

IN THE HIGH COURT OF JUSTICE  
BIRMINGHAM DISTRICT REGISTRY

B E T W E E N:

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

Claimants/Applicants

-and-

- (1) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND KNOWN AS LAND AT CASH'S PIT, STAFFORDSHIRE SHOWN COLOURED ORANGE ON PLAN A ANNEXED TO THE ORDER DATED 11 APRIL 2022 ("THE CASH'S PIT LAND")
- (2) PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANTS ON, IN OR UNDER LAND ACQUIRED OR HELD BY THE CLAIMANTS IN CONNECTION WITH THE HIGH SPEED TWO RAILWAY SCHEME SHOWN COLOURED PINK, AND GREEN ON THE HS2 LAND PLANS AT <https://www.gov.uk/government/publications/hs2-route-wide-injunction-proceedings> ("THE HS2 LAND") WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES
- (3) PERSONS UNKNOWN OBSTRUCTING AND/OR INTERFERING WITH ACCESS TO AND/OR EGRESS FROM THE HS2 LAND IN CONNECTION WITH THE HS2 SCHEME WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT, WITH THE EFFECT OF DAMAGING AND/OR DELAYING AND/OR HINDERING THE CLAIMANTS, THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, INVITEES AND/OR EMPLOYEES WITHOUT THE CONSENT OF THE CLAIMANTS
- (4) PERSONS UNKNOWN CUTTING, DAMAGING, MOVING, CLIMBING ON OR OVER, DIGGING BENEATH OR REMOVING ANY ITEMS AFFIXED TO ANY TEMPORARY OR PERMANENT FENCING OR GATES ON OR AT THE PERIMETER OF THE HS2 LAND, OR DAMAGING, APPLYING ANY SUBSTANCE TO OR INTERFERING WITH ANY LOCK OR ANY GATE AT THE PERIMETER OF THE HS2 LAND WITHOUT THE CONSENT OF THE CLAIMANTS
- (5) MR ROSS MONAGHAN (AKA SQUIRREL / ASH TREE) AND 58 OTHER NAMED DEFENDANTS AS SET OUT IN THE SCHEDULE TO THE PARTICULARS OF CLAIM

Defendants/Respondents

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CLAIMANTS' SKELETON ARGUMENT ON  
APPLICABLE LEGAL PRINCIPLES

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## INTRODUCTION

1. This is the Claimants' first skeleton argument for the hearing of its application dated 25 March 2022 for relief in respect of unlawful trespass and related activities on and around land relating to the High Speed Two Railway Scheme ("the **HS2 Scheme**"). Its sole aim is to set out applicable legal principles. Defendants are invited to agree or propose amendment.
2. A second skeleton argument will address the merits.

## ENABLING LEGISLATION

3. The HS2 Scheme is a project specifically authorised by Acts of Parliament (the High Speed Rail (London - West Midlands) Act 2017 – "the **Phase One Act**"; and the High Speed Rail (West Midlands – Crewe) Act 2021 ("the **Phase 2a Act**") together: the "**HS2 Acts**").
4. It is "...an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament..." and "...those lawful activities in this case had been authorised by Parliament through the 2017 Act after lengthy consideration of both the merits of the project and objections to it. The legislature has accepted that the HS2 project is in the national interest." *DPP v Cuciurean* [2022] EWHC 736 (Admin) at [84]; see also *R (oao) Packham v SSfT* [2021] EWCA Civ 1004; Env LR 10 at [54].

## CAUSES OF ACTION

### Trespass

#### *Title*

5. A landowner whose title is not disputed is prima facie entitled to an injunction to restrain a threatened or apprehended trespass on his land: Snell's Equity at §18-012.
6. Temporary possession powers in the HS2 Acts give sufficient title to sue for trespass: *SSfT & HS2 v Persons Unknown (Harvil Road)* [2019] EWHC 1437 (Ch) at [30]-[31]. All that needs to be demonstrated is better right to possession than the

occupiers: *Manchester Airport plc v Dutton* [1999] 3 WLR 524 per Laws LJ at p147 onwards.

