marked 'reserved for road' on the said plan and thereon coloured brown". The plan attached to the conveyance showed a 40 feet wide strip of land coloured brown which had printed on it "reserved for road". Until 1972 there was a defined cart track to the south of the cottage which did not occupy the whole width of the brown strip. In 1972 the defendant, at his own expense and without objection, put a tarmacadam surface about 13 feet wide on top of the hard core track. He resurfaced it in 1980 and in 1994 at his own expense. In 1972 he also put tree stumps and logs on the side of the road. He replaced these in 1975 with concrete blocks along the length of both sides of the road. The concrete blocks did not prevent access to the rear of the cottage and the road was wide enough for two vehicles to pass one another. In 1988 the plaintiffs opened an 11 feet wide entrance-way in the hedge along the south side of the cottage to create a rear entrance to a hard standing on their property for the parking of a vehicle, to be accessed via the tarmacadamed road. They removed some of the concrete blocks which would otherwise have obstructed the entrance. In 1996 the defendant lopped the trees on either side of the road causing an obstruction to the road and the plaintiffs' access for about 36 hours. The plaintiffs sought an order that the defendant remove the trees, which obstructed convenient access to the rear of their property, and the concrete blocks. They also sought an injunction forbidding the defendant from placing obstructions or doing any act which might hinder or obstruct their access to the right of way adjoining the south side of their property, and damages. They argued that turning vehicles into and manoeuvring them out of the area of hard standing was obstructed. Mr Recorder S.R. Page concluded that on the construction of the 1935 conveyance, the plaintiffs had a right to way over the whole 40 feet width of the brown strip. It was not, however, a proper case for the award of an injunction or damages since there was no substantial interference with the plaintiffs' right of way by the presence of the trees or the concrete blocks or by the tree cutting. On appeal and cross-appeal to the Court of Appeal:

Held, dismissing the appeal and the cross-appeal, that: (i) the judge correctly construed the grant in the 1935 conveyance. In the ordinary, natural meaning of the language, the right of way was over the land coloured brown shown on the plan annexed to the conveyance. It was not limited either by the language of the grant or by the plan itself to a track which happened to exist on the brown strip at the time of the grant or to a road subsequently constructed within the brown strip; (ii) the judge's conclusion that the interference was not such as to justify the granting of an injunction or the making of an award of damages, was a matter of fact and degree which was justified by the evidence. The judge was entitled to find that there was no substantial interference with the plaintiffs' right of way, eitherby the permanent narrowing of the road by the tarmacadamed width of 13 feet or by the presence opposite the entrance to the plaintiffs' property of a sycamore tree and the concrete blocks; (iii) there was no evidence adduced of damage and in particular no suggestion

that the cottage had been reduced in value as a result of the actions of the defendant in relation to the plaintiffs' right of way.

Cases referred to:

(1) *Celsteel Ltd v. Alton House Holdings Ltd* [1986] 1 W.L.R. 512; [1986] 1 All E.R. 608; (1986) 130 S.J. 204; (1986) 83 L.S.Gaz. 700, CA; [1985] 1 W.L.R. 204; [1982] 2 All E.R. 562; (1985) 49 P. & C.R. 165; (1985) 129 S.J. 115; (1985) 82 L.S.Gaz. 1168.

(2) *Keefe v. Amor* [1965] 1 Q.B. 334; [1964] 3 W.L.R. 183; [1964] 2 All E.R. 517; 108 S.J. 334, C.A.

Appeal by the plaintiffs, Anneliese Kathe West and Harry William West, from an order of Mr Recorder S.R. Page sitting in the Lewes County Court made on August 15, 1997 whereby he dismissed their claims for injunctions and for damages for interference with a right of way by the defendant, Peter Llewelyn Sharp. The defendant cross-appealed on the physical extent of the right of way to which, on the construction of the relevant grant contained in a conveyance dated August 22, 1935, the learned judge found that the plaintiffs were entitled. The facts are stated in the judgment of Mummery L.J.

Paul Rogers for the appellants.
Christopher Wilson for the respondent.

MUMMERY L.J.:

Introduction

This is an appeal against the order of Mr Recorder Page made on August 15, 1997. He dismissed the claims of the plaintiffs, Mr and Mrs West, for injunctions and for damages for interference with a right of way. He ordered the plaintiffs to pay 75 per cent of the costs of the defendant, Mr Peter Sharp.

On October 22, 1997 Mr and Mrs West lodged a notice of appeal in which they asked this court to make a mandatory order forthwith requiring Mr Sharp to remove trees and concrete blocks from the right of way and for a negative injunction restraining him from committing certain acts of obstruction to the right of way in dispute, alternatively for damages to be assessed.

Mr Sharp seeks leave to serve out of time a cross-appeal against the recorder's decision on the physical extent of the right of way to which, on the construction of the relevant grant, the recorder found that Mr and Mrs West were entitled. Mr Sharp's contention in the proposed cross-appeal is that the right of way is now limited to a roadway constructed by him on a piece of land marked "reserved for road" on the plan annexed to the express grant of the easement.

On the application to extend the time for cross-appealing, we considered the affidavit sworn by Mr Sharp's solicitor and the skeleton argument by Mr Wilson as to why leave should be granted. We were satisfied that this is a case in which we should extend the time for the cross-appeal.

The Factual Background

The factual background to this very unfortunate litigation is this. Mrs West, the first named plaintiff, is the owner of freehold property at Juggs Corner Cottage, Kingston, Lewes in East Sussex ("the cottage"). She and her husband have lived there since 1961. Her husband is her co-plaintiff. Mr Sharp, the defendant, is a now retired fruit farmer of Castlemer Fruit Farm,

Ashcombe Lane, Kingston. A roadway runs along the south side of the cottage on land owned by Mr Sharp and joins the public highway at Ashcombe Lane.

Mr and Mrs West claim a right of way on Mr Sharp's land, including the tarmac road which is now there, according to the terms of a conveyance of the site of the cottage on August 22, 1935 to ther predecessors in title. The cottage in which Mr and Mrs West live was built on the built on the site in about 1960.

At the centre of this dispute is the express grant, the terms of which I quote from the 1935 conveyance:

> "TOGETHER WITH full right and liberty for the purchaser and her successors in title owners for the time being of the said plot of land and all other persons authorised by her or them from time to time and at all times hereafter and for all purposes to pass and repass with or without horses cattle carts carriages motor cars and other vehicles over and along the piece of land marked 'reserved for road' on the said plan and thereon coloured brown on paying a proportionate part (to be settled by arbitration in case of dispute) of the expense of keeping the said roadway in repair."

The plan attached to the conveyance shows the site of the plot of land conveyed on which the cottage now stands. It also shows to the south, a 40 feet strip of land coloured brown throughout. It has printed on it in capital letters "reserved for road".

Until 1972 there was a defined cart track to the south of the cottage. It did not occupy the whole width of the strip coloured brown. There were trees growing to the side of the track. In 1972 Mr Sharp, at his own expense and without objection, put a tarmacadam surface about 13 feet wide on the top of the hard core track. He resurfaced it in 1980, and again in 1994, at his own expense.

In 1972 he put tree stumps and logs on the side of the road. In 1975 he replaced them with concrete blocks along the length of both sides of the road. His case was that he did this to prevent parking on the grass verges and for the protection of gas and water services lying shallowly underneath the surface of the road. The concrete blocks did not prevent access to the rear of the cottage. The road was wide enough for two vehicles to pass one another without difficulty.

In 1988 Mr and Mrs West opened an 11 feet wide entrance way in the hedge along the south side of the cottage. They did this to create a rear entrance to a hard standing on their property for the parking of a vehicle. That vehicle would gain access from Ashcombe Lane along the tarmacadamed road. Mr and Mrs West cut down part of the hedge. At the same time they removed some concrete blocks from the entrance way which, if they had remained in position, would have obstructed the entrance created on to their property. This was the first time that Mr and Mrs West used the road for vehicular access.

In 1996 Mr Sharp, without prior written notice to Mr and Mrs West, lopped and cut branches from the trees on either side of the road. This caused an obstruction to the road and the upper access to Mr and Mrs West's land for a period of about 36 hours.

On July 22, 1996 Mr and Mrs West began legal proceedings against Mr Sharp in the Lewes County Court. In the amended particulars of claim they

sought an order that Mr Sharp forthwith remove the trees, which obstructed convenient access to the rear of their property, and the concrete blocks. They also sought an injunction forbidding Mr Sharp from placing obstructions or doing any act whereby they or their licensees, agents or visitors might be hindered or obstructed from entering or leaving the right of way adjoining the south side of their property, with or without vehicles, or doing any other acts interfering with the enjoyment of their rights. They also claimed damages and costs.

I should mention that Mr and Mrs West have never at any time made any contribution to the cost of constructing or repairing the surface of the road. It is accepted by Mr Rogers, on their behalf, that they are potentially liable to make a contribution to the cost of repairing the road in accordance with the terms of the 1935 conveyance. But it is common ground that the issue of contribution to cost does not arise in these proceedings, since there has never been any demand for a liquidated sum or a proportion by way of contribution and, consequently, no refusal.

The Judgment

The trial took place before the recorder over two days on July 22 and 23, 1997. This court has been provided with a transcript of evidence given by Mr West, by Mr Sharp and by a Mr Hicks. In his reserved judgment the recorder came to the following conclusions.

First, Mr and Mrs West had a right of way which extended to the whole of the 40 feet width of the brown strip. He arrived at that conclusion on the construction of the unambiguous terms of the 1935 conveyance, taking account of the fact that, at the time of the conveyance, no tarmacadamed road was in existence—only a farm track. He held that the expression "the said roadway" in the part of the grant quoted was not a reference to an existing cart track. He rejected the contention made on behalf of Mr Sharp that the right of way was limited to any road actually constructed on the brown strip. In his view the expression written on the plan "reserved for road" was merely one of identification.

Secondly, he concluded that it was not a proper case for the award of an injunction or damages, since there was no substantial interference with the Wests' right of way by the presence of the trees or the concrete blocks. He further held that there had been no substantial interference caused by the tree cutting, which only had short-term effects for the 36 hours that I have mentioned.

There is an appeal and a cross-appeal against that judgment.

Before coming to the appeal, I should say this. The parties have spent an estimated £10,000 each on legal costs in order to produce a situation which is not accepted by either side. Although Mr and Mrs West have a decision in their favour on the construction and the extent of the right of way, that has not helped them to secure what they really want, which is a larger area opposite the entrance to their property at the rear to enable them to turn into and gain access from their property without three-point turns or other inconvenient manoeuvres. Mr Sharp has not got what he wants, because he continues to object to a construction of the 1935 conveyance which would give Mr and Mrs West a right of way over an area of land greater than the 13 feet wide tarmacadamed road.

The Appeal

In those circumstances Mr and Mrs West seek on this appeal to secure some practical remedy, either in the form of an injunction or damages, for the obstruction of the right of way which the recorder found they were entitled to exercise. They seek to achieve this by an enlargement of the turning area outside the entrance to the rear of the cottage giving access to the hard standing for the parking of a vehicle.

The Cross-Appeal

Mr Sharp, in his cross-appeal, seeks to restrict the right of way to a narrower extent than that which the judge held was subject to the easement of way.

The Wests' Submissions

In summary, the submission made by Mr Rogers, on behalf of the Wests, is as follows:

On the question of the construction of the grant, the judge was right and the cross-appeal should be dismissed. In its natural and ordinary meaning, the grant extended over the whole of the 40 feet strip and not over a restricted portion of it. The second point is that the narrowing of the strip by the tarmacadamed road of 13 feet wide is in itself an actionable and substantial interference with their right of way since the use of it by vehicles, by them or by their visitors, is substantially and permanently reduced to only a part of the brown strip. They do not seek a remedy in respect of the whole length of the roadway.

The point made by Mr Rogers is that the permanent narrowing of the way to a metalled road for vehicles has not left a sufficient area for reasonable use of the way for the purposes of gaining access to the rear of the cottage and to the hard standing. Mr Rogers pointed to the unchallenged evidence of Mr West and Mr Hicks about the difficulties of manoeuvring from the roadway to the rear of the cottage, both forward and reversing. Access would be improved if the court ordered the removal of the concrete blocks and the sycamore tree opposite the entrance way.

Mr Sharp's Submissions

On behalf of Mr Sharp, Mr Wilson's submissions may be summarised as follows:

First, on the question of construction, the recorder was wrong in his conclusion about the extent of the right of way. The right of way is in fact now limited to the road subsquently constructed by Mr Sharp on the brown strip. The parties could not have contemplated a roadway 40 feet wide serving the properties. Ashcombe Lane is not and was not ever that wide.

Mr Wilson focused on the words "the said roadway". He pointed out that the conveyance referred to the brown land as "reserved for road". It did not refer to any part of the brown strip as a roadway. The expression "the said roadway" could only refer, not to any roadway that was to be constructed in the future, but to an existing roadway, that is to the cart track. The rights that were granted of passing and repassing were over that track, whatever position it was in at any time within the 40 feet strip. When it was made up into a road, as it was by Mr Sharp in 1972, the right of passing and repassing would be over that metalled road.

He pointed out that the right of way was subject to the payment of the repair costs and the exercise of the right of way was conditional on contributions to repair. It cannot have been reasonably contemplated that, even after the road had been constructed by Mr Sharp, Mr and Mrs West as grantees would be entitled to use any part of the remainder of the brown strip for the passage of cars and vehicles. Mr Wilson submitted that the cross-appeal should be allowed.

As for Mr and Mrs West's appeal in relation to the obstruction of their right of way, he relied on the reasoning of the judge. The judge's conclusion was on a matter of fact and degree with which this court should not interfere. The judge concluded that Mr Sharp's activities did not substantially interfere with Mr and Mrs West's use of the roadway as for the time being was reasonably required. Neither the trees nor the concrete blocks created an interference with access, to and egress from, the cottage substantial enough to give rise to a cause of action for infringement of the right. Having to manoeuvre backwards and forwards out of the parking space in consequence of the blocks and trees and having to perform a U-turn in order to get out was not a substantial interference with the easement. The judge was entitled, in the exercise of his discretion, to refuse to grant the equitable remedy of an injunction. He was entitled to decline to make any award of damages.

The Legal Principles

In considering the rival arguments, I would have regard to the following legal principles. I do not believe that they are in dispute.

(1) *The principles governing the construction of an express grant*
The nature and extent of a right of way created by an express grant depends on the language of the deed of grant, construed in the context of the circumstances surrounding its execution, including the nature of the place over which the right was granted. But a right of way expressly granted is not necessarily limited by the physical characteristics of the site of the easement at the time of the grant. This is borne out by *Keefe v. Amor* [1965] 1 Q.B. 334, where it was recognised by Russell L.J. that the language of the grant may be such that the topographical circumstances cannot properly be regarded as restricting the scope of the grant according to the language of it.

(2) *The principles governing infringement of easements*
Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him. Authority for that is to be found in the judgment

of Russell L.J. in *Keefe v. Amor* [1965] 1 Q.B. 334 at 347. As Scott J. held in *Celsteel Ltd v. Alton House Ltd* [1985] 1 W.L.R. 204 at 217:

> "There emerge from the three cases I have cited two criteria relevant to the question whether a particular interference with a right of way is actionable. The interference will be actionable if it is substantial. And it will not be substantial if it does not interfere with the reasonable use of the right of way."

(3) *Remedy*
An injunction, which was sought by Mr and Mrs West at trial and is sought in the notice of appeal, is a discretionary equitable remedy available only in cases where it is just to grant it. It is not usually granted in cases of trivial or temporary infringements or in cases where there is no continuing interference or threat of interference with enjoyment or in cases where damages would be an adequate remedy. It is only granted if there is a substantial interference such as to justify the intervention of equity.

(4) *Damages as a remedy*
Wrongful interference with an easement is a nuisance. Although actual damage does not have to be proved, in fact damages are not awarded unless there has been a substantial interference with enjoyment.

Conclusions

Applying those principles to the facts of the case and having regard to the helpful submissions by Mr Wilson and Mr Rogers, I have come to these conclusions on this appeal.

I would dismiss the appeal and I would dismiss the cross-appeal. My conclusions on each of the issues are as follows.

1. *Construction: the existence and extent of the right of way*

In my judgment the judge correctly construed the grant in the 1935 conveyance. In the ordinary, natural meaning of the language, the right of way is over the land coloured brown shown on the plan annexed to the conveyance. It is not limited either by language of the grant or by the plan itself to a track which happened to exist on the brown strip at the time of the grant or to a road subsquently constructed within the brown strip.

Mr Wilson's submission involves substantially rewriting the grant so as to give no effect to the words in the grant that refer to the brown strip and to the plan. He would have it that the right was only along the track existing at the time or the road to be constructed at a later time. That is not what the grant says and it is not what it means.

2. *Substantial interference*

The judge came to the conclusion that the interference was not such as to justify the granting of an injunction or the making of an award of damages. In my view his conclusion is a matter of fact and degree which was justified by the evidence.

The facts that have most influence on me are these: The 13 feet wide tarmacadamed road has been there since 1972; no objection was taken to the

construction of the metalled road of that width; the trees have been there for a long period, growing on either side of the roadway; the concrete blocks along both sides of the road were there from 1975; neither the width of the road nor the presence of the concrete blocks impeded the *passage* of vehicles—two vehicles could pass one another without difficulty.

It was in this existing state of affairs that in 1988 Mr and Mrs West made their 11 feet wide opening in the hedge on to the road. They chose to make it of that width. They opened it on to the road in order to obtain access to, and egress from, their land. From 1988 until 1996, when they started the legal proceedings, they did use the road with a vehicle for the purposes of gaining access and egress to the rear of the cottage. It might be easier for them to drive in an out of the hard standing if there was a wider turning area at the point on the road opposite the gap in the hedge. It would be easier for them to do these things if the tree was pulled up and the concrete blocks were removed. But that is not the same as establishing by evidence that there was an actionable obstruction, for which Mr Sharp would be held responsible, occasioning a substantial interference with their right of way. It does not follow from the width of the tarmac road being narrower than the 40 feet strip that there is some actionale interference with their right of way.

Mr Rogers relied heavily on the application by Scott J. of the legal principles to the facts of the case in *Celsteel Ltd v. Alton House Ltd* [1985] 1 W.L.R. 204. Mr Rogers referred, in particular, to passages in the judgment at pages 217 and 218, in particular the passage at page 218 to the effect that the permanent narrowing in that case of a rear driveway to a block of 54 flats could not be said to leave that driveway as convenient for the reasonable use of the plaintiffs as it was before the reduction of width. I agree with Mr Wilson that, while that case enunciates a principle that applies to this case, it is distinguishable from the facts of this case. I would particularly emphasise the matters which I have already mentioned as to the circumstances in which Mr and Mrs West made the opening in the hedge into their property in 1988 and to the time between 1988 and this institution of the proceedings in which they have been able to exercise their right of way. I conclude that the judge was entitled to find that there was no substantial interference with Mr and Mrs West's right of way, either by the permanent narrowing of the road by the tarmacadamed width of 13 feet or by the presence opposite the entrance to their property of the sycamore tree and the concrete blocks.

3. *Damages*

As for damages, it does not appear from any of the material that was before the judge that nay evidence was adduced of damage. In particular, there was no suggestion that the cottage had been reduced in value as a result of the actions of Mr Sharp in relation to the Wests' right of way. I have to say that, on the material I have seen, what Mr Sharp has done at his own expense must have increased rather than reduced the value of the Wests' property.

It is of course an unfortunate feature of this case, and of many other cases of this kind, that there is such bad feeling between these neighbours. The court can do nothing about that. Colman J. and I suggested at the opening of this appeal that it seemed eminently a case for alternative dispute resolution, where, by the help of a third party, the parties could arrive at a far more satisfactory decision than could any court adjudicating on their strict legal rights. This suggestion was not taken up.

I hope that, after the institution of new rules of civil procedure at the

beginning of this week, a case management conference at an early stage would prevent litigation of this kind wasting the money of the parties without any satisfactory outcome.

I would dismiss the appeal and dismiss the cross-appeal.

COLMAN J.: I agree with the orders proposed by my Lord for the following reasons.

First, as to the construction issue, it is argued that the effect of the condition as to contributing to the expense of keeping "the said roadway in repair" was to indicate that the reservation of the grant was confined to the existing track and to any road subsequently built in substitution for it. The obvious intention would be accurately expressed if the words were "the track or road across the piece of land marked brown". I am unable to accept the submission that the effect of the words of the grant was to delineate that part of the servient tenement over which the right of way was granted. Quite clearly, if the intention had been to restrict the delineation to the confines of the track or subsequent road, the grant would have so stated. Even given that a track may move about in the countryside before any metalled road has been laid down, it could be expected that, if a grant were so confined, it would have delineated the right of way by reference to the line of the track or road, wherever it might from time to time be located within a designated area. This is not what the conveyance provided.

As to the availability of remedies to protect the right so granted, although, as I have said, the location of the ground over which the right of way was granted was defined by reference to the 40 feet wide strip coloured brown on the plan, the intervention of the court could not be invoked unles the owner of the servient tenement interfered with the reasonable use of the right of way in all the circumstances. The principle is neatly expressed in the judgment of Scott J. in *Celsteel Ltd v. Alton House Ltd* [1985] 1 W.L.R. 204 at page 217B–C. This is conveniently expressed as a "substantial interference" in a right of way. This is only another way, however, of indicating a situation in which, having regard to the scope of the right granted, the conduct of the owner of the servient tenement would in all the circumstances justify the equitable intervention of the court so as to make available a wider means of access. Equally, only if the interference is of a magnitude which is substantial *in this sense* would a remedy be available.

Was there an actionable interference in this case? The problem is one which arises from the difficulty of turning vehicles into and manoeuvring them out of an area of hard standing in the grounds of Mr and Mrs West's house. Access to that is gained through a gap or opening in the hedge from the road. There is no doubt, on the evidence, that cars and a Land Rover can be driven along the road to and from the opening in the hedge. There is also no doubt that, in order to enter and leave the hard standing area, it is necessary to manoeuvre the vehicle in and out, often by means of a sharp three-point turn. However, this is, on the evidence, not such a difficult problem as to deter the owner of a Land Rover from paying for parking rights on the hard standing.

In the present case, Mr and Mrs West's property was built in about 1960. The metalled road, having its present width, was constructed in 1972, the concrete blocks inserted in 1975 and the road resurfaced in 1980. The hard standing and opening in the hedge were created in 1988, the road was again resurfaced in 1994 and the action was then started in July 1996. In these circumstances the proposition that there was a substantial interference in the

right of way from the time when the road was built in 1972 or, at latest, from the time when the concrete blocks were inserted, is nothing short of astonishing.

Apart from the dimension of the road width, there could be nothing which impeded access along the road. On the evidence, cars could pass comfortably within that 13 feet space. Accordingly, it could hardly be said that there was unreasonable interference in the right of way at that time. One could comfortably and safely drive along the metalled road. There is no evidence of any protest by Mr and Mrs West on the ground of the dimensions of the road at any time from 1972 until 1988, when they wished to construct the area of hard standing. That was a period of 16 years. Then in 1998, when they constructed the area of hard standing, they persuaded Mr Sharp to remove one or more concrete blocks which stood between that area and the edge of the metalled road. Mr and Mrs West then made their 11 feet opening in the hedge. Given the width of the road as it then existed, the manoeuvres which a vehicle entering or leaving the hard standing would have to make would be substantially dependent on the width of that opening in the hedge and on the depth of the area of hard standing behind the hedge. Investigation of the plan leads to the very clear conclusion that access to, and exit from, the area of hard standing would have been made far easier and involved far less sharp turnings if the opening had been wider or the depth of the area had been greater.

If, as I have held, there was no substantial interference with the right of way up to 1988, Mr and Mrs West can only be entitled to injunctive relief giving them a wider turning area outside the opening in the hedge by removal of the blocks and the sycamore tree opposite if they can establish that as from 1988 there has been substantial interference with the right of way in the sense that Mr Sharp has done something which since then is an interference with the reasonable use of that right. Mr Sharp, however, has done nothing at all except to maintain the existing surface of the road at his own expense by renovations in 1994. What has changed is the purpose for which Mr and Mrs West require to use the right of way, namely to gain access from the road to their area of hard standing and to the road from that area.

In these circumstances the relevant question is whether Mr Sharp is now unreasonably interfering with that right of way by refusing to widen the road, remove the blocks and cut down the sycamore opposite the opening. In my judgment, such refusal cannot be unreasonable because (1) the road is now, as it has always been since 1972, wide enough for vehicles to pass at any point; (2) there is no evidence of protest at any time prior to 1996; (3) the difficulty of manoeuvring has been largely created by Mr and Mrs West in providing themselves with an insufficiently wide opening and with an insufficiently deep area to facilitate manoeuvring; (4) the magnitude of the manoeuvring difficulty is very far from being more than a routine motoring difficulty; and, finally, (5) Mr and Mrs West have for 17 years enjoyed the benefit of the road without contribution to its construction or its maintenance, and that must have enhanced the value of their property.

In these circumstances there has been no unreasonable interference with the right of way and there is, in my judgment, no basis for the invocation of the court's equitable jurisdiction to grant an injunction as claimed.

MUMMERY L.J.: In those circumstances, the appeal is dismissed and the cross-appeal is dismissed.

Appeal and cross-appeal dismissed. No order as to costs on the appeal or cross-appeal.

Solicitors—Adams & Remers, Lewes; Donne Mileham & Haddock, Lewes.

Reporter—David Stott.

CO/4366/2004,
Neutral Citation Number: [2005] EWHC 1024 (Admin)

IN THE HIGH COURT OF JUSTICE
IN THE QUEENS BENCH DIVISION
(ADMINISTRATIVE COURT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday 27th May, 2005

B e f o r e:

THE HONOURABLE MR JUSTICE OWEN

– – – – – – –

MATTHEW KANSSEN

Claimant

– v –

THE SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS

Defendant

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Stephen Knafler (instructed by The Community Law Partnership) for the Claimant
Jonathan Karas (instructed by Whitehead Vizard) for the Defendant

J U D G M E N T
As Approved by the Court

1. The claimant is a Traveller. Since Easter 2004 he has been camping on Forestry Commission land in Rendlesham Forest, near Woodbridge, Suffolk. According to his witness statement of 10 November 2004, he shares his encampment with 4 others, Alice Futter and her 3 children aged 13, 10 and 2œ. On 18 March 2004 the defendant obtained a possession order in respect of the whole of Rendlesham Forest, and now seeks to enforce the order against the claimant and those living in his encampment. The claimant seeks to challenge the defendant's decision to enforce the possession order.

2. THE FACTUAL BACKGROUND

On 18 March 2004 His Honour Judge Thompson sitting in the Ipswich County Court ordered that the defendants, Persons Unknown, give the Forestry Commission possession of land at Rendlesham Forest and Tunstall Forest, forthwith, possession was recovered on 426 March 2004.

3. The claimant accepts that he was present on the site when the possession order was obtained. He then moved off, but returned to the site as one of a larger group of 6 adults and 7 children in April 2004. On 24 June 2004, Mr Richard Davies, who is employed by the defendant, visited the site. There was one person present to whom he read the following notice:

> *"This is Forestry Commission land and you have no right to be on it. You are in breach of the Forestry Commission Byelaws. I am requesting you on behalf of the Forestry Commission to leave forthwith. If you do not do so the Forestry Commission will take legal action to regain possession."*

4. As a result of Mr Davies' visit to the site, the defendant wrote letters to the Suffolk Coastal District Council and the Suffolk County Council on 5 August 2004 in identical terms. The letters contained the following paragraphs:

> *"Our instructions are that there are, at present, a number of vehicles and an unknown number of people on the site. Our clients have visited the site and given notice to the occupants to leave. Our clients representatives have no training or facilities to determine whether the occupants include any to whom one or other of the humanitarian obligations referred to in DoE Circular 18/94 (as amended) might be relevant.*
>
> *Our clients intend to apply to the court for a possession as soon as reasonably practical because the occupants of the encampment may be causing a nuisance, and in any event are there in breach of Forestry Commission Byelaws and therefore of the criminal law.*

×

In addition to their overall obligation to act in a humane manner to the occupants and generally to follow the advice given in the circular, our clients are also a public authority for the purposes of the Human Rights Act. As such they are bound to take account of the occupant's qualified rights under Article 8 of the European Convention.

As noted above, our clients have no expertise in being able to assess the occupants' needs and conditions nor have they the facilities for discharging any of the duties referred to in Circular 18/94. However in the new ODPM "Guidance on Managing Unauthorised Camping", paragraph 5.10 states:

> *"Because local authorities have appropriate skills and resources to enable them to make (or to co−ordinate) welfare enquiries, it is considered good practice for local authorities to respond positively to requests for assistance in making enquiries from the police or other public bodies."*

We are, therefore, writing to ask you urgently to visit the site to carry out an assessment so that you can fulfil your statutory obligations, if you have any in this particular instance. You will be afforded all reasonable co−operation in visiting the site to carry out your assessment but we must stress the need for you to undertake any visits as soon as possible. ×.