### *Defences*

7. Genuine and bona fide concerns on the part of the protestors about HS2 or the proposed HS2 Scheme works do not amount to a defence, and the Court should be slow to spend significant time entertaining these: *City of London Corporation v Samede* [2012] EWCA Civ 160 at [63].
8. A protestor's Articles 10 and 11 rights, even if engaged in a case like this, will not justify continued trespass onto private land (the HS2 Harvil Road decision [2019] EWHC 1437 (Ch) at [136], and *DPP v Cuciurean* at [46], [50] and [77]). See further below as to Convention rights.
9. There is no right to undertake direction action protest on private land: *Secretary of State for Transport and HS2 v Persons Unknown* [2020] EWHC 671 (Ch) at [35] and [42]

### **Nuisance**

#### *Private Nuisance - Definition*

10. Private nuisance is "any continuous activity or state of affairs causing a substantial and unreasonable interference with a [claimant's] land or his use or enjoyment of that land": *Bamford v Turnley* (122 ER 25); more recently *West v Sharp* [1999] 79 P&CR 327 at [332].
11. The unlawful interference with the right of access to its land via the public highway, where the Claimants' land adjoins a public highway can be a private nuisance: *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 at [13]; and can be an unlawful interference with one or more of the Claimants' rights of way over land privately owned by a third party: Gale on Easements at 13-01.

### *Public Nuisance and the Highway*

12. An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see Clerk & Lindsell on Torts, 22nd ed (2017), para 20–181, cited in *Cuadrilla* at [13].
  
13. The position in relation to actions which amount to an obstruction of the highway, for the purposes of public nuisance, is described in Halsbury's Laws, 5th ed. (2012) at para. 325 where it is said (cited in *Ineos Upstream Ltd* [2017] EWHC 2945 (Ch):
  - (1) whether an obstruction amounts to a nuisance is a question of fact;
  - (2) an obstruction may be so inappreciable or so temporary as not to amount to a nuisance;
  - (3) generally, it is a nuisance to interfere with any part of the highway; and
  - (4) it is not a defence to show that although the act complained of is a nuisance with regard to the highway it is in other respects beneficial to the public.

### *Remedy*

14. The starting point, if not the primary remedy in most cases, will be an injunction to bring the nuisance to an end: *Shelfer v City of London Electric Lighting Co* per A L Smith LJ at 322–323; *Hunter v Canary Wharf* [1997] AC 655 per Lord Goff at 692H; *Lawrence v Fen Tigers* per Lord Neuberger at [120] to [124].

## **INTERIM INJUNCTIVE RELIEF**

### *Power*

15. The High Court may grant an injunction (whether interlocutory or final) in all cases in which it appears to the court to be just and convenient: s. 37(1) of the Senior Courts Act 1981 (“the 1981 Act”).

#### *Purpose*

16. The function of an interim injunction is to “hold the ring” pending final determination of a claim (*United States of America v Abacha* [2015] 1 WLR 1917). The basic underlying principle of that function is that the court should take whatever course seems likely to cause the least irremediable prejudice to one party or another (*National Commercial Bank Jamaica Limited v Olint Corp Ltd (Practice note)* [2009] UKPC 16 at [17]).

#### *Test*

17. It requires that there be at least a serious question to be tried and then refers to the adequacy of damages for either party and the balance of justice (or convenience): *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.
18. The threshold for obtaining an injunction is normally lower where wrongs have already been committed by the defendant: *Secretary of State for Transport and HS2 Limited v Persons Unknown* [2019] EWHC 1437 (Ch) at [122] to [124]. *Snell’s Equity* states at §18-028:

“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.”
19. However, *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515; 4 WLR 100 at [44-48] makes clear that the Court should be satisfied that the Claimants would be likely to obtain an injunction preventing future trespass at trial; not just that there is a serious question to be tried. “Likely” in this context usually means more likely than not: *Cream Holdings Limited v Banerjee* [2004] UKHL 44, [2005] 1 AC 253 at [22].

#### *Precautionary injunction*

20. Where the relief sought is a precautionary injunction, the question is whether there is an imminent and real risk of harm: *Ineos* at [34(1)] and the first instance decision *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 (Ch) at [88]. ‘Imminent’ means that

the circumstances must be such that the remedy sought is not premature – *Hooper v Rogers* [1975] Ch 43 (CA) at [49-50].

## PERSONS UNKNOWN

21. There has been much recent consideration of the availability of injunctions against persons unknown in a protest context by the Court of Appeal, in: *Boyd v Ineos Upstream Limited* [2019] EWCA Civ 515; *Cuadrilla* and *Canada Goose v Persons Unknown* [2020] EWCA Civ 303. All were considered by the Court of Appeal in *London Borough of Barking and Dagenham v Persons Unknown & Ors* [2022] EWCA Civ 13. The guidelines set out in *Canada Goose (CA)* at [82] remain good law:

“(1) The “persons unknown” defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The “persons unknown” defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the “persons unknown”.

(2) The “persons unknown” must be defined in the originating process by reference to their conduct which is alleged to be unlawful.

(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify [precautionary] relief.

(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as “persons unknown”, must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant’s rights.

(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant’s intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose’s application for a final injunction on its summary judgment application.”