If as the result of your assessment you are of the view that there is anyone on the site to whom you may owe a duty, please notify us. Please specify what the need may be and what action you think our client should take to enable you to discharge your obligations. Please also advise us of any other matters you think may be relevant to our clients' consideration of the question of Article 8 issues."

×

As you may be aware, the occupants of encampments of the type with which this letter is concerned often come and go. It may therefore be that, even if any initial visit by you reveals no−one to whom you might appear to owe a humanitarian duty or to whom the enactments refer to in paragraphs 10 - 13 of Circular 18/94 might apply, people coming on to the site after that visit might be owed such an obligation. Doubtless you will bear this in mind as part of your assessment review and reporting process.

Please acknowledge receipt of this letter as soon as possible and in your reply tell us when you propose to visit.

Alternatively, if you do not intend to undertake any visit or assessment, please tell us why.

Finally, please note that although our clients are anxious to make the appropriate application to the court without delay, they will defer doing so for 7 days from the date of this letter, that is until 12 August 2004 to enable you to respond to this letter."

5. On 19 August 2004 Mr Charles Ashley, who is employed by the defendant as a Land Agent, and who is responsible for the management of Rendlesham Forest, filed a witness statement in the possession action seeking permission to issue a Warrant of Restitution in relation to all of the land covered by the original possession order.

6. On 3 September 2004 the claimant and others received notice from the Ipswich County Court of the execution of a warrant of eviction on 10 September 2004. On the same day solicitors instructed on behalf of the claimant wrote to the defendant asking for information about the case.

7. The defendant's solicitors replied on 6 September 2004 in the following terms:

"This is a possession by way of restitution. We attach a copy of Mr Ashley's statement made in support of the application. You will see that this refers to the usual welfare enquiries having been raised of the local authorities. We confirm that those were done and that no needs were identified. You will be aware, therefore, that the course adopted by our clients is the one that they routinely use under the circumstances which has of course been approved by the courts over time."

8. The claimant's solicitors responded on the same day saying that "× *no welfare enquiries have been carried out in connection with our clients' occupancy of this site* ." They also sought an assurance that their clients would not be evicted from the site. The letter did not identify any specific welfare considerations to be taken into account by the defendant in deciding whether to proceed with the eviction.

9. On 7 September 2004 the defendant's solicitors wrote inter−alia in the following terms:

"As to welfare enquiries, Mr Ashley's statement is clear. The authorities were notified. The only one to have responded has been the Suffolk County Council who have indicated that as the land is not theirs they are not going to make any welfare enquiries. Any complaints your clients may have in that regard, therefore, should be addressed to the County Council and not to our clients. In the state of the law as it is, our

clients have discharged the obligation on them so far as it may exist.

If any of those who you are representing has any particular welfare need it should be made known to us promptly. You will be more than aware of our clients' unvarying practice to try to accommodate genuine welfare needs when dealing with an eviction that practice holds good in this instance. Indeed we believe that our client's representative Mr Davies is already in discussions with the Bailiff on just this point."

10. On 8 September 2004 the claimant's solicitors wrote addressing the issue of welfare enquiries. Its author stated that he did not accept that the defendant's practice of writing to the relevant local authorities, and relying upon them to respond or not as the case may be, was sufficient bearing in mind the government Guidance on Managing Unauthorised Camping issued in February 2004. The letter continued:

> *"It seems clear to me that some pro−active approach must be taken by the Forestry Commission, especially where the local authority or authorities concerned effectively do not respond and do not take any pro−active stance themselves. In terms of this encampment there is a 3 week old baby and there are 6 children at local schools. There are clearly therefore humanitarian considerations that must be taken into account."*

The remainder of the letter was framed so as to comply with the pre−action protocol.

11. On the following day, 8 September, the defendant's solicitor wrote again repeating that *"× if individuals have welfare needs which may justify those people not being evicted now my clients will sympathetically consider their position* ." Later that day there was an exchange of e−mails in which the defendant's solicitors again invited the claimant's solicitors to identify any particular welfare needs that their clients might have, and stating that they would be considered on a case by case basis. The claimant's solicitors response was to file the application for permission to apply for judicial review on the following day, 9 September 2004.

12. On 5 November 2004 the claimant was given permission to apply for judicial review and the eviction stayed pending determination of the application.

13. <u>THE ISSUES</u>

The claimant contends that the defendant acted unlawfully in proceeding with the eviction of those occupying the site. There are two limbs to the challenge, namely the ‘welfare enquiries' issue, and secondly the ‘site provision' issue. It is convenient first to address the second, as it provides the legal context within which to consider the first.

14. THE SITE PROVISION ISSUE

The first and critical issue between the parties is whether the defendant has the legal power to provide temporary or transit sites for travellers. The claimant contends that it does, and that accordingly it has erred in law in failing to consider including provision for travellers in woodland planning and strategy in the erroneous belief that it has no power to do so. The defendant's case is quite simply that on a proper analysis of the relevant statutory provisions, it has no power to do so.

15. THE STATUTORY FRAMEWORK

The Forestry Commission was constituted under the Forestry Acts 1919 - 1945, and continues in existence by virtue of the Forestry Act 1967. A number of the provisions of the 1967 Act are of relevance.

*"**Section 1***

1(2) The Commissioners shall be charged with the general duty of promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products × and in that behalf shall have the powers and duties conferred or imposed on them by this Act.

(3A) In discharging their functions under the Forestry Acts 1967 - 1979 the Commissioners shall, so far as may be consistent with the proper discharge of those functions, endeavour to achieve a reasonable balance between:

(a) the development of afforestation, the management of forests and the production and supply of timber, and

(b) the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interests.

***Section (3) Management of Forestry land**:*

(1) The Commissioners may manage, plant and otherwise use for the purpose of the exercise of their functions under this Act, any land × and

(a) the power of the Commissioners under this sub−section to manage and use any land, shall without prejudice to the generality of that power, include power to erect buildings or execute works on the land ×"

16. Sections 23 and 24 of the Countryside Act 1968 made further provision for the Forestry Commissioners:

23. Provisions of facilities by Forestry Commissioners

(1) The Forestry Commissioners × shall have the powers confirmed on them by this section.

(2) The Commissioners may on any land placed at their disposal × provide, or arrange for or assist in the provision of, tourists, recreational or sporting facilities and any equipment, facilities or works ancillary thereto, including without prejudice to that generality -

(a) accommodation for visitors,

(b) camping sites and caravan sites,

(c) places for meals and refreshments,

(d) picnic places, places for enjoying views, parking spaces, routes for nature studies and footpaths

(e) information and display centres

(f) shops in connection with the aforesaid facilities

(g) public conveniences

24.Amendments of Forestry Act 1967

(1) Without prejudice to the provisions of section 11 of this Act the said Commissioners may, on any land placed at their disposal by the Minister ×

plant, care for and manage trees in the interest of amenity and in section 3(1) of the Forestry Act 1967 (Management of Forestry Land) the reference to the Commissioners' functions under that Act shall include a reference to their functions under this sub section. "

17. Mr Knafler submits on behalf of the claimant that the power to manage land placed at the defendant's disposal under section 3 of the Forestry Act is wide−ranging, and enables it to use land for a variety of purposes, in particular social purposes, provided that such purposes are not incompatible with the overall interests of forestry. He submits that the phrase ‘promoting the interests of forestry' within section 1(2) includes taking account of the legitimate needs of all sections of the community provided they are not incompatible with other forestry objectives.

18. In my judgment the argument is misconceived. The powers of management under section 3 may only be exercised in discharge of the defendant's functions under section 1(2), namely "*the general duty of promoting the interest of forestry, the development of afforestation and the production and supply of timber and other forest products* ." The general duty of promotion of the interests of forestry cannot sensibly be construed as embracing the provision of residential sites for travellers. That is borne out by section 23 of the Countryside Act 1968 which conferred additional powers on the defendant to ‘*provide or arrange for or assist in the provision of tourist, recreational or sporting facilities* ×' If sections 1 and 3 of the 1967 Act were to be construed in the manner for which the claimant contends, section 23 of the Countryside Act would have been unnecessary. Mr Knafler sought to meet that argument by submitting that section 23 was a provision inserted for the avoidance of doubt. That argument is unsustainable given that section 23(1) expressly provides that "*the forestry commissioners × shall have the powers conferred on them by this section* ."

19. It follows that in my judgment the defendant has no power to provide residential sites for travellers on land placed at its disposal, and the claimant must fail on the ‘site provision' issue.

20. THE WELFARE ENQUIRIES ISSUE

The first point to be made is that Mr Knafler acknowledged on behalf of the claimant that I am bound by the decision of the Court of Appeal in *Price & Others v Leeds City Council* Neutral Citation [2005] EWCA Civ 389, in which the court held that where a public authority demonstrates that it has an absolute right to possession of land, a defendant cannot raise by way of defence to an action for an order for possession of that land a plea that the obtaining of possession will infringe his rights under Article 8 of the ECHR. He simply reserved his position should the decision be reversed on appeal to the House of Lords.

21. The claimant contends that the defendant acted unlawfully in deciding to enforce the possession order in that it failed to enquire into the welfare of the travellers occupying the site in question.

22. The contention is based upon the following propositions:

a) The defendant had a discretion as to whether to seek to recover possession of the land or to defer eviction.

b) As a public body the defendant was under a common law duty to act with common humanity towards trespassers.

c) The welfare of the travellers was a consideration material to the decision to seek to recover possession by evicting them from the land, and therefore a consideration that the defendant was obliged to take into account in arriving at its decision.

d) Discharge of the duties at (b) and (c) above required the defendant to enquire into the welfare of travellers before evicting them as trespassers.

e) Compliance with the government policy set out in Guidance on Managing Unauthorised Camping February 2004, required the defendant to enquire into the welfare of travellers before evicting them as trespassers.

23. The first 3 propositions are not in issue. Propositions (d) and (e) are. It is convenient first to consider (e), the effect of the 2004 guidance, not least because it purports to give general guidance as to the effect of decisions by the courts as to the welfare enquiries to be taken by public authorities when making decisions to take action against unauthorised encampments.

24. <u>GUIDANCE ON MANAGING UNAUTHORISED CAMPING</u>

The guidance was issued by the office of the Deputy Prime Minister in February 2004; and it is accepted on behalf of the defendant that the policy that it contains was a material consideration when making the decision under challenge. The issue between the parties is whether compliance with the guidance required the defendant to take positive steps to enquire into the welfare of the travellers before taking steps leading to their eviction.

25. The overall objective of the guidance is *"× to assist local authorities, police and others to tackle unauthorised camping to minimise the disruption it can cause."* (para 1.4)

26. Paragraph 1.5 provides that:

> *"1.5 The Guidance is primarily aimed at local authorities and police who share responsibility for managing unauthorised camping, but will also be relevant to all bodies likely to be involved in partnership approaches. While the Guidance is advisory, local authorities and police are strongly advised to bear it in mind when devising and implementing their approaches, and are reminded that the courts may consider it as a material consideration in eviction or other enforcement decisions."*

27. The guidance as to welfare enquiries is contained in paragraphs 5.7 - 5.10:

> *"5.7. Local authorities may have obligations towards unauthorised campers under the legislation (mainly regarding children, homelessness and education). Authorities should liaise with other local authorities; health and welfare services who might have responsibilities towards the families of unauthorised campers. Some form of effective welfare enquiry is necessary to identify whether needs exist which might trigger these duties or necessitate the involvement of other sectors, including the voluntary sector, to help resolve issues. The police and other public bodies who might be involved in dealing with unauthorised encampments do not have comparable duties but must still, as public servants, show common humanity to those they meet.*
>
> *5.8. The Human Rights Act (HRA) applies to all public authorities including local authorities (including town and parish councils), police, public bodies and the courts. With regard to eviction, the issue that must be determined is whether the interference with Gypsy/Traveller family life and home is justified and proportionate. Any particular welfare needs experienced by unauthorised campers are material in reaching a balanced and proportionate decision. The Human Rights of members of the settled community are also material if an authority fails to act to curb nuisance from an encampment.*
>
> *5.9. Case law is still developing with regard to the sorts of welfare enquiries, which the courts consider necessary to properly taken decisions in relation to actions against unauthorised encampments. Cases are testing the requirements under different powers, and the requirements placed on different agencies (authorities, police, and other*

public landowners). Very generally, court decisions to date suggest:

- *All public authorities need to be able to demonstrate that they have taken into consideration any welfare needs of unauthorised campers prior to making a decision to evict.*

- *The courts recognise that the police and other public bodies have different resources and welfare duties from local authorities. Generally the extent and detail of appropriate enquiries is less for police and non−local authority 'public authorities'.*

- *In the case of local authorities, the onus of making welfare enquiries appears to be greater when using Criminal Justice and Public Order Act 1994 s.77, where the use of the section can result in criminal sanctions, then when using landowners' civil powers against trespass. Local authorities should however, make thorough welfare enquiries whatever powers they intend to use.*

5.10. Because local authorities have appropriate skills and resources to enable them to make (or to co−ordinate) welfare enquiries, it is considered good practice for local authorities to respond positively to requests for assistance in making enquiries from the police or other public bodies."

28. The Guidance contains express reference to the defendant at paragraph 6.14:

> *"6.14. Several government bodies are major landowners and their land may be subject to unauthorised encampment - examples include the Forestry Commission and the Highways Agency. Public bodies should ask local authorities to assist with welfare enquiries and local authority should be prepared to help with these."*

29. Finally Annexe E identifies the defendant as a major landowner in some areas which may be affected by unauthorised camping, and as one of the parties to be involved in the development of a strategy for unauthorised camping; but it is the local authority that should lead the development of such strategy. It is common ground that no such strategy has yet been developed by the local authorities involved in this case.

30. There are a number of points to be made about the Guidance. First it is directed principally at local authorities which have statutory powers and duties with regard to housing, and the welfare and education of children. Secondly the guidance acknowledges that, in contrast to public bodies that do not have such statutory powers and duties, local authorities have the appropriate skills and resources to make

enquiries into welfare needs. In consequence *"the extent and detail of appropriate enquiries"* is less for bodies such as the defendant than for local authorities. Thirdly public bodies such as the defendant are advised to seek assistance in making enquiries from local authorities; and the guidance states that it is good practice for local authorities to respond positively to such requests.

31. The defendant is concerned with forestry. It has no statutory duties with regard to welfare, nor does it have the expertise or resources to make an assessment of welfare needs. In those circumstances compliance with the Guidance did not require the defendant itself to undertake welfare enquiries. The claimant has not demonstrated that the defendant failed to follow the policy contained in the Guidelines.

32. I therefore turn to proposition (d). The issue between the parties can be simply stated. The claimant contends that the defendant was under a duty to make enquiries into the welfare of the travellers before deciding to evict them. The defendant submits that the defendant was obliged to take account of welfare considerations before making such a decision, but that it was not under a positive duty to carry out such enquiries, nor to take steps to ensure that they were carried out by others on its behalf.

33. The claimant submits that the defendant cannot take any or any proper account of welfare considerations unless it either carries out enquiries into the circumstances of the travellers, or satisfies itself that such enquiries have been carried out by others, who have relayed any relevant information. He seeks to place reliance on the decision of Sedley J, as he then was, in *R v Lincolnshire County Council & Wealden District Council ex parte Atkinson & Others (1996) 8 Admin LR 529*. The respondent local authorities had purported to give removal directions under the Criminal Justice and Public Order Act 1994 to the applicants, who were unlawfully camped on land in their localities, and had obtained removal orders from magistrates against those remaining. Enquiries about the circumstances of those encamped on the land had only occurred after removal directions were issued in one set of cases, and after the removal orders had been made by magistrates in the other. Sedley J held that the local authorities were under a duty to take reasonable steps to acquaint themselves with the relevant information, namely the situation and possible needs of the persons to be covered by the removal direction, before deciding to make the decisions in issue. At 543C he found:

> *"By the date when it gave a removal direction under s.77(1) Lincolnshire County Council had undertaken no meaningful enquiries whatever into the situation and possible needs of the persons to whom the intended direction would apply. At that stage, therefore, it had failed in its elementary duty to 'reasonable steps to acquaint [itself] with the relevant information' (per Lord Diplock Secretary of State for Education v Tameside MBC [1977] AC 1014, 1065). "*

34. But the position of the defendant cannot be equated with that of the local authorities in *Atkinson*. As the defendant's solicitors pointed out in their letters to the local

authorities, the defendant has no statutory duties with regard to welfare, and no expertise in assessing welfare needs, whereas a local authority has statutory duties with regard to housing, and the education and welfare of children, and has the expertise necessary for the proper exercise of discharge of such duties. As Turner J. observed in *R v Minister of Agriculture Fisheries & Food, ex p. Callaghan 32 HLR8 at 11* :

> *"It is, of course, elementary in the nature of the considerations in play in the present case that there is an obvious distinction between local authorities, on the one hand, who have powers and duties conferred upon them by acts of Parliament in the fields of education, housing, and children and welfare. I do not intend that to be an exhaustive list but merely to highlight the statutory position of local authorities when contrasted with that of a private owner of land, albeit who may be a government department, who has no such statutory powers let alone statutory duties."*

35. It is well established that, as the author of Judicial Review Handbook 4th ed puts it 51.1 "*A public body has a basic duty to take reasonable steps to acquaint itself with relevant material."* Secondly, and as Laws LJ held in *R (Khatun) v London Borough of Newham [2004] EWCA Civ 55, [2004] 3 WLR 417, "it is for the decision−maker and not the court, subject×to Wednesbury review, to decide upon the manner and intensity of enquiry to be undertaken into any relevant factor accepted or demonstrated as such".* Laws LJ derived support for that proposition from the judgment of Schiemann LJ in *R v Nottingham City Council, Ex p Costello (1989) 21 HLR 301,* a housing case in which he said at 309 -

> *"In my view the court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient."*

Laws LJ found further authoritative support for that approach in *R v Kensington and Chelsea Royal London Borough Council, Ex p Bayani (1990) 22 HLR 406,* another housing case in which Neill LJ said at p 415 −

> *"The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable housing authority could have been satisfied on the basis of the inquiries made."*

36. Each of the above decisions concerned housing authorities, but the principle applies equally to the defendant. This court should only intervene if the course adopted by the defendant before taking the decision to enforce the order for possession was in all the circumstances 'Wednesbury' unreasonable.

37. Secondly I agree with Sedley J as he then was in *Atkinson (see p549 D−E)* that having taken the decision the defendant was obliged to keep the situation of those affected by its decision under review. If further relevant information was brought to its attention, it was obliged to take such information into account in deciding whether to continue with the enforcement action.

38. The defendant's letters to the local authorities by which it sought their assistance were admirably clear and comprehensive. Such requests for assistance were the obvious and appropriate means by which the defendant could acquaint itself of any material welfare considerations. They also served to alert the local authorities to the fact that eviction of the travellers might give rise to duties on their part. The steps taken by the defendant to acquaint itself with the relevant material were reasonable.

39. But the question that then arises is whether a reasonable public body in the position of the defendant ought to have taken any further steps in the light of the failure on the part of Suffolk Coastal District Council to respond to the letter, and the negative response from the Suffolk County Council.

40. As has already been observed, the defendant had neither the expertise nor the resources to carry out welfare enquiries. It had alerted the appropriate authorities to the possibility that there might be those to whom they owed statutory duties. There was no reason to doubt that if any such statutory duties to the travellers arose on their eviction from the site, they would be discharged by the relevant authority. In those circumstances I am not persuaded that the defendant acted 'Wednesbury' unreasonably in not embarking upon further enquiries of its own, or in instructing others to make such enquiries on its behalf.

41. Finally I am satisfied that in discharge of its obligation to keep the situation under review, and as is clear from the correspondence with the claimant's solicitors, the defendant would have given fresh consideration to the enforcement of the order for possession, had those acting for the claimant brought any specific welfare considerations to their attention. I do not consider that the reference to there being a 3 week old baby and 6 children at local schools in the letter dated 8 September 2004 was of itself sufficient to give rise to a duty to reconsider the position.

42. It follows that in my judgment the defendant's decision of 24 June 2004, and their continuing decision to take possession of Rendlesham Forest was not unlawful. The application therefore fails.

Neutral Citation Number: [2022] EWHC 1010 (QB)

Case No: QB-2021-004465

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 28/03/2022

Before:

THE HONOURABLE MR. JUSTICE LINDEN

- -

Between:

HIGH SPEED TWO LIMITED

Claimant

- and -

(1) LARCH MAXEY
(2) DANIEL HOOPER
(3) ISLA SANDFORD
(4) JULIET STEVENSON-CLARK BETHANY COOKE

Defendants

- -

- -

MR. MICHAEL FRY & MR. JONATHAN WELCH for the **Claimants**
MR. TIM JAMES-MATTHEWS for the **Defendants**

- -

APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MR. JUSTICE LINDEN :

Introduction

1. This is an application, dated Friday 24th March 2022 for approval of a consent order in respect of an application for committal of the defendants for contempt of court which was made by the claimant on 7th December 2021. The matter is listed for a four-day hearing starting today but the effect of the consent order would be to dispose of that application.

2. Mr. Fry appeared with Mr. Welch for the claimant; Mr. James-Matthews appeared for the defendants.

Background

3. The claimant is the nominated undertaker appointed by the Secretary of State for Transport pursuant to section 45 of the High Speed Rail (London-West Midlands) Act 2017. These proceedings relate to direct action taken by the defendants between September 2020 and February 2021 at Euston Square Gardens in Central London which, at the material time, the claimant was engaged in clearing for the purposes of works relating to Phase 1 of the HS2 project.

4. The direct action at Euston Square Gardens involved a number of people establishing a camp on the site which included tents, wooden defence structures and wooden platforms in the trees. However, it was not until a report by the BBC in late January 2021 that it became apparent to the claimant that the occupants of the camp had also dug a network of underground tunnels in anticipation of what were imminent attempts to evict them. Their plan was that they would occupy the tunnels with a view to thwarting their eviction by the claimant, and the progress of the claimant's operations in relation to HS2, by making it difficult to extract them.

5. The exercise of evicting the activists required substantial resources. There were various specialist teams which were supervised by a High Court Enforcement Officer, including a Confined Spaces Team (CST) of personnel who were trained in operations underground and whose responsibility it was to bring activists out of the underground tunnels. This was a highly dangerous task given the poor state of the tunnels. A Mines Rescue Services (MRS) Team was also brought in, together with a Ground Penetrating Radar Team and other relevant specialists. Emergency services were also in attendance and on standby.

6. On 1st February 2021, Mr. Justice Robin Knowles made an order against the first defendant in the context of judicial review proceedings brought by him which challenged the eviction of the occupants of the camp. In summary, paragraph 4 of the Knowles order required the first defendant forthwith:

    a) To cease any further tunnelling activity and not to cause any other person to engage in tunnelling;

    b) To provide information about how many people were in the tunnels and how many of them were children. In the case of any occupants who were

children, there was also a requirement to provide additional information which was relevant to their welfare and safeguarding;

c) To provide details of the tunnelling system which had been constructed so that the layout and the level of risk associated with entering the tunnels could be assessed;

d) To co-operate with the claimant and the authorities, to leave the tunnel safety and to allow others to do the same.

7. The Knowles order did not include a penal notice.

8. The first defendant failed to comply with the Knowles order. Instead, he applied to set it aside. That application was resisted by the claimant and a cross-application was made for a penal notice to be added to the order against him.

9. On 10th February 2021, Mrs. Justice Steyn rejected the first defendant's application, save for discharging paragraph 4(b) of the Knowles order, and she allowed the claimant's cross-application. The neutral citation number for her judgment is [2021] EWHC 246 (Admin). At paragraph 6, she noted that the evidence was that the tunnels which the activists had built were poorly constructed and liable to collapse. The first defendant and others in the tunnel were in a highly dangerous situation and the danger was equally grave for those who made attempts to rescue them. There was, moreover, nothing hindering the first defendant and other activists from leaving the tunnel and several of the protestors had done so over the course of the preceding week.

10. Mrs. Justice Steyn's order therefore required the first defendant to:

(a) cease all tunnelling activity and is not to cause, assist or encourage any other person to engage in further tunnelling;

(b) provide details to the Defendant, the Health and Safety Executive, the London Fire Brigade and the Metropolitan Police to the best of the Claimant' s knowledge, of the layout, size and engineering used for the tunnel or tunnels (including the composition of the walls, floors and ceiling of the tunnel or tunnels); and

(c) cooperate with the Defendant, the Health and Safety Executive, the London Fire Brigade and the Metropolitan Police to leave the tunnel safely and not return and to allow others to do the same.

11. The Steyn order also made provision for alternative service on the first defendant. It was served on the first defendant in accordance with its terms at 10 a.m. on 11th February 2021 and he was also regularly reminded of its terms in the course of the attempts to remove him from the tunnelling system which followed.

12. On 12th February 2021, the claimant issued its claim for possession and trespass against the occupiers of the camp, including the defendants, and in that context the matter came before Mr. Justice Mann on 22nd February 2021. By now the first defendant and some others had been removed from the tunnels. Mr. Justice Mann made an order which

applied to the second to fifth defendants in the present application. The material parts of that order forbade them from remaining on the land and required them to cooperate with the claimant, the Health and Safety Executive, the London Fire Brigade and the Metropolitan Police to leave the tunnel safely and allow others to do the same. The Mann order also made provision for alternative service on the second to fifth defendants. It was served in accordance with its terms at lunchtime on 23rd February 2021.

13. The breaches of the Steyn and the Mann orders which are alleged against the defendants by the claimant in its application for committal are as follows:

    a) That the first defendant refused to leave the tunnelling system until 10.25 a.m. on 22nd February 2021, therefore just over eleven days after he was served with the Steyn order. He failed to provide the information which he had been ordered to provide. He continued to tunnel and to assist others with tunnelling. He obstructed attempts to remove him and he interfered with the efforts of CST officers to remove other tunnellers. He also threw soil in the face of one CST officer, stole the phone of another and his actions caused one of the tunnels to collapse.

    b) In the case of the second to fourth defendants, they refused to leave the tunnelling system until 6.57 a.m. on 25th February 2021, so 42 hours after they were served with the Mann order. In the case of the fifth defendant, they refused to leave until 9.05 a.m. on 26th February 2021, so 68 hours after they were served. The second to fifth defendants refused to provide the information which they had been ordered to provide. They continued to engage in tunnelling and in the case of the second defendant, he obstructed CST officers who were attempting to remove him and other tunnellers.

14. The actions of the defendants in failing to comply with the Steyn and the Mann orders immediately, and in obstructing efforts to clear the tunnels as rapidly and safely as possible, are said by the claimant to having endangered their own lives and the lives of others, including the CST officers who were charged with the task of removing them. They also led to additional public resources being wasted, giving the need for the police and emergency services to be available when there were other very pressing calls on their time, including the COVID-19 pandemic. Further particulars of the defendants' actions are provided in a schedule to the claimant's statement of case.

15. The defendants admit that they acted in contempt of court by failing to co-operate with the claimant and emergency services to leave the tunnels, by continuing to engage in tunnelling and by failing to provide the information which they were ordered to provide. They have also agreed with the claimant the terms of a draft consent order which sets out the basis on which the claimant would consent to the dismissal of its application to commit, with no order as to costs.

16. The terms of the order include:

    a) Admissions by the defendants that they acted in contempt of court;

    b) A provision for them to apologise to the court;

c) Undertakings, which would bind them until 31st December 2024, in summary:

i) To comply with any future anti-trespass injunctions made in connection with the HS2 project against persons unknown, as well as any existing injunctions of this sort;

ii) Not to obstruct or interfere with the claimant's operations in various specified ways; and

iii) Not to train others to engage in the activities in which they themselves have undertaken not to engage.

17. The terms of the proposed consent order suggest a highly pragmatic approach on the part of the claimant having regard to its particular interests and priorities. This is understandable. The court also generally encourages the parties to resolve their differences by agreement if they can. However, the interests and priorities of the parties are not the only relevant consideration in this type of application, given that the court is seized of the fact that its orders were breached by the defendants. Although committal applications for breach of an order are brought by the beneficiary of the order which was breached, and although that party's views as to whether a proposed outcome is satisfactory in terms of ensuring compliance with the order in question and redress for any harm which has been done are relevant, there is also a strong public interest in the court deterring disobedience to its orders and upholding the rule of law. As the Divisional Court put it in *National Highways Limited v Ana Heyatawin & Ors* [2021] EWHC 3078 (QB):

> *"In our democratic society all citizens are equal under the law and all are subject to the law. It is integral to the rule of law and to the fair and peaceful resolution of disputes first that orders made by the court must be obeyed unless and until they are set aside or subject to successful challenge on appeal, and secondly that a mechanism exists to enforce orders made by the court against those who breach them. In this jurisdiction that mechanism is provided by the law of contempt".*

18. At paragraph 45 the court said:

> *"The essence of civil contempt is disobedience to a court order. It is not only the applicant but the court and, we would add, the public which has an interest in deterring disobedience to its orders and in upholding the rule of law".*

19. It is for this reason that the court has jurisdiction to commit a person of its own motion, even if no application is made by the beneficiary of an order (see CPR rule 81.6) and the permission of the court is required to discontinue a committal application (see paragraph 16.3 of Practice Direction 81).