22. The Court of Appeal’s review in *Barking and Dagenham* considered the grant of final injunctions against persons unknown, but made the point that there was considerable commonality between interim and final injunctions:

22.1 The Court undoubtedly has the power under s.37 of the 1981 Act to grant final injunctions that bind non-parties to the proceedings – [71]. The remedy can be fairly described as ‘exceptional’, albeit that formulation should not be used to lay down limitations on the Court’s broad discretion. The categories in which such injunctions can be granted are not closed and they may be appropriate in protest cases - [120].

22.2 There is no real distinction between interim and final injunctions in the context of injunctions granted against persons unknown [89] and [93]. While the guidance regarding identification of persons unknown in *Canada Goose* was given in the context of an application for an interim injunction, the same principles apply in relation to the grant of final injunctions: [89].<sup>1</sup>

22.3 As to the position of a non-party who behaves so as satisfy the definition of persons unknown only after the injunction has been granted (‘newcomers’), such a person becomes a party on knowingly committing an act that brings them within the description of persons unknown set out in the injunction: *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658 at [32]. There is no need for a claimant to apply to join newcomers as defendants. There is “no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort”: *Boyd (supra)* at [30].<sup>2</sup>

22.4 Procedural protections available to ensure a permanent injunction against persons unknown is just and proportionate include the provision of a mechanism for review by the Court - “*Orders need to be kept under review. For as long as the court is concerned with the enforcement of an order, the action is not at end.*” – [89], “...all persons unknown injunctions ought normally to have a fixed end point for review

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<sup>1</sup> See also [102] and [117]. This aspect of *Canada Goose* was not disturbed by the overall conclusion in *Barking and Dagenham* (which was based on criticisms of other aspects of the judgment in *Canada Goose*).

<sup>2</sup> See *Barking and Dagenham* at [94] to [100], where the Court of Appeal refuses to follow the reasoning in *Canada Goose* drawing a sharp distinction between interim and final injunctions, *inter alia* on the basis of a failure by the Court in *Canada Goose* to consider the propositions cited above from *Gammell* and *Ineos*.

*as the injunctions granted to these local authorities actually had in some cases” – [91], “It is good practice to provide for a periodic review, even when a final order is made” – [108].*

22.5 In the unauthorised encampment cases, the Court of Appeal has suggested that borough-wide injunctions should be limited to one year at a time before a review – *Bromley London Borough Council v Persons Unknown* [2020] PTSR 1043 (CA) at [106].

## **INJUNCTIVE RELIEF & GEOGRAPHICAL SCOPE**

23. There is effectively no limit to injunctive relief. It may operate against the world. In the trespass and nuisance jurisdiction, the Court was not troubled by a 4,300 mile injunction: *National Highways Limited v Persons Unknown & Ors* [2021] EWHC 3081 (QB), at [24(7)]: *“the geographical extent is considerable, since it covers 4,300 miles of roads, but this is in response to the unpredictable and itinerant nature of the Insulate Britain protests”*.
24. The Court in *National Highways Limited* at [24(7)(c)] found additionally that if a claimant is entitled to an injunction, it would not be appropriate to require the claimant to need to apply for separate injunctions for separate roads, effectively chasing protestors from location to location.
25. Although an individual protest may appear small in the context of the HS2 Scheme as a whole, that was not a reason to overlook its impact. Protesters should not *“believe with impunity they can wage a campaign of attrition”*: *DPP v Cuciurean* at [87].

## **INJUNCTIVE RELIEF & CONVENTION RIGHTS**

26. The key articles of European Convention on Human Rights (“the **ECHR**”) for these purposes are:

“PROTOCOL 1, ARTICLE 1

Protection of property



1. 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.

2. 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.

#### ARTICLE 10

##### Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

#### ARTICLE 11

##### Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of

health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

27. The ECHR is given effect in domestic law via the Human Rights Act 1998 (“the **HRA 1998**”). Section 6(1) of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The Court is a public authority - s.6(3)(a).
28. Section 12 of HRA 1998 provides as follows:

**“12.— Freedom of expression.**

  - (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
  - (2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—
    - (a) that the applicant has taken all practicable steps to notify the respondent; or
    - (b) that there are compelling reasons why the respondent should not be notified.
  - (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.”
29. “Publication” in s.12(3) has been interpreted by the courts as extending beyond the literal meaning of the word to encompass “*any application for prior restraint of any form of communication that falls within Article 10 of the Convention*” – *Birmingham City Council v Afsar* [2019] ELR 373 at [60] to [61].
30. Articles 10 and 11 were considered in respect of protest on publicly owned land in *Samede* at [39] – [41], and were cited with approval by the Supreme Court in *DPP v Ziegler* [2022] AC 408 at [17], [72], [74] to [77], [80] and [152]. However, the more restrictive approach where the protest takes place on private land is explained in *Appleby v United Kingdom* [2003] 27 EHRR 38 at [43] and [47].
31. In *Ziegler*, the Supreme Court highlighted the features that should be taken into account, as: (i) the place where the obstruction occurs; (ii) the extent of the actual interference the

protest causes to the rights of others, including the availability of alternative thoroughfares; (iii) whether the protest is aimed directly at an activity of which protestors disapprove or another activity which had no direct connection with the object of the protest; (iv) the importance of the precise location to the protestors; and (v) the extent to which continuation of the protest breaches domestic law. At [58], the Supreme Court endorsed the “*Ziegler* questions” where Articles 10 and 11 were engaged:

- 31.1 Is what the defendant did in exercise of one of the rights in article 10 or 11?
- 31.2 If so, is there an interference by a public authority with that right?
- 31.3 If there is an interference, is it “prescribed by law”?
- 31.4 If so, is the interference in pursuit of a legitimate aim as set out in paragraph (2) of article 10 and 11, for example the protection of the rights of others?
- 31.5 If so, is the interference ‘necessary in a democratic society’ to achieve that legitimate aim?
- 31.6 The last question has been divided into sub-questions as follows:
  - (i) Is the aim sufficiently important to justify interference with a fundamental right?
  - (ii) Is there a rational connection between the means chosen and the aim in view?
  - (iii) Are there less restrictive alternative means available to achieve that aim?
  - (iv) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

32. This structured approach is one which the Court would be “well-advised to follow” at each stage of a process which might restrict Article 11 rights: *SSfT v Cuciurean* [2022] EWCA Civ 661 at [13].

33. As observed in *Cuadrilla* (CA) at [94], given that Articles 10 and 11 are concerned with the protection of rights to persuade others, it is a relevant point of distinction that a protest that aims to cause disruption is ultimately seeking to compel, rather than persuade, others to act in a particular way.

34. The same principles have been applied by the courts in concluding that offences criminalising protests that involve serious disruption to ordinary lives or to activities lawfully carried on by others (where the disruption is more significant than that involved in the normal exercise of the right of peaceful assembly in a public place) do not

constitute a breach of Articles 10 or 11: *DPP v Cuciurean* at [37] – [38], [45], [62], [76] – [79].

35. 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, to the extent that it arises at all (*SSfT v Cuciurean* (CA) at [34]) an assessment of the proportionality of the interference to the aim pursued (*Crossland* at [40]).
36. In having regard to the balance of convenience and the appropriate weight to be had to the Defendants’ convention rights, there is no right to protest on private land (*Appleby* at [43] and *Samede* at [26]) and therefore articles 10 and 11 rights are unlikely to be applicable (see *Ineos* at [36], and *DPP v Cuciurean* at [46], [50] and [77]).
37. Whilst there is a right to express a point of view, and to gather together to do so, there is no right to do so by trespass on private land (*DPP v Cuciurean* at [77]). There is no “freedom of forum” (*Ibid* at [45]). A protest which involves serious disruption or obstruction to the lawful activities of other parties may amount to “reprehensible conduct” so that articles 10 and 11 are not violated: *Ibid* at [76].
38. Direct action protest and trespass to the HS2 Land is “*against the public interest*” (*DPP v Cuciurean* at [84]). The rights enshrined in articles 10 and 11 “...do not sanction a right to use guerrilla tactics endlessly to delay and increase the cost of an infrastructure project which has been subjected to the most detailed public scrutiny, including in Parliament”.

## ALTERNATIVE SERVICE

39. It is a fundamental principle of justice that a person cannot be subject to the court’s jurisdiction without having notice of the proceedings (*Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6 at [14]). The essential requirement for any form of alternative service is that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant (*Cameron* at [21] and *Cuciurean v SSfT and High Speed Two (HS2) Limited* [2021] EWCA Civ 357 – at [14] – [15], [25] – 26], [60] and [70]). Posting on social media and attaching copies at or nearby

premises would have a greater likelihood of bringing notice of the proceedings to the attention of defendants: Canada Goose (CA) at [50].

40. There is a difference between service of proceedings, and service of an injunction order. A person unknown is a newcomer, and is served and made a party by violating an order of which they have knowledge, as opposed to being personally served (Barking and Dagenham at [85] and [91], approving South Cambridgeshire v Gemmell [2005] EWCA Civ 1429 at [34]).
41. Service provisions must deal with the question of notice to an unknown and fluctuating body of potential defendants. There may be cases where the service provisions in an order have been complied with, but the person subject to the order can show that the service provisions have operated unjustly against him or her. In such a case, service ought to be set aside and the threat of committal removed altogether: SSfT and High Speed Two (HS2) Limited v Cuciurean [2020] EWHC 2614 (Ch) at [63(7)].

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18<sup>th</sup> May 2022