20. The breaches of the relevant orders by all of the defendants in the present case, and especially the first defendant, were particularly serious. They were well aware of the orders which had been made and, in the case of the first defendant, had the benefit of competent legal advice throughout. What made their failures to comply so serious was the fact that they put their lives and the lives of others at a very high degree of risk. It was extremely dangerous for anyone to be down there in makeshift and poorly-

constructed tunnels but they also subjected the CST officers to that risk. Particularly in the case of the first and second defendants, they also heightened that risk by reckless behaviour in obstructing attempts to remove them from the network of tunnels.

21. Initially, I was therefore very doubtful that I should approve the proposed consent order and invited counsel to explain why I should do so. They then addressed arguments to me which I have accepted and which are reflected in the reasons which follow.

22. In coming to a view about whether I should approve the proposed order, I have had regard to the guidance in *Cuciurean v Secretary of State for Transport* [2021] EWCA Civ 357, at paragraphs 9 to 11 in particular, and in *National Highways Limited v Ana Heyatawin & Ors,* at paragraphs 48 to 53, about the approach to determining the sanction for contempt of court where the contempt involves breach of a court order and takes place as part of a protest or direct action in relation to issues of public interest. I have also had regard to the following considerations.

i) The narrow issue with which I am concerned in this application is the fact that the defendants have breached the orders to which I have referred, the degree of culpability on their part in doing so and the particular harm which this caused. The wider picture of trespass, disruption and cost to the claimant and the public between September 2020 and February 2021 forms an important part of the context for my decision but they are primarily the subject matter of the underlying proceedings in which the orders were made. It is a matter for the claimant and the police to decide what steps they wish to take in relation to that wider picture.

ii) The breaches by the defendants were, in my view, highly culpable given the danger to which they exposed themselves and others.

iii) They also caused significant harm in terms of the additional disruption and cost to the public. However, the essential nature of the breaches was a failure to comply with the orders immediately and voluntarily. This meant that the disruption lasted longer than it should have and the cost and risk to safety was increased.

iv) There was substantial compliance with the orders within a relatively short time - within 48 hours in the case of the second to fourth defendants at least - and there has now been compliance by all defendants save for aspects of the orders which are now otiose.

v) The claimant was also slow to proceed with the application for committal. The breaches occurred in February 2021, as I have noted, and the application was not made until 7th December 2021.

vi) No evidence of similar activities by the defendants (inaudible) since February 2021 has been put before the court;

vii) Indeed, the first defendant admitted breaches of an earlier order and gave undertakings, in similar terms to the present ones, which formed part of a consent order made by Mr. Justice Marcus Smith on 10th November 2021 albeit that order relates to breaches of an order by Mrs. Justice Andrews, as she then

was, to prevent him from trespassing on other land in connection with HS2. Mr. Fry confirmed that there is no evidence that the first defendant has in any way failed to comply with the undertakings which he gave on that occasion and that in turn gives me a degree of optimism that the undertakings provided to the court will be complied with.

viii) The defendants have each admitted that they breached the relevant orders and have apologised to the court for doing so. I also accept that their apologies were sincere and that they accept that they should have complied with relevant orders and should not have put the safety of others at risk in the way that they did.

ix) The defendants have also given clear undertakings that they will comply with future court orders in connection with HS2 which prohibit trespass on land, as well as wider undertakings not to disrupt the claimant's operations in the future. These undertakings will apply for a period of nearly three years, as I have said. The undertakings are equivalent to a court order and are underpinned by the risk of imprisonment for breach. As Mr. James-Matthews pointed out, the fact that the defendants have given these undertakings precludes arguments by them, pursuant to Articles 10 and 11 of the European Convention on Human Rights, that a degree of future disruption to the claimant's activities by them may be permissible: see *DPP v Zeigler* [2021] 3 WLR 179. The undertakings he submitted, and I accept, therefore contain a measure of punishment.

x) The claimant, which is in a good position to judge given its dealings with protestors over the past several months, evidently considers that these undertakings are sufficiently likely to be effective for the proposed consent order to be a more beneficial outcome from its point of view than the outcome if it were to proceed with the application to commit.

xi) I also accept, looking at the matter from the point of view of the interests of the public, that provided the undertakings are complied with the consent order will potentially prevent a good deal of further litigation, wasted court time and public expense.

23. I am, therefore, persuaded that I should approve the draft consent order effectively on the basis that it constitutes a final warning to the defendants, but I make clear that I do so with considerable reluctance. Were it not for the fact that the claimant is content with the proposed order, and therefore no longer wishes to proceed, it is highly likely that the defendants would be facing custodial sentences. If any of them breaches the undertakings which they have given to the court they should expect committal to prison to be the consequence. Moreover, in deciding the sentence to be imposed on them, a future court will take into account the circumstances in which the consent order was made in this application.

24. With this in mind, I will direct that this judgment be transcribed at the expense of the claimant so that it will be available to any judge who is called upon to deal with any breaches of the undertakings which have been given.

For proceedings, see separate transcript

This judgment has been approved by Linden J.

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High Speed Rail (London - West Midlands) Act 2017

2017 CHAPTER 7

Compulsory acquisition of land

4 Power to acquire land compulsorily

(1) Subject to subsection (6), the Secretary of State may acquire compulsorily so much of the land within the Act limits as may be required for Phase One purposes.

(2) Schedule 5 contains provision about the particular purposes for which land within the limits of land to be acquired or used may be acquired under subsection (1).

(3) Part 1 of the Compulsory Purchase Act 1965, so far as not inconsistent with this Act, applies to an acquisition of land under subsection (1)—

(a) as it applies to a compulsory purchase to which Schedule 1 to the Acquisition of Land Act 1981 applies, and

(b) as if this Act were a compulsory purchase order under that Act.

(4) The Compulsory Purchase (Vesting Declarations) Act 1981 applies as if this Act were a compulsory purchase order.

(5) Schedule 6 contains further provision about the application of compulsory purchase legislation.

(6) This section does not apply to Plot 91 or 91a in the Parish of Bickenhill in the Metropolitan Borough of Solihull, as shown on the deposited plans and in the deposited book of reference.

(7) In subsection (6), "the deposited book of reference" means the book deposited in November 2013 in connection with the High Speed Rail (London - West Midlands) Bill in the office of the Clerk of the Parliaments and the Private Bill Office of the House of Commons.

5 Acquisition of rights in land

(1) The power under section 4(1) includes power to acquire such easements or other rights over land to which the power relates as may be required for Phase One purposes, by—

(a) creating new easements or other rights, or

(b) acquiring easements or other rights already in existence.

(2) The terms of an easement created under subsection (1)(a) may include terms imposing a restrictive covenant for the purpose of making the easement effective.

(3) In the case of land specified in the table in Schedule 7, the power under section 4(1) also includes power to impose restrictive covenants over the land for the purposes specified in relation to the land in column (3) of the table.

(4) In the case of land specified in the table in Schedule 8, the power under section 4(1) may be exercised only so as to acquire rights for purposes specified in relation to the land in column (3) of the table.

(5) The Secretary of State may by order provide that section 4(1), so far as relating to compulsory acquisition by virtue of this section, is to be treated as also authorising acquisition of rights or imposition of restrictive covenants by such person as may be specified in the order.

(6) The power to make an order under subsection (5) includes power to make an order varying or revoking any order previously made under that subsection.

(7) Schedule 9 contains provision about the application of compulsory purchase legislation to a compulsory acquisition by virtue of this section.

6 Acquisition of part of land

(1) The provisions of Schedule 10 apply instead of section 8(1) of the Compulsory Purchase Act 1965 where—

(a) a notice to treat under Part 1 of the Compulsory Purchase Act 1965, as applied by section 4(3) to the acquisition of land under section 4(1), is given in respect of land forming part only of a house, building or manufactory or part only of land consisting of a house with a park or garden, and

(b) a copy of this section and Schedule 10 is given with the notice to treat.

(2) Nothing in this section or Schedule 10 applies in relation to a compulsory acquisition under section 4(1) by virtue of section 5 (acquisition of rights or imposition of restrictive covenants).

7 Acquisition of airspace

(1) The power under section 4(1) in relation to land may be exercised in relation to the airspace over the land only.

(2) The following do not apply in connection with the exercise of the power under section 4(1) in relation to airspace only—

(a) section 8(1) of the Compulsory Purchase Act 1965 (limitation on right to require person to sell part only of any house, building, manufactory or park or garden belonging to a house);

(b) Schedule 1 to the Compulsory Purchase (Vesting Declarations) Act 1981 (corresponding provision in case of general vesting declaration).

8 Acquisition of subsoil or under-surface

(1) The power under section 4(1) in relation to land may be exercised in relation to the subsoil or under-surface of the land only.

(2) The following do not apply in connection with the exercise of the power under section 4(1) in relation to subsoil or under-surface only—

(a) section 8(1) of the Compulsory Purchase Act 1965 (limitation on right to require person to sell only part of a house, building, manufactory or park or garden belonging to a house);

(b) Schedule 1 to the Compulsory Purchase (Vesting Declarations) Act 1981 (corresponding provision in case of general vesting declaration).

(3) Subsection (2) is to be disregarded where the power under section 4(1) is exercised in relation to a cellar, vault, arch or other construction forming part of a house, building or manufactory.

(4) Schedule 11 contains provision which in certain cases restricts the power under section 4(1)—

(a) to the subsoil or under-surface of land, or

(b) to the subsoil or under-surface of land and rights of passage.

9 Highway subsoil

(1) The nominated undertaker may enter upon, take and use for the purposes of the works authorised by this Act so much of the subsoil of any highway within the Act limits as is required for the purposes of the construction or maintenance of those works, without being required to acquire that subsoil or any interest in it.

(2) Subsection (1) does not apply in relation to any cellar, vault, arch or other construction in, on or under a highway which forms part of a building fronting on to the highway.

(3) In the case of land specified in the table in Schedule 12—

(a) the power under subsection (1) is not exercisable in relation to the subsoil of a highway comprised in the land, and

(b) the power under section 4(1) is not exercisable in relation to the land so far as the surface of the land is comprised in a highway.

(4) Subsection (3)(b) does not restrict the exercise of the power under section 4(1) in relation to a cellar, vault, arch or other construction in, on or under a highway which forms part of a building fronting on to the highway where—

(a) the building is within the Act limits, and

(b) the power under section 4(1) is exercisable in relation to the building.

(5) In the case of a highway comprised in land specified in the table in paragraph 1 of Schedule 11, the power under subsection (1) is exercisable only in relation to so much of the subsoil of the highway as lies more than 9 metres beneath the level of the surface of the highway.

(6) The restrictions imposed by subsections (3) and (5) on the power under subsection (1) do not affect the power under paragraph 7(1) of Schedule 4 (power of nominated undertaker to enter upon highway to carry out certain street works).

(7) The nominated undertaker must compensate any person who—

(a) is an owner or occupier of land in respect of which the power under subsection (1) is exercised, and

(b) suffers loss by the exercise of that power.

(8) Any dispute as to a person's entitlement to compensation under subsection (7), or as to the amount of compensation, must be determined under and in accordance with Part 1 of the Land Compensation Act 1961.

(9) Compensation is not payable under subsection (7) to any person who is an undertaker to whom section 85 of the New Roads and Street Works Act 1991 applies (sharing of cost of necessary measures) in respect of measures of which the allowable costs are to be borne in accordance with that section.

10 Termination of power to acquire land

(1) After the end of the period of 5 years beginning with the day on which this Act is passed—

(a) no notice to treat may be served under Part 1 of the Compulsory Purchase Act 1965, as applied by section 4(3) to the acquisition of land under section 4(1), and

(b) no declaration may be executed under section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981, as applied by section 4(4) to the acquisition of land under section 4(1).

(2) The Secretary of State may by order extend the period under subsection (1) in relation to any land, but may only do so—

(a) once, and

(b) by not more than 5 years.

(3) An order under subsection (2) is subject to special parliamentary procedure (as to which, see the Statutory Orders (Special Procedure) Act 1945).

(4) Schedule 13 contains provision about a right to require acquisition where an order is made under subsection (2).

11 Amendments consequential on the Housing and Planning Act 2016

Schedule 14 contains amendments to this Act that are consequential on provision made by Part 7 of the Housing and Planning Act 2016 (compulsory purchase).

High Speed Rail (London - West Midlands) Act 2017

2017 CHAPTER 7

Temporary possession and use of land

15 Temporary possession and use of land

Schedule 16 contains provisions about temporary possession and use of land in connection with the works authorised by this Act.

16 Use of roads

(1) The nominated undertaker may use any road situated on land specified in—

(a) the table in Schedule 8, or

(b) the table in paragraph 2 of Schedule 11,

for the passage of persons or vehicles (with or without materials, plant or machinery) for Phase One purposes.

(2) The power under subsection (1) may not be exercised after the end of five years beginning with the date on which Phase One of High Speed 2 is brought into general use.

(3) The nominated undertaker must compensate the person having the management of a road to which subsection (1) applies for any loss which the person may suffer by reason of the exercise of the power under that subsection.

(4) Any dispute as to a person's entitlement to compensation under subsection (3), or as to the amount of compensation, must be determined under and in accordance with Part 1 of the Land Compensation Act 1961.

17 Cranes

(1) The nominated undertaker may enter upon and use airspace above the surface of land specified in subsection (7) for the oversailing of cranes used by the nominated undertaker for Phase One purposes.

(2) The power under subsection (1) is exercisable on giving at least 7 days' notice to the owners and occupiers of the land.

(3) The nominated undertaker may not, without the agreement of the owners of the land, use airspace above the surface of the land as mentioned in subsection (1) after the end of 7 days beginning with the date of completion of the activities for which the crane has been used.

(4) The nominated undertaker must pay compensation to the owners and occupiers of land above which the power under subsection (1) is exercised for any loss which they may suffer by reason of the exercise of that power.

(5) Any dispute as to a person's entitlement to compensation under subsection (4), or as to the amount of compensation, must be determined under and in accordance with Part 1 of the Land Compensation Act 1961.

(6) Nothing in this section affects any liability to pay compensation under section 10(2) of the Compulsory Purchase Act 1965 (as applied by section 4(3) to the acquisition of land under section 4(1)) or under any other enactment, otherwise than for loss for which compensation is payable under subsection (4).

(7) This is the land referred to in subsection (1)—

Area	*Number of land shown on deposited plans*
London Borough of Camden	865, 866, 877 to 888, 890, 895 to 898, 902, 903, 909, 913 to 915, 922 to 925, 927, 929 to 931, 943, 944, 956, 957, 969, 1039, 1046, AP3-1
London Borough of Hillingdon	581, 582, 589, 592, 596, 599

18 Enforcement of restrictions on land use

(1) This section applies where—

(a) a prohibition or restriction on the use of land is imposed by a covenant or agreement between a person interested in the land ("the promisor") and the Secretary of State, and

(b) the covenant or agreement is made for Phase One purposes.

(2) The Secretary of State may enforce the prohibition or restriction against persons deriving title from or under the promisor in respect of land to which it relates as if—

(a) the Secretary of State were possessed of adjacent land, and

(b) the covenant or agreement had been expressed to be made for the benefit of such land.

(3) Section 2(c) of the Local Land Charges Act 1975 (under which a prohibition or restriction enforceable by a Minister of the Crown under a covenant or agreement is not a local land charge if binding on successive owners because made for the benefit of land of the Minister) does not apply to the prohibition or restriction.

19 Compensation for injurious affection

Section 10(1) of the Compulsory Purchase Act 1965 (compensation for injurious affection) has effect, in relation to land injuriously affected by the execution of works under this Act by the nominated undertaker, as if for "acquiring authority have" there were substituted "nominated undertaker has".

SCHEDULES

SCHEDULE 16

Section 15

TEMPORARY POSSESSION AND USE OF LAND

PART 1

TEMPORARY POSSESSION FOR CONSTRUCTION OF WORKS

Right to enter upon and take possession of land

1 (1) The nominated undertaker may enter upon and take possession of the land specified in the table in Part 4 of this Schedule—

(a) for the purpose specified in relation to the land in column (3) of the table in connection with the authorised works specified in column (4) of the table,

(b) for the purpose of constructing such works as are mentioned in column (5) of the table in relation to the land, or

(c) otherwise for Phase One purposes.

(2) The nominated undertaker may (subject to paragraph 2(1)) enter upon and take possession of any other land within the Act limits for Phase One purposes.

(3) The reference in sub-paragraph (1)(a) to the authorised works specified in column (4) of the table includes a reference to any works which are necessary or expedient for the purposes of or in connection with those works.

Exceptions

2 (1) Paragraph 1(2) does not apply in relation to—

(a) land which is subject to a restricted power of compulsory acquisition,

(b) land in respect of which a notice of entry has been served under section 11 of the Compulsory Purchase Act 1965 (as applied by section 4(3) to the acquisition of land under section 4(1)), other than in connection with the acquisition of rights or subsoil only or the imposition of a restrictive covenant, or

(c) land in respect of which a declaration has been made under section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981 (as applied by section 4(4) to the acquisition of land under section 4(1)), other than in connection with the acquisition of rights or subsoil only or the imposition of a restrictive covenant.

(2) The power under section 4(1) (power to acquire land compulsorily) is not exercisable in relation to land specified in the table in Part 4 of this Schedule.

(3) But sub-paragraph (2) does not apply in relation to land specified in the table to the extent (if any) that—

(a) the land is subject to a restricted power of compulsory acquisition, or

(b) there is power by virtue of section 5(3) to impose restrictive covenants over the land.

(4) For the purposes of this Schedule, land is subject to a restricted power of compulsory acquisition if the power under section 4(1) may be exercised in relation to the land only—

(a) so as to acquire rights relating to the land (see section 5(4)),

(b) so as to acquire the subsoil or under-surface of the land or so as to acquire rights of passage over the land (see paragraphs 1 and 2 of Schedule 11),

(ignoring any power by virtue of section 5(3) to impose restrictive covenants over the land).

Powers exercisable on land of which temporary possession has been taken

3 (1) Where under paragraph 1(1) or (2) the nominated undertaker has entered upon and taken possession of land, the nominated undertaker may, for the purposes of or in connection with the construction of the works authorised by this Act—

(a) remove any structure or vegetation from the land,

(b) construct such works as are mentioned in relation to the land in column (5) of the table in Part 4 of this Schedule,

(c) construct temporary works (including the provision of means of access) and structures on the land, and

(d) construct landscaping and other works on the land to mitigate any adverse effects of the construction, maintenance or operation of the works authorised by this Act.

(2) The other works referred to in sub-paragraph (1)(d) include works involving the planting of trees and shrubs and the provision of replacement habitat for wild animals.

(3) In this paragraph, "structure" includes any erection.

Procedure and compensation

4 (1) Not less than 28 days before entering upon and taking possession of land under paragraph 1(1) or (2), the nominated undertaker must give notice to the owners and occupiers of the land of its intention to do so.

(2) The nominated undertaker may not, without the agreement of the owners of the land, remain in possession of land under paragraph 1(1) or (2) after the end of the period of one year beginning with the date of completion of the work for which temporary possession of the land was taken.

(3) Sub-paragraph (2) does not apply, in the case of land mentioned in paragraph 1(2), if before the end of the one-year period either of the following powers has been exercised in relation to the land—

(a) the power to serve a notice to treat under Part 1 of the Compulsory Purchase Act 1965 (as applied by section 4(3) of this Act to the acquisition of land under section 4(1));

(b) the power to execute a declaration under section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981 (as applied by section 4(4) of this Act to the acquisition of land under section 4(1)).

(4) The nominated undertaker must pay compensation to the owners and occupiers of land of which possession is taken under paragraph 1(1) or (2) for any loss which they may suffer by reason of the exercise in relation to the land of the power or powers under that paragraph.

(5) Any dispute as to a person's entitlement to compensation under sub-paragraph (4), or as to the amount of compensation, must be determined under and in accordance with Part 1 of the Land Compensation Act 1961.

(6) Nothing in this paragraph affects any liability to pay compensation under section 10(2) of the Compulsory Purchase Act 1965 (as applied by section 4(3) to the acquisition of land under section 4(1)) or under any other enactment, otherwise than for loss for which compensation is payable under sub-paragraph (4).

5 (1) Before giving up possession of land of which possession has been taken under paragraph 1(1) or (2), the nominated undertaker must, in accordance with a scheme agreed with the owners of the land and the relevant planning authority, put the land into such condition as the scheme may provide.

(2) If no scheme has been agreed for the purposes of this paragraph within 6 months of the date of completion mentioned in paragraph 4(2) in relation to the land, the scheme is to be such as may be determined by the appropriate Ministers after consulting the nominated undertaker, the owners of the land and the relevant planning authority.

(3) Unless the owners of the land and the nominated undertaker otherwise agree, a scheme determined under sub-paragraph (2) must provide for land to be restored to its former condition.

(4) Sub-paragraph (3) does not require land on which works referred to in paragraph 1(1)(b) or 3(1)(d) have been constructed to be restored to its former condition.

(5) Unless the nominated undertaker otherwise agrees, a scheme determined under sub-paragraph (2) may not provide for the nominated undertaker to replace a structure removed under paragraph 3, other than a fence.

(6) Where the appropriate Ministers ask the relevant planning authority for assistance in connection with the carrying out by them of their function under sub-paragraph (2), they may require the nominated undertaker to reimburse to the relevant planning authority any expenses which it reasonably incurs in meeting the request.

(7) The duty under sub-paragraph (1) in relation to any land is owed separately to the owners of the land and to the relevant planning authority.

(8) Where a scheme for the purposes of this paragraph provides for any step to be taken by the nominated undertaker before a specified date and that step has not been taken before that date, the relevant planning authority may—

(a) enter the land concerned and take that step, and

(b) require the nominated undertaker to reimburse to it any expenses which it reasonably incurs in acting under paragraph (a).

(9) In this paragraph—

"appropriate Ministers" means the Secretary of State for Communities and Local Government and the Secretary of State for Transport and, in relation to the carrying out of any function, means those Ministers acting jointly;

"relevant planning authority" means the unitary authority or, in a non-unitary area, the district council in whose area the land is situated.

(10) But where—

(a) the unitary authority in whose area the land is situated is a London borough council, and

(b) as a result of a Localism Act TCPA order, a Mayoral development corporation is the local planning authority for the purposes of Part 3 of the Town and Country Planning Act 1990 for that area,

the relevant planning authority is the Mayoral development corporation instead of the London borough council.

6 (1) The Secretary of State may make regulations modifying the operation of this Part of this Schedule—

(a) in consequence of an order under section 198(2) of the Localism Act 2011 giving effect to a decision under section 204(2) of that Act (decision removing or restricting planning functions), or

(b) to make transitional provision relating to—

(i) an order mentioned in paragraph (a),

(ii) a Localism Act TCPA order, or

(iii) an order under section 217 of the Localism Act 2011 (order dissolving Mayoral development corporation).

(2) Regulations under this paragraph—

(a) must be made by statutory instrument;

(b) may make different provision for different purposes.

(3) A statutory instrument containing regulations under this paragraph is subject to annulment in pursuance of a resolution of either House of Parliament.

PART 2

TEMPORARY POSSESSION FOR MAINTENANCE OF WORKS

Right to enter upon and take possession of land

7 (1) At any time during the maintenance period relating to any of the scheduled works, the nominated undertaker may—

(a) enter upon and take possession of any land which is—

(i) within 20 metres from that work, and

(ii) within the Act limits,

if possession of the land is reasonably required for the purposes of or in connection with maintaining the work or any ancillary works connected with it, and

(b) construct on the land such temporary works (including the provision of means of access) and structures as may be reasonably so required, unless the land is specified in the table in Part 4 of this Schedule.

(2) Sub-paragraph (1) does not authorise the nominated undertaker to take possession of—

(a) a house, any other structure which is for the time being occupied, or a garden belonging to a house, or

(b) land which is subject to a restricted power of compulsory acquisition.

(3) The nominated undertaker may only remain in possession of the land for so long as may be reasonably required to carry out the maintenance works for which possession of the land was taken.

(4) In this paragraph—

(a) "the maintenance period", in relation to any work, means the period beginning with the date on which the work is completed and ending 5 years after the date on which it is brought into general use;

(b) "structure" includes any erection;

(c) the reference in sub-paragraph (1)(a) to land within a specified distance of a work includes, in the case of a work under the surface of the ground, a reference to land within the specified distance of any point on the surface below which the work is situated.

Procedure and compensation

8 (1) Not less than 28 days before entering upon and taking possession of land under paragraph 7, the nominated undertaker must give notice to the owners and occupiers of the land of its intention to do so.

(2) Before giving up possession of the land, the nominated undertaker must restore the land to the reasonable satisfaction of its owners.

(3) The nominated undertaker must pay compensation to the owners and occupiers of the land for any loss which they may suffer by reason of the exercise in relation to the land of the powers under paragraph 7.

(4) Any dispute as to a person's entitlement to compensation under sub-paragraph (3), or as to the amount of compensation, must be determined under and in accordance with Part 1 of the Land Compensation Act 1961.

(5) Nothing in this paragraph affects any liability to pay compensation under section 10(2) of the Compulsory Purchase Act 1965 (as applied by section 4(3) of this Act to the acquisition of land under section 4(1)), or under any other enactment, otherwise than for loss for which compensation is payable under sub-paragraph (3).

PART 3

SUSPENSION OF RIGHTS AND ENFORCEMENT

Suspension of rights relating to land

9 (1) All private rights over land of which the nominated undertaker takes possession under paragraph 1(1) or (2) or 7 are suspended and unenforceable for as long as the nominated undertaker remains in lawful possession of the land.

(2) The nominated undertaker may, in relation to a private right, direct—

(a) that sub-paragraph (1) does not apply to the right, or

(b) that sub-paragraph (1) applies to the right only to the extent specified in the direction.

(3) In this paragraph, "private rights" include—

(a) private rights of way over land,

(b) rights of common,

(c) easements, liberties, privileges, rights or advantages annexed to land and adversely affecting other land, including any natural right to support, and

(d) restrictions as to the user of land arising under a contract.

(4) Any person who suffers loss by reason of the suspension of a right under sub-paragraph (1) is entitled to be compensated by the nominated undertaker.

(5) Any dispute as to a person's entitlement to compensation under sub-paragraph (4), or as to the amount of compensation, must be determined under and in accordance with Part 1 of the Land Compensation Act 1961.

(6) This paragraph applies to a private right which is for the benefit of Crown land if the Crown authority consents (and consent may be subject to conditions).

10 (1) All general rights over land of which the nominated undertaker takes possession under paragraph 1(1) or (2) or 7 are suspended and unenforceable for as long as the nominated undertaker remains in lawful possession of the land.

(2) The nominated undertaker may, in relation to a general right, direct—

(a) that sub-paragraph (1) does not apply to the right, or

(b) that sub-paragraph (1) applies to the right only to the extent specified in the direction.

(3) In this paragraph, references to "general rights" over land are to—

(a) rights to access land (however expressed) which are exercisable as a result of section 2(1) of the Countryside and Rights of Way Act 2000 or an enactment mentioned in section 15 of that Act,

(b) other public rights over land which are conferred by an enactment, and

(c) rights exercisable as a result of trusts or incidents to which a common, town or village green, open space or allotment is subject.

Enforcement

11 (1) Section 13 of the Compulsory Purchase Act 1965 (refusal to give possession to acquiring authority) applies for the purposes of this Schedule as if—

(a) references to the acquiring authority were to the nominated undertaker,

(b) references to compensation payable to the person refusing to give possession were to compensation payable under this Schedule, and

(c) in subsection (1), for "this Act" there were substituted "Schedule 16 to the High Speed Rail (London - West Midlands) Act 2017".

(2) In the case of Crown land, that section does not, by virtue of sub-paragraph (1), apply as against the Crown authority for that land.

PART 4

LAND WHICH MAY BE OCCUPIED AND USED FOR CONSTRUCTION OF WORKS

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
London Borough of Camden	192, AP3-27	Provision of worksite and access for construction	1/18	
	291 to 305307, 308	Provision of access for utility works	1/1	
	312, 313, 314, 317, 346, 350 to 360, 771 to 776	Diversion or installation of, or works to, utilities apparatus	1/1	
	705, 706, 708	Diversion or installation of, or works to, utilities apparatus	1/15	
London Borough of Brent	22, 24, 30, 31, 34, 44, 45, 67, 71, 73, 382, 390 to 393	Diversion or installation of, or works to, utilities apparatus	1/15	
	60, 61, 114, 118, 121	Diversion or installation of, or works to, utilities apparatus	1/1	
	82, 85	Diversion or installation of, or works to, utilities apparatus	1/21	
	AP2-2	Provision of access for utility works	1/52	
	AP4-15a	Provision of worksite and access for construction	1/1	
London Borough of Hammersmith & Fulham	15	Diversion or installation of, or works to, utilities apparatus	1/1	

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
	24, 25a, 25b	Diversion or installation of, or works to utilities apparatus	1/15	
London Borough of Ealing	23	Diversion or installation of, or works to, utilities apparatus	1/40	
	878, 879	Provision of worksite and access for construction	1/1	
		Diversion or installation of, or works to, utilities apparatus		
	473, 475, 478, 479, 481, 482, 485, 488, 513 to 516, 527 to 535, 537 to 539, 543, 546, 549, 552, 554, 559, 563 to 566, 568 to 578, 690, 701, 881 to 883, 965, 966, 983	Diversion or installation of, or works to, utilities apparatus	1/1	
	676 to 682	Diversion or installation of, or works to, utilities apparatus	1/15	
	708, 954	Provision of worksite and access for construction		
	871, 873, 874	Worksite and access for construction	1/55	
		Diversion or installation of, or		

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
		works to, utilities apparatus		
	1028, 1029, 1031 to 1034	Provision worksite and access for construction	Diversion or installation of, or works to, utilities apparatus	
			Provision of environmental mitigation	
London Borough of Hillingdon	34, 187 to 189, 249, 254	Provision of access for utility works	Diversion or installation of, or works to, utilities apparatus	
	59, 60, 76, 174	Provision of worksite and access for construction	Diversion or installation of, or works to, utilities apparatus	
	81, 82, 83, 86,144 to 147, 222, 226, 228,250, 252, 253	Diversion or installation of, or works to utilities apparatus	1/15	
	157, 159, 161, 162	Provision of worksite and access for construction	1/57	
	372 to 375, 380 to 383	Diversion or installation of, or works to, utilities apparatus	1/1 and 1/15	
	720e	Provision of access for construction	Provision of environmental mitigation	
	598, 602, 681, 682, 684 to 687, 689 to 691	Diversion and installation of overhead electric lines	2/1	

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
	703a, 703b,704 to 706747c, 750	Provision of worksite and access for construction	2/1	
	720a, AP5-15 to AP5-20	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	733	Diversion or installation of, or works to utilities apparatus	2/1	
County of Buckinghamshire District of South Bucks Parish of Denham	4, 5, 5a, 6	Provision of worksite and access for construction	Provision of environmental mitigation	
	9, 10, 13	Provision of worksite and access for construction	2/5	
	20	Provision of worksite and access for construction	2/6	
County of Hertfordshire District of Three Rivers	118	Provision of worksite and access for construction	2/10a	
County of Buckinghamshire District of Chiltern Parish of Chalfont St Peter	15, 17, 18, 20	Provision of worksite and access for construction	2/1	
	73	Provision of access for construction		
Parish of Chalfont St Giles	1, 3	Provision of access for construction		
	9, 46, 59, 93 to 95, 99, 101, 102	Provision of protective works to watercourse	2/1	Protective works to watercourse
Parish of Amersham	AP4-1, AP4-3	Reprofiling of ground	2/1	Reprofiling of ground
	40, 58	Dewatering operations	2/1	Dewatering operations

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
	61	Provision of access for site investigation	2/1	
	75	Provision of access for construction	2/1	
Parish of Great Missenden	AP4-16, AP4-17	Provision of worksite and access for construction	2/14	
District of Aylesbury Vale Parish of Wendover	105, 106, AP1-2 to AP1-7, AP1-9	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	107, AP1-1, AP1-8	Implementation of protective measures for land beneath overhead line works	Diversion and installation of overhead electric lines	
	200, 201	Diversion and installation of overhead electric lines	2/28	
District of Wycombe Parish of Ellesborough	1, 3, 7, 9, 29, 31, 43, AP1-2, AP1-3	Diversion and installation of overhead electric lines	2/28	
District of Aylesbury Vale Parish of Stoke Mandeville	1 to 3118a, 121	Diversion and installation of overhead electric lines	2/28	
Parish of Stone with Bishopstone and Hartwell	2, 5, 12	Diversion and installation of overhead electric lines	2/28	
	AP5-1, AP5-2	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Parish of Aylesbury	4, 7 to 14, 16, 17, 19, 25 to 27, AP1-1 to AP1-3	Implementation of protective measures for land beneath overhead line works	Diversion and installation of overhead electric lines	

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
Parish of Waddesdon	12, 22, 23	Reprofiling of ground		
	99	Removal of utility apparatus	2/49	
Parish of Quainton	15, 26, 28, 30, 34	Removal of utility apparatus		
	236, 238, 242, AP1-2, AP1-3, AP1-6 to AP1-14, AP1-21	Diversion and installation of overhead electric lines		
Parish of Grendon Underwood	AP1-10, AP1-11	Diversion and installation of overhead electric lines		
	AP5-1, AP5-2	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Parish of Hogshaw	3 to 6, 8, 13, 15, 16	Diversion and installation of overhead electric lines		
	AP5-1	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Parish of Steeple Claydon	104	Provision of access for construction		
		Provision of new public right of way		
Parish of Chetwode	61, 81, 82	Removal of utility apparatus	2/49	
County of Oxfordshire District of Cherwell Parish of Newton Purcell with Shelswell	69a, 87	Removal of utility apparatus		
	89 to 91	Provision of new public right of way		

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
Parish of Finmere	1 to 3	Provision of new public right of way		
	20, 27b, 43a, 44, AP1-5, AP1-7	Removal of utility apparatus		
	50, 53, 61 to 66, 69, 70	Diversion and installation of overhead electric lines		
	67 and 68	Provision of access for utility works		
Parish of Mixbury	30, 58, 59, 61	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	45a	Provision of new public right of way	2/49	
	55, 65	Removal of utility apparatus	2/49	
County of Buckinghamshire District of Aylesbury Vale Parish of Westbury	2 to 4, 15 to 17	Removal of utility apparatus	2/49	
	10 to 13	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Parish of Turweston	1, 1a, 2, 2a, 3a, 4a, 5a, 6a, 7a, 8a, 10a, 11a, 34, 92, 93	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	22, 23, 26, 27a	Removal of utility apparatus	2/49	
County of Northamptonshire District of South Northamptonshire Parish of Evenly	2 to 5	Diversion and installation of overhead electric lines		
Parish of Greatworth	2, 8a, 40, 41	Provision of new public right of way	2/111	

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
	12a, 37, 45	Removal of utility apparatus	2/111	
	AP2-4	Provision of temporary public right of way	1/52	
Parish of Thorpe Manderville	34, 37, 38	Removal of utility apparatus	2/111	
Parish of Culworth	3	Removal of utility apparatus	2/111	
Parish of Chipping Warden and Edgcote	42, 55, 56, 70	Removal of utility apparatus	2/111	
	102	Provision of new public right of way	2/128b	
Parish of Aston Le Walls	12	Provision of new public right of way	2/111	
Parish of Boddington	5	Provision of new public right of way	2/111	
	21	Diversion or installation of, or works to, utilities apparatus	2/129	
	44, 79, 83, 84, 100, 102	Removal of utility apparatus	2/111	
County of Warwickshire District of Stratford-on-Avon Parish of Wormleighton	33	Reprofiling of ground	2/133	Reprofiling of ground
	37	Provision of worksite and access for construction	2/137	
	41	Provision of worksite and access for construction	2/133	
	45, 51, 57	Provision of worksite and access for construction	2/133	Reprofiling of ground
		Reprofiling of ground		

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
Parish of Stoneton	23	Provision of worksite and access for construction and maintenance	2/133	
	26	Provision of worksite and access for construction and maintenance	2/133	Provision of environmental mitigation
Parish of Radbourn	17, 27	Provision of worksite and access for construction	2/139	
	4	Provision of worksite and access for construction	2/133	Reprofiling of ground
		Reprofiling of ground		
Parish of Ladbroke	4, 11	Provision of worksite and access for construction	2/133	Reprofiling of ground
		Reprofiling of ground		
Parish of Southam	20	Provision of worksite and access for construction	2/142c	
District of Warwick Parish of Offchurch	14, 16	Provision of worksite and access for construction	2/146	Reprofiling of ground
		Reprofiling of ground		
	46	Reprofiling of ground	2/146	Reprofiling of ground
	72	Provision of access for construction and maintenance	2/146	
Parish of Cubbington	8	Provision of balancing pond and associated works and access for maintenance	Provision of balancing pond and associated works and	

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
			access for maintenance	
	63	Provision of worksite and access for construction	2/163	
Parish of Stoneleigh	30, 46	Removal of utility apparatus	Utility diversion	
	156	Provision of environmental mitigation	2/175	
Parish of Burton Green	36	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Metropolitan Borough of Solihull Parish of Berkswell	19a, 19b, 20 to 22, 23a, 27a, 29a	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	18b, 30b	Provision of access for utility works	Diversion and installation of overhead electric lines	
	AP4-1	Provision of access for utility works		
Parish of Chelmsley Wood	10, 16, 70	Provision of worksite and access for construction	3/25	
	19 to 63, 65, 66, 68	Implementation of protective measures for land beneath overhead line works	Diversion and installation of overhead electric lines	
Parish of Hampton-in-Arden	AP4-1, AP4-2	Provision of a temporary parking facility		
County of Warwickshire District of North Warwickshire Parish of Coleshill	1d	Provision of access for utility works	Diversion and installation of overhead electric lines	

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
	72, 76, 79, 80, 81, 82, 84, 86, 88, 112a, 261, 262, 265, 273, 307, 311, 356	Provision of access for utility works	Diversion and installation of overhead electric lines	
	418	Reprofiling of ground	Reprofiling of ground	
	Removal of utility apparatus			
	421, 423, 426, 429	Implementation of protective measures for land beneath overhead line works	Diversion and installation of overhead electric lines	
	AP1-1 to AP1-10	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Parish of Curdworth	20, 198, 207, 232, AP4-34 to AP4-36, AP4-38	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	53	Implementation of protective measures for land beneath overhead line works	Diversion and installation of overhead electric lines	
	124, 158	Provision of worksite and access for construction	3/36	
	AP1-9 to AP1-11	Provision of worksite and access for construction	3/45A	
Parish of Lea Marston	AP4-7 to AP4-9	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
Parish of Wishaw and Moxhull	4, 6c, 7, 9a, 10, AP1-6 to AP1-10	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	AP1-2	Provision of worksite and access for construction	3/45A	
Parish of Middleton	14, AP1-1 to AP1-3, AP1-4a, AP1-5 to AP1-7, AP1-12, AP2-23, AP2-26, AP2-27	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	36, 64	Removal of utility apparatus	3/48A	
	68a	Provision of access for utility works	3/50a	
	86	Reprofiling of ground	3/48A	Reprofiling of ground
	25a, AP1-4a	Diversion and installation of overhead electric lines		
		Access for construction		
	37b	Removal of utility apparatus	3/48A	
County of Staffordshire District of Lichfield Parish of Drayton Bassett	91, 125, 121, 126, 127, AP1-1 to AP1-9	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Parish of Fazeley	1	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Parish of Hints	32, 34, 36, 40 to 44, 46	Diversion and installation of	Diversion and installation of	

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
		overhead electric lines	overhead electric lines	
	136 to 138	Removal of utility apparatus	Diversion or installation of, or works to, utilities apparatus	
Parish of Weeford	1, 2, 3a, 4, AP1-2, AP5-1	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Parish of Swinfen and Packington	13a, AP2-3	Provision of access for construction	3/48A	
	AP1-1, AP1-2	Implementation of protective measures for land beneath overhead line works	Diversion and installation of overhead electric lines	
Parish of Lichfield	AP4-4 to AP4-10	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	5	Provision of worksite and access for construction	3/112	
Parish of Fradley and Streethay	AP4-1, AP4-2	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	139	Provision of worksite and access for construction	3/112	
Parish of Curborough and Elmhurst	4, 5, AP4-1, AP4-2, AP4-10 to AP4-12	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Parish of Longdon	12b, AP1-1a, AP1-2a, AP5-1, AP5-2	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
Parish of King's Bromley	153	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
Parish of Armitage with Handsacre	21, 22	Provision of worksite and access for construction	3/106	
Parish of Mavesyn Ridware	1, 2, 3, 4	Provision of worksite and access for construction	Installation of signal gantries	Installation of signal gantries
	2a	Installation of signal gantries	Installation of signal gantries	Installation of signal gantries
Parish of Colton	1, 20	Provision of worksite and access for construction	Installation of signal gantries	Installation of signal gantries
	2, 3, 5, 6, 8, 13, 14, 19, 21, 22	Provision of worksite and access for construction	Installation of signal gantries	
County of Staffordshire Borough of Stafford Parish of Colwich	1, 3, 7, 9	Provision of worksite and access for construction	Installation of signal gantries	Installation of signal gantries
	7a, 2, 4, 5, 6, 8, 19a, 20, 21, 22, 23, 26, AP2-2 to AP2-6	Provision of worksite and access for construction	Installation of signal gantries	
Metropolitan Borough of Solihull Parish of Bickenhill	3b	Provision of access for utility works	Diversion and installation of overhead electric lines	
	38	Provision of worksite and access for construction	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines
	41a	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
County of Warwickshire	6a	Provision of access for utility works	Diversion and installation of	

(1) *Area*	*(2)* *Number of land shown on deposited plans*	*(3)* *Purpose for which temporary possession may be taken*	*(4)* *Specified authorised works*	*(5)* *Specified works which may be carried out*
District of North Warwickshire Parish of Little Packington			overhead electric lines	
City of Birmingham	57, 59, 61	Diversion or installation of, or works to, utilities apparatus	3/200	
	172, 174, 176	Provision of worksite and access for construction	3/207	
	191	Use of sidings	3/205	
	300	Provision of worksite and access for constructionDiversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	
	412	Provision of drainage and associated works	Highway works	Provision of drainage and associated works
	446, 451	Provision of worksite and access for constructionDiversion and installation of overhead electric lines	3/205	Diversion and installation of overhead electric lines
	AP4-3 to AP4-7, AP4-11 to AP4-19	Diversion and installation of overhead electric lines	Diversion and installation of overhead electric lines	

High Speed Rail (West Midlands - Crewe) Act 2021

2021 CHAPTER 2

Compulsory acquisition of land

4 Power to acquire land compulsorily

(1) The Secretary of State may acquire compulsorily so much of the land within the Act limits as may be required for Phase 2a purposes.

(2) Schedule 6 contains provision about the particular purposes for which land within the limits of land to be acquired or used may be acquired under subsection (1).

(3) Part 1 of the Compulsory Purchase Act 1965, so far as not inconsistent with this Act, applies to an acquisition of land under subsection (1)—

(a) as it applies to a compulsory purchase to which Schedule 1 to the Acquisition of Land Act 1981 applies, and

(b) as if this Act were a compulsory purchase order under that Act.

(4) The Compulsory Purchase (Vesting Declarations) Act 1981 applies as if this Act were a compulsory purchase order.

(5) Schedule 7 contains further provision about the application of compulsory purchase legislation.

Changes to legislation:
There are currently no known outstanding effects for the High Speed Rail (West Midlands - Crewe) Act 2021, Section 4.

High Speed Rail (West Midlands - Crewe) Act 2021

2021 CHAPTER 2

Temporary possession and use of land

13 Temporary possession and use of land

Schedules 15 and 16 contain provision about temporary possession and use of land in connection with the works authorised by this Act.

14 Use of roads

(1) The nominated undertaker may use any road situated on land specified in the table in Schedule 8 for the passage of persons or vehicles (with or without materials, plant or machinery) for Phase 2a purposes.

(2) The power under subsection (1) is exercisable on giving at least 7 days' notice (or, where access is urgently required, such notice as is reasonably practicable) to the owners and occupiers of the land.

(3) But subsection (2) does not require notice to be given in relation to a road where notice under that subsection has already been given in relation to the road.

(4) The power under subsection (1) may not be exercised after the end of 5 years beginning with the date on which Phase 2a of High Speed 2 is brought into general use.

(5) The nominated undertaker must compensate the person having the management of a road to which subsection (1) applies for any loss which the person may suffer by reason of the exercise of the power under that subsection.

(6) Any dispute as to a person's entitlement to compensation under subsection (5), or as to the amount of compensation, must be determined under and in accordance with Part 1 of the Land Compensation Act 1961.

15 Enforcement of restrictions on land use

(1) This section applies where—

(a) a prohibition or restriction relating to the use of land is imposed by a covenant or agreement between a person interested in the land ("the promisor") and the Secretary of State, and

(b) the covenant or agreement is made for Phase 2a purposes.

(2) The Secretary of State may enforce the prohibition or restriction against persons deriving title from or under the promisor in respect of land to which it relates as if—

(a) the Secretary of State were possessed of adjacent land, and

(b) the covenant or agreement had been expressed to be made for the benefit of such land.

(3) Section 2(c) of the Local Land Charges Act 1975 (under which a prohibition or restriction enforceable by a Minister of the Crown under a covenant or agreement is not a local land charge if binding on successive owners because made for the benefit of land of the Minister) does not apply to the prohibition or restriction.

16 Compensation for injurious affection

Section 10(1) of the Compulsory Purchase Act 1965 (compensation for injurious affection) has effect, in relation to land injuriously affected by the execution of works under this Act by the nominated undertaker, as if for "acquiring authority have" there were substituted " nominated undertaker has ".

Changes to legislation:
There are currently no known outstanding effects for the High Speed Rail (West Midlands - Crewe) Act 2021, Cross Heading: Temporary possession and use of land.

SCHEDULES

SCHEDULE 15

Section 13

TEMPORARY POSSESSION AND USE OF LAND

PART 1

TEMPORARY POSSESSION FOR CONSTRUCTION OF WORKS

Right to enter on and take possession of land

1 (1) The nominated undertaker may enter on and take possession of the land specified in the table in Schedule 16—

(a) for the purpose specified in relation to the land in column (3) of that table in connection with the authorised works specified in column (4) of the table,

(b) for the purpose of constructing such works as are mentioned in column (5) of that table in relation to the land, or

(c) otherwise for Phase 2a purposes.

(2) The nominated undertaker may (subject to paragraph 2(1)) enter on and take possession of any other land within the Act limits for Phase 2a purposes.

(3) The reference in sub-paragraph (1)(a) to the authorised works specified in column (4) of the table in Schedule 16 includes a reference to any works which are necessary or expedient for the purposes of or in connection with those works.

Exceptions

2 (1) Paragraph 1(2) does not apply in relation to—

(a) land which is subject to a restricted power of compulsory acquisition,

(b) land in respect of which a notice of entry has been served under section 11 of the Compulsory Purchase Act 1965 (as applied by section 4(3) to the acquisition of land under section 4(1)), other than in connection with the acquisition of rights or subsoil only or the imposition of a restrictive covenant, or

(c) land in respect of which a declaration has been made under section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981 (as applied by section 4(4) to the acquisition of land under section 4(1)), other than in connection with the acquisition of rights or subsoil only or the imposition of a restrictive covenant.

(2) The power under section 4(1) (power to acquire land compulsorily) is not exercisable in relation to land specified in the table in Schedule 16.

(3) But sub-paragraph (2) does not apply in relation to land specified in that table to the extent (if any) that the land is subject to a restricted power of compulsory acquisition.

(4) For the purposes of this Schedule, land is subject to a restricted power of compulsory acquisition if the power under section 4(1) may be exercised in relation to the land only—

(a) so as to acquire rights or impose restrictive covenants relating to the land (see section 5(2));

(b) so as to acquire the subsoil or under-surface of the land (ignoring the power by virtue of section 5(1)(b) to impose restrictive covenants over the land).

Powers exercisable on land of which temporary possession has been taken

3 (1) Where under paragraph 1(1) or (2) the nominated undertaker has entered upon and taken possession of land, the nominated undertaker may, for the purposes of or in connection with the construction of the works authorised by this Act—

(a) remove any structure or vegetation from the land;

(b) construct such works as are mentioned in relation to the land in column (5) of the table in Schedule 16;

(c) construct temporary works (including the provision of means of access) and structures on the land;

(d) construct landscaping and other works on the land to mitigate any adverse effects of the construction, maintenance or operation of the works authorised by this Act.

(2) The other works referred to in sub-paragraph (1)(d) include works involving the planting of trees and shrubs and the provision of replacement habitat for wild animals.

(3) In this paragraph, "structure" includes any erection.

Procedure and compensation

4 (1) Not less than 28 days before entering upon and taking possession of land under paragraph 1(1) or (2), the nominated undertaker must give notice to the owners and occupiers of the land of its intention to do so.

(2) The nominated undertaker may not, without the agreement of the owners of the land, remain in possession of land under paragraph 1(1) or (2) after the end of the period of one year beginning with the date of completion of the work for which temporary possession of the land was taken.

(3) Sub-paragraph (2) does not apply, in the case of land mentioned in paragraph 1(2), if before the end of the one-year period either of the following powers has been exercised in relation to the land—

(a) the power to serve a notice to treat under Part 1 of the Compulsory Purchase Act 1965 (as applied by section 4(3) of this Act to the acquisition of land under section 4(1));

(b) the power to execute a declaration under section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981 (as applied by section 4(4) of this Act to the acquisition of land under section 4(1)).

(4) The nominated undertaker must pay compensation to the owners and occupiers of land of which possession is taken under paragraph 1(1) or (2) for any loss which they may suffer by reason of the exercise in relation to the land of the power or powers under that paragraph.

(5) Any dispute as to a person's entitlement to compensation under sub-paragraph (4), or as to the amount of compensation, must be determined under and in accordance with Part 1 of the Land Compensation Act 1961.

(6) Nothing in this paragraph affects any liability to pay compensation under section 10(2) of the Compulsory Purchase Act 1965 (as applied by section 4(3) to the acquisition of land under section 4(1)) or under any other enactment, otherwise than for loss for which compensation is payable under sub-paragraph (4).

5 (1) Before giving up possession of land of which possession has been taken under paragraph 1(1) or (2), the nominated undertaker must, in accordance with a scheme agreed with the owners of the land and the relevant planning authority, put the land into such condition as the scheme may provide.

(2) If no scheme has been agreed for the purposes of this paragraph within 6 months of the date of completion mentioned in paragraph 4(2) in relation to the land, the scheme is to be such as may be determined by the appropriate Ministers after consulting the nominated undertaker, the owners of the land and the relevant planning authority.

(3) Unless the owners of the land and the nominated undertaker otherwise agree, a scheme determined under sub-paragraph (2) must provide for land to be restored to its former condition.

(4) Sub-paragraph (3) does not require land on which works referred to in paragraph 1(1)(b) or 3(1)(d) have been constructed to be restored to its former condition.

(5) Unless the nominated undertaker otherwise agrees, a scheme determined under sub-paragraph (2) may not provide for the nominated undertaker to replace a structure removed under paragraph 3, other than a fence.

(6) Where the appropriate Ministers ask the relevant planning authority for assistance in connection with the carrying out by them of their function under sub-paragraph (2), they may require the nominated undertaker to reimburse to the relevant planning authority any expenses which it reasonably incurs in meeting the request.

(7) The duty under sub-paragraph (1) in relation to any land is owed separately to the owners of the land and to the relevant planning authority.

(8) Where a scheme for the purposes of this paragraph provides for any step to be taken by the nominated undertaker before a specified date and that step has not been taken before that date, the relevant planning authority may—

(a) enter the land concerned and take that step, and

(b) require the nominated undertaker to reimburse to it any expenses which it reasonably incurs in acting under paragraph (a).

(9) In this paragraph—

"appropriate Ministers" means the Secretary of State for **[**[F1]Levelling Up, Housing and Communities**]** and the Secretary of State for Transport and, in relation to the carrying out of any function, means those Ministers acting jointly;

"relevant planning authority" means the unitary authority or, in a non-unitary area, the district council in whose area the land is situated.

Textual Amendments

F1 Words in Sch. 15 para. 5(9) substituted (8.12.2021) by The Transfer of Functions (Secretary of State for Levelling Up, Housing and Communities) Order 2021 (S.I. 2021/1265), art. 1(2), **Sch. 2 para. 27(b)** (with art. 12)

PART 2

TEMPORARY POSSESSION FOR MAINTENANCE OF WORKS

Right to enter on and take possession of land

6 (1) At any time during the maintenance period relating to any of the scheduled works, the nominated undertaker may—

(a) enter on and take possession of any land which is—

(i) within 20 metres from that work, and

(ii) within the Act limits,

if possession of the land is reasonably required for the purposes of or in connection with maintaining the work or any ancillary works connected with it, and

(b) construct on the land such temporary works (including the provision of means of access) and structures as may be reasonably so required, unless the land is specified in the table in Schedule 16.

(2) Sub-paragraph (1) does not authorise the nominated undertaker to take possession of—

(a) a house, any other structure which is for the time being occupied, or a garden belonging to a house, or

(b) land which is subject to a restricted power of compulsory acquisition.

(3) The nominated undertaker may only remain in possession of the land for so long as may be reasonably required to carry out the maintenance works for which possession of the land was taken.

(4) In this paragraph—

(a) "the maintenance period", in relation to any work, means the period beginning with the date on which the work is completed and ending 5 years after the date on which it is brought into general use;

(b) "structure" includes any erection;

(c) the reference in sub-paragraph (1)(a) to land within a specified distance of a work includes, in the case of a work under the surface of the ground, a reference to land within the specified distance of any point on the surface below which the work is situated.

Procedure and compensation

7 (1) Not less than 28 days before entering upon and taking possession of land under paragraph 6, the nominated undertaker must give notice to the owners and occupiers of the land of its intention to do so.

(2) Before giving up possession of the land, the nominated undertaker must restore the land to the reasonable satisfaction of its owners.

(3) The nominated undertaker must pay compensation to the owners and occupiers of the land for any loss which they may suffer by reason of the exercise in relation to the land of the powers under paragraph 6.

(4) Any dispute as to a person's entitlement to compensation under sub-paragraph (3), or as to the amount of compensation, must be determined under and in accordance with Part 1 of the Land Compensation Act 1961.

(5) Nothing in this paragraph affects any liability to pay compensation under section 10(2) of the Compulsory Purchase Act 1965 (as applied by section 4(3) of this Act to the acquisition of land under section 4(1)), or under any other enactment, otherwise than for loss for which compensation is payable under sub-paragraph (3).

PART 3

SUSPENSION OF RIGHTS AND ENFORCEMENT

Suspension of rights relating to land

8 (1) All private rights over land of which the nominated undertaker takes possession under paragraph 1(1) or (2) or 6 are suspended and unenforceable for as long as the nominated undertaker remains in lawful possession of the land.

(2) The nominated undertaker may, in relation to a private right, direct—

(a) that sub-paragraph (1) does not apply to the right, or

(b) that sub-paragraph (1) applies to the right only to the extent specified in the direction.

(3) In this paragraph, "private rights" include—

(a) private rights of way over land,

(b) rights of common,

(c) easements, liberties, privileges, rights or advantages annexed to land and adversely affecting other land, including any natural right to support, and

(d) restrictions as to the user of land arising under a contract.

(4) Any person who suffers loss by reason of the suspension of a right under sub-paragraph (1) is entitled to be compensated by the nominated undertaker.

(5) Any dispute as to a person's entitlement to compensation under sub-paragraph (4), or as to the amount of compensation, must be determined under and in accordance with Part 1 of the Land Compensation Act 1961.

(6) This paragraph applies to a private right which is for the benefit of Crown land if the Crown authority consents (and consent may be subject to conditions).

9 (1) All general rights over land of which the nominated undertaker takes possession under paragraph 1(1) or (2) or 6 are suspended and unenforceable for as long as the nominated undertaker remains in lawful possession of the land.

(2) The nominated undertaker may, in relation to a general right, direct—

(a) that sub-paragraph (1) does not apply to the right, or

(b) that sub-paragraph (1) applies to the right only to the extent specified in the direction.

(3) In this paragraph, references to "general rights" over land are to—

(a) rights to access land (however expressed) which are exercisable as a result of section 2(1) of the Countryside and Rights of Way Act 2000 or an enactment mentioned in section 15 of that Act,

(b) other public rights over land which are conferred by an enactment, and

(c) rights exercisable as a result of trusts, or incidents, to which a common, town or village green, open space or allotment is subject.

Enforcement

10 (1) Section 13 of the Compulsory Purchase Act 1965 (refusal to give possession to acquiring authority) applies for the purposes of this Schedule as if—

(a) references to the acquiring authority were to the nominated undertaker,

(b) references to compensation payable to the person refusing to give possession were to compensation payable under this Schedule, and

(c) in subsection (1), for "this Act" there were substituted " Schedule 15 to the High Speed Rail (West Midlands - Crewe) Act 2021 ".

(2) In the case of Crown land, that section does not, by virtue of sub-paragraph (1), apply as against the Crown authority for that land.

Changes to legislation:
There are currently no known outstanding effects for the High Speed Rail (West Midlands - Crewe) Act 2021, SCHEDULE 15